

**RECENT DEVELOPMENTS IMPACTING
FIDUCIARY STANDARDS
IN TEXAS BUSINESS ORGANIZATIONS**

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By Elizabeth S. Miller

I. INTRODUCTION

Amendments to the Texas Business Organizations Code in the 2025 Legislative session codified standards with respect to fiduciary duties and liabilities applicable to publicly held Texas for-profit corporations, limited liability companies, and limited partnerships, and present new opportunities (and, in some instances, challenges) in drafting the governing documents of privately held Texas for-profit corporations, limited liability companies, and general and limited partnerships with respect to fiduciary duties and liabilities. Understanding the differences in, and ramifications of, the statutory provisions addressing the duties and liabilities of governing persons and other managerial officials in the various forms of business entities, as well as the manner and extent to which the governing documents may impact those duties and liabilities, is critical when drafting or reviewing governing documents.

II. CORPORATIONS

A. Fiduciary Duties of Corporate Directors, Officers, and Shareholders

The provisions of the Texas Business Organizations Code (BOC) governing for-profit corporations (like the predecessor Texas Business Corporation Act), do not explicitly set forth or define the fiduciary duties of corporate directors; however, case law generally recognizes that directors owe the corporation (but not individual shareholders) a duty of obedience, a duty of care, and a duty of loyalty. *See, e.g., Matter of Estate of Poe*, 648 S.W.3d 277 (Tex. 2022); *Ritchie v. Rupe*, 443 S.W.3d 856, 868 (Tex. 2014); *Gearhart Indus., Inc. v. Smith Int'l, Inc.*, 741 F.2d 707, 719-721 (5th Cir. 1984). As noted below, several longstanding provisions of the BOC (and prior law, i.e., the Texas Business Corporation Act) are relevant to a director's discharge of the duties of care and loyalty and potential liability for breach of those duties. For some corporations, however, these provisions have been somewhat eclipsed by the 2025 amendments to the BOC discussed below, which explicitly set forth presumptions concerning compliance by directors and officers with respect to their duties in certain for-profit corporations as well as pleading and proof requirements that must be met by a claimant in order to have a cause of action for an act or omission of a director or officer of such a corporation.

1. Director's Duty of Obedience Under Texas Case Law and Longstanding Statutory Provisions

A director's common-law duty of obedience forbids ultra vires acts but is rarely implicated given that modern corporation laws define corporate powers expansively and permit broad purpose clauses in the certificate of formation. *See* Tex. Bus. Orgs. Code §§ 2.001, 2.003, 2.007, 2.008, 2.101, 3.005(a)(3); *see also* Tex. Bus. Orgs. Code § 20.002 (defining scope of ultra vires doctrine). In general, courts appear reluctant to hold directors liable for ultra vires acts. As one court has summed up Texas law in this area, "Texas courts have refused to impose personal liability on corporate directors for illegal or *ultra vires* acts of corporate agents unless the directors either participated in the act or had actual knowledge of the act." *Resolution Trust Corp. v. Norris*, 830 F. Supp. 351, 357 (S.D. Tex. 1993).

2. Director's Duty of Care Under Texas Case Law and Longstanding Statutory Provisions

Until the 1990s, Texas cases dealing with director liability for breach of the duty of care, as distinct from the duty of loyalty, had been few and far between. A brief overview of Texas case law addressing the duty of care and business judgment rule is set forth below in order to provide context for the 2025 amendments to the BOC, which are often described as "codifying the business judgment rule" under Texas law.

In *Gearhart Industries, Inc. v. Smith International, Inc.*, 741 F.2d 707 (5th Cir. 1984), the Fifth Circuit reviewed Texas case law addressing a director's duty of care going back to the 1880s and concluded

that “Texas courts to this day will not impose liability upon a noninterested corporate director unless the challenged action is ultra vires or is tainted by fraud. . . . Such is the business judgment rule in Texas.” 741 F.2d at 721. Thus, despite references to a standard of “ordinary care” in early Texas cases, the Fifth Circuit characterized the business judgment rule in Texas as protecting all but fraudulent or ultra vires conduct (which would literally protect even grossly negligent conduct and thus provide more protection than the Delaware business judgment rule).

The tension between the standard of care and standard of liability in Texas received little attention in the reported cases until the 1990s when federal banking regulatory agencies began seeking recovery from the directors of failed financial institutions (and their liability insurers) for their alleged mismanagement of the failed institutions. Federal district courts were then faced squarely with the issue of what degree of negligence, if any, would subject the directors to liability under Texas corporate law. These federal district courts generally rejected the argument of the FDIC and RTC that directors are liable under Texas common law for acts of mismanagement that amount to simple negligence, but concluded that the business judgment rule does not protect a breach of the duty of care that amounts to gross negligence or an abdication of responsibilities resulting in a failure to exercise any judgment. *See, e.g., FDIC v. Schreiner*, 892 F. Supp. 869 (S.D. Tex. 1995); *RTC v. Acton*, 822 F. Supp. 307 (N.D. Tex. 1994); *FDIC v. Benson*, 867 F. Supp. 512 (S.D. Tex. 1994); *FDIC v. Harrington*, 844 F. Supp. 300 (N.D. Tex. 1994). At least two federal district courts in Texas have relied upon this line of cases outside the banking context. *See In re Life Partners Holdings, Inc. Shareholder Derivative Litigation*, 2015 WL 8523103 (W.D. Tex. 2015); *Weaver v. Kellog*, 216 B.R. 563, 584 (S.D. Tex. 1997).

In *Floyd v. Hefner*, 2006 WL 2844245 (S.D. Tex. 2006), Judge Harmon followed the *Gearhart* opinion and rejected the proposition that corporate directors can be held liable for gross negligence under current Texas law. The court concluded that the district court opinions that followed a gross negligence standard appear to be the product of the special treatment that banks receive under Texas law,¹ whereas *Floyd v. Hefner* involved actions taken by directors of an oil and gas exploration company, which the court characterized as “a far more speculative business.”

In *TTT Hope, Inc. v. Hill*, 2008 WL 4155465 (S.D. Tex. 2008), the court discussed the division in case law as to whether the business judgment rule permits a gross negligence claim against a director under Texas law, but the court concluded that it need not resolve the issue because the record did not raise a fact issue as to the defendant’s gross negligence. *See also Ye v. Zhang*, 2021 WL 5862093 (S.D. Tex. 2021) (stating that it is clear that a corporate director’s simple negligence is not actionable as a breach of fiduciary duty, but that it is unclear whether directors are liable for gross negligence, and assuming without deciding that directors may be liable for gross negligence, the conduct at issue did not constitute gross negligence); *Ye v. Zhang*, 2020 WL 2521292 (S.D. Tex. 2020) (same) .

In 2009, the Texas Supreme Court alluded to the Texas business judgment rule when addressing the sufficiency of a shareholder’s demand prior to filing a derivative suit. *In re Schmitz*, 285 S.W.3d 451 (Tex. 2009). In *Schmitz*, the Texas Supreme Court cited *Cates v. Sparkman*, 73 Tex. 619, 11 S.W. 846, 849 (1889) and *Pace v. Jordan*, 999 S.W.2d 615, 623 (Tex. App.—Houston [1st Dist.] 1999, pet. denied) when referring to the business judgment rule. Interestingly, the court did not cite the *Gearhart* case. *Cates v. Sparkman* and *Pace v. Jordan* state that acts of the board of directors that are merely unwise, inexpedient, negligent, or imprudent do not authorize the courts to interfere at the behest of a shareholder. According to these cases, judicial interference with a board decision is warranted only if the board’s conduct or breach of duty is characterized by “ultra vires, fraudulent, and injurious practices, abuse of power and oppression . . . clearly subversive of the rights of . . . a shareholder.” *Cates*, 11 S.W. at 849; *see also Pace*, 999 S.W.2d at 623. *Pace v. Jordan*, goes on, however, to state that a board may only invoke the protection of the business judgment rule if the directors are informed of all material information reasonably available to them before making a decision. *Pace*, 999 S.W.2d at 624.

¹In 2003, H.B. 1076 amended the Texas Banking Code to provide that bank officers and directors may be held liable only for acts of gross negligence. H.B. 1076 states that the statute was intended merely to clarify existing law regarding the proper standard of care for bank officers and directors.

In 2014, in *Ritchie v. Rupe*, the Texas Supreme Court cited *Gearhart* when describing the common-law fiduciary duties of corporate directors as follows:

Directors, or those acting as directors, owe a fiduciary duty to the corporation in their directorial actions, and this duty “includes the dedication of [their] uncorrupted business judgment for the sole benefit of the corporation.” *Int’l Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567, 577 (Tex. 1963); *see also Gearhart Indus., Inc. v. Smith Intern., Inc.*, 741 F.2d 707, 723-24 (5th Cir. 1984)(describing corporate director’s fiduciary duties of obedience, loyalty, and due care).

443 S.W.3d at 868.

In 2015, the Texas Supreme Court addressed the business judgment rule in the context of a double derivative suit brought by a shareholder of a closely held corporation against officers of the corporation’s wholly owned subsidiary. *Sneed v. Webre*, 465 S.W.3d 169 (Tex. 2015). The court described the business judgment rule as “generally protect[ing] corporate officers and directors, who owe fiduciary duties to the corporation, from liability for acts that are within the honest exercise of their business judgment and discretion,” citing *Cates v. Sparkman. Id.* at 173. The court explained that the special BOC provisions applicable to derivative suits on behalf of closely held corporations alter the role of the business judgment rule in the analysis of a shareholder’s standing to assert a claim on behalf of the corporation such that the board’s decision not to assert the claim cannot deprive a shareholder of standing to pursue the claim derivatively. However, the court confirmed that the business judgment rule still applies to the merits of a claim against the officers and directors of a closely held corporation such that the officers and directors do not have liability for acts within the honest exercise of their business judgment.

The court in *Sneed* reiterated its explanation in *Cates* that “courts will not interfere with the officers or directors in control of the corporation’s affairs based on allegations of mere mismanagement, neglect, or abuse of discretion.” *Id.* at 186. In order to merit relief, a claim for breach of duty against an officer or director must be “characterized by *ultra vires*, fraudulent, and injurious practices, abuse of power, and oppression on the part of the company or its controlling agency clearly subversive of the rights of the minority, or of a shareholder, and which, without such interference, would leave the latter remediless.” *Id.*

Although numerous federal district courts applying Texas law have concluded that the business judgment rule does not protect gross negligence, recent pronouncements by Texas courts of appeals reflect the view that grossly negligent conduct falls within the protection of the business judgment rule under Texas law. In *Chapman v. Arfeen*, 2018 WL 4139001, at *15 (Tex. App.—Beaumont 2018, pet. denied), the court of appeals stated that “[n]egligent or grossly negligent conduct falls within the [protection provided by the] business judgment rule” and held that the lower court properly dismissed claims against an officer whose conduct was alleged to constitute gross negligence but was not alleged to involve fraud, dishonesty, or self-dealing. *See also Roels v. Valkenaar*, 2020 WL 4930041, at *9 (Tex. App.—Austin 2020, no pet.) (stating that the CEO’s alleged “actions might constitute negligence or gross negligence, but such conduct falls within the business judgment rule, which prevents courts from ‘interfer[ing] with the officers or directors in control of the corporation’s affairs based on allegations of mere mismanagement, neglect, or abuse of discretion”).

There are some longstanding provisions of the BOC (and prior law, i.e., the Texas Business Corporation Act) that are relevant to a director’s potential liability for breach of the duty of care. In recognition that informed decision making by directors cannot feasibly involve personal research or expertise on the part of each director with respect to the myriad business decisions faced, the BOC provides that a director may, in good faith and with ordinary care, rely on information, opinions, reports, or statements prepared or presented by officers or employees of the corporation, by a committee of the board of which the director is not a member, or by legal counsel, accountants, investment bankers, or others with professional or other expertise. Tex. Bus. Orgs. Code § 3.102; *see also* Tex. Bus. Corp. Act art. 2.41D (expired Jan. 1, 2010). The provisions that govern derivative suits on behalf of corporations other than closely held corporations also reflect a deference to the good faith, informed determination of disinterested, independent

directors as to whether the derivative proceeding is in the best interest of the corporation. *See* Tex. Bus. Orgs. Code § 21.558(a); *see also* Tex. Bus. Corp. Act art. 5.14F (expired Jan. 1, 2010). Additionally, the corporate statutes contain indemnification provisions and permit a corporation's certificate of formation to limit or eliminate the liability of a director (and, as amended in 2025, an officer) for monetary damages for breach of the duty of care absent bad faith, intentional misconduct, or a knowing violation of law. Tex. Bus. Orgs. Code §§ 7.001, 8.001-8.152.

3. Director's Duty of Loyalty Under Texas Case Law and Longstanding Statutory Provisions

As described by one Texas court, the director's duty of loyalty "demands that there shall be no conflict between duty and self-interest. The [methods] for the determination of honesty, good faith and loyal conduct are many and varied, and no hard and fast rule can be formulated. The standard of loyalty is measured by no fixed scale." *Imperial Grp. (Texas), Inc. v. Scholnick*, 709 S.W.2d 358, 365 (Tex. App.—Tyler 1986, writ ref'd n.r.e.), quoting *Guth v. Loft*, 23 Del. 255, 5 A.2d 503, 510 (1939). The duty of loyalty dictates that a corporate officer or director must act in good faith and must not allow the individual's personal interest to prevail over the interest of the corporation. The duty of loyalty has been described by the Texas Supreme Court as requiring "an extreme measure of candor, unselfishness, and good faith." *Int'l Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567, 577 (Tex. 1963). Common examples of transactions or conduct implicating the duty of loyalty are self-dealing and usurpation of a corporate opportunity. *See, e.g., Int'l Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567 (Tex. 1963); *Gearhart Indus., Inc. v. Smith Int'l, Inc.*, 741 F.2d 707 (5th Cir. 1984); *Landon v. S & H Mktg. Grp., Inc.*, 82 S.W.3d 666 (Tex. App.—Amarillo 2002, no pet.).

Self-dealing transactions, i.e., contracts or transactions between a corporation and a director or officer or certain parties related to a director or officer, are addressed by statute. The BOC contains provisions outlining procedures under which interested-director or interested-officer transactions will be deemed valid notwithstanding the director's or officer's interest in the transaction or an interested director's participation in the meeting at which the transaction is approved. *See* Tex. Bus. Orgs. Code § 21.418; *see also* Tex. Bus. Corp. Act art. 2.35-1 (expired Jan. 1, 2010). Generally, these procedures require full disclosure by the interested director and approval by disinterested directors or the shareholders. If one of these procedures is not followed, the transaction will nevertheless withstand challenge if it passes scrutiny for "fairness" to the corporation. Tex. Bus. Orgs. Code § 21.418(b).

In 2011, the interested-director/interested-officer provisions of the BOC were amended to make clear that if at least one of the three conditions provided by the statute is met, neither the corporation nor its shareholders have any cause of action against the conflicted director or conflicted officer for breach of duty in respect of the contract or transaction because of the director's or officer's relationship or interest or as a result of the conflicted director's taking any of the actions described in Section 21.418(d), i.e., the execution of a consent or participation in a meeting of directors. The amendment adding subsection (e) to Section 21.418 was in response to comments in an opinion suggesting that the effect of the statute was limited to insulating the contract or transaction from being set aside as opposed to protecting the conflicted director or officer from liability for damages or other equitable remedies in an action for breach of the duty of loyalty. *See Floyd v. Hefner*, 2006 WL 2844245 no. 7 (S. D. Tex. 2006). Various other clarifications and refinements were made in 2009 and 2011.

Importantly, Texas courts have held that the burden is on the interested director or officer to establish that the transaction was approved as provided by the statute or was fair to the corporation at the time of the transaction. *Matter of Estate of Poe*, 648 S.W.3d 277, 289 (Tex. 2022) (stating that "[th]e burden of proving that a transaction falls within this safe harbor [§ 21.418(b)] rests on the interested director"); *Landon v. S & H Mktg. Grp., Inc.*, 82 S.W.3d 666 (Tex. App.—Amarillo 2002, no pet.).

Other situations traditionally implicating a director's or officer's duty of loyalty include misappropriation or usurpation of a corporate opportunity, engaging in competition with the corporation, and otherwise misappropriating or misusing corporate assets or information for personal benefit. *Ritchie v. Rupe*, 443 S.W.3d 856, 887 (Tex. 2014).

According to Texas case law, before a director can safely embark on what would be considered a corporate opportunity, the opportunity must be fully disclosed to and declined by the corporation. *See*

Imperial Grp. (Texas), Inc. v. Scholnick, 709 S.W.2d 358, 365 (Tex. App.—Tyler 1986, writ ref’d n.r.e.). A corporate opportunity arises where a corporation has a legitimate interest or expectancy in and the financial resources to take advantage of a particular business opportunity. *Landon v. S & H Mktg. Grp., Inc.*, 82 S.W.3d 666, 681 (Tex. App.—Amarillo 2002, no pet.), citing *Icom Sys., Inc. v. Davies*, 990 S.W.2d 408, 410 (Tex. App.—Texarkana 1999, no writ). A corporation’s abandonment of a corporate opportunity or financial inability to take advantage of the opportunity may constitute a defense in a suit involving an alleged appropriation of a corporate opportunity. See *Huffington v. Upchurch*, 532 S.W.2d 576 (Tex. 1976). The burden of pleading and proving corporate abandonment and corporate inability is on the officer or director who allegedly appropriated the corporate opportunity. *Huffington v. Upchurch*, 532 S.W.2d at 579; *Canion v. Texas Cycle Supply, Inc.*, 537 S.W.2d 510, 513 (Tex. Civ. App.—Austin 1976, writ ref’d n.r.e.).

In *International Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567, 571 (Tex. 1963), officers and directors of a corporation sold some of their personal shares of stock in competition with a stock offering by the corporation. The supreme court held that “the burden is upon the defendants to establish the fairness of the personal sales transaction to the corporation, and that plaintiff does not have the burden of establishing that the corporation could or would have sold its stock had the defendants not engaged in their competitive sales activities. The latter is no more than evidentiary upon the question of fairness, and upon the question of exemplary damages.” *Int’l Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567, 578 (Tex. 1963).

In *Imperial Group (Texas), Inc. v. Scholnick*, 709 S.W.2d 358, 365 (Tex. App.—Tyler 1986, writ ref’d n.r.e.), the court rejected a corporate officer’s defense that the corporation would not have purchased certain real property if the officer had disclosed the opportunity to the corporation. According to the court, “[i]f an opportunity is within the scope of a corporation’s business, then the only acceptable method of determining whether a corporation would take advantage of the opportunity is by complete disclosure of the opportunity to it. The corporate opportunity doctrine requires total disclosure.” In light of the corporate officer’s failure to disclose the opportunity to the corporation, a jury finding that the corporation would not have acquired the property was immaterial. The court explained that “permit[ting] an after-the-fact determination as to whether [the corporation] would have purchased the [property] under the facts before us would abrogate the full disclosure rule.”

4. Fiduciary Duties of Officers Under Texas Case Law and Longstanding Statutory Provisions

As agents of the corporation, officers have duties of obedience, care, and loyalty. See generally RESTATEMENT (THIRD) OF AGENCY §§ 8.01-8.12 (2006) (dealing with an agent’s duties of loyalty and performance); RESTATEMENT (SECOND) OF AGENCY §§ 377-398 (1958) (dealing with an agent’s duties of service, obedience, and loyalty). See also *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 200 (Tex. 2002) (stating that agency is a special relationship giving rise to a fiduciary duty on the part of the agent to act solely for the benefit of the principal); PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 4.01 cmt. a (1994) (stating that it is relatively well-settled that officers will be held to the same duty-of-care standards as directors and that sound public policy supports holding officers to the same duty of care and business judgment standards as directors); PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS Part V, introductory note b (1994) (stating that courts have usually treated officers in the same category as directors when imposing and enforcing the duty of fair dealing). Often the courts speak of officers and directors in one breath when addressing duties. See, e.g., *Sneed v. Webre*, 465 S.W.3d 169, 172 (Tex. 2015) (describing the business judgment rule as “generally protect[ing] corporate officers and directors, who owe fiduciary duties to the corporation, from liability for acts that are within the honest exercise of their business judgment and discretion”).

In terms similar to provisions permitting directors to rely on information and expertise supplied by others, the BOC permits officers, in the discharge of a duty, to rely on information, opinions, reports, or statements of other officers or employees, attorneys, accountants, investment bankers, or other professionals or experts. Tex. Bus. Orgs. Code § 3.105; see also Tex. Bus. Corp. Act art. 2.42 (expired Jan. 1, 2010). BOC Section 21.418, detailing procedures for valid interested-director transactions, also applies to interested-officer transactions. See Tex. Bus. Orgs. Code § 21.418; see also TBCA Article 2.35-1 (expired Jan. 1, 2010). Indemnification of corporate officers is addressed in Chapter 8 of the BOC. Tex. Bus. Orgs. Code §§ 8.105, 8/106, 8.151. Though arguably permissible under the common law of agency, exculpation of

officers was not addressed by the corporate statute until recent amendments to the BOC expanding the scope of Section 7.001 to include officers. *See* Tex. Bus. Orgs. Code § 7.001.

5. 2025 Amendments Impacting Fiduciary Duties and Liabilities of Directors and Officers

In the 2025 Legislative session, the Legislature passed S.B. No. 29, which became effective immediately upon Governor Abbott’s signature on May 14, 2025. S.B. No. 29 added Section 21.419 to the BOC, which codifies a business judgment rule applicable to directors and officers of certain Texas for-profit corporations, as further described below. Section 21.419 applies to the following:

(1) Texas for-profit corporations with a class or series of voting shares listed on a national securities exchange; and

(2) Texas for-profit corporations that include in their bylaws or certificate of formation a statement affirmatively electing to be governed by Section 21.419.

Tex. Bus. Orgs. Code § 21.419(a) (effective May 14, 2025).

As further discussed below, an election to be governed by Section 21.419 also triggers the application of several other sections of the BOC.

Additionally, S.B. No. 2411, passed by the Legislature in the 2025 session and effective Sept. 1, 2025, amended Section 7.001 of the BOC to expand a corporation’s statutory authorization to limit or eliminate the liability of a “governing person” (i.e., a directors) by expanding the class of persons whose liability may be limited or eliminated to “managerial officials” (i.e., directors and officers). Thus, as further discussed below, the statute now permits a corporation’s certificate of formation to exculpate both directors and officers from liability for monetary damages except for certain liabilities specified by the statute.

a. Impact of BOC Section 21.419 on Fiduciary Duties of Directors and Officers of Corporations Governed by Section 21.419

Section 21.419 characterizes the statute as “set[ting] out certain presumptions concerning compliance by directors and officers with their duties to a domestic corporation, including the duty of care and duty of loyalty as those duties pertain to transactions with interested persons.” Tex. Bus. Orgs. Code § 21.419(b). The statute specifies that a director or officer, “in taking or declining to take any action on any matters of the corporation’s business, is presumed to act: (1) in good faith; (2) on an informed basis; (3) in furtherance of the interests of the corporation; and (4) in obedience to the law and the corporation’s governing documents.” Tex. Bus. Orgs. Code § 21.419(c).

The statute further provides that “neither a corporation nor any shareholder has a cause of action against an officer or director as a result of any act or omission in the person’s capacity as a director or officer unless: (1) the claimant rebuts one or more of the above-specified presumptions and proves that the director’s act or omission constituted a breach of duty that involved fraud, intentional misconduct, an ultra vires act, or a knowing violation of law. Tex. Bus. Orgs. Code § 21.419(d). Allegations of fraud, intentional misconduct, ultra vires action, or knowing violation of law must be pleaded with particularity. Tex. Bus. Orgs. Code § 21.419(f).

Given that the common-law business judgment rule in Texas arguably already protects directors for acts and omissions short of dishonesty or intentional misconduct, the significance of the presumptions and requisite proof of misconduct set forth in the statutory business judgment rule in Section 21.419 might not be readily apparent on a cursory reading of the statute. Importantly, however, under Texas common law, the business judgment rule protects disinterested directors and disinterested officers but does not apply to situations implicating a director’s or officer’s duty of loyalty, such as a self-dealing transaction. *Sneed v. Webre*, 465 S.W.3d 169, 178 (Tex. 2015); *Gearhart Ind., Inc. v. Smith Int’l, Inc.*, 741 F.2d 707, 720-21 (5th Cir. 1984). Section 21.419 thus does far more than clarify or resolve the standard to be applied pursuant to the business judgment rule under Texas common law inasmuch as Section 21.419 signals that its provisions apply not only with respect to the duty of care of a director or officer, but also with respect to the *duty of loyalty*—at least insofar as a claim for breach of the duty of loyalty pertains to taking or declining to take

action on a transaction with an interested person and involves an act or omission in the person's capacity as a director or officer. *See* Tex. Bus. Orgs. Code § 21.419(b), (d).

In this regard, S.B. No. 29 also amended Section 21.418 to add a new subsection (f) stating that, regardless of whether the conditions of subsection (b) of Section 21.418 are satisfied (i.e., regardless of whether the contract or transaction was approved by disinterested directors, was approved by the shareholders, or was fair at the time of its approval), neither the corporation nor its shareholders will have a cause of action against *any* director or officer for breach of duty with respect to the making, authorization, or performance of an interested-director or interested-officer contract or transaction unless the cause of action is permitted by Section 21.419. Thus, not only are the *disinterested* directors protected by the business judgment rule (as would be the case under pre-existing law), but an *interested* director or interested officer apparently is now also protected by the statutory business judgment rule set forth in Section 21.419 (i.e., the presumptions of Section 21.419 must be rebutted by the claimant, and the claimant must plead with particularity and prove that the breach of duty involved fraud, intentional misconduct, an ultra vires act, or a knowing violation of law) in a corporation to which Section 21.418(f) applies, i.e., a corporation that has a class or series of voting shares listed on a national securities exchange or that has made an affirmative election to be governed by Section 21.419. Tex. Bus. Orgs. Code § 21.418(f).

Fertile ground for litigation applying these provisions in the future will include questions regarding what will be sufficient to rebut the presumption of “good faith” and what will constitute “fraud” (dishonesty of purpose or intent to deceive? non-disclosure by the conflicted party? constructive fraud?) or “intentional misconduct” (what has to be intended?) on the part of a conflicted director or officer in a self-dealing transaction. Another significant battleground will be the “particularity” requirement imposed on the claimant's pleadings. (*Cf. In re Schmitz*, 285 S.W.3d 451 (Tex. 2009) (holding that a derivative plaintiff's pre-suit demand did not satisfy the statutory requirement of particularity in the provisions governing derivative suits)).

Also of note in the context of potential conflict-of-interest transactions in the corporate context are new subsection (g) of Section 21.416 of the BOC and new Section 21.4161 of the BOC, which were added by S.B. No. 29 effective May 14, 2025. These new provisions apply only to a corporation that is publicly traded or has elected to be governed by Section 21.419. Section 21.416(g) authorizes the board of directors to adopt a resolution authorizing “the formation of a committee of independent and disinterested directors to review and approve transactions, whether or not contemplated at the time of the committee's formation or a petition under Section 21.4161, involving the corporation or any of its subsidiaries and a controlling shareholder, director, or officer.” Tex. Bus. Orgs. Code § 21.416(g).

Section 21.4161 authorizes a corporation that adopts such a resolution to petition a court to hold an evidentiary hearing to determine whether the directors appointed to the committee are disinterested and independent with respect to any transactions involving the corporation or any of its subsidiaries and a controlling shareholder, director, or officer. Tex. Bus. Orgs. Code § 21.4161(a). The statute requires such a proceeding to be filed in a business court unless the corporation's principal place of business in Texas is located in a county not contained within an operating division of the business court, in which case the petition may be filed in a district court in which the corporation's principal place of business in Texas is located. Tex. Bus. Orgs. Code § 21.4161(b). (This provision presents a problem for a privately held corporation that has elected to be governed by Section 21.419 since the proceeding involves a declaration in advance of any controversy and thus seemingly does not meet the amount-in-controversy requirements for jurisdiction of the business court in a proceeding involving a privately held entity. Tex. Gov't Code § 25A.004(b), (e); *see also C Ten 31 LLC ex rel. Summer Moon Holdings LLC v. Tarbox*, 2025 Tex. Bus. 1, 2025 WL 224542 (Tex. Bus. Ct. 3d Div. 2025).)

