

**RESTRICTING/ELIMINATING FIDUCIARY DUTIES
IN TEXAS AND DELAWARE**

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CHAPTER 5.3

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Restricting/Eliminating Fiduciary Duties in Texas and Delaware

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Fiduciary Duties



- § Absent express contractual modification, general partners/managers have traditional fiduciary duties to the limited partnership/LLC and its equityholders



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Fiduciary Duties



§ Duty of Loyalty

- Motivated solely by the best interests of the limited partnership/LLC and its equityholders.
- Not permitted to use their position of trust and confidence to further their private interests.

§ Duty of Care

- Be attentive and inform itself of all material facts regarding a decision before taking action.
- Affirmative duty to protect the financial interests of the limited partnership/LLC and its equityholders and must proceed with a critical eye in assessing information.

§ Duty of Disclosure

- Honesty when communicating with equityholders.
- Disclose all material information reasonably available when seeking equityholder action.



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Standard of Review



§ Business Judgment Rule

- The rule presumes that “in making a business decision the fiduciary acted on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the company/partnership.” *Unocal v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985).
- Where the presumptions of the business judgment rule apply, a court will not substitute its judgment for that of the fiduciary—but will instead sustain the fiduciary’s decision—if the decision “can be attributed to any rational business purpose.” *Unocal v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985).



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Standard of Review



§ Enhanced Scrutiny

- generally requires that the fiduciary defendant “bear the burden of persuasion to show that [its] motivations were proper and not selfish” and that “[its] actions were reasonable in relation to [its] legitimate objective.” *Mercier v. Inter-Tel (Del.), Inc.*, 929 A.2d 786, 810 (Del. Ch. 2007).
- Enhanced scrutiny applies in situations where the “decision making context can subtly undermine the decisions of even independent directors,” such as a board’s resistance to a hostile takeover or proxy contest; in contexts where “the law provides stockholders with a right to vote and the directors take action that intrudes upon the space allotted for stockholder decision making”; and in change-of-control transactions, such as cash-out mergers. See *Reis v. Hazelett Strip-Casting Corp.*, 28 A.3d 442, 457-58 (Del. Ch. 2011).



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Standard of Review



§ Entire Fairness

- The entire fairness inquiry requires the fiduciary to demonstrate both fair price and fair dealing.
 - § “[Fair price] relates to the economic and financial considerations of the proposed [transaction], including all relevant factors: assets, market value, earnings, future prospects, and any other elements that affect the intrinsic or inherent value of a company’s stock.” *Weinberger v. UOP, Inc.*, 457 A.2d 701, 711 (Del. 1983).
 - § “[Fair dealing] embraces questions of when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and the stockholders were obtained.” *Id.*
- The inquiry, however, is a holistic one; thus, if the price is very fair, an unfair process may not render a transaction entirely unfair.



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Standard of Review



§ Rebutting Presumption of BJR

- Assuming that a decision is made with requisite care, a plaintiff seeking to rebut the presumptions of the business judgment rule must demonstrate that the fiduciary responsible for the decision had a disabling conflict of interest in the decision and/or was not independent or, if the decision did not result from self-interest, that the fiduciary did not act in good faith. *Citron v. Fairchild Camera & Instrument Corp.*, 569 A.2d 53, 64 (Del. 1989).



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Standard of Review



§ Interested

- Fiduciaries are considered “interested” if they either “appear on both sides of a transaction” or “expect to derive any personal financial benefit from it in the sense of self-dealing, as opposed to a benefit which devolves upon the corporation or all stockholders generally.” *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984).
- § Financial interest, motives of entrenchment, and abdication of directorial duty often lead to allegations of interestedness.
- § The test of financial interestedness is one of materiality and depends on whether the director’s interest does or is likely to affect the director’s action. *Cinerama, Inc. v. Technicolor Inc.*, 663 A.2d 1156, 1169 (Del. 1995).



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Standard of Review



§ Independence

- A director is deemed to be independent “when he is in a position to base his decision on the merits of the issue rather than being governed by extraneous considerations or influences.” *Kaplan v. Wyatt*, 499 A.2d 1184, 1189 (Del. 1985).
- Mere conclusory allegations of structural bias on the part of a director, or of domination or control of that director by an interested party, will not be sufficient to demonstrate a disabling conflict to overcome the presumption of the business judgment rule. See, e.g., *Aronson*, 473 A.2d at 816.
 - § But directors may be found to be not independent if facts are presented that “would demonstrate that through personal or other relationships the directors are beholden to the controlling person.” *Id.* at 815.



