

**OPINION NO. 89-081****Syllabus:**

1. Unless it is a limited partner under R.C. Chapter 1782, a foreign corporation that is a partner in a partnership that is "transacting business" in Ohio pursuant to R.C. 1777.02, is also "transacting business" for purposes of R.C. 1703.03 and is thereby required to obtain a license from the Secretary of State pursuant to the terms of R.C. Chapter 1703.
2. A foreign corporation that is a limited partner under R.C. Chapter 1782 in a limited partnership that is "transacting business" in Ohio pursuant to R.C. 1777.02 is not "transacting business" for purposes of R.C. 1703.03 and is not required, thereby, to obtain a license from the Secretary of State pursuant to the terms of R.C. Chapter 1703 if the foreign corporation is

not also a general partner or does not take part in the control of the partnership business.

**To: Sherrod Brown, Secretary of State, Columbus, Ohio**  
**By: Anthony J. Celebrezze, Jr., Attorney General, October 16, 1989**

I have before me your request for my opinion concerning the licensing of foreign corporations in Ohio. Specifically you have asked:

1. Is a foreign corporation that is a partner in an Ohio or foreign partnership "transacting business" in Ohio so as to be subject to the licensing requirements of [R.C.] Chapter 1703?
2. Should a distinction be made between a general and limited partner in this context?

In order to answer your questions it is necessary to first examine the domestication procedure whereby corporations chartered in other states are registered to do business in Ohio. A corporation created under the laws of a jurisdiction other than Ohio is permitted to transact business in Ohio only while holding a valid license from the Ohio Secretary of State pursuant to R.C. 1703.03. R.C. 1703.03 states:

No foreign corporation not excepted from sections 1703.01 to 1703.31, inclusive, of the Revised Code, shall transact business in this state unless it holds an unexpired and uncanceled license to do so issued by the secretary of state. To procure and maintain such a license, a foreign corporation shall file an application, pay a filing fee, file annual reports, pay a license fee in initial and additional installments, and comply with all other requirements of law respecting the maintenance of such license as provided in such sections.

R.C. 1703.01(B) expressly defines "foreign corporation", as used in R.C. sections 1703.01 to 1703.31, inclusive, by stating: "[f]oreign corporation" means a corporation incorporated under the laws of another state." "State" is defined by R.C. 1703.03(C) to mean "the United States, any state, territory, insular possession, or other political subdivision of the United States, including the District of Columbia; any foreign country whose political sovereignty is recognized by the United States; and any political subdivision of such foreign country." If a foreign corporation transacting business in Ohio fails to properly register, a forfeiture of up to ten thousand dollars may be recovered, R.C. 1703.28, and the corporation is barred from using Ohio courts to maintain any action, R.C. 1703.29. The purpose of the Ohio domestication statute is to place a foreign corporation on an equal footing with an Ohio corporation. *State v. Pohlmeyer*, 59 Ohio St. 491, 52 N.E. 1027 (1899). Some corporations, however, are excepted from compliance with R.C. 1703.03, pursuant to R.C. 1703.02, which states:

Sections 1703.01 to 1703.31 of the Revised Code do not apply to corporations engaged in this state solely in interstate commerce, including the installation, demonstration, or repair of machinery or equipment sold by them in interstate commerce, by engineers, or by employees especially experienced as to such machinery or equipment, as part thereof; to banks, trust companies, savings and loan associations, credit unions, title guarantee and trust companies, bond investment companies, and insurance companies; or to public utility companies engaged in this state in interstate commerce.

I turn now to a review of the law governing partnerships.<sup>1</sup> Definitions of essential terms relating to the partnership form of business association are found

<sup>1</sup> R.C. Chapters 1775, 1777 and 1779 govern partnerships in Ohio. R.C. Chapter 1782 governs limited partnerships. The Uniform Partnership Act

generally in R.C. Chapter 1775. A partnership is defined as "an association of two or more persons to carry on as co-owners a business for profit." R.C. 1775.05(A). "Person" specifically includes individuals, partnerships, corporations and other associations. R.C. 1775.01(C). A corporation, thus, may be a partner in a partnership.

