

Code of Alabama

Title 10A. Alabama Business and Nonprofit Entities Code.

Chapter 9. Alabama Uniform Limited Partnership Law of 2010. (Refs & Annos)

Article 1. . General Provisions. (Refs & Annos)

Ala.Code 1975 § 10A-9-1.10

§ 10A-9-1.10. Effect of partnership agreement; nonwaivable provisions.

Currentness

- (a)(1) Except as otherwise provided in subsection (b), the partnership agreement governs relations among the partners and between the partners and the partnership.
- (2) To the extent that, at law or in equity, a partner or other person has duties, including fiduciary duties, to a limited partnership or to another partner or to another person that is a party to or is otherwise bound by a partnership agreement, the partner's or other person's duties may be expanded or restricted or eliminated by provisions in the partnership agreement; provided that the partnership agreement may not eliminate the implied contractual obligation of good faith and fair dealing.
- (3) To the extent the partnership agreement does not otherwise provide, this chapter governs relations among the partners and between the partners and the partnership.
- (b) A partnership agreement may not:
- (1) vary a limited partnership's power under [Section 10A-9-1.05](#) to sue, be sued, and defend in its own name;
 - (2) vary the law applicable to a limited partnership under [Section 10A-9-1.06](#);
 - (3) vary the requirements of [Section 10A-9-2.04](#);
 - (4) vary the information required under [Section 10A-9-1.11](#) or unreasonably restrict the right to information under [Sections 10A-9-3.04](#) or [10A-9-4.07](#), but the partnership agreement may impose reasonable restrictions on the availability and use of information obtained under those sections and may define appropriate remedies, including liquidated damages, for a breach of any reasonable restriction on use;
 - (5) Eliminate the duty of loyalty under [Section 10A-9-4.08](#), but the partnership agreement may:
 - a. Identify specific types or categories of activities that do not violate the duty of loyalty, if not manifestly unreasonable; and

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b. Specify the number or percentage of partners which may authorize or ratify, after full disclosure to all partners of all material facts, a specific act or transaction that otherwise would violate the duty of loyalty;

(6) Unreasonably reduce the duty of care under [Section 10A-9-4.08\(c\)](#);

(7) Eliminate the obligation of good faith and fair dealing under [Sections 10A-9-3.05\(b\)](#) and [10A-9-4.08\(d\)](#), but the partnership agreement may prescribe the standards by which the performance of the obligation is to be measured, if the standards are not manifestly unreasonable;

(8) vary the power of a person to dissociate as a general partner under [Section 10A-9-6.04\(a\)](#) except that the partnership agreement may require that the notice under [Section 10A-9-6.03\(1\)](#) be in a record and may be in a specific form of record;

(9) vary the power of a court to decree dissolution in the circumstances specified in [Section 10A-9-8.02](#);

(10) vary the requirement to wind up the partnership's business as specified in [Section 10A-9-8.03](#);

(11) unreasonably restrict the right to maintain an action under Article 10;

(12) restrict the right of a partner under [Section 10A-9-11.10\(a\)](#) to approve a conversion or merger or the right of a general partner under [Section 10A-9-11.10\(b\)](#) to consent to an amendment to the certificate of limited partnership which deletes a statement that the limited partnership is a limited liability limited partnership; or

(13) restrict rights under this chapter of a person other than a partner or a transferee.

Credits

([Act 2009-621](#), p. 1805, § 1.)

Editors' Notes

ALABAMA COMMENT

This section is substantially similar to Section 110 of the Uniform Act.

Subsection (b)(8) was modified to allow the partnership agreement to require that the resignation of a general partner be in a specific form of record, e.g., in a writing and subscribed by the general partner.

UNIFORM COMMENT

Source -- [RUPA Section 103](#).

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Subject only to subsection (b), the partnership agreement has plenary power to structure and regulate the relations of the partners *inter se*. Although the certificate of limited partnership is a limited partnership's foundational document, among the partners the partnership agreement controls. See Section 201(d).

The partnership agreement has the power to control the manner of its own amendment. In particular, a provision of the agreement prohibiting oral modifications is enforceable, despite any common law antagonism to "no oral modification" provisions. Likewise, a partnership agreement can impose "made in a record" requirements on other aspects of the partners' relationship, such as requiring consents to be made in a record and signed, or rendering unenforceable oral promises to make contributions or oral understandings as to "events upon the happening of which the limited partnership is to be dissolved," Section 111(9)(D). See also Section 801(1).

