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Zombies Attack Inadvertent Partnerships!—How Undead Precedents Killed By Uniform Statutes Still Roam the Reporters

Joseph K. Leahy
South Texas College of Law Houston

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ZOMBIES ATTACK INADVERTENT PARTNERSHIPS!
—HOW UNDEAD PRECEDENTS KILLED BY
UNIFORM STATUTES STILL ROAM THE REPORTERS

Joseph K Leahy *

ABSTRACT

Recently, the Texas Supreme Court breathed new life into some ancient zombies—zombie precedents, that is!—which have long lurked in the shadows of the nation’s partnership formation caselaw. This Article tells the story of those undead cases—describing them, debunking them, and plotting their demise.

This zombie tale begins with the supposed black-letter law of partnership formation. In nearly every state, formation of a general partnership is governed by one of two uniform partnership acts. Under both acts, a business relationship ripens into a partnership whenever the statutory definition of partnership is satisfied. The parties’ intent to become “partners” (or not) is always, either explicitly or implicitly, one of the required elements of this definition. However, a storied line of cases holds—and the more recent uniform partnership act explicitly states—that the parties’ subjective intent to be partners (or not) is not dispositive as to formation. Therefore, law students learn as “settled law” that two parties cannot avoid formation of a partnership simply by signing a contract not to be partners. If the two parties’ business relationship satisfies the elements of partnership as a factual matter, the supposed “black-letter law” dictates that the two parties have formed an inadvertent partnership, even if they previously agreed not to become partners.

Thing is, the caselaw was never really settled. In fact, an even more ancient—but far less famous—line of cases holds that the

* Professor of Law, South Texas College of Law—Houston. Thanks to my colleagues at South Texas, including Gary Rosin in particular, for helping me develop the idea for this Article. Thanks also to Doug Moll, Christine Hurt, and Beth Miller for our many discussions about inadvertent partnerships, and to Evan Seale and Cameron Keener for their research assistance. No actual zombies were harmed in the writing of this Article.

parties' intent not to form a partnership is dispositive as between themselves. Further, from time to time courts have mistakenly given effect to parties' agreements not to be partners without even considering the applicable partnership statute. Both types of cases appear in some modern treatises but have largely escaped scholarly attention because they are directly at odds with the uniform statutes.

This Article finally brings the obscure, subjective-intent line of cases out of the shadows and gives them a close review. After briefly describing the ancient line of cases and the uniform partnership acts, this Article concludes that the latter were enacted (in part) to eliminate the former. Yet, modern courts unwittingly continue to cite the old subject intent cases, as well as the cases that simply ignore partnership law—occasionally allowing parties to contract around partnership as a matter of law. Hence, the subjective-intent cases are zombies—killed by the uniform acts, but still wandering the treatises, upending partnership law.

Two years ago, the Texas Supreme Court faced a case that pitted the two lines of cases—one famous, one forgotten—against each other. It all began with a massive, highly publicized jury's verdict that two energy companies had formed a joint venture (a form of partnership) despite initially agreeing not to do so unless and until their boards approved (which never happened). Subsequently, an appellate court overturned the verdict and held that the parties contracted around partnership formation as a matter of law; the Texas Supreme Court later upheld the reversal. This erroneous decision could revitalize the undead subjective-intent cases, sending them on a nationwide rampage to destroy inadvertent partnership formation.

The only way to destroy a zombie is to obliterate its brain. In this case, the "brain" of the subjective-intent cases—i.e., what animates them—is the failure of legal research websites to recognize their death at the hands of the uniform partnership acts. Accordingly, the next court to address the issue of whether parties can contract around partnership should describe these cases as abrogated, thereby marking them with a red flag. Squarely repudiating the subjective-intent cases will effectively blow those ancient zombies to smithereens.

TABLE OF CONTENTS

INTRODUCTION.....	386
I. THE LAW OF PARTNERSHIP FORMATION.....	394
A. <i>A Simple Partnership: Shaun and Ed Sell Electronics</i>	394
1. Two or More People, Associated as Co-Owners of a For-Profit Business	394
a. The Longstanding, Near Universal Test for Partnership.....	395
b. Application of the Test to Shaun and Ed.....	397
2. Sharing Profits and Its Connection to Being Co-Owners	398
3. The Role of Intent: “Subjective” v. “Objective”	399
B. <i>A Simple Partnership with One Caveat: Shaun and Ed Disclaim Partnership</i>	401
1. Under UPA. Disclaimers of Partnership Were Not Dispositive	401
a. <i>Martin v. Peyton</i>	402
i. Factual Background	403
ii. Litigation and Holding	404
iii. Rejection of the Subjective-Intent Test.....	406
2. RUPA Explicitly Adopted Courts’ Interpretation of UPA.....	406
3. Under TBOC, Intent <i>Not</i> to Be Partners is Merely a “Factor”	407
C. <i>Enterprise Products Upends the Law of Partnership Formation</i>	409
II. THE ZOMBIE LINE OF CASES—DESCRIBED.....	411
A. <i>The Seeming Exception in Action: Uncertainty for Shaun and Ed</i>	412
B. <i>Treatises Describing the Seeming Exception</i>	414
1. <i>Partnership Law and Practice</i>	414
2. <i>Bromberg and Ribstein on Partnership</i>	416

3.	<i>The Revised Uniform Partnership Act</i>	418
C.	<i>The Seeming Exception That Was Not</i>	419
1.	The Life and Death of the Subjective-Intent Line of Cases	419
a.	The Subjective-Intent-Governs-Inter-Se Rule Predates UPA.....	419
b.	UPA Indirectly Kills the Ancient Rule	422
c.	A Triumph of the Objective Definition.....	427
d.	RUPA and TRPA/TBOC Intended the Supposed Exception to Stay Dead.....	428
2.	Abrogation by Statute Means Death to the Common Law.....	429
3.	How to Identify—and Kill—a Zombie Precedent.....	429
D.	<i>Rise of the Zombies: The Purported Exception That Would Not Die</i>	431
1.	Litigants Continue to Cite the Seeming Exception	431
2.	Treatises Have Failed to Destroy the Seeming Exception	431
III.	THE ZOMBIE LINE OF CASES—DEBUNKED	432
A.	<i>Cases Cited in Partnership Law and Practice</i>	434
1.	Pennsylvania Cases: <i>Rosenberger</i> and <i>Kingsley Clothing</i>	435
2.	Maryland Case: <i>Garner</i>	437
3.	North Carolina Case: <i>Carefree Carolina Communities</i>	440
4.	Washington Case: <i>Cusick</i>	441
B.	<i>Cases Cited in Bromberg and Ribstein on Partnership</i>	442
1.	Pre-UPA Cases—Alabama, Connecticut, Kansas, and Massachusetts.....	444
a.	Alabama Cases: <i>Adams</i> and <i>Waters</i>	444
b.	Kansas Case: <i>Grimm</i>	445
c.	Massachusetts Case: <i>Rosenblum</i>	445

2. Post-UPA Cases with Pre-UPA Facts.....	446
a. Connecticut Case: <i>Greenhouse</i>	446
b. Texas Case: <i>Holman</i>	447
3. Likely Post-UPA Cases—Florida, Michigan, Georgia, and Texas.....	448
a. Florida Case: <i>Myers</i>	448
b. Michigan Cases: <i>Snell</i> and <i>LeZontier</i>	449
c. Georgia Case: <i>Mabry</i>	451
d. Texas Cases: <i>Claycomb</i> and <i>Griffin</i>	452
i. <i>Claycomb</i>	452
ii. <i>Griffin</i>	453
4. Cases Stating a Higher Standard of Proof as Between the Parties	454
a. Vermont Cases: <i>Cressy</i> , <i>Harman</i> , and <i>Raymond S. Roberts, Inc.</i>	454
b. Arizona Case: <i>Mercer</i>	455
C. <i>Case Cited in The Revised Uniform Partnership Act</i>	456
1. Oregon Case: <i>Westerlund</i>	456
CONCLUSION	458

Mere words will not blind us to realities. Statements that no partnership is intended are not conclusive. If as a whole a contract contemplates an association of two or more persons to carry on as co-owners a business for profit a partnership there is.

— Judge William S. Andrews, New York Court of Appeals¹

As between the parties themselves partnership is a matter of intention, and where they expressly declare that they are not partners this settles the question, for . . . the law permits them to agree upon their legal status and relationship inter se.

— Justice Horace Stern, Supreme Court of Pennsylvania²

Who died and made you [expletive] King of the Zombies?

— Ed, *Shaun of the Dead*³

INTRODUCTION

Recently, two massive, Texas-based energy pipeline companies, plaintiff Energy Transfer Partners (“ETP”)⁴ and defendant Enterprise Products Partners (“Enterprise”),⁵ engaged in a knock-down, drag-out dispute—the hottest partnership case the Lone Star

1. *Martin v. Peyton*, 158 N.E. 77, 78 (N.Y. 1927).

2. *Kingsley Clothing Mfg. Co. v. Jacobs*, 26 A.2d 315, 317 (Pa. 1942) (citing *Kaufmann v. Kaufmann*, 70 A. 956, 959 (Pa. 1908)).

3. *SHAUN OF THE DEAD* (Focus Features 2004).

4. See *Corporate Overview*, ENERGYTRANSFER.COM, https://web.archive.org/web/20190321005354/https://energytransfer.com/company_overview.aspx [https://perma.cc/4M7S-WEGY] (explaining that, after a ETP merged with another pipeline company in 2018, “[t]he combined company, now called Energy Transfer LP . . . is one of the largest MLPs by Enterprise Value” and “owns and operates one of the largest and most diversified portfolios of energy assets” in the US); *Fortune 500: 64—Energy Transfer Equity*, FORTUNE, <https://fortune.com/fortune500/energy-transfer-equity/> [https://perma.cc/U924-JXJV] (listing ETE as number 64 on Fortune magazine’s annual list of the largest American companies by revenue for 2018, prior to the 2018 merger).

5. See *About Us*, ENTERPRISE PRODUCTS PARTNERS L.P., <https://www.enterpriseproducts.com/about-us> [https://perma.cc/9VQ5-3PNH] (explaining that Enterprise “is one of the largest publicly traded partnerships and a leading North American provider of midstream energy services to producers and consumers of natural gas, natural gas liquids . . . , crude oil, refined products and petrochemicals”); *Fortune 500: 105—Enterprise Products Partners*, FORTUNE, <https://fortune.com/fortune500/2018/search/> [https://perma.cc/U924-JXJV] (listing Enterprise as number 105 on Fortune magazine’s annual list of the largest American companies by revenue for 2018).

State has seen in years”⁶—that went all the way to the Texas Supreme Court. The key issue in that case, *Energy Transfer Partners, L.P. v. Enterprise Products Partners, L.P.* (“*Enterprise Products*”),⁷ was whether two sophisticated parties could contract around formation of a joint venture (a type of partnership⁸) as a matter of law.⁹

Yet, the media frenzy surrounding *Enterprise Products* made no mention of the most frightening discovery related to the case: zombies! Research for an amicus brief filed in the case¹⁰ led this Author to unearth an obscure¹¹ line of zombie precedents—long-overruled cases that simply never died, and which continue to be cited by courts and treatises alike as if they are good law.¹²

Unfortunately, the Texas Supreme Court unwittingly sided with the zombies in *Enterprise Products*, thereby possibly breathing new life into these undead cases.¹³ This Article tells the story of those zombies and describes how they should meet their end. The next time a non-Texas court faces the issue of contracting around partnership, that court should destroy the zombies once and for all. Only decisive action will stop them from running amok in the nation’s partnership caselaw.

* * *

This tale of the living dead begins in 2014, when ETP won a widely reported¹⁴ half-billion dollar judgment resulting from a

6. See *What Is a Texas Partnership: The Answer to Come Soon in the Case of ETP v. Enterprise Products Partners LP*, WINSTEAD BUS. DIVORCE (Feb. 27, 2017), <https://www.winsteadbusinessdivorce.com/2017/02/texas-partnership-answer-come-soon-case-etp-v-enterprise-products-partners-lp/> [<https://perma.cc/98HV-ZEM5>].

7. 593 S.W.3d 732 (Tex. 2020).

8. Courts typically “use the term ‘joint venture’ to mean a partnership for a limited time or objective.” Joseph K. Leahy, *Undead Dicta or Holdings? A Closer Look at Partnership Cases Stating that Subjective Intent Governs Inter Se*, 21 U.N.H. L. REV. 1, 54 (2023).

9. See *Enterprise Products*, 593 S.W.3d at 734.

10. Amicus Brief in Support of Petitioners, *Energy Transfer Partners, L.P. v. Enter. Prods. Partners, L.P.*, No. 17-0862 (Tex. Apr. 11, 2019) (submitted by Joseph K. Leahy), available at <https://tinyurl.com/LeahyAmicusEPPvETP> [<https://perma.cc/7AC9-92B8>]. See also *Enterprise Products*, 593 S.W.3d at 740 n.31 (describing amici filed by academics and energy industry sources).

11. The Author’s conversations with colleagues at other law schools suggest that this line of cases is not widely known even to academic experts on partnership law.

12. See *infra* Part II.C.3.

13. See *infra* Part I.C.

14. See, e.g., *Jury: Energy Transfer Partners and Enterprise Had Legal Partnership*, DALL. MORNING NEWS (Mar. 4, 2014, 9:22 PM), <https://www.dallasnews.com/business/energ>

\$914 million jury verdict.¹⁵ In that verdict, the jury found that Enterprise and ETP created a partnership “to market and pursue a pipeline project to transport crude oil,”¹⁶ despite having agreed (in a “non-binding” letter of intent) *not* to be partners until both of their boards signed off on the deal.¹⁷ The jury also found that Enterprise breached its duty of loyalty to ETP by developing an oil pipeline with a competitor, Enbridge Inc.¹⁸

But like in any good zombie flick, there was a shocking twist: in 2016, in a highly publicized opinion,¹⁹ a Dallas-based court of appeals reversed the *Enterprise Products* trial court’s judgment.²⁰ In striking down the jury verdict, the court of appeals held, as a matter of law, that Enterprise and ETP never formed a partnership because (1) the letter of intent contained valid conditions precedent to forming a partnership and (2) those conditions precedent were neither satisfied nor waived.²¹ The appellate court offered no other basis for holding that no partnership existed.²²

In particular, the court of appeals in *Enterprise Products* never suggested (and defendant-appellant Enterprise never argued on appeal²³) that the evidence at trial was insufficient to support a

y/2014/03/04/jury-energy-transfer-partners-and-enterprise-had-legal-partnership [https://perma.cc/46AQ-BYKZ]; *How Texas Oil Company Won \$319 Million ‘Common Law’ Partnership Verdict*, REUTERS (Mar. 7, 2014, 5:31 PM), <https://www.reuters.com/article/idUK237799286420140307> [https://perma.cc/9YTS-M84Q].

15. The jury found that Enterprise owed ETP \$914 million—\$319 million in damages and about \$595 million in disgorgement of funds “gained as a result of its misconduct.” *Enterprise Products*, 593 S.W.3d at 736. However, the trial court judge “reduced the disgorgement award to \$150 million,” resulting in a final judgment of about \$469 million. *Id.*

16. *Enter. Prods. Partners, L.P., v. Energy Transfer Partners, L.P.*, 529 S.W.3d 531, 536 (Tex. App. 2017).

17. *See id.*

18. *See id.*

19. *See, e.g.,* Charles Sartain & Chance Decker, *Pipeline Partnership Verdict Reversed*, GRAY REED (July 25, 2017), <https://www.energyandthelaw.com/2017/07/25/pipeline-partnership-verdict-reversed/> [https://perma.cc/9QMD-2Q86].

20. *See Enter. Prods. Partners, L.P.*, 529 S.W.3d at 533 (reversing judgment for plaintiff ETP).

21. *See id.* (outlining the court’s three conclusions as: “1. The unfulfilled conditions precedent in the parties’ written agreements precluded forming the alleged partnership unless ETP obtained a jury finding that the parties waived those conditions precedent; 2. ETP’s failure to request such a finding meant that it had to establish waiver of the conditions precedent as a matter of law; and 3. ETP did not prove as a matter of law that the parties waived the conditions precedent.”).

22. *See id.* (offering only the aforementioned three grounds for its opinion).

23. *See* Brief of Appellees at 1, 4, 19–21, *Enter. Prods. Partners, L.P. v. Energy Transfer Partners, L.P.*, No. 05-14-01383-CV (Tex. App. June 29, 2015) (explaining that defendant-appellant Enterprise did not argue on appeal that the evidence at trial was insufficient to establish a partnership), *available at* <https://tinyurl.com/ETPApelleeBr> [https://perma.cc/

finding of partnership formation *in the absence* of the parties' written agreements.²⁴ Further, while the appellate court's decision explicitly turned on conditions precedent, the logic of its reasoning was not limited to any particular type of contact clause.²⁵ Hence, the implication of the appellate decision was that, regardless of what contractual mechanism the parties use, if they *agree* not to form a partnership, no partnership will exist *as a matter of law*—even if there is sufficient evidence at trial from which a jury can find that the parties satisfied the statutory definition of partnership as a *factual* matter.

In January 2021, the Texas Supreme Court upheld the court of appeals' decision, opining that “Texas law permits parties to conclusively agree that, *as between themselves*, no partnership will exist unless certain conditions are satisfied.”²⁶

At first glance, this is simply not the law of Texas or anywhere else in the United States—nor has it been for nearly a century, since the advent of modern partnership statutes.²⁷ As most any professor of partnership law would opine,²⁸ the uniform partner-

L6KD-SASG]; *see also generally* Brief of Appellant, *Enter. Prods. Partners, L.P. v. Energy Transfer Partners, L.P.*, No. No. 05-14-01383-CV (Tex. App. Mar. 30, 2015), available at <https://tinyurl.com/ETPAppellantBr> [<https://perma.cc/MR9Z-4UB7>].

24. *See generally* *Enter. Prods. Partners, L.P.*, 529 S.W.3d 531.

25. Further, in upholding the appellate court's decision, the Supreme Court explicitly stressed the importance of the “freedom of contract” in Texas. *Enterprise Products*, 593 S.W.3d at 737–40 (reasoning that “no principle of law is as deeply engrained in Texas jurisprudence as freedom of contract”). If freedom of contract is so important, why deny parties the freedom to contract around partnership *however* they see fit—using conditions precedent or some other contractual mechanism?

26. *Id.* at 734 (emphasis added). The court opined further that “[s]uch an agreement would not, of course, bind third parties” and did not consider the effect of its decision (if any) on such parties. *Id.* at 741 n.34. Despite this language, one partnership expert has expressed concern that the *Enterprise Products* decision might be expanded to apply as to third parties. *See* Douglas K. Moll, *Contracting Out of a Partnership*, 22 *TRANSACTIONS: TENN. J. BUS. L.* 239, 249 (2021).

27. *See infra* Part I.A & B. Shortly before this Article went to press, Professor Doug Moll published an article addressing this exact issue. *See generally* Douglas K. Moll, *Contracting Out of Partnership*, 47 *J. CORP. L.* 753 (2022) (arguing that allowing parties to contract out of partnership is inconsistent with the uniform partnership statutes and bad policy). This Author has benefitted from numerous discussions with Professor Moll about the issues discussed herein and his article provides further support for many of the points made herein. This Article cites Professor Moll's article below, but due to impending publication deadlines there was insufficient time to cite that article as much as might otherwise have been warranted. The reader is therefore urged to carefully review Professor Moll's entire article for further support of the arguments advanced herein.

28. In two different anonymous surveys of law professors, more than 90% of those responding agreed with the district court's decision in *Enterprise Products*. The first survey was addressed to all Texas law professors who regularly teach business associations. *See id.*

ship statutes enacted in (almost²⁹) every state provide that parties *cannot* avoid formation of a partnership by simply denying that they are partners when they have nonetheless satisfied the statutory test for partnership as a factual matter.³⁰ Hence, by ignoring the explicit dictates to the statute governing partnership formation, the Texas Supreme Court essentially re-wrote the statute without even acknowledging it.

But *Enterprise Products* is not alone in privileging contract-based arguments over the applicable partnership statutes. In a smattering of cases, courts from Texas and elsewhere have held or reasoned that the parties could avoid formation of partnership as a matter of law simply by agreeing not to be partners³¹—or, at least, that the parties’ intent not to attain the legal status of partners is dispositive as to partnership formation.³² In some such cases, the court never bothered to address the statutory rules for partnership formation and instead simply gave effect to the parties’ agreements as a matter of contract law.³³ This is inconsistent with the partnership statutes in effect in all such jurisdictions, and especially those statutes that—like Texas’s—track the latest

Of thirty-eight professors polled, nine responded—eight of whom have taught partnership law. See Joseph K. Leahy, *An LLC is the Key: The False Dichotomy Between Inadvertent Partnerships and the Freedom of Contract*, 52 TEX. TECH L. REV. 243, 294–95, 304–12 (2020) (reporting on a survey of law Texas law professors). All these partnership law teachers agreed that, in a case similar to *Enterprise Products*, the parties could not contract around partnership as a matter of law; the sole dissenting professor had never taught partnership. See *id.* The second survey took place at a panel discussion entitled “Agency, Partnership, LLC’s and Unincorporated Associations: Entity Selection in the 21st Century,” at the Meeting of the Section on Agency, Partnership, LLCs and Unincorporated Associations, at the American Association of Law Schools 2020 Annual Meeting. The survey was posed (in a PowerPoint presentation) to the entire conference room of perhaps sixty people—which presumably included many (but not exclusively) partnership law teachers. Of the fifteen attendees who responded (via software on a smartphone), all agreed that unsophisticated parties cannot contract around partnership as a matter of law; one such respondent believed that sophisticated parties like the litigants in *Enterprise Products* should be able to contract around partnership.

29. Louisiana apparently “is the only state that has adopted neither the Uniform Partnership Act nor the Revised Uniform Partnership Act.” See USLEGAL, <https://partnerships.uslegal.com/partnership/state-laws-governing-partnerships/> [https://perma.cc/MK9U-W4G3]. However, it is possible that even Louisiana follows the same law, since “many of the provisions of the Louisiana law governing partnership are similar to the UPA and RUPA.” *Id.*

30. See *infra* Part I.A & B.

31. See *infra* Part II.B.

32. See *infra* Part II.B.2.

33. See, e.g., *infra* Part III.C.1.

uniform partnership act, which explicitly states that the parties' intent to be partners does not control.³⁴

These cases that privilege contract terms over partnership statutes do not simply come out of nowhere, however. Over a century ago, courts applying the common law of partnership often held that parties' intent to be partners (or not) was dispositive as to whether they were partners as between themselves ("inter se" or "inter sese").³⁵ These cases are consistent with *Enterprise Products*' holding that two parties who co-owned a for-profit business could nonetheless avoid partnership with respect to transactions between themselves, as a matter of law, simply by agreeing that they were *not* partners.³⁶

These old, common-law cases should have passed into history more than a century ago with the advent of uniform partnership statutes.³⁷ These uniform acts standardized the definition of "partnership"—creating a single, unified test for partnership formation in all circumstances, rather than one test as between the parties and a second test as to third persons.³⁸ The uniform partnership acts also clarified that satisfying this definition—not desiring to attain that legal status as "partners"—causes a partnership to form.³⁹ Hence, under the uniform acts, once the objective test for partnership formation is satisfied, the parties are partners for *all* purposes.⁴⁰

Unfortunately, courts in some jurisdictions have continued, occasionally, to cite the old common-law cases about partners as good law.⁴¹ There can be no doubt that such cases are *not* good law, since they fail to recognize the change in law wrought by the modern partnership statutes.⁴² This is particularly true in Texas (at least prior to *Enterprise Products*), where the language of the current partnership statute makes crystal clear that the parties' intent to

34. See *infra* Part I.B.2 & 3.

35. See *infra* Part II.C.1.

36. See *infra* Part II.C.1.

37. See *infra* Part II.C.1.

38. See *infra* Part II.C.1.

39. See *infra* Part II.C.1.

40. See *infra* Part II.C.1.

41. See *infra* Part III (describing, e.g., *Kingsley Clothing Mfg. Co. v. Jacobs*, 26 A.2d 315 (Pa. 1942)).

42. See *infra* Part II.C.2 (discussing statutory abrogation of common law precedents and per incuriam decisions).

be partners does not control.⁴³ Yet, no court or commentator has described the death and after-death rise of this zombie line of cases—until now.

This Article reviews every case cited in three reputable national partnership treatises for the proposition that the parties' intent to be partners is dispositive as to partnership formation *inter se*. As it turns out, each such case either (1) pre-dates, and was therefore abrogated by, the relevant jurisdiction's own first adoption of one of the uniform partnership acts; (2) cites only cases that predate that jurisdiction's uniform act adoption without recognizing that such adoption abrogated the common law rule; or (3) gives effect to the parties' agreement solely as a matter of contract law, thereby completely ignoring both the governing partnership law statute and any controlling partnership law cases.⁴⁴ Further, no such case addresses, much less refutes, the view that adoption of an uniform partnership act abrogated the rule that the parties' subjective intent controls *inter sese*.

Hence, these cases exist solely because judges either (1) were unaware that the common law rules for partnership formation had been overruled by the enactment of the uniform partnership statutes or (2) never bothered to apply the applicable partnership statute.⁴⁵ These cases are not "good law" in any sense of the word, yet nowhere is there a record of their status as bad law. As a result, all these cases are zombie precedents—killed but not fully dead.⁴⁶ They lie in wait in legal research databases, ready to be cited errantly by unsuspecting courts and litigants.

The best way to eliminate this trap for unwary lawyers and judges is for a court to explicitly repudiate all the subjective-intent-governs-*inter-sese* cases. Red-flagging these zombie cases would be akin to a bullet to their undead brains.⁴⁷ Only then will these undead cases stop haunting the partnership formation caselaw.

43. See *infra* Part I.B.

44. See *infra* Part III. However, many cases in groups (1) and (2) do not actually hold that the parties' intent to be partners controls *inter se*. Rather, in these cases, the courts held that the parties were not partners as a *factual* matter. As a result, many of the cases in categories (1) and (2) represent zombie dicta rather than zombie holdings. This Author sorts the two types of zombies in a companion article. See *generally* Leahy, *supra* note 8.

45. See *infra* Part III.

46. See *infra* Part II.C.2 (defining zombie precedents).

47. See *infra* Conclusion.

* * *

The remainder of this Article is organized into three parts and a brief conclusion.

