

NO. 79884-2

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

---

CERTIFICATION FROM  
THE NINTH CIRCUIT COURT OF APPEALS

IN

J & J CELCOM, *et al.*, Appellants

v.

AT&T WIRELESS SERVICES, INC., *et al.*, Appellees

---

CLERK

BY RONALD R. CARPENTER

07 APR 11 AM 7:52

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON

---

**BRIEF OF APPELLANTS**

---

Philip E. Cutler  
Robert G. Nylander  
Thomas W. Hayton  
Kerissa Freeberg  
Cutler Nylander & Hayton, P.S.  
505 Madison Street, Suite 220  
Seattle, WA 98104  
(206) 340-4600

**ORIGINAL**

**TABLE OF CONTENTS**

I. INTRODUCTION. . . . . 1

II. STATEMENT OF FACTS. . . . . 2

    A. CELLULAR TELEPHONE SPECTRUM LICENSES. . . . . 2

    B. THE PARTNERSHIPS. . . . . 3

    C. THE SQUEEZE-OUT TRANSACTIONS. . . . . 5

III. QUESTION CERTIFIED. . . . . 11

IV. ARGUMENT. . . . . 12

    A. *BASSAN* IS CONTROLLING CASE LAW; *KARLE*  
        NOT ON POINT . . . . . 13

    B. POST-*BASSAN* STATUTE *EXPANDS* DUTY OF  
        LOYALTY. . . . . 20

    C. THE DUTY OF LOYALTY MAY NOT BE  
        ELIMINATED EXCEPT UNDER LIMITED  
        CONDITIONS NOT PRESENT IN THIS CASE 23

VIII. CONCLUSION. . . . . 29

## TABLE OF AUTHORITIES

### CASES

<i>Bassan v. Investment Exchange Corp.</i> , 83 Wn.2d 922, 524 P.2d 233 (Wash. 1974) . . . . .	passim
<i>Davis v. Dep't of Licensing</i> , 137 Wn.2d 957, 977 P.2d 554 (1999) . . . . .	27
<i>Gildon v. Simon Property Group, Inc.</i> , 158 Wn.2d 483, 145 P.3d 1196 (2006) . . . . .	26
<i>In re Marriage of Greenlaw</i> , 123 Wn.2d 593, 869 P.2d 1024 (1994) . . . . .	28
<i>J&amp;J Celcom v. AT&amp;T Wireless Services, Inc.</i> , ___ F.3d ___, 2007 WL 676007 . . . . .	2, 12, 14, 21, 22
<i>Jones v. Allstate Ins. Co.</i> , 146 Wn.2d 291, 45 P.3d 1068 (2002) . . . . .	28
<i>Karle v. Seder</i> , 35 Wn.2d 542, 214 P.2d 684 (Wash. 1950) . . . . .	13, 14, 15, 16, 20, 29
<i>Kelsey Lane Homeowners Ass'n v. Kelsey Lane Co., Inc.</i> , 125 Wn. App. 227, 103 P.3d 1256 (2005) . . . . .	28
<i>Linney v. Cellular Alaska Partnership</i> , 1997 WL 450064 (N.D.CAL. 1997) . . . . .	3
<i>Marina Cove Condo. Owners Ass'n v. Isabella Estates</i> , 109 Wn. App. 230, 34 P.3d 870 (2001) . . . . .	27, 28

**UNIFORM ACTS**

Revised Uniform Partnership Act (RUPA) § 103 ..... 25

Revised Uniform Partnership Act (RUPA) § 103  
(b)(3)(ii) ..... 25

Revised Uniform Partnership Act (RUPA) § 307(d)(5) ..... 27

Uniform Child Custody Jurisdiction Act ..... 28

Uniform Commercial Code ..... 28

Uniform Condominium Act ..... 27, 28

Uniform Laws Annotated ..... 25

Uniform Partnership Act ..... 14, 21

**STATE STATUTES**

RCW 25.04.210 ..... 14, 15, 16, 19, 20, 29

RCW 25.05.015 ..... 22, 23, 24

RCW 25.05.015(2)(c) ..... 23

RCW 25.05.015(2)(c)(ii) ..... 22

RCW 25.05.130(4)(e) ..... 27

RCW 25.05.165(1) ..... 22

RCW 25.05.165(2) ..... 20, 23

RCW 25.05.165(2)(a) .....	21, 24
RCW 25.05165(2)(b) .....	22, 24
RCW 25.05.165(5) .....	22, 24
RCW 25.05.165(6) .....	22, 24
RCW 25.05.235(2)(c) .....	23
RCW 25.05.904 .....	26
RCW 64.34 (Washington Condominium Act) .....	27
RCW 64.34.950 .....	27

## I. INTRODUCTION.

Appellants are former minority partners (collectively “the Minority Partners”) in nine partnerships<sup>1</sup> (the “Partnerships”) operated by Defendants AT&T Wireless Services, Inc. and its wholly-owned subsidiaries (collectively “AWS”), as part of its nationwide cellular telephone network.<sup>2</sup>

In the District Court, the Minority Partners argued, among other things, that AWS breached its fiduciary duty by using a sham “sale” of the assets of the Partnerships to very closely affiliated entities – essentially a “sale” to AWS itself.

