

# **FIDUCIARY DUTIES IN ALTERNATE ENTITIES**

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# Michael C. Holmes

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## Biography

Michael has been a member of the firm's litigation department since 1997. His practice includes corporate governance, mergers & acquisitions, representation of directors and officers, securities litigation, contracts, and general commercial disputes. Michael has significant experience in Delaware corporate law matters and master limited partnerships. Michael has tried cases before state and

federal courts and arbitration panels, and has handled a variety of corporate investigations, including internal investigations and investigations initiated by the Securities and Exchange Commission.

Michael has been recognized by *Texas Rising Stars* from 2004 - 2011 and by *Texas Super Lawyers* in 2012 and 2013.

Michael currently serves as a leader of the firm's Securities Litigation and Enforcement practice group.

## Representative Experience

### Corporate Governance, M&A, D&O, and Securities Litigation and Enforcement Cases

- Lead lawyer for publicly held master limited partnership and its directors and officers in lawsuits pending in Missouri and Delaware arising from simplification transaction
- Lead lawyer for public master limited partnership in lawsuits filed in Delaware arising from recapitalization and restructuring
- Lead lawyer for master limited partnership in lawsuits filed in Oklahoma and Delaware arising from go-private transaction
- Lead lawyer for master limited partnership in lawsuits filed in multiple forums, including Delaware, arising from acquisition of another MLP
- Lead lawyer for master limited partnership in lawsuit filed in Texas arising from asset drop down
- Lead lawyer for foreign publicly traded energy company in lawsuits filed in Delaware and Texas challenging fairness of its \$4.0 billion acquisition with another publicly-traded company
- Represented Southwest Airlines in lawsuits filed in Nevada and Florida challenging fairness of its merger with AirTran
- Lead lawyer for committee of independent directors of specialty retail company in lawsuits filed in Delaware and California challenging fairness of a go-private transaction; case was settled favorably to our clients and transaction closed
- Obtained dismissal of securities fraud class action against telecommunications company
- Obtained dismissal with prejudice of securities fraud class action and shareholder derivative claims against largest domestic electrical subcontractor
- Defeated shareholder challenges filed in Louisiana state and federal court to a \$1.3 billion merger based on allegations of inadequate price and disclosures
- Defended with other V&E lawyers software company and its directors in class action lawsuit challenging approval of proposed merger
- Defended with other V&E lawyers directors of telecommunications company in derivative case challenging proposed merger; merger closed after favorable settlement
- Obtained dismissal of shareholder challenge to telecommunications merger following parties' settlement
- Represented private equity group in challenge of merger of supermarket company that was settled favorably to our client
- Submitted amicus brief to Texas Supreme Court on issue of aides liability under Texas Securities Act

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### Industries/Practices

Antitrust

Commercial and  
Business Litigation

Director and Officer  
Liability

Energy

Finance

Financial Institutions  
Litigation

Securities Litigation  
and Enforcement

where court adopted arguments in our brief

- Part of team that obtained dismissal of putative securities fraud class action lawsuit filed against multinational energy services company
- Part of team that represented officers and directors of an S&P 500 company in putative securities fraud class action; clients' motion to dismiss was granted, and plaintiffs were denied opportunity to replead
- Part of team that represented industrial valve company in various securities fraud lawsuits involving alleged accounting irregularities; cases settled favorably to our client
- Part of team that represented broker-dealer in "trading away" lawsuits brought in Texas state court; case settled after court compelled arbitration of several plaintiffs' claims and severed remaining plaintiffs into several trial groups
- Part of team that represented individual in connection with SEC investigation for potential insider trading; no enforcement action ever taken
- Represented numerous companies and individuals in inquiries conducted by the Securities and Exchange Commission concerning a variety of issues, including internal controls, books and records, accounting, and disclosures

#### Case Citations

- *In re Inergy Unitholder Litigation* - C.A. No. 5816-VCP, in the Delaware Court of Chancery, Wilmington, Delaware
- *Loneragan v. EPE Holdings LLC*, 5 A.3d 1008 (Del. Ch. 2010)
- *Lormand v. US Unwired*, 2006 WL 2366342 (E.D. La. Aug. 11, 2006), reversed in part, 565 F.3d 228 (5th Cir. 2009)
- *Central Laborers' Pension Fund v. Integrated Elec. Servs.*, 497 F.3d 546 (5th Cir. 2007)
- *Feyler v. U.S. Unwired*, 2005 WL 2050280 (E.D. La. Aug. 11, 2005)
- *In re Securities Litigation BMC Software, Inc.*, 183 F. Supp. 2d 860 (S.D. Tex. 2001)

