Limited Liability for General Partners in Arkansas LLLPs (Limited Liability Limited Partnerships)

Carol Goforth

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Carol R. Goforth  Clayon N. Little Professor of Law

The Original Arkansas LLP and LLP Legislation

On March 28, 1997, Governor Huckabee signed into law legislation which, for the first time, allowed general partners in Arkansas partnerships to limit their personal liability, at least in part.¹ This act enabled general partnerships to file an application with the Arkansas Secretary of State to register as LLPs (limited liability partnerships),³ and also authorized limited partnerships to register as LLPs (limited liability limited partnerships.) The benefit of achieving LLP or LLP status in Arkansas under this act was that general partners in an appropriately registered enterprise would not be liable directly or indirectly (including by way of indemnification, contribution, assessment or otherwise) for debts, obligations, and liabilities of or chargeable to the partnership arising, whether in tort, contract or otherwise, from errors, omissions, negligence, incompetence or misconduct committed in the course of the partnership business by another partner or by an employee, agent, or representative of the partnership.⁵

¹ The bulk of this legislation is now codified at ARK. CODE ANN. §§ 4-42-307, 401, 606, 608, 612 and 703-07, all as part of the Arkansas Uniform Partnership Act. A few sections of the 1997 legislation on LLPs, however, appear at ARK. CODE ANN. §§ 4-43-1104, 1110 and 1201, as part of the Arkansas Revised Limited Partnership Act of 1991 (which is often referred to as RULPA).
³ ARK. CODE ANN. §§ 4-42-703.
⁴ It may be worth noting that limited partners in a limited partnership had long been insulated against personal liability for debts of the partnership (unless the limited partners participated excessively in the control of the partnership). ARK. CODE ANN. § 4-43-303. However, under traditional principles of partnership law, a limited partnership was required to have at least one general partner. ARK. CODE ANN. § 4-43-101 (7). The advantage of becoming an LLP is that the general partner(s) of the limited partnership will be insulated from personal liability to the same extent as general partners in LLPs.
⁵ ARK. CODE ANN. § 4-42-307(2).
This limitation on liability did not extend to a partner’s “own errors, omissions, negligence, incompetence or misconduct, or that of any other person under his direct supervision and control.”

This model of limited liability, which has variously been termed a “first generation” LLP statute or a “partial shield” statute, allowed general partners to limit their liability for the misconduct of others, but not for ordinary business debts of the enterprise. Thus, a general partner in either an LLP or LLLP formed pursuant to this legislation would be personally liable for some, but not all, entity-level debts, a situation that is neither akin to the traditionally unlimited personal liability of general partners nor the limited liability enjoyed by shareholders in corporations, or, more recently, members in limited liability companies (LLCs).

The choice to limit liability for tortious misconduct of others without limiting liability for contractual debts of the partnership in Arkansas’s initial LLP legislation was deliberate. First, as a purely practical matter, it was generally believed that it would be easier to win acceptance for a new limited-liability entity where the limitation on liability was not absolute. Second, there was the possibility that providing a full shield against personal liability might inadvertently increase transaction costs, since more sophisticated potential creditors, such as banks or larger suppliers, would conceivably start asking for personal guarantees and personal financial statements if the applicable statutes did not continue to hold partners personally liable for these kinds of debts as a matter of law. Similarly, at the time the original LLP act was adopted here, this “partial shield” against personal liability reflected the approach taken in a majority of American jurisdictions.

The Adoption of RUPA and New LLP Language

Enter a new and improved Uniform Partnership Act, complete with model LLP language. Widely referred to as RUPA (which stands for “Revised Uniform Partnership Act”), the technical title of the new Uniform Act is simply the Uniform Partnership Act, with a date appended in parenthesis.

