Enforcement of Partnership Obligations—Who Is Sued for the Partnership?

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A. In General

Partners are liable for their own acts, while partnerships are generally liable for the acts of their partners and other agents and employees. It is common knowledge that partners are in turn liable for partnership obligations arising from the acts of partners, agents and employees. Moreover, this is full personal liability, so that any partner is theoretically liable for the entire amount of the partnership obligation. However, this burden may be lightened in two ways. First, in many instances exhaustion of partnership assets or partnership insolvency is required before a partner's personal assets can be reached. Second, indemnification or contribution rights within the partnership

1. ALAN R. BROMBERG & LARRY E. RIBSTEIN, BROMBERG & RIBSTEIN ON PARTNERSHIP (1988)[hereinafter BROMBERG & RIBSTEIN].
or among the partners\textsuperscript{2} may reimburse the partner for any dispropor-
tionate satisfaction of partnership obligations from the partner's per-
sonal assets. However, indemnification and contribution do not
reduce a partner's liability to third parties. Despite these reliefs, per-
sonal liability is probably the greatest drawback of the general part-
nership form of business and the reason most commonly assigned for
using other forms of organization.

As one court wrote after noting the individual liability of partners:
"It is a different and more serious matter to be directly within the
power of a court to order immediate attachment of one's property."\textsuperscript{3}
How one or more partners and the partnership come within the power
of a court and how their personal liability can be enforced are the sub-
jects of this Article. The answers are far from simple. Particular
questions include: Who must or may be sued: partners (all or some)
or the partnership? Who must or may be served with process: part-
ners (all or some) or the partnership or agent? Against whom may
judgment be entered: partners (all or some) or the partnership?
Against whose property may judgment be executed: partners' (all or
some) or the partnership's? Against whom may the judgment debt be
enforced by supplementary proceeding or separate suit: partners (all
or some) or the partnership? Must partnership assets be exhausted
before partners' individual assets are applied?

The enforcement of partnership obligations is the least uniform—
and most confusing—of all aspects of American partnership law. It is
fragmented by a major division within the Uniform Partnership Act
("U.P.A"), variations of the U.P.A. in the adopting states, and diverse
procedural overlays. We will examine the three principal methods,
deﬁned by the styles of the suits, that might be used to enforce part-
nership obligations:

(1) An action against all the partners in their own names: \textit{P v. A, B & C (doing business as, or as partners of, ABC Partnership)}. This suit
is discussed in Part II below.

(2) An action against fewer than all the partners in their own
names: \textit{P v. A} or \textit{P v. A & B (doing business as, or as partners of, ABC Partnership)}. This suit is considered in Part III (for most contract
cases) and Part IV (for tort, trust breach and some contract cases)
below.

(3) An action against the partnership in its own name: \textit{P v. ABC Partnership}. This suit is considered in Part V below.

The structure of these Parts generally parallels that of a previous

\textsuperscript{2} \textsc{Unif. Partnership Act} §§ 18(b), 40(a)(II), 40(d), 6 U.L.A. 1, 213, 469 (1969); 2
\textsc{Bromberg & Ribstein, supra} note 1, § 6.02(f).

\textsuperscript{3} \textsc{First Nat'l Bank of Minneapolis v. White}, 420 F.Supp. 1331, 1336 (D. Minn. 1976).
article 4 which dealt with the converse problems of enforcement of partnership rights. The principles discussed in this Article apply to judicial actions and generally to nonjudicial actions such as arbitrations and administrative proceedings in which partner or partnership defendants raise the kind of questions discussed here (e.g., by motion to dismiss or for summary judgment, for failure to state a claim or for lack of jurisdiction).

Obviously, before a person can be held liable as a partner, he or she must be pled and proved to be a partner. 5 Limited partners are generally not liable at all for partnership obligations. 6 The discussion in this Article applies to general partnerships and to general (but not usually to limited) partners in limited partnerships since general partners in limited partnerships have the same liabilities as general partners in general partnerships. 7 However, limited partners, even though not generally suable on partnership obligations, are of particular importance in determining whether their partnerships can be sued in federal court. This issue is examined in the separate treatment of federal court partnership litigation in Part VI below. A critique of the whole untidy area of enforcement of partnership obligations appears in Part VII.

B. Joint v. Joint and Several

The U.P.A. draws a sharp distinction between two kinds of partner liability. Under U.P.A. section 15(a) partners are jointly and severally liable “for everything chargeable to the partnership under” U.P.A. sections 13 (wrongful acts, e.g., torts) and 14 (breaches of trust). Under U.P.A. section 15(b) partners are jointly liable “for all other debts and obligations (e.g., contracts) of the partnership.” 8

In joint liability, all the joint parties (partners) must be sued 9 with

8. Historical development of these two concepts of partner liability in law and in equity and in England and in America is described in Francis M. Burdick, Joint and Several Liability of Partners, 11 COLUM. L. REv. 101 (1911).
9. See infra section II.C.
a number of exceptions discussed in Part III below. In joint and several liability, all the parties may be sued together, or, as discussed in Part IV, any one or more may be sued separately or together. Various consequences flow from these differences. These include exhaustion of partnership assets before partners' individual assets are reached (generally required in joint liability and not in joint and several liability) and whether a judgment against one partner extinguishes claims against the other partners; sometimes phrased as whether the claim merges into the judgment (applied in joint liability [unless otherwise modified] but not in joint and several liability).

The U.P.A. drafters gave no policy reason for codifying the distinction between "joint" and "joint and several." The distinction is all the more surprising in that the drafters noted that about half the states had, by statute or otherwise, achieved the equivalent of joint and several liability for all partnership obligations. However, the drafters dismissed this as procedural, not affecting "substantive law," and concluded that a state making all partner liability joint and several in adopting the U.P.A. would not affect the Act's uniformity of substantive law. In more modern times, we tend to think that the nature of liability is at least as much substantive as procedural. Be that as it may, a number of states have made all liability joint and several as noted in Part III below.

The usual result contemplated by U.P.A. section 15 is that all partners must be sued on contract since a partnership contract is typically regarded as a joint obligation of the partners. But there are important and numerous exceptions in the form of local modifications of U.P.A. section 15 and other statutes or procedural rules for joint obligors, and for suits in the firm name.

In contrast, any or all the partners may be sued on tort or breach of trust since that liability is always joint and several by U.P.A. section 15.

The contract-tort difference is dramatically illustrated by a case involving both kinds of claims arising out of the same conduct, such as breach of a professional contract and malpractice. The contract claim against fewer than all the partners may have to be dismissed while the

11. Id.
12. See infra sections I.D–F.
13. See infra sections III.B, IV.E–F, and V.E–F.
15. See infra section III.C.
16. See infra Part II.
17. See infra section III.C.
18. See infra Part V.
19. See infra Part IV.
tort claim proceeds. Whether a claim is for contract or tort may, of course, be a matter of dispute.

Joint liability, if not modified by statutes or procedural rules, has advantages for the partners. They may be able to avoid personal liability altogether if the plaintiff cannot manage to join them all properly. If the partners are all joined they can coordinate their defense, sharing defense costs and adjudged liabilities, or they can assure that they will be reimbursed from partnership assets as fully as possible. Joint liability imposes costs on a third party who enforces a claim against the partnership. He or she must identify, sue, serve and prosecute the case against all the partners. However, because joint liability is essentially confined to contracts, it is easily contracted around, although at some cost.

Proposed Revised U.P.A. section 306 would make liability joint and several for all debts and obligations of the partnership; joint liability of partners would then vanish from the scene.

C. Entity and Aggregate Theories

The differences between joint and joint and several liability are historical. They do not derive from another fundamental divergence: the differing theories of a partnership as an entity (a legal personality separate from the individual partners) or as an aggregate (a group of individuals). Both joint and joint and several partner liability are inconsistent in some degree with the entity theory. Entity theory would preclude any liability of a partner for partnership obligations, just as entity theory precludes shareholder liability for corporate obligations. The closest accommodation to entity theory would be that the partners are guarantors or sureties of partnership obligations. Joint and several liability is consistent with aggregate theory. Joint liability is hard to reconcile with aggregate theory unless aggregate theory conceives of the partnership not merely as a collection of individuals, but as an inseparable collection. The partnership may be sued in its firm name, usually with one or more of the partners, on any kind of claim (e.g., contract or tort) where a statute or procedural rule so permits.


23. Entity and aggregate theories are discussed in 1 BROMBERG & RIESTEIN, supra note 1, § 1.03.
This is obviously consistent with entity theory, and inconsistent with aggregate theory.

D. Exhaustion of Partnership Assets Before Recourse to Partners' Assets

Cutting across all the possible methods of enforcing partnership obligations against partners is the question whether partnership assets must be exhausted before reaching partners' individual assets. The answer turns primarily on the nature of the partners' liability. Joint liability generally requires exhaustion while joint and several does not.

An exhaustion requirement is consistent with the entity theory of partnership and inconsistent with aggregate theory.

Exhaustion is a valuable feature for partners and a partial insulation against individual liability. The partners' liability is deferred pending an unsatisfied judgment against the partnership or a determination of partnership insolvency. Depending upon whether the court awards interest and at what rate, the partners probably gain some time value from this delay. Perhaps most importantly, the exhaustion rule eliminates—to the extent of partnership assets—the possibility that one partner will have to pay a disproportionate part of the partnership obligation. To that extent, and perhaps altogether, partners will be spared the cost and delay of having to seek indemnification or contribution from the partnership or their copartners.24 Claims against the partnership can typically be settled by the partnership or partners for somewhat less if exhaustion prevails. The partners may therefore be more willing to have the partnership engage in risky activities. There is, inevitably, a cost to the partnership and the partners associated with exhaustion. Credit may be less readily available to the partnership, or more costly. To obtain partnership credit, the partnership may have to provide collateral or credit enhancement that would otherwise not be needed, and partners may be required to waive exhaustion or give individual guarantees. Contracting costs are associated with each of these.

Persons seeking to enforce a partnership obligation face the converse of the aspects just noted. The exhaustion rule imposes costs and burdens on them. They must obtain an unsatisfied judgment against the partnership or gather sufficient information to show that the partnership is insolvent. This is particularly difficult if the partnership cannot be sued in the partnership name, and unmodified joint liability requires that all the partners be sued. Alternatively, the claimants must incur the expense of contracting for joint and several liability, guarantees, collateral or other assurances of payment, hence, their

claims typically have somewhat less settlement value. These costs may be unexpected if the persons dealing with the partnership are unaware of the exhaustion rule.

Expectation and/or reliance may point either way. Exhaustion is not supported if third persons expect and rely significantly on the credit of the individual partners. Exhaustion is supported if third persons contracting with the partnership expect and rely solely or primarily on the credit of the partnership.25

If it were demonstrated that the benefit to third persons from personal liability of partners was small relative to the costs of enforcing that liability, or compared to the benefits to partners or partnerships from reducing or eliminating that liability, there would be strong support for the exhaustion rule.

The cost to partners of apportioning (e.g., by indemnification or contribution26) any liabilities they have to pay personally is probably lower than the cost to third parties of complying with the exhaustion requirement.27 From this perspective the exhaustion rule is not efficient. The exhaustion rule is efficient in one respect: it can be easily contracted around at a cost which may be relatively low (e.g., if simple guarantee forms are used). However, there is rarely a way to contract around exhaustion in tort cases and it does not provide efficiency there. Equitable considerations plus the lack of efficiency make the exhaustion rule even less justified for torts. This may explain why the exhaustion rule is generally not applied in joint and several liability cases which include torts.28

Federal courts generally apply state law in requiring29 or not requiring exhaustion.30

The applicable law is considered separately below for joint liability

25. It has been stated as a corollary that the partners have a right to insist that partnership property be first exhausted. Cf. Martinez v. Koelling, 228 Neb. 1, 2-4, 421 N.W.2d 1, 2-4 (1988).
26. UNIF. PARTNERSHIP ACT §§ 18(b), 40(a)(II), 40(d), 6 U.L.A. 1, 213, 469 (1989); 2 BROMBERG & RIBSTEIN, supra note 1, § 6.02(f).
27. Cf. Bank of Commerce v. DeSantis, 451 N.Y.S.2d 974, 980 (Civ. Ct. 1982)(partner granted judgment against copartner for bank's chargeback against partner's individual account because of copartner's wrongful overdraft of partnership bank account); Rubin, P.C. v. A. C. Kluger & Co., 383 N.Y.S.2d 828 (Civ. Ct. 1976)(if named and served partners are required to pay judgment against partnership, they may apply for indemnity judgment against partnership and contribution judgment against copartners they named and served in cross claim). But see Colligan v. Caprio, 252 N.Y.S.2d 571 (D. Ct. 1964)(partner against whom judgment was entered on partnership claim may not proceed against copartners for contribution without an equity action, i.e. an accounting)).
28. See infra section I.F.
30. See, e.g., Foster v. Daon Corp., 713 F.2d 149, 151 (5th Cir. 1983)(Tex. law).
cases, joint and several liability cases, and suits in partnership name cases.

