University of Richmond Law Review

Volume 44
Issue 1 *In Memoriam: Robert E. Shepherd, Jr.*

Article 11

11-1-2009

Partnership Derivative Suits: Jennings v. Kay Jennings Ltd. P'ship

Patricia Collins McCullagh
McCandlish Holton, P.C., Richmond, Virginia

PARTNERSHIP DERIVATIVE SUITS: *JENNINGS V. KAY JENNINGS FAMILY LTD. PARTNERSHIP*

Patricia Collins McCullagh *

I. INTRODUCTION

In *Jennings v. Kay Jennings Family Ltd. Partnership*, a case of first impression, the Supreme Court of Virginia established the criteria for determining when a limited partner "fairly and adequately represent[s] the interests" of other limited partners and a partnership for purposes of properly bringing a derivative action pursuant to Virginia Code section 50-73.62.[1] Section 50-73.62 allows a limited partner to stand in the shoes of a limited partnership to seek recovery for damage to the partnership, as compared to bringing a direct claim for individual harm or damage caused to the limited partner himself.[2] Although a derivative claim can be brought against a third party, limited partners often bring such actions against the general partner(s) for alleged wrongdoing that has caused harm to the limited partnership or its value.

The holdings and determinations in *Jennings* may have a significant impact on the ability of limited partners—especially those who are economically antagonistic to the partnership—to seek redress for the wrongful acts of the general partner(s). Part II of this article discusses current Virginia law regarding derivative actions, including when a limited partner must bring a derivative action as opposed to a direct action. Part III explores the *Jennings* decision and the impact this decision may have on a limited partner's ability to seek redress, whether derivatively or directly, under current Virginia law. Finally, Part IV outlines some of the potential options a limited partner may have to ad-

* Partner, McCandlish Holton, P.C., Richmond, Virginia. J.D., 1997, University of Richmond School of Law; B.S., 1994, Fairfield University.

1. 275 Va. 594, 600–02, 659 S.E.2d 283, 287–88 (2008).

2. *See* VA. CODE ANN. § 50-73.62 (Repl. Vol. 2009).

dress alleged wrongful acts of the general partner(s) in the wake of the *Jennings* decision.

II. VIRGINIA LAW ON DERIVATIVE ACTIONS

A. *Distinction Between Derivative and Direct Claims*

In Virginia, derivative claims are statutorily created.[3] Thus, the Virginia Code and relevant case law set forth the requirements and process for bringing such actions. The derivative actions provision of Virginia's Revised Uniform Limited Partnership Act ("Limited Partnership Act") provides that "[a] limited partner may bring an action in the right of a limited partnership to recover a judgment in its favor to the *same extent that a stockholder may bring an action for a derivative suit under the Stock Corporation Act.*"[4] Accordingly, the principles that apply to shareholder derivative suits also apply to derivative claims brought by limited partners.[5] The Limited Partnership Act further provides that

> [s]uch action may be brought if general partners with authority to do so have refused to bring the action or if an effort to cause those general partners to bring the action is not likely to succeed. *The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the limited partners and the partnership in enforcing the right of the partnership.*[6]

The Limited Partnership Act also provides for the award of attorney's fees in certain situations:

> If a derivative action is successful, in whole or in part, or if anything is received by the plaintiff as a result of a judgment, compromise or settlement of an action or claim, except as hereinafter provided, the court may award the plaintiff reasonable expenses, including reasonable attorney's fees, and shall direct him to remit to the limited partnership the remainder of those proceeds received by him. On termination of the derivative action, the court may require the plaintiff to pay any defendant's reasonable expenses, including reasonable

---

3. *See, e.g.*, Virginia Stock Corporation Act, VA. CODE ANN. §§ 13.1-672.1 to 13.1-672.6 (Repl. Vol. 2006 & Cum. Supp. 2009).

4. *Id.* § 50-73.62 (Repl. Vol. 2009) (emphasis added).

5. *See id.*; *see also* Little v. Cooke, 274 Va. 697, 710, 652 S.E.2d 129, 137 (2007) (citing Strain v. Seven Hills Assocs., 429 N.Y.S.2d 424, 432 (N.Y. App. Div. 1980) ("[A] limited partner's power to vindicate a wrong done to the limited partnership and to enforce redress for the loss or diminution in value of his interest is no greater than that of a stockholder of a corporation.")).