Part I sets forth the basic law of partnership formation,⁴⁸ including the role of the parties' intent to be "partners" (or not) in the partnership formation inquiry.⁴⁹ This Part (1) describes the well-established rule that the parties' desire to attain the legal status of "partners" (or not) is not dispositive and (2) explains that the key question of intent is the parties' intent to become co-owners of a for-profit business (or not).⁵⁰ Part I concludes by describing the Texas Supreme Court's decision in *Enterprise Products*, which seemed contrary to long-settled partnership law in Texas and elsewhere.⁵¹

Part II introduces an older rule, developed at common law before the first uniform partnership act existed (and long before Texas enacted a partnership statute).⁵² Under this common law rule, according to three different treatises, the parties' subjective intent to be partners (or not) *was* (to varying degrees) dispositive as to their legal status *as between themselves*, but *not* as to third parties.⁵³ Yet, as Part II explains, the uniform partnership acts' drafters unequivocally intended to kill the concept of partners-as-to-third-parties—and, in so doing, to destroy the subjective-intent-governs-inter-se line of cases.⁵⁴ Nonetheless, as this Part details, post-uniform act cases continue to cite this rule.⁵⁵

Part III addresses cases that hold—or, more often than not, simply assert⁵⁶—that the parties' intent to be partners controls whether they are partners inter sese.⁵⁷ This Part analyzes every single case cited by one of the three treatises that describe the rule and concludes that none of these cases are properly cited as good

48. *See infra* Part I.A.

49. *See infra* Part I.A.3. & B.

50. *See infra* Part I.A.3. & B.

51. *See infra* Part I.C.

52. *See infra* Part II.A.

53. *See infra* Part II.B.

54. *See infra* Part II.C.

55. *See infra* Part II.D.1.

56. *See Leahy, supra* note 8, at 17–20 (distinguishing between two types of zombie cases: those that merely state undead dicta and those that actually reach haunted holdings); *id.* at 20–89 (determining which cases cited by the above-mentioned three treatises are merely undead dicta and which such cases are haunted holdings).

57. *See infra* Part III.

law for the proposition that the parties' subjective intent to be partners controls partnership formation as between them.⁵⁸ Rather, these cases are (at worst⁵⁹) simply zombie precedents, killed by the uniform acts long ago but left unburied by courts that continue to cite them as good law.⁶⁰

How do we destroy these zombie decisions, so they can no longer haunt the caselaw? To kill a real zombie, its brain must be destroyed so that its animated-but-dead body can no longer function.⁶¹ By analogy, to kill a zombie precedent, it must be deemed abrogated or per incuriam so that it is unlikely to find its way into lawyers' briefs and judicial opinions.⁶² Thus, this Article concludes, to obliterate the zombie partnerships precedents, some court must plant a red flag in each one.⁶³

I. THE LAW OF PARTNERSHIP FORMATION

A. *A Simple Partnership: Shaun and Ed Sell Electronics*

To explicate the black-letter law of partnership formation, let us begin with a hypothetical:

1. Two or More People, Associated as Co-Owners of a For-Profit Business

Imagine that Shaun and Ed, two adults of sound mind, decide to start an electronics store in Houston, Texas.⁶⁴ Shaun and Ed agree, in writing, that they will both contribute \$10,000 to fund the store's operation; that they will both have equal say in managing the electronics store; and that they will share all profits and losses from

58. See *infra* Part III.

59. However, many of these cases are better described as stating undead dicta rather than issuing zombie holdings. See *supra* note 44 (summarizing Leahy, *supra* note 8).

60. See *infra* Part III.B.3.d.i (discussing, e.g., *Holman v. Dow*, 467 S.W.2d 547 (Tex. Civ. App.), *writ ref'd n.r.e.* (Tex. Dec. 31, 1971), as abrogated by UPA); Part III.B.3.d.ii (discussing *FSLIC v. Griffin*, 935 F.2d 691 (5th Cir. 1991) (citing *Holman* as good law)).

61. See *infra* Part II.C.3 (describing how to kill a zombie in fiction).

62. See *infra* Part II.C.3 (describing how legal research databases mark cases as abrogated).

63. See *infra* Conclusion.

64. With apologies to SHAUN OF THE DEAD (2004 Focus Features). For our purposes, we will assume that both Shaun and Ed are live human beings, not zombies—which, being mindless, presumably lack the capacity to contact. This would unnecessarily complicate the question of whether or not Shaun and Ed are partners in the electronics business.

the store equally. They put in their cash, rent a storefront, order a truckload of electronic equipment at wholesale prices, and choose a name for the store.

Assuming that Shaun and Ed make no further agreements and file no paperwork with the secretary of state, what type of business entity have they formed? Even before they sell their first electronic gadget, the answer is clear: Shaun and Ed are partners in a Texas general partnership.

a. The Longstanding, Near-Universal Test for Partnership

Shaun and Ed's business will be governed by the Texas Revised Partnership Act ("TRPA"),⁶⁵ as recodified into the Texas Business Organization Code ("TBOC").⁶⁶ Under TBOC, "an association of two or more persons to carry on a business for profit as owners creates a partnership."⁶⁷ This test for partnership, basically a verbatim reiteration of the definition in the Uniform Partnership Act of 1914 (UPA),⁶⁸ has been the law in Texas for over six decades, since the state adopted UPA as the Texas Uniform Partnership Act (TUPA) in 1961.⁶⁹

65. TBOC governs because Shaun and Ed's business is located in Texas and they have no contrary agreement. See TEX. BUS. ORGS. CODE ANN. § 1.102(43)(C)(i), (ii) (West 2006) (providing that, absent contrary agreement, the governing law for a non-filing entity is "the jurisdiction in which the entity has its chief executive office"); *id.* § 1.102(43) (defining a general partnership as a non-filing entity).

66. All Texas business organizations have been governed by the TBOC since 2010. See *Ingram v. Deere*, 288 S.W.3d 886, 895 n.4 (Tex. 2009). TRPA was re-codified into TBOC with essentially no substantive changes intended; however, a few new provisions that were added or slight changes in wording could potentially result in some substantive differences. See ELIZABETH S. MILLER & ROBERT A. RAGAZZO, 19 TEXAS PRACTICE: BUSINESS ORGANIZATIONS § 6:1 (West 2021); Erin Larkin, Comment, *What's in a Word? The Effect on Partners' Duties After Removal of the Term "Fiduciary" in the Texas Revised Partnership Act*, 59 BAYLOR L. REV. 895, 901 n.31 (2007). See generally TBOC Revisor's Notes to Texas Business Organizations Code, available at https://lrl.texas.gov/legis/revisorsNotes.cfm?code=Business_Organizations [<https://pe.rma.cc/9T78-GSNH>] (stating "no substantive changed is intended" for the great bulk of provisions that were recodified from TRPA to TBOC).

67. TEX. BUS. ORGS. CODE ANN. § 152.051(a) (West 2006).

68. See UNIF. P'SHIP ACT § 6(a) (UNIF. L. COMM'N 1914) ("A partnership is an association of two or more persons to carry on as co-owners a business for profit.").

69. See Alan R. Bromberg, *Texas Uniform Partnership Act—The Enacted Version*, 15 SW. L.J. 386, 386–87 (1961) (discussing Texas's 1961 adoption of UPA, including UPA section 6(1), as TUPA). Prior to the UPA, there existed many different common law definitions of partnership. See Vernon J. Veron, *Taxation of the Income of Family Partnerships*, 59 HARV. L. REV. 209, 232 (1945) (citing *inter alia* LINDLEY, PARTNERSHIP 10–13 (10th ed. 1935) (explaining that "[o]ne author has collected twenty definitions" of partnership under the common law and explaining further that this list was by no means comprehensive); Deborah W. Post, *Continuity and Change: Partnership Formation Under the Common Law*,

This definition of partnership also is the law of nearly every other state because (1) every state except Louisiana adopted the UPA “in substantially identical form”;⁷⁰ and (2) the definition of partnership was largely unchanged by the [“Revised”] Uniform Partnership Act (1997)⁷¹ (commonly known⁷² as “RUPA”), which was promulgated in 1997 to update the UPA⁷³ and then amended in 2013.⁷⁴ Hence, even in the majority of states, where a version of RUPA has supplanted UPA⁷⁵—including Texas (TRPA was an early version of RUPA)⁷⁶—this same definition remains law.⁷⁷

32 VILL. L. REV. 987, 990 n.9, 992 n.13 (1987) (citing various common law definitions of partnership). However, at least one pre-UPA Texas decision adopted a definition of partnership that is much like UPA’s. See *Moore v. Scott*, 16 S.W.2d 1100, 1102 (Tex. Civ. App. 1929), *writ dismissed w.o.j.* (Oct. 16, 1929) (“‘Partnership,’ as that term is used in this charge is defined to you by the court to be a combination by two or more persons of capital, or labor, or skill, for the purpose of business for their common benefit.”).

70. See Leahy, *supra* note 28, at 249 n.23 (discussing history of UPA’s enactment) (quoting J. William Callison, *Blind Men and Elephants: Fiduciary Duties Under the Revised Uniform Partnership Act, Uniform Limited Liability Company Act, and Beyond*, 1 J. SMALL & EMERGING BUS. L. 109, 113 (1997)).

71. UNIF. P’SHP ACT (1997) (UNIF. L. COMM’N 1997) (“Original RUPA”).

72. See Leahy, *supra* note 28, at 247 n.21 (citing ALLAN G. DONN ET AL., REVISED UNIFORM PARTNERSHIP ACT § 1202 (2019–2020 ed.)).

73. See *id.* at 247–48 n.22 (listing 39 states that have enacted RUPA-based statutes).

74. See UNIF. P’SHP ACT (1997) (UNIF. L. COMM’N amended 2013) (“Harmonized RUPA”). The 2013 amendments occurred as part of an effort by the Uniform Law Commission to incorporate all the existing uniform business entity acts into a single Uniform Business Organizations Code—much like the TBOC. See Harry J. Haynsworth, *Our Mini-Theme: The Uniform Business Organizations Code and Its Constituent Acts*, BUS. L. TODAY, Apr. 2015, at 1. Hence, the stated purpose of Harmonized RUPA was principally to “harmonize” Original RUPA with other uniform unincorporated entity acts. However, the drafters of Harmonized RUPA ultimately made numerous substantive changes to Original RUPA. See UNIF. P’SHP ACT (1997) prefatory note to 2011 & 2013 harmonization amends. (UNIF. L. COMM’N amended 2013) (listing Harmonized RUPA’s many “substantive” changes to Original RUPA); see generally Robert R. Keatinge, *Harmonization, Rationalization, and Uniformity*, in RESEARCH HANDBOOK ON PARTNERSHIPS, LLCs AND ALTERNATIVE FORMS OF BUSINESS ORGANIZATIONS 299–318 (Robert W. Hillman & Mark J. Loewenstein eds., 2015) (criticizing Harmonized RUPA for making substantive changes to Original RUPA other than mere “harmonization”). Some of these changes to Original RUPA were “controversial” among business law scholars. Mohsen Manesh, *Fiduciary Principles in Unincorporated Entity Law*, in THE OXFORD HANDBOOK OF FIDUCIARY LAW 80–81 (Evan J. Criddle et al. eds., 2019). However, this controversy is beyond the scope of this article, since both versions of RUPA state the exact same test for partnership. See *infra* note 77.

75. See Leahy, *supra* note 28, at 249 n.23 (listing the remaining states that have retained UPA).

76. Texas adopted an early version of RUPA in 1993, effective 1994. See Leahy, *supra* note 28, at 248 n.22 & 249 n.23.

77. Original RUPA and Harmonized RUPA define partnership in the same way. Compare UNIF. P’SHP ACT (1997) § 202 (UNIF. L. COMM’N 1997) (“the association of two or more persons to carry on as co-owners a business for profit forms a partnership, whether or not the persons intend to form a partnership”) with UNIF. P’SHP ACT (1997) § 202(a) (UNIF. L. COMM’N amended 2013) (“the association of two or more persons to carry on as co-owners a business for profit forms a partnership, whether or not the persons intend to form a

Indeed, it has been the law in most states for well over fifty years, and some states for over one hundred years.⁷⁸

In sum, the definition of partnership is both long settled and nearly universal in the United States. Nobody disputes that—not even the court or the parties in *Enterprise Products*.⁷⁹

b. Application of the Test to Shaun and Ed

Here, Shaun and Ed (two people), have voluntarily come together (associated) to run an electronics store (a for-profit business). It is immaterial that Shaun and Ed have neither sold a single item nor earned a penny in revenue (and therefore, have earned no profit to date).⁸⁰ The crux of the partnership is not the actual operation of a business, profitable or otherwise, but the voluntary⁸¹ decision (or agreement⁸²) of two people to associate as co-owners of a for-profit business.⁸³

partnership”). As of this writing, thirty-six states and District of Columbia have adopted a version of Original RUPA, *see* UNIF. P’SHP ACT (1997), Table of Jurisdictions Wherein Act Has Been Adopted, 6 pt. 2 U.L.A. 223–24 (2015), and four states have adopted a version of Harmonized RUPA, *see* UNIF. P’SHP ACT (1997) (amended 2013), Table of Jurisdictions Wherein Act Has Been Adopted, 6 pt. 2 U.L.A. 1 (2018 supp.) (table listing three states); *Partnership Act*, UNIFORM LAW COMMISSION, <https://www.uniformlaws.org/committees/community-home?communitykey=52456941-7883-47a5-91b6-d2f086d0bb44#LegBillTrackingAnchor> [<https://perma.cc/2B7Q-K3BX>] (showing map of jurisdictions that have enacted a version of RUPA and listing legislative updates reflecting Rhode Island’s enactment of Harmonized RUPA effective January 2023).

78. By 1923, fifteen states and Alaska had already adopted UPA. *See* UNIF. P’SHP ACT, Table of Jurisdictions Wherein Act Has Been Adopted, 6 U.L.A. 1 (1969). In the early 1970s, a handful of states adopted UPA, leaving one last holdout—Georgia, which adopted a version of UPA in 1984. *See* UNIF. P’SHP ACT, Table of Jurisdictions Wherein Act Has Been Adopted, 6 U.L.A. 125 (1995).

79. *See* *Energy Transfer Partners, L.P. v. Enter. Prods. Partners, L.P.*, 593 S.W.3d 732, 737 (Tex. 2020) (quoting TEX. BUS. ORGS. CODE ANN. § 152.051(b) (West 2006)) (opining that “an association of two or more persons to carry on a business for profit as owners creates a partnership”).

80. *See* Christine Hurt, *Startup Partnerships*, 61 B.C. L. REV. 2487, 2503 (2020) (explaining that the co-ownership element of a partnership is generally satisfied by “the intent or agreement to share in business profits in the future”).

81. UNIF. P’SHP ACT (1997) § 402(b)(3) cmt. (UNIF. L. COMM’N amended 2013) (“A partnership being a voluntary association, a person cannot become a partner without manifesting consent to do so. That consent also is judged objectively.”).

82. Although in most cases that association will involve some sort of (oral or written) contractual agreement between the partners, *cf. id.* § 402(b)(3) (describing partnership as “a creature of contract”), such a contract is technically unnecessary, *see* Hurt, *supra* note 80, at 2526 (quoting UNIF. P’SHP ACT § 6(1) cmt. (UNIF. L. COMM’N 1914) (“To say that the association must be created by contract, is . . . unnecessary”)) (“UPA attempted to circumvent the rigors of contract law by using . . . ‘association.’”).

83. *See infra* Part I.A.3.

2. Sharing Profits and Its Connection to Being Co-Owners

Although Shaun and Ed have never explicitly discussed whether they co-own the electronics store, under the UPA, two people are deemed co-owners of a business when they share its profits and there is no strong evidence that they intended some relationship other than co-ownership.⁸⁴

On its face, Texas partnership law is slightly different. It no longer (post-TUPA) treats the sharing of profits as presumptive evidence that the parties are co-owners of a business.⁸⁵ Instead, TBOC deems the sharing of profits as one of five non-exclusive factors for a court to consider when deciding whether a partnership exists.⁸⁶ Yet, Texas courts have long recognized that sharing profits is one of the two key factors in determining whether a partnership exists.⁸⁷ Thus, when sharing profits is the only factor among the five that is satisfied, but there is no contrary evidence, Texas law probably works just like UPA.

Any potential difference between Texas law and UPA is irrelevant in Shaun and Ed's case, however, because sharing profits is not the only factor they have satisfied. Rather, they also have satisfied three other factors that the TBOC says to consider when determining whether a partnership exists. Here, Shaun and Ed share control of the business.⁸⁸ This is the second factor that Texas courts have deemed to be among the two "most important" in determining whether a partnership exists.⁸⁹ Further, Shaun and Ed have agreed to contribute money to the business and share in its

84. See UNIF. P'SHIP ACT § 7(4) (UNIF. L. COMM'N 1914) (the sharing of profits is "prima facie evidence" of co-ownership of a business, and therefore, partnership). UPA provides several specific exceptions in which no such inference of co-ownership derives from the sharing of profits, but none apply here. See *id.* § 7(4)(a)–(e) (listing the exceptions).

85. TRPA added five factors to the statute. See *Ingram v. Deere*, 288 S.W.3d 886, 891, 895–96 (Tex. 2009).

86. See TEX. BUS. ORGS. CODE ANN. § 152.052(a)(1) (West 2006) (sharing of profits is a "factor" in determining whether a partnership exists); see also MILLER & RAGAZZO, *supra* note 66, § 6:7 ("The current statute does not purport to give presumptive weight to any one factor but instead lists factors that indicate a partnership has been created.")

87. See *Ingram*, 288 S.W.3d at 896 (comments to TRPA "note that . . . sharing profits as well as control over the business will probably continue to be the most important factors" in determining whether a partnership exists).

88. See TEX. BUS. ORGS. CODE ANN. § 152.052(a)(3) (West 2006).

89. See *supra* note 87 (quoting *Ingram*, 288 S.W.3d at 896).

losses.⁹⁰ Hence, four of the five statutory factors of partnership formation have been satisfied in our hypothetical.

3. The Role of Intent: “Subjective” v. “Objective”

The only Texas statutory factor left unsatisfied in our hypo is whether Shaun and Ed have expressed their intent to be partners.⁹¹ Yet, the fact that Shaun and Ed never deemed themselves “partners” is no barrier to their forming a partnership. Under long-settled UPA caselaw, parties may become partners even if they lack the “subjective intent”⁹² to do so.⁹³ All that matters is whether, as a factual matter, they satisfy the definition of partnership. That is to say, under UPA, “it is the intent to do the things which constitute a partnership,” not the intent to attain the legal status of “partners,” that controls.⁹⁴ Or, to put it differently, under UPA, the intent required to become partners is the intent to co-own a business—what some have called the “objective intent” to become partners⁹⁵—*not* the intent to enter into the legal arrangement known as “partnership.”

In sum, if two or more people satisfy the statutory definition of partnership by associating as co-owners of a for-profit business,

90. See TEX. BUS. ORGS. CODE ANN. § 152.052(a)(4), (5) (West 2006).

91. See *id.* § 152.052(a)(2).

92. CHRISTINE HURT, D. GORDON SMITH, ALAN R. BROMBERG & LARRY E. RIBSTEIN, *BROMBERG AND RIBSTEIN ON PARTNERSHIP* § 2.04[B], at 2-30 (2d ed. 2015, 2018-2 Supp.) [hereinafter HURT & SMITH] (defining “subjective intent” to be partners as “the parties’ own expression of intent in their written agreement (if any), their utterances, or in documents relating to the business”).

93. See *id.* § 2.01[C], at 2-5 (“[I]t is neither necessary nor sufficient . . . for the parties to call their relationship a ‘partnership.’”); 68 C.J.S. *Partnership* § 10, at 415 (1950) (explaining that “a partnership may be created without any definite intention to create it” and further, that this “intention . . . may be . . . inferred from their conduct and dealings with one another”); *id.* at 416 (“It is not essential that the parties actually intend to become partners. The existence of a partnership is not a question of the parties’ undisclosed intention or even of the words they use; nor is it essential that the parties have knowledge of the legal effect of their acts.”).

94. 68 C.J.S. *Partnership* § 10, at 416 (“It is the intent to do the things which constitute a partnership that usually determines whether or not that relationship exists between the parties, and, if they intend to do a thing which in law constitutes a partnership, they are partners whether their purpose was to create or avoid the relationship.”).

95. HURT & SMITH, *supra* note 92, § 2.04[C], at 2-49 (defining “objective intent” to be partners as the “intent to do the acts that in law constitute partnership”—which courts ascertain by “look[ing] for the presence or absence of the attributes of co-ownership, including profit and loss sharing, control, and capital contributions”).

they are partners whether they wanted to be or not. In short, parties may form inadvertent or accidental partnerships.⁹⁶

This rule was implicit in UPA's text, but not stated explicitly therein. Nonetheless, cases interpreting the UPA widely followed the rule.⁹⁷ RUPA's drafters then made this rule explicit when they updated and clarified the definition of partnership by adding the language "whether or not the persons intend to form a partnership" to the UPA definition of partnership.⁹⁸ Indeed, RUPA's drafters explicitly warned that parties "may inadvertently create a partnership."⁹⁹

Texas adopted RUPA's updated definition of partnership essentially wholesale. Thus, in Texas, "an association of two or more persons to carry on a business for profit as owners creates a partnership, *regardless of whether*: (1) the persons intend to create a partnership; or (2) the association is called a 'partnership.'"¹⁰⁰ Hence, it is beyond cavil that, in Texas, two people can inadvertently form a partnership in at least *some* instances. At a minimum, two people

96. See 68 C.J.S. *Partnership* § 10, at 416 (1950) (explaining that "[i]t is not essential that the parties actually intend to become partners" in order for them to form a partnership).

97. See UNIF. P'SHIP ACT (1997) § 202 cmt. 1 (UNIF. L. COMM'N 1997) ("The addition of the phrase, 'whether or not the persons intend to form a partnership,' merely codifies the universal judicial construction of [UPA section] 6(1) that a partnership is created by the association of persons whose intent is to carry on as co-owners a business for profit, regardless of their subjective intention to be 'partners.'"); accord UNIF. P'SHIP ACT (1997) § 202 cmt. 1 (UNIF. L. COMM'N amended 2013) (same).

98. See UNIF. P'SHIP ACT (1997) § 202 (UNIF. L. COMM'N 1997) (defining partners, like UPA section 6(1), as "an association of two or more persons to carry on as co-owners a business for profit"—but adding "whether or not the persons intend to form a partnership"); accord UNIF. P'SHIP ACT (1997) § 202 cmt. (UNIF. L. COMM'N amended 2013) (same). Some have criticized this language in RUPA as ambiguous, on the theory that (1) UPA case law "indicates clearly that intent to form a partnership is essential," see WILLIAM A. GREGORY, *THE LAW OF AGENCY AND PARTNERSHIP* § 175, at 266 (3d ed. 2001), and (2) that while the statute requires the intent to be partners, that intent can be implied rather than express, see *id.* n.19 ("Didn't the drafters of RUPA really mean that an express intention was not necessary to form a partnership?"). On this theory, RUPA would be less ambiguous if its drafters changed "intend" to "expressed an intention to form." This criticism is misguided, however. In fact, comment one is best read to mean that RUPA's drafters used the word "intend" to refer to the subjective intent to attain the legal status as partners as opposed to the objective intent to co-own a for-profit business. See ALLAN G. DONN ET AL., *REVISED UNIFORM PARTNERSHIP ACT* § 202 cmt. 2, at 245–46 (2022-23 ed.) (explaining that Comment 1 was "intended to put into the statute what is clear upon an examination of the case law: that the intent of the parties to be classified as partners or to avoid partnership classification is not determinative. Rather, the question is whether or not the partners have intended to enter into a relationship, however it is denominated, the essence of which is partnership.").

99. UNIF. P'SHIP ACT (1997) § 202 cmt. 1 (UNIF. L. COMM'N 1997); accord UNIF. P'SHIP ACT (1997) § 202 cmt. (UNIF. L. COMM'N amended 2013) (same).

100. TEX. BUS. ORGS. CODE ANN. § 152.051(b) (West 2006) (emphasis added).

who have not expressed any opinion about whether they are partners can form a partnership by accident.¹⁰¹

In sum, there is simply no doubt that Shaun and Ed have formed a partnership in Texas—or in any other jurisdiction—even in the absence of a specific intent to form a partnership.

B. *A Simple Partnership with One Caveat: Shaun and Ed Disclaim Partnership*

Let us now change the hypothetical slightly: Instead of assuming that Shaun and Ed never considered whether to form a partnership, assume now that they *do not* wish to operate their business as a partnership. That is to say, they do not wish to enter into the legal relationship known as “partnership” and they do not wish for their business to be governed by the Texas partnership statute—despite that they would agree (if asked) that they are undoubtedly co-owners of the electronics store. To this end, the two men sign a document which states: “We agree that we are not general partners and that our electronics store business is not a general partnership.”

Does this language change anything? Prior to the Texas Supreme Court’s decision in *Enterprise Products* (and possibly afterward¹⁰²), the answer to this question was clear in every jurisdiction: Certainly not! Shaun and Ed are still partners, despite their express agreement to the contrary.

1. Under UPA, Disclaimers of Partnership Were Not Dispositive

UPA does not explicitly address whether people can become partners despite disclaiming, by contract or otherwise, the intent

101. See, e.g., *Freeman v. Huttig Sash & Door Co.*, 153 S.W.122, 124–25 (Tex. 1913) (reasoning that “parties may intend no partnership and yet form one” if “by implied agreement they assume a relation that the law constitutes a partnership,” and holding that the purchaser of a partner’s interest became a partner in a new partnership, despite his intent that the business be incorporated, because it was never incorporated). The opposite also is true. See, e.g., *City of Corpus Christi v. Bayfront Assocs., Ltd.*, 814 S.W.2d 98, 108–09 n.4 (Tex. App.), *writ denied* (Nov. 20, 1991) (analogizing that “a duck which is called a horse does not become a horse; a duck is a duck”) (rejecting that partnership existed despite that one party called the other “partner,” because this say-so was not determinative of the relationship).

