MODIFYING FIDUCIARY DUTIES IN DELAWARE: OBSERVING TEN YEARS OF DECISIONAL LAW

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ABSTRACT

In 2004, Delaware amended its laws to allow limited partnerships and limited liability companies (uncorporations) to eliminate or modify fiduciary duties in their uncorporation agreements. Looking to Delaware, the Author surveys thirty-six written fiduciary duty cases penned in the ten years immediately following the amendments to conduct a systematic content analysis; that is to say, the Author systematically read the thirty-six cases, recorded patterns, and drew inferences therefrom. The goal was to answer the following question: for those cases that elude settlement and are complicated enough to require the judge to issue a written decision, did the modification or elimination of fiduciary duties in the uncorporation agreement help protect management from a claim of breach of fiduciary duty?

The Author observes that a management's chance of success in such litigation (e.g., prevailing via motion to dismiss or motion for summary judgment) is not unrelated to how the uncorporation agreement in question modifies fiduciary duties. An uncorporation agreement that takes an ad-hoc approach to modification will often be self defeating, creating an interpretive Gordian knot unsuitable for dismissal. On the other hand, if the modification is structured to provide for special approval pursuant to a good faith standard, it is more likely that the court will dismiss the action.

Second, the Author surveys the same thirty-six cases to see what happens when plaintiffs buttress their fiduciary duty claims with a claim for breach of the implied covenant of good faith. The Author observes that despite the Court of Chancery's recurring admonition that the implied covenant is not a replacement for fiduciary duties, the implied covenant remains a potent attack where the uncorporation agreement partially modifies fiduciary duties, leaving discretionary gaps.

Finally, this Article provides some observations about the tactics of those uncorporations that successfully modify fiduciary duties to

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protect management—at least as those tactics are revealed in written decisions. One commonality is that their contractual modifications are not overly creative. No drafter of an uncorporation agreement—no matter how skilled—is capable of foreseeing how one creative provision will be interpreted in light of other provisions in the same agreement. Successful uncorporations seem to realize this, and appear to be coalescing around a standardized approach: approval by a special committee, coupled with a good faith standard.

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I. INTRODUCTION

On June 24, 2004, Delaware amended its laws to allow limited partnerships and limited liability companies ("uncorporations"[1]) to eliminate or modify fiduciary duties in their operating or "uncorporation" agreements ("2004 Elimination Amendments").[2] Looking to Delaware, I surveyed thirty-six written fiduciary duty decisions penned between 2004 and 2014 to conduct a systematic content analysis, that is to say, I systematically read the thirty-six fiduciary duty cases, recorded patterns,

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[1]*See generally* LARRY E. RIBSTEIN, THE RISE OF THE UNCORPORATION (2010) (coining the phrase "uncorporation"). This Article refers to the management documents for uncorporations as "uncorporation agreements."

[2]In referring to these pieces of legislation as the "2004 Elimination Amendments," I borrow from then-Chancellor Leo E. Strine, Jr. *See* Auriga Capital Corp. v. Gatz Props., LLC, 40 A.3d 839, 851-52 (Del. Ch. 2012), *aff'd*, 59 A.3d 1206, 1218 (Del. 2012). The Limited Partnership Act was amended by 74 Del. Laws, c. 265 (2004). Post-amendment, the Delaware Limited Partnership Act provides, in part, the following:

> 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 or to another person that is a party to or is otherwise bound by a partnership agreement, 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.

DEL. CODE ANN. tit. 6, § 17-1101(d) (2011) (emphasis added). The Limited Liability Company Act was amended by 74 Del. Laws, c. 275 (2004). Post amendment, the Delaware Limited Liability Company Act reads:

> A limited liability company agreement may provide for the limitation or *elimination* of any and all liabilities for breach of contract and breach of duties (including fiduciary duties) of a member, manager or other person 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; provided, that a limited liability company agreement may not limit or eliminate liability for any act or omission that constitutes a bad faith violation of the implied contractual covenant of good faith and fair dealing.

DEL. CODE. ANN. tit. 6, § 18-1101(e) (2011) (emphasis added); *see also* Brent J. Horton, *The Going-Private Freeze-Out: A Unique Danger for Investors in Delaware Non-Corporate Business Associations*, 38 DEL. J. CORP. L. 53, 69-71 (2013) (discussing the battle between the Delaware Supreme Court and Delaware General Assembly that culminated in the amendments); Myron T. Steele, *Judicial Scrutiny of Fiduciary Duties in Delaware Limited Partnerships and Limited Liability Companies*, 32 DEL. J. CORP. L. 1, 9-13 (2007) (discussing the conflict between the Delaware Supreme Court and the Delaware General Assembly). The 2004 Elimination Amendments followed previous amendments allowing for modification in general. *See* Larry E. Ribstein, *Unlimited Contracting in the Delaware Limited Partnership and Its Implications for Corporate Law*, 16 J. CORP. L. 299, 301 (1991) (explaining that the amendments were simply an acknowledgment of an already existing ability to modify fiduciary duties in uncorporation agreements).

and drew inferences therefrom.[3] The goal was to answer the following question: for those cases that elude settlement and are complicated enough to require the judge to issue a written decision, did the modification or elimination of fiduciary duties in the uncorporation agreement help insulate management from a claim of breach of fiduciary duty?[4] Early ad-hoc attempts at modifying fiduciary duties in uncorporation agreements proved ineffective—often creating a linguistic Gordian knot that frustrated courts[5]—but gave way to more competent strategies, such as special approval provisions.[6] A related observation: replacing traditional fiduciary duties with a special approval provision utilizing a lowered standard (such as subjective good faith) proved an effective strategy for insulating management from lawsuits for breach of fiduciary duty—at least for those cases that are litigated to the point of requiring a written decision.[7]

I then surveyed the same thirty-six written decisions to see what happens when plaintiffs buttress their fiduciary duty claims with a claim

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[3]*See* Mark A. Hall & Ronald F. Wright, *Systematic Content Analysis of Judicial Opinions*, 96 CALIF. L. REV. 63, 64 (2008) (discussing systematic content analysis). This approach has gained in popularity since Hall and Wright published their article in 2008. *See, e.g.*, David Adam Friedman, *Bringing Order to Contracts Against Public Policy*, 39 FLA. ST. U. L. REV. 563, 565 (2012) (using systematic content analysis to study public policy defense in contract law); Michael J. Bommarito II, Daniel Martin Katz & Jillian Isaacs-See, *An Empirical Survey of the Population of U.S. Tax Court Written Decisions*, 30 VA. TAX REV. 523, 527 (2011) (using systematic content analysis to determine what kind of litigants and cases appear before the United States Tax Court); Richmond McPherson & Nader Raja, *An Empirical Study of Piercing Rates and Factors Courts Consider When Piercing the Corporate Veil*, 45 WAKE FOREST L. REV. 931, 932 (2010) (using systematic content analysis to examine trends in corporate veil piercing).

[4]A more ambitious question would not include the qualifier "for those cases that elude settlement and are complicated enough to require the judge to issue a written decision." However, problems with litigation bias and decisional bias prevent any broader observations. The truly successful agreements, those that avoid litigation, are not observable. Further, the question posed is not meant to imply that uncorporations did not attempt such modifications pre-2004. *See* Gelfman v. Weeden Investors, LP, 859 A.2d 89, 110-12 (Del. Ch. 2004) (involving partial modification of fiduciary duties in limited partnership agreement dated pre-2004).

[5]Early partial modifications often resulted in questions of fact serious enough to justify victory for equity holders, allowing the claims to at least make it beyond motions to dismiss. *See* Bay Ctr. Apartments Owner, LLC v. Emery Bay PKI, LLC, 2009 WL 1124451, at *8-9 (Del. Ch. Apr. 20, 2009) (denying motion to dismiss where operating agreement dated November 1, 2005 partially, and ambiguously, modified fiduciary duties); Kahn v. Portnoy, 2008 WL 5197164, at *13 (Del. Ch. Dec. 11, 2008), *reprinted in* 34 DEL. J. CORP. L. 1123 (2009) (denying defendant's motion to dismiss).

[6]Allen v. El Paso Pipeline GP Co., 113 A.3d 167, at 192-93 (Del. Ch. 2014) (dismissing claim for breach of fiduciary duty where challenged transaction received special approval), *aff'd*, 2015 WL 803053 (Del. Feb. 26, 2015).

[7]*See infra* Part IV.D, Table I.

for breach of the implied covenant of good faith.[8] When plaintiffs are discouraged by contractual language from bringing a traditional fiduciary duty claim (which is a tort claim), they often fall back on the implied covenant claim (which is a contract claim).[9] This Article describes how, despite the Court of Chancery's recurring admonition that the implied covenant is not a replacement for fiduciary duties,[10] the implied covenant remains a potent attack where an uncorporation agreement partially modifies fiduciary duties, leaving discretionary gaps.[11]

The structure of this Article is as follows: Part II sets out limitations, methodology and existing scholarship. This part provides an important discussion of how the chosen methodology necessarily limits the observations that can be drawn. Part III provides the reader with a short overview of fiduciary duties, a topic that is treated in great detail by other scholars.[12] Part IV provides a summary of my observations and provides a summary chart. Part V details my observations and provides analysis. Part VI presents final observations, lessons for drafters, some of which are intuitive, but some of which may come as a surprise. Appendix I is a table, listing the thirty-six written decisions surveyed in chronological order, the authoring judicial official, a brief description of the type of fiduciary modification, the nature of the fiduciary claim, and the disposition of the fiduciary claims. The table also lists any associated implied covenant claim, together with its disposition.

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[8]*See infra* Part V.D, E.

[9]Lonergan v. EPE Holdings LLC, 5 A.3d 1008, 1016 (Del. Ch. 2010) ("[T]he plaintiff seeks to cloak familiar breach of fiduciary duty theories in the guise of the implied covenant of good faith and fair dealing."); Wiggs v. Summit Midstream Partners, LLC, 2013 WL 1286180, at *8 (Del. Ch. Mar. 28, 2013) ("The Plaintiffs argue that even if the Defendants' actions were technically permissible under the [uncorporation agreement], the Defendants still violated the implied covenant of good faith and fair dealing because they 'repeatedly acted in bad faith to prohibit Plaintiffs from receiving the fruits of their bargain . . . .'").

[10]*See, e.g.*, *In re* El Paso Pipeline Partners, LP, 2014 WL 2768782, at *20 (Del. Ch. June 12, 2014) (quoting *Lonergan*, 5 A.3d at 1017) ("The implied covenant is not a substitute for fiduciary duty analysis.").

[11]*See, e.g.*, Gerber v. Enter. Prods. Holdings, LLC, 67 A.3d 400, 426 (Del. 2013) (reversing the Court of Chancery's determination that the complaint failed to state a claim for breach of the implied covenant).

[12]*See, e.g.*, Myron T. Steele, *The Moral Underpinnings of Delaware's Modern Corporate Fiduciary Duties*, 26 NOTRE DAME J.L. ETHICS & PUB POL'Y 3 (2012) (presenting the historical evolution of the duty of care and loyalty); Randy J. Holland, *Delaware Directors' Fiduciary Duties: The Focus on Loyalty*, 11 U. PA. J. BUS. L. 675 (2009) (detailing the fiduciary duties of care and loyalty in Delaware); Steele, *supra* note 2, at 4 (discussing the intersection of fiduciary duties and contractual freedom in Delaware); Lyman Johnson, *After Enron: Remembering Loyalty Discourse in Corporate Law*, 28 DEL. J. CORP. L. 27, 40 (2003) (discussing the duty of loyalty).

II. LIMITATIONS, METHODOLOGY AND CONTRIBUTION TO EXISTING SCHOLARSHIP

A. *Limitations*

"The term 'empirical' is used to describe a variety of topics and methodologies (and, arguably, to cover a variety of sins)."[13] Some claim that one such "sin" is using judicial decisions as data, because of the inherent obstacles posed by small sample size, selection bias, and publication bias.[14] Nevertheless, this Article engages in the "sin" of treating judicial decisions as data, and works to draw inferences therefrom.

That being said, this Article is not *per se* empirical (you will see no reference to "statistical significance"[15] or complicated mathematical formulas that render much empirical work inaccessible to the vast majority of legal scholars, judges, and practitioners[16]). Instead, this Article engages in what Mark Hall and Ronald Wright call systematic content analysis of judicial opinions.[17] That is when "a scholar collects a set of . . . judicial opinions on a particular subject, and systematically reads them, recording consistent features of each and drawing inferences about their use and meaning."[18] By focusing on more than a few select appellate decisions the author can develop "a truer measure of broad patterns in the case law."[19]

I do not deny that there are limitations to treating judicial decisions as data. As indicated above, one of the most dangerous is settlement bias.[20] Settlement bias results from the fact that many cases are settled voluntarily, and those cases tend to have different characteristics than the few that elude settlement.[21] Yet scholars can observe only the few.[22]

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[13]Peter J. Hammer & William M. Sage, *Antitrust, Health Care Quality, and the Courts*, 102 COLUM. L. REV. 545, 559-60 (2002).

[14]William M. Sage, *Judicial Opinions Involving Health Insurance Coverage: Trompe L'Oeil or Window on the World?*, 31 IND. L. REV. 49, 61-68 (1998).

[15]*See* Tracey E. George, *An Empirical Study of Empirical Legal Scholarship*, 81 IND. L.J. 141, 146 (2006) (using the search term "statistical significance" as a locator for empirical legal scholarship).

[16]*See* Lee Epstein, Andrew D. Martin & Matthew M. Schneider, *On the Effective Communication of the Results of Empirical Studies, Part I*, 59 VAND. L. REV. 1811, 1814 (2006) ("When analysts write that 'the coefficient on Plaintiff Politics is statistically significant at the 0.05 level,' they likely immediately turn off many potential readers.").

[17]Hall & Wright, *supra* note 3, at 64.

[18]*Id.*

[19]*Id.* at 65.

[20]George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 2 (1984).

[21]*See id* at 2-3.

This is like the problem posed to a ship's captain by an iceberg.[23] Only a small portion appears above the water.[24] The captain can only observe the tip of the iceberg, but it would be folly to use the tip to draw conclusions about what lies below the surface.[25] To use an example pertinent to this Article, cases where the uncorporation agreement unambiguously eliminates fiduciary duties are more likely to result in settlement, because both parties will have similar predictions of the outcome.[26] The plaintiff will recognize the weakness of his case. The defendant will recognize the strength of hers. Thus, this Article will likely underestimate the number of uncorporation agreements that unambiguously eliminate fiduciary duties.

Another issue is publication bias.[27] All Delaware Supreme Court opinions are published; however, the same cannot be said of the decisions of the Delaware Court of Chancery.[28] Only a portion of those decisions are published in the reporters.[29] A judge might not submit his or her decision to the official reporters for publication if he "did not feel the decision represented his or her best written work."[30] Further, "a judge is more likely to publish an opinion in a case that is more complicated, longer, or involves particular subject matters . . . [or] in a close case—a case in which it is not clear which party should prevail—because the judge's decision in a close case is more likely to require an explanation than is a decision in a clear case."[31] Finally, Court of Chancery bench rulings, while available in transcript form, are very difficult (and expensive) to obtain.[32]

I admit a certain amount of "agonized hand-wringing"[33] about what conclusions I could reasonably draw from the data—the characteristics teased from the thirty-six written decisions. Likely thousands of uncorporation agreements will never see the light of day (via written decision) because they were successful in preventing

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[22] *Id.*

[23] Hammer & Sage, *supra* note 13, at 605 n.149.

[24] *Id.*

[25] *Id.*

[26] *See* Ahmed E. Taha, *Data and Selection Bias: A Case Study*, 75 UMKC L. REV. 171, 172-73 (2006).

[27] Sage, *supra* note 14, at 65.

[28] *See, e.g.*, Edward M. McNally, *The Court of Chancery Speaks by Transcript*, MORRIS JAMES LLP (Sept. 12, 2012), *archived at* https://perma.cc/Q3TU-SRYE.

[29] *Id.*

[30] *Id.*

[31] Taha, *supra* note 26, at 174.

[32] McNally, *supra* note 28.

[33] Hall & Wright, *supra* note 3, at 104.

litigation.[34] And, as mentioned above, "many claims are settled, . . . many trial decisions are not appealed [and a]ppellate courts regularly dispose of cases without opinions or decide not to publish some opinions . . . ."[35]

In the end, I decided that the best solution was to narrowly tailor the research question.[36] I asked: what can these judicial decisions actually tell us? The data can tell us something about the difficult cases—those that elude settlement and require the judge to issue a written decision. These are the four questions that presented themselves:

> (1) If an uncorporation agreement *eliminated* fiduciary duties, and the case is difficult enough to require a written decision, did the agreement insulate management from a claim of *breach of fiduciary duty*?
> (2) If an uncorporation agreement *eliminated* fiduciary duties, and the case is difficult enough to require a written decision, did the agreement insulate management from a claim of breach of the *implied covenant of good faith*?
> (3) If an uncorporation agreement *modified* fiduciary duties, and the case is difficult enough to require a written decision, did the agreement insulate management from a claim of *breach of fiduciary duty*?
> (4) If an uncorporation agreement *modified* fiduciary duties, and the case is difficult enough to require a written decision, did the agreement insulate management from a claim of breach of the *implied covenant of good faith*?