6. VA. CODE ANN. § 50-73.62 (Repl. Vol. 2009) (emphasis added).

> attorney's fees, incurred in defending the action if it finds that the action was commenced without reasonable cause or the plaintiff did not fairly and adequately represent the interests of the limited partners and the partnership in enforcing the right of the partnership.[7]

Although neither the Limited Partnership Act nor the Stock Corporation Act defines exactly what is and what is not a derivative claim,[8] a review of relevant case law and other background sources provides the guidance necessary to determine when an action may be brought directly and when it must be filed derivatively. A direct claim exists when the injury is suffered by the plaintiff individually as either a shareholder or limited partner, and not by the corporation, such as "where the action is based on a contract to which the [plaintiff] is a party, or on a right belonging severally to the [plaintiff], or on a fraud affecting the [plaintiff] directly."[9] Conversely, a derivative claim exists when the entire body of shareholders or limited partners is injured by the actions or omitted actions for which a complaint has been submitted.[10] Therefore, derivative claims are ones that belong to the limited partnership rather than the individual limited partner.

Two cases from the Supreme Court of Virginia, *Simmons v. Miller*[11] and, more recently, *Little v. Cooke*,[12] are particularly instructive on the distinction between derivative and direct claims in Virginia. *Simmons* involved a direct claim against the officer and director of a closely held corporation.[13] The minority shareholder, Simmons, alleged that Miller, the majority shareholder and sole officer and director, breached her fiduciary duty by usurping corporate opportunities for her own individual benefit.[14] Simmons appealed the trial court's ruling that he could not maintain a direct claim for breach of fiduciary duty against Miller and that he must bring such a claim derivatively on behalf of the corporation.[15] In affirming the trial court's decision and determining

---

7. *Id.* § 50-73.65 (Repl. Vol. 2009). The remaining portions of the Limited Partnership Act involving derivative actions are not directly relevant to this article.

8. *See id.* §§ 50-73.62 to 50-73.65 (Repl. Vol. 2009); *id.* §§ 13.1-672.1 to 13.1-672.6 (Repl. Vol. 2006 & Cum. Supp. 2009).

9. 12B WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 5911 (perm. ed., rev. vol. 2009) (footnotes omitted).

10. *Id.*

11. 261 Va. 561, 544 S.E.2d 666 (2001).

12. 274 Va. 697, 652 S.E.2d 129 (2007).

13. *Simmons*, 261 Va. at 565, 544 S.E.2d at 669.

14. *Id.* at 566, 570, 544 S.E.2d at 669–70, 672.

15. *Id.* at 571–72, 544 S.E.2d at 673.

that the harm alleged was to the corporation and not to Simmons individually, the supreme court stated that "[t]he overwhelming majority rule is that an action for injuries to a corporation cannot be maintained by a shareholder on an individual basis and must be brought derivatively."[16] The court declined to adopt an exception to this majority rule that would allow for direct claims to be brought when the entity involved is a closely held corporation, reasoning that the majority rule was preferable because it (1) prevented a multiplicity of lawsuits by shareholders, (2) protected creditors by returning erroneously removed assets or proceeds back into the corporation, and (3) promoted predictability and protected the interests of all shareholders.[17]

Little essentially affirmed the holdings of *Simmons* and directly applied them to limited partnership derivative actions.[18] In *Little*, the supreme court appeared to agree that the limited partners properly filed the action as a derivative claim, but determined that certain tax damages awarded to the limited partners individually were not appropriate.[19] The court reasoned that a derivative action could only recover damages incurred by the partnership, and in this situation, the partnership itself suffered no tax consequences as a result of the defendant's actions.[20] As it did in *Simmons*, the supreme court looked to the harm caused to the partners individually and the harm caused to the limited partnership as a whole to determine what was properly covered by a derivative versus a direct action.[21]

Accordingly, in Virginia, to determine whether a limited partner may file a direct claim against the general partner(s) or whether the action must be filed derivatively, it is necessary to evaluate the nature of the alleged damage. If the harm impacts

16. *Id.* at 573, 544 S.E.2d at 674.

17. *See id.* at 576, 544 S.E.2d at 675. The court further opined that "[d]erivative suits play an 'important role in protecting shareholders of corporations from the designing schemes and wiles of insiders who are willing to betray their company's interest in order to enrich themselves.'" *Id.* at 573, 544 S.E.2d at 674 (quoting Surowitz v. Hilton Hotels Corp., 383 U.S. 363, 371 (1966)).