#### Class Action Disputes

- Lead lawyer for group of car dealers in parallel federal antitrust and state DTPA class action cases alleging conspiracy to fix prices – class certification in federal case reversed on appeal and state cases settled favorably to our clients
- Obtained order reversing certification of a class alleging breach of contract claims against major credit card issuer
- Represented major consumer credit card issuer in lawsuit alleging violations of FDCPA; court granted motion to dismiss with prejudice
- Part of team that represented cable television provider in numerous class action lawsuits challenging the validity of late fees; cases settled in client's favor after court granted summary judgment on plaintiff's initial claim
- Obtained summary judgment for major domestic airlines in a federal antitrust class action case filed in North Carolina district court alleging conspiracy to reduce commissions paid to travel agents
- Represented consumer credit card issuer in various individual and class action lawsuits

#### Case Citations

- *Robinson v. Texas Automobile Dealers Association*, 307 F.3d 416 (5th Cir. 2004)
- *Capital One Bank v. Rollins*, 106 S.W.3d 286 (Tex. App.—Hous. [1st Dist], 2003)
- *Johnson v. Capital One Bank*, 2000 WL 1279661 (W.D. Tex. May 19, 2000)

#### Commercial Disputes

- Obtained judgment that the buyer in a \$10 billion merger breached its obligations to use its reasonable best efforts to secure its financing and consummate the merger with the client
- Lead lawyer in dispute among shareholders of a closely held corporation
- Obtained arbitration award of 90 percent of clients' damages in case involving allocation of offering proceeds
- Second-chaired arbitration on behalf of computer software company in arbitration involving issues of

breach of contract and breach of duty of good faith and fair dealing; arbitrator awarded client \$6.2 million in compensatory damages

- Second-chaired arbitration of multi-million dollar contract dispute; arbitrator denied claimant's primary allegations against our client and awarded only limited damages
- Second-chaired arbitration on behalf of international industrial company in a finder's fee dispute; arbitration panel found client not liable for finder's fee and awarded client costs
- Part of team that represented energy company in federal antitrust litigation; case was settled favorably to our client after filing motions for summary judgment
- Represented plaintiff private investors in breach of contract and stock fraud lawsuit; claims were settled week before trial

#### Case Citations

- *Hexion Specialty Chemicals, Inc., et al. v. Huntsman Corp.*, \_\_\_ A.2d, \_\_\_, 2008 WL 5704768 (Del. Ch. 2008)

*Prior results do not guarantee a similar outcome.*

#### Education and Professional Background

- The University of Texas, B.A. 1994, J.D. with honors, 1997 (Editor, *The Review of Litigation*)
- Judicial intern to The Honorable Jerry Buchmeyer, U.S. District Court for the Northern District of Texas, 1995
- Judicial intern to The Honorable Priscilla R. Owen, Texas Supreme Court, 1996
- Admitted to practice: Texas, 1997

#### Professional Recognition

- *Legal 500* U.S. in energy litigation; in securities and shareholder litigation; in M&A litigation, 2013
- Recognized in *Texas Super Lawyers*, 2012 - 2013
- Recognized in *Texas Rising Stars*, 2004 - 2011

#### Activities and Affiliations

- Member: American Bar Association, Antitrust, Litigation, and International Law Sections; State Bar of Texas; Houston Bar Association; Houston Young Lawyers Association
- Committee Member: Civil Practice and Procedure Committee of the American Bar Association Section of Antitrust Law