102. *Enterprise Products* held that parties can contract around partnership as a matter of law using conditions precedent. See *infra* text accompanying notes 156–59. However, the logic of the holding also would apply to a complete disclaimer of partnership. See *infra* text accompanying note 160.

to form a partnership.¹⁰³ However, courts interpreting UPA universally held that, not only can people accidentally form a partnership without realizing it, they also could form a partnership even if they *explicitly* intended *not* to form a partnership.¹⁰⁴

a. *Martin v. Peyton*

Perhaps the most famous statement of this doctrine was the New York Court of Appeals (that state's highest court) decision in *Martin v. Peyton*.¹⁰⁵

103. See UNIF. P'SHIP ACT § 6(1) (UNIF. L. COMM'N 1914) (defining partnership but making no mention of contractual disclaimers).

104. See DONN ET AL., *supra* note 98, § 202 cmt. 2, at 146 (explaining that RUPA section 202 followed the UPA case law in concluding “that the intent of the parties to be classified as partners or to avoid partnership classification is not determinative”; “[r]ather, the question is whether or not the partners have intended to enter into a relationship, however it is denominated, the essence of which is partnership”); GREG ABBOTT & DOUG COULSON, TEXAS PRACTICE GUIDE: BUSINESS & COMMERCIAL LITIGATION § 1:15 prac. tip (2021-2022 ed.) (quoting *Stephanz v. Laird*, 846 S.W.2d 895, 899 (Tex. App.), *writ denied* (Sep 10, 1993)) (“[W]ords used by the parties in a contract do not necessarily control the substance of the relationship.”); see GREGORY, *supra* note 98, § 175, at 267 n.22 (first citing *Coastal Plains Dev. Corp. v. Micrea, Inc.*, 572 S.W.2d 285, 287-88 (Tex. 1978); and then quoting *Taylor v. Lewis*, 553 S.W.2d 153, 158 (Tex. Civ. App.), *writ ref'd n.r.e.* (Oct 26, 1977)) (“Words used by the parties in a contract do not necessarily control the substance of the relationship, nor do the terms used by the parties in referring to the arrangement ‘Persons who intend to do the things that constitute a partnership are partners whether their expressed purpose was to create or avoid the relationship.’”); 68 C.J.S. *Partnership* § 10 (1950) (“[I]t is the intent to do the things which constitute a partnership that usually determines whether or not that relationship exists between the parties, and, if they intend to do a thing which in law constitutes a partnership, they are partners whether or not their purpose was to create or avoid the relationship. A partnership may be the legal result of an agreement notwithstanding an expressed intention not to create such a relationship.”); see, e.g., *Byker v. Mannes*, 641 N.W.2d 210, 216 (Mich. 2002) (citing *Beecher v. Bush*, 7 N.W. 785, 785-86 (Mich. 1881) (Cooley, J.)) (“[I]n determining the existence of a partnership, the focus of inquiry is on the parties’ actual conduct in their business arrangements, as opposed to whether the parties subjectively intend that such arrangements give rise to a partnership. Thus, one analyzes whether the parties acted as partners, not whether they subjectively intended to create, or not to create, a partnership [T]he absence of subjective intent to create a partnership is [not] determinative of the question of the existence of a legal partnership. Rather, it is one factor to consider in deciding if the parties did, in fact, carry on as co-owners a business for profit.”) (reversing appellate court holding that parties did not form a partnership due to their subjective intent not to do so); *Arnold v. Erkmann*, 934 S.W.2d 621, 630 (Mo. Ct. App. 1996) (citing *Bernard McMenamy Contractor, Inc. v. Kitchen*, 692 S.W.2d 817, 820-21 (Mo. Ct. App. 1985)) (holding that plaintiff had adduced sufficient evidence to establish the existence of a partnership despite the parties’ contract disclaiming partnership). *But cf.* J. WILLIAM CALLISON & MAUREEN A. SULLIVAN, PARTNERSHIP LAW AND PRACTICE § 5:7, at 113 (2021-2022 ed.) (citing *Martin v. Peyton*, 158 N.E. 77, 78 (N.Y. 1927) (Andrews, J.)) (“If persons place themselves in a relationship which constitutes a partnership, the fact that they . . . deny that a partnership exists, is not determinative of the issue of whether a partnership exists *with respect to third parties.*”) (emphasis added).

105. 158 N.E. 77 (N.Y. 1927).

i. Factual Background

Martin involved an investment banking partnership, Knauth, Nachod and Kuhne (“KNK”), that “found itself in financial difficulties.”¹⁰⁶ One of the bankers, Hall, sought the assistance of his wealthy friends, the Peytons, borrowing “almost \$500,000 of Liberty bonds” from them to “use as collateral to secure bank advances.”¹⁰⁷ Unfortunately this “was not sufficient” to save the KNK partnership because the firm “had engaged in unwise speculations, and it was deeply involved.”¹⁰⁸ Hall then asked the Peytons and some other friends (collectively, “the Peyton group”) to become partners in the firm; this “met [with] a decided refusal.”¹⁰⁹

Instead, the Peyton group entered into three agreements with KNK in which they agreed to become “trustees” of the firm.¹¹⁰ Under these agreements, the Peyton group “loan[ed KNK] \$2,500,000 worth of liquid securities” that the KNK firm could use “to secure loans totaling \$2,000,000” to obtain operating capital; these securities “[we]re not to be mingled with” KNK’s securities and the trustees were to be “paid all dividends and income accruing therefrom.”¹¹¹ Further, the trustees were permitted to “substitute for any of the securities loaned securities of equal value.”¹¹² In return for this loan, the KNK partners turned over to the trustees a large number of potentially valuable securities that “were of so speculative a nature that they could not be used as collateral for bank loans.”¹¹³ As “compensation for the loan,” the Peyton group “were to receive 40 per cent of the profits” of the KNK firm “not exceeding . . . \$500,000 and not less than \$100,000.”¹¹⁴ Members of the Peyton group also were “given an option to join the firm.”¹¹⁵

In connection with the loan, the Peyton group also negotiated some control over the KNK partnership. The “trustees [we]re to be kept advised as to the conduct of the business and consulted as to

106. *Id.* at 79.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* The KNK partners could, “with . . . consent . . . sell any of [the loaned] securities . . . ,” but “the proceeds [were] to go . . . to the trustees.” *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

important matters”; permitted to “inspect the . . . books and . . . [obtain] any information they think important” and given a “veto” over “any business they think highly speculative or injurious.”¹¹⁶ Further, the Peyton group required that Hall be appointed managing partner of the firm until their securities were returned¹¹⁷ and demanded that every partner in KNK sign a resignation letter that Hall and the Peyton group could accept any time at their discretion.¹¹⁸

ii. Litigation and Holding

Unfortunately, despite this second loan, the KNK firm became insolvent and went into receivership.¹¹⁹ The receiver, Martin, sued for a declaration that the trustees were partners of the firm, “liable as such” to the firm’s general creditors.¹²⁰ The *Martin* court held, as a factual matter, that they were not.¹²¹ Despite the rights of control over KNK exercised by the Peyton group, the Court of Appeals held that the trustees lacked key powers usually entrusted to partners: they could not “initiate any transaction as a partner may do,” nor could they “bind the firm by any action of their own.”¹²² The fact that the trustees could veto but not initiate transactions showed that they were genuine creditors, with limited (and “not uncommon”)¹²³ control over large expenditures to protect the

116. *Id.*

117. *Id.*

118. *See id.* at 80.

119. *See Martin v. Peyton*, 220 N.Y.S. 29, 30, 35–36 (App. Div. 1927).

120. *Id.* at 30.

121. *See* 158 N.E. at 80.

122. *Id.* at 79–80 (holding that the various agreements did not cause the Peyton group to cross the line from being creditors to being partners); accord Howard P. Walthall, Sr., *What Do You Mean “We,” Kemo Sabe? Partnership Law and Client Responsibilities of Office Sharing Lawyers*, 28 CUMB. L. REV. 601, 621–22 (1998).

123. William A. Klein, *The Story of Martin v. Peyton: Rich Investors, Risky Investment, and the Line Between Lenders and Undisclosed Partners*, in CORPORATE LAW STORIES 77, 88 (J. Mark Ramseyer ed., 2009) (describing the limitation on KNK engaging in “any speculative undertakings” as “not uncommon”—but noting that that the Peyton group’s control “went further” in permitting the Peyton group to exercise a veto over transactions that it viewed as speculative).

business from hemorrhaging cash¹²⁴—not partners, who have the “ultimate control” over the firm’s ability to do business.¹²⁵

Further, although the Peyton group received some profits from the business as repayment of a loan, their profit share had both a floor and a ceiling—thereby creating a guaranteed but limited return, akin to the way that creditors are paid.¹²⁶ The group’s payment plan looked nothing like the compensation available to a true equity investor who shares all the risks and rewards of the business; such investors typically have neither a guaranteed minimum nor a guaranteed maximum payout.¹²⁷

Moreover, the *Martin* court held that the Peyton group’s securities “were not contributed to the partnership”¹²⁸ to become an asset of the KNK firm and were to be used solely as a bailment. Evidence of this included “the stipulation that the securities were loaned to a partnership and were not ‘mingled with other securities’ of the partnership; that defendants, not the partnership, received dividends and retained the right to vote stock;” and that the defendants “could withdraw [the loaned] securities as [they] appreciated

124. *Martin*, 158 N.E. at 79–80 (explaining that “the safety of the loan depended upon” KNK’s success not being “compromised by the inclination of its members to engage in speculation”—and that the Peyton group’s controls were “a proper precaution to safeguard the loan”). In so holding, the *Martin* court cited *Cox v. Hickman* (1860) 11 Eng. Rep. 431; 8 H.L.C. 268. In *Cox*, the court held that sharing profits was not determinative as to partnership if the business was not run on behalf of the person sharing the profits—i.e., if the person was not a co-owner of the business, but rather, shared profits in some other capacity (such as a lender). *Cox* therefore represented a sea change in partnership law. See FLOYD R. MECHEM, ELEMENTS OF THE LAW OF PARTNERSHIP 45–48 (Chicago, Callaghan & Co. 1899). In jurisdictions that followed *Cox*, sharing profits merely raised a presumption of partnership that could be rebutted upon a showing that the profits were being shared for some reason other than co-ownership of the business (e.g., if profits were shared as payment of a debt to a lender). UPA section 7(4) codifies this approach. See UNIF. P’SHIP ACT § 7(4)(a) & (d) (UNIF. L. COMM’N 1914) (“The receipt by a person of a share of the profits of a business is prima facie evidence that the person is a partner in the business, but no such inference shall be drawn if such profits were received in payment. . . [a]s a debt by installments or otherwise . . . [or] [a]s interest on a loan though the amount of payment varies with the profits of the business.”).

125. See UNIF. P’SHIP ACT § 6(1) cmt. (UNIF. L. COMM’N 1914) (explaining that a partner has the “power of ultimate control”).

126. *Martin*, 158 N.E. at 79.

127. Others have described *Martin* as a closer case. See Klein, *supra* note 123, at 89, 91 (describing the Peyton group-KNK agreement in *Martin* as “creat[ing] neither pure debt nor pure partnership, but rather a hybrid of the two” and opining that *Martin* “could have gone either way” on the question of whether the Peyton group were partners in KNK). However, this view essentially ignores UPA’s explicit recognition that the repayments and interest on a bona fide loan need not be fixed, as with a traditional loan, but rather, can fluctuate based on the debtor’s profits. See UNIF. P’SHIP ACT § 7(4) (UNIF. L. COMM’N 1914).

128. Post, *supra* note 69, at 1038.

in value or substitute other securities for those that were initially loaned.”¹²⁹

iii. Rejection of the Subjective-Intent Test

In holding that the members of the Peyton group were not partners in KNK, the Court of Appeals was called upon to decide whether the KNK-Peyton group agreement that deemed the latter “trustees” and lenders to the firm was controlling as to their status. Judge Andrews concluded that it was not, writing:

Assuming some written contract between the parties, the question may arise whether it creates a partnership. If it be complete; if it expresses in good faith the full understanding and obligation of the parties, then it is for the court to say whether a partnership exists. It may, however, be a mere sham intended to hide the real relationship. Then other results follow. In passing upon it effect is to be given to each provision. Mere words will not blind us to realities. Statements that no partnership is intended are not conclusive. If as a whole a contract contemplates an association of two or more persons to carry on as co-owners a business for profit a partnership there is.¹³⁰

Nearly a century later, this language is regularly cited for the proposition that parties cannot contract around partnership as a matter of law.¹³¹ Rarely (if ever), however, are such citations accompanied by the caveat that *Martin* involved a third party suing alleged partners and applies only in such cases.¹³²

2. RUPA Explicitly Adopted Courts’ Interpretation of UPA

As explained previously, RUPA’s drafters added the language “whether or not the persons intend to form a partnership” to the

129. *Id.*

130. *Martin*, 158 N.E. at 78–79.

131. *See, e.g.*, 15A N.Y. JUR. 2D *Business Relationships* § 1538 (2022) (citing *Martin*, 158 N.E. at 78) (“Statements in a partnership agreement as to the nature of the relationship are not conclusive in establishing a partnership.”); JAMES D. COX & THOMAS LEE HAZEN, 1 TREATISE ON THE LAW OF CORPORATIONS § 1:7 (3d ed. 2021) (citing, *inter alia*, *Martin*, 158 N.E. at 78) (“[A] statement in an agreement that it does not create a partnership, although probative of the party’s intent, is not dispositive in determining whether a partnership in fact exists. The determination depends not upon the form of the agreement but rather on the nature of relationship that the parties intended and how the law classifies such a relationship.”).

132. This Author has read numerous cases and authorities that cite *Martin* but is aware of no case citing *Martin* which makes this distinction.

UPA definition of partnership.¹³³ In the official comment to the original (1997) version of RUPA, the uniform statute’s drafters explained the meaning of this language: parties “may inadvertently create a partnership *despite their expressed subjective intention not to do so.*”¹³⁴ Hence, even as initially drafted, RUPA clarified that express disclaimers of partnership were not legally binding.

If this were not clear enough, when RUPA was amended in 2013¹³⁵ its revisers added the following language to the official commentary:

[RUPA] added, ‘whether or not the persons intend to form a partnership’ to [UPA], thereby codifying a rule uniformly applied by courts: *Subjective intent to create the legal relationship of ‘partnership’ is irrelevant.*^[136] What matters is the intent vel non to establish the business relationship that the law labels a ‘partnership.’ *Thus, a disclaimer of partnership status is ineffective to the extent the parties’ intended arrangements meet the criteria stated in [RUPA section 202].*¹³⁷

Hence, there can be little doubt that, under RUPA, Shaun and Ed’s disclaimer of partnership would not be dispositive as to whether they have formed a general partnership.

3. Under TBOC, Intent *Not* to Be Partners Is Merely a “Factor”

Since TRPA adopted RUPA’s definition of partnership almost verbatim (and TBOC simply recodified TRPA’s definition),¹³⁸ it should go without saying that it incorporated the RUPA approach that disclaimers of partnership are not dispositive. Yet, by defining parties’ expressions of intent to become partners as merely *a factor to consider* when determining whether a partnership was formed,¹³⁹ TBOC answers the question even more decisively. Since

133. See *supra* text accompanying notes 97–99 (discussing the drafting of—and quoting—comment 1 to Original RUPA section 202).

134. UNIF. P’SHP ACT (1997) § 202(a) cmt. 1 (UNIF. L. COMM’N 1997) (emphasis added).

135. UNIF. P’SHP ACT (1997) § 202(a) cmt. 1 (UNIF. L. COMM’N amended 2013).

136. This seems to be an overstatement, however. Subjective intent to form a partnership is relevant as to whether the parties are partners—just not dispositive.

137. UNIF. P’SHP ACT (1997) § 202(a) cmt. 1 (UNIF. L. COMM’N amended 2013). *Accord* Moll, *supra* note 27, at 764–65 (arguing that Original RUPA and Harmonized RUPA “further undermined” the view that parties can contract around partnership as a matter of law).

138. See *supra* notes 65–77 and accompanying text (discussing UPA, TUPA, TRPA, RUPA and TBOC).

139. See TEX. BUS. ORGS. CODE ANN. § 152.052(a)(2) (listing “expression of an intent to be partners in the business” one of five “[f]actors indicating that persons have created a partnership”).

all five factors need *not* be present to form a partnership,¹⁴⁰ the mere absence of one factor—intent to be partners—logically cannot preclude partnership formation as a matter of law.¹⁴¹

Prior to *Enterprise Products*, no Texas case applied either TRPA or TBOC to a disclaimer of partnership. However, some Texas appellate cases applying TRPA's UPA-based predecessor, TUPA, refused to honor disclaimers of partnership.¹⁴² Instead, courts applying TUPA looked to partners' objective intent, reasoning that the "expression of intent to form a partnership is not necessarily controlling."¹⁴³ If the parties "intend[ed] to do a thing which in law constitute[d] a partnership, they [became] partners whether their express purpose was to create or avoid the relationship."¹⁴⁴ Hence, under TUPA, "an express disavowal of intent to form a partnership [was] not controlling" where the facts indicated that a partnership was formed because the parties agreed to become co-owners of a for-profit business.¹⁴⁵

In short, Texas law adopted the UPA and RUPA approach to partnership disclaimers, under which objective intent trumped subjective intent. Regardless of any agreement not to be partners, courts would ask whether the parties had satisfied the definition of partnership as a factual matter—that is to say, whether they agreed to associate as co-owners of a for-profit business.¹⁴⁶ If so,

140. See *Ingram v. Deere*, 288 S.W.3d 886, 896 (Tex. 2009) ("TRPA does not require proof of *all* of the listed factors in order for a partnership to exist.").

141. If they did, the statute would be a list of required "elements," not a list of "factors."

142. See MILLER & RAGAZZO, *supra* note 66, § 6:7 (citing, *inter alia*, *Howard Gault & Son, Inc. v. First Nat. Bank of Hereford*, 541 S.W.2d 235, 237 (Tex. Civ. App. 1976), *no writ*; see, e.g., *Shindler v. Marr & Assocs.*, 695 S.W.2d 699, 704 (Tex. App. 1985), *writ refused* (Feb 5, 1986). Cases so holding even pre-date Texas's adoption of UPA. See *Freeman v. Huttig Sash & Door Co.*, 153 S.W. 122, 124–25 (Tex. 1913) ("[P]arties may intend no partnership and yet form one" if "by implied agreement they assume a relation that the law constitutes a partnership"). Old, pre-TUPA cases also concluded that a partnership existed based on the objective intent to be co-owners of a business despite parties' characterization of their agreement as non-partnership. See *Giddings v. Harding*, 267 S.W. 976, 977 (Tex. Comm'n App. 1925) (holding that parties to a "lease" of ranch land were in fact partners in the cattle business when they shared profits and losses, and where both contributed capital equipment to the business; reasoning that the "contract evidence[d] an intention . . . of the parties thereto to engage in a business undertaking with each other, which in law constitutes a partnership" because the lessor "was interested in the profits of the cattle business as a joint owner of the business, and not merely as" a lessor).

143. MILLER & RAGAZZO, *supra* note 66, § 6:7.

144. *Id.* (quoting *Howard Gault & Son, Inc.*, 541 S.W.2d at 237).

145. *Id.*

146. See *Hurt*, *supra* note 80, at 2504 ("Courts will analyze, however, whether the parties intended to co-own a business for profit, not whether the parties specifically intended to create an entity known as a partnership."); *Moll*, *supra* note 27, at 757 ("[S]o long as the

the courts would disregard the parties' agreement about the legal status of their business entity.¹⁴⁷

Since Shaun and Ed created what is functionally a partnership by associating to co-own their business, a Texas court would have deemed them partners despite their expressed intent not to be.

Or so Texas law stood prior to *Enterprise Products*.

C. *Enterprise Products* Upends the Law of Partnership Formation

In *Enterprise Products*,¹⁴⁸ the Texas Supreme Court upheld the Dallas appellate court's decision to overturn the jury's verdict that pipeline companies Enterprise and ETP created a general partnership despite their contrary agreement.¹⁴⁹ In so doing, the *Enterprise Products* court unambiguously held that "Texas law permits parties to conclusively agree that, as between themselves, no partnership will exist unless certain conditions are satisfied."¹⁵⁰

The *Enterprise Products* court began its analysis with the TBOC's statutory definition of partnership, which describes an "expression of an intent to be partners in the business" to be one of the "[f]actors indicating that persons have created a partnership."¹⁵¹ Next, the court observed that "the principles of law and equity and the other partnership provisions supplement this chapter unless otherwise provided by this chapter or the other

parties' conduct falls within the statutory definition, a general partnership is created, even if the partners do not realize that they are forming such an enterprise, and even if they specifically disclaim that they are partners. Put differently, while it is often stated that the intent of the parties is critical to the question of whether a partnership has been formed, the intent that matters is the intent to do the things that meet the legal definition of partnership—not the parties' subjective intent to be characterized (or not characterized) as 'partners.'") See also authorities cited in *supra* notes 92–101.

147. Accord *Hurt*, *supra* note 80, at 2536 ("Under statutory law, however, the non-partnership relationship that is purportedly created should not be merely a partnership in everything but name. Parties should not intend to co-own a business but be able to disclaim the consequences of partnership even though they create a functional partnership. [P]artners should not be able to avoid legal consequences merely by stipulating to a different label."); *Moll*, *supra* note 27, at 758 ("[T]he legal definition of partnership cannot be circumvented by the parties' agreement that a partnership has not been formed or, similarly, that they are not to be characterized as partners. So long as the parties' actions fall within the statutory definition . . . , a partnership has been formed and the parties are partners, regardless of their subjective desires.").

148. *Energy Transfer Partners, L.P. v. Enter. Prods. Partners, L.P.*, 593 S.W.3d 732 (Tex. 2020).

149. See *id.* at 734.

150. *Id.*

151. *Id.* at 737 (quoting TEX. BUS. ORGS. CODE ANN. § 152.052(a) (West 2006)).

partnership provisions.”¹⁵² The Texas high court then explained that the parties’ intent to be partners or not “is just one factor of the totality-of-the-circumstances test”—which, according to its *Ingram* decision, “does not by its terms give the parties’ intent or expression of intent any greater weight than the other factors.”¹⁵³ The *Enterprise Products* court added that, under the TBOC, “persons can create a partnership regardless of whether they intend to”¹⁵⁴—meaning, that they “may inadvertently create a partnership despite their expressed subjective intention not to do so.”¹⁵⁵ All of this is correct.

After that, however, the Texas Supreme Court reiterated its own prior “skepticism” from *Ingram* that the Texas Legislature “intended to spring surprise or accidental partnerships on independent business persons.”¹⁵⁶ Further, the *Enterprise Products* court asked whether (presumably to avoid such “surprise”), parties could “override the default test for partnership formation . . . by agreeing not to be partners until conditions precedent are satisfied”—an issue that the *Ingram* court did not consider.¹⁵⁷ Invoking Texas’s “well-developed body of common law that ‘strongly favors parties’ freedom of contract” and the fact that Texas’s five factors for determining whether a partnership exists are “nonexclusive,” the *Enterprise Products* court answered that question in the affirmative.¹⁵⁸ Accordingly, the Texas Supreme Court held that “parties can contract for conditions precedent to preclude the unintentional formation of a partnership—and held further that the parties here did so “as a matter of law.”¹⁵⁹

In so holding, the *Enterprise Products* court did not state any caveats to its reasoning that would limit its applicability to conditions precedent.¹⁶⁰ If co-owners of a business can agree not to be partners until a specified event happens, why cannot they agree not to be partners forever? Indeed, presumably they could agree

152. *Id.* (quoting TEX. BUS. ORGS. CODE ANN. § 152.003 (West 2006)).

153. *Id.* (quoting *Ingram v. Deere*, 288 S.W.3d 886, 899 (Tex. 2009)).

154. *Id.* (citing TEX. BUS. ORGS. CODE ANN. § 152.051(b) (West 2006)).

155. *Id.* at 737–38 (quoting UNIF. P’SHIP ACT (1997) § 202(a) cmt. 1 (UNIF. L. COMM’N 1997)).

156. *Id.* (quoting *Ingram*, 288 S.W.3d at 898).

157. *Id.* at 738.

158. *Id.* at 738, 740.

159. *Id.* at 740.

160. *See id.*; *see also* Moll, *supra* note 27, at 763 (arguing that the logic of *Enterprise Products* “would seem to extend to absolute disclaimers of partnership”).

not to be partners until some incredibly distant future event (e.g., explosion of the Sun) occurs, thereby assuring that they would never become partners in their lifetimes.

Further, the *Enterprise Products* court recognized that even if “parties can conclusively negate the formation of a partnership” between them by contract, “[s]uch an agreement would not . . . bind third parties.”¹⁶¹ By so doing, the court effectively created two different standards for determining whether a partnership exists in Texas: (1) a test applicable only to the putative partners, wherein an agreement not to be partners is dispositive as between them; and (2) a test in which such an agreement is only one factor among others to be considered.¹⁶²

Despite the Texas Supreme Court’s focus on privileging the “freedom to contract,” *Enterprise Products* is not necessarily limited to Texas. Since TBOC’s definition of partnership is substantially similar to UPA/RUPA’s definition, the logic of *Enterprise Products* could apply in any jurisdiction.¹⁶³ Hence, the case is ripe for citation as persuasive authority by a court in any jurisdiction for the proposition that parties may contract around partnership as a matter of law.

II. THE ZOMBIE LINE OF CASES—DESCRIBED

At first glance, the so-called “black-letter rule” described in Part I—that people can be partners even if they agree not to be—should have made *Enterprise Products* an easy case. If *Enterprise* and ETP could not contract around partnership as a matter of law, the jury was free to find that the two pipeline companies formed a partnership despite their contrary agreement. As a result, absent alternative grounds for affirming, the case seemed like an easy reversal for the Texas Supreme Court. The black-letter law demanded that the judgment for ETP be reinstated. Like Shaun and

161. *Id.* at 741–42, 741 n.34.

162. *See* Moll, *supra* note 26, at 249 (“[T]he consequence of [*Enterprise Products*] is that the partnership formation test can now differ depending on who our plaintiff is. If our plaintiff is some outside third-party alleging that a partnership has been formed, the inquiry is going to be governed solely by whether the alleged partners’ conduct met the legal definition of partnership. . . . In an *inter se* dispute alleging partnership formation, however, that inquiry into conduct will be irrelevant if the parties agreed to disclaim partnership status.”).

163. *See id.* at 242 (“[T]he rationale of the *Enterprise* court is easily portable” because “RUPA, which again is followed by the vast majority of jurisdictions in this country, has substantially the same partnership definition as” TBOC.).

Ed, Enterprise and ETP's attempt to contract around partnership should have failed.

