Abstract:

In Indeterminacy, Irony and Partnership Law, J. William Callison draws parallels between the corporation entity-aggregate debate as articulated by Millon and changes in the Revised Uniform Partnership Act (RUPA) as put forth by the National Conference of Commissioners on Uniform State Laws (NCCUSL). Historically partnerships have been considered aggregates, but RUPA departs from this tradition. It attempts to make partnership law determinate, embracing the “partnership-as-entity” model especially through its adoption of the appellation “LLP”. Ironically, while the entity-aggregate debate persists in corporate law, it has seemingly been resolved in partnership law. However, Callison suggests that the NCCUSL drafters must now focus on determining when individuals have person liability.

INDETERMINACY, IRONY AND PARTNERSHIP LAW

J. William Callison*

In his article, The Ambiguous Significance of Corporate Personhood, Professor Millon notes that a standard form of argument has been to assert that the business corporation is some kind of person and then, from the supposedly disinterested descriptive assertion, derive normative conclusions on one side or the other concerning the respective rights and obligations of shareholders and other interested parties. Thus, an assertion that “the corporation is an entity” can be followed by a conclusion, such as, “therefore shareholders lack personal responsibility for corporate debts, obligations and liabilities.” Millon maintains that the idea of the corporation as a legal person is indeterminate, and that legal theorists have long argued about whether the corporation should be considered as an entity or an aggregation of natural persons. After tracing the historical development

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3 Id. at __

4 See id. at 45.
of entity-aggregate characterization, with different approaches being taken with different results over time, Millon states that normative issues remain unresolved because characterization questions cannot be settled. In Millon’s view, this focus on the distinctiveness of activities engaged in by corporations, specifically with regard to the entity-aggregate dichotomy, has hindered social policy analysis. He concludes that we might be better off focusing on the problem of personal obligation.

As a legal practitioner and an unincorporated business organization scholar/writer, I believe that interesting parallels can be drawn between the corporation aggregate-entity debate described by Professor Millon and law changes in the partnership and unincorporated business organization arena. At common law, a partnership was considered an aggregate of the individual partners, rather than a distinct legal entity separate from the partners. Extrapolating this aggregate theory to its extreme, a partnership would be nothing more than a relationship between persons acting for a common business purpose and for which common business purpose such persons would jointly own assets, jointly incur obligations, and conduct a pro rata share of the partnership business in their own behalf. A pure aggregate theory of partnerships, which places emphasis on the individual rights and responsibilities of the partners rather than the collective rights and responsibilities of the partnership, was ill suited for the commercial environment in which modern commercial partnerships operated. In response, the courts often adopted and applied an entity view of the nature of partnerships or reached decisions which, while not expressly based on an entity theory, are more easily reconciled with it than with an aggregate theory. In any case, the fact that the 1914 Uniform Partnership Act did not state either that a partnership is an aggregate or that it is an entity (although it generally adopts an aggregate approach, with entity twists) left room for wiggle and evolution.5

In 1994, the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) declared that its Revised Uniform Partnership Act (“RUPA”) was ready for adoption by the states. As of this writing, a majority of the states have adopted RUPA in its 1992, 1994 or 1996 forms. RUPA section 201(a) states, “A partnership is an entity distinct from its partners.”6 The comment to RUPA § 201 provides “RUPA embraces the entity theory of partnership. In light of the [Uniform Partnership Act’s] ambivalence on the nature of partnerships, the explicit statement provided by subsection (a) is deemed appropriate as an expression of the increased emphasis on the entity theory as the dominant model.”7 Numerous “since/then” results follow. For example, since RUPA partnerships are entities separate from their partners, then under RUPA such partnerships need not dissolve whenever a person is admitted to the partnership or dissociates from the partnership.