#### Publications and Presentations

- "[Forum Selection Provisions: Why Strine Got It Right](#)," *Law360*, September 27, 2013 (co-author)
- "[Lessons from the Recent Delaware Supreme Court Opinions Concerning Master Limited Partnerships](#)," V&E's Securities Litigation and Enforcement and MLP Update E-communication, June 7, 2013 (co-author)
- "[Recent Chancery Court Decisions Expand Availability of Direct Claims for Stockholder Dilution Under Gentile](#)," *V&E Securities Litigation Insights*, Issue 10, Spring 2013 (co-author)
- "MLPs and Resolutions of Conflicts: Conflicts Committees, Fairness Opinions, and Process," V&E CLE Event, Energy Finance Series, April 10, 2013 (co-presenter)
- "[Say-On-Pay Lawsuits Losing Steam](#)," *Law360*, July 10, 2012 (co-author)
- "[Five Significant Delaware Corporate Governance Opinions in 2011](#)," *V&E Securities Litigation Insights*, Winter 2012 (co-author)
- "[MLP and Securities Litigation](#)," V&E CLE Event, December 6, 2011 and December 4, 2012 (co-presenter)
- "[Delaware Court of Chancery Awards \\$1.2 Billion Under Entire Fairness Standard in Shareholder Derivative Action](#)," V&E Securities Litigation and Enforcement E-Communication, October 26, 2011 (co-author)
- "[Fifth Circuit Revives the SEC's Insider Trading Case Against Mark Cuban](#)," V&E Securities Litigation and Enforcement E-communication, September 22, 2010 (co-author)
- "[Get Prepared for Dodd-Frank](#)," V&E Securities Litigation and Enforcement E-communication, August 4, 2010 (co-author)
- "[Recent Developments Concerning the PSLRA's Safe Harbor Provision](#)," *V&E Securities Litigation Insights*, Summer 2010 (co-author)

- "Fifth Circuit Clarifies Loss Causation Standards," *V&E Securities Litigation and Enforcement E-Comm*, September 2009 (co-author)
- "[The \\$10 Billion Huntsman Litigation: The Inside Story](#)," *V&E Litigation News*, Spring 2009 (co-author)
- "Dealing with the Post-Announcement Merger Challenge," *V&E Litigation News*, Spring 2007 (co-author)
- "'Clone' Derivative Actions: Securities Fraud Claims in Sheep's Clothing?" *V&E Litigation News*, Fall 2005 (co-author)
- "Are 'Expert' Directors Subject to Greater Liability for Breach of Fiduciary Duties?" *V&E Litigation News*, Winter 2005 (co-author)

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# Fiduciary Duties in Alternate Entities

— Advanced Business Law, Dallas, Texas

Presented by:

Michael C. Holmes  
Vinson & Elkins LLP

November 7, 2013

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## Introduction

- ❖ Overview of Traditional Fiduciary Duties and Alternate Entities
- ❖ Relevant Delaware Statutes Governing Alternate Entities
- ❖ Relevant Texas Statutes Governing Alternate Entities
- ❖ Standard Contractual Provisions in Alternate Entity Agreements
- ❖ Delaware Supreme Court Cases

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## Traditional Fiduciary Duties (Delaware Law)

- Director's basic fiduciary duties are duty of care and loyalty
- Fiduciary duties are governed and restricted by:
  - Common law rules
  - Delaware General Corporation Law
  - Federal statutory laws, including the federal securities laws
  - Listing standards published by national registered securities exchanges (e.g., the NYSE, NASDAQ and NYSE AMEX)
  - The company's charter documents (certificate of incorporation and bylaws), corporate governance guidelines and charters of Board committees

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## What are alternate entities?

General and limited partnerships and limited liability companies are often referred to alternate entities or alternative entities because they are alternatives to the traditional corporation or unincorporated entities.

Trend in recent years show an uptick in litigation involving alternate entities

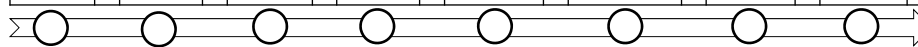
Duties for alternate entities governed by statute, entities' governing documents and common law

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## Representative Litigation Involving Alternate Entities

								Buckeye (\$1.14 billion)	D	Enbridge (\$1.2 billion)	D			
								Eagle Rock (\$1.2 billion)	D	Energy Transfer (\$2 billion)	D	El Paso (Brinkerhoff) (\$810 million)	P	
								Enterprise (\$9 billion)	D	Energy Transfer/ Southern Union (\$6 billion)	D	El Paso (Allen) (\$667 million)	P	
								Inergy (\$2 billion)	D	Kinder Morgan/ El Paso (\$21.1 billion)	P	El Paso (Hite Hedge) (\$38 billion)	D	Plains All American (\$750 million)
Gotham (increased control from 5 to 30%)	D					Hiland (\$369 million)	D	Williams (\$12 billion)	D	K-Sea/ Kirby (\$600 million)	D	Summit Midstream (\$835 million)	D	Pioneer (\$1.46 billion)
Cencom (\$15 million)	D	Brickell (\$170 million)	D	Texas Eastern (Teppco) (\$3.3 billion)	P	Atlas (\$1.42 billion)	P	Penn Virginia (\$955 million)	D	Encore/ Vanguard (\$1.05 billion)	D	Hi-Crush (\$220 million)	*	Inergy/ Crestwood (\$7 billion)
1996		2001		2008		2009		2010		2011		2012		2013



