

801.1(b)

**Verne, B. Michael**

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**From:** [REDACTED]  
**Sent:** Wednesday, January 25, 2006 2:54 PM  
**To:** Verne, B. Michael  
**Subject:** General partner's duties

Dear Mike,

I am trying to figure out the UPE of a NewCo. Some time ago, I talked with you and Nancy about a situation where a large number of investing partnerships (the number is now 8) planned to create a NewCo to purchase a target company. Assuming all the investing partnerships are their own UPE or have different UPEs, and no one investing partnership will hold 50% or more of the outstanding voting securities of the NewCo, the question came down to the issue of whether any one person or entity had the right to appoint 50% or more of the board of directors of NewCo.

A majority of the investing partnerships have the same general partner, and it's my current understanding that this general partner has the right to appoint 50% or more of the board of directors of the NewCo.

As I understood your answer back then, you said that if the general partner was given the right to appoint the directors of NewCo as part of its normal duties and in its regular capacity as the general partner of each of the investing partnerships, its power to appoint directors would not be aggregated among the various investing partnerships for UPE analysis, and the NewCo would be its own UPE. However, if there was some kind of contract entered into wherein the investors in each partnership granted a contractual right to the general partner to appoint the directors of NewCo, then the general partner's power to appoint directors would be aggregated across the investing partnerships, thus making the general partner the UPE of NewCo.

I've done more research, and I don't know on which side of the line this situation falls. Each investing partnership has created a deed of limited partnership that (among other things) appoints this general partner, and spells out its general duties. Among them is the power to appoint directors. I excerpt it here:

**5.2 Authority and Powers**

Without prejudice to the generality of clause 5.1 hereof, but subject to the terms of this Agreement, the General Partner shall have full power and authority on behalf of the Partnership and with the power to bind the Partnership thereby and without prior consultation with any of the Limited Partners:

[...]

(c) to monitor and where appropriate to appoint or remove directors to the boards of Investee Companies (subject always to the provisions of clause 6(e));

Clause 6(e) merely states that the general partner will take care to continue to qualify as a "venture capital operating company" under ERISA rules.

These deeds were executed a while ago, long before this acquisition was contemplated, and apply to all investments made by the limited partnerships, not just the one at issue here. It is a general grant and right of power.

Can you let me know whether you consider that a normal/regular duty or a special contractual power?

Many thanks.

Best regards,

[REDACTED]

[REDACTED]

I'D BE INCLUDED TO SAY  
THAT IT IS WITHIN THE  
NORMAL DUTIES OF THE GP.

B. [Signature]

1/25/06

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