AN AMENDMENT TOO FAR?: LIMITS ON THE ABILITY OF LESS THAN ALL MEMBERS TO AMEND THE OPERATING AGREEMENT

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I. INTRODUCTION

*Nothing endures but change.****

Just as persons have the capacity to enter into contracts and to have those agreements enforced,[1] they likewise have the capacity to

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*** Heraclitus (540 bc – 480 bc), from Diagones Laertius, Lives of Eminent Philosphers.

1. *See*, *e.g.*, Printing & Numerical Registering Co, v. Sampson, 19 L.R.-Eq 462, 465 (1875) ("It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice. Therefore, you have this paramount public policy to consider – that you are not lightly to interfere with this freedom of contract."); Balt. & Ohio S.w. Ry. Co. v. Voigt, 176

amend those agreements into which they have already entered.[2] In the case of the typical bilateral agreement, amendment will require the consent of both parties thereto. In a business venture in which there may be many owners, there is still sometimes seen the requirement that all of the participants therein approve any amendment to the operative agreement. While obtaining unanimous consent may at times be difficult, unanimous consent most clearly eliminates possible disputes as to the efficacy of the amendment and its effectiveness to bind non-consenting parties.[3]

Partnership law consistently provides a default rule that amendment of the partnership agreement requires the unanimous

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U.S. 498 (1900) ("the right of private contract is no small part of the liberty of the citizen, and. . . the usual and most important function of courts of justice is rather to maintain and enforce contracts than to enable parties thereto to escape from their obligation. . . ."); Ryan v. Weiner, 610 A.2d 1377, 1380 (Del. 1992) ("The right of competent persons to make contracts and thus privately to acquire rights and obligations is a basic part of our general liberty. This ability to enter and enforce contracts is universally thought not only to reflect and promote liberty, but as well to promote the production of wealth."). *See also* RESTATEMENT (SECOND) OF CONTRACTS § 72 cmt. b (1981).

2. *See*, *e.g.*, Vinaird v. Bodkin's Adm'x, 72 S.W.2d 707 (Ky. 1934) (The power to modify or rescind a pre-existing contract is coextensive with power to initiate contract prevails although contract recites that no modification shall be made except in writing); Energy Home, Div. of S. Energy Homes, Inc. v. Peay, 406 S.W.3d 828 (Ky. 2013) ("We have long recognized that parties who have the right to make a contract have the power to unmake or modify, regardless of self-imposed limitations[.]" (internal quotation omited)); Fraser v. Magic Chef-Food Giant Markets, Inc., 324 F.2d 853 (6th Cir. 1963) ("Parties to a contract may amend, modify or cancel a contract in such manner as is agreeable to them."); Diamond v. Pappathanasi, 21 Mass. L. Rptr. 522 (Mass. Super. Ct. 2006) (citing Simkims Indus., Inc. v. Jeppson, 402 F. Supp. 1265 (D. Mass. 1975)) ("The parties to a contract can agree to replace a contract with a new contract, or to modify the terms of the contract.").

3. Agreements that may be amended by less than all parties, but thereafter bind all parties, are not unique to business organizations. *See*, *e.g.*, Kentucky Home Mut. Life Ins. Co. v. Leitner, S.W.2d 421, 423 (Ky. 1946) [reinsurance agreement] ("It is stipulated that the insured was bound by the original reinsurance agreement. Since it provided for amendments thereto, he was likewise bound by the amendments, unless the Company was estopped or unless a consideration separate and distinct from the original consideration is required to support the amendment."); Carrington v. Kentucky Home Mut. Life Ins. Co., 61 F. Supp. 424 (W.D. Ky. 1945) [reinsurance agreement] ("[P]laintiff's contract of insurance with the defendant, regardless of its original terms. . . was legally subject to modification without his later consent."); Arch Petroleum, Inc. v. Hardy Oil & Gas USA, Inc., No B14-93-00527-CV, 1995 WL 57246 (Tex. App. 14th Dist., Feb. 9, 1995) [oil and gas development agreement]; Brockway v. Harkleroad, 615 S.E.2d 182, 184 (Ga. Ct. App. 2005) [deed restriction] ("[T]he investors, acting as more than 90 percent of the lot owners, were entitled to enforce the clear written provisions of the declaration binding all the lot owners, and to use the amendment provision in any manner not contrary to law or public policy."); Woodside Vill. Condo. Ass'n v. McClernan, 806 So.2d 452, 459 (Fla. 2002) [condominium regulations] ("[A] duly adopted amendment restricting either occupancy or leasing is binding upon unit owners who purchased their units before the amendment was effective."); Fredrick v. Mut. Bldg. & Inv. Co., 191 N.E. 729, 732 (Ohio 1934) [building and loan association] ("All of the steps required for the adoption of the amendment appear to have been regularly taken, and the amendment was duly approved by the superintendent of building and loan associations of the state. We must hold, therefore, that the plaintiff was bound by the amendment . . .").

consent of the partners;[4] but the partnership agreement may alter this threshold[5] to the effect that unanimous approval is not required.[6] Under the law of limited partnerships, the default rule is again all of the partners (general and limited) must approve an amendment,[7] but that threshold may be altered in the partnership agreement.[8] The law of LLCs is not so consistent. While there is a significant number of jurisdictions that provide a default rule of unanimous approval of the members to amend the operating agreement,[9] another set of

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4. *See* UNIF. PART. ACT (1914) § 18(h), 6 (pt. 1) U.L.A. 101 (2001); REV. UNIF. PART. ACT (1997) § 401(j), 6 (pt. 1) U.L.A. 133 (2001); COLO. CODE § 7-64-401(10) (2016); DEL. CODE ANN. tit. 6, § 15-401(j) (2016); FLA. STAT. § 620.8401(10); IND. CODE § 23-4-1-18 (2016); KY. REV. STAT. ANN. § 362.235(8) (2016); *id.* § 362.1-401(10).

5. *See* UNIF. PART. ACT (1914) § 18(1), 6 (pt. 2) U.L.A. 101 (2001) ("The rights and duties of the partners in relation to the partnership shall be determined, *subject to any agreement between them…*") (*emphasis* added); REV. UNIF. PART. ACT (1997) § 103(a), 6 (pt. 1) U.L.A. 73 (2001) ("Except as otherwise provided in subsection (b), relations among the partners and between the partners in the partnership are governed by the partnership agreement."); FLA. STAT. § 620.8103(1); *see also* Alexander Hamilton, *Other Defects of the Present Confederation*, THE FEDERALIST NO. 22, New York Packet, Friday, December 14, 1787:

> The necessity of unanimity in public bodies, or of something approaching towards it, has been founded upon a supposition that it would contribute to security. But it's real operation is to embarrass the administration, to destroy the energy of the government, and to substitute the pleasure, caprice, or artifices of an insignificant, turbulent, or corrupt junto, to the regular deliberations and decisions of a respectable majority.

6. Under both UPA and RUPA, except with respect to extraordinary matters including the amendment of the partnership agreement, a mere majority of the partners may bind the partnership. *See* UNIF. PART. ACT (1914) § 18(h), 6 (pt. I) U.L.A. 101 (2001); REV. UNIF. PART. ACT (1997) § 401(j), 6 (pt. I) U.L.A. 133 (2001); *See also* FLA. STAT. § 620.8401(10); KY. REV. STAT. ANN. § 362.235(8); *id.* § 362.1-401(10). The partnership agreement may raise this threshold or provide for an alternative decision making structure such as an executive committee. The capacity to alter the default thresholds defined by partnership law is in no manner restricted to altering the threshold for amendment of the partnership agreement. *See, e.g.*, Heritage Co. *of Massena v. LaValle*, 199 A.D.2d 1036 (1993) (litigation not in the ordinary course must be approved by 75% of the partnership interests); *Day v. Sidley & Austin*, 394 F. Supp. 986 (D. D.C. 1975), *aff'd sub. nom. Day v. Avery*, 548 F.2d 1018 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 908 (1977) (partnership agreement authorized admission of new partner or approval of a merger on a majority vote).

7. *See, e.g.*, UNIF. LTD. PART. ACT (2001) § 406(b)(1), 6A U.L.A. 434 (2008); FLA. STAT. § 620.1406(1)(a); *id.* § 620.1406(3); KY. REV. STAT. ANN § 362.2-406(2)(a). The same rule applied under the prior uniform limited partnership act by means of linkage to the unanimity rule of UPA. *See* REV. UNIF. LTD. PART. ACT (1985) § 1105, 6B U.L.A. 399 (2008); KY. REV. STAT. ANN. § 362.523.

8. *See* UNIF. LTD. PART. ACT (2001) § 406(b)(1), cmt. (b), 6A U.L.A. 434 (2008) ("This subsection is subject to change in the partnership agreement. . .").

9. *See, e.g.*, REV. PROTOTYPE LLC ACT § 406(c)(1)(A), 67 BUS. LAW. 117 at 159 (Nov. 2011); REV. UNIF. LTD. LIAB. CO. ACT. § 407(b)(5), 6B U.L.A. 483 (2008); *id.* § 407(c)(4)(D), 6B U.L.A. 483 (2008); DEL. CODE ANN. tit. 6, § 18-302(f); WEST VA. § 31B-4-404(c)(1); FLA. STAT. § 605.04073(1)(d) ("The operating agreement and articles of organization may be amended only with the affirmative vote or consent of all members."); TEXAS BUS. ORGS. CODE § 101.053; S. C. CODE § 33-44-404(c)(1); COLO. REV. STAT. ANN. § 7-80-209 (West 2014) ("An amendment to the articles of organization is invalid unless approved by all of the members or in such other manner as may be provided in the operating agreement"); MICH. COMP. LAWS ANN. § 450.4603 (West 2014) (requiring in a certificate of amendment "[a]

jurisdictions allow for amendment by a mere majority or some other threshold of the members.[10] Alternatively, by permitting a merger to proceed with the approval of less than all members, it is possible to bind persons to an operating agreement to which they have not consented.[11]

If less than a majority of the parties to the contract, be it a partnership or operating agreement, is there (i) a limit to the extent such amendments may be effective to alter the fundamental contract

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statement that the amendment or amendments were approved by the unanimous vote of all of the members entitled to vote or by a majority in interest if an operating agreement authorizes amendment of the articles of organization by majority vote."); OR. REV. STAT. ANN. § 63.444 (West 2014) ("Except as otherwise provided in ORS 63.441 [regarding amendments that can be approved by a manager or managers of a manager-managed LLC] or in the articles of organization or any operating agreement, all amendments to the articles of organization or any operating agreement must be approved unanimously by the members.").

10. *See*, *e.g.*, CONN. STAT § 34-142(b)(1) ("the affirmative vote, approval or consent of at least two-thirds in interest of the members shall be required to: (1) Amend a written operating agreement"); KY. REV. STAT. ANN. § 275.175(2)(a) ("Unless otherwise provided in a written operating agreement, the affirmative vote, approval, or consent of the majority-in-interest of the members shall be required to . . . amend a written operating agreement"); LA. REV. STAT. ANN. § 12:1318(B)(6) ("Unless otherwise provided in the articles of organization or a written operating agreement, a majority vote of the members shall be required to approve the following matters … (6) An amendment to the articles of organization or an operating agreement."); MICH. STAT. § 450.4502(8) ("Unless the vote of a greater percentage of the voting interest of members is required by this act, the articles of organization, or an operating agreement a vote of a majority in interest of the members entitled to vote is required to approve any matter submitted for a vote of the members."); N. M. STAT. ANN. § 53-19-17(B)(1) ("the affirmative vote, approval or consent of the embers having a majority share of the voting power of all members shall be required to amend the articles of organization or an operating agreement"); N.Y. LTD. LIAB. CO. LAW § 402(c)(3) ("(c) Except as provided in the operating agreement, whether or not a limited liability company is managed by the members or by one or more managers, the vote of a majority in interest of the members entitled to vote thereon shall be required to:. . . (3) adopt, amend, restate or revoke the articles of organization or operating agreement. . ."); OKLA. STAT. ANN. TIT. 18 § 2020(B)(3) (West) ("a majority vote of the members shall be required to approve the following matters: . . . (3) An amendment to the articles of organization or operating agreement."). *Cf.* Hugh Mullen, *Limitations of Corporate By-Laws*, 19 ST. JOHNS L. REV. 144, 147 (1945) ("As early as 1820 Chancellor Kent pointed out that corporations were invented to circumvent the unity required in partnerships, and that the right of the majority to rule was one of the chief differences between corporations and partnerships.") (citing Livingston v. Lynch, 4 Johns. ch. 573 (N.Y. 1820)); *See also* Johann Wolfgang von Goethe ("We must always change, renew, rejuvenate ourselves; otherwise we harden.").

11. For example, under Kentucky law, absent a contrary provision in a written operating agreement, a majority-in-interest of the members can approve a merger. Utilizing this provision, it is possible for a majority of the members to set up a new company and with it a new operating agreement and then cause the existing LLC to be merged with and into the new LLC with the new LLC's operating agreement binding all of its members. *See* KY. REV. STAT. ANN. § 275.350(1). Upon the effective time and date of the merger, all of the members of the former LLC are bound by that new operating agreement. *See* KY. REV. STAT. ANN. § 275.365(11); *see also* Thomas E. Rutledge, *The 2010 Amendments to Kentucky's Business Entity Laws*, 33 N. KY. L. REV. 383, 397-99 (2011). While members who vote against the merger may not be subject to capital contribution obligations to the new company, KY. REV. STAT. ANN. § 275.365(11), they may be subject to various penalties, detailed in the new LLC's operating agreement, if they do not participate in additional capital raises. KY. REV. STAT. ANN. §§ 275.003(2)(a)-(g).

of the parties, or (ii) a limit to the extent to which such amendments may be binding on those who do not consent?[12]

This article will begin with a largely chronological review of cases that have assessed the enforceability of non-unanimous amendments. From there it will address the development of dissenters' rights in corporations and the limited development of the same mechanism in LLCs, considering the viability of either as a means of militating the effect of non-unanimous amendments. The third and last component of this article will consider and largely reject various theories including fiduciary obligations and the implied covenant of good faith and fair dealing as limitations on the scope of amendments that may be adopted by less than all participants in the venture.

II. The Cases

While not universal, it has been the trend to respect the ability of the participants in an unincorporated venture to ex post formation reorder the relationship and, if the controlling agreement may be amended by less than all participants, to allow that threshold to bind the objecting participants.

Probably as a result of the unwaivable power of a partner under the UPA (1914) to withdraw and receive a liquidating distribution,[13] there is a relative dearth of cases under traditional partnership law addressing non-unanimous amendment. There are, in contrast, a good number of "old" cases addressing non-unanimous amendment in the corporate context. In the earliest cases, utilizing the label or at least the reasoning of "vested rights," there is expressed hostility to enforcing amendments even when the power to amend by less than all and to still bind all is reserved in the operative documents.

While it may be restricted in its application to policies of insurance issued by mutual benefit societies, *Sautter v. Supreme*

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12. The following consideration presupposes that the amendment at issue has *ab initio* been adopted by the requisite threshold of the participants in the venture. *See*, *e.g.*, Airgas, Inc. v. Air Products and Chemicals, Inc., 8 A.3d 1182, 1194-95 (Del. 2010) (bylaws not amended where purported amendment was not approved, as required by certificate of incorporation, by at least 67% of the voting shares). The separate and analytically distinct question of whether and how amendment of the underlying LLC Act may by incorporation amend the operating agreement has been addressed elsewhere. *See* Thomas E. Rutledge, *As Amended From Time To Time*, 19 J. PASSTHROUGH ENTITIES 35 (March/April 2016). Also outside the scope of this review is the debate as to what threshold of action is required to amend a provision that itself requires action by a higher threshold than the default amendment threshold. *See*, *e.g.*, Frankins v. Gleason, 1999 Del. Ch. LEXIS 219 (Del. Ch. Nov. 5, 1999) (majority may amend supermajority provision); Driveway Austin GP, LLC v. Turbo Partners, LLC, 409 S.W.3d 197 (Tex. Ct. App. 2013) (same); Wurtzel v. Park Towne Place Apartments Ltd. P'ship, 2001 WL 1807405, *4 (Pa. Ct. Com. Pleas. Sept. 11, 2001) ("amendment of the supermajority voting provision requires the approval of a like supermajority of the partners.")

13. *See* UNIF. PART. ACT § 31(1)(b), 6 (pt. 2) U.L.A. 370 (2001); *id.* § 29, 6 (pt.2) U.L.A. 349 (2001).

