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STATE OF MINNESOTA

IN COURT OF APPEALS

A08-1899

R&R Investors I - UPA Partnership, Curtis Hogenson, individually and as tenant-in-partnership of R&R Investors I - UPA Partnership consisting of Curtis Hogenson, Diane Larson, Gerald Berger (deceased) and Norman Arvidson (deceased); Diane Larson, individually and as tenant-in-partnership of R&R Investors I - UPA Partnership consisting of Curtis Hogenson, Diane Larson, Gerald Berger (deceased) and Norman Arvidson (deceased); Eileen M. Berger, individually and as successor tenant-in-partnership in R&R Investors I - UPA Partnership consisting of Curtis Hogenson, Diane Larson, Gerald Berger (deceased) and Norman Arvidson (deceased); and Shirley J. Arvidson, individually and as successor tenant-in-partnership in R&R Investors I - UPA Partnership consisting of Curtis Hogenson, Diane Larson, Gerald Berger (deceased) and Norman Arvidson (deceased),

Appellants,

vs.

R&R Investors and Paul Strangis,
Faegre & Benson LLP and Eckland & Blando LLP,

Respondents.

APPELLANTS' PRINCIPAL BRIEF

Erick G. Kaardal, Esq.
Mohrman & Kaardal, P.A.
33 South Sixth Street, Suite 4100
Minneapolis, Minnesota 55402
Telephone: 612-341-1074

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1. Under Minnesota's Uniform Partnership Act, when the relationship between the partners changes, that partnership dissolves. The business of a partnership, namely the ownership and management of real property, continues under the same name, but partners are added, withdrawn, or substituted. Even if a business continues, under MUPA, does a partnership dissolve with a change in partner relationships?

   The lower court stated no because the substituted partners continued the business of the partnership as a single entity.

   Apposite Statutes:

   Minn. Stat. § 323.28
   Minn. Stat. § 323.29

   Apposite Cases:

   Egner v. States Realty Co., 223 Minn. 305, 26 N.W.2d 464 (1947);
   Hurwitz v. Padden, 581 N.W.2d 359 (Minn. App. 1998).

2. The government and a partnership are in privity of contract when the government breached a mortgage loan agreement. The cause of action is considered an asset under the UPA since it accrued before dissolution of the partnership. After dissolution, the partnership sues although another partnership continued the business and assumed the mortgage loan. Does the dissolved partnership own the cause of action asset as the only party in privity to the breached contract?

   The lower court determined the chose in action as specific partnership property and owned by subsequent partnerships.

   Apposite Cases:
   Cates v. ITT Corp., 756 F.2d 1161 (5th Cir. 1985);
   McCormack v. Theo. Hamm Brewing Co., 284 F.Supp. 158 (D. Minn. 1968);
   GAIA Techs. v. Recoversion Techs,, 93 F.3d. 774 (Fed. Cri. 1996).

3. A 1989 partnership is the only partnership in privity to sue a federal cause of action. It hires law firms to litigate the claim. The law firms later enter into separate agreements with a 2004 partnership to litigate the previous partnership's 2003 claim pending in federal court. Did the law firms breach their contract with the 1989 partnership when the law firms entered into a contract with the 2004 partnership to litigate the 1989 partnership's claim filed in 2003?

    The lower court found the claim moot because it found the 2004 partnership owner of the cause of action of the 1989 partnership.

    Apposite Cases:

    N. Nat'l Bank v. N. Minn. Nat'l Bank, 244 Minn. 202, 70 N.W.2d 118 (1955);
    La Mourea v. Rhude, 209 Minn. 53, 295 N.W. 304 (1940).

4. Parties filed verified counterclaims and cross-claims asserting *inter alia,* breach of contract, legal malpractice, and seeking declaratory judgment. The court delayed the statutory expert affidavit for the malpractice claim. The court relied on documents submitted which revealed (1) genuine issues of material fact and (2) other evidence yet produced would support claims for relief sought. The court dismissed all claims under Minn. R. Civ. P. 12 and 56. Did the lower court properly apply the standards of review for Rule 12 and 56 motions to dismiss all claims as pled?

    The lower court dismissed all counterclaims and cross-claims. Under Rule 12, the court ruled the claims as moot and that the parties failed to assert damages. Under Rule 56, the lower court found subsequent partnerships as having ownership of a litigated claim started by the initial partnership.

Apposite Cases:

Funchess v. Cecil Newman Corp., 632 N.W.2d 666 (Minn. 2001);
Bodah v. Lakeville Motor Express, Inc., 633 N.W.2d 550 (Minn. 2003);
Martens v. Minnesota Min. & Mfg. Co., 616 N.W.2d 732 (Minn. 2000).

I. Statement of the Case

This appeal arises from the Hennepin District Court decision of the Honorable Cara Lee Neville. The decision dismissed counterclaims and cross-claims against certain interpleader plaintiffs and defendants under Minn. R. Civ. P. 12 and 56. The lower court's decision should be reversed.

The lower court incorrectly applied the Uniform Partnership Act governing law as applied to UPA partnerships. The Court suggested that substitution of partners means the partnership continues as a "single entity." Yet, UPA law finds that whenever there is a change in the relationship among partners, the partnership "dissolves" and a new partnership is created — the "aggregate theory." Furthermore, in this case, a cause of action — a breach of contract claim — arose during the initial partnership. Since a cause of action accrued during the initial partnership, it is an asset and its litigation and recovery of damages is that of the initial partners. Its distribution is among the initial partners in privity to the breached contract, and not as the lower court found, an asset of subsequent partnerships.

The Appellants include a 1989 partnership known as R & R Investors and its four general partners — Gerald Berger, Curtis Hogenson, Diane Larson, and Norman Arvidson ("the Hogenson partnership").

The lower court interpleader action arose when two law firms, Faegre & Benson and Eckland & Blando, sought judicial resolution to a dispute between different partnerships regarding settlement proceeds from a federal action in the U.S. Court of Federal Claims. The underlying federal claim involved the government's breach of loan mortgage agreements then held by the Hogenson partnership.

In 1997, the Hogenson partnership sought to prepay federal mortgage loans it held on an apartment property. The federal government rejected the partnership's request.

Within the six-year statute of limitations of the government's decision, the partners discovered they had a claim against the United States for breach of contract and a taking under the Fifth Amendment because of the 1997 rejection of the partners' offer to prepay the loans. Although the partnership transferred its Maranatha business interests to another partnership in 2000, the Hogenson partnership has not terminated, and therefore, still owns the federal cause of action. Since the Hogenson partnership was in privity of contract at the time of the breach in 1997, the chose of action remained an asset of *that* partnership.

The subsequent partnership of David and Mary Klug received the Maranatha business interests in 2000 and assumed the related loans. The new Klug partnership also operated under the partnership name of R & R Investors. Although the Klug partnership continued the business and assumed the loans, the Hogenson R & R Investors partnership agreement specifically stated the point of termination of *its* partnership, *inter alia,* when "[d]istribution to the partners in accordance with their percentage of contribution ... of any remaining assets of the partnership."

But the lower court found the Hogenson partnership never dissolved, wound up, or terminated because the partnership interests were "assumed" by the Klugs and subsequent partnerships. It suggests the Hogenson R & R Investors partnership continued as a "single entity." Yet, the Hogenson partnership in 2000 never transferred, nor did the Klug partnership assume the cause of action as an asset, *as the Klugs admitted.*

The facts and law are contrary to the lower court's holding. Under the governing Uniform Partnership Act, changes in the relationships of partners results in the dissolution of the partnership. After dissolution, the partners are entitled to wind up *all affairs* of the partnership before termination. Here, obligations of and among the Hogenson partners to the Klug partnership remained at the time of the sale and through 2003 -- including the transfer of the Maranatha real estate by deed to the Klug partnership.

Further, in 2003, the Hogenson partners, as governing UPA law allows, initiated actions to sue the federal government for the 1997 breach of contract that accrued before dissolution and within a six-year statute of limitations period. Because the cause of action is an asset, accrued before dissolution, it remained an asset of the Hogenson partnership — the party in privity with the government at the time of the breach.

In 2003, the Hogenson partners entered into a contract with Faegre and Eckland to represent their partnership in federal court and litigated the breach of contract claim.

In 2004, one year later — and one year beyond the statute of limitations — Faegre and Eckland entered a separate representation agreement with the Strangis partnership unbeknownst to the Hogenson partners. In 2004, Strangis had acquired the Maranatha business and real estate interests from the Klug partnership.

Meanwhile, Faegre and Eckland would successfully litigate the original Hogenson partnership claim. They held two distinct fee agreements representing both the Hogenson and Strangis partnerships without ever advising the Hogenson partners of the dual representation.

When the federal case settled, all Hogenson and Strangis partners signed settlement agreements. Hogenson partners remained unaware of the Faegre and Eckland representation of Strangis. Hogenson partners later discovered the Faegre and Eckland and Strangis relationship and Strangis's intent to collect all settlement proceeds. Faegre and Eckland agreed – asserting it only represented the Strangis partnership.

The Hogenson partners hired another law firm to represent its interests in the federal action and sought to substitute counsel. Days later, Faegre and Eckland filed a state interpleader action to have the Hennepin County District Court resolve the dispute between the law firms and partnerships.

Meanwhile, the U.S. Court of Federal Claims denied the substitution of counsel, content with allowing the state district court to resolve the dispute of which partnership owns the cause of action and hence, the yet to be determined settlement recovery of $400,000 to $450,000.

In the lower court proceedings, Eckland and Faegre moved to dismiss the claims brought against them under Minn. R. Civ. P. 12(e). Strangis moved for summary judgment under Minn. R. Civ. P. 56 regarding Hogenson's claims against him and the 2004 Strangis partnership. Likewise, counsel for the 1989 Hogenson R & R Investors partnership moved for partial summary judgment on its declaratory judgment act claims.[1]

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[1] *Id.*

II. Statement of Facts

A. The original UPA Janski partnership enters into a federal mortgage loan contract on the Maranatha apartment building and agrees to low rental rates for the life of the mortgage.

This appeal involves distinct partnerships under MUPA[2] and RUPA.[3] The first is the MUPA partnership of Robert Janski and Ruth Janski known as R & R Investors. They owned a 25-unit apartment building identified as the Maranatha Apartments in Royalton, Minnesota.

In 1978, Janski R & R Investors placed Maranatha in a federal housing program referred to as the Farmers Home Administration § 515 [4] — receiving two mortgage loans, one of $473,400 and the second in 1979 of $44,730.[5]

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[2] Codifed at Minn. Stat. § 323. Verified Answer, Counterclaims and Cross-Claims at ¶ 67 ("Verified Counter-Complaint") App. p. 106.

[3] Codifed at Minn. Stat. § 323A. It included a savings clause regarding UPA partnerships — "Minnesota statutes, chapter 323A, does not affect an action or proceeding commenced or *right accrued* before January 1, 1999." Verified Counter Complaint ¶¶ 74; *see also* ¶¶ 70 – 75, App. pp. 106-107 (emphasis added).

[4] Congress amended the 1949 Housing Act, 42 U.S.C. § 1485, as a means to subsidize the construction and management of federally assisted affordable housing making low interest mortgage loans to participating private property owners.

[5] App. pp. 384-389.

Each of the loan transactional documents identified the borrower as R & R Investors, a partnership consisting of Robert J. Janski and Ruth Ann Janski.[6]

Under § 515, the FmHA made direct loans to private property owners with low interest rates amortized over 50 years if the housing financed provided for low- and moderate-income and elderly tenants. In turn, the federal government also required participating private property owners to charge rents which the FmHA set at rates lower than market rental rates and to restrict the owner's return on his investment to a specific percentage of initial investment.[7] These governing covenants remained in force during the pendency of the mortgage loan obligations, only expiring upon the loan's maturity date or upon the date of a prepayment of the loan.[8]

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[6] *Id.*

[7] *See Franconia Associates v. U.S.,* 43 Fed. Cl. 702 (1999), *Franconia Associates v. U.S.,* 240 F.3d 1358 (Fed. Cir. 2001), and *Franconia Associates v. U.S.,* 122 S.Ct. 1993 (2002) for the complete factual history.