Nearly every partnership transacting business<sup>2</sup> in Ohio must file for record a certificate stating in full the names and addresses of each partner if the partnership name either does not show the names of all of the partners or if it is using a fictitious name.<sup>3</sup> R.C. 1777.02. If a partnership is required to file the certificate pursuant to R.C. 1777.02, such certificate must be filed for every change of the partnership membership. R.C. 1777.03. Upon a failure to file the certificate, the persons doing business as partners may not use Ohio courts to commence or maintain an action on any transaction made or contract had in the partnership name. R.C. 1777.04.

The central question which must be answered is whether each of the partners in a partnership transacts business. This question is best answered by examining the partnership form of business association as it exists in Ohio. A partnership is not treated as a separate legal entity under Ohio law. *Battista v. Lebanon Trotting Association*, 538 F.2d 111 (6th Cir. 1976). Ohio follows the common law "aggregate theory of partnership" under which a partnership is the sum of the partners rather than being regarded as an entity in itself. *Fairway Development Co. v. Title Insurance Company of Minnesota*, 621 F. Supp. 120 (N.D. Ohio 1985); 1988 Op. Att'y Gen. No. 88-102, p. 2-504 at n.1. The members of a partnership do not form a collective whole, distinct from the individuals comprising it, and they are not collectively endowed with any rights beyond their rights as individual partners. *Byers v. Schluppe*, 51 Ohio St. 300, 38 N.E. 117 (1894); *McMillen v. Industrial Commission of Ohio*, 13 Ohio App. 310 (Columbiana County 1920); see also R.C. 1777.02. Exceptions to the aggregate nature of the partnership form in Ohio, however, do exist for specific purposes: for suing and being sued pursuant to R.C. 2307.24, for titling and conveying real estate pursuant to R.C. 1775.09 and for

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and the Uniform Limited Partnership Act have been substantially adopted by Ohio as R.C. Chapter 1775 and R.C. Chapter 1782, respectively. R.C. 1775.03(D); Uniform Partnership Act, table, 6 U.L.A. 1989 Supp. at 1 (1914); Revised Uniform Limited Partnership Act, table, 6 U.L.A. 1989 Supp. at 220 (1985). These statutes however do not abrogate the common law of agency as applied to partnerships under R.C. Chapter 1775 and to a limited extent as applied to general partners in a limited partnership under R.C. Chapter 1782. R.C. 1775.03(A); R.C. 1775.04; R.C. 1782.24.

<sup>2</sup> I note that your questions are premised upon a determination that a partnership is transacting business in Ohio. You have not asked for and this opinion does not attempt to include a definitive discussion of what constitutes transacting business for purposes of R.C. 1703.03 or R.C. 1777.02. I note for the general discussion that the term, "transacting business", is not statutorily defined. The general rule, for licensure purposes, is that:

a foreign corporation engages in business within a state when it has entered the state by its agents and is there engaged in carrying on and transacting through them some substantial part of its ordinary or customary business, usually continuous in the sense that it may be distinguished from merely casual, sporadic, or occasional transactions and isolated acts (citation omitted).

*Contel Credit Corp. v. Tiger, Inc.*, 36 Ohio App. 3d 71, 73, 520 N.E.2d 1385, 1387 (Summit County 1987).

<sup>3</sup> R.C. 1777.02 does not require a commercial partnership to register if the partnership is established and transacting business without the United States.

municipal annexation issues pursuant to R.C. 709.02. Op. No. 88-102. Treating a partnership as an entity in these very limited instances has been construed to be for judicial and administrative convenience only and does not effect the overall treatment of the partnership form as an aggregate. *Whitman v. Keith*, 18 Ohio St. 134 (1868) (status of partnership as an entity restricted to its status in court as person to render the administration of justice more convenient); *Church Budget Envelope Co. v. Cornell*, 136 N.E.2d 101, 104 (Ct. App. Franklin County 1955) ("[i]t has been held that the Uniform Partnership Act does not make a legal partnership an independent juristic entity, and whatever recognition is given therein to the entity theory is solely for procedural or conveyancing purposes"); R. Matthews and J. Folkerth, *Ohio Partnership Law and the Uniform Partnership Act*, 9 Ohio St. L.J. 616, 619 (1948) ("[a]s a matter of fact, suits may now be brought by or against all jointly, or the firm as such, or both together. This is but a matter of procedure in respect to parties litigant. In no respect does it qualify the substantive nature of the relation").