18. *See* Little v. Cooke, 274 Va. 697, 709–10, 652 S.E.2d 129, 136–37 (2007).

19. *See id.* at 712, 652 S.E.2d at 138.

20. *See id*; *see also* Golden Tee, Inc. v. Venture Golf Schs., Inc., 969 S.W.2d 625, 628–29 (Ark. 1998) (stating that a derivative claim was the appropriate action for a limited partner to bring where the alleged harm was "individual" indirect damage based on a decrease in value of the partnership).

21. *Little*, 274 Va. at 710–12, 652 S.E.2d at 137–38.

the partnership generally, then the action is derivative and the plaintiff can recover damages incurred by the partnership and return those monies to the partnership.[22] However, if it is shown that the limited partner suffered an individual harm separate and apart from the partnership or other limited partners, then the limited partner may bring a direct claim against the general partner(s) for breach of fiduciary duty, breach of the partnership agreement, fraud, or similar claims.[23] Thus, when the harm caused is truly to the partnership and not the individual partners, a limited partner may only assert a derivative claim to challenge the actions of the general partner(s) and then must meet the specific requirements of the Limited Partnership Act's derivative provisions in order to bring and maintain such a suit.

B. *Requirements of a Derivative Action*

The Limited Partnership Act requires the limited partner to have certain characteristics and take certain procedural steps prior to filing a derivative action. To meet the characteristics requirement, the limited partner must (1) have been a partner—or possessed the rights of a partner—at the time the claim arose and at the commencement of the action and (2) "fairly and adequately represent the interests of the limited partners and the partnership in enforcing the right of the partnership."[24] Procedurally, the limited partner must show that the general partner(s) have failed to act upon the request of the limited partner or, if the partner has not made the request, that such request would be unheeded.[25] Therefore, in the complaint the limited partner must plead with particularity the efforts taken to induce the general partner(s) to bring such an action or the reasons for not making such an effort or request.[26] Inherently, the limited partner should also plead that he was a partner at the appropriate times and that he "fairly

22. *See, e.g.*, *id.* at 710, 652 S.E.2d at 137.

23. *See* FLETCHER ET AL., *supra* note 9.

24. VA. CODE ANN. §§ 50-73.62 to 50-73.63 (Repl. Vol. 2009).

25. *Id.* § 50-73.62 (Repl. Vol. 2009).

26. *Id.* § 50-73.64 (Repl. Vol. 2009). Also, as the Limited Partnership Act authorizes a limited partner to bring an action "to the same extent" as a shareholder in a derivative action, a limited partner plaintiff would be wise to make his demand for action on the general partners in writing unless he intends to show that such a demand would go unaddressed. *See id.* § 13.1-672.1(B)(1) (Repl. Vol. 2009).

and adequately" represents the partnership or limited partners for the pleading to survive a demurrer.[27]

Although most of these requirements were easy to comprehend and satisfy procedurally, neither the Virginia Code nor any Virginia court provided guidance as to what a limited partner must show in order to meet the "fairly and adequately represent" standard prior to the supreme court's decision in *Jennings*.

III. *JENNINGS'* ANALYSIS OF THE "FAIRLY AND ADEQUATELY REPRESENTING" STANDARD

A. *Case Summary*

Jennings involved a limited partnership, the Kay Jennings Family Limited Partnership (the "Partnership"), in which siblings Katherine, Louis, and Beverly Jennings each held a 5% general partnership interest and a 15% limited partnership interest, while another sibling, Michael, held a 40% limited partnership interest.[28] The Partnership was a tenant on property owned by Avis and Mary Boothe in Springfield, Virginia (the "Property").[29] Michael, through DAMN, LLC—an entity he controlled—ultimately purchased the Property and became the Partnership's landlord.[30] The Partnership then subleased this property for $50,000 per month to a Toyota car dealership in which Michael was the sole stockholder (the "Lease").[31] In 2004, Michael asked the Partnership to subordinate the Lease to a construction loan that Michael wanted to obtain in order to perform extensive improvements and expansions to the dealership.[32] These expansions were expected to significantly increase the dealership's sales.[33] The Partnership refused Michael's request.[34] Around the same

27. *See id.* § 50-73.62 to 50-73.63 (Repl. Vol. 2009).

28. Jennings v. Kay Jennings Family Ltd. P'ship, 275 Va. 594, 598–99, 659 S.E.2d 283, 285–86 (2008). Another Jennings sibling, Mary, also previously held interest in the Partnership, but sold her interest to Michael in 2004. *Id.* at 598, 659 S.E.2d at 286.