Conclave, Improved Order of Heptasophs[14] exemplifies the vested rights paradigm. Therein, Sautter's husband purchased a $1,000 policy upon his own life for his spouse's benefit. The certificate made it conditional upon the purchase "to conform in all other respects to the laws, rules, and usages of [the Supreme Conclave] now in force, or which may be hereafter adopted by the same."[15] Subsequently the Supreme Conclave determined it would not pay on deaths resulting from suicide. When Sautter did later commit suicide, the Supreme Conclave defended against a payment obligation on the basis of the limitation adopted after Sautter purchased his policy, resting that his policy was subject to rules "hereafter adopted." The court rejected that limitation, holding that Sautter's spouse, at the time the policy was purchased, had a vested right therein that could not be altered by subsequent amendment of the Supreme Conclave's "laws, rules and usages."[16] Rather the court would enforce post-purchase changes in/additions to the laws, rules and usages only prospectively. Further, in reliance upon *O'Neill v. Supreme Council*,[17] it was stated that amendments, to have effect on an existing relationship "must be construed as referring only to reasonable by-laws and amendments adopted in furtherance of the contract, and not to such as would overthrow it or materially alter its terms."[18]

In *A.W. Ayers v. Burley Tobacco Growers Cooperative Association*,[19] the court was able to both acknowledge and sidestep the question of vested rights. The Burley Tobacco Growers Corporation had been organized under a statute that limited the cooperative's period of existence to fifty years.[20] The 1960 amendment to the statute enabled a two-thirds majority of the board of directors to amend the articles of incorporation to eliminate the limited existence

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14. Sautter v. Supreme Conclave, Improved Order of Heptasophs, 71 A. 232 (N.J. 1908).

15. *Id.* at 233.

16. *Id.*

17. In *O'Neill*, the defendant amended its bylaws to reduce the amount payable under a benefit certificate from $5,000 to $2,000. O'Neill v. Supreme Council American Legion of Honor, 57 A. 467 (N.J. 1904). The court found the amendment to be ineffective because a benefit certificate confers a vested interest that "may not be impaired by a subsequent amendment, even though the power to amend be reserved in general terms." *Id.*

18. *Sautter*, 71 A. 232 at 234 (citing *O'Neill*, 70 N.J.L. at 420-21); *see also* Lambert v. Fisherman's Dock Coop., Inc., 297 A.2d 566 (N.J. 1972) (notwithstanding broad reservation of right of amendment, post-purchase amendment of valuation formula for repurchase of shares held ineffective as to shares acquired prior to amendment); Hueftle v. Farmers Elevator, 16 N.W.2d 855 (Neb. 1944) (holding ineffective amendment of articles and bylaws that had provided for the sharing of profits on a per-patronage basis in place of sharing profits on a per-share basis; "By their purchase of stock they acquired a contractual right to share in the net profits in the form of dividends on stock. An attempt to make a distribution of net profits on a patronage basis constitutes a violation of plaintiffs' contract rights.").

19. Ayers v. Burley Tobacco Growers Coop. Ass'n, 344 S.W.2d 836 (Ky. App. 1961).

20. *See* KY. REV. STAT. ANN. § 272.310 as adopted in 1942 Ky. Acts, ch. 208, § 1 and prior to amendment by 1960 Ky. Acts, ch. 133, § 1.

provision and substitute perpetual existence. But for this statutory authorization, amendment of the articles of incorporation would have required a vote of the members.Certain members brought suit, alleging that the statutory amendments were unconstitutional contract impairment and a taking of the member's property right to vote as to amendments to the articles of incorporation.

The Court of Appeals began its analysis by noting a statutory right[21] to dissent from the amendment and withdraw from the venture, concluding that if the 1960 statutory amendment deprived the members of a vested voting right, the problem was avoidable based upon each dissenting member's right to withdraw and be redeemed from the corporation. Specifically:

> The members are not compelled to continue membership for a period greater than that contemplated when they became members. They have always been privileged to withdraw. Consequently, it appears to us that, under the circumstances of this case, there was no real loss upon being deprived of the right to vote on this particular amendment to the articles.[22]

In the more modern decisions, the high water mark of "vested rights" (even without the label) and the rejection of amendment of an agreement by less than unanimous approval is likely *McCallum v. Asburg*,[23] it arising out of a dispute in a medical partnership.[24] The

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21. *See Ayers*, 344 S.W.2d at 838:

> As we discuss this case let us keep in mind that the General Assembly, upon enacting the two amendments heretofore mentioned, also made the following provision in KRS 272.145: 'When an amendment to the articles of incorporation is adopted by virtue of subsection (2) of KRS 272.140 such an amendment shall be without prejudice to the right of any stockholder or member to withdraw from the corporation and receive the value in cash of his interest therein as appraised and determined by the board of directors as permitted by KRS 272.150(2)(i).' Let us also keep in mind that the charter was originally granted when KRS 272.150(2)(i) and (3) were in full force and effect, the pertinent part of which reads as follows: 'In case of the withdrawal or expulsion of a member, the board of directors shall equitably and conclusively appraise his property interests in the association and shall fix the amount thereof in money, which shall be paid to him within one year after such expulsion or withdrawal.' (internal citations omitted).

22. *Id.* at 840.

23. McCallum v. Asburg, 393 P.2d 774 (Or. 1964).

24. This is not to suggest that the *McCullum* court was the first case to propose such a limitation upon the capacity of the majority. While a contrary reading of the decision is entirely valid, at least hints of this paradigm can be seen in Nick v. Craig, 151 A. 573 (Pa. 1930), and as well in FLOYD R. MECHEM, ELEMENTS OF THE LAW OF PARTNERSHIP § 189 (pp. 126-27) (1896):

> The extent to which a majority of the partners may control the partnership affairs is not definitely settled by the authorities. It is clear, however, that a majority cannot, against the dissent of the minority, change the essential nature or extent of the partnership business as

agreement at issue provided that, but for certain actions, a majority of the partners could amend the partnership agreement. The plaintiff had been expelled from the partnership pursuant to a provision to which he had agreed, and that triggered the application of a thirty-mile non-compete, to which he likewise had agreed. The partnership sought confirmation of its right to affect the expulsion, and the plaintiff sought to be released of the burden of the non-compete. The expulsion was upheld, as was the non-compete.

In dicta, the court considered an amendment made to the partnership agreement, over the plaintiff's objection, to create an executive committee. Substantially, the validity of that amendment was upheld.[25] Unfortunately, in reaching that conclusion the *McCallum* court wrote:

> Fundamental changes in a partnership agreement may not be made without the consent of all the partners. This is true even though the agreement may provide that it can be amended by majority vote. The power to amend is limited by the rule that, unless unanimous, no amendment may be in contravention of the agreement.[26]

In *Kornstein v Taylor*,[27] certain limited partners withdrew from the partnership at a time when the partnership agreement provided that they would receive the value of their interest in the partnership in five tranches paid over the 15 months after the withdrawal. After numerous limited partners withdrew from the partnership, the remaining partners purported to amend the partnership agreement to provide that partners would not be cashed out unless and until all partnership creditors had been paid in full. The opinion is silent as to the required threshold of the partners for its amendment, but it is assumed that the requisite threshold for the amendment, excluding of course the now withdrawn limited partners therefrom, was achieved.

> originally agreed upon, as to alter or amend the articles, reduce or increase the capital, embark upon a new business, change its location, alter the share of a partner, admit a new member, and the like. If they do, the dissenting partners may withdraw from the firm. (citations omitted).

25. *McCallum*, 393 P.2d at 776 ("We hold that these limitations upon the committee's powers kept the delegation well within the scope and interest of the original partnership agreement.").

26. *Id.* at 775-76 (citation omitted). A student comment suggested that the *McCallum* rule be incorporated into the Uniform Partnership Act. *See* Jody E. Graham, *U.P.A. Section 18(h): Majority Control, Dissenting Partners, and the Need for Reform*, 13 U.C. DAVIS L. REV. 903, 921-23 (1980). This proposal was not incorporated in the Revised Uniform Partnership Act (1997).

27. *Kornstein v Taylor*, 68 Pa. D. & C.2d 7, 1974 WL 15732 (Pa. Com. Pl. 1974), *aff'd* 322 A.2d 369 (Super. Ct. Pa. 1974).

It was held that the post-withdrawal amendment to the limited partnership agreement could not be enforced against those partners who had already withdrawn, even in opposition to the admittedly valid subsequent agreement to dissolve the partnership. Specifically, addressing the partnership agreement as it existed pre-amendment:

> It does contain promises to make certain payments to withdrawn partners within 15 months of their withdrawal. Those promises bind the remaining partners and the partnership even as to the unpaid funds due the withdrawn partners despite section 38 of the Uniform Partnership Act, 59 PS § 100, because they constitute agreements between the partners to apply the assets of the partnership in a manner other than that provided for in the said section of said law.[28]

Other cases, in opposition to *McCallum* and *Kornstein*, have enforced the right of the majority to amend the partnership agreement when that right was granted to them,[29] even as to quite significant changes in the terms of the original deal. For example, in *Aztec Petroleum Corporation v. MHM Company*,[30] the court was called upon to consider the removal of the initial general partner and the substitution of a new general partner. The original partnership agreement was silent as to the capacity of the limited partners to remove the incumbent general partner. However, in the manner provided in the limited partnership agreement, certain limited partners proposed[31] the agreement's amendment to create the right to remove the general partner.[32] That proposal was approved by in excess of the 70% threshold required for amendment of the limited partnership agreement. Applying the newly created capacity of the limited partners to remove a general partner and substitute a new general partner, Aztec Petroleum was removed and MHM was substituted. Aztec Petroleum contested its removal, and the amendment of the partnership agreement that enabled that removal, on a trio of grounds, namely that: (1) the change was in opposition to

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28. *Id.* at 13.

29. An alternative formula would be to characterize each of the partners as having relinquished the right to veto any proposed amendment of the agreement.

30. Aztec Petroleum Corporation v. MHM Company, 703 S.W.2d 290 (Tx. Ct. App. 1985).

31. *Id.* at 292 ("In accordance with section 11.12, more than ten percent of the owners of the limited partnership units submitted to Aztec a written proposal for amendment of the partnership agreement.").

32. *Id.* ("Upon receipt by the General Partner of written notice of removal from Limited Partners holding either 70% or more of the Units or 70% or more in interest of the Sharing Ratios of the Limited Partners (the 'Removal Notice'), Aztec Petroleum Corp. or any successor General Partner to Aztec Petroleum Corp. as General Partner (the 'Removed General Partner') shall be removed as General Partner of the Partnership.").

the terms of the controlling statutes; (2) the amendment and removal violated contract law; and (3) the partnership agreement itself was violated. All of these arguments were rejected by the Texas Court of Appeals.

As to the alleged violation of the controlling statutes, and specifically the requirement of unanimous approval of an amendment of the partnership agreement, while the default rule is that unanimity is required, it is contemplated by the statute that the partners may alter this threshold.[33] With respect to the suggestion that contract law was violated, the court found that the express terms of the agreement at issue permitted amendment by less than all partners. Aztec asserted that:

> [I]ts identity as sole general partner in the partnership agreement is a fundamental element of the agreement. As such, it argues that basic contract law and the intent of the parties as shown in the partnership agreement require unanimous consent before a new general partner can be substituted in Aztec's place.[34]

While that might otherwise be true, that unanimous approval is required for amendment of a contract, in this case the agreement required only a 70% threshold. As to Aztec's suggestion, intra alia, that changing the general partnership is such a fundamental change that unanimity should be required, the court was not willing to write into the contract a limitation that is not otherwise there.[35]

To Aztec's suggestion that the partnership agreement was violated because its removal constituted an impermissible interference in the management of the partnership,[36] the court held that amendment of

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33. *Id.* at 293:

> We conclude, however, that Aztec's reliance on section 18(1)(g) is misplaced in a situation where a partnership agreement sets forth the rights and duties of the parties. In such a situation the agreement, rather than the partnership act, controls and the courts look to the partnership act only for guidance. In the present case, the partnership agreement differs from the provisions of section 18(1)(g) in two ways. The agreement permits additional partners to join the partnership upon approval of seventy percent of the partners, rather than upon unanimous consent. It also permits amendment of the agreement upon approval of seventy percent of the limited partnership units without limiting the scope of amendments so as to preclude an amendment providing for replacement of the general partner. Therefore, we conclude that these provisions, rather than section 18(1)(g), control and show that Aztec's consent to its own replacement as general partner is not required. (citation omitted).

34. *Id.* at 293-94.

35. *Id.* at 294 ("Having agreed to a contract which contained a mechanism for amendment upon approval of seventy percent of the partnership units, we conclude that Aztec cannot now create an exception for what it deems to be a fundamental element of the contract.").

36. *See Id.* at 294. Aztec relied on Section 7.1 of the agreement, which provided:

the partnership agreement is not participation in the partnership's management.[37]

Gladstone v. McHenry Medical Group[38] involved the question of whether certain payments to a particular partner in the partnership could, by means of amendment to the partnership agreement, be terminated after that partner had left the partnership and, for a period of time, had been receiving those payments. The court would ultimately hold that the incumbent partners had the right to amend the partnership agreement to terminate those payments.

Under the McHenry Medical Group partnership agreement, there was held back from the amounts to be paid to each partner a charge of 1% that would be credited to Gladstone, a founder of the practice, until he reached the age of 65; that partnership agreement was entered into initially in 1960. Gladstone withdrew from the partnership in 1966, and he received the 1% payments through 1975, at which time he was 61 years of age. No payment was made, however, from 1976, and upon inquiry Gladstone was advised that the partnership agreement had been amended effective January 1, 1976 to eliminate the provision for the payments to Gladstone.[39] Gladstone filed suit asserting that the payments being made to him under the partnership agreement were a retirement account that was not subject to the provision of the partnership agreement allowing for its amendment by a majority of the partners. In opposition, the partnership asserted that the payments to Dr. Gladstone were of the participation in current earnings that was subject to amendment by a majority vote of the partners. By means of an amended complaint,

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> *No Right to Participate in Management*. Except as otherwise expressly provided herein, the Limited Partners shall have no right to, nor shall they, bind the Partnership or take any part in or interfere with the conduct, control or management of the Partnership's business. From this, Aztec argues that changing the general partner constitutes interference by the limited partners in the management of the partnership.

37. *Id.* at 295 ("We cannot see how proposing, voting on and approving an amendment to the partnership agreement in the exact method provided within it can violate the express terms of the partnership agreement.") Although not as focused, *Driveway Austin GP, LLC v. Turbo Partners, LLC*, 409 S.W.3d 197 (Tex. Ct. App. 2013), has elements similar to the *Aztec* decision. The limited partnership agreement as issue required a 100% vote of the limited partners to remove the general partner, while the generally applicable threshold for amending the agreement was a majority. A 54% majority of the limited partners amended the agreement to reduce the threshold for removal of the general partner to a simple majority, and then proceeded to remove the incumbent general partner and appoint a successor. The court rejected the motion that the provision initially setting a unanimous threshold to remove the general partner could be amended only by unanimous approval (409 S.W.3d at 201), finding that it did not "otherwise provide" a different threshold for its amendment. A dissent would have held that unanimity was required to amend the provision requiring unanimously to remove the general partner, asserting that a contrary reading abrogated protections negotiated for in the initial document.

38. Gladstone v. McHenry Medical Group, 553 N.E.2d 1174 (Ill. Ct. App. 2nd Dist. 1990).

39. *Id.* at 1177.

Gladstone asserted as well that the provision providing for the payments to him, Section S-2(c), constituted a separate contract severable from the other provisions of the partnership agreement and on that basis not subject to amendment by the partners. The trial court would determine that Section S-2(c) was a separate contract severable from the partnership agreement as a whole supported by its own consideration and therefore exempt from the amendment provision of the partnership agreement. That determination would be scrutinized and reversed by the appellate court.

The crux of the argument was Gladstone's assertion that Section S-2(c) of the partnership agreement should be treated as its own, freestanding agreement exempt from the otherwise applicable amendment provision of the partnership agreement. In sum and substance, he was arguing that Section S-2(c) was a bilateral agreement between himself and the partnership. This argument failed on two bases: first, on a lack of consideration[40] and second, on the structure of the agreement, which indicated that all of it, including Section S-2(c), constituted a single integrated writing.[41]

In *Diamond Parking Inc. v. Frontier Building Limited Partnership*,[42] the partnership agreement allowed for amendment by a 70% vote.[43] The holders of 74% of the partnership interests voted to amend the partnership agreement to the effect that the interests of limited partners who contributed additional capital would enjoy a disproportionate increase in their returns.[44] In response to a challenge from a limited partner who did not vote in favor of the amendment, it

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40. Gladstone relied upon the fact that the partnership agreement identified Section S-2(c) as having been put in place in recognition of Gladstone's many years of under-compensated service in the organization and growth of the practice; this he argued constituted independent consideration for treatment of this provision as an independent agreement. The court disposed of this argument rather easily, noting that valid consideration needs to be contemporaneous with, not predating, the agreement. *Id.* at 1180. *See also* E. ALLAN FARNSWORTH, CONTRACTS § 2.7 (2nd ed. 1990).

