

Permanent Editorial Board for the Uniform Commercial Code

PEB COMMENTARY NO. 17
Limited Liability Partnerships under the Choice of Law Rules of Article 9

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PREFACE TO PEB COMMENTARY

The Permanent Editorial Board (PEB) for the Uniform Commercial Code (UCC) acts under the authority of The American Law Institute and the Uniform Law Commission (also known as the National Conference of Commissioners on Uniform State Laws). In March 1987, the PEB resolved to issue from time to time supplementary commentary on the UCC to be known as *PEB Commentary*. These *PEB Commentaries* seek to further the underlying policies of the UCC by affording guidance in interpreting and resolving issues raised by the UCC and/or the Official Comments. The Resolution states that:

“A *PEB Commentary* should come within one or more of the following specific purposes, which should be made apparent at the inception of the Commentary: (1) to resolve an ambiguity in the UCC by restating more clearly what the PEB considers to be the legal rule; (2) to state a preferred resolution of an issue on which judicial opinion or scholarly writing diverges; (3) to elaborate on the application of the UCC where the statute and/or the Official Comment leaves doubt as to inclusion or exclusion of, or application to, particular circumstances or transactions; (4) consistent with UCC § 1-102(2)(b),¹ to apply the principles of the UCC to new or changed circumstances; (5) to clarify or elaborate upon the operation of the UCC as it relates to other statutes (such as the Bankruptcy Code and various federal and state consumer protection statutes) and general principles of law and equity pursuant to UCC § 1-103;² or (6) to otherwise improve the operation of the UCC.”

For more information about the PEB, visit www.ali.org or www.uniformlaws.org.

¹ Current UCC § 1-103(a)(2).

² Current UCC § 1-103(b).

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Background

The location of an organization,¹ as “location” is determined under U.C.C. § 9-307, plays an important role in determining the local law that governs perfection, the effect of perfection or nonperfection, and the priority of a security interest. *See* U.C.C. § 9-301(1). As a general matter, a “registered organization” is located, as determined under U.C.C. § 9-307(e), in the State under whose laws the organization is organized while an organization that is not a registered organization is considered under U.C.C. § 9-307(b)(2) to be located in the State in which the organization has its place of business.²

The 2010 amendments to Article 9 clarified and expanded the definition of “registered organization” by providing in relevant part that the term “means an organization formed or organized solely under the law of a single State ... by the filing of a public organic record with ... the State....” *See* U.C.C. § 9-102(a)(71)(2010).

The 2010 amendments also added a new definition of “public organic record.” The term in relevant part means “a record that is available to the public for inspection and is ... a record consisting of the record initially filed with ... a State ... to form or organize an organization and any record filed with ... the State...which amends or restates the initial record.” *See* U.C.C. § 9-102(a)(68)(2010).

Issue

Under the 2010 amendments to Article 9, should a limited liability partnership organized under the law of a State be considered a registered organization or an organization that is not a registered organization?

Analysis

A full survey of the limited liability partnership law of each State is beyond the scope of this Commentary. This Commentary focuses upon the Uniform Partnership Act promulgated by the Uniform Law Commission in 1997 (the “1997 UPA”) as a typical example of a State’s limited liability partnership law.³

¹ The term “organization” is defined in U.C.C. § 1-201(b)(25) as a “person” other than an individual. The term “person” is defined in U.C.C. § 1-201(b)(27) to include not only an individual but also a corporation, partnership or other legal or commercial entity.

² If an organization that is not a registered organization has more than one place of business, it is considered under U.C.C. § 9-307(b)(3) to be located where its chief executive office is located.

³ The reasoning and conclusions of this Commentary would also apply to legislation similar to the 1997 UPA that has the material attributes of the 1997 UPA discussed in this Commentary, including those provisions (discussed later in the text) that state that a limited liability partnership is a continuation of the pre-existing general partnership.