E. Exhaustion in Joint Liability

Where partner liability for partnership obligations is joint, as discussed in Parts II and III below, the virtually unanimous rule is that partnership assets must be exhausted or the partnership shown to be insolvent, before partnership creditors can reach partners' individual assets to enforce their liability. This is true where all partners are sued,\textsuperscript{31} where fewer than all partners are sued pursuant to a statute or procedural rule that overrides the common law requirement that they all be sued\textsuperscript{32} (such as a joint obligor statute),\textsuperscript{33} and where there is no statute or procedural rule of that kind.\textsuperscript{34} Where fewer than all the partners can be sued, their liability is effectively joint and several. But courts in these cases do not consider the rationale (discussed in section F below) that dispenses with exhaustion when liability is joint and several. The exhaustion rule is most fully developed in New York.\textsuperscript{35}

Deviations from the exhaustion rule in joint liability situations are rare.\textsuperscript{36}

\textsuperscript{31} See \textit{In re Peck}, 99 N.E. 258 (N.Y. Ct. App. 1912). See Seligman v. Friedlander, 92 N.E. 1047 (N.Y. Ct. App. 1910)(construing common law to this effect as unchanged by an 1897 limited partnership statute); Grogan v. Herrington, 54 S.E.2d 284, 287 (Ga. Ct. App. 1949)(partners may insist on exhaustion; sets aside judgment against one partner when no judgment was entered against partnership); Gordon v. Texas Co., 109 A. 368, 369 (Me. 1920)(states that law is well settled that individual assets are held for payment of partnership debts if partnership assets are insufficient; holds that partner's properly scheduled liability for partnership debt was discharged in his bankruptcy); Lidberg v. United States, 375 F.Supp. 631, 633 (D. Minn. 1974)(dictum: exhaustion is "apparently" law in Minnesota); McInnish v. Continental Oil Co., 362 P.2d 969, 970 (Okla. 1961); Commonwealth Capital Inv. Corp., v. McElmurry, 302 N.W.2d 222, 225 (Mich. Ct. App. 1980) requires exhaustion although judgment was apparently entered against only one of the partners sued. See infra section I.E. (discussing where all partners are sued).


\textsuperscript{34} Moseley, Hallgarten, Estabrook & Weeden, Inc. v. Ellis, 849 F.2d 264, 271 (7th Cir. 1988)(Ill. law). See McCune & McCune v Mountain Bell Tel., 758 P.2d 914, 917 (Utah 1988)("common law requires that the partnership's assets be resorted to and exhausted before partnership creditors can reach the partners' individual assets"). See infra section III.B.

\textsuperscript{35} See infra section III.C.

\textsuperscript{36} Gilbert Switzer & Assoc. v. National Hous. Partnership, Ltd., 641 F.Supp. 150, 154-57 (D. Conn. 1986)(Conn. law; granting summary judgment to a partnership
The exhaustion requirement is not explicit in the U.P.A. It has been seen as suggested by U.P.A. section 18(a) which allows partners to share in the surplus after all liabilities are satisfied. It has also been seen as having been suggested by three provisions which apply after dissolution: (i) U.P.A. section 40(a) which separately lists the partnership assets as partnership property and partner contributions to pay liabilities; (ii) section 40(c) which requires partnership property to be applied first to pay creditors before partners are called on to contribute; and (iii) section 40(d) which requires partners to contribute the amount necessary to satisfy liabilities. These sections are discussed in Part III below. The exhaustion requirement is an implementation of the "partners' equities" right to have partnership assets applied to pay partnership obligations.

The exhaustion requirement, in modified form, prevails by statute as part of federal bankruptcy law. In a liquidation bankruptcy (as opposed to a reorganization bankruptcy) the trustee (who represents partnership creditors) must, in effect, exhaust partnership assets before proceeding against nonbankrupt partners (i.e. those who are not debtors in a Bankruptcy Code case). The trustee is given a claim creditor against a partner objecting that partnership assets must first be exhausted citing Robinson v. Security Co., 87 A. 879, 884-85 (Conn. 1913)(as stating that the state does not require exhaustion; Robinson so states but holds only that creditors of insolvent partnership may share their remaining claims [after application of partnership assets] ratably with creditors of insolvent partners); Sternberg Dredging Co. v. Estate of Sternberg, 140 N.E.2d 125, 128 (III. 1957)(stating that exhaustion not previously required in equity and UNIF. PARTNERSHIP ACT § 15, 6 U.L.A. 174 (1969) made no change; it holds that a separate action can be brought against a dead partner's estate and [by implication] collected from the estate without exhaustion of partnership assets). See In re Elsub Corp., 66 B.R. 172 (Bankr. D. N.J. 1986)(N.J. and federal law; partner's obligation for partnership debts is not contingent as to liability; hence partnership debts are counted in determining whether there are fewer than 12 holders of non contingent claims against the partner so that a single creditor can file an involuntary petition against the partner under Bankruptcy Code, 11 U.S.C. § 303(b)(3)(1988)).

38. E.g., Casey v. Grantham, 79 S.E.2d 735, 738 (N.C. 1954). Partners' equities are discussed in 1 BROMBERG & RIESTEIN, supra note 1, § 3.05(c)(2).
39. Only allowed claims are considered in determining whether there is a deficiency in partnership assets (i.e., whether they have been exhausted). Allowance of claims is governed by the Bankruptcy Code 11 U.S.C. § 502 (1988).
40. Id. §§ 701-766.
41. Id. § 103(b); M. Bank Corpus Christi v. Seikel (In re I-37 Gulf Ltd. Partnership), 48 B.R. 647, 649-50 (Bankr. S.D. Tex. 1985). See In re Monetary Group, 55 B.R. 297, 298-99 (Bankr. M.D. Fla. 1985)(11 U.S.C. §§ 723(a),(b) right of trustee to indemnification by general partners when partnership assets are insufficient is not available in Chapter 11 (reorganization) bankruptcy even though debtor partnership is liquidating).
42. "If there is a deficiency of property of the [partnership] estate to pay in full all claims which are allowed in a case under this chapter concerning a partnership and with respect to which a general partner of the partnership is personally lia-
against each nonbankrupt partner for the full amount of the deficiency in partnership assets. The deficiency is the amount of allowed claims against the partnership remaining after applying all partnership assets. The trustee must proceed first against nonbankrupt partners to the extent practicable. In contrast, the trustee is given a claim against bankrupt partners for the full amount of the allowed claims against the partnership (i.e. with no explicit exhaustion requirement). The statute makes no distinction between joint and several liability and joint liability.

F. Exhaustion in Joint and Several Liability

As discussed in Part IV below, where partner liability for partnership obligations is joint and several, the prevailing rule is that partnership assets need not be exhausted, or the partnership shown to be insolvent, before partnership creditors can reach partners' individual

ble, the trustee shall have a claim against such general partner for the full amount of the deficiency.” 11 U.S.C. § 723(a)(1988).


47. 11 U.S.C. § 723(c)(1988). Exhaustion is the usual practical effect, by virtue of the § 723(b) requirement that the trustee proceed first against nonbankrupt partners. See Carlton J. Eibl, Strategies for Partners Under The Bankruptcy Code When The Partnership Is Insolvent, 61 AM. BANKR. L. J. 37, 44-48 (1987). Section 723(b) was used as supporting analogy in In re Elsub Corp., 66 B.R. 182, 185-87 (Bankr. D. N.J. 1986) on a different bankruptcy point discussed supra note 36. By allowing partnership creditors (through the trustee) to share pro rata with partners’ individual creditors in partners’ individual assets, § 723(c) overrules in bankruptcy the dual priorities or “jingle rule” of UNIF. PARTNERSHIP ACT § 40(b), 6 U.L.A. 469 (1969) §§ 40(b), (h), (i) and 25(2)(c), that partnership creditors have priority in partnership assets and individual creditors have priority in individual assets. Proposed REV. UNIF. PARTNERSHIP ACT § 807 (Discussion draft 1991) would similarly eliminate the jingle rule by dropping equivalents of UNIF. PARTNERSHIP ACT §§ 40(h), (i), 6 U.L.A. 469 (1969) §§ 40(h), (i).
assets to enforce their liability. This follows logically from the nature of joint and several liability and contrasts with the exhaustion rule discussed above where partner liability is joint for contract. One court explained the difference this way:

Several liability is "[l]iability separate and distinct from liability of another to the extent that an independent action may be brought without joinder of others." The individual liability associated with partners that are not jointly liable is not separate and distinct from the liability of all the partners jointly. Rather, [that] individual liability arises only after it has been shown that the partnership assets are inadequate. No direct cause of action may be maintained against the individual partners until the above condition is met. Several liability, on the other hand, imposes no such conditions precedent before one can be held individually liable.

However, the exhaustion requirement is described as prevailing in some joint and several jurisdictions in decisions which do not directly involve its application and do not discuss the difference between joint and joint and several liability. It also appears to prevail as to


49. See supra section I.E.


51. Head v. Henry Tyler Construction Corp., 539 So.2d 195, 199 (Ala. 1988)(emphasis original), quoted and followed in Catalina Mortgage Co. v. Monier, 800 P.2d 574, 578 (Ariz. 1990)(en banc) and followed in Head v. Vulcan Painters, Inc., 541 So.2d 11 (Ala. 1989). Two earlier Alabama cases supported an exhaustion requirement. Brown v. Bateh, 331 So.2d 671, 676-77 (Ala. 1976)(dictum in construing partition statute: partner has right to protect individual property from partnership debts if there are enough partnership assets); Briley v. Briley, 228 So.2d 733, 738 (Ala. Civ. App. 1974)(in degree of divorce and dissolution of husband-wife partnership, court cannot subject individual assets to payment of partnership liabilities so long as there are partnership assets). Both cases were distinguished by Head as dealing with rights and liabilities on dissolution and may have been effectively overruled by it.

nonbankrupt partners in liquidation bankruptcies under federal law, but not as to bankrupt partners, nor to any partners in reorganization bankruptcies.53

Proposed Revised U.P.A. section 306 would impose joint and several liability for all debts and obligations of the partnership (i.e. for contracts and torts alike).54 Proposed section 307(c)-(d) would generally adopt an exhaustion requirement before recourse to partners' individual assets.55 More specifically, it would require an unsatisfied judgment against the partnership unless: the partnership is in Chapter 11 bankruptcy reorganization; the claimant (third party) and the partner have agreed that exhaustion is not necessary; or the court finds that partnership assets in the state are insufficient, that exhaustion is excessively burdensome, or that the court's inherent equitable powers are appropriately exercised to permit direct recovery against individual assets. These last exceptions would be appropriate in tort

(5th Cir. 1983) states that a partner "is generally only personally liable after all the assets of the partnership have been exhausted." This is in the course of holding that a partner had apparent authority under Mississippi law to settle a claim against the partnership and obtain a release of general partners. The resulting protection to the general partners was not notice to the claimant that the partner lacked authority.

Norman v. Norman (In re Norman), 32 B.R. 562, 565 (Bankr. W.D. Mo. 1983) states that Missouri law "appears" to require exhaustion. This is in the course of holding that a partner's liability for the debts of a solvent partnership were not noncontingent and therefore did not have to be counted toward the maximum allowed for a small businessperson bankruptcy filing under Bankruptcy Code 11 U.S.C. §§ 1301-1330 (1988). The filing was upheld over the objections of the debtor's main creditor, his ex-wife. The two cases relied on by the court for its statement do not require exhaustion. In re Ransom, 75 B.R. 684, 686 (Bankr. E.D. Mo. 1987)(Mo. law)(recites the exhaustion requirement but cites only Norman for it; holds that partners' liability for partnership debt is individual, hence eligible for discharge in bankruptcy under 11 U.S.C., §§ 701-766 since partnership assets have been liquidated). Disagreeing with Norman in a different bankruptcy context is In re Elsub, 66 B.R. 172 (Bankr. D. N.J. 1986), discussed supra note 36.

The exhaustion rule was used to hold that the insurer of a joint venturer was entitled to recover from the insurer of the coventurer and of the joint venture the first insurer's contribution toward the settlement of a tort claim against the venture and the venturers. The second insurance was an asset of the venture and was to be exhausted before resort to the first insurance (an individual asset of the first venturer). Ohio Casualty Ins. Co. v. Harbor Ins. Co., 66 Cal. Rptr. 340, 346 (Ct. App. 1968).

