Chapter 5: Business Associations

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§ 5.1. Joint Ventures.* A business entity may assume a variety of organizational forms. ¹ One such organizational structure is commonly known as the “joint venture.” ² Although courts from various jurisdictions have attempted to delineate the specific attributes which constitute a joint venture, ³ there is no uniform definition of this structure. ⁴ During the Survey year in Shain Investment Co., Inc. v. Cohen, ⁵ the Massachusetts Court of Appeals addressed the problem of defining the characteristics which establish the existence of a joint business venture.

The plaintiffs in Shain acquired a one-tenth interest in Investment Funds, Inc. ("IF"), a company which designed, financed and managed nursing homes, apartments and condominiums. ⁶ In return for this interest, the plaintiffs agreed to aid IF in obtaining capital and corporate guarantees. ⁷ The plaintiffs later entered into a written agreement with the defendant Cohen, whereby the defendant purchased one-third of the plaintiffs' interest in IF. ⁸ Under this agreement, the defendant was entitled to one-third of the plaintiffs' income and profits resulting from the

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² Jane Stiles, staff member, Annual Survey of Massachusetts Law.
⁵ Jaeger, supra note 2, at 5-6; Note, Nebraska Supreme Court Refuses to Disturb Jury Determination of a Sharecropping Arrangement as Constituting a Joint Venture—Fangmeyer v. Reinwald, 13 Creighton L. Rev. 353, 357 (1979) [hereinafter cited as Note, Fangmeyer v. Reinwald]; see Payton v. Abbott Labs, 512 F. Supp. 1031, 1035 (D. Mass. 1981) (The joint venture theory is one of the most fluid concepts in all of the law).
⁶ Id. at 5, 443 N.E.2d at 128. In this agreement, the plaintiffs also acquired a one-tenth interest in the net earnings of Roberts & Co., and an option to purchase ten percent of the stock of Medical Services Corp. of America. Both of these companies were engaged in substantially the same business as IF, and were owned by IF's principal shareholder. Id.
⁷ Id.
⁸ Id.
plaintiffs’ prior agreement with IF. The defendant also assumed an obligation for one-third of the potential losses and obligations arising under the agreement between the plaintiffs and IF.

Following the agreement between the plaintiffs and the defendant, IF filed for bankruptcy. The plaintiffs sued the defendant to collect one-third of the losses and expenses incurred due to their agreement with IF. The defendant denied liability for any such losses, claiming that his agreement with the plaintiffs create a partnership or joint venture, and, consequently, that the plaintiffs owed him a fiduciary duty. The defendant asserted that because the plaintiffs violated this fiduciary duty by mismanaging the shared investment, the defendant was not liable to them for the resultant losses. The superior court granted the plaintiffs’ motion for summary judgment, ruling that no genuine issue of material fact had been presented to support the existence of either a partnership or joint venture. The Massachusetts Appeals Court reversed the decision of the superior court, finding that the agreement between the plaintiffs and the defendant was “sufficiently similar” to a joint venture to create a fiduciary relationship between the parties, and remanded the case for further proceedings.

In reaching its decision, the Appeals court first rejected the defendant’s contention that the agreement at issue created a partnership. The court stated that the intent of the parties was essential in determining whether an agreement established either a partnership or a joint venture. Since the agreement did not provide for co-ownership of a business, the court found that there was no partnership.

The court next considered whether the relationship between the plaintiffs and defendant constituted a joint venture. In attempting to articulate the characteristics of a joint venture, the court recognized that exist-