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11 Obviously, so long as partners retain personal liability for contractual indebtedness of the partnership, there is no need for such creditors to go to the effort and expense of obtaining this type of information or guarantee.
12 See Goforth, supra note 10 at 59.
13 As originally adopted, the statute was named the Revised Uniform Partnership Act (1992). See generally, Prefatory Note, Uniform Partnership Act (1997); U.L.A. Partnership 1997 Refs & Annos (2000 Electronic P.P. Update). The name of the act was shortened to eliminate the “Revised” and the date was updated for the first time the next year. Id.
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Originally promulgated by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in 1992, RUPA has already been amended a number of times. For the purposes of this note, the most important changes were adopted by NCCUSL in 1996, at which time RUPA was amended to add LLP language. This version of the Act is technically the Uniform Partnership Act (1996), but it is still informally referred to as RUPA by many.

On April 15, 1999, Arkansas joined the growing number of American jurisdictions which have adopted RUPA, when Governor Huckabee signed Arkansas Senate Bill 231 into law. As adopted, the statute says that it is to be known as the Uniform Partnership Act (1996), which is perfectly consistent with the official text of the Uniform Act, but is also somewhat confusing because RUPA was not actually adopted in Arkansas until 1999, and did not go into effect until January 1, 2000. Because it is confusing to call a statute that was adopted in 1999 the “Uniform Partnership Act (1996),” this note will refer to the statute as the Arkansas RUPA, notwithstanding a different official name.

In any event, one of the peculiarities of the Arkansas RUPA is that it contains a very different model for liability of partners in LLPs than was first approved in Arkansas in 1997, when the state’s initial LLP legislation was enacted. RUPA incorporates a second generation, or full shield, approach, which means that under this statute,

[a]n obligation of a partnership incurred while the partnership is a limited liability partnership, whether arising in contract, tort, or otherwise, is solely the obligation of the partnership. A partner is not personally liable, directly or indirectly, by way of contribution or otherwise, for such a

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14 As indicated in the preceding footnote, RUPA was first amended in 1993 to respond to a number of comments and suggestions, at which time the official name of the act was changed to the Uniform Partnership Act (1993). Additional amendments were adopted in 1994, at which time the act was renamed the Uniform Partnership Act (1994). In 1996, further changes were made to address provisions dealing with LLPs, and the name was changed to Uniform Partnership Act (1996). Additional changes were made in 1997, with the current version of the uniform statute being called the Uniform Partnership Act (1997). Id.

15 Given the speed with which the uniform act has been amended, this choice of nomenclature is quite understandable. “RUPA” may be a convenient acronym for the Revised Uniform Partnership Act; Re-RUPA (for Revised, Revised Uniform Partnership Act) or Re-Re-RUPA (for three sets of revisions) certainly would not be. On the other hand, there is plenty of room for confusion when a state adopts the Uniform Partnership Act (1995) in a year other than 1996 and uses the official name of the act.

16 According to the on-line version of Uniform Laws Annotated, Alabama, Arizona, California, Colorado, Connecticut, the District of Columbia, Florida, Idaho, Iowa, Kansas, Maryland, Minnesota, Montana, Nebraska, New Mexico, North Dakota, Oklahoma, Oregon, Texas, Vermont, the Virgin Islands, Virginia, Washington, West Virginia and Wyoming had all adopted RUPA prior to April 1, 1999. Table of Jurisdictions Wherein Act has been Adopted, Uniform Partnership Act (1997), U.L.A. Partnership 1997 Refs & Anns (2000 Electronic P.P. Update). Some of these states adopted RUPA before the 1996 amendments were promulgated.


19 See supra notes 1-3 and accompanying text.
partnership obligation solely by reason of being or so acting as a partner. 20

In other words, general partners in LLPs governed by the Arkansas RUPA are shielded not only against personal liability arising out of the misconduct of others, but against all entity-level debts and obligations.

There are some confusing twists in the law created as a result of the abrupt about-face on this issue, and the phase-in provisions of the new statute. 21 However, one of the more irrational aspects of the new legislation appears only when the rules applicable to LLLPs are also figured into the equation.