The exhaustion rule was used to reinstate a partner's suit against his copartner and the copartner's father for an accounting and to enjoin the father from foreclosing a mortgage on the partner's farm given to secure a loan to the partnership. The accounting was necessary to determine whether there were sufficient partnership assets to pay off the loan. Only if those assets were insufficient would foreclosure be proper. Casey v. Grantham, 239, 79 S.E.2d 735, 738-39 (N.C. 1954).

55. Id. § 307(c)(d).
cases where the claimant could not contract around exhaustion. In light of the factors discussed earlier in this section, it is doubtful that there is an economic justification for the exhaustion rule. The Proposed Revised Act would reverse the prevailing rule of nonexhaustion in joint and several liability situations, and would benefit claimants against partnerships where liability is now joint, but disadvantage claimants where exhaustion is not now required (e.g., almost all tort cases).

G. Exhaustion in Suits in Partnership Name

Where partnerships can be sued in the firm name along with some or all the partners, as discussed in Part V below, the exhaustion rule is applied when required or implied by some other statute or procedural rule, or without discussion whether the authority to sue in the firm name in effect creates joint and several liability that negates the exhaustion rule.

II. ENFORCEMENT OF PARTNERSHIP OBLIGATIONS AGAINST ALL PARTNERS

A. In General

This Part deals with the enforcement of partnership obligations by suit against all the partners, which was and still is the common law pattern. That enforcement is sufficient in almost all U.S. jurisdictions, and it is necessary in a significant number of jurisdictions in contract cases but not in tort cases. This Part concludes with a discussion on the nature of the judgment.


B. Sufficiency of All Partners

A suit against all partners appears to be valid virtually everywhere in the United States, whether the liability of the partners is joint (as in contract in most states, as discussed in Part III below),58 or joint and several (as in tort and breach of trust in virtually all states as discussed in Part IV),59 and whether the partnership is or is not sued along with the partners. In at least one state, the arbitrary distinction is made that the partners must be sued as partners rather than as individuals.60

The law of the state of Louisiana is an exception to the sufficiency of a suit against all partners. In this state, the partners may only be sued along with the partnership61 unless the partnership is insolvent or has ceased to exist.62 Another exception is limited partnerships, in which limited partners are generally not suable on partnership obligations.63

From a purely legal viewpoint, a plaintiff should sue all the partners on a partnership claim. But it may be impractical or unduly costly to do so. Alternatives, such as suing the partnership or some but fewer than all the partners, are considered in Parts III and V below.

C. Necessity of All Partners: Contract Cases

U.P.A. section 15(b) makes partners jointly liable for "debts and obligations of the partnership" except for those specified in U.P.A. sections 13 (wrongful acts, e.g., torts) and 14 (breaches of trust), for which the liability is joint and several by U.P.A. section 15(a). A number of jurisdictions adhere to the common law requirement that all partners must be sued and served to enforce a partnership obligation for which they are jointly liable.64 This can be considered an ap-

61. LA. CODE CIV. PROC. ANN. ART. 737 (West 1992)(partners of existing partnership "may not be sued on a partnership obligation unless the partnership is joined as a defendant"), applied in Melancon v. Morrison-Knudsen International Co., 329 F.Supp. 981, 983-84 (W.D. La. 1971)(two joint venturers not suable without joint venture as a party); Stone v. Stone, 233 So.2d 523 (La. Ct. App. 1974)(one or both partners not suable without partnership which is indispensable party).
64. E.g., Brown & Bigelow v. Roy, 132 N.E.2d 755 (Ohio Ct. App. 1955)(but finding waiver by failure to demur); Mansour v. Massey, 336 S.E.2d 15 (S.C. 1985)(reversing judgment against one alleged partner when other three were sued but not served).
plication of the aggregate theory of partnership as discussed in Part I if the partnership is regarded as an inseparable collection of individuals unmodified by any statutes, procedural rules or exceptions of the kind discussed in Parts III and V below. The common law view dies hard, as at least one major court has read a joint and several partnership statute as not changing the common law.66

The obligations for which U.P.A. section 15 creates joint liability are not limited to monetary obligations, but include contracts and the obligations to perform them.67 Thus, partners generally may not be sued individually on partnership contracts.68 This result is sometimes reached by characterizing the partners as indispensable parties.69 The necessity, then, is to sue all partners with the limited exceptions described in Parts III and V below.

The New York rule has been described in slightly different terms which emphasize the conditional nature of copartner indispensability: “The joint nature of the obligation does not imply that the joint obligor is immune from being sued individually (citation omitted). It only gives the joint obligor the right to insist that the plaintiff join other such obligors if joinder be possible.”70 However, the effect may be much the same, since a partner sued individually without the copartners will usually insist (e.g., by a motion to dismiss) that they be added. But, if the defendant partner fails to make a proper objection, he or she waives the right to have the copartners joined and the suit proceeds against the defendant partner alone.71 New York’s statutes, which produce similar results, are discussed in Part III below.72

D. Necessity of All Partners: Tort and Trust Breach Cases

Where partners are jointly and severally liable for partnership acts, as U.P.A. section 15(a) makes them by reference to U.P.A. sec-

65. See supra section I.C.
68. See Meyer v. Park South Assocs., 159 A.D.2d 337, 552 N.Y.S.2d 614 (1990)(violation of lease); discussed infra note 74 (court notes exception if partnership is insolvent or otherwise unable to pay).
71. Seligman v. Friedlander, 92 N.E. 1047, 1050-51 (N.Y. 1910). Similar waiver holdings are discussed infra note 86.
72. See infra section III.C.
tion 13 for wrongful acts (e.g., torts\textsuperscript{73}) and to U.P.A. section 14 for breaches of trust, any one or more of them may be sued without the others and without the partnership.\textsuperscript{74} They are proper parties, not indispensable\textsuperscript{75} or necessary.\textsuperscript{76} Thus there is no necessity that all partners be sued. This issue is discussed further in Part IV below.

E. Judgment and Enforcement

In a suit against all the partners on a partnership obligation, judgment may be entered against all the partners. In some states, judgment can also be entered against the partnership if the partners have been identified as such in the pleadings,\textsuperscript{77} and the partnership is recognized as an entity to this extent. The judgment is enforceable against their joint property (i.e. the partnership assets).\textsuperscript{78} It is also enforceable against the individual partners named and served. However, in most states where liability is joint, the judgment cannot be executed against individual partners until partnership assets are exhausted or the partnership is shown to be insolvent as discussed in Part I above.\textsuperscript{79}

III. ENFORCEMENT OF PARTNERSHIP OBLIGATIONS AGAINST FEWER THAN ALL PARTNERS: CONTRACT CASES—JOINT LIABILITY

A. In General

This Part focuses on liability of partners for partnership contract obligations. This liability is joint in many states, typically calling for a suit against all the partners if the common law has not been modified. However, the common law has been extensively modified by partnership or joint debtor statutes or procedural rules to permit suits against fewer than all the partners.\textsuperscript{80} This Part discusses the related questions of parties, service of process, enforcement and effect of judgments and concludes with a discussion on agreements between

\textsuperscript{74} E.g., Meyer v. Park South Associates, 552 N.Y.S.2d 614, 616 (App. Div. 1990)(partner of landlord partnership may be sued individually for partnership's alleged harassment of tenant but not for alleged causes of action arising out of the lease).
\textsuperscript{77} See Frazier v. Carlin, 591 P.2d 1348, 1350 (Colo. Ct. App. 1979)(judgment against limited partnership proper when suit was against its two general partners, identified as such; notice to general partners sufficient to satisfy due process for partnership).
\textsuperscript{78} E.g., Carter v. Love, 394 P.2d 472, 476 (Okla. 1964).
\textsuperscript{79} See supra sections I.D and I.E.
\textsuperscript{80} See infra section III.C.
partners and third parties that may alter partner liability for partnership contracts.

B. Without Statute or Procedural Rule

As discussed in Part II above, partner liability for partnership contracts is classified as joint in most states by U.P.A. section 15(b). In those states, each partner is considered liable for the full amount of the contract, although the plaintiff is entitled to only one satisfaction. But enforcement of that liability is not directly available. All the partners must generally be sued. Thus a release or dismissal of one partner discharges all. There are exceptions to the required suit against all partners if a partner is bankrupt, dead, or beyond the jurisdiction of the court, or if a partner sued fails to plead properly the nonjoinder of the other partner(s). In addition, there are numerous exceptions by statutes or procedural rules as discussed below.

Where all partners must be sued, states differ in how many partners must be served. Some hold that service on one partner (or fewer

81. E.g., Moseley, Hallgarten, Estabrook & Weeden, Inc. v. Ellis, 849 F.2d 264, 271 (7th Cir. 1988) (Ellis argued unsuccessfully in the trial court that as a 50% partner he was liable for only 50% of the debt, but did not appeal this point); Midwood Dev. Corp. v. K 12th Associates, 537 N.Y.S.2d 237, 239 (App. Div. 1989) ("[e]ach partner is liable for the whole amount of every debt of the partnership, not merely for a proportionate part;"); Patrikes v. J.C.H. Serv. Stations, Inc., 41 N.Y.S.2d 158 (City Ct. 1943), aff'd, 46 N.Y.S.2d 233 (Sup. Ct. 1943) (three partners not relieved of joint obligation on lease or entitled to return of security deposit although one of them would have been relieved by military induction and Soldiers and Sailors Relief Act if individual obligation).


than all) suffices to give jurisdiction over the partnership to the extent the partnership is recognized. Failure to serve may be waived (e.g., by appearance at trial). If one partner answers, default judgment cannot be entered against others who fail to answer because a valid defense by the answering partner will normally protect the other partners as well. A judgment in the plaintiff’s favor is enforceable only against property of the partnership (the joint property of the partners) and of the partners served. However, in most states with joint liability, the judgment is enforceable against the partners served only if the property of the partnership is insufficient (i.e. is first exhausted) as explained in Part I above. If judgment is taken against fewer than all the partners, the common law rule is that the claim is merged in the judgment and therefore cannot be pursued against the remaining partners. A judgment against all the partners is enforceable against partnership property as well as against the partners’ individual property.

C. With Statute or Procedural Rule

U.P.A. section 15 has been modified in about a dozen states to prescribe joint and several liability of partners for all partnership obligations, including those based on contract as well as those based on tort. The proposed Revised U.P.A. section 306 would do the same. Where a statute of this kind prevails, contract plaintiffs may sue any or all of the partners, with or without the partnership, as discussed

88. Baum v. Glen Park Properties, 660 S.W.2d 723, 725-26 (Mo. Ct. App. 1983) (service on an assistant vice president; partnership lawyer appeared, one partner was in court; property suit).
90. Id. at 455. See L. C. Jones Trucking Co. v. Superior Oil Co., 234 P.2d 802 (Wyo. 1951) and supra note 87.
91. See supra sections I.D and I.E.
92. Mason v. Eldred, 73 U.S. 231 (1868); Salem v. Siegel, 126 N.Y.S.2d 214, 216-17 (Sup. Ct. 1953); Iwanaga v. Hagopian, 179 P. 523 (Cal. 1919); In re Merrill Lynch Relocation Management, Inc., 812 F.2d 1116, 1123-24 (9th Cir. 1987)(Or. law); Jefferson State Bank v. Welch, 702 P.2d 414 (Or. In Banc 1985)(discussing common law merger and related “all or none” rules but finding them inapplicable because no final judgment had been entered against a defaulting partner).
94. E.g., ALA. CODE § 10-8-52 (1987) (“except as may be otherwise provided by law”); ARIZ. REV. STAT. ANN. § 29-215 (1989); COLO. REV. STAT. § 7-60-115 (1986); GA. CODE ANN. § 14-8-15 (Harrison 1990); KAN. STAT. ANN. § 56.315 (1983); MISS. CODE ANN. § 79-12-29 (1972); MO. REV. STAT. § 358.150 (1968); N.C. GEN. STAT.
more fully below.96 Judgments are against the parties named and served97 and do not discharge other partners.98 The judgments are enforceable against the property of the partners named and served, generally subject to exhaustion of partnership assets before recourse to individual assets, as discussed in Part I99 above.100 Release of one partner generally does not discharge the others.101

At least one state has a rule permitting suit against fewer than all the partners102 with the judgment enforceable against the partnership and the partners named and served.103 Another state permits suit against fewer than all the partners if the others cannot be found.104 Where partners are sufficiently numerous, a suit may be maintained against all the partners as a class by suing representative partners selected by plaintiff, on satisfaction of the many other complex class requirements (e.g., typicality, common questions, adequacy of the representatives, superiority of a class action).105

A number of states have joint debtor or joint obligor statutes or


U.P.A. drafters anticipated that states might make this modification; See supra note 14, and accompanying text.

95. REV. UNIF. PARTNERSHIP ACT § 306 (Discussion Draft 1992).


98. RESTATEMENT (SECOND) OF CONTRACTS § 292 (1981)(for joint and several obligors generally). The third party is, of course, entitled to only one satisfaction of the contract. See RESTATEMENT (SECOND) OF CONTRACTS § 293 (1981).