As indicated by the italics, the above questions are sorted based on the characteristics of the uncorporation agreement (elimination or modification), and the type of claim (fiduciary or implied covenant). The written decisions also lend themselves to providing data for a further subset of questions. These include:

> (5) What kind of elimination and modification provisions are being litigated to the point where a written decision is needed?
> (6) What businesses are these uncorporations engaged in?
> (7) Which judges are writing decisions?

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[34]*Id.*
[35]*Id.*
[36]*Id.*

B. *Methodology*

1. Case Selection

The project began by selecting decisional law penned following passage of the 2004 Elimination Amendments.[37] The cases were limited as follows:

> (1) the written decision must have come from the Delaware Court of Chancery or the Supreme Court of Delaware;
> (2) the written decision must have been decided on or after June 25, 2004 and before June 25, 2014 (the ten years immediately following passage of the Elimination Amendments);
> (3) the written decision must involve a claim for breach of fiduciary duty;
> (4) the written decision must involve an LP or LLC (an uncorporation); and
> (5) the written decision must cite section 17-1101 (allowing modification or elimination of fiduciary duties in LP uncorporation agreements) or section 18-1101 (allowing modification or elimination of fiduciary duties in LLC uncorporation agreements).[38]

2. Sorting the Cases

The result of the case selection phase was thirty-six cases.[39] The next step was to sort them. The cases were sorted by numerous elements, including court, judge, procedural posture, type of entity, whether the entity was publicly traded, the type of business, the type of transaction being challenged, whether the agreement modified or eliminated fiduciary duties (and how), and who prevailed. For purposes of writing this Article, the most important elements were the last three: the type of fiduciary duty implicated, whether the agreement modified or

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[37]DEL. CODE ANN. tit. 6, § 17-1101 (2011) (allowing for the elimination of fiduciary duties by LPs); DEL. CODE ANN. tit 6, § 18-1101 (2011) (allowing for the elimination of fiduciary duties by LLCs).

[38]After limiting the results to the appropriate jurisdiction and dates, the Lexis search was: fiduc! & ("17-1101" or "18-1101"). As such, some fiduciary duty cases where no modification was present may be excluded because the court had no need to cite Section 17-1101 or Section 18-1101.

[39]*See infra* Appendix I.

eliminated fiduciary duties (and how), and who prevailed. Twenty-five cases involved modified or eliminated fiduciary duties. Eleven cases applied traditional fiduciary duties despite the fact that they discussed the ability to eliminate or modify fiduciary duties. Those cases that modified or eliminated fiduciary duties were divided into three kinds: (1) partial modification without special approval, (2) partial modification with special approval, and (3) elimination. The particulars of each category will be set forth in more detail in Part IV, below.

Sorting the cases is not an easy task, and thus gives rise to a common criticism of systematic content analysis. Critics refer to such attempts to sort cases as "pseudo measurement."[40] Critics point out that the law "is the painting of a picture—not the doing of a sum."[41] Taking this Article as an example, whether a particular provision falls into the category of modifying or eliminating fiduciary duties is often unclear. The law of fiduciary duties is complicated and nuanced. A provision in an uncorporation agreement may contain elements of modification and elimination of fiduciary duties. Or a modification may result in a standard so close to the default common law as to be indistinguishable.

There are further limitations to this methodology. First, as a practical matter, only the uncorporation agreement provisions quoted or mentioned in the decision can be examined. That is to say, written decisions may not fully reflect what was contained in the uncorporation agreement. Take for example *Hite Hedge LP v. El Paso Corp*.[42] The written decision cites the fiduciary elimination provision in the uncorporation agreement,[43] but does not mention that the uncorporation agreement also contains a special approval provision.[44] This Article's stated methodology requires that the case be sorted into "elimination." That is to say, this Article treats the case as eliminating fiduciary duties, because the written decision only cited that specific part of the uncorporation agreement.

A more mundane problem involves determining who the decision favored—plaintiff or defendant. If a decision is split, dismissing some causes of action, and allowing others to continue, is that a victory for the

[40]Hall & Wright, *supra* note 3, at 82 (quoting Wallace Mendelson, *The Neo-Behavioral Approach to the Judicial Process: A Critique*, 57 AM. POL. SCI. REV. 593, 595, 602-03 (1963)).

[41]*Id.* (quoting Mendelson, *supra* note 40, at 602-03).

[42]2012 WL 4788658 (Del. Ch. Oct. 9, 2012).

[43]*Id.* at *3.

[44]*See id.* The special approval provision can be found in the full agreement on file with EDGAR, because El Paso Pipeline Partners, L.P. is publicly traded. El Paso Pipeline Partners, L.P., Amendment No. 2 to Form S-1 Registration Statement, at A-55, (Oct. 18, 2007), *archived at* https://perma.cc/S32R-FH45.

plaintiff? If the decision follows a bench trial, and the plaintiff is awarded $100,000 on a $1,000,000 breach of fiduciary duty claim, is that a victory for the plaintiff? This Article treats a particular decision as in favor of management if management convinced the court to dismiss the action. On the other hand, a decision is in favor of the plaintiff when any of its fiduciary duty claims survived a motion to dismiss,[45] motion for summary judgment, where the court approved a settlement of such claim,[46] or where the court awarded damages to the plaintiff following a trial.[47]

C. *Contribution to Existing Scholarship*

Despite the limitations, the above methodology does help to answer narrow questions, and has "considerable power for the discovery of anomalies which may escape the naked eye."[48] Take for example one of the questions posed above: If an uncorporation agreement *modifies* fiduciary duties, and the case is difficult enough to require a written decision, did the agreement insulate management for a claim of breach of fiduciary duty? This Article finds that the written decisions were more likely to side with management against the plaintiff's fiduciary duty claim, if the modification included special approval (plaintiffs only prevailed in one of seven written decisions). On the other hand, written decisions were less likely to side with management if the modification did not include special approval (plaintiffs prevailed in eight of fifteen decisions).

The reality is that any research that examines uncorporation agreements, which by definition are private law,[49] will be limited to the subsets that are subsequently brought into public view, in this case, by litigation. Alternative ways to learn about fiduciary eliminations or modifications in uncorporation agreements include surveying the

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[45] *See, e.g.*, Feeley v. NHAOCG, LLC, 62 A.3d 649, 655, 676 (Del. Ch. 2012) (plaintiff survived a motion to dismiss), *reprinted in* 37 DEL. J. CORP. L. 1115 (2013).

[46] *See, e.g.*, Brinckerhoff v. Tex. E. Prods. Pipeline Co., LLC, 986 A.2d 370, 374, 395 (Del Ch. 2010) (approving settlement in excess of $10 million).

[47] *See, e.g.*, Aurgia Capital Corp. v. Gatz Props., LLC, 40 A.3d 839, 879 (Del. Ch. 2012) (awarding plaintiffs $776,515), *aff'd*, 59 A.3d 1206 (Del. 2012).

[48] Hall & Wright, *supra* note 3, at 65 (internal citations omitted).

[49] *See* Daniel S. Kleinberger, *Series of Unincorporated Business Entities: The Mobius Strip and Klein Bottle of Business Entity Law*, BUS. L. TODAY, Feb. 2015, at 1, 4.

practitioners that draft such agreements,[50] or by reviewing public filings in the case of publicly traded uncorporations.[51]

One of the first empirical examinations of fiduciary modifications by uncorporations was conducted by Sandra Miller in 2006, *An Empirical Glimpse Into Limited Liability Companies*.[52] Professor Miller followed up with a recent article titled *The Best of Both Worlds*, which while supportive of the ability of uncorporation agreements to modify fiduciary duties, also argues that the modifications should only go to "specific types or categories of activities" and must not be "manifestly unreasonable."[53] Professor Miller suggests that such an approach is only prudent until the true impact of fiduciary modification and elimination provisions can be ascertained.[54] She calls for scholars to explore the impact of fiduciary modifications and eliminations.[55] This Article attempts to do that through a systematic content analysis of judicial decisions.

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[50]Sandra K. Miller et al., *An Empirical Glimpse into Limited Liability Companies: Assessing the Need to Protect Minority Investors*, 43 AM. BUS. L.J. 609, 615-618 (2006).

[51]*E.g.*, Horton, *supra* note 2, at 68-72 (examining uncorporation agreements of publicly traded LPs and LLCs); Suren Gomtsian, *The Governance of Publicly Traded Limited Liability Companies*, 40 DEL. J. CORP. L. 207, 218-24 (2015) (examining uncorporation agreements of publicly traded LLCs); Mohsen Manesh, *Contractual Freedom Under Delaware Alternative Entity Law: Evidence from Publicly Traded LPs and LLCs*, 37 J. CORP. L. 555, 557 (2012) (examining uncorporation agreements of publicly traded LPs and LLCs).

[52]Miller et al., *supra* note 50, at 609. Professor Miller surveyed 53 practitioners from Delaware that draft limited liability company agreements. *Id.* at 615. She measured the number of practitioners that reported modifying or eliminating fiduciary duties via survey. *Id.* at 624. Of those respondents from Delaware, 77% of respondents to her survey indicated that they drafted uncorporation agreements that eliminated or modified fiduciary duties. *Id.* She concluded that due to the inability of minority members to contractually protect themselves, fiduciary duties should be statutorily mandated. *Id.* at 639 ("[J]udicial or statutory remedies, may be needed in light of the practical realities of the contractual playing field."). The idea that minority unitholders cannot reasonably protect themselves was recently expanded on by Chief Justice Leo E. Strine, Jr. and Vice Chancellor J. Travis Laster. Leo E. Strine, Jr. & J. Travis Laster, *The Siren Song of Unlimited Contractual Freedom*, *in* RESEARCH HANDBOOK ON PARTNERSHIPS, LLCS AND ALTERNATIVE FORMS OF BUSINESS ORGANIZATIONS 11-27 (Robert W. Hillman & Mark J. Loewenstein eds., 2015). Their collective 20 years of experience left them with the firm belief that "it is almost always the case that the manager or general partner's counsel drafted the governing instrument and investors were only given the choice to sign up or not, but not to bargain over its terms." *Id.* at 23.

[53]Sandra K. Miller, *The Best of Both Worlds: Default Fiduciary Duties and Contractual Freedom in Alternative Business Entities*, 39 J. CORP. L. 295, 329-32 (2014) [hereinafter Miller, *Best of Both Worlds*] (approving of the California approach). In a forthcoming paper, Professor Miller suggests that the correct approach is to prohibit the elimination of fiduciary duties altogether, at least for publicly traded uncorporations. *See* Sandra K. Miller & Karie Davis-Nozemack, *Toward Consistent Fiduciary Duties For Publicly-Traded Entities*, 68 FLA. L. REV. (forthcoming 2016).

[54]Miller, *Best of Both Worlds*, *supra* note 53, at 328.

[55]*Id.* at 334.

III. A SHORT OVERVIEW OF FIDUCIARY DUTIES AND THE IMPLIED COVENANT OF GOOD FAITH

Before discussing how uncorporation agreements eliminate or modify fiduciary duties, it is important to discuss exactly what fiduciary duties are being modified or eliminated in those agreements. As such, this Part will provide a brief overview of the two categories of fiduciary duty, the duty of care and the duty of loyalty. It will also provide an explanation of the implied covenant of good faith, which rather than requiring fidelity to one's partners, requires fidelity to the contract.

A. *Fiduciary Duty of Loyalty*

In *Meinhard v. Salmon*, Chief Judge Benjamin Cardozo articulated the essence of the duty of loyalty among partners:

> [Partners] owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. . . .
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> [A partner puts] himself in a position in which thought of self [is] to be renounced, however hard the abnegation.[56]

Delaware courts mirror Judge Cardozo's formulation.[57] The Delaware

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[56] 164 N.E. 545, 546, 548 (N.Y. 1928).

[57] *See, e.g.*, Auriga Capital Corp. v. Gatz Props., 40 A.3d 839, 844 (Del. Ch. 2012). Perhaps the most famous Delaware case concerning the duty of loyalty is *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939) (emphasis added):

> If an officer or director of a corporation, in violation of his duty as such, acquires gain or advantage for himself, the law charges the interest so acquired with a trust for the benefit of the corporation, at its election, while it denies to the betrayer all benefit and profit. *The rule, inveterate and uncompromising in its rigidity, does not rest upon the narrow ground of injury or damage to the corporation resulting from a betrayal of confidence, but upon a broader foundation of a wise public policy that, for the purpose of removing all temptation, extinguishes all possibility of profit flowing from a breach of the confidence imposed by the fiduciary relation.* Given the relation

Court of Chancery recently stated, "[t]he purpose of the duty of loyalty is in large measure to prevent the exploitation by a fiduciary of his self-interest to the disadvantage of the minority."[58] The duty of loyalty requires that fiduciaries refrain from misappropriating assets, usurping business opportunities, self-dealing, or competing.[59]

Interestingly, while common law fiduciary duties were incorporated expressly into the Delaware Partnership Act,[60] the standards were not expressly incorporated into the Delaware Limited Partnership Act[61] or Delaware Limited Liability Company Act.[62] Be that as it may and despite some recent controversy,[63] it is now well accepted that absent a provision in the uncorporation agreement to the contrary, common law fiduciary duties apply to both limited partnerships and limited liability companies.[64] As such, the Delaware Supreme Court and the Delaware

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> between the parties, a certain result follows; and a constructive trust is the remedial device through which precedence of self is compelled to give way to the stern demands of loyalty.

[58]*Auriga Capital Corp.*, 40 A.3d at 884.

[59]ULLCA § 409(a)(b), (h)(2). The relevant portion states:

> (a) The only fiduciary duties a member owes to a member-managed company and its other members are the duty of loyalty and the duty of care imposed by subsections (b) and (c).
>
> (b) A member's duty of loyalty to a member-managed company and its other members is limited to the following:
>
> > (1) to account to the company and to hold as trustee for it any property, profit, or benefit derived by the member in the conduct or winding up of the company's business or derived from a use by the member of the company's property, including the appropriation of a company's opportunity;
> >
> > (2) to refrain from dealing with the company in the conduct or winding up of the company's business as or on behalf of a party having an interest adverse to the company; and
> >
> > (3) to refrain from competing with the company in the conduct of the company's business before the dissolution of the company.
>
> (c) A member's duty of care to a member-managed company and its other members in the conduct of and winding up of the company's business is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.

Id.

[60]DEL. CODE ANN. tit. 6, § 15-404 (2011).

[61]*See* DEL. CODE ANN. tit. 6, § 17-101 (2011).

[62]*See* DEL. CODE ANN. tit. 6, § 18-101 (2011).

[63]Gatz Props., LLC v. Auriga Capital Corp., 59 A.3d 1206, 1218 (Del. 2012) ("In these circumstances we decline to express any view regarding whether default fiduciary duties apply as a matter of statutory construction."); Mohsen Manesh, *Damning Dictum: The Default Duty Debate in Delaware*, 39 J. CORP. L. 35, 38 (2013) (discussing the confusion caused by *Gatz*).

[64]H.B. 126, 147th Gen. Assemb. (Del. 2013) (amending "§ 18-1104, Title 6 of the Delaware Code by making insertions as shown by underlining as follows: In any case not

Court of Chancery have been called upon to resolve disputes regarding alleged violations of the duty of loyalty, ranging from competing with the entity[65] to misappropriation.[66]

In *Meinhard v. Salmon*, the issue was misappropriation of business opportunity.[67] Meinhard and Salmon formed a partnership to operate real estate on Fifth Avenue, in New York City.[68] The partnership leased the real estate from 1902 to 1922, and sublet to various businesses and shops for a profit.[69] In 1922, when the lease was coming to an end, the landlord offered to enter into a new lease for twenty years, communicating the offer to Salmon.[70] Salmon formed a corporation of which he was the sole shareholder, and caused the corporation to enter into the lease.[71] Meinhard learned of this fact and brought a lawsuit claiming that the opportunity of leasing and operating real estate was the type that their partnership traditionally undertook.[72] Meinhard argued that Salmon should have presented it to the partnership, rather than keeping it for himself.[73] The New York Court of Appeals agreed, stating "[h]ere the subject-matter of the new lease was an extension and enlargement of the subject-matter of the old one. A [partner] appropriating the benefit of such a lease without [including] his partner might fairly expect to be reproached."[74] The court went on to place 50% of the shares of the newly formed corporation in trust for Meinhard (giving one extra share to Salmon so that he might maintain his management role).[75] In that way, Salmon was forced to give half his

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provided for in this chapter, the rules of law and equity, including the rules of law and equity relating to fiduciary duties and the law merchant, shall govern.").

[65] Touch of Italy v. Bascio, 2014 WL 108895, at *7 n.50 (Del. Ch. Jan. 13, 2014) (finding no violation of duty of loyalty where member properly withdrew from LLC before forming competing business).

[66] Reid v. Siniscalchi, 2014 WL 6589342, at *1 (Del. Ch. Nov. 20, 2014) (refusing to dismiss action where plaintiff alleged that defendants divested LLC "of its share of the joint venture's proceeds, misappropriated its assets, and usurped its corporate opportunities."); PT China LLC v. PT Korea LLC, 2010 WL 761145, at *29 (Del. Ch. Feb 26, 2010) ("[T]he allegation that [the defendant LLC manager] misappropriated [the LLC's] resources for his own benefit and that of his affiliates would be a classic example of self-dealing, and another breach of the duty of loyalty.").

[67] 164 N.E. 545, 546-48 (N.Y. 1928).