Under the 1997 UPA a general partnership is formed from the association of the partners and not from any public filing with the State. *See* 1997 UPA § 202. Under Section 1001 of the 1997 UPA a general partnership may become a limited liability partnership by obtaining a vote of its partners to become a limited liability partnership and by filing with the State a statement of qualification. The already existing partnership becomes a limited liability partnership on the date of the filing of the statement or on such later date as is designated in the statement. *See* 1997 UPA § 1001(e). Once the statement of qualification becomes effective, Section 306(c) of the 1997 UPA establishes a liability shield that protects the partnership’s partners from vicarious personal liability for all partnership obligations incurred while the partnership is a limited liability partnership. The partnership’s status as a limited liability partnership remains in effect until the statement is canceled or revoked. *See* 1997 UPA §§ 105(d), 1001(e), and 1003.

Under the 1997 UPA a limited liability partnership is not a new entity; rather, the original partnership, formed by the association of the partners, continues as a partnership, albeit with the liability shield for its partners. Section 201(b) of the 1997 UPA states categorically: “A limited liability partnership continues to be the same entity that existed before the filing of a statement of qualification under Section 1001.” An official comment elaborates:

[T]he filing of a statement of qualification does not create a “new” partnership. The filing partnership continues to be the same partnership entity that existed before the filing. Similarly, the amendment or cancellation of a statement of qualification under Section 105(d) or the revocation of a statement of qualification under Section 1003(c) does not terminate the partnership and create a “new” partnership. *See* Section 1003(d). Accordingly, a partnership remains the same entity regardless of a filing, cancellation, or revocation of a statement of qualification.

It follows that the statement of qualification filed with the State and by which a partnership becomes a limited liability partnership under the 1997 UPA is not a “public organic record” under the 2010 amendments to Article 9. The statement of qualification is not a record filed with the State to “form or organize” the partnership. It is the association of the partners that forms the partnership, not any record publicly filed with the State. Both conceptually and legally, a partnership is formed wholly apart from the filing of a statement of qualification with the State.

Because a limited liability partnership is not formed or organized by the filing of a public organic record, it cannot be a “registered organization” under the 2010 amendments to Article 9.⁴

The forgoing analysis does not suggest that a change of law for the characterization of a limited liability partnership, as discussed in this Commentary, was effected by the 2010 amendments to Article 9. Even before giving effect to the 2010 amendments, a limited liability partnership would not be considered a “registered organization.” That is because the public filing of a statement of qualification would not be a record that “the State ... must maintain ... showing the organization to have been organized.” *See* U.C.C. § 9-102(a)(70)(2009). The statement of

⁴ A limited liability partnership should be distinguished from a limited partnership. This Commentary does not address a limited partnership. A limited partnership is ordinarily considered to be a registered organization. *See* U.C.C. § 9-102 cmt. 11.

qualification maintained by the State would show only that the partners have the benefit of the liability shield, not that the partnership itself has been organized.

Conclusion

The 2010 amendments to Article 9 did not change the law on whether a limited liability partnership should be characterized as a registered organization under Article 9. Whether before or after giving effect to the 2010 amendments to Article 9, a limited liability partnership organized under the law of a State that has adopted the 1997 UPA, or similar legislation having the material attributes of the 1997 UPA discussed in this Commentary, is an organization that is not a “registered organization” as defined by U.C.C. § 9-102(a).

Official Comment 11 to U.C.C. § 9-102 is amended by adding at the end of the penultimate sentence of the second paragraph of the Official Comment (the fifth paragraph after giving effect to the changes to the Official Comment made in connection with the 2010 amendments to Article 9):

Likewise, a limited liability partnership, which is a form of general partnership under the Uniform Partnership Act (1997), is not a “registered organization” even if it has filed a record that is a statement of qualification under Section 1001 of the Uniform Partnership Act (1997). The filing of the record does not form or organize the partnership. The filing only provides the partners in the general partnership with a limited liability shield and evidences that the general partnership has limited liability partnership status. See PEB Commentary No. 17. As discussed in PEB Commentary No. 17 the same conclusion would apply to a limited liability partnership formed under the law of state that has not adopted the Uniform Partnership Act (1997) but has adopted for limited liability partnerships similar legislation having the material attributes of that Act. Also as discussed in PEB Commentary No. 17, the same conclusion would apply whether before or after giving effect to the 2010 amendments to this Article.