99. See supra sections D and E of Part I.

100. See In re Peck, 99 N.E. 258 (N.Y. 1912)(pre U.P.A. tort case). See also sections D and E of Part I.


102. PA. R. CIV. P. 2128(a): “An action against a partnership may be prosecuted against one or more partners as individuals trading as the partnership . . . .”

103. PA. R. CIV. P. 2132(b)(if jurisdiction has been validly obtained).

104. GA. CODE ANN. § 3-301 (Harrison 1991).

105. FED. R. CIV. P. 23. See In re American Continental Corp/Lincoln Sav. and Loan Sec. Litig., Fed. Sec. L. Rep. (CCH) ¶ 95,704 (D. Ariz. Oct. 31, 1990)(certifying defendant class of partners of three accounting firms under FED. R. CIV. P. 23(b)(3); over 1000 class members in each firm; commonality and predominance satisfied by joint and several liability of partners for partnership obligations under Arizona and California versions of U.P.A. § 15; managing partners will be adequate representatives); Alexander Grant & Co v. McAlister, 116 F.R.D. 583 (S.D. Ohio 1987)(certifying counterdefendant class of 300 partners of accounting firm under FED. R. CIV. P. 23(b)(1)(B) and 23(b)(3); one partner will be adequate representative); In re Alexander Grant & Co. Litigation, 110 F.R.D. 528, 532-38 (S.D. Fla. 1986)(similar; FED. R. CIV. P. 23(b)(1)(B)). Similar results are possible under state class action rules. Class action prerequisites are designed, among other things, to satisfy due process requirements.
rules which effectively create joint and several liability by permitting suit against any one or more of the joint obligors (partners), sometimes in addition to the partnership, with judgment enforceable against the individual property of the partners sued and served and the joint (partnership) property. Some of these statutes authorize a relatively summary later proceeding against a partner who was not sued and served in the prior proceeding to obtain a judgment against that partner which is enforceable against his or her individual property. As a result, the claim based on the contract is not merged in or extinguished by the first judgment.

Prominent among the states with joint obligor statutes is New York, whose jurisprudence is more fully developed than elsewhere.

106. E.g., ARIZ. REV. STAT. ANN. § 44-141 (1987)(all parties to a joint obligation shall be severally liable also); ANK. CODE ANN. § 16-61-111 (Michie 1987)(joint obligation shall be construed to have the same effect as joint and several); CALIF. CIV. PROC. CODE § 410.70 (West 1973)(in action against persons jointly liable on contract, court "has jurisdiction to proceed against such of the defendants as are served as if they were the only defendants"); DEL. CODE ANN. tit. 6, § 2701 (1974)(obligation of several persons shall be joint and several); D.C. CODE ANN. § 16-2101 (1983)(obligation of two or more persons deemed joint and several); KAN. STAT. ANN. § 16-104 (1988)(suits may be brought against any one or more of those jointly liable); MONT. CODE ANN. § 28-1-302 (1991)(joint obligations shall be taken and held to be joint and several); NEV. REV. STAT. § 14.060 (1991)(in suit against defendants jointly indebted on contract where not all are served, plaintiff may proceed against defendant served unless court otherwise directs; judgment may be entered against all defendants enforceable against their joint property and separate property of defendant served), applied in Diamond Nat'l Corp. v. Thunderbird Hotel, Inc., 454 P.2d 13, 14-16 (Nev. 1969); N.M. STAT. ANN. § 38-4-3 (Michie 1978)(joint contracts shall be held and construed to be joint and several), applied in Gallegos v. Citizens Ins. Agency, 779 P.2d 99 (N.M. 1989)(partner who settled with plaintiff not indispensable party in plaintiff's suit against copartner); N.C. GEN. STAT. § 1-113 (1983)("unless the court otherwise directs . . ."); OR. R. CIV. P. 67E(2)(in action against parties jointly indebted, judgment may be taken against less than all); S.D. CODIFIED LAWS ANN. § 15-8-2 (1984)(in action against joint obligors, plaintiff may proceed against defendant served unless court directs otherwise).


108. N.C. GEN. STAT. § 1-113(4)(1983): "the plaintiff, in case the judgment remains unsatisfied, may by action recover of such partner [not named in the suit] separately, upon proving his joint liability. . . ." N.C. GEN. STAT. § 1-114 (1983) "When a judgment is recovered against one or more of several persons jointly indebted upon a contract in accordance with the preceding section (§ 1-113), those who were not originally summoned to answer the complaint may be summoned to show cause why they should not be bound by the judgment, in the same manner as if they had been originally summoned. A party so summoned may answer . . . denying the judgment, or setting up any defense thereto which has arisen subsequent to such judgment; and may make any defense which he might have made to the action if the summons had been served on him originally." CALIF. CIV. PROC. CODE §§ 899-994 (West 1980) are similar to the N. C. section just quoted. OR. R. CIV. P. 67E(2), applied in Jefferson State Bank v. Welch, 702 P.2d 414 (Or. 1985)(en banc), allows a later judgment in the same action.
New York's statutes impliedly require that all the partners be named as defendants but not that they all be served:

Where less than all of the named defendants in an action based upon a joint obligation, contract or liability are served with the summons, the plaintiff may proceed against the defendants served, unless the court otherwise directs, and if the judgment is for the plaintiff it may be taken against all the defendants.109

The judgment may be enforced against the joint property (i.e. the partnership property).111 Despite the contrary suggestion in the quoted language, the judgment may not be enforced against the individual property of a partner unless the partner was served,112 and it may be enforced against the served partners only if it cannot be satisfied from partnership property.113 However, if the judgment remains unsatisfied after enforcement against the partnership and served partner(s), a separate suit on the judgment may be brought against any previously unserved partner to obtain a judgment enforceable against the individual property of that partner.114 That partner may raise any defense or counterclaim he or she could have raised if served in the original suit.115 One Court of Appeals decision goes further holding that a limited partner who has received a return of contribution (and is therefore liable to the partnership under U.L.P.A. section 17(4)) is bound by the judgment against the partnership and, if sued on this judgment, may defend only by showing he or she is not a limited part-

110. N.Y. Civ. Prac. L. & R. § 1501 (McKinney 1976); N.Y. Civ. Prac. L. & R. §§ 310 (McKinney 1991("Personal service upon persons conducting a business as a partnership may be made by personally serving the summons within the state upon any one of them").
111. N.Y. Civ. Prac. L. & R. § 5201(b)(McKinney 1976)("A money judgment entered upon a joint liability of two or more persons may be enforced against individual property of those persons summoned and joint property of such persons with any other persons against whom the judgment is entered"), applied in Gotham Air Conditioning Serv., Inc. v. Heitner, 544 N.Y.S.2d 703 (Civ. Ct. 1989)(suit maintainable against partner and partnership when copartner not served). See Tehran-Berkeley Civil and Envtl. Eng'rs v. Tippetts-Abbett-McCarthy-Stratton, 888 F.2d 239 (2d Cir. 1989)(one of two joint venturers [regarded under New York law as partners and as joint obligors on a contract with third party] ordered to arbitration pursuant to the contract).
114. N.Y. Civ. Prac. L. & R. § 1502 (McKinney 1976), applied in Lauratex Textile Corp. v. Gorin, 322 N.Y.S.2d 76 (App. Div. 1971) to confirm an arbitration award against a partner who was not known at the time the award was made against his copartner. COMPARE N.C. GEN. STAT. § 1-113(4)(1983), supra note 108.
ner or did not receive a return of contribution covered by that section.\textsuperscript{116}

There is New York authority that fewer than all the partners cannot be sued individually without first obtaining a judgment against the partnership or showing that partnership property is insufficient.\textsuperscript{117} This exhaustion requirement is discussed in Part I.\textsuperscript{118} Indeed, there is authority that a New York complaint against individual partners fails to state a claim unless it alleges partnership insolvency.\textsuperscript{119} Requiring depletion of firm assets (or a showing that there are none) before permitting suit against a partner is an extension of the exhaustion rule which only requires depletion of firm assets before collection from a partner. Efficiency considerations support letting a plaintiff maintain suit against any or all the partners, even though exhaustion of partnership assets must precede collection from the partner, because a single suit is less costly than an original suit followed by one or more separate suits, if needed, to collect from one or more partners after exhaustion of partnership assets.

Later, and better reasoned, authority allows a suit to proceed against individual partners since they may become liable if the partnership assets prove insufficient and there appears to be no effective remedy without resort to individual property.\textsuperscript{120}

New York permits a separate suit against the partnership in the firm name\textsuperscript{121} with service on any one or more partners,\textsuperscript{122} as discussed in Part V below.

\textsuperscript{116} Whitley v. Klauber, 416 N.E.2d 569, 576 (N.Y. 1980)(5-2 on this point). The majority disclaims collateral estoppel but reaches this result "because the partnership, in whose right the creditor sues the limited partners to recover partnership assets (the capital, though rightfully returned), has already fully litigated its obligation to the creditor as such." \textit{Id.} at 570.


\textsuperscript{118} \textit{See supra} sections D and E of Part I.


\textsuperscript{121} N.Y. CIV. PRAC. L. & R. § 1025 (McKinney 1976).

D. With Agreement

U.P.A. section 15(b) adds to its prescription of joint liability of partners for partnership debts and obligations: "but any partner may enter into a separate obligation to perform a partnership contract." The separate obligation may take various forms including a provision in the partnership's contract with a third party that specified partners are individually obligated to perform the contract,123 a separate agreement to that effect, or a guarantee of the partnership's performance of the contract. The separate obligation in effect makes joint and several the liability of the partner(s) who have given the separate obligation. When there is a separate obligation, it may be sued on without joining the other partners, and a judgment may be entered on this separate obligation.124 The judgment is enforceable against the individual property of the partner(s) sued and served.

Similarly, partners may, by contract with a third party, make their liability joint and several125 or several only.126 Alternatively, they may limit their joint liability by making it nonrecourse as to one or more partners,127 or by specifying the maximum liability of some or all the partners.128 U.P.A. section 15 does not prohibit agreements of this kind.129 Less formal methods of contracting against liability may be recognized.130

An agreement among partners that purports to limit their individual liability on partnership obligations is effective among themselves

123. See, e.g., Langdon v. Hurdle, 189 S.E.2d 517 (N.C. 1972)(surviving partners assumed partnership obligation to make payments to deceased partner's estate by agreement with executrix).
124. Thriftway Lumber Co. v. Tisherman, 672 P.2d 236 (Idaho 1983)(suit against all partners; judgment against only partner found, on evidence, to have agreed to pay entire partnership debt).
127. See Lenkin v. Beckman, 575 A.2d 273 (D.C. 1990)(lease specified no personal liability of partners of landlord or of partners of tenant but did not thereby preclude reaching assets of tenant partnership even though partnership could not be sued as an entity).
129. Id.
130. Larry E. Ribstein, Limited Liability and Theories of the Corporation, 50 Md. L. Rev. 80 (1991)(discusses law and policy of limited liability in a variety of situations including, at 112-14, informal contract where a company or partnership identifies itself as having limited liability).
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(e.g., for indemnification or contribution). Such an agreement is generally not effective against a third party, although it may be if the third party has knowledge of the limiting agreement when contracting with the partnership. A similar principle applies to limitations on a partner's authority to bind the firm.

IV. ENFORCEMENT OF PARTNERSHIP OBLIGATIONS AGAINST FEWER THAN ALL PARTNERS: TORT AND BREACH OF TRUST AND SOME CONTRACT CASES—JOINT AND SEVERAL LIABILITY

A. In General

This Part focuses on liability of partners for partnership tort and trust breach obligations. That liability is joint and several almost everywhere in the U.S., allowing suit against any one or more of the partners, is discussed below. Partner liability for partnership contracts is joint and several by statute in some states, considered below and in Part III above. Other statutes or procedural rules similarly permitting suits against fewer than all the partners are noted below. The related questions of parties, service of process and enforcement and effect of judgments are also considered.