Section 21.4161 specifies requirements for notice to the shareholders and designation of legal counsel to act on their behalf. Tex. Bus. Orgs. Code § 21.4161(c)-(f). The statute requires a court to “promptly” hold an evidentiary hearing on the independence and disinterestedness of the directors on the committee and to make a determination in that regard. Tex. Bus. Orgs. Code § 21.4161(g). The statute further provides that “[t]he court's determination that the directors are independent and disinterested under Subsection (g) shall be dispositive in the absence of facts, not presented to the court, constituting evidence sufficient to prove that one of more of those directors is not independent and disinterested with respect to

a particular transaction involving the corporation or any of its subsidiaries and a controlling shareholder, director, or officer.” Tex. Bus. Orgs. Code § 21.4161(f).

Shareholders often rely on their statutory right of access to books and records of the corporation to obtain information regarding potential wrongdoing by managerial officials, but the 2025 amendments to shareholder information rights will present additional challenges to shareholders in this respect, especially in a case governed by Section 21.419, i.e., in which pleading with particularity is required. *See* Tex. Bus. Orgs. Code § 21.218 (as amended May 14, 2025). For example, a shareholder’s statutory inspection right now specifically excludes internal electronic communications and information (“e-mails, text messages or similar electronic communications, or information from social media accounts”) from the records available to the shareholder under the statute unless the communication or information effectuates an action by the corporation. Tex. Bus. Orgs. Code § 21.218(b).

Furthermore, the 2025 amendments to shareholder inspection rights provide that a shareholder’s demand for access to books and records is not for a proper purpose in a publicly traded corporation or a corporation that has elected to be governed by Section 21.419 if:

the corporation reasonably determines that the demand is in connection with: (1) an active or pending derivative proceeding in the right of the corporation under Subchapter L that is or is expected to be instituted or maintained by the holder or the holder’s affiliate; or (2) an active or pending civil lawsuit to which the corporation, or its affiliate, and the holder, or the holder’s affiliate, are or are expected to be adversarial parties.

Tex. Bus. Orgs. Code § 21.218(b-2). The 2025 amendments to shareholder inspection rights make clear that this provision does not impair discovery rights in a derivative suit or civil proceeding described in this subsection; however, satisfying the particularity standard of pleading in order to get to court so as to be able to conduct discovery on a claim against a managerial official for breach of a duty may prove challenging or insurmountable in the face of these limitations on the shareholder’s inspection rights.

It remains to be seen whether or to what extent the provisions of Section 21.419 of the BOC will be interpreted to apply in the context of duty-of-loyalty claims that are based on usurpation of a corporate opportunity, use of corporate assets or corporate information for personal gain, or improper competition by a corporate director or officer. One argument that might be made by the corporation or a shareholder suing on the corporation’s behalf is that the acts did not constitute “matters of [the] corporation’s business” and were not taken “in the person’s capacity as a director or officer” and are thus outside the protection of Section 21.419. *See* Tex. Bus. Orgs. Code § 21.419(c), (d). In the event that a court views such an act as falling within the scope of Section 21.419, a claimant will likely argue that the act involves “bad faith” and is a breach of duty involving “fraud” or “intentional misconduct” that rebuts the presumptions and supports a cause of action.

b. Impact of Amendment of BOC Section 7.001 on Liabilities of Corporate Officers

As further discussed below, the BOC has since its inception permitted a corporation’s certificate of formation to limit or eliminate the liability of corporate directors within certain parameters. Tex. Bus. Orgs. Code § 7.001; *see also* Tex. Rev. Civ. Stat. art. 1302-7.06 (expired Jan. 1, 2010). Until September 1, 2025, the statute only authorized limiting or eliminating liability of a “governing person” of a corporation, i.e., a director; however, S.B. No. 2411, passed by the Legislature in the 2025 session, expanded the scope of the authorization to limit or eliminate liability to include officers as well as directors by replacing references to a “governing person” in Section 7.001 with references to a “managerial official.” *See* Tex. Bus. Orgs. Code §§ 1.002(35(A)(1), (37), (52). Thus, as of September 1, 2025, Section 7.001 permits a corporation’s certificate of formation to limit or eliminate liability of both directors and officers for monetary damages to the corporation or its shareholders. The statute does not permit elimination or limitation of liability for:

- (1) breach of the person’s duty of loyalty;
- (2) an act or omission not in good faith that constitutes a breach of duty to the corporation or involves intentional misconduct or a knowing violation of the law;

- (3) a transaction from which the person received an improper benefit, whether or not the benefit resulted from an act within the scope of the person's duties; or
- (4) an act or omission for which liability is expressly provided by a statute.

The statute does not automatically exculpate corporate directors and officers. To relieve directors and officers of liability for acts and omissions in their capacity as directors and officers as allowed by the statute, the certificate of formation must contain a provision limiting or eliminating liability within the parameters permitted by the statute. Thus, newly formed corporations may now include a charter provision in the original certificate of formation exculpating officers as well as directors to the extent permitted by the statute, and existing corporations may amend the certificate of formation by the requisite vote of the shareholders to relieve officers as well as directors of liability to the extent permitted by the statute.

6. Duties (or Absence of Duties) of Shareholders

a. Formal Fiduciary Duty

Courts of appeals have generally held that shareholders, even in a closely held corporation, do not owe one another fiduciary duties. *See Hoggett v. Brown*, 971 S.W.2d 472, 488 (Tex. App.—Houston [14th Dist.] 1997, pet. denied); *see also Allen v. Devon Energy Holdings, L.L.C.*, 367 S.W.3d 355 (Tex. App.—Houston [1st Dist.] 2012, pet. granted, judgment vacated w.r.m.); *Schoellkopf v. Pledger*, 739 S.W.2d 914, 920 (Tex. App.—Dallas 1984), rev'd on other grounds, 762 S.W.2d 145 (Tex. 1988); *Kaspar v. Thorne*, 755 S.W.2d 151 (Tex. App.—Dallas 1988, no writ); *Pabich v. Kellar*, 71 S.W.3d 500 (Tex. App.—Ft. Worth 2002, pet. denied).

In *Willis v. Donnelly*, 199 S.W.3d 262 (Tex. 2006), the Texas Supreme Court expressly refrained from addressing the question of whether a majority shareholder in a closely held corporation owes a minority shareholder a general fiduciary duty under Texas law. An employee asserted a breach-of-fiduciary-duty claim against the controlling shareholders of two corporations based on the corporations' failure to issue him stock that was promised to him. Assuming without deciding that the relationship of majority and minority shareholder can give rise to a fiduciary duty, the supreme court held that the record did not support the existence of such a duty because the employee never became a shareholder. Because the employee's claim was that he was denied shareholder status, his only potential relief was for breach of contract.

In *Ritchie v. Rupe*, 443 S.W.3d 856 (Tex. 2014), the Texas Supreme Court stated that it had "never recognized a formal fiduciary duty between majority and minority shareholders in a closely-held corporation," citing *Willis v. Donnelly*, and the court noted that no party had asked the court to do so. The court went on to say that "[t]he dissent's contention that this Court should recognize a common-law duty between majority and minority shareholders, rather than between corporate controllers and the corporation, for [misapplication of corporate funds and diversion of corporate opportunities] is contrary to well-established law."

In *Allen v. Devon Energy Holdings, L.L.C.*, 367 S.W.3d 355 (Tex. App.—Houston [1st Dist.] 2012, pet. granted, judgment vacated w.r.m.), the court noted that the vast majority of intermediate appellate courts in Texas have declined to recognize a broad formal fiduciary duty by a majority shareholder to a minority shareholder in a closely held corporation, but the court concluded that case law supports the proposition that a controlling shareholder owes a formal fiduciary duty to a minority shareholder in the context of the communication of an offer to purchase the minority shareholder's shares, including an offer to redeem the shares where the redemption will result in an increase in the controlling shareholder's ownership of the corporation.

A few Texas cases have alluded to a fiduciary duty on the part of a majority shareholder running to the corporation. *See Hoggett v. Brown*, 971 S.W.2d 472, 488 n. 13 (Tex. App.—Houston [14th Dist.] 1997, pet. denied); *Schautteet v. Chester State Bank*, 707 F.Supp. 885, 889 (E.D. Tex. 1988). In a corporation that has modified its management structure to provide for operation and management directly by the shareholders under a shareholders' agreement, such shareholders have the duties and liabilities that would otherwise be imposed on directors. *See Tex. Bus. Orgs. Code* §§ 21.106, 21.727; *see also Tex. Bus. Corp. Act* art. 2.30-1F, art. 12.37C (expired Jan. 1, 2010).

b. Informal Fiduciary Duty

Although shareholders do not generally owe one another fiduciary duties, Texas courts of appeals have historically recognized that the relationship between particular shareholders may constitute a confidential relationship giving rise to fiduciary duties when influence has been acquired and confidence has been justifiably reposed. *Flanary v. Mills*, 150 S.W.3d 785 (Tex. App.—Austin 2004, pet. denied) (stating that “[a] person is justified in placing confidence in the belief that another party will act in his or her best interest only where he or she is accustomed to being guided by the judgment or advice of the other party, and there exists a long association in a business relationship, as well as personal friendship”). The supreme court in *Ritchie v. Rupe*, 443 S.W.3d 856 (Tex. 2014) acknowledged that an informal fiduciary duty may arise on a case-by-case basis where there is a moral, social, domestic, or purely personal relationship of trust and confidence prior to and independent from the parties’ business relationship. On remand of that case, the Dallas Court of Appeals held that the evidence did not support the jury’s finding of a confidential relationship between the plaintiff minority shareholder and other shareholders of the family owned corporation at issue in the case. *Ritchie v. Rupe*, 2016 WL 145581 (Tex. App.—Dallas 2016, pet. denied).

In *Matter of Estate of Poe*, 648 S.W.3d 277 (Tex. 2022), the Texas Supreme Court held as a matter of law that “a corporation’s director cannot owe an informal duty to operate or manage the corporation in the best interest of or for the benefit of an individual shareholder. A director’s fiduciary duty in the management of a corporation is solely for the benefit of the corporation.” *See also Martin v. Hutchison*, 2025 WL 876812 (Tex. App.—Texarkana 2025, pet. denied) (pointing out the Texas Supreme Court’s holding in *Estate of Poe* that a corporation’s director cannot simultaneously owe a fiduciary duty to the corporation and an informal fiduciary duty to a shareholder and rejecting plaintiff shareholders’ claim that fellow shareholders/directors of a family owned corporation owed fiduciary duties to plaintiffs pursuant to a preformation agreement requiring the corporation’s profits to “be divided between the [shareholders] in accordance with their . . . percentage of ownership” and a bylaws provision addressing the board’s discretion to declare dividends; concluding that any contractual obligation under the preformation agreement did not constitute a fiduciary duty, and any injury by failure to adhere to the bylaws was common to all shareholders rather than personal to any plaintiff). In closely held corporations, there is often significant overlap among shareholders and directors, and many of the actions that may operate to the disadvantage of minority shareholders are within the purview of the directors rather than the shareholders. It remains to be seen how courts will address the potential existence and scope of an informal fiduciary owed by a shareholder to another shareholder for acts taken in the capacity as a shareholder, as distinct from the capacity as a director, in light of *Estate of Poe*.

c. Oppression

Until 2014, courts of appeals in Texas had recognized the availability of various equitable remedies, including a court-ordered buyout, where a minority shareholder established that the majority shareholder engaged in “oppressive” conduct. “Oppressive” conduct was defined by the courts as:

- (1) majority shareholders’ conduct that substantially defeats the minority’s expectations that, objectively viewed, were both reasonable under the circumstances and central to the minority shareholder’s decision to invest; or
- (2) burdensome, harsh, or wrongful conduct; a lack of probity and fair dealing in the company’s affairs to the prejudice of some members; or a visible departure from the standards of fair dealing and a violation of fair play on which each shareholder is entitled to rely.

Davis v. Sheerin, 754 S.W.2d 375, 381-82 (Tex. App.—Houston [1st Dist.] 1988, writ denied) (awarding the minority shareholder an equitable buyout at fair value as determined by the jury based upon the majority’s refusal to recognize the minority’s ownership in the corporation).

The seminal case in this area was *Davis v. Sheerin*. In the years after the *Davis* case, oppression cases in Texas appeared with increasing frequency. *See, e.g., Kohanim v. Katoli*, 440 S.W.3d 798 (Tex. App.—El Paso 2013, pet. denied); *Boehringer v. Konkel*, 404 S.W.3d 18 (Tex. App.—Houston [1st Dist.]

2013, no pet.); *ARGO Data Res. Serv., Inc. v. Shagrithaya*, 380 S.W.3d 249 (Tex. App.—Dallas 2012, pet. denied); *Allen v. Devon Energy Holdings, L.L.C.*, 367 S.W.3d 355 (Tex. App.—Houston [1st Dist.] 2012, pet. granted, judgment vacated w.r.m.); *Redmon v. Griffith*, 202 S.W.3d 225, 234 (Tex. App.—Tyler 2006, pet. denied); *Cotten v. Weatherford Bancshares, Inc.*, 187 S.W.3d 687, 699-700 (Tex. App.—Fort Worth 2006, pet. denied); *Pinnacle Data Servs., Inc. v. Gillen*, 104 S.W.3d 188 (Tex. App.—Texarkana 2003, no pet.); *Willis v. Bydalek*, 997 S.W.2d 798, 801 (Tex. App.—Houston [1st Dist.] 1999, pet. denied); *Four Seasons Equip., Inc. v. White (In re White)*, 429 B.R. 201 (Bankr. S.D. Tex. 2010).

In 2014, the Texas Supreme Court disapproved of the manner in which courts of appeals had been applying the oppression doctrine and significantly limited the reach of the oppression doctrine. In *Ritchie v. Rupe*, 443 S.W.3d 856 (Tex. 2014), the court: (1) rejected the “reasonable expectations” and “fair dealing” tests for oppression that courts of appeals had been applying in Texas since 1988 and adopted a definition requiring abuse of authority by management with intent to harm an owner in disregard of management’s honest business judgment; (2) held that a rehabilitative receivership is the only remedy for oppression under Section 11.404 of the BOC; and (3) declined to recognize a common-law cause of action for oppression. In the future, minority shareholders will thus seek to assert their grievances as breaches of fiduciary duty to the corporation (in a derivative suit in which the minority shareholder will be relieved of certain requirements in the context of a closely held corporation and may have the prospect of direct recovery under Tex. Bus. Orgs. Code § 21.563) or as violations or grounds for relief pursuant to common-law causes of action or statutory provisions (e.g., shareholder right to examine corporate books and records under Tex. Bus. Orgs. Code § 21.218, appointment of a receiver under Tex. Bus. Orgs. Code § 11.404), fraud, breaches of contractual obligations, etc., to the extent applicable. In *French v. Fisher*, 2018 WL 8576652 (W.D. Tex. 2018), the district court denied the defendants’ motion to dismiss an LLC member’s request for a court-ordered buyout, relying on a footnote in *Ritchie v. Rupe* in which the Texas Supreme Court left open the possibility that a court-ordered buyout may be appropriate in some circumstances in connection with a rehabilitative receivership to remedy oppression. *See Ritchie*, 443 S.W.3d at 877 n.32.

In *DeNucci v. Matthews*, 463 S.W.3d 200 (Tex. App.—Austin 2015, no pet.), the minority shareholder asserted claims against the majority shareholder for fraud, breach of fiduciary duty, and shareholder oppression. On appeal, the minority shareholder conceded his shareholder oppression claim in light of the Texas Supreme Court’s opinion in *Ritchie v. Rupe*, but the court of appeals affirmed an award of damages in favor of the corporation based on the minority shareholder’s derivative claim for breach of fiduciary duty. Interestingly, the opinion reveals that the trial court also awarded the minority shareholder equitable relief that included reinstatement of the minority shareholder to the board of directors and an order to require the corporation to retain a bookkeeper and provide the minority shareholder access to the financial records. This equitable relief (which apparently was not challenged on appeal) is an example of one trial court’s willingness to employ equitable relief in favor of a shareholder in response to a breach of fiduciary duty to the corporation. *See also Ritchie*, 443 S.W.3d at 892 (suggesting buyout order may be an appropriate equitable remedy for breach of fiduciary duty in some cases).

B. Statutory Provisions to Consider When Drafting Governing Documents of a Corporation

1. Election to Be Governed by BOC Section 21.419

As discussed above, effective May 14, 2025, S.B. No. 29 added provisions to the BOC providing broad protection to directors and officers of publicly traded corporations as well as directors and officers of privately held corporations that elect to be governed by Section 21.419 of the BOC. *See* Tex. Bus. Orgs. Code §§ 21.418(f), 21.419. These provisions codify a business judgment rule that gives directors and officers of such corporations the benefit of certain presumptions in connection with compliance with their duties to the corporation, including their duties of care and loyalty as those duties pertain to transactions with interested persons, and further provide that neither the corporation nor a shareholder has a cause of action against a director or officer for any act or omission in that capacity unless the corporation or shareholder rebuts at least one of the statutory presumptions and proves a breach of duty that involved fraud, intentional misconduct, an ultra vires act, or a knowing violation of law. Tex. Bus. Orgs. Code § 21.419(b)-(d).

Additionally, the claimant must plead with particularity the requisite fraud, intentional misconduct, ultra vires act, or knowing violation of law. Tex. Bus Orgs. Code § 21.419(f).

In a privately held Texas corporation, even a closely held corporation, a statement in the corporation's governing documents such as the following will invoke Section 21.419 (as well as several other provisions of the BOC as noted in Section II.5.a. above):

The corporation affirmatively elects to be governed by Section 21.419 of the Texas Business Organizations Code.

a. Electing to be Governed by Section 21.419 in Certificate of Formation

Many practitioners are routinely including an election to be governed by Section 21.419 when drafting the original certificate of formation of a newly formed for-profit corporation. If a privately held corporation's initial certificate of formation does not include an affirmative election to be governed by Section 21.419, an election may be added to the certificate of formation pursuant to an amendment of the certificate of formation, but the amendment will require approval of shareholders holding 2/3 of the outstanding shares entitled to vote (absent a provision in the certificate of formation providing for a different threshold for shareholder approval of an amendment to the certificate of formation) if shares have been issued. Tex. Bus. Orgs. Code § 21.364. As noted below, inclusion of an election to be governed by Section 21.419 in the certificate of formation, either by the organizer in the original certificate of formation, or by a shareholder vote to amend the certificate of formation, obviously avoids or minimizes the potential for an argument that the election itself as a breach of duty by the directors if the directors include or add an election in the bylaws of the corporation.

b. Electing to be Governed by Section 21.419 in Bylaws

Because the governing documents of a corporation include the bylaws in addition to the certificate of formation, a corporation's election to be governed by Section 21.419 may also be included in the bylaws of a corporation. *See* Tex. Bus. Orgs. Code §§ 1.002(36), 21.419(a)(2). Initial bylaws are adopted by the directors, and bylaws may be amended by the directors unless otherwise provided by the bylaws; therefore, the board of directors will ordinarily have the power to make an election for the corporation to be governed by Section 21.419 without a shareholder vote. *See* Tex. Bus. Orgs. Code § 21.057. It is conceivable that amendment of the bylaws by the directors to include an election for the corporation to be governed by Section 21.419 might prompt a claim by a shareholder that the action to amend the bylaws is a self-dealing or conflicted transaction in breach of the directors' duty of loyalty absent proof by the directors establishing the fairness of the amendment under Section 21.418. Amendment of the bylaws by a shareholder vote to include an election to be governed by Section 21.419 or inclusion of the election in the certificate of formation (either by the organizer in the original certificate of formation or by a shareholder vote to amend the certificate of formation) obviously avoids or minimizes the potential for an argument that the election itself as a breach of duty by the directors.

2. Exculpation as Permitted by BOC Section 7.001

The BOC permits a corporation's certificate of formation to limit or eliminate the liability of managerial officials (i.e., directors and officers) within certain parameters. Tex. Bus. Orgs. Code § 7.001; *see also* Tex. Rev. Civ. Stat. art. 1302-7.06 (expired Jan. 1, 2010). The statute provides that the certificate of formation of a corporation may limit or eliminate the liability of managerial officials for monetary damages to the corporation or shareholders for an act or omission in the person's capacity as a managerial official subject to certain exceptions. Before September 1, 2025, the statute only authorized limiting or eliminating liability of a "governing person"; however, S.B. No. 2411, passed by the Legislature in the 2025 session, expanded the scope of the authorization to limit or eliminate liability for monetary damages to include officers as well as directors by replacing references to a "governing person" in Section 7.001 with references to a "managerial official." *See* Tex. Bus. Orgs. Code §§ 1.002(35(A)(1), (37), (52). Thus, as of September 1, 2025, Section 7.001 permits a corporation's certificate of formation to limit or eliminate

liability of both directors and officers for monetary damages to the corporation or its shareholders. The statute does not permit elimination or limitation of liability for:

- (1) breach of the person's duty of loyalty;
- (2) an act or omission not in good faith that constitutes a breach of duty to the corporation or involves intentional misconduct or a knowing violation of the law;
- (3) a transaction from which the person received an improper benefit, whether or not the benefit resulted from an act within the scope of the person's duties; or
- (4) an act or omission for which liability is expressly provided by a statute.

This provision is sometimes summarized as generally permitting elimination of liability for duty-of-care violations. If the standard of liability for a breach of the duty of care is simple negligence, this provision obviously allows a corporation to provide meaningful protection from liability for such negligence. As discussed above, however, recent Texas case law has tended toward the conclusion that the protection of the business judgment rule under Texas law extends to acts or omissions that constitute not only simple negligence but gross negligence as well. Furthermore, new Section 21.419 provides that a director or officer of a publicly traded corporation, or any corporation whose governing documents have adopted Section 21.419, is not liable absent a breach of duty involving fraud, intentional misconduct, an ultra vires act, or a knowing violation of law. Even if the standard of liability for a breach of the duty of care is gross negligence, it is not clear whether a breach of the duty of care could be in "good faith" so as to fall outside the second exception above.² Thus, an exculpatory provision of the type authorized by Section 7.001 may be somewhat superfluous. On the other hand, to the extent an exculpatory provision pursuant to Section 7.001 could be interpreted to provide additional protection beyond Section 21.419 in a corporation governed by that section, Section 21.419 provides that it "does not limit the effectiveness or applicability of a provision contained in the certificate of formation or similar instrument of a corporation limiting monetary liability of a governing person." Tex. Bus. Orgs. Code § 21.419(g).

In *In re Life Partners Holdings, Inc. Shareholder Derivative Litigation*, 2015 WL 8523103 (W.D. Tex. 2015), the court stated that the question of whether claims for breach of care can be exculpated under Section 7.001 of the Business Organizations Code was a matter of first impression under Texas law. The court held that Section 7.001(b) authorizes the same scope of exculpation as the comparable statutory provision in Delaware, which Delaware courts have held authorizes exculpation for claims for breach of care based on gross negligence. The court observed that Section 7.001 either authorizes exculpation for breaches of care or it exculpates nothing at all.

The BOC was amended in 2021 to add a provision clarifying that a requirement under Texas law that indemnification or exculpation for negligence be expressly or conspicuously stated does not apply to a provision in an entity's governing documents that provides for indemnification or exculpation. Tex. Bus. Orgs. Code § 8.005. This provision makes clear that the so-called "fair notice" and "express negligence" doctrines that generally apply to contractual indemnification and exculpation provisions under Texas common law, *see, e.g., Dresser Industries, Inc. v. Page Petroleum Products, Inc.*, 853 S.W.2d 505 (Tex. 1993), do not apply to the governing documents of Texas entities governed by the BOC.

3. Renunciation of Corporate Opportunity as Permitted by BOC Section 2.101(21)

Because Section 7.001 of the Business Organizations Code (which is the successor to Article 7.06 of the Texas Miscellaneous Corporation Laws Act) does not permit elimination of liability for the breach of a duty of loyalty, corporate-opportunity issues ordinarily must be addressed at the time they arise. If a director or officer makes full disclosure to the corporation regarding the business opportunity when it arises and the corporation declines the opportunity, the director or officer is permitted to proceed; however, until

²The Texas Supreme Court has generally defined gross negligence to involve actual subjective awareness of an extreme degree of risk and conscious indifference to the rights, welfare, and safety of others. *See Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10 (1994). *Moriel* was cited in *Weaver v. Kellogg*, 216 B.R. 563 (S.D. Tex. 1997) for the definition of gross negligence in the context of a director's duty.

2003, the corporate statutes in Texas contained no specific statutory provisions indicating that a preemptive waiver in the governing documents would be effective to relieve a managerial official from the obligation to first offer a business opportunity to the corporation before personally taking advantage of the opportunity.

The Delaware General Corporation Law was amended in 2000 to expressly permit a corporation to renounce, in its certificate of incorporation or by action of the board of directors, any interest or expectancy in specified business opportunities or specified classes or categories of business opportunities presented to the corporation or its officers, directors, or shareholders. Del. Code Ann. tit. 8, § 122(17). The Texas Business Corporation Act (TBCA) was similarly amended in 2003, and Article 2.20(20) of the TBCA was carried forward in the BOC. Thus, the BOC provides that a corporation has the power to renounce, in its certificate of formation or by action of its board of directors, an interest or expectancy of the corporation in, or an interest or expectancy in being offered an opportunity to participate in, specified business opportunities or specified classes or categories of business opportunities that are presented to the corporation or one or more of its officers, directors, or shareholders. Tex. Bus. Orgs. Code § 2.101(21). This provision is included in the general powers provision of the BOC and applies to domestic entities of all types governed by the BOC.

4. Shareholders' Agreements Authorized by BOC Chapter 21, Subchapters C and O

Another approach to limiting fiduciary duties in the corporate context is to utilize a shareholders' agreement under Sections 21.101-21.109 (Subchapter C of Chapter 21) of the BOC. (These provisions are the successor to Article 2.30-1 of the TBCA.) Under these provisions, a corporation that is not publicly traded may be governed by a shareholders' agreement entered into by all persons who are shareholders at the time of the agreement. BOC Section 21.101(a) lists matters that may be included in a shareholders' agreement even though they are inconsistent with one or more provisions of the corporate statutes. Included in the list is a catch-all provision that states that such an agreement is effective even though it "otherwise governs the exercise of corporate powers, the management of the business and affairs of the corporation, or the relationship among the shareholders, the directors, and the corporation as if the corporation were a partnership or in a manner that would otherwise be appropriate only among partners and not contrary to public policy." Tex. Bus. Orgs. Code § 21.101(a)(11); *see also* Tex. Bus. Corp. Act art. 2.30-1A(9) (expired Jan. 1, 2010). Thus, it appears that fiduciary duties of those in a management role of a corporation governed by such an agreement may be modified or waived in ways not generally permitted by corporate law so long as such provisions would be permissible in the context of a partnership. There may be a similar argument under Sections 21.714 and 21.719 of the BOC (*see also* Tex. Bus. Corp. Act arts. 12.32, 12.35 (expired Jan. 1, 2010)) for "close corporations" that comply with Subchapter O of BOC Chapter 21. The predecessor to Subchapter O of the BOC was the Texas Close Corporation Law found in Part 12 of the TBCA.

5. Indemnification as Provided by BOC Chapter 8

BOC Chapter 8 outlines circumstances under which indemnification of directors, officers, and others is required, permitted, and prohibited. The governing documents of a corporation may limit indemnification that is otherwise required by the statute and may limit or require indemnification that is permitted by the statute. These statutory indemnification provisions are somewhat lengthy and detailed. The predecessor provision in the TBCA was Article 2.02-1.

