

# Duty Waivers, Exculpation, and Indemnifications of Management: Recent Developments in Delaware and Texas

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1

## Default Duties

- Care
  - Delaware:
    - Be attentive and inform itself of all material facts regarding a decision before taking action
    - Affirmative duty to protect the financial interests of the limited partnership/LLC and its equityholders and must proceed with a critical eye in assessing information.
  - Texas partners (TBOC § § 152.204(b), 152.206)
    - Act as ordinarily prudent person under similar circumstances
    - Error in judgment is not itself a breach
    - Presumptively satisfied if partner acts on an informed basis, in good faith, and in a manner reasonably believing to be in partnership's best interest
  - Texas LLCs: Implied; likely to follow partnership principles

2

## Default Duties

- Loyalty
  - Delaware:
    - Motivated solely by the best interests of the limited partnership/LLC and its equityholders.
    - Not permitted to use their position of trust and confidence to further their private interests.
  - Texas partners (TBOC § 152.205):
    - Using partnership property only for partnership purposes
    - No competition
    - No dealing when an adverse interest
  - Texas LLCs: Implied; likely to follow partnership principles

3

## Default Duties

- Good faith
  - Delaware:
    - Part of duty of loyalty
    - Not to be confused with “good faith” component of the implied covenant of good faith and fair dealing
  - Texas:
    - Element of statutory business judgment rule (TBOC § 152.204(b))
    - Conduct furthering partner’s interest does not by itself violate duties ((TBOC § 152.204(c))

4

## Sources of Duties

- The law
  - LPs: Statutes impose same duties on GPs that partners have in general partnerships
  - LLCs
    - 2013 amendment to DLLCA makes explicit that fiduciary duty law applies to LLCs
    - TBOC § 101.401 permits modification of duties, implying duties exist
    - Compare *Allen v. Devon Energy Holdings, L.L.C.*, 367 S.W.3d 355 (Tex. App.—Houston [1st Dist.] 2012, pet. granted but case settled), with *Suntech Processing Systems, L.L.C. v. Sun Communications, Inc.*, 2000 WL 178236 (Tex. App.—Dallas Dec. 5, 2000, pet. denied)
- Partnership and LLC agreements

5

## Who Owes Duties?

- GPs, managers, managing members
- Other controlling persons; e.g., officers, directors, etc., of GP/manager/managing member
  - *In re Harwood*, 637 F.3d 615 (5th Cir. 2001) (applying Texas law)
  - *In re USACafes, L.P. Litigation*, 600 A.3d 43 (Del. Ch. 1991) and succeeding cases
- Limited partners
  - Delaware: commensurate with powers they have. See *KE Property Management, Inc. v. 275 Madison Management Corp.*, 19 DEL. J. CORP. L. 805 (Del. Ch. 1993) (memorandum opinion) and succeeding cases
  - Texas: not in capacities as such, but perhaps wearing other hats. See TBOC § 153.003(b)-(c); *Strebel v. Wimberly*, 371 S.W.3d 267 (Tex. App.—Houston [1st Dist.] 2012, writ denied)

6

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