B. Under the Uniform Partnership Act

Joint and several liability is prescribed for partnership wrongful acts (e.g., torts) and trust breaches by U.P.A. sections 15(a), 13 and 14. This liability is for the full amount of the damages and permits suits against one or more partners individually without suing the other partners, and generally without suiting the partnership. As

131. See supra note 2.
134. UNIF. PARTNERSHIP ACT § 9(4), 6 U.L.A. 1, 133 (1969); 2 BROMBERG & RIBSTEIN, supra note 1, § 4.02(c).
135. See supra section III.C.
one court put it (in a state also allowing suit against the partnership entity): "When a tort is committed by the firm, the wrong is imputable to all of the partners jointly and severally, and an action may be brought against all or any of them in their individual capacities ... or against the partnership as an entity.\textsuperscript{139} Thus, an innocent partner can be held liable for a copartner's tort,\textsuperscript{140} even, by a minority view, for related punitive damages in some instances.\textsuperscript{141} It is not necessary that

\begin{itemize}
  \item N.W.2d 1, 3 (1988); Gearhart v. Angeloff, 244 N.E.2d 802 (Ohio Ct. App. 1969)(partner liable for copartner's negligent gunshot); Johnson v. King, 426 S.W.2d 196 (Tenn. 1968)(assuming two defendants were partners, either or both could have been sued for negligence, so jury verdict in favor of one was not res judicata for other; privity was lacking); Key v. Davis, 554 S.W.2d 60, 65 (Tex. Civ. App. 1977)(partner not necessary party in malpractice suit v. copartners; venue case).
  \item Truscott v. Peterson, 50 N.W.2d 245, 254-55 (N.D. 1951)(one partner properly sued without copartner or partnership).
the copartner or the partnership be sued.\textsuperscript{142} Tort is, of course, a broad category that includes virtually all non-contract claims.

In a dramatic break from tradition, Texas, in 1991, permitted partnerships to relieve partners from any liability for most partnership obligations arising from certain of another partner's (or an employee's) torts.\textsuperscript{143} A partnership may achieve this registered limited liability partnership status by filing identifying information with the secretary of state, paying a fee of $100 per partner, adding "L.L.P." (for limited liability partnership) to its name, and carrying $100,000 of insurance designed to cover the kind of torts for which partner liability is limited by the statute.\textsuperscript{144} The status is good for a year and may be renewed in the same way. A partner remains liable for his or her own torts and, to an extent, for partnership obligations arising from torts of other partners or employees working under the partner's supervision or direction.\textsuperscript{145} Partnerships remain liable for torts of their partners (and employees).

Joint and several liability for contracts (as well as torts and trust breaches) is specified in some states' modifications of U.P.A. section 15, usually by reference to "all obligations" of the partnership.\textsuperscript{146} as

\begin{flushleft}
142. Smith v. Wohl, 702 S.W.2d 905, 910-11 (Mo. Ct. App. 1985)(copartner not necessary party on contract breach case where contract liability is joint and several).


"A partner in a registered limited liability partnership is not individually liable for debts and obligations of the partnership arising from errors, omissions, negligence, incompetence, or malfeasance committed in the course of the partnership business by another partner or a representative of the partnership not working under the supervision or direction of the first partner at the time the errors, omissions, negligence, incompetence, or malfeasance occurred, unless the first partner:

(a) was directly involved in the specific activity in which the errors, omissions, negligence, incompetence, or malfeasance were committed by the other partner or representative; or

(b) had notice or knowledge of the errors, omissions, negligence, incompetence, or malfeasance by the other partner or representative at the time of occurrence."


146. Statutes are cited in section III.C supra, note 94. See, e.g., Cone Mills Corp. v. Hurdle, 369 F.Supp. 426, 438 (N.D. Miss. 1974)(Miss. law; plaintiff may sue one of
discussed in Part III above. It may also be specified by agreement with the third party or, in some situations, by agreement among the partners, as discussed in Part III above.

Where one partnership is a general partner of a second partnership, joint and several liability passes through so that partners of the first partnership are jointly and severally liable for the obligations of the first partnership which include its liability for the obligations of the second partnership. Thus, the partners of the first partnership are jointly and severally liable for the obligations of the second partnership.

The judgment in joint and several liability is against the partners sued and served, and may be enforced against their individual property. If the partnership is properly sued and served, the judgment is also enforceable against partnership property. It may not be enforced against a partner who is not sued and served. Service on one partner is not service on other partners.

Applicable long arm statutes


See supra section III.C.

See supra section III.D.


may be used for service on a partner, and may also provide personal jurisdiction for that partner and, if his or her acts constitute the transaction of partnership business, for the other partners.

It follows logically from joint and several liability that a judgment against a partner may be enforced without first exhausting partnership assets or showing that the partnership is insolvent, as discussed in Part I above. This contrasts with the requirement of prior exhaustion of partnership assets in joint liability.

C. Under Statutes or Procedural Rules

Where partners' liability is joint and several for any reason—by agreement, by U.P.A. section 15, or by other statute or procedural rule—nothing more is needed to permit suits against fewer than all the partners. However, other provisions may achieve the same result and might be urged in dispute. Common name statutes or procedural rules often permit suit against fewer than all the partners, as explained in Part V below. In addition, statutes or rules, aimed primarily at joint obligors may be worded so as to also apply to joint and several obligors. If so, they too would reinforce the ability to sue any one or all of the partners. Class actions against representatives of all the partners are possible in appropriate situations.

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154. See supra section I.F.
155. See supra section III.D.
156. See supra section II.C.
157. See supra section III.C.
D. Preclusive Effect of Judgments of Liability

Liability established against one partner generally does not establish liability against another partner.\textsuperscript{160} The theories are that partners are not in privity with one another for res judicata or collateral estoppel,\textsuperscript{161} or that due process is not satisfied without notice and opportunity for hearing by the other partner.\textsuperscript{162} However, the other partner may be bound (\textit{i.e.} held liable) if he or she, though not a party, controlled or participated significantly in the first suit.\textsuperscript{163} Some courts allow the other partner to be sued on a judgment against the first partner and the partnership on a showing that he or she was a partner at the time the partnership liability was incurred.\textsuperscript{164} Nor does liability established against one partner preclude establishing liability against another partner.\textsuperscript{165} The doctrine of merger does not apply; the other partners may be sued on the merits.\textsuperscript{166}

\textsuperscript{160}Arkoma Coal Corp. v. Alexander, 593 F.Supp. 1524, 1535-37 (W.D. Ark. 1984)(Ark. law)(plaintiff previously obtained judgment against one joint venturer; in later suit court declines to enter judgment against coventurers on basis of prior judgment); Dillard v. McKnight, 209 P.2d 387 (Cal. 1949)(determination in suit against partner that employee's accident was in scope of employment was in scope of employment not binding on copartners in second suit; insufficient privity between partners; due process requires notice and opportunity for hearing before copartners can be held liable); Emmons v. Hirschberger, 69 N.Y.S.2d 401 (Sup. Ct. 1947)(plaintiff previously obtained judgment against partnership and one partner, in later suit against two other partners who were severed from prior suit, plaintiff not entitled to judgment on the pleadings).

\textsuperscript{161}Dillard v. McKnight, 209 P.2d 387, 391-94 (Cal. 1949).

\textsuperscript{162}Id. at 392.

\textsuperscript{163}Id. at 392-93 (dictum); \textsc{Restatement (Second) of Judgments} § 39 (1982). This result is supported by cases holding partners bound—through res judicata or collateral estoppel—by a judgment against the partnership. See cases discussed \textit{infra} section V.D., Krofcheck v. Ensign Co., 169 Cal. Rptr. 516 (Ct. App. 1980)(Utah law)(partner not named in suit against partnership would be collaterally estopped if he controlled the suit); State of New York v. Mayflower Nursing Home, 535 N.Y.S.2d 377, 379 (App. Div. 1988)(administrative determination of Medicaid overpayments in proceeding against partnership binds partners who participated); Heavrin v. Lack Malleable Iron Co., 155 S.W. 729 (Ky. 1913)(judgment against partnership binds partners who actually defended suit).

\textsuperscript{164}Benvenuto v. Taubman, 690 F.Supp. 149, 152 (E.D. N.Y. 1988)(N.Y. law). Related authorities on suits after judgment against the partnership are in section V.D \textit{infra}.

\textsuperscript{165}Carter v. Forstrom, 722 P.2d 23, 25 (Or. Ct. App. 1986)(partner's confession of judgment doesn't preclude judgment against copartner); Ablon v. King, 279 S.W. 563, 566 (Tex. Civ. App. 1926); \textsc{Restatement (Second) of Judgments} § 60(1)(b)(i)(1982).

\textsuperscript{166}See Arkoma Coal Corp. v. Alexander, 593 F.Supp. 1524, 1535-37 (W.D. Ark. 1984)(Ark. law)(indicating that coventurers not named and served in prior suit could be sued on the breach of contract and damage issues determined against one joint venturer in the prior suit). The court regarded collateral estoppel as
A partner held liable for a partnership obligation is entitled to indemnification from the partnership by U.P.A. section 18(b) or, in some cases, from the copartners.\footnote{167}

E. Preclusive Effect of Judgments of Non-Liability

Nonliability of one partner has been held not to preclude establishing liability of another partner,\footnote{168} but preclusion would be a better result where the claim is the same.\footnote{169} Indeed, a respectable argument can be made that the partners have sufficient representative authority from one another that each of them is bound by a decision, whether of liability or nonliability, on a claim prosecuted against any one of them.\footnote{170} The argument is reinforced if each partner is given notice of the suit and opportunity to intervene. The policy against repetitive litigation reinforces the argument. The argument is even stronger where the aggregate view of partnership prevails.

Preclusion in suits against fewer than all partners to enforce partnership obligations—whether resulting in liability or nonliability—involves considerations similar to those for preclusion in suits by fewer than all partners to enforce partnership rights\footnote{171} and, as discussed in Part V\footnote{172} below, for preclusion in suits against partnerships.

V. ENFORCEMENT OF PARTNERSHIP OBLIGATIONS AGAINST PARTNERSHIPS (IN PARTNERSHIP NAME)

A. In General

Partnerships may not be sued in the partnership or firm name at common law. As discussed below, most states now permit suits in the

\footnote{167} See Bank of Commerce v. DeSantis, 451 N.Y.S.2d 974, 980 (Civ. Ct. 1982)(partner granted judgment against copartner for bank's chargeback against partner's individual account because of copartner's wrongful overdraft of partnership bank account).

\footnote{168} Johnson v. King, 426 S.W.2d 196 (Tenn. 1968)(no privity or identity of partners); Rohdie v. Washington, 641 S.W.2d 317 (Tex. Ct. App. 1982)(no privity of partners; no res judicata).

\footnote{169} See RESTATEMENT (SECOND) OF JUDGMENTS § 60(1)(a)(1982); Minehan v. Silveria, 53 P.2d 770 (Cal. Dist. Ct. App. 1936)(contract judgment against partners for $343 bars suit against partnership for larger amount on same claim; partnership was named in first suit but did not answer). Cf MacAllister v. Hosley, 224 N.E.2d 416 (Mass. 1967)(judgment for defendants as individuals bars suit against defendants as partners).

\footnote{170} See RESTATEMENT (SECOND) OF JUDGMENTS § 41(1)(b)(1982)(nonparty represented by authorized party is bound by judgment).

\footnote{171} Bromberg, supra note 4, at 7-10.

\footnote{172} See infra sections D and E of Part V.
firm name by statute or procedural rule. The preclusive effects of such suits are discussed below.

B. Without Statute or Procedural Rule

Where there is no procedural rule or statute to modify the common law aggregate theory of partnership, most courts hold that a partnership cannot be sued in the partnership name, just as it cannot sue in the partnership name, since it lacks capacity or is not considered a legal person. If that is true in a state, a federal court applying that state's law in a diversity suit will reach the same result. Even though a partnership is not subject to suit, its assets can be reached by a suit against the partners, as described in Parts II-IV above.176

C. With Statute or Procedural Rule

In more than half the states, statutes or rules explicitly permit partnerships to be sued in the firm or common name. The same is

174. E.g., Day v. Avery, 548 F.2d 1018 (D.C. Cir. 1976), cert. denied, 431 U.S. 908 (1977)(since partnership could not be sued under D.C. law, there was no D.C. defendant to bar removal of diversity case to federal court); Affie, Inc. v. Nurel Enterprises, Inc., 607 F.Supp. 220, 221-22 (D.D.C. 1984)(D.C. law; dismissing attempted suit v. partnership since not an entity; suit must be against partners with process served on them individually); Fazi v. Peters, 440 F.2d 242 (Cal. 1968); Hartford Fin. Sys., Inc. v. Florida Software Services, Inc., 550 F.Supp. 1079, 1090 (D. Me. 1982)(Maine law), appeal dismissed, 712 F.2d 724 (1st Cir. 1983), citing Macomber v Wright, 35 Me. 156, 157 (1852); Tiffany Indus., Inc. v. Harbor Ins. Co., 536 F.Supp. 432 (W.D. Mo. 1982)(Mo. law; dismissing claim against partnership, not an entity capable of being sued); Pate v. Martin, 661 S.W.2d 410 (Ark. Ct. App. 1985)(workers compensation award against partnership not enforceable; U.P.A. did not make partnership an entity); Dolph v. Cortez, 446 P.2d 939, 940 n.1 (Ariz. App. 1968)(dictum, citing a statute stating that in situations not covered by U.P.A. the common law applies; striking partnership's name from caption of suit; partnership not a legal entity and not capable of being sued). Arizona has since adopted a rule permitting partnerships to sue and be sued in the firm name; see infra note 177. Baum v. Glen Park Properties, 660 S.W.2d 723 (Mo. Ct. App. 1983)(dictum: partnership cannot be sued in firm name; suit must be against individual partners; absent service on them or their appearance, there is no entity against which judgment may be entered; but partners held to have waived lack of personal jurisdiction over them, so they, and hence the partnership, were considered before the court).