Because a partnership is an aggregate of the partners, it must next be determined whether the acts of one partner qualify the other partners as transacting business. The definition of "partnership" in R.C. 1775.05 contemplates that the purpose of the association is "to carry on as co-owners a business for profit." Each partner has an equal right to manage and control the conduct of the partnership business. R.C. 1775.17. See also Uniform Partnership Act, Comment following §6, 6 U.L.A. 23 (1914) ("[t]o state that partners are co-owners of a business is to state that they *each* have the power of ultimate control" (emphasis added)). Control is the essence of co-ownership. H. Reuschlein & W. Gregory, *Handbook on the Law of Agency and Partnership* 248 (1979). The right of joint control by the partners exposes each partner to joint liability for the acts of a partner on behalf of the partnership. See R.C. 1775.14. Two of the essential elements of partnership co-ownership, an equal right of joint control of the management of the partner coupled with joint liability of the partners, indicate each partner is transacting business if the partnership is transacting business.

The essential relationship of a partner *v.s-a-vis* another partner is generally that each partner is both a principal and an agent to each and every other partner in the partnership. *Vrabel v. Acri*, 156 Ohio St. 467, 103 N.E.2d 564 (1952). Each partner is a principal in every partnership transaction. *Brown & Bigelow v. Roy*, 132 N.E.2d 755 (Ohio Ct. App. Franklin County 1955); *Bouslough v. Shingledecker*, 97 Ohio App. 329, 125 N.E.2d 885 (Mahoning County 1953). Furthermore, R.C. 1775.08(A) reflects the common law of agency by stating, in relevant part: "[e]very partner is an agent of the partnership for the purpose of its business." Each member of a partnership acting within the scope of the business of the partnership, acts for all and is bound by the acts of all of the other partners. *Shingledecker*. The activities of one partner are imputed to all of the partners. *Myers v. Freedom Newspapers, Inc.*, 274 F. Supp. 93 (N.D. Ohio 1967). The concept that every partner is a principal of the partnership is codified in R.C. 1775.08(A) which states, in pertinent part, "the act of every partner...carrying on in the usual way the business of the partnership...binds the partnership." The principle that one partner's actions have a binding effect upon the other partners is repeated throughout R.C. Chapter 1775. See, e.g., R.C. 1775.09 (partner may convey partnership real property); R.C. 1775.10 (admission or representation by partner is evidence against partnership); R.C. 1775.12 (partnership liable for wrongful act of partner); R.C. 1775.13 (partnership bound by partner's breach of trust); R.C. 1775.14 (all partners jointly and severally liable for wrongful acts of partner and partner's breach of trust, and jointly liable for debts and obligations of partnerships).

The inherent nature of the partnership form and relationship leads to the general rule, that if any partner transacts business in Ohio, all of the partners transact business. I conclude, therefore, if any one partner transacts business in Ohio on behalf of the partnership in which the foreign corporation is a partner, the foreign corporation transacts business in Ohio. Where, however, by the partnership agreement or provision of law, a foreign corporation does not possess the inherent attributes of being a partner, namely, right of control, joint liability and the power to be bound by another partner's acts, such foreign corporation does not transact business solely because another partner in the partnership is transacting business in Ohio.

Your second question asks whether a foreign corporation that is a limited partner is subject to registration under R.C. Chapter 1703. Your request again assumes that the partnership is transacting business in Ohio. The relevant inquiry is whether, because of the inherent differences between a limited partner and a general partner or a partner in a partnership without limited partners, the act of transacting business by a general partner in a limited partnership is imputed to the limited partner.<sup>4</sup>