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9 Id. at 5-6, 443 N.E.2d at 128. The defendant also acquired a one-third share of the plaintiff’s interest in Roberts & Co. and Medical Services of America, which the plaintiff had secured in his prior agreement with IF. See supra note 6.
10 Id. at 6, 443 N.E.2d at 128. It was provided that Cohen would be responsible for one-third of “all payments, expenditures, losses, duties and obligations, under . . . the July twenty-fifth agreement.” Id.
11 Id.
12 Id.
13 Id.
14 Id.
15 Id. at 6, 443 N.E.2d at 129.
16 Id. at 13, 443 N.E.2d at 132.
17 Id. at 11-12, 443 N.E.2d at 131-132.
18 Id. at 7, 443 N.E.2d at 129.
19 Id.
20 Id.
21 Id. at 7-11, 443 N.E.2d at 129-31.
ing precedent did not provide a clear definition. The court noted, however, that a joint venture may be distinguished from a partnership in that a joint venture is usually limited to a single enterprise, while a partnership is organized to transact a general business. The Shain court listed eight factors to be considered in determining whether a joint venture exists. These eight factors are: (1) an agreement by the parties manifesting their intention to associate for joint profit not amounting to a partnership or a corporation; (2) a contribution of money property, effort, knowledge, skill, or other assets to a common undertaking; (3) a joint property interest in all or parts of the subject matter of the venture; (4) a right to participate in the control or management of the enterprise; (5) an expectation of profit; (6) a right to share in profits; (7) an express or implied duty to share in losses; and (8) a limitation to a single undertaking, or possibly a small number of enterprises.

In light of these eight factors, the court found that the agreement between the plaintiffs and the defendant established a joint venture. The court characterized the agreement as embodying a "limited arrangement in which the parties pooled capital and risk to obtain mutual advantage from an investment opportunity." The specific characteristics of the agreement at issue, the court found, "obviously" included all the relevant factors except the fourth, the right to participate in the control or management of the enterprise. The court recognized this factor as an essential element of a joint venture. Although the agreement did not expressly give the defendant a legal right to manage the investment, the court determine that the terms of the agreement should be construed to require that the plaintiffs involve the defendant in decisions affecting their mutual investment. According to the court, the duties, obligations and potential liability imposed on the defendant by the agreement, as well as the implicit understanding of the parties, gave the defendant rights far greater than those held by a mere passive investor. The court concluded, therefore, that the fourth factor of its test was essentially satisfied, and the agreement at issue was "sufficiently similar" to a joint venture to create a fiduciary relationship between the parties.

The court in Shain recognized that participants in a joint venture stand

22 Id. at 7, 443 N.E.2d at 129.
23 Id.
24 Id. at 8-9, 443 N.E.2d at 130.
25 Id. at 10-11, 443 N.E.2d at 131.
26 Id. at 8, 443 N.E.2d at 129.
27 Id. at 9, 443 N.E.2d at 130.
28 Id.
29 Id. at 10, 443 N.E.2d at 130-131.
30 Id. at 10-11, 443 N.E.2d at 130-131.
31 Id. at 11, 443 N.E.2d at 131.
in the same fiduciary relationship as do members of a partnership. The court determined, however, that it could not reach the issue of whether the plaintiffs in fact violated the fiduciary duties arising from the joint venture because the trial court had erroneously decided that no fiduciary relationship existed. Accordingly, the court remanded the case for further proceedings to determine whether the plaintiffs had violated their fiduciary duties and, if so, whether such violations caused the resulting losses.

The Shain court's characterization of a joint business venture is consistent with earlier Massachusetts case law. The Shain case adopted the distinction articulated in prior Massachusetts decisions which recognized that a joint venture and a partnership are two separate forms of business organization. Although this separate classification has been criticized by courts and commentators on the basis that a joint venture and a partnership are indistinguishable, a joint venture remains a distinct form of business organization in Massachusetts.

Massachusetts courts, although recognizing the separate existence of a joint venture, had at one time expressly declined to provide a comprehensive definition of that relationship. More recent court decisions prior to Shain, however, had begun to develop more fully the attributes of a joint venture. These developments were summarized in Payton v.  

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34 Id.

35 Although a joint venture resembles a partnership, these two forms of business organization have been distinguished primarily because a joint venture usually is limited to a single enterprise, while a partnership is organized to transact a general business. See Cardullo v. Landau, 329 Mass. 5, 8, 105 N.E.2d 843, 845 (1952); See also Jaeger, supra note 2, at 17-23.