41. The Section S-2(c) was contained in Supplement A of the partnership agreement, it being provided that the Supplement A "*shall be treated as a part*" of the partnership agreement. *See Gladstone*, 553 N.E.2d at 1179.

42. Diamond Parking Inc. v. Frontier Building Limited Partnership, 864 P.2d 954 (Wash. App. 1993).

43. *Id.* at 957.

44. *Id.* at 956. Specifically:

> The proposed restructuring offered those limited partners willing to risk more capital a "substantial profit opportunity" and relabeled them class A limited partners. The amendment essentially divided the partnership interest in to three groups: class B limited partners would retain a collective 5 percent interest, class A limited partners would receive an 85 percent interest, and general partners were entitled to a 0 percent interest. The 5 percent class B limited partner interest would be allocated in proportion to their percentage interest holdings under the Original Agreement. Class A limited partners received other benefits as well, including voting rights over major decisions, recovery of capital contributions, and allocation of losses.

was enforced, the court noting the "partnership agreement is the law of the partnership."[45] Addressing the validity of a provision allowing amendment of the partnership agreement by less than all partners, and harkening to freedom of contract, the court wrote that "[h]aving elected to join the partnership with this type of majority voting provision ... [he] cannot now complain merely because the partnership adopted an amendment of which he did not approve."[46]

Another case upholding the capacity of the majority to exercise the right granted to amend the partnership agreement is *Fox v. I-10 Ltd.*[47] Unlike the *Aztec Petroleum* decision, which may fairly be characterized as involving an amendment that went to the procedural aspects (*i.e.*, who is the general partner?), *Fox v. I-10 Ltd.* involved an amendment that altered the personal obligations of the individual partners. I-10 Ltd. was a limited partnership organized under Colorado law. In 1982, Fox purchased approximately 20% of the limited partnership units. At the time of that acquisition the partnership agreement provided a cap of 400% of the initial contribution on further capital calls. Subject to certain limitations as to the rights of the general partners, the agreement provided that it could be amended by the general partner and a majority of limited partners.[48]

Separately, the agreement required unanimous approval to change the "principal business and purpose of the partnership."[49] In 1986, with Fox's approval, the 400% cap was raised to 600%. However, in 1988, in response to a proposal to again raise the cap, this time to 800%, while the general partner and a majority of the limited partners voted in favor, Fox voted against. When a capital call in excess of the 600% cap was made, he paid up to 600% and filed suit seeking a determination that his obligations are capped at the 600% threshold he approved.[50]

The Colorado Supreme Court began its analysis by reciting a variety of decisions emphasizing the right of parties to enter into agreements and court enforcement of the agreements made, even if *ex parte* improvident.[51] From there it considered Fox's argument that there is an inconsistency between the 600% cap as set by the last amendment to which he consented and the provision allowing less than unanimous approval of amendments. The court determined there to be no inconsistency, writing:

45. *Id.* at 957.
46. *Id.*
47. *Fox v. I-10 Ltd.*, 957 P.2d 1018 (Colo. 1998).
48. *Id.*
49. *Id.* at 1021.
50. *Id.*
51. *Id.* 1021-22.

> Article 7.02 plainly states that "*[a]ll* amendments, other than those [routine amendments] set forth in paragraph 7.01" may be accomplished by majority vote. Article 7.02 goes on to specify that certain items are excluded from amendment by the majority vote procedure set out therein. Increase in capital contributions is not among the exclusions of article 7.02. Furthermore, article 2.04 specifically requires unanimous consent of the limited partners prior to allowing the general partner to take certain actions. Hence the parties clearly excluded certain items from amendment by majority vote, but did not exclude a change in capital contributions from this method of amendment. Neither the language in article 4.09, nor any other language in the Agreement, creates doubt about whether article 7.02 provides the proper procedure for amending article 4.09.[52]

From there the court considered Fox's argument "that the ceiling on a limited partner's capital contribution is such a fundamental of a limited partnership that, as a matter of law, it may not be amended by a majority vote regardless of what the agreement might state."[53] While accepting that "liability represents a defining characteristic of a limited partnership interest,"[54] it was as well observed that "[a] [limited partner]s liability to the partnership is also limited, but this limitation is defined, not by operation of law, but by the partnership agreement as the amount of capital which [a limited partner] agrees to contribute."[55] As to how the partnership agreement determines the capital contribution obligations of the various limited partners, "there is no fundamental tenet of limited partnership law that prevents [limited partners] from voluntarily agreeing, by majority vote or otherwise, to increase their capital contribution to the partnership."[56] From there the *Fox* court was able to:

> conclude that the plain language of the Agreement allows a majority of the partners to vote to amend the capital contribution amount, and no "fundamental right" invalidates that contractual term. Rather, if any fundamental right is implicated, it is the fundamental right to enter into a contract and expect its terms to be enforced.[57]

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52. *Id.* at 1022 (emphasis in original).
53. *Id.*
54. *Id* at 1023.
55. *Id.*
56. *Id.*
57. *Id.*

Another (in)famous case addressing the expulsion of a partner from a law firm, *Cadwalader, Wickersham & Taft v. Beasley*,[58] did not involve an amendment of the firm's partnership agreement. Curiously, that failure to amend the agreement contributed to finding Cadwalader liable. The Cadwalader firm, in order to maximize the financial return to at least some of its partners, determined to engage in a "rightsizing" transaction that included the closing of its Palm Beach office. Beasley, a partner resident in that office, was to say the least displeased with that action, and in response filed an action alleging that his expulsion from the firm was in violation of its partnership agreement, it not containing a provision by which a partner may be expelled, and as well that the efforts to effect his expulsion constituted a breach of fiduciary duties otherwise owed to him.[59] The firm was ultimately found liable for in excess of $3 million in damages, including over $1.9 million in compensatory damages. Judge Cook, in his ruling in favor of Beasley, noted that the Cadwalader partnership had a path, not in this case utilized, by which it could have sanctioned the expulsion of partners, that being to amend its partnership agreement to allow such expulsions to take place.[60] Specifically:

> There was a way for CW&T to address the problem of profitability and the presence of too many unproductive partners. . . . That was to present the problem to the partnership with a proposed amendment to the partnership agreement providing for the expulsion of partners. This could have been done pursuant to paragraph "O" of the partnership agreement. However, the management committee chose not to follow this route, but rather, apparently for the sake of expediency, to bend to the will of the disgruntled partners by expelling others to whom they owed a fiduciary duty.[61]

58. Cadwalader, Wickersham & Taft v. Beasley, 728 So.2d 253 (Fla. 4th DCA 1998).

59. For comprehensive review of this case and its place within UPA and RUPA, see Allan W. Vestal, *"Assume a Rather Large Boat…": The Mess We Have Made of Partnership Law*, 54 WASH. & LEE L. REV. 487 (1997).

60. The decision did not recite whether the Cadwalader partnership agreement allowed its amendment by less than unanimous approval of the partners. Absent a contrary provision, unanimous approval of all partners would have been required for its amendment. *See* UNIF. PART. ACT (1914) § 18(h), 6 (pt. 1) U.L.A. 101 (2001); REV. UNIF. PART. ACT (1997) § 401(j), 6 (pt. 1) U.L.A. 133 (2001); COLO. CODE § 7-64-401(10) (2016); DEL. CODE ANN. tit. 6, § 15-401(j) (2016); FLA. STAT. § 620.8401(10); IND. CODE § 23-4-1-18 (2016); KY. REV. STAT. ANN. § 362.235(8) (2016); *id.* § 362.1-401(10).

61. *Beasley v. Cadwalader, Wickersham & Taft*, No. CL-94-8646 "AJ", 1996 WL 438777 (Fla. Cir. Ct. July 23, 1996), *aff'd in part, rev'd in part*, 728 So. 2d 253 (Fla. 1st DCA. 1998)

While admittedly dicta, clearly the *Beasley* court thought that amendment of the partnership agreement for the purpose of creating an expulsion mechanism would be permissible.

Bailey v. Fish & Neave is a curious case as to amendment of the partnership agreement in that it involved a challenge to an amendment made after the plaintiff had been told that an amendment was likely forthcoming.[62] Bailey was a partner in the venerable Fish & Neave intellectual property firm, which was in 2004 acquired by Ropes & Gray.[63] Presumably in anticipation of that transaction, in December 2003 and again in March 2004, "standstill" amendments were adopted by Fish & Neave to the effect that amendments to the partnership agreement as to the rights of withdrawing partners were being considered, and that any partner who did withdraw would be subject to the agreement as ultimately adopted.[64] The second of those standstill agreements ran through June 1, 2004. Bailey would ultimately give notice on May 12 of his withdrawal from the firm effective May 14.[65] Another partner, Culligan, likewise withdrew from the firm, that withdrawal being effective June 25, 2004.[66] Both Bailey and Culligan delivered proxies to the effect that they objected to any extension of the standstill amendments and as well objecting to any amendment of the partnership agreement that would change the rights to repayment of capital or the payment of accrued earnings. Ultimately, however, the partnership would amend its agreement to change from an accrual to a cash method of determining partner compensation, thereby eliminating the "pipeline" payments, and deferring over a period of years the repayment of capital to withdrawn partners. The plaintiffs filed a complaint, setting forth a series of legal theories, all to the effect that:

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62. Bailey v. Fish & Neave, 801 N.Y.S.2d 230 (N.Y. App. Div.), *aff'd*, 814 N.Y.S.2d 104 (N.Y. App. Div. 2006), *aff'd*, 868 N.E.2d 956 (N.Y. 2007).

63. *See, e.g.*, *Ropes & Gray and Fish & Neave Complete Merger; Combination Creates One of the Largest and Most Sophisticated National IP Practices*, BUSINESS WIRE, January 4, 2005, http://www.businesswire.com/news/home/20050104005427/en/Ropes-Gray-Fish-Neave-Complete-Merger-Combination

64. As described by the court:

> This amendment states that it was made because the partners were considering amending provisions of the Partnership Agreement that could affect the amount or timing of payments made to withdrawing partners. It provided that the rights of any partner who voluntarily withdrew from the Firm prior to the enactment of a permanent amendment addressing the rights to receive payment from the partnership, would be governed by the permanent amendment ultimately enacted.

Fish & Neave, 801 N.Y.S.2d 230, ¶ 2.

65. *Id.* at ¶ 3.

66. *Id.* at ¶ 3.

> Plaintiffs claim that prior to the purported amendment of the Partnership Agreement, and for 34 years, withdrawing partners were entitled to their share of the accounts receivable and work in process (work done but not yet paid for), based on the partner's percentage interest in the Firm. They were also entitled to receive a portion of the contingent fees collected by the Firm after departure. Finally, they were entitled to the return of their capital by the end of the fiscal year in which they departed. Plaintiffs assert that they had an established right to these payments, and, then, the majority voted for the monies to "go into their own pockets."[67]

As to the various theories based upon an assertion that the partners did not have the capacity to alter the rights of the partners, the court began with a review of the centrality of the agreement of the partners:

> There is a long-settled principle that partnership rights and duties may be fixed by agreement between the partners. The partners may include in their written contract any agreement they wish regarding the sharing of profits and losses as long as no part of the agreement conflicts with "prohibitory provisions of the statutes or of rules of the common law relating to partnerships, or considerations of public policy. The courts lack authority to alter express provisions of a partnership agreement.[68]

From there it examined the provision of the Fish & Neave partnership agreement governing its amendment. That agreement provided for a general rule of majority rule, including as to dissolution of the firm. The court concluded that this extended to amendment of the partnership agreement in that "it would be anomalous for the Partnership Agreement to permit the Firm to be dissolved entirely by majority vote, but then to bar amendment to the partner payment process without unanimous consent."[69] Further, while the agreement did require the consent of two-thirds of the partners to expel a partner, "it would be anomalous to require unanimity for an amendment to the withdrawing partner payment structure, as plaintiffs urge, but to require less than unanimous consent for the termination of a partner."[70] Also noted was that while section 16 of the agreement, it governing the rights of retiring partners, could not

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67. *Id.* at ¶¶ 3-4.
68. *Id.* at ¶ 5 (citations omitted).
69. *Id.* at ¶ 5.
70. *Id.* at ¶ 5.

be amended without the consent of an affected partner, no such limitation applied to section 11 and its determination of the rights of a withdrawing partner.[71] From there the court concluded:

> Reading these provisions together, it is evident that the Partnership Agreement permits an amendment, regarding the amount and timing of payments to a withdrawing partner, such as the one at issue here, to be made by a majority vote. Here, the documentary evidence shows that, first, the partnership passed, by majority votes, the two "standstill" amendments in anticipation of the permanent amendment. Then, it passed, by a majority vote, the Amendment. As set forth above, the Amendment changed the Firm from an accrual-based accounting system to a cash-based accounting system, and eliminated the "pipeline," by adding a new Section 11C to the Partnership Agreement, which specified the timing and amount of the payments to all withdrawing partners. Accordingly, unless, as plaintiffs argue, the majority rule provision, in Section 6 of the Partnership Agreement, conflicts with prohibitory provisions of the statutes or of common-law rules, or public policy considerations, the Partnership Agreement was appropriately amended by a majority vote, and unanimous consent was not required.[72]

Twin Bridges LP v. Draper,[73] a decision of the Delaware Chancery Court, addressed challenges to a limited partnership agreement that enabled a merger into a new limited partnership with a different management structure. The case arose out of a deadlock between the two general partners as to how to develop the partnership's real estate. One of the general partners, Schutt, and most of the limited partners voted to amend the partnership agreement to include a merger provision.[74] They then merged the partnership into a newly formed limited partnership.[75] The new partnership agreement provided for three general partners, but did not change any of the partner's economic interests.[76] Schutt and the limited partners that voted for the amendment and merger filed a declaratory action as to the validity of their actions,[77] arguing that the amendment and merger should be treated as separate and independent events under

71. *Id.* at ¶¶ 5-6.
72. *Id.* at ¶ 6.
73. *See* Twin Bridges LP v. Draper, Civil Action No. 2351-VCP, 2007 WL 2744609, 2007 Del. Ch. LEXIS 136, at *11-13 (Del. Ch. Sept. 14, 2007).
74. *Id.* at *2.
75. *Id.* at *2.
76. *Id.* at *2.
77. *Id.* at *2.

the corporate law doctrine of independent legal significance, and not one transaction designed to circumvent the other general partner.[78] On motion for summary judgment, the court did not dismiss counterclaims from the other general partner alleging that Schutt breached her fiduciary duty of loyalty by spearheading first the effort to amend the partnership agreement and then to effect the merger,[79] even though the court found that the actions of Schutt did not violate either the original partnership agreement or DRUPLA.[80] The court questioned the applicability of the doctrine of independent legal significance in the context of limited partnership disputes, but did not answer the question as the issues in the case could be resolved without doing so.[81] Instead, the court stated that "inequitable action does not become permissible simply because it is legally possible."[82] Unfortunately, the court did not expand on what conduct could have been inequitable.[83]

In *IH Riverdale, LLC v. McChesney Capital Partners, LLC*, IH was entitled to a five percent "profits" distribution under the parties' operating agreement.[84] The agreement provided that it could be amended by a writing signed by the members holding a majority interest.[85] The member holding a majority interest, MCP, amended the agreement to eliminate IH's distribution.[86] The court upheld the amendment, finding that nothing in the agreement prohibited MCP

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78. *Id.* at *32 n.47.

79. *Id.* at *82, 146.

80. *Id.* at *83.

81. *Id.* at *32 n. 47.

82. *Id.* at *79 (citing Schnell v. Chris-Craft Indus., Inc., 285 A.2d 437, 439 (Del. 1971)). The case subsequently settled, and for that reason there is no definitive determination under Delaware law as to whether the conduct was or was not appropriate.