[68] *Id.*

[69] *Id.*

[70] *Id.* at 546.

[71] *Meinhard*, 164 N.E. at 551.

[72] *Id.* at 546.

[73] *Id.* at 547.

[74] *Id.* at 548.

[75] *Meinhard*, 164 N.E. at 548.

profits from the new venture to his partner, Meinhard.[76]

B. *Fiduciary Duty of Care*

A company's management must exercise care in its decision-making.[77] However, merely bad decisions do not violate the duty of care.[78] Instead the management's decision must rise to the level of gross negligence.[79] The reason that courts require a plaintiff to show that the challenged action was grossly negligent, as opposed to merely negligent, before they will find a violation of the duty of care is the business judgment rule.[80] Under the business judgment rule, courts presume "that in making a business decision the directors of a corporation act[] on an informed basis, in good faith and in the honest belief that the action taken [is] in the best interests of the company."[81] The reason is that courts "are generally hesitant to second-guess the actions of corporate officials or otherwise interfere in the internal affairs of a corporation, on the practical grounds that 'judges are not business experts and therefore should not substitute their judgment for the judgment of the directors.'"[82]

Here, the quintessential case is *Smith v. Van Gorkom*.[83] In that case, Van Gorkom was Trans Union's Chairman and CEO.[84] Trans Union was doing very well, with a cash flow of hundreds of millions of

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[76] *Id.*

[77] *See* Elizabeth S. Miller & Thomas E. Rutledge, *The Duty of Finest Loyalty and Reasonable Decisions: The Business Judgment Rule in Unincorporated Business Organizations?*, 30 DEL. J. CORP. L. 343, 346 (2005).

[78] Ash v. McCall, 2000 WL 1370341, at *10 (Del. Ch. Sept. 15, 2000) ("[M]ere allegations that directors made a poor decision—absent some showing of self-dealing or suspect motivation—[do] not state a cause of action . . . ."), *reprinted in* 27 DEL. J. CORP. L. 213 (2001).

[79] Feeley v. NHAOCG, LLC, 62 A.3d. 649, 664 (Del. Ch. 2012) ("Gross negligence is the standard for evaluating a breach of the duty of care."), *reprinted in* 37 DEL. J. CORP. L. 1115 (2013). The iconic, or infamous, Delaware decision on the duty of care is *Smith v. Van Gorkom*, 488 A.2d 858, 873 (Del. 1985).

[80] Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83, 83 (2003) ("The business judgment rule pervades every aspect of state corporate law, from the review of allegedly negligent decisions by directors, to self-dealing transactions, to board decisions to seek dismissal of shareholder litigation, and so on."); Miller & Rutledge, *supra* note 77, at 363-70 (discussing the duty of care in the LLC context).

[81] Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984).

[82] Blue Dane Simmental Corp. v. Am. Simmental Ass'n, 1997 Mont. Dist. LEXIS 50, at *35-36 (Jan. 13, 1997) (quoting Daniels v. Thomas, Dean & Hoskins, Inc., 804 P.2d 359, 367 (Mont. 1990)); *see also*, Horton, *supra* note 2, at 62.

[83] *Van Gorkom*, 488 A.2d at 872 (internal citations omitted) ("Under the business judgment rule there is no protection for directors who have made 'an unintelligent or unadvised judgment.' A director's duty to inform himself in preparation for a decision derives from the fiduciary capacity in which he serves the corporation and its stockholders.").

[84] *Id.* at 865-66.

dollars annually, but faced some tax challenges.[85] For reasons that are beyond the scope of this Article, one solution was to merge Trans Union into another company.[86] It is here that Van Gorkom took the initiative. He secretly met with a potential buyer, unilaterally offering up the company stock for $55 per share.[87]

While Van Gorkom's actions were unsavory, it is the action (or inaction) of the board of directors that implicates the duty of care.[88] Van Gorkom called a meeting of the directors, and on-the-spot presented the proposed deal to the Trans Union board.[89] The board was presented with no written studies or other documentation to support the price of $55 per share.[90] The board did not have a written summary of the proposed merger agreement.[91] After only two hours of deliberation, the board voted to approve the offer and present it to the shareholders.[92] Not surprisingly, the Delaware Supreme Court found that Trans Union's board of directors was grossly negligent:

> The directors (1) did not adequately inform themselves as to Van Gorkom's role in forcing the "sale" of the Company and in establishing the per share purchase price; (2) were uninformed as to the intrinsic value of the Company; and (3) given these circumstances, at a minimum, were grossly negligent in approving the "sale" of the Company upon two hours' consideration, without prior notice, and without the exigency of a crisis or emergency.[93]

The Court remanded the case to the Court of Chancery to award damages to the extent that the fair value of Trans Union exceeded $55 per share.[94]

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[85] *Id.* at 865.
[86] *Id.*
[87] *Van Gorkom*, 488 A.2d at 866.
[88] *Id.* at 868-89.
[89] *Id.* at 869. The proposal was presented in a twenty-minute oral presentation. *Id.*
[90] *Id.* at 869.
[91] *Van Gorkom*, 488 A.2d at 869.
[92] *Id*
[93] *Id.* at 874.
[94] *Id.* at 893. After the case was remanded, the parties settled for $23.5 million. *See* Bayless Manning, *Reflections and Practical Tips on Life in the Boardroom after* Van Gorkom, 41 BUS. LAW. 1, 1 n.a1 (1985).

C. *Implied Covenant of Good Faith*

The implied covenant of good faith is not a fiduciary duty.[95] However, the concept has a curious propensity for infiltrating fiduciary duty cases.[96] Unlike the fiduciary duties of loyalty and care, which are based in tort, the implied covenant of good faith and fair dealing is based in contract.[97] It is a requirement that each contracting party act with "faithfulness to the scope, purpose, and terms of the parties' contract."[98] Breach of the implied covenant requires the showing of "a specific implied contractual obligation, a breach of that obligation by the defendant, and resulting damage to the plaintiff."[99]

Many Delaware courts refer to the implied covenant as a "gap-filler."[100] While that characterization is technically correct, the use of the term "gap-filler" is somewhat misleading, because it implies that there must be something missing from the contract for the implied covenant to apply.[101] That is to say, it implies a material provision is missing.[102] A

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[95]*In re* El Paso Pipeline Partners, LP Derivative Litig., 2014 WL 2768782, at *20 (Del. Ch. June 12, 2014) (quoting Lonergan v. EPE Holdings, LLC, 5 A.3d 1008, 1017 (Del. Ch. 2010)) ("The implied covenant is not a substitute for fiduciary duty analysis.").

[96]*See* Monica E. White, *"Package Deal": The Curious Relationship Between Fiduciary Duties and the Implied Covenant of Good Faith and Fair Dealing in Delaware Limited Liability Companies*, 21 U. MIAMI BUS. L. REV. 111, 133 (2013).

[97]Bellemare v. Wachovia Mortg. Corp., 894 A.2d 335, 345-46 (Conn. App. Ct. 2005) (quoting Collins v. Anthem Health Plans, Inc., 880 A.2d 106, 119 (2005)) ("[A] claim brought pursuant to a contract, alleging a breach of the implied covenant of good faith and fair dealing, sounds in contract because '[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement . . . .'"); Road & Highway Builders, LLC v. N. Nev. Rebar, Inc., 284 P.3d 377, 383 (Nev. 2012) ("[T]he implied covenant of good faith and fair dealing . . . claim sounds in contract, and not tort. . . .").

[98]Gerber v. Enter. Prods. Holdings, LLC, 67 A.3d 400, 419 (Del. 2013) (emphasis omitted).

[99]NAMA Holdings, LLC v. Related WMC LLC, 2014 WL 6436647, at *16 (Del. Ch. Nov. 17, 2014) (quoting Fitzgerald v. Cantor, 1988 WL 842316, at *1 (Del. Ch. Nov. 10, 1998)) (internal quotation marks omitted).

[100]*In re El Paso*, 2014 WL 2768782, at *17 ("[T]he contract is silent on the subject, revealing a gap that the implied covenant might fill."); *NAMA Holdings*, 2014 WL 6436647, at *16 (quoting Allen v. El Paso Pipeline GP Co., 113 A.3d 167, 182 (Del. Ch. 2014)) ("The implied covenant of good faith and fair dealing is the doctrine by which Delaware law cautiously supplies terms to fill gaps in the express provisions of a specific agreement."); *Allen*, 113 A.3d at 183 ("When presented with an implied covenant claim, a court first must engage in the process of contract construction to determine whether there is a gap that needs to be filled."); *see also* Harold Dubroff, *The Implied Covenant of Good Faith in Contract Interpretation and Gap-Filling: Reviling a Revered Relic*, 80 ST. JOHN'S L. REV. 559, 582 (2006) (describing the gap filling nature of the implied covenant).

[101]I am concerned that the use of the term "gap" risks confusing the implied covenant with implied contract. "[A]n implied covenant is not to be confused with a *separate* implied contract, for the covenant is merely an obligation, or promise, that is implicitly contained *within* an existing contract." Travelers Indem. Co. v. United States, 16 Cl. Ct. 142, 149 (1988). The implied covenant requires that the court not allow one party to act in bad faith in

better approach is to recognize that the implied covenant is properly applied where an uncorporation agreement addresses a question, but there is room for discretion—what this Article will refer to as a "discretionary gap."[103] The implied covenant "should operate only in the narrow band of cases where the contract as a whole speaks sufficiently to suggest an obligation and point to a result, but does not speak directly enough to provide an explicit answer."[104]

Under this formulation, the implied covenant requires that discretion be exercised in good faith, in a manner that provides the contracting parties with the "fruits of their bargain."[105] Thus, the implied covenant is violated if discretion is exercised in such a way that the parties, at the time of contracting, would have viewed it (the way the discretion is exercised) as arbitrary or even nonsensical.[106] Thus, as the Delaware Supreme Court stated in *ASB Allegiance* and reiterated more recently in *Gerber*, "[w]hen exercising a discretionary right, a party to the contract must exercise its discretion reasonably."[107]

Interestingly, and perhaps counter-intuitively, what is reasonable is subjective: would *the specific parties to this contract*, at the time of contracting, have viewed the questioned exercise of discretion as reasonable?[108] Was the party exercising discretion being faithful to the terms of the contract?[109] The Supreme Court in *Gerber* provided several examples involving a company's comptroller seeking a fairness opinion from a financial advisor, where the implied covenant of good faith would

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its performance of the contract, whereas implied covenant requires that gaps be filled via traditional cannons of contractual interpretation, such as usage of trade. *Id.*

[102] *Id.*

[103] Gerber v. Enter. Prods. Holdings, LLC, 67 A.3d 400, 418-19 (Del. 2013) (emphasis omitted) (allowing an implied covenant claim to go forward, stating "[w]hen exercising a discretionary right, a party to the contract must exercise its discretion reasonably"); Third Story Music, Inc. v. Waits, 48 Cal. Rptr. 2d 747, 752 (Cal. Ct. App. 1995) (implied covenant limits the "interpret[ation of] an ambiguous discretionary power"); Andrew S. Gold, *On the Elimination of Fiduciary Duties: A Theory of Good Faith for Unincorporated Forms*, 41 WAKE FOREST L. REV. 123, 127 (2006) (arguing that in Delaware the implied covenant applies to discretionary gaps only). *But see* Mohsen Manesh, *Express Contract Terms and the Implied Contractual Covenant of Delaware Law*, 38 DEL. J. CORP. L. 1, 21-22 (2013) (dividing gaps into two categories, discretionary gaps and gaps in express rights).

[104] Dawson v. Pittco Capital Partners L.P., 2012 WL 1564805, at *25 (Del. Ch. Apr. 30, 2012) (quoting Lonergan v. EPE Holdings LLC, 5 A.3d 1008, 1018 (Del. Ch. 2010)).

[105] Nemec v. Shrader, 991 A.2d 1120, 1126 (Del. 2010).

[106] *See Gerber*, 67 A.3d at 419.

[107] *Id.* (emphasis omitted).

[108] *See id*. (highlighting that the parties' original intent controls what is reasonable or unreasonable in contracting).

[109] *Id.* at 418-19 (discussing that the obligation is to the contract and not to the contractual counterparty).

be violated.[110] Each time the financial advisor opines that the deal is fair, when it is not.[111] The only difference between each example is how the comptroller convinces the financial advisor to provide a favorable opinion:

> [A] qualified financial advisor may be willing to opine that a transaction is fair even though (unbeknownst to the advisor) the *controller has intentionally concealed* material information that, if disclosed, would require the advisor to opine that the transaction price is in fact not fair. . . . [T]he *controller outright bribes* the financial advisor to opine (falsely) that the transaction is fair. . . . [Under *pressure from the comptroller*,] the financial advisor, eager for future business from the controller, compromises its professional valuation standards to achieve the controller's unfair objective.[112]

In the above examples, the implied covenant arises not because there is a material provision missing from the contract (which would be the domain of implied contract), but in the discretion by which that material provision—obtaining a fairness opinion—is carried out by the controller. By carrying out his discretion in a way that is "arbitrary or unreasonable,"[113] and at least in the first two examples, outright dishonest, the controller "frustrat[es] the fruits of the bargain that the asserting party reasonably expected."[114]

IV. CATEGORIES OF ELIMINATION OR MODIFICATION OF FIDUCIARY DUTIES, AND SUMMARY OF OBSERVATIONS

Part III explained in general terms the fiduciary duties of loyalty and care, as well as the implied covenant of good faith. This Part will discuss three ways that uncorporation agreements may modify, or even eliminate fiduciary duties: (1) partial modification without special approval, (2) partial modification with special approval, and (3) elimination.

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[110] *Gerber*, 67 A.3d at 420.
[111] *Id.*
[112] *Id.* at 420-21 (emphasis added).
[113] *Id.* at 420.
[114] *Gerber*, 67 A.3d at 420.

A. *Elimination*

Many uncorporation agreements provide, "[*e*]*xcept as expressly set forth* in this agreement, to the fullest extent permitted by Applicable Law, neither the Manager nor any other Indemnified Person shall have any duties or liabilities, including fiduciary duties, to the Company, any Member or any other Person."[115] If the uncorporation agreement said nothing further as to fiduciary duties, then it is treated as completely eliminating fiduciary duties (however, the implied covenant of good faith is retained).[116]

B. *Partial Modification (Without Special Approval)*

The above quoted provision eliminating fiduciary duties states "[e]xcept as expressly set forth . . . ."[117] Thus the uncorporation agreement could, after eliminating traditional fiduciary duties, later set out a modified fiduciary duty. I refer to this as a partial modification of fiduciary duties (although technically fiduciary duties are eliminated and replaced with contractual standards).[118] Some partial modifications are "light," coming close to no modification at all. Here is an example of a light partial modification of the duty of loyalty:

> Unless otherwise approved by a majority of disinterested Managers, all transactions between the Company on the one hand, and any Affiliate of the Company on the other hand, will be on arms' length terms and conditions, including fair market values and prices equivalent to those that would be charged and paid between parties at arms' length at the time of the entering into of the transactions in question.[119]

While the arm's length standard for interested transactions is arguably

[115] Amended and Restated Limited Liability Company Agreement of Apollo Global Management, LLC, § 6.22(e), at 38 (July 13, 2007) (emphasis added) [hereinafter Agreement].

[116] The Delaware Code does not allow for the elimination of the implied covenant of good faith. DEL. CODE ANN. tit. 6, § 17-1101(d) (2011); DEL. CODE. ANN. tit. 6, § 18-1101(e) (2011).

[117] Agreement, *supra* note 115, at § 6.22(e).

[118] *See, e.g.*, *In re* Atlas Energy Res., LLC, 2010 WL 4273122, at *3 (Del. Ch. Oct. 28, 2010) (emphasis added) ("The limited liability company agreement *eliminated* the traditional fiduciary duties of the company's directors and officers, *replacing* them with a contractually-defined duty of good faith."), *reprinted in* 36 DEL. J. CORP. L. 823 (2011).

[119] Flight Options Int'l, Inc. v. Flight Options LLC, 2005 WL 6799224, at *7 (Del. Ch. July 11, 2005) (quoting § 6.2(1) of the LLC agreement).

less onerous than the default entire fairness standard, the two are close, and thus the partial modification does not represent a major departure from the default standard.[120] Other partial modifications are "heavy," coming close to eliminating fiduciary duties. An example of a heavy partial modification of the duty of care would be as follows:

> Whenever the [Board of Directors, or any Director or Officer,] makes a determination or takes or declines to take any other action . . . then, unless another express standard is provided for in this Agreement, [the Board of Directors or such other Director or Officer] shall make such determination or take or decline to take such other action in good faith . . . . In order for a determination or other action to be in "good faith" for the purposes of the Agreement, the Person or Persons making such determination or taking or declining to take such other action must believe that the determination is in the best interest of the [Company].[121]

Courts treat the foregoing language as creating a subjective good faith standard.[122] It is very difficult for a plaintiff to prevail when faced with such a standard, because plaintiffs have to show that the individual directors "believe[d] they were acting *against* [the uncorporation's] interest."[123] As such, the above heavy partial modification comes close to elimination.

