INTRODUCTION TO THE "UNCORPORATION"

*Larry E. Ribstein**

Here I provide a fly-over view of some of the issues covered by the very interesting articles collected in this symposium. I propose to pique readers' interest, and not to provide the edification that can come only from reading these articles.

This symposium inaugurates a new approach to the academic study of business associations. Until now, business association scholars have focused on corporations. While they have been obsessed with corporations, the universe of partnerships and unincorporated firms—that is, "uncorporations"—has expanded. Practitioners have developed new types of contracts, have persuaded state legislatures to make statutes more accommodating, and have educated their fellow lawyers about these new business forms. But these issues have not engaged the attention of legal academics.

This symposium seeks at long last to focus scholars' attention on the theoretical implications of the uncorporation. The participants in this symposium have responded to this call in a variety of ways that help set the agenda for further work in this area.

Some of the writers discuss the essential differences between incorporated and unincorporated entities. One difference is that, while the traditional corporation has a strong hierarchical structure designed to maintain the firm's continuity and to separate ownership and control, partnership is characterized by a more horizontal structure and less emphasis on locking assets into the firm. Richard Booth analyzes the application of the partnership owner-management model to executive compensation in publicly held firms. My article concerns the implications of partnership structure for fiduciary duties, which I argue should be limited to the sort of delegation of control that is associated with the vertical corporate-type structure. Lynn Stout explores the implications of lock in for directors' fiduciary duties, the rise of large professional partnerships, and government regulation of corporate governance.

One important difference between uncorporations and corporations is the relative availability of private contracting in the former context.

* Corman Professor, University of Illinois College of Law.

Richard Painter discusses the implications of such contracting for attorneys' ethical obligations. Saul Levmore notes that partnerships so far have escaped the abiding threat of federal regulation that influences corporate law, and wonders whether they will continue to do so. And Robert Hillman reminds us that the theoretical issues concerning contracting in business entities do not divide neatly along partnership and corporate lines—while closely held firms typically feature the sort of direct bargaining by owners that we normally associate with partnerships, many large professional partnerships have corporate-style hierarchical organization and no such direct bargaining.

Several writers focus on limited liability issues. Hansmann, Kraakman, and Squire look at the evolution of both limited liability and its converse, which the authors term "entity shielding," and the relationship of this evolution to the new types of business entities. They see the rise of the uncorporation, not as corporations being replaced by partnerships, but rather as an aspect of the spread of corporate-type rules of creditor rights because of the increasing sophistication of credit markets. Per Samuelsson questions this conclusion, relying on historical evidence from Europe in general, and Sweden in particular.

Courts and interest groups might resist the expansion of limited liability into the uncorporation, using theories such as veil piercing to undercut statutory limited liability. Stephen Bainbridge argues that veil piercing should be unavailable in this setting, consistent with his analysis of corporate veil piercing. One might look past statutory limited liability forms and ask whether limited liability should be available by contract or otherwise informally. Barry Adler suggests, for example, that parties might be able to opt out of vicarious liability to consensual creditors by remaining hidden.

The expansion of uncorporate limited liability theoretically might end with vicarious liability becoming a vestigial rule for only the most informal firms, or perhaps even disappearing as a default rule. Krawiec and Baker's study of New York law firm conversions to the limited liability partnership form shows the complex factors that underlie the conversion decision. Though the trend is clearly toward limited liability, Krawiec and Baker argue that vicarious liability should be retained as a penalty default rule that forces disclosure of relevant information and facilitates regulation.

The uncorporation universe extends beyond LLCs and general and limited partnerships. For example, Robert Sitkoff discusses the business, or statutory, trust. Even within the more widely recognized forms, uncorporations transcend statutory rules. Gordon Smith examines customized contractual structures, specifically in venture capital firms, which combine aspects of partnership-type exit and corporate-type lock in and deadlock.

Though this symposium is an important beginning of the academic study of the uncorporation, it leaves many issues to be explored. Sitkoff's article on business trusts is particularly useful in developing a prospectus of these issues.

Despite its inevitable incompleteness, hopefully this symposium has accomplished at least one important objective—to persuade legal scholars that they are wrong to characterize the study of business entities as corporate law. Looking far ahead, perhaps all this will end some day with a symposium on that forgotten entity, the "unpartnership."