RUPA and LLLPs (Limited Liability Limited Partnerships)

Recall that the original Arkansas LLP statute (which was incorporated into the Arkansas UPA22 and, to a lesser extent, the Arkansas RULPA23) explicitly addressed the formation of domestic LLLPs. As part of the 1997 LLP legislation, the Arkansas RULPA24 was specifically amended to authorize LLLPs, so long as they were formed under the terms of the Arkansas UPA. Here is the conundrum. Although the Arkansas UPA expressly authorizes LLLPs, 25 the Arkansas RUPA does not. 26 Not surprisingly, the Arkansas RULPA includes no reference to the Arkansas RUPA, and does not contain any indication that LLLPs can be organized pursuant to the new partnership provisions.

If it were not for the difference in liability standards between the Arkansas UPA and Arkansas RUPA and the fact that the Arkansas UPA will shortly be phased out of existence, it might not matter that the LLLP provisions in the Arkansas RULPA refer only to the Arkansas UPA and not

20 Ark. Code Ann. § 4-46-306(c). This is not the only substantive difference between the Arkansas versions of the UPA and RUPA with regard to the liability of partners. For example, Arkansas RUPA makes no mention of liability for a partner’s own acts or acts by persons under a partner’s “direct supervision and control.” Cf. Ark. Code Ann. § 4-42-307(3).

However, the failure of RUPA to address liability for one’s own negligence or misconduct is unlikely to be problematic, because it is hard to conceive of a court exonerating an individual for an act of personal negligence or other misconduct even absent any express provision retaining such liability. On the other hand, the decision not to reference any responsibility for the acts of persons under a partner’s direct supervision and control may well be a significant change in the law. After all, if the statutory provision that Arkansas adopted in 1997, which specified that partners in LLPs retained liability for the acts of those under their direct supervision and control, was nothing more than a recitation of liability in the event of negligent supervision, the same point was already made elsewhere in the statute and would have been the rule even if the statute were silent. Presumably it meant something for the legislature to impose an affirmative rule of liability for the acts of those under a partner’s “direct supervision and control.”

What the new statute means is therefore not entirely clear. It is certain, however, that the protection against personal liability offered to partners in LLPs under the Arkansas RUPA is significantly broader than that offered to partners in LLPs under the Arkansas UPA.

21 For a further discussion of some of these issues, see Carol R. Goforth, Limited Liability Partnerships: The Newest Game in Town, 1997 Ark. L. Notes 25.


the Arkansas RUPA. However, as it currently stands, general partners in an Arkansas general partnership can elect to have their business adopt a form that will shield them from essentially all personal liability for debts of the enterprise by the simple expedient of having their partnership elect LLP status under the Arkansas RUPA. General partners in Arkansas limited partnerships can also elect a special “limited liability” status, but there is currently no way for them to get any protection beyond limited liability for the misconduct of others, because the limited partnership statute does not cross reference to the Arkansas RUPA (the new statute), but only to the Arkansas UPA (the statute that will be shortly phased out of existence). Thus, general partners in the form of partnership that traditionally offered at least some partners limited liability, wind up with less protection than partners in the form of partnership that traditionally offered absolutely no protection against personal liability.

What is the rationale behind this? It certainly does not appear to be a reasoned outcome; almost certainly it is happenstance. So how can this drafting oversight be corrected? Moreover, how does the fact that the Arkansas UPA is due to be repealed in the next few years fit into the picture?

**Fixing RULPA and the LLP Conundrum**

One possibility, which would address both the problem of differing rules as to the liability of general partners in LLPs and LLPS as well as the pending repeal of the Arkansas UPA, would be simple legislation providing that when the Arkansas UPA is deemed to be repealed, effective January 1 of 2005, all remaining statutory cross references to the Arkansas UPA will be deemed to be cross references to the Arkansas RUPA. This is a plausible solution, although it will mean that there will be years before the irrational discrepancy between the level of protection available to general partners in LLPs and LLPS is corrected. In addition, since the section numbers of the Arkansas UPA and RUPA do not correspond perfectly, this fix may not be entirely satisfactory, since it may not always be clear which section of RUPA is supposed to be referenced when the actual citation is to a section of the Arkansas UPA.