Subsection (b)(3) -- The referenced section states who must sign various documents.

Subsection (b)(4) -- In determining whether a restriction is reasonable, a court might consider: (i) the danger or other problem the restriction seeks to avoid; (ii) the purpose for which the information is sought; and (iii) whether, in light of both the problem and the purpose, the restriction is reasonably tailored. Restricting access to or use of the names and addresses of limited partners is not per se unreasonable.

Under this Act, general and limited partners have sharply different roles. A restriction that is reasonable as to a limited partner is not necessarily reasonable as to a general partner.

Sections 304(g) and 407(f) authorize the limited partnership (as distinguished from the partnership agreement) to impose restrictions on the use of information. For a comparison of restrictions contained in the partnership agreement and restrictions imposed unilaterally by the limited partnership, see the Comment to Section 304(g).

Subsection (b)(5)(A) -- It is not per se manifestly unreasonable for the partnership agreement to permit a general partner to compete with the limited partnership.

Subsection (b)(5)(B) -- The Act does not require that the authorization or ratification be by disinterested partners, although the partnership agreement may so provide. The Act does require that the disclosure be made to all partners, even if the partnership agreement excludes some partners from the authorization or ratification process. An interested partner that participates in the authorization or ratification process is subject to the obligation of good faith and fair dealing. Sections 305(b) and 408(d).

Paragraphs (5), (6), and (7) of subsection (b) of the Uniform Act were modified to reflect the expansion of the default fiduciary duties set forth in Section 408 to include the traditional fiduciary duties under common law by modifying the word "only" in Section 408 to "include." See Section 408(a). In addition, the Act has clarified that the implied contractual obligation of good faith and fair dealing may not be eliminated by the parties. In keeping with the contractual nature of the limited partnership, but in an effort to protect against oral or implied modifications of partnership agreements regarding fiduciary duties, the Act provides that the parties may modify the fiduciary duties if such modifications are in a written partnership agreement.

Subsection (b)(8) -- This restriction applies only to the power of a person to dissociate as a general partner. The partnership agreement may eliminate the power of a person to dissociate as a limited partner.

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Subsection (b)(8) was modified to allow the partnership agreement to require that the resignation of a general partner be in a specific form of record, e.g., in a writing and subscribed by the general partner.

Subsection (b)(9) -- This provision should not be read to limit a partnership agreement's power to provide for arbitration. For example, an agreement to arbitrate all disputes -- including dissolution disputes -- is enforceable. Any other interpretation would put this Act at odds with federal law. See *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (holding that the Federal Arbitration Act preempts state statutes that seek to invalidate agreements to arbitrate) and *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265 (1995) (same). This provision does prohibit any narrowing of the substantive grounds for judicial dissolution as stated in Section 802.

Example: A provision of a partnership agreement states that no partner may obtain judicial dissolution without showing that a general partner is in material breach of the partnership agreement. The provision is ineffective to prevent a court from ordering dissolution under Section 802.

Subsection (b)(11) -- Section 1001 codifies a partner's right to bring a direct action, and the rest of Article 10 provides for derivative actions. The partnership agreement may not restrict a partner's right to bring either type of action if the effect is to undercut or frustrate the duties and rights protected by Section 110(b).

The reasonableness of a restriction on derivative actions should be judged in light of the history and purpose of derivative actions. They originated as an equitable remedy, intended to protect passive owners against management abuses. A partnership agreement may not provide that all derivative claims will be subject to final determination by a special litigation committee appointed by the limited partnership, because that provision would eliminate, not merely restrict, a partner's right to bring a derivative *action*.

Subsection (b)(12) -- Section 1110 imposes special consent requirements with regard to transactions that might make a partner personally liable for entity debts.

Subsection (b)(13) -- The partnership agreement is a contract, and this provision reflects a basic notion of contract law -- namely, that a contract can **directly** restrict rights only of parties to the contract and of persons who derive their rights from the contract. A provision of a partnership agreement can be determined to be unenforceable against third parties under paragraph (b)(13) without therefore and automatically being unenforceable *inter se* the partners and any transferees. How the former determination affects the latter question is a matter of other law.

Ala. Code 1975 § 10A-9-1.10, AL ST § 10A-9-1.10
Current through the end of the 2013 Regular Session.