C. *Partial Modification (With Special Approval)*

Drafters may incorporate a special approval provision into their uncorporation agreement, which may be properly classified as a genre of

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[120] *Id.* at *8 n.34 ("The burden of demonstrating that the Purchase Agreement is based on an arms' length price is properly imposed upon the RTA Managers because that is the standard prescribed in the LLC Agreement for them to justify their conduct, instead of the more onerous 'entire fairness' standard, a burden which, if applicable, clearly would be theirs."). The showing of an arms-length negotiation, while strong evidence of entire fairness, does not establish entire fairness. *See, e.g.*, Kahn v. Lynch Commc'ns Sys., Inc., 669 A.2d 79, 82 (Del. 1995); Weinberger v. UOP, Inc., 457 A.2d 701, 709-10 n.7 (Del. 1983) ("Particularly in a parent-subsidiary context, a showing that the action taken was as though each of the contending parties had in fact exerted its bargaining power against the other at arm's length is strong evidence that the transaction meets the test of fairness.").

[121] *In re* El Paso Pipeline Partners, L.P. Derivative Litig., 2014 WL 2768782, at *10 (Del. Ch. June 12, 2014) (quoting El Paso MLP § 7.9(b)).

[122] *Id.* at *12 (citing Allen v. Encore Energy Partners, L.P., 72 A.3d 93, 104 (Del. 2013)).

[123] Horton, *supra* note 2, at 76 (emphasis in original).

partial modification.[124] Here is an example of a typical special approval provision:

> Unless otherwise expressly provided in this Agreement . . . , whenever a potential conflict of interest exists or arises between the General Partner . . . , on the one hand, and the Partnership . . . , any Partner or any Assignee, on the other, any resolution or course of action by the General Partner . . . in respect of such conflict of interest shall be permitted and deemed approved by all Partners, and shall not constitute a breach of this Agreement, . . . or of any duty stated or implied by law or equity, if the resolution or course of action in respect of such conflict of interest is (i) *approved by Special Approval* . . . .[125]

Partial modifications that provide for special approval can also run the gamut from light to heavy, depending on the restrictions or freedoms placed on the conflicts committee. For example, a special approval provision may require that the conflicts committee act reasonably.[126] On

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[124]In an earlier article, I categorized an uncorporation agreement as eliminating fiduciary duties if it contained such elimination language, even if the agreement also allowed for special approval. Horton, *supra* note 2, at 89-92, apps. C-D. Such an approach tracks the language of the uncorporation agreements, which generally speak in terms of eliminating and replacing:

> Except as expressly set forth in this Agreement, neither the General Partner nor any other Indemnitee shall have any duties or liabilities, including fiduciary duties, to the Partnership or any Limited Partner or Assignee and the provisions of this Agreement, to the extent that they restrict, eliminate or otherwise modify the duties and liabilities, including fiduciary duties, of the General Partner or any other Indemnitee otherwise existing at law or in equity, are agreed by the Partners to replace such other duties and liabilities of the General Partner or such other Indemnitee.

Allen v. El Paso Pipeline GP Co., L.L.C., 90 A.3d 1097, 1100-01 (Del. Ch. 2014). It also tracks the interpretation of the Delaware Court of Chancery. *See In re* Atlas Energy Res., LLC, Unitholder Litig., 2010 WL 4273122, at *1 (Del Ch. Oct. 28, 2010) (emphasis added) ("The limited liability company agreement *eliminated* the traditional fiduciary duties of the company's directors and officers, *replacing* them with a contractually-defined duty of good faith."), *reprinted in* 36 DEL. J. CORP. L. 823 (2011). However, such language can be misleading, because contrary to the implication of the word "eliminated," fiduciary duties still exist, they are just contractually defined later in the agreement. I believe this Article takes a better approach than that taken in Horton, *supra* note 2, by looking at the end result of elimination followed by special approval, and categorizing such cases as partial modification.

[125]Allen v. El Paso Pipeline GP Co., L.L.C., 113 A.3d 167, 174 (Del. Ch. 2014) (quoting LPA § 7.9(a)) (ellipsis in original) (emphasis added).

[126]Brinckerhoff v. Tex. E. Prods. Pipeline Co., LLC, 986 A.2d 370, 390 (Del. Ch. 2010) ("[T]he special approval provision in the Fourth LP Agreement did not confer on the

the other hand, the conflicts committee may only be required to act with subjective good faith,[127] a difficult standard for the plaintiff to meet.[128]

D. *Summary of Observations*

Below is a summary of observations for each category discussed above. Again, the question this Article is addressing: for those cases that elude settlement and are complicated enough to require the judge to issue a written decision, did the modification or elimination of fiduciary duties in the uncorporation agreement help insulate management from a claim of breach of fiduciary duty? Where the uncorporation agreement retained traditional fiduciary duties, the written decision sided with plaintiffs 82% of the time.[129] Where the uncorporation agreement partially modified fiduciary duties without special approval, the written decision sided with plaintiffs 53% of the time.[130] Where the uncorporation agreement partially modified fiduciary duties and included special approval, the written decision sided with plaintiffs 14% of the time.[131] Finally, where the uncorporation agreement eliminated fiduciary duties, the written decision sided with plaintiffs 0% of the time.[132]

[conflicts committee] the right to make the special approval determination in its 'sole discretion' or under a similar contractual grant of authority [and as such] . . . the parties would have to join issue on whether some form of reasonableness standard would apply under the Fourth LP Agreement.").

[127] *Allen*, 113 A.3d at 178 (quoting LPA § 7.9(b)).

[128] *See id.* at 192-93 (discussing the application of the subjective good faith standard in the context of the special approval provision).

[129] However, this is an imperfect measurement, as many traditional fiduciary duty cases were necessarily excluded from the cases surveyed. For how the sample was selected, see *supra* Part II.B.

[130] See *infra* Table I.

[131] *Id.*

[132] For breach of fiduciary duty claims, the win rate for plaintiffs for all 36 cases was 50%. That is more success than the 6% reported by Professor Roberta Romano. Roberta Romano, *The Shareholder Suit: Litigation without Foundation?*, 7 J.L. ECON. & ORG. 55, 60 (1991). However, it is less success than that reported by Thomas Jones, who found that plaintiffs received some form of relief in 75% of cases. Thomas M. Jones, *An Empirical Examination of the Resolution of Shareholder Derivative and Class Action Lawsuits*, 60 B.U. L. REV. 542, 545 (1980) ("[T]he notion that shareholder plaintiffs rarely obtain relief is clearly a myth."). The wide range makes sense when one considers that comparing the various articles is like comparing apples to oranges. For example, while Professor Romano found that "[s]hareholder-plaintiffs . . . have abysmal success in court," she was examining corporations, not uncorporations. Romano, *supra*, at 60. Further she was not just looking at fiduciary claims; she was examining five categories of lawsuits against directors: "(1) acquisitions, including challenges to friendly mergers, and proxy fights; (2) challenges to takeover defensive tactics; (3) challenges to executive compensation and other self-interested transactions; (4) misstatements or omissions in financial statements; and (5) a residual category of all other suits." *Id.*

Table I
Observed Patterns in Written Decisions Penned Between 2004 and 2014

	No. of Written Decisions With Claim of Breach of Fiduciary Duty	Written Decision Sides With Plaintiff on Fiduciary Duty Issue (P Wins/D Wins)	No. of Written Decisions With Claim of Breach of Implied Covenant	Written Decision Sides With Plaintiff on Implied Covenant Issue (P Wins/D Wins)
Agreement Maintained Traditional Fiduciary Duties	11	82% (9/2)	5	0% (0/5)
Agreement Partially Modified Fiduciary Duties, But Did Not Include Special Approval	15	53% (8/7)	4	25% (1/3)
Agreement Partially Modified Fiduciary Duties, And Included Special Approval	7	14% (1/6)	4	25% (1/3)
Agreement Eliminated Fiduciary Duties	3	0% (0/3)	2	0% (0/2)
All	36	50% (18/36)	15	13% (2/15)

Ten years after the 2004 Elimination Amendments several trends are evident in the above table, although the picture of their impact is still evolving. These trends will be discussed in greater detail in Part V below. In general, the following patterns present for those cases that elude settlement and are complicated enough to require the judge to issue a written decision are as follows:

> (1) Eliminating fiduciary duties helps insulate management from lawsuits claiming breach of fiduciary duty.

(2) Partially modifying fiduciary duties can lead to a Gordian knot[133] of conflicting provisions that may cause a judge to find against management.
(3) Partially modifying fiduciary duties is more likely to insulate management when the modification takes the form of a special approval clause.
(4) Eliminating fiduciary duties may help insulate management from lawsuits claiming breach of the implied covenant of good faith and fair dealing, where the alleged facts would normally implicate fiduciary duties.
(5) Partially modifying fiduciary duties—e.g., providing for special approval of conflicted transactions—provides interpretive gaps that may leave management vulnerable to a claim that they breached the implied covenant of good faith.

V. DETAILED OBSERVATIONS AND ANALYSIS

A. *The Impact of Elimination on Fiduciary Claims*

Three of the written decisions involved uncorporation agreements that completely eliminated fiduciary duties. An illustrative case is *Hite Hedge LP v. El Paso Corp*.[134] That case involved a uncorporation agreement that provided "neither the General Partner nor any other Indemnitee shall have any duties or liabilities, including fiduciary duties, to the Partnership or any Limited Partner . . . ."[135] The defendant was, among others, El Paso Corporation (El Paso Corp.), which was the controlling unitholder of El Paso Pipeline Partners, L.P., a master limited partnership (El Paso MLP).[136] El Paso MLP purchased pipeline assets from its parent, El Paso Corp., and with each purchase, increased its revenue stream.[137] The more assets that El Paso MLP purchased from El Paso Corp., the greater the revenue stream benefited its unitholders.[138] These sales from parent to subsidiary are referred to as "drop downs."[139]

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[133] According to the Oxford English Dictionary, a Gordian knot is defined as, "[a]n intricate knot tied by Gordius, king of Gordium in Phrygia. The oracle declared that whoever should loosen it should rule Asia, and Alexander the Great overcame the difficulty by cutting through the knot with his sword." OXFORD ENGLISH DICTIONARY 689 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989).

[134] 2012 WL 4788658, at *1 (Del. Ch. Oct. 9, 2012).

[135] *Id.* at *3.

[136] *Id.* at *1-2.

[137] *Id.* at *2.

[138] *Hite Hedge*, 2012 WL 4788658, at *2.

[139] *Id.* The importance of dropdown transactions to MLP was recently explained:

The alleged fiduciary lapse occurred when El Paso Corp. merged into Kinder Morgan, Inc. (Kinder Inc.), with Kinder Inc. being the surviving entity (New Kinder Inc.).[140] The merger was bad news for unitholders in El Paso MLP, because Kinder Inc. (and it follows New Kinder Inc.) possessed its own master limited partnership, Kinder Morgan Partners, L.P. (Kinder MLP).[141] The drop downs that had previously gone to El Paso MLP would now go to Kinder MLP.[142] As the Delaware Court of Chancery pointed out, "[a]lthough [El Paso MLP's] revenue stream would continue in the absence of additional drop downs, its revenue and distributions to investors would not increase."[143]

Plaintiffs, unitholders in El Paso MLP, argued that their harm was undeniable, because their unit price dropped upon announcement of the merger.[144] "The Plaintiffs contend[ed] that this drop in market value reflect[ed] the decreased likelihood of future drop downs from [New Kinder Inc. to El Paso MLP]."[145] Plaintiffs further claimed that the harm was caused by El Paso MLP's manager's breach of fiduciary duty in consummating the merger.[146] Specifically they argued

> [El Paso Corp.], as [de facto manager] of [El Paso MLP],

> As the sponsor, the modus operandus for creating an MLP is primarily to monetize assets. A "sale" to an MLP generates cash for reinvestment in the sponsor's other projects that may not constitute "qualifying income" or that may yield a higher return, and the sponsor receives a premium price for its asset because the MLP is not taxed at the entity level. A beneficial dropdown transaction unlocks the greater value of assets generating qualifying income by transferring them to an MLP because the MLP can pay more for the asset since the cash flows it is buying the asset for will only be taxed once, namely not at the entity level. If a new MLP is created, the consideration for the assets is partnership interests, which are converted into cash when some of the units are marketed to the public through an IPO. In the case of a pre-existing MLP, the sponsor may transfer the assets in exchange for cash secured from the capital markets by the MLP through debt and equity offerings.

Matthew J. McCabe, Comment, *Master Limited Partnerships' Cost of Capital Conundrum*, 17 U. PA. J. BUS. L., 319, 325 (2014) (internal citations omitted); *see also* Diana M. Liebmann et al., *Recent Developments in Texas and United States Energy Law*, 4 TEX. J. OIL GAS & ENERGY L. 363, 410 (2008-2009) ("To the extent that it owns additional MLP-able assets, the parent/sponsor can over time engage in additional drop-down transactions with the MLP, selling additional assets to the MLP in exchange for cash, additional partnership interests, or a combination of both.").

[140] *Hite Hedge*, 2012 WL 4788658, at *2.

[141] *Id.*

[142] *Id.*

[143] *Id.*

[144] *Hite Hedge*, 2012 WL 4788658, at *1.

[145] *Id.* at *2.

[146] *Id.* at *2-3.

> had a duty to . . . account for the interests of [El Paso MLP's] minority unitholders in its merger negotiations with Kinder Morgan[, and that by agreeing to] reduced drop downs to EPB, [El Paso Corp.] has extracted value from [El Paso MLP] at the expense of the minority unitholders and for its own benefit, namely, increased merger consideration."[147]

The plaintiffs allegations would make a colorable claim if traditional fiduciary duties applied.[148] If traditional fiduciary duties applied, the court could have applied entire fairness review to the transaction.[149] The Delaware Supreme Court described entire fairness review in *Weinberger v. UOP, Inc.*:

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[147] *Id.* at *2.

[148] If El Paso MLP was a corporation, management would not have been able to eliminate fiduciary duties. *See* Manesh, *supra* note 51, at 561-62 ("Corporations cannot . . . eliminate the substantive obligations of the fiduciary duty of loyalty or any liability arising from the breach of that duty; cannot eliminate the corporate opportunity doctrine altogether . . . [and] cannot insulate all interested transactions from exacting entire fairness review. . . ."); Horton, *supra* note 2, at 57 ("In Delaware, publicly traded corporations cannot eliminate the traditional duties owed to minority shareholders, and thus cannot avoid the reach of entire fairness."). However, it must also be noted that an additional issue would then become whether El Paso exerted its control to breach fiduciary duties owed to the minority unitholders. The Court seemed skeptical, stating, "the harm alleged here—New Kinder Morgan's withholding of drop downs from EPB—is completely divorced from El Paso's role as controlling partner; the alleged harm derives solely from El Paso's control, not over the Partnership, but over its own assets." *Hite Hedge*, 2012 WL 4788658, at *4

[149] Because this is not the case of a cash-out merger of the uncorporation that the unitholders own (but instead its parent), there may be some room here for disagreement as to the exact level of scrutiny. As professor Siegel explains:

> Both the type of transaction and the degree of control raise reasons to trigger varying levels of judicial review; the combination of the extremes within each category, however, creates a compelling case regarding which monitor the court ought to choose. For example, a cash-out merger effectuated by a majority shareholder would provide the court with the most reasons to scrutinize a transaction carefully. Closely related are all ownership-claim transactions effectuated by either a majority or controlling-minority shareholder. At the other end of the spectrum, causing little judicial concern, is an enterprise issue proposed by a noncontrolling shareholder. In between these extremes are enterprise transactions by majority or controlling shareholders. As is later demonstrated, the courts are most inconsistent in choosing monitors for these transactions.

Mary Siegel, *The Erosion of the Law of Controlling Shareholders*, 24 DEL. J. CORP. L. 27, 46-47 (1999); *see also In re* Nine Sys. Corp. S'holders Litig., 2014 WL 4383127, at *33 (Del. Ch. Sept. 4, 2014) ("Delaware courts have employed the entire fairness standard of review where a corporation with a controlling stockholder implements a recapitalization that benefits the controller to the detriment of other stockholders.").

> The concept of fairness has two basic aspects: fair dealing and fair price. The former 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. The latter aspect of fairness relates to the economic and financial considerations of the proposed merger, 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. However, the test for fairness is not a bifurcated one as between fair dealing and price. All aspects of the issue must be examined as a whole since the question is one of entire fairness.[150]

However, El Paso MLP was not a corporation, and thus was able to eliminate fiduciary duties pursuant to 17-1101.[151] That is precisely what El Paso MLP's uncorporation agreement did.[152] As such, Vice Chancellor Glasscock had no trouble dismissing the plaintiff's action, finding the limited partnership's language "insurmountable" and stating, "I find that the Partnership Agreement eliminates any fiduciary duties El Paso might [in the absence of such waiver] owe to the limited partners."[153]

Such a result was not always a foregone conclusion. Indeed, the question that predominated directly following the 2004 Amendments was posed by Professor Miller: "To what extent will deceptive conduct be tolerated in the face of . . . a clause giving the manager every possible discretion, and/or a clause that broadly relinquishes or disclaims contractual rights?"[154] Miller continued: "[Will courts] develop meaningful limitations to curb abusive conduct using contractually based concepts[?]"[155] The answer following *Hite Hedge* seems to be "no limitations."[156] Identical results to *Hite Hedge* were reached in *Wiggs v. Summit Midstream Partners, LLC*,[157] *and Fisk Ventures, LLC v. Segal*.[158]

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[150] 457 A.2d. 701, 711 (1983) (internal citations omitted).

[151] *Hite Hedge*, 2012 WL 4788658, at *3.

[152] *Id.*

[153] *Id.* at *3.