In addition, it is probably worth emphasizing that the Arkansas legislature would have to enact a provision affirmatively making this change. The current language phasing out the Arkansas UPA merely says that, effective January 1, 2005, the bulk of the Arkansas UPA will be deemed to be repealed.

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27 See supra note 20 and accompanying text.
28 See supra notes 4-6 and accompanying text.
29 1999 Ark. Acts 1518, § 1204, which provides: “Effective January 1, 2005, the following sections of the Arkansas Code are repealed: Ark. Code Ann. §§ 4-42-101 through 4-42-702.” This actually does not repeal the entire Arkansas UPA, which now includes Ark. Code Ann. §§ 4-42-703 to 806. In fact, much of the LLP language appears in the sections that will not be repealed. Ark. Code Ann. §§ 4-42-703 to 707. Unfortunately, the provision that explains that the benefit of LLP status is a degree of limited liability for general partners (Ark. Code Ann. § 4-42-307) is to be repealed, so this omission is not sufficient to eliminate the problems discussed in this note.
30 Of course, since the Legislature does not meet again until 2003, some delay in fixing this problem is inevitable.
32 See supra note 29.
The statutory language does not currently include a fix for cross-references to the Arkansas UPA that appear in other portions of the Arkansas Code. Of course, the Arkansas Legislature does not need to wait until 2005 to fix the problem. A more direct approach would be for the Arkansas legislature to amend the Arkansas RUPA, even before the Arkansas UPA is finally phased out. Such an amendment could mimic the phase-in provisions of the Arkansas RUPA, but this might be unduly complicated. It should be sufficient to provide that up until January 1, 2005, any limited partnership that elects to register or qualify as an LLLP will be presumed to be registering under the terms of the UPA, unless the limited partnership clearly elects to be governed by the Arkansas RUPA. Once such an election is made, it should not be revocable. In addition, after January 1, 2005, all LLLPs would be deemed to have qualified under the terms of the Arkansas RUPA, regardless of their status up until that time. The effect of these provisions would be that general partners in any LLLP that elects to be governed by RUPA prior to 2005, and in any Arkansas LLLP thereafter, would have limited liability akin to that of members in LLCs or shareholders in corporations. For the sake of convenience, suggested language to accomplish this proposal is appended at the end of this article.

I should also note that this suggestion does not eliminate the need to adopt language changing other statutory cross references to the Arkansas UPA over to the RUPA, to take effect January 1, 2005. (And it would probably be helpful to repeal the last few sections of the Arkansas UPA at the same time).

Why the Legislature Really Needs to Fix This Problem

Finally, what happens if the legislature does not act? Will the repealed Arkansas UPA provisions continue in existence as to LLLPs? Will LLLPs no longer be permitted? Will the RUPA provisions be read into the limited partnership statute after January 1, 2005?

The truth is that there are no clear answers to these questions. Unless the Arkansas RULPA is amended before January 1, 2005, it will contain a cross reference to a Code provision that has been repealed. Presumably, such a cross reference would be a legal nullity, and in fact there are other

33 See 1999 Ark. Acts 1518, § 1205, which provides:
   (a) Before January 1, 2005, this chapter governs only a partnership formed:
      (1) after the effective date of this Act, unless that partnership is continuing the business of a dissolved partnership...
      (2) before the effective date of this Act, that elects...to be governed by this Act.
   (b) Beginning January 1, 2005, this Act governs all partnerships.
   (c) Before January 1, 2005, a partnership may elect, in the manner provided in its partnership agreement or by law for amending the partnership agreement, to be governed by this Act....

36 See supra note 29 for a discussion of those sections of the Arkansas UPA that are not covered by the current language mandating repeal of most of that statute.
37 The Arkansas RULPA specifically references Ark. Code Ann. § 4-42-307 as the statute that will govern the liability of general partners in Arkansas LLLPs. Ark. Code Ann. § 4-43-1110(3). This is one of the sections of the Arkansas UPA that will be repealed on January 1, 2005. See supra note 29.
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instances where the codifiers of the Arkansas Code have simply deleted cross references to non-existent provisions. So what happens to existing LLLPs? And what happens to limited partnerships that thereafter wish to register as LLLPs?