The BOC specifies circumstances under which a corporation is required to indemnify a director, permitted to indemnify a director, and prohibited from indemnifying a director. A corporation is required to indemnify a director or officer who is "wholly successful on the merits or otherwise" unless indemnification is limited or prohibited by the governing documents. Tex. Bus. Orgs. Code §§ 8.051, 8.003; *see also* Tex. Bus. Corp. Act art. 2.02-1H, U (expired Jan. 1, 2010). A corporation is prohibited from indemnifying a director who is found liable to the corporation or for improperly receiving a personal benefit if the liability was based on willful or intentional misconduct in the performance of the director's duty to the corporation, breach of the director's duty of loyalty to the corporation, or an act or omission not in good faith constituting a breach of duty to the corporation. Tex. Bus. Orgs. Code §§ 8.102(b)(3). *Cf.* Tex. Bus. Corp. Act art. 2.02-1C, E (corporation prohibited from indemnifying director who is found liable to corporation, or for improper

receipt of personal benefit, if liability arose out of willful or intentional misconduct in performance of director's duty to corporation).

A corporation is permitted, without the necessity of any enabling provision in the certificate of formation or bylaws, to indemnify a director who is determined to meet certain standards. Tex. Bus. Orgs. Code § 8.101, 8.102; *see also* Tex. Bus. Corp. Act art. 2.02-1B, E (expired Jan. 1, 2010). These standards require that the director: (1) acted in good faith; (2) reasonably believed the conduct was in the best interest of the corporation (if the conduct was in an official capacity) or that the conduct was not opposed to the corporation's best interest (in cases of conduct outside the director's official capacity); and (3) in the case of a criminal proceeding, had no reasonable cause to believe the conduct was unlawful. Tex. Bus. Orgs. Code § 8.101(a); *see also* Tex. Bus. Corp. Act art. 2.02-1B (expired Jan. 1, 2010). If a director is found liable to the corporation or on the basis of improperly receiving a personal benefit, indemnification, if permissible at all, is limited to reasonable expenses (other than the judgment, penalty, or excise or similar taxes). Tex. Bus. Orgs. Code § 8.102(b); Tex. Bus. Corp. Act art. 2.02-1E (expired Jan. 1, 2010). Indemnification may be limited by the governing documents, or it may be mandated by the governing documents, a resolution of the directors or shareholders, or a contract. Tex. Bus. Orgs. Code §§ 8.003, 8.103(c); *see also* Tex. Bus. Corp. Act art. 2.02-1G, U (expired Jan. 1, 2010). Directors may only be indemnified to the extent consistent with the statute. Tex. Bus. Orgs. Code § 8.004; *see also* Tex. Bus. Corp. Act art. 2.02-1M (expired Jan. 1, 2010).

Chapter 8 of the BOC was amended in 2021 to add a provision clarifying that a requirement under Texas law that indemnification or exculpation for negligence be expressly or conspicuously stated does not apply to a provision in an entity's governing documents that provides for indemnification or exculpation. Tex. Bus. Orgs. Code § 8.005. This provision makes clear that the so-called "fair notice" and "express negligence" doctrines that generally apply to contractual indemnification and exculpation provisions under Texas common law, *see, e.g., Dresser Industries, Inc. v. Page Petroleum Products, Inc.*, 853 S.W.2d 505 (Tex. 1993), do not apply to the governing documents of Texas entities governed by the BOC.

Officers are required and permitted to be indemnified to the same extent as directors. Tex. Bus. Orgs. Code § 8.105(b), (c); *see also* Tex. Bus. Corp. Act art. 2.02-1O (expired Jan. 1, 2010). Officers, employees, agents, and others who are not also directors may be indemnified "to the extent consistent with other law . . . as provided by (1) [the corporation's] governing documents; (2) general or specific action of the [board of directors]; (3) resolution of the [corporation's shareholders]; (4) contract; or (5) common law." Tex. Bus. Orgs. Code § 8.105; *see also* Tex. Bus. Corp. Act art. 2.02-1O, Q (expired Jan. 1, 2010).

Insurance or other arrangements providing indemnification for liabilities not otherwise indemnifiable under Chapter 8 are expressly permitted. Tex. Bus. Orgs. Code § 8.151; *see also* Tex. Bus. Corp. Act art. 2.02-1R (expired Jan. 1, 2010). Shareholder approval is required for self-insurance or another arrangement with a party other than a commercial insurer if the indemnification extends to liabilities the corporation would not otherwise have the power to indemnify. Tex. Bus. Orgs. Code § 8.151(c).

Chapter 8 of the BOC governs any proposed indemnification by a domestic entity after January 1, 2010, even if the events on which the indemnification is based occurred before the BOC became applicable to the entity. Tex. Bus. Orgs. Code § 402.007. A special transition provision in the BOC regarding indemnification states that "[i]n a case in which indemnification is permitted but not required under Chapter 8, a provision relating to indemnification contained in the governing documents of a domestic entity on the mandatory application date that would otherwise have the effect of limiting the nature or type of indemnification permitted by Chapter 8 may not be construed after the mandatory application date as limiting the indemnification authorized by Chapter 8 unless the provision is intended to limit or restrict permissive indemnification under applicable law." Tex. Bus. Orgs. Code § 402.007. This provision will be helpful in interpreting some pre-BOC indemnification provisions, but its application will not always be clear; therefore, a careful review of indemnification provisions in pre-BOC governing documents is advisable.

Although Chapter 8 sets certain limits on the extent to which directors may be protected by the governing documents, more protective provisions are allowed pursuant to insurance, self-insurance, or other arrangements under Section 8.151. Additionally, indemnification beyond that permitted by Chapter 8 could possibly be achieved through a shareholders' agreement under Sections 21.101-21.109 of the BOC. *See also* Tex. Bus. Corp. Act art. 2.30-1 (expired Jan. 1, 2010). As noted above in the discussion of director

exculpation, Sections 21.101-21.109 permit a corporation that is not publicly traded to be governed by a shareholders' agreement entered into by all persons who are shareholders at the time of the agreement. BOC Section 21.101 lists matters that may be included in a shareholders' agreement even though they are inconsistent with one or more provisions of the corporate statutes. Included in the list is a catch-all provision that states that such an agreement is effective even though it "governs the exercise of corporate powers, the management of the business and affairs of the corporation, or the relationship among the shareholders, the directors, and the corporation as if the corporation were a partnership or in a manner that would otherwise be appropriate only among partners and not contrary to public policy." Tex. Bus. Orgs. Code § 21.101(a)(11); *see also* Tex. Bus. Corp. Act art. 2.30-1A(9) (expired Jan. 1, 2010). Thus, it appears that indemnification beyond the parameters set by BOC Chapter 8 may be achieved under such an agreement if it would be permissible in a partnership and would not offend public policy. There may be a similar argument under Sections 21.714 and 21.719 of the BOC (*see also* Tex. Bus. Corp. Act arts. 12.32, 12.35 (expired Jan. 1, 2010)) for "close corporations" that comply with Subchapter O of BOC Chapter 21. The predecessor to Subchapter O of the BOC was the Texas Close Corporation Law found in Part 12 of the TBCA.

III. LIMITED LIABILITY COMPANIES

A. Fiduciary Duties of Members, Managers, and Officers

The provisions of the BOC governing LLCs (like the provisions of the predecessor Texas Limited Liability Company Act (TLLCA)) do not define or expressly impose fiduciary duties on managers or members of an LLC; however, as further discussed below, various provisions of the statute implicitly recognize that such duties may exist, and recent amendments to the statute expand and elaborate on the contractual freedom of the members with respect to those duties. Furthermore, the BOC expressly characterizes governing persons of an LLC, as well as officers, as agents of the company. Tex. Bus. Orgs. Code § 101.254. Thus, when acting as agents of the LLC, managers and managing members, as well as officers, may be viewed as owing a duty of care pursuant to basic agency principles. RESTATEMENT (THIRD) OF AGENCY § 8.08; *see also* RESTATEMENT (SECOND) OF AGENCY § 379. In addition, the agent status of an officer, a manager in a manager-managed LLC, and a member in a member-managed LLC provides a basis under agency law to impose a duty of loyalty. *See* RESTATEMENT (THIRD) OF AGENCY §§ 8.01-8.06; *see also* Restatement (Second) of Agency §§ 387-398. In *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193 (Tex. 2002), the Texas Supreme Court discussed the fiduciary nature of the agency relationship under Texas common law. Cases have relied on common-law agency principles, the implication of provisions of the LLC statute, and/or analogies to corporate or partnership law to recognize and impose common-law fiduciary duties in the LLC context in the absence of contractual provisions altering those duties.

1. Fiduciary Duties of Members, Governing Persons, and Officers Under Texas Case Law and Longstanding Statutory Provisions

Numerous state and federal courts in Texas have recognized fiduciary duties on the part of LLC managers, managing members, or officers along the lines of those owed by corporate directors and officers (or, in some cases, by analogizing to duties of general partners in a partnership). Under Texas common law, these duties would generally encompass a duty of obedience, duty of loyalty, and duty of care *to the LLC*. The bases for these conclusions have included agency law, analogies to corporate or partnership law, provisions in the governing documents, and implications from the LLC statute. *See, e.g., Straehla v. AL Global Services, LLC*, 619 S.W.3d 795 (Tex. App.—San Antonio 2020, pet. denied); *Kott v. Miller*, 2025 WL 3247114 (Tex. App.—Austin 2025, no pet.); *Weiss v. Arabella Exploration Inc. (In re Arabella Petroleum Company, LLC)*, 647 B.R. 851 (Bankr. W.D. Tex. 2022); *Sherman v. T&T Realty Corp. (In re Maple Heights Investments, LLC)*, 2025 WL 610859 (Bankr. N.D. Tex. 2025); *CyberX Grp., LLC v. Pearson*, 2021 WL 1966813 (N.D. Tex. 2021); *Valley Ridge Roofing and Construction, LLC v. Silver State Holdings (In re Silver State Holdings)*, 2020 WL 7414434 (Bankr. N.D. Tex. 2020); *ETRG Investments v. LLC v. Hardee (In re Hardee)*, 2013 WL 1084494 (Bankr. E.D. Tex. 2013); *but see Power Contracting, LLC v. Thurman*, 2025 WL 2411598 (S.D. Tex. 2025) (stating that because the plaintiff was an LLC rather than a

corporation, a fiduciary relationship did not automatically arise on the part of the vice-president defendant, and the company failed to establish a formal or informal fiduciary duty on the part of the defendant due to a factual dispute as to the level of authority conferred on the defendant). In *Enosis Investments, LLC v. Jensen*, 737 S.W.3d 357 (Tex. Bus. Ct. 3d Div. 2026), the Texas Business Court acknowledged that the manager of the manager-managed LLCs in that case might owe fiduciary duties to the LLCs, but the court stated that a non-managing member generally does not owe such duties, and the fiduciary duty of a corporation serving as manager of an LLC is not passed through to individual officers and owners of the corporation absent a basis for piercing the corporate veil of the manager.

While generally acknowledging that managers and managing members would ordinarily owe duties to the LLC, the case law has been less consistent on the question of whether or on what basis duties are owed to members, as opposed to the LLC, in the absence of contractual provisions imposing duties owed to members. In *Bertucci v. Watkins*, 709 S.W.3d 534, 544 (Tex. 2025), the Texas Supreme Court commented in passing that members of an LLC do not owe formal fiduciary duties to fellow members based merely on the relationship as co-members. A number of courts have recognized, however, that a formal or informal fiduciary relationship may give rise to a duty owed directly to a member under particular circumstances. See, e.g., *Davis v. Crawford*, 700 S.W.3d 438 (Tex. App.—Eastland 2024, no pet.) (relying on *Allen v. Devon Energy* (cited below) for the proposition that the manager in that case, who exercised sole control over the LLC, owed the minority member a fiduciary duty, stating that the court “agree[d] with the First Court of Appeals that the relationship between a managing member of an LLC and a nonmanaging member is similar to that of a general partner/limited partner relationship, and that such an arrangement thereby creates a fiduciary obligation on the part of the managing member”); *McLeod v. McLeod*, 644 S.W.3d 792 (Tex. App.—Eastland 2022, no pet.) (noting Texas case law declining to recognize a broad formal fiduciary duty between members, but holding the trial court did not err in submitting a jury question inquiring into the existence of an informal fiduciary duty owed by the deceased member to the surviving member); *Siddiqui v. Fancy Bites, LLC*, 504 S.W.3d 349 (Tex. App.—Houston [14th Dist.] 2016, pet. denied) (rejecting claims for breach of fiduciary duty by two LLC members against two other members because informal fiduciary duties do not arise in business transactions absent a pre-existing special relationship of trust and confidence and because members in this case were co-equal managers and owners with equal rights of control and access to books and records); *Guevara v. Lackner*, 447 S.W.3d 566 (Tex. App.—Corpus Christi 2014, no pet.) (stating that co-member relationship does not automatically create fiduciary relationship, but holding that there was evidence of an informal fiduciary duty owed by two members of an LLC who were also managers to a third member who was not involved in the day-to-day affairs of the LLC); *Bazan v. Munoz*, 444 S.W.3d 110 (Tex. App.—San Antonio 2014, no pet.) (holding that evidence supported finding of an informal fiduciary duty by two LLC members to a third member based on their longstanding friendship and trust placed in them and concluding that evidence was sufficient to support a finding of breach of fiduciary duty by fraud by nondisclosure); *Allen v. Devon Energy Holdings, L.L.C.* 367 S.W.3d 355 (Tex. App.—Houston [1st Dist.] 2012, pet. granted, judgment vacated w.r.m.) (concluding, in the context of a buyout or redemption of a minority owner’s interest that will increase the ownership of a controlling owner of a closely held LLC, that the corporate “special facts” doctrine and similarity to the duties owed by a general partner in a limited partnership result in a formal fiduciary duty on the part of the controlling owner to the minority owner); *Mundy v. Savell*, 2026 WL 1375482 (Tex. App.—El Paso 2026, no pet. h.) (stating that members do not generally owe each other fiduciary duties based only on the relationship of co-membership, but managing member may owe duty to non-managing member, and member in this case owed fellow member fiduciary duty by virtue of her position as sole manager and because LLC’s governing documents imposed duty); *Kott v. Miller*, 2025 WL 3247114 (Tex. App.—Austin 2025, no pet.) (recognizing LLC members do not ordinarily owe each other fiduciary duties, but do owe fiduciary duties, including duty to refrain from self-dealing, to LLC itself); *Sohani v. Sunesara*, 2023 WL 1112165 (Tex. App.—Houston [1st Dist.] 2023, pet. denied) (acknowledging that Texas case law generally has not recognized a formal fiduciary relationship between members of an LLC, but holding that there was evidence supporting the existence of an informal fiduciary duty among the members that was breached and caused the plaintiff to suffer damages based on the defendants’ failure to identify the plaintiff to the IRS as a member who received distributions, thus causing the plaintiff to pay taxes and penalties upon an audit of the member); *Tall v. Vanderhoef*, 2025 Tex. Bus.

15, 2025 WL 1165208 (Tex. Bus. Ct. 8th Div. 2025) (stating that members do not owe each other broad formal fiduciary duties under Texas common law but recognizing that an informal fiduciary duty may exist among LLC members based on specific facts establishing a personal relationship of special trust and confidence); *Shield Indus. Coatings, LLC v. Shield Liners, LLC*, 2025 WL 4716821 (S.D. Tex. 2025) (stating that members of LLC do not owe formal fiduciary duty to one another, and recognizing that informal fiduciary duty may exist in certain circumstances but finding no facts were pleaded to suggest informal fiduciary duty); *Irongate AI, LLC v. Houk*, 2025 WL 3113655 (W.D. Tex. 2025), report and recommendation adopted, 2025 WL 3113204 (W.D. Tex. 2025) (stating that “it is not so cut and dry whether a member owes the LLC or other members a fiduciary duty” and that “[a]t most, case law suggests a managing member of an LLC owes a fiduciary duty to the LLC through agency-law principles” “[a]nd a managing member may owe a fiduciary duty to an individual member in certain circumstances”); *KrisJenn Ranch, LLC v. DMA Props., Inc. (In re KrisJenn Ranch, LLC)*, 629 B.R. 589 (Bankr. W.D. Tex. 2021) (stating that members and managers of an entity may owe informal fiduciary duties to one another even in the absence of a formal fiduciary relationship and concluding that there was at least an informal fiduciary duty owed by 50% owner/manager to co-owner based on their past dealings and personal relationship of trust and confidence); *ETRG Invs., LLC v. Hardee (In re Hardee)*, 2013 WL 1084494 (Bankr. E.D. Tex. 2013) (concluding that members did not establish that managing member owed them a formal or informal fiduciary duty).

The Texas Supreme Court’s decision in *Matter of Estate of Poe*, 648 S.W.3d 277 (Tex. 2022), which was decided in the context of a closely held corporation, may impact the future viability of claims based on an informal fiduciary duty in the LLC context. In *Matter of Estate of Poe*, 648 S.W.3d 277 (Tex. 2022), the Texas Supreme Court held as a matter of law that “a corporation’s director cannot owe an informal duty to operate or manage the corporation in the best interest of or for the benefit of an individual shareholder. A director’s fiduciary duty in the management of a corporation is solely for the benefit of the corporation.” It seems inevitable that the courts will be confronted with the argument that the holding in *Estate of Poe* should be extended to the LLC context. *See, e.g., Dunster Live, LLC v. LoneStar Logos Mgmt. Co., LLC*, 2024 WL 291403 (Tex. App.—Austin 2024, no pet.) (in which the court’s discussion tended to conflate LLCs and corporations, stating that the Texas Supreme Court held in *Ritchie v. Rupe* that “members of an LLC owe a fiduciary duty to the LLC, but not to individual members themselves” and citing *Estate of Poe* for the proposition that “the Texas Supreme Court again declined to recognize a fiduciary duty owed to members, holding that a director cannot owe a fiduciary duty to the corporation while simultaneously owing an informal fiduciary duty to a shareholder to operate the corporation for that shareholder’s benefit”).

For a chronological survey of Texas cases addressing fiduciary duties in the LLC context, see Appendix A of “*Fiduciary Duties, Exculpation, and Indemnification in Texas Business Organizations*” available at <http://law.baylor.edu/MillerFiduciaryDuty>.

Although the Texas LLC statute does not directly impose or describe fiduciary-type duties of governing persons or officers of LLCs, multiple longstanding statutory provisions in the LLC context imply the existence of duties in the LLC context, and numerous courts have referred to the implication of some of these statutory provisions. For example, in *Straehla v. AL Global Services, LLC*, 619 S.W.3d 795, 804-05 (Tex. App.—San Antonio 2020, pet. denied), the court observed that the BOC does not directly address the duties that a manager or member owes the LLC but contemplates that duties may exist by providing that “[t]he company agreement of a limited liability company may expand or restrict any duties, including fiduciary duties, and related liabilities that a member, manager, officer, or other person has to the company or to a member or manager of the company.” The court noted that it did not have the LLC agreement in the record, but the court stated that it presumed, “based on the assumption inherent in section 101.401 of the Business Organizations Code that, Jorrie [an LLC member] owed the same fiduciary duties that a corporate executive or partner would owe a corporation or partnership, unless the LLC agreement shows otherwise.” Thus, the court concluded that Jorrie “owed a duty of loyalty to [the LLC] and a duty not to usurp corporate opportunities.” *See* Tex. Bus. Orgs. Code §§ 101.401; *see also* Tex. Rev. Civ. Stat. art.1528n, art. 2.20 (expired Jan. 1, 2010)

A number of other longstanding statutory provisions imply that fiduciary-type duties are generally owed by governing persons and officers in the LLC context. For example, duty-of-loyalty concerns obviously underlie statutory provisions addressing interested-governing-person and interested-officer transactions. *See*

Tex. Bus. Orgs. Code § 101.255; *see also* Tex. Rev. Civ. Stat. art. 1528n, art. 2.17 (expired Jan. 1, 2010)). In a manner similar to the interested-director and interested-officer provisions of Chapter 21, Section 101.255 outlines procedures under which interested-governing-person or interested-officer transactions will be deemed valid notwithstanding the conflicted person’s interest in the transaction or an interested governing person’s participation in the meeting or a written consent pursuant to which the transaction is approved. *See* Tex. Bus. Orgs. Code § 21.418; *see also* Tex. Bus. Corp. Act art. 2.35-1 (expired Jan. 1, 2010). Generally, these procedures require full disclosure by the interested person and approval by disinterested governing persons or the members. If one of these procedures is not followed, the transaction will nevertheless withstand challenge if it passes scrutiny for “fairness” to the LLC. Tex. Bus. Orgs. Code § 101.255(b). Importantly, Texas courts have held in the corporate context that the burden is on the interested director or officer to establish that the transaction was approved as provided by the statute or was fair to the corporation at the time of the transaction. *Matter of Estate of Poe*, 648 S.W.3d 277, 289 (Tex. 2022) (stating that “[th]e burden of proving that a transaction falls within this safe harbor [§ 21.418(b)] rests on the interested director”); *Landon v. S & H Mktg. Grp., Inc.*, 82 S.W.3d 666 (Tex. App.—Amarillo 2002, no pet.). In the absence of provisions otherwise in the company agreement, the same principle should apply in the LLC context. *See Kott v. Miller*, 2025 WL 3247114 (Tex. App.—Austin 2025, no pet. h.) (interpreting and applying Section 101.255 of the BOC and relying on *Estate of Poe* for the proposition that the interested governing person bears the burden of proving that the conditions of Section 101.255 are met).

The BOC, like prior law, also implicitly recognizes that governing persons and officers of an LLC generally have a duty of loyalty with respect to pursuit of business opportunities. *See* Tex. Bus. Orgs. Code § 2.101(21); Tex. Bus. Corp. Act art. 2.02(20) (expired Jan. 1, 2010) (applicable by virtue of Tex. Rev. Civ. Stat. art. 1528n, art. 2.02A (expired Jan. 1, 2010) (specifying means by which an entity may renounce its expectancy in business opportunities)).

Provisions of the BOC permitting governing persons (including managers and managing members of an LLC) to rely on various types of information in discharging a duty implicitly recognize that such persons are charged with a duty of care in their decision making. Tex. Bus. Orgs. Code § 3.102; *see also* Tex. Bus. Orgs. Code § 3.105 (reliance by officers on information in discharging a duty).

Broad authorization to indemnify, insure, and advance expenses to members, managers, and other persons can be read to reflect concern with liabilities to the LLC as well as to third parties. Tex. Bus. Orgs. Code § 101.402; *see also* Tex. Rev. Civ. Stat. art. 1528n, art. 2.20 (expired Jan. 1, 2010).

Provisions outlining procedures applicable to derivative proceedings reflect an underlying assumption that members need a mechanism to hold management accountable and a concern for balancing the rights and powers of owners and management in these situations. Tex. Bus. Orgs. Code §§ 101.451-101.463; *see also* Tex. Bus. Corp. Act art. 5.14 (expired Jan. 1, 2010) (applicable by virtue of Tex. Rev. Civ. Stat. art. 1528n, art. 8.12 (expired Jan. 1, 2010)).

2. 2025 Amendments Impacting Fiduciary Duties and Liabilities of Members, Governing Persons, and Officers

As explained below, from 1997 until 2025, the LLC statutes in Texas expressly permitted the company agreement (or “regulations” as the equivalent governing document was referred to under the original Texas Limited Liability Company Act), to “expand or restrict” duties (including fiduciary duties) as well as related liabilities of members, managers, and other persons to the LLC or another member or manager. Despite the strong common-law support for the freedom to contract under Texas law and the provisions of Sections 101.052 and 101.054 of the BOC (which placed no limitations on the freedom to contract in this respect), some practitioners and commentators questioned whether complete elimination of fiduciary duties and related liabilities was permitted by the statute. Effective May 14, 2025, S.B. No. 29 resolved that question by an amendment to Section 101.401 of the BOC, which now expressly permits the company agreement to “expand, restrict, *or eliminate* any duties, including fiduciary duties, and related liabilities that a member, manager, officer, or other person has to the company or to a member or manager of the company.” Tex. Bus. Orgs. Code § 101.401 (emphasis added).

In addition to making clear the complete freedom to contract possessed by members of an LLC with respect to fiduciary duties and related liabilities, S.B. No. 29 also amended the BOC to add Section 101.256,

effective May 14, 2025, which essentially sets forth a business judgment rule for publicly traded LLCs and any other LLC that adopts in its company agreement a provision that “duplicates the effect of” Section 101.256. *See* Tex. Bus. Orgs. Code § 101.256(a). Section 101.256 implicitly recognizes that governing persons (i.e., managers of a manager-managed LLC and members of a member-managed LLC) and officers may owe duties to the LLC under common law or the company agreement and that those duties may be modified or eliminated by the company agreement. *See* Tex. Bus. Orgs. Code § 101.256(b), (c), (d)(2)(A).

If an LLC is publicly traded or has adopted in its company agreement a provision that “duplicates the effect” of Section 101.256, the provisions of Section 101.256 establish certain presumptions in favor of its managerial officials (which must be overcome by a claimant LLC or member with respect to an act or omission regarding a matter of the LLC’s business) and require that a claimant LLC or member plead with particularity and prove that the managerial official breached a duty by an act or omission that involves fraud, intentional misconduct, an ultra vires act, or a knowing violation of law.

Section 101.256 provides that, with respect to an LLC that is publicly traded or “has duplicated the effect” of Section 101.256 in the company agreement, “[i]n taking or declining to take any action on any matters of a limited liability company’s business, a governing person or officer, and each affiliate or associate of a governing person or officer, is presumed to act in good faith and in compliance with: (1) the person’s or officer’s duties required under common law or the governing documents of the limited liability company; and (2) the governing documents of the limited liability company.” Tex. Bus. Orgs. Code § 101.256(a), (c). Although Section 101.255, which provides default rules regarding contracts or transactions involving interested governing persons or officers (in a manner similar to Section 21.418 in the corporate context), was not directly amended by S.B. No. 29 (unlike Section 21.418, to which a new subsection (f) was added), Section 101.256 states that the presumptions concerning compliance by managerial officials with their duties to an LLC extend to compliance with any duties that pertain to transactions with interested persons. Tex. Bus. Orgs. Code § 101.256(b).

Additionally, with respect to an LLC governed by Section 101.256, neither the LLC nor any member has a cause of action against a managerial official or its affiliate or associate based on an act or omission in that capacity unless the LLC or its member rebuts one of the above presumptions and proves the person’s act or omission involved fraud, intentional misconduct, an ultra vires act, or a knowing violation of law. Tex. Bus. Orgs. Code § 101.256(d). These provisions will present interesting questions regarding the extent to which they do or do not apply to various types of situations implicating a managerial official’s duty of loyalty to the LLC. As in the corporate context, it remains to be seen how the courts will interpret “good faith” and what will constitute “fraud” (dishonesty of purpose or intent to deceive? non-disclosure by the conflicted party? constructive fraud?) or “intentional misconduct” (what has to be intended?) on the part of a conflicted managerial official in a self-dealing transaction. What constitutes an “ultra vires” act in the LLC context is another interesting question. The ultra vires doctrine developed in the corporate context and has rarely been addressed in the partnership or LLC context.

Like the provisions of Section 21.419 discussed above that apply to certain corporations, Section 101.256 requires that a party alleging fraud, intentional misconduct, an ultra vires act, or a knowing violation of the law under Subsection (d)(2)(B), must state with particularity the circumstances constituting the fraud, intentional misconduct, ultra vires act, or knowing violation of law. Tex. Bus. Orgs. Code § 101.256(f). Thus, with respect to claims against managerial officials of LLCs that are subject to Section 101.256, a significant threshold issue in the litigation will be the “particularity” requirement imposed on the claimant’s pleadings. (*Cf. In re Schmitz*, 285 S.W.3d 451 (Tex. 2009) (holding that a derivative plaintiff’s pre-suit demand did not satisfy the statutory requirement of particularity in the provisions governing derivative suits)).

A member’s or assignee’s ability to adequately plead (especially if particularity is required) a breach of duty on the part of a managerial official may be impacted by amendments made to a member’s or assignee’s statutory right to access books and records of the LLC. *See* Tex. Bus. Orgs. Code § 101.502 (as amended May 14, 2025). As amended, a member’s or assignee’s statutory inspection right now specifically excludes internal electronic communications and information (“e-mails, text messages or similar electronic communications, or information from social media accounts”) from the records available to the member or assignee under the statute unless the communication or information effectuates an action by the LLC or the company agreement expressly states otherwise. Tex. Bus. Orgs. Code § 101.502(a). A member’s or

assignee's statutory inspection rights may be varied by the company agreement but may not be unreasonably restricted. Tex. Bus. Orgs. Code §§ 101.052(a), (c), 101.054(e), 101.502(a).