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Abbott Labs. In Payton, the federal district court stated that the important elements of a joint venture include an agreement to associate in business activity, sharing of profits and of losses, joint control of the objectives of the undertaking, and, finally, contributions by both parties to the assets of the venture. These factors were relied upon by the Massachusetts courts in deciding whether a business organization was a joint venture. The Shain court expanded the characteristics bearing upon the existence of a joint venture. In addition to the factors identified in Payton, the Shain court recognized that parties involved in a joint venture may share both a property interest in the subject matter of the venture and an expectation of profit. Furthermore, according to the Shain court, the parties’ association must be limited to a single or small number of undertakings. In all, the Shain court compiled eight characteristics which aid in recognizing a joint business venture. Accordingly, the decision in Shain provides the first comprehensive statement of the factors Massachusetts courts will consider in determining whether a joint business venture exists.

Shain is also important as an indication that Massachusetts courts will continue to employ a case-by-case approach to evaluate the existence of a particular form of business organization. Shain reiterated the common theme that the intent of contracting parties to associate in a particular fashion is controlling.

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45 Id.
46 15 Mass. App. Ct. at 8-9, 443 N.E.2d at 130. The Shain court is thus substantially in accord with the factors identified in 2 S. WILLISTON, supra note 2, at § 318A.
therefore, a fiduciary duty existed, despite the fact that the agreement did not provide expressly for joint control of the shared investment. Instead, the court looked to the reasonable expectations of the parties. Thus, Shain suggests that the terms of an agreement will not be strictly construed, but rather that the court will examine the intent and expectations of the parties in order to determine whether the eight factor test has been satisfied.

The court’s decision in Shain did not eliminate all ambiguities regarding the definition of a joint venture. Left unresolved by Shain is the relative weight each factor is to be accorded. The court did state that mutual control was an “essential element” of a joint venture. Other courts have stated that “profit-sharing and joint control are the sine qua non of the joint venture.” It is unclear from the court’s analysis, however, what importance a court should accord to the existence or non-existence of any particular factor in the ultimate determination of whether a joint venture exists between two parties.

The Shain court also failed to state whether all eight enumerated factors must be present before a joint venture can be established. Although the court specifically stated that these factors “may” bear upon the recognition of a joint venture, the court went on to confirm the existence of each factor in the particular circumstances of the case at bar. Although at least one Massachusetts court has stated that the “absence of any one of these elements may not be fatal to establishing the existence of a joint venture,” the Shain decision did not address the combination of characteristics sufficient to define a joint venture. Whether a joint venture can exist in the absence of certain of the factors identified in Shain is a question to be resolved in future litigation.

§ 5.2. Limited Partners—Obligation to Make Capital Contributions.* Limited partnerships have enjoyed increased popularity in recent years,

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in large measure because the unique features of the limited partnership make it a more attractive vehicle for developing income tax shelters than the traditional corporate form of organization. In contrast to the corporation, in which income is taxed at both the corporate and shareholder levels, the limited partnership acts as a conduit, allowing the income and losses of the partnership to flow through to the individual partners for tax purposes. Similar to corporate shareholders, however, limited partners enjoy limited liability for the actions of the entity; only general partners bear unlimited liability.

Although limited liability, combined with tax benefits, has attracted investors to the limited partnership, concern for the rights of third parties who deal with partnerships has prompted states to regulate limited partnerships in a manner similar to corporations. Thus, unlike a general partnership, which can be created through the actions of the general partners, limited partnerships and corporations must be formally created under state statute. These state statutes subject both forms of organization to filing requirements, which require the investors to include information, relied upon by third parties, regarding capitalization of the organization. Most states, including Massachusetts, have chosen to regulate limited partnerships through the adoption of the Uniform Limited Partnership Act ("ULPA"), which was first enacted in 1916 and was revised in 1976.


2 Aslanides, supra note 1, at 280-304.

3 Id.; see also ALI-ABA Course of Study: Partnerships: U.P.A., U.L.P.A., Securities, Taxation and Bankruptcy (3d ed. 1982) [hereinafter cited as ALI-ABA]. Limited partners may deduct partnership losses against other income. ALI-ABA, supra, at 48; see I.R.C. §§ 701, 6031. Under the Tax Reform Act of 1976, the loss deductible by a limited partner is limited to his "at risk" investment in the venture. Aslanides, supra note 1, at 280; see I.R.C. §§ 465, 704(d). In a limited partnership primarily engaged in real estate projects, however, the limited partner may deduct his pro-rata share of partnership liabilities, including both invested capital and non-recourse financing. Aslanides, supra note 1, at 295; see I.R.C §§ 465, 704(d).