Since the Arkansas UPA will have been repealed, can it continue to govern LLLPs in existence at the time the UPA is repealed? It is hard to see how this would work, although it also seems unfair to decide that the repeal of the UPA impliedly works a repeal of something that was authorized in an entirely different statute, i.e., RULPA.

From the partners’ point of view, it might make sense for the courts to simply read a cross reference to the Arkansas RUPA provisions into RULPA after the Arkansas UPA is repealed. This would presumably mean that, effective January 1, 2005, general partners in existing LLLPs would be granted the same protection against personal liability as is available to general partners in LLPs under the Arkansas RUPA, including LLPs that were governed by the Arkansas UPA up until its repeal.

Of course, from a creditor’s point of view, this alternative could be rather draconian. In fact, creditors might well challenge the constitutionality of a statutory construction that results in general partners who have always been liable for at least the ordinary business debts of the partnership suddenly having a shield against personal liability that does not appear anywhere in the limited partner-

ship statute, but is created solely by implication. It is already somewhat of a stretch to argue that creditors of LLLPs have sufficient notice that, effective as of January 1, 2005, all general partners in these entities will be shielded against personal liability, even though the statute clearly spells out this result. It is a much further stretch to suggest that the repeal of the Arkansas UPA means that the provisions of RUPA should thereafter be read into an entirely different statute, the Arkansas RULPA, which does not mention the new rules that might reduce the liability of general partners in existing LLLPs.

So how will the Arkansas courts react if the Arkansas legislature does not clear this up? Frankly, I don’t know. Probably the fairest result would be to have pre-existing LLLPs continue to be governed by the Arkansas UPA, even after that provision has been repealed as to general partnerships. New LLLPs would either be allowed by implication under the provisions of the Arkansas RUPA, or would not be allowed at all until the legislature does speak on this issue. Of course, courts are likely to reach this result only if they find that this is consistent with the legislative intent.

Other commentators have argued that the general reference to general partnership law in RULPA should be interpreted as permitting the formation of LLLPs even in states where they are not expressly authorized by statute, so long as LLLPs are autho-

38 See, e.g., the A.C.R.C. notes following Ark. Code Ann. § 4-43-1110, which state: “The phrase ‘and § 4-32-310’ following § 4-42-307 in subsection (3) was deleted by the Arkansas Code Revision Commission as a manifest error in reference to law pursuant to § 1-2-303, since such section does not exist.”

39 In a traditional limited partnership, the general partners had unlimited personal liability. In LLLPs, which are currently governed by the liability provisions of the Arkansas UPA, the general partners are insulated from liability for the misconduct of others, but not other entity-level debts. See supra discussion at notes 4-6 and accompanying text.

40 The specific section of the Arkansas UPA that governs liability of general partners and which is cross-referenced in the Arkansas RULPA appears at Ark. Code Ann. § 4-42-307. This section will be deemed repealed on January 1, 2005.
rized in the general partnership act. However, the Arkansas situation is a little different because the cross reference in the Arkansas RULPA is to the Arkansas UPA, not to RUPA or even partnership law generally. Thus, it is not entirely clear whether courts should read the provisions of the Arkansas RUPA into the Arkansas limited partnership statute after the Arkansas UPA is repealed.

This lack of predictability is precisely why the legislature needs to act.

So What Does the Legislature Need to Do?

The steps that need to be taken are not that complicated. First, the Arkansas legislature should amend the Arkansas RULPA to make an explicit reference to the terms of RUPA. The easiest change would probably be to make RUPA applicable to all LLLPs after January 1, 2005, and to any pre-existing LLLP that affirmatively elects this status prior to that date. The suggested language appended to this note should accomplish this objective.

Second, the legislature should adopt a general provision that deems all statutory cross references to the Arkansas UPA to be references to the corresponding Arkansas RUPA provisions, effective with the repeal of the Arkansas UPA on January 1, 2005.

Finally, the legislature should repeal all of the Arkansas UPA on January 1, 2005, since there are a few residual sections that will not be repealed under the terms of existing law.