[8] Through further Congressional acts in 1988 such as the Emergency Low Income Preservation Act, Pub. L. No.100-242, 42 U.S.C. § 1472(c), supplemented with the Housing and Community Development Act of 1992, Pub. L. No. 102-550, the FmHA also issued regulations under 7 C.F.R. Pt.1965 governing the federal government's decision-making regarding the approval or disapproval of prepayment requests.

B. In 1984, the Hogenson UPA partnership purchases the Janksi business interests and assumes the federal mortgage on the property.

The Janski R & R Investors partnership sold Maranatha to another partnership in 1984 for $610,000. This partnership, created on December 1, 1984, included the general partners Curtis Hogenson, Gerald Berger (now deceased), Robert Abel (now deceased), Diane Larson, and Norman Arvidson (now deceased).[9] The general partnership interests were divided in the following percentages:

Gerald A. Berger 30%;
Robert C. Abel 5%;
Norman Arvidson 20%;
Diane L. Larson 25%; and
Curtis O. Hogenson 20%.[10]

As part of the transactional documents, the Janskis entered into several agreements with the 1984 Hogenson R & R Investors partnership, including a Substitution of Partnership dated October 30, 1984[11] and an Assumption Agreement with the FmHA dated December 5, 1984[12] wherein the 1984 Hogenson partnership assumed the liability on the FmHA loans.

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[9]App. p. 396.

[10] App. p. 430.

[11]App. p. 394.

[12]App. p. 403.

The Assumption Agreement identified the general partners of the 1984 Hogenson R & R Investors as signatories; Abel, Berger, Hogenson, Arvidson, and "incoming partners" as "general partners into the debtor/partnership."[13]

Robert and Ruth Janski, as the deed reflected, later conveyed the Maranatha property title to R & R Investors, consisting of the partners Hogenson, Berger, Larson, and Arvidson on December 14th.[14] The Janskis however, inadvertently omitted 1984 Hogenson R & R Investors general partner Diane Larson, and incorrectly listed William D. Willhite as a partner.[15] Finally, a bill of sale, also dated the 14th, transferred the Janskis' partnership interests to the Hogenson R & R Investors partnership.

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[13] *Id.* Willhite again identified as a partner but not as a signatory on the Assumption Agreement. His name is specifically eliminated on the signature page.

[14]App. p. 406. The warranty deed, also dated December 14, 1984, reflects Robert and Ruth Janski as partners of R & R Investors conveyed and warranted the property to Hogenson, Berger, Larson, and Arvidson as individuals. App. p. 405.

[15] App. p. 364. Robert C. Abel's December 15, 2003 affidavit filed with the County Recorder, explains the 1984 factual mistake. *See* Kaardal Aff. II at p. 4 with 17 (Larson deed dated March 3, 2003 and Willhite deed dated December 8, 2003. App. pp. 423; 428).

The purpose of the Hogenson R & R Investors partnership specifically included the "constructing, financing, managing, and operating of a residential apartment building or buildings in Royalton, Minnesota."[16]

C. In 1989, the 1984 Hogenson partnership loses a partner reconfiguring the partnership under the MUPA.

Five years later in 1989, partner Robert Abel sold and transferred his 5% general partnership interest to the remaining partners with the resulting interest shares:

> Gerald A. Berger 31%;
> Diane L. Larson 26%;
> Norman K. Arvidson 22%; and
> Curtis O. Hogenson 21%.[1]

With the withdrawal of Abel, the 1989 Hogenson R & R Investors consisted of four general partners — Berger, Hogenson, Larson, and Arvidson.

D. In 1997, Hogenson R & R Investors seeks to prepay the federal mortgage loans but the government rejects the partnership's intentions.

During the period of the 1989 Hogenson R & R Investors ownership of the Maranatha, it gave notice to the FmHA on December 2, 1997 of its intent to prepay the FmHA loan obligations. On that same day, the FmHA said the request would be rejected. The FmHA apparently cited Congressional enactments in 1992 of the Emergency Low Income Housing Preservation Act and subsequent federal regulations governing the approval or disapproval of

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[16] App. p. 396.

prepayment requests. The Hogenson R & R Investors took no further action at that time.

E. In 2000, the 1989 Hogenson R & R Investors transfers the Maranatha business interests, but not the Maranatha real estate, to the Klugs.

In 2000, David and Mary Klug, as partners, purchased Maranatha from Hogenson R & R Investors for $485,000 "based entirely on an analysis of the rents which the Maranatha (sic) could generate under the FmHA's low income housing program...."[17] The Klugs 2000 partnership would retain the name and the business purpose of "R & R Investors."

With the sale, the 1989 Hogenson R & R Investors partnership executed with the Klugs several documents: (1) a purchase agreement on January 12, 2000, with three addendum, each very specific regarding the transfer of assets and identifying the buyers as "David and Mary Klug" and the sellers as "R & R Investors" signed by all Hogenson partners[18] -- Addendum A for the real property, Addendum B for specific personal property and Addendum C for the loan mortgages and "cash assets";(2) an amendment to the partnership agreement dated February 15, 2000 transferring partnership interests except for 1% of Berger's for the set term of

[17] App. p. 326.

[18] App. pp. 412-417.

13 months, but with no rights to profits or losses;[19] and (3) the eventual execution of a cross-indemnification agreement on April 10, 2000 specifically delineating the obligations for outstanding debts.[20] Berger's termed retention related to the federal government's desire for management continuity of the property. All documents were subject to FmHA approval.

No other document referenced a general or specific asset.

However, unlike the Janski R & R Investors sale to the Hogenson R & R Investors partnership in 1984 or the later 2004 Klug partnership sale to the Strangis partnership, the Hogenson R&R Investors partnership in 2000 transferred only the Maranatha business interest to the Klugs – not the Maranatha real estate. Later, in 2003, the Hogenson partners transferred the Maranatha real estate by deed to the Klugs.

F. After the events in 2000, the Hogenson partnership continued because it owned the Maranatha real estate, had obligations to the Klugs and the continuing obligations among the partners.

With the approval of the FmHA, the Klugs, signed an "Assumption of Original or Withdrawing Partner's Obligations" on February 15, 2000. According to the document they assumed the responsibilities of paying the federal loan mortgage contracts held by the Hogenson R & R Investors.[21]

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[19] App. p. 418.

[20] App. pp. 421-422.

[21] App. pp. 419-420.

Yet, the Hogenson partnership continued because it owned the Maranatha real estate, had obligations to the Klugs and continuing obligations among the partners that existed under their partnership agreement. Specifically, paragraphs 13 and 17 of the partnership agreement state:

> 13. Duration: The partnership shall continue until all of its assets shall have been disposed of.
>
> ... [and]
>
> 17(c). Distribution to the partners in accordance with their percentage of contribution ...of any remaining assets of the partnership.[22]

After 2000, the Hogenson partnership continued under the agreement because "all of its assets [had yet] been disposed of," specifically the Maranatha real estate interests, and all distributions were not yet completed "in accordance with [the partners'] percentage of contribution."[23]

G. In 2003, the Hogenson partners transfer the Maranatha real estate to the Klugs.

In 2003, the 1989 Hogenson R & R Investors general partners transferred title to the Maranatha real estate by deeds to the Klugs.

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[22] App. pp. 399; 401.
[23] *See e.g., Id.*

All deeds were signed by December 8, 2003. Hogenson signed the last corrected deed of the 1989 Hogenson partnership on December 2, 2003.[24] Included were deeds from William Willhite[25] — originally on the misidentified 1984 Janski deed to the 1984 Hogenson R & R Investors — and a deed and an affidavit from former partner Robert Abel.[26]

Each deed, similar in language, conveyed the Maranatha property from a Hogenson general partner(s) to David Klug and Mary Klug individually.[27] The Klugs then filed all executed deeds by December 22, 2003. Likewise, on that same day, David and Mary Klug conveyed the property to their own R & R Investors partnership.[28] Four months later, on May 6, 2004, the Klugs substituted the previously filed deed.[29]

Later, in 2004, the Klug R & R Investors transferred title in the Maranatha property to Paul Strangis. But, prior to the 2004 sale of the property to Strangis, old business between the Klugs and the 1989 Hogenson

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[24] Verified Counter-complaint ¶ 83; App. pp. 109; 427.

[25] *Id.*; App. p. 428.

[26] App. p. 429.

[27] App. pp. 423-427.

[28] App. p. 435.

[29] App. p. 475.

R & R Investors general partners remained — the transfer of the Maranatha real estate from the Hogenson partnership to the Klugs.

H. The UPA 2000 Klug partnership is amended in 2003.

On September 30, 2003, the Klugs amended their original 2000 partnership.[30] The 2003 RUPA Klug R & R Investors partnership expanded its purpose, changed partnership roles identifying David Klug as the managing partner with corresponding authority, and identified the transferred Berger's 1% interest as David Klug's.[31] Berger had left the 2000 Klug partnership as agreed sometime in 2001 -- 13 months after the 2000 Maranatha sale.[32]

I. In 2004, over six years after the government rejected the Hogenson partnership's intent to prepay federal mortgage loans, the Klugs sell their interests to the Strangis partnership.

On March 31, 2004 — over six years after the 1989 Hogenson R & R Investors futile attempt in December 1997 to prepay the federal § 515 Maranatha mortgage loans — Paul Strangis and Kass Properties IV, LLC entered into a purchase and sale agreement with the 2003 Klug R & R Investors for the Maranatha property.[33]

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[30] App. pp. 464-474

[31] App. pp. 449-463; Exh. A at 458.

[32] App. p. 415.

On September 1, 2004, the 2003 Klug R & R Investors partners assigned their partnership interests in two separate documents to Kass Properties IV, LLC and Strangis. Mary Klug assigned her 48% partnership interest wholly to Kass.[34] David Klug assigned his 52 % interest between Kass (51%) and Strangis (1%).[35]

On the same day, September 1, 2004, Strangis entered into a new partnership agreement.[36] That 2004 RUPA Strangis R & R Investors reflected original contributions of Strangis with $998, Kass Properties IV, LLC of $1, and David Klug of $1.[37] The partnership agreement also identified the obligations governing profits and losses and distributions wherein Strangis obligations and distributions became 99% of the former Klug partnership interests and 1% to Kass.[38]

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[33] App. p. 436.

[34] App. p. 496.

[35] App. p. 495.

[36] App. p. 464.

[37] App. p. 469. Because discovery in the district court action had not been commenced, the exact date and executed document is unavailable.

[38] *See* App. pp. 436-496.

J. The 1989 Hogenson R & R Investors partnership signs a contract with Faegre & Benson in February 2003 and files suit against the United States.

In 2003, while the 1989 Hogenson R & R Investors partners were transferring the Maranatha real estate by deeds to the Klugs, Berger and Hogenson sought legal representation from the law firm of Faegre & Benson through Jeff Eckland, a partner of the firm. Berger learned that the Hogenson R & R Investors partnership had a potential claim against the United States relating to the FmHA's December 1997 rejection of the partnership's intent to prepay the FmHA § 515 mortgage loans.[39]

On February 28, 2003, the Hogenson R & R Investors partnership entered into a contract with Faegre through a contingency fee agreement to sue the United States.[40] The contract specifically stated the purpose as joining an existing lawsuit against the United States regarding FmHA Tucker Act housing claims:

> Client employs Attorneys to represent Client as his/her/its Attorney at Law regarding the following matter:
>
> FmHA Tucker Act Housing Claims
>
> Client will join a lawsuit to be filed in the U.S. Court of Federal Claims similar in kind to lawsuits filed by Attorneys on behalf of the existing clients of Attorneys who are plaintiffs in lawsuits

[39] Verified Counter-Complaint ¶¶ 128 (a) - (e); App. pp. 118-19.

[40] Verified Counter-Complaint ¶ 128 (f); App. pp. 41; 502.