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Fiduciary Duty Bonanza



- § ***CanCan Dev., LLC v. Manno*, C.A. No. 6429-VCL (Del. Ch. May 27, 2015) (V.C. Laster)**
- § The facts described a number of self interested actions by the initial managing member of an LLC
- § The Court applied an entire fairness standard to several of the acts and found the manager had breach her duty of loyalty
- § The Court discussed the standard for a claim for waste
 - No person of ordinary, sound judgment would have made the decision
 - Manager was liable for luxury sporting box seats about which she had lied and not used for business guests and for compensation paid to a convicted felon friend (give the regulated casino business)



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Fiduciary Duty Bonanza



- § **CanCan ...con't**
- § Counter claims were made by the initial managing member against the member who took control of the Company
 - Claim for usurpation of company opportunity failed because the LLC lacked resources to pursue opportunity
- § The Court applied an entire fairness standard of review to the new controller's actions in causing the dissolution of the LLC since he held a preferred interests with rights senior to the ordinary interests of the other members
 - The new managing member was found to not have breached his fiduciary duties even under an entire fairness standard of review
- § Interesting discussion of reverse Veil-piercing
 - Court noted different policies and analytical considerations apply to reverse piercing, and claim was not properly presented

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Who Owes Fiduciary Duties?



§ Controlling Members

- § In *Kelly v. Blum*, a controlling member initiated and completed a freeze-out merger, at the expense of minority owners of the LLC; the court held that such controlling member in fact owed fiduciary duties absent a clear waiver (which was absent). 2010 WL 629850 (Del. Ch., February 24, 2010).
 - Controlling shareholders-typically defined as shareholders who have voting power to elect directors, cause a break-up of the company, merge the company with another, or otherwise materially alter the nature of the corporation and the public shareholder's interests owe certain fiduciary duties to minority shareholders. Specifically...such fiduciary duties include the duty 'not to cause the corporation to effect a transaction that would benefit the fiduciary at the expense of the minority stockholders.
- § *Zimmerman v. Crothall, et al.*, C.A. No. 6001-VCP (Del. Ch. Jan. 31, 2013). The claim against the majority members failed as the Court found that they were not acting in concert.

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Who Owes Fiduciary Duties?



§ Controlling Members can't

§ *Bay Ctr Apartments* held that a complaint stated a breach of fiduciary duty claim against the owner of an entity that managed the LLC where the complaint alleged that the owner had used his control to stave off personal liability under a guarantee. *Bay Center Apartments Owner, LLC v. Emery Bay PKI, LLC*, 2009 WL 1124451 (Del. Ch., April 20, 2009).

- The Court noted that the scope of fiduciary duties of a controlling entity may be limited, but at least included "the duty not to use control over the partnership's property to advantage the corporate director at the expense of the partnership." (citing *USACafes*)



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Who Owes Fiduciary Duties?



§ Controlling Members can't

§ In ***Friedman v. Aimco Props, L.P.*, 2015 Del. Ch. LEXIS 33 (Feb. 10, 2015)**, the Court of Chancery clarified that the concept of controlling stockholder from corporate law may be misplaced in the limited partnership context where a limited partner with a large or minority ownership had no power to manage or control the limited partnership because that power was contractually given to the general partner.



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Who Owes Fiduciary Duties?



§ Delaware Courts have imposed fiduciary duties upon those who act for the benefit of another.

- In *USACafes*, the Court found that directors of a corporate general partner owed a fiduciary duty of loyalty to the partnership and its limited partners
 - See *In re USACafes, L.P. Litig.*, 600 A.2d 43 (Del. Ch. 1991).
 - "the principle of fiduciary duty, stated most generally, [is] that one who controls property of another may not, without implied or express agreement, intentionally use that property in a way that benefits the holder of the control to the detriment of the property or its beneficial owner." *Id.* at 48



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Who Owes Fiduciary Duties?



§ In *Feeley v. NHAOCG, LLC*, 62 A.3d 649 (Del. Ch. 2012), the court addressed who may owe fiduciary duties in the absence of an operating agreement provision to the contrary, including passive investors who take on an active role in management of the entity.