[154] Sandra K. Miller, *What Fiduciary Duties Should Apply to the LLC Manager After More Than a Decade of Experimentation?*, 32 J. CORP. L. 565, 589 (2007).

[155] *Id.*

[156] *See Hite Hedge*, 2012 WL 4788658, at *3.

[157] Wiggs v. Summit Midstream Partners, LLC, 2013 WL 1286180, at *11, *13 (Del. Ch. Mar. 28, 2013) (dismissing claim for breach of fiduciary duty based on fiduciary elimination provision in uncorporation agreement).

As such, the first observation based on the written decisions is an unsurprising one: For those elimination cases that elude settlement and are complicated enough to require the judge to issue a written decision, plaintiffs' made it past (at least) a motion to dismiss 0% of the time.[159]

B. *The Impact of Partial Modification (Without Special Approval) on Fiduciary Claims*

Fifteen of the written decisions involved partially modified fiduciary duties (without providing for special approval). More often than not, this results in an interpretive jumble that the Court of Chancery was in the unenviable position of unwinding. One early example of this problem is *Gelfman v. Weeden Investors*.[160] During the late 1990s, Weeden Investors, LP issued millions of new units to inside investors, greatly diluting outside investors.[161] Broadly speaking, inside investors were employees of Weeden, a broker-dealer firm.[162] The purported reason for the issuance was to retain these broker dealers.[163] On the other hand, outside investors—non-employees—could not participate in the new issuances and were diluted (they were original non-broker investors). They saw their distributions decrease by 36%, while inside investors distributions doubled, and in some cases tripled.[164]

The decision to issue these new units was in the hands of the GP.[165] The problem was not so much that the GP treated inside and outside investors differently (there is a plausible business reason for such decision, retention of brokers).[166] The problem was that the GP included certain outside directors in the new issuances, despite the fact that they were not insiders—violating his own purported reason for the issuance, retention of brokers.[167] The GP needed the outside directors support on other matters—the court referred to it as "logrolling" or the trading of

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[158] Fisk Ventures, LLC v. Segal, 2008 WL 1961156, at *11-12 (Del. Ch. May 7, 2008) (dismissing claim for breach of fiduciary duty based on fiduciary elimination provision in uncorporation agreement), *aff'd*, 984 A.2d 124, 2009 WL 3338094 (Del. Oct. 16, 2009) (Table).

[159] *See supra* Part IV.D, Table I.

[160] 859 A.2d 89 (2004).

[161] *Id.* at 92.

[162] *Id.* at 100.

[163] *Id.* at 106-107.

[164] *Gelfman*, 859 A.2d at 102.

[165] *Id.* at 92

[166] *Id.* at 99

[167] *Id.*

favors.[168] In short, the GP did not want to upset them by diluting them to the same extent as the outside investors.[169]

The LP Agreement replaced traditional fiduciary duties with a contractual standard: GP is not liable so long as his "action or decision [in this case, issuing new units] . . . is not reasonably believed by the General Partner to be inconsistent with the overall purposes of the Partnership."[170] That is, here, the general partner must believe that issuing new units is consistent with the overall purpose of the partnership.

Vice Chancellor Strine began his analysis by calling the provision "linguistically challenging."[171] He chided the drafters of the agreement for "succumbing to the lawyerly impulse to utilize double negatives."[172] That the matter was not going to end well for the defendants was foretold when the Vice Chancellor opined that the provision must have been "prepared by a member of a cold-blooded species, rather than a breathing, feeling member of our species trying to capture in words an actual human state of mind."[173] One must wonder why the drafters did not just write that the GP was permitted "to take any action or decision that it reasonably believed to be consistent with the Partnership's purposes?"[174] After voicing his frustration, the Vice Chancellor found that the issuance was contrary to the overall purpose of the partnership.[175] There was no partnership purpose in allowing the outside directors to participate in the issuance.[176]

Another such case was *Bay Center Apartment Owner, LLC v. Emery Bay PKI, LLC*.[177] Emery Bay's uncorporation agreement provided "to the fullest extent permitted by the Delaware Act . . . (b) The Members shall have the same duties and obligations to each other that members of a limited liability company formed under the Delaware Act have to each other."[178] Later—and confusingly—the agreement provided, "each Member shall owe no duty of any kind towards the Company or the other Members in performing its duties and exercising its rights hereunder or

[168] *Gelfman*, 859 A.2d at 100.
[169] *Id*.
[170] *Id*. at 111-12.
[171] *Id*. at 112.
[172] *Gelfman*, 859 A.2d at 112 n.25.
[173] *Id*. at 112.
[174] *Id*. at 112 n.25.
[175] *Id*. at 124-25.
[176] *Gelfman*, 859 A.2d at 124-25.
[177] 2009 WL 1124451 (Del. Ch. Apr. 20, 2009).
[178] *Id.* at *8.

otherwise."[179] The two statements are in direct conflict. The court, faced with a claim that Emery Bay PKI management had diverted rental income away from the project, had no choice but to conclude that the waiver of fiduciary duties—to the extent they were waived at all—was not clear.[180] The court denied defendants' motion to dismiss, stating "the interpretive scales also tip in favor of preserving fiduciary duties under the rule that the drafters of chartering documents must make their intent to eliminate fiduciary duties plain and unambiguous."[181] In short, if management is going to eliminate or modify fiduciary duties, it must be done clearly.[182]

Other times, rather than the waiver being contradictory, the drafting is so complicated that the court has difficulty determining what types of transactions the modification impacts.[183] A classic example is *Kahn v. Partnoy*.[184] The case involved truckstop operator Travel Centers of America, LLC (TCA).[185] Plaintiff, Kahn, alleged that TCA's board of directors—including director Portnoy—breached their fiduciary duty of loyalty and care by approving a lease between TCA and HPT that benefited Partnoy.[186] Partnoy benefited under the transaction, because he was the owner of HPT, which under the lease in question was collecting above-market rents from TCA.[187]

TCA's uncorporation agreement contained fiduciary modification provisions that were susceptible to several different interpretations.[188] Section 7.1 of the uncorporation agreement provided that a board of directors will manage the LLC and that such board has the "same powers and duties (including fiduciary duties) as a board of directors of a corporation," that is to say, the board must adhere to the traditional duty of loyalty.[189] However, in direct contrast, section 7.5 of the uncorporation agreement provided that whenever there is a conflict of interest (i.e., when the duty of loyalty is implicated), the court must

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[179] *Id.* at *8.

[180] *Id.* at *9.

[181] *Bay Ctr. Apartments Owner*, 2009 WL 1124451, at *9.

[182] *Id.*

[183] *See* Kahn v. Partnoy, 2008 Del. Ch. LEXIS 184 (Del. Ch. Dec. 11, 2008). Rather than the type of transaction, the question may be the parties that the transaction applies to. *See In re* Atlas Energy Res., Unitholder Litig. LLC, 2010 Del. Ch. LEXIS 21, *19 (Del. Ch. July 20, 2010) (finding the fiduciary modification did not apply to Atlas' unitholders).

[184] 2008 Del. Ch. LEXIS 184, at *1.

[185] *Id.* at *3.

[186] *Id.* at *1.

[187] *Id.* at *7.

[188] The court began its analysis by warning that the drafting flexibility embodied in the Delaware LLC statute increases the risk that "the resulting LLC agreement will be incomplete, unclear, or even incoherent." *Kahn*, 2008 Del. Ch. LEXIS 184, at *1.

[189] *Id.* at *19.

presume that the board of directors acted appropriately:

> It shall be presumed that, in making its decision and notwithstanding that such decision may be interested, the Board of Directors acted properly and in accordance with its duties (including fiduciary duties), and in any proceeding brought by or on behalf of any Shareholder or the Company challenging such approval, the Person bringing or prosecuting such proceeding shall have the burden of overcoming such presumption by clear and convincing evidence.[190]

Given the conflict between sections 7.1 (traditional) and 7.5 (modified), the court found that there were multiple reasonable interpretations.[191] One reasonable interpretation was that there was a presumption that the board of directors acted in accordance with its fiduciary duty of loyalty, and that the burden was on the plaintiffs to overcome that presumption through clear and convincing evidence.[192] However, the court also found that it was reasonable to interpret the presumption as only applying to transactions with a shareholder (the transaction in question did not involve a shareholder, but instead was between the directors and the company)—if that was the case, then as required by section 7.1,

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[190] *Id.* at *16-17 (citing Agreement §7.5(a)).

[191] *Id.* at *2. The full provision provided:

> [W]henever a potential conflict of interest exists or arises between any Shareholder or an Affiliate thereof, and/or one or more Directors or their respective Affiliates and/or the Company, any resolution or course of action by the Board of Directors in respect of such conflict of interest shall be permitted and deemed approved by all Shareholders, and shall not constitute a breach of this Agreement, of any agreement contemplated herein, or of any duty stated or implied by law or equity, including any fiduciary duty, if the resolution or course of action in respect of such conflict of interest is (i) approved by a Share Plurality (with interested Shareholders not counted for any purpose), or (ii) on terms no less favorable to the Company than those generally being provided to or available from unrelated third parties or (iii) fair and reasonable to the Company, taking into account the totality of the relationships between the parties involved (including other transactions that may be particularly favorable or advantageous to the Company). It shall be presumed that, in making its decision and notwithstanding that such decision may be interested, the Board of Directors acted properly and in accordance with its duties (including fiduciary duties), and in any proceeding brought by or on behalf of any Shareholder or the Company challenging such approval, the Person bringing or prosecuting such proceeding shall have the burden of overcoming such presumption by clear and convincing evidence.

Kahn, 2008 Del. Ch. LEXIS 184, at *16 n.17 (quoting Agreement §7.5(a)).

[192] *Id.* at *16-18.

traditional fiduciary duties would apply.[193] Under Delaware law, "if two opposing interpretations are reasonable, the [c]ourt may not choose between them."[194] That is to say, rather than being a question of law, "[t]he proper application of ambiguous contract provisions is a question of fact that cannot be determined on a motion to dismiss."[195]

However, even if it was clear that traditional fiduciary duties applied, the court was faced with another layer of confusion.[196] Section 10.2(a) of the uncorporation agreement exculpated the directors from personal liability for monetary damages that arise from breach of the fiduciary duty of loyalty, unless the director acted in bad faith or "derived an improper personal benefit."[197] Then Section 10.2(b) provides that a director can only be liable where he "acted in bad faith."[198] Thus, the sections are in conflict, with the former allowing for greater exposure to liability—i.e, not only when the director acted in bad faith, but even where he acted in good faith and derived an improper personal benefit.[199]

The Vice Chancellor appeared exasperated, stating that he could not figure out a reason for the contradictions within the uncorporation agreement, concluding: "I have been unable to explain these provisions as anything other than poor drafting or a strategy of 'if one exculpatory provision is good, then two must be better.'"[200] Unable to determine "the contours of [the parties'] contractual fiduciary duties," he refused to grant defendant's motion to dismiss.[201]

Gelfman, *Bay Center*, and *Kahn* emphasize the danger of less-than-clear partial modification. The practitioner must make sure that the numerous provisions that may be implicated by a claim for breach of fiduciary duty are congruent.[202] For example, imagine that an attorney writes at section 7.1 of an uncorporation agreement, "each member shall owe no duty of any kind towards the company or the other members," but then forgets to conform the language of the uncorporation agreement at 7.5 governing interested transactions, or the language at 10.2 regarding exculpation. When years later there is a complaint alleging an interested

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[193] *Kahn*, 2008 Del. Ch. LEXIS 184, at *18.

[194] Prokupek v. Consumer Capital Partners LLC, 2014 WL 7452205, at *3 (Del. Ch. Dec. 30, 2014).

[195] *Id.* at *3 (quoting MCG Capital Corp. v. Maginn, 2010 WL 1782271, at *8 (Del. Ch. May 5, 2010)).

[196] *See Kahn*, 2008 Del. Ch. LEXIS 184, at *22-23.

[197] *Id.* at *23.

[198] *Id.*

[199] *Id.*

[200] *See Kahn*, 2008 Del. Ch. LEXIS 184, at *23-24.

[201] *Id.* at *2.

[202] *See, e.g.*, *id.*

merger, the court will look at 7.1, 7.5, and 10.2, and rather than attempting to unravel the Gordian knot,[203] it will simply deny the defendant's motion to dismiss the claim. This leads to the second observation based on the written decisions: for those partial modification cases (not including special approval) that elude settlement and are complicated enough to require the judge to issue a written decision, plaintiffs made it past (at least) a motion to dismiss 53% of the time.[204]

C. *The Impact of Partial Modification (With Special Approval) on Fiduciary Claims*

Seven of the written decisions involved partially modified fiduciary duties (with special approval).[205] A typical special approval case is *Allen v. El Paso Pipeline GP Co., LLC*.[206] That case involved El Paso Pipeline Partners L.P. (El Paso MLP) purchasing a 25% share in Southern Natural Gas Co. from its general partner, El Paso Pipeline GP Company, LLC (the General Partner) in a "drop down"[207] transaction.[208] The transaction was to be financed with the public issuance of 12 million common units in El Paso MLP.[209] While drop down transactions normally increase cash flow to unitholders, in this case because of several factors, including the issuance of 12 million common units in El Paso MLP to finance the transaction, the plaintiff unitholders argued that the transaction did not benefit them enough.[210] The court explained that

> [the Plaintiff's] argument is not that the Drop-Down did not

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[203] Norton v. K-Sea Transp. Partners L.P., 67 A.3d 354, 361 (Del. 2013) (comparing the operating agreement provisions to the impenetrable problem posed by a Gordian knot).

[204] *See supra* Part IV.D, Table I.

[205] Interestingly, during the first five years of the survey period (2004 to 2009), I found no decisional law where the partial modification took the form of a special approval provision. I can only conclude that the absence of "special approval" cases between 2004 and 2009 was an anomaly, because special approval provisions were already in existence, and had been litigated before that time. *See, e.g.*, Brickell Partners v. Wise, 794 A.2d 1 (Del. Ch. 2001). Of the eight partial modification cases decided between 2004 and 2009, plaintiffs made it past a motion to dismiss 82% of the time. However, once special approval provisions began appearing in the decisional law in 2010, the success rate for plaintiffs fell to 14%. *See supra* Part IV.D, Table I.

[206] Allen v. El Paso Pipeline GP Co., L.L.C., 113 A.3d 167 (Del. Ch. 2014). A related case also worked its way through the Delaware Court System, *In re El Paso Pipeline Partners, L.P. Derivative Litigation*, 2015 WL 1815846, at *1 (Del. Ch. Apr. 20, 2015), *reprinted in* 40 DEL. J. CORP. L. 717 (2016).

[207] For a discussion of drop-down transactions, see *supra* note 139.

[208] *Allen*, 113 A.3d at 189.

[209] *Id.* at 173.

[210] *Id.* at 181.

> benefit the limited partners, because they now concede that the distributions received by the holders of common units did increase. Rather, the plaintiffs argue that the Drop-Down did not benefit the limited partners enough relative to what the General Partner received.[211]

If default fiduciary duties applied, plaintiffs would have had a fair case for breach of the duty of care (the Special Committee did not act to maximize return to the common unitholders[212]) as well as breach of the duty of loyalty (because one party, or its affiliate, was on both sides of the transaction).[213] However, the uncorporation agreement in question eliminated fiduciary duties and replaced them with a procedure for special approval (which I refer to in this Article as partial modification, because at the end of the day, there are still duties that the general partner must comply with).[214] In turn, the uncorporation agreement defines Special Approval as "approval by a majority of the members of the Conflicts Committee acting in good faith."[215] Finally, the uncorporation agreement provided that

> "[i]n order for a determination or other action to be in 'good faith' for purposes of this Agreement, the Person or Persons making such determination or taking or declining to take such other action must believe that the determinations or other action is in the best interests of the Partnership."[216]

Applying the contractual standard, the court emphasized "subjective belief" and "best interests of the Partnership" in its decision.[217] As to subjective belief, because the court lacks the "ability to read minds," it "only can infer a party's subjective intent from external indications."[218] Thus, as the court explained "[s]ome actions may objectively be so egregiously unreasonable . . . that they seem [] essentially inexplicable

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[211] *Id.*

[212] This would of course depend on whether the duty of management is long-term or short-term maximization of return to the common unitholders. *See* Jesse M. Fried, *The Uneasy Case for Favoring Long-Term Shareholders*, 124 YALE L.J. 1554, 1568-71 (2015).

[213] *See supra* Part III.A-B.

[214] Allen v. El Paso Pipeline GP Co., L.L.C., 113 A.3d 167, 174 (Del. Ch. 2014) (quoting LPA § 7.9(a)).

[215] *Id.* (quoting LPA § 1.1).

[216] *Id.* at 178 (quoting LPA §7.9(b)).

[217] *Id.* at 178-81.

[218] *Allen*, 113 A.3d at 178.

on any ground other than [subjective] bad faith."[219] As to "best interest of the partnership," the court emphasized that does not equate to best interest of the limited partners alone, but to maximizing firm value in the long term.[220] The court concluded that "[t]he actions of the [Special] Committee were consistent with [acting] in subjective good faith.[221] The Special Committee met six times, and consulted with a financial advisor that gave three presentations to the Special Committee, with active participation from the members.[222] The court concluded by noting that

> [c]onstruing the evidence in the plaintiffs favor, it supports at best for the plaintiffs an inference that the Conflicts Committee performed its job poorly. The evidence does not support a reasonable inference that the Conflicts Committee did not subjectively believe that the Drop-Down was in the best interests of El Paso MLP.[223]

Similar outcomes were reached in *Lonergan v. EPE Holdings, LLC*,[224] *In re Encore*,[225] *Norton v. K-Sea*,[226] *Gerber v. Enterprise*

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[219] *Id.* (quoting Allen v. Encore Energy Partners, L.P., 72 A.3d 93, 106-08 (Del. 2013)) (internal quotation marks omitted).