The Minority Partners moved for partial summary

---

<sup>1</sup> Boise City Cellular Partnership (“Boise”), Fort Collins-Loveland Cellular Telephone Company (“Fort Collins”), Greeley Cellular Telephone Company (“Greeley”), Redding Cellular Partnership (“Redding”), Rochester CellTelCo Partnership (“Rochester”), Texarkana Cellular Partnership (“Texarkana”), Wheeling Cellular Telephone Company (“Wheeling”), Yakima Cellular Telephone Company (“Yakima”) and Yuba City Cellular Telephone Company (“Yuba City”).

<sup>2</sup> Since the time of the original proceedings, AWS was acquired by Cingular, and rebranded; Cingular was then acquired by AT&T, and rebranded again as AT&T. See, Tricia Duryee, *Cingular Is Getting New Name: AT & T Rollout Shedding Orange for Blue Signals Post-merger Identity*, Seattle Times, Jan. 12, 2007, 2007 WLNR 705835, at D1.

judgment as to liability for the purported asset sales, and AWS moved for summary judgment on all issues. The Federal District Court denied Minority Partners' motion and granted AWS' motion (Amended Order, ER00386-410).

On appeal, the Ninth Circuit affirmed the District Court with one exception, and certified that question to this court.

*J&J Celcom v. AT&T Wireless Services, Inc.*, \_\_ F.3d \_\_, 2007 WL 676007.

## **II. STATEMENT OF FACTS.**

### **A. CELLULAR TELEPHONE SPECTRUM LICENSES.**

The Federal Communications Commission (FCC) launched the cellular industry by awarding spectrum licenses in the 900 MHz range for each of the major Metropolitan Statistical Areas (MSAs) and Rural Statistical Areas (RSAs) in the United States. Each of the Partnerships acquired the "A" Block, or non-wireline license for an MSA through a lottery process. In accordance with FCC regulations, applicants were allowed to band together prior to the lottery in each market so that following the drawing the winner of the lottery was given a

bare majority interest in the market and the other members of the winner's band were given the balance of the interest.

AWS has purchased the rights of a number of majority interest holders throughout the country and became a major player in the cellular industry. *Linney v. Cellular Alaska Partnership*, 1997 WL 450064 at \*1 (N.D.Cal. 1997).

## **B. THE PARTNERSHIPS.**

Each of the Partnerships is a general partnership that initially consisted of a majority interest owner and as many as several hundred minority interest owners. See ER00032-245 and ER00504-525 for the full text of the nine Partnership Agreements (the "PAs").

All of the PAs provide that the Partnerships shall continue for a term of 99 years. See, e.g., Boise PA at ER00037. The Boise PA §6.7, ER00041, and the Texarkana PA §6.7, ER00159, provide for a sale of "all or substantially all" of the assets upon a 2/3 vote of the partnership interests, but do not mention dissolution in the event of a sale of the assets of the Partnerships. The Rochester PA §§5.1, 10.1, ER00143,

148, provides for both a sale of all assets and dissolution upon its occurrence. Other PAs provide for dissolution upon the “sale or assignment of substantially all of the assets.” See, e.g., Boise PA, §6.7, ER00041.

The Minority Partners were passive investors with no voice in day to day management, but they could elect a single representative on an executive or partners committee. See, e.g., Boise PA, §6.1 at ER00040. AWS employees constituted a majority of the executive committees. ER00559, ER00608.

The PAs expressly permit certain arrangements, substantially as follows:

The Partnership may enter into reasonable agreements with a Partner or affiliate of a Partner for the performance of services or the acquisition of equipment or other property. However, each such agreement shall be on terms no less favorable to the Partnership than could readily be obtained if it were made with a person who is not a Partner [or] affiliate of a Partner.

Boise PA, §6.5 at ER00041. There is no similar provision permitting sales of assets to partners or their affiliates.

### C. THE SQUEEZE-OUT TRANSACTIONS.

AWS obtained a majority position in the Partnerships in question. Then, it gradually purchased interests from minority partnership interest owners as part of an ongoing program to reduce minority interests in selected markets, ER00653-657. By early 2001, the number of minority partners in many of the twenty-eight markets with minority partners had been reduced to a mere handful. *Id.* AWS knew that most, if not all, of the remaining minority partners had no intention of selling at prices offered by AWS. ER00664.

In February of 2001, AWS developed a plan to increase its profit margins by purchasing the remaining partnership interests from the Minority Partners. ER00527. For example, in the event that the Minority Partners refused to sell their interest in the Rochester CellTelCo Partnership, AWS intended to vote to sell all the assets of Rochester CellTelCo Partnership to a company AWS created called "New Rochester CellTelCo Partnership" wholly owned by AWS. Then, AWS intended to return the name back to Rochester

CellTelCo Partnership, and continue with business as usual as the sole owner. ER00249-253. This is what AWS did. And in this way, AWS expunged the Minority Partners.