176. Lenkin v. Beckman, 575 A.2d 273, 276-77 (D.C. App. 1990)(lease to partnership specified that partners would have no personal liability; landlord could sue partners after dissolution for partnership property in their hands).

177. ALA. CODE § 6-7-70 (1975); ARIZ. R. CIV. P. 17(j); CAL. CIV. PROC. CODE. § 388 (West 1973); COLO. REV. STAT. ANN. § 13-50-105 (West 1987); CONN. GEN. STAT. ANN. § 52-112 (West 1991); DEL. CODE ANN. tit. 10, § 3904 (1975); GA. CODE ANN. § 14-8-15.1 (Harrison 1990); ILL. CODE CIV. PROC. § 2-411(a); HAW. REV. STAT. § 634-3 (1985); IND. R. TRIAL P. 17(B), 17(E); IOWA R. CIV. P. 4; KAN. STAT. ANN.
true in federal court for enforcing substantive rights under the U.S. Constitution or federal laws, as more fully discussed in Part VI below. Proposed Revised U.P.A. section 307(a)(1991 draft) would sensibly provide for suits in the firm name. Provisions of this kind were added because of the injustice or diseconomy of requiring plaintiffs to identify and sue all the partners. Suit in the firm name is one of the stronger entity characteristics.

Other states provide for service of process on a partnership, from which the ability to sue in the partnership name is inferred. A suit in the partnership name need not identify the partners except so far as necessary to permit service of process. Jurisdiction over the partnership requires, of course, that it be properly named and served with process. The statutes or rules typically provide that service on a partner is service on the partnership. Where one partnership is a general partner of a second partnership, service passes through so that

§ 56-344 (Supp. 1990); LA. CODE CIV. PROC. ANN. art. 737 (West 1992); ME. REV. STAT. ANN. tit. 31 § 160-A (West Supp. 1991); MICH. COMP. LAWS ANN. § 600.2051(2)(West 1981); MISS. CODE ANN. § 13-3-55 (Supp. 1991); N.H. REV. STAT. § 25-313 (1989); N.H. REV. STAT. ANN. ch. 510 § 13 (1983)(if more than four partners); N.M. STAT. ANN. § 38-4-5 (Michie 1978); N.Y. CIV. PRAC. L. & R. § 1025 (McKinney 1990); N.C. GEN. STAT. § 1-69.1 (1983); OHIO REV. CODE ANN. § 2307.24 (Anderson 1991); OKLA. STAT. ANN. tit. 12, § 1082 (West 1988); OR. R. CIV. P. 67E(1); PA. R. CIV. P. 2128; S.D. CODIFIED LAWS ANN. § 15-6-17(b)(1984); TEX. R. CIV. P. ANN. 28 (West 1991); VT. STAT. ANN. tit. 12, § 814 (1973); VA. CODE ANN. § 50-8.1 (Michie 1989); WYO. R. CIV. P. 17(b). These are essentially the same statutes and rules permitting partnerships to sue in the firm name, cited in Bromberg, supra note 4, at 29 n.152, with the addition of ALA. CODE § 6-7-70 (1975); ILL. CODE CIV. PROC. § 2-411; and PA. R. CIV. P. 2128. 178. FED. R. CIV. P. 17(b).


181. Texaco, Inc. v. Wolfe, 601 S.W.2d 737, 742 (Tex. Civ. App. 1980)(suit against partners without naming partnership or alleging that they were partners insufficient for judgment against partnership).

182. See, e.g., International Aerial Tramway Corp. v. Konrad Doppelmayr & Sohn, 450 P.2d 284 (Cal. 1969)(remanding to determine whether partner was served on behalf of partnership or nonexistent corporation of same name); Touche Ross & Co. v. Canaverall Int'l Corp., 369 So.2d 441, 442 (Fla. Dist. Ct. App. 1979)(no jurisdiction over partnership where Florida resident partners were served solely as individuals and not as copartners of all the named members of the... partnership as required by the... statute... then in force); ISO Production Mgmt. 1982 Ltd. v. M & L Oil and Gas Exploration, Inc., 768 S.W.2d 354 (Tex. Ct. App. 1988)(citation directed to and served on president of corporate general partner of partnership insufficient for default judgment against partnership; citation should have been directed to the partnership). See Speight v. Horne, 133 So. 574 (Fla. 1931)(summons to A, B, and C "partners doing business as" X Co. was to A, B, and C as individuals, not as partners, so case could not proceed against partnership). These decisions exalt form over substance.

183. E.g., N.Y. CIV. PRAC. L. & R. § 310 (McKinney 1990)("Personal service upon persons conducting a business as a partnership may be made by personally serving
service on a partner of the first partnership is service on both the first and second partnerships.184

More general statutes or rules may authorize service on a managing agent or other person.185 The validity of such service may turn on whether the person served is reasonably likely to transmit the service to the partnership promptly.186 Applicable long arm statutes may be used for service on the partnership,187 and may also provide personal jurisdiction of the partnership if due process minimum contacts are satisfied.188 Service on the partnership is generally not service on any

the summons within the state upon any one of them”); Louis Benito Advertising, Inc. v. Brown, 517 So.2d 775 (Fla. Dist. Ct. App. 1988).

184. First Nat'l Bank of Minneapolis v. White, 420 F.Supp. 1331, 1336 (D. Minn. 1976). Care should be taken to assure that both partnerships are identified as parties being served. Liability similarly passes through (see supra note 149).


187. Sarne v. Fiesta Motel, 79 F.R.D. 567, 569-70 (E.D. Pa. 1978); International Aerial Tramway Corp. v. Konrad Doppelmayr & Sohn, 450 P.2d 284 (Cal. 1969)(remanded for determination whether service on general partner present in state was properly on partnership). Farmers & Merchants Bank v. Hamilton Hotel Partners, 702 F.Supp. 1417, 1426-28 (W.D. Ark. 1988) apparently upheld longarm personal jurisdiction over a partnership while noting that a partnership in Arkansas was an aggregate not suable as an entity. The court did not mention, but may have been relying on, FED. R. CIV. P. 17(b) permitting suit in the partnership name since federal securities law claims were made.

individual partner who is not served. Defective service may be waived, by appearance for example. Common name statutes are permissive, not mandatory; suit may still be brought against the partners.

The statutes or rules usually add that any one or more of the partners may be sued along with the partnership (i.e. named as defendants and served with process). There is authority (less than unanimous) that the same acts which give personal jurisdiction over the partnership give personal jurisdiction over the partners as well, and satisfy minimum contacts.

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192. Provisions of this kind were added when statutes or rules permitting suit in the firm name were considered to preclude suit against individual partners. Fazzi v. Peters, 440 P.2d 242, 246 (Cal. 1968).

The partnership may typically be sued without the partners. When it is so sued, venue is determined, not by residence of the partners, but, depending on the applicable venue statute, by the partnership's principal place of business or the places where it does business.

In a suit against the partnership in the firm name, judgment may be entered against the partnership and against the partners sued and served, but not against other partners who were not sued or were not served. Judgment may be entered against the partnership even if partner is calculated to give actual notice to unserved partners; judgment confined to joint assets in California.

An individual's physical presence in a state and service while there gives jurisdiction over the individual whether or not the suit is related to activity in the state. Minimum contacts are not required for jurisdiction based on physical presence. Burnham v. Superior Court of California, 495 U.S. 604 (1990) (divorce cases; no majority opinion by Court).

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198. Fazzi v. Peters, 440 P.2d 242 (Cal. 1968) (no judgment against partner served but never named as party); Krofcheck v. Ensign Co., 169 Cal. Rptr. 516, 520-22 (Cl. App. 1980) (Utah law) (no sister state judgment in California on Utah judgment against limited partnership when general partner was not named or served in Utah); Brittany Ltd. v. Brittany of Michigan, 468 So.2d 344 (Fla. Dist. Ct. App. 1985) (foreign limited partnership served on secretary of state; judgment affirmed against partnership but reversed as to general partner who was not named or served, although he had notice and testified at trial); Clark v. Inn West, 365 S.E.2d 682, 686 (N.C. Ct. App. 1988) (suit against partnership without naming partners doesn't subject partners to individual liability), rev'd on other grounds, 379 S.E.2d 23 (N.C. 1989).

199. Prado North Resources, Ltd. v. Prado North Condominium Assoc., Inc., 477 So.2d 396 (Ala. 1985) (no judgment against general partner based on judgment in another state in which he had not been served); Krofcheck v. Ensign Co., 169 Cal. Rptr. 516, 520-22 (Cl. App. 1980) (Utah law); Promotus Enters., Inc. v. Jiminez, 98 Cal. Rptr. 571 (Cl. App. 1971) (unserved partner did not know of suit and did not authorize partnership's lawyer to represent him; copartner had authority to hire lawyer to represent partnership but not to represent unserved partner); Brittany Ltd. v. Brittany of Michigan, 468 So.2d 344 (Fla. Dist. Ct. App. 1985); Foster Lumber Co. v. Glad, 303 N.W.2d 815 (S.D. 1981). See supra note 150, and accompanying text and infra notes 203-04.

See Martinoff v. Triboro Roofing Co., 228 N.Y.S.2d 139 (Sup. Ct. 1962) (minutes
though partners who are sued along with it are found not liable.\textsuperscript{200}

Judgment against the partnership alone is particularly important when intrafamily or other immunity bars suit against a wrongdoing partner.\textsuperscript{201}

The judgment is enforceable against assets of the partnership and assets of the individual partners sued and served.\textsuperscript{202} However, the judgment is generally not enforceable against other partners\textsuperscript{203} since they have not been accorded procedural due process (notice and op-

amended to show lawyer's appearance only for partnership and partner served, not for unserved partner; partner has no implied authority to appear for co-partner; appearance for partnership is not appearance for individual partners).

\textit{But see} Heavrin v. Lack Malleable Iron Co., 155 S.W. 729 (Ky. 1913), allowing holder of tort judgment against partnership to sue partners on that judgment when partners had been actively defending partnership; "[P]artners actually making defense for and on behalf of the partnership, and for and on behalf of themselves in the partnership name, will be treated as the real parties in interest and as the real defendants, and therefore bound by the judgment." The quoted language suggests that the partnership judgment might be enforceable directly against the partners.

\textbf{FLA. STAT. ANN. § 48.061} (West 1969) prior to its 1987 amendment prescribed that process against a partnership could be served on any member (partner) and, after that service, "plaintiff may proceed to judgment and execution against all members of the partnership." The section was strictly construed in several ways: \textit{E.g.}, Hayman v. Weil, 44 So. 176 (Fla. 1937)(original process must show on its face as sued out against all members as members of a partnership; statute is in derogation of common law); Touche Ross & Co. v. Canaveral Int'l Corp., 369 So.2d 441, 442 (Fla. Dist Ct. App. 1979)(no jurisdiction where Florida resident partners were served solely as individuals and not "as copartners of all the named members of the . . . partnership as required by the . . . statute"). In 1987 § 48.061 was amended to say that, after service on a partner, "plaintiff may proceed to judgment and execution against that partner and the assets of the partnership." 1987 Fla. Laws. ch. 87-405, § 3.


201. See, \textit{e.g.}, Eule v. Eule Motor Sales, 170 A.2d 241 (N.J. 1961)(wife allowed to sue husband's partnership for husband's negligence and obtain a judgment enforceable against partnership assets [presumably insurance] although she could not at that time sue her husband); Cody v. J. A. Dodds & Sons, 110 N.W.2d 255 (Iowa 1961)(son allowed to sue father's partnership for father's negligence); Mathews v. Wosek, 205 N.W.2d 813 (Mich. Ct. App. 1973)(passenger allowed to sue driver's partnership although he could not sue driver since they were fellow servants. \textit{See} 1 BROMBERG & RIESTEIN, \textit{supra} note 1, § 1.03(c)(7) for further discussion of the relation of partnership liability to partner immunity.


portunity to contest).\textsuperscript{204} Yet there are instances of enforcement against other partners,\textsuperscript{205} especially if they have had notice and appeared and participated in the action against the partnership.\textsuperscript{206} There are instances noted below, sometimes hard to distinguish in the reported opinions, when a later suit against partners is permitted on the prior judgment against the partnership or on the partnership debt created by the judgment. There also are rulings that an arbitration award against a partnership can be confirmed by judgment against the partners as well as the partnership even though the partners were not parties to the arbitration.\textsuperscript{207}

Proposed Revised U.P.A. § 307(c) would specify that a partner's assets cannot be reached unless there is a judgment against the partner, and that a judgment against the partnership is not by itself a judgment against the partner.\textsuperscript{208} This would require the partner to be sued and served and subjected to judgment.