4 ALI-ABA, supra note 3, at 30; Aslanides, supra note 1, at 259.


7 H. Henn, supra note 5, at 47, 50.

8 Id. at 67.

9 See, e.g., G.L. c. 155, §§ 1-56 (corporations); G.L. c. 109, §§ 1-62 (limited partnerships).

During the Survey year, the Massachusetts Appeals Court considered the obligation of subscribers to a limited partnership. In *Partnership Equities v. Marten*, the court ruled that, under the version of the ULPA in effect in Ohio, subscribers may not refuse to pay installments of their capital contributions where the limited partnership certificate places no conditions on their obligations to contribute, and where their refusal is based on alleged wrongdoing of the general partners which falls short of a profound failure of consideration. Although the case involved a limited partnership organized under Ohio law, the reasoning and analysis applied by the court, as well as the similarity of the Ohio and Massachusetts versions of the ULPA, suggest that the court’s response to future cases involving Massachusetts limited partnerships would follow the principles of the *Partnership Equities* decision.

In *Partnership Equities*, the two defendants had subscribed to shares in Columbia-Heather, Ltd., a limited partnership organized under Ohio law. Columbia-Heather had contracted to construct a 110-unit apartment complex in Ohio financed by mortgage insured by the Federal Housing Administration. Each of the defendant subscribers, under the amended limited partnership agreement which they signed, agreed to contribute $83,750. Defendants Khoury and Marten both paid their initial contributions and two further installments as required by the agreement. Claiming a breach of the partnership agreement by the general partners, however, the defendants refused to contribute their final two installments when due. Columbia-Heather brought suit against each defendant for the final two installments.

1 A subscriber is one who signs a written instrument, binding himself to participate as a limited partner in the limited partnership. See *Black’s Law Dictionary* 1279 (5th Ed. 1979).

12 Id. at 44, 443 N.E.2d at 135-36.

13 Id. at 44, 443 N.E.2d at 135-36.

14 The U.L.P.A., with insignificant variations from the pre-1976 revision as approved by the National Conference of Commissioners on Uniform State Laws, appears in *Ohio Rev. Code Ann.* §§ 1781.1 et seq. (Baldwin 1982). Although the Massachusetts statute includes the 1976 revisions, the Massachusetts Appeals Court found no substantive change via the revisions. Id. at 43, 443 N.E.2d at 135, 138.

15 Id. at 43, 443 N.E.2d at 135.

16 Id. at 43, 443 N.E.2d at 135.

17 Id. at 43, 443 N.E.2d at 135.

18 Id. at 43, 443 N.E.2d at 135.

19 Id. at 43, 443 N.E.2d at 135, 138. The defendants complained that the general partners prematurely reimbursed themselves for certain development costs they had advanced, in violation of the partnership agreement. Id. at 48, 50, 443 N.E.2d at 138, 139.

20 Id. at 42 nn.1-3, 443 N.E.2d at 134 nn.1-3. *Partnership Equities*, a general partner of Columbia-Heather, Ltd., was a successor in interest by assignment to the interests of Columbia Properties, Inc., a co-plaintiff in the original complaint. Id. at 42 n.1, 443 N.E.2d at 134 n.1. Separate actions were filed against defendants Khoury and Marten, but were consolidated for trial. Id. at 42 n.3, 443 N.E.2d at 134 n.3.
Court judge found for the plaintiffs, ruling that the breach alleged by the defendants, even if proved, did not justify the withholding of the capital contributions to which the defendants had obligated themselves.21 Upon entry of judgment for the plaintiffs, the defendants appealed.22 The Appeals Court affirmed the trial court's decision, finding that the ULPA, as in effect in Ohio, requires that any conditions on a limited partner's obligation to contribute be stated in the certificate of limited partnership filed with state authorities.23