83. Subsequent to this decision, the Delaware Legislature amended the Limited Partnership Act to expressly incorporate the doctrine of independent legal significance. *See* DEL. CODE ANN. tit. 6, § 17-1101(h) as created by 2009 H.B. 142. A similar amendment was made to the Delaware LLC Act. *See* DEL. CODE ANN. tit. 6, § 15-1101(h) as created by 2009 S.B. 82. *Accord* KY. REV. STAT. ANN. § 275.003(5) (West 2016) ("Action validly taken pursuant to one (1) provision of this chapter shall not be deemed invalid solely because it is identical or similar in substance to an action that could have been taken pursuant to some other provision of this chapter but fails to satisfy one (1) or more requirements prescribed by such other provision."); *see also* Rutledge, *supra* note 10, at 397-99. Under this doctrine, "Action taken in accordance with different sections of that law are acts of independent legal significance even though the end result may be the same under different sections." *Orzeck v. Englehart*, 195 A.2d 375, 377 (Del. 1963). Had this language been extant in the Delaware Limited Partnership Act at the time of the *Twin Bridges* decision, likely the claims for breach of fiduciary duty would have been dismissed. *See also* Welch v. Via Christi Health Partners, Inc., 133 P.3d 122 (Kan. 2006) (applying doctrine of independent legal significance and holding that as the statutory provisions pursuant to which the reorganization was accomplished did not provide for dissenter rights, the plaintiff limited partners had no such rights); Fletcher International Ltd. v. ION Geophysical Corp., 2011 WL 1167088, n. 39 (Del. Ch. March 29, 2011) (collecting cases).

84. IH Riverdale, LLC v. McChesney Capital Partners, LLC, 666 S.E.2d 841 (Ga. Ct. App. 2008).

85. *Id.* at 842.

86. *Id.*

from eliminating the distribution.[87] The court noted that the article governing distributions did not state that it could not be amended, and the distribution was not included in the list of major decisions that required unanimous consent.[88]

The decision of the Idaho Supreme Court rendered in *Bushi v. Sage Healthcare, PLLC*[89] provides limited guidance as to how an amendment to an operating agreement might be challenged. In this case, Bushi was one of the members of Sage Healthcare, PLLC, an Idaho limited liability company. The operating agreement of the LLC required a threshold of all of the members less one for its amendment.[90] That same operating agreement provided for dissociation by a mere majority vote upon the happening of certain events.[91] It did not contain a provision allowing the affirmative expulsion of a member from the LLC. Certain internal disputes arose in the practice consequent to a personal relationship between Bushi and a nurse practitioner employed by the firm and as well as Bushi's unilateral drawing down on a line of credit. After being confronted with these issues, Bushi joined a competing group of physicians even as he purported to remain a member of Sage Healthcare.[92] When the other members sought to redeem his interest in the company Bushi characterized the offer price as "ridiculous."[93]

Unable to agree as to the terms of Bushi's redemption from the firm, the remaining members approved amendments to the operating agreement "to require mandatory dissociation of a member upon an affirmative vote by all but one of the members;" the other members then unanimously approved Bushi's dissociation. Thereafter, Bushi filed suit against the LLC and its members on the grounds of breach of fiduciary duty, breach of the implied covenant of good faith and fair dealing, unjust enrichment and breach of the operating agreement, seeking a variety of relief. The trial court granted summary judgment with respect to both the claim for breach of the implied covenant of good faith and fair dealing and of fiduciary duty. The Supreme Court would split the difference, affirming the summary judgment as to the implied covenant but not as to fiduciary duties.

As to the assertion, *inter alia*, that the obligation of good faith and fair dealing was violated by the amendment of the operating agreement enabling expulsion of a member, the court observed:

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87. *Id.* at 845.
88. *Id.*
89. Bushi v. Sage Healthcare, PLLC, 203 P.3d 694 (Idaho 2009).
90. *Id.* at 696.
91. *Id.*
92. *See Id.* (Bushi's counsel wrote a letter to Respondents "rejecting their offer [to buy him out of the firm] and explained that Bushi would continue as a member and retain his rights, including his right to a share in the profits of Sage, until a mutually satisfactory agreement had been reached.").
93. *Id.*

> [W]hile Bushi claims he relied on the then existing dissociation provisions which the Members changed it… The Court finds that the Operating Agreement also specifically provides that [n]o member shall have any vested rights in Company Agreement which may not be modified through an amendment to the Company Agreements. Article Roman XIV, Section 1. Therefore, such reliance, to the extent reasonable at all, was simply not justified and his argument is specious.[94]

At the same time, the grant of summary judgment to Sage and its remaining members against Bushi's claims for breach of fiduciary duty were reversed. Parsing the language of the then applicable Idaho Limited Liability Company Act and holding that members of an LLC owe one another fiduciary duties (but without specifying what are those duties), the grant of summary judgment was reversed on the basis that whether a fiduciary duty has been breached is a question of fact not appropriate for resolution by summary judgment.[95] In the course thereof, while clearly dicta, the *Bushi* court reviewed a number of decisions to the effect that, notwithstanding compliance with the terms of the agreement, on particular fact patterns, particularly situations that result in financial gain to the parties remaining in the firm, exercise of a right under the agreement may still give rise to a breach of a fiduciary duty of good faith.[96]

In an analysis heavily rooted in an objective of maintaining without modification the "retirement" benefits to be paid withdrawn partners, and in so doing oft relying upon the analysis set forth with respect to ERISA governed retirement plans, in *Abbott v. Schnader, Harrison, Segal & Lewis, LLP*,[97] it was held, utilizing unilateral contract analysis, that a partnership agreement could not, after the vesting of "retirement benefits," be amended to reduce those benefits.

In *Dudley v. Dudley*,[98] the court considered and rejected an amendment to an operating agreement intended to alter the consequences of an already done act. The operating agreement of this Ohio LLC, which could be amended by majority vote, provided, inter alia, that the company would dissolve after the dissociation of a member unless all of the remaining members consented to the continuation of the company. Kevin Dudley gave written notice that he was withdrawing from the LLC, and Terry Dudley gave notice that he did not consent to the continuation of the company after Kevin's

94. *Id.* at 698.

95. *Id.* at 699-700.

96. No subsequent history of this case is reported. Counsel for one of the parties has advised that after this decision was rendered the parties mediated and resolved their dispute.

97. Abbott v. Schnader, Harrison, Segal & Lewis, LLP, 50 Pa. D. & C.4th 225, 2001 WL 819796 (Pa. Com. Pl. 2001), *aff'd* 805 A.2d 547 (Pa. Super. 2002).

98. Dudley v. Dudley, No. CA2008-07-165, 2009-Ohio-1166, 2009 WL 683702 (Ohio Ct. App. 12 Dist. March 16, 2009).

dissociation. Thereafter, a majority of the remaining members acted to amend the operating agreement to reduce the continuation threshold from the unanimous vote of the remaining members to a simple majority of them. Those majority members would assert that as the company was not dissolved until 90 days after the dissociation, and as the operating agreement did not provide that it was "frozen" after dissociation, they retained the ability to amend the operating agreement and thereby effect the LLC's continuation.[99] In response, the appellees would assert that the proposed retro-active amendment could not "have any effect since it would invalidate the terms of the Agreement that were in effect when the withdrawal occurred" arguing that "Appellants' action is contrary to the intent of the Agreement."[100]

The trial court granted partial summary judgment to the effect that the amendment was not effective, a determination that would be confirmed by the court of appeals, it writing:

> Appellants, however, argue that a unanimous vote was not required because a majority of the remaining members amended the Operating Agreement on July 15, 2007 and, due to such amendment, only a majority vote of the remaining members was required to continue the Company. However, even though the remaining members attempted to amend the Operating Agreement in an effort to allow for the continuation of the Company by a simple majority vote, there is nothing in the record to indicate that the parties originally intended such

99. *See* Brief for Appellants at 6-7, *Id.*:

> Appellees contend a majority of the remaining members, following the withdrawal of a member, no longer have the right to amend the agreement. However, there is nothing in the agreement to that affect, or stating that the company ceases to exist as of the date of withdrawal of a member from the company, or that the members are no longer entitled to their rights under Item V to amend the agreement. Although there is no dispute that Kevin Dudley had the right to withdraw from the company as provided by law, Item VII does not state that the company is immediately dissolved upon the occurrence of a notice of withdrawal or upon any of the other "triggers" for dissolution. In fact, the withdrawal of a member does not dissolve the company except upon the occurrence of a subsequent event: a failure of the members to agree to continue the company within 90 days of the withdrawal.
>
> In the case at bar, Kevin Dudley gave notice of his intent to withdraw from the company on May 17, 2007, and the Operating Agreement was amended by the concurrence of a majority of the remaining members on July 15, 2007. The amendment of the agreement amended Item VII, paragraph E to require only majority concurrence of the members to continue operation of the company following the withdrawal of a member. This amendment was made well within 90 days of the notice of withdrawal given by Kevin Dudley. Clearly the giving of the notice of withdrawal did not immediately dissolve the company in so far as the members had a right to continue the company upon agreement to do so within 90 days. During that 90 day window, the company continued in operation and the members have the right to amend the Operating Agreement pursuant to Item V, paragraph E by majority vote.

100. *See Id.* at 3.

> a result. The original Operating Agreement, specifically Item VII Section A through F, deals explicitly and unambiguously with respect to the triggering events leading to the Company's dissolution and the requirements of the remaining members to continue the business after such an event occurs. To allow the remaining members to amend the Operating Agreement's dissolution procedures after one of its members withdraws from the Company, which is exactly what happened here, would effectively render Item VII of their original agreement meaningless, and furthermore, severely prejudice any member who wanted to withdraw from the Company, a right specifically provided for in Item V, Section E. As a result, because the language used by the parties is clear and unambiguous in regard to the dissolution of the Company, we find that the July 15 amendment cannot supersede and defeat the intent of the parties found in Item VII of the original Operating Agreement.[101]

Unfortunately, and noteworthy for these purposes, is that the court cited no authority for the proposition that the amendment was invalid. Rather, the sum and substance of the decision as to why that cannot be done is "I told you so." Essentially, the reader is left unaware as to why the amendment was invalid, and the court's explanation is not helpful. If and to the extent the court was protecting the right of the person who initially withdrew from the LLC to have it ultimately dissolved, that suggestion fails in that;

> (a) dissolution of the company remains contingent upon the absence of a member vote after dissociation to continue the company; and
>
> (b) after dissociation, the withdrawing member had no further voice in the management of the LLC that could or should be protected.

No explanation is provided as to why, in the series "If A and then B, then C," once A has taken place B or C cannot be redefined. The alternative analysis, namely that the amendment was invalid because it in some manner infringed upon a right of the member objecting to continuation of the company after dissociation to have the company dissolved, fails for the simple reason it was not referenced by the court. Further, under that interpretation (again, one not cited by the *Dudley* court), there is left open the possibility of a majority of the members, immediately after receipt of the notice of withdrawal by the one member, having amended the operating agreement to require

101. *Dudley*, No. CA2008-07-165, 2009-Ohio-1166, 2009 WL 683702, ¶ 17.

only a majority vote to continue the company. In that situation, no member having yet objected to continuation, it would seem that the amendment, within the limited analytic structure of the *Dudley* decision, could proceed.

The *Dudley* decision needs to be considered alongside that in *Kastern v. MOA Investments, LLC.*[102] Therein, after suit was brought on behalf of an LLC charging the majority with having diverted company assets and other misfeasance, a super-majority of the members amended the operating agreement to in effect cause the suit's dismissal. Specifically:

> On June 1, 2005, approximately four months after Marie commenced this action, a consent resolution was adopted amending [the LLC's] operating agreement to permit members with a financial interest in the outcome of pending actions to vote to dismiss such actions, to require members asserting or maintaining a derivative action without approval of a supermajority to indemnify [the LLC's] for all costs and attorney fees incurred in the action, and to impose a one year limitation on claims asserted by a member against the company or other members. Under the amendment, the supermajority voted to dismiss Marie's lawsuit and hired counsel to pursue dismissal.[103]

While likely dicta, the court rejected the plaintiff's objection, observing "it is sufficient to note that the amendment was valid as adopted by the super-majority as allowed in [the LLC's] operating agreement."[104]

In *KNC Investors, LLC v. Lane's End Stallions, Inc.*, a syndicate agreement created forty tenancy-in-common interests in a thoroughbred horse.[105] The agreement provided that it could be altered, amended, or modified with the affirmative vote of thirty-four of the owners.[106] One of the owners, KNC, brought suit against the syndicate manager. The other thirty-nine owners voted to amend the agreement to ratify the manager's previous actions that were the subject of the lawsuit, and thereafter the case was dismissed for lack of subject matter jurisdiction.[107] On appeal, KNC argued that the agreement could not be amended without its consent, especially when the amendment voided provisions of the contract that existed when

102. Kastern v. MOA Invs., LLC, 731 N.W.2d 383 (Wis. Ct. App. 2007).
103. *Id.* at ¶ 16.
104. *Id.* at ¶ 16-17.
105. KNC Investors, LLC v. Lane's End Stallions, Inc., 581 F. App'x 484, 485-86 (6th Cir. 2014).
106. *Id.* at 486.
107. *Id.*

KNC became a party to it.[108] The court upheld the validity of the amendment,[109] observing that "[w]here a contract contains a provision for amendment, even if that provision allows for unilateral modification by only one party, there is no blanket requirement under Kentucky law that all parties must consent to an amendment before it binds them."[110] Therefore, "KNC's assent to the amendment provision in the [o]riginal [a]greement precluded it from challenging the validity of subsequent amendments enacted pursuant to that provision."[111]

Leight v. Osteosymbionics, L.L.C., held that, even if one of the members had the capacity to amend the operating agreement, they did not have the authority to impose on the other members an obligation to arbitrate disputes.[112] Osteosymbionics, L.L.C. was formed in 2006 by Cynthia Brogan, Troy Leight and John Nail. Brogan was the 55% member of the LLC.[113] The operating agreement contemplated, with the exception of certain matters that could be approved by the board of managers, that the agreement could be amended by a member vote, and it was specifically provided that a majority vote of the members could affect an amendment of the operating agreement.[114] Brogan, acting unilaterally, purported to adopt an amended and restated operating agreement that appointed her the sole manager of the company and requiring that all members arbitrate any disputes.[115] Leight and Nail thereafter filed suit against the LLC and Brogan asserting a variety of claims including breach of fiduciary duty.[116] Brogan would argue that those claims had to go to arbitration.[117]

Focusing upon the question as to whether the parties had agreed to arbitrate their dispute, and qualifying their analysis to "the unique facts of the instant case," the court would ultimately answer that no such agreement had been reached.[118] Relying on the decision rendered in *Maestle v. Best Buy Co.*,[119] notwithstanding the fact that Brogan

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108. *Id.* at 488.
109. *Id.* at 489.
110. *Id.*
111. *Id.*
112. Leight v. Osteosymbionics, L.L.C., No. 102869, 2016 WL 193511 at ¶ 40 (Ohio Ct. App. Jan. 14, 2016).
113. *Id.* at ¶ 3-4.
114. *Id.* at ¶ 5, 9.
115. *Id.* at ¶ 11.
116. *Id.* at ¶ 13.
117. *Id.* at ¶ 14.
118. *Id.* at ¶ 28.
119. In *Maestle*, even though a credit card agreement allowed the bank to unilaterally amend or change the terms with proper notice to the cardholders, there was not a "meeting of the minds" to include an arbitration clause and it was therefore invalid. *Maestle v. Best Buy Co.*

No. 78827, 2005 WL 1907282, ¶ 28 (Ohio Ct. App. 2005).

might have had the right to unilaterally amend the operating agreement,[120] there was no meeting of the minds as to an agreement to arbitrate.[121] Ultimately:

> Interpreting the meaning and scope of § 9.2 of the OA as giving Brogan unfettered authority to amend the OA amounts to the assumption the Leight and Nail agreed ahead of time to be bound by any change Brogan chose to make. This is particularly concerning because there is no procedural or notice provision in the OA that the majority Members - in this case, Brogan - must follow before amending the OA. See generally *Badie v. Bank of Am.*, 67 Cal. App. 4th 779, 79 Cal. Rptr. 2d 273, 281 (1998) (California cases "do not support the proposition that a party with the unilateral right to modify a contract has carte blanche to make any kind of change whatsoever as long as the specified procedure is followed.").[122]

It is hard to know how much further this case may be extended. Arbitration involves the waiver of the otherwise applicable constitutional right to access the courts, to appeal, etc., and is therefore markedly different from, for example, modifying the decision-making process or economic terms. But to what else could this reasoning apply? Would on the same basis an obligation to mediate before filing litigation have the same problem? How about a waiver of any right to a jury trial as to any action for breach of the partnership or operating agreement? Besides limits as to forum and/or decision maker, how would one analyze a fee shifting provision akin to that in the *Tennis Bund* decision applicable to a suit, individually or derivatively, for breach of the partnership or operating agreement?[123]

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120. At this juncture the only matter under consideration was the validity of the arbitration clause. If it was unenforceable the court would determine if the amended and restated operating agreement as purportedly adopted by Brogan was itself validly adopted to bind Leight and Nail.