In a memo appropriately titled "Approval Request - Acquisition of Minority Partnership Interests," AWS set forth its plan:

[i]n the proposed transaction, AWG Subs would sell all of its assets to a newly formed partnership that is wholly owned by AWG ('New Partnership'). New Partnership would then use the cash proceeds of that sale to redeem all of the [General Partners'] existing partners without recording a gain on the sale. The purchase price would be determined through an appraisal. Excess cash would be returned to AWG.

ER00250. Through the buyout, AWS expected an out-of-pocket savings of \$9.6 million and a tax savings of \$2.5 million. ER00250. The proposal noted that there would be no adverse tax consequences to AWS since the acquisitions would be treated as a redemption of the minority interests and a mere continuation of the existing partnerships rather than as a sale of assets to a new entity. *Id.*

To implement this scheme, AWS commissioned an appraisal. While AWS has continually referred to this appraisal as "independent", the Minority Partners have never conceded that it was. The methodology employed is revealed, in part, at SER 99, §16. This was a "captive" effort by a company which was housed in AWS' offices and spoon-fed information by AWS. No reference is made to any communication with the Minority Partners, or, for that matter, any actual appraisal made for the benefit of any actual third party buyer.<sup>3</sup> Obviously, since AWS acted unilaterally, if it was not satisfied that the appraisal prices were advantageous to it and not the minorities, there was no compulsion for AWS to proceed with the transactions.

Offers were then extended to the Minority Partners.

See, e.g., ER00571-581. AWS offered to pay a certain

---

<sup>3</sup> Another indicia of the type of "appraisal" that occurred was AWS' rejection of the suggestion that a "special committee of partners who have no affiliation with the majority owner or its other subsidiaries" be appointed and an independent investment banker and attorney be retained to advise the minority partners so as to maximize the values for the benefit of *all* the partners. ER 00529, 00531.

amount for each partnership interest, but also warned that if any one minority partner refused to sell, it would force a vote using its controlling interest in favor of an asset sale to a company wholly owned by AWS. See, e.g., ER00569. The Minority Partners would receive less compensation if AWS proceeded with the forced sale. The offer letter threatened, "AWS controls sufficient Partnership interests to approve the transaction under the terms of the Partnership's Partnership Agreement." ER00569. The offers did not disclose to the Minority Partners the potential cost and tax savings that AWS expected to realize as a result of the buyouts. See, e.g., ER00569-570.<sup>4</sup>

At the time, AWS was aware that some partners did not want to sell. ER00527, ER00664. Predictably, the offer was

---

<sup>4</sup> Neither did AWS disclose the fact that AWS believed the partnerships were worth substantially more than the appraised values based on comparable transactions reflected in AWS' internal documents dealing with transactions where AWS did in fact deal with arms-length parties. Compare ER 00251 and ER 00954-955. Minority Partners' expert, Charles Walters, demonstrated that the appraised values understated the values of the partnerships that could be obtained through arms-length negotiations. ER 00954-955.

not accepted by all of the Minority Partners. So, AWS held "partnership meetings" to confirm the sale and dissolution of the partnerships. During these meetings, AWS cast the only votes in favor of the transactions.<sup>5</sup>

The "sale" transactions amounted to a paper shuffle with no change of substance other than elimination of the minority ownership interests. The "closings" were accomplished by the simple expedient of Mark Bradner, a Vice President of both AWS and all relevant AWS subsidiaries, sitting in his office alone signing documents for both the old partnerships and the new partnerships<sup>6</sup>. ER00709-710. Although the Asset Purchase Agreements between the new partnerships and the

---

<sup>5</sup> See, e.g., ER00556 (Fort Collins), and ER00602 (Rochester).

<sup>6</sup> "Q. (By Mr. Oitzinger) Was there an actual face-to-face closing where people sat around a table and signed documents and exchanged signed sets?

A. I think that most of the closing documents were signed by me, so I met with myself.

Q. And you signed them and you poured yourself a cup of coffee?

A. Yeah.

Q. And conducted the closing?

A. Yes."

ER00709 (Bradner Deposition).

old partnerships provided for a cash payment of many millions, see e.g., ER00587, ER00585 (Rochester Asset Purchase Agreement calling for a payment of \$32,481,000), no money beyond the relatively small amount given to the Minority Partners ever changed hands. See ER00705, ER00707-710. See also, ER00718-719.

The "new" partnerships were mere continuations of the business of the old partnerships. For example, the board consent of AWS-MN (the 95% owner of Rochester before and after the transaction) stated that "the Parties intend to cause the [New] Partnership to continue the business presently conducted by the Rochester CellTelco and to treat the Partnership as the successor of the Rochester CellTelco in all other respects." ER00610. Simultaneous with the "closing" the names of the new partnerships were changed back to the names of the old partnerships. See, e.g., ER00616 (Rochester). No new bank accounts were opened, no notices of the "sale" were sent to customers, suppliers or employees. See, ER00703-704, ER00706. *No money went from New to*

*Old Partnerships; not even inter-company book-entries.* ER 00710. See also, ER00719-720. The only substantive change resulting from the "sale" of the assets was the elimination of the Minority Partners from the continuing partnerships.