The court first considered the wording of the statute itself. Section 17 of the ULPA states: "(1) A limited partner is liable to the partnership . . . (b) for any unpaid contribution which he agreed in the certificate to make in the future at the time and on the conditions stated in the certificate."24 Under this statute, the court reasoned, payment may be excused only in two narrow circumstances: first, where the payment conditions expressly stated in the filed partnership certificate have not been fulfilled; and second, where there exists a profound failure of consideration, such as a repudiation of the agreement by the general partners or fraud with respect to the essentials of the project.25 In the case before it, the court found that the certificate placed no conditions on the defendants' obligations to contribute the withheld installments.26 Moreover, because the partnership's housing project had been built and the defendants had received their anticipated tax benefits, the court found no breach amounting to a profound failure of consideration.27 To remedy alleged breaches falling short of a profound failure of consideration, the court concluded, a derivative action on behalf of the limited partnership is the most appropriate remedy.28

In reaching its conclusion, the court rejected defendant's argument that the case involved simply a material breach of a bilateral agreement between the defendants and the partnership.29 In such a case, the court acknowledged, the principle of contract law excusing nonperformance for a material breach might be applicable.30 In the court's view, however, the limited partnership represents a more sophisticated business relation-

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21 Id. at 43-44, 443 N.E.2d at 135.
22 Id. at 42 n.3, 443 N.E.2d at 134 n.3.
23 Id. at 44, 51, 443 N.E.2d at 135, 138.
26 Id. at 44, 48, 443 N.E.2d at 136, 138.
27 Id. at 49, 443 N.E.2d at 138.
28 Id. at 50, 443 N.E.2d at 138-39.
29 Id. at 44-46, 443 N.E.2d at 136-38.
30 Id. at 44-45, 443 N.E.2d at 136; see also RESTATEMENT (SECOND) OF CONTRACTS § 237 (1979).
ship. Other limited partners as well as third parties such as a mortgagee, the court reasoned, rely upon the publicly-filed expressed obligation of each limited partner to contribute to the capital of the partnership. In the case before it, the court stated, the financing lender may have considered the subscribed contributions in evaluating the riskiness of the venture, while the other limited partners may have based their decisions to invest on the level of contributions recorded in the partnership certificate. Section 17 of the ULPA itself, the court determined, supports the special concern for creditors of and other subscribers to the limited partnership. Subdivision three of section 17 permits a waiver or compromise of a limited partner’s liability only upon the consent of all partnership members; such waiver or compromise is not effective, however, against any creditor who extended credit before cancellation or amendment of the partnership certificate. Moreover, the court indicated, the revised ULPA, enacted in Massachusetts but not in Ohio, reinforces the conclusion that, because of the concern for parties relying upon the filed partnership certificate, the right of a partner to withhold contributions should be limited to the two narrow situations listed by the court.

As further support for its view of a limited partner’s obligations, the Partnership Equities court considered the similarity of limited partners to stock subscribers of a business corporation. Stock subscribers, the court noted, may be excused from performance where a condition upon which the subscription is made does not occur. Disappointed expectations or mismanagement by corporate officers, on the other hand, the

32 Id. at 45, 443 N.E.2d at 136.
33 Id. at 45, 443 N.E.2d at 136. The Appeals Court found support in both case law and scholarly writing for its view of investor and creditor reliance upon the obligations included in the partnership certificate. See Hurst and Mayer, Ohio Limited Partnership—Business Use and Effects, 27 Ohio St. L.J. 373, 382 (1966); Kasher, Financing Limited Partnerships and their Partners: Caveat Emptor, 27 Bus. Law. 171, 181-82 (1982); Whiteley v. Klauber, 69 A.D.2d 99, 105-07, 417 N.Y.S.2d 959, 963-65 (N.Y. 1979), aff’d, 51 N.Y.2d 555, 435 N.Y.S.2d 568 (1980); Donroy, Ltd. v. United States, 301 F.2d 200, 205 (9th Cir. 1962) (creditors of the limited partnership allowed to maintain an action directly against limited partners to the extent of their withdrawn contributions); but see Bell Sound Studios, Inc. v. Enneagram Prod. Co., 36 Misc.2d 879, 880, 234 N.Y.S.2d 12, 13-14 (N.Y. Sup. Ct. 1962).
35 Id. at 45-46, 443 N.E.2d at 136.
36 Id. at 46, 443 N.E.2d at 137, citing U.L.P.A. § 502(a), (b), G.L. c. 109, § 28(a), (b).
While failure of consideration will excuse the contribution of capital by a stock subscriber, the court noted, such failure "implies that the venture to which the subscriber committed himself has failed to materialize in a manner resembling what was represented to the subscriber." Finally, the Partnership Equities court stated, a derivative suit by limited partners for alleged breaches short of a failure of consideration would serve the same purposes furthered by corporate stockholder derivative suits. With respect to mismanagement or other wrongdoing by general partners, the court explained, all of the limited partners have a lively interest in ending the general partners' abuse. Moreover, a derivative suit on behalf of the partnership, the court explained, would be more effective in compelling recovery from the wrongdoers than isolated acts of withholding capital contributions by certain limited partners.