If these changes are made, all of the issues raised in this note should be cleared up, and both general partners in LLLPs and creditors of those entities should be able to predict how the law will work so as to be able to protect their own interests.

Suggested Language

Section 1110 of the Revised Limited Partnership Act of 1991 (codified at Ark. Code Ann., § 4-43-1110) is hereby amended to read as follows (with additions to current law being underlined):

§ 4-43-1110 Limited partnerships as registered limited liability limited partnerships.

(1) To become and continue as a registered limited liability limited partnership, a limited partnership shall, in addition to complying with the requirements of this chapter:

(a) File an application as provided in § 4-42-703 of the Arkansas Uniform Partnership Act or a statement of qualification as provided in § 4-46-1001 of the Uniform Partnership Act (1996), as applicable, as permitted by the limited partnership’s partnership agreement or, if the limited partnership’s partnership agreement does not provide for the limited partnership’s becoming a registered limited liability limited partnership, with the approval (i) by all general partners, and (ii) by the limited partners or, if there is more than one class or group of limited partners, by each class or group of limited partners, and in either

42 Ark. Code Ann. § 4-43-1107 specifies that “[i]n any case not provided for in this chapter, the provisions of the Uniform Partnership Act, § 4-42-101 et seq., govern.”
43 This provision would only need to repeal Ark. Code Ann. §§ 4-42-703 to 806.
case, by limited partners who own more than fifty percent (50%) of the then current percentage or other interest in the profits of the limited partnership owned by all of the limited partners or by the limited partners in each class or group, as appropriate; and

(b) Have as the last words or letters of its name the words “Registered Limited Liability Limited Partnership,” or the abbreviation “L.L.L.P.” or “LLL.P,” and the word “Limited” may be abbreviated as “Ltd.”

(2) In applying § 4-42-703 of the Arkansas Uniform Partnership Act or § 4-46-1001 of the Uniform Partnership Act (1996), as applicable, to a limited partnership:

a) An application to become or statement of qualification for a registered limited liability limited partnership, or a withdrawal notice, shall be executed by at least one general partner of the limited partnership;

(b) All references to partners mean general partners only; and

(c) With respect to the initial filing of a certificate of limited partnership by a limited partnership which also files an application as provided in § 4-42-703 or statement of qualification as provided in § 4-46-1001 to become a registered limited liability limited partnership, there shall only be one filing fee, which shall equal the greater of the filing fee under this chapter or the filing fee provided in § 4-42-703 or § 4-46-1207.

(3) If a limited partnership is a registered limited liability limited partnership, its partners who are liable for the debts, liabilities and other obligations of the limited partnership shall have the limitation on liability afforded to partners of registered limited liability partnerships under § 4-42-307 of the Arkansas Uniform Partnership Act or § 4-46-306 of the Uniform Partnership Act (1996), as applicable.

(4) With respect to a limited partnership which is simultaneously filing a certificate of limited partnership along with an application to become or statement of qualification as a registered limited liability limited partnership, the name used in the certificate of limited partnership may contain the words designating the limited partnership as a registered limited liability limited partnership as indicated in subdivision (1)(B) of this section.

(5) Before January 1, 2005, a limited partnership making an election to become a registered limited liability limited partnership will be presumed to have registered under the Arkansas Uniform Partnership Act, unless a contrary intention is clearly manifested as provided in this subsection. Beginning January 1, 2005, the Uniform Partnership Act (1996) will apply to all LLLPs, even those previously registered under the Arkansas Uniform Partnership Act, and a statement of qualification under § 4-46-1001 will thereafter be required in order for a limited partnership to become an LLLP. In addition, before January 1, 2005, a limited partnership may elect, in the manner provided in its partnership agreement or by law for amending the partnership agreement, to be governed by the Uniform Partnership Act (1996). In order to provide third parties with notice that such an election has been made, the limited partnership shall be required to file a statement of qualification fully complying with the terms of § 4-46-1001, even if a prior registration under § 4-42-703 would otherwise be in effect.