–The court discusses the *USA Cafes* line of Court of Chancery precedents and notes that an individual “controller” owes only the duty of loyalty.

§ Declined to expand *USA Cafes* to duty of care claims.

–The court held that claims of aiding and abetting breach of contract, while not recognized for commercial contracts, plead a valid claim in the context of an operating agreement where the agreement provides a contractual fiduciary duty standard.

–The court discussed the difference between eliminating fiduciary duty and eliminating liability.



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Who Owes Fiduciary Duties?



§ Unlike corporations, creditors do not have standing to bring derivative actions on behalf of an LLC under the Delaware LLC Act and thus do not have standing to bring claims for breach of fiduciary duty, even when the LLC is insolvent.

– *CML v. Bax*, C.A. No. 735,2010 (Del. Sept. 6, 2011).

§ The Court stated that Section 18-1002 of the LLC Act expressly limits the right to sue derivatively on behalf of an LLC to members and assignees. The Court noted Appellant had ample remedy at law because it could have negotiated its remedies by contract.



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Who Owes Fiduciary Duties?



§ ***CMS Inv. Holdings, LLC v. Castle*, C.A. No. 9468-VCP (Del. Ch. June 23, 2015) (V.C. Parsons)**

§ Breach-of-fiduciary duty claims brought against managers and related parties based on alleged self-dealing scheme to force an LLC into insolvency and purchase its assets at a favorable value

§ Court applied *Tooley* analysis to find plaintiff's claims were more direct than derivative in nature, and at least dually direct and derivative

- If breach of contract claims were proven, the Class A Unitholders, including the Plaintiff would recover individually
- Predominant harm fell upon the Class A Unitholders



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Who Owes Fiduciary Duties?



§ ***CMS Inv. ..con't***

- § Court found traditional fiduciary duties applied not only to the Board of Managers but also certain high level officers
- § Court found that members of the Board of Managers were bound to the LLC Agreement even if not a party, and also bound by Implied Covenant
 - A high level officer who was not found bound to the LLC Agreement (but was a fiduciary) could not be in breach of the Implied Covenant
- § Court found that secondary liability (under an aiding and abetting claim) could exist where an entity acts as “middleman for and beneficiary of improper disbursements by’ the allegedly faithless fiduciaries with which they are affiliated.”

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Modifying Fiduciary Duties



- § Fiduciary duties may be expanded, restricted or eliminated in an LLC/LP Agreement
 - Sections 18-1101(c) and 17-1101(d).
- § The Delaware Court of Chancery distinguished the LLC/LP ability to modify fiduciary duties from the corporate context, stating that unlike the corporate context, the relationship between limited partners and a general partner is “primarily contractual in nature.”
 - *In re Cencom Cable Income Partners, L.P. Litigation*, C.A. No. 14636, at 5. (Del. Ch. Feb. 15, 1996)

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Modifying Fiduciary Duties



§ Why Modify?

- Avoid uncertainty and inefficiency
 - § Existence of inherent conflicts with control persons
 - § Allocation of opportunities
- Avoid divided loyalties
- Requirements of third parties
- Other effects
 - § Burden of proof shift



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Modifying Fiduciary Duties



§ In order to modify the default traditional fiduciary duties, the language in the LLC/LP Agreement must be clear and unambiguous.

- See, e.g., *Miller v. Am. Real Estate Partners, L.P.*, 2001 WL 1045643, at *8 (Del. Ch. Sept. 6, 2001) (citing *Sonet v. Timber Co., L.P.*, 772 A.2d 319, 322 (Del. Ch. 1998)).

§ The Court will attempt to reconcile the application of traditional default fiduciary duties with the terms of the partnership agreement. Default fiduciary duties will only be supplanted when the application of those duties irreconcilably conflicts with the rights and obligations of partners as set forth in the partnership agreement.

- See *R.S.M. Inc. v. Alliance Capital Mgmt. Holdings L.P.*, 790 A.2d 478 (Del. Ch. 2001); *Miller v. American Real Estate Partners, L.P.*, 2001 WL 1045643 (Del. Ch. Sept. 6, 2001).