29. *Id.* at 598, 659 S.E.2d at 285.

30. *Id.* at 599, 659 S.E.2d at 286.

31. *Id.* at 598, 659 S.E.2d at 286.

32. *Id.*

33. *Id.*

34. *Id.*

time, Louis allegedly made various statements to the dealership's Toyota franchisor that the Lease was invalid.[35]

In response, Michael filed a derivative suit against the Partnership and Louis, alleging that Louis' actions breached his fiduciary duties to the Partnership, increased the likelihood of harm to the Partnership, and potentially subjected the Partnership to Louis' creditors.[36] The derivative suit also claimed that Louis intentionally interfered with the dealership's business relationship with Toyota.[37] Michael asked for Louis to be expelled from the Partnership and for Michael to be substituted as a general partner in Louis' stead.[38]

The Partnership filed a plea in bar and motion to dismiss the derivative action, primarily asserting that Michael lacked standing to bring a derivative claim against the Partnership because he did not "fairly and adequately represent the interests" of the limited partners and Partnership as mandated by Virginia Code section 50-73.62.[39] The Partnership claimed that Michael possessed economic interests directly adverse to the Partnership and was pursuing remedies not supported by the other partners or the Partnership.[40] The trial court agreed with the Partnership and dismissed Michael's claim for lack of standing.[41]

The supreme court affirmed the trial court's decision,[42] and in doing so, followed the trial court in considering the decision of the United States Court of Appeals for the Sixth Circuit in *Davis v. Comed, Inc.*[43] In determining the standard for establishing the standing requirement of fair and adequate representation in derivative suits, the *Davis* court stated:

> [A] court should examine any indications that there are extrinsic factors which render it likely that the representative may disregard the interest of the class of members. Indeed, while a plaintiff is not necessarily disabled to bring suit simply because some of his interests

35. *Id.* at 599, 659 S.E.2d at 286.
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.* at 600, 659 S.E.2d at 287.
40. *See id.*
41. *See id.*
42. *Id.* at 606, 659 S.E.2d at 290.
43. *Id.* at 601–02, 659 S.E.2d at 287–88 (citing Davis v. Comed, Inc., 619 F.2d 588, 593–94 (6th Cir. 1980)).

> extend beyond that of the class, *the court may take into account outside entanglements that render it likely that the representatives may disregard the interest of other class members.*[44]

The *Davis* court elaborated that this standard must be analyzed by considering (1) the economic antagonism between the plaintiff limited partner and other limited partners, (2) the plaintiff's enumerated remedy, (3) whether the plaintiff is the driving force behind the litigation, (4) the familiarity of plaintiff with the litigation, (5) other existing litigation between the parties, (6) the magnitude of the plaintiff's personal interest compared with his interest in the derivative claims, (7) any vindictiveness between the parties, and (8) any support or approval obtained from other limited partners.[45]

The supreme court agreed that these factors were relevant for making the "fairly and adequately representing" determination, but the court indicated that the totality of the circumstances must also be evaluated.[46] In concluding that Michael Jennings did not "fairly and adequately" represent the interests of the Partnership for purposes of bringing a derivative action, the trial court and supreme court focused primarily on the economic antagonisms between Michael and the other partners and Partnership.[47] While the supreme court referred to the fact that the other partners did not support Michael's derivative action, it did not address any of the other *Davis* factors in significant detail.[48]

The supreme court identified several examples of Michael's economic antagonism towards the Partnership that, ultimately, precluded him from bringing a derivative suit. First, as a principal of DAMN, LLC—the owner of the Property—Michael had an adverse economic interest in securing as much rental income from the Partnership as possible.[49] Second, as the subtenant to the Lease, he had the adverse economic interest of paying the Partnership as little rent on the Lease as possible.[50] Third, Michael had a personal interest in expanding the dealership by sub-

---

44. *Davis*, 619 F.2d at 593 (emphasis added) (citations omitted) (internal quotation marks omitted).

45. *Id.* at 593–94.

46. *Jennings*, 275 Va. at 602, 659 S.E.2d at 288.

47. *See id.* at 603–04, 659 S.E.2d at 289.

48. *See id.* at 603–05, 659 S.E.2d at 289–90.

49. *Id.* at 603, 659 S.E.2d at 289.