A brief examination of the nature of a limited partnership compared with that of a partnership without limited partners reveals that the two forms of business association are fundamentally different. Limited partnerships are specifically governed by R.C. Chapter 1782, while partnerships without limited partners are separately governed by R.C. Chapter 1775.<sup>5</sup> A limited partnership is a partnership having one or more limited partners and one or more general partners. R.C. 1782.01(G); D. Hurd and E. Mayer, *Ohio Limited Partnerships - Business Use and Effect*, 27 Ohio St. L.J. 373, 374 (1966) ("[i]n the simplest sense a limited partnership is a partnership under the Uniform Limited Partnership Act, with exclusive management and control coupled with unlimited liability in a general partner, and with limited liability in the limited partner" (footnotes omitted)). The limited partnership form exists as an intermediate alternative to the corporation and partnership under R.C. Chapter 1775. See Comment, *H. 607: Ohio Adopts the Revised Uniform Limited Partnership Act*, 11 U. Dayton L. R. 187, 189 (1985) ("[b]y changing the partnership from general to limited and by bringing into the partnership a limited partner with investment capital, the general partner can raise capital as if the partnership were a corporation, yet avoid the formalities associated with incorporation and, of course, the double taxation of business profit. The limited partner benefits through the availability of an opportunity for investment, an opportunity that does not have its profits taxed twice, and the limited liability exposure of an amount equal to his or her investment" (footnotes omitted)).

Inasmuch as a limited partnership is a form of business association distinct and significantly different from a partnership without limited partners, the attributes of a limited partner differ from the attributes of other types of partners. R.C. 1782.01(F) defines "limited partner" as "a person who has been admitted to a limited partnership as a limited partner in accordance with the partnership agreement and named in the certificate of limited partnership as a limited partner." For purposes of R.C. Chapter 1782, a partnership agreement is "any valid written or oral agreement of the partners regarding the affairs of a limited partnership or the conduct of its affairs." R.C. 1782.01(I). Thus, the terms of the partnership agreement and the certificate of limited partnership, to the extent they do not conflict with a provision of R.C. Chapter 1782, define the nature of a specific limited partner in a given limited partnership. In recognition of the latitude granted

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<sup>4</sup> The second question posed by your request specifically refers to a "general partner". It is not apparent from your letter the meaning you intend to be assigned to that term. I note that R.C. Chapter 1775 does not use the term "general partner" but refers, instead to "partners". R.C. Chapter 1782 uses the term "general partner" but limits it to one who is a partner other than a limited partner in a limited partnership. When R.C. Chapter 1782 refers to a partner in a partnership under R.C. Chapter 1775, such partner is a "partner in a partnership without limited partners." Common usage treats a partner in a partnership without limited partners and a general partner in a limited partnership as synonymous within the term "general partners." *Black's Law Dictionary* 616, 1009 (5th ed. 1979). I will, therefore, treat your use of "general partner" as encompassing both a partner in a partnership without general partners and a general partner in a limited partnership.

<sup>5</sup> A limited partnership formed under the laws of a state other than Ohio is a "foreign limited partnership". R.C. 1782.01(D). The laws of the state under which a foreign limited partnership is organized govern such partnership's organization, internal affairs and the liability of its limited partners. R.C. 1782.48.

to limited partnerships, R.C. Chapter 1782 defers extensively to the agreement and certificate. *See, e.g.*, R.C. 1782.17 (admission of additional limited partners); R.C. 1782.18 (voting rights of limited partners); R.C. 1782.24 (rights and powers of general partner); R.C. 1782.26 (voting rights of general partners); R.C. 1782.28 (liability of partner to partnership); R.C. 1782.29 (allocation of profits and losses); R.C. 1782.30 (allocation of distributions). The partners in a limited partnership are permitted to specifically include a statement of the nature and extent of the limited partner's powers in the partnership certificate. R.C. 1782.08(A) (designated information must be contained in a certificate of limited partnership and may include "[a]ny other matters that the partners determine to include in the certificate").

While the common law of agency applies to a partner in a partnership without limited partners, R.C. 1775.04, R.C. Chapter 1782 does not contain a provision similar to R.C. 1775.04, and, therefore, the common law of agency does not apply to a limited partner. General partners in a limited partnership, however, are subject to the common law of agency. *See* R.C. 1782.24 ("a general partner of a limited partnership shall have all the rights and powers and be subject to all the restrictions and liabilities of a partner in a partnership without limited partners"); R.C. 1775.04. No provision of R.C. Chapter 1782, however, brings the general law of agency to bear upon limited partners. A limited partner is, therefore, not principal or agent to the other partners.