B. Statutory Provisions to Consider When Drafting Governing Documents of LLC (Statutory Authorization to Modify (Including Eliminate) Duties and Liabilities of Members, Managers, and Officers in Governing Documents)

1. Exculpation of Liability and Modification of Duties Under LLC Statutes

Prior to 1997, Article 8.12 of the TLLCA followed the corporate approach to exculpation of directors by incorporating by reference Article 7.06 of the Texas Miscellaneous Corporation Laws Act (Tex. Rev. Civ. Stat. art. 1302-7.06 (expired Jan. 1, 2010)). The original version of Article 8.12 of the TLLCA indicated that a manager's liability could be eliminated in the articles of organization to the extent permitted for a director under Article 1302-7.06. The statute did not address modification of duties themselves other than incorporating by reference a corporation's ability to renounce business opportunities. Tex. Bus. Corp. Act art. 2.02(20) (expired Jan. 1, 2010) (applicable by virtue of Tex. Rev. Civ. Stat. art. 1528n, art. 2.02A (expired Jan. 1, 2010) (specifying means by which an entity may renounce its expectancy in business opportunities)).

In 1997, amendments to the statute effected a significant departure from the linkage to corporate laws regarding exculpation of directors. In 1997, the reference to Article 1302-7.06 was eliminated from the TLLCA, and a new provision, Article 2.20B, was added as follows:

To the extent that at law or in equity, a member, manager, officer, or other person has duties (including fiduciary duties) and liabilities relating thereto to a limited liability company or to another member or manager, such duties and liabilities may be expanded or restricted by provisions of the regulations.

This provision was modeled after similar provisions in the Delaware LLC and limited partnership acts³ and left the extent to which duties and liabilities may be limited or eliminated to be determined by the courts as a matter of public policy. Article 2.20B of the TLLCA was carried forward in Section 101.401 of the BOC, which, until 2025, read as follows:

The company agreement of a limited liability company may expand or restrict any duties, including fiduciary duties, and related liabilities that a member, manager, officer, or other person has to the company or to a member or manager of the company.

In 2025, Section 101.401 of the BOC was amended to read as follows:

The company agreement of a limited liability company may expand, restrict, *or eliminate* any duties, including fiduciary duties, and related liabilities that a member, manager, officer, or other person has to the company or to a member or manager of the company. [Emphasis added.]

³The Delaware statutes were amended in 2004 to expressly permit the elimination of fiduciary duties (but not the implied covenant of good faith and fair dealing) in a limited partnership agreement or LLC agreement. *See* Delaware Limited Liability Company Act § 18-1101. These amendments were a response by the Delaware General Assembly to a Delaware Supreme Court opinion pointing out that the prior Delaware provision did not explicitly authorize elimination of fiduciary duties. *See Gotham Partners, L.P. v. Hollywood Realty Partners, L.P.*, 817 A.2d 160 (Del. 2002) (noting, in response to Chancery Court opinions indicating that the Delaware limited partnership act permitted a limited partnership agreement to *eliminate* fiduciary duties, that the statute actually stated that fiduciary duties and liabilities could be *expanded or restricted*, but did not state that they could be *eliminated*).

The addition of “or eliminate” is arguably a mere clarification of prior law. *See Tall v. Vanderhoeft*, 2025 Tex. Bus. 15, 2025 WL 1165208 (Tex. Bus. Ct. 8th Div. 2025) (holding that Section 101.401 (prior to the above-referenced amendment) permitted the company agreement to eliminate all fiduciary duties that might otherwise exist between the two members of the LLC at issue). In any event, the amendment removes any doubt as to whether the company agreement may completely eliminate fiduciary duties and liabilities owed by a member, manager, officer, or other person to the LLC or a member or manager.

The BOC was amended in 2021 to add a provision clarifying that a requirement under Texas law that indemnification or exculpation for negligence be expressly or conspicuously stated does not apply to a provision in an entity’s governing documents that provides for indemnification or exculpation. Tex. Bus. Orgs. Code § 8.005. This provision makes clear that the so-called “fair notice” and “express negligence” doctrines that generally apply to contractual indemnification and exculpation provisions under Texas common law, *see, e.g., Dresser Industries, Inc. v. Page Petroleum Products, Inc.*, 853 S.W.2d 505 (Tex. 1993), do not apply to the governing documents of Texas entities governed by the BOC.

It should be noted that Section 7.001 of the BOC, which permits limitation or elimination of liability of directors and officers of a corporation subject to certain exceptions does not limit the extent to which an LLC’s governing documents may limit or eliminate liability of managerial officials of an LLC. *See* Tex. Bus. Orgs. Code § 7.001(a)(1), (d)(3). An LLC’s governing documents may go further in eliminating liability of its managerial officials than Section 7.001 provides for corporations. Tex. Bus. Orgs. Code § 7.001(d)(3). Section 7.001(d) of the BOC was amended in 2013 to clarify that the company agreement may eliminate the liability of a manager or managing member to the LLC and the other members to the same extent that a corporation’s certificate of formation may eliminate a director’s liability under Section 7.001 and to such additional extent allowed by Section 101.401. Tex. Bus. Orgs. Code § 7.001(d)(3). There are no express prohibitions or limitations in Section 101.401 with respect to the limitation or elimination of liability of a manager or managing member to the LLC or the members; as amended in 2025, Section 101.401 expressly permits the company agreement to “expand, restrict, *or eliminate*” fiduciary duties and related liabilities of a member, manager, officer, or other person to the LLC or a member or manager. Tex. Bus. Orgs. Code § 101.401.

There is relatively little case law addressing the statutory power to limit duties and liabilities in Texas LLCs, but a recent decision of the Texas Business Court recognized the strong Texas policy of honoring contractual terms that parties use to define the scope of their obligations and agreements, including those restricting fiduciary duties that might otherwise exist, and the court held that the company agreement in that case contractually eliminated any fiduciary duty between the members and limited any liability for losses or damages sustained by a member to loss or damage resulting from gross negligence, fraud, or intentional misconduct. Because the company agreement disclaimed any fiduciary duty between the members, the court held that one member’s claim for breach of fiduciary duty against the other member was legally baseless. *Tall v. Vanderhoeft*, 2025 Tex. Bus. 15, 2025 WL 1165208 (Tex. Bus. Ct. 8th Div. 2025).

The bankruptcy court in the case of *In re Arabella Petroleum Company, LLC*, 647 B.R. 851 (Bankr. W.D. Tex. 2022) stated that “Texas law allows an LLC to limit to some extent” the fiduciary duty owed by an LLC’s manager and officer and characterized the company agreement of the LLC at issue as doing so by relieving the individual who was the sole manager and officer from any action or failure to act taken in good faith with the reasonable belief that the action or failure to act was authorized or within the scope of authority unless the action or failure to act constituted fraud, gross negligence, bad faith, or willful misconduct. The court concluded that the individual’s actions draining the LLC of cash and properties by transfers to himself and related entities with full knowledge of the LLC’s deteriorating financial condition established both bad faith and willful misconduct. In *Kott v. Miller*, 2025 WL 3247114 (Tex. App.—Austin 2025, no pet.), the court concluded that provisions of the company agreement that permitted the LLC to “transact business with any Member, . . . provided the terms of those transactions are no less favorable than those the Company could obtain from unrelated third parties” did not override Tex. Bus. Orgs. § 101.255 with respect to self-dealing transactions.

In *Dunster Live, LLC v. LoneStar Logos Management Company, LLC*, 2024 WL 291403 (Tex. App.—Austin 2024, no pet.), the court discussed the contractual freedom of LLC members pursuant to Sections 7.001(d)(3) and 101.401 of the BOC and concluded that the members had eliminated any

prohibition on outside business ventures by members based on a provision of the company agreement that permitted managers, members, and officers to engage in and possess interests in other business ventures with no obligation to offer the LLC or any other member, manager, or officer the right to participate.

In *Allen v. Devon Energy Holdings, L.L.C.* 367 S.W.3d 355, 396 (Tex. App.—Houston [1st Dist.] 2012, pet. granted, judgment vacated w.r.m.), the court noted that LLCs are expressly excluded from the statutory restriction on the limitation or elimination of liability of governing persons in Section 7.001 of the BOC, and the court stated that the members of an LLC are “free to expand or eliminate, as between themselves, any and all potential liability” of a manager of the LLC as the members see fit. The court also concluded that an exculpation provision in the articles of organization that largely tracked Section 7.001 of the BOC and referred to the manager’s “duty of loyalty to [the LLC] or its members” could be read to create a fiduciary duty to the members individually. *Id.* at 397-98. *See also*

In *Cardwell v. Gurley*, 2018 WL 3454800, at *9 (Tex. App.—Dallas 2018, pet. denied), the court of appeals stated that, “[b]y incorporating [into the LLC’s articles of organization] the terms of article 1302-7.06(b) [the predecessor to Section 7.001(b) and (c) of the BOC], the parties did not contract for ‘zero liability’ as Cardwell suggests. Liability for a breach of the fiduciary duty of loyalty is excepted from the provision’s elimination or limitation of liability.”

In *Mundy v. Savell*, 2026 WL 1375482 (Tex. App.—El Paso 2026, no pet. h.), the court concluded that the member who was the sole manager had “a fiduciary duty to the other members of the companies by virtue of her position as manager and because governing documents specifically impose that duty,” pointing to an exculpation clause of an LLC’s certificate of formation, which provided that a manager is not liable to the LLC or its members for monetary damages for an act or omission in the manager’s capacity as manager, except for liability to the extent that the manager is found liable for a breach of the duty of loyalty to the LLC or its members, an act or omission not in faith constituting a breach of duty to the LLC or involving intentional misconduct or knowing violation of law, a transaction from which the manager received an improper benefit, or an act or omission for which liability is expressly provided by an applicable statute.

When discussing the application of Section 7.001 to LLCs, one court inexplicably overlooked the explicit provisions of Section 7.001 recognizing the broad freedom to contract provided in the LLC context. *Marchiani v. Shadle*, 2024 WL 3586022, at *4 (Tex. App.—Austin 2024, no pet.).

It should be noted that a distinction can be drawn between the limitation or elimination of *duties* and the limitation and elimination of *liabilities*. If the liability of a person is contractually eliminated, but the duty still exists, a breach of the duty could give rise to equitable relief (such as injunctive relief or receivership) even though the person could not be held liable for damages. *See Feeley v. NHAOCG, LLC*, 62 A.3d 649, 664 (Del. Ch. 2012) (applying Delaware law); *VTX Commc’ns LLC v. AT&T, Inc.*, 2023 WL 2144154, at *9 (S.D. Tex. 2023) (applying Delaware law); *see also Gilbreath v. Horan*, 682 S.W.3d 454 (Tex. App.—Houston [1st Dist.] 2023, pet. denied) (stating that exculpatory clauses in limited partnership agreements exculpating general partners from “liability” did not preclude the plaintiff’s action for declaratory relief based on violations of the plaintiff limited partner’s rights to access books and records); *Primexx Energy Opportunity Fund v. Primexx Energy Corp.*, 2025 Tex. Bus. 21, at ¶ 12, 2025 WL 1479394 (Tex. Bus. Ct. 1st Div. 2025) (recognizing distinction between duties and liability and stating that contractual waiver of liability was not precluded by statutory prohibition on elimination of certain partner responsibilities because the waiver at issue eliminated liability rather than duties; furthermore, the persons whose liability was eliminated were not partners).

Further, the manner in which a contractual provision expresses the exculpation may give rise to an issue regarding the scope of the liabilities that have been contractually eliminated. Contractual provisions that merely eliminate liability for “damages” may still expose the exculpated person to equitable remedies that involve monetary recovery where these remedies are not technically “damages.” *See In re Longview Energy Co.*, 464 S.W.3d 353, 361 (Tex. 2015) (characterizing disgorgement as equitable forfeiture of benefits wrongfully obtained and stating that disgorgement is compensatory but is not damages). Redefining or eliminating duties, on the other hand, narrows or eliminates not only potential liability for damages by the party who would otherwise owe the duty, but determines whether there is a breach at all, thus affecting the availability of equitable relief as well.

In addition to broadly permitting the company agreement to expand, restrict, or eliminate fiduciary duties of members and managers in the company agreement (Tex. Bus. Orgs. Code § 101.401), the BOC also provides an LLC the specific power to renounce company opportunities. Tex. Bus. Orgs. Code § 2.101(21); *see also* Tex. Rev. Civ. Stat. art. 1528n, art. 2.02A (expired Jan. 1, 2010) (pursuant to which Tex. Bus. Corp. Act art. 2.02(20) (expired Jan. 1, 2010) applied to an LLC).

While members are often concerned with the extent to which duties and liabilities may be reduced or eliminated, there are also situations in which members desire to confirm or even expand the existence or application of duties and liabilities. In *French v. Fisher*, 2018 WL 8576652 (W.D. Tex. 2018), the court interpreted provisions of a company agreement that contractually imposed fiduciary duties of loyalty and care and placed constraints on conflict-of-interest transactions and competition. One member argued that the other two members breached their contractual duties of care and loyalty by engaging in another venture and diverting assets and resources to that venture. The defendants argued that they were free to pursue the other venture without consent of the other member because the other venture was in a different business, but the court concluded that the evidence showed that the LLC and the other venture were in the same type of business and that injunctive relief was merited based on the threatened harm and substantial likelihood the plaintiff would prevail on the merits of his claims. In *CyberX Group, LLC v. Pearson*, 2021 WL 1966813 (N.D. Tex. 2021), the court held that a provision of an LLC's company agreement that stated that "each [m]anager, [m]ember and officer of [the LLC] ... may engage in and possess interests in other business ventures ..., save and except for ones in competition with [the LLC]" imposed a contractual fiduciary duty to refrain from competing with the LLC and was not an unenforceable covenant not to compete because members and officers of the company owed fiduciary duties as agents of the LLC. In *WBL SPO I, LLC v. United Hotels, LLC*, 2025 WL 2023064 (Tex. App.—El Paso 2025, no pet.), the court recognized that Tex. Bus. Orgs. Code §101.401 provides that a company agreement of an LLC may expand, restrict, or eliminate fiduciary duties, and the court applied a provision of an LLC's operating agreement that provided a manager had a duty of loyalty "limited to" the following: (1) a duty to account to the LLC for property, profit, or benefit derived by the manager in the conduct or winding up of the LLC or derived from use of the LLC's property, including appropriation of an LLC opportunity, without the members' consent; (2) a duty to refrain from dealing with the LLC in the conduct or winding up of the LLC as or on behalf of a party with an interest adverse to the LLC without the members' consent; and (3) a duty to refrain from competing with the LLC in the conduct or winding up of the LLC without the members' consent. Based on this provision, the court concluded that the manager breached his fiduciary duty to obtain consent of the members before transferring title of LLC property to the manager's own company for no consideration.

As noted above, amendments to Chapter 101 of the BOC made by S.B. No. 29 in 2025 provide for certain presumptions and pleading and proof requirements applicable to claims for breach of duty against managerial officials of publicly held LLCs as well as any LLC that "duplicates the effect" of the statute in its company agreement. Given the contractual freedom already available to LLCs prior to the addition of Section 101.256, the statute does not appear to authorize anything that could not already have been provided in the company agreement of an LLC, but the language of the statute may become a sort of template that tends to be followed in drafting a company agreement and may thus accelerate the development of case law interpreting and applying the language. A practitioner should, of course, always carefully consider the interests of the client(s) and the particular context and circumstances in fashioning the language of provisions of a company agreement addressing these issues.

2. Indemnification Under LLC Statutes

Prior to 1997, the TLLCA provided that an LLC was permitted to indemnify members, managers, and others to the same extent a corporation was permitted to indemnify directors and others under the TBCA and that an LLC must, to the extent indemnification was required under the TBCA, indemnify members, managers, and others to the same extent. Thus, applying these provisions in the LLC context, indemnification was mandated in some circumstances even if the articles of organization and regulations were silent regarding indemnification. On the other hand, there were certain standards and procedures that could not be varied in the articles of organization or regulations. Article 2.20A of the TLLCA was amended in 1997 to read as follows:

Subject to such standards and restrictions, if any, as are set forth in its articles of organization or in its regulations, a limited liability company shall have the power to indemnify members and managers, officers, and other persons and purchase and maintain liability insurance for such persons.

Tex. Rev. Civ. Stat. art. 1528n, art. 2.20A (expired Jan. 1, 2010). Sections 8.002, 101.052, and 101.402 of the BOC generally carry forward this approach. The provisions of Chapter 8 do not apply to LLCs, but the governing documents “may” adopt provisions of Chapter 8 or may contain other indemnification provisions. Tex. Bus. Orgs. Code § 8.002. Section 101.402 expressly provides that an LLC “may” indemnify a person, but Chapter 101 has no other default provisions specifying standards or procedures for indemnification. Tex. Bus. Orgs. Code § 101.402. Thus, the current LLC indemnification provisions neither specify any circumstances under which indemnity would be required nor place any limits on the types of liabilities that may be indemnified, and there are no provisions that limit the ability of the members to provide for indemnification in the company agreement. *See* Tex. Bus. Orgs. Code §§ 101.052, 101.054. The BOC was amended in 2021 to add a provision clarifying that a requirement under Texas law that indemnification or exculpation for negligence be expressly or conspicuously stated does not apply to a provision in an entity’s governing documents that provides for indemnification or exculpation. Tex. Bus. Orgs. Code § 8.005. This provision makes clear that the so-called “fair notice” and “express negligence” doctrines that generally apply to contractual indemnification and exculpation provisions under Texas common law, *see, e.g., Dresser Industries, Inc. v. Page Petroleum Products, Inc.*, 853 S.W.2d 505 (Tex. 1993), do not apply to the governing documents of Texas entities governed by the BOC.

There is little Texas case law exploring the parameters of these statutory provisions. In *L Series, L.L.C. v. Holt*, 571 S.W.3d 864 (Tex. App.—Fort Worth 2019, pet. denied), the court discussed the expansive nature of the statutory provisions in the LLC context and held that the contractual provisions at issue required advancement of the defendants’ expenses even though the defendant would not be entitled to indemnity if the alleged misconduct was ultimately established. In *Equine Holdings, LLC v. Jacoby*, 2020 WL 2079183 (Tex. App.—Dallas 2020, pet. denied), the court interpreted an indemnification provision in an LLC’s articles of organization without referring to the LLC statute at all. The court held that an LLC member’s claim for indemnification of attorney’s fees incurred in a pending action was ripe, even though the action was not concluded, because the indemnification provision encompassed attorney’s fees and did not condition indemnification on the outcome of an action but merely on the determination of the members that the indemnitee acted in good faith and in a manner reasonably believed to be in the best interest of the LLC. Because the members had previously made the requisite determination and the LLC had previously paid attorney’s fees incurred by the member in the action, the court rejected the LLC’s argument that the member’s indemnification claim (which was based on the LLC’s refusal to continue paying the member’s attorney’s fees) was premature. Advancement in the LLC context is further discussed in Section V. below.

In the absence of any explicit limitations on the power of an LLC to indemnify and advance expenses, it is left to the courts to determine the bounds equity or public policy will place on contractual obligations to do so. Thus, for example, if a company agreement states that a manager or member “shall be indemnified to the maximum extent permitted by law,” it is not clear how far the indemnification obligation extends. Would the LLC be required to indemnify for bad-faith acts or intentional wrongdoing?

IV. GENERAL PARTNERSHIPS (INCLUDING LIMITED LIABILITY PARTNERSHIPS (LLPs)) AND LIMITED PARTNERSHIPS (INCLUDING LIMITED LIABILITY LIMITED PARTNERSHIPS (LLLPs))

A. Fiduciary Duties of Partners

1. Fiduciary Duties of Partners Under Common Law

The principle that general partners owe fiduciary duties to the other partners and the partnership is oft-recited in the case law. Perhaps the most famous case in this area is Justice Cardozo’s opinion in *Meinhard v. Salmon*, 249 NY 458, 164 N.E. 545 (1928). Texas cases have reiterated the unyielding duty-of-

loyalty standard set forth in that case (*see Huffington v. Upchurch*, 532 S.W.2d 576 (Tex. 1976); *Johnson v. Peckham*, 132 Tex. 148, 120 S.W.2d 786 (1938); *Kunz v. Huddleston*, 546 S.W.2d 685 (Tex. App.—El Paso 1977, writ ref’d n.r.e.)), and case law has often characterized the fiduciary role of a general partner in a limited partnership to that of a trustee. *See, e.g., Hughes v. St. David’s Support Corp.*, 944 S.W.2d 423 (Tex. App.—Austin 1997, writ denied)(“[I]n a limited partnership, the general partner stands in the same fiduciary capacity to the limited partners as a trustee stands to a trust.”); *McLendon v. McLendon*, 862 S.W.2d 662 (Tex. App.—Dallas 1993, writ denied)(“In a limited partnership, the general partner acting in complete control stands in the fiduciary capacity to the limited partners as a trustee stands to the beneficiaries of a trust.”); *Crenshaw v. Swenson*, 611 S.W.2d 886 (Tex. Civ. App.—Austin 1980, writ ref’d n.r.e.)(same); *Watson v. Ltd. Partners of WCKT*, 570 S.W.2d 179 (Tex. Civ. App.—Austin 1978, writ ref’d n.r.e.)(same).

In the Texas Revised Partnership Act (TRPA), which became effective January 1, 1994, the legislature expressly described a partner’s duties of care and loyalty and obligation of good faith, stated that a partner is not a trustee, and set forth provisions intended to clarify the extent to which contractual modification of the duties is permissible. These provisions have been carried forward in the BOC. Thus, the starting point for analyzing, interpreting, and applying partner duties under current law is the partnership statute (or the partnership agreement to the extent the partners have exercised their freedom to contract pursuant to the statute).

2. Statutory Treatment and Case Law Analysis of Partner (Fiduciary?) Duties Under Current Law

The Texas Uniform Partnership Act (which became effective in Texas in 1962 and expired in 1999) addressed only certain aspects of the fiduciary duties of partners; the nature, scope, and application of duties of partners continued to be governed by common law. In fleshing out the fiduciary duties of partners, courts often spoken in broad, sweeping terms. As mentioned above, courts even referred to partners as “trustees.” With the passage of the Texas Revised Partnership Act, partnership statutory law entered into the calculus of partner duties in a significant way.

The current statutory provisions include a more comprehensive description of partner duties than the Texas Uniform Partnership Act but eschew some of the broader language found in some cases. BOC Sections 152.204-152.207, which carry forward the provisions of Section 4.04 of the TRPA, certainly describe the core of what has traditionally been referred to by the courts as partner fiduciary duties, but the Bar Committee comments to Section 4.04 of the TRPA reflect the Committee’s hope that the statutorily described duties will not be expanded by loose use of “fiduciary” concepts from other contexts or by the broad rhetoric from some prior cases. *See* Tex. Rev. Civ. Stat. art. 6132b-4.04 (expired Jan. 1, 2010), Comment of Bar Committee—1993. In fact, the drafters of the TRPA quite deliberately refrained from using the term “fiduciary,” and the statutes explicitly provide that a partner is not a trustee and is not to be held to such a standard. Tex. Rev. Civ. Stat. art. 6132b-4.04(f) (expired Jan. 1, 2010); Tex. Bus. Orgs. Code § 152.204(d). On the other hand, the statutes leave courts some flexibility because the duties are not listed or described in exclusive terms. Furthermore, as was the case under the TRPA, the BOC provides that every partner is an “agent” of the partnership. Tex. Bus. Orgs. Code § 152.301; Tex. Rev. Civ. Stat. art. 6132b-3.02(a) (expired Jan. 1, 2010). An agent owes the principal fiduciary duties under Texas common law (*see, e.g., Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193 (Tex. 2002)), and the principles of law and equity supplement Chapter 152 of the BOC unless otherwise provided by Chapters 151, 152, and 154. Tex. Bus. Orgs. Code § 152.003.

Relatively few cases have explored in any depth whether the duties as they are described under the TRPA and BOC differ significantly from the common-law duties. The Texas Supreme Court addressed Section 4.04 of the TRPA in one case and indicated in passing that the law as it applied in that case was not changed by the TRPA; however, the case was actually governed by the Texas Uniform Partnership Act. *See M.R. Champion, Inc. v. Mizell*, 904 S.W.2d 617 (Tex. 1995). In *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 199-200 (Tex. 2002), a case involving the fiduciary duty owed by an agent to a principal, the Texas Supreme Court noted that it had historically held that partners owe one another certain fiduciary duties but that it “need not consider here the impact of the provisions of the Texas Revised Partnership Act on duties partners owe to one another.” In *Ingram v. Deere*, 288 S.W.3d 886, 892 (Tex. 2009), the court characterized Section 4.04 of the TRPA as “recognizing the unwaivable duties of care and loyalty and the

obligation of good faith required of partners under the Texas Revised Partnership Act” and cited case law “recognizing ‘as a matter of common law that ‘[t]he relationship between . . . partners . . . is fiduciary in character.’” The court did not analyze the duties of partners, however, because the court held that there was no legally sufficient evidence that the parties in that case were partners. In *Bombardier Aerospace Corp. v. SPEP Aircraft Holdings, LLC*, 572 S.W.3d 213, 220 (Tex. 2019), the Texas Supreme Court listed a partnership among several legal relationships giving rise to a formal fiduciary duty.

In *Red Sea Gaming, Inc. v. Block Investments (Nevada) Co.*, 338 S.W.3d 562 (Tex. App.—El Paso 2010, pet. denied), the court of appeals relied upon the non-exclusive nature of the description of the duty of loyalty set forth in the TRPA to conclude that a jury instruction that included a requirement that a partner show it “fully and fairly disclosed all important information” concerning the purchase of the other partner’s partnership interest was consistent with the statutory duties set forth in Section 4.04 of the TRPA. *See also Zinda v. McCann St., Ltd.*, 178 S.W.3d 883 (Tex. App.—Texarkana 2005, pet. denied) (citing case law and Section 4.04 of the TRPA and stating that partners owe one another “fiduciary” duties as a matter of law, including a duty to make full disclosure of all matters affecting the partnership, a duty to account for all partnership property and profits, and a strict duty of good faith and candor).

In *American Star Energy and Minerals Corp. v. Stowers*, 457 S.W.3d 427 (Tex. 2015), the Texas Supreme Court cited *Zinda v. McCann Street, Ltd.*, for the proposition that the duty of care owed by a partner under Section 152.204(a)(2) of the BOC imposes a disclosure obligation in some circumstances. Specifically, the court suggested that “[w]hen a partnership is served with a lawsuit, [the duty of care] may require the partner served to apprise the other partners.” *Am. Star Energy*, 457 S.W.3d at 434-35 (citing *Zinda v. McCann St., Ltd.*, 178 S.W.3d 883, 890 (Tex. App.—Texarkana 2005, pet. denied) for the proposition that “[p]artners have a duty to one another to make full disclosure of all matters affecting the partnership . . .”).

As pointed out by Judge Jernigan in a 2011 bankruptcy opinion, federal courts applying Texas law have generally assumed that partners’ duties under the current statutes are consistent with their duties under common law without any analysis of the impact of the TRPA on partners’ common-law duties. *Mullen v. Jones (In re Jones)*, 445 B.R. 677 (Bankr. N.D. Tex. 2011). In 2004, a Fifth Circuit Court of Appeals case pointed out that the TRPA “significantly amended” partnership law in 1994 to “refine the nature and scope of partners’ duties to each other” and stated that some aspects of the statutory duties may not be “fiduciary” in nature for purposes of certain provisions of the Bankruptcy Code, but the court did not reach any conclusions as to how or if the statutory duties of partners are materially different from the duties imposed on partners at common law. *See Gupta v. E. Idaho Tumor Inst., Inc. (In re Gupta)*, 394 F.3d 347 (5th Cir. 2004).