> including ...*Franconia Associates v. United States,* No. 97-381C ...All such clients of Attorneys ... shall constitute the Tucker Act FmHA Housing Claims Client Group ("Client Group"). The client acknowledges that the Client Group is represented by a Claimants Committee ... all clients in the Client Group shall share in the costs incurred in this matter.
>
> * * *
>
> In recognition of this Agreement and as an initial payment for the above Attorney costs, a retainer of $1,250 is hereby paid by the Client....[41]

Faegre had previously commenced claims against the United States under the Tucker Act in the U.S. Court of Federal Claims on behalf of several property owners in May 1997 against the FmHA.[42] The claims included breach of contract and takings under the Fifth Amendment's Just Compensation Clause.[43] Two years later, the court dismissed the contract claims against the United States, subsequently affirmed in the U.S. Court of Appeals for the Federal Circuit.[44] The U.S. Supreme Court, however, reversed the appellate decision and remanded the matter back to the Court of Federal Claims.[45] The Supreme Court decision based on FmHA's rejections

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[41] App. pp. 502; 503.

[42] *Franconia Associates v. U.S.,* 43 Fed. Cl. 702 (1999).

[43] *Id.*

[44] *Franconia Associates v. U.S.,* 240 F.3d 1358 (Fed. Cl. 2001).

[45] *Franconia Associates v. U.S.,* 536 U.S. 129 (2002).

to private property owners requests and intentions to prepay § 515 mortgage loans, laid the foundation for Faegre and Eckland[46] to represent hundreds of private property owners to join the original underlying complaint for damages against the federal government.

K. The specific partners of the 1989 Hogenson R&R Investors partnership are identified to Faegre and Eckland – Eckland confirms in writing.

Prior to the finality of Faegre's contract with the 1989 Hogenson R & R Investors partnership, Berger wrote to Eckland describing that specific 1989 partnership:

> This property was purchased on December 4, 1984 by our general partnership called R & R Investors Partnership which was comprised of Gerald Berger (managing partner), Diane Larson, Curtis Hogenson, Norman Arvidson (now deceased) and Robert Abel (now no longer partner). The purchase price at the date of purchase was $610,000.
>
> R & R Investors subsequently sold Maranatha Inn on April 1, 2000 for the selling price of $485,000...The selling agent was sternly told ... that the USDA mortgages on the property could not be prepaid, in order to take the property out of the [FmHA § 515] program....[47]

Likewise, in a letter sent to Eckland about two months before the February 2003 contingency fee contract forwarding the buying and selling

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[46] Jeff Eckland departed from Faegre & Benson starting his own firm – Eckland & Blando in September, 2004. Verified Counter-Complaint ¶ 128 (n). App. p. 121.

[47] App. p. 499.

documents, Berger described the losses the 1989 Hogenson R & R Investors partnership incurred as a result of the federal government's 1997 act:

> Without factoring in any price increase over the years of inflation in the real estate market, the direct losses are substantial and created by the government's action in eliminating mortgage pay off.

Eckland responded on May 13, 2003 confirming representation and noting that recovered damages would be returned to the 1989 Hogenson R & R Investors partnership to be distributed as per their partnership agreement:

> Please be aware that any damages recovered will be awarded to the partnership of R & R Investors. It will then be the partnership's responsibility to divide and distribute the damages among the partners per your partnership agreement.[48]

The litigation then moved forward.

L. The Hogenson Partnership files suit against the United States within six years of the tender of prepayment and the government's rejection -- and Klugs reject any suggested interest in the claim.

Faegre filed the 1989 Hogenson R & R Investors Tucker Act claims for breach of contract and takings in the U.S. Court of Federal Claims on September 30, 2003, just over two months before the six-year anniversary of the FmHA rejection of the partnership's December 1997 intent to prepay the

[48] App. p. 506.

federal mortgage loans.[49] The complaint would represent to the court the federal government's denial of the 1989 Hogenson partnership's attempt to prepay the FmHA mortgages:

> (i). regarding Maranatha Inn Apartments, a pre-1979 property, plaintiff [R & R Investors] planned to prepay its FmHA mortgage without restrictions and raise rents on or about 12/02/97. As a result of the meeting, or otherwise communicating, with agency officials regarding prepayment of its mortgage loan, said plaintiff did not submit any prepayment request at that time because of the futility of doing so. Plaintiff has not been [sic] permitted to raise rents to market rate rent levels.[50]

Likewise, the 2000 Klug R & R Investors partnership also understood the claims asserted for the Hogenson partnership did not belong to the Klug partners:

> [T]he purchase price ... paid for the Marantha (sic) Inn was based entirely on an analysis of rents ... and not on any claims against the FmHA. Neither Mary [Klug] nor I paid any consideration for any claims held by the R & R Investors general partnership from which Mary and I purchased the Marantha (sic) Inn, or its general partners.[51]

David Klug's affidavit expressed his understanding of who should receive the recovery from the 1989 Hogenson R & R Investors partnership

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[49] Verified Counter-Complaint ¶¶ 102, 128 (h), (i), (k), (l), (o), and (p) Gerald Berger's address is used as the partnership's address. App. pp. 113; 119. The federal complaint is also identified as a limited partnership but all parties agreed the designation is a mistake. App. p. 18.

[50] App. pp. 112; 121.

[51] Klug Aff. ¶4 App. pp. 326; 524.

cause of action. It stems from a perplexing letter written in January 2004, months after the 2003 federal court filing and the Klugs' new 2003 RUPA partnership: "In the event that R & R Investors, now owned by me, receives any funds through litigation started by past partner, Gerald Berger, I will assign any and all interest received to those checks and to any law suit to the original partners of R & R Investors."[52]

The apparent befuddlement of UPA partnerships assets was further compounded in July 2004 by a lawyer Hogenson actually hired and conversations the lawyer had with Eckland. Responding to Hogenson's lawyer's belief for a need to ensure the recovery of future damages went to the correct partnership, Eckland suggested to Hogenson's lawyer that "the possible best way to do this is by assignment but also an amendment of any partnership agreement that would travel to and be binding upon the purchasers and any successor purchasers or owners."[53] This is later followed by an August 2004 letter suggesting a need to preserve Berger's one percent interest in the 2000 Klug partnership: "I attempted to preserve in Jerry Berger a one percent interest until the matter is put into suit/or settled and

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[52] App. p. 544.

[53] App. p. 551.

the funds are received and disbursed to Jerry to be disbursed to the remaining partners or their heirs."[54] Nothing became of this exchange.

Meanwhile, Eckland left the Faegre firm to start his own law firm in 2004. The Hogenson partnership stayed with Eckland as counsel.[55]

The lawsuit settled in 2006 although the Hogenson partners would not see the settlement agreement until January 4, 2008.[56] Regardless, the settlement agreement itself stated that payment of settlement proceeds shall not be made if the "loan for the property was assumed by the plaintiff after ... the 1992 Legislation."[57] In June 2006, the 1989 Hogenson R & R Investors partners signed the settlement agreement consent forms.[58]

The initial settlement payment of $37,500 (net attorney fees) would not be distributed until 2007, and the final calculations of damages are yet to be

[54] *Id.*

[55] App. p. 507.

[56] App. p. 524.

[57] App. p. 534. Part II(B), para. 5(b).

[58] App pp. 518-522.

determined.[59] The initial settlement distribution, however, would not go to the 1989 Hogenson R & R Investors.[60]

M. Eckland enters into a contract with the Strangis partnership for representation in the Tucker Act litigation, later amended to include Faegre.

Unbeknownst to the 1989 Hogenson R & R Investors partnership,[61] Eckland signed a contract with the 2004 Strangis R & R Investors partnership on November 3, 2004.[62] The contingency fee agreement employed Eckland regarding the "FmHA/HUD Tucker Act Housing Claims." The Strangis contract differed from the Hogenson R & R Investors partnership contract with Eckland in several terms:

Attorney fees from any recovery of damages:
Hogenson – 33 1/3%
Strangis – 25%

Initial payment for costs:
Hogenson - $1,250 ($50 per unit – 25 units)
Strangis - $625 ($25 per unit - 25 units)

Advance non-refundable retainer:
Hogenson – 0 (not applicable, term not in contract)

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59 App. p. 73.

60 *Id.*

61 Verified Counter-Complaint ¶ 138; App. pp. 124; 511.

62 App. p. 511.

Strangis - $1,875 ($75 per unit - 25 units).[63]

Faegre would later join with Eckland to represent Strangis on December 31, 2005.[64]

When the 2003 litigation settled — like the Hogenson partners but unbeknownst to the Hogenson partners — Strangis also signed a settlement agreement consent form in June 2006.[65]

N. Only in 2007 do Faegre and Eckland admit to the Hogenson partners that they have been representing the 2004 Strangis R & R Investors partnership since 2004 instead of them.

In 2007, after Faegre and Eckland refused to provide additional information about the settlement agreement,[66] the 1989 Hogenson R & R Investors became aware that Eckland and Faegre represented Strangis.[67] The Hogenson partners then engaged the law firm of Mohrman & Kaardal as legal counsel.

On October 5, 2007, Mohrman & Kaardal filed a motion to substitute counsel with the U.S. Court of Federal Claims: Mohrman & Kaardal, not Faegre and Eckland would represent the 1989 Hogenson R&R Investors

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[63] *Compare* App. p. 502 with App. p. 511.

[64] App. p. 515.

[65] App. p. 523.

[66] Verified Counter-Complaint ¶¶ 49, 51. App. p. 98.

[67] *Id.*

partnership.[68] The motion did not challenge the settlement per se, but did assert that the 1989 Hogenson R & R Investors partnership, not the 2004 Strangis partnership, was the real plaintiff-party entitled to the Tucker Act settlement with the United States.[69]

Four days later, on October 9, 2007, Faegre and Eckland filed an interpleader action in Hennepin County District Court to resolve the dispute between Faegre and Eckland and the Hogenson partnership.[70] With the action, Faegre and Eckland sought to remit to the court the initial distribution of $37,500 from the United States of settlement damages.[71] The balance of the settlement amount due has yet to be calculated.[72]

Meanwhile, in response to Mohrman & Kaardal's motion to substitute counsel in the U.S. Court of Federal Claims, Faegre and Eckland stated they were representing the Strangis partnership.[73]

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68 *Id.* at ¶ 140; App. p. 125.

69 App. pp. 202-204.

70 Verified Counter-Complaint ¶ 60; App. p. 100.

71 App. pp. 73-78.

72 *Id.* But, *See* March 6, 2008 Hearing Transc. P. 25.

73 Verified Counter-Complaint ¶ 62; App. p. 100.

O. The U.S. Court of Federal Claims denies Hogenson's substitution of counsel but seeks guidance from state court proceedings.

After oral argument, the U.S. Court of Federal Claims, although acknowledging a dispute as to who is in the partnership or who owns the federal claim under partnership law, determined the partnership questions to be a state matter. The Court denied at that time the motion to substitute counsel and stayed its proceedings until the state court action was concluded.[74] The court stated it would "hear back from all of you after the state court proceeding has taken place, and we'll see where we go from there...."[75]

III. Legal Argument and Authorities

A. The Court should apply the applicable standards of review for summary judgment motions and declaratory judgment claims.

This Court will review a district court's grant or denial of a summary judgment motion to determine whether any genuine issues of material fact exist and whether the lower court erred in the application of the law.[76] The

[74] App. p. 316.

[75] *Id.*

[76] *Funchess v. Cecil Newman Corp.*, 632 N.W.2d 666, 672 (Minn. 2001).

evidence will be viewed in the light most favorable to the nonmoving party.[77] But, that party cannot defeat the summary judgment with unverified and conclusory allegations or by postulating evidence that might be presented at trial.[78]

On appeal, this Court will review a declaratory judgment claim, applying a clearly erroneous standard of review to the findings of fact and a de novo standard to the district court's determination of legal questions.[79]

B. Relief sought is for declaratory judgment and for reversal and remand of all other claims.

The 1989 Hogenson R & R Investors partnership seeks reversal of the lower court's decision, a declaratory judgment declaring (1) the 1989 Hogenson R & R Investors partnership is a separate and distinct partnership under the MUPA entitled to dissolution, winding up, and termination; (2) the Tucker Act cause of action accrued before the dissolution of the 1989 Hogenson partnership and as such is an asset of that partnership; (3) the 1989 Hogenson partnership is the proper party for purposes of litigating the cause of action, including entering into a contract for legal services with Faegre & Benson and Eckland & Blando; (4) the 1989 Hogenson R & R

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[77] *Id.*

[78] *Lubbers v. Anderson,* 539 N.W.2d 398, 401 (Minn. 1995).