121. *Accord* Abbey v. Fortune Drive Assocs., LLC, 2010 WL 1553616 (Cal. Ct. App. 1st Dist. April 20, 2010) (Member expelled from LLC pursuant to amendment to which that member did not consent held not bound by arbitration provision added to operating agreement at the same time). Still, the *Abbey* court, in dicta later adopted in In re Club Ventures Inv. LLC, Case No. 11-10891 ALG, 2012 WL 6139082 (Bankr. S.D.N.Y. Dec. 11, 2012), noted that an arbitration provision adopted by less than all members could be enforceable if not adopted in contemplation of a dispute with a member. Id. at *6-7.

122. *Leight*, No. 102869 at ¶ 39. In *Badie*, the bank sent notice of an amendment to its credit card agreement in the cardholders' monthly account statements. The amendment included an alternative dispute resolution clause. The court stated that a modification's general subject matter must be anticipated when the contract was entered into. Therefore, the clause was held unenforceable.

123 *See* ATP Tours, Inc. v. Deutscher Tennis Bund, 91 A.3d 554, 557–59 (Del. 2014) (holding that by amendment of the bylaws the board of a nonprofit corporation could impose upon the members thereof a fee shifting provision in the event of a derivative action that "does not obtain a judgment on the merits

In a recent decision from New York, *Shapiro v. Ettenson*,[124] three individuals came together and formed a member-managed LLC, equally owned by the three of them. They did not, however, adopt a written operating agreement. Nearly two years after the LLCs organization, two of the members executed a written consent pursuant to which the articles of organization were amended to change the LLC from being member-managed to manager-managed and they also adopted a written operating agreement. In addition to addressing the management of the company, it provided that a majority of the members could determine to make a capital call upon all of the members and, upon a member's failure to satisfy a capital call, its interest in the company would be diluted. After a capital call was made, one of the members, Shapiro, filed a lawsuit challenging the adoption of the written operating agreement and the capital calls.

Shapiro lost; primarily because the New York LLC Act provides a default rule that a majority of the members can adopt or amend the articles of organization or operating agreement.[125] Essentially, in failing to adopt a written operating agreement, the New York LLC Act became the operating agreement of the LLC owned by Shapiro, Ettenson and Newman.[126] As New York provides a default rule that a simple majority of the members may amend the operating agreement,[127] two of the three equal members were a majority and could adopt an operating agreement that imposed new, prospective obligations upon all members, including those not participating in its approval. Shapiro's suggestion that there was an oral agreement amongst the members that "all material decisions would be made by

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that substantially achieves, in substance and amount, the full remedy sought."); *see also* 18 OKLA. STAT. ANN. tit. 18, § 1126 (West 2015); Joseph A. Grundfest & Kristen A. Savelle, *The Brouhaha Over Inter-Corporate Forum Selection Provisions: A Legal, Economic and Political Analysis*, 68 BUS. LAW. 325 (Feb. 2013). *But see Delaware Proposal Would Restrict Fee-Shifting Corporate Bylaws, Charters*, 30 CORP. COUNSEL WEEKLY 73 (Mar. 11, 2015) (reviewing Delaware proposal limiting fee-shifting bylaws). The 2015 Delaware General Assembly passed amendments to the Delaware General Corporation Law providing, essentially, that fee shifting provisions in either the certificate or the bylaws will not be effective. *See* DEL. CODE ANN. tit. 8, § 102(f); *id.* § 109

124. 2015 N.Y. Slip Op 31670 (U), 2015 WL 5096026 (N.Y. Sup. Ct. Aug. 16, 2016), *aff'd* 45 N.Y.S.3d 439, 146 A.D.3d 650 (N.Y. App. Div. (1st Dept.) 2017).

125. *See* N.Y. LTD. LIAB. CO. LAW § 402(c) (McKinney 1999). A detailed analysis of this decision, prepared by Peter Mahler and posted on his (highly recommended) blog, *New York Business Divorce*, is available at *Can LLC Agreement Be Enforced Against Member Who Doesn't Sign It?* NEW YORK BUSINESS DIVORCE (Sep. 8, 2015), http://www.nybusinessdivorce.com/2015/09/articles/llcs/can-llc-agreement-be-enforced-against-member-who-doesnt-sign-it/.

126. *Shapiro*, 2015 N.Y. Slip Op 31670 (U), 2015 WL 5096026, *5, citing In re 1545 Ocean Ave, LLC, 72 A.D.3d 121, 129 (N.Y. Sup. Ct., New York Cty. 2010). *Accord* KY. REV. STAT. ANN. § 275.003(8) ("To the extent the articles of organization and the operating agreement do not otherwise provide, the Kentucky Limited Liability Company Act shall govern relations among the limited liability company, the members, the managers, and the assignees.").

127. *See* N.Y. LTD. LIAB. CO. LAW § 402(c)(3).

unanimous vote of all the members"[128] was rejected on the basis that New York requires a written amendment under the default rule of majority approval of amendments to the operating agreement.[129] The claim for breach of contract failed because it was based on alleged oral agreement that, pursuant to the LLC Act, was unenforceable.[130] There having been no enforceable agreement that could have been breached, Shapiro's claim for violation of the implied covenant of good faith and fair dealing likewise failed.[131] A claim for breach of fiduciary duty failed before having been based upon "conclusory allegations of breaches of fiduciary duties, without alleging bad faith, self-dealing, or any other conduct that would constitute a breach of fiduciary duty."[132]

Zohar v. LaRock[133] arose out of the separation of Zohar from Zohar, Larock and Perez, LLP, a firm governed by a written "limited partnership agreement" dated August 1, 2005, that could be amended by the members holding 66% of the percentage interests. Those interests were allocated 25% to Zohar and 37½% to each of Larock and Perez. The buyout price of a partner is in part dependent upon the withdrawing partner's percentage interest in the firm, it being multiplied by the firm's net book value less its operating accounts of August 1, 2005. On learning of Zohar's intention to leave the firm, Larock and Perez met and amended the agreement to reduce Zohar's interest to 15%. Several days later Zohar withdrew from the firm. In response to otherwise undetailed allegations as to the validity or invalidity of the reduction in Zohar's interest in the firm, the court wrote:

> "In the absence of prohibitory provisions of the statutes or of rules of the common law relating to partnerships, or considerations of public policy, the partners…, as between themselves, may include in the partnership articles any agreement…concerning the sharing of profits and losses, priorities of distribution on winding up.., [sic] and other matters" (*Bailey v Fish & Neave*, 8 NY3d 523, 528-29 [2007]). The partners may agree to be bound by majority vote as to the most fundamental change, dissolution, as well as matters of payment and compensation (Id). The majority may agree to switch from an accrual to a cash-based system, and make other retroactive changes, to the compensation of partners who have not yet withdrawn from the partnership. (Id). However,

128. *Shapiro*, 2015 WL 5096026, at *4.

129. *Id.* ("Prior to the Operating Agreement, there was no 'written' operating agreement and, therefore, the default provisions of the LLC Law controlled.").

130. *Id.* at *6.

131. *Id.* at *7.

132. *Id.* at *6.

133. Zohar v. LaRock, No. 14826/10, slip op. (N.Y. App. Div. Jul. 25, 2016).

> as a general rule, rights which accrued or vested under the partnership agreement are not forfeited upon a partner's withdrawal from the partnership (Cf. *Kolbe v Tibbetts*, 22 N.Y.3d 344, 353 [2013]).
>
> Because Larock and Perez controlled 75% of the partnership, their reduction of Zohar's partnership interest to 15% on July 29, 2010 was valid, subject to his retention of a 25% interest in vested rights… Plaintiff Zohar's motion for summary judgment is granted to the extent of declaring that plaintiff is entitled to an accounting of his interest in Zohar, LaRock & Perez as of [the date of Zohar's withdrawal from the firm], defined as i) 15% of the net attorney fees generated by open cases which settled after that date, ii) 25% of the net fees of any cases which had settled as of August 3, 2010 but as to which the settlement proceeds had not been received, iii) 25% of the net book value of the firm's fixed assets, including the security deposit under the lease, iv) 50% of the balance in the firm's operating account as of August 1, 2005, and v) $4,750 return of capital.[134]

The *Zohar* decision both gives and takes with the same hand. Initially, based upon *Bailey v. Fish and Neave*,[135] the right of the majority to, via rights granted by private ordering, amend the agreement and thereby bind the minority is recognized. But then the court adopted what was effectively an accrual analysis and determined that amendments could not alter accrued rights. It is at best difficult to reconcile this analysis with that employed in *Gladsone v. McHenry Medical Group*.[136]

III. DISSENTER RIGHTS[137]

Historically, major corporate actions such as a merger, sale of substantially all assets or amendment of the articles of incorporation required the consent of all shareholders, a rule that protected the shareholder's vested property interest in the contractual terms of the venture.[138] That state of the law permitted opportunistic rent seeking

134. *Id.* at *4. The partnership agreement provided that the operating account as of August 1, 2005 would be attached 50% to Zohar and 50% to LaRock for purposes of calculating any buyout.

135. *See supra* notes 62-72 and accompanying text.

136. *See supra* notes 38-41 and accompanying text.

137. This discussion is in part adapted from Thomas E. Rutledge & Sarah J. Sloan, *When the World Ends I Want to Be in Kentucky Because There Everything Happens Thirty Years Late: Kentucky Finally Joins the Modern Rule Against Marketability Discounts in Dissenter Rights Actions*, BENCH & BAR HOT TOPICS, July 2012.

138. *See, e.g.*, Voeller v. Neilston Warehouse Co., 311 U.S. 531, 535 n.6 (1941); In re McLoom Oil Co., 565 A.2d 997, 1004 (Me. 1989) ("The appraisal remedy has deep roots in

by minority shareholders whose approval was required for significant transactions.[139] Responding to pressures to permit significant transactions upon less than a unanimous consent, the various state legislatures reduced the applicable voting thresholds to less than unanimity.[140] At the same time, in order to mitigate the impact upon the shareholder's property rights in the terms of the existing venture,[141] dissenter rights were codified,[142] thereby affording

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equity. The traditional rule through much of the 19th century was that any corporate transaction that changed the rights of common shareholders required unanimous consent. The appraisal remedy for dissenting shareholders evolved as it became clear that unanimous consent was inconsistent with the growth and development of large business enterprises. By the bargain struck in enacting an appraisal statute, the shareholder who disapproves of a proposed merger or other major corporate change gives up his right of veto in exchange for the right to be bought out—not at market value, but at 'fair value.'") (citations omitted); In re Enstar Corp., 1986 WL 8062, at *5 (Del. Ch. 1986); Chi. Corp. v. Munds, 172 A. 452, 455 (Del. Ch. 1934); Recent Developments, *Corporate Fusion by Sale of Assets and Dissolution Held Free from Delaware Statutory Right of Appraisal Despite Claim of De Facto Merger*, *in* 63 COLUM. L. REV. 1135, 1136 (1963); Irving J. Levy, *Rights of Dissenting Shareholders to Appraisal and Payment*, 15 CORNELL L. REV. 420 (1930); 12B WILLIAM MEADE FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 5906.10 (2009).

139. *See*, *e.g.*, Salomon Bros. v. Interstate Bakeries Corp., 576 A.2d 650, 651-52 (Del. Ch. 1989) ("[V]eto power at common law 'made it possible for an arbitrary minority to establish a nuisance value for its shares by refusal to cooperate.'") (quoting *Voeller*, 311 U.S. at 535 n.6 (1941)); In re Shore, 67 A.D.2d 526 (N.Y. App. Div. 1979).

140. *See* FLETCHER, *supra* note 138 ("Consequently, statutes were enacted conferring wide powers on the majority or a specified percentage of the stock to amend the charter, sale, consolidate, merge, etc.") (citation omitted). As early as the 1928 Uniform Business Corporation Act (the predecessor to the Model Business Corporation Act), a merger could be approved by a vote of two-thirds of the shareholders. *See* UNIF. BUS. CORP. ACT, § 44(II); *see also* KY. REV. STAT. ANN. § 271.415(2) (repealed 1972 Ky. Acts, ch. 274, § 165) (permitting a sale of corporate assets with the approval of a majority of the shareholders).

141. *See*, *e.g.*, Yanow v. Teal Indus., Inc., 422 A.2d 311, 317 n.6 (Conn. 1979) ("the appraisal remedy has been described as an adequate quid pro quo for statutes giving the majority the right to override the veto of a dissenting shareholder"); Ala. By-Prods. Corp. v. Cede & Co., 657 A.2d 254, 258 (Del. 1995) (describing appraisal as "a limited legislative remedy developed initially as a means to compensate shareholders of Delaware corporations for the loss of their common law right to prevent a merger or consolidation by refusal to consent to such transactions"); Reynolds Metals Co. v. Colonial Realty Corp., 190 A.2d 752, 755 (Del. 1963) (characterizing dissenter rights as "compensation" for the loss of the right to block fundamental transactions); *Salomon Bros.*, 576 A.2d at 651 ("The judicial determination of fair value pursuant to § 262 is a 'statutory right . . . given the shareholder as compensation for the abrogation of the common law rule that a single shareholder could block a merger.'", quoting Francis I. duPont & Co. v. Universal City Studios, 343 A.2d 629, 634 (Del. Ch. 1975)); In re Appraisal of ENSTAR Corp., No. 7802, 1986 WL 8062, slip op. at *5 (Del. Ch. July 17, 1986) (characterizing dissenter rights as "compensation" for the loss of the right to block fundamental transactions); Hariton v. Arco Elecs., Inc., 182 A.2d 22, 25 (Del. Ch. 1962) (appraisal remedy given shareholders in "compensation" for loss of right to prevent a merger), *aff'd*, 188 A.2d 123 (Del. 1963); *Munds*, 172 A. 452 at 455. ("In compensation for the lost right [of a stockholder to defeat a merger transaction] a provision was written into the modern statutes giving the dissenting stockholder the option completely to retire from the enterprise and receive the value of his stock in money."); FLETCHER, *supra* note 138.

142. For a review of the adoption of the appraisal remedy and its development since that time, see Robert B. Thompson, *Exit, Liquidity and Majority Rule: Appraisal's Role in Corporate Law*, 84 GEO. L.J. 1 (1995-96). In 2007 Kentucky's partnership, limited

minority participants in the venture the ability, upon objecting to the proposed change in the business, to extract a proportionate interest in the venture's value for investment elsewhere.[143] These rights became more important with the development of the cash-out merger,[144] morphing from a liquidity mechanism to a check on the majority's valuation of the minority's interest in the venture.[145] For our purposes, as the right to dissent is triggered when, *inter alia*, the majority approves a significant change in the corporation or as to the rights of a particular shareholder, a minority shareholder is protected from being subjected to a revised agreement to which they have not consented. For example, alterations in preferential distribution rights, the creation, alteration, or abolition of a redemption right, and cash out mergers effected by means of a reverse split all trigger dissenter rights.[146]

This is not to suggest, however, that dissenter rights are universally effective in limiting the ability of those in control of a corporation from imposing unreasonable limitations upon the

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partnership and LLC acts were amended to expressly provide that, in those organizational contexts, dissenter rights exist only if provided for by private agreement. These amendments preclude the argument that dissenter rights are a matter of common law that protect the interests of partners and LLC members. *See* Thomas E. Rutledge, *The 2007 Amendments to the Kentucky Business Entity Statutes*, 97 KY. L.J. 229, 248 (2008-09); *see also* Shawnee Telecom Resources Inc. v. Brown, 354 S.W.3d 542, 552-56 (Ky. 2011) (recognizing that dissenter rights were created to compensate corporate shareholders for the loss of a common law right).

143. As such, upon certain transactions, a minority shareholder may cause to be set aside the otherwise applicable rules described as alternatively "defensive asset partitioning," Henry Hausmann & Renier Krackman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387, 395-96 (2000), or "capital lock-in." *See* Lynn Stout, *On the Nature of Corporations*, 2005 U. ILL. L. REV. 253 (2005).

