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## **2012 Choice of Jurisdiction Considerations: Texas vs. Delaware**

**Recent Developments Regarding Fiduciary Duties  
in Unincorporated Entities and How They May  
Affect Choice of Jurisdiction and Drafting**

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### Table of Contents

	<u>Page</u>
I. Introduction .....	1
II. What is a Fiduciary? .....	2
III. <i>Meinhard v. Salmon</i> .....	2
IV. Examining the Statutes .....	4
A. Texas Statutes .....	4
B. Delaware Statutes.....	7
V. Case Law and Recent Developments in Delaware .....	10
A. Gotham Partners Case.....	10
B. Amendments to the Delaware Statutes .....	10
C. Justice Steele’s Article .....	11
D. The Court Responds.....	12
E. The Requirement of Good Faith .....	15
VI. Texas Case Law .....	17
VII. Examples of Contract Provisions Dealing with Duties.....	19
A. Texas LP – Competing Business .....	19
B. Delaware LLC – Forced Sale of Company Assets .....	19
C. Delaware LP – Replace Fiduciary Duty with Best Interests.....	20
D. Delaware LP – No Duties Absent Fraud, etc.....	20
E. Delaware LLC – No Fiduciary Duties .....	20
F. Delaware LP – Discretion Implies No Duties.....	21
G. Delaware LLC – No Duties; Good Faith Reliance on Experts.....	22
VIII. Summary and Conclusions .....	23

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*Joint adventurers, like copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions. . . . Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court.<sup>1</sup>*

-- Benjamin Cardozo, Chief Judge, New York Court of Appeals

### I. Introduction

This paper will focus on recent developments in the law regarding the duties of the management of limited liability companies and partnerships, particularly limited partnerships,<sup>2</sup> and the impact these developments may have on (i) choice of jurisdiction when a lawyer advises clients about whether to form an entity under the laws of Texas or the laws of Delaware and (ii) drafting and negotiating the organization agreement. We will begin with an examination of the development and history of these duties, which began as a common law concept. We will

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<sup>1</sup> *Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545, 546 (N.Y. 1928).

<sup>2</sup> General and limited partnerships and limited liability companies are often referred to as alternate entities or alternative entities (because they are alternatives to the traditional corporation) or unincorporated entities. In this paper such terms are used interchangeably.

review and compare the relevant Texas and Delaware statutory provisions. Then we will examine recent developments in Delaware pertaining to this area of the law. We will end by examining some examples of contractual provisions drafted with these developments in the law taken into consideration.

## II. What is a Fiduciary?

Let us begin by considering what the term “fiduciary” means. Merriam-Webster’s Dictionary defines a “fiduciary” as “one that holds a fiduciary relation or acts in a fiduciary capacity,”<sup>3</sup> which is not particularly helpful. The following definitions are more helpful:

A person to whom property or power is entrusted for the benefit of another.<sup>4</sup>

An individual, corporation or association holding assets for another party, often with the legal authority and duty to make decisions regarding financial matters on behalf of the other party.<sup>5</sup>

In layman’s terms, a fiduciary is a person or entity who takes care of money or other property for another person or entity. Fiduciary duties arise as a matter of common law when certain relationships exist such as attorney-client, trust-trustee and partnership relationships.<sup>6</sup> In 1928, in a case called *Meinhard v. Salmon*<sup>7</sup>, Benjamin Cardozo, then the Chief Judge of the Court of Appeals of New York, found that this duty arises in the context of a real estate joint venture. In doing so, he created one of the most famous and durable articulations of the duty, which is quoted at the beginning of this article.

## III. *Meinhard v. Salmon*

While *Meinhard v. Salmon*<sup>8</sup> was decided in 1928, it involved an agreement that had been made twenty-six years earlier in 1902. That agreement was between Walter J. Salmon and Morton Meinhard to form a venture to own and develop real estate in New York City, not unlike the arrangement that many modern practitioners draft and negotiate legal documents for every week.

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<sup>3</sup> <http://www.merriam-webster.com/dictionary/fiduciary>.

<sup>4</sup> Dictionary.com <http://dictionary.reference.com/browse/fiduciary>.

<sup>5</sup> InvestorWords.com <http://www.investorwords.com/1932/fiduciary.html>.

<sup>6</sup> *Insurance Co. of North America v. Morris*, 981 S.W.2d 674, 678 (Tex. 1998).

<sup>7</sup> 164 N.E. 545 (N.Y. 1928).

<sup>8</sup> *Id.*

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