ER00710-711.

Tax returns for subsequent periods were filed by the "new" partnerships using the same employer tax ID number as the old partnerships and stated that the partnerships were created many years ago. See e.g., Rochester Tax return for 2003, ER00533. In its dealings with the IRS, AWS treated the "new" partnerships to be the same as the old partnerships. ER 00711.

Subsequent to the squeeze-out sales, AWS sold itself to Cingular for considerably more than the amount reflected in the "appraisals" obtained for the squeeze-outs. ER00011, ER00013-14, ER00030, ER00944.

### **III. QUESTION CERTIFIED.**

The Ninth Circuit has posed the following issue to this Court; under Washington law:

Does a controlling partner violate the duty of loyalty to the partnership or to dissenting minority partners where the controlling partner causes the partnership to sell all its assets to an affiliated party at a price determined by a third-party appraisal, when the appraisal and the parties to the transaction are disclosed and the partnership agreement allows for sale of assets upon majority or supermajority vote, but the partnership agreement is silent on the subject of sale to a related party?

*J&J Celcom v. AT&T Wireless Services, Inc.*, \_\_\_ F.3d \_\_\_, 2007

WL 676007, \*4.

#### **IV. ARGUMENT.**

The Ninth Circuit laid out the remaining items for analysis in this case as follows:

In the instant case, we have construed the partnership agreements to allow for sale of all assets by either majority or supermajority vote. None of them restricts the parties to whom assets may be sold. However, the partnership agreements do not specifically authorize sale of all assets to a related party as they do, for example, specifically authorize AWS to provide services to the partnership under certain conditions. If the Supreme Court of Washington holds that the asset sales would violate the duty of loyalty, and that the language in the partnership agreements is insufficient to contract around this duty under Wash. Rev.Code § 25 .05.015(2)(c)(ii), then we must reverse the district court's grant of

summary judgment on this issue. Otherwise, we will affirm.

*Id.* at \*4. This Court should hold, for the reasons given here, that the asset sale violated the duty of loyalty and that the partnership agreements do not include language sufficient to contract around the duty of loyalty. Under our case law and statutory system, the Minority Partners should prevail.

**A. BASSAN IS CONTROLLING CASE LAW; KARLE NOT ON POINT**

The Ninth Circuit perceived a disagreement between two Washington cases *Karle v. Seder*, 35 Wn.2d 542, 214 P.2d 684 (1950), and *Bassan v. Investment Exchange Corp.*, 83 Wn.2d 922, 524 P.2d 233 (1974) :

The two Washington cases of which we are aware that are relevant to a partner's fiduciary duty of loyalty in the context of a sale between partners, *Karle v. Seder*, [35 Wn.2d 542], 214 P.2d 684 (Wash.1950), and *Bassan v. Investment Exchange Corp.*, [83 Wn.2d 922,] 524 P.2d 233 (Wash.1974), seem to point in different directions. *Karle* holds that full disclosure, fair price, and good faith suffice to satisfy a partner's fiduciary duty in the context of a consensual sale of partnership assets. [35 Wn.2d at 549,] 214 P.2d at 687-88. But *Bassan* holds that, where a partnership agreement is silent as to the specific

transaction, a general partner may not sell property to a limited partnership and reap a profit, even where all partners expect that this kind of transaction will occur, the price is fair, and the amount of profit is reasonable. [83 Wn.2d at 924-928] 524 P.2d at 236-38.

*J&J Celcom v. AT&T Wireless Services, Inc.*, \_\_\_ F.3d \_\_\_, 2007

WL 676007, \*3. With respect to the Ninth Circuit, however,

*Karle* and *Bassan* do not point in opposite directions. That is because they address different issues.

Under the Uniform Partnership Act<sup>7</sup> that was in effect at the time of *Karle* there were two primary statutory duties for a partnership, codified in RCW 25.04.200<sup>8</sup> and RCW 25.04.210<sup>9</sup>. These duties were summarized in the *Washington Partnership Law and Practice Handbook* (Rev. ed. 1992), section 4.3.3:

---

<sup>7</sup> RCW chapter 25.04, Laws of Washington 1945 ch. 137. The statute was repealed by the adoption of the revised Uniform Partnership Act, RCW 25.05.

<sup>8</sup> Uniform Partnership Act § 20. "Partners shall render on demand true and full information of all things affecting the partnership to any partner or the legal representative of any deceased partner or partner under legal disability."

<sup>9</sup> Uniform Partnership Act § 21. The full text of the statute is set out in Appendix A

Each partner has two primary duties to the partnership. The partner must relate relevant information regarding “all things affecting the partnership” to any other partner requesting the same. RCW 25.04.200. In addition, a partner must account to the partnership for any benefit or profit held by the partner relating to any aspect of the partnership. RCW 25.04.210.