[79] *Minn. Crt. For Envtl. Advocacy v. Big Stone County Bd. of Comm'rs,* 638 N.W.2d 198, 202 (Minn. App. 2002), *review denied* (Minn. Mar. 27, 2002).

Investors is the proper party to receive all settlement amounts owed to it for the 1997 United States (FmHA) breach of contract and takings claim made under the Tucker Act in the U.S. Court of Federal Claims; (5) the Strangis R & R Investors partnership is to receive nothing from the settlement of the Tucker Act claim; (6) the contingency fee agreement with Faegre & Benson and Eckland & Blando is a valid contract between them and the 1989 Hogenson R & R Investors partnership and may be enforced accordingly; (7) re-instatement of the Interpleader Counterclaim and Cross-claim Plaintiffs' Complaint; and (8) have this Court remand the matter for further proceedings in accordance with the appellate court's disposition.

C. The Hogenson partnerships of 1984 and 1989 were created and operated under Minnesota's Uniform Partnership Act of 1921.

The Minnesota Uniform Partnership Act governed the 1989 Hogenson R & R Investors partnership. Minnesota adopted and codified the Uniform Partnership Act of 1914 in 1921 ("MUPA") under Minn. Stat. §§ 323.01 – 323.49.

The object of statutory interpretation for conflicts arising under the MUPA "is to ascertain and effectuate the intention of the legislature."[80] But because the MUPA is a "uniform law", Minn. Stat. § 645.22 requires

[80] Minn. Stat. § 645.16.

Minnesota courts to give "great weight to other state courts' interpretations of [the] uniform law":[81]

> Laws uniform with those of other states shall be interpreted and construed to effect their general purpose to make uniform the laws of those states which enact them.[82]

Minnesota would later adopt the Revised Uniform Partnership Act,[83] but that did not take effect until January 1, 2002 and does not affect MUPA interpretations regarding the partners' relationship between themselves or the business of the Hogenson R & R Investors partnership.

For instance, key issues in the lower court's 2008 decision and the instant appeal is whether the substitution of partners continues the partnership as a single entity and whether the substitution also gives the subsequent partnership the right to a chose in action asset identified and commenced during the winding up of the previous partnership.[84]

The MUPA does not make a partnership an entity for all purposes, but it does for certain limited purposes. The Minnesota Supreme Court has found a partnership not a legal entity, having no existence separate and

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[81] *Johnson v. Murray,* 648 N.W.2d 664, 670 (Minn. 2002).

[82] Minn. Stat. § 645.22.

[83] Minn. Stat. § 323A.1-01, et seq.

[84] App. p. 32.

apart from the persons who compose it.[85] On the other hand, it has also found it to be a legal entity under, for instance, an employee claim against a partnership as an employer under workmen's compensation law.[86] Even as a legal entity for certain purposes, however, it does not affect the understanding of when and how a partnership dissolves, winds up, terminates, or the identity and ownership of the partnership's assets.

D. A dissolution of a partnership is the change of a relationship among the partners.

A partnership agreement is the measure of the partners' rights and obligations. The Hogenson partnership agreement indicated when the circumstances under which the partnership dissolved and terminated:

> 13. Duration. The partnership shall continue *until all its assets* shall have been disposed of.
>
> * * *
>
> 17. Termination and Dissolution of Partnership. The partnership may be voluntarily dissolved by 60% consent of the partners, with or without cause, or may be dissolved in accordance with the terms and conditions provided elsewhere in this agreement. Upon dissolution, the partnership assets will be distributed ...

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[85] *Angell v. White Eagle Oil & Ref. Co.,* 169 Minn. 183, 210 N.W. 1004 (1926).

[86] *Monson v. Arcand,* 244 Minn. 440, 444, 70 N.W.2d 364, 366 (Minn. 1955) (for purposes of Minnesota's compensation act, a partnership is a legal entity from the individual members of the partnership as an employer of an employee).

> (c) ... in accordance with their percentage of contribution, as set forth herein, *of any remaining assets of the partnership.*[87]

The causes of dissolution within the Hogenson partnership agreement is in accord with the MUPA governing causes of dissolution.[88] Contrary to the lower court's application of a single entity theory as it relates to the continuation of a business, it is the aggregate theory of partnerships that is applicable to the MUPA.[89] Minn. Stat. § 323.28 which is identical to § 29 of the UPA:

> The dissolution of a partnership is the change in the relation of the partners by any partner ceasing to be associated in the carrying, as distinguished from the winding up, of the business.

As one authority affirms, the MUPA:

> The rule that the partnership dissolves upon disassociation or express will of any partner (Uniform Partnership Act §§ 29 and 31) is one of the clearest examples of application of the aggregate

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[87] App. pp. 399; 401.

[88] *See* Minn. Stat. § 323.30 (similar to UPA § 31).

[89] *Egner v. States Realty Co.,* 223 Minn. 305, 26 N.W.2d 464 (1947) (Under the UPA the withdrawal of a partner from a partnership dissolves the partnership.) Other cases also consistently find partnerships not "single entities and dissolve when a partner withdraws or is added." *See, e.g., Johnson v. Hill,* 402 P.2d 255 (Ariz.App. 1965); *Maryland Associates, Ltd. Partnership v. Sheehan,* 14 S.W 3d 576 (Mo. 2000); *Fairway Development Co. v. Title Insurance Co.,* 621 F.Supp. 120 (N.D. Ohio 1985).

> approach, since it assumes that the entity does not have a life apart from individuals associated with it.[90]

Likewise, even if partners withdraw from a partnership, and the remaining partners carry on the business, the continuing partnership is distinct from the former operating as a new partnership:

> Although the remaining partners may choose to carry on the business of the firm as a new partnership and the partnership agreement may provide that the withdrawal of a partner does not terminate the business of the partnership, the fact remains that, in continuing the business, *the partnership operates as a new entity distinct from the former partnership.*[91]

UPA rules concerning the dissolution of partnerships adopt the aggregate theory of partnership law and assume that the partnership does not have a separate life from the member partners.[92] Likewise, there is nothing in the MUPA stating that a partnership becomes nonexistent upon

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[90] Bromberg & L. Ribstein, *Partnership* vol. 1A § 1.03 (c) (6) (2002). *In re Taylor & Assoc. L.P.*, 249 B.R. 448, 473 (Bkr. E.D. Tenn. 1998) ("It has long been settled that the addition of a partner to, or the removal of a partner from a partnership dissolves the partnership that existed prior to the addition or removal, and if that partnership business continues, creates a new partnership.")

[91] *Joseph Babener & Carpenter v. Employment Div.*, 737 P.2d 628, 629 (Ore.. App. 1987). *See also, Weeks v. McMillan,* 353 S.E.2d 289 (S.C. App. 1987) ("...the withdrawal of two partners and the admission of two other partners worked ipso facto dissolution of the partnership represented by the 1980 agreement.") (Emphasis added).

[92] *See Fairway Development Co. v. Title Ins. of Minnesota,* 621 F.Supp. 120 (N.D. 1985) (Title insurance that insured dissolved partnership did not cover reconstituted, continued partnership). Callison § 3.7 at p. 3-11.

the completion of its stated business purpose. The partnership merely dissolves and is not terminated:

> On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is complete.[93]

Unfortunately, the word "termination" is used to misidentify actual events of a UPA partnership at the time of dissolution creating confusion between the end of ordinary business relationships and termination signifying when all partnership affairs are settled *after* dissolution:

> It is also frequently said that dissolution, although the word is used to designate only the termination of ordinary business relations, terminates the partnership, it being at the same time explained that the *partnership thereafter continues to exist for the purpose of suing and being sued in the process of winding up partnership affairs*. Certainty demands that this confusion be removed if possible. In this Act *dissolution designates the point in time when the partners cease to carry on the business together;* termination is the point in time when all the partnership affairs are wound up; *winding up, the process of settling partnership affairs after dissolution.*[94]

Dissolution generally operates with respect to future transactions.[95] After dissolution, the partnership continues with respect to past transactions and existing assets, including the winding up or liquidation of partnership

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[93] Minn. Stat. § 323.29 (This section is the same as UPA § 30).

[94] UPA Official Comments § 29 (Minn. Stat. § 323.28), *Uniform Laws Annotated,* 6 Pt. II, 348 (West 2001) (emphasis added).

[95] *Hentges v. Wolff,* 240 Minn. 517, 520, 61 N.W.2d 748, 751 (1954).

affairs, performance of existing contracts, collection of debts or claims due to the partnership, and payment of firm debts.[96] Further, a dissolved partnership retains not only the right to wind up, but a collection of rights including the right to retain legal counsel[97] and to litigate partnership claims,[98] to control, use, and convey partnership property,[99] and to complete partnership contracts.[100]

In the instant case, the 1989 Hogenson partnership did not wind up or terminate in 2000 with the transfer of the Maranatha business interests to the Klug partnership. The Hogenson partnership did continue as a partnership because it had remaining partnership business to do:

> Dissolution of a partnership triggers an end to the relationship, but it does not end the partnership itself. Minn. Stat. § 323.29 (1996). Despite a dissolution, a partnership relationship continues to exist until *all issues* involving the business of the partnership entity are resolved....When the partnership's business is completely resolved, only then are the entity and the partnership relationship finally terminated.[101]

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[96] *Id.*

[97] *Metzenbaum v. Metzenbaum,* 115 Cal. App. 2d 395, 252 P.2d 31 (2d Dist. 1953).

[98] *Berk v. Sherman,* 682 A.2d 209 (D.C. 1996); *Baker v. Rushing,* 104 N.C.App. 240, 409 S.E.2d 108 (1991).

[99] *See, e.g., Gorin v. Morello,* 360 Mass. 859, 277 N.E.2d 308 (1971).

[100] *Scholastic, Inc. v. Harris,* 259 F.3d. 73 (2nd Cir. 2001) (dissolution does not terminate executory contracts that contemplate survival, and partners have obligation to perform contracts and obtain benefits).

[101] *Hurwitz v. Padden,* 581 N.W.2d 359, 361 (Minn. App. 1998) (emphasis added).

After 2000, the Hogenson partnership continued to have obligations and issues to the Klugs and among Hogenson partners to complete. For instance, the transfer of the Maranatha real estate by deed occurred in 2003. In Minnesota, to transfer title, a deed must be delivered.[102] Thus, in 2003, the 1989 Hogenson R & R Investors partners signed deeds to transfer the Maranatha real estate to the Klugs.

As to termination, the 1989 Hogenson R & R Investors partnership agreement is in complete accord with the MUPA describing when termination of the partnership is to occur — when "[d]istribution to the partners in accordance with their percentage of contribution ... of any remaining assets of the partnership."[103]

Important to this case, while the Hogenson partnership was transferring title to the Maranatha real estate to the Klugs, the partnership *discovered* a remaining asset of the Hogenson partnership — the 1997 breach of contract cause of action against the United States.

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[102] *Slawik v. Loseth,* 207 Minn. 137, 139, 290 N.W. 228, 229 (1940); *Stone v. Jetmar Properties, LLC,* 733 N.W.2d 480, 486 (Minn. App. 2007).

[103] App. p. 401.

E. The 1989 Hogenson partnership did dissolve with the 2000 Klug purchase of the Hogenson business interests.

The lower court decision appears to suggest the 1989 Hogenson partnership never wound up because the partnership business continued:

> Thus, the transactional documents demonstrate that the partnership business was never wound-up, and the partnership was continued even upon dissolution with a substitution of partners. Thus when Mr. Berger executed the contingency fee agreement, he was purportedly still a 1% partner in R & R Investors.[104]

The lower court's opinion suggests that a change in partnership relationships under the UPA never occurred. In doing so, it denies the facts of the instant case.

Setting apart the Hogenson partnership agreement for a moment and the Klugs' substitution as partners as a line of demarcation for dissolution, there remains one troubling factor — the deeds. If a change of relationship between the Hogenson partners did not occur in 2000, then it did in 2003 when the Hogenson partners signed and delivered the deeds to the Klugs. But even so, the Hogenson partners had already set into motion their lawsuit for the cause of action their partnership owned as an asset before dissolution in 2000 or 2003 and discovered after the Klug substitution.