Yet, a deep dive into three national partnership law treatises reveals what appears (at first glance¹⁶⁴) to be exception to the supposed black-letter rule,¹⁶⁵ which neither Enterprise nor ETP (nor their many amici) ever raised in *Enterprise Products*. According to these treatises, the parties' intent to be partners (or not) is dispositive *as between themselves*.¹⁶⁶ As a result, these treatises claim (to varying degrees), the so-called black-letter rule that parties cannot contract around partnership is limited to situations where *a third party* alleges that a partnership exists.¹⁶⁷

The remainder of this Part analyzes this apparent exception under which the parties' subject intent to be partners governs inter se. This Part (1) explains how the apparent exception would affect Shaun and Ed;¹⁶⁸ (2) summarizes the three treatises' discussion of the apparent exception;¹⁶⁹ and (3) investigates the origin of the apparent exception.¹⁷⁰ Ultimately, this Part concludes that this seeming exception is not what it appears. Rather, it is a hiding place for zombies!¹⁷¹

A. *The Seeming Exception in Action: Uncertainty for Shaun and Ed*

Application of the apparent exception to our heroes Shaun and Ed would mean that, if they signed an agreement stating that they were *not* partners, whether they are *in fact* partners depends entirely on *who* so argues. Let us assume that Shaun and Ed signed the same disclaimer of partnership described above. Assume further that Liz, a customer of the electronics store, trips and is injured when Shaun negligently runs a power cord across the floor.

164. But in legal research as in horror films, not everything is as it seems (at first). As it turns out, what appeared to be an exception to the black-letter law was in fact . . . a horde of zombies! See *infra* Part II.C.

165. See *infra* Part II.A.

166. See *infra* Part II.A.

167. See *infra* Part II.B (citing and quoting various treatises). If this were a correct summary of the law, then the Texas Supreme Court decided *Enterprise Products* correctly, since the dispute was between the parties.

168. See *infra* Part II.A.

169. See *infra* Part II.B.

170. See *infra* Part II.C.

171. See *infra* Parts II.C & D.

Liz sues Ed (and, in RUPA-based jurisdictions like Texas, the alleged partnership of Shaun and Ed) for Shaun's negligence. Under settled law, Ed would be liable to Liz as Shaun's partner, *despite* the partnership disclaimer.

By contrast, now assume that Liz is not a customer but a mall owner. She offers Ed an opportunity to open a new store in her mall, and Ed takes the offer without including Shaun. Here, Shaun could *not* sue Ed for breaching the duty of loyalty by stealing a partnership opportunity. Instead, Shaun and Ed's written disclaimer of partnership would control, and Shaun and Ed would *not* be partners.¹⁷² Indeed, so long as the contract is enforceable,¹⁷³ it should not matter whether Shaun and Ed's agreement not to be partners is written or oral, explicit or implicit.

Moreover, there probably is no need for a legally binding contract. If the law turns on would-be partners' subjective intent, the mere fact that Shaun and Ed's agreement not to be partners is not an enforceable contract should not stop the court from granting them the relationship they chose. Partnership is a *voluntary* association,¹⁷⁴ which means that it is usually—but not necessarily—contractual in nature.¹⁷⁵ Hence, *if* (as the apparent exception holds) whether Shaun and Ed are partners turns solely on their subjective intent to form a general partnership, there is no logical reason to require that such intent be reflected in a binding contract. All that should be required is a finding that Shaun and Ed both intended to avoid being partners.¹⁷⁶ Hence, the apparent exception is best described as turning on the purported partners' intent as opposed to their agreement.

172. Shaun and Ed's co-owned business would therefore exist outside of the partnership law regime and would be governed solely by contract (unless fiduciary duties arose independently based on Shaun and Ed's relationship). If a dispute arose that Shaun and Ed had not anticipated, partnership law would not provide them with a default rule to resolve their dispute. This would thwart the purpose of partnership law, which is to provide a system of default rules for unsophisticated business co-owners who create no rules of their own. See Leahy, *supra* note 28, at 270–72 (discussing partnership as the default co-owned business organization); Hurt, *supra* note 80, at 2500, 2516–20 (same).

173. I.e., so long as some doctrine of contract law (e.g., the Statute of Frauds) does not prevent enforcement.

174. See *supra* note 81 and accompanying text.

175. See *supra* note 82 and accompanying text.

176. Such a view would turn TBOC on its head, rendering one factor—intent—dispositive of formation.

B. *Treatises Describing the Seeming Exception*

Three national partnership law treatises currently provide some support for the existence of (what appears to be) an exception to the ostensible “black-letter rule” described in Part I.¹⁷⁷ The treatises ascribe varying degrees of vitality to the rule that the parties’ intent to be partners governs *inter se*. This Section surveys the three treatises.

1. *Partnership Law and Practice*

Bill Callison and Maureen Sullivan’s *Partnership Law and Practice*¹⁷⁸ lends credence to the apparent exception in several ways. First, *Partnership Law and Practice* explicitly limits application of so-called “black-letter rule” to instances where third parties allege that a partnership exists:

Even if the parties to an agreement expressly state that they are not partners or that nothing in the agreement shall be construed to create a partnership relationship *among them*, a court will hold that the parties created a partnership *with respect to third parties* if the partnership definition contained in UPA § 6(1) is met.¹⁷⁹

177. Other modern treatises reviewed by this Author do not mention the supposed exception. *See, e.g.*, GREGORY, *supra* note 98, § 175, at 266 n.22 (discussing the role of the intent to be partners without mentioning any such distinction); *id.* at 266–67, 267 n.23 (stating that “[t]he existence of a partnership is a question of the parties’ intent,” but citing cases that seem to turn on objective rather than subjective intent to be partners). However, some older treatises do mention cases in which courts have held that subjective intent is dispositive as between the parties. *See* 68 C.J.S. *Partnership* § 10 (1950) (citing, *inter alia*, *Kingsley Clothing Mfg. Co. v. Jacobs*, 26 A.2d 315 (1942)) (explaining that, while express disclaimers “are not conclusive” as to partnership, “stipulations denying intent have been held controlling and it has been held that, where the parties expressly declared that they are not partners, this settles the question as between them”); JUDSON A. CRANE, *HANDBOOK ON THE LAW OF PARTNERSHIP AND OTHER UNINCORPORATED ASSOCIATIONS* § 5, at 20 n.4 (1938) (citing the pre-UPA case, *Rosenblum v. Springfield Produce Brokerage Co.*, 137 N.E. 357, 360 (Mass. 1922)) (explaining that “many courts” still adhere to “the obsolete doctrine . . . that less evidence is required to establish partnership *inter se*,” and noting that “[i]t has been said that partnership relations *inter se* are commonly held to exist only where actual intent to be partners is present”).

178. CALLISON & SULLIVAN, *supra* note 104, § 5:7.

179. *Id.* at 112 (emphasis added). Callison and Sullivan’s explanation for the general rule is that, with it, “persons would be able to agree among themselves that they are not partners and thereby avoid liability to third parties, even if they conduct business in a manner which gives those third parties the impression that there is a partnership.” *Id.* This explanation appears to overlook the doctrine of partnership by estoppel, which explicitly holds non-partners liable as partners to third parties when they hold themselves out (or allow others to hold them out) as partners. *See* UNIF. P’SHIP ACT § 16(1) (UNIF. L. COMM’N 1914).

Second, Callison and Sullivan state that the rule is different when the person alleging partnership is a purported partner: “if the parties agree[d] that they shall not be treated as partners, the courts generally have held that no partnership existed in actions between the parties.”¹⁸⁰ In support of this rule, the treatise quotes *Kingsley Clothing Manufacturing Co. v. Jacobs*:¹⁸¹

The Pennsylvania Supreme Court has stated the general rule [in *Kingsley Clothing*]: “[Where the parties] expressly declare that they are not partners this settles the question, for, whatever their obligations may be as to third persons, the law permits them to agree upon their legal status and relationship [as between themselves].”¹⁸²

Callison and Sullivan also cite other cases in support of the seeming exception.¹⁸³ However, *Partnership Law and Practice* does offer two notes of caution about the supposed exception. First, the treatise cites some cases that did *not* apply the apparent exception.¹⁸⁴ Second, Callison and Sullivan state that RUPA—which, as described above, provides that two co-owners of a for-profit business are partners “whether or not the persons intend to form a partnership”¹⁸⁵—“might” eliminate the seeming exception.¹⁸⁶ Finally, elsewhere in the same section, the authors uses less definitive language to describe the effect of an agreement not to be partners, describing it as “likely” leading to a finding of no partnership.¹⁸⁷

180. See CALLISON & SULLIVAN, *supra* note 104, § 5:7, at 113 n.26; see also *id.* (citing *Energy Transfer Partners, L.P. v. Enter. Prods. Partners, L.P.*, 593 S.W.3d 732 (Tex. 2020)) (“When the parties agree that there are conditions precedent to partnership formation, there is no partnership until the conditions have been met, even if other factors indicate partnership formation.”).

181. 26 A.2d 315 (Pa. 1942).

182. CALLISON & SULLIVAN, *supra* note 104, § 5:7, at 113 (second and third alterations in the original) (quoting *Kingsley Clothing*, 26 A.2d at 317).

183. See *id.* at n.26 (citing *Garner v. Garner*, 358 A.2d 583 (Md. Ct. Spec. App. 1976); *Carefree Carolina Cmtys., Inc. v. Cilley*, 340 S.E.2d 529 (N.C. Ct. App. 1986); *Rosenberger v. Herbst*, 232 A.2d 634 (Pa. Super. Ct. 1967); *Cusick v. Phillippi*, 709 P.2d 1226 (Wash. Ct. App. 1985)).

184. See *id.* (citing *Union Carbide Corp. v. Montell N.V.*, 944 F. Supp. 1119 (S.D.N.Y. 1996); *Arnold v. Erkmann*, 934 S.W.2d 621 (Mo. Ct. App. 1996)).

185. See *supra* note 98 and accompanying text (quoting UNIF. P’SHIP ACT (1997) § 202(a) (UNIF. L. COMM’N 1997)).

186. CALLISON & SULLIVAN, *supra* note 104, § 5:7, at 113 n.26 (explaining that “RUPA § 202(a) provides that an association of two or more persons to carry on as co-owners a business for profit forms a partnership ‘*whether or not the persons intend to form a partnership*’”); see also *id.* (quoting comment to UNIF. P’SHIP ACT (1997) § 202(a) (UNIF. L. COMM’N 1997)).

187. See *id.* at 113 (“Although an express, written partnership contract is not necessary to create a partnership, . . . such an agreement is highly advisable. . . . [I]f the parties have

In sum, the *Partnership Law and Practice* treatise appears to deem the supposed exception good law with a caveat that not all courts follow it.

2. *Bromberg and Ribstein on Partnership*

Christine Hurt and Gordon Smith's *Bromberg and Ribstein on Partnership* (a successor to two earlier treatises¹⁸⁸) is decidedly more lukewarm about the existence of the apparent exception. Hurt and Smith first mention the seeming exception by stating that cases that have "said"—not "held"—"that the parties' intent to be treated as partners . . . is controlling only in actions among . . . partners."¹⁸⁹ Next, they list cases that they characterize as "stating that intent controls"—again, taking care not to describe any of these cases as *deciding* this issue.¹⁹⁰

Elsewhere, Hurt and Smith point out that "there is . . . some support for a stricter standard of proof [regarding the existence of a partnership] . . . in cases between the [purported] partners."¹⁹¹ They then cite several cases in which it (purportedly) "has been held that proof inter sese may be more difficult because actual intent must be shown."¹⁹² (The authors also add that one state has

a written agreement establishing their relationship as something other than a partnership, courts *likely will* hold that there is no partnership.") (emphasis added).

188. Alan Bromberg thoroughly updated and revised Judson Crane's classic hornbook, *Crane on Partnership*, in 1968. See William H. Painter, *Crane and Bromberg on Partnership*, 23 SW. L.J. 415, 415 (1969) (book review). Twenty years later, Larry Ribstein joined Professor Bromberg to expand on that volume. See Steve Thel, *Bromberg and Ribstein on Partnership by Alan R. Bromberg and Larry E. Ribstein*, 45 BUS. LAW. 1381, 1381 (1989-1990) (book review). Christine Hurt and Gordon Smith then took over authorship of the *Bromberg and Ribstein on Partnership* treatise after Professors Ribstein and Bromberg died in 2011 and 2014, respectively. (Bromberg and Ribstein are technically still listed as treatise authors, however.) In light of this history, language in the treatise may have been written in the first instance by Professors Bromberg or Ribstein (or perhaps even Professor Crane). Nevertheless, for ease of reference, this Article attributes all language in *Bromberg and Ribstein on Partnership* to the current authors, Hurt and Smith.

189. HURT & SMITH, *supra* note 92, § 2.01[C], at 2-11.

190. *Id.* at n.16 (citing R4 Props. v. Riffice, No. 09-cv-00400, 2014 U.S. Dist. LEXIS 133260 (D. Conn. Sept. 23, 2014); LeZontier v. Shock, 260 N.W.2d 85 (Mich. Ct. App. 1977); Snell v. Meyers, No. 226068, 2001 Mich. App. LEXIS 1470 (June 12, 2001); Myers v. Brown, 296 So. 2d 121 (Fla. Dist. Ct. App. 1974); Grimm v. Pallesen, 527 P.2d 978 (Kan. 1974); Waters v. Cochran, 285 So. 2d 474 (Ala. 1973); Rosenberger v. Herbst, 232 A.2d 634 (Pa. Super. Ct. 1967); Adams v. State, 189 So. 2d 354 (Ala. Ct. App. 1966); Greenhouse v. Zempsky, 218 A.2d 533 (Conn. 1966)).

191. *Id.* § 2.02[B], at 2-16.

192. *Id.* § 2.02[B], at 2-17 n.14 (citing Cressy v. Proctor, 22 F. Supp. 3d 353 (D. Vt. 2014); Harman v. Rogers, 510 A.2d 161 (Vt. 1986); Mercer v. Vinson, 336 P.2d 854 (Ariz. 1959);

explicitly abolished the rule of requiring a higher standard as between the parties.)¹⁹³

In addition, *Bromberg and Ribstein on Partnership* recognizes that the black-letter rule “in which the courts have held that the parties’ characterization of the agreement as a non-partnership was not controlling,” usually is imposed in cases “involv[ing] . . . third parties.”¹⁹⁴ By contrast, that treatise explains, “courts have been somewhat more willing to give effect to the parties’ characterization of their agreement as a non-partnership in [disputes] involving rights and duties between the purported partners.”¹⁹⁵ Hurt and Smith then cite more cases that (presumably) uphold the parties’ agreement not to be partners as between themselves.¹⁹⁶ Yet, in doing so, they also point out that other cases between purported partners have held just the opposite:

Nevertheless, even in cases wholly among the purported partners, the courts have held that the characterization as a . . . non-partnership was not controlling where facts indicated a contrary intent. It seems clear that the parties in these cases intended a partnership for some purposes and the courts avoided unintended consequences of partnership by holding that there was no partnership.¹⁹⁷

In short, Hurt and Smith describe the authorities on this point as mixed at best.

Finally, in what appears to be a strong rejection of the merits of the supposed exception, the *Bromberg and Ribstein on Partnership*

Raymond S. Roberts, Inc. v. White, 97 A.2d 245 (Vt. 1953); Rosenblum v. Springfield Produce Brokerage Co., 137 N.E. 357, 360 (Mass. 1922) (labeled as “pre-UPA”).

193. *Id.* (citing *In re KeyTronics*, 744 N.W.2d 425 (Neb. 2008)).

194. *Id.* § 2.04[C], at 2-53 to -54.

195. *Id.* at 2-54.

196. *See id.* § 2.04[C], at 2-54 n.47 (citing *Mabry v. Pelton*, 432 S.E.2d 588 (Ga. Ct. App. 1993); *Carefree Carolina Cmty., Inc. v. Cilley*, 340 S.E.2d 529 (N.C. Ct. App. 1986); *Rosenberger v. Herbst*, 232 A.2d 634 (Pa. Super. Ct. 1967); *Holman v. Dow*, 467 S.W.2d 547 (Tex. Civ. App.), *writ ref’d n.r.e.* (Dec. 31, 1971); *Cusick v. Phillippi*, 709 P.2d 1226 (Wash. Ct. App. 1985); *FDIC v. Claycomb*, 945 F.2d 853 (5th Cir. 1991); *FSLIC v. Griffin*, 935 F.2d 691 (5th Cir. 1991)). Further, Hurt and Smith cite numerous cases that “disregard[] the parties’ expressed intentions in the third-party setting.” *Id.* at n.16 (citing, *inter alia*, *Minute Maid Corp. v. United Foods*, 291 F.2d 577 (5th Cir. 1961) (Texas law)).

197. *Id.* at 2-54 to -55. It appears that the authors refer here to a lack of what they label “subjective,” as opposed to “objective,” intent. The authors criticize these cases, stating that “[a] more direct and clear approach would have been to hold that the parties did not intend the particular consequence at issue rather than that they did not intend partnership at all.” *Id.*

treatise spends substantial time explaining the distinction between subjective and objective intent to be partners.¹⁹⁸

All told, *Bromberg and Ribstein on Partnership*'s evaluation of the seeming exception's viability is tepid at best—the reluctant recognition of a doctrine the authors apparently view as ill-advised.¹⁹⁹

3. *The Revised Uniform Partnership Act*

Finally, Donald Weidner, Allan Donn, and Robert Hillman's *The Revised Uniform Partnership Act*²⁰⁰ gives *extremely* short shrift to the supposed exception. According to this treatise: "Despite statutory language, some courts continue to state that there must be more proof of intent to create a partnership when no third-party claimants are involved."²⁰¹ The treatise then cites but one case for this proposition.²⁰² Further, *The Revised Uniform Partnership Act* goes on to state that "[m]ore typical[]" are cases which describe "subjective intent as not dispositive."²⁰³ Weidner, Donn, and Hillman therefore appear almost to criticize the exception, while grudgingly admitting that it may exist on paper.

* * *

In sum, three treatises suggest that the question of whether business co-owners can contract around partnership as a matter of law *may* turn on *who* alleges that they are partners in the first place. According to these treatises, some cases hold—or, at least state—that people may contract around partnership as a matter of law as between themselves, but not as to third parties. Although

198. See *id.* § 2.04[B]–[C].

199. It is not entirely clear that the authors believe that an agreement not to be partners is dispositive of the parties' status *inter se* if the parties otherwise satisfy the definition of partnership.

200. Dean Weidner was the original Reporter (i.e., drafter) of RUPA. See Robert W. Hillman, *Donald Weidner and the Modern Law of Partnerships*, 43 FLA. STATE UNIV. L. REV. 1111, 1113, 1117 (2016).

201. DONN ET AL., *supra* note 98, § 202, at 146 n.17.

202. *Id.* (citing *Westerlund v. Murphy Overseas USA Astoria Forest Prods., LLC*, No. 25-cv-1296, 2018 U.S. Dist. LEXIS 14912 (D. Or. Jan. 29, 2018)) (where parties' agreement stated there was no intent to be partners, the court denied one party's request to prove that the agreement was drafted to mislead third parties and conceal an oral partnership agreement).

203. *Id.* (citing *Adelman v. Adelman*, No. B251644, 2015 Cal. App. Unpub. LEXIS 4407 (June 23, 2015)).

the treatises disagree about the exception's viability, all three suggest it applies in *at least some* cases.

C. *The Seeming Exception That Was Not*

After stumbling on the subjective-intent-governs-inter-se line of cases, this Author sought to understand why courts created it. Was it an interpretation of the uniform acts' definition of partnership or an equitable exception to that definition? Or was it perhaps the continuation of some common law doctrine that predated, but was not precluded by, the uniform partnership acts?

Turns out, it was none of the above. Rather, the subjective-intent-governs-as-between-the-parties cases arose due to the two famed horsemen of per incuriam decisions, "inertia and ignorance."²⁰⁴ First, inertia: the great bulk of the cases are the continuation of a common law doctrine that predated—but was intentionally eliminated by—UPA.²⁰⁵ Second, ignorance: other cases simply apply contract law without bothering to consult the applicable partnership act.²⁰⁶

The remainder of this Section describes the history of the seeming exception that was not.

1. The Life and Death of the Subjective-Intent Line of Cases

a. The Subjective-Intent-Governs-Inter-Se Rule Predates UPA

All the cases cited for the subjective-intent-governs-inter-se rule in the three aforementioned treatises postdate the promulgation of UPA in 1914. But where did those cases find the rule?

Kingsley Clothing,²⁰⁷ perhaps the most prominent subjective-intent case, provides a clue: despite that *Kingsley Clothing* was decided in 1942,²⁰⁸ it does not cite UPA or any post-UPA case as the source of the rule; rather, it cites solely to a pre-UPA case,

204. See ALAN R. BROMBERG, CRANE AND BROMBERG ON PARTNERSHIP § 4(b), at 34–35 (1968) (attributing courts' failure to cite the UPA definition of partnership to "inertia and ignorance," as well as to deficient research materials).

205. See *infra* Part III.

206. See, e.g., *Westerlund v. Murphy Overseas USA Astoria Forest Prods., LLC*, No. 25-cv-1296, 2018 U.S. Dist. LEXIS 14912 (D. Or. Jan. 29, 2018).

207. *Kingsley Clothing Mfg. Co. v. Jacobs*, 26 A.2d 315 (Pa. 1942).

208. See *id.*

Kaufmann v. Kaufmann,²⁰⁹ decided in 1908.²¹⁰ When *Kaufmann* was decided, Pennsylvania had no partnership statute, and its partnership rules were developed at common law.²¹¹ Hence, on its face, the subjective-intent-governs-inter-se rule appears to arise out of the pre-UPA common law of partnership.

209. 70 A. 956 (Pa. 1908).

210. *See id.* The *Kaufmann* court stated the exact rules that UPA intended to abrogate. *See infra* text accompanying notes 290–95.

211. *See* James B. Lichtenberger, *The Uniform Partnership Act*, 63 U. PA. L. REV. 639, 639 (1915) (discussing Pennsylvania's adoption of UPA, which he describes as "adher[ing] to the common law theories and ideas and in great part conform[ing] to the existing law in this and most other States"). *See generally* Samuel Williston, *The Uniform Partnership Act, with Some Remarks on Other Uniform Commercial Laws*, 63 U. PA. L. REV. 196, 196, 199 (1915).

A quick Westlaw search confirms this. Numerous pre-UPA cases,²¹² old law reviews,²¹³ and ancient treatises²¹⁴ refer to the subjective-intent-governs-inter-se rule. According to these sources, the distinction between partnership as to third parties—which originally turned on an objective criterion, the sharing of profits—and partnership inter sese dates back to the 1793 English case of

212. See, e.g., *Tayloe v. Bush*, 75 Ala. 432, 436 (1883); *Hazard v. Hazard*, 11 F. Cas. 927, 927–28 (D.R.I. 1840) (citing, *inter alia*, *Waugh v. Carver* (1793) 126 Eng. Rep. 525; 2 H. Bl. 235). In *Tayloe*, the Alabama Supreme Court described “a well recognized distinction between cases where third persons have dealt with parties associated in business as partners, and controversies between the parties themselves, or controversies in which the rights of such persons are not involved.” 75 Ala. at 436. In the former cases, the *Tayloe* court explained, “a partnership may arise by mere operation of law, without an inquiry into, or in direct opposition to the expressed intention of the parties”; by contrast, in the latter cases, “the question is as to the intention of the parties.” *Id.* Yet, in a seemingly inconsistent point, the *Tayloe* court also opined that “[t]he test of a partnership generally, whether the controversy is between the parties, or quoad third persons, is, whether there is a community of interests, a participation in losses and profits.” *Id.* UPA’s drafters exalted these two requirements over the parties’ subjective intent, thereby making partnership an objective-intent test. In *Hazard*, the Circuit Court of the District of Rhode Island reasoned that the case before it turned upon the “well known distinction between cases, where, as to third persons, there is held to be a partnership, and cases where there is a partnership between the parties themselves.” 11 F. Cas. at 927. According to the *Hazard* court, partnership as to third persons “may arise between the parties by mere operation of law against the intention of the parties”; by contrast, a partnership inter se “exists only when such is the actual intention of the parties.” *Id.* at 927–28. Thus, *Hazard* opined, if two persons “should agree to carry on any business for their joint profit, and to divide the profits equally between them . . . and should agree, that there should be no partnership between them; as to third persons dealing with the firm, they would be held partners, although inter sese, they would be held not to be partners.” *Id.* at 928.

213. See, e.g., Coleman Karesh, *Partnership Law and the Uniform Partnership Act in South Carolina—Part 1*, 3 S.C.L.Q. 193, 242 (1950) (“[I]t was for a long time the rule in England and the United States that whenever persons shared profits . . . , they were partners as to third persons, even though as between themselves they were not. . . . The English case that crystallized the rule was *Waugh v. Carver*. . . . The rule of *Waugh*. . . . persisted until 1860, when . . . it was overthrown in the celebrated case of *Cox v. Hickman*, and from that case has originated the rule that persons who are not partners as to each other are not partners as to third persons.”); J.F.S., Jr., *Partnership—Presumption—Profit-Sharing*, 18 TEX. L. REV. 346, 347 (1939) (“The old view of *Waugh v. Carver*, . . . that a sharing of profits constituted a partnership as to third persons was applied at one time in Texas. It is now generally held that the test of profit-sharing no longer obtains. The real intention of the parties as shown by the entire transaction is now stressed. This means, of course, that the parties must intend to create the relation which the law recognizes as a partnership, not that the parties must intend to assume the liability of partners.”) (citations omitted); Comment, *Partnership—What Constitutes—Hawkins v. Campbell et al.*, 9 YALE L.J. 336, 336–37 (1900) (describing *Hawkins v. Campbell*, 62 N.Y.S. 678 (App. Div. 1900) (“Held, an agreement whereby the partners were to share the profits of the business, and showing that each had contributed something to its capital and possessed a definite interest in the business, is sufficient to constitute them partners as to third persons, irrespective of their agreement not to be partners.”) (emphasis omitted)).

214. See, e.g., EUGENE ALLEN GILMORE, *HANDBOOK ON THE LAW OF PARTNERSHIPS INCLUDING LIMITED PARTNERSHIPS* 1–9, 19–29 (1911); WILLIAM GEORGE, *HANDBOOK ON THE LAW OF PARTNERSHIP* 3 (St. Paul, West Publ’g Co., 1897).