[220] *Id.* at 179-80. This case is also interesting for its contribution to the debate over the true purpose of the corporation, vis-à-vis maximizing profits. The court stated:

> A board of directors owes fiduciary duties to the corporation for the ultimate benefit of its residual risk bearers, *viz.* the class of claimants represented by the undifferentiated equity. When exercising their authority, directors must seek "to promote the value of the corporation for the benefit of its stockholders." "It is, of course, accepted that a corporation may take steps, such as giving charitable contributions or paying higher wages, that do not maximize corporate profits currently. They may do so, however, because such activities are rationalized as producing greater profits over the long-term."

Id. (quoting Leo E. Strine, Jr., *Our Continuing Struggle with the Idea that For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135, 147 n.34 (2012)). Compare the suggestion of Professor Lynn Stout that a corporation need not act to maximize profit, but instead for some broader social purpose. Lynn A. Stout, *Why We Should Stop Teaching* Dodge v. Ford, 3 VA. L. & BUS. REV. 163, 168-72 (2008).

[221] Allen v. El Paso Pipeline GP Co., L.L.C., 113 A.3d 167, 182 (Del. Ch. 2014).

[222] *Id.*

[223] *Id.*

[224] 5 A.3d 1008, 1024-25 (Del. Ch. 2010) (stating that "the Holdings LP agreement eliminates all fiduciary duties, which therefore cannot support a disclosure obligation").

[225] 2012 WL 3792997, at *15 (Del. Ch. Aug. 31, 2012) (concluding that "the Conflicts Committee satisfied their express and implied duties under the LPA in giving their Special Approval to the Merger . . . .").

[226] 67 A.3d 354, 364-68 (Del. 2013) (finding that "K-Sea GP is conclusively presumed to have approved the Merger in good faith, and a majority of the unitholders voted to consummate it.").

Products,[227] *Allen v. Encore Energy Partners, L.P.*,[228] and *Allen v. El Paso Pipeline GP Co., L.L.C.*[229] This leads to the third observation based on the written decisions: for those partial modification cases (which also allowed for special approval) that elude settlement and are complicated enough to require the judge to issue a written decision, plaintiffs made it past (at least) a motion to dismiss 14% of the time.[230]

The exception within the survey period—i.e., a written decision that involved a special approval provision that was not in favor of management—was *Brinckerhoff v. Texas Eastern Products Pipeline Co., LLC*, and that case (based on allegations of a self serving merger designed to extinguish plaintiff's standing in an underlying derivative action) was unique.[231] It was unique, because the court in *Brinckerhoff* was not called upon to decide a motion to dismiss, but instead to approve a settlement.[232] As the court stated, it simply need pass on the fairness of the settlement, and in so doing, "[is] not required to make a definitive evaluation of the case on its merits [because] '[t]o do so would defeat the basic purpose of the settlement of litigation.'"[233] In assessing the value of the plaintiff's case for purpose of its fairness determination, the court noted that while the special approval provision in the contract certainly strengthened the defendant's case, "the syllogism of 'if Teppco [Special] Committee approval, then judgment for the defendants' does not automatically follow."[234] That was because the contract did not give "sole discretion" to the special committee, and "[a]t a minimum, the approval must have been given in compliance with the implied covenant of good faith and fair dealing, which a partnership agreement 'may not eliminate.'"[235] That is to say, there was at least some value assignable to the plaintiff's case, there was a "meaningful litigation threat"—although the exact value cannot be determined the court was comfortable that the settlement amount fell within that range.[236]

There is a more recent case (after the ten-year survey period) where a written decision that involved a special approval provision was

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[227] 67 A.3d 400, 423-25 (Del. 2013) (finding that "the general partner breached the implied covenant in carrying out the 2010 Merger.").

[228] 72 A.3d 93, 106-10 (Del 2013) (finding "[t]he Conflicts Committee gave Special Approval to the Merger. Therefore, the 'resolution . . . shall be permitted and deemed approved by all [p]artners, and shall not constitute a breach of [the LPA]'").

[229] 113 A.3d 167, 178-82 (Del. Ch. 2014).

[230] *See supra* Part IV.D, Table I.

[231] 986 A.2d 370, 373, 397 (Del. Ch. 2010).

[232] *Id.* at 373.

[233] *Id.* at 384 (quoting Rome v. Archer, 197 A.2d 49, 53 (Del. 1964)).

[234] *Id.* at 390.

[235] *Brinckerhoff*, 986 A.2d at 390.

[236] *Id.* at 390.

not in favor of management, and that is *In re El Paso Pipeline Partners, L.P. Derivative Litigation*.[237] What is interesting about this case is that Vice Chancellor Laster expected that he would find that the special approval provision (which required that the special committee act in the best interest of the MLP) protected management from any claim of breach of fiduciary duty stemming from a dropdown transaction:

> I expected that at trial, the Committee members and their financial advisor would provide a credible account of how they evaluated the Fall Dropdown, negotiated with Parent, and ultimately determined that the transaction was in the best interests of El Paso MLP. It turned out that in most instances, the Committee members and their financial advisor had no explanation for what they did.[238]

The MLP Agreement "permitted the General Partner to cause El Paso MLP to engage in a transaction involving a conflict of interest, like the dropdowns, if the transaction received Special Approval."[239] Special approval was defined as approval by the conflicts committee, which was in turn made up of qualified members of the board of directors of the General Partner.[240] In order for the special approval to be valid, the members were required to "believe in good faith that the transaction was in the best interests of El Paso MLP." [241] As has been discussed elsewhere in this Article, plaintiff's burden of showing that the members lacked such a belief is difficult.[242] Plaintiff must show that the members failed to form a subjective belief that the Fall Dropdown was in the best interests of the MLP.[243]

In *El Paso Derivative Litigation*, the plaintiffs were able to meet this burden.[244] The plaintiffs proffered numerous facts that called into question the good faith of the committee members: (1) Committee members privately expressed concerns about the dropdown in emails (e.g., that the asking price was too high), but abandoned those concerns

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[237] 2015 WL 1815846 (Del. Ch. Apr. 20 2015), *reprinted in* 40 DEL. J. CORP. L. 717 (2016).

[238] *Id.* at *1.

[239] *Id*.

[240] *Id*.

[241] *In re El Paso*, 2015 WL 1815846, at *1.

[242] *See supra* Parts IV.C, V.C.

[243] *In re El Paso*, 2015 WL 1815846, at *15 ("For purposes of trial, the contractual standard meant that the plaintiff bore the burden of proving by a preponderance of the evidence that the Committee members did not hold the necessary subjective belief.").

[244] *Id*. at *2.

when the parent corporation pushed back; (2) after receiving said pushback, committee members simply asked if distributions to common unitholders would increase following the dropdown, ignoring whether the price paid was too high (the former does not foreclose the latter); (3) the committee members had evidence that they had recommended a price in a previous dropdown transaction involving the same MLP that was too high (that is, they refused to learn from past experience); and (4) the committee members agreed to a price that was 26% higher than their internal assessment.[245]

Second, plaintiffs proffered numerous facts that called into question the good faith of Tudor, the firm that prepared the fairness opinion: (1) Tudor appeared driven by a desire to find the price prepared by parent fair, not their duty to independently determine a fair price; (2) Tudor changed inputs to make the price that parent was asking seem fair; (3) Tudor manipulated the inputs to its discounted cash flow analysis, including cost of capital and discount rate, resulting in an overvaluation of the target, and (4) in many areas, Tudor did not conduct any original analysis, but simply adopted data that was provided by parent.[246]

Given the foregoing, the court found that no person could seriously believe that the members of the committee bargained vigorously, or ever considered saying "no."[247] The court concluded that "[b]ecause the committee members disregarded their known duty to determine that the Fall Dropdown was in the best interest of El Paso MLP, they did not act in good faith."[248] As such, the general partner breached its contractually imposed duty to the MLP.[249]

El Paso Derivative Litigation should serve as a cautionary tale.[250] While this Article concludes that the inclusion of a special approval provision bodes well for management (plaintiffs only prevailed in one of seven written decisions), it should also be apparent that the specific facts and consequences of a case are the primary drivers. Phrased differently: even where they are provided the best contractual protections, executives can always find a way to injure themselves.

[245]*Id*. at *17-21.
[246]*Id*. at *22-25.
[247]*In re El Paso*, 2015 WL 1815846, at *25.
[248]*Id*.
[249]*Id*.
[250]*Id*.

D. *The Impact of Elimination on Implied Covenant Claims*

While the implied covenant of good faith sounds like yet another formulation of the fiduciary duties of loyalty and care, it is not.[251] A claim for breach of the former sounds in contract, and a claim for breach of the latter sounds in tort.[252] That being said, there is some overlap between the two. Perhaps the overlap arises because both require that the contracting party act in good faith: fiduciary duties require that a contracting party act with good faith and fidelity toward the counterparty; on the other hand, the implied covenant requires that a contracting party act with good faith and fidelity toward the contract she entered into.

Because of this relationship, many breach of fiduciary duty cases also implicate the implied covenant. *Wiggs* is illustrative of a fiduciary elimination case where the plaintiff adds a breach of implied covenant claim.[253] (Recall that while uncorporation agreements can eliminate fiduciary duties, they cannot eliminate the implied covenant, making such claim an attractive fallback).[254] The plaintiffs were members of Midstream Services, LLC ("Services").[255] Wiggs alleged that Summit, the managing member of Services, structured various transactions so that payments would go to it (Summit) rather than Services.[256] This had the impact of reducing plaintiffs' distributions.[257] As the court points out:

> [T]he [p]laintiffs seem to be arguing for an implied covenant that would require Summit to manage Services in such a way as would . . . allow for a distribution that would ultimately reach the Plaintiffs as quickly as possible. One understands why the Plaintiffs would seek to characterize

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[251] *See supra* Part III.C.

[252] *See* Bellemare v. Wachovia Mortg. Corp., 894 A.2d 335, 345-46 (Conn. App. Ct. 2006) ("[A] claim brought pursuant to a contract, alleging a breach of the implied covenant of good faith and fair dealing, sounds in contract because '[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement. . . .'"); Road & Highway Builders, LLC v. N. Nev. Rebar, Inc., 284 P.3d 377, 383 (Nev. 2012) ("[B]reach of the implied covenant of good faith and fair dealing . . . sounds in contract, and not in tort").

[253] Wiggs v. Summit Midstream Partners, LLC, 2013 WL 1286180, *12 (Del. Ch. Mar. 28, 2013).

[254] *See supra* notes 2, 9 and accompanying text.

[255] *Wiggs*, 2013 WL 1286180, at *3.

[256] *Id.* at *8.

[257] *Id.* ("Plaintiffs argue that . . . the Defendants still violated the implied covenant of good faith and fair dealing because they 'repeatedly acted in bad faith to prohibit Plaintiffs from receiving the "fruits of their bargain . . . ."'").

the 'fruits of their bargain' in that fashion . . . ."[258]

The court went on to reject the plaintiffs' argument, stating, "[plaintiffs] may be disappointed in what Summit has done, but they have not shown how Summit acted outside of . . . the management discretion to which they agreed."[259] In short, the management discretion was not exercised in an arbitrary, or unforeseeable manner.[260]

Likewise, in *Fisk Ventures* the court was faced with an uncorporation agreement that eliminated fiduciary duties, and after dismissing the claim for breach of fiduciary duty, turned to the claim for breach of the implied covenant.[261] Plaintiff argued that defendant class B board members violated the implied covenant by not approving additional financing, to the detriment of the company.[262] But the court pointed out that was an acceptable—and indeed foreseeable—exercise of their discretion.[263] The court stated that

> the LLC Agreement *does* address the subject of financing, and it specifically requires the approval of 75% of the Board. Implicit in such a requirement is the right of the Class B Board representatives to disapprove of and therefore block Segal's proposals. As this Court has previously noted, "[t]he mere exercise of one's contractual rights, without more, cannot constitute . . . a breach [of the implied covenant of good faith and fair dealing]."[264]

Thus in both *Wiggs* and *Fisk Ventures,* the uncorporation agreements eliminated fiduciary duties, *and* the court refused to find a breach of the implied covenant of good faith.[265] The question is whether the two facts are linked.

It must be emphasized at this point that the Delaware legislature is clear that uncorporation agreements may not eliminate the implied covenant of good faith.[266] However, some commentators fear—apparently a valid fear based on *Wiggs* and *Fisk Ventures*—that where

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[258] *Id.* at *10.

[259] *Wiggs*, 2013 WL 1286180 at *27.

[260] *See id.*

[261] Fisk Ventures, LLC v. Segal, 2008 WL 1961156, at *9-10 (Del. Ch. May 7, 2008), *aff'd*, 984 A.2d 124, 2009 WL 3338094 (Del. 2009) (Table).

[262] *Id.* at *11.

[263] *Id.*

[264] *Id.*

[265] *Wiggs*, 2013 WL 1286180, *10; *Fisk Ventures*, 2008 WL 1961156, at *9-11.

[266] DEL. CODE ANN. tit. 6, § 17-1101(d) (2011); DEL. CODE. ANN. tit. 6, § 18-1101(e) (2011).

there is a complete waiver of fiduciary duties, a waiver of the implied covenant is the de facto result.[267] This fear draws support from the Court of Chancery's decision in *Lonergan*.[268] Although not a case involving a complete waiver (*Lonergan* was a special approval case), the language in *Lonergan* is applicable to a discussion of whether a plaintiff can prevail in an implied covenant claim where the uncorporation agreement waives fiduciary duties.[269] *Lonergan* involved a going private transaction where public unitholders were cashed out for units in the surviving entity.[270] They claimed that the exchange ratio was unfair: 1.5 units of the surviving company for each unit of the merged company.[271] The uncorporation agreement provided for special approval, and that the special approval could only be challenged where the unitholders "allege[d] particularized facts from which [the] Court could infer that the members of the [special committee] acted arbitrarily or in bad faith."[272] The court found that plaintiff could not meet that burden where the Special Committee negotiated an increase in the exchange ratio from 1.37 (a 2.6% premium) to 1.50 (a premium of 11.8%) relying on a fairness opinion from Morgan Stanley.[273]

However, the plaintiffs in *Lonergan* also claimed breach of the implied covenant of good faith.[274] While parties cannot waive the implied covenant of good faith in an uncorporation agreement, in dismissing the claim, Vice Chancellor Laster pointed out that "[w]hen an LP agreement eliminates fiduciary duties as part of a detailed contractual governance scheme, Delaware courts should be all the more hesitant to resort to the implied covenant."[275]

Some have cited Vice Chancellor Laster's words to argue that in a complete waiver situation, there is a de facto waiver of the implied covenant.[276] I think that overstates the dicta in *Lonergan*. *Lonergan* was a case of bad pleading, the actions that the plaintiff claimed implicated

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[267] *See* White, *supra* note 96, at 132-33 ("[T]here are indications that, in situations where Delaware parties eliminate fiduciary duties by contract, the scope of the Implied Covenant will be narrowed even further, thereby rendering the Covenant functionally meaningless."); Gold, *supra* note 103, at 184 (suggesting that Delaware's contractualist approach to uncorporations should restrict application of the implied covenant of good faith).

[268] Lonergan v. EPE Holdings LLC, 5 A.3d 1008 (Del. Ch. 2010).

[269] *Id.* at 1018.

[270] *Id.*at 1014.

[271] *Id.* at 1018.

[272] *Lonergan*, 5 A.3d at 1021.

[273] *Id.* at 1015.

[274] *Id.* at 1018.

[275] *Id.*

[276] White, *supra* note 96, at 153-56; Gold, *supra* note 103, at 136.

the implied covenant were not contractually based (as a claim for breach of the implied covenant must be), but instead grounded in tort.[277] The reality is that mere allegations of unfairness do not implicate the implied covenant.[278] This ties back to the above discussion, which stated that the implied covenant is applicable where there is a contractual provision that allows for discretion—what I term a "discretionary gap"—and that discretion is exercised in an arbitrary or capricious manner.[279] In a "discretionary gap" case, breach of the implied covenant remains a viable claim.

E. *The Impact of Partial Modification on Implied Covenant Claims*

As discussed in Part V.C above, special approval provisions are prominent in Delaware uncorporation agreements.[280] Such provisions are very effective at shielding management from liability for breach of fiduciary duty.[281] However, by drafting (via their attorney) an uncorporation agreement with a special approval provision, management leaves plaintiffs an opening.[282] Special approval provisions will often leave discretionary gaps.[283] Those discretionary gaps can open the door for a claim that management violated the implied covenant good faith.[284]

Here, the illustrative case is *Gerber v. Enterprise Products Holdings, LLC*.[285] *Gerber* was a complicated case because it involved two transactions implicating fiduciary duties.[286] In 2009 Enterprise GP Holdings, LP ("EPE") sold—allegedly at below fair market value—one of its assets to Enterprise Products LP (which was controlled by EPE's general partner and thus a conflicted sale).[287] Then in 2010, EPE was merged into Enterprise Products, LP, and Gerber's limited partnership

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[277] *Lonergan*, 5 A.3d at 1016 ("[T]he plaintiff seeks to cloak familiar breach of fiduciary duty theories in the guise of the implied covenant of good faith and fair dealing.").