50. *Id.*

ordinating the Partnership's interest to his own construction loan.[51] Fourth, when offering to purchase his siblings' partnership interest in the Partnership, Michael had expressed an interest in "control[ling] the partnership and the land."[52] Finally, on behalf of DAMN, LLC, he had instigated and participated in arbitration proceedings against the Partnership regarding a rent dispute.[53]

Arguing that the "economic antagonism must exist between the plaintiff's economic interest and the claims raised in the derivative action," Michael asserted that Louis' actions adversely impacting the Partnership's income stream were not related to any of Michael's alleged economically antagonistic actions.[54] The supreme court disagreed, stating:

> Economic interests that may not be directly antagonistic to the claims made in the derivative suit may, nevertheless, have an impact on the derivative plaintiff's ability to fairly and adequately maintain the litigation in the best interests of the partnership and the other limited partners. Accordingly, in applying the *Davis* factors, it is appropriate to consider economic interests that may influence the derivative plaintiff's judgment in the management of the litigation . . . .[55]

Thus, the supreme court dismissed Michael's position and held that because Michael was generally economically antagonistic to the Partnership, his economic interests should properly be considered a factor in precluding Michael from representing the interests of the limited partners or Partnership for purposes of bringing the derivative action.[56]

Although the supreme court focused primarily on Michael's economic antagonism, it also evaluated his relationship with the other limited partners and the weight this had on the other factors the trial court was required to consider.[57] Michael did not contest that the other limited partners did not support his action against Louis or the Partnership but argued that lack of support of the others, who were both limited and general partners, was

---

51. *Id.*
52. *Id.*
53. *Id.* at 604, 659 S.E.2d at 289.
54. *Id.* at 602–03, 659 S.E.2d at 288.
55. *Id.* at 603, 659 S.E.2d at 289.
56. *See id.* at 603–04, 659 S.E.2d at 289.
57. *See id.* at 604–05, 659 S.E.2d at 289–90.

the "very essence of a derivative claim."[58] Michael asserted that because he was statutorily required to show that the general partners refused to bring the claim or would not bring it if asked, the dissent of the few remaining limited partners was "not a preclusion to the derivative claim, but a requirement."[59] Although the supreme court agreed with Michael that having only a few partners within a limited partnership may be relevant in analyzing proper representation under the *Davis* test and that it may not be possible to obtain support and consent from the other partners when there are only a few other limited partners involved, it determined that this factor "does not overshadow all other factors."[60] In light of all the circumstances involved—such as the level of Michael's economic antagonism to the Partnership—the court held that this one factor did not warrant a finding that Michael "fairly and adequately represented" the interests of the limited partners or the Partnership.[61] Thus, the supreme court affirmed that Michael lacked standing to bring a derivative claim on the Partnership's behalf and dismissed his derivative claims against Louis and the Partnership.[62] Moreover, the supreme court also determined that Louis and the Partnership were entitled to attorney's fees in defending against Michael's appeal pursuant to Virginia Code section 50-73.65 and remanded the matter to the trial court for that purpose.[63]

B. *Impact on Limited Partners' Claims and Ability to Seek Redress*

The supreme court's ruling in *Jennings* presents certain hurdles for economically antagonistic limited partners who have allegedly suffered from the actions of the general partner(s) and want to seek redress. For example, if the harm suffered by the limited partner cannot be distinguished from the harm caused to the partnership or other limited partners, the partner would be required to bring a derivative claim—instead of a direct claim—to recover the damages incurred by the partnership. However, if

58. *Id.*
59. *Id.* at 605, 659 S.E.2d at 290.
60. *Id.*
61. *Id.*
62. *See id.* at 605–06, 659 S.E.2d at 290.
63. *Id.* at 606, 659 S.E.2d at 290; *see* VA. CODE ANN. § 50-73.65 (Repl. Vol. 2009).

the limited partner plaintiff is economically antagonistic to the partnership, he could be precluded from bringing a derivative action on behalf of the partnership because, based on *Jennings*, he may not fairly and adequately represent the interests of the partnership or other limited partners.[64] Accordingly, depending on the circumstances and harm involved, that limited partner could be prevented from bringing *any* claim to recover for damage incurred either directly or derivatively.