*Karle* was concerned with the first of these duties, the duty to relate relevant information. *Bassan* was concerned with the second duty, the duty to account for the partnership for any benefit or profit held by the partner relating to any aspect of the partnership. Satisfying one duty does not satisfy the other. So while one case was decided on the basis of a failure to relate relevant information, the other was decided on the basis of the necessity of accounting to the partnership for a benefit or profit held by partner. *Karle* did not abrogate RCW 25.04.210.

*Karle*, as the Ninth Circuit noted, addressed *consensual* sales. (The present sales were not.) The reason *Karle* did not concern itself with the partner’s duty to account for profits made from the partnership was that *Karle*, at bottom, is a fraud

case.

However, the District Court relied on *Karle* to conclude that the standard for determining whether AWS' self-dealing transactions violated the duty of loyalty and care was nothing more than (1) full disclosure of the material facts and (2) payment of a fair price. ER00406. This is the wrong standard under the facts in this case. Again, *Karle* is a fraud case and this Court in *Karle* never approached a discussion of the duty of loyalty. The duty of loyalty was contained in the then-current statute, RCW 25.04.210, as discussed above, and was also well-known in the case law at the time of *Karle*. The statute had been in effect for five years before *Karle* was decided. The obvious reason that this Court did not address RCW 25.04.210 is that, if fraud has been committed, the transaction came under the purview of RCW 25.04.200, no further discussion was needed. This Court affirmed the judgment for the plaintiff.

*Karle* also involved the *voluntary* sale (induced by fraud) of one partner's interest to the other partner. Initially, the

partners agreed to dissolve the partnership and put the business up for sale to third parties. A willing third party buyer for the business was identified. However the one partner ended up buying from the other, then turning around and reselling to the third party for a tidy profit, without disclosing to the selling partner that the willing buyer was waiting in the wings. The court simply adopted hornbook law principles that a partner *purchasing the interest of another partner who is selling voluntarily* must make full disclosure and pay a fair price.

In the present case, the Minority Partners relied upon *Bassan* in their briefing to the Federal Court. To date, AWS has failed to offer any reason that the holding of *Bassan* that a partner must account for any profits *regardless of whether the partner acted fairly or reasonably* should not apply in this case.

In *Bassan*, Investment Exchange Corporation formed a limited partnership called Auburn West Associates. Investment Exchange Corporation was the general partner. It was given broad discretion to manage the affairs of the partnership

and, in the articles of the partnership, Investment Exchange Corporation was authorized to sell land that it owned to the limited partnership. Subsequently, Investment Exchange Corporation bought additional tracts of land and sold them to the limited partnership. In the last purchase and sale arrangement (the Murakami property) the general partner received a markup of \$167,500. The limited partners complained that the partnership agreement did not allow for a markup for the general partner on these purchase and sale arrangements.

The trial court found that Investment Exchange had not breached its fiduciary obligations to the limited partners in that the price it charged for the Murakami property was fair and the amount of profit made by the Investment Exchange was reasonable.

On appeal, this Court pointed out that the partnership agreement did not provide a consent by the limited partners for a profit on the sale of the Murakami property to the partnership. This Court pointed out that the partnership

agreement was “silent as to any formula to determine the general partner’s profit.” *Id.* at 925. This Court observed that under former RCW 25.08.090 (the then-current version of the Uniform Limited Partnership Act) the general partner was subject to all the restrictions and liabilities of a general partner in a partnership. This Court then applied former RCW 25.04.210, which provided in relevant part:

(1) Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property.

This Court then held that:

Where consent is lacking, the general partner is held under RCW 25.04.210, as a trustee, to account to the partnership for any profits derived by it. That standard, by the terms of the statute, is not whether the general partner acted fairly and reasonably, but whether it acted as a fiduciary.

*Id.* at 928. This Court reversed the trial court, stating that “[c]onsent was not given by the appellants as to the profit taken in that transaction and Investment Exchange Corporation should be held accountable to the partnership for

the profits it there realized.” *Id.* at 928. In that regard, *Bassan* is virtually on all fours with the instant case. This Court should reaffirm *Bassan*.

*Karle* dealt with the duty to disclose; *Bassan* dealt with the duty to account. One case does not supplant the other. Both cases were consistent with the partnership law of the time. *Bassan* continues to be vital law and govern the present case.

#### **B. POST-BASSAN STATUTE EXPANDS DUTY OF LOYALTY.**

RCW 25.05.165(2)<sup>10</sup>, the current equivalent of former RCW 25.04.210, provides that the duty of loyalty requires partners:

- (a) “to account to the partnership and hold as trustee for it any property, profit, or benefit derived by the partner in the conduct or winding up of the partnership business or derived from a use by the partner of partnership property including the appropriation of a partnership opportunity;
- (b) “to refrain from dealing with the partnership in the conduct or winding up of the partnership business as or on behalf of a party having an

---

<sup>10</sup> The full text of the statute is set out in Appendix B.

interest adverse to the partnership.”<sup>11</sup>

The Ninth Circuit, citing *Bassan* and RCW

25.05.165(2)(a) recognized that even if the price paid by AWS was "fair",

if the sales nevertheless violated the duty of loyalty, see *infra*, the minority owners may be entitled to their share of a constructive trust on the partnership assets and any profits made thereupon. See Wash. Rev.Code § 25.05.165(2)(a); *Bassan v. Inv. Exch. Corp.*, 524 P.2d 233, 236-38 (Wash.1974).