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Modifying Fiduciary Duties



§ Drafting is critical

- *In re Atlas Energy Resources, LLC*, 2010 WL 4273122 (Del. Ch. Oct. 28, 2010) held that even though the LLC Agreement modified the fiduciary duties of directors and officers for an interested transaction through the approval of a special committee, it did not specifically modify the fiduciary duties of the controlling member, and therefore the controlling members still owed fiduciary duties to the minority members in an interested transaction.

§ Although the LLC Act explicitly allows modification or elimination of members' fiduciary duties, § 7.9(d) eliminates only directors and officers' fiduciary duties... Because the LLC Agreement does not eliminate [the controlling unitholder's] fiduciary duties, [the controlling unitholder] owes [the] minority unitholders "the traditional fiduciary duties that controlling shareholders owe minority shareholders."



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Modifying Fiduciary Duties



§ Drafting is critical

§ Entirety of agreement

- "Limited partnership agreements that attempt to modify, rather than eliminate, fiduciary duties often create a Gordian knot of interrelated standards in different sections of the agreement." (*Norton, et al. v. K-Sea Transp. Ptrs. L.P., et al.*, -- A.3d --, 2013 WL 2316550 (Del. May 28, 2013).)
- *Bay Center Apartments Owner, LLC v. Emery Bay PKI, LLC*, 2009 WL 1124451 (Del. Ch. Apr. 20, 2009)
 - § Conflicting provision on duties on same page of LLC Agreement pulled the fiduciary duties back in.



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Modifying Fiduciary Duties



§ Sample full elimination:

- To the fullest extent permitted by law, including Section [18-1101(c)][17-1101(d)] of the Act, and notwithstanding any other provision of this Agreement or in any agreement contemplated herein or applicable provisions of law or equity or otherwise, the parties hereto hereby agree that the [Manager][General Partner] shall owe no fiduciary duty to any [Member, the Company][Partner, the Partnership] or other person bound by the [LLC][LP] Agreement; provided, however, that the foregoing shall not eliminate duty to comply with the implied contractual covenant of good faith and fair dealing.



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Modifying Fiduciary Duties



§ Sample mechanic

- To the fullest extent permitted by law and notwithstanding any other provision of this Agreement or in any agreement contemplated herein or applicable provisions of law or equity or otherwise, the General Partner, shall not [owe any fiduciary duty][be in breach of any duties owed] to the Partnership or any of the Partners, shall not be liable to the Partnership or any of the Partners and shall not be in breach of this Agreement or applicable provisions of law or equity with respect to any actions or in actions taken [in good faith] by them with respect to any matter if, with respect to such matter (i) the General Partner consults with the LP Advisory Committee, and (ii) the General Partner acts in a manner approved by the LP Advisory Committee or pursuant to standards or procedures set by the LP Advisory Committee.
- Any consent of the LP Advisory Committee required or permitted under this Agreement may be replaced instead by obtaining the consent of a Majority in Interest in lieu of obtaining the consent of the LP Advisory Committee.



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Modifying Fiduciary Duties



§ Sample Burden Shift

- Notwithstanding any applicable provisions of law or equity or otherwise, the parties hereto agree that (i) in any proceeding relating to the determination of whether the Manager has met its duties under this Agreement or any applicable law there shall be a presumption that the Manager has met such duties and (ii) any person bringing or prosecuting a proceeding in the name or on behalf of the Company or the Member challenging any determination or action, or decision not to act, of the Manager, the person bringing or prosecuting such proceeding will bear the burden of proving by clear and convincing evidence that such duties were not met regardless of whether the Manager shall be regarded as an interested person or otherwise having a conflict of interest.



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Modifying Fiduciary Duties



§ Sample of burden shift and other deemed presumptions

- For all purposes of this Agreement and notwithstanding any applicable provision of law or in equity, a determination or other action or failure to act by one or more Indemnitees or other Persons conclusively will be deemed to be made, taken or omitted to be made or taken in “good faith” unless the Indemnitee(s) or such other Person(s), as applicable, subjectively believed such determination, action or failure to act was adverse to the interests of the Company. The belief of a majority of the Board of Managers or committee thereof shall be deemed to be the belief of the Board of Managers or such committee. In any proceeding brought by the Company, any Member or any other Person who is bound by this Agreement challenging an action, determination or failure to act, notwithstanding any provision of law or equity to the contrary, the Person bringing or prosecuting such proceeding shall have the burden of proving that such determination, action or failure to act did not satisfy the applicable standard of conduct pursuant to this Agreement. To the fullest extent permitted by law, any action or determination taken or made by one or more Indemnitees or other Persons which is not in breach of this Agreement shall be deemed taken or determined in compliance with this Agreement, the Act and any other applicable fiduciary requirements.