D. Preclusive Effect of Judgments of Liability

Some states permit a later suit, on the prior judgment against the partnership (or on the partnership debt created by it), against a partner who was not named in the prior judgment.\textsuperscript{209} "To hold otherwise

\textsuperscript{204} Detrio v. United States, 264 F.2d 658 (5th Cir. 1959); Duncan, Inc. v. Head, 519 So.2d 1305, 1308 (Ala. 1988).

\textsuperscript{205} Cookson v. Durivage, 572 A.2d 897, 899-900 (Vt. 1990)(attachment and execution against person on showing that she was a partner).


\textsuperscript{207} Carlyle Joint Venture v. H. B. Zachry Co., 802 S.W.2d 814 (Tex. Ct. App. 1990)(award is liability of partnership for which partners are jointly and severally liable; summary judgment against partners; joint venture treated as partnership). In Texas, partner liability is joint and several for all partnership obligations. See Keller Constr. Co. v. Kashani, 269 Cal. Rptr. 259 (Ct. App. 1990)(general partner bound by limited partnership's arbitration agreement with third party; award against general partner confirmed although he did not participate in arbitration); Gilbert Switzer & Assocs. v. National Housing Partnership, Ltd., 641 F.Supp. 150, 154-57 (D. Conn. 1986)(Conn. law; summary judgment against partner in favor of arbitration claimant for unpaid portion of arbitration award against partnership; partner did not participate in arbitration).

\textsuperscript{208} REV. UNIF. PARTNERSHIP ACT § 307(c) Discussion Draft 1992.

\textsuperscript{209} ILL. CODE CIV. PROC. § 2-411(b)(West 1991)(unsatisfied judgment against partnership does not bar action to enforce any partner's individual liability); NEB. REV. STAT. § 25-316 (1987)(holder of unsatisfied judgment against partnership may file bill in equity against partners and have decree for the debt and execution against the partners), applied in Security State Bank v. Gugelman, 230 Neb. 842, 434
would insulate partners from their joint liability for a partnership debt.\textsuperscript{210} Other states do not permit a suit on the prior judgment but permit a suit on the merits,\textsuperscript{211} or on a showing that the non-named partner controlled the prior litigation.\textsuperscript{212} Some states permit a later suit but do not clarify its nature.\textsuperscript{213} The earlier doctrine of merger (of the cause of action in the prior judgment), which would not permit a later suit at all, has been largely abandoned.\textsuperscript{214} These divergent results may depend on whether the state, or the court in the particular case, considers the partners to be in privity\textsuperscript{215} or not to be in privity\textsuperscript{216} with the partnership for res judicata or collateral estoppel purposes. Efficiency grounds support privity and res judicata or collateral estoppel against a partner who is sued on a judgment against the partnership.\textsuperscript{217} Parallel issues in suits against fewer than all the partners are

\begin{itemize}
\item \textsuperscript{210} Dayco Corp. v. Fred T. Roberts & Co., 472 A.2d 780, 784 (Conn. 1984).
\item \textsuperscript{211} Duncan, Inc. v. Head, 519 So.2d 1305, 1307-08 (Ala. 1988); PA. R. Civ. P. 2134(a)(judgment against partnership does not bar later suit "upon the same cause of action against any partner who was not individually named as a defendant" in the partnership suit). Related authorities on suits after judgment against a different partner are in section IV.D supra.
\item \textsuperscript{212} Krofcheck v. Ensign Co., 169 Cal. Rptr. 516, 522-23 (Ct. App. 1980)(non named partner would be collaterally estopped from denying partnership liability and damages). See Dillard v. McKnight, 209 P.2d 387 (1949)(recognizing principle that nonparty who controls a suit is bound by its determination as if a party, but finding it inapplicable); Brunsoman v. Seltz, 414 N.W.2d 547, 550 (Minn. Ct. App. 1987).
\item \textsuperscript{213} ILL. ANN. STAT. ch. 110 § 2-411(b)(Smith-Hurd 1983)(unsatisfied judgment against partnership doesn't bar action to enforce partner's individual liability).
\item \textsuperscript{215} See Krofcheck v. Ensign Co., 169 Cal. Rptr. 516 (Ct. App. 1980), supra note 212; Brunsoman v. Seltz, 414 N.W.2d 547, 550 (Minn. Ct. App. 1987)(general partner's control over limited partnership's affairs and participation in suit against it [though he was not a party] supported finding of privity for purpose of collateral estoppel justifying a judgment against him in second suit based on the judgment against the partnership). See also Bromberg, supra note 4, at 7-10.
\item \textsuperscript{216} Dillard v. McKnight, 209 P.2d 387, (Cal. 1949)(partner's liability not res judicata of copartner's liability; no privity; no due process without serving and serving co-partners); Martinoff v. Triboro Roofing Co., 228 N.Y.S.2d 139 (Sup. Ct. 1962)(partner has no implied authority to appear for copartner; appearance for partnership is not appearance for individual partners; implication: no privity). Cf. Johnson v. King, 426 S.W.2d 196 (Tenn. 1968)(jury verdict for one partner not res judicata for copartner in tort case where joint and several liability destroys privity).
\item \textsuperscript{217} Gottlieb, supra note 214, at 877-85, (arguing that a partner's due process require-
discussed in Part IV. As noted above, in some states, a judgment against a partner cannot be enforced against individual assets unless the partnership assets are exhausted or the partnership is insolvent.

E. Preclusive Effect of Judgments of Non-Liability

A judgment in favor of the partnership should preclude, on efficiency and fairness grounds, a later suit against the partners on the same claim. Parallel issues in suits against fewer than all the partners are discussed in Part IV.

VI. ENFORCEMENT OF PARTNERSHIP OBLIGATIONS IN FEDERAL COURT

A. In General

The limited jurisdiction of federal courts makes them differ in some important respects from state courts in enforcing partnership claims and obligations. Specifically, there are differences within the federal court system, depending on whether the claim is based on a federal question, or on some other question that invokes diversity jurisdiction. In either case: (1) Partners may sue or be sued in essentially the same way as in state courts; (2) Service of process may be made under the relatively liberal federal rules, or under rules of the forum state adopted by the federal rules; (3) Judgment may be taken against the parties sued and served, and judgment may be enforced, in essentially the same ways as in state courts. The main difference lies in whether partnerships may sue or be sued and how their citizenship is measured if that is the basis of jurisdiction.

B. Federal Question Cases

A partnership may sue or be sued in federal court “in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States.” This entity treatment of the partnership recognizes the importance of a uniform rule for “federal question” cases involving partnerships, and

ments of notice, opportunity to be heard and adequacy of representation will usually be present when a partnership is sued). 218. See supra section IV.D. 219. Gottlieb, supra note 214, at 872-75. 220. See supra section IV.E. 221. FED. R. CIV. P. 4. 222. FED. R. CIV. P. 4(c)(2)(C)(i). See, e.g., Henderson v. Cherry, Bekaert & Holland, 932 F.2d 1410 (11th Cir. 1991) (accounting partnership sufficiently served by service on non partner accountant bearing the title of “manager;” “manager” and “principal” are titles often used in accounting firms for professionals below the partner level who do not have managerial functions). 223. FED. R. CIV. P. 17(b). Jurisdiction of these cases is granted by 28 U.S.C. § 1331.
reflects the practical reality of partnerships as entities in the business world and the efficiency of enforcing claims directly by or against partnerships rather than through some or all of the partners. This entity treatment is particularly significant in overriding the state laws which adhere to the aggregate theory and do not allow partnerships to sue or be sued in their firm name.

Among the many federal questions on which partnerships may sue or (probably more importantly) be sued are those in: securities; antitrust; racketeering; patent; trademark; copyright; civil rights and discrimination; and perhaps arbitration. In all federal question cases process may be served on a partnership by serving "an officer, a managing or general agent, or... any other agent authorized by appointment or by law to receive service of process...." Since a general partner is normally a "managing or general agent," service on him or her is service on the partnership within the quoted rule. Additionally, some or all partners can join or be joined with the part-


235. This is by virtue of a general partner's status as "an agent of the partnership for the purpose of its business" with power to bind the firm and the right to participate in management. UNIF. PARTNERSHIP ACT §§ 9(1), 18(e), 6 U.L.A. 1, 132, 213 (1969).

236. Porter v. Hardin, 164 F.2d 401 (5th Cir. 1947).
partnership as plaintiffs or defendants.237

In some instances, federal statutes offer other advantages over state law, such as broader venue,238 or nationwide service of process.239 Federal courts have discretion to exercise pendent jurisdiction of state law claims arising out of the same nucleus of operative facts on which a federal claim is based.240 Whether partnerships may sue or be sued in the firm name on the pendent claims is determined by state law, however.241

C. Diversity Cases

With exceptions not relevant here, federal courts have jurisdiction of non-federal question cases only if they involve diversity of citizenship between plaintiffs and defendants and amounts in controversy of more than $50,000.242 In these diversity cases, the capacity of partnerships to sue or be sued is determined by the law of the state in which the court sits.243 Thus, a partnership cannot be sued in its firm name in federal court in a state where it cannot be so sued in state court.244 Conversely, a partnership can be sued in its firm name in federal court in a state where it can be so sued in state court.245 Thus, for capacity to sue or be sued in diversity cases, federal courts mirror the varying state perceptions of the nature of partnerships.

Diversity must be complete: no plaintiff may have the same citizenship as any defendant.246 Early decisions applied the prevailing aggregate theory to hold that unincorporated organizations were only

239. Id.
246. Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806). This and later rulings construe the diversity statutes culminating in the present 28 U.S.C. § 1332, not the potentially broader language of U.S. Const. art. III, § 2, cl. 1 ("The judicial Power shall extend . . . to Controversies . . . between Citizens of the different States. . . .").
collections of individuals, and that the citizenship of each individual had to be considered, whether or not the individuals were parties to the suit. Thus, an unincorporated joint stock company whose members were personally liable for company debts lacked diversity if any of its shareholder members had common citizenship with a party on the other side.\footnote{247} This aggregate or total membership diversity test was extended to a limited partnership association even though it had authority, by state law to sue in its own name and possessed other corporate-like features.\footnote{248} From this point, federal courts, in determining citizenship for diversity purposes, drifted away from state law models and established independent federal tests. The aggregate or total membership test was confirmed for a labor union.\footnote{249} \textit{A fortiori} the test applied to general partnerships.\footnote{250} In contrast, a corporation had separate citizenship (\textit{e.g.}, at its place of organization or principal office\footnote{251}) and its shareholders were disregarded for diversity purposes.

Limited partnerships grew in number after the adoption of the 1916 Uniform Limited Partnership Act by many states. They grew further in number and in size and complexity as their federal income tax advantages increased and became more widely apparent, and they were sold by securities broker-dealers as passive investments. Many limited partnerships resembled corporations in their concentrated management power in general partners, and in the passive role of their numerous investors with limited liability.

Analytically, there are three ways a limited partnership might be considered for diversity purposes: (1) An entity, with citizenship determined by its state of organization, similar to a corporation; (2) An aggregate with citizenship determined by its managers (\textit{i.e.} its general partners); (3) A "mere partnership" which the Court required repleading of the citizenship of all the members and a showing that they were diverse from all the defendants.\footnote{252} (\textit{See} Great Southern Fire Proof Hotel Co. v. Jones, 177 U.S. 449 (1900).)\footnote{253}

\begin{itemize}
  \item Chapman v. Barney, 129 U.S. 677, 682 (1889)(plaintiff New York joint stock company—"a mere partnership"—failed to show that all its members had citizenship diverse from Illinois defendant).
  \item Great Southern Fire Proof Hotel Co. v. Jones, 177 U.S. 449 (1900). The plaintiff association was formed under an 1874 Pennsylvania statute generally providing limited liability for all members. The Court ruled that the suit could be maintained only on repleading the citizenship of all the members and a showing that they were diverse from all the defendants.
  \item A corporation is "deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business" with an exception for liability insurers. 28 U.S.C. § 1332(c)(1).
\end{itemize}
partners); (3) An aggregate with citizenship determined by all of its general and limited partners (the aggregate or total membership test).