[104] App. p. 32.

At the time of the property purchase and the substitution of partners, no party knew of the existence of the breach of contract as a cause of action. Therefore, Klug could not and did not as he affirmed, pay consideration for the claim. None of the transactional documents specifically identify any claim or cause of action as an asset or supports a claim for consideration paid for *that asset.*

Contrary to the lower court's holding that the Klugs had rights to the cause of action as substituted partners in 2000, the Klugs obtained only the Maranatha business interests. In so doing, the Klugs assumed the loan obligations for property valued based on rents collected until they obtained title in 2003, but not to the cause of action as an asset.

"To be legally enforceable, an assignment must describe the subject matter with sufficient particularity to render it capable of identification."[105] Although documents state "partnership interests," there is no document suggesting and "coupled with the surrounding circumstances" revealing the intent of the Hogenson partnership to transfer an unknown "present" partnership property asset — the cause of action — as a partnership interest. The Hogenson partnership's actions reflect otherwise — litigating the federal claim — as does the Klugs' absence of doing nothing.

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[105] *Benton v. Albuquerque National Bank,* 103 N.M. 5, 10, 701 P.2d 1025, 1030 (N.M. App. 1985).

Under any interpretation of the facts, the Hogenson partnership may have dissolved in 2000 or 2003 but it has not terminated *because* the business continues "even upon dissolution with [the] substitution of partners." In this case, *because* of the existence of the Hogenson partnership's federal claim — a claim accrued prior to dissolution and a claim filed prior to termination – the Hogenson partnership continues.

A case on all fours to this instant appeal involves a brokerage firm that had either added or had withdrawn partners over a period of time, starting with the general partnership of Fenner, Beane & Urgleider. Nelson, a client was indebted to the starting general partnership. After the change in partners, the firm Fenner, Beane & Urgleider became Fenner & Beane. Fenner and Beane later sued Nelson for the debt. In his defense, Nelson asserted he owed the original partnership Fenner, Beane & Urgleider and not Fenner & Beane.

The court found for Nelson dismissing the claim. The court held Fenner & Beane did not own the claim because no evidence showed the original partnership's claim — the chose in action against Nelson — *passed* to Fenner & Beane from Fenner, Beane & Urgleider. Fenner & Beane's argument is the same as that of the lower court's:

> Under the law of New York, admissions or withdrawals of members did not work a dissolution, that the same entity continued in the name of Fenner & Beane and that named

> partnership succeeded to or owned all assets of the original Fenner, Beane & Ungerleider partnership.[106]

But, as the Georgia court held, the lack of evidence transferring the cause of action of the original partnership definitively showed the subsequent partnership of Fenner & Beane with its present partners did not own the chose in action:

> An assignment or transfer to another of an account or chose in action belonging to a partnership must be in writing.
>
> A partnership was dissolved by admission of new members ... and [the] third partnership dissolved by admitted changes in its personnel, and hence forth partnership could not recover on account held by original partnership, in absence of written assignment or transfer to the new partnership.[107]

Finally, courts have found that a chose in action that accrued prior to dissolution remains the property of the dissolved general partnership even though the existence of the chose in action is not discovered for years after dissolution of the partnership.[108]

Nonetheless, the lower court erroneously suggests as proof of its single continuing entity theory that when Hogenson partner Gerald Berger signed

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[106] *Fenner & Beane v. Nelson,* 64 Ga. App. 600, 13 S.E. 2d 694 (Ga. App. 1941).

[107] *Id.*

[108] *Balfour, Guthrie & Co. v. Hansen,* 38 Cal. Rptr. 525, 227 Cal App. 2d 173 (1964) (dissolved partnership owned fraud claim arising prior to dissolution even though claim not discovered unit three years after partnership business ceased operations).

Faegre's contingency fee agreement in 2003, he did so as a partner of the 2000 Klug partnership.[109]

The court however, did not address the transactional document — the indemnity agreement of April 10, 2000 — that demonstrates the acknowledgement of the existence of two distinct partnerships, and the term-ending association of Berger as a 1% partner with the Klug partnership in 2001.[110]

First, the indemnity agreement is signed by the "selling partners" Berger, Arvidson, Hogenson, and Larson of the 1989 R & R Investors to sell the partnership to the "buying partners" David Klug and Mary Klug.[111] A partnership is "an association of two or more persons to carry on as co-owners a business for profit ...."[112] Upon the sale of R & R Investors, the partners changed as did the partnership even if the name and business continued.

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109 App. p. 32.

110 Minn. Stat. § 323.20 governing causes of dissolution includes "[b]y the termination of the definite terms or particular undertaking specified in the agreement." § 323.20(a).

111 App. p. 422.

112 Minn. Stat. § 323.02, subd. 8. (This section is similar to UPA § 2)

Second, the cross-indemnity agreement also identifies two distinct partnerships, one consisting of the "selling partners" and the other of the "buying partners:"

> In consideration of the purchase of the [Sellers] partnership by Buyers, Sellers agree to indemnify Buyers...
>
> In consideration of the sale of the [Sellers] partnership by Sellers, Buyers agree to indemnify Sellers and agree to assume all debts, obligations and liabilities incurred by the [Buyers] partnership following the date of closing ....[113]

And with the separate signatures of each partner for both sellers and buyers, it further reflects the proposition of separate partnerships — each partner indemnifying the other— versus the single entity, since no one person is designated as a sole signatory of a single identified entity.

Third, for Berger, contrary to the lower court's belief he remained a partner with the Buyers — the Klugs' partnership through 2003 – the indemnity agreement specifically states otherwise:

> Parties further agree that Gerald A. Berger will remain a 1% owner of R & R Investors for a *period of 13 months* from and after the date of closing.[114]

Berger remained a termed- 1% partner pursuant to the request of the FmHA to ensure some continuity relating to the management of the Maranatha. As

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[113] App. p. 421.

[114] App. p. 422.

the MUPA reflects, by the termination of a definite term — here, 13 months — that partnership automatically dissolved in 2001.[115]

Finally, the separate contingency fee agreement between the Hogenson partnership and Faegre and Eckland, and the contingency fee agreement between Faegre and Eckland and the Strangis partnership suggests separate and distinct partnerships. The terms of each contract differ significantly suggesting an acknowledgment of Faegre and Eckland of dealing with separate partnerships. Faegre and Eckland never dissolved the relationship it had with the Hogenson partnership. In fact, the law firms had the Hogenson partners sign settlement consent agreements in 2006 as well as Strangis. Therefore, the two contracts reflect agreements with two different partnerships and an on-going relationship with two partnerships governing the exact same claims against the United States.

Thus, despite the lower court's belief that a continuing business of a partnership reflects a continuation of a single partnership entity, the facts and law show differently. While an agreement to continue a partnership may be enforceable,[116] it would not prevent the dissolution and winding up of the Hogenson partnership. Two factors supporting this proposition apply.

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[115] Minn. Stat. § 323.30(a).

[116] *See* App. p. 29, citing *Maras v. Stilinovich,* 268 N.W.2d 541, 544 (Minn. 1978).

First, the Hogenson partnership in 2003 still had title to the Maranatha real estate until the Hogenson partners transferred it to the Klugs by deed. Thus, the Hogenson partnership had contractual obligations to the Klugs in 2003 which were eventually satisfied by the end of 2003. Thus, the Hogenson partnership could not have ended in 2000, as the lower court found, because its business continued with the transfer of real estate in 2003 and the filing of the federal cause of action in 2003 and pursuit of that claim thereafter.

Second, there is no evidence in the present record that affirms the lower court's suggestion the Hogenson partnership waived, stipulated, or otherwise agreed to forego winding up and distribution of contributions from remaining assets of that partnership. In fact, the Hogenson partnership agreement specifically states that termination is not complete until "all remaining assets" are distributed — including the transfer of the Maranatha real estate to the Klugs. But, more importantly, the remaining asset of the Hogenson partnership is now the cause of action against the United States for which the partnership was and is free to litigate because the Hogenson partnership has not terminated.

F. An asset of the 1989 Hogenson partnership included a cause of action that accrued prior to dissolution.

A "chose of action" or "cause of action" is an asset of the partnership.[117] "A cause of action accruing to a partnership is partnership property, both generally and within the meaning of the [UPA]."[118] There is nothing by the express terms of the MUPA regarding the enforcement of claims that accrued to the partnership, the timing of a civil action brought on behalf of the partnership, or whether fewer than all the partners can sue on a partnership right.

There is nothing in the MUPA precluding the filing, during the winding up of a partnership whose cause of action accrued during the existence of the partnership:[119]

> The right to wind up affairs of a partnership includes the duty and power to litigate claims for the partnership that arise out of transactions occurring *prior to dissolution.*[120]

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[117] *Berk v. Sherman,* 682 A.2d 209, 216 n.13 (D.C. App. 1996) citing *Taylor v. Swirnow,* 80 F.R.D. 79, 82 (D. Md. 1978) ("A cause of action is an asset or property right of the individual it belongs.").

[118] *Cates v. ITT Corp.,* 756 F2d 1161, 1173 (5th Cir. 1985); *Crane v. Essex Furniture Co.,* 92 F.Supp. 164, 165 (D. N.J. 1950) ("In New Jersey, a cause of action accruing to a partnership is regarded as an intangible asset of the partnership so that all partners must join in an action to enforce such a claim.").

[119] *Berk,* 682 A.2d at 214.

[120] *Id.* at 219 (emphasis added).

The Official Comment to the UPA under § 29 governing the definition of dissolution is in accord with the ability to commence a legal action or be sued during the winding-up process:

> It is also frequently said that dissolution, although the word is used to designate the termination of ordinary business relations, terminates the partnership, it being at the same time explained that the partnership thereafter *continues to exist for the purposes of suing and being sued in the process of winding up partnership affairs.*[121]

In the instant case, the 1989 Hogenson partnership was entitled to resolve whether the United States had breached its contract in 1997 when the FmHA rejected the partners' intent to prepay the federal FmHA § 515 mortgage loans, resulting in monetary damages for a taking under the Just Compensation Clause of the Fifth Amendment. This is consistent with Minnesota law.

For instance, in a federal Minnesota District Court case the fact that a beer distributing partnership was in the process of winding up did not affect its right to bring an antitrust lawsuit, in the partnership name, alleging conspiracy in violation of the Sherman and Clayton Acts:

> The defendant does not argue that Minnesota law prohibits a suit from being brought in the partnership name. Moreover, when a federal question is involved, suit may be brought in the partnership name even where that procedure would be impossible under state law. Rule 17(b), Federal Rules of Civil

[121] UPA Official Comment at § 29 (§ 28 of the MUPA) (emphasis added).

> Procedure. It appears from the affidavit that the partnership continues to exist. The fact that it is in the process of winding up does not affect the right to bring this suit in the partnership name. Minn. Stat. 323.34 states that a partner can bind the partnership "by an act appropriate for winding up partnership affairs or completing transactions unfinished at dissolution."[122]

The case is analogous to the instant matter. Because the Maranatha real estate interests were not transferred until 2003, the 1989 Hogenson R & R Investors partnership continued. In 2003, while the Hogenson partnership was continuing, the 1989 Hogenson partnership entered into a contract with Faegre to litigate a federal claim that *accrued prior to dissolution*. The right of the Hogenson partnership to wind up affairs —here, regarding a federal claim against the United States — included the "duty and power" to litigate the breach and takings claims arising prior to dissolution.

G. The right to wind up Hogenson's partnership affairs included the start of the federal action, and because a cause of action is an asset, questions of ownership depend on partners' intent and accordingly, the lower court's decision must be reversed.

The engagement of Faegre and commencement of the federal Tucker Act lawsuit was appropriate for winding up partnership affairs. The actions are also consistent with the partnership agreement and partnership law governing winding up leading to termination:

> [D]issolution designates the point in time when the partners cease to carry on business together; termination is the point in

[122] *McCormack v. Theo. Hamm Brewing Co.*, 284 F.Supp. 158, 161 (D. Minn. 1968).