*J&J Celcom v. AT&T Wireless Services, Inc.*, \_\_\_ F.3d \_\_\_, 2007

WL 676007, \*3.

The Ninth Circuit reviewed the statutory changes made in Washington partnership law after this Court's opinion in *Bassan*, pointing out that the new statute expands the duty of loyalty:

Critically, both cases predate Washington revisions to the Uniform Partnership Act, which

---

<sup>11</sup> These duties strongly echo *Bassan*, which required a strict accounting for benefits, regardless of the "fairness" of the price paid. See, *Bassan v. Investment Exch. Corp.*, 83 Wn.2d 922, 524 P.2d 233 (1974): "the general partner is held . . . , as a trustee, to account to the partnership for any profits." *Bassan*, 83 Wn.2d at 927.

appear to have made four important, relevant changes. First, the statute now states that the only fiduciary duties owed by a partner to the partnership or other partners are the duties of loyalty and care, as defined in the statute. Wash. Rev.Code § 25.05.165(1). *Second, it expands the definition of the duty of loyalty to include “refrain[ing] from dealing with the partnership in the conduct or winding up of the partnership business as or on behalf of a party having an interest adverse to the partnership.”* *Id.* § 25.05.165(2)(b). Third, the statute clarifies that a partner does not violate a fiduciary duty merely because he furthers his own interest and that he may transact business with the partnership. *Id.* § 25.05.165(5), (6). Fourth, it permits the percentage of partners specified in the partnership agreement to authorize transactions that would otherwise violate the duty of loyalty. *Id.* § 25.05.015(2)(c)(ii).

*J&J Celcom v. AT&T Wireless Services, Inc.*, \_\_\_ F.3d \_\_\_, 2007 WL 676007, \*3. (Emphasis added.) AWS violated the terms of subsection 156(2)(b) in that it acted “as or on behalf of a party having an interest adverse to the partnership”. It acted as or on behalf of the “new” partnerships which took away the assets of the old partnerships, and the minority parties.

**C. THE DUTY OF LOYALTY MAY NOT BE  
ELIMINATED EXCEPT UNDER LIMITED  
CONDITIONS NOT PRESENT IN THIS CASE.**

As pointed out by the Ninth Circuit, the partnership agreement may not eliminate the duty of loyalty except under certain limited conditions. None of these conditions exist in the present case. The present Partnership Agreements do not contain any such language.

RCW 25.05.015(2)(c)<sup>12</sup> does allow partnership agreements to vary, but not eliminate, the duty of loyalty:

(2) The partnership agreement may not:

\* \* \*

(c) Eliminate the duty of loyalty under RCW 25.05.165(2) or 25.05.235(2)(c), but, if not manifestly unreasonable:

(i) The partnership agreement may identify specific types or categories of activities that do not violate the duty of loyalty; or

(ii) All of the partners or a number or percentage specified in the partnership agreement may authorize or ratify, after full disclosure of all material facts, a specific act or transaction that otherwise would violate the duty of loyalty;

---

<sup>12</sup> The full text of RCW 25.05.015 is set out in Appendix C.

Specifically, there is nothing in the present partnership agreements to "identify specific types or categories of activities that do not violate the duty of loyalty." Further, the acts complained of in the present case were not authorized or ratified by all of the partners.<sup>13</sup> There is no provision in the Partnership Agreements that specifies a percentage that may authorize or ratify a specific act or transaction that would otherwise violate the duty of loyalty.

The majority or supermajority provisions of the partnership agreements, which govern the sale of assets, do not govern or even mention this concern. RCW 25.05.015(c)(ii) would require a provision which would relate to transactions which would otherwise violate the duty of loyalty.

Majority rule is not enough. Unless clearly stated in the partnership agreement, the vote must be unanimous when approving transactions which otherwise violate the duty of

---

<sup>13</sup> Neither may AWS shelter behind RCW 25.05.165(5) or (6). The exceptions in those subsections 165(a) and (b) cannot be used to swallow the entire rule about loyalty in subsections or there would be no point in having 165(2)(a) and (b) on the books in the first place.

loyalty. See, *Uniform Laws Annotated, Revised Uniform Partnership Act (1997)*, section 103, comment (5) (a copy of the entire Comment is attached at Appendix D):

Subsection (b)(3)(ii)<sup>14</sup> is intended to clarify the right of partners, recognized under general law, to consent to a known past or anticipated violation of duty and to waive their legal remedies for redress of that violation. This is intended to cover situations where the conduct in question is not specifically authorized by the partnership agreement. It can also be used to validate conduct that might otherwise not satisfy the "manifestly unreasonable" standard. Clause (ii) provides that, after full disclosure of all material facts regarding a specific act or transaction that otherwise would violate the duty of loyalty, it may be authorized or ratified by the partners. *That authorization or ratification must be unanimous unless a lesser number or percentage is specified for this purpose in the partnership agreement.*

(Emphasis Added.) Again, nothing in the Partnership Agreements allows for anything less than unanimous consent to the squeeze-out sale by AWS to the "New" partnerships.