144. For example, under the Kentucky enactment of the Uniform Business Corporation Act, *see* 1946 Ky. Acts, ch. 14l, there was no provision for the issuance of cash to a shareholder in a corporation taking part in a merger. KY. REV. STAT. ANN. § 271.470 (repealed 1972 Ky. Acts, ch. 274, § 165). By the 1972 adoption of the Model Business Corporation Act, cash was permitted consideration in a merger. *See* KY. REV. STAT. ANN. § 271A.355(2)(c), adopted 1972 Ky. Acts, ch. 274, § 71; repealed 1988 Ky. Acts ch. 23, § 248. *See also* Coyne v. Park & Tilford Distillers Corp., 154 A.2d 893, 895 (Del. 1959) (the early Delaware statute did not permit the payment of cash for shares surrendered in a merger or consolidation; it provided that the merger agreement must "state the manner of converting the shares of each of the constituent corporations into shares" of the resulting corporation); 5-23 ROBERT B. THOMPSON, O'NEAL AND THOMPSON'S OPPRESSION OF MINORITY SHAREHOLDERS AND LLC MEMBERS, § 5.3 (2011):

> During the 1960s, the important commercial jurisdictions authorized cash as consideration in their regular or long-form merger statutes. Although no statute explicitly authorized differential consideration so that minority shareholders would be forced to accept cash, this became the result. As a result, formerly popular forms of squeeze-outs, such as dissolution, sale of assets or use of debt or redeemable stock in mergers, which excluded the minority in an indirect or circuitous fashion, gave way to more direct squeeze-outs such as cash-out mergers. (citations omitted.)

145. *See* THOMPSON, *supra* note 142, at 22.

146. *See*, *e.g.*, KY. REV. STAT. ANN. §§ 271B.13-020(1)(e)1-(e)2, (e)4 (2015); IND. CODE §§ 23-1-44-8(a) (2016).

minority. For example, in *ATP Tour, Inc. v. Deutscher Tennis Bund*,[147] it was held that members of a nonprofit corporation could be bound by a fee shifting bylaw added to corporation's bylaws after the time they became members to the effect that in the event they did not prevail in a derivative action, the complaining members would be responsible for the corporation's defense costs. In that the law of nonprofit corporations does not provide for dissenter rights, no protection was in the instance of this corporation provided. Even in the case of a business corporation, the right to dissent is restricted to particular classes of changes to the corporate structure. Conversely that right does not protect a minority participant with respect to changes that are not within the identified classes. Still, it is inescapable that dissenter rights have reduced these questions in, especially the modern, corporate context. Of course general partnerships did not have dissenter rights, and they are as well absent from limited partnerships.

Certain LLC Acts afford the members the right to dissent from particular transactions and to be redeemed from the venture,[148] and presumably similar rights may be provided for by private agreement.[149] It may be the case that a particular dissenter rights statute or agreement will afford a minority member, dissatisfied with a proposed alteration of the venture's terms the opportunity to extract themselves from the venture. For example, under the Minnesota LLC Act, a member may dissent from the creation in the articles of organization of a right of redemption.[150] However, this protection is not available if the right of redemption is created by an amendment to the "member control agreement."[151] Likewise, the Georgia LLC Act provides for dissenter rights upon certain amendments to the articles of organization,[152] but does not provide similar rights upon amendments to the same effect of the operating agreement.

Dissenter rights have at least two deficiencies as minority protection devices in LLCs. Initially, and in contrast to the law of

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147. *ATP Tours, Inc. v. Deutscher Tennis Bund,*, 91 A.3d 554 (Del. 2014). *See also* N.Y. LTD. LIAB. CO. LAW § 402(c) (McKinney 1999)..

148. *See, e.g.*, FLA. STAT. § 605.1006 (2016); GA. CODE § 14-11-1002 (2015); WASH. REV. CODE § 25.15.471 (2016); OHIO REV. CODE § 1705.40 (West 2016); NEV. REV. STAT. § 92A.360 (2016); WISC. CODE § 183.1206 (2014).

149. In some states, dissenter rights are by statute authorized, but not required, by the LLC Act. *See, e.g.*, DEL. CODE ANN. tit. 6, § 18-210 (2016); KY. REV. STAT. ANN. §§ 275.175(5), 275.247(2), 275.345(3), 275.350(4) (2015); MINN. STAT. § 322B.383(2) (2016); TENN. CODE § 48-249-706 (2016). While the Florida LLC Act contains a listing of transactions that give rise to appraisal rights, it allows them to be provided for in additional circumstances. *See* FLA. STAT. § 605.1006(1)(h) (2016).

150. *See* MINN. STAT. § 322B.383(1)(ii) (2016).

151. *Id.*

152. GA. CODE § 14-11-1002(a)(4)(B) (2015) (providing for dissenter rights upon an amendment of the articles of organization that "creates, alters or abolishes a right is respect of redemption…").

business corporations in which the protections of the dissenter rights are not subject to modification by private ordering, the LLC acts providing for dissenter rights generally allow for their waiver in the operating agreement.[153] Second and more crucially, the dissenter right provisions of the LLC Acts do not provide for those rights upon amendment of the operating agreement. Rather, generally speaking they are restricted to mergers.[154] Why this is the case is not entirely clear, but it is possible to hazard a guess. Under the law of corporations, the economic terms of the various classes of stock, as well as rights regarding the redemption of a class of shares, are detailed in the articles of incorporation.[155] When dissenter rights provisions were being drafted for various LLC Act, the easiest path would have been to substitute "articles of organization" for "articles of incorporation" and from there proceed forward. But in an LLC the capital structure is defined not in the filed articles but in the private operating agreement. As a consequence, protections afforded with respect to changes in the articles are ineffective vis-à-vis the significant changes that can occur by amendment of the operating agreement.

Still, assuming the applicability of the statutory protection to the proposed alteration, a minority participant will find a degree of protection in the right to dissent and receive a liquidating distribution at an amount set with court supervision.[156] This statutory protection[157] may serve to provide a "pressure relief valve" as to certain amendments approved by less than all participants in the venture, allowing those objecting to depart and thereby avoiding substantive challenges to the amendments enacted.[158] This pressure relief valve, while perhaps shortening and no doubt altering the nature of the dispute, comes at the cost of an imposition upon the fiscal health of the LLC. The amounts contributed by a member to an LLC, and an LLC's earnings from its activities, are the property of the

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153. *See, e.g.*, WISC. STAT. § 183.1206 ("Unless otherwise provided in an operating agreement"); OHIO REV. CODE ANN. § 1705.40 (West 2016) ("Unless otherwise provided in writing in the operating agreement"); WASH. REV. CODE § 25.17.471 ("Except as provided . . . in a written limited liability company agreement"). Under the Florida LLC Act, an amendment that alters or abolishes the appraisal right itself gives rise to appraisal rights. *See* FLA. STAT. § 605.1006(1)(g) (2016). This right is, however, subject to waiver. *See id.* § 605.1006(2).

154. *See, e.g.*, OHIO REV. CODE § 1705.40 (dissenter rights available upon a merger or conversion); WASH. REV. CODE § 25.15.471(1) (dissenter rights available upon a merger).

155. *See, e.g.*, MBCA § 6.01; IND. CODE § 23-1-25-1; KY. REV. STAT. ANN. § 271B.6-010.

156. Query whether and how an arbitration clause in the agreement will impact upon the ability of the dissenting member to enlist that court oversight.

157. Assuming the statute's default rule has not been restricted or waived by private ordering. *See, e,g.* FLA. STAT. § 605.1006(2) (2016) (right of appraisal is subject to waiver).

158. Counsel should consider, in the face of a proposed amendment that is expected to generate opposition, giving dissenting rights as a mechanism of channeling that objection into a dispute over value and away from a dispute over propriety.

LLC in which a member has no property interest.[159] Simply put, a member able to dissent and withdraw a portion of the LLC's value puts a strain on the venture. Where dissenter's rights are imposed by statute there is a paternalistic protection afforded a potentially dissenting member to the disadvantage of the LLC and the remaining members.

IV. LIMITATIONS UPON NON-UNANIMOUS AMENDMENT

Against this background, is it possible to determine a protocol by which particular amendments to agreements, approved over the objection of certain venture participants, may be successfully challenged? To a certain degree, no, but that is consequent to the wide variety of agreements at issue and the underlying state statutes, they perhaps providing either greater protection or alternatively depriving a plaintiff of a potential argument. Second, the degree to which an amendment is a modification of the terms of the pre-existing agreement may have an impact upon the analysis. Still, some generalized thoughts as to how these disputes may be addressed are possible.

A. Vested Rights

The fundamental problems with the vested rights doctrine are its unpredictability and its paternalistic deprivation of freedom of contract. As to unpredictability, it is ab initio impossible to know whether any particular amendment to the transaction documentation will be ex post determined to have gone over an undeterminable line and violated the "vested rights" of a participant.

The test set forth by the *McCallum* court compels an unworkable analytic path. Although the parties to the agreement may agree that it may be amended by less than unanimous consent, the court found there to be an outer limit to that capacity. That outer limit is "contravention" of the un-amended agreement, an entirely unworkable, of itself self-contradictory, threshold. The very purpose of most amendments is to either add to or restrict from the rights and

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159. *See, e.g.*, ALA. CODE § 10A-5A-4.02 (2014) (" A member has no interest in any specific property of a limited liability company or a series thereof."); ALASKA STAT. § 10.50.350(a) (2016) ("Property transferred to or otherwise acquired by a limited liability company is the property of the company and is not the property of the members individually."); FLA. STAT. § 605.0110(1) (2016) ("All property originally contributed to the limited liability company or subsequently acquired by a limited liability company by purchase or other method is limited liability company property"); KY. REV. STAT. ANN. § 275.240(1) (West 2016) ("Property transferred to or otherwise acquired by a limited liability company shall be the property of the limited liability company and not of the members individually."); WIS. STAT. § 183.0701(1) (2016) ("All property originally transferred to or subsequently acquired by or on account of a limited liability company is property of the limited liability company and not of the members individually.").

obligations set forth in the original document. If the original agreement obligates X to do A, and the proposed amendment would relieve X of that obligation, the amendment is "in contravention of the agreement."[160] Ultimately the test enunciated by the *McCallum* court would eliminate the capacity of parties to utilize the flexibility to permit modifications by less than all parties.

The weakness of the *Dudley* decision is that it failed to define why the proposed amendment was improper. If the court was conceptualizing the case as one of a withdrawing member having a right to have the effect of withdrawal determined by the rules in effect as of the withdrawal, well, it would have been nice for the court to say so. The court's description of the wrong suffered, namely "severely prejudice any member who decided to withdraw from the Company," is a red herring.[161] Nothing about the post-withdrawal amendment reduced or eliminated the right of any member to withdraw from the company. It did impact (or at least was intended to impact) upon the effect of withdrawal from the LLC as to the balance of the members, but those interests were never referenced in the decision. In consequence, if the *Dudley* court was, *inter alia*, thinking of vested rights, it failed to articulate the vested right.

As to its paternalism, the vested rights doctrine deprives at least some of the participants in the venture of the benefit of the bargain they struck by focusing upon and advancing the interest of those who may not have fully understood the implications of the agreement into which they entered. Put another way, the paradigm of vested rights provides that parties otherwise competent to contract are incompetent to contract for amendment by less than all parties to a multi-lateral agreement. A contract providing, inter alia, "that a majority of the participants in the venture may amend this agreement" vests in that majority a legally enforceable right. The vested rights paradigm deprives them of the benefit of that right, limiting the exercise of the right to amend by parameters never negotiated for. In effect, the *Sautter* decision posits that he intended to purchase insurance that would pay-out even in the event of his planned suicide,[162] and that expectation could not be eliminated by a subsequent amendment to the rules of the supreme conclave. But then what was to be the effect of the language conditioning the policy upon subsequently approved changes in the laws, rules, and usages? That answer is both unknown and unknowable; rather, it would have to be resolved on a dispute-by-dispute basis.

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160. McCallum v. Asbury, 393 P.2d 774, 776 (1964); *See also* Driveway Austin GP, LLC v. Turbo Partners, LLC, 409 S.W.3d 197, 203 (Tex. App. 2013).

161. Dudley v. Dudley, No. CA2008-07-165, 2009 WL 683702, at *3 (Ohio Ct. App. Mar. 16, 2009).

162. If *Sautter* was not, at the time he purchased the policy, contemplating suicide, then he could not have had an expectation of payment upon that event.

Furthermore, vested rights and the consequent ossification of the venture fails to account for the dynamic challenges facing business organizations,[163] and were it to have continuing viability it would deprive business organization law of the benefit of cy pres long afforded to trusts.[164] Fortunately, notwithstanding occasional appearances,[165] the vested rights doctrine is no longer with us.[166]

B. Unilateral Contract

The *Bailey v. Fish & Neave, Abbott* and *Gladstone* decisions highlight the particular problems that arise when, post-separation from the venture, its active participants alter the pre-existing agreement as to post-separation payments.[167] Gladstone was

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163. *See* Mullen, *supra* note 10 at 156 ("Like every other living organism, the corporation is of its nature subject to incessant, endless change, internal and external alike: internal because stockholders and directors themselves change. While the corporation is immortal, they are mortal. Greater still are the external changes usually beyond corporate control, requiring everlasting vigilance and readjustment, occasioned by industrial progress or industrial chaos. It may be an idea, a patent, a new invention, something intangible, as ephemeral as a by-word, or as evanescent as a passing vogue, or again it may be a tax or a tariff, a war or a famine–be it what it may, the corporate body instantly feels its impact. To avoid ruin and disaster the corporation must possess the necessary resilience to absorb the shock, and the faculty to readjust itself to changed and changing conditions.").

164. *Cy pres* is an equitable doctrine used by courts to prevent the failure of charitable trusts when the settlors original charitable purposes have become "unlawful, impracticable, impossible to achieve or wasteful" by modifying the trusts "in a manner consistent with the settlors' [original] purposes." UNIF. TRUST CODE § 413 (amended 2010); *See also Cy Pres* BLACK'S LAW DICTIONARY 470 (4th ed. 2014).

165. Feldkamp v. Long Bay Partners, LLC, 773 F. Supp. 2d 1273, 1282-83 (M.D. Fla. 2011). *See*, *e.g.*, First Florida Bank, N.A. v. Fin. Transaction Sys., Inc., 522 So. 2d 891 (Fla. 2d Dist. Ct. App. 1988), reh'g denied, 531 So. 2d 168 (Fla. 1988). *But see* Hamlet Country Club, Inc. v. Allen, 622 So. 2d 1081, 1083 (Fla. 4th Dist. Ct. App. 1993) (amendment of bylaws to clarify right to withdraw and receive return of initiation fee paid upon joining the club did not infringe upon a vested right in that they were "governed by and subject to the bylaws" that were themselves "subject to amendment."). The vested rights doctrine does continue to have application in assessing the availability of indemnification, the focus there being upon whether the right to indemnification accrued before or after the amendment of the indemnification by-law. *See*, *e.g.*, Branin v. Stein Roe Investment Counsel, LLC, C.A. No. 8481-VCN, 2014 WL 2961084, at *6-8 (Del. Ch. June 30, 2014).

166. *See*, *e.g.*, 7A FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 3689 ("Today, modern statutory provisions have eliminated or severely restricted the concept of vested rights, and the concept of 'vested and defeasible' rights is now outmoded."); *see also* Joan MacLeod Heminway, *Fundamental Changes in the LLC: A Study in Path-Divergence and Convergence* in RESEARCH HANDBOOK ON PARTNERSHIPS, LLCS AND ALTERNATIVE FORMS OF BUSINESS ORGANIZATIONS 200-01 (Robert W. Hillman & Mark J. Loewenstein eds., Edward Elgar Publishing, 2015).

167. These obligations can be significant and can have a material impact upon the long-term survival of a firm. Gladstone v. McHenry Med. Grp., 553 N.E.2d 1174, 1177 (Ill. Ap. Ct. 1990). As recited in *Gladstone*, those payment obligations had a negative impact upon the ability to recruit new physicians to the practice. In March, 2015, the Lincoln, Nebraska firm of Harding Shultz announced it was dissolving. *See* Richard Piersol, *Harding & Shultz Law Firm is Dissolving*, JOURNALSTAR.COM (Mar. 12, 2015), http://journalstar.com /business/local/harding-shultz-law-firm-is-dissolving/article_b5f1e841-1d7e-5ac0-bf51-9285a6147c02.html. According to a press report, the dissolution of the firm was precipitated by two partner's retirements, which triggered certain payment obligations. *See* Martha

unsuccessful, even as Abbott was successful, in arguing that the post-retirement benefits were in the nature of a unilateral contract for which the venture's liability had been fixed.[168] Clearly where there is a unilateral agreement, seldom, if ever, will the venture post-performance be able to alter its obligation thereunder.[169] However, as is evidenced by the *Gladstone* decision, it can be difficult if not impossible to identify a unilateral contract within the terms of a multi-party agreement, especially in the face of expansive integration language. Simply put, those departing a venture should enter into a unique bi-lateral agreement with the venture fixing the post-separation benefits or risk that they will otherwise be modified.[170]

C. Fiduciary Duty

As evidenced by the dearth of cases affording relief on that basis, it is doubtful that reliance on fiduciary duties will provide protection against a non-unanimous amendment of the agreement. Simply put, in order for there to be a breach of fiduciary duty there must first be a duty. While in the discharge of the LLC's business a member or manager may have a duty to the LLC, in deciding on the terms of an operating agreement (or an amendment thereto), where is the fiduciary duty? Specifically, what fiduciary duty limits the capacity of a majority or other threshold of less than all members, otherwise in accordance with the operating agreement, to amend the operating agreement?