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Contractual Duties



§ Even with elimination of fiduciary duties, there are often contractual duties created that will have a similar effect

– Arm's Length

§ Neither the Manager nor any other Member shall be entitled to cause the Company to ... enter into any additional agreements with affiliates on terms and conditions which are less favorable to the Company than the terms and conditions of similar agreements which could then be entered into with arm's-length third parties, without the consent of a majority of the non-affiliated Members (such majority to be deemed to be the holders of 66-2/3% of all Interests which are not held by affiliates of the person or entity that would be a party to the proposed agreement).



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Contractual Duties



§ Language was reviewed by Delaware Supreme Court in *Gatz Properties, LLC v. Auriga Capital Corp.*, 59 A.3d 1206 (Del. 2012)

– The Court of Chancery determined that Section 15 imposed fiduciary duties in transactions between the LLC and affiliated persons. We agree. To impose fiduciary standards of conduct as a contractual matter, there is no requirement in Delaware that an LLC agreement use magic words, such as “entire fairness” or “fiduciary duties.” Indeed, Section 15 nowhere expressly uses either of those terms. Even so, we construe its operative language as an explicit contractual assumption by the contracting parties of an obligation subjecting the manager and other members to obtain a fair price for the LLC in transactions between the LLC and affiliated persons. **Viewed functionally, the quoted language is the contractual equivalent of the entire fairness equitable standard of conduct and judicial review.**



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Contractual Duties



- § Good Faith
 - A loaded term—use sparingly
- § Should we define "Good Faith"?
 - Reduces ambiguity
 - Potentially opens a can of worms



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Contractual Duties



- § *Policemen's Annuity and Benefit Fund of Chicago, Illinois, et al. v. DV Realty Advisors LLC*, 2012 WL 3548206 (Del. Ch. Aug. 16, 2012).
 - The Court considered whether the implied covenant imposed a requirement that LPs' decision to remove a partnership's general partner be objectively reasonable
 - The Court held that, because the removal provision granted the LPs the discretion to remove the general partner and established a specific standard for exercise of their discretion, the implied covenant was not applicable
 - The Court addressed the meaning of the term of "good faith" that was contractually required in the partnership agreement for the LPs' exercise of their removal rights.
 - In the absence of a contractually defined term of "good faith" in the LPA, the court applied the "purely subjective" definition of good faith it established in *Brinckerhoff v. Enbridge*.
 - The court confirmed that the contractual duty to act in "good faith" is different from the good faith concept encompassed in the implied covenant of good faith and fair dealing.
 - The court applied the traditional common law good faith definition set out in *Brinckerhoff*, holding that the LPs' determination to remove the GP would be considered to be in "good faith" unless the LPs in making such determination went "so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith."
 - § predominately subjective, with objective boundaries when dealing with utterly unreasonable conduct



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Contractual Duties



§ Examples of definitions of Good Faith

§ Notwithstanding anything to the contrary contained in this Agreement, it is understood and agreed by the Members that the term "good faith" as used in this Agreement shall, in each case ...

- mean the subjective belief that an act or omission to act was in, or not opposed to, the best interests of the Company
- mean that an act or omission to act was not done in conscious disregard of the best interests of the Company
- Means subjectively acting within the bounds of reasonable judgment and in the absence of bad faith
- mean subjectively acting with faithfulness to the scope, purpose and terms of this Agreement



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Implied Contractual Covenant



§ Regardless of any elimination of fiduciary duties, the implied contractual covenant will still exist.

- The purpose of the Covenant is to enforce the reasonable expectations of parties to a contract where situations arise that are not expressly contemplated and provided for in the language of the contract itself.

§ *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 442 (Del. 2005).