Additionally, the limited partner is likely to possess the characteristics that make him economically antagonistic prior to the ripening of any claim against the general partner(s), and once these characteristics exist, they likely cannot be changed. Furthermore, because *Jennings* requires each limited partner plaintiff to be evaluated on a case-by-case basis to determine if he fairly and adequately represents the interest of the partnership,[65] it may be difficult to specifically ascertain what level of potential or actual economic adversity or other relevant factor would preclude pursuit of the derivative claim. Must the antagonism be as pervasive as the supreme court determined Michael Jennings to be, or could it be as minor as having personal economic incentive to receive a distribution instead of having such distribution reinvested into the partnership as a whole? Although the latter likely would not in and of itself amount to economic antagonism sufficient to preclude the bringing of a derivative action, in light of *Jennings'* assertion that *all* relevant circumstances be considered, there is no bright-line test or definition that automatically "protects" the limited partner in this kind of a situation. What about the other *Davis* factors or other non-enumerated factors not specifically analyzed or discussed in detail in *Jennings*? Again, as *Jennings* does not establish a bright-line test for analyzing these factors, there is a significant level of ambiguity and factual variation as to when a limited partner can and cannot bring a derivative claim on behalf of a partnership.

As a result, if a general partner perceives that the power of a limited partner to bring either a direct or derivative claim is restricted or entirely precluded—especially if any other limited partners are aligned with the general partner—*Jennings* may have the indirect effect of promoting the "designing schemes and

64. *See id.* at 601, 659 S.E.2d at 287.
65. *See id.* at 602, 659 S.E.2d at 288.

wiles of insiders who are willing to betray their company's interests in order to enrich themselves."[66] This result is directly contrary to the intent and purpose of derivative suits.[67] Thus, a limited partner who is precluded from pursuing a derivative claim under *Jennings* may end up "stuck" in a limited partnership that continues to suffer harm at the hands of the general partner(s) with little or no ability to seek a judicial remedy for such harm.

IV. SO WHAT CAN A POTENTIALLY "*JENNINGS*-PRECLUDED" LIMITED PARTNER DO?

A. *Responsibility of Practitioner Representing Limited Partners*

Based on *Jennings*, the attorney representing a limited partner contemplating an action against the general partner(s) in a limited partnership must not only determine whether the client's claims are direct or derivative in nature, but also whether, in light of the *Davis/Jennings* factors, the client "fairly and adequately represents" the interests of the partnership or other limited partners.[68] Prior to filing any complaint, the attorney must carefully review the entire scope of the *Jennings* factors with the client to determine what risks, if any, exist that would cause a derivative claim to be dismissed for failure to fairly and adequately represent the interests of the other limited partners or the partnership. Although clearly the economic antagonism factor primarily relied upon in *Jennings* must be examined, all other enumerated and non-enumerated potentially relevant factors must also be discussed and considered. If such risks are identified, the attorney must counsel the client on the ramifications and consider if there are other potential remedies to address the situation. If there is a likelihood that the client could be considered economically antagonistic or otherwise fail the scrutiny of

66. Simmons v. Miller, 261 Va. 561, 573, 544 S.E.2d 666, 674 (2001) (quoting Surowitz v. Hilton Hotels Corp., 383 U.S. 363, 371 (1966)).

67. *See id.* (noting that derivative suits are meant to protect shareholders and partners from insiders' schemes).

68. Although *Jennings* involved only a limited partnership, there is a chance that these factors could be used to determine when a shareholder in a Virginia corporation or member in a Virginia limited liability company also has standing to bring a derivative action, as the language "fairly and adequately represents" is included in the Virginia Stock Corporation Act as well as the Virginia Limited Liability Company Act for defining when a shareholder or member may bring such an action. *See* VA. CODE ANN. § 13.1-672.1(A)(4) (Cum. Supp. 2009); *id.* § 13.1-1042 (Repl. Vol. 2006 & Cum. Supp. 2009).

the *Jennings* factors, the client must be informed of the possibility of dismissal as well as the potential that the attorney's fees incurred by the general partner(s) in defending against such action could be assessed to the client.[69] There should then be an open discussion between the attorney and client about how to proceed and the risks and benefits of doing so.

B. *Potential Remedies*

There are several remedies available to a limited partner plaintiff pursuing a derivative action. Depending on the specific situation, there may be other options or remedies to consider, but the ones identified herein likely have the broadest application.[70]

1. Bring the Derivative Claim, Focusing on Why the Limited Partner Does Fairly and Adequately Represent the Limited Partnership.

