

**DIRECTOR AND OFFICER AND CONTROLLING SHAREHOLDER
DUTIES AND LIABILITIES UNDER TEXAS LAW—FIDUCIARY
DUTIES AND SHAREHOLDER OPPRESSION
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I. Fiduciary Duties of Loyalty and Care and the Business Judgment Rule.

A. Relevant Texas Statutory Law.

1. The prior corporation laws and other entity statutes were codified in the Texas Business Organizations Code, which became effective for all Texas corporations on January 1, 2010. The Texas Business Corporation Act (“TBCA”) provisions referred to herein have been carried forward substantially in the Texas Business Organizations Code, which is referred to throughout as the “BOC” or the “Texas BOC”.

Texas BOC § 21.401, provides as follows:

- a. Except as provided by Section 21.101 [shareholder agreements] or Subchapter O [close corporations], the board of directors of a corporation shall:
 - (i) exercise or authorize the exercise of the powers of the corporation; and
 - (ii) direct the management of the business and affairs of the corporation.
- b. in discharging the duties of director under this code or otherwise and in considering the best interests of the corporation, a director may consider the long-term and short-term interests of the corporation and the shareholders of the corporation, including the possibility that those interests may be best served by the continued independence of the corporation.

§ 3.101 of the BOC provides as follows with respect to general provisions relating to the governing authority of all domestic entities:

Subject to the title of this code that governs the domestic entity and the governing documents of the domestic entity, the governing authority [board of directors in the case of a corporation] of a domestic entity manages and directs the business and affairs of the domestic entity.

With respect to the management and direction of the business and affairs of a domestic entity, §3.102 of the BOC provides as follows:

- (a) In discharging a duty or exercising a power, a governing person, including a governing person who is a member of a committee, may, in good faith and with ordinary care, rely on information, opinions, reports, or statements, including financial statements and other financial data, concerning a domestic entity or another person and prepared or presented by:
 - (1) an officer or employee of the entity;
 - (2) legal counsel;

- (3) a certified public accountant;
 - (4) an investment banker;
 - (5) a person who the governing person reasonably believes possesses professional expertise in the matter; or
 - (6) a committee of the governing authority of which the governing person is not a member.
- (b) A governing person may not in good faith rely on the information described by Subsection (a) if the governing person has knowledge of a matter that makes the reliance unwarranted.

B. Texas Common Law

In general, except for certain prohibited “distributions” (*see* BOC § 21.306), the BOC does not set up standards for director, officer or controlling shareholder duties or related liabilities for breach of duties. Therefore, generally, the duties and liabilities of corporate directors and officers and controlling shareholders are governed by Texas common law. Fiduciary duties of officers are often identical to those of directors. *See*, Paddock v. Siemoneit, 218 S.W. 2d 428, 431-432 (Tex. 1949); Gearhart Industries, Inc. v. Smith International, Inc., 741 F.2d 707, 719 (5th Cir. 1984); Miller and Ragazzo, TEXAS PRACTICE—BUSINESS ORGANIZATIONS, § 36.1 (West 2011) [hereinafter “MILLER”]. Under Texas common law directors and officers of a Texas corporation owe fiduciary duties of loyalty, care and obedience to the corporation. *Id.*

1. *Loyalty and Fairness*

Directors and Officers. The duty of loyalty of a director or officer of a Texas corporation dictates that a director or officer must act in good faith and must not allow personal interests to prevail over the interests of the corporation. Gearhart, *supra*, at 719-720; International Bankers Life Insurance Company v. Holloway, 368 S.W.2d 567, 576-78 (Tex. 1963). So a director or officer of a Texas corporation is not permitted to derive a personal benefit or advantage at the expense of the corporation and must carry out his obligation solely with an eye to the best interest of the corporation, unhampered by any pecuniary interest of his own. *Id.*; *see, e.g.*, A. Copeland Enterprises, Inc. v. Guste, 706 F. Supp. 1283, 1290-91 (W.D. Tex. 1989); Milam v. Cooper Company, 258 S.W.2d 953 (Tex. Civ. App.—Waco 1953, *writ refused n.r.e.*).

Controlling Shareholders. Akin to loyalty breach or conflict of interest claims against directors and officers, some Texas cases have also embraced the notion in some limited contexts that a dominant or controlling shareholder of a Texas corporation is, like a director, a “fiduciary” with respect to minority shareholders, generally meaning that the possible duty owed by such a shareholder to minority shareholders is really one of fairness as distinguished from the “trustee notion” of total selflessness. *See, e.g.*, Riebe v. National Loan Investors, L.P., 828 F. Supp. 453 (N.D. Tex. 1993) (“narrow” duty to deal fairly with minority but not a duty to act in minority shareholder’s best interest); Hoggett v. Brown, 971 S.W. 2d 472 (Tex. Civ. App.—Houston [14th Dist.], 1997, *writ denied*) (dicta: in certain limited circumstances

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