Although holding that the defendants in the case before it were not justified in withholding their capital contributions, the Partnership Equities court stated that its decision does not prevent a limited partner from conditioning his obligation to contribute on certain levels of performance by the partnership or a certain level of conduct by management. Under the ULPA, however, the court ruled, such conditions must be expressly stated in the partnership agreement and included in the limited partnership certificate on file with the designated public officer.

While Partnership Equities concerned a limited partnership organized under Ohio law, the court's analysis applies to Massachusetts limited partnerships as well. Although Ohio has not enacted the revised ULPA which is in effect in Massachusetts, the Partnership Equities court correctly noted that the revised statute supports the rule found in the former version concerning a limited partner's obligation to contribute

40 Id. at 49, 443 N.E.2d at 138.
42 Id. at 50, 443 N.E.2d at 139.
43 Id. at 51, 443 N.E.2d at 139.
44 Id. In Massachusetts, the partnership certificate must be on file with the Secretary of State. G.L. c. 109, § 13. In Ohio, the required filing is with the recorder of the county in the limited partnership's principal place of business. OHIO REV. CODE ANN. § 1781.02 (Baldwin 1982).
45 15 Mass. App. Ct. at 43 n.5, 443 N.E.2d at 135 n.5. Ohio has not enacted the 1976 revision of the U.L.P.A. Id.
capital. Chapter 109, section 17 of the General Laws states that a limited partner subscribing directly from the partnership must do so in the manner stated in the partnership agreement. Unlike its cognate provision in the Ohio Code, section 17 does not explicitly state the limited partner’s obligation to contribute in terms of conditions stated in the partnership certificate. Consideration of the revised ULPA as a whole, however, leads to the conclusion that the limited partner’s obligation to contribute is determined by the partnership certificate. Under the statute, the certificate describes the consideration contributed by each partner, any future consideration, as well as the times and events upon which any such agreed additional contributions will be made. Each new limited partner must sign the certificate. Within thirty days of a change in the amount or character of any participant’s contribution, or of a participant’s ability to contribute, an amended certificate reflecting the changes must be filed. Similar to the Ohio version of the ULPA, all participants must consent to any compromise of any partner’s obligations, and creditors may enforce an original uncompromised claim arising before an amended certificate reflecting the compromise is filed.

These provisions of the Massachusetts statute, considered together, reflect the concern articulated by the Partnership Equities court that the partnership actually receive the capital contributions as represented in the publicly-filed certificate. Central to the goal of assuring performance in accordance with the certificate is section 28(a) of chapter 109 of the General Laws, which provides:

Except as provided in the certificate of limited partnership, a partner is obligated to the limited partnership to perform any promise to contribute cash or property or to perform services, even if he is unable to because of death, disability or any other reason.

While the revised section 28(a) is not as explicit as section 1781.17 of the Ohio Code, commentators have stated that section 28(a) clearly applies to present obligations to make future contributions to the limited partnership.

Clearly, the ULPA, as in effect in both Massachusetts and Ohio,
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evinces a concern for those who may rely upon the capital contribution obligations stated in the partnership certificate in weighing investment or financing decisions. Absent conditions on his obligation which are explicitly included in the publicly-filed certificate, each limited partner must contribute his full agreed amount, regardless of mismanagement or unauthorized acts by the general partners which fall short of a profound failure of consideration.\(^\text{58}\) The appropriate remedy for wrongs to the limited partnership which affect the participants' benefits only indirectly is a derivative suit on behalf of the partnership.\(^\text{59}\)


\(^{59}\) Id. at 50, 443 N.E.2d at 138-39. See supra note 41 and accompanying text.