In consenting to an amendment of an operating agreement, a member is not acting as a manager of or an agent on behalf of the LLC – positions that would implicate fiduciary obligations – but

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Neil, *Law firm is dissolving after nearly 60 years; senior partner points finger at retirement plan*, ABA JOURNAL.COM (Mar. 13, 2015), http://www.abajournal.com/news/article/law_firm_is_dissolving_after_nearly_60_years_senior_partner_points_finger. Reading between the lines, other attorneys had no interest in working to fund those obligations and left, ultimately precipitating the firm's demise. *Id.*; *see also* Jeff Blumenthal, *Wolf Block Work Still Unfinished*, PHILADELPHIA BUSINESS JOURNAL (Mar. 22, 2010), http://www.bizjournals.com/philadelphia/stories/2010/03/22/story2.html ("But the biggest issue of contention could be retired partners who lost their pension because of Wolf Block's unfunded pension plan. Those retirees must stand in line with other creditors.").

168. Bailey and his co-plaintiff did not, it would appear, make an argument based upon unilateral contract.

169. It must be wondered whether and how often a firm has dissolved, paid its net assets to a retired partner in partial satisfaction of that obligation, and then the active participants have formed a new venture to in name at least continue the activities of the old firm. There is an interesting question as to the application of the Unfinished Business Doctrine in those situations. *See* Thomas E. Rutledge & Tara M. McGuire, *Conflicting Views as to the Unfinished Business Doctrine*, 46 TEX. J. BUS. L. 1, 1 (2015).

170. *See also* Schoon v. Troy Corp., 948 A.2d 1157 (Del. Ch. 2008) (Delaware corporation could, after a director's resignation, amend bylaws to eliminate rights of advancement and indemnification for former directors, and thereafter pursue a claim of breach of fiduciary duty against that director), superseded by statute, DEL. CODE ANN. tit. 8, 145(f), as recognized in Marino v. Patriot Rail Co., 131 A.3d 325, 341 (Del. Ch. 2016).

rather on the member's own behalf in a principal function.[171] A relatively straightforward thought experiment will demonstrate why application of fiduciary obligations, rather than allowing venture participants to act individually as principals, will lead to at minimum perverse results. A hypothetical partnership has five equal partners, A, B, C, D and E. The partnership agreement provides that it may be amended by a vote of 80% of the total number of partners.[172] D has proposed an amendment to the partnership agreement. Only E is opposed to the amendment. All else being equal, the amendment will be approved by the 80% threshold defined by the partnership agreement. But what if the partners, in consenting (or not) to the proposed amendment, are subject to the fiduciary obligations, especially an inter-se the partners duty of loyalty?[173] Understanding the duty of loyalty as requiring that "the fiduciary must place the interests of the principal above his own,"[174] then:

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171. *See*, *e.g.*, Larry E. Ribstein, *Are Partners Fiduciaries?*, 2005 U. ILL. L. REV. 209, 238 ("The partners of a default partnership, when exercising their governance rights, inherently lack the open-ended delegation of power that would make them fiduciaries."); *id.* at 245 ("Moreover, partners have a duty of care only when they act as agents or managers, and not when they are acting solely as co-owners."). Certain laws go so far as to make explicit that a partner, after a trustee the quintessential fiduciary, may properly pursue self-interest. *See* REV. UNIF. PART. ACT § 409(e) (UNIF. LAW COMM'N. 2014) ("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."). *See also* FLA. STAT. § 605.04091(5) (2016) ("A manager of a manager-managed limited liability company or a member of a member-managed limited liability company does not violate a duty or obligation under this chapter or under the operating agreement solely because the manager's or member's conduct furthers the manager's or member's own interest.").

172. Partners vote on a per-capita basis. *See*, *e.g.*, REV. UNIF. PART. ACT § 401(a); KY. REV. STAT. ANN. § 362.1-401(6) (West 2016) ("Each partner has equal rights in the management and conduct of the partnership business.").

173. Depending upon the underlying act, it may be that the duty of loyalty is owed only to the LLC and not inter-se the members. *See*, *e.g.*, KY. REV. STAT. ANN. § 275.170(2). If that is not the case, by private ordering the LLC, to the exclusion of the other members, may be defined as the sole beneficiary of the duty of loyalty. Defining the duty of loyalty as being owed to only one beneficiary avoids competition and conflict among multiple beneficiaries of a duty of loyalty. *See also Gospel of Thomas* 47, from ROBERT I. MILLER, ed., THE COMPLETE GOSPELS (4th ed. 2012) ("No one can mount two horses or bend two bows. And a slave cannot serve two masters, otherwise the slave will honor the one and offend the other."); *Matthew* 6:24 (NIV) ("No one can serve two masters. Either you will hate the one and love the other, or you will be devoted to the one and despise the other."). Other states define the fiduciary obligations as being owed to both the LLC and the other members. *See*, *e.g.*, FLA. STAT. § 605.04091(1) ("Each manager of a manager-managed limited liability company and member of a member-managed limited liability company owes fiduciary duties of loyalty and care to the limited liability company and members of the limited liability company."). This formula creates tension in the discharge of duties between beneficiaries with potentially competing interests.

174. *See* Holmes v. Couch, No. 2007-CA-000445-MR, 2008 WL 2468764, at *7 (Ky. Ct. App. June 20, 2008) (citation omitted); Uzyel v. Kadisha, 116 Cal. Rptr. 3d 244, 275 (Ct. App. 2010) ("The duty of loyalty requires a trustee to subordinate his or her interests to those of the beneficiaries in every regard.") (citation omitted); *see also* Zastrow v. Journal Commc'ns, Inc., 718 N.W.2d 51, 60 (Wis. 2006) ("The fiduciary's duty of loyalty is 'to act solely for the benefit of the principal in all matters connected with the agency, even at the expense of the agent's own interests.' ") (citation omitted);

- E, in the discharge of his duty to each of A, B, C, and D, is obligated to vote in favor of the amendment as it is in the interest of A, B, C, and D that it be passed; and
- A, B, C, and D, in the discharge of their respective duties to E, are obligated to vote against the amendment as it is in E's interest that it not be passed.

Obviously this cannot be the outcome as in effect no action could ever be taken that was not unanimous without there being a violation of a duty of loyalty.[175] Likewise, even if otherwise a duty of care or of "good faith" binds the members vis-à-vis one another,[176] each member must be permitted to vote unconstrained by those obligations. Only if each of the individual partners are empowered to act as his or her own principal, without fiduciary or related obligations restraining his or her individual actions, can there be realized the objective of allowing the partnership agreement to be amended by 80% of the partners.

Ultimately, except in the most curious of circumstances, there can be no claim that in approving an amendment to the operating agreement there was a breach of fiduciary duty because the members were not in voting on the amendment discharging a function constrained by fiduciary obligations.[177]

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175. *Accord* Moon v. Lesikar, 230 S.W.3d 800, 808-10 (Tex. App. 2007) (in response to and rejecting the assertion that the settlor/trustee of a revocable trust owes a fiduciary duty to a contingent beneficiary, the court observed a resulting conflict in duties in that "the settlor, in his capacity as trustee, would have a duty to prevent *himself*, in his capacity as settlor, from revoking the trust."); *see also* Chism v. Tri-State Constr., Inc., 374 P.3d 193 (Wash. Ct. App. 2016) (in-house counsel did not stand in a fiduciary relationship when negotiating compensation arrangement with employer); Robert R. Keatinge, *Duties in Allotment: Duties of Tax Partners with Respect to Inconsistent Positions*, 88 TAX MAG. 213 (2010).

176. *See*, *e.g.*, KY. REV. STAT. ANN § 275.170(1) (West 2016) (duty of care, set forth in the terms of a standard of culpability among members of an LLC); *Anderson v. Wilder*, No. E2006-02647-COA-R3- CV, 2007 Tenn. App. LEXIS 582, at *8 (Tenn. Ct. App. Sept. 17, 2007) (duty of good faith owed among members).

177. This is not to suggest that the ultimate utilization of the right of expulsion or other right created by the amendment is not subject to fiduciary scrutiny. For example, effecting a member's expulsion for the purpose of a low cost redemption followed by a sale of the interests redeemed or the venture itself at a higher price may be challenged. *See*, *e.g.*, Anderson v. Wilder, No. E2003-00460–COA–R3–CV, 2003 WL 22768666 (Tenn. Ct. App. Nov. 21, 2003); Blue Chip Emerald LLC v. Allied Partners, Inc., 750 N.Y.S.2d 291 (App. Div. 2002), abrogated by Centro Empresarial Cempresa S.A. v. América Móvil, S.A.B. de C.V., 952 N.E.2d 995 (App. Div. 2011); Salm v. Feldstein, 799 N.Y.S.2d 104 (App. Div. 2005). *But see* Ledford v. Smith, 618 S.E.2d 627 (Ga. Ct. App. 2005). The call for additional capital and the manipulation of the terms thereof to the detriment of a particular member may likewise be a breach of duty. *See*, *e.g.*, Schafer v. RMS Realty, 741 N.E.2d 155 (Ohio Ct. App. 2000). That analysis is separate and apart from the question of whether the amendment of the organic agreement was appropriate.

D. The Implied Covenant of Good Faith & Fair Dealing

Seldom if ever will it be a successful argument that the implied covenant of good faith and fair dealing will be a basis for avoiding the application of an amended agreement, a conclusion drawn from the limited application of the implied covenant.

Every contract incorporates and imposes upon the parties thereto an obligation of good faith and fair dealing.[178] While not inconceivable, it is difficult to contemplate a circumstance by which the implied covenant of good faith and fair dealing would either invalidate or otherwise limit an amendment to the operative document approved by the statutorily or contractually defined quantum for approving an amendment. The implied covenant is understood to afford a minimal gap filling function so as to protect the express expectations of the parties to an agreement[179] by obligating a party to a contract to do "everything necessary" to carry out the contract.[180] There is as well a negative burden to not act to "prevent [] the creation of the condition under which payment would be due."[181] The implied covenant does not, however, serve to impose additional obligations upon the parties to a contract, and it does not provide extra-contractual terms.[182] The covenant of good faith and fair dealing will not preclude a party from exercising its contractual rights.[183]

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178. *See* Farmers Bank and Tr. Co. v. Willmott Hardwoods, Inc., 171 S.W.3d 4, 11 (Ky. 2005) ("Within every contract there is an implied covenant of good faith and fair dealing, and contracts impose on the parties thereto a duty to do everything necessary to carry them out."); *see also* FLA. STAT. § 605.04091(4) (2016) ("A manager of a manager-managed limited liability company and a member of a member-managed limited liability company shall discharge their duties and obligations under this chapter or under the operating agreement and exercise any rights consistently with the obligation of good faith and fair dealing."); KY. REV. STAT. ANN. § 275.003(7) (2016); *id.* § 362.1-404(4); *id.* § 362.2-408(4); *id.* § 386A.1-060(6); *accord* RESTATEMENT (SECOND) OF CONTRACTS § 205 (AM. LAW INST. 1981).

179. *See*, *e.g.*, Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting, 908 F.2d 1351, 1357 (7th Cir. 1990) ("When the contract is silent, principles of good faith. . . and the reasonable expectation of the trade. . . fill the gap. They do not block use of terms that actually appear in the contract."); R.I. Charities Tr. v. Engelhard Corp., 109 F. Supp. 2d 66, 75 (D. R.I. 2000), *aff'd*, 267 F.3d 3 (1st Cir. 2001) (the implied covenant is a gap filler utilized to effectuate the intentions of the parties to the agreement); In re IAC/Interactive Corp., 948 A.2d 471, 506-07 (Del. Ch. 2008) (concluding that the covenant of good faith is not triggered if the issue is expressly addressed by the contract or the contract is intentionally silent on the issue); Nygaard v. Sioux Valley Hosp. & Health Sys., 731 N.W.2d 184, 194 (S.D. 2007) (noting that as the express language of the contract addressed the issue the claim for breach of the covenant failed).

180. In re Toliver, 466 B.R. 720, 742-43 (Bkr. E.D. Ky. 2012) (citing Harvest Homebuilders LLC v. Commonwealth Bank and Trust Co., 310 S.W.2d 218, 220 (Ky. App. 2012)); Ranier v. Mount Sterling Nat'l Bank, 812 S.W.2d 154, 156 (Ky. 1991); Ram Eng'g & Constr., Inc. v. Uni. of Louisville, 127 S.W.3d 579, 585 (Ky. 2003).

181. Oden Realty Co. v. Dyer, 45 S.W.2d 838, 840 (Ky. 1932); Crestwood Farm Bloodstock v. Everest Stables, Inc., 751 F.3d 434, 445 (6th Cir. 2014); James T. Scatuorchio Racing Stable, LLC v. Walmac Stud Mgt., LLC, No. 5: 11–374–DCR, 2014 WL 2113096, at *8 (E.D. Ky. May 20, 2014).

182. *See*, *e.g.*, Winshall v. Viacom Int'l, Inc., 55 A.3d 629, 636-37 (Del. Ch. 2011).

183. *See*, *e.g.*, Scheib v. Commonwealth Anesthesia*, P.S.C.*, 2011 WL 5008089, at *5 (Ky. App. 2011) (quoting Farmers Bank and Trust Co., 171 S.W.3d 4, 11 (Ky. 2005); *see also*

Having entered into an agreement that could be amended over the objection of any participant therein, any rights a participant enjoys are necessarily contingent upon the absence of modification.[184] Where, as is here posited, the agreement both allows amendment by less than all parties thereto and is silent as to the outer limits of such an amendment, there is no discernible basis for holding that any particular amendment is outside the scope of what the parties contemplated. Put another way, as to the objections of any participant, "faithfulness to the scope, purpose and terms of parties contact"[185] is impossible to define when all of scope, purpose and terms are subject to revision. In effect, the agreement entered into is the agreement of the parties unless and until it is amended, whereupon the amended agreement is the agreement of the parties. There is no place to apply the implied covenant to protect the parties' expectations in the agreement as written where the party has already accepted that the agreement may be modified over their objections.

As for efforts to utilize the implied covenant to invalidate actions that are asserted to be self-interested "a party may act in its own interest and not breach the covenant of good faith and fair dealing, as long as its discretion is not used in a way that is contrary to the spirit of the agreement."[186] While the implied covenant may serve to limit opportunistic behavior as to agreements and obligations not rising to

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United Propane Gas, Inc. v. Federated Mut. Ins. Co., 2007 WL 779443, at *3 (Ky. Ct. App. Mar. 16, 2007) ("Since Federated had a right to settle under the contract and therefore was merely exercising a contractual right, and UPG has otherwise cited us to no specific policy provision alleged to have been breached, we affirm the circuit court's award of summary judgment on the breach of contract claim."); Hunt Enter. Inc. v. John Deere Indus. Equip. Co., 18 F. Supp.2d 697, 700 (W.D. Ky. 1997) (the covenant of good faith and fair dealing, "does not preclude a party from enforcing the terms of the contract . . . It is not 'inequitable' or a breach of good faith and fair dealing in a commercial setting for one party to act according to the express terms of a contract for which it bargained."); Pepsi-Cola Bottling Co. of Pittsburg v. Pepsi Co., Inc., 431 F.3d 1241, 1261 (10th Cir. 2005) (stating that "mere exercise of one's contractual rights, without more, [is not a] . . . breach of the implied covenant of good faith and fair dealing."); F.W.F., Inc. v. Detroit Diesel Corp., 494 F. Supp. 2d 1342, 1359 (S.D. Fla. 2007) (stating that the covenant is not breached "where the contract expressly permits the actions being challenged, and the defendant acts in accordance with the express terms of the contact."); Uebelacker v. Allen Holdings, Inc., 464 F. Supp. 2d 791, 803 (W.D. Wis. 2006) (holding that "if a contract expressly provides a party with certain rights, exercising [these] rights cannot amount to a breach of the implied duty of good faith."); Martin v. Hamilton State Bank, 723 S.E.2d 726, 728 (Ga. Ct. App. 2012) ("Firms that have negotiated contracts are entitled to enforce them to the letter, even to the great discomfort of their trading partners, without being mulcted for lack of "good faith."); *see also* Hammonds v. Hartford Fire Ins. Co., 501 F.3d 991, 997, n.9 (8th Cir. 2007) ("When the express language of the contract addresses the matter at issue, there is no need to turn to the implied covenant.").