> time when all the partnership affairs are wound up; winding up, the process of settling partnership affairs after dissolution.[123]

Furthermore, contrary to the lower court's opinion — and the perplexing correspondence of counsel in 2004 — the laws governing partnership law do not require separate assignments to "carv[e] out the Tucker Act Claim."

Again, since the asset is property of the 1989 Hogenson partnership, "when there is no written partnership agreement, or when the written agreement does not refer to the property in question, intent is a question of fact."[124] Intention is shown "by the facts and circumstances with particular emphasis on the partners' conduct regarding the property."[125]

Likewise, the lower court determined the cause of action asset as specific partnership property.[126] But, the MUPA prevents the assignment of specific partnership property:

> A partner is co-owner with the other partners of specific partnership property holding as a tenant in partnership.
>
> The incidents of this tendency are such that ...

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[123] UPA Official Comment §29 (§ 28 of MUPA).

[124] Callison § 7:3, p. 7-5.

[125] *Id.* at p. 7-4.

[126] App. p. 31.

> (2) a partner's right is specific partnership property is not assignable except in connection with the assignment of the rights of all the partners *in the same property.*[127]

Since the cause of action commenced during the winding up of the Hogenson partnership in 2003, if the asset were to be transferred, an assignment in *that property* is required under Minn. Stat. § 323.24. Since the 1989 Hogenson R & R Investors partnership sold its business interests in 2000, the 2003 asset required a separate assignment. It is not embodied, as the lower court suggests, within the Maranatha sale, or assumption of the mortgage loans because of the nature of the asset as a cause of action for breach of contract and a taking realized in 2003 but accruing prior to the Hogenson partnership dissolution— in 1997. It is a separate asset of the Hogenson partnership:

> In order to succeed to the property rights of the prior partnership [the Hogenson partnership], those property rights must be devolved upon this new entity [the Klug partnership] by grant, purchase, or operation of law.[128]

The cause of action did not succeed to the Klug partnership by grant, purchase, or operation of law. The cause of action accrued before dissolution. The Hogenson partners commenced litigation during the winding up period to

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[127] Minn. Stat. § 323.24 (This section is the same as UPA's § 25).

[128] *Londin v. Carro, Spanbock, Londin, Fass & Geller,* 478 N.Y.S.2d 452 (1984).

collect damages arising from the cause of action as obligated to each other as partners, and to eventually disburse damages received. The 1989 Hogenson partnership conducted itself as owners of the claim – as they are.

Nevertheless, there is no separate assignment between the 1989 Hogenson partnership and the 2000 or 2003 Klug partnerships for this partnership property.

David Klug previously stated in his affidavit that he paid no consideration of any value for the Tucker Act cause of action asset.[129] Thus, because the cause of action reflects the harm caused to the Hogenson partnership, only the 1989 Hogenson partners — Arvidson having died — Hogenson, Berger, and Larson could engage Faegre and Eckland to litigate within six years of the wrongful act before the statute of limitations had run. In addition, the Hogenson partners could not bind the Klug partnership to a contract in 2003 since they were not partners of the Klug partnership — including Berger. Finally, there is no evidence, for instance, that the Klug partnership repaid the Hogenson partners for the Faegre retainer agreement.

More importantly, if there is any question about the partners' intent and conduct regarding the asset as the property of the 1989 Hogenson partnership, it is a genuine material issue of fact defeating the underlying

[129] App. p 326 at ¶ 4.

grant of summary judgment. Therefore, if a question of fact exists, the district court's decision must be reversed and the matter remanded to the trial court.

H. Because of Faegre's and Eckland's breach of contract for legal representation with the Hogenson R & R Investors partnership, as a matter of law, the Hogenson partnership is entitled to a declaratory judgment.

The 1989 Hogenson R & R Investors entered into a valid contract for legal representation with Faegre & Benson and later, with Eckland & Blando. The unambiguous terms of the contract, and the correspondence between client and counsel, specifically identified the partnership for whom counsel filed the federal Tucker Act claim in the U.S. Court of Federal Claims. The law firm's breach of contract and subsequent acts sought to and did cause harm, unnecessary litigation, attorney fees, and costs to the partners of the 1989 Hogenson R & R Investors partnership.

On an appeal in a declaratory judgment action, this Court will apply a clearly erroneous standard of review to the findings of fact and review the district court's determinations of legal questions de novo.[130] The lower court denied the declaratory judgment claim as "moot as the Court has found that

[130] *Minn. Ctr. For Envtl. Advocacy v. Big Stone County Bd. of Comm'rs,* 638 N.W.2d 198, 202 (Minn. App. 2002), *review denied* (Minn. Mar. 27, 2002).

the Tucker Act proceeds belong to R & R Investors currently owned by Strangis."[131]

I. The determination of the rights between the parties concerning a contingency fee agreement is ripe for declaratory judgment.

The Minnesota Declaratory Judgment Act gives courts the "power to declare rights, status, and other legal relations whether or not further relief is or could be claimed."[132] In Minnesota, a court has jurisdiction to issue a declaratory judgment if there is a justiciable controversy.[133] A controversy is justiciable only when it involves definite and concrete assertions of right.[134]

In the instant case, there is a justiciable controversy because it (a) involves definite and concrete assertions of right that emanate from a legal source; (b) involves a genuine conflict in tangible interests between parties with adverse interests; and (c) is capable of specific resolution by judgment rather than presenting hypothetical facts that would form an advisory opinion.[135]

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[131] App. p. 71.

[132] Minn. Stat. § 555.01.

[133] *Minn. Ass'n of Pub. Sch. v. Hanson,* 287 Minn. 415, 419-20, 178 N.W.2d 846, 850 (1970).

[134] *Id.* at 420, 178 N.W.2d at 850.

[135] *State ex rel. Smith v. Haveland,* 223 Minn. 89, 92, 25 N.W.2d 474, 477 (1946); *Graham v. Crow Wing County Bd. of Comm'rs,* 515 N.W.2d 81, 84 (Minn. App. 1994), *review denied* (Minn. June 2, 1994).

Under governing Minnesota statutory proclamations, "[a]ny person interested under a ...written contract ... may have determined any question of construction or validity arising under ...the contract... and obtain a declaration of rights, status, or other legal relations thereunder."[136] Furthermore, that contract may be construed either before or after the breach of that contract.[137] Therefore, the Declaratory Judgment Act's purpose "is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and is to be liberally construed and administered."[138]

J. The 1989 Hogenson partnership entered into a contract for legal representation with Faegre and Eckland.

Gerald Berger, Curtis Hogenson, and Diane Larson — partners of the 1989 Hogenson R & R Investors partnership[139] — entered into a contingency fee agreement with Faegre & Benson for legal representation, signed in February 2003.[140] The contract identified the "R & R Investors" as the client

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[136] Minn. Stat. § 555.02.

[137] Minn. Stat. § 555.03.

[138] Minn. Stat. § 555.12.

[139] Berger had died, but his spouse would later sign the Settlement Consent Form.

[140] App. p. 502.

—but not any partnership — the 1989 Hogenson R & R Investors partnership formed under the MUPA.

Berger specifically identified the partners of the R & R Investors as early as November 30, 2002 to Faegre and Eckland:

> This property [the Maranatha Inn] was purchased on December 4, 1984 by our general partnership called R & R Investors Partnership which was comprised of Gerald Berger (managing Partner), Diane Larson, Curtis Hogenson, Norman Arvidson (now deceased), and Robert Abel, (now, no longer a partner)....[141]

To which Eckland would verify in May 2003 after receiving the signed February 28, 2003 contingency fee agreement with the signatures of Berger and Hogenson as general partners:

> Thank you for sending your signed Contingent Fee Agreement and retainer of $1,200.00 for Maranatha Inn. I would like to verify that you received $350.00 for the retainer from Curtis Hogenson and $400.00 from Diane Larson. Your matter has been opened and you will be the key contact for all correspondence, with copies sent to Mr. Hogenson and Ms. Larson.[142]

Furthermore, there is nothing unusual in identifying the partnership as the client versus the named partners when considering the 1989 Hogenson

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[141] App. p. 499.

[142] App. p. 506.

partnership as formed under the UPA,[143] and the Rules of Court for the U.S. Court of Federal Claims governing litigation of federal claims under the Tucker Act. RCFC 17(b) provides that partnerships who lack the capacity to sue under applicable state law, may nonetheless, sue in their own name to enforce a "substantive right existing under the Constitution or laws of the United States."

Finally, Faegre and Eckland understood the general partners of the 1989 Hogenson R & R Investors as Berger (now deceased but signed by his spouse), Hogenson, Larson, and Arvidson (also deceased but signed by his spouse) when they executed the Settlement Agreement Consent Form in June 2006.[144] Larson also wrote on her settlement form "owner of R and R Investors 12-1 1984- 12-1 1999 Maranatha Inn Apts, Royalton, MN."[145]

Generally, after dissolution, partners cannot enter into new transactions as partners. Here, the litigation to collect damages from the federal government for its breach is unfinished business or old business of the

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[143] *Compare,* Minn. Stat. § 323A.0307(a) (2005) governing all partnerships formed after January 1, 2002, the effective date of Minnesota's RUPA: "[a] partnership may sue and be sued in the name of the partnership." Under the UPA, Minnesota courts did not find a partnership a legal entity for all purposes.

[144] App. pp. 518-22.

[145] *Id.* at 519.

dissolved partnership.[146] "Unless there is an agreement to the contrary, all partners have an interest in income derived from the completion of the dissolved partnership's unfinished business."[147] The 1997 cause of action remained a partnership asset and its litigation "unfinished business" to which each partner has a fiduciary duty to complete and recover damages disbursed in accordance with their partnership agreement.[148] It is not "new business."

The distinction between a dissolved partnership's unfinished business and new business is based on the nature of the work involved:[149]

> The ... unfinished business cases stride in a reasonable balance between a partner's right to pursue his own business after dissolution of a partnership, and his duty of loyalty to his ex-partners. The partner may take for his own account new business even when emanating from clients of the dissolved partnership and the partner is entitled to the reasonable value of the services in completing the partnership business, *but he may*

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[146] Callison § 12:20, 16-55.

[147] *Id. See also, Gast v. Peters,* 267 Neb. 18, 671 N.W.2d 758 (2003) (Income derived in winding up phase from contingent fee cases must be allocated among former partners in accordance with partnership interests; partner had fiduciary obligation not to decrease partnership's contingent fee interest without co-partner's consent); *Maus v. Galic,* 669 N.W.2d 38 (Minn. App. 2003) applying similar concepts in a non-professional firm setting.

[148] Callison § 12:20, 16-57.

[149] *Id.*

> *not seize for his own account the business which was in existence during the term of the partnership....*[150]

The idea of winding up a partnership's unfinished business may require, and as here, did require the filing of new litigation. It is not a novelty. Just as some types of former partnerships sue to collect debts,[151] so too should dissolved partnerships be expected to initiate litigation to facilitate the collection of damages from wrongful *predissolution acts* owed from the United States because of its breach of contract. Here, the cause of action is an asset of the 1989 Hogenson partnership. Based on that fact, the Hogenson partnership retained Faegre and Eckland to pursue the Hogenson partnership's claim.

K. Privity of contract is necessary to enforce any breach of contract.

Under Minnesota law, generally, no one can sue for the breach of contract who is not a party or in privity to the contract.[152] Privity of contract

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[150] *Id.* at 16-56, quoting in part from, *Rosenfeld, Meyer & Susman v. Cohen,* 146 Cal. App. 3d 200, 194 Cal. Rptr. 180, 192 (2d Dist. 1983) (disapproved of by *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.,* 7Cal. 4th 503, 28 Cal Rptr. 2d 475, 869 P.2d 454 (1994)) and (overruling recognized by, *AB Group v. Wertin,* 59 Cal. App. 4th 1022, 69 Cal. Rptr.2d 652 (4th Distr. 1997).

[151] *E.g., Weisbrod v. Ely,* 767 P.2d 171, 174 (Wyo. 1989); *Scaglione v. St. Pau-Mercury Idem. Co.,* 28 N.J. 88, 145 A.2d 297, 304-05 (1958); 59A Am Jur.2d Partnership, § 1111, pp. 782-83).