Subsequent to *In re Gupta*, a number of federal courts, including the Fifth Circuit Court of Appeals itself, addressed duties of partners under Texas law without considering whether or to what extent the statutory changes affected the analysis of such duties. In *Wilson v. Cantwell*, 2007 WL 2285947 (N.D. Tex. 2007), the district court cited Section 152.204 of the BOC for the proposition that partners owe the partnership and other partners the “fiduciary” duties of loyalty and care and that partners must discharge their duties in good faith and in the best interest of the partnership. Bankruptcy courts have cited both case law and Section 4.04 of the TRPA for the proposition that partners owe one another and the partnership “fiduciary” duties that include the duties of loyalty and care. *See Wallace v. Perry (In re Perry)*, 423 B.R. 215 (Bankr. S.D. Tex. 2010); *Leal v. Mokhabery (In re Leal)*, 360 B.R. 231 (Bankr. S.D. Tex. 2007); *see also Trinkets and Tea, LLC v. Hunt (In re Hunt)*, 605 B.R. 758 (Bankr. W.D. Tex. 2019) (describing partner’s duties under Sections 152.204 through 152.206 of the BOC and concluding that individual stood in a “fiduciary capacity” in his relationship to the partnership and “personally owed fiduciary duties” to the partnership and the other partner because of his control over an LLC that served as one of the two general partners of the general partnership); *West v. Seiffert (In re Houston Drywall, Inc.)*, 2008 WL 2754526 (Bankr. S.D. Tex. 2008) (citing Section 152.205 of the BOC along with Texas case law for the proposition that partners owe one another “fiduciary” duties and stating that Texas courts have analogized the duty owed by a general partner to a limited partner to that owed by a trustee to a beneficiary).

In *McBeth v. Carpenter*, 565 F.3d 171 (5th Cir. 2009), the Fifth Circuit Court of Appeals stated that “[u]nder Texas law, managing partners owe trust obligations to the partnership, having a duty of loyalty and due care as well as being under an obligation to discharge their duties in good faith and in the reasonable

belief that they are acting in the best interest of the partnership,” citing Section 4.04 of the TRPA. Notwithstanding the court’s observation in *Gupta* that the TRPA significantly amended Texas law “to refine the nature and scope of partners’ duties” and to provide that a partner is not held to a trustee standard, the court quoted from Texas case law analogizing a general partner in a limited partnership to a trustee. *See also FNFS, Ltd. v. Harwood (In re Harwood)*, 637 F.3d 615 (5th Cir. 2011) (relying upon *In re Bennett*, a 1993 Fifth Circuit opinion, and *McBeth v. Carpenter* to conclude that an officer of a corporate general partner who is entrusted with the management of the limited partnership and who exercises control over the limited partnership in a manner analogous to those cases owes a fiduciary duty to the partnership that satisfies Section 523(a)(4) of the Bankruptcy Code); *S.E.C. v. Helms*, 2015 WL 1040443 (W.D. Tex. 2015) (citing Sections 153.152(a) and 152.204 of the BOC for the proposition that the general partner of a limited partnership owes fiduciary duties to the partnership and the limited partners and citing case law for the proposition that a general partner acting in complete control stands in the same fiduciary capacity to the limited partners as a trustee stands to the beneficiaries of the trust); *Pacific Addax Co., Inc. v. Lau (In re Lau)*, 2013 WL 5935616 (Bankr. E.D. Tex. 2013) (citing Texas case law for the proposition that a general partner of a limited partnership “owes trust obligations to the partnership” and “stands in the same fiduciary capacity to the limited partners as a trustee stands to the beneficiaries of a trust”); *West v. Seiffert (In re Houston Drywall, Inc.)*, 2008 WL 2754526 (Bankr. S.D. Tex. 2008) (citing Section 152.205 of the BOC and case law for the proposition that partners owe one another fiduciary duties and stating that Texas courts have analogized a general partner’s duty to a limited partner to that owed by a trustee to a beneficiary).

Not only the general partner, but those in control of the general partner have been held to fiduciary standards. *See, e.g., FNFS, Ltd. v. Harwood (In re Harwood)*, 637 F.3d 615 (5th Cir. 2011); *LPS Inv. P’ship v. Bennett (In re Bennett)*, 989 F.2d 779 (5th Cir. 1993); *Trinkets and Tea, LLC v. Hunt (In re Hunt)*, 605 B.R. 758 (Bankr. W.D. Tex. 2019); *Edelman v. Drexel Highlander Ltd. P’ship*, 2015 WL 5714728 (N.D. Tex. 2015); *Light v. Whittington (In re Whittington)*, 530 B.R. 360 (Bankr. W.D. Tex. 2014); *Mullen v. Jones (In re Jones)*, 445 B.R. 677 (Bankr. N.D. Tex. 2011); *Pacific Addax Co., Inc. v. Lau (In re Lau)*, 2013 WL 5935616 (Bankr. E.D. Tex. 2013); *CBIF Ltd. P’ship v. TGI Friday’s Inc.*, 2017 WL 1455407 (Tex. App.—Dallas 2017, pet. denied). “While the use of multi-tiered organizational structures may have formerly provided an absolute shield to individuals seeking protection from liability to subsidiary entities, strict adherence to that standard has eroded as the expanding use of entities, rather than individuals, as general partners has forced the courts to engage in a closer examination of the responsibilities imposed upon, and the protections granted to, those individuals whose actions and/or omissions directly determine the conduct of any entity serving as a general partner of a limited partnership.” *FNFS, Ltd. v. Harwood (In re Harwood)*, 404 B.R. 366, 394-95 (Bankr. E.D. Tex. 2009), *aff’d*, 427 B.R. 392 (E.D. Tex. 2010), *aff’d*, 637 F.3d 615 (5th Cir. 2011). The Texas Business Court recently expressed skepticism regarding cases imposing what the court referred to as a “pass-through fiduciary duty” on officers, shareholders, and general partners of a general partner in a limited partnership. *See Enosis Investments, LLC v. Jensen*, 737 S.W.3d 357, 364 n.37 (Tex. Bus. Ct. 3d Div. 2026) (characterizing Fifth Circuit cases in which the court held that an officer or general partner of the general partner in a limited partnership owed a fiduciary duty to the limited partners as “older cases” that were “based on the specific facts of those cases, particularly in the bankruptcy context”).

The question of whether an individual who controls an entity partner owes fiduciary duties to the partnership and the other partners based on the “multi-tier” structure of the partnership usually arises in the context of limited partnerships, but a bankruptcy court addressed this question in the context of a general partnership in *Trinkets and Tea, LLC v. Hunt (In re Hunt)*, 605 B.R. 758 (Bankr. W.D. Tex. 2019). In that case, the court concluded that Hunt, the individual sole member and manager of one of two LLC general partners of a general partnership, personally owed fiduciary duties to the partnership and the other partner because the LLC “would have ‘no life’ without Hunt.” *Id.* at 777.

In *Mullen v. Jones (In re Jones)*, 445 B.R. 677 (Bankr. N.D. Tex. 2011), the court engaged in a somewhat extensive analysis of the impact of the statutory developments under Texas partnership law on the common-law fiduciary duties of partners. In determining whether the debtor owed a non-dischargeable debt to the plaintiff under Section 523(a)(4) of the Bankruptcy Code, the bankruptcy court first examined whether the debtor was acting in a fiduciary capacity *vis a vis* the plaintiff. After noting that the debtor, as an officer

and director of the corporate general partner of a limited partnership, stood in a fiduciary relationship to the corporation and its shareholders under Texas corporate law, the court proceeded to analyze the nature of the relationship of the corporate general partner to the partnership and the limited partners under Texas partnership law. The court noted that a large amount of common law stands for the proposition that a general partner occupies a fiduciary role with respect to the limited partners, but the court recognized that significant amendments to the Texas partnership statutes in 1994 impact the analysis of fiduciary duties in the partnership context. The court summarized the statutory developments, explaining that the Texas Uniform Partnership Act only used the term “fiduciary” when referring to a partner’s duty to account for any benefit and hold as trustee any profits obtained in connection with the partnership without the consent of other partners, but that case law under the Texas Uniform Partnership Act consistently referred to a partner as a fiduciary.

The bankruptcy court then discussed the approach taken in the TRPA, which rejected the notion of a partner as a trustee and specifically set forth the duties of partners in precise terms. The court noted that the Official Comments state that these changes were meant to reign in the loose use of fiduciary concepts. Finally, the court noted that the BOC contains language nearly identical to the TRPA. Despite these changes since the Texas Uniform Partnership Act, the court observed that very little case law has addressed the significance of the changes. Ultimately, the bankruptcy court in *Mullen v. Jones* concluded that the changes in Texas statutory partnership law in recent years expunged the concept of a partner as a *per se* fiduciary but did not eliminate the fiduciary status of a managing general partner because of the control exercised by such a partner. The court reasoned that the new statutory language, which makes clear that a partner is not *per se* a fiduciary, puts partners and partnerships on a parity with shareholders and corporations in that shareholders do not generally owe fiduciary duties to other shareholders. The court concluded that control is the key to determining whether a partner is a fiduciary.

The court in *Jones* then looked at the two-tiered structure of the limited partnership to determine how it affected the fiduciary duties owed by the debtor. The debtor was president, a director, and 51% shareholder of the corporate general partner. The court relied on Fifth Circuit cases to conclude that the debtor owed the plaintiff fiduciary duties through at least two avenues: (1) in his capacity as officer and director of the corporate general partner (since the plaintiff was a shareholder); and (2) in his capacity as the control person/manager of the general partner (since the plaintiff was a limited partner).

The bankruptcy court next analyzed whether the debtor committed a defalcation in a fiduciary capacity (for purposes of federal bankruptcy law regarding exceptions to discharge), i.e., whether he breached or neglected fiduciary duties, whether he was at least reckless in doing so, and whether a reasonable person in the debtor’s position reasonably should have known better. The court described the duties of loyalty and care and the obligation of good faith set forth in the TRPA and further noted how cases have described a partner’s duties. The court then concluded that the debtor committed defalcation while acting in his fiduciary capacity by repeatedly spending partnership funds for his own personal use and allowing others involved in the business to do the same. The court stated that lack of fraudulent intent and apparent lack of business savvy did not matter because a reasonable person should have known better. The court stated that spending partnership funds for one’s lavish lifestyle is not administering the partnership’s affairs solely for the benefit of the partnership, nor was the debtor complying with the partnership agreement, abiding by his duty not to misapply funds, acting with utmost good faith, fairness, and honesty, or making full disclosure of matters affecting the partnership.

In the years since the bankruptcy court’s analysis in *Mullen v. Jones* (*In re Jones*), 445 B.R. 677 (Bankr. N.D. Tex. 2011), most courts in Texas have not specifically analyzed whether a partner’s statutory duties under the TRPA and BOC are “fiduciary” in character. Many courts explicitly or implicitly characterize the statutory duties of partners as “fiduciary,” citing Texas case law in addition to the duty provisions of the TRPA and BOC. *See, e.g., B. Frazier Mgt., Inc., v. Anson Fin., Inc. (In re Anson Fin., Inc.)*, 2025 WL 2942116 (Bankr. N.D. Tex. 2025); *Dunn v. Chappelle (In re Alta Mesa Res., Inc.)*, 2022 WL 7750353 (Bankr. S.D. 2022); *Power v. Power*, 2022 WL 1314944 (Tex. App.—Dallas 2022, no pet.); *Smith v. Ins. Adjusters Grp, LLC*, 2021 WL 3477362 (E.D. Tex. 2021), report and recommendation adopted, 2021 WL 3471210 (E.D. Tex. 2021); *Shannon Med. Ctr. v. Triad Holdings, III, LLC*, 601 S.W.3d 904 (Tex. App.—Houston [14th Dist.] 2019, no pet.); *Trinkets and Tea, LLC v. Hunt (In re Hunt)*, 605 B.R. 758 (Bankr.

W.D. Tex. 2019); *Lopez v. Hernandez (In re Hernandez)*, 565 B.R. 367 (Bankr. W.D. Tex. 2017); *Nguyen v. Hoang*, 507 S.W.3d 360 (Tex. App.—Houston [1st Dist.] 2016, no pet.); *Westergren v. Jennings*, 441 S.W.3d 670 (Tex. App.—Houston [1st Dist.] 2014, no pet.); *SEC v. Helms*, 2015 WL 1040443 (W.D. Tex. 2015); *Drexel Highlander Ltd. P’ship v. Edelman (In re Edelman)*, 2014 WL 1796217 (Bankr. N.D. Tex. 2014), aff’d, 2015 WL 5714728 (N.D. Tex. 2015). Some courts continue to discuss fiduciary duties of partners under Texas law without referring to the statutory provisions at all. See, e.g., *Gilbreath v. Horan*, 682 S.W.3d 454 (Tex. App.—Houston [1st Dist.] 2023, pet. denied); *Hrdy v. Second St. Props. LLC*, 649 S.W.3d 522 (Tex. App.—Houston [1st Dist.] 2022, pet. denied); *WC 1st and Trinity, LP v. Roy F. & JoAnn Cole Mitte Foundation*, 2021 WL 4465995 (Tex. App.—Austin 2021, no pet.); *Dandachli v. Active Motorworks, Inc.*, 2021 WL 3118437 (Tex. App.—Austin 2021, no pet.); *Houle v. Casillas*, 594 S.W.3d 524 (Tex. App.—El Paso 2019, no pet.); *Red Honor Ventures, Ltd. v. Edmonds (In re Edmonds)*, 2019 WL 4780921 (Bankr. N.D. Tex. 2019); *Brown v. Outlaw*, 2019 WL 2647791 (Tex. App.—Dallas 2019, pet. denied); *Lopez v. Hernandez (In re Hernandez)*, 2019 WL 2402998 (Bankr. W. D. Tex. 2019); *Home Comfortable Supplies, Inc. v. Cooper*, 544 S.W.3d 899 (Tex. App.—Houston [14th Dist.] 2018, no pet.); *Patel v. Harbor Hospice Beaumont, LP*, 2017 WL 4296615 (Tex. App.—Corpus Christi 2017, pet. denied); *CBIF Ltd. P’ship v. TGI Friday’s Inc.*, 2017 WL 1455407 (Tex. App.—Dallas 2017, pet. denied); *Thunder Rose Enters., Inc. v. Kirk*, 2017 WL 2172468 (Tex. App.—Corpus Christi 2017, pet. denied); *Art Midwest Inc. v. Atl. Ltd. P’ship XII*, 742 F.3d 206 (5th Cir. 2014); *Light v. Whittington (In re Whittington)*, 530 B.R. 360 (Bankr. W.D. Tex. 2014); *Naples v. Leshner*, 2014 WL 1856846 (Tex. App.—Texarkana 2014, no pet.); *Serengeti Resort, LLC v. Esperanza*, 2014 WL 235336 (Tex. App.—San Antonio 2014, no pet.); *Pacific Addax Co., Inc. v. Lau (In re Lau)*, 2013 WL 5935616 (Bankr. E.D. Tex. 2013); *United States v. Woodward*, 2011 WL 13182857 (S.D. Tex. 2011), aff’d, 493 F. App’x 483 (5th Cir. 2012). And some courts describe and apply the statutory duties without expressly characterizing the duties as “fiduciary.” See *Jerry L. Starkey, TBDL, LP v. Graves*, 448 S.W.3d 88 (Tex. App.—Houston [14th Dist.] 2014, no pet.).

In *Bruce v. Cauthen*, 515 S.W.3d 495 (Tex. App.—Houston [14th Dist.] 2017, pet. denied), the court held that a partner failed to preserve for appeal his argument that a partner’s statutory duties are not the equivalent of common-law fiduciary duties.

In *Cohen v. Flat Stone Dev. Co., Inc.*, 2018 WL 6411410 (S.D. Tex. 2018), the court implicitly concluded that the statutory duties need not necessarily be characterized as fiduciary duties. The case involved a dispute among the general and limited partners of three limited partnerships, and each of the limited partnership agreements contained the following provision: “[T]he General Partner will not owe a fiduciary duty to the Partnership or any Partner. The General Partner will owe a duty of loyalty and a duty of care to the Partnership.” The court stated that “[t]he contract by its plain language distinguishes a fiduciary duty from duties of loyalty and care,” and “[f]ailing to give effect to this distinction would fail to ‘harmonize and give effect’ to both sentences.” The court noted by way of footnote that each limited partnership agreement “[a]dditionally, . . . tracks the general meaning of the Texas statute governing the duties of general partners. See Tex. Bus. Orgs. Code Ann. § 152.204 (West Supp. 2018).” The court held that the parties intended to disclaim any fiduciary duties, and the court granted summary judgment as to the breach-of-fiduciary-duty claims against the general partner and dismissed those claims.

In *Shannon Medical Center v. Triad Holdings, III, L.L.C.*, 601 S.W.3d 904 (Tex. App.—Houston [14th Dist.] 2019, no pet.), the court stated in a footnote that the managing general partner of a limited partnership failed to preserve its objection that the breach-of-duty jury questions improperly shifted the burden to the managing general partner, but the court went on to note that “under the common law, when a fiduciary enters into a transaction in which its self-interest might conflict with the beneficiary’s interests, the fiduciary bears the burden to show compliance with the duty of care.” The court expressed the view that the BOC makes this burden-shifting rule applicable to alleged violations of statutory duties as well, citing Tex. Bus. Orgs. Code Ann. § 153.003 (providing that “the provisions of Chapter 152 governing partnerships that are not limited partnerships and the rules of law and equity govern” limited partnerships in matters not addressed in Chapters 153, 151, and 154); Tex. Bus. Orgs. Code Ann. § 152.003 (stating that “[t]he principles of law and equity and the other partnership provisions supplement [Chapter 152] unless otherwise provided by [Chapter 152] or [Chapters 151 and 154].”); Tex. Bus. Orgs. Code Ann. §§ 152.004, 153.002(b) (providing that “[t]he rule that a statute in derogation of the common law is to be strictly construed does not

apply” to Chapters 151-154). Beginning May 14, 2025, this analysis and the conclusions reached would be significantly impacted with regard to a limited partnership that is publicly traded or whose partnership agreement has provisions that “duplicate the effect of” Section 153.163. *See* Tex. Bus. Orgs. Code §§ 152.006, 153.163.

As indicated above, courts have been inclined to refer to a general partner of a limited partnership as a “trustee.” However, a general partner is no longer automatically analogous to a trustee. The general partnership statutes negate the trustee standard, and a general partner in a limited partnership has the liabilities of a partner in a general partnership to the other partners and the partnership unless the limited partnership statutes or the partnership agreement provide otherwise. Tex. Bus. Orgs. Code § 153.152(a)(2); *see also* Tex. Bus. Orgs. Code § 153.003(a) (providing that the provisions of Chapter 152 of the BOC govern limited partnerships in a case not provided for by Chapter 153). These gap-filler provisions “linking” the law governing general partnerships to limited partnership law are consistent with provisions contained in the predecessor Texas Revised Limited Partnership Act (TRLPA). *See* Tex. Rev. Civ. Stat. art. 6132a-1, § 4.03(b) (expired Jan. 1, 2010); Tex. Rev. Civ. Stat. art. 6132a-1, § 13.03 (expired Jan. 1, 2010). Thus, a general partner in a limited partnership has the duties of care and loyalty and obligation of good faith set forth in Chapter 152 of the BOC (discussed above) but should no longer automatically be described as a “trustee.” *See Primexx Energy Opportunity Fund, LP v. Primexx Energy Corp.*, 709 S.W.3d 619, 642 (Tex. Bus. Ct. 1st Div. 2025).

In *Primexx Energy Opportunity Fund, LP v. Primexx Energy Corp.*, 709 S.W.3d 619 (Tex. Bus. Ct. 1st Div. 2025), reconsideration denied, 2025 Tex. Bus. 13, 2025 WL 1125042 (Tex. Bus. Ct. 1st Div. 2025), the court provided a helpful review of the history and development of partner duties under Texas common law and statutory law in view of the current lack of clarity by courts and commentators regarding the extent to which the BOC and its predecessors have modified common-law fiduciary principles. The court concluded that, in view of the express statutory statement that partners are not held to trustee standards and the omission of the word “fiduciary” from the TRPA and BOC when describing partners’ duties to the partnership and the other partners,

traditional trustee-fiduciary duties, as such, do not apply to partners except (i) as TBOC imposes analogous statutory duties and obligations; (ii) the TBOC incorporates compatible common law principles; or (iii) partners agreed to impose them on themselves.

709 S.W.3d at 642.

The court noted that the BOC’s “list of loyalty duties is not exclusive because ‘includes’ precedes the list,” and “any supplemental common law loyalty duties must be of the type listed in § 152.205 and consistent with other partnership statutes.” *Id.* The court stated that the statutory duty-of-care definition is exclusive, however, because the statute omits expansive language, and the court further commented that the statutory statement that a partner is presumed to satisfy its duty of care if it acts on an informed basis and in compliance with its obligations under Section 152.206 is an evidentiary presumption and not a separate statutory responsibility. *Id.*

3. Application of Duties to Limited Partners

As illustrated by cases mentioned below, there has in the past been some confusion with regard to whether limited partners owe fiduciary duties to the partnership or other partners. While the duties enumerated in Section 4.04 of the TRPA might literally have been read to apply to limited partners (by virtue of the linkage of the TRPA to the TRLPA under TRLPA Section 13.03), such an approach was not a logical application of the statutes. Some provisions of the TRPA clearly only applied to general partners even though the TRLPA was silent in such regard and the TRPA acted as a gap filler.

Ordinarily, limited partners should not owe fiduciary duties as limited partners because they are merely passive investors. The BOC contains provisions clarifying that a limited partner is not subject to the duties of a general partner based solely on the limited partner’s status as a limited partner. BOC Section 153.003(b) provides that “[t]he powers and duties of a limited partner shall not be governed by a

provision of Chapter 152 that would be inconsistent with the nature and role of a limited partner as contemplated by this chapter,” and BOC Section 153.003(c) provides that “a limited partner shall not have any obligation or duty of a general partner solely by reason of being a limited partner.” These new provisions were necessitated by the structure of the BOC. Chapter 1 defines “partner” as including both general and limited partners. A literal application of this definition, along with the general linkage provision of Section 153.003(a) (providing that the provisions of Chapter 152 of the BOC govern limited partnerships in a case not provided for by Chapter 153), would cause all of the provisions in Chapter 152 governing general partnerships to apply to limited partners as well as general partners where Chapter 153 was silent on an issue. The language in Section 153.003(b) was added to make clear that provisions of Chapter 152 that would be inconsistent with the nature of a limited partner (e.g., provisions conferring agent status and apparent authority on each partner) do not apply to limited partners. The language in Section 153.003(c) specifically makes it clear that limited partners do not have the duties of a general partner (e.g., duties of loyalty and care) solely by reason of being a limited partner.

In *Bertucci v. Watkins*, 709 S.W.3d 534 (Tex. 2025), the Texas Supreme Court addressed whether one limited partner (Watkins) of a limited partnership owed the other limited partner (Bertucci) a fiduciary duty under the particular circumstances of that case. The supreme court stated that “*limited* partners generally do not owe each other fiduciary duties,” relying on Tex. Bus. Orgs. Code § 153.003(c), but the court acknowledged that “some courts have held that a limited partner may assume fiduciary duties to other limited partners if he ceases to act as a limited partner and instead acts as a general partner by ‘tak[ing] part in the daily operations of the business.’” See *Strebel*, 371 S.W.3d at 279 (holding that a limited partner owes a fiduciary duty to another limited partner when he ‘also takes on a nonpassive role by exercising control over the partnership in a way that justifies the recognition of such duties’); see also TEX. BUS. ORGS. CODE § 153.102 (providing that a limited partner can be liable to a third party when he ‘participates in the control of the business’ and leads the third party to believe he is a general partner).” *Bertucci*, 709 S.W.3d at 543-44. The supreme court concluded, however, that the trial court had correctly entered summary judgment against Bertucci on his claim that Watkins owed him a fiduciary duty individually. The supreme court reached its conclusion based on the failure of Bertucci to adequately allege or explain in his summary-judgment motion how Watkins’s positions created a fiduciary relationship between Watkins and Bertucci (as distinct from duties allegedly owed to the entities owned and operated by the two individuals). Bertucci alleged in the trial court that Watkins owed him fiduciary duties, separate from the duties Watkins owed to their entities, because Watkins assumed the role of “managing partner” in their “venture.” Although Bertucci asserted that Watkins effectively acted as a general partner or managing partner, Bertucci did not explain how Watkins’s positions created a fiduciary relationship between Watkins and himself. Furthermore, in his response to Watkins’s summary-judgment motions, Bertucci argued that he “need not prove Watkins owed Bertucci a direct fiduciary duty” because Bertucci was suing “derivatively on behalf of the entities.” Thus, the supreme court concluded that Bertucci submitted less than a scintilla of evidence to the trial court that Watkins owed fiduciary duties to Bertucci individually and effectively conceded that the issue was irrelevant in light of his derivative claims on behalf of the parties’ entities.

There is case law in other jurisdictions holding that limited partners do not, based solely on their status as limited partners, have fiduciary duties, and three appellate courts in Texas reached that conclusion under prior law. See *Villa W. Assocs. v. Kay*, 146 F.3d 798 (10th Cir. 1998); *Herzog v. Leighton Holdings, Ltd. (In re Kids Creek Partners)*, 212 B.R. 898 (N.D. Ill. 1997); *Strebel v. Wimberly*, 371 S.W.3d 267 (Tex. App.—Houston [1st Dist.] 2012, pet. denied); *AON Props. v. Riveraine Corp.*, 1999 WL 12739 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (not designated for publication); *Crawford v. Ancira*, 1997 WL 214835 (Tex. App.—San Antonio 1997, no writ) (not designated for publication). The unpublished opinions by Texas Courts of Appeals lack precedential weight because the decisions were issued prior to 2003, but the more recent decision of the First District Court of Appeals in *Strebel v. Wimberly* at last provided precedent in Texas for the proposition that limited partners do not, solely based on their status as limited partners, owe other limited partners fiduciary duties under Texas law, refuting and distinguishing the *Zinda* and *McBeth* cases (discussed below) to the extent that they suggest otherwise.

In *Zinda v. McCann Street, Ltd.*, 178 S.W.3d 883 (Tex. App.—Texarkana 2005, pet. denied), the court of appeals concluded that three limited partners owed fiduciary duties to the other limited partner based

on the general proposition that a partnership is a fiduciary relationship and that partners owe one another certain fiduciary duties. The court relied upon statements from case law dealing with general partners and cited Section 4.04 of the TRPA without providing any explanation for applying these principles to limited partners. Ultimately, the court found the evidence sufficient to support the jury's finding that the defendants satisfied their fiduciary duty to the plaintiff, concluding that the defendant limited partners had treated the plaintiff fairly.

In *McBeth v. Carpenter*, 565 F.3d 171, 177-78 (5th Cir. 2009), the Fifth Circuit Court of Appeals analyzed whether a general partner and certain limited partners owed a fiduciary duty to other limited partners. The court stated that “[u]nder Texas law, managing partners owe trust obligations to the partnership, having a duty of loyalty and due care as well as being under an obligation to discharge their duties in good faith and in the reasonable belief that they are acting in the best interest of the partnership,” citing Section 4.04 of the TRPA. The court also quoted Texas case law analogizing a general partner in a limited partnership to a trustee. With respect to limited partners, the court stated that Texas law recognizes fiduciary obligations between limited partners and applies the same partnership principles that govern the relationship between a general partner and limited partners. In addition to relying on decisions by courts of appeals in Texas that have failed to distinguish between general and limited partners’ duties (*Zinda v. McCann St., Ltd.*, 178 S.W.3d 883, 890 (Tex. App.—Texarkana 2005, pet. denied) and *Dunnagan v. Watson*, 204 S.W.3d 30, 46-47 (Tex. App.—Fort Worth 2006, pet. denied)), the court stated that the Texas Supreme Court has made no distinction between the fiduciary duties of general and limited partners. The court quoted from *Insurance Co. of North America v. Morris*, 981 S.W.2d 678, 674 (Tex. 1998), a case in which the supreme court referred to the fiduciary duties that arise in certain formal relationships, “including attorney-client, partnership, and trustee relationships.” The Fifth Circuit in *McBeth* noted parenthetically that *Insurance Co. of North America v. Morris* was a case evaluating claims involving limited partnerships, implying that the supreme court’s statement regarding partner fiduciary duties was intended to encompass limited partners; however, the supreme court did not discuss or analyze the duties of limited partners in that case. That case involved claims by investors in a limited partnership against an insurance company that was seeking reimbursement from the investors with regard to payment made on surety bonds. The relationship at issue was that of surety and principal, and the supreme court concluded that the surety-principal relationship is not generally of a fiduciary nature and that the insurance company did not have any affirmative duty of disclosure to the investors. As noted above, the Texas Supreme Court has now directly addressed the issue of fiduciary duties on the part of a limited partner and has distinguished between general and limited partners in that regard. See *Bertucci v. Watkins*, 709 S.W.3d 534 (Tex. 2025) discussed above.