Waugh v. Carver,²¹⁵ which was overthrown in England by the 1860 case of *Cox v. Hickman*.²¹⁶

In sum, the distinction between partnership as to third persons, in which objective intent is said to govern, and partnership inter se, which is said to turn solely on subjective intent, existed at common law long before UPA's creation.

b. UPA Indirectly Kills the Ancient Rule

Since it turns out that UPA post-dates the subjective-intent-governs-inter-se rule, the proper question to ask is whether UPA's drafters knew of the seeming exception's existence—and, if so, what effect (if any) they intended UPA to have on it. Did they intend for UPA to retain or abrogate the exception?

An article by Howard Walthall provides the answer.²¹⁷ According to Professor Walthall:

Pre-UPA cases as to the existence of a partnership arrayed along two prongs. Along one prong were cases addressing the question of whether persons are partners among themselves . . . [T]he important inquiry . . . along this prong was the actual intent of the parties to form a partnership. The other prong involved cases addressing . . . whether parties in a business relationship are partners as to third parties. This line of cases recognized that a partnership could be inferred as a matter of law, regardless of the intention of the parties.²¹⁸

215. (1793) 126 Eng. Rep. 525; 2 H. Bl. 235. Many commentators described the *Waugh* doctrine as originating in *Grace v. Smith* (1775) 96 Eng. Rep. 587; 2 W. Bl. 998. See, e.g., Constantine J. Smyth, *The Test of Partnership*, 11 GEO. L.J., Nov. 1922, at 10, 11–12.

216. (1860) 11 Eng. Rep. 431; 8 H.L.C. 268, 272. *Waugh* adopted the so-called “net profit rule” under which one “who takes a part of the profits shall by operation of law be made liable to losses as to third persons,” despite not being a partner inter se. L.B., *Partnership—Contract Whereby Parties Engaged in Business Sharing Profits and Losses, One of Partnership*, 3 TEX. L. REV. 495, 495 (1925). The net profits rule was repudiated in England in *Cox*, “which [held] that partnership liability is restricted to cases of actual partnership, except in cases of estoppel, and that the fact of sharing profits is but one circumstance, not in itself conclusive, . . . in determining the existence of a real partnership relation.” *Id.* For a detailed discussion of *Waugh*, *Cox*, and related common law cases (which completely ignores the then-recently promulgated UPA), see generally Smyth, *supra* note 215.

217. See generally Walthall, Sr., *supra* note 122. Accord SCOTT ROWLEY, ROWLEY ON PARTNERSHIP § 7.0(H), at 118–33 (2d ed.) (1960).

218. Walthall, Sr., *supra* note 122, at 626 (citing *Tayloe v. Bush*, 75 Ala. 432, 436 (1883)). Accord Editorial Notes, *Share Tenancies and Partnerships*, 8 IOWA L. BULL. 95, 95 (1923) (explaining that the rule of *Waugh v. Carver* which made “a participation in the profits conclusive evidence of partnership . . . was applied . . . only to third persons; it was never contended that, as between the parties, it created a partnership”). For an example of the “as to third parties” line of cases, see, e.g., *Dilley v. Abright*, 48 S.W. 548, 549 (Tex. Civ. App. 1898) (holding, where Illingworth advanced money to Abright for a business and both agreed that

In short, at common law, one line of cases addressed whether two persons were partners *inter se*, focusing on their *subjective* intent, while a second line of cases addressed whether those persons were partners *as to third parties*, focusing on *objective* intent.²¹⁹

the money would be returned plus interest and a share of the profits, that Illingworth and Abright were nonetheless liable as partners as to third parties, despite that both intended that the arrangement be a loan rather than a partnership); *see id.* (citing *Cothran v. Marmaduke*, 60 Tex. 370 (1883)) (“[W]here one advances money to be used in a business, under an agreement that he is to receive compensation by sharing in the net profit, he thereby becomes a partner in such business, and this result follows though the parties do not themselves understand their dealings as creating a partnership.”).

219. Not all commentators make this precise distinction, however. One author discusses the subjective-intent and objective-intent approaches but neither describes *Cox’s* role nor says, as Professor Walthall does, that the latter approach applied only to third-party cases while the former approach applied exclusively *inter se*. *See* Editorial Notes, *supra* note 218, at 99 (describing, among various pre-UPA tests for partnership, the “actual intention of the parties” approach, under which the “intent to create a partnership” is “essential” “as between the parties”; and describing “earlier authorities” as referring to intent “very generally” but more recent cases—as of 1922—as looking largely to objective intent). Another commentator attributes the rise of the objective-intent approach to *Cox* but does not suggest that this approach applied only in cases involving third party claims. *See*, H. S. Richard, *The Uniform Partnership Act*, 1 WIS. L. REV. 5, 12 (1920) (describing “the leading case of *Cox v. Hickman*” as “overrull[ing] the previously prevailing doctrine that anyone who shared in the profits of a business must be liable as a partner” and describing the modern approach as asking “what was the real intention and contract of the parties as shown by all the facts of the case”). A different writer describes *Cox/UPA* as both eliminating the “partners as to third parties” doctrine *and* adopting the rule that sharing of profits is merely presumptive of partnership—but does not explicitly explain that the objective approach to intent, rather than the subjective approach, survived the transition. *See* Karesh, *supra* note 213, at 241–43 (explaining that, *Cox*, in overthrowing *Waugh*, “originated the rule that persons who are not partners as to each other are not partners as to third persons” and “is chiefly responsible for the rule that sharing of profits is merely presumptive of partnership” but not explicitly addressing objective versus subjective intent). Two other commenters describe the same distinction as Professor Walthall, but do not describe it as a bright line rule. *See* Byron D. Sher & Alan R. Bromberg, *Texas Partnership Law in the 20th Century—Why Texas Should Adopt the Uniform Partnership Act*, 12 SW. L.J. 263, 267 (1958) (describing “partners as to third persons” as a doctrine where “courts apply a less strict test and require less evidence to establish a partnership as to a third person, . . . than to show the existence of a partnership as among the partners”—and adding that “[i]n Texas the doctrine manifests itself in a tendency on the part of the courts to give more weight to the ‘actual intention,’ including expressions of intent, of the alleged partners when the question involves rights and obligations among themselves, than they do when the dispute is between the alleged partner and a third person”). Finally, another author makes exactly the same distinction as Professor Walthall—i.e., that objective intent controlled as to third parties while subjective intent controlled *inter se*—but later undermines that distinction by conflating subjective and objective intent. *See*, Smyth, *supra* note 215, at 10–11, 17 (distinguishing, in cases not involving estoppel, cases deciding “whether certain persons, *inter se*, are partners” and cases in which “a third party . . . seeks to hold” alleged partners liable; explaining that, in the former situation, “intention is the criterion,” while in the latter scenario, “intention, while important, is not essential”; and later, stating that “the fact that the parties declared they were not partners” could be “rejected as a mere conclusion contrary to the inference which the law draws from what they did” if they did “all the things which the law says constitute them partners”). It therefore seems likely that not all courts made the clear distinction between third-party cases (applying objective intent) and *inter-se* cases (applying subjective intent)

Hence, it was possible for two people to be partners as to third parties (objectively), but not partners as between themselves (subjectively).

The objective-intent-governs-as-to-third-parties rule was particularly stringent in New York, where cases held that “persons who share in [the] profits are partners as to third parties even though they may not be partners as among themselves.”²²⁰ The New York courts stubbornly refused to adopt the then-modern trend in partnership law (which is now established law²²¹) under which sharing profits was no longer determinative per se as to whether one was a partner (as to third parties or otherwise).²²² As the New York Court of Appeals opined in *Leggett v. Hyde*:²²³ “[I]t matters not that the defendants meant not to be partners at all, and were not partners inter sese. They may be partners as to third parties notwithstanding. . . . [This] rule [will remain] in this state . . . [until] the legislature shall see fit to abrogate it.”²²⁴ Subsequent New York decisions refused to modernize the law and continued to hold that merely sharing profits of a business was enough to make people partners as to third parties.²²⁵ If New York was ever going to adopt

in exactly the way that Professor Walthall describes. See also 40 AM. JUR. *Partnership* §§ 43–44 (1942) (describing cases addressing the “intention of the parties” to be partners *inter se* and seemingly switching back and forth between subjective and objective approaches to intent). However, for purposes of this Article we shall assume that Professor Walthall’s description of the cases is correct; further inquiry will be left for another day.

220. Walthall, Sr., *supra* note 122, at 627.

221. See UNIF. P’SHP ACT § 7(4)(a)–(e) (UNIF. L. COMM’N 1914).

222. Walthall, Sr., *supra* note 122, at 627 (citing *Cox v. Hickman* (1860) 11 Eng. Rep. 431; 8 H.L.C. 268). In *Cox*, the court held that sharing profits was not determinative as to partnership if the business was not run on behalf of the person sharing the profits—i.e., if the person was not a co-owner of the business, but rather, shared profits in some other capacity (such as a lender). *Cox*, 11 Eng. Rep. 431; 8 H.L.C. 268, 284, 287. *Cox* therefore represented a sea change in partnership law. In jurisdictions that followed *Cox*, sharing profits merely raised a presumption of partnership that could be rebutted upon a showing that the profits were being shared for some reason other than co-ownership of the business (e.g., if profits were shared as payment of a debt to a lender). UPA section 7(4) adopts this exact approach by statute. See UNIF. P’SHP ACT § 7(4) (UNIF. L. COMM’N 1914).

223. 58 N.Y. 272 (1874).

224. Walthall, Sr., *supra* note 122, at 627 (quoting *Leggett*, 58 at 278). *Accord* Editorial Notes, *supra* note 218, at 96–97 (explaining that, although *Cox v. Hickman*’s overthrow of the *Waugh v. Carver* rule in England “has received general approval in this country,” “[a] few American states . . . have had difficulty in abandoning the old rule”; including in New York, where “it took the adoption . . . of the [UPA] to eliminate the last supporter of the old rule in the United States”); Joff Neill & Lewis Hoffman, Recent Statutes, *Uniform Partnership Law with Oregon Notes* (pt. 2), 20 OR. L. REV. 96, 98 (1940) (explaining that the rule of *Waugh v. Carver*, “in spite of supersedence by *Cox v. Hickman*, did not die completely, but persist[s] in the favor of a few American courts”).

225. See Walthall, Sr., *supra* note 122, at 627 (explaining that, in *Hackett v. Stanley*, 22 N.E. 745 (N.Y. 1889), the New York Court of Appeals “resisted arguments” to modernize

the modern approach to partnership, a legislative solution was necessary.

As a result, the “challenge to the drafters of the UPA,” according to Professor Walthall, was how to “overturn, as definitively as possible” New York’s adherence to the archaic rule that sharing profits necessarily makes one a partner²²⁶—a rule that operated solely in “cases in which it was claimed that parties were partners as to third parties . . . rather than those in which there was a claim that the defendants were partners *inter se*.”²²⁷ Happily, once UPA’s drafters realized this, they devised “a somewhat indirect but nevertheless elegant solution”: kill the partners-as-to-third-parties line of cases in order to “drive a nail” into the sharing-profits-is-determinative rule.²²⁸

This is “exactly what was done” by UPA’s drafters:

UPA § 7(1) provides: “Except as provided by . . . the provision for partnership by estoppel, . . . persons who are not partners as to each other are not partners as to third persons.” That done, cases like *Leggett v. Hyde* . . . , holding that profit sharers are deemed partners as to third parties, were overturned.²²⁹

Further, as Professor Walthall explains, “*Martin v. Peyton* would provide proof of this.”²³⁰

In *Martin*, Judge Andrews wasted no time confirming that the law of New York had changed, remarking at the outset of the case:

partnership law and instead “declared that ‘[t]he doctrine that persons may be partners as to third persons, although not so as between themselves, and although the contract of partnership contains express provisions repudiating such a relation, has been too firmly established in this state by repeated decisions to be now disregarded by its courts’”).

226. *Id.*

227. *Id.*

228. *Id.* at 627–28. In so describing the two lines of cases, Professor Walthall described the partner-as-to-third-parties line as “de facto” partnership and the partners-inter-se line as “de jure” partnership. Thus, his view is that UPA was designed to “drive a nail into” the “de facto” partnership cases. Unfortunately, this terminology does not reflect the usage in many jurisdictions (including Texas) where the term “de facto” partnership is still used to describe partnerships that form when the statutory definition of partnership is satisfied regardless of whether or not the parties intended to be “partners.” If Professor Walthall would have anticipated this continued usage of the term “de facto” partnership, he would have better described UPA as “driv[ing] a nail into” the profit-sharing-is-determinative-of-partnership rule, thereby killing the concept of a “de jure” partnership and making all partnerships “de facto” partnerships. That is to say, post-UPA, partnership formation is *always* a factual determination, and the parties cannot either form (or avoid) a partnership by contract unless the facts of their business either satisfy (or do not satisfy) the statutory definition.

229. *Id.* at 628 (quoting UNIF. P’SHP ACT § 7(1) (UNIF. L. COMM’N 1914)).

230. *Id.* (citing *Martin v. Peyton*, 158 N.E. 77, 78 (N.Y. 1927)).

“Much ancient learning as to partnership is obsolete. Today only those who are partners between themselves may be charged for partnership debts by others.”²³¹ In light of this UPA-wrought change in the law, Judge Andrews reasoned that merely sharing in the KNK investment bank’s profits did not render the defendants partners in that business.²³² Rather, the *Martin* court held that the defendants were simply lenders because, *inter alia*, they shared in the profits as repayment of a loan.²³³ By so holding, the Court of Appeals effectively repudiated earlier cases which had held to the contrary on the same facts—and thereby, confirmed that the sharing-profits-is-determinative rule was dead.²³⁴

Hurt and Smith confirm Professor Walthall’s explanation of the history of the exception, and its intended effect of UPA section 7.²³⁵ In particular, according to *Bromberg and Ribstein on Partnership*: “[UPA] § 7(1) . . . abolish[es] the doctrine of ‘partners as to third persons’ by providing that, except in the partnership-by-estoppel situation, persons who are not partners as to each other are not partners as to third persons.”²³⁶ The purpose of section 7(1), according to Hurt and Smith was “to eliminate distinctions between

231. *Martin*, 158 N.E. at 78 (citing N.Y. P’SHIP LAW § 11 (McKinney 1927) (New York’s adoption of UPA section 7)).

232. *See id.* at 80; *see also* Walthall, Sr., *supra* note 122, at 621 (“Since the Peytons clearly were entitled to a share of profits, the thrust of the case was to decide whether the various rights retained by the Peyton group—the right to be consulted as to the firm’s business, and to veto any transaction they deemed too speculative, the right to inspect the books, the right to require the resignation of any partner, a provision that management was to be in the hands of a particular individual trusted by them, and an option to become partners—constituted participation in control sufficient to make them partners. Pervasive as were the rights retained by the Peyton group, the court found that they were not partners . . .”).

233. *See Martin*, 158 N.E. at 79.

234. *See* Walthall, Sr., *supra* note 122, at 627–28 (comparing *Martin* to *Hackett v. Stanley*, 22 N.E. 745 (N.Y. 1889) (holding that sharing profits as repayment of a bona fide loan rendered a lender partners with a debtor)).

235. HURT & SMITH, *supra* note 92, § 2.01[C], at 2-10 (“At one time, partnership liability was imposed vis-à-vis third parties on the basis of profit sharing alone. This firm rule was modified in England by *Cox v. Hickman*, which is now codified in [UPA and RUPA]. . . . [UPA] § 7(1) [provides] that persons who are not partners as to each other are not partners as to third parties, except in the estoppel situation.”); *see also id.* § 2.06[B], at 2-72 to -73 (“At one time profit sharing was a *sufficient* basis for partnership. . . . *Waugh v. Carver* . . . originated the doctrine of ‘partners as to third persons’—liability based solely on profit sharing—which was followed in some older American cases. The *Waugh* doctrine was overruled in England by *Cox v. Hickman*. In this country, UPA § 7(4) and [RUPA] § 202(c)(3) provide that profit sharing is only rebuttably presumptive of partnership.”). Partnership by estoppel, which is governed by UPA section 16(1) and turns on one or more of the purported partners’ representations to third parties, does not apply here.

236. HURT & SMITH, *supra* note 92, § 2.06[B], at 2-73. *Accord* Sher & Bromberg, *supra* note 219, at 267 (explaining that “adoption of [UPA] would eliminate the vague ‘partners as to third persons’ doctrine that has found some support in the Texas cases”).

third-party cases and cases between the purported partners except those based on estoppel”²³⁷—a change that “ha[d] the advantage of bringing predictability to the partnership determination.”²³⁸

In sum, UPA’s drafters decided to kill the line of cases holding that two people could be partners as to third parties even if they were not partners *inter se*; the drafters did this to kill the rule that sharing in the profits of a business rendered one a partner in the business as to third parties.

c. A Triumph of the Objective Definition

UPA eliminated the doctrine under which people could be partners as to third parties but not as to themselves by destroying the partners-as-to-third parties, sharing-profits-is-dispositive line of cases—the objective-intent cases.²³⁹ Under UPA, being partners as to third parties also meant being partners *inter se*.²⁴⁰ But being partners *inter se* had previously turned on subjective intent.²⁴¹ The consolidation of the definition into partnership required one definition, and one approach to intent—subjective or objective. Which approach would prevail under UPA?

As described above, cases like *Martin* interpreted UPA section 6(1) as taking a strictly objective approach to intent.²⁴² Although the sharing of profits was no longer dispositive as to partnership,²⁴³ UPA’s drafters nonetheless chose an objective definition of partnership: two or more persons associated as co-owners of a for-profit business.²⁴⁴ Nowhere does that definition suggest that the parties’ intent to obtain the legal status of “partners” (or not) is controlling.

In sum, UPA replaced two separate approaches to defining partnership—one objective and one subjective—with a single, objective definition. As *Martin* confirmed, subjectivity was dead.²⁴⁵

237. HURT & SMITH, *supra* note 92, § 2.01[C], at 2-10 to -11.

238. *Id.* at 2-11. Not all commentators agree that this was a change for the better. See Shawn Bayern, *Three Problems (and Two Solutions) in the Law of Partnership Formation*, 49 U. MICH. J.L. REFORM 605, 606, 614, 618 (2016).

239. See *supra* Part II.C.1.b.

240. See *supra* Part II.C.1.b.

241. See *supra* Part II.C.1.b.

242. See *supra* Part I.B.1.a.3 (discussing *Martin v. Peyton*, 158 N.E. 77, 78 (N.Y. 1927)).

243. See UNIF. P’SHIP ACT § 7(4) (UNIF. L. COMM’N 1914).

244. See *id.* § 6(1).

245. See *supra* Part II.C.1.b (discussing *Martin v. Peyton*, 158 N.E. 77, 78 (N.Y. 1927)).

d. RUPA and TRPA/TBOC Intended the Supposed Exception to Stay Dead

The successor statute to UPA section 7(1), RUPA section 308(e), states that, “Except as otherwise provided in subsections (a) and (b) [dealing with ostensible partners], persons who are not partners as to each other are not liable as partners to other persons.”²⁴⁶ Texas adopted substantially similar language in its own version of RUPA.²⁴⁷

According to Weidner, Donn, and Hillman, RUPA 308(e) was “a repudiation of the doctrine of ‘partnership as to third persons’” under which “courts found that partnerships existed . . . [as to] third parties in situations in which no partnership would have been found if the issue had been rights and liabilities among the alleged partners.”²⁴⁸ Like UPA section 7(1), RUPA section 308(e) was “intended to apply a uniform test to determine the existence of a partnership: either there is a partnership or there is not”—so that “those who are not partners as among themselves are not liable as partners to third parties.”²⁴⁹ Hurt and Smith,²⁵⁰ among others,²⁵¹ confirm that the drafters of RUPA 308(e) intended no change from UPA, as its language is “derived from” UPA section 7(1).

Hence, there can be no doubt that the drafters of RUPA 308(e), and its Texas analog, intended the same result as the drafters of UPA: the death of the subjective-intention view.²⁵²

In sum, UPA/RUPA establish a single definition of partnership, founded upon objective intent, thereby eliminating the subjective-intent test. Although their reasons were complex, there can be no

246. UNIF. P'SHIP ACT (1997) § 308(e) (UNIF. L. COMM'N 1997).

247. See TEX. BUS. ORGS. CODE ANN. § 152.053(b) (West 2006) (“Except as provided by Section 152.307 [dealing with ostensible partners], a person who is not a partner in a partnership under Section 152.051 is not a partner as to a third person and is not liable to a third person under this chapter.”).

248. DONN ET AL., *supra* note 98, § 308, at 306.

249. *Id.*

250. See HURT & SMITH, *supra* note 92, § 2.01[C], at 2-10 (“[RUPA] § 308(e) changes this language slightly by saying that those who are not partners among themselves are not ‘liable as’ partners to third parties. The Comment says that [RUPA] section 308(e) is ‘derived from [UPA] § 7(1).’”).

251. Moll, *supra* note 27, at 780–81 (explaining that UPA section 7(1) and RUPA section 308(e) were “designed to repudiate the doctrine of partners as to third persons and to make it clear that a uniform test was to govern the partnership formation question”).

252. The Texas Supreme Court never addressed this issue in *Enterprise Products*. See Moll, *supra* note 26, at 248–49.

doubt that UPA’s drafters intended to kill the supposed exception—and RUPA’s drafters meant for it to stay dead. TRPA/TBOC, following RUPA, does the same.

2. Abrogation by Statute Means Death to the Common Law

Statutes that clearly intend to displace the common law abrogate and replace it.²⁵³ Since the intent of UPA’s (and RUPA’s) drafters was to kill the seeming exception, the enactment of either uniform act in a particular state should have killed the seeming exception in that jurisdiction—unless, perhaps, that state’s legislature expressly rejected the intent of UPA’s (and RUPA’s) drafters.

3. How to Identify—and Kill—a Zombie Precedent

In fiction, zombies are “undead” humans²⁵⁴—dead people who have been “brought back to life, but without human qualities.”²⁵⁵ They are “not able to think and they are often shown as attacking and eating human beings.”²⁵⁶

253. See *Felton v. Lovett*, 388 S.W.3d 656, 660 n.10 (Tex. 2012) (citing *Energy Serv. Co. v. Superior Snubbing Servs., Inc.*, 236 S.W.3d 190, 194 (Tex. 2007)) (“Whether a statute modifies or abrogates the common law depends on legislative intent.”); *Abutahoun v. Dow Chem. Co.*, 463 S.W.3d 42, 51 (Tex. 2015) (citing *Energy Serv. Co. v. Superior Snubbing Servs., Inc.*, 236 S.W.3d 190, 194 (Tex. 2007)) (“We have explained that statutes can modify or abrogate common law rules, but only when that was what the Legislature clearly intended.”); see also *Jones v. City of Albany*, 45 N.E. 557, 558 (N.Y. 1896) (“It is the general rule that an intention to change the rule of the common law will not be presumed from doubtful statutory provisions. The presumption is that no such change is intended, unless the statute is explicit and clear in that direction.”); accord 82 C.J.S. *Statutes* § 516 (2022) (“Statutes will not be held in derogation of the common law unless the statute itself shows that such was the object and intention of the lawmakers, and the common law will not be changed by doubtful implication. Absent a clear manifestation of legislative intent to abrogate the common law, courts interpret statutes with every intendment in favor of consistency with the common law.”); see also 73 AM. JUR. 2D *Statutes* § 182 (Supp. 2022) (citing *Holland v. Caviness*, 737 S.E.2d 669, 672 (Ga. 2013) (“A statute does not need to expressly say, ‘this is intended to preempt the common law,’ in order for it to do so; the actual canon of statutory construction is that statutes in derogation of the common law must be limited strictly to the meaning of the language employed, and not extended beyond the plain and explicit terms of the statute.”)).

254. See *Undead*, ZOMBIEPEDIA, <https://zombie.fandom.com/wiki/Undead> [<https://perma.cc/9SWL-3PJJ>] (describing “[u]ndead, or risen dead” as “a class of monster, or unnatural horror” and describing “zombies” as “one type of [u]ndead”).

255. *Zombie*, CAMBRIDGE ENG. DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/zombie> [<https://perma.cc/L6R3-4WMP>].

256. *Id.*

By analogy, zombie precedents are rules “definitively extinguished by” statute that “continue[] to prowl, repeatedly re-animated by mistaken citation and dicta.”²⁵⁷ The traditional term for such precedents is “per incuriam,” which means “wrongly decided, usu[ally] because the judge or judges were ill-informed about the applicable law.”²⁵⁸ A classic example of a per incuriam case is one that was decided without reference to an overriding statute.²⁵⁹

Courts are not bound by per incuriam decisions.²⁶⁰ Hence, to conclude that a precedent is a “zombie” means it is bad law. If a court determines a decision is per incuriam, the court ought not follow that decision.²⁶¹

In the movies, simply avoiding being eaten by a zombie will not kill it. Rather, one must destroy the zombie’s brain so that its mindless body falls into a lifeless heap.²⁶² Similarly, if courts simply refuse to cite or even decline to follow a zombie case, this will not stop those zombies from being cited by other lawyers and judges who are unaware of the case’s undead status. To truly neutralize a zombie precedent, a court must clearly deem it abrogated or per incuriam. Once that happens, the commonly used legal research databases Westlaw and Lexis-Nexis will mark the case as abrogated—placing either a red flag or a red stop sign on the case.²⁶³ This makes it more likely that future litigants and law

257. *Crowell v. Knowles*, 483 F. Supp. 2d 925, 931 (D. Ariz. 2007); *accord Hendrickson v. Doyle*, 150 F. Supp. 3d 1233, 1238 (D. Colo. 2015) (quoting *Crowell*, 483 F. Supp. 2d at 931).

258. *Per Incuriam*, BLACK’S LAW DICTIONARY (7th ed. 1999).

259. See Sarah Deer & Mary Kathryn Nagle, *Return to Worcester: Dollar General and the Restoration of Tribal Jurisdiction to Protect Native Women and Children*, 41 HARV. J. L. & GENDER 179, 238 n.388 (2018) (quoting LOUIS-PHILIPPE PIGEON, DRAFTING AND INTERPRETING LEGISLATION 59–60 (1988)) (“A judgment *per incuriam* is one which has been rendered inadvertently . . . rendered in ignorance of legislation of which they should have taken account.”); see, e.g., *Tibbetts v. Sight ‘n Sound Appliance Centers, Inc.*, 77 P.3d 1042, 1064 (Okla. 2003) (“In English law, a *per incuriam* decision is one given in ignorance or forgetfulness of a statute or of a rule having the force of law.”).