D	Defense Oriented Outcome (Including Disclosure Settlement)
P	Plaintiff Oriented Outcome
*	Pending

Corporate Opportunity	Restructuring
Drop-Down	GP Simplification
Joint Venture	Take Private
Merger	IPO

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## Delaware Statutes

DRULPA Section 17-1101(d):

To the extent that, at law or in equity, a partner or other person has duties (including fiduciary duties) to a limited partnership or to another partner . . . the partner's or other person's duties may be expanded or restricted or eliminated by provisions in the partnership agreement; provided that the partnership agreement may not eliminate the implied contractual covenant of good faith and fair dealing.

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## Delaware Statutes Cont . . .

LLC Act Section 18-1101(c):

To the extent that, at law or in equity, a member or manager or other person has duties (including fiduciary duties) to a limited liability company or to another member or manager or to another person that is a party to or is otherwise bound by a limited liability company agreement, the member's or manager's or other person's duties may be expanded or restricted or eliminated by provisions in the limited liability company agreement; provided, that the limited liability company agreement may not eliminate the implied contractual covenant of good faith and fair dealing.

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## Texas Statutes

- Texas Business Organizations Code governs entities formed in Texas, including limited partnerships (Ch.151-54 ) and limited liability companies (Ch. 101)
- Limited partners owe duties of loyalty, care and good faith (TBOC § 152.204)
- Fiduciary duty waiver not as explicit as Delaware statutes
- No published Texas opinion construing fiduciary duty waiver provisions

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## Texas Statutes Cont. . .

- TBOC Section 153.152:  
Except as provided by this chapter, the other limited partnership provisions, or a partnership agreement, a general partner of a limited partnership has the rights and powers and is subject to the restrictions of a partner in a partnership without limited partners.
- Introductory clause suggests waiver by contract is okay, but no published opinion has expressly confirmed
- *Strebel v. Wimberly*, 371 S.W.3d 267 (Tex. App.--Houston [1st Dist.] 2012, pet. filed) (holding that parties contractually disclaimed traditional fiduciary duties, but not relying on Section 153.152)

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## Relevant Texas Statutes

- TBOC Section § 101.401:  
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.
- No published opinion interpreting statute

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## Standard Contractual Provisions

- Elimination of all duties other than the implied contractual covenant of good faith and fair dealing
- Mechanisms for handling transactions with potential conflicts of interests

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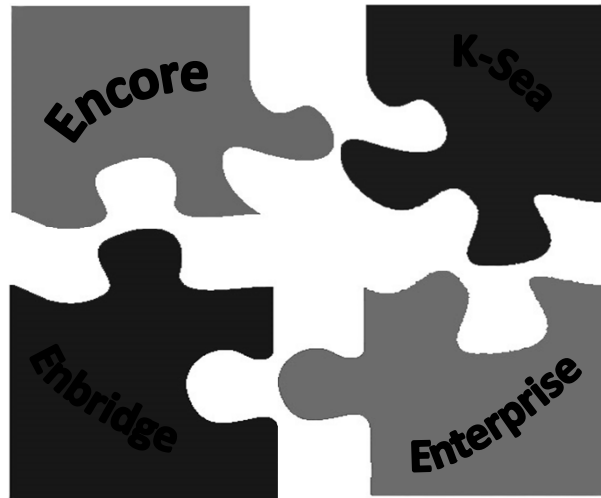
## Standard Contractual Provisions (cont...)

- Redefine governing standard
  - Good faith standard for GP when acting as GP
  - Sole discretion when acting in individual capacity
- Indemnification except in cases of bad faith
- Conclusive presumption of good faith for reliance on expert advice (i.e., financial advisors, legal counsel)

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### Delaware Supreme Court Case Studies



**Norton v. K-Sea Transp. Partners L.P., 67 A.3d 354, 2013 WL 2316550 (Del. May 28, 2013)**

- Plaintiffs challenged merger between K-Sea and Kirby Corporation, which included a separate payment to GP for its IDRs
- Merger received Special Approval from a conflicts committee that obtained fairness opinion from an investment bank
- Court of Chancery granted dismissal and the Delaware Supreme Court affirmed:

## K-Sea Cont . . .

- Court of Chancery granted dismissal and Delaware Supreme Court affirmed:
  - LPA waived traditional fiduciary duties, imposed contractual duty to act in good faith, a granted GP sole discretion to consent to a merger
  - Contractual duty to act in, or at least not inconsistent with, the best interests of K-Sea
  - Contractual Special Approval process was permissive and not mandatory.
  - GP was entitled to a conclusive presumption of good faith under the LPA because it relied on the opinion of an investment bank

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## **Brinckerhoff v. Enbridge Energy Co., 67 A.3d 369, 2013 WL 2321598 (Del. May 28, 2013)**

- Plaintiff challenged JV between Enbridge and its MLP
- JVA was approved by GP special committee after obtaining an opinion from an investment bank that the price was “representative of an arm’s length transaction”
- Defendants moved to dismiss, which the Court of Chancery granted. Plaintiff appealed, and the Delaware Supreme Court remanded for consideration of Plaintiff’s claim for reformation. After the Court of Chancery held that Plaintiff waived any claim for reformation by not raising it in a timely manner, Plaintiff appealed again

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## Enbridge Cont . . .

- Court of Chancery granted dismissal and Delaware Supreme Court affirmed both lower court rulings:
  - LPA waived traditional fiduciary duties, imposed contractual duty to act in good faith, and limited defendants' monetary liability to acts that were not taken in good faith
  - GP was entitled to a conclusive presumption of good faith based on its reliance on opinion from investment bank
  - Plaintiff failed to sufficiently plead any bad faith conduct
  - Plaintiff waived the claim for reformation by not timely raising it

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## **Gerber v. Enterprise Products Holdings, LLC, 67 A.3d 400, 2013 WL 2477233 (Del. June 10, 2013)**

- Plaintiff challenged EPE's 2009 sale of a company it owned to Enterprise Products, and 2010 merger of EPE into a wholly owned subsidiary of Enterprise Products
- GP gave Special Approval to each transaction after obtaining a fairness opinion from an investment bank
- The Court of Chancery granted dismissal:
  - LPA waived traditional fiduciary duties and imposed contractual duty to act in good faith
  - No breach of the LPA because GP obtained Special Approval for both transactions
  - Breach of the implied covenant claims were barred because GP was entitled to a conclusive presumption of good faith for relying on the opinion of an investment bank

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**Gerber Cont . . .**

- Delaware Supreme Court affirmed dismissal of the breach of fiduciary duty claims against GP, but reversed and remanded on all other claims.
  - Conclusive presumption of good faith not a bar to implied covenant claim
  - Plaintiff pleaded bad faith

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**Allen v. Encore Energy Partners, L.P., No. 534-2012 (Del. July 22, 2013)**

- Plaintiffs challenged Encore's merger with Vanguard, which owned GP and 46% of Encore's common units
- Conflicts committee gave "Special Approval" to the merger after obtaining a fairness opinion from an investment bank

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## Encore Cont . . .

- The Court of Chancery granted dismissal:
  - LPA waived traditional fiduciary duties and imposed contractual duty to act in good faith
  - Special Approval process deemed merger not a breach and the grant of Special Approval was subject to a rebuttable presumption of good faith
  - Dismissed implied covenant claim
  - GP was entitled to a conclusive presumption that it acted in good faith because it relied on the opinion of a financial advisor
- Delaware Supreme Court affirmed dismissal

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## Takeaways

### Delaware

- Use clear, express language to eliminate all traditional fiduciary duties except implied covenant of good faith and fair dealing
- Definition of good faith & bad faith
- Objective fact relevant for subjective analysis that is contractually required
- Procedural mechanisms in alternate entity agreements will be upheld if strictly followed
- Conclusive presumption provision enforceable, but does not foreclose implied covenant claim

### Texas

- Partners owe fiduciary duty to partnership and other LPs
- Enforceability of provision waiving traditional fiduciary duties is unclear

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## Speaker Profile

**Michael C. Holmes, Partner**  
*mholmes@velaw.com • +1.214.220.7814*

Michael has been a member of the firm's litigation department since 1997. His practice includes corporate governance, mergers & acquisitions, representation of directors and officers, securities litigation, contracts, and general commercial disputes. Michael has significant experience in Delaware corporate law matters and master limited partnerships. Michael has tried cases before state and federal courts and arbitration panels, and has handled a variety of corporate investigations, including internal investigations and investigations initiated by the Securities and Exchange Commission. Michael has been recognized by Texas Rising Stars from 2004 - 2011 and by Texas Super Lawyers in 2012 and 2013.

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