The purpose of enacting uniform acts is to bring the law of all the states into conformity. This was the legislature's

---

<sup>14</sup> Subsection (b)(3)(ii) of the Uniform Act is codified as subsection (c)(ii) of the Washington statute.

express purpose in adopting the Revised Uniform Partnership Act (“RUPA”). RCW 25.05.904 states, “[t]his act shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this act among states enacting it.” Where a uniform act was explicitly adopted to make the law uniform throughout the states, Washington courts have looked to the official comments to ascertain legislative intent, particularly where a portion of the statute is ambiguous.

The official comments to the RUPA have guided Washington courts in interpreting and clarifying the RUPA. This Court has recently looked to the official comments of the RUPA to clarify when tortfeasors can avoid direct liability for their own torts. In *Gildon v. Simon Property Group, Inc.*, 158 Wn.2d 483, 498, 145 P.3d 1196 (2006), this Court held that “[w]hether the partner acted within the scope of the partnership business is...not relevant in deciding whether a plaintiff may proceed directly and solely against the partner for his or her own tortious acts.” In so ruling, the Court looked to the official

comments, noting that “Simon Property fails to take account of the drafters’ comment to § 307(d)(5) [RCW 25.05.130(4)(e)]”. *Id* at 499, n.17. The Court noted, “[t]he comment clarifies that the exhaustion requirement does not permit tortfeasors to elude direct liability for their own torts.” *Id*.

In the context of another statute, RCW ch. 64.34, Division One of the Court of Appeals stated,

Statutes must be construed so that all statutory language is given effect, with no portion rendered meaningless or superfluous. In this case, the Washington Legislature's express purpose in adopting the [Washington Condominium Act] was to make uniform the laws of the several states concerning condominiums. Because RCW 64.34.950 requires that we apply and construe the WCA to effect that purpose and because the WCA substantially conforms to the Uniform Condominium Act, we look to the UCA's Official Comment in determining the intent of the Legislature.

*Marina Cove Condo. Owners Ass'n. v. Isabella Estates*, 109 Wn. App. 230, 241, 34 P.3d 870 (2001) (footnotes omitted), citing *Davis v. Dep't of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999), RCW 64.34.950. The language in the Uniform Condominium Act with respect to the purpose of making the laws uniform among states is substantially the

same as the language in the Revised Uniform Partnership Act. Therefore, the official comments may similarly be used to determine legislative intent in enacting provisions of the RUPA.

Washington courts have looked to official comments to identify the legislative intent of certain chapters of the Uniform Condominium Act. See *Marina Cove, supra*; *Kelsey Lane Homeowners Ass'n v. Kelsey Lane Co., Inc.*, 125 Wn. App. 227, 103 P.3d 1256 (2005). The courts look to official comments to the Uniform Commercial Code, e.g., for examples of lack of good faith. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 313-14, 326, 45 P.3d 1068 (2002). Official comments have also helped the courts interpret the purpose of the Uniform Child Custody Jurisdiction Act. See *In re Marriage of Greenlaw*, 123 Wn.2d 593, 600-01, 869 P.2d 1024 (1994). Washington courts have a long history of official comments to uniform acts to aid in interpreting the statutes. The Court should do that here as well.

## VIII. CONCLUSION.

*Karle* addressed the duty to disclose; it did not address the fiduciary duty of loyalty found in former RCW 25.04.210. *Karle* certainly did not abrogate the duty of loyalty. *Bassan* did address the duty of loyalty in RCW 25.04.210, and did require that it be enforced. Washington's adoption of the RUPA reinforces the teaching of *Bassan*, and expands the duty of loyalty under the former statute and *Bassan*. The RUPA also shows that the duty of loyalty cannot be contracted around, except in the most particular manner, something not done in this case. Here, AWS violated its duty to the dissenting partners by selling the partnership assets to a closely related party. The Partnership Agreements did not authorize such a breach of the duty of loyalty. This Court should answer the question certified by the Ninth Circuit in the affirmative.

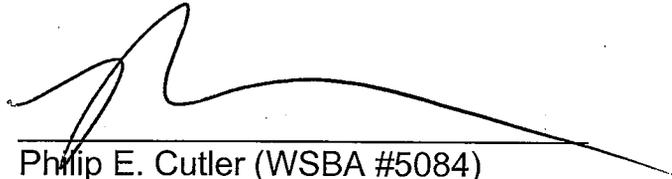
“

“

“

“

DATED this 9<sup>th</sup> day of April, 2007.

A handwritten signature in black ink, appearing to be 'Philip E. Cutler', written over a horizontal line.

Philip E. Cutler (WSBA #5084)  
Robert G. Nylander (WSBA #17264)  
Thomas W. Hayton (WSBA #5657)  
Kerissa Freeberg (WSBA #35789)  
Of Cutler Nylander & Hayton, P.S.  
Attorneys for all plaintiffs

## **APPENDIX A**

RCW 25.04.210:

(1) Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property.