184. *See*, *e.g.*, Wolf v. Walt Disney Pictures and Television, 76 Cal. Rptr.3d 585, 597 (Cal. Ct. App. 2008) ("If the express purpose of the contract is to grant unfettered discretion, and the contract is otherwise supported by adequate consideration, then the conduct is, by definition, within the reasonable expectations and [does not] violate [the] implied covenant of good faith and fair dealing.").

185. *See* Allen v. El Paso Pipeline GP Co., 113 A.3d 167, 183 (Del. Ch. 2014).

186. *Scatuorchio*, 2014 WL 2113096, at *9.

unilateral contract status,[187] applications of this nature will be rare. Simply put, the implied covenant is <u>not</u> an obligation of self-abnegation or to act altruistically.[188]

Alternatively, if the implied covenant is viewed as a bar to conduct that, had it been considered by the parties, would have been barred by the agreement,[189] there is no mechanism for making a determination that a particular amendment is improper. Being presented with an agreement that could be amended by less than unanimous approval, absent holding a blocking position, a participant enters aware that the terms are subject to modification. In failing to seek limitations on the right of modification, a participant aggrieved by an amendment has no recourse to the implied covenant of good faith and fair dealing. Alternatively, if limits were sought and could not be achieved, there is no recourse to the implied covenant.[190] The purpose of the implied covenant is not to ex post re-write agreements based upon some objective standard of fairness or to protect participants in a venture from the consequences of a bad deal.

E. Forfeiture/Unreasonable Liquidated Damages

Separate and apart from the question of whether the partnership or operating agreement may be amended to create a right of expulsion is the question of the consequence of the expulsion.[191] One alternative is that expulsion results in a partner/member becoming an assignee of

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187. *See*, *e.g.*, Tymshare Inc. v. Corell, 727 F.2d 1145 (D.C. Cir. 1984) (employer violated the implied covenant where, although employment agreement allowed employee to unilaterally modify its terms, it retroactively revised sales quota and then terminated employee, thereby reducing sales commission otherwise earned).

188. *See*, *e.g.*, Original Great American Chocolate Chip Cookie Co. v. River Valley Cookies Ltd., 970 F.2d 273, 280 (7th Cir. 1992) (citations omitted).

> Contract law does not require parties to behave altruistically toward each other; it does not proceed on the philosophy that I am my brother's keeper. That philosophy may animate the law of fiduciary obligations, but parties to a contract are not each other's fiduciaries. . . Contract law imposes a duty, not to "be reasonable," but to avoid taking advantage of gaps in a contract in order to exploit the vulnerabilities that arise when contractual performance is sequential rather than simultaneous. . . Suppose A hires B to paint his portrait to his satisfaction, and B paints it and A in fact is satisfied but says he is not in the hope of chivvying down the agreed-upon price because the portrait may be unsalable to anyone else. . . This. . . would be [considered] bad faith. . . because a provision had been invoked dishonestly to achieve a purpose contrary to that for which the contract had been made.

189. *See*, *e.g.*, ASB Allegiance Real Estate Fund v. Scion Breckenridge Managing Member, LLC, 50 A.3d 434, 440-41(Del. Ch. 2013), *aff'd in part and rev'd in part on other grounds*, 68 A.3d 665 (Del. 2013) (the implied covenant "necessarily turns on the contract itself and what the parties would have agreed upon had the issue arisen when they were bargaining originally."); *El Paso Pipeline GP Co.*, 113 A.3d at 183 (same).

190. *See Allen*, 113 A.3d at 183.

191. *See generally* Thomas E. Rutledge, *It's Not Me, It's You: – Planning for Expulsion of Members from LLCs*, J. PASSTHROUGH ENTITIES at 47 (July-Aug. 2016).

its own interest in the venture.[192] Alternatively, the act of expulsion may give rise to the redemption of the expelled member's interest in the venture.[193] When the amendment to the agreement provides for both a right to effect an expulsion and the valuation of the redeemed interest, it will not be surprising when the expelled member objects to the valuation methodology. While there may be an effort to rely upon common law limitations upon unreasonable liquidated damages and forfeitures,[194] there is no obvious basis for invalidating a valuation methodology adopted by the requisite majority over the objections of a minority. Again, having entered into an operating or other agreement affording some threshold of less than all participants to amend it, the minority has agreed to be bound by their determination. This conclusion is especially compelling when the underlying act permits a consequence/remedy equivalent to or more punitive than is adopted in the operating or partnership agreement.[195]

Limitations imposed *ex post* upon the determination of value to be paid an expelled partner or member, especially when they are consistent with statutory authorization, are pernicious paternalistic redrafting of the agreement otherwise entered into by one competent to contract. As a beginning point, in *Lawlis v. Kightlinger & Gray*,[196] it was observed that:

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192. *See*, *e.g.*, KY. REV. STAT. ANN. § 275.280(5) (West 2016); REV. PROTOTYPE LLC ACT § 603(a), 67 BUS. LAW. at 171; All Saints University of Medicine Aruba v. Chilana, No. C–147–08, 2012 WL 6652510, at *13 (N.J. Super. Ct. Ch. Div. Dec. 24, 2012) (a dissociated member of an LLC "is enjoined from participating in the management of the LLC" but "retains [his] economic rights" since dissociation does not "automatically constitute[ ] a loss of economic rights in addition to a loss of managerial rights.").

193. *See*, *e.g.*, CALIF. CODE § 17704.10 (2016) (transferee has right to inspect books and records); REV. PROTOTYPE LLC ACT § 504, 67 BUS. LAW. at 168 (estate of deceased member may inspect company books and records); IND. CODE § 23-18-4-8(d) (2016) (affording document inspection rights to a deceased member's representative); UNIF. LTD. PART. ACT § 704, 6A U.L.A. 465 (2008) (estate of deceased limited partner may inspect partnership books and records). One advantage of a buy-out versus retaining the expelled member as an assignee is to terminate any rights as an assignee that might be used in a vexatious manner.

194. For example, in *Man O'War*, the Kentucky Supreme Court struck down as an impermissible penalty or excess liquidated damages a requirement that a shareholder/employee, upon termination of employment, surrender his stock for the price he had paid for it. Man O'War Restaurants, Inc. v. Martin, 932 S.W.2d 366 (Ky. 1996). This aspect of the *Man O'War* decision was prospectively overruled in 2002 by the amendment of KRS section 271B.6-270. *See* 2002 Ky. Acts, ch. 122, § 13. *Contrast* Krebs v. McDonald's Executrix, 266 S.W.2d 87 (Ky. 1953) (upholding as enforceable against estate of deceased shareholder agreed valuation of shares that was made 20 years prior to death); Coyle v. Schwartz, Nos. 2002-CA-001287-MR and 2002-CA-001574-MR (Ky. Ct. App. March 26, 2004) (upholding as enforceable against a terminated shareholder a redemption price agreed to 12 years previously).

195. *See*, *e.g.*, KY. REV. STAT. ANN. § 275.003(2)(a)-(g) (West 2016) (detailing permitted consequences for breach of the operating agreement or failure to make an agreed contribution and including "reducing or eliminating" and "forfeiture" of the member's interest in the LLC); REV. PROTOTYPE LLC ACT § 110(b)(5), 67 BUS. LAW. at 1367.

196. Lawlis v. Kightlinger & Gray, 562 N.E.2d 435, 442-43 (Ind. Ct. App. 1990).

> Where the remaining partners in a firm deem it necessary to expel a partner under a no cause expulsion clause in a partnership agreement freely negotiated and entered into, the expelling partners act in "good faith" regardless of motivation if that act does not cause a wrongful withholding of *money or property legally due the expelled partner* at the time he is expelled.[197]

And there is the problem; what is the "money or property legally due the expelled" partner or member? Absent either the declaration of a distribution or liquidation of the venture,[198] the assets of an LLC are those of the LLC as a legal entity, and the members have no ownership interest therein.[199] Absent a non-waived statutory rule or a provision of an agreement to the effect "upon expulsion from the firm the expelled member is entitled to receive a payment in the amount of $XX[,]" the "money or property legally due the expelled partner" is a null set. Were a court to impose a fair value/fair market value limitation upon what may be dictated by the agreement as amended, the court would in effect be imposing dissenter rights as a remedy for a minority participant vis-à-vis an amendment to the operative agreement otherwise adopted in accordance with the controlling law.[200]

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197. *Id.* at 442-43 (emphasis added).

198. *See, e.g.*, FLA. STAT. § 605.0404(4) (2016) (stating that a member or transferee entitled to receive a distribution is and has the rights of a creditor of the LLC); *id.* § 605.0710(2) (distribution of net assets upon dissolution); KY. REV. STAT. ANN. § 275.235 (West 2016) (upon declaration of a distribution, a member has the rights of a general unsecured creditor); *id.* § 275.310(4) (distribution of net assets of venture to members upon liquidation); IND. CODE § 23-18-5-6(d) (upon declaration of a distribution, a member has the rights of a general unsecured creditor); *id.* § 23-18-9-6(3) (distribution of net assets of venture to members upon liquidation); REV. PROTOTYPE LLC ACT § 404(a)(4), 67 BUS. LAW. at 156 (upon declaration of a distribution, a member has the rights of a general unsecured creditor); *id.* § 711(b), 67 BUS. LAW. at 181 (distribution of net assets of venture to members upon liquidation).

199. *See, e.g.*, FLA. STAT. § 605.0110(1) (2016) ("All property originally contributed to the limited liability company or subsequently acquired by a limited liability company by purchase or other method is limited liability company property."); *id.* at 605.0110(4) ("A member of a limited liability company has no interest in any specific limited liability company property."); KY. REV. STAT. ANN. § 275.240(1) (West 2016) ("Property transferred to or otherwise acquired by a limited liability company shall be the property of the limited liability company and not of the members individually."); MO. REV. STAT. § 347.061(1) ("Property transferred to or otherwise acquired by a limited liability company becomes property of the limited liability company. A member has no interest in specific limited liability company property."); MONT. CODE ANN. § 35-8-701(1) (West 2016) ("Property transferred to or otherwise acquired by a limited liability company becomes property of the limited liability company. A member has no interest in specific limited liability company property.").

200. Under certain acts, such a remedy would be in contravention of the statute. *See, e.g.*, REV. PROTOTYPE LLC ACT § 404(a)(2) ("A member's dissociation does not entitle the dissociated member to a distribution.").

In this regard, decisions such as *Froonjian v. Ultimate Combatant, LLC*[201] are troubling. Therein, two of the three members of an LLC effected the expulsion of the third member with no compensation paid for his interest in the company. While the court found that there was authority to effect the expulsion,[202] it had concerns regarding the failure to pay the expelled member for his interest. The court looked to provisions of the LLC Act that would provide for a liquidating distribution (neither applicable upon an expulsion) and directed their application upon remand. That direction was at best highly questionable. If the LLC Act says in the event of X or Y a member is entitled to a buy-out, on what basis may that consequence be applied in the event of Z? The legislature, in writing the LLC Act, did not provide that remedy upon event Z. While the *Froonjian* court justified its decision on the basis of in pari materia,[203] the fact that the legislature defined a liquidating distribution upon certain circumstances, but not that here at issue, demonstrates that in fact the court was not harmonizing the statute but rather expanding it. Other courts should avoid following a similar path.

VI. CONCLUSION

Between these cases the courts have confirmed that less than a majority of the participants in a venture, pursuant to the authority afforded them to amend an agreement, may determine new management for the venture (*Aztec*, *Day,* and *Twin Bridges*), require that additional capital be contributed to the venture (*Fox* and *Shapiro*), reshuffle the participation rates for an investor unwilling to contribute additional capital (*Diamond Parking*), alter the rights upon or after withdrawal from the partnership (*Gladstone* and *Bailey*) and create a right to expel a participant from the venture (*Aztec, Driveway Austin,* and *Bushi*). This is not to say that there is unanimity as to the ability to alter the agreement's terms.

We here posit a circumstance in which a person has joined an LLC whose operating agreement, by virtue of either statute or private ordering, may be amended by approval of less than all the members. By any reading, each member has agreed that the agreed quantum of the members may alter the deal and in so doing alter the rights of any

201. Froonjian v. Ultimate Combatant, LLC, 169 So. 3d 151 (Fla. Dist. Ct. App. 2015).

202. *See id.* at 155.

203. *See id.* at 156:

> [a]pplying the doctrine of *in pari material*, we can deduce two possible alternatives under chapter 608 for the disposition of a removed member's interest in an LLC. *See* Fla. Dep't of State, Div. of Elections v. Martin, 916 So.2d 763, 768 (Fla. 2005) ("The doctrine of *in pari material* is a principle of statutory construction that requires that statutes relating to the same subject or object be construed together to harmonize the statutes and to give effect to the Legislature's intent.") (citation omitted).

particular member vis-à-vis the LLC. Parties to the operating agreement may negotiate protections against particular amendments such as limitation upon expulsion, disproportionate returns, additional capital contributions and the elimination of returns. Reliance on the terms of an agreement that may be amended over the objection of the person purporting to rely thereon is especially unjustified when the agreement[204] or the governing LLC Act[205] provide expressly that there are no vested rights thereunder they may not be modified by amendment.

It is not meant to be implied that participants who have joined a venture that may be altered by less than all participants are not going to be oft surprised when that power of amendment is utilized "against" them or that there are not significant opportunities to deprive those minority participants of some or all of the fruits of the venture. But that is the consequences of the agreement made ab initio. While "for every wrong the law provides a remedy,"[206] there must first be the showing of a wrong.[207] When there has been no deprivation of a legal right,[208] there is no wrong to be remedied. While this conclusion may be seen as stern, it is the natural and expected outcome of permitting parties to enter into agreements that may be amended by less than unanimous approval.[209]

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204. *See*, *e.g.*, Bushi v. Sage Health Care, PLLC, 203 P.3d 694, 699 (Idaho 2009). *See also* Kidsco Inc. v. Dinsmore, 674 A.2d 483, 492 (Del. Ch. 1995) ("[W]here a corporation's by-laws put all on notice that the by-laws may be amended at any time, no vested rights can arise that would contractually prohibit an amendment."), citing Roven v. Cotter, 547 A.2d 603, 608 (Del. Ch. 1988).

205. *See*, *e.g.*, KY. REV. STAT. ANN. § 275.003(6) (West 2016) ("No member or other person shall have a vested property right resulting from any provision of the operating agreement which may not be modified by its amendment or as otherwise permitted by law."); UTAH CODE ANN. (2016) § 48-2c-407(2) ("Except as may otherwise be expressly provided in the articles of organization or operating agreement, a member has no vested property right resulting from any provision in the articles of organization, including any provision relating to management, control, capital structure, purpose, duration of the company, or entitlement to distributions."); TENN. CODE § 48-209-101(b) ("A member of an LLC does not have a vested property right resulting from any provision in the articles or operating agreement, including provisions relating to management, control, capital structure, distribution entitlement or purpose or duration of the LLC."). *See also* VA. CODE ANN. § 13.1-1014.E ("A member of a limited liability company does not have a vested property right resulting from any provision of the articles of organization.").

206. *Ubi jus ibi remedium*.

207. *Damnum absque injuria*.

208. *See* Ala. Power Co. v. Ickes, 302 U.S. 464, 479 (1938) ("'An injury, legally speaking, consists of a wrong done to a person, or, in other words, a violation of his right. It is an ancient maxim, that a damage to one, without an injury in this sense (*damnum absque injuria*), does not lay the foundation of an action; because, if the act complained of does not violate any of his legal rights, it is obvious, that he has no cause to complain. . . Want of right and want of remedy are justly said to be reciprocal. ….' The converse is equally true, that where, although there is damage, there is no violation of a right no action can be maintained.") (citation omitted).

209. The authors are indebted to Professor Joan Heminway and Robert Keatinge for comments on the working draft of this article. Still, the analysis here employed and all mistakes herein made are those of the authors.