260. See *Tibbetts*, 77 P.3d at 1064.

261. See, e.g., *Crowell*, 483 F. Supp. 2d at 931 (refusing to follow zombie precedents: “[T]his court is not bound to further animate the dead rule.”).

262. See *Zombie Killing*, ZOMBIEPEDIA, https://zombie.fandom.com/wiki/Zombie_Killing [<https://perma.cc/M77Y-X62L>]; *Removing the Head or Destroying the Brain*, TVTROPES, <https://tvtropes.org/pmwiki/pmwiki.php/Main/RemovingTheHeadOrDestroyingTheBrain> [<https://perma.cc/XZ5Y-8GQQ>]; Joe Pappalardo, *Anatomy of the Perfect (Undead) Headshot*, POPULARMECHANICS (Dec. 3, 2010), <https://www.popularmechanics.com/science/health/a6264/zombie-kill-brain-forensics/> [<https://perma.cc/P46S-YL6F>].

263. Westlaw’s KeyCite system uses a red flag to indicate that a precedent has been overruled. See *Researching Case Law*, UNIV. CIN. LIBR., <https://guides.libraries.uc.edu/c.php>

clerks will realize that the case has been abrogated and avoid citing it.

D. *Rise of the Zombies: The Purported Exception That Would Not Die*

1. Litigants Continue to Cite the Seeming Exception

Alas, the subjective-intent-governs-inter-se line of cases did not die. Rather, it slunk off into a quiet corner of the treatises, weakened but not dead. Every so often, litigants use this ancient rule in their legal briefs, presumably without knowing of its intended abrogation.²⁶⁴ Courts then unwittingly cite the subjective-intent-governs-inter-se line of cases without deeming it debunked.²⁶⁵

2. Treatises Have Failed to Destroy the Seeming Exception

Rather than drive a stake into the purported exception, the aforementioned three treatises have allowed it to survive by attributing varying levels of vitality to it.²⁶⁶ Even *Bromberg and Ribstein on Partnership*, which explains the purpose of UPA section 7(1), fails to reject the exception out of hand. Rather, that treatise

?g=222559&p=1472876 [https://perma.cc/9WYV-UJ2N]. Lexis-Nexis's Shepard's uses a stop sign in the same situation. *See id.*

264. *See e.g.*, Warren J. Apollon, D.M.D., P.C. v. OCA, Inc., 592 F. Supp. 2d 906, 912 (E.D. La. 2008); *In re PCH Assocs.*, 804 F.2d 193, 197 (2d Cir. 1986). In *OCA, Inc.*, defendant argued—citing *Kingsley Clothing*—that “if the parties agree that the legal status of their relationship is not a partnership, the agreement will be given effect.” 592 F. Supp. 2d at 912 (citing *Kingsley Clothing Mfg. Co. v. Jacobs*, 26 A.2d 315, 317 (Pa. 1942)). Similarly, in *PCH Associates*, a debtor appealed from the bankruptcy court’s determination that an agreement denominated as a “sale-leaseback” agreement constituted a joint venture rather than a non-residential lease. *See* 804 F.2d at 194. In so doing, the debtor argued—also citing *Kingsley Clothing*—that “contracting parties who agree on the legal status of their relationship are bound by that expression of intent.” *Id.* at 197–98 (citing *Kingsley Clothing Mfg. Co. v. Jacobs*, 26 A.2d 315, 317 (1942)).

265. *See e.g.*, *OCA, Inc.*, 592 F. Supp. 2d at 912–13; *PCH Assocs.*, 804 F.2d at 197–98. The *OCA, Inc.* court rejected the defendant’s argument that the parties’ agreement was dispositive of their arrangement because it concluded that the facts of *Kingsley Clothing* were distinguishable, not because it recognized that the rule stated in *Kingsley Clothing* had been abrogated. *See* F. Supp. 2d at 912–13. In *PCH Associates*, the court concluded that *Kingsley Clothing* was distinguishable because the subjective-intent-governs-inter-se rule stated therein “neither governs the rights of third parties nor affects the legal consequences of the parties’ agreement.” 804 F.2d at 197–98. Nowhere did the *PCH Associates* court question whether the rule stated in *Kingsley Clothing* was good law.

266. *See supra* Part II.B (discussing CALLISON & SULLIVAN, *supra* note 104, § 5:7, at 113; HURT & SMITH, *supra* note 92, § 2.04[B], at 2-30–31; DONN ET AL., *supra* note 98, § 202, at 146 n.17).

describes UPA section 7(1) and RUPA section 308(e) as “inconsistent” with post-UPA cases, holding that “the parties’ intent to be treated as partners, as distinguished from their intent to engage in a relationship that contains the prerequisites of partnership, is controlling only in actions among the partners.”²⁶⁷

Such language necessarily misstates the incongruity in one of two possible ways. First, courts are not free to apply the common law when a statute has obviated it; if there exists any “inconsistency” between the statute and the cases, the statute controls.²⁶⁸ Hence, if post-UPA decisions applying the exception simply ignore UPA section 7(1) and RUPA section 308(e), or refuse to follow those provisions without explanation, those decisions are not “inconsistent” with UPA/RUPA—they are “wrong.”

But second, if post-UPA cases that apply the exception offer justifications for doing so, they are not necessarily “inconsistent” with section 7(1) and RUPA section 308(3) either. Rather, they may be citing policy considerations for continuing to apply the exception or perhaps reading the history of section 7(1) (and RUPA section 308(e)) differently than Professor Walthall did. In this case, it would be best to describe the supposed exception line of cases as “disagreeing” with Professor Walthall—i.e., rejecting his view that UPA section 7(1) eliminated the rule that the intent to be partners controlled *inter se*.²⁶⁹

In short, any supposed “inconsistency” is actually either an error or a disagreement. To assess which, we must carefully review the apparent-exception line of cases. The next Part does just that.

III. THE ZOMBIE LINE OF CASES—DEBUNKED

As described above, three treatises state with varying degrees of certainty that an agreement (or the intent) not to be partners controls as between the parties.²⁷⁰ Although this is an ancient, common-law rule that the UPA was enacted to destroy, these treatises nonetheless cite many cases that postdate UPA’s promulgation in support of the rule.²⁷¹ This Part analyzes those cases.

267. HURT & SMITH, *supra* note 92, § 2.01[C], at 2-11.

268. See *supra* notes 253, 259–60 and accompanying text.

269. See *supra* Part II.C.1.b. (discussing Walthall, Sr., *supra* note 122).

270. See *supra* Part II.B.

271. See *supra* Part II.B.

This Part reviews every case cited in one of the three treatises for the proposition that an agreement (or the intent) not to be partners controls as between the parties. In so doing, this Part inquires why such cases cite the old, common law rule. Do such cases consider—and reject—the view that UPA was enacted to kill the rule that subjective intent governs *inter se*? Or is there some other reason that these cases cite the supposedly long-dead subjective-intent-governs-*inter-se* rule?

Turns out, no case surveyed even considers, much less rejects, the view that UPA section 7(1) abrogated the rule that subjective intent to be partners controls as between the parties. Each reviewed case either (1) predates, and was therefore abrogated by, the relevant jurisdiction’s adoption of UPA (“pre-UPA zombies”);²⁷² (2) cites only cases that predate that jurisdiction’s UPA’s adoption, without recognizing that UPA abrogated the common law rule (“post-UPA zombies”);²⁷³ or (3) gives effect to the parties’ agreement solely as a matter of contract law, and completely ignores both the governing partnership law statute and any controlling partnership law cases (“non-UPA zombies”).²⁷⁴ In short, every single one of these cases is—at worst²⁷⁵—a zombie precedent!

272. The cases that fit this description are (1) *Adams v. State*, 189 So. 2d 354 (Ala. Ct. App. 1966) and (2) *Waters v. Cochran*, 285 So. 2d 474 (Ala. 1973), both discussed *infra* Part III.B.1.a; (3) *Greenhouse v. Zempsky*, 218 A.2d 533 (Conn. 1966), discussed *infra* Part III.B.2.a; (4) *Grimm v. Pallesen*, 527 P.2d 978 (Kan. 1974), discussed *infra* Part III.B.1.b; (5) *Rosenblum v. Springfield Produce Brokerage Co.*, 137 N.E. 357 (Mass. 1922), discussed *infra* Part III.B.1.c; (6) *Holman v. Dow*, 467 S.W.2d 547 (Tex. Civ. App.), *writ ref’d n.r.e.* (Dec. 31, 1971), discussed *infra* Part III.B.2.b.

273. The cases that fit this description are (1) *Kingsley Clothing Mfg. Co. v. Jacobs*, 26 A.2d 315 (Pa. 1942) and (2) *Rosenberger v. Herbst*, 232 A.2d 634 (Pa. Super. Ct. 1967), discussed *infra* Part III.A.1; (3) *Garner v. Garner*, 358 A.2d 583 (Md. Ct. Spec. App. 1976), discussed *infra* Part III.A.2; (4) *Myers v. Brown*, 296 So. 2d 121 (Fla. Dist. Ct. App. 1974), discussed *infra* Part III.B.3.a; (5) *LeZontier v. Shock*, 260 N.W.2d 85 (Mich. Ct. App. 1977) and (6) *Snell v. Meyers*, No. 226068, 2001 Mich. App. LEXIS 1470 (Jun. 12, 2001), discussed *infra* Part III.B.3.b; (7) *Mabry v. Pelton*, 432 S.E.2d 588 (Ga. Ct. App. 1993), discussed *infra* Part III.B.3.c; (8) *FDIC v. Claycomb*, 945 F.2d 893 (5th Cir. 1991) and (9) *FSLIC v. Griffin*, 935 F.2d 691 (5th Cir. 1991), discussed *infra* Part III.B.3.d; and (10) *Cressy v. Proctor*, 22 F. Supp. 3d 353 (D. Vt. 2014); (11) *Harman v. Rogers*, 510 A.2d 161 (Vt. 1986) and (12) *Raymond S. Roberts, Inc. v. White*, 97 A.2d 245 (Vt. 1953), discussed *infra* Part III.B.4.a; and (12) *Mercer v. Vinson*, 336 P.2d 854 (Ariz. 1959), discussed *infra* Part III.B.4.b.

274. The case that fits this description is *Westerlund v. Murphy Overseas USA Astoria Forest Products, LLC*, No. 25-cv-1296, 2018 U.S. Dist. LEXIS 14912 (D. Or. Jan. 29, 2018), discussed *infra* Part III.C.

275. However, almost none of the cases cited in notes 272 to 274, in which courts *stated* the subjective-intent-governs-*inter-se* rule, actually *held* that the parties could contract around partnership as a matter of *law*; to the extent that these cases held that no partnership existed, almost every single one so held as a *factual* matter. See *generally* Leahy, *supra* note 8. Such cases are better described as involving undead dicta rather than haunted

Such undead cases are not good law by any stretch of the imagination. Whether they pre-date UPA and were abrogated by statute, or post-date UPA and cite only abrogated cases, either way they are mistaken opinions—classic examples of per incuriam precedents. Nor can a partnership formation decision that fails to cite the applicable partnership statute or case law be called “good law” either. In sum, all the cases cited by the abovementioned three treatises for the proposition that the parties’ intent to be partners governs as between them (including any cases which stated or held that parties could contact around partnership as a matter of law *inter sese*) are zombies. They are all overruled, but not marked as such.

The remainder of this Part reviews each case cited in the three treatises.

A. *Cases Cited in Partnership Law and Practice*

Callison and Sullivan quote one Pennsylvania case²⁷⁶ and cite another²⁷⁷ for what they call the “general rule” that an agreement not to be partners is binding as between the parties.²⁷⁸ They also cite cases from Maryland,²⁷⁹ North Carolina,²⁸⁰ and Washington²⁸¹ in support of this same proposition.²⁸² This Section analyzes those cases.

holdings. *See id.* at 17–20 (distinguishing between these two types of cases). Of all the cases addressed in this Part, only one—*Westerlund*, 2018 U.S. Dist. LEXIS 14912—turned solely on the parties’ subjective intent to be partners (or not). *See Leahy, supra* note 8, at 78–80. The remaining cases either unequivocally, probably, or plausibly turned on the parties’ objective intent to be partners (or not). *See id.* at 25–78.

276. *Kingsley Clothing Mfg. Co. v. Jacobs*, 26 A.2d 315 (Pa. 1942).

277. *Rosenberger v. Herbst*, 232 A.2d 634 (Pa. Super. Ct. 1967).

278. CALLISON & SULLIVAN, *supra* note 104, § 5:7, at 113 n.25 (quoting *Kingsley Clothing*, 26 A.2d at 317) (“The Pennsylvania Supreme Court has stated the general rule: ‘[Where the parties] expressly declare that they are not partners this settles the question . . . the law permits them to agree upon their legal status and relationship [as between themselves].’”); *id.* n.24 (citing, *inter alia*, *Rosenberger*, 232 A.2d at 636) (“[I]f the parties agree[d] that they shall not be treated as partners, the courts generally have held that no partnership existed in actions between the parties, although, as discussed above, third parties can argue that the parties created a partnership with respect to obligations to such third parties.”).

279. *Garner v. Garner*, 358 A.2d 583 (Md. Ct. Spec. App. 1976).

280. *Carefree Carolina Cmtys., Inc. v. Cilley*, 340 S.E.2d 529 (N.C. Ct. App. 1986).

281. *Cusick v. Phillippi*, 709 P.2d 1226 (Wash. Ct. App. 1985).

282. *See* CALLISON & SULLIVAN, *supra* note 104, § 5:7, at 113 & n.24 (citing, *inter alia*, *Garner v. Garner*, 358 A.2d 583 (Md. App. 1976); *Carefree Carolina Cmtys., Inc. v. Cilley*, 340 S.E.2d 529 (N.C. App. 1986); *Cusick v. Phillippi*, 709 P.2d 1226 (Wash. App., Div. 3 1985)) (“[I]f the parties agree[d] that they shall not be treated as partners, the courts

1. Pennsylvania Cases: *Rosenberger* and *Kingsley Clothing*

The two Pennsylvania cases cited by Callison and Sullivan—*Rosenberger v. Herbst*,²⁸³ decided in 1967,²⁸⁴ and *Kingsley Clothing Manufacturing Co. v. Jacobs*,²⁸⁵ decided in 1942²⁸⁶—both long post-date Pennsylvania’s 1915 adoption of UPA.²⁸⁷ The *Rosenberger* court applied Pennsylvania’s UPA,²⁸⁸ however, the *Kingsley Clothing* court neither discussed nor cited Pennsylvania’s UPA.

In *Rosenberger*, the court—citing *Kingsley Clothing*—stated the law of Pennsylvania as follows:

The construction of this contract must, ultimately, be determined by reference to the intent of the parties Our Supreme Court has held: “[W]here [the parties] expressly declare that they are not partners this settles the question, for, whatever their obligations may be as to third persons, the law permits them to agree upon their legal status and relations [as between themselves].”²⁸⁹

In addition to the quoted language, the *Kingsley Clothing* court also opined:

As between the parties themselves partnership is a matter of intention, and where they expressly declare that they are not partners this settles the question, for, whatever their obligations may be as to third persons, the law permits them to agree upon their legal status and relationship inter se.²⁹⁰

Since they both post-date UPA, *Rosenberger* and *Kingsley Clothing* seem to provide strong, post-UPA support for the view that an agreement not to be partners is dispositive as between the parties.

generally have held that no partnership existed in actions between the parties, although, as discussed above, third parties can argue that the parties created a partnership with respect to obligations to such third parties.”).

283. 232 A.2d 634 (Pa. Super. Ct. 1967).

284. *See id.*

285. 26 A.2d 315 (Pa. 1942).

286. *See id.*

287. Pennsylvania adopted UPA in 1915. It was the first state to do so. *See* ROWLEY, *supra* note 217, § 7.0, at 120.

288. *See Rosenberger*, 232 A.2d at 635–36.

289. 232 A.2d at 636 (citing *Kingsley Clothing*, 26 A.2d at 317). In so doing, *Rosenberger* noted that the *Kingsley Clothing* quote “is not the rule in most jurisdictions.” *Id.* at n.2. Professor Moll generously describes *Kingsley Clothing* as not “represent[ing] a mainstream position.” Moll, *supra* note 27, at 764. This Article takes a more dismal view of *Kingsley Clothing* and its ilk: they were not simply a minority position—they were undead decisions, unaware of their own *per incuriam* status!

290. 26 A.2d at 317 (citing *Kaufmann v. Kaufmann*, 70 A. 956, 959 (Pa. 1908)). In so stating, the *Kingsley Clothing* court did not cite or even reference UPA.

Yet, on a closer look, both *Rosenberger* and *Kingsley Clothing* cite only outdated law. The only case that *Rosenberger* cites for the “general rule” is *Kingsley Clothing*,²⁹¹ which cites only *Kaufmann v. Kaufmann*—a case decided in 1908,²⁹² years before UPA was first promulgated. *Kaufmann*, in turn, states the precise rule that UPA intended to abrogate: people can be partners as to third parties but not inter se.²⁹³ *Kaufmann* also states the corollary rule that UPA intended to destroy: that the parties’ expression of their intent not to be partners is binding as between them.²⁹⁴

Hence, *Kaufmann* is exactly the sort of common law case that UPA section 7(1) was intended to overrule.²⁹⁵ In citing *Kaufmann*, neither the *Rosenberger* nor *Kingsley Clothing* explicitly indicated any understanding that the UPA was intended to displace the precise rule for which they were citing *Kaufmann*. Indeed, the *Kingsley Clothing* court did not even appear to recognize that a statute, rather than the common law, governed Pennsylvania partnerships. This failure to recognize *Kaufmann*’s abrogation by UPA was blatant error, not reasoning that is “inconsistent” with UPA.

Accordingly, to the extent that *Rosenberger* and *Kingsley Clothing* stand for the proposition that the parties’ agreement not to be partners controls their legal status inter se,²⁹⁶ they are classic

291. *Rosenberger*, 232 A.2d at 636 (citing *Kingsley Clothing*, 26 A.2d at 317).

292. 70 A. 956, 959 (Pa. 1908).

293. See *id.* (quoting *Gill v. Kuhn*, 6 Serg. & Rawle 333, 337 (Pa. 1821)) (“That there is a distinction between partnership as respects the public and partnership as respects the parties is an elementary principle of this branch of the law”); see also *id.* (quoting *Hazard v. Hazard*, 11 F. Cas. 927, 928 (C.C.D. R.I. 1840)) (“A mere participation in the profits will not make the parties partners inter sese, whatever it may do as to third persons, unless they so intend it.”).

294. See *id.* (citing *Gill v. Kuhn*, 6 Serg. & Rawle 333, 338 (Pa. 1821)) (“[W]here the [parties] explicitly declare there is to be no partnership, it is unnecessary to inquire further; for among themselves the law permits them to determine their respective interests by their own stipulations.”).

295. 59 Penn. Stat. § 12(1) adopted UPA section 7(1) verbatim. See *Rosenberger*, 232 A.2d at 635 (quoting Uniform Partnership Act of 1915, No. 15, 1915 Pa. Laws 18, 19 § 12(1) (repealed 1975), a verbatim adoption of UPA section 7(1)). Yet, it is not clear that the *Kaufmann* court applied the abrogated subjective-intent rule that it stated. Instead of applying the rule it announced, *Kaufmann* may have analyzed whether the parties were partners as a factual matter. The case may therefore reflect undead dicta, not a haunted holding. See Leahy, *supra* note 8, at 53–54 n.411 (analyzing *Kaufmann*).

296. Indeed, while both cases state the subjective-intent-governs-inter-se rule, neither case provides strong support for that rule. *Rosenberger* clearly did not hold, and *Kingsley Clothing* probably did not hold, that parties can contract around partnership as a matter of law. Rather, as described in a companion article, both cases are better read as simply holding that the parties in question did not form a partnership as a factual matter. See Leahy, *supra* note 8 at 50–55 (analyzing *Rosenberger* and *Kingsley Clothing*). These cases did not

examples of zombie precedents—killed by statute, but still roaming the reporters.²⁹⁷ Despite that UPA has been the law for over a century, any court that cites *Kingsley Clothing* or *Rosenberger* is effectively citing the pre-UPA common law rule, enshrined in *Kaufmann*, that UPA section 7(1) was intended to eliminate. The fact that the *Rosenberger* and *Kingsley Clothing* courts were blissfully ignorant as to UPA's statutory countermand of the common-law rule does not render that override invalid.²⁹⁸

2. Maryland Case: *Garner*

Garner v. Garner,²⁹⁹ a Maryland case cited by *Partnership Law and Practice*, was decided in 1976,³⁰⁰ decades after Maryland adopted UPA in 1916.³⁰¹ Accordingly, the *Garner* court applied UPA.³⁰²

Callison and Sullivan presumably cite *Garner* for the following quote: “[a] partnership *inter sese* cannot exist against the consent and intention of the parties.”³⁰³ In addition, the *Garner* court explained that the partnership test “most often applied in Maryland in cases arising out of a dispute between parties alleged to be

turn solely on the parties' contracts; rather, the courts considered all the relevant facts including the parties' contractual disclaimers of partnership. *See id.*

297. *See supra* Part II.C.2 & .3 (explaining that zombie precedents are bad law).

298. However, the *Rosenberger* court's seeming ignorance of this change in law is particularly jarring, since that court actually quoted Pennsylvania's own version of UPA section 7(1) and acknowledged that “persons who are not partners as to each other are not partners as to third persons,” *see* 232 A.2d at 635 (quoting Uniform Partnership Act of 1915, No. 15, 1915 Pa. Laws 18, 19 § 12(1) (repealed 1975)), before later stating the common law rule that UPA section 7(1) was intended to eliminate, *see id.* at 636 (quoting *Kingsley Clothing Mfg. Co. v. Jacobs*, 26 A.2d 315, 317 (Pa. 1942)). It is possible that the *Rosenberger* court simply was not aware of cases like *Martin v. Peyton*, 158 N.E. 77 (N.Y. 1927), which held that parties cannot contract around partnership as a matter of law, *see id.* at 78. However, that seems doubtful, since the *Rosenberger* court cited a treatise which referred to the *Martin* rule. *See Rosenberger*, 232 A.2d at 636 n.7 (citing ROWLEY, *supra* note 217, § 7.6(H) (“[I]t is not what the parties call their relation that is controlling in the determination of the existence of a partnership.”) (citing *Martin*, 158 N.E. at 78)). Indeed, the *Rosenberger* court made an extremely strange choice by announcing (but not necessarily applying) the *Kingsley Clothing* rule—while at the same time noting that it was “not the rule in most jurisdictions” and citing cases that did not follow it. *See Rosenberger*, 232 A.2d at 636 n.7 (citing ROWLEY, *supra* note 217, § 7.6(H)).

299. 358 A.2d 583 (Md. Ct. Spec. App. 1976).

300. *See id.*

301. *See id.* at 587 n.2.; *see also* UNIF. P'SHIP ACT, Table of Jurisdictions Wherein Act Has Been Adopted, 6 U.L.A. 1 (1969).

302. *See* 358 A.2d at 587, 589 (quoting Md. Ann. Code. Art. 73A §§ 6–7 (repealed 1975)).

303. *Id.* at 588.

partners is the intention of the parties”³⁰⁴—and thus, the test “should be given great weight.”³⁰⁵ This appears to provide some support for the seeming exception.

Garner cites two cases for the proposition that “[a] partnership *inter sese* cannot exist against the consent and intention of the parties”:³⁰⁶ a post-UPA case, *Southern Can Co. of Baltimore City v. Hartlove*,³⁰⁷ which was decided in 1927,³⁰⁸ and a pre-UPA case, *Waring v. National Marine Bank of Baltimore*,³⁰⁹ which was decided 1891.³¹⁰ *Southern Can*, in turn, quotes only *Waring* for the same proposition.³¹¹ Although both *Garner* and *Southern Can* purport to apply UPA,³¹² neither case addresses whether UPA overrode the rule that the partners’ agreement was dispositive as to formation *inter se*.

In *Waring*, the Maryland Court of Appeals (the highest court in that state), applying the common law, explicitly adopted the pre-UPA approach under which the parties’ subjective intent to be partners governs as between them and objective intent governs as to third parties:

Persons by their conduct . . . may be held liable as partners to third parties dealing with them, even though there was in fact no agreement of partnership. But the question of partnership *inter sese* is one of intention, and it may be laid down as a general rule that no such partnership can exist against the consent and intention of the parties.³¹³

Waring also concluded that two people can be partners as to third parties but not as between themselves—the precise approach that the UPA’s drafters eliminated with sections 7(1) and 16(1).³¹⁴

304. *Id.* (citing *S. Can Co. of Baltimore City v. Hartlove*, 136 A. 624, 628 (Md. 1927)).

305. *Id.* (quoting *S. Can Co. of Baltimore City v. Hartlove*, 136 A. 624, 628 (Md. 1927)).

306. *Id.* (citing *S. Can Co. of Baltimore City v. Hartlove*, 136 A. 624, 628 (Md. 1927); *Waring v. Nat’l Marine Bank of Baltimore*, 22 A. 140, 141 (Md. 1927)).

307. 136 A. 624 (Md. 1927).

308. *See id.*

309. 22 A. 140 (Md. 1927)

310. *See id.*

311. *See S. Can*, 136 A. at 628 (quoting *Waring*, 22 A. at 140–41).

312. *See Garner*, 358 A.2d at 587 (applying Maryland’s UPA); *see S. Can*, 136 A. at 627 (same).

313. *Waring*, 22 A. at 140–41; *see also S. Can*, 136 A. at 628 (quoting *Bull v. Schubert*, 2 Md. 38, 55 (1852) (“[T]he existence or nonexistence of a partnership, as between the partners themselves, must be gathered from the intention of the parties.”)).

314. *See Waring*, 22 A. at 140 (“[T]here is . . . a well recognized distinction between a partnership as *between the parties themselves*, and a partnership as *to third parties*, which

Thus, *Waring*, which pre-dates UPA's promulgation by more than two decades, is precisely the sort of case that UPA section 7(1) was intended to abrogate. By citing *Waring* without so much as mentioning UPA's effect on the common law, *Garner* and *Southern Can* were citing stale law.

Hence, *Garner* and the post-UPA case it cites, *Southern Can*, are—at worst³¹⁵—post-UPA zombies. They mindlessly roam the reporters, not knowing that UPA destroyed the entire basis for their existence. Such undead cases are per incuriam—accidental bad law that ought not be followed.