It very well may be that, upon discussing and analyzing the factors in *Jennings*, the attorney and client feel comfortable that the client fairly and adequately represents the interests of the partnership or other limited partners. Maybe the limited partner is not truly economically antagonistic to the partnership. Perhaps, even if the limited partner is economically antagonistic, other relevant factors under the *Jennings* test would still allow the limited partner to proceed with the claim. For example, consider the situation in which there is only one limited partner and only one general partner in the limited partnership. A court could determine that the limited partner—the only potential plaintiff in a derivative setting—is the only person who could prevent egregious harm to the partnership. As such, the court could determine that the potential ongoing harm to the partnership outweighs the economic antagonism of the plaintiff and rule that the limited partner fairly and adequately represents the interests of the partnership. Further, the limited partner plaintiff, even if eco-

69. *See Jennings*, 275 Va. at 606, 659 S.E.2d at 290 (quoting VA. CODE ANN. § 50-73.65 (Repl. Vol. 2009)).

70. As each situation is factually distinct, this article does not, nor cannot, identify and/or discuss in detail every potential remedy or option that may exist or be appropriate for a given client. Accordingly, this article only highlights and summarily discusses certain options that may be available given the rulings in *Jennings*.

nomically antagonistic to the partnership or general partner(s), may have the support of other limited partners to pursue the derivative claim. However, because there is no bright-line test to determine who "fairly and adequately" represents the interests of the limited partners or partnership, all the facts and issues must be considered to evaluate whether the limited partner's derivative claim will pass muster.

2. Re-Analyze the Ability to Bring a Direct Cause of Action

Although the attorney and limited partner plaintiff may have initially dismissed the possibility of bringing a direct claim, they may wish to reevaluate whether a distinguishable harm to the limited partner can be established or if there are other non-derivative claims that can be brought. A direct claim may be proper when the limited partner can show that the general partner breached an individual fiduciary duty to the limited partner that has caused a harm distinguishable from any harm caused to the partnership or the other limited partners. For example, the limited partner may be able to bring a direct breach of fiduciary duty claim against a general partner who intentionally fails to make proper distributions to that limited partner despite the fact that the general partner has provided proper distributions to the other limited partners. In this situation, the limited partner appears to be injured in a way that the other limited partners and partnership have not, and, thus, the harm to the individual limited partner is unique and arguably distinguishable. Although the supreme court has held that, under Virginia law, directors of a corporation and managing members of a limited liability company do not owe a fiduciary duty to individual shareholders or members, a general partner does owe a fiduciary duty to individual limited partners and other general partners in a limited partnership.[71]

71. *See* Remora Invs., L.L.C. v. Orr, 277 Va. 316, 322, 673 S.E.2d 845, 847 (2009) (contrasting fiduciary duties under Virginia's general partnership law to corporate and limited liability company law). Virginia's law on general partnerships provides that "a partner owes to the partnership and the other partners . . . the duty of loyalty and the duty of care . . . ." VA. CODE ANN. § 50-73.102(A) (Repl. Vol. 2009). The Virginia Limited Partnership Act contains similar requirements of general partners unless the limited partnership agreement states otherwise. *Id.* § 50-73.29(B) (Repl. Vol. 2009) ("Except as provided in this chapter or in the partnership agreement, a general partner of a limited partnership has the liabilities of a partner in a partnership without limited partners to the partnership

Under similar theories, a direct claim may be the proper remedy when the general partner has breached the partnership agreement in a way that caused distinguishable harm to the limited partner. Likewise, if the general partner made misrepresentations to the limited partner for purposes of inducing that limited partner to invest in the limited partnership and the limited partner ultimately relied on these misrepresentations to his detriment, then a direct claim for fraud in the inducement may be available. After fully discussing the *Jennings* factors and the potential preclusion of a derivative claim, other facts may surface that lead the attorney and limited partner plaintiff to determine that a direct claim may truly be appropriate.

3. Consult Other Limited Partners

If the potential limited partner plaintiff and counsel evaluate the *Jennings* factors and conclude that the derivative claim could be dismissed for the plaintiff's failure to fairly and adequately represent the interests of the other limited partners or partnership, the limited partner may want to consult the other limited partners to determine whether they would support his derivative claim. If the limited partner believes that even with other limited partners' support he would still be precluded from bringing the derivative claim, he might inquire as to the other limited partners' interest in pursuing the claim. Although such conversations should be carefully undertaken so as not to amount to potential conspiracy, consulting with the other limited partners to determine their level of support appears to be crucial for meeting the *Jennings* test.[72] Accordingly, in addition to being a practical consideration, it is likely that any limited partner who pursues a derivative action would need to describe in his initial pleading the level of support received from other limited partners in order to establish that he met the "fairly and adequately representing" standard.