In *McBeth v. Carpenter*, the evidence showed that Carpenter was in a position of control over the partnership by virtue of his control of the LLC general partner, and the court thus concluded that Carpenter owed the plaintiffs a fiduciary duty. Likewise, the court concluded that the limited partner defendants owed the plaintiffs a fiduciary duty as co-limited partners in the partnership and as entities controlled by Carpenter. The court noted in a footnote that it was not bound by unpublished cases cited by the defendant limited partners for the proposition that limited partners do not owe one another fiduciary duties. Further, the court stated that, even accepting the argument that limited partners do not ordinarily owe one another fiduciary duties, Carpenter’s position of control over the limited partner defendants, and the fact that it was often unclear on whose behalf he was acting, was a basis to impose fiduciary duties on the limited partners in this case. The court did not address whether or to what extent Section 153.003(c) of the BOC (discussed above) would have made any difference in the court’s analysis if it had been applicable.

In *Strebel v. Wimberly*, 371 S.W.3d 267 (Tex. App.—Houston [1st Dist.] 2012, pet. denied), the court addressed the argument of a limited partner that his fellow limited partner owed him fiduciary duties of loyalty and care under the Texas Revised Partnership Act because the Texas Revised Limited Partnership Act contains no provisions on duties of limited partners. The court discussed the *Zinda* and *McBeth* cases as well as the unpublished *Crawford* and *AON Properties* cases in Texas and reconciled the cases as follows:

[We hold] that status as a limited partner alone does not give rise to a fiduciary duty to other limited partners. That is not to say, however, that a party who is a limited partner does not owe fiduciary duties to other limited partners when that party, wearing a different hat, exerts

operating control over the affairs of the limited partnership. For example, when a limited partner also serves as an officer of the limited partnership, as in *McBeth*, that partner may owe fiduciary duties based on his agency relationship to the partnership and the other limited partners, without regard to the limited partner role. The existence and scope of that duty will be defined not by the law governing limited partners, but rather by the relevant laws and contracts governing the role under which the party is exercising authority.

Strebel, 371 S.W.3d at 281.

There is case law in some jurisdictions suggesting that limited partners should be subject to fiduciary duties to the extent they actually have control in management matters, e.g., because of control of the general partner. *See RJ Assocs., Inc. v. Health Payors' Org. Ltd. P'ship*, 1999 WL 550350 (Del. Ch. 1999) (containing dictum suggesting that, unless a partnership agreement provides to the contrary, any limited partner owes fiduciary duties to the partnership); *KE Prop. Mgmt. v. 275 Madison Mgmt.*, 1993 WL 285900 (Del. Ch. 1993); *Red River Wings, Inc. v. Hoot, Inc.*, 751 N.W.2d 206 (N.D. 2008) (holding that majority limited partners who controlled or acted in concert with the general partner could be held personally liable to the minority limited partners for breach of fiduciary duties) and cases cited therein. In *CBIF Limited Partnership v. TGI Friday's Inc.*, 2017 WL 1455407 (Tex. App.—Dallas 2017, pet. denied), the court stated that a limited partner owes a fiduciary duty to the partnership and the other partners if the limited partner exercises control over the operation of the business, and the jury's unchallenged findings of dominance and control by a limited partner provided the basis for recognizing a fiduciary duty on the part of the limited partner. The court went on to affirm the liability of an individual's knowing participation in the limited partner's fiduciary duty based on the individual's knowledge of the fiduciary relationships and actual awareness of the breach. As noted above, there is also case law in Texas recognizing a fiduciary duty on the part of those who control the general partner. *See FNFS, Ltd. v. Harwood (In re Harwood)*, 637 F.3d 615 (5th Cir. 2011); *LPS Inv. P'ship v. Bennett (In re Bennett)*, 989 F.2d 779 (5th Cir. 1993); *Mullen v. Jones (In re Jones)*, 445 B.R. 677 (Bankr. N.D. Tex. 2011); *cf. Strebel v. Wimberly*, 371 S.W.3d 267 (Tex. App.—Houston [1st Dist.] 2012, pet. denied) (recognizing that limited partner may owe fiduciary duties to other limited partners by virtue of exerting control over limited partnership in other capacities); *but see Enosis Investments, LLC v. Jensen*, 737 S.W.3d 357, 364 n.37 (Tex. Bus. Ct. 3d Div. 2026) (characterizing Fifth Circuit cases in which the court held that an officer or general partner of the general partner in a limited partnership owed a fiduciary duty to the limited partners as “older cases” that were “based on the specific facts of those cases, particularly in the bankruptcy context”).

4. Statutory Duty of Care

A partner owes a duty of care to the partnership and the other partners. Tex. Bus. Orgs. Code § 152.204(a); *see also* Tex. Rev. Civ. Stat. art. 6132b-4.04(a) (expired Jan. 1, 2010). The duty is described in BOC Section 152.206 (*see also* Tex. Rev. Civ. Stat. art. 6132b-4.04(c) (expired Jan. 1, 2010)) as a duty to act in the conduct and winding up of the partnership business with the care of an ordinarily prudent person under similar circumstances. An error in judgment does not by itself constitute a breach of the duty of care. Further, a partner is presumed to satisfy this duty if the partner acts on an informed basis, in good faith, and in a manner the partner reasonably believes to be in the best interest of the partnership. Tex. Bus. Orgs. Code §§ 152.206, 152.204(b); Tex. Rev. Civ. Stat. art. 6132b-4.04(c), (d) (expired Jan. 1, 2010).

The statutory provisions obviously draw from the corporate business judgment rule in articulating the duty of care. Nevertheless, it is unclear in the final analysis if the standard is simple or gross negligence. The sparse case law in this area (pre-dating the TRPA) indicates that a partner will not be held liable for mere negligent mismanagement. *See Cates v. Int'l Tel. & Tel. Corp.*, 756 F.2d 1161, 1179 (5th Cir. 1985); *Ferguson v. Williams*, 670 S.W.2d 327, 331 (Tex. App.—Austin 1984, writ ref'd n.r.e.). It is unlikely the drafters intended to up the ante in this regard. On the other hand, the TRPA stopped short of expressly specifying gross negligence as the standard (which is the standard specified in the Revised Uniform Partnership Act). As discussed further below with respect to limited partnerships, S.B. No. 29, which became effective May 14, 2025, specifies certain presumptions, pleading requirements, and proof requirements

protecting managerial officials of publicly traded limited partnerships absent proof of fraud, intentional misconduct, an ultra vires act, or a knowing violation of law. *See* Tex. Bus. Orgs. Code §§ 152.006(a), 153.163. As discussed further below, general partnerships and privately held limited partnerships have the freedom to adopt provisions mirroring the standards specified in S.B. No. 29, but these standards do not automatically apply to all partnerships.

There is not a great deal of case law exploring a partner's duty of care under the TRPA or BOC. In *Leal v. Mokhabery (In re Leal)*, 360 B.R. 231, 239 (Bankr. S.D. Tex. 2007), the court initially noted in its opinion that the TRPA governed the case and cited provisions in Section 4.04, but the court did not discuss the relationship between the duty of care as described in Section 4.04 and its conclusions that a partner's poor management performance, absent a showing of wrongful conduct, was not actionable.

Relying on the TRPA, a Texas bankruptcy court concluded a partner breached his duty of care in the winding up of a partnership by failing to honor an indemnification clause in an agreement with the other partners. *Wallace v. Perry (In re Perry)*, 423 B.R. 215, 285-86 (Bankr. S.D. Tex. 2010). In the course of its discussion of the duty of care, the court stated that "the business judgment rule does not apply to partnership decisions made by partners in a partnership." *Id.* at 288. This assertion is patently at odds with the language of Section 4.04(c) of the TRPA (recodified in Section 152.206(b) and (c) of the BOC) and the Bar Committee Comment. *See* Tex. Rev. Civ. Stat. art. 6132b-4.04(c) (expired Jan. 1, 2010), Comment of Bar Committee—1993 ("This subsection, along with subsection (d), incorporates the so-called 'business judgment rule,' . . ."). The more pertinent questions are what effect the business judgment rule has on the standard of liability of a partner and the circumstances under which it applies. Indeed, assuming the business judgment rule applies to a general partner, the court held in the alternative that the business judgment rule was not a valid defense because the partner was not disinterested in relation to his failure to indemnify the other partners.

In *American Star Energy and Minerals Corp. v. Stowers*, 457 S.W.3d 427 (Tex. 2015), the Texas Supreme Court cited *Zinda v. McCann Street, Ltd.*, for the proposition that the duty of care owed by a partner under Section 152.204(a)(2) of the BOC imposes a disclosure obligation in some circumstances. Specifically, the court suggested that "[w]hen a partnership is served with a lawsuit, [the duty of care] may require the partner served to apprise the other partners." *Am. Star Energy*, 457 S.W.3d at 434-35 (citing *Zinda v. McCann St., Ltd.*, 178 S.W.3d 883, 890 (Tex. App.—Texarkana 2005, pet. denied) for the proposition that "[p]artners have a duty to one another to make full disclosure of all matters affecting the partnership . . .").

In *Shannon Medical Center v. Triad Holdings III, L.L.C.*, 601 S.W.3d 904 (Tex. App.—Houston [14th Dist.] 2019, no pet.), the court of appeals held that the trial court did not err in submitting a jury question that described the managing general partner's duty of care to the partnership as described in Sections 152.204 and 152.206 of the BOC and inquired whether the managing general partner complied with its duty of care to the partnership. The court also concluded that the jury question, which tracked the language of the statute, did not fail to adequately address alleged alterations of the statutory duty of care in the partnership agreement. Because the instruction made clear that a partner does not violate a duty or obligation merely because the partner's conduct furthers its own interest and an error in judgment does not alone constitute a breach of the duty of care, the court concluded that the charge correctly reflected the governing law and the terms of the partnership agreement, which authorized contracts between the partnership and a partner's affiliates but did not alter the requirement that a partner act in good faith and reasonably believe that the contract was in the partnership's best interest.

Under the BOC, provisions patterned after Article 2.41D of the TBCA are applicable not only to directors of a corporation, but to governing persons of other types of entities as well. Under these provisions, a partner may, in good faith and with ordinary care, rely on information, opinions, reports, or statements of specified persons when the partner is discharging a duty such as the duty of care. Tex. Bus. Orgs. Code § 3.102.

5. Statutory Duty of Loyalty

Unlike the duty of care, a partner's duty of loyalty was the subject of a good deal of case law prior to the passage of the TRPA. In the BOC, like the predecessor TRPA, a partner's duty of loyalty is described as including:

- (1) accounting to the partnership and holding for the partnership any property, profit, or benefit derived by the partner:
 - (A) in the conduct and winding up of the partnership business; or
 - (B) from use by the partner of partnership property;
- (2) refraining from dealing with the partnership on behalf of a person who has an interest adverse to the partnership; and
- (3) refraining from competing with the partnership or dealing with the partnership in a manner adverse to the partnership.

Tex. Bus. Orgs. Code § 152.205; *see also* Tex. Rev. Civ. Stat. art. 6132b-4.04(b) (expired Jan. 1, 2010).

These provisions embrace the typical areas traditionally encompassed by the duty of loyalty, e.g., self-dealing and conflicts of interest, usurpation of partnership opportunity, and competition. To temper some of the broader expressions of partner duties in the case law, however, the statute specifically states that a partner does not breach a duty merely because the partner's conduct furthers the partner's own interest and that a partner is not a trustee and should not be held to a trustee standard. *See* Tex. Bus. Orgs. Code §§ 152.204(c), (d); *see also* Tex. Rev. Civ. Stat. art. 6132b-4.04(e), (f) (expired Jan. 1, 2010). A court has some room to find that conduct not specifically embraced in the three categories listed nevertheless implicates the duty of loyalty in a given case since the statute states that the duty of loyalty "includes" the matters set forth above. *See Primexx Energy Opportunity Fund, LP v. Primexx Energy Corp.*, 709 S.W.3d 619, 642 (Tex. Bus. Ct. 1st Div. 2025), reconsideration denied, 2025 Tex. Bus. 13, 2025 WL 1125042 (Tex. Bus. Ct. 1st Div. 2025) (noting that the BOC's "list of loyalty duties is not exclusive because 'includes' precedes the list," and commenting that "any supplemental common law loyalty duties must be of the type listed in § 152.205 and consistent with other partnership statutes").

A bankruptcy court cited both case law and Section 4.04 of the TRPA for the proposition that partners owe one another and the partnership "fiduciary" duties. *See Leal v. Mokhabery (In re Leal)*, 360 B.R. 231 (Bankr. S.D. Tex. 2007). The court stated that the duties include the aspects of a partner's duty of loyalty specified in Section 4.04 of the TRPA, as well as an obligation not to usurp opportunities for personal gain, a strict duty of good faith and candor, and an obligation of the utmost good faith, fairness, and honesty in their dealings with each other in matters pertaining to the partnership. *Id.* at 235-36. The court noted at one point in its opinion that a partner who withdraws ceases to owe the fiduciary duties of a partner (e.g., the duty not to compete under Section 4.04 of the TRPA only applies to a partner); however, a withdrawn partner owes the duties owed by a former agent following termination of the agency relationship. *Id.* at 241. (As noted above, a partner is by statute an "agent" of the partnership, and an agent owes a fiduciary duty to the principal under Texas common law. Tex. Bus. Orgs. Code § 152.301; Tex. Rev. Civ. Stat. art. 6132b-3.02(a) (expired Jan. 1, 2010); *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193 (Tex. 2002). The principles of law and equity supplement the partnership statutes unless otherwise provided by the statutes. Tex. Bus. Orgs. Code § 152.003.)

In *McBeth v. Carpenter*, 565 F.3d 171 (5th Cir. 2009), the Fifth Circuit Court of Appeals stated that "[u]nder Texas law, managing partners owe trust obligations to the partnership, having a duty of loyalty and due care as well as being under an obligation to discharge their duties in good faith and in the reasonable belief that they are acting in the best interest of the partnership," citing Section 4.04 of the TRPA. *See also FNFS, Ltd. v. Harwood (In re Harwood)*, 637 F.3d 615 (5th Cir. 2011); *Zinda v. McCann St., Ltd.*, 178 S.W.3d 883 (Tex. App.—Texarkana 2005, pet. denied); *Wilson v. Cantwell*, 2007 WL 2285947 (N.D. Tex. 2007). A bankruptcy court cited Section 152.205 of the BOC along with Texas case law for the proposition that partners owe one another "fiduciary" duties and stated that Texas courts have analogized the duty owed by a general partner to a limited partner to that owed by a trustee to a beneficiary. *See West v. Seiffert (In*

re Houston Drywall, Inc.), 2008 WL 2754526 (Bankr. S.D. Tex. 2008). Numerous other courts have explicitly or implicitly characterized the statutory duty of loyalty under the TRPA or BOC as a fiduciary duty consistent with the common-law duty of loyalty owed by a partner. *See, e.g., Lopez v. Hernandez (In re Hernandez)*, 565 B.R. 367 (Bankr. W.D. Tex. 2017); *Nguyen v. Hoang*, 507 S.W.3d 360 (Tex. App.—Houston [1st Dist.] 2016, no pet.); *Westergren v. Jennings*, 441 S.W.3d 670 (Tex. App.—Houston [1st Dist.] 2014, no pet.); *SEC v. Helms*, 2015 WL 1040443 (W.D. Tex. 2015); *Drexel Highlander Ltd. P’ship v. Edelman (In re Edelman)*, 2014 WL 1796217 (Bankr. N.D. Tex. 2014), *aff’d*, 2015 WL 5714728 (N.D. Tex. 2015). As discussed above, in *Mullen v. Jones (In re Jones)*, 445 B.R. 677 (Bankr. N.D. Tex. 2011), the bankruptcy court concluded that the changes in Texas statutory partnership law expunged the concept of a partner as a *per se* fiduciary but did not eliminate the fiduciary status of a managing general partner because of the control exercised by such a partner. In a somewhat unusual application of the duty of loyalty, a court held that a partner dealt with the partnership in an adverse manner and thus breached his duty of loyalty under Section 4.04(b) of the TRPA when the partner cancelled partnership meetings that were necessary to determine the entity’s direction and chose instead to go to the movies. *Wallace v. Perry (In re Perry)*, 423 B.R. 215, 285-86 (Bankr. S.D. Tex. 2010).

Effective May 14, 2025, S.B. No. 29 added Section 153.163 to the BOC, which codifies a business judgment rule that applies to publicly traded limited partnerships and provides broad protection to general partners and other managerial officials of such a partnership. *See* Tex. Bus. Orgs. Code §§ 152.006(a), 153.163. The presumptions in favor of managerial officials set forth in Section 153.163 specifically extend to duties that pertain to transactions with interested persons. Tex. Bus. Orgs. Code § 153.163(a). Whether certain types of conduct implicating the duty of loyalty are subject to the pleading and proof requirements that apply to a cause of action against a managerial official of such a partnership resulting from “any act or omission in the person’s capacity as a managerial official” will present interesting questions. *See* Tex. Bus. Orgs. Code § 153.163(c), (e).

6. Statutory Duties Owed to Transferees of Deceased Partners

In 2003, Section 4.04(a) of the TRPA was amended to provide that partners owe the duties of loyalty and care to “transferees of deceased partners under Section 5.04(b)” in addition to the other partners and the partnership. *See also* Tex. Bus. Orgs. Code § 152.204(a). This amendment was requested by Representative Will Hartnett. Prior to this amendment, some courts had held that partners owe no fiduciary duties to assignees or transferees. *See Griffin v. Box*, 910 F.2d 255, 261 (5th Cir.1990) (applying Texas law and stating that general partners did not owe a fiduciary duty to transferees of partnership interests who had not been admitted as substituted partners); *Adams v. United States*, 2001 WL 1029522 (N.D. Tex.2001) (stating that remaining partners did not owe a fiduciary duty to assignees of the deceased partner under Texas law); *but see Bader v. Cox*, 701 S.W.2d 677, 685 (Tex. App.—Dallas 1985, writ ref’d n.r.e.) (stating that surviving partners owed fiduciary duties to the representative of a deceased partner under the Texas Uniform Partnership Act).

As a default rule, the BOC (like the predecessor TRPA) provides that the partnership interest of a deceased partner in a general partnership is automatically redeemed by the partnership for its fair value as of the date of death of the partner; thus, the statutory default provisions do not give rise to transferees of a deceased partner. *See* Tex. Bus. Orgs. Code § 152.601; *see also* Tex. Rev. Civ. Stat. art. 6132b-7.01(a) (expired Jan. 1, 2010). Rather, the deceased partner’s personal representative, surviving spouse, heirs, and devisees are regarded as creditors until paid. Tex. Bus. Orgs. Code § 152.406(a)(2)(A). If, however, a partnership agreement negates the automatic redemption provision under the statutes, the personal representative, surviving spouse, heirs, and devisees of a deceased partner will be regarded as transferees of the deceased partner’s partnership interest to the extent they succeed to the deceased partner’s partnership interest, and BOC Section 152.204(a) would apply. Tex. Bus. Orgs. Code § 152.406(a)(2)(B). One can also expect that the personal representative, surviving spouse, heirs, and devisees of a deceased limited partner whose interest is not bought out might assert that the general partner owes them fiduciary duties under BOC Section 152.204(a) by virtue of the linkage of the general partnership statutes to the limited partnership statutes. Tex. Bus. Orgs. Code § 153.003(a).

7. Statutory Obligation of Good Faith

The BOC imposes on a partner the obligation to discharge any duty and exercise any rights or powers in conducting or winding up partnership business in good faith and in a manner the partner reasonably believes to be in the best interest of the partnership. Tex. Bus. Orgs. Code § 152.204(b); *see also* Tex. Rev. Civ. Stat. art. 6132b-4.04(d) (expired Jan. 1, 2010). Though courts may be tempted to elevate this language to an independent duty, this obligation is not stated as a separate duty, but merely as a standard for discharging a partner's statutory or contractual duties. *See* Tex. Rev. Civ. Stat. art. 6132b-4.04, Comment of Bar Committee—1993; *see also Primexx Energy Opportunity Fund, LP v. Primexx Energy Corp.*, 709 S.W.3d 619, 643-44 (Tex. Bus. Ct. 1st Div. 2025), reconsideration denied, 2025 Tex. Bus. 13, 2025 WL 1125042 (Tex. Bus. Ct. 1st Div. 2025) (stating that the statutory obligation of good faith does not rise to the level of a separate “fiduciary” duty and relying on common law for the meaning of “good faith” in the absence of a statutory definition).

8. Statutory Duty to Provide or Disclose Information

The BOC requires that partners be furnished complete and accurate information on request. Tex. Bus. Orgs. Code § 152.213(a); *see also* Tex. Rev. Civ. Stat. art. 6132b-4.03(c) (expired Jan. 1, 2010). Furthermore, the partnership must provide access to its books and records to partners and their agents and attorneys for inspection and copying. Tex. Bus. Orgs. Code § 152.212(a)(c); *see also* Tex. Rev. Civ. Stat. art. 6132b-4.03(b) (eff. Jan. 1, 2010). In the limited partnership context, Chapter 153 more specifically provides for a partner's or assignee's access to books and records on written demand for a proper purpose and excludes access to internal electronic communications unless the partnership agreement expressly provides otherwise. Tex. Bus. Orgs. Code § 153.552.

The Texas Uniform Partnership Act did not address whether or when a partner has a duty to disclose information absent a request, and the current statutes are silent on this point as well. Case law has traditionally imposed upon partners a duty of disclosure in certain circumstances, such as when a partner is purchasing the partnership interest of a fellow partner. *See, e.g., Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 175 (Tex. 1997); *Johnson v. Peckam*, 132 Tex. 148, 120 S.W.2d 786, 788 (1938); *Harris v. Archer*, 134 S.W.3d 411, 431 (Tex. App.—Amarillo 2004, pet. denied); *Johnson v. Buck*, 540 S.W.2d 393, 399 (Tex. App.—Corpus Christi 1976, writ ref'd n.r.e.).

In *American Star Energy and Minerals Corp. v. Stowers*, 457 S.W.3d 427 (Tex. 2015), the Texas Supreme Court suggested that there are circumstances in which a partner owes another partner a duty to disclose information. Specifically, the court suggested that “[w]hen a partnership is served with a lawsuit, [the duty of care] may require the partner served to apprise the other partners.” *Am. Star Energy*, 457 S.W.3d at 434-35 (citing *Zinda v. McCann St., Ltd.*, 178 S.W.3d 883, 890 (Tex. App.—Texarkana 2005, pet. denied) for the proposition that “[p]artners have a duty to one another to make full disclosure of all matters affecting the partnership . . .”).

In *Red Sea Gaming, Inc. v. Block Investments (Nevada) Co.*, 338 S.W.3d 562 (Tex. App.—El Paso 2010, pet. denied), the court of appeals relied upon the non-exclusive nature of the description of the duty of loyalty set forth in the TRPA to conclude that a jury instruction that included a requirement that a partner show it “fully and fairly disclosed all important information” concerning the purchase of the other partner's partnership interest was consistent with the statutory duties set forth in Section 4.04 of the TRPA. *See also McBeth v. Carpenter*, 565 F.3d 171 (5th Cir. 2009) (citing case law and the TRPA in discussing the duties of partners and concluding that the defendant partners had an affirmative duty to disclose material information to the plaintiff limited partners); *Lopez v. Hernandez (In re Hernandez)*, 565 B.R. 367 (Bankr. W.D. Tex. 2017) (stating that partners in Texas owe duties of loyalty and care, that partners must discharge those duties in good faith, and that the duty of loyalty includes a duty to account to the partnership for property and profits pursuant to Tex. Bus. Orgs. Code §§ 152.204, 152.205, and relying on case law for the proposition that partners owe one another a general duty of full disclosure with regard to matters affecting a partner's interests); *Zinda v. McCann St., Ltd.*, 178 S.W.3d 883 (Tex. App.—Texarkana 2005, pet. denied) (citing case law and the TRPA and stating that partners owe one another fiduciary duties that include a duty to make full disclosure of all matters affecting the partnership and strict duty of good faith and candor).

In *Primexx Energy Opportunity Fund, LP v. Primexx Energy Corp.*, 709 S.W.3d 619 (Tex. Bus. Ct. 1st Div. 2025), reconsideration denied, 2025 Tex. Bus. 13, 2025 WL 1125042 (Tex. Bus. Ct. 1st Div. 2025), the court analyzed the current state of Texas law regarding duties of candor and mandatory disclosure in the partnership context and concluded that the BOC “effectively incorporates the candor duty to be honest in § 152.204(b)(1)’s good faith obligation.” 709 S.W.3d at 645. Concluding that the Texas Supreme Court has not provided firm rules with regard to when a partner must volunteer information outside the circumstances expressly mentioned in Section 152.213, the court applied the following standards:

- A partnership agreement may address the issue either directly or indirectly by omission. *See* TBOC §§ 152.002(a) (partnership agreement governs the relations among partners and the partnership), 152.002(b)(2)–(4) (ability to modify loyalty and care duties and good faith obligation); *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84, 95–96 (Tex. 2011) (contract freedom); *FPL Energy, LLC v. TXU Portfolio Mgmt. Co., L.P.*, 426 S.W.3d 59, 68 (Tex. 2014) (omissions may be read as intentional).
- Absent a partnership agreement standard, partners must disclose material information affecting the partnership or other partners that ordinarily would not be expected to be covered by a partnership agreement. For example, a partner must tell at least partnership management when the partner is served with a suit against the partnership. *See Stowers*, 457 S.W.3d at 434–35.
- A partner may not mislead the partnership or other partners where fraud by omission principles would apply absent the partnership relationship. [citing previous portions of the court’s opinion]
- That a partner is acting in its self-interest does not by itself create a duty to voluntarily disclose information regarding its conduct if the partnership agreement lawfully permits that conduct. *See* TBOC § 152.204(c), (d).
- A partner need not disclose facts that would be immaterial under the circumstances, including circumstances contemplated by the partnership agreement.

709 S.W.3d at 646-47.

9. 2025 Amendments Impacting Duties and Liabilities of Partners

Since the Texas Revised Partnership Act became effective in Texas in 1994, the Texas partnership statutes have set forth a statutory duty of care, duty of loyalty, and obligation of good faith, but have expressly permitted the partnership agreement to contractually alter the parameters and standards associated with the duties of care and loyalty and the obligation of good faith so long as the contractual alterations were not manifestly unreasonable. Tex. Bus. Orgs. Code § 152.002(b)(2), (3), (4); *see also* Tex. Rev. Civ. Stat. art. 6132b-1.03(b)(2), (3), (4) (expired Jan. 1, 2010). The statute expressly prohibits complete elimination of the statutory duties of care and loyalty and the obligation of good faith. *Id.*

S.B. No. 29, which became effective on May 14, 2025, includes amendments to Chapter 152 that create some confusion with respect to the scope of contractual freedom in a general partnership under the amended statute. S.B. No. 29 added a new subsection (e) to Section 152.002 (the section that expressly prohibits elimination of the statutory duties in subsection (b)). New subsection (e) expressly permits the partnership agreement of a *limited partnership* to eliminate “any or all” of the statutory duties of care and loyalty, as well as the statutory obligation of good faith. Tex. Bus. Orgs. Code § 152.002(e). New Section 152.006 provides in subsection (a) that Section 152.002(e) applies only to a publicly traded partnership, but goes on to provide in subsection (b) that Section 152.006 “may not be construed as prohibiting *any* partnership from adopting, in its partnership agreement, provisions that duplicate the effect of Sections 152.002(e) [allowing limited partnerships to eliminate the statutory duties of care and loyalty and statutory obligation of good faith] and 153.163 [a new provision codifying a type of business judgment rule applicable to certain limited partnerships], regardless of whether the partnership has a class or securities of partnership interests listed on a national securities exchange.” Tex. Bus. Orgs. Code § 152.006 (emphasis added). Thus, in a somewhat confusing manner, the statute allows the partnership agreement of a limited partnership,

whether publicly traded or not, to eliminate the partners' statutory duties of care and loyalty and obligation of good faith. While it appears that these new provisions were probably intended to apply only to limited partnerships (since the prohibitions on elimination were not removed from Sections 152.002(b)), the wording of Section 152.006 and its placement in Chapter 152 rather than Chapter 153 have muddled the law with respect to whether there remain any statutory outer limits of contractual freedom in a general partnership.