3. North Carolina Case: *Carefree Carolina Communities*

Carefree Carolina Communities, Inc. v. Cilley,³¹⁶ a North Carolina case, was decided in 1986.³¹⁷ Since North Carolina adopted the UPA in 1941,³¹⁸ the *Carefree Carolina Communities* court purported to apply the state's verbatim adoption of UPA.³¹⁹

arises by operation of law. Persons . . . may be held liable as partners to third parties dealing with them, even though there was in fact no agreement of partnership.”) Yet, that said, the *Waring* court did not involve a situation even remotely like *Enterprise Products*, in which two parties expressed the intent not to become partners in the first place. Rather, *Waring* involved two admitted partners who incorporated their business, and therefore contended that they no longer operated as a partnership. The current uniform partnership, RUPA, explicitly provides for this as an exception to the formation of a partnership. See Leahy, *supra* note 28, at 262. Hence, *Waring* is more than just abrogated by UPA; it is rendered unnecessary by RUPA.

315. However, *Garner's* citation of *Waring* is likely dicta. The *Garner* court did not hold that the parties in that case contracted around partnership as a matter of law or that their intent not to be partners was dispositive of partnership non-formation; rather, the court held that the parties were not partners as a factual matter. See Leahy, *supra* note 8, at 30–31, 38 (analyzing *Garner*). Their written expression of the intent to be partners—which was never counter-signed—was just one of the facts that the *Garner* court relied upon in determining that there was no partnership. See *id.* at 30–31. Moreover, *Southern Can* provides little support for the view that partners can contract around partnership as a matter of law. Although *Southern Can* cited *Waring* for the proposition that the parties' intent to be partners (or not) governs as between them, it interpreted that language to mean objective rather than subjective intent. See *id.* at 31–38 (analyzing *Southern Can*). Further, *Southern Can* involved a lawsuit against alleged partners by third parties. See Leahy, *supra* note 8, at 31. Hence, while *Southern Can's* focus on objective intent is not inconsistent with a rule that subjective intent governs inter se, it also offers no support for the proposition that UPA did not overrule the seeming exception.

316. 340 S.E.2d 529 (N.C. Ct. App. 1986).

317. See *id.*

318. See UNIF. P'SHIP ACT, Table of Jurisdictions Wherein Act Has Been Adopted, 6 U.L.A. 1 (1969).

319. See 340 S.E.2d at 531 (applying G.S. 59-36, North Carolina's UPA section 6, and G.S. 59-37(4), its UPA section 7(4)).

Partnership Law and Practice presumably cites *Carefree Carolina Communities* because it held that two parties who had disclaimed partnership in their written agreement were not partners.³²⁰ The Court of Appeals of North Carolina did not cite any case or UPA section for this holding. Although the court relied upon UPA's definition of partnership, it did not mention, much less address whether UPA abrogated, the subjective-intent-governs-inter-se rule. Hence, to the extent that *Carefree Carolina Communities* rests solely upon contractual grounds and can be read to hold that parties can contract around partnership as a matter of law,³²¹ it is a non-UPA zombie.

Elsewhere, the *Carefree Carolina Communities* court did reason that “[a] contract, express or implied, is essential to the formation of a partnership,”³²²—for which it quoted a 1948 case, *Eggleston v. Eggleston*.³²³ *Eggleston* quoted the 1942 legal encyclopedia *American Jurisprudence* for this proposition,³²⁴ which in turn cites two cases and the 1918 legal encyclopedia *Ruling Case Law* treatise for the same proposition.³²⁵ One of those two cases, *Bussell v. Barry*,³²⁶ was decided in 1940,³²⁷ long after the relevant state (Idaho) adopted UPA;³²⁸ the other, *Crockett v. Burlison*,³²⁹ was decided in 1906,³³⁰ over a decade before UPA was drafted. However, *Bussell*

320. See *id.* at 531 (applying an agreement which stated that it “does not constitute a partnership between the Parties,” and that “no partnership was ever contemplated” or “will ever exist” as between the parties).

321. This is unlikely. *Carefree Carolina Communities* is best read to hold, as a factual matter, that that the parties were debtor and creditor rather than partners. See Leahy, *supra* note 8, at 47–49 (analyzing *Carefree Carolina Communities*).

322. 340 S.E.2d at 531 (quoting *Eggleston v. Eggleston*, 47 S.E.2d 243, 247 (N.C. 1948)).

323. 47 S.E.2d 243 (N.C. 1948).

324. *Id.* at 247 (“A contract, express or implied, is essential to the formation of a partnership.” 40 Am. Jur., Partnership, p. 135, sec. 20, see notes 14, 15.”). It appears that this citation is an error, since the quotation in question actually appears on pages 139 to 140 of the *American Jurisprudence* treatise in question. See 40 AM. JUR., Partnership § 20, at 139–40 (1942) (“A contract, express or implied, is essential to the formation of a partnership. . . .”). Moreover, while *Eggleston* cites to two footnotes, only one—note 15—appears to stand for the proposition that the parties can contract around partnership as a matter of law.

325. 40 AM. JUR., Partnership § 20, at 139–40 & n.15 (citing *Bussell v. Barry*, 102 P.2d 276 (Idaho 1940) (quoting RULING CASE LAW § 12, at 810 (1918) (“A partnership can be created only by contract, either express or implied”); *Crockett v. Burlison*, 54 S.E. 341 (W. Va. 1906)); RULING CASE LAW § 12, at 810 n.9 (citing *Crockett*, 54 S.E. 341).

326. 102 P.2d 276 (Idaho 1946).

327. See *id.*

328. Idaho adopted UPA in 1919. See UNIF. P'SHIP ACT, Table of Jurisdictions Wherein Act Has Been Adopted, 6 U.L.A. 1 (1969).

329. 54 S.E. 341 (W. Va. 1906).

330. See *id.*

cites only *Ruling Case Law* for the relevant proposition,³³¹ leading again back to the pre-UPA *Crockett*. Moreover, none of these cases or encyclopedias address whether UPA section 7(1) was intended to abrogate the subjective-intent-governs-inter-se rule. Thus, to the extent that *Carefree Carolina Communities* relies on *Eggleston*'s language about a partnership arising out of contract, that language traces back to *Crockett*—a pre-UPA case. Accordingly, if *Carefree Carolina Communities* can be read to support the proposition that parties can contract around partnership as a matter of law as between themselves,³³² it is a post-UPA zombie.

In sum, *Carefree Carolina Communities* reflects either judicial ignorance of UPA or inertia in following abrogated pre-UPA caselaw. Either way, it is a per incuriam decision.

4. Washington Case: *Cusick*

Cusick v. Phillippi,³³³ a Washington case, was decided in 1985³³⁴—long after that state adopted UPA verbatim in 1945.³³⁵ In *Cusick*, the Court of Appeals of Washington reasoned that “[a]n express or implied contract is essential to a partnership relationship”³³⁶ and that “[t]he essential test of the existence of a partnership is whether the parties intended to establish such a relation.”³³⁷ In both instances, *Cusick* cited a post-UPA case for the relevant proposition.³³⁸ However, both of those cases pulled their language from a 1915 case, *Nicholson v. Kilbury*,³³⁹ which predated

331. See *Bussell*, 102 P.2d at 278 (quoting RULING CASE LAW § 12, at 810); RULING CASE LAW § 12, at 810 n.9 (citing *Crockett*, 54 S.E. 341).

332. However, *Carefree Carolina Communities* does not really provide any serious support for that proposition, since the court never held, or even stated, that parties can contract around partnership as a matter of law, or that subjective intent to be partners (or not governs) as between them. See Leahy, *supra* note 8, at 47–49 (analyzing *Carefree Carolina Communities*). Rather, the court held that there was no partnership based on all the facts of the parties’ relationship, including their intent (or not) to be partners (or not). See *id.*

333. 709 P.2d 1226 (Wash. Ct. App. 1985).

334. See *id.*

335. See UNIF. P'SHIP ACT, Table of Jurisdictions Wherein Act Has Been Adopted, 6 U.L.A. 126 (1995); accord *Horne v. Aune*, 121 P.3d 1227, 1231 (Wash. Ct. App. 2005) (explaining that Washington adopted UPA in 1945).

336. *Cusick*, 709 P.2d at 1230 (citing *Eder v. Reddick*, 278 P.2d 361, 365 (Wash. 1955) (citing *Nicholson v. Kilbury*, 145 P. 189, 191–92 (Wash. 1915)).

337. *Id.* at 1231 (citing *In re Estate of Thornton*, 499 P.2d 864, 867–68 (Wash. 1972) (quoting *Nicholson v. Kilbury*, 145 P. 189, 191–92 (1915)).

338. See *supra* note 336 (*Cusick* citing *Eder*); note 337 (*Cusick* citing *Thornton*). *Eder* was decided in 1955; *Thornton* was decided in 1972.

339. 145 P. 189 (Wash. 1915).

UPA's enactment in Washington by three decades. Moreover, nowhere does *Cusick* or the cases that it cites mention, much less rebut the view that UPA was intended to kill the subject intent governs inter se cases.

Hence, to the extent that *Cusick* can be read to suggest that the parties' subjective intent to be partners governs inter se,³⁴⁰ it is founded on a case that (to the extent it supports the subjective-intent rule) UPA abrogated—*Nicholson*. Just as the victim of a zombie bite turns into a zombie, and can turn other people into zombies, *Cusick*'s reliance on undead post-UPA cases, which in turn rely upon the long-dead *Nicholson*, means that *Cusick* is itself a zombie. Because it failed to recognize UPA's abrogation of the subjective-intent-governs-inter-se rule, *Cusick* must be deemed per incuriam.

B. Cases Cited in Bromberg and Ribstein on Partnership

Hurt and Smith's treatise cites numerous cases that they describe as "sa[ying] that the parties' intent to be treated as partners . . . is controlling only in actions among the partners."³⁴¹ These cases "stating that intent controls, but only in actions among the partners"³⁴² hail from Alabama,³⁴³ Connecticut,³⁴⁴ Kansas,³⁴⁵ Florida,³⁴⁶ and Michigan.³⁴⁷ (They also cite one case cited by Callison

340. However, *Cusick* does not actually support the view that the subjective intent to be partners controls inter se. The *Cusick* court did not hold that parties can contract around partnership as a matter of law; rather, it held that the parties were not partners as a factual matter. See Leahy, *supra* note 8, at 56–57 (analyzing *Cusick*). Moreover, the court employed an objective rather than a subjective definition of the intent to be partners in reaching its holding. See *id.*

341. See HURT & SMITH, *supra* note 92, § 2.01[C], at 2-10.

342. See *id.* at 2-11 n.16 (citing, *inter alia*, R4 Properties v. Riffice, No. 09-cv-00400, 2014 U.S. Dist. LEXIS 133260 (D. Conn. Sept. 23, 2014); LeZontier v. Shock, 260 N.W.2d 85 (Mich. Ct. App. 1977); Snell v. Meyers, No. 226068, 2001 Mich. App. LEXIS 1470 (Jun. 12, 2001); Myers v. Brown, 296 So. 2d 121 (Fla. Dist. Ct. App. 1974); Grimm v. Pallesen, 527 P.2d 978 (Kan. 1974); Waters v. Cochran, 285 So. 2d 474 (Ala. 1973); Adams v. State, 189 So. 2d 354 (Ala. Ct. App. 1966); Greenhouse v. Zempsky, 218 A.2d 533 (Conn. 1966)).

343. Waters v. Cochran, 285 So. 2d 474 (Ala. 1973); Adams v. State, 189 So. 2d 354 (Ala. Ct. App. 1966).

344. R4 Properties v. Riffice, No. 09-cv-00400, 2014 U.S. Dist. LEXIS 133260 (D. Conn. Sept. 23, 2014); Greenhouse v. Zempsky, 218 A.2d 533 (Conn. 1966).

345. Grimm v. Pallesen, 527 P.2d 978 (Kan. 1974).

346. Myers v. Brown, 296 So. 2d 121 (Fla. Dist. Ct. App. 1974).

347. LeZontier v. Shock, 260 N.W.2d 85 (Mich. Ct. App. 1977); Snell v. Meyers, No. 226068, 2001 Mich. App. LEXIS 1470 (Jun. 12, 2001).

and Sullivan.)³⁴⁸ Elsewhere, the *Bromberg and Ribstein on Partnership* treatise cites cases from Georgia³⁴⁹ and Texas³⁵⁰ (and several others cited by Callison and Sullivan³⁵¹) for the proposition that courts are more “willing to give effect to the parties’ characterization of their agreement as a non-partnership” as between the parties.³⁵² Finally, Hurt and Smith point out that “[t]here is also some support for a stricter standard of proof [regarding the existence of a partnership] . . . in cases between the [purported] partners.”³⁵³ They then cite several cases—from Arizona,³⁵⁴ Massachusetts³⁵⁵ and Vermont³⁵⁶—in which it (purportedly) “has been held that proof *inter sese* may be more difficult because actual intent must be shown.”³⁵⁷

By offering plenty of caveats about the cases they cite, Hurt and Smith implicitly cast doubt on the validity of those cases.³⁵⁸ (Elsewhere, their criticism is more pointed.)³⁵⁹ As a careful review of

348. See HURT & SMITH, *supra* note 92, § 2.01[D], at 2-11 n.16 (citing, *inter alia*, *Rosenberger v. Herbst*, 232 A.2d 634 (Pa. Super. Ct. 1967)); see *supra* Part III.A.1 (discussing *Rosenberger*, which was cited by Callison and Sullivan, and *Kingsley Clothing*).

349. *Mabry v. Pelton*, 432 S.E.2d 588 (Ga. Ct. App. 1993).

350. *Holman v. Dow*, 467 S.W.2d 547 (Tex. Civ. App.), *writ ref’d n.r.e.* (Dec. 31, 1971); *FDIC v. Claycomb*, 945 F.2d 853 (5th Cir. 1991); *FSLIC v. Griffin*, 935 F.2d 691 (5th Cir. 1991)). Hurt and Smith also cite a Texas case among the many case that “disregard[] the parties’ expressed intentions in the third-party setting.” HURT & SMITH, *supra* note 92, § 2.12[D], at 2-11 n.16 (citing, *inter alia*, *Minute Maid Corp. v. United Foods*, 291 F.2d 577, 583–84 (5th Cir. 1961) (applying Texas law)).

351. See HURT & SMITH, *supra* note 92, § 2.04[C], at 2-54 n.47 (citing *Carefree Carolina Cmtys., Inc. v. Cilley*, 340 S.E.2d 529, 530–31 (N.C. Ct. App. 1986); *Rosenberger v. Herbst*, 232 A.2d 634 (Pa. Super. Ct. 1967); *Cusick v. Phillippi*, 709 P.2d 1226, 1228, 1230–31 (Wash. Ct. App. 1985)).

352. See *id.* (citing, *inter alia*, *Mabry*, 432 S.E.2d at 589, 591; *Holman*, 467 S.W.2d at 549–51; *Claycomb*, 945 F.2d at 855–56, 858; *Griffin*, 935 F.2d at 699–700).

353. HURT & SMITH, *supra* note 92, § 2.02[B], at 2-16.

354. *Mercer v. Vinson*, 336 P.2d 854 (Ariz. 1959).

355. *Rosenblum v. Springfield Produce Brokerage Co.*, 137 N.E. 357 (Mass. 1922).

356. *Cressy v. Proctor*, 22 F. Supp. 3d 353 (D. Vt. 2014); *Harman v. Rogers*, 510 A.2d 161 (Vt. 1986); *Raymond S. Roberts, Inc. v. White*, 97 A.2d 245 (Vt. 1953).

357. HURT & SMITH, *supra* note 92, at 2-17 n.14 (citing *Cressy*, 22 F. Supp. 353; *Harman*, 510 A.2d 161); *Mercer*, 336 P.2d 854; *Raymond S. Roberts, Inc.*, 97 A.2d 245; *Rosenblum*, 137 N.E. 360 (labeled as “pre-UPA”). The authors also add that one state has explicitly abolished the rule of requiring a higher standard as between the parties. See *id.* (citing *In re KeyTronics*, 744 N.W.2d 425 (Neb. 2008)).

358. See Part II.B.2 (describing Hurt and Smith’s skeptical approach to the seeming exception).

359. Hurt and Smith describe these cases as instances where courts “avoided unintended consequences of partnership” by holding that there was no partnership because the parties only (subjectively) intended partnership for some purposes (and presumably not others). HURT & SMITH, *supra* note 92, § 2.04[C], at 2-54–2-55. According to the authors, these courts should have taken a different path: “[a] more direct and clear approach would have been to

these cases reveals, Hurt and Smith were wise to give these cases little credence. They are all zombies!³⁶⁰

1. Pre-UPA Cases—Alabama, Connecticut, Kansas and Massachusetts

The Alabama, Kansas and Massachusetts cases cited in *Bromberg and Ribstein on Partnership* all pre-date UPA's adoption in the applicable jurisdiction. Accordingly, they have no business being cited as good law today, post-UPA (and RUPA). Rather, they are all pre-UPA zombies.

a. Alabama Cases: *Adams* and *Waters*

Hurt and Smith cite two Alabama cases. The first, *Adams v. State*,³⁶¹ was decided in 1966.³⁶² The second, *Waters v. Cochran*,³⁶³ was decided in 1973³⁶⁴ but involved an alleged partnership that purportedly existed between 1958 and 1967.³⁶⁵ Neither court applied UPA—and for good reason, since Alabama adopted it in 1971.³⁶⁶

b. Kansas Case: *Grimm*

Bromberg and Ribstein on Partnership cites one Kansas case, *Grimm v. Pallesen*,³⁶⁷ which was decided in 1974;³⁶⁸ the alleged partnership in this case supposedly existed between 1970 and

hold that the parties did not intend the particular consequence at issue rather than that they did not intend partnership at all." *Id.* at 2-55.

360. Moreover, most are undead dicta rather than undead holdings. *See generally* Leahy, *supra* note 8.

361. 189 So. 2d 354 (Ala. Ct. App. 1966).

362. *See id.*

363. 285 So. 2d 474 (Ala. 1973).

364. *See id.*

365. *See id.* at 476, 481.

366. *See* RICHARD THIGPEN, ALABAMA CORPORATION LAW § 1:3 (4th ed. 2021).

367. 527 P.2d 978 (Kan. 1974).

368. *See id.*

1972.³⁶⁹ However, Kansas adopted UPA in 1972.³⁷⁰ Accordingly, the *Grimm* court did not apply Kansas's adoption of UPA.³⁷¹

c. Massachusetts Case: *Rosenblum*

The Massachusetts case that Hurt and Smith cite, *Rosenblum v. Springfield Produce Brokerage Co.*,³⁷² was decided in 1922³⁷³—the exact year that Massachusetts adopted UPA.³⁷⁴ Accordingly, as the treatise authors acknowledge, *Rosenblum* predates UPA.

* * *

As described above, the Alabama, Kansas and Massachusetts cases cited in *Bromberg and Ribstein on Partnership* all pre-date the UPA's adoption in their relevant state. Hence, these cases were abrogated by UPA. Yet, nobody seems to have recognized UPA's override of these cases. Accordingly, these cases are all (at worst³⁷⁵) the walking dead: killed by statute but not deemed dead by a court. They lie in wait, ready to be cited by an unsuspecting lawyer or judge. Courts in each of these jurisdictions must be alerted to these zombies.

369. *See id.* at 979–80.

370. *See* UNIF. P'SHIP ACT, Table of Jurisdictions Wherein Act Has Been Adopted, 6 U.L.A. 1 (1969).

371. Moreover, language in *Grimm* strongly implies that intent plays a different role in partnership formation between the parties and as to third persons—the precise distinction that UPA was intended to overrule. *See Grimm*, 527 P.2d at 981–82 (citing cases for the proposition that parties cannot become partners against their will, with the caveat that the rule applies “as between the parties, and not involving third parties”).

372. 137 N.E. 357 (Mass. 1922).

373. *See id.*

374. *See* UNIF. P'SHIP ACT, Table of Jurisdictions Wherein Act Has Been Adopted, 6 U.L.A. 1 (1969).

375. Yet, it is likely that some or all of these cases reflect undead dicta rather than zombie holdings. *Waters* upheld a trial court's finding that the parties were partners based on all the facts and circumstances, so its statements of zombie law were undoubtedly dicta. *See Leahy, supra* note 8, at 20–21 (analyzing *Waters*). By contrast, *Adams* concluded that partnership formation turns on all the facts and circumstances, definitely reflecting objective intent, *see id.* at 23–24 (analyzing *Adams*). Moreover, both *Grimm* and *Rosenblum* may have turned on objective intent. *See id.* at 74 (explaining that *Grimm* “did not explicitly hold that the parties' agreement not to be partners was dispositive as a matter of law” and that “it is possible to read the court as simply weighing all the facts and concluding that the [parties] . . . simply did not agree that *Grimm* co-owned the . . . business”); *id.* at 76 (stating that “[i]t is not entirely clear whether” *Rosenblum* turned on the parties' “subjective intent to form a general partnership or the[ir] objective intent to co-own a for-profit business,” since the *Rosenblum* court's reasoning “seem[ed] to neatly straddle both positions”).

2. Post-UPA Cases with Pre-UPA Facts

Hurt and Smith cite a Connecticut case and a Texas case that technically pre-date UPA despite that they were decided after UPA was adopted in each state.

a. Connecticut Case: *Greenhouse*

The relevant Connecticut case that Hurt and Smith cite, *Greenhouse v. Zempsky*³⁷⁶ was decided in 1966.³⁷⁷ Although Connecticut adopted UPA in 1961,³⁷⁸ the timeframe for the alleged partnership in *Greenhouse* was 1955 to 1960.³⁷⁹ Hence, the *Greenhouse* court did not apply Connecticut's UPA.³⁸⁰

b. Texas Case: *Holman*

Hurt and Smith also cite *Holman v. Dow*³⁸¹ for the proposition that subjective intent to be partners (or not) controls as between the parties. *Holman* arose out a series of agreements between the plaintiff and the defendants relating to the production of natural

376. 218 A.2d 533 (Conn. 1966).

377. See *id.* Hurt and Smith also cite a second Connecticut case, *R4 Properties v. Riffice*, No. 09-cv-00400, 2014 U.S. Dist. LEXIS 133260 (D. Conn. Sept. 23, 2014). However, it appears that this case—which applies Florida law—is a mistaken cite. The case arose from a dispute over whether property was contributed to an undisputed partnership. See *id.* at *1–2. The case does not address any issues related to contracting around partnership, either as a matter of fact or as a matter of law. Rather, the court looked to the parties' intent when deciding whether a partner contributed property to the partnership. See *id.* at *10 (quoting FLA. STAT. ANN. § 620.8204 cmt. 3 (West 2014)) (“Ultimately, it is the intention of the partners that controls whether property belongs to the partnership or to one or more of the partners in their individual capacities, at least among the partners themselves.”).

378. See *Guillemette v. Gaffney*, No. CV 93-0343428S, 1996 Conn. Super. LEXIS 2310, at *26 (Aug. 29, 1996) (noting that “a review of the pre- and post-uniform act cases shows little, if any, difference in how the existence of a partnership is to be determined when there is no express contract”).

379. See *Greenhouse*, 218 A.2d at 534–35.

380. Rather, for its statements about the law of intent, *Greenhouse* cited an ancient pre-UPA case, *Morgan v. Farrel*. See *id.* at 535 (citing *Morgan v. Farrel*, 20 A. 614 (Conn. 1890)). That case describes the different tests for partnership inter se and partnership as to third persons in great detail. See *Morgan*, 20 A. at 614 (reasoning that “[b]etween the parties themselves [a partnership] cannot exist except by their voluntary agreement” but that “[a] partnership as to third persons sometimes arises by operation of law even against the intention of the parties”). *Morgan* is therefore a pre-UPA zombie—precisely the type of precedent that UPA was intended to overthrow.

381. 467 S.W.2d 547 (Tex. Civ. App.), writ *ref'd n.r.e.* (Dec. 31, 1971).

gas in Texas.³⁸² The case was decided in 1971,³⁸³ long after Texas adopted UPA on May 16, 1961.³⁸⁴ However, the agreements at issue dated to 1958 and 1959,³⁸⁵ and the parties' business relationship was terminated by the defendants (purportedly due to the plaintiffs' breach of contract) on June 19, 1961.³⁸⁶ Further, although TUPA (as Texas's adoption of UPA was known) went into effect immediately upon its enactment and applied to all existing partnerships, it did not impair any contract already in force or affect any vested right.³⁸⁷ Likely for these reasons, the Holman court did not so much as refer to TUPA.

Holman is therefore a pre-UPA case, and to the extent that it can be read to hold that parties can contract around partnership as a matter of law, TUPA's enactment abrogated that holding.

* * *

Because the facts of *Greenhouse* and *Holman* pre-date the UPA's adoption in their relevant state, they also are (at most³⁸⁸) both pre-UPA zombies. The UPA rendered both cases obsolete, but unfortunately nowhere do the legal research databases so indicate. They must be updated to say so. Otherwise, left to their own devices, these cases could create more zombie precedents.

3. Likely Post-UPA Cases—Florida, Michigan, Georgia, and Texas

a. Florida Case: *Myers*

Myers v. Brown,³⁸⁹ a Florida case, appears to deal with a partnership that formed prior to 1969 and continued through sometime

382. See *id.* at 548–49 (describing the underlying agreements).

383. See *id.* at 547.

384. See Leahy, *supra* note 28, at 249 n.23 (quoting *Ingram v. Deere*, 288 S.W.3d 886, 894 (Tex. 2009)).

385. See *Holman*, 467 S.W.2d at 548–49.

386. See *id.* at 552.

387. See Alan R. Bromberg, *The Proposed Texas Uniform Partnership Act*, 14 SW. L.J. 437, 465–66 (1960) (citing UNIF. P'SHIP ACT §§ 44 & 4(5) (UNIF. L. COMM'N 1914)).

388. However, neither *Greenhouse* nor *Holman* actually turned on subjective intent; rather, both cases employed an objective approach to intent. See Leahy, *supra* note 8, at 21–23 (analyzing *Greenhouse*); *id.* at 58–60 (analyzing *Holman*). Thus, to the extent that these cases state zombie law, that law is mere undead dicta. See *id.* at 23 (so concluding about *Greenhouse*); *id.* at 60 (so concluding about *Holman*).