(2) This section applies also to the representatives of a deceased partner engaged in the liquidation of the affairs of the partnership as the personal representatives of the last surviving partner.

## APPENDIX B

RCW 25.05.165:

General standards of partner's conduct.

(1) The only fiduciary duties a partner owes to the partnership and the other partners are the duty of loyalty and the duty of care set forth in subsections (2) and (3) of this section.

(2) A partner's duty of loyalty to the partnership and the other partners is limited to the following:

(a) To account to the partnership and hold as trustee for it any property, profit, or benefit derived by the partner in the conduct and winding up of the partnership business or derived from a use by the partner of partnership property, including the appropriation of a partnership opportunity;

(b) To refrain from dealing with the partnership in the conduct or winding up of the partnership business as or on behalf of a party having an interest adverse to the partnership; and

(c) To refrain from competing with the partnership in the conduct of the partnership business before the dissolution of the partnership.

(3) A partner's duty of care to the partnership and the other partners in the conduct and winding up of the partnership business is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.

(4) A partner shall discharge the duties to the partnership and the other partners under this chapter or under the partnership agreement and exercise any rights consistently with the obligation of good faith and fair dealing.

(5) A partner does not violate a duty or obligation under this chapter or under the partnership agreement merely because the partner's conduct furthers the partner's own interest.

(6) A partner may lend money to and transact other business with the partnership, and as to each loan or transaction the rights and obligations of the partner are the same as those of a person who is not a partner, subject to other applicable law.

(7) This section applies to a person winding up the partnership business as the personal or legal representative of the last surviving partner as if the person were a partner.

## APPENDIX C

RCW 25.05.015:

25.05.015. Effect of partnership agreement--Nonwaivable provisions

(1) Except as otherwise provided in subsection (2) of this section, relations among the partners and between the partners and the partnership are governed by the partnership agreement. To the extent the partnership agreement does not otherwise provide, this chapter governs relations among the partners and between the partners and the partnership.

(2) The partnership agreement may not:

(a) Vary the rights and duties under RCW 25.05.025 except to eliminate the duty to provide copies of statements to all of the partners;

(b) Unreasonably restrict the right of access to books and records under RCW 25.05.160(2);

(c) Eliminate the duty of loyalty under RCW 25.05.165(2) or 25.05.235(2)(c), but, if not manifestly unreasonable:

(i) The partnership agreement may identify specific types or categories of activities that do not violate the duty of loyalty; or

(ii) All of the partners or a number or percentage specified in the partnership agreement may authorize or ratify, after full disclosure of all material facts, a specific act or transaction that

otherwise would violate the duty of loyalty;

(d) Unreasonably reduce the duty of care under RCW 25.05.165(3) or 25.05.235(2)(c);

(e) Eliminate the obligation of good faith and fair dealing under RCW 25.05.165(4), but the partnership agreement may prescribe the standards by which the performance of the obligation is to be measured, if the standards are not manifestly unreasonable;

(f) Vary the power to dissociate as a partner under RCW 25.05.230(1), except to require the notice under RCW 25.05.225(1) to be in writing;

(g) Vary the right of a court to expel a partner in the events specified in RCW 25.05.225(5);

(h) Vary the requirement to wind up the partnership business in cases specified in RCW 25.05.300 (4), (5), or (6);

(I) Vary the law applicable to a limited liability partnership under RCW 25.05.030(2); or

(j) Restrict rights of third parties under this chapter.

## APPENDIX D

RUPA § 103. Effect of Partnership Agreement; Nonwaivable Provisions.

\*\*\*\*

### COMMENT

\*\*\*\*

5. Subsection (b)(3)(i) permits the partners, in their partnership agreement, to identify specific types or categories of partnership activities that do not violate the duty of loyalty. A modification of the statutory standard must not, however, be manifestly unreasonable. This is intended to discourage overreaching by a partner with superior bargaining power since the courts may refuse to enforce an overly broad exculpatory clause. See, e.g., Vlases v. Montgomery Ward & Co., 377 F.2d 846, 850 (3d Cir.1967) (limitation prohibits unconscionable agreements); PPG Industries, Inc. v. Shell Oil Co., 919 F.2d 17, 19 (5th Cir.1990) (apply limitation deferentially to agreements of sophisticated parties).

Subsection (b)(3)(ii) is intended to clarify the right of partners, recognized under general law, to consent to a known past or anticipated violation of duty and to waive their legal remedies for redress of that violation. This is intended to cover situations where the conduct in question is not specifically authorized by the partnership agreement. It can also be used to validate conduct that might otherwise not satisfy the "manifestly unreasonable" standard. Clause (ii) provides that, after full disclosure of all material facts regarding a specific act or transaction that otherwise would violate the duty of loyalty, it may be authorized or ratified by the partners. That authorization or ratification must be unanimous unless a lesser number or percentage is specified for this purpose in the

partnership agreement.