Occasionally, courts have adopted concept (1) and measured citizenship by the partnership's state of organization.\textsuperscript{252} A few courts applied concept (2), ruling that limited partners should not be considered in determining diversity because U.L.P.A. section 26 prescribes that a limited partner "is not a proper party to proceedings by or against a partnership, except where the object is to enforce a limited partner's right against or liability to the partnership."\textsuperscript{253} This left diversity to be measured by the citizenship of the general partners (concept (2)) rather than the state of organization of the limited partnership (concept (1)).\textsuperscript{254} A few courts applied concept (2) on the alternate theory that the general partners are the only real parties to the controversy because of their decisional authority and their individual liability for partnership obligations.\textsuperscript{255} One court effectively carried concept (2) still further by upholding jurisdiction of a suit against the class of partners of a large general partnership measured only by the citizenship of the defendant class representative rather than by all the general partners.\textsuperscript{256}

The majority of courts disagreed, applied concept (3) and required consideration of all the limited partners\textsuperscript{257} even in cases where the large number of limited partners bore close resemblance to corpora-

\begin{itemize}
\item \textsuperscript{252} Namco, Inc. v. Davidson, 725 F.Supp 1148, 1153-57 (D. Kan. 1989).
\item \textsuperscript{254} Colonial Realty Corp. v. Bache & Co., 358 F.2d 178, 184 (2d Cir. 1966), \textit{cert. denied}, 385 U.S. 817 (1966). Plaintiff pleaded state of organization as citizenship; the court held this inadequate without saying why.
\item \textsuperscript{255} Mesa Operating Ltd. Partnership v. Louisiana Intrastate Gas Corp., 797 F.2d 238, 240-43 (5th Cir. 1986)(partnership as plaintiff); Wroblewski v. Brucher, 550 F.Supp. 742 (W.D. Okla. 1982)(partnership as defendant). The \textit{Mesa} court relied on similar reasoning sustaining diversity jurisdiction in a suit by eight trustees of a Massachusetts business trust (whose beneficial shareholders included Texas residents) against a Texas corporation. The trustees' broad powers made them the real parties to the controversy. Navarro Savings Assoc. v. Lee, 446 U.S. 458 (1980). \textit{Navarro} is the Court's only decision employing a functional analysis of an unincorporated organization for diversity purposes.
\item \textsuperscript{257} \textit{E.g.}, SHR Ltd. Partnership v. Braun, 888 F.2d 455, 456-59 (6th Cir. 1989)(West Virginia limited partnerships with Michigan limited partners v. Michigan defendants); Elston Inv. Ltd. v. David Altman Leasing Corp., 731 F.2d 436, 438-39 (7th Cir. 1984)(Illinois limited partnership with two Illinois individual limited partners and one Delaware corporate limited partner v. Delaware corporation).
\end{itemize}
PARTNERSHIP OBLIGATIONS

In 1990 in Carden v. Arkoma Assocs., a sharply divided Supreme Court, in sharply worded opinions addressed the conflict. The majority resolved it in favor of concept (3) by counting all the limited partners: "diversity jurisdiction . . . depends on the citizenship of 'all the members.'" Speaking through Justice Scalia, the majority thus applied Court precedents for other unincorporated organizations to limited partnerships. In so doing, the Court held that a limited partnership, unlike a corporation, has no separate entity citizenship for diversity purposes (rejecting concept (1)), and that its citizenship, as an aggregate, is not defined merely by the citizenship of its general partners (rejecting concept (2)). The four dissenters, speaking through Justice O'Connor, did not address the separate citizenship of a limited partnership (concept (1)). Rather, they argued that diversity should be measured by the general partners (concept (2)) as the only real parties to the controversy, (i.e. those with control of the litigation and its subject). For the dissenters, the limited partners are not proper parties by virtue of U.L.P.A. section 26, the agreement's standard prohibition on their taking part in control, and the general partner's exclusive control by statute and agreement.

Carden may well have been influenced by the Court's lack of enthusiasm for diversity cases and its concern about heavy federal dockets. Carden's context is narrow: citizenship for diversity jurisdiction in federal court. However, it is inconsistent with the preponderant entity character of general partnerships, and the even stronger entity character of limited partnerships.

The Carden majority conceded that its holdings "can validly be characterized as technical, precedent-bound, and unresponsive to policy considerations raised by the changing realities of business organi-


259. Stouffer Corp. v. Breckenridge, 859 F.2d 75, 76-77 (8th Cir. 1988)(2-1 decision; Ohio corporation as general partner of limited partnership with Missouri limited partners v. Missouri citizen).


261. *See supra* notes 247-49.

zation."263 But the majority asserted that response should be by legislation—"the people's elected representatives"—rather than by judicial interpretation of "citizen."264 Carden leaves the law on partnership diversity cases with the strange combination of a federal test of citizenship, and a state test of capacity to sue or be sued.

There is at least one situation, that may survive Carden, in which the citizenship of all partners is not considered for diversity purposes. In a class action,265 only the citizenship of the class representatives is considered.266

VII. ENFORCEMENT OF PARTNERSHIP OBLIGATIONS—A CRITIQUE

A. In General

The law on enforcement of partnership obligations is, like the law on enforcement of partnership rights,267 needlessly complicated and inconsistent. It is similarly inefficient, costly, and wasteful of the time and energy of parties and judges. It tends to favor partners and partnerships over nonpartner claimants against them, in much the same way that the law on enforcement of partnership rights tends to favor nonpartners over partner and partnership claimants against them. To the extent the law favors partners and partnerships, it may encourage risk taking by them and discourage it by their claimants or creditors. There is no general reason to favor partners and partnerships over

263. Id. at 196. The majority's failure to make a functional analysis of the limited partnership for diversity purposes contrasts with its willingness to make a functional analysis of other non corporate organizations for taxation purposes. See, e.g., Morrissey v. Commissioner, 296 U.S. 344 (1935)(business trust had sufficient corporate characteristics to be taxed as corporation).


265. FED. R. Civ. P. 23 and 23.2. Rule 23.2 applies to actions by or against "members of an unincorporated association as a class" and requires only that the representatives "will fairly and adequately protect the interests of the association and its members." The more general Rule 23 applies to classes of all sorts, but contains additional requirements that include numerosity, common questions and their predominance, and superiority of class treatment over alternative methods. All the additional requirements except numerosity can be met in many partnership cases, so that either rule can be employed. Where partners are not numerous, Rule 23.2 can be satisfied while Rule 23 cannot. However, there is authority that Rule 23.2 cannot be used against an unincorporated association as a class" and requires only that the representatives "will fairly and adequately protect the interests of the association and its members." The more general Rule 23 applies to classes of all sorts, but contains additional requirements that include numerosity, common questions and their predominance, and superiority of class treatment over alternative methods. All the additional requirements except numerosity can be met in many partnership cases, so that either rule can be employed. Where partners are not numerous, Rule 23.2 can be satisfied while Rule 23 cannot. However, there is authority that Rule 23.2 cannot be used against an unincorporated association if it has local law capacity to be sued (and, by implication, that it cannot be used by an association if it has local law capacity to sue). Northbrook Excess and Surplus Ins. Co. v. Medical Malpractice Joint Underwriting Assoc., 900 F.2d 476, 478-79 (1st Cir. 1990).


nonpartners dealing with them, or vice versa. Accordingly, balanced measures that will reduce complexity in claims between parties will reduce transaction costs and increase the efficiency of claim resolution with a net advantage for business and society. This Part indicates methods by which the law of enforcing partnership obligations can be made more efficient, consistent, and less complicated by legislatures, courts, litigators, and drafters of partnership agreements. Similar methods to make the law of enforcing partnership rights more efficient and consistent and less complicated are considered elsewhere.268

B. Legislatures

Enforcement of partnership obligations has been greatly simplified in two respects in some states: (1) by common name statutes or procedural rules which permit a partnership to be sued in the partnership name along with none, some, or all of the partners, as discussed in Part V above; and (2) by statutes or procedural rules which make partner liability for all obligations, including contract and tort, joint and several.269 Proposed Revised U.P.A. section 307(a) would embrace part of the first of these simplifications by stating that “A partnership may sue and be sued in the partnership name.”270 Proposed Revised U.P.A. section 306 would embrace the second of these simplifications by stating that “All partners are liable jointly and severally for all debts and obligations of the partnership... unless otherwise agreed by the claimant or provided by law.”271 The two sections together would embrace the remainder of the first of these simplifications by allowing none, some, or all the partners to be sued along with the partnership. These, or similar statutes (or procedural rules), should be adopted by states that do not already have them.272

Legislatures can increase efficiency and clarity and reduce confusion by specifying whether partnership assets do or do not need to be exhausted before partners’ individual assets can be applied to satisfy partnership debts. Proposed Revised U.P.A. section 307(c) would largely achieve this by requiring an unsatisfied judgment against the partnership unless the partnership is in Chapter 11 bankruptcy reorganization, the claimant (third party) and the partner have agreed that exhaustion is not necessary, or the court finds that partnership assets in the state are insufficient, that exhaustion is excessively bur-

268. Id. at 31-35.
269. See supra section III.C.
272. These provisions tend to increase the partnership’s ability to obtain credit and to lower its cost. But they also tend to discourage persons from becoming partners, to discourage taking risks in the conduct of the partnership business and to reduce partners’ monitoring of each other.
densome or that the court's inherent equitable powers are appropriately exercised to permit direct recovery against individual assets. As noted above, it is doubtful that there is an economic justification for the exhaustion rule. The rule is even harder to justify in tort cases where there is rarely a way for parties to contract around it. If legislatures adopt an exhaustion requirement like Proposed Revised U.P.A. section 307(c), they should make it inapplicable to torts, or clarify in the legislative history that the exceptions in the section are intended to allow a court to dispense with the exhaustion rule in tort cases.

Legislatures that have not already done so can further simplify and clarify by specifying that service on a partner is sufficient for judgment against that partner and the partnership, and that a judgment on the merits against the partnership permits a summary proceeding to obtain a judgment against a partner not previously served. In such a proceeding, a partner's defenses would be limited to payment, release or similar individual matters, and, if applicable, failure to exhaust partnership assets. Conversely, a judgment on the merits for the partnership should preclude a claim against a partner.

C. Courts: General Principles

For their part, courts could simplify the law somewhat by focusing less on abstract concepts and more on practical operational issues reflected in these general principles:

(1) Recognize the commercial reality of the partnership as an entity in many, perhaps most, instances.

(2) Assure that all partners are aware of enforcement actions and given an opportunity to participate in them.

(3) Require that objections to enforcement against the partnership, or against fewer than all the partners, be made early in the pleading stage of a trial. If sustained, the result should be no more severe than dismissal with leave to amend or without prejudice. Early objections, if sustained, may permit joinder of the requisite partners or avoid the running of limitations. Late objections should be overruled or treated as waived.

(4) Recognize the entity character of partnerships and the substantial "partner authority" of each partner to defend a suit against the partnership.

(5) Enter judgments only against parties named and served, but,

(6) Recognize the privity of partner and partnership and apply res judicata or collateral estoppel (i) to preclude a partner from contesting individual liability for a partnership obligation once the partnership's

273. See supra section I.D.
274. "Partner authority" is discussed in 1 BROMBERG & RIBSTEIN, supra note 1, Chapter 4.
liability has been established (in a suit either against the partnership or against another partner), and (ii) to preclude a claimant from pursuing liability of a partner once partnership nonliability has been established (in a suit either against the partnership or against another partner).275

D. Litigators

Claimants or their counsel, seeking to enforce partnership obligations, should, of course, ascertain the forum's applicable law on who can or must be sued and served. If all partners must be parties, they should be so named. Claimants will ordinarily want to sue the partnership, and all the partners, in order to obtain the broadest possible judgment and access to assets.

Defendants should raise their objections early (e.g., by motion to dismiss or similar pleading), or at the latest, at the time of their answer. And they should make sure that all the partners are aware of the suit so they will have an opportunity to participate in it.

E. Drafters

There is relatively little a partnership agreement can do to deal with the enforcement of partnership obligations. The partnership can clarify which partners have authority to defend or settle suits against the partnership. It can require that all partners be given notice of suits attempting to enforce partnership obligations, whether against the partnership or against individual partners. And, it can deal with related matters such as partnership indemnification of partners sued on partnership obligations, partnership payment of defense costs, contribution rights of partners, and the maintenance of insurance.

In agreements with third parties, the partnership may specify whether, or to what extent, partners have individual liability and, if there is liability, whether it is joint, joint and several, or otherwise limited, and whether partnership assets must be exhausted before individual partners' assets may be reached.276

275. Recognizing vertical privity between partner and partnership does not require recognizing horizontal privity between partners. Horizontal privity would indicate that liability of a sued partner (when partnership liability has not been established) determines liability of an unsued partner. Even if liability of a sued partner collaterally estops the partnership from contesting liability (as horizontal privity implies), the latter partner should have a hearing on at least his or her individual defenses. See supra section VII.B (discussing recommendation for legislative authorization of a summary proceeding for this purpose if partnership liability has been established).

276. Supra section III.D (noting the possibility of less formal agreements limiting liability).