[278] *Id.*

[279] *See supra* Part III.C.

[280] In a prior article, I found that nearly 85% of publicly traded uncorporation agreements contained special approval provisions. Horton, *supra* note 2, at 60-61.

[281] *See infra* Part IV.D, Table I (showing that plaintiffs only succeed 14% of time when facing special approval clauses).

[282] Gerber v. Enter. Prods. Holdings, LLC, 67 A.3d 400, 419 (Del. 2013) ("Express contractual provisions always supersede the implied covenant, but even the most carefully drafted agreement will harbor residual nooks and crannies for the implied covenant to fill. In those situations, what is 'arbitrary' or 'unreasonable'—or conversely 'reasonable'—depends on the parties' original contractual expectations, . . .").

[283] *Id.*

[284] *Id.*

[285] *Id.*

[286] *Gerber*, 67 A.3d at 406-08.

[287] *Id.* at 406.

units were exchanged for units in Enterprise Products, LP (also, Gerber's derivative stemming from the earlier asset sale was extinguished).[288] Gerber alleged that the exchange rate was unfair, because the valuation of his EPE units did not take into account the value of his claim stemming from the challenged 2009 sale.[289]

I will focus on Gerber's claim stemming from the merger, and how it faired in light of various provisions within EPE's uncorporation agreement.[290] The Delaware Supreme Court found that the uncorporation agreement eliminated common law fiduciary duties and replaced them with contractual duties, specifically a special approval process.[291] In short, if the special approval process is properly followed—in this case, if the special approval committee found that the exchange was fair—all partners are deemed to have agreed to the conflict transaction in question.[292] However—and this is where this case gets complicated—the special committee must carry out the special approval process in good faith, which is contractually defined as the "contractual good faith standard."[293] To wit, the contractual good faith standard is met if the special committee relies on a fairness opinion in making its decision.[294] The court below had found that the special committee had acted in good faith, presumed from reliance on the fairness opinion, and dismissed the claim for breach of fiduciary duty.[295]

The confusion arises because in addition to carrying out the special approval process according to the *contractual good faith* standard, the special committee also must act in accordance with the *implied covenant of good faith*, a separate and distinct standard.[296] The first is grounded in the language of the contract itself, the second is imposed by common law upon the contract.[297] As discussed in Part III.C above, the implied covenant of good faith is violated where the special committee exercises its contractual discretion in a way that is arbitrary, depriving the limited partners of the benefit of their bargain.[298] Here, the limited partners had (at least theoretically) bargained for special approval, and that such

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[288] *Id.* at 407-08.
[289] *Id.* at 422.
[290] *See Gerber*, 67 A.3d at 418.
[291] *Id.* at 410-11.
[292] *Id.*
[293] *Id.* at 418.
[294] *Gerber*, 67 A.3d at 410-11.
[295] *Id.* at 414.
[296] *Id.* at 418-19.
[297] *See id.*
[298] *See supra* Part III.C.

special approval would take into account a fairness opinion.[299]

The question thus becomes, where is the "discretionary gap" that the implied covenant must fill? In *Gerber* the special committee had discretion as to how to use the fairness opinion.[300] The uncorporation agreement provided that

> [t]he General Partner may consult with . . . [experts or] investment bankers . . . , and any act taken or omitted to be taken in *reliance* upon the opinion . . . of such Persons as to matters that the General Partner reasonably believes to be within such Person's professional or expert competence shall be *conclusively presumed* to have been done or omitted in good faith and in accordance with such opinion.[301]

Thus, as stated by the Court, "[t]he implied covenant requires that [the special committee] refrain from arbitrary or unreasonable" reliance on the fairness opinion.[302] Of course, it would be arbitrary and unreasonable to rely on an incomplete fairness opinion. And that is what Gerber was able to allege the special committee did.[303] As stated by the Court:

> The Complaint pleads that the Morgan Stanley 2009 opinion did *not* address whether holders of EPE's LP units received fair consideration for their Teppco GP interest. Instead, Morgan Stanley addressed only the total consideration paid in both the Teppco LP Sale (which did not include any consideration for EPE's LP unitholders) and the 2009 Sale, and explicitly disclaimed to opine as to the fairness of any specific component of the total consideration.[304]

The court found that the fairness opinion did not fulfill its basic function, determining whether the consideration paid was fair, because it did not assign a value to a shareholder derivative suit then underway, which was ironic because the merger was designed to extinguish this.[305] The court went on to note that "[the fairness opinion] stated that the 2010 Merger consideration was fair without considering the [derivative

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[299] *Gerber*, 67 A.3d at 422.
[300] *Id.* at 423-24.
[301] *Id.* at 410-11 (emphasis in original).
[302] *Id.* at 419.
[303] *Gerber*, 67 A.3d at 421-22.
[304] *Id.* (emphasis in original).
[305] *Id.* at 422.

claims] it did not 'address whether the consideration was fair *with* the [derivative claims].'"[306] The fairness opinion opined as to a fair price without considering one of the major assets of the company.[307] Such a fairness opinion necessarily fails its primary purpose, and as such, deprived Gerber of the benefit of his bargain.[308] Gerber prevailed in his claim for breach of the implied covenant of good faith, to the extent that he received a reversal of the lower courts dismissal of his breach of implied covenant claim.[309]

Now, compare the outcome in the cases of *Wiggs* and *Fisk Ventures*, where the uncorporation agreement eliminated fiduciary duties, and plaintiffs lost on their claim for breach of the implied covenant of good faith,[310] against *Gerber*, where the uncorporation agreement only modified fiduciary duties, and plaintiff won on their claim for breach of the implied covenant of good faith.[311] This leads to the final observation based on the written decisions: an elimination of fiduciary duties in an uncorporation agreement may also serve as some protection against claims for breach of the implied covenant of good faith.[312]

VI. LESSONS AND CONCLUSION

Professor Miller, in *The Best of Both Worlds: Default Fiduciary Duties and Contractual Freedom in Alternative Business Entities*, argues that the true impact of the 2004 Elimination Amendments have yet to be ascertained.[313] She calls for scholars to explore the impact of fiduciary modifications and eliminations.[314] This Article attempts to do that through a systematic content analysis of judicial decisions. I read thirty-six fiduciary duty cases, recorded patterns, and drew inferences therefrom. The goal was to answer the following question: for those cases that elude settlement and are complicated enough to require a judge to issue a written decision, did the modification or elimination of fiduciary duties in the uncorporation agreement help insulate

[306] *Id.* at 422-23 (citations omitted).
[307] *Gerber*, 67 A.3d at 423.
[308] *Id.*
[309] *Id.* at 426 (remanding for further proceedings consistent with the opinion).
[310] Wiggs v. Summit Midstream Partners, LLC, 2013 WL 1286180, at *8 (Del. Ch. Mar. 28, 2013); Fisk Ventures, LLC v. Segal, 2008 WL 1961156, at *8 (Del. Ch. May 7, 2008).
[311] *Gerber*, 67 A.3d at 426.
[312] *See supra* Table I.
[313] Miller, *Best of Both Worlds*, *supra* note 53, at 328-29.
[314] *Id*. at 334.

management from a claim of breach of fiduciary duty? As detailed in Part V, I was able to make the following observations:

> (1) For those elimination cases that required a written decision, plaintiffs made it past (at least) a motion to dismiss 0% of the time.[315]
> (2) For those partial modification cases (not including special approval) that required a written decision, plaintiffs made it past (at least) a motion to dismiss 53% of the time.[316]
> (3) For those partial modification cases (which did include special approval) that required a written decision, plaintiffs made it past (at least) a motion to dismiss 14% of the time.[317]
> (4) An elimination of fiduciary duties in an uncorporation agreement may also serve as some protection against claims for breach of the implied covenant of good faith.[318]

In turn, those realities lead to five pieces of advice for drafters of uncorporation agreements with the goal of protecting management, and who also fear it (the uncorporation agreement) may be the subject of a written decision by the Delaware Court of Chancery or Delaware Supreme Court:

> (1) Do not be too creative. No attorney—no matter how skilled—is capable of foreseeing how one creative provision will be interpreted in light of other provisions in the same uncorporation agreement. An attorney will be depriving her client of what they are paying for—a modicum of certainty moving forward. Business thrives on certainty.
> (2) Related to 1 above, use tried-and-true provisions. Partial modifications only became effective after 2010, when most drafters began consistently using special approval provisions.
> (3) If a special approval provision is used, remember to define the duties the members of the special committee must

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[315] *See supra* Part V.A.
[316] *See supra* Part V.B.
[317] *See supra* Part V.C. However, as further discussed in Part V.C, that trend is brought into question by *In re El Paso Pipeline Partners, L.P. Derivative Litigation,* which awarded plaintiffs $171 million in damages. 2015 WL 1815846, at *27 (Del. Ch. Apr. 20, 2015), *reprinted in* 40 DEL. J. CORP. L. 717 (2016).
[318] *See supra* Parts V.D, V.E.

follow. If the goal is to reduce legal exposure, provide that the decision of the special committee may be made in its sole discretion, or with subjective good faith.
(4) If a special approval provision is used, do not use the word "may"—e.g., "the special committee *may* rely on a fairness opinion." Such discretion opens the door to challenges that the special approval process was not exercised in good faith (that is, inconsistent with the implied covenant of good faith).
(5) If only a specific type of transaction is to be exempted from fiduciary duties, be clear about it. Do not make it difficult for the court to determine what types of transactions the modification impacts.
(6) For more certainty, completely eliminate fiduciary duties. That will help insulate management from lawsuits claiming breach of fiduciary duty (and possibly the implied covenant of good faith). Although a complete waiver may present its own challenges from a standpoint of raising capital.[319]

Finally, the goal of this Article was to observe various patterns in written decisions. This Article does not take a position on whether

[319]One note of caution regarding modifying or eliminating fiduciary duties in uncorporation agreements: It may have less than ideal consequences in other areas. For example, eliminating fiduciary duties altogether—while helping to insulate management—may also cause the value of the uncorporation's units to decrease. In the publicly traded MLP context, this impact is observable, at least in the actions of credit rating agencies. Horton, *supra* note 2, at 59-60. For a discussion of MLPs, see note 139. In June 2007, Moody's raised the risk profile for twenty-six MLPs that it monitors, reasoning that due to the waiver fiduciary duties, "common unitholders have very limited ability relative to shareholders in a corporation to use litigation or the threat of litigation as a mechanism to wield influence and protect their interests." SPECIAL COMMENT, MOODY'S INVESTOR SERVS., CORPORATE GOVERNANCE STRUCTURE OF MASTER LIMITED PARTNERSHIPS CARRIES CREDIT RISK 2-3 (2007) [hereinafter MOODY'S COMMENT]. Moody's Special Comment goes on to say that "[u]nitholder suits are rare and generally unsuccessful." *Id.* This Article supports that last contention, at least where the partial modification takes on the form of special approval or where the uncorporation agreement eliminates fiduciary duties altogether. *See infra* Table I. As Moody's implies, MLPs that heavily eliminate or modify fiduciary duties may be forced to either reduce the price of their common units to compensate for such added risk, or increase their payouts. As to increasing payouts, Moody's observes that one MLP, in order to quell fears that its "GP could use its control to extract cash from the MLP to the detriment of bondholders . . . voluntarily amended the partnership agreement to reduce the proportion of cash distributed to the GP." MOODY'S COMMENT, *supra*, at 1. Thus, the advantages available to the GP from fiduciary modification or elimination in the uncorporation agreement may lead to disadvantages elsewhere.

fiduciary eliminations or modifications are good or bad. And related to the foregoing, this Article does not mean to infer that the Delaware General Assembly's decision to allow parties to discard traditional fiduciary duties in favor of contractually based duties is unwise. In fact, the decision may be in fact wise. Investors may be able to use contractual devices, or market pressures, at least in the case of publicly traded MLPs, to compensate for increased risk (and achieve equilibrium between owner and management) through reduction in common unit price, or reduction in cash distributions to the GP.[320] However, that is a question for another day.

[320] *See* Gomtsian, *supra* note 51, at 212.

APPENDIX I

CASE NAME AND CITATION	JUDGE	ENTITY TYPE AND BUSINESS	TYPE OF MODIFICATION[321]	ALLEGED FIDUCIARY BREACH[322]	DISPOSITION[323]	WAS THERE AN IMPLIED COVENANT CLAIM?[324]	DISPOSITION
Gelfman v. Weeden Investors, L.P., 859 A.2d 89 (Del. Ch. 2004)	Strine	**LP** was a broker-dealer that exclusively focuses on the execution of securities trades	**Partial.** Duty of care set at gross negligence, willful or wanton misconduct, or GP's action was "reasonably believed to be inconsistent with the overall purposes of the Partnership"	**Dilution** and **freeze-out** of limited partners by forced redemption of limited partners' units, while at same time issuing units to outside directors to gain support for plan	**P Wins.** Post trial opinion finds for plaintiffs	**No**	N/A
Blackmore Partners, L.P. v. Link Energy,	Lamb	**LLC** in the business of purchasing,	**Partial.** Duty of care eliminated; duty of	**Failure to maximize unitholder**	**P Wins.** Motion to dismiss denied	**No**	N/A

[321]For an explanation of the categories of expansions, restrictions, or eliminations of fiduciary duties, see *supra* Part IV.
[322]For a description of various fiduciary duties, see *supra* Part III.A-B.
[323]A particular claim was counted as a victory for plaintiff if plaintiff survived a motion to dismiss, motion for summary judgment, where the court approved a settlement, or where the court awarded damages to the plaintiff following a trial. *See supra* Part II.
[324]For a description of the implied covenant of good faith, and how it differs from fiduciary duties, see *supra* Part III.C.

LLC, 864 A.2d 80 (Del. Ch. 2004)		gathering, transporting, trading, storage and resale of crude oil	loyalty retained	**value.** LLC sold all assets, and proceeds were given to bond-holders, leaving nothing for equity holders			
Flight Options Int'l, Inc. v. Flight Options, LLC, 2005 WL 5756537 (Del. Ch. July 11, 2005)	Noble	**LLC** provides aircraft services to members	**Partial.** Leans toward no modification because sets arms length/fair price standard for interested transactions	**Self-dealing.** Conversion of majority owner's debt to equity, **diluting** other owners	**P Wins.** Proposed transaction enjoined for 30 days	**No**	N/A
Twin Bridges LP v. Draper, 2007 WL 2744609 (Del. Ch. Sept. 14, 2007)	Parsons	**LP** that owns real estate	**Traditional.** There was no 1101 modification	**Self-dealing.** Defendant amended LP agreement to eliminate fiduciary duties	**P Wins.** At the motion to dismiss stage, the court could not conclude whether fiduciary duties were breached	**Yes.** Plaintiff claims that amendment of LP Agreement violated the implied covenant	**D Wins.** The amendment of the LP Agreement followed both DE law and the LP Agreement
Fisk Ventures, LLC v. Segal, 2008 WL 1961156 (Del.	Chandler	**LLC** formed to develop and market biomedical	**Elimination.** Agreement completely eliminated fiduciary	**Deadlock.** Plaintiff alleges that the failure of the other	**D Wins.** Court granted defendants' motions to	**Yes.** Plaintiff argues that the failure to approve additional financing	**D Wins.** Dismissed

Ch. May 7, 2008)		technology	duties	members to approve additional financing was grossly negligent, violating their duty of care	dismiss	robbed him of the "fruits of his bargain"	
Venhill LP v. Hillman, 2008 WL 2270488 (Del. Ch. June 3, 2008), *reprinted in* 33 DEL. J. CORP. L. 982 (2009)	Strine	**LP** engaged in the computer software business	**Partial.** Modified so that general partner liable only if fails to act in good faith and is not found to be guilty of gross negligence or willful or wanton misconduct with respect thereto.	**Self-dealing.** General partner caused LP to engage in a series of irrational investments in a company he controlled	**P Wins.** Judgment entered for plaintiff following trial on merits	**No**	N/A
Schuss v. Penfield Partners, L.P., 2008 WL 2433842 (Del. Ch. June 13, 2008), *reprinted in* 33 DEL. J. COP. L. 960 (2009)	Parsons	**LP** hedge fund	**Partial.** General partner exculpated from any breach of fiduciary duty unless gross negligence, willful misconduct, or violation of law	General partner of LP conceivably **breached its fiduciary duties** to retiring partners by in-kind distribution of securities with	**P Wins.** Motion to dismiss denied in part	**No**	N/A

				fair market value less than withdrawing partners' capital accounts)			
Wood v. Baum, 953 A.2d 136 (Del. 2008)[325]	Jacobs	**LLC** that invests in housing related debt	**Partial.** Liability limited to fraudulent or illegal conduct	Management breached **duty of care** by filing inaccurate forms with SEC, and **duty of loyalty** by causing LLC to enter into related party transactions	**D Wins.** Affirmed Court of Chancery's dismissal of action	**No**	N/A
Kahn v. Partnoy, 2008 Del. Ch. LEXIS 184 (Dec. 11, 2008)	Chandler	**LLC** that operates truck stops	**Partial.** Modified ambiguously	**Self-dealing.** Managing member caused LLC to enter into lease with affiliate at higher than fair market	**P Wins.** Motion to dismiss denied	**No**	N/A