[152] *N. Nat'l Bank v. N. Minn. Nat'l Bank,* 244 Minn. 202, 208, 70 N.W.2d 118, 123 (1955).

is established by showing the legal relationship to the contract or its parties.[153] Here, the only parties to the contract for legal representation included Faegre and Eckland and the *1989 Hogenson R & R Investors partnership.* The legal relationship between these parties prevents a third party to assert claims under that contract.

For instance, the 2004 Strangis R & R Investors partnership cannot establish a third-party beneficiary status and associated rights to the contract. First, when the 2004 Strangis R & R Investors entered into a contingency fee agreements with Eckland in 2004 (now with his own firm), and Faegre and Eckland on December 31, 2005, it did so as a separate and distinct party. Strangis formed the partnership under RUPA with the identified partners of Strangis and Kass Properties and the terms of the contract were different, including the amounts for the initial retainer than the Hogenson contract with Faegre and Eckland. Furthermore, there is no evidence in the record reflecting an amendment to the Hogenson contract or a repudiation of that contract.

This shows the Strangis partnership as a third party.

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[153] *La Mourea v. Rhude,* 209 Minn. 53, 57, 295 N.W. 304, 307 (1940).

Second, the Hogenson contract with Faegre and Eckland makes no reference to the third party or any intent to benefit a third party.[154]

When the 1989 Hogenson partners hired Faegre and Eckland, none of the partners had a relationship — as a partner — with the 2000 or 2003 Klug partnership and nor with the 2004 Strangis partnership. Thus, none of the Hogenson partners — including Berger who left the 2000 Klug partnership 13 months after its creation — could have committed a subsequent partnership to a contract *of any kind* having no privity of contract.

Strangis could argue, however, that the absence of a third-party's name — the 2004 Strangis R & R Investors partnership— would not preclude a finding of intent to benefit a third party as a beneficiary of the Hogenson contract for legal representation with Faegre and Eckland since the Hogenson contract only states as the client "R & R Investors." But, the facts and circumstances here do not lend any support to a claim of an "intent to benefit" or a "duty owed" test.[155]

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[154] *614 Co. v. Minneapolis Cmty. Dev. Agency,* 547 N.W.2d 400, 410 (Minn. App. 1996).

[155] *Cretex Co., Inc. v. Constr. Leaders, Inc.,* 342 N.W.2d 135, 139 (Minn. 1984).

To establish an intent to benefit, the contract must express some intent by the parties to benefit the third party though contractual performance.[156] None of the partners of the 1989 Hogenson partnership in 2003 were members of any other R & R Investors partnership — not the Klugs 2000 or 2003 partnership, nor the *future* 2004 Strangis partnership. The contingency fee agreement does not express any intent of the Hogenson R & R Investors partners to benefit an existing partnership — the Klugs — or a future partnership — Strangis — for a cause of action that accrued in 1997 against the United States. Strangis' separate contract with Faegre and Eckland contradicts any construction of the Hogenson's original contract to show the existence of "intent to benefit."

The Hogenson R & R Investors partnership agreement with Faegre and Eckland also fails any "duty owed" test. To establish a duty owed, the promisor's performance under the contract must discharge a duty otherwise owed to the third party by the promisee.[157] Again, since the Hogenson partnership owned the cause of action as an asset, commencing the litigation is not a duty owed to a future partnership.

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[156] *Chard Realty, Inc. v. City of Shakopee*, 392 N.W.2d 716, 720 (Minn. App. 1986), *review denied* (Minn. Nov. 19, 1986).

[157] *Id.*

Because the Hogenson partnership commenced the litigation within the six year statute of limitations under the Tucker Act for the breach of 1997, only that partnership could be the real party of interest in federal court.

L. The 1989 Hogenson R & R Investors had privity of contract with the federal government at the time of the 1997 breach of contract and taking.

The 1997 breach of contract and taking by the federal government "belongs" to the 1989 Hogenson R & R Investors partnership.[158] The federal government's wrongful action denied the Hogenson R & R Investors their intent to prepayment of the FmHA § 515 mortgage loans. And the wrongful act occurred during the partnership of the 1989 Hogenson R & R Investors. That partnership is the only partnership in privity of contract with the government at the time of the breach and the only party that could have commenced the action.

Under federal law, jurisdiction is determined at the time the complaint is filed.[159] Post-filing events cannot create jurisdiction.[160] The concern of the federal court is ensuring that there be a party with a redressable injury to

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[158] *Compare* App. p. 71 of lower court decision.

[159] *Sharman Co. v. United States,* 2 F.3d 1564, 1569 (Fed. Cl. 1993), *overruled in part by, Reflectone, Inc. v. Dalton,* 60 F.3d 1572 (Fed. Cir. 1995).

[160] *Tyler House Apartment, Ltd. v. United States,* 38 Fed. Cl. 1, 7 (1997) *citing, Lujan v. Defenders of Wildlife,* 504 U.S. 555, 571 n.4 (1992).

preserve a case or controversy.[161] Here, the 2004 Strangis partnership had no standing to bring a timely action in the U.S. Court of Federal Claims. If filed when Strangis entered into a contract with Faegre and Eckland in 2004, it would be outside the six-year time period of the wrongly rejected tender of payment.[162] Further, as the federal settlement agreement also indicates, no proceeds could be disbursed to a party who had not assumed the loan prior to "the 1992 [Congressional] Legislation."[163] With the Strangis' purchase of the Maranatha property from the Klugs in 2004 and assumption of the loans, the facts further suggest Strangis — nor the Klugs having purchased the property and assumed the loans in 2000 — had standing to sue. Thus, the federal court has no jurisdiction for Strangis' claims or Klugs' claims – as the Klugs acknowledge.

For example, in the case *GAIA Techs. v. Reconversion Techs.,*[164] the Federal Circuit found that an alleged owner of intellectual property did not have standing to sue *at the time the suit was filed* because it could not prove to be the owner of the intellectual property.[165] Even though the facts

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161 *Tyler* 38 Fed.Cl. at 7.

162 *Franconia Associates v. U.S.,* 536 U.S. 129, 149 (2002).

163 App. p. 534, Part II, ¶5(b).

164 *GAIA Techs. v. Reconversion Techs,* 93 F.3d 774 (Fed. Cir. 1996).

165 *Id.* at 780.

suggested GAIA owned the property *after* the filing of the complaint, the only period important to GAIA's standing was *when* the complaint was filed:

> As a general matter, parties should possess rights before seeking to have them vindicated in court. Allowing subsequent assignment to automatically cure a standing defect would unjustifiably expand the number of people who are statutorily authorized to sue...Permitting non-owners and licensees the right to sue, so long as they eventually obtain the rights they seek to have redressed would enmesh the judiciary in abstract disputes, risk multiple litigation, and provide incentives for parties to obtain assignments in order to expand their arsenal and the scope of litigation....[166]

The court's rationale is in accord with the federal Anti-Assignment Act. Enacted, in part, to ensure the United States is able to prevent persons of influence from buying up claims against the United States and then improperly urging them on officers of the United States, the Act is applicable to the circumstances of the instant case.[167] First, the only partnership that can hold the breach of contract claim and takings claim for purposes of standing is the 1989 Hogenson R & R Investors as previously discussed.

Second, under 31 U.S.C. § 3127(b) there is a prohibition of assignments, here Strangis, from asserting claims against the United States:

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[166] *Id.* (quoting *Procter & Gamble Co. v. Paragon Trade Brands, Inc.,* 917 F. Supp. 305, 310 (D.Del. 1995).

[167] *U.S. v. Improved Premises Located at Northwest Corner of Irving Place and Sixteenth St.,* 204 F. Supp. 868 (S.D.N.Y. 1962).

> An assignment may be made only after a claim is allowed, the amount of the claim is decided, and a warrant for payment of the claim has been issued. The assignment shall specify the warrant, must be made freely, and must be attested to by 2 witnesses....

The litigation against the United States in the U.S. Court of Federal Claims settled in 2006, based on a claim "allowed" of the 1989 Hogenson partnership. No warrant — payment — has been made of the full damage amount. Only the initial payment of $37,500 is known. Nevertheless, Stangis cannot point to any one document in the record or elsewhere reflecting an assignment in the format required under 31 U.S.C. § 3127 from the 1989 Hogenson partnership to the 2004 Strangis partnership.

Any argument of the Strangis partnership to suggest it is the current party of interest under a relation-back theory under Rule 17 of the Federal Circuit also fails. As the Ninth Circuit analyzed Rule 17's rejection of the relation-back policy because of an effort to circumvent a statute of limitations issue — an issue of the 2004 Strangis partnership — a matter Faegre and Eckland as experienced counsel knew or should have known:

> ...Rule 17(a) does not apply to a situation where a party with no cause of action files a lawsuit to toll the statute of limitations and later obtains a cause of action through assignment. Rule 17(a) is the codification of the salutary principle that an action should not be forfeited because of an honest mistake; it is not a provision to be distorted by parties to circumvent the limitations period. [168]

[168] *United States v. CMA, Inc.*, 890 F.2d 1070 (9th Cir. 1989).

In the instant case, Faegre and Eckland, as experienced counsel, cannot claim an honest mistake to assert that the 2004 Strangis partnership had standing to claim a right to the underlying cause of action. The Berger letter of November 30, 2002, previously quoted here, described the federal government's breach of contract in 1997 — as well as the original and amended complaints filed with the U.S. Court of Federal Claims:

> The selling agent [representing the 1989 Hogenson partnership] was sternly told by the USDA at the Waite Park, MN office that the USDA mortgages on the property could not be prepaid, in order to take the property out of the USDA program. The selling agent described the statement of the FmDA person as blunt, stern, and without any toleration of discussion on this matter.[169]

Any relation-back is suggested as allowable when "necessary to avoid an injustice."[170] But here the opposite is true if a relation-back policy is allowed. In other words, there is no mistake that the 1989 Hogenson partnership was the wronged party as a result of the federal government's breach of contract in 1997. Additionally, any claimed assignment further impedes the purpose of Rule 17 and provides Strangis with a methodology to circumvent the statute of limitations period – a distortion of Rule 17 the federal courts seek to prevent.

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169 App. p. 499; *see* the Verified Counter-Complaint ¶¶ 101, 128(q); App. pp. 112; 121.

170 *Tyler House Apartments,* 38 Fed. Cl. at 8 quoting 6A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Fed. Prac. & Proc.* 1555, p. 415.

In short, the only partnership with standing to sue a timely complaint to enforce the 1997 federal breach of contract remained with the 1989 Hogenson R & R Investors partnership. Strangis had no legal or equitable ownership interest in the Maranatha property in 1997 at the time of the breach or in 2003 when Faegre and Eckland filed suit on the Hogenson partnership's behalf. Therefore, under federal law, only the 1989 Hogenson R & R Investors partnership had standing to sue. Strangis had no standing then or now.

M. The lower court's dismissal of the Hogenson partnership's claims under Rule 12 is unsupportable as a matter of law.

In 2007, the 1989 Hogenson R & R Investors partners realized their initial claim and settlement in the Tucker Act litigation in the U.S. Court of Federal Claims had gone astray. Their interests were no longer being represented by the law firms hired to litigate the breach of contract and takings claims regarding the partnership's attempt to prepay the FmHA § 515 mortgage loans. The Hogenson partners had found the firms now represented the 2004 Strangis R & R Investors partnership. Additionally, the Hogenson partnership found that the Strangis partnership would receive the settlement from the federal government for the Hogenson partnership's Tucker Act claim.

Through new counsel, the Hogenson R & R Investors sought to substitute counsel in the U.S. Court of Federal Claims. On October 9, 2007, four days after the 1989 Hogenson partners filed the motion in the U.S. Court of Federal Claims, Faegre and Eckland filed an interpleader action in Hennepin County District Court to resolve the dispute between the law firms and partnerships.

The Hogenson partners counterclaimed and cross-claimed against the interpleader plaintiffs Faegre and Eckland, Paul Strangis individually, and the 2004 Strangis partnership for attorney deceit and collusion, fraud, breach of contract, legal malpractice, conversion, and for declaratory judgment. The district court subsequently dismissed the claims.