In addition to amending Chapter 152 to provide that a limited partnership agreement may eliminate any or all of the statutory duties of care and loyalty and obligation of good faith, S.B. No. 29 also amended the BOC to add Section 153.163, which essentially sets forth a business judgment rule that provides broad protection for general partners and other managerial officials of a publicly traded limited partnership and any other limited partnership that adopts in its partnership agreement a provision that "duplicates the effect of" Section 153.163. *See* Tex. Bus. Orgs. Code § 152.006.

With respect to a limited partnership governed by Section 153.163 (i.e., a publicly traded limited partnership or a limited partnership whose partnership agreement contains a provision that "duplicates the effect" of Section 153.163), the provisions of new Section 153.163 establish presumptions in favor of a limited partnership's general partners and other managerial officials (which must be overcome by a claimant limited partnership or partner with respect to an act or omission regarding a matter of the limited partnership's business) to the effect that the managerial official is presumed to act in good faith and in compliance with duties owed under the BOC, common law, and the partnership agreement. Tex. Bus. Orgs. Code § 153.163(b). Section 153.163 states that these presumptions concerning compliance by managerial officials with their duties to a limited partnership extend to compliance with any duties that pertain to transactions with interested persons. Tex. Bus. Orgs. Code § 153.163(a). Additionally, with respect to a limited partnership governed by Section 153.163, neither the limited partnership nor any partner has a cause of action against a managerial official of the limited partnership based on the managerial official's act or omission in that capacity unless the limited partnership or partner claimant proves the managerial official's act or omission involved fraud, intentional misconduct, an ultra vires act, or a knowing violation of law. Tex. Bus. Orgs. Code § 153.163(d). These provisions will present interesting questions regarding the extent to which they do or do not apply to various types of situations implicating a managerial official's duty of loyalty. As in the corporate context, it remains to be seen how the courts will interpret "good faith" and what will constitute "fraud" (dishonesty of purpose or intent to deceive? non-disclosure by the conflicted party? constructive fraud?) or "intentional misconduct" (what has to be intended?) on the part of a conflicted managerial official in a self-dealing transaction. What constitutes an "ultra vires" act in the limited partnership context is another interesting question. The ultra vires doctrine developed in the corporate context and has rarely been addressed in the partnership or LLC context.

Like the provisions of Section 21.419 discussed above that apply to certain corporations, Section 153.163 requires that a party alleging fraud, intentional misconduct, an ultra vires act, or a knowing violation of the law under Subsection (c)(2)(B), must state with particularity the circumstances constituting the fraud, intentional misconduct, ultra vires act, or knowing violation of law. Tex. Bus. Orgs. Code § 153.163(e). Thus, with respect to claims against managerial officials of limited partnerships that are subject to Section 153.163, a significant threshold issue in the litigation will be the "particularity" requirement imposed on the claimant's pleadings. (*Cf. In re Schmitz*, 285 S.W.3d 451 (Tex. 2009) (holding that a derivative plaintiff's pre-suit demand did not satisfy the statutory requirement of particularity in the provisions governing derivative suits)).

A partner's or assignee's ability to adequately plead (especially if particularity is required) a breach of duty on the part of a managerial official of a limited partnership may be impacted by amendments made to a partner's or assignee's statutory right to access books and records of the limited partnership. *See* Tex. Bus. Orgs. Code § 153.552 (as amended May 14, 2025). As amended, a partner's or assignee's statutory inspection right now specifically excludes internal electronic communications and information ("e-mails, text messages or similar electronic communications, or information from social media accounts") from the records available to the partner or assignee under the statute unless the communication or information effectuates an action by the limited partnership or the partnership agreement expressly states otherwise. Tex. Bus. Orgs. Code § 153.552(a). A partner's or assignee's statutory inspection rights may be varied by the

partnership agreement but may not be unreasonably restricted. Tex. Bus. Orgs. Code §§ 153.552(a), 153.004(a)(3).

B. Statutory Provisions to Consider When Drafting Partnership Agreement (Statutory Authorization to Modify Duties and Liabilities of Partners)

1. Modification of Duties and Liabilities Under Statutes Applicable to General Partnerships

Since the adoption of the Texas Revised Partnership Act in 1994, the Texas partnership statutes have expressly provided that the partnership agreement cannot eliminate the duties of care and loyalty or the obligation of good faith in a general partnership; however, the statutes permit the partnership agreement to modify the duties of care and loyalty and the obligation of good faith, subject to a “not manifestly unreasonable” standard. Tex. Bus. Orgs. Code § 152.002(b)(2), (3), (4); *see also* Tex. Rev. Civ. Stat. art. 6132b-1.03(b)(2), (3), (4) (expired Jan. 1, 2010). S.B. No. 29, which became effective on May 14, 2025, includes provisions that create some confusion in this regard with respect to general partnerships. S.B. No. 29 added a new subsection (e) to Section 152.002, expressly permitting the partnership agreement of a *limited partnership* to eliminate “any or all” of the statutory duties of care and loyalty, as well as the statutory obligation of good faith. Tex. Bus. Orgs. Code § 152.002(e). New Section 152.006 provides that Section 152.002(e) applies only to a publicly traded partnership, but goes on to provide that Section 152.006 “may not be construed as prohibiting *any* partnership from adopting, in its partnership agreement, provisions that duplicate the effect of Sections 152.002(e) [allowing limited partnerships to eliminate the statutory duties of care and loyalty and statutory obligation of good faith] and 153.163 [a new provision codifying a type of business judgment rule applicable to certain limited partnerships], regardless of whether the partnership has a class or securities of partnership interests listed on a national securities exchange.” Tex. Bus. Orgs. Code § 152.006 (emphasis added). It appears that these new provisions were probably intended to apply only to limited partnerships, but the wording of Section 152.006 and its placement in Chapter 152 rather than Chapter 153 has muddled the law with respect to the outer limits of contractual freedom in a general partnership.

Assuming new Section 152.006 does not override the limitations on elimination and variation of the statutory duties of care and loyalty and obligation of good faith in a general partnership (see discussion above regarding the confusion created by new Section 152.006), the BOC provides that the partnership agreement of a general partnership may not eliminate the duty of care but may determine the standards by which the performance of the obligation is to be measured if the standards are “not manifestly unreasonable.” Tex. Bus. Orgs. Code § 152.002(b)(3); *see also* Tex. Rev. Civ. Stat. art. 6132b-1.03(a)(3) (expired Jan. 1, 2010). How far, then, may the partnership agreement go? If the statutory standard is simple negligence (*see* discussion of the duty of care under IV.A.4 above), will a gross negligence standard in the partnership agreement pass muster as “not manifestly unreasonable?” The answer is almost certainly yes. *See Jerry L. Starkey, TBDL, L.P. v. Graves*, 448 S.W.3d 88 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (acknowledging statutory prohibition on elimination of partner’s duties of loyalty and care but stating that partnership agreement at issue did “not disclaim all such duties and liability” where it required plaintiff to prove fraud, gross negligence, or willful misconduct to establish failure to comply with duties); *see generally Primexx Energy Opportunity Fund, LP v. Primexx Energy Corp.*, 709 S.W.3d 619 (Tex. Bus. Ct. 1st Div. 2025), reconsideration denied, 2025 Tex. Bus. 13, 2025 WL 1125042 (Tex. Bus. Ct. 1st Div. 2025) (recognizing sophisticated parties’ “sacred right” of freedom to contract as they wish under Texas law and concluding that the arm’s-length sale process specified by a limited partnership agreement satisfied the statutory duty of care owed by the managing general partner and its controlling party with respect to an exit-event sale, based on provisions of the limited partnership agreement eliminating the duties of loyalty and care to the full extent allowed under Texas law, while expressly preserving duties of good faith and fair dealing). Arguably, the partnership agreement should be able to define the duty of care even more protectively than gross negligence given the corporate case law that indicates gross negligence is not sufficient to breach the duty of loyalty and the provisions of Section 153.163 that are available to a limited partnership.

With respect to the partners’ duty of loyalty (setting aside the confusion created by new Section 152.006 discussed above), the BOC provides that the partnership agreement of a general partnership may not

eliminate the duty of loyalty but may identify specific types or categories of activities that do not violate the duty of loyalty if “not manifestly unreasonable.” Tex. Bus. Orgs. Code § 152.002(b)(2); *see also* Tex. Rev. Civ. Stat. art. 6132b-1.03(a)(2) (expired Jan. 1, 2010). One obvious issue here, in addition to the meaning of “manifestly unreasonable,” is how “specific” these provisions must be in identifying types or categories of activities. The answer may depend upon the circumstances, such as the sophistication of the parties, scope of activities of the partnership, etc. As noted above, amendments to Chapter 153 of the BOC made by S.B. No. 29 in 2025 provide for certain presumptions and pleading and proof requirements applicable to claims for breach of duty against managerial officials of publicly held limited partnerships as well as “any partnership” that “duplicates the effect” of the statute in its partnership agreement. Assuming the provisions of Section 153.163 are not “manifestly unreasonable,” the statute does not authorize anything that could not already have been provided in a partnership agreement prior to the statute, but the language of the statute may become a sort of template for drafters and may thus accelerate the development of case law interpreting and applying the language. A practitioner should, of course, always carefully consider the interests of the client(s) and the particular context and circumstances in fashioning the language of provisions of a partnership agreement addressing these issues.

Provisions in partnership agreements permitting partners to engage in competition and to take advantage of business opportunities are fairly commonplace. For example, in *Cruz v. Ghani*, 2018 WL 6566642 (Tex. App.—Dallas 2018, pet. denied), the plaintiff claimed that the individual who controlled the general partner of a limited partnership breached his fiduciary duty to the limited partnership by pursuing a competing business opportunity. The court held that the plaintiff’s claim was foreclosed by a provision in the limited partnership agreement that expressly permitted the general partner and the general partner’s partners, directors, officers, employees, agents, and representatives to engage in competing businesses. The court relied on the strong policy favoring freedom of contract in Texas as well as the provisions of the BOC that permit the partnership agreement to “identify specific types of activities or categories of activities that do not violate the duty of loyalty if the types or categories are not manifestly unreasonable.” *Cruz v. Ghani*, 2018 WL 6566642, at *13-14, citing Tex. Bus. Orgs. Code § 152.002(b)(2). The court stated that the provision of the limited partnership agreement that permitted the general partner and any of its directors, officers, employees, agents, and representatives to “engage in business activities in addition to those relating to the Partnership, including business interests and activities in direct competition with the Partnership” was a provision that “identified a specific type of activity or category of activities that do not violate the duty of loyalty.” *Cruz v. Ghani*, 2018 WL 6566642, at *14. The court noted that the plaintiff did not argue that the type of activity or category of activities specified in the provision was manifestly unreasonable.

Under the BOC, a domestic entity may “renounce, in its certificate of formation or by action of its governing authority, an interest or expectancy of the entity in, or an interest or expectancy of the entity in being offered an opportunity to participate in, specified business opportunities or a specified class or category of business opportunities presented to the entity or one or more of its managerial officials or owners.” Tex. Bus. Orgs. Code § 2.101(21). This provision applies to a general partnership governed by the BOC, but it is not clear whether it adds anything significant to the provisions of Section 152.002(b)(2) since a general partnership does not file a certificate of formation.

Finally (setting aside the confusion created by new Section 152.006 discussed above), the BOC provides that the obligation of good faith may not be eliminated by the partnership agreement of a general partnership, but the agreement may determine the standards by which the performance is to be measured if the standards are “not manifestly unreasonable.” Tex. Bus. Orgs. Code § 152.002(b)(4); *see also* Tex. Rev. Civ. Stat. art. 6132b-1.03(a)(4) (expired Jan. 1, 2010). Again the parameters of this provision are not readily apparent and probably will depend, at least in part, on the circumstances of any particular case.

It should be noted that the BOC contains no express limitations on the extent to which the partnership agreement may eliminate a partner’s liability to the partnership and the other partners.⁴ In fact,

⁴In one case decided prior to the passage of the TRPA, a court dealt with a mismanagement claim against a general partner in a limited partnership where the partnership agreement stated that the general partner would not be liable absent willful malfeasance or fraud. *Grider v. Boston Co., Inc.*, 773 S.W.2d 338 (Tex. App.—Dallas 1989, writ denied). The court assumed the clause was enforceable to protect the general partner against the mismanagement claim. The court

in 2013, the legislature highlighted the expansive contractual freedom provided partners in this regard by amending Chapter 7 of the BOC to clarify that the partnership agreement may eliminate the liability of a partner to the partnership and the other partners to the same extent that a corporation's certificate of formation may eliminate a director's liability under section 7.001 and to such *additional* extent allowed by Chapter 152 of the BOC. Tex. Bus. Orgs. Code § 7.001(d)(1). (As discussed above with respect to corporations, Section 7.001 was amended, effective Sept. 1, 2025, to permit corporations to eliminate the liability of officers as well as directors.) Although Chapter 152 states that the duties of care and loyalty may not be completely eliminated, there are no express prohibitions or limitations in Chapter 152 with respect to the limitation or elimination of liability (as opposed to duties) of a partner or other managerial official to the partnership or the partners. *See* Tex. Bus. Orgs. Code § 152.002(a), (b)(2)-(4).

A distinction can be drawn between the elimination of *duties* and the elimination or indemnification of *liabilities*. If the *liability* of a general partner is contractually eliminated or indemnified, but the *duty* still exists, a breach of the duty could give rise to equitable relief (such as injunctive relief or receivership) even though the general partner could not be held liable or would be held harmless by the partnership. *See Feeley v. NHAOCG, LLC*, 62 A.3d 649, 664 (Del. Ch. 2012) (applying Delaware law); *VTX Commc'ns LLC v. AT&T, Inc.*, 2023 WL 2144154, at *9 (S.D. Tex. 2023) (applying Delaware law); *see also Gilbreath v. Horan*, 682 S.W.3d 454 (Tex. App. —Houston [1st Dist.] 2023, pet. denied) (stating that exculpatory clauses in limited partnership agreements exculpating general partners from “liability” did not preclude the plaintiff's action for declaratory relief based on violations of the plaintiff limited partner's rights to access books and records); *Primexx Energy Opportunity Fund v. Primexx Energy Corp.*, 2025 Tex. Bus. 21, at ¶ 12, 2025 WL 1479394 (Tex. Bus. Ct. 1st Div. 2025) (recognizing distinction between duties and liability and stating that contractual waiver of liability was not precluded by statutory prohibition on elimination of certain partner responsibilities because the waiver at issue eliminated liability rather than duties; furthermore, the persons whose liability was eliminated were not partners). The manner in which a contractual provision expresses the exculpation may give rise to an issue regarding the scope of the liabilities that have been contractually eliminated. Contractual provisions that merely eliminate liability for “damages” may still expose the partner to equitable remedies that involve monetary recovery even though these remedies are not technically “damages.” *See In re Longview Energy Co.*, 464 S.W.3d 353, 361 (Tex. 2015) (characterizing disgorgement as equitable forfeiture of benefits wrongfully obtained and stating that disgorgement is compensatory but is not damages). Redefining or eliminating duties, on the other hand, narrows or eliminates not only potential liability for damages by the partner who would otherwise owe the duty, but determines whether there is a breach at all, thus affecting the availability of equitable relief as well. While there are strong arguments for enforcing broad indemnification and exculpation provisions in view of the statutory scheme, a court might balk at enforcing contractual elimination of all remedies, including equitable remedies.

The BOC was amended in 2021 to add a provision clarifying that a requirement under Texas law that indemnification or exculpation for negligence be expressly or conspicuously stated does not apply to a provision in an entity's governing documents that provides for indemnification or exculpation. Tex. Bus. Orgs. Code § 8.005. This provision makes clear that the so-called “fair notice” and “express negligence” doctrines that generally apply to contractual indemnification and exculpation provisions under Texas common law, *see, e.g., Dresser Industries, Inc. v. Page Petroleum Products, Inc.*, 853 S.W.2d 505 (Tex. 1993), do not apply to the governing documents of Texas entities governed by the BOC.

The statutory parameters around the contractual freedom to vary the partners' duties of loyalty and care have received relatively little attention by Texas courts, and Texas courts have not been consistent in describing the extent to which partners may contractually disclaim their duties.

In *Primexx Energy Opportunity Fund, LP v. Primexx Energy Corp.*, 709 S.W.3d 619 (Tex. Bus. Ct. 1st Div. 2025), reconsideration denied, 2025 Tex. Bus. 13, 2025 WL 1125042 (Tex. Bus. Ct. 1st Div. 2025), the Texas Business Court engaged in a thoughtful and lengthy explanation and analysis of the statutory duties and obligations of partners in a Texas partnership, the extent to which they can be modified (under the BOC

stated that, when the parties bargain on equal terms, a fiduciary may contract for the limitation of liability. Public policy would preclude, according to the court, limitation of liability for (1) self-dealing, (2) bad faith, (3) intentional adverse acts, and (4) reckless indifference with respect to the interest of the beneficiary. *Id.* at 343.

prior to its amendment by S.B. No. 29 in 2025), and the application and effect of certain provisions minimizing duties in a limited partnership at issue in that case. The limited partnership agreement expressly provided that the partners owed each other and the partnership “the duties of good faith and fair dealing,” but the agreement then eliminated to the fullest extent permitted by law any duties (including fiduciary duties), “other than Agreed Duties,” owed by a partner as well as giving the managing general partner and the limited partner controlling the managing general partner the right to make partnership decisions in their sole and absolute discretion and in their sole interests. The agreement gave the controlling party drag-along rights authorizing it to negotiate and force the other unitholders to sell to a third party provided the sale resulted from an arm’s-length transaction at least two years after the controlling party’s investment in the partnership. Two limited partners sued after the controlling party exercised its drag-along rights and forced an exit-event sale to a third party. In this opinion, the court emphasized the strong Texas policy in favor of freedom to contract (especially with respect to sophisticated parties) and concluded that the controlling party did not breach the duties that remained under the partnership agreement.

In *Jerry L. Starkey, TBDL, L.P. v. Graves*, 448 S.W.3d 88 (Tex. App.—Houston [14th Dist.] 2014, no pet.), which involved alleged breaches of duties by the general partner and its affiliates in the limited partnership context, the court acknowledged the statutory prohibition on elimination of a partner’s duties of loyalty and care but stated that the partnership agreement at issue “limits but does not disclaim all such duties and liability.” The court stated that the jury instructions—which required the plaintiff to prove fraud, gross negligence, or willful misconduct to establish a defendant’s failure to comply with its duties—included the contractual language containing the limitation on the statutory duties.

In *Cohen v. Flat Stone Development Co., Inc.*, 2018 WL 6411410 (S.D. Tex. 2018), the court gave effect to a provision that disclaimed fiduciary duties but preserved the statutory duties of loyalty and care. The case involved a dispute among the general and limited partners of three limited partnerships, and each of the limited partnership agreements contained the following provision: “[T]he General Partner will not owe a fiduciary duty to the Partnership or any Partner. The General Partner will owe a duty of loyalty and a duty of care to the Partnership.” The court stated that “[t]he contract by its plain language distinguishes a fiduciary duty from duties of loyalty and care,” and “[f]ailing to give effect to this distinction would fail to ‘harmonize and give effect’ to both sentences.” The court noted by way of footnote that each limited partnership agreement “[a]dditionally, . . . tracks the general meaning of the Texas statute governing the duties of general partners. See Tex. Bus. Orgs. Code Ann. § 152.204 (West Supp. 2018).” The court held that the parties intended to disclaim any fiduciary duties, and the court granted summary judgment as to the breach-of-fiduciary-duty claims against the general partner and dismissed those claims.

In *Hardwick v. Smith Energy Co.*, 500 S.W.3d 474 (Tex. App.—Amarillo 2016, pet. granted, judgment vacated w.r.m.), the parties to an oil and gas transaction entered into a series of agreements relating to a number of prospect areas, and each of the operating agreements disclaimed the creation of a partnership and fiduciary duties. The plaintiff argued that their activities under their agreements established a joint venture between the parties and that the defendant thus owed the plaintiff fiduciary duties regardless of the disclaimers. The court stated that, regardless of whether the disclaimers of joint venture were effective and without deciding whether the business arrangement constituted a joint venture, it was clear that the parties expressly disclaimed fiduciary duties. Citing Tex. Bus. Orgs. Code § 152.002(b)(2) and *Strebel v. Wimberly*, 371 S.W.3d 267, 284 (Tex. App.—Houston [1st Dist.] 2012, pet. denied), the court of appeals stated that “[c]ourts must honor the contractual terms that parties use to define the scope of their obligations and agreements, including limiting fiduciary duties that might otherwise exist.” Further relying on *Strebel*, the court stated that “[t]his is especially true when the contractual limitation arises from an arms-length business transaction between sophisticated businessmen,” and the court commented that “[t]his principle adheres to Texas’s public policy of freedom of contract.” *Hardwick*, 500 S.W.3d at 485.

In *Stephens v. Three Finger Black Shale Partnership*, 580 S.W.3d 687 (Tex. App.—Eastland 2019, pet. denied), the court concluded that a disclaimer of fiduciary duties in a letter agreement (in which the parties agreed that they were not entering into a partnership relationship and did not owe one another a fiduciary duty or obligation) was effective to insulate the parties from liability for any breach of disclaimed fiduciary duties even assuming *arguendo* that the letter agreement created a partnership. Noting that the parties were “sophisticated businessmen” and relying on *Strebel v. Wimberly*, the court stated that it must

honor the terms of the parties' contract. The court held "that any fiduciary duty that might have existed as a result of an alleged partnership growing out of the [letter agreement] was expressly disclaimed in that agreement and that no recovery may be had . . . in relation to those alleged fiduciary duties."

Responding to a managing general partner's argument that the jury charge did not adequately address alterations of the statutory duty of care in the partnership agreement, the court of appeals in *Shannon Medical Center v. Triad Holdings III, L.L.C.*, 601 S.W.3d 904 (Tex. App.—Houston [14th Dist.] 2019, no pet.), made the broad pronouncement that, "[a]s a matter of law, . . ., the duty of care cannot be disclaimed," relying on Section 152.002(b)(3) of the BOC. The court quoted the statutory duty of care and obligation of good faith, stating that "[a] partner must conduct the partnership's business 'with the care an ordinarily prudent person would exercise in similar circumstances,'" and "must discharge the partner's duties 'in good faith' and 'in a manner the partner reasonably believes to be in the best interest of the partnership.'" Acknowledging that the partnership agreement authorized contracts between the partnership and a partner or a partner's affiliate, the court pointed out that the partnership agreement "did not purport to" change the statutory requirement that "a partner entering into such a contract still must comply with the duty of care by acting in good faith and in a manner the partner reasonably believes to be in the partnership's best interest." In addition, however, to pointing out that the partnership agreement "did not purport to" change this standard, the court stated that the partnership agreement "could not change this" statutory standard of partner conduct (an apparent overstatement given the statutory contractual freedom conferred by Section 152.002(b)(3) to determine the standards by which performance of the duty of care will be measured).

2. Modification of Duties and Liabilities Under Statutes Applicable to Limited Partnerships

As discussed above, Chapter 152 sets forth statutory duties of loyalty and care as well as a statutory obligation of good faith and authorizes contractual modification of such duties by the partnership agreement. Pursuant to gap-filler provisions in Chapter 153 that make provisions in Chapter 152 applicable in the limited partnership context where Chapter 153 and other provisions of the BOC that are directly applicable to limited partnerships do not otherwise provide (*see* Tex. Bus. Orgs. Code §§ 153.003, 153.152), the statutory duties and obligations of partners in a general partnership set forth in Sections 152.204 through 152.206, and the contractual freedom to vary such duties and obligations set forth in Section 152.002, have been applied by the courts with respect to general partners of limited partnerships. Until recently, the ability to completely eliminate the statutory duties of loyalty and care and the obligation of good faith in the limited partnership context has been somewhat unclear. As of May 14, 2025, however, S.B. No. 29, added provisions to the BOC that expressly authorize a limited partnership agreement to eliminate the duties of loyalty and care and the obligation of good faith. New Section 152.002(e) states:

Notwithstanding Subsection (b)(2), (3), or (4), a partnership agreement of a limited partnership may eliminate any or all of the duty of loyalty under Section 152.205, the duty of care under Section 152.206, and the obligation of good faith under Section 152.204(b), to the extent the partnership agreement expressly provides so.

Tex. Bus. Orgs. Code § 152.002(e).

Although new Section 152.006 added by S.B. No. 29 states that new Section 152.002(e) (quoted above) only applies to a publicly traded partnership, Section 152.006 goes on to indicate that any limited partnership may contractually eliminate the statutory duties and obligations of partners. New Section 152.006 reads as follows:

- (a) The provisions of Sections 152.002(e) and 153.163 apply only to a partnership that has a class or series of partnership interests listed on a national securities exchange.
- (b) This section may not be construed as prohibiting any partnership from adopting, in its partnership agreement, provisions that duplicate the effect of Sections 152.002(e) and 153.163, regardless of whether the partnership has a class or series of partnership interests listed on a national securities exchange.

Tex. Bus. Orgs. Code § 152.006.

Chapter 153 of the BOC does not itself address the extent to which the duties and liabilities of general partners in a limited partnership may be altered by agreement of the partners except to state as follows:

Except as provided by this chapter, the other limited partnership provisions, *or a partnership agreement*, a general partner of a limited partnership:...(2) has the liabilities of a partner in a partnership without limited partners to the partnership and to the other partners.

Tex. Bus. Orgs. Code § 153.152(a)(2) (emphasis added); *see also* Tex. Rev. Civ. Stat. art. 6132a-1, § 4.03(a) (expired Jan. 1, 2010). This language indicates that the partnership agreement may modify the liabilities of a general partner. It is not clear whether it is an authorization without express limits or may be linked to the provisions in BOC Section 152.002(b)(2), (b)(3), and (b)(4) that prohibit elimination of duties and set a “manifestly unreasonable” floor for contractual variation of duties, but it appears that a limited partnership agreement that “expressly provides” for the elimination of “any or all of the duty of loyalty under Section 152.205, the duty of care under Section 152.206, and the obligation of good faith under Section 152.204(b),” should be given effect so long as it can be interpreted as “adopting . . . provisions that duplicate the effect of Sections 152.002(e).”

As of May 14, 2025, S.B. No. 29 amended the BOC to add Section 153.163, which essentially sets forth a business judgment rule that provides broad protection for general partners and other managerial officials of a publicly traded limited partnership and any other limited partnership that adopts in its partnership agreement a provision that “duplicates the effect of” Section 153.163. *See* Tex. Bus. Orgs. Code § 152.006. The provisions of Section 153.163 establish presumptions in favor of a limited partnership’s managerial officials (which must be overcome by a claimant limited partnership or partner with respect to an act or omission regarding a matter of the limited partnership’s business) to the effect that the managerial official is presumed to act in good faith and in compliance with duties owed under the BOC, common law, and the partnership agreement. Tex. Bus. Orgs. Code § 153.163(b). Section 153.163 states that these presumptions concerning compliance by managerial officials with their duties to a limited partnership extend to compliance with any duties that pertain to transactions with interested persons. Tex. Bus. Orgs. Code § 153.163(a). Additionally, with respect to a limited partnership governed by Section 153.163, neither the limited partnership nor any partner has a cause of action against a managerial official of the limited partnership based on the managerial official’s act or omission in that capacity unless the limited partnership or partner claimant proves the managerial official’s act or omission involved fraud, intentional misconduct, an ultra vires act, or a knowing violation of law. Tex. Bus. Orgs. Code § 153.163(d). The allegations of fraud, intentional misconduct, an ultra vires act, or a knowing violation of law must be pleaded with particularity. Tex. Bus. Orgs. Code § 153.163(e).