4. Withdrawal from or Dissolution of the Limited Partnership

If the limited partner ultimately determines that his claim would have to be brought derivatively, he would likely be pre-

---

and to the other partners.").

72. *See Jennings*, 275 Va. at 604–05, 659 S.E.2d at 289–90.

cluded from bringing such a derivative action for failing to fairly and adequately represent the partnership, and other limited partners are unwilling to bring the action on behalf of the limited partnership, the limited partner may then look for a way to exit the limited partnership in order to limit any harm. The limited partner could do this in two ways: either attempt to disassociate and withdraw from the limited partnership[73] or attempt to seek dissolution of the limited partnership.[74]

In order to withdraw from the limited partnership, the limited partner must review and consult the limited partnership agreement and determine what requirements must be met before withdrawal is allowed.[75] In order to seek judicial dissolution of the limited partnership, a limited partner may petition the circuit court to dissolve the limited partnership upon a finding that "it is not reasonably practicable to carry on the business in conformity with the partnership agreement."[76] However, depending on the factual situation, the court could determine that dissolution is not appropriate because the limited partnership could reasonably carry on pursuant to the partnership agreement despite the alleged wrongdoing of the general partner(s).[77] Further, as there are significant tax and other financial considerations that result from withdrawal from or dissolution of a partnership, it is crucial for the limited partner attempting to pursue these remedies to seek appropriate counsel and advice to evaluate the overall ramifications of such actions.

5. Proactive Considerations

Given the *Jennings* ruling, there are several matters a potential limited partner should consider in addition to the business, financial, and legal issues that are normally considered prior to

---

73. *See* VA. CODE ANN. § 50-73.38 (Repl. Vol. 2009) (setting forth the circumstances in which a limited partner may withdraw from a limited partnership).

74. *See id.* § 50-73.50 (Repl. Vol. 2009) (setting forth the requirements for a judicial dissolution of a limited partnership).

75. *Id.* § 50-73.38 (Repl. Vol. 2009).

76. *Id.* § 50-73.50 (Repl. Vol. 2009).

77. *See, e.g.*, Dunbar Group, LLC v. Tignor, 267 Va. 361, 367–68, 593 S.E.2d 216, 219 (2004) (finding that even upon the expulsion of a member of a limited liability company ("LLC"), the business was still viable and thus the court could not dissolve the LLC). Although this case involved a LLC and not a limited partnership, it is likely that the dicta in *Dunbar* would be instructive to a court being asked to consider dissolution of a limited partnership.

entering into or joining a limited partnership. First, the potential limited partner should consider that should a dispute arise regarding the actions of the general partner(s), the potential limited partner's business ventures or other characteristics could preclude him from bringing a derivative action on behalf of the partnership. If the potential limited partner would be precluded from bringing a derivative suit, the potential limited partner should consider whether the benefits of joining the limited partnership outweigh the risk of claim preclusion and seek advice from counsel regarding whether there is a way to structure the potential limited partner's ownership interest in a way that would not preclude the ability to bring a derivative action.

Second, the potential limited partner may be able to negotiate with the general partner(s) to include terms in the partnership agreement that allow for the limited partner to withdraw based on parameters deemed crucial to the potential limited partner. Finally, the potential limited partner should review the partnership agreement to ensure that nothing in it precludes the limited partner from bringing an individual claim for breach of fiduciary duty. Although potential limited partners likely do not have strong leverage to negotiate partnership agreement terms that have already been predetermined by the general partner(s), if the general and limited partners are on "equal footing" or are at the nascent stages of negotiating and structuring such an agreement, it may be possible to include terms favorable to the limited partner.

V. CONCLUSION

Jennings presents almost as many questions as it intended to resolve by holding that a limited partner must "fairly and adequately" represent the interests of a partnership or other limited partners when bringing a derivative action. Although ambiguity exists, *Jennings* does provide guidance for the limited partner plaintiff and his attorney in evaluating potential claims and remedies for perceived and actual harms. Accordingly, all the issues, facts, circumstances, relationships involved in the limited partnership, and potential claims should be thoroughly reviewed, discussed, and analyzed prior to filing any claim.

***