389. 296 So. 2d 121 (Fla. Dist. Ct. App. 1974).

around 1972;³⁹⁰ Florida did not adopt UPA until 1972.³⁹¹ Hence, Florida's UPA did not strictly apply to the parties' formation of a partnership prior to its enactment. That said, the *Myers* court mentioned that Florida "has adopted" UPA and purported to apply it—presumably for its persuasive effect.³⁹²

Hurt and Smith probably cite *Myers* for the following quote: "the true test [for partnership] as between the parties themselves seems to be their intention when making the agreement under consideration."³⁹³ However, *Myers* did not derive this rule from UPA or any case that purported to interpret it. Rather, the court looked to a pre-UPA Florida case *Uhrig v. Redding*, which itself cited two treatises that predate UPA.³⁹⁴ Nor did the *Myers* court so much as discuss UPA section 7(1), much less its abrogation of the subjective-intent-governs-inter-se rule.

Hence, to the extent that *Myers* supports the proposition that the intent to be partners governs inter se,³⁹⁵ it is entirely premised on the zombie case *Uhrig*. Just as being bitten by a zombie makes a person a zombie, reliance solely on a zombie case for support makes a case a zombie.

b. Michigan Cases: *Snell* and *LeZontier*

Hurt and Smith cite two Michigan decisions—a 2001 case, *Snell v. Meyers*³⁹⁶ and a 1977 case, *LeZontier v. Shock*³⁹⁷—for the proposition that the subjective intent, not objective intent, controls

390. *See id.* at 122.

391. *See* UNIF. P'SHIP ACT, Table of Jurisdictions Wherein Act Has Been Adopted, 6 U.L.A. 125 (1995).

392. *Myers*, 296 So. 2d at 123.

393. *Id.*

394. *See id.* (quoting *Uhrig v. Redding*, 8 So. 2d 4, 6 (Fla. 1954) (citing "Rowley, Modern Law of Partnership, Blank Ed.1916, Vol. 1, Sec. 102; Burdick, Partnership, 3rd Ed.1917, 64; 20 R.C.L., Partnership, Sec. 36.")).

395. However, a closer look at *Myers* shows that the court did not hold that the parties could contract around partnership as a matter of law. *See Leahy, supra* note 8, at 26–28 (analyzing *Myers*). Rather, *Myers* is "a straightforward application of the UPA rule that a court must consider all the circumstances—including the parties' agreement—in determining whether or not they are co-owners of a for-profit business." *Id.* at 28. Hence, *Myers*'s statement of the subjective-intent-governs-inter-se rule is arguably dicta. *See id.* Presumably, Hurt and Smith—who carefully distinguish between the subjective and objective intent to be partners in their treatise—therefore cite *Myers* simply because of how it *might* be interpreted. *See HURT & SMITH, supra* note 92, § 2.04[C], at 2-49.

396. No. 226068, 2001 Mich. App. LEXIS 1470 (Jun. 12, 2001).

397. 260 N.W.2d 85 (Mich. Ct. App. 1977).

partnership formation as between the parties.³⁹⁸ Both cases post-date Michigan's adoption of UPA in 1917.³⁹⁹

Bromberg and Ribstein on Partnership presumably cites *Snell* because (1) it quotes language from *LeZontier* which stresses that a partnership requires an agreement between the parties and turns on the parties' intention;⁴⁰⁰ and (2) because, despite invoking UPA's definition of partnership, the *Snell* court repeatedly used the ambiguous language of "agreement" and "intention" when describing its conclusion that no partnership was formed.⁴⁰¹ However, neither *Snell* nor *LeZontier* clarifies whether it is referring to subjective or objective intent.

LeZontier quoted a 1943 Michigan Supreme Court case—*Lobato v. Paulino*⁴⁰²—for the proposition that "[f]or a partnership to exist, it must be shown by an agreement, since it is the intention of the parties that is of prime importance" in making that determination.⁴⁰³ However, like *Snell* and *LeZontier*, *Lobato* does not explicitly endorse either subjective or objective intent.⁴⁰⁴

Lobato pulled its "the intention of the parties is of prime importance" language from *Block v. Schmidt*,⁴⁰⁵ a 1941 case.⁴⁰⁶ *Block*, which also does not explicitly distinguish between objective and subjective intent,⁴⁰⁷ cites *Morrison v. Meister*,⁴⁰⁸ a case arising out of transactions in 1919,⁴⁰⁹ for that same proposition.⁴¹⁰ *Morrison*, which also does not explicitly distinguish between objective and

398. HURT & SMITH, *supra* note 92, § 2.01[C], at 2-10.

399. See UNIF. P'SHIP ACT, Table of Jurisdictions Wherein Act Has Been Adopted, 6 U.L.A. 1 (1969).

400. See *Snell*, 2001 Mich. App. LEXIS 1470, at *2 (quoting *LeZontier*, 260 N.W.2d at 89) ("For a partnership to exist, it must be shown by an agreement, since it is the intention of the parties that is of prime importance in ascertaining the existence of a partnership.").

401. See, e.g., *id.* at *2, *6 (referring to the lack of an agreement to be partners).

402. 8 N.W.2d 873 (Mich. 1943).

403. *Id.* at 876.

404. Indeed, a close review of *Lobato* reveals that it was an objective-intent case. See Leahy, *supra* note 8, at 42 n.328 (quoting *Byker v. Mannes*, 641 N.W.2d 210, 217 (Mich. 2002)) (analyzing the facts of *Lobato* and concluding that the case turned on objective intent).

405. 296 N.W. 698 (Mich. 1941).

406. *Lobato*, 8 N.W.2d at 876 (citing *Block*, 296 N.W. 698).

407. *Block* did not address the issue of whether a partnership was formed (it simply assumed it); accordingly, *Block* provides no support for either a subjective- or objective-intent approach. See Leahy, *supra* note 8, at 43 n.329 (analyzing the facts of *Block*).

408. 180 N.W. 395 (Mich. 1920).

409. See *id.* at 395.

410. See *Block*, 296 N.W. at 700 (quoting *Morrison*, 180 N.W. at 396).

subjective intent,⁴¹¹ cites the 1881 case *Beecher v. Bush*⁴¹² for the same proposition.⁴¹³

Even if *Morrison* (which post-dated UPA but did not mention it) applied the UPA, *Beecher* clearly did not, since it long predated UPA. Since *Beecher* is a pre-UPA case, any support that it provides for the subjective-intent-governs-inter-se rule was overthrown when Michigan adopted UPA.⁴¹⁴ Moreover, none of the cases in the citation chain from *Morrison* to *Snell* address whether UPA section 7(1) abrogated the common law rule that subjective intent governs as between the parties.

In sum, once we get to the bottom of *LeZontier*'s ambiguous language—by tracing it back through *Lobato*, *Block* and *Morrison*—we see that it rests on a case that should have been put to rest long ago, *Beecher*. Thus, even if one reads *Beecher* as applying the common law rule (which it emphatically did not⁴¹⁵), it is a zombie—thereby rendering all of its progeny undead as well. Therefore, to the extent that *Snell* and *LeZontier* (or any of the cases leading back to *Beecher*) can be read to support the view that the parties' subjective intent controls as between them (or that parties can contract around partnership as a matter of law) those cases should be just as dead as the cases upon which they rely. They are all (at worst) zombies.

411. That said, a close reading of *Morrison* shows that it was an objective-intent case. See Leahy, *supra* note 8, at 44 n.333 (quoting *Byker v. Mannes*, 641 N.W.2d 210, 217 (Mich. 2002)) (analyzing the facts of *Morrison* and concluding that the case turned on objective intent).

412. 7 N.W. 785 (Mich. 1881).

413. 180 N.W. at 396 (“[W]here [the] rights of third persons . . . are not involved, the intention of the parties is of prime importance.” (citing *Beecher*, 7 N.W. 785)).

414. However, *Beecher* is not, in fact, a subjective-intent case. Rather, *Beecher* strongly endorses an objective-intent approach to partnership formation. See Leahy, *supra* note 8, at 45–47 (describing *Beecher*'s invocation of objective intent); accord *Byker v. Mannes*, 641 N.W.2d 210, 216 (Mich. 2002) (quoting *Beecher*, and concluding that “Justice Cooley’s statements clearly express that, in determining the existence of a partnership, the focus of inquiry is on the parties’ actual conduct in their business arrangements, as opposed to whether the parties subjectively intend that such arrangements give rise to a partnership. Thus, one analyzes whether the parties acted as partners, not whether they subjectively intended to create, or not to create, a partnership”).

415. See *supra* note 414.

c. Georgia Case: *Mabry*

Mabry v. Pelton,⁴¹⁶ a Georgia case, was decided in 1993,⁴¹⁷ after that state adopted UPA in 1985.⁴¹⁸ Yet, *Mabry* cites neither Georgia's partnership statute nor any case that applies that statute. (Indeed, *Mabry* cites no cases whatsoever in support of its holding.) It is not clear whether this is an oversight or whether the facts underlying *Mabry* simply predated Georgia's 1985 enactment of UPA.

Mabry held that the parties contracted around partnership when their agreement stated that “[n]othing herein shall be construed as constituting . . . a partnership.”⁴¹⁹ In so doing, the court also rejected the plaintiffs' attempt to adduce parole evidence to support their partnership claim.⁴²⁰ On its face, *Mabry* therefore provides support for the subjective-intent-governs-inter-se rule.

However, a case that fails to cite the relevant partnership statute (or, for that matter, *any* governing partnership caselaw) is not “good law.” It is per incuriam—a lazy mistake. In that event, *Mabry* is a non-UPA zombie. Or, if the *Mabry* court purposefully failed to cite UPA because its facts predated the statute's adoption in Georgia, then the case was abrogated like any other pre-UPA precedent. If that is so, it is a pre-UPA zombie. Thus, regardless of whether or not *Mabry* is read to hold that the parties contracted around partnership as a matter of law,⁴²¹ the case is undead.

D. Texas Cases: *Claycomb* and *Griffin*

The United States Court of Appeals for the Fifth Circuit applied Texas law in two 1991 cases, *FDIC v. Claycomb*,⁴²² and *FSLIC v. Griffin*.⁴²³ Since *Claycomb* and *Griffin* both postdated Texas's 1961

416. 432 S.E.2d 588 (Ga. Ct. App. 1993).

417. *See id.*

418. *See* UNIF. P'SHIP ACT, Table of Jurisdictions Wherein Act Has Been Adopted, 6 U.L.A. 125 (1995).

419. *Mabry*, 432 S.E.2d at 589.

420. *See id.* (concluding that plaintiffs could “not now vary the plain, unambiguous language of the written contract by their parol claims that it constitutes evidence of a partnership”).

421. Yet, *Mabry* does not hold that the parties contracted around partnership as a matter of law. *See Leahy, supra* note 8, at 70–72 (analyzing *Mabry*). Rather, it holds that the parties contracted around partnership as a factual matter. *See id.* at 71.

422. 945 F.2d 853 (5th Cir. 1991).

423. 935 F.2d 691 (5th Cir. 1991).

adoption of UPA⁴²⁴ by three decades, both purported to apply TUPA.

i. *Claycomb*

In *Claycomb*, the Fifth Circuit addressed an agreement between the parties that disclaimed both the intent to be partners and the intent to share losses; the appellate court reasoned that this language “preclude[d] a finding of . . . partnership . . . as a matter of law.”⁴²⁵ However, nowhere did the *Claycomb* court state or imply that the intent of the parties was controlling as to their formation of a partnership, either inter se or as to third parties. Rather, the Court of Appeals’s conclusion turned on its (dubious, even then⁴²⁶) reasoning that no partnership could be formed in Texas as a matter of law unless the purported partners agreed to share losses between them.⁴²⁷

Whether or not this was the law of Texas when *Claycomb* was decided, it is no longer the law of Texas today. As described above, TRPA, which was enacted in 1993 and recodified into the TBOC in 2003, listed five factors for a court to consider when deciding whether parties have formed a partnership; one such factor is an agreement to share losses.⁴²⁸ Further, the Texas Supreme Court decisively held in *Ingram* that a partnership may exist even if all of the factors are *not* present.⁴²⁹ Accordingly, since the sharing of losses is no longer required in order to form a partnership in Texas,

424. See *supra* note 69 and accompanying text.

425. *Claycomb*, 945 F.2d at 859.

426. Even prior to TUPA’s enactment, some Texas courts applied a totality of the circumstances test that did not require the sharing of losses. See *Ingram v. Deere*, 288 S.W.3d 886, 896–97 (Tex. 2009) (citing *Davis v. Gilmore*, 244 S.W.2d 671, 673–74 (Tex. Civ. App. 1951), *writ ref’d*) (“While proof of all five common law factors was a prerequisite to partnership formation under the common law, the totality-of-the-circumstances test was, in some respect, foreshadowed in Texas case law.”). Moreover, UPA does not require the sharing of losses, and as such, the enactment of TUPA in 1961 presumably abrogated the common law requirement of the sharing of losses.

427. See *Claycomb*, 945 F.2d at 858 (“The essential elements of . . . a partnership agreement, whether implied or express, are: (1) a community of interest in the venture/partnership; (2) an agreement to share profits; (3) an agreement to share losses; and (4) a mutual right of control or management of the enterprise. Where any one of these elements is absent, no joint venture or partnership exists.”).

428. See *supra* note 86 and accompanying text.

429. *Ingram*, 288 S.W.3d at 896 (“TRPA does not require proof of all of the listed factors in order for a partnership to exist.”).

Claycomb is a post-UPA zombie, too, having been overruled by TRPA's adoption.⁴³⁰

ii. *Griffin*

Presumably Hurt and Smith cite *Griffin* for its statement—for which it cites *Holman*—that “the parties’ intent is the most important test in determining whether a partnership [was] formed.”⁴³¹ However, in so stating, the *Griffin* court did not mean that the parties’ intent was dispositive of their status as partners. Rather, the *Griffin* court explained, while “intent is clearly the major focus” of the partnership formation inquiry, “a statement that no partnership [was] formed cannot be conclusive” as to the formation of a partnership.⁴³² This is the UPA rule, which turns on the objective intent to be partners.⁴³³ Hence, *Griffin* provides no support for the view that the subjective intent to be partners (or not) is dispositive as between the parties. *Griffin* is therefore not a zombie at all.

4. Cases Stating a Higher Standard of Proof as Between the Parties

a. Vermont Cases: *Cressy*, *Harman*, and *Raymond S. Roberts, Inc.*

Bromberg and Ribstein on Partnership cites three Vermont cases for the proposition that “proof [of the existence of a partnership] inter sese may be more difficult because actual intent must be shown.”⁴³⁴ All three cases—*Cressy v. Proctor*,⁴³⁵ decided in

430. However, *Claycomb* does not “state or even imply that the subjective intent of the parties is controlling as to their formation of a partnership, either inter se or as to third parties.” Leahy, *supra* note 8, at 64 (analyzing *Claycomb*). Rather, the case turns on whether the parties satisfied the required elements—“not [that] the parties’ intent to avoid partnership trumped their satisfaction of the required elements. In short, *Claycomb* appears to endorse an objective approach to the intent to form a partnership.” *Id.* Hence, “any language in *Claycomb* which suggests that the parties’ subjective intent to be partners governs as between themselves is, at worst, undead dicta.” *Id.* at 65.

431. *FSLIC v. Griffin*, 935 F.2d 691, 700 (5th Cir. 1991) (citing *Holman v. Dow*, 467 S.W.2d 547, 550 (Tex. Civ. App.), *writ ref’d n.r.e.* (Dec. 31, 1971)).

432. *Id.*

433. See *supra* Parts I.A.3 & B.

434. HURT & SMITH, *supra* note 92, §2.02 [B], at 2-16 n.14 (citing *Cressy v. Proctor*, 22 F. Supp. 3d 353 (D. Vt. 2014); *Harman v. Rogers*, 510 A.2d 161 (Vt. 1986); *Raymond S. Roberts, Inc. v. White*, 97 A.2d 245 (Vt. 1953)).

435. 22 F. Supp. 3d 353 (D. Vt. 2014).

2014;⁴³⁶ *Harman v. Rogers*,⁴³⁷ decided in 1986;⁴³⁸ and *Raymond S. Roberts, Inc. v. White*,⁴³⁹ decided in 1953⁴⁴⁰—long post-date Vermont’s adoption of the UPA in 1941.⁴⁴¹ Accordingly, each of these Vermont cases applied either UPA or its successor, RUPA.⁴⁴²

Despite applying UPA or RUPA, these cases opine that, in a lawsuit between two alleged partners, the parties must affirmatively manifest an intent to be bound.⁴⁴³ In so opining, *Cressy* cites *Harman*, which in turn cites *Raymond S. Roberts, Inc.*,⁴⁴⁴ none of these cases cites any other case for this proposition or recognizes that UPA (and RUPA) intended to abolish any distinctions in proving the existence of a partnership as between the partners or as to third parties.

Yet, *Raymond S. Roberts, Inc.* is not the end of the citation chain. That case relies upon *Sheldon v. Little*⁴⁴⁵—a pre-UPA case from 1940⁴⁴⁶—which in turn cites other pre-UPA cases for the proposition that proof of partnership *inter sese* turns on the parties’ intent.⁴⁴⁷ These pre-UPA cases, which provide the foundation for all

436. *See id.*

437. 510 A.2d 161 (Vt. 1986).

438. *See id.*

439. 97 A.2d 245 (Vt. 1953).

440. *See id.*

441. *See* UNIF. P’SHP ACT, Table of Jurisdictions Wherein Act Has Been Adopted, 6 U.L.A. 125 (1995).

442. Vermont adopted RUPA in 1998. UNIF. P’SHP ACT (1997), Table of Jurisdictions Wherein Act Has Been Adopted, 6 pt. 2 U.L.A. 223 (2015).

443. *Cressy*, 22 F. Supp. 3d at 360 (quoting *Harman*, 510 A.2d at 164) (“Where the rights in question are between the alleged partners only, ‘there must be a manifestation of an intent to be so bound.’”); *Harman*, 510 A.2d at 163 (“In deciding whether a partnership has been created by tacit agreement, courts must examine the facts to determine whether the parties carried on as co-owners of a business for profit. As against third persons, such a finding is determinative regardless of the parties’ knowledge that their association created a partnership. Where the issue hinges on the rights of the parties *inter se* only, however, there must be a manifestation of an intent to be so bound.”) (citing, *inter alia*, *Raymond S. Roberts, Inc.*, 97 A.2d at 248 (“Where the rights of the parties *inter se* merely are concerned, and no question as to third parties is involved, the criterion to determine whether the contract is one of partnership or not must be: what did the parties intend by the contract which they made as between themselves?”)).

444. *See supra* note 443 (describing how *Cressy* cited *Harman*, which in turn cited *Raymond S. Roberts, Inc.*).

445. 15 A.2d 574 (Vt. 1940).

446. *See id.*

447. *See id.* at 575 (“Where the rights of the parties *inter se* merely are concerned, and no question as to third parties is involved, the criterion to determine whether the contract is one of partnership or not must be: what did the parties intend by the contract which they made as between themselves? This intention may be shown by their express agreement or inferred from their conduct and dealings with one another.”).

the Vermont cases cited by *Bromberg and Ribstein on Partnership*, are precisely the sort of cases that the drafters of UPA intended to abrogate by promulgating UPA section 7(1).

Therefore, although several of the Vermont cases post-date UPA's enactment in that state, they all are premised entirely on language from an abrogated, pre-UPA case. Moreover, none of these cases address the question of whether UPA section 7(1) was intended to abrogate the subjective-intent line of cases. Thus, to the extent that the Vermont cases opine that the parties' intent controls *inter se*, they are all post-UPA zombies—wandering about despite their abrogation.⁴⁴⁸

b. Arizona Case: *Mercer*

Hurt and Smith also cite one Arizona case—*Mercer v. Vinson*,⁴⁴⁹ decided in 1959⁴⁵⁰—for the proposition that the standard of proof is higher *inter sese*.⁴⁵¹ Although the *Mercer* decision post-dates Arizona's 1954 adoption of UPA,⁴⁵² the case arose out of facts occurring in 1952.⁴⁵³ Presumably for this reason the Supreme Court of Arizona did not apply UPA.

In stating the common law rule, *Mercer* clearly states that the standard for proving partnership as between the parties differs from the standard applicable as to third parties:

The intent of the contracting parties to form a partnership is always an essential element of a partnership relation *as between the parties themselves*, but as to third parties, the relation will be determined

448. However, a closer analysis of the Vermont cases reveals that they all turned on objective rather than subjective intent. See Leahy, *supra* note 8, at 65–67 (analyzing *Cressy*); *id.* at 67–68 (analyzing *Harman*); *id.* at 68–70 (analyzing *Raymond S. Roberts, Inc.*). Hence, all the Vermont cases simply state *unde ad dicta*. See *id.* at 67 (so concluding about *Cressy*); *id.* at 68 (so concluding about *Harman*); *id.* at 70 (so concluding about *Raymond S. Roberts, Inc.*).

449. 336 P.2d 854 (Ariz. 1959)).

450. See *id.*

451. See HURT & SMITH, *supra* note 92, §2.02[B], at 2-18 n.14) (citing *Mercer*, 336 P.2d 854) (“[I]t has been held that proof [of the existence of a partnership] *inter sese* may be more difficult because actual intent must be shown.”).

452. See UNIF. P'SHIP ACT, Table of Jurisdictions Wherein Act Has Been Adopted, 6 U.L.A. 125 (1995).

453. See *Mercer*, 336 P.2d at 856.

from the facts rather than the conclusions of the co-partners as to the nature of their business relationship.⁴⁵⁴

This is exactly the bifurcated approach to partnership that UPA section 7(1) eliminated—a fact the *Mercer* court never bothered to consider. *Mercer* is, therefore, undead: a pre-UPA zombie.⁴⁵⁵

C. Case Cited in The Revised Uniform Partnership Act

Finally, Weidner, Donn, and Hillman's *The Revised Uniform Partnership Act* both criticizes and cabins the supposed exception under which the parties' intent controls inter se.⁴⁵⁶ That treatise only cites one case—*Westerlund v. Murphy Overseas USA Astoria Forest Products, LLC*,⁴⁵⁷ from Oregon—for the rule.

1. Oregon Case: *Westerlund*

Yet, the *Westerlund* court consulted neither Oregon's partnership law statute nor any case addressing partnership law formation.⁴⁵⁸ Indeed, the court explicitly declined to address plaintiffs' partnership law argument, that formation required consideration of all the relevant facts (i.e., objective intent), and instead ruled based on a contract law doctrine, the parole evidence rule.⁴⁵⁹ In so doing, the court evinced no understanding that applying the parole evidence rule effectively foreclosed consideration of all the relevant facts—i.e., that application of contract law effectively precluded

454. *Id.* at 859 (emphasis in original) (citing *May v. Sexton*, 206 P.2d 575, 575 (Ariz. 1949)).

455. However, in *Mercer*, the partnership claim was being asserted by a third party, so the court's statement of the subjective-intent rule was a mere throwaway; the court's actual holding turned on objective intent. See Leahy, *supra* note 8, at 25–26 (analyzing *Mercer*). Hence, *Mercer*'s statement of law is no haunted holding. It is walking-dead dicta. See *id.* at 26.

456. DONN ET AL., *supra* note 98, § 202, at 146 n.17 (“Despite statutory language, some courts continue to state that there must be more proof of intent to create a partnership when no third-party claimants are involved.”).

457. No. 15-cv-1296, 2018 U.S. Dist. LEXIS 14912 (D. Or. Jan. 29, 2018).

458. Oregon adopted UPA in 1939, see UNIF. P'SHIP ACT, Table of Jurisdictions Wherein Act Has Been Adopted, 6 U.L.A. 126 (1995), and replaced it with a version of RUPA in 1998, see UNIF. P'SHIP ACT (1997), Table of Jurisdictions Wherein Act Has Been Adopted, 6 pt. 2 U.L.A. 223 (2015).

459. See *Westerlund*, 2018 U.S. District LEXIS 14912, at *15–16 (evaluating plaintiffs' claim that the parties had previously entered into an oral partnership agreement; holding that this “prior, inconsistent oral agreement” was barred from admission into evidence at trial by the parole evidence rule; and dismissing plaintiffs' claim for breach of the partnership agreement)

application of partnership law. Instead, the court simply reasoned that the partnership law issue was premature.⁴⁶⁰

As a result, while the case appears to support the rule that parties can contract around partnership as a matter of law, the case's precedential value is weak because it completely ignored partnership law and failed to grapple with an apparent conflict between contract law and partnership law. *Westerlund* is therefore a non-[R]UPA zombie that might not exist if the court had bothered to apply partnership law or had sought to understand how it interacts with contract law.

* * *

In sum, all of the cases cited by three national treatises for the proposition that “subjective intent is dispositive inter se” are, at worst,⁴⁶¹ zombies. While these cases may state the rule, they do so only because of ignorance or inertia. Some of the cases simply ignore the governing partnership statute and must be rejected out of hand for that reason. The others either have been abrogated by, or cite only cases that were abrogated by, UPA/RUPA. Hence, these cases are all undead precedents—decisively killed by statute, but still cited as good law. They must be destroyed.

CONCLUSION

The best way to kill a zombie case is to “red-flag” it in the legal research databases by deeming it abrogated.⁴⁶² The next non-Texas court that decides whether parties can contract around partnership as a matter of law should label every case cited in this Article as a zombie—a per incuriam decision that ought not be followed. In so doing, that court should also explicitly disavow *Enterprise Products* because it conflicts with UPA section 7(1) by creating two separate tests for partnerships: one as between the partners

460. See *id.* at *8 n.5 (refusing to address plaintiffs' arguments (1) that “two parties may form a partnership without an express intent to do so . . . even while disclaiming any intent to do so” and that (2) “a court must look to all the surrounding circumstances in determining whether an oral partnership was formed”—and reasoning that such arguments are “not the question . . . at this juncture”).

461. However, as it turns out, most such cases are weak zombies at that, because they state the subjective-intent-governs-inter-se rule in dicta and base their holdings on objective intent. See generally Leahy, *supra* note 8.

462. See *supra* Part III.C.3 (describing how to kill a zombie in fiction).

(which turns on subjective intent) and one as to third parties (which does not).

If enough courts recognize that the subjective-intent-governs-inter-se cases are undead precedents, the treatise authors will surely take notice and change their characterization of those cases from “inconsistent with UPA” to “wrongly decided.”

Only then, when lawyers and judges are fully on notice about these zombie precedents, will inadvertent partnership formation be saved from the heretofore unchallenged march of the undead.