N. The standard of review for the dismissal of claims under Rule 12 is de novo.

This Court will review de novo, a dismissal under Minn. R. Civ. P. 12(e) to determine "whether the complaint sets forth a legally sufficient claim for relief."[171] And, if any evidence that may have been produced is consistent with the theory of the pleader's demanded relief, the dismissal will be reversed:

[171]*Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003).

> "This court will not uphold a Rule 12(e) dismissal 'if it is possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded.'"[172]

O. Relief sought is for reversal and remand.

The 1989 Hogenson R & R Investors partnership seeks declaratory judgment and reversal of the lower court's decision, re-instatement of the claims as asserted as Interpleader Counterclaim and Cross-Claim Plaintiffs, and remand this case to the district court for further proceedings in accordance with the appellate court's disposition.

P. Evidence reflects the legal malpractice of Faegre and Eckland, and the statutorily required expert opinion would have substantiated the pleader's theory to grant relief.

Under the aggregate theory of the MUPA, a change in the relationship of the partners is a change of the partnership itself. Thus, when the 1989 Hogenson R & R Investors transferred the Maranatha business interests to the Klugs in 2000 and Maranatha real estate to the Klugs in 2003, who in turn sold the Maranatha business and real estate interests in 2004 to the Strangis partnership, each occurrence created a new partnership. But, because the Hogenson R & R Investors sought to prepay their federal mortgage loans in 1997 with the federal government denying their effort, any

[172] *Martens v. Minnesota Min. & Mfg. Co.*, 616 N.W.2d 732, 739-40 (Minn. 2000) (citations omitted).

breach of contract claim or takings claim belongs to that partnership as an asset.

With the 1989 Hogenson R & R Investors partnership hiring of Faegre & Benson (through Eckland who would start his own firm in 2006 as Eckland & Blando), a federal action was commenced in the fall of 2003 within the six year statute of limitation for the claims against the United States. The cause of action accrued before the dissolution of the Hogenson partnership in 2000 or 2003 and was discovered and filed before the partnership's termination. The Hogenson partnership, consistent with MUPA, is now winding up its affairs by pursuing its federal cause of action and the settlement proceeds for eventual distribution per their partnership agreement.

The 1989 Hogenson partnership's counterclaims against Faegre and Eckland included legal malpractice. The lower court's dismissal of that claim is predicated on its understanding of partnership law as a single entity as previously examined and challenged. Thus, if the lower court decision is reversed, *all stated claims* against the firms for malpractice, negligence, breach of contract, and breach of the duty of loyalty must be sustained, re-instated, and remanded for further disposition.

But, there are at least two points needed for examination challenging the lower court's conclusions. First, the lower court declared, that even if the 1989 Hogenson partnership had a basis for the claims asserted, they fail because no specific damages were asserted.[173] It is one thing to conclude a party failed to assert any theory or facts to allow the recovery of the relief demanded, including damages, it is another to state the claims fail because of a failure to allege an actual dollar amount as damages resulting from the claims asserted.

The only actual damages known is the initial settlement amount asserted in the interpleader action for $37,500. Unless and until further discovery is obtained regarding the underlying counterclaims and cross-claims, the full extent of the monetary damages cannot be foretold. More importantly, unless the court declares the actual contractual relationship between the parties as demanded under Hogenson's declaratory judgment demand for relief, the remaining claims are either moot or valid. The lower court cited no case law supporting the notion that the failure to assert a specific amount for damages in an initial counterclaim or cross-claim pleading, undeterminable when pled, is fatal to the claim asserted as pled.

What is also forgotten, however, is that because the Hogenson partners believed Faegre and Eckland had been representing them from 2003 to 2007 but later discovered that to be false because of Faegre's and Eckland's wrongdoings, obtaining "their litigation files" was next to impossible. Faegre and Eckland repeatedly refused to produce the requested files because they

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[173] *See e.g.* App. pp. 49; 50; 53.

abandoned the 2003 contract with the Hogenson partnership for the 2004 contract with the Strangis partnership.[174]

Second, as to the claims alleged, evidence produced would support the theories underlying each claim for the relief demanded. For instance, under the malpractice claims against Faegre and Eckland, it is the client who determines who the client is — not the attorney. What evidence is known shows the 1989 Hogenson R & R Investors partners hired Faegre and Eckland to litigate the partnership's 1997 breach of contract and takings claim. The contingency fee agreement confirms that representation. Yet, facts thus far revealed also show a separate contractual agreement between the law firms and Strangis for representation on the same exact federal claim. If Faegre and Eckland believed the claim to be the Strangis' partnership it did not properly terminate its relationship with the Hogenson partnership. Furthermore, if Faegre and Eckland believed Strangis solely owned the claim, why did they obtain signatures of the Hogenson partners on the settlement consent forms at the same time?

What is apparent is that according to the settlement agreement, settlement proceeds shall not be made if the "loan for the property was

[174] App. pp. 320; 350-360; 502; 511.

assumed by the plaintiff after .... the 1992 Legislation."[175] The Hogenson partnership assumed the § 515 loans in 1984 well before 1992. Under the settlement terms, Strangis could not be the recipient of the settlement proceeds. The only partnership with any claim to the asset is that of the Hogenson partnership.[176] It is the Hogenson partnership the FmHA harmed in 1997 and the cause of action is the Hogenson partnership asset.

Flowing from the contractual relationship with Faegre and Eckland as counsel in the federal action is the claim under Minn. Stat. §§ 481.07 and 481.07 for attorney deceit, collusion, and delay. The lower court determined the claims lacked reliance and the pleadings failed to meet the first element of fraud and the statute.[177] The court found that Faegre and Eckland "were never deceitful about who they represented" – the entity R & R Investors.[178] Yet, Faegre and Eckland knew, as the federal Tucker Act complaint alleged, the only partnership with the viable federal Tucker Act claim asserted within

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[175] App. p. 524.

[176] The Klugs have made no appearance in the lower court proceedings. App. p. 36. Even if they sought to do so, the Klug partnership assumed the mortgage loans in 2000, eight years after the line of demarcation for settlement proceeds — the 1992 Legislation — as per the settlement agreement.

[177] App. p. 42.

[178] *Id.*

the six years statute of limitations period of the wrongly rejected tender of the prepayment[179] to be the MUPA 1989 Hogenson R & R Investors partnership. Further, evidence from discovery would bear that out.

Likewise, the lower court determined the Hogenson partnership's claim for fraudulent misrepresentation failed because of the absence of asserting "how they" relied on the purported misrepresentation.[180] The "how" is the Hogenson partners' reliance on Faegre and Eckland representing the Hogenson partners' interests in the litigation from the time of the signing of the retainer agreements in 2003 until the discovery in 2007 that Faegre and Eckland were actually representing the Strangis partnership since 2004. During this period, Faegre and Eckland, unbeknownst to the Hogenson partners, took the position that the Strangis partnership owned 100% of the Hogenson partnership's claim filed in 2003 – leaving the Hogenson partnership with 0%.

It was not until after the settlement is achieved that the Hogenson partners discovered their interests had not been represented since the execution of the 2004 Strangis contract with Eckland. Thus, every act or omission of Faegre and Eckland since 2004 in and out of court was deceptive

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[179] *See Franconia Associates,* 526 U.S. at 149.

[180] App. p. 44.

and a misrepresentation to the Hogenson partners. Evidence to be produced would further affirm the specific allegations pled.

As for the remaining claims of breach of contract, negligence, breach of duty of loyalty, the lower court dismisses the claims and misconstrues the Hogenson allegations regarding the federal Tucker Act settlement.[181] The court contends that because the Hogenson partners signed the settlement consent forms they failed "to allege they have been damaged."[182]

Contrary to the court's opinion, the basis of the claim is *not the amount of the settlement* -- albeit the full amount has yet to be calculated beyond the initial $34,500. But, Faegre and Eckland, knowing the settlement is the property of the 1989 Hogenson R & R Investors partnership, still sought to give the settlement to the 2004 Strangis partnership but for the action of Mohrman & Kaardal, P.A. to substitute counsel in the U.S. Court of Federal Claims. In so doing, Faegre and Eckland were not representing the Hogenson partnership's interests before the federal court.

Faegre's and Eckland's interpleader action was a desperate attempt to avoid responsibility for their own wrongdoing during their Tucker Act dual representation and to assert "clean hands" based on a make-believe "dispute"

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[181] App. pp. 49-50.

[182] App. p. 50.

among R & R Investor partners. Faegre's and Eckland's interpleader actions and allegations therein are not only false but misleading.[183] Faegre and Eckland do not have clean hands.

Evidence produced would substantiate the pleaders' theory for the relief requested. The lower court's grant of the Rule 12(e) motion was premature and in conflict with the law governing Rule 12(e) motions, and, accordingly, should be reversed.

IV. Conclusion

The MUPA contemplated aggregate partnerships – when a partner enters or withdraws, a new partnership is created. The 1989 Hogenson partnership of Curtis Hogenson, Diane Larson, Gerald Berger, and Norman Arvidson was the only partnership in privity of contract in 1997 when the federal government breached the mortgage loan contracts then held by the Hogenson partnership. Therefore, the 1989 Hogenson partnership owns the claims.

Thus, the cause of action – the breach of contract – belonged to the Hogenson partnership to litigate. The partnership did sue in 2003 within the necessary six years statute of limitations period from the date of the 1997 breach.

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[183] App. p. 73.

No other partnership was in privity of contract in 1997 with the government to sue. Likewise, the Hogenson partnership entered into a contract with Faegre and Eckland to sue the federal government in the U.S. Court of Federal Claims as the real party in interest. Faegre and Eckland breached that contract when they switched their representation to another partnership – Strangis – created in 2004 that had no privity to the 1997 breached contract. Furthermore, Faegre and Eckland breached their contingency fee agreement with the Hogenson partnership when they signed a separate and distinct fee agreement with Strangis to litigate Hogenson's already-filed claim in federal court.

The lower court's decision erred regarding the interpretation of partnership law, the Hogenson partnership counter claims and cross-claims. This Court is requested to reverse the lower court, grant the Hogenson partnership's motion for partial summary judgment regarding declaratory judgment and remand this matter for further disposition of the remaining claims in accordance with this Court's decision.

Dated: December 22, 2008

MOHRMAN & KAARDAL, P.A.

Erick G. Kaardal, 229647
33 South Sixth Street, Suite 4100
Minneapolis, Minnesota 55402
Telephone: 612-341-1074

STATE OF MINNESOTA

IN COURT OF APPEALS

A08-1899

R&R Investors I - UPA Partnership, Curtis Hogenson, individually and as tenant-in-partnership of R&R Investors I - UPA Partnership consisting of Curtis Hogenson, Diane Larson, Gerald Berger (deceased) and Norman Arvidson (deceased); Diane Larson, individually and as tenant-in-partnership of R&R Investors I - UPA Partnership consisting of Curtis Hogenson, Diane Larson, Gerald Berger (deceased) and Norman Arvidson (deceased); Eileen M. Berger, individually and as successor tenant-in-partnership in R&R Investors I - UPA Partnership consisting of Curtis Hogenson, Diane Larson, Gerald Berger (deceased) and Norman Arvidson (deceased); and Shirley J. Arvidson, individually and as successor tenant-in-partnership in R&R Investors I - UPA Partnership consisting of Curtis Hogenson, Diane Larson, Gerald Berger (deceased) and Norman Arvidson (deceased),

Appellants,

vs.

R&R Investors and Paul Strangis,
Faegre & Benson LLP and Eckland & Blando LLP,

Respondents.

LR 7.1(c) WORD COUNT COMPLIANCE CERTIFICATE

I, Erick G. Kaardal, certify that the Appellant's Principal Brief complies with Local Rule 7.1(c).

I further certify that, in preparation of this memorandum, I used Microsoft Word 2007, and that this word processing program has been applied specifically to include all text, including headings, footnotes, and quotations in the following word count.

I further certify that the above referenced memorandum contains 13,961 words.

MOHRMAN & KAARDAL, P.A.

Dated: December 22, 2008

By [signature]

Erick G. Kaardal (229647)
33 South Sixth Street, Suite 4100
Minneapolis, MN 55402
Telephone: 612-341-1074
Facsimile: 612-341-1076