The comprehensive statutory scheme under R.C. Chapter 1782 indicates that a limited partner has no powers, duties or characteristics beyond the parameters of R.C. Chapter 1782. Indeed various sections of R.C. Chapter 1782 limit the indicia of the common law agent-principal relationship. For example, a limited partner is not a principal since a limited partner exercises no control of the business. *See* R.C. 1782.19 (limited partner not liable for partnership obligations if no control is exercised).<sup>6</sup> R.C. 1782.19 excepts a limited partner from personal liability for the obligations of a limited partnership. A limited partner has only a duty to make the contribution of cash, property or services agreed to in the partnership agreement. R.C. 1782.28.

Reading R.C. Chapter 1782 as a whole, it appears that the essence of a limited partner is that of a passive investor, with limited liability and no control of the management or conduct of the partnership business. It is doubtful that a limited partner is properly considered a "partner" under Ohio law as used in R.C. Chapter 1775. *See generally, Handbook on the Law of Agency and Partnership* 437; J. Crane & A. Bromberg, *Law of Partnership* 148, 517 (1968); Uniform Limited Partnership Act, Official Comment following §1, 6 U.L.A. 564 (1916) (in the Uniform Limited Partnership Act, the person who contributes the capital, though in accordance with custom is called a limited partner is, however, only a member of the association; the limited partnership is not in any sense a principal in the business).

The relevant dissimilarities of a limited partner and other partners may be reduced to three factors. A limited partner is neither principal nor agent to the other partners in a limited partnership and is not bound by the act of another partner. A limited partner has no right to control or participate in the management

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<sup>6</sup> R.C. 1782.19 states:

(A) Except as provided in division (D) of this section, a limited partner shall not become liable for the obligations of a limited partnership unless he is also a general partner or, in addition to the exercise of his rights and powers as a limited partner, he takes part in the control of the business. However, if the limited partner's participation in the control of the business is not substantially the same as the exercise of the powers of a general partner, he is liable only to persons who transact business with the limited partnership with actual knowledge of his participation in control.

(B) A limited partner does not participate in the control of

of the partnership business. A limited partner, because of this minimal role in a limited partnership, is insulated from liability from partnership obligations beyond the amount of his agreed contribution to the partnership capital. R.C. 1782.19; R.C. 1782.28. A limited partner lacks the attributes of being a partner, and, therefore, another partner's act is not imputed to a limited partner. I conclude, therefore, that a foreign corporation does not transact business in Ohio solely by being a limited partner in a partnership that is transacting business in Ohio.

Based on the foregoing, it is my opinion, and you are hereby advised, that:

1. Unless it is a limited partner under R.C. Chapter 1782, a foreign corporation that is a partner in a partnership that is "transacting business" in Ohio pursuant to R.C. 1777.02, is also "transacting business" for purposes of R.C. 1703.03 and is thereby required to obtain a license from the Secretary of State pursuant to the terms of R.C. Chapter 1703.
2. A foreign corporation that is a limited partner under R.C. Chapter 1782 in a limited partnership that is "transacting business" in Ohio pursuant to R.C. 1777.02 is not "transacting business" for purposes of R.C. 1703.03 and is not required, thereby, to obtain a license from the Secretary of State pursuant to the terms of R.C. Chapter 1703 if the foreign corporation is not also a general partner or does not take part in the control of the partnership business.

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the business within the meaning of division (A) of this section solely by doing one or more of the following:

- (1) Being a contractor for, or an agent or employee of, the limited partnership or a general partner;
- (2) Consulting with and advising a general partner with respect to the business of the limited partnership;
- (3) Acting as surety for the limited partnership;
- (4) Approving or disapproving an amendment to the partnership agreement;
- (5) Voting on one or more of the following matters:
  - (a) The dissolution and winding up of the limited partnership;
  - (b) The sale, exchange, lease, mortgage, pledge, or other transfer of all or substantially all of the assets of the limited partnership other than in the ordinary course of its business;
  - (c) The incurrence of indebtedness by the limited partnership other than in the ordinary course of its business;
  - (d) A change in the nature of the business;
  - (e) The removal of a general partner.

(C) Division (B) of this section shall not be read to mean that the possession or exercise of powers other than those enumerated in that division by a limited partner constitutes participation by him in the control of the business of the limited partnership.

(D) A limited partner who knowingly permits his name to be used in the name of the limited partnership, except as permitted by division (A)(1) of section 1782.02 of the Revised Code, shall be liable to creditors who extend credit to the limited partnership without actual knowledge that the limited partner is not a general partner.