Notwithstanding the impact of entity characterization on important issues such as partnership dissolution, personal liability remains the “600-pound gorilla” of business organization law. It is the liability question that has led to modern developments such as

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5 For a full discussion of the aggregate-entity approach to partnership law, see J. W. Callison, Partnership Law and Practice: General and Limited Partnerships (1994).


the limited liability company, the limited liability partnership and the limited liability limited partnership. Although RUPA § 307(d) adheres to the new “partnership-as-entity” model by providing that partnership judgment creditors generally may not execute against individual partner assets without first attempting to satisfy their claims from partnership assets, RUPA §306(a) backs away from fully embracing the entity form and leaves partners jointly and severally liable for partnership obligations. The Prefatory Note to RUPA states that “the aggregate approach is retained for some purposes, such as partners’ joint and several liability.” What one hand attempts to clarify, the other hand obfuscates; thus, under RUPA a partnership is an entity unless RUPA provides that it is an aggregate. In light of more modern developments, this aggregate perspective with respect to liability can be viewed as a hangover from partnership law past and probably accommodated both NCCUSL’s original reluctance to tinker with the liability expectations of persons who deal with “partnerships” and NCCUSL’s desire to bring all existing partnerships under RUPA.

Yet, the RUPA drafters were quickly compelled to recognize the current “business organization as entity” focus of modern law concerning participant liability. In the 1996 version of RUPA, NCCUSL adopts the limited liability partnership (“LLP”) form and provides in RUPA § 306(c) that “an 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 an obligation solely by reason of being or so acting as a partner.” An LLP is a partnership which has filed a registration statement with the appropriate state authority. Such organization typically uses the appellation “LLP” in its name to separate itself from partnerships in which partners have joint and several liability. Following the aggregate-entity classification, an LLP can be viewed as a partnership that declares that it does not follow the aggregate characterization of RUPA § 306(a) and instead is a separate entity for liability purposes. It likely is a historical anachronism that LLP status is not the default rule for general partnerships, with an affirmative election required for joint and several partnership liability.

All this brings me to several observations. First, it is ironic that legal theorists addressing the nature of the corporate personality continue to discuss aggregate-entity characterization and the results therefrom, while the drafters of modern partnership law

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8 UNIF. P’SHIP ACT § 307(d), 6 U.L.A. 70 (Supp. 1997). This is contrary to the case law in some jurisdictions. See CALLISON, supra n.1 at 14-6.


11 See UNIF. P’SHIP ACT §1006(b), 6 U.L.A. 122. (“After January 1, 199_, this [Act] governs all partnerships.”)


13 Section 404(a) of the current draft of the Proposed Revisions of Uniform Limited Partnership Act (1976) with Revisions (“Re-RULPA) provides that general partners do not have personal liability for limited partnership obligations unless the certificate of limited partnership provides for unlimited liability and the general partner consents to such liability. Re-RULPA has flip-flopped on the appropriate default rule and the final outcome is uncertain.
have attempted to resolve the issue by stating “a partnership is an entity.” I, like many other practitioners, view the business corporation as the ultimate entity form with its inherent characteristics of limited liability, centralized management, continuity of life and free transferability of interests. Partnerships, on the other hand, historically have been considered aggregates of their partners for many purposes, with an entity overlay for some purposes. Now, RUPA attempts to make partnership law determinate, while corporate law remains, in Millon’s view, indeterminate.

Second, I have some hope that the attempted determinacy of partnership characterization will permit the drafters and courts to move beyond the entity-aggregate approach to focus on policy decisions concerning the precise meaning of “partnership as entity.” Once the aggregate-entity lingo is decided, it may be possible to focus on what it means to be an entity and when carve-outs should be made from entity status as a matter of policy. The lingering joint and several liability of partners in a RUPA partnership can be focused on as a policy matter — should persons who associate in a business community have personal responsibility for the community’s acts and obligations, and when should personal liability exist? I do not believe the NCCUSL drafters focussed on these policy issues, and they should.

Third, I am skeptical. I believe that the entity characterization of partnerships will strip partnership law of its vitality and adaptability. I fear that much of the conversation will end with a descriptive assertion that “a partnership is an entity, therefore y must follow.” Millon demonstrates that corporate law remains alive and adaptable in part because the law does not contain a statement that “a corporation is x.” At the end of the day, I think that is a good thing.