[325] Before the court was a motion to dismiss the derivative suit for failure to make a demand on the board. The plaintiff claimed that demand was excused because there was a "'reasonable doubt' that the Board would have properly exercised its business judgment . . . because of a substantial risk of personal liability." *Wood*, 953 A.2d at 140-41. As such, the court was forced to examine the impact of the operating agreement's fiduciary modification provision on the potential liability of the directors.

				value			
Bay Ctr. Apartment Owner, LLC v. Emery Bay PKI, LLC, 2009 WL 1124451 (Del. Ch. Apr. 20, 2009)	Strine	**LLC** developing condominiums	**Partial.** Modified ambiguously. One provision retained traditional fiduciary duties; another eliminated them	**Self-dealing.** Renegotiated note between LLC and bank to avoid his personal guarantee, diverting cash flow from LLC	**P Wins.** Motion to dismiss denied	**Yes.** Plaintiff argues that renegotiation of note was an abuse of discretion under the operating agreement, and thus violated the implied covenant	**P Wins.** Claim survives motion to dismiss
Brinckerhoff v. Tex. E. Prods. Pipeline Co., LLC, 986 A.2d 370 (Del. Ch. 2010) Derivative Action Merger Action	Laster	**LP** operates in the upstream, midstream, and downstream segments of the oil and gas industry	**Partial.** Transaction must be no less favorable to the Partnership than those available from unrelated third parties **Partial with Special App.** Modified to provide for special approval	**Self-dealing.** General partner caused LP to enter into unfair contract with company controlled by general partner **Self-serving merger** designed to extinguish P's standing in the	**P wins.** Court approved $10m settlement	**No**	N/A

				derivative action			
Kelly v. Blum, 2010 WL 629850 (Del. Ch. Feb. 24, 2010)	Parsons	**LLC** owned and operated urban radio station	**Traditional.** However, monetary damages for violation of duty of loyalty only awarded where manager acts willfully	**Self-serving merger** designed to squeeze-out Kelly and take control of an FCC broadcasting license	**P Wins.** Defendants' motion to dismiss denied as to loyalty claim. Significant mistrust and rancor proliferated	**Yes.** P argues that approving merger violated implied covenant	**D Wins.** P failed to allege any implied contractual obligation in the operating agreement
PT China LLC v. PT Korea LLC, 2010 WL 761145 (Del. Ch. Feb 26, 2010)[326]	Noble	**LLC** that invests in distressed or underperforming Asian asset-backed securities	**Traditional.** There was no 1101 modification	**Mis-appropriation.** Defendant misappropriated investment opportunities that should have been offered to the LLC	**P Wins.** The plaintiff adequately alleged misappropriation (this was necessary for the court to exercise jurisdiction)	**No**	N/A

[326]The decision involved whether the court could exercise jurisdiction over the third-party defendant, a resident of Singapore. However, this in turn required an examination as to whether the third-party plaintiffs "adequately state a claim for breach of fiduciary duty, which would give the Court personal jurisdiction over Wang under 6 Del. C. § 18-109." *PT China*, 2010 WL 761145, at *4.

Lola Cars Int'l Ltd. v. Krohn Racing, LLC, 2010 WL 3314484 (Del. Ch. Aug. 2, 2010)	Noble	**LLC** that constructed and sold race cars	**Traditional.** There was no 1101 modification	**Violation of duty of care.** Defendant one (who was appointed by LLC member, defendant two) engaged in gross negligence causing crippling inventory problems, which in turn led to parts being lost	**D Wins.** Defendant wins at trial. Post-trial decision makes clear that Plaintiff failed to show gross negligence	**Yes.** Plaintiff claimed that defendant two failed to remove Defendant one, denying P the "fruits of its bargain."	**D2 wins.** Claim rejected
Lonergan v. EPE Holdings, LLC, 5 A.3d 1008 (Del. Ch. 2010)	Laster	**LP** provides midstream energy services to producers and consumers of natural gas	**Partial with Special App.** Special approval provided for reliance on fairness opinion, which in turn led to presumption of good faith	**Self-serving merger.** Each owner of the LP will receive 1.5 units of the surviving entity, which plaintiffs claim is an unfair price	**D Wins.** Motion to expedite denied. Contractual standard supplanted traditional fiduciary duties	**Yes.** Plaintiff claims that the special approval provision was exercised in a manner that deprived D of the benefit of his bargain	**D wins.** The plaintiff cannot recast traditional claims for breach of fiduciary duties as implied covenant claims
In re Atlas Energy, 2010 WL 4273122 (Del.	Noble	**LLC** operates natural gas and	**Partial.** Individual directors are required to act with subjective	**Self-serving merger.** Each owner of the LP	**D Wins.** Motion to dismiss granted because	**No**	N/A

Ch. Oct. 28, 2010) (action against directors), *reprinted in* 36 DEL. J. CORP. L. 823 (2011)		oil assets	good faith	will receive 1.16 units of the surviving entity, which is claimed to be an unfair price.	none of the defendants approved the merger in a manner they subjectively believed was not in the best interests of the unitholders.		
In re Atlas Energy Res., LLC, 2010 WL 4273122 (Del. Ch. Oct. 28, 2010) (action against controlling unitholder, America), *reprinted in* 36 DEL. J. CORP. L. 823 (2011)	Noble	**LLC** operates natural gas and oil assets	**Traditional.** The special approval provision did not apply, and thus the court used an entire fairness standard	**Freeze out merger.** Each owner of the LP will receive 1.16 units of the surviving entity, which is claimed to be an unfair price	**P Wins.** Plaintiffs alleged adequate problems, both with price and process. Motion to dismiss denied	**No**	N/A
In re Inergy, L.P., 2010 WL 4273197 (Del.	Parsons	**LP** that operates propane supply and distribution business	**Partial.** One person special committee is insulated as long as	**Dilution.** Through a series of transactions,	**D Wins.** Court denies a preliminary	**No**	N/A

Ch. Oct. 29, 2010)			he reasonably believed action to be in the best interests of the Partnership	Inergy's public unitholders will be diluted from 92% to 60% ownership	injunction, finding that it is not likely P would prevail on the merits		
CNL-AB LLC v. E. Prop. Fund I SPE (MS Ref) LLC, 2011 WL 353529 (Del. Ch. Jan. 28, 2011)	Parsons	**LLC** owns resort and hotel properties	**Partial.** Managing member liable only where it acts with bad faith	**Self-dealing.** Managing member of LLC consented to foreclosure on property (to the benefit of its affiliates) at the expense of other members	**D Wins.** The plaintiffs cannot show that the managing member acted in bad faith by not opposing the foreclosure. Motion for preliminary injunction denied	**No**	N/A
Paige Capital Mgmt., LLC v. Lerner Fund, LLC, 2011 WL 3505355 (Del. Ch. Aug. 8, 2011)	Strine	**LP** hedge fund	**Traditional.** There was no 1101 modification	**Conflict of Interest.** General partner in LP refused to allow investor in hedge fund to withdraw money	**P Wins.** Post-trial decision for Plaintiff. Manager should have put investor's interest ahead of her own	**Yes.** Defendant brought a counterclaim arguing that seeking to withdraw money violated implied covenant	**Counterclaim D Wins.** It is not a violation to use contractual protections

Philips v. Hove, 2011 WL 4404034 (Del. Ch. Sept. 22, 2011)	Laster	**LLC** that is internet retailer of candles	**Traditional.** There was no 1101 modification	**Mis-appropriation.** One member misappropriated inventory and sold for own profit. The other member misappropriated the domain name and used it for his own profit	**P Wins.** Post-trial decision finds that both parties violated fiduciary duties	**No**	N/A
Brinckerhoff v. Enbridge Energy Co., 2011 WL 4599654 (Del. Ch. Sept. 30, 2011)	Noble	**LP** engaged in energy transportation	**Partial.** GP not liable for monetary damages if acted with good faith, and good faith presumed where fairness opinion obtained	**Self-dealing.** GP caused LP to enter into a joint venture agreement with an affiliate to construct a pipeline from Canada on less than favorable terms--a related party transaction	**D Wins.** Motion to dismiss granted	**Yes.** Plaintiffs claim that defendant breached good faith by relying on banker's opinion	**D Wins.** Limited partnership agreement expressly provides for such reliance

Dawson v. Pitco Capital Partners, 2012 Del. Ch. LEXIS 92 (Jan. 2012)	Noble		**Partial.** Duty of loyalty broadly eliminated. Duty of care limited to gross negligence, fraud or intentional misconduct	**Self-serving merger.** Merger where the members of LLC would be severely diluted	**D Wins.** Post-trial decision emphasized that plaintiff did not argue gross negligence at trial	**Yes.** Plaintiffs claim that manager should not be able to amend operating agreement in manner that deprives them of the fruits of their bargain	**D Wins. The board was given broad power to amend the operating agreement within the agreement itself.** Mere allegations of unfairness in the exercise of such power will not suffice
Auriga Capital Corp. v. Gatz Props., LLC, 40 A.3d 839 (Del. Ch. 2012)	Strine	**LLC** that operated a golf course	**Traditional.** Conflicted transaction subject to review for fair price (generally, what traditional duties would require); all other actions subject to traditional fiduciary duties	**Duty of Care.** Manager operated LLC in a grossly negligent manner (to reduce its value to prospective purchasers) **Self-serving transaction.** Manager then sold company to	**P Wins.** Post-trial decision found that Defendant violated duty of care and loyalty	**No**	N/A

				self at below FMV. Manager withheld important information from minority members			
In re Encore Energy Partners LP Unitholder Litig., 2012 WL 3792997 (Del. Ch. Aug. 31, 2012)	Parsons	**LP** involved in natural gas exploration and development	**Partial with Special App.** Modified to provide for special approval, which in turn required good faith. Good faith presumed when special committee relies on advise of advisor	**Self-Serving Merger.** Encore's GP approved a merger (interested because with GP's parent) where Encore unitholders received below FMV	**D Wins.** Motion to dismiss granted because defendant followed special approval requirements	**Yes.** Plaintiff claims that the discretion (using special approval) must be used to reach a fair result	**D Wins.** To require a fair result would read fiduciary duties back into the limited partnership agreement
Hite Hedge LP v. El Paso Corp., 2012 WL 4788658 (Del. Ch. Oct. 9, 2012)	Glasscock	**LP** involved in owning and operating natural gas pipelines	**Elimination.** Agreement completely eliminated fiduciary duties	**Self-serving merger.** Controlling partner approved merger (of self) that would reduce drop downs to	**D Wins.** Motion to dismiss granted because the limited partnership agreement clearly waives all	**No**	N/A

				subsidiary MLP, and thus reduce distributions to minority partners of MLP	fiduciary duties		
Feeley v. NHAOCG, LLC, 62 A.3d 649 (Del. Ch. 2012), *reprinted in* 37 DEL. J. CORP. L. 1115 (2013)	Laster	**LLC** involved in real estate development	**Traditional.** However, operating agreement limits monetary liability for breach of fiduciary duty to gross negligence or willful misconduct	**Duty of Care.** Manager violated duty of care by failing to make scheduled payment to acquire real estate **Misappropriation.** Manager misappropriated opportunities that should have been offered to the LLC	**P Wins.** Motion to dismiss fiduciary claims denied	**No**	N/A
Metro. Life Ins. Co. v. Tremont Grp. Holdings, Inc., 2012 WL 6632681 (Del.	Parsons	**LP** engaged in investing	**Partial**. Limited partnership agreement stated that GP liable only for gross negligence,	**Duty of Care.** Defendant allegedly ignored warning signs and invested	**P Wins.** Motion to dismiss denied where numerous warning signs and opportunities	**Yes**. Defendant failed to evaluate information when selecting investment managers depriving	**D Wins.** General allegations of bad faith conduct will not suffice

Ch. Dec. 20, 2012)			willful misfeasance, bad faith or reckless disregard of duties	investor's money with Madoff	to uncover fraud	Plaintiffs of the benefit of their bargain	
Zimmerman v. Crothall, 62 A.3d 676 (Del. Ch. 2013), *reprinted in* 38 DEL. J. CORP. L. 339 (2013)	Parsons	**LLC** that manufactures medical devices	**Partial.** Interested transaction must be fair to the LLC and members[327]	**Self-dealing issuance of debt.** Management of LLC entered into various financing transactions which eviscerated plaintiff's investment	**D Wins.** Post-trial decision found that management did not breach its fiduciary duties	**No**	N/A
Wiggs v. Summit Midstream Partners, LLC, 2013 WL 1286180 (Del. Ch. Mar. 28, 2013)	Noble	**LLC** that developed a natural gas gathering system	**Elimination.** Agreement completely eliminated fiduciary duties	**Self-dealing.** Managing member changed operating agreement to reduce members' distributions	**D Wins.** Court granted motion to dismiss because the operating agreement eliminates all fiduciary duties	**Yes.** Plaintiff claims that defendant deprived them of their bargain by reducing their distributions	**D Wins.** Reduction in distributions was foreseeable when they entered into the operating agreement

[327]This is similar to no waiver at all, because courts have interpreted this as requiring fair process and price, that is to say, entire fairness. *See* Zimmerman v. Crothall, 62 A.3d 676, 703-04 (Del. Ch. 2013) ("Delaware courts have interpreted similar provisions as effectively calling for review under an entire fairness standard. That is, there must be a fair process and a fair price."), *reprinted in* 38 DEL. J. CORP. L. 339 (2013).

Norton v. K-Sea Transp. Partners L.P., 67 A.3d 354 (Del. 2013)	Steele	**LP** that transports petroleum	**Partial with Special App.** Members of special committee must have a good faith belief that the action is in the best interest of the partnership. Good faith presumed where fairness opinion obtained	**Self-serving merger.** Merger of K-Sea into Kirby, with GP receiving excessive compensation at the expense of the limited partners	**D Wins.** Dismissal affirmed because the general partner obtained an appropriate fairness opinion	**No**	N/A
Gerber v. Enter. Prods. Holdings, LLC, 67 A.3d 400 (Del. 2013)	Jacobs	**LP** engaged in the oil and gas business	**Partial with Special App.** Modified to provide for special approval, which in turn required good faith. Good faith presumed where fairness opinion obtained	**Self-serving merger.** EPE merged into Enterprise at an exchange ratio unfair to existing limited partners, because it did not take into account existing fiduciary claim arising from 2009 sale	**D Wins.** Dismissal affirmed because the general partner obtained an appropriate fairness opinion	**Yes.** Plaintiff claims that reliance on the fairness opinion was in bad faith because it did not value the fairness of the 2009 sale	**P wins.** Proper use of the special approval provision would include a fairness opinion that values the derivative claims where (as here) terminating those claims was a principal purpose of a merger
Allen v. Encore Energy Partners, L.P., 72 A.3d 93	Steele	**LP** that developed oil and natural gas	**Partial with Special App.** Modified to provide for special	**Self-serving merger.** Merger of LP into its	**D Wins.** Dismissal affirmed. Special	**No**	N/A

(Del. 2013)		fields	approval, which in turn required good faith	GP's controller with inadequate exchange ratio	committee decision not so outside the bounds of reasonable judgment that one can infer subjective bad faith		
Touch of Italy Salumeria & Pasticceria, LLC v. Bascio, 2014 WL 108895 (Del. Ch. Jan. 13, 2014), *reprinted in* 39 DEL. J. CORP. L. 305 (2014)	Glasscock	**LLC** that operates a specialty Italian grocery	**Traditional.** There was no 1101 modification	**Competition.** Member withdrew from LLC and started a competing business	**D Wins.** Did not start competing until after withdrew	**Yes.** P claims that D opening competing business deprived them of the benefit of their bargain	**D Wins.** It is foreseeable that a withdrawing member may compete, especially where operating agreement does not contain non-compete clause
Allen v. El Paso Pipeline GP Co., L.L.C., 2014 WL 2819005 (Del. Ch. June 20, 2014)	Laster	**LP** that owns interests in companies that operate natural gas pipelines and storage facilities	**Partial with Special App.** Modified to provide for special approval, which in turn required good faith	**Self-interested transaction.** LP bought interest in a company from the parent of its general partner. The transaction	**D Wins.** Defendants' motion for summary judgment granted. The special	**Yes.** Like *Gerber*, the plaintiff claims that the opinion used by the committee did not value all assets	**D Wins.** The court found that this was different from Gerber because it did not include a conclusive

				was to be funded with a public offering	committee acted in good faith		presumption provision
Ross Holding & Mgmt. Co. v. Advance Realty Grp., LLC, 2014 WL 4374261 (Del. Ch. Sept. 4, 2014)	Noble	**LLC** real estate investment and development firm	**Traditional.** The agreement did not clearly eliminate or modify fiduciary duties	**Reorganization.** Pursuant to the reorganization the minority were either cashed out at a discounted price, or received units in a spun-off entity with questionable prospects	**P Wins.** Post-trial decision found that the transaction was not entirely fair, specifically as to procedure	**No**[328]	N/A

[328]Plaintiffs did include a beach of implied covenant claim in their complaint, but did not oppose defendant's motion to dismiss that claim, and did not brief the matter for the court. Ross Holding & Mgmt. Co. v. Advance Realty Group, LLC, 2014 WL 4374261, at *36 (Del. Ch. Sept. 4, 2014).