Assuming the provisions of Section 153.163 are not “manifestly unreasonable,” the new statute does not authorize anything that could not already have been provided in a partnership prior to the statute, but the language of the statute may become a sort of template for drafters and may thus accelerate the development of case law interpreting and applying the language. A practitioner should, of course, always carefully consider the interests of the client(s) and the particular context and circumstances in fashioning the language of provisions of a partnership agreement addressing these issues.

Chapter 7 of the BOC was amended in 2013 to clarify that the partnership agreement may eliminate the liability of a general partner to the partnership and the other partners to the same extent that a corporation’s certificate of formation may eliminate a director’s liability under section 7.001 and to such additional extent allowed by Chapters 152 and 153 of the BOC. Tex. Bus. Orgs. Code § 7.001(d)(2). (As discussed above with respect to corporations, Section 7.001 was amended, effective Sept. 1, 2025, to permit corporations to eliminate the liability of officers as well as directors.) There are no express prohibitions or limitations in Chapter 152 or 153 with respect to the limitation or elimination of liability (as opposed to duties) of a general partner or other managerial official to the partnership or the partners.

As noted above, a distinction can be drawn between the limitation or elimination of duties and the limitation and elimination of liabilities. If the *liability* of a general partner is contractually eliminated, but the *duty* still exists, a breach of the duty could give rise to equitable relief (such as injunctive relief or receivership) even though the general partner could not be held liable for damages. See *Feeley v. NHAOCG, LLC*, 62 A.3d 649, 664 (Del. Ch. 2012) (applying Delaware law); *VTX Commc'ns LLC v. AT&T, Inc.*, 2023 WL 2144154, at *9 (S.D. Tex. 2023) (applying Delaware law); see also *Gilbreath v. Horan*, 682 S.W.3d 454 (Tex. App.—Houston [1st Dist.] 2023, pet. denied) (stating that exculpatory clauses in limited partnership agreements exculpating general partners from “liability” did not preclude the plaintiff’s action for declaratory relief based on violations of the plaintiff limited partner’s rights to access books and records); *Primexx Energy Opportunity Fund v. Primexx Energy Corp.*, 2025 Tex. Bus. 21, at ¶ 12, 2025 WL 1479394 (Tex. Bus. Ct. 1st Div. 2025) (recognizing distinction between duties and liability and stating that contractual waiver of liability was not precluded by statutory prohibition on elimination of certain partner responsibilities because the waiver at issue eliminated liability rather than duties). The manner in which a contractual provision expresses the exculpation may give rise to an issue regarding the scope of the liabilities that have been contractually eliminated. Contractual provisions that merely eliminate liability for “damages” may still expose the partner to equitable remedies that involve monetary recovery even though these remedies are not technically “damages.” See *In re Longview Energy Co.*, 464 S.W.3d 353, 361 (Tex. 2015) (characterizing disgorgement as equitable forfeiture of benefits wrongfully obtained and stating that disgorgement is compensatory but is not damages). Redefining or eliminating duties, on the other hand, narrows or eliminates not only potential liability for damages by the partner who would otherwise owe the duty, but determines whether there is a breach at all, thus affecting the availability of equitable relief as well. While there are strong arguments for enforcing broad indemnification and exculpation provisions in view of the statutory scheme, a court might balk at enforcing contractual elimination of all remedies, including equitable remedies.

The BOC was amended in 2021 to add a provision clarifying that a requirement under Texas law that indemnification or exculpation for negligence be expressly or conspicuously stated does not apply to a provision in an entity’s governing documents that provides for indemnification or exculpation. Tex. Bus. Orgs. Code § 8.005. This provision makes clear that the so-called “fair notice” and “express negligence” doctrines that generally apply to contractual indemnification and exculpation provisions under Texas common law, see, e.g., *Dresser Industries, Inc. v. Page Petroleum Products, Inc.*, 853 S.W.2d 505 (Tex. 1993), do not apply to the governing documents of Texas entities governed by the BOC.

In *Primexx Energy Opportunity Fund, LP v. Primexx Energy Corp.*, 709 S.W.3d 619, 638-47 (Tex. Bus. Ct. 1st Div. 2025), the court assumed that the prohibitions and limitations of Tex. Bus. Orgs. Code § 152.002(b)(2), (3), (4) applied to the Texas limited partnership at issue, and the court applied and enforced the provisions of the limited partnership agreement, recognizing sophisticated parties’ “sacred” right of freedom to contract under Texas law and concluding that the arms’-length sale process specified by the limited partnership agreement and exercise of contractual drag-along rights satisfied the statutory duties of loyalty and care of the managing general partner and its controlling party with respect to an exit-event sale in view of provisions of the partnership agreement that eliminated, to the full extent allowed by Texas law, all duties other than the duties of good faith and fair dealing, and expressly allowed the managing general partner to act in its sole discretion, taking into account solely its interests.

In *Hrды v. Second Street Properties LLC*, 649 S.W.3d 522 (Tex. App.—Houston [1st Dist.] 2022, pet. denied), limited partners of a limited partnership involved in a marina development project alleged that the general partner acquired certain real property in breach of the general partner’s fiduciary duty to the partnership. The court stated that the limited partners’ suggestion that the transaction was unfair because it created a conflict of interest—by making the general partner and the partnership competitors in the project—ignored that the limited partnership agreement allowed any partner to “engage in or possess an interest in other business ventures of any nature or description, independently or with others, similar to, or competitive with the business” of the limited partnership. The court stated that Texas law allows parties to limit the scope of fiduciary duties in this manner in the partnership agreement, citing *Strebel v. Wimberly*, 371 S.W.3d 267, 284 (Tex. App.—Houston [1st Dist.] 2012, pet. denied). Thus, the existence of a conflict of interest resulting from competition, standing alone, did not establish unfairness of the transaction. Consistent with the partnership agreement, the trial court’s charge instructed the jury that possessing a

competitive business interest was not a breach of the duty of loyalty, and the court was required to assess evidentiary sufficiency based on the charge given in the absence of an objection to the instruction.

In *Shannon Medical Center v. Triad Holdings III, L.L.C.*, 601 S.W.3d 904 (Tex. App.—Houston [14th Dist.] 2019, no pet.), the court of appeals responded to the managing general partner’s argument that the jury charge did not adequately address alterations of the statutory duty of care in the partnership agreement. The court broadly pronounced that, “[a]s a matter of law, . . . , the duty of care cannot be disclaimed,” relying on Section 152.002(b)(3) of the BOC. The court quoted the statutory duty of care and obligation of good faith, stating that “[a] partner must conduct the partnership’s business ‘with the care an ordinarily prudent person would exercise in similar circumstances,’” and “must discharge the partner’s duties ‘in good faith’ and ‘in a manner the partner reasonably believes to be in the best interest of the partnership.’” Acknowledging that the partnership agreement authorized contracts between the limited partnership and a partner or a partner’s affiliate, the court pointed out that the partnership agreement “did not purport to” change the statutory requirement that “a partner entering into such a contract still must comply with the duty of care by acting in good faith and in a manner the partner reasonably believes to be in the partnership’s best interest.” In addition, however, to pointing out that the partnership agreement “did not purport to” change this standard, the court stated that the partnership agreement “could not change this” statutory standard of partner conduct (an apparent overstatement given the statutory contractual freedom conferred by Section 152.002(b)(3) to determine the standards by which performance of the duty of care will be measured).

In *Jerry L. Starkey, TBDL, L.P. v. Graves*, 448 S.W.3d 88 (Tex. App.—Houston [14th Dist.] 2014, no pet.), the court of appeals stated that Section 152.002(b) of the BOC does not permit the partnership agreement to disclaim the statutory duties of care and loyalty entirely, but the court stated that the limited partnership agreement did not disclaim all statutory duties and liability. Under the limited partnership agreement, the general partner was not liable in damages or otherwise for an act or omission unless such act or omission was performed or omitted fraudulently or constituted gross negligence or willful misconduct.

In *Cruz v. Ghani*, 2018 WL 6566642 (Tex. App.—Dallas 2018, pet. denied), the plaintiff claimed that the individual who controlled the general partner of a limited partnership breached his fiduciary duty to the limited partnership by pursuing a competing business opportunity. The court held that the plaintiff’s claim was foreclosed by a provision in the limited partnership agreement that expressly permitted the general partner and its partners, directors, officers, employees, agents, and representatives to engage in competing businesses. The court pointed out that Chapter 153 does not directly address the extent to which duties and liabilities of general partners may be altered by agreement, but the court noted that Section 153.152 indicates that the partnership agreement may modify the liabilities of a general partner, and Section 153.003 provides that the provisions of Chapter 152 govern limited partnerships in a case not provided for by Chapter 153 and the other partnership provisions. *Id.* at *13. The court then discussed Texas’s strong policy favoring freedom to contract and the provisions of Chapter 152 of the BOC that permit the partnership agreement to modify a partner’s duties, including the duty of loyalty. *Id.* at *13-14. The court concluded that the provision of the limited partnership agreement that permitted the general partner and any of its directors, officers, employees, agents, and representatives to “engage in business activities in addition to those relating to the Partnership, including business interests and activities in direct competition with the Partnership” was a provision that “identified a specific type of activity or category of activities that do not violate the duty of loyalty” as permitted by Chapter 152. *Id.* at *14, citing § 152.002(b)(2). The court noted that the plaintiff did not argue that the type of activity or category of activities specified in the provision was manifestly unreasonable. (The court went on, however, to hold that there was some evidence to support the jury’s findings that the defendant failed to comply with his fiduciary duties to the corporate general partner—of which he was an officer and director—by forming a new entity to serve as general partner of the new limited partnership that pursued the competing opportunity.)

In *Cohen v. Flat Stone Development Co., Inc.*, 2018 WL 6411410 (S.D. Tex. 2018), a case involving a dispute among the general and limited partners of three limited partnerships, each of the limited partnership agreements contained the following provision: “[T]he General Partner will not owe a fiduciary duty to the Partnership or any Partner. The General Partner will owe a duty of loyalty and a duty of care to the Partnership.” The court stated that “[t]he contract by its plain language distinguishes a fiduciary duty from duties of loyalty and care,” and “[f]ailing to give effect to this distinction would fail to ‘harmonize and give

effect’ to both sentences.” The court noted by way of footnote that each limited partnership agreement “[a]dditionally, . . . tracks the general meaning of the Texas statute governing the duties of general partners. See Tex. Bus. Orgs. Code Ann. § 152.204 (West Supp. 2018).” The court held that the parties intended to disclaim any fiduciary duties, and the court granted summary judgment as to the breach-of-fiduciary-duty claims against the general partner and dismissed those claims.

In *Strebel v. Wimberly*, 371 S.W.3d 267 (Tex. App.—Houston [1st Dist.] 2012, pet. denied), the court of appeals gave effect to a waiver of fiduciary duties in a limited partnership agreement (governed by the Texas Revised Limited Partnership Act) that provided: “The General Partner shall not have duties (including fiduciary duties) except as expressly set forth in this agreement.” The agreement did not specify any fiduciary duties. The general partner of the limited partnership was an LLC, and Wimberly argued that Strebel, the managing member of the LLC, took actions that breached a fiduciary duty to Wimberly as a limited partner. The court concluded that the actions of which Wimberly complained were all taken by Strebel in his capacity as managing member of the general partner and could not form the basis of a breach-of-fiduciary-duty claim because the fiduciary duties of the general partner had been expressly disclaimed in the limited partnership agreement. The court stated that general partners in a limited partnership owe fiduciary duties to the limited partners but noted that “the supreme court has emphasized the importance of honoring parties’ contractual terms defining the scope of their obligations and agreements, including limiting fiduciary duties that might otherwise exist.” The court stated that “[t]his is especially true in arms-length business transactions in which the parties are sophisticated businessmen represented by counsel, as the parties were here.” The court did not discuss the provisions of the Texas Revised Partnership Act that are now found in Section 152.002(b)(2), (3), and (4) of the BOC or the argument that these provisions applied to the limited partnership pursuant to the linkage of the general partnership and limited partnership statutes (as implicitly recognized in *Jerry L. Starkey, TBDL, L.P. v. Graves*, 448 S.W.3d 88 (Tex. App.—Houston [14th Dist.] 2014, no pet.) and expressly recognized in *Cruz v. Ghani*, 2018 WL 6566642 (Tex. App.—Dallas 2018, pet. denied)).

3. Indemnification Under General Partnership Statutes

The BOC provides, as a default rule, for repayment of a partner who reasonably incurs a liability in the proper conduct of the business or for the preservation of its business or property. Tex. Bus. Orgs. Code § 152.203(d); *see also* Tex. Rev. Civ. Stat. art. 6132b-4.01(c) (expired Jan. 1, 2010). The BOC also provides that a domestic entity, which would include a general partnership, has the power to “indemnify and maintain liability insurance for managerial officials, owners, members, employees, and agents of the entity or the entity’s affiliates.” Tex. Bus. Orgs. Code § 2.101(16); *see also* Tex. Rev. Civ. Stat. art. 6132b-3.01(15) (expired Jan. 1, 2010) (providing that a partnership has the power to “indemnify a person who was, is, or is threatened to be made a defendant or respondent in a proceeding and purchase and maintain liability insurance for such person”). The indemnification provisions of Chapter 8 of the BOC do not apply to a general partnership other than to specify that the partnership agreement of a general partnership may adopt provisions of Chapter 8 or include “other provisions” for indemnification, “which will be enforceable.” Tex. Bus. Orgs. Code § 8.002. There are no specified limits on a general partnership’s power to indemnify, and the partnership agreement governs the relations of the partners except to the extent the statute specifically restricts the partners’ ability to define their relationship under BOC Section 152.002(b). Tex. Bus. Orgs. Code § 152.002(a); *see also* Tex. Rev. Civ. Stat. art. 6132b-1.03(a) (expired Jan. 1, 2010).

The BOC was amended in 2021 to add a provision clarifying that a requirement under Texas law that indemnification or exculpation for negligence be expressly or conspicuously stated does not apply to a provision in an entity’s governing documents that provides for indemnification or exculpation. Tex. Bus. Orgs. Code § 8.005. This provision makes clear that the so-called “fair notice” and “express negligence” doctrines that generally apply to contractual indemnification and exculpation provisions under Texas common law, *see, e.g., Dresser Industries, Inc. v. Page Petroleum Products, Inc.*, 853 S.W.2d 505 (Tex. 1993), do not apply to the governing documents of Texas entities governed by the BOC.

4. Indemnification Under Limited Partnership Statutes

In the BOC, one set of indemnification provisions governs both corporations and limited partnerships. *See* Tex. Bus. Orgs. Code §§ 8.001-8.152. The TRLPA contained indemnification provisions patterned largely after the TBCA provisions. *See* Tex. Rev. Civ. Stat. art. 6132a-1, §§ 11.01-11.21 (expired Jan. 1, 2010). A limited partnership is required to indemnify a general partner who is “wholly successful on the merits or otherwise” unless indemnification is limited or prohibited by the partnership agreement. Tex. Bus. Orgs. Code §§ 8.051-8.003; *see also* Tex. Rev. Civ. Stat. art. 6132a-1, §§ 11.08, 11.21 (expired Jan. 1, 2010). The limited partnership is prohibited from indemnifying the general partner if the general partner was found liable to the limited partnership or for improperly receiving a personal benefit if the liability was based on the general partner’s willful or intentional misconduct in the performance of a duty to the limited partnership, breach of the partner’s duty of loyalty to the limited partnership, or an act or omission not in good faith constituting a breach of duty to the limited partnership. Tex. Bus. Orgs. Code § 8.102(b)(3); *cf.* Tex. Rev. Civ. Stat. art. 6132a-1, §§ 11.03, 11.05 (prohibiting indemnification of general partner found liable to limited partners or partnership, or for improperly receiving personal benefit, if liability arose out of willful or intentional misconduct in performance of duty to limited partnership).

Under the TRLPA, a limited partnership was permitted, *if provided in a written partnership agreement*, to indemnify a general partner who was determined to meet certain standards. Tex. Rev. Civ. Stat. art. 6132a-1, §§ 11.02, 11.05 (expired Jan. 1, 2010). The BOC provides for such permissive indemnification without the necessity of any provisions in the partnership agreement. Tex. Bus. Orgs. Code §§ 8.102, 8.103. The standards for permissive indemnification require that the general partner acted in good faith, reasonably believed the conduct was in the best interest of the partnership (if the conduct was in an official capacity) or that the conduct was not opposed to the partnership’s best interest (in cases of conduct outside the general partner’s official capacity), and, in the case of a criminal proceeding, had no reasonable cause to believe the conduct was unlawful. Tex. Bus. Orgs. Code § 8.101; *see also* Tex. Rev. Civ. Stat. art. 6132a-1, § 11.02 (expired Jan. 1, 2010). If a general partner is found liable to the limited partnership or on the basis of improperly receiving a personal benefit, permissible indemnification is limited to reasonable expenses (other than the judgment, penalty, or excise or similar taxes). Tex. Bus. Orgs. Code § 8.102(b); *see also* Tex. Rev. Civ. Stat. art. 6132a-1, § 11.05 (expired Jan. 1, 2010). Indemnification may be limited by the partnership agreement, or it may be mandated by the partnership agreement, a resolution of the partners, or a contract. Tex. Bus. Orgs. Code §§ 8.003, 8.103(c); *see also* Tex. Rev. Civ. Stat. art. 6132a-1, § 11.07. (expired Jan. 1, 2010). A general partner may only be indemnified to the extent consistent with the statutes. Tex. Bus. Orgs. Code § 8.004; *see also* Tex. Rev. Civ. Stat. art. 6132a-1, § 11.13 (expired Jan. 1, 2010).

The BOC was amended in 2021 to add a provision clarifying that a requirement under Texas law that indemnification or exculpation for negligence be expressly or conspicuously stated does not apply to a provision in an entity’s governing documents that provides for indemnification or exculpation. Tex. Bus. Orgs. Code § 8.005. This provision makes clear that the so-called “fair notice” and “express negligence” doctrines that generally apply to contractual indemnification and exculpation provisions under Texas common law, *see, e.g., Dresser Industries, Inc. v. Page Petroleum Products, Inc.*, 853 S.W.2d 505 (Tex. 1993), do not apply to the governing documents of Texas entities governed by the BOC.

Limited partners, officers, employees, and agents who are not also general partners may be indemnified to the extent consistent with other law as provided by the partnership agreement, general or specific action of the general partner, contract, or common law. Tex. Bus. Orgs. Code § 8.105; *see also* Tex. Rev. Civ. Stat. art. 6132a-1, §§ 11.15, 11.17 (expired Jan. 1, 2010).

Insurance, self-insurance, or other arrangements providing indemnification for liabilities for which Chapter 8 does not otherwise permit indemnification are expressly permitted. Tex. Bus. Orgs. Code § 8.151; Tex. Rev. Civ. Stat. art. 6132a-1, § 11.18 (expired Jan. 1, 2010). Approval of the limited partners (by a vote of a majority-in-interest) is required for self-insurance or another arrangement with a party other than a commercial insurer if the indemnification extends to liabilities the limited partnership would not otherwise have to power to indemnify. Tex. Bus. Orgs. Code § 8.151(c), (c-1).

Chapter 8 of the BOC governs any proposed indemnification by a domestic entity after January 1, 2010, even if the events on which the indemnification is based occurred before the BOC became applicable to the entity. Tex. Bus. Orgs. Code § 402.007. A special transition provision in the BOC regarding

indemnification states that “[i]n a case in which indemnification is permitted but not required under Chapter 8, a provision relating to indemnification contained in the governing documents of a domestic entity on the mandatory application date that would otherwise have the effect of limiting the nature or type of indemnification permitted by Chapter 8 may not be construed after the mandatory application date as limiting the indemnification authorized by Chapter 8 unless the provision is intended to limit or restrict permissive indemnification under applicable law.” Tex. Bus. Orgs. Code § 402.007. This provision will be helpful in interpreting some pre-BOC indemnification provisions, but its application will not always be clear; therefore, a careful review of indemnification provisions in pre-BOC governing documents is advisable.

V. ADVANCEMENT

The issue of advancement of expenses in connection with a proceeding should also be considered in connection with indemnification and exculpation. Chapter 8 of the BOC contains provisions authorizing advancement of expenses in the corporate and limited partnership contexts pursuant to specific procedures. Chapter 8 permits advancement of expenses to a governing person upon a written affirmation by the governing person that the person has met the standard necessary for indemnification and a written undertaking to repay the amount paid or reimbursed if it is finally determined that the person has not met the standard or that indemnification is prohibited. Tex. Bus. Orgs. Code § 8.104(a); *see also* Tex. Bus. Corp. Act art. 2.02-1K (expired Jan. 1, 2010); Tex. Rev. Civ. Stat. art. 6132a-1, § 11.11 (expired Jan. 1, 2010). The written undertaking need not be secured and may be accepted by the entity without regard to the person’s ability to make repayment. Tex. Bus. Orgs. Code § 8.104(c); *see also* Tex. Bus. Corp. Act art. 2.02-1L (expired Jan. 1, 2010); Tex. Rev. Civ. Stat. art. 6132a-1, § 11.12 (expired Jan. 1, 2010). Advancement of expenses of governing persons can be made mandatory by provisions in the governing documents or a contract or by action of the owners or governing authority. Tex. Bus. Orgs. Code § 8.104(b); *see also In re Aguilar*, 344 S.W.3d 41 (Tex. App.—El Paso 2011, no pet.) (applying Texas Business Corporation Act advancement provisions and enforcing bylaw provision that stated corporation “shall” advance expenses); Tex. Bus. Corp. Act art. 2.02-1K (expired Jan. 1, 2010); Tex. Rev. Civ. Stat. art. 6132a-1, § 11.11 (expired Jan. 1, 2010). Advancement for officers, agents, and employees who are not governing persons is permitted to the extent consistent with other law as provided by the governing documents, action of the governing authority or owners, contract, or common law. Tex. Bus. Orgs. Code § 8.105; *see also* Tex. Bus. Corp. Act art. 2.02-1P, Q (expired Jan. 1, 2010); Tex. Rev. Civ. Stat. art. 6132a-1, §§ 11.15, 11.17 (expired Jan. 1, 2010).

Chapter 8 does not apply to an LLC or general partnership unless the governing documents of such an entity adopt the provisions of Chapter 8. Tex. Bus. Orgs. Code § 8.002. In the LLC context, the BOC authorizes advancement of expenses without specifying procedures. *See* Tex. Bus. Orgs. Code §§ 101.402(a)(2) (stating that LLC may “pay in advance or reimburse expenses incurred by a person”); *cf.* Tex. Rev. Civ. Stat. art. 1528n, art. 2.20(A) (expired Jan. 1, 2010) (referring to LLC’s power to indemnify and provide insurance, but not explicitly mentioning advancement). In *Energy Founders Fund, LP v. Daskevich*, 2026 Tex. Bus. 17, 2026 WL 964374 (Tex. Bus. Ct. 11th Div. 2026), the court explained the concept of advancement of expenses of legal fees as they are incurred in a lawsuit, and further explained that the BOC permits, but does not require, LLCs to provide for indemnification and advancement, providing freedom of contract with respect to who is covered, what claims qualify, and what conditions must be satisfied. In *Mundy v. Savell*, 2026 WL 1375482 (Tex. App.—El Paso 2026, no pet. h.), the appellate court upheld a temporary injunction in which the trial court found a probable right of recovery on claims for breach of fiduciary duty, prohibited the manager from using LLC funds to pay her legal fees or make various other payments for her benefit, and required the manager to deposit into the court’s registry an amount equal to the funds already spent by the LLC to pay her attorney’s fees in the case. The manager argued the trial court abused its discretion by prohibiting her from paying her attorney’s fees with LLC funds because Tex. Bus. Orgs. Code § 101.402 allows such payments. The court rejected the manager’s argument because the statute “provides only that a company *may* cover such fees, not that it must.” The manager argued that the LLC could have chosen to restrict advancement or indemnification, but the court pointed out that “the right to

advancement or indemnification is not the default,” and there was no provision in the LLC’s regulations (i.e., company agreement) giving the manager the right to pay her legal expenses from LLC funds.

In *L Series, L.L.C. v. Holt*, 571 S.W.3d 864 (Tex. App.—Fort Worth 2019, pet. denied), the court discussed the expansive nature of the statutory provisions in the LLC context. The court of appeals held that the trial court’s advancement order was not subject to interlocutory appeal, and the court denied mandamus relief because the trial court did not abuse its discretion in ordering advancement based on a mandatory advancement provision in the regulations (i.e., company agreement) of several LLCs. The court concluded that the contractual provisions at issue required advancement of the defendant’s expenses even though the defendant would not be entitled to indemnity if his alleged misconduct was ultimately established. In *Equine Holdings, LLC v. Jacoby*, 2020 WL2079183 (Tex. App.—Dallas 2020, pet. denied), the court held that an LLC member’s claim for indemnification of attorney’s fees incurred in a pending action was ripe, even though the action was not concluded, because the indemnification provision in the LLC’s articles of organization encompassed attorney’s fees and did not condition indemnification on the outcome of an action but merely on the determination of the members that the indemnitee acted in good faith and in a manner reasonably believed to be in the best interest of the LLC. Because the members had previously made the requisite determination and the LLC had previously paid attorney’s fees incurred by the member in the action, the court rejected the LLC’s argument that the member’s indemnification claim (which was based on the LLC’s refusal to continue paying the member’s attorney’s fees) was premature. In the case of *In re DeMattia*, 644 S.W.3d 225 (Tex. App.—Dallas 2022, orig. proceeding), the court of appeals relied on Delaware and Texas case law to conclude that a Texas LLC that sued its former managing member was obligated by the indemnification and advancement provision of the LLC’s regulations (i.e., company agreement) to advance the managing member’s legal fees incurred in defending the lawsuit notwithstanding the LLC’s arguments that the managing member had unclean hands and that enforcement of the provision would violate public policy. In *Energy Founders Fund, LP v. Daskevich*, 2026 Tex. Bus. 17, 2026 WL 964374 (Tex. Bus. Ct. 11th Div. 2026), the Texas Business Court interpreted an advancement provision contained in an LLC’s company agreement, holding that the provision in effect at the time of the events underlying the lawsuit applied notwithstanding amendment of the company agreement to eliminate the provision at the inception of the lawsuit, but the provision did not entitle the defendant to advancement in the suit against the defendant by the company because advancement was provided for claims against a director brought “by reason of” his service as a director, and the claims were brought based on the defendant’s alleged actions as an equity holder (resisting transfer of his units by failing to comply with procedures provided by drag-along provisions) rather than as a director.

The BOC does not specifically address advancement by a general partnership other than to authorize the partnership agreement to contain provisions on advancement. *See* Tex. Bus. Orgs. Code § 8.002(b). There is no provision of the BOC that specifically limits the extent to which advancement could be provided by the partnership agreement. *See* Tex. Bus. Orgs. Code §§ 2.101, 8.002(b), 152.002.

VI. CONCLUSION

Fiduciary-duty issues in the context of business organizations are not controlled by case law alone. The statutes governing the various types of business organizations contain provisions relating to fiduciary duties and liabilities arising from such duties, and the governing documents of a particular entity may contain provisions affecting the fiduciary duties and liabilities of those involved in the business. Whether the different approaches to fiduciary duties, liabilities, and indemnification under the various Texas business entity statutes amount to a significant difference between the entities might be debated; however, subtle differences may certainly prove significant in particular cases. Recent amendments to the Texas Business Organizations Code provide new opportunities for private ordering in the governing documents of an entity with respect to fiduciary duties and related liabilities. Understanding the differences in, and ramifications of, the statutory provisions addressing the duties and liabilities of governing persons and other managerial officials in the various forms of business entities, as well as the manner and extent to which the governing documents may impact those duties and liabilities, is critical when drafting or reviewing governing documents.