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Implied Contractual Covenant



- § Cannot eliminate the implied covenant of good faith and fair dealing
 - See, 6 *Del C.* § 18-1101(c) and 6 *Del C.* § 17-1101(d).
- § Implied covenant is the floor of an agreement and often misunderstood
 - It is not a fiduciary duty
 - Does not offer much protection
 - The purpose of the covenant is to enforce the reasonable expectations of parties to a contract where situations arise that are not expressly contemplated and provided for in the language of the contract itself

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Implied Contractual Covenant



- § The Courts have described the covenant as a "limited and extraordinary remedy that addresses only events that could not reasonably have been anticipated at the time the parties contracted," which is meant to "protect[] a party from arbitrary conduct that was objectively unanticipated by the terms of the contract and that frustrates the fruits of the bargain that the asserting party reasonably expected."
 - *In re Atlas Energy Res., LLC*, 2010 WL 4273122, at *13 (Del. Ch. Oct. 28, 2010)

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Implied Contractual Covenant



- § "The implied covenant of good faith and fair dealing involves a 'cautious enterprise,' inferring contractual terms to handle developments or contractual gaps that the asserting party pleads neither party anticipated."
 - *Nemec v. Shrader*, 991 A.2d 1120, 1125 (Del. 2010).
- § The Courts have asserted that when parties have expressly agreed to contractual provisions addressing an issue, the covenant cannot be invoked to override such express provisions.
 - See *Nemec*, 991 A.2d at 1128 (citing *Kuroda v. SPJS Holdings, L.L.C.*, 971 A.2d 872, 888 (Del.Ch.2009))("[T]he implied covenant cannot be invoked to override express provisions of a contract.")



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Implied Contractual Covenant



- § The Courts have stated that "where the parties have contractually agreed to eliminate fiduciary duties, they may not invoke the implied covenant of good faith and fair dealing as a back door through which such duties may be reimposed after the fact."
 - *Atlas*, 2010 WL 4273122, at *13.



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Implied Contractual Covenant



§ Application of Implied Covenant

- The use of the covenant to imply contract terms is a fact-intensive exercise governed by issues of compelling fairness.
§ *Dunlap v. State Farm & Cas. Co.*, 878 A.2d 434, 422 (Del. 2005).
- The test for determining whether the covenant has been breached requires the court to extrapolate the "spirit" of the contract from its express terms, and to determine whether it is clear that the parties would have agreed to proscribe the act complained of as a breach of the agreement had they thought to negotiate with respect to that matter.
§ *PAMI-LEMB I Inc. v. EMB-NHC, L.L.C.*, 2004 WL 1488720, at *14 (Del. Ch. 21, 2004)



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Implied Contractual Covenant



- § "Good Faith" may be a fiduciary duty or a contractual duty, but in either case, it is fundamentally distinct and different from the Implied Contractual Covenant of Good Faith and Fair Dealing.
- § In *Gerber v. Enterprise Products Holdings, LLC*, 67 A.3d 400 (Del. June 10, 2013), the Delaware Supreme Court considered on appeal a ruling by the Delaware Court of Chancery that defendants had not breached the implied covenant of good faith and fair dealing because their actions complied with the contractual standard of "good faith" as defined in the partnership agreement.
- § The Delaware Supreme Court overruled on this point, holding that the Chancery Court's opinion "improperly conflates two distinct concepts."



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Implied Contractual Covenant



§ Duty of Good Faith vs. Implied Covenant

- In *Gerber*, the Delaware Supreme Court adopted the discussion in *ASB Allegiance Real Estate Fund v. Scion Breckenridge Managing Member, LLC*, 50 A.3d 434 (Del. Ch. 2012).
- Temporal focus.
 - § Fiduciary/Contractual Duty – “[L]iability depends on the parties’ relationship when the alleged breach occurred, not on the relationship as it existed in the past.”
 - § Implied Covenant – “Looks to the past.” The court asks, “what the parties would have agreed had they considered the issue in their original bargaining positions at the time of contracting?”
 - § The fact that the phrase “good faith” is used in both instances is not relevant.



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Implied Contractual Covenant



- § “Fair dealing” is not akin to the fair process component of entire fairness, *i.e.*, whether the fiduciary acted fairly when engaging in the challenged transaction as measured by duties of loyalty and care whose contours are mapped out by Delaware precedents. It is rather a commitment to deal “fairly” in the sense of consistently with the terms of the parties’ agreement and its purpose.
- § Likewise “good faith” does not envision loyalty to the contractual counterparty, but rather faithfulness to the scope, purpose, and terms of the parties’ contract. Both necessarily turn on the contract itself and what the parties would have agreed upon had the issue arisen when they were bargaining originally



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