THE GOING-PRIVATE FREEZE-OUT: A UNIQUE DANGER FOR INVESTORS IN DELAWARE NON-CORPORATE BUSINESS ASSOCIATIONS

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ABSTRACT

This Article is the first to empirically examine provisions that limit or eliminate the fiduciary duties of managers (in the case of LLCs) and general partners (in the case of LPs) in the operating agreements of publicly traded non-corporate business associations, and link those findings to a problem faced by investors in such entities, the going-private freeze-out. In a going-private freeze-out, public stockownership is eliminated and the company becomes closely held. This Article is especially timely given the exponential growth of LPs and LLCs over the past fifteen years. In 2011, in Delaware, the state of formation for most publicly traded companies, seventy-five percent of newly formed companies were either LPs or LLCs (up from twenty percent in 1997).

This Article begins with an explanation of corporate going-private freeze-outs, and the dissatisfaction that may arise among cashed-out shareholders seeking a fair price. In the corporate context such shareholders are protected by the fiduciary doctrine of entire fairness. The cashed-out shareholders can bring a lawsuit to force a fair price.

In contrast, for non-corporate entities, the protection of entire fairness may fail. In Delaware, LPs and LLCs can draft provisions in their operating agreements that eliminate fiduciary duties, including the applicability of entire fairness to going-private freeze-outs. The Author discusses cases where challenges to going-private freeze-outs based on entire fairness were foreclosed by provisions in the applicable operating agreement. Most prominent among these cases are In re Atlas Energy Resources, LLC, *and* Lonergan v. EPE Holdings, LLC.

This Article, The Going-Private Freeze-Out, *culminates with an empirical analysis, that is to say, a count of how many publicly traded non-corporate business associations contain provisions like those in* Atlas Energy *and* Lonergan*–specifically special approval provisions and fiduciary elimination provisions. The Author concludes that almost ninety percent of publicly traded non-corporate business associations subject their investors to a unique susceptibility (beyond that experienced by investors in publicly traded corporations) to going-private freeze-outs.*

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I. INTRODUCTION

In a going-private freeze-out, controlling shareholders "seek to terminate public stockownership and return the firm to the status of a closely held entity."[1] This can be accomplished through a number of methods: if the controlling shareholder is a natural person, she may transfer her stock to a

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[1]Victor Brudney & Marvin A. Chirelstein, *A Restatement of Corporate Freezeouts*, 87 YALE L. J. 1354, 1365 (1978); *see* Joshua M. Koenig, *A Brief Roadmap to Going Private*, 2004 COLUM. BUS. L. REV. 505, 532-38 (describing going-private transactions via long form merger, tender offer followed by short form merger, and reverse stock split).

holding company and then merge the controlled company into the holding company, with the public shareholders receiving cash; or if the controlling shareholder is a parent entity, it may seek to merge the controlled subsidiary into itself (the parent), again with the public shareholders being compensated with cash.[2] The full number of permutations is limited only by the imagination of the transactional attorney.

Unfortunately, in a going-private freeze-out, minority shareholders often claim that they should have received more compensation for their shares. They argue that being publicly traded—and the corresponding liquidity—does not guaranty a fair price.[3] While the stock is publicly traded, it may be caught up in a stock market slump, or put otherwise, "the firm, having gone public when the market was buoyant and high, now elects to go private when the same market is depressed, and will presumably go public again when the market averages recover."[4] Or perhaps "'insiders will elect to go private at a moment in time that they perceive as a turning point in the company's affairs—but before that perception has become general.'"[5]

Alternatively (or in addition), the price per share in a going-private freeze-out may not take into account an adequate control premium.[6] This argument is based on the theory that "a publicly-traded stock price is solely a measure of the value of a minority position and, thus, . . . the value of a single share."[7] Control is worth something (I would pay more for a car where I was guaranteed the right to drive it, than a car where I was merely promised a spot in the back seat). In fact, Salomon Smith Barney conducted a study of "minority squeeze-out transactions and found that the average premium paid for a control block when compared

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[2]*See* Brudney & Chirelstein, *supra* note 1, at 1365.

[3]Share prices show a "persistent tendency to deviate from their rational values [where there are inefficiencies], . . . most significantly, disparities in information." Allen D. Boyer, *Activist Shareholders, Corporate Directors, and Institutional Investment: Some Lessons from the Robber Barons*, 50 WASH. & LEE L. REV. 977, 1034 (1993) (citing Kenneth A. Snowden, *American Stock Market Development and Performance 1871-1929*, 24 EXPLORATIONS IN ECON. HISTORY 327, 347-51 (1987)).

[4]Brudney & Chirelstein, *supra* note 1, at 1366.

[5]*Id.* at 1368; *see* Richard A. Booth, *Management Buyouts, Shareholder Welfare, And The Limits Of Fiduciary Duty,* 60 N.Y.U. L. REV. 630, 633 (1985) (citing Brudney & Chirelstein, *supra* note 1, at 1366, 1368) ("[M]anagement buyouts should be prohibited because they are equivalent to management's trading on inside information.").

[6]*E.g.*, William J. Carney & Mark Heimendinger, *Appraising the Nonexistent: The Delaware Courts' Struggle with Control Premiums*, 152 U. PA. L. REV. 845, 855 (2003) (identifying an example how the exclusion of a control premium can artificially and unrealistically turn a security holder into a minority shareholder).

[7]Smith v. Van Gorkom, 488 A.2d 858, 876 (Del. 1985).

to the stock price was approximately 50%."[8] Others have placed the premium as high as eighty percent.[9]

In the corporate context, controlling shareholders are discouraged from taking a company private for less than fair value by the threat of a lawsuit, specifically a lawsuit for breach of fiduciary duty.[10] In Delaware, fiduciary protections in the case of a going-private freeze-out have evolved beyond the ordinary duty of care, with the corresponding defense of business judgment, to a more exacting review based on entire fairness.[11] Part II of this Article discusses the evolution and application of these fiduciary duties in Delaware, the state of incorporation for most publicly traded corporations.[12] Part II begins with a brief discussion of *Kahn v. Lynch Communication Systems, Inc.*, which conclusively established the application of entire fairness in the going-private context.[13] The Author then examines in detail the application of entire fairness to a going-private freeze-out in *In re Emerging Communications, Inc.*[14] In the latter case, the court ordered that the per share price paid to

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[8]Doft & Co. v. Travelocity.com, Inc., 2004 Del. Ch. LEXIS 75, at *46 n.78 (Del. Ch. May 21, 2004).

[9]*See* Matthew D. Cain & Steven M. Davidoff, *Form Over Substance? The Value Of Corporate Process And Management Buy-Outs*, 36 DEL. J. CORP. L. 849, 870 (2011) (citing Steven N. Kaplan, *Sources of Value in Management Buyouts, in* LEVERAGED MANAGEMENT BUYOUTS: CAUSES AND CONSEQUENCES 95, 98 (Yakov Amihud ed., 1989)) (discussing premiums as high as 80%); *see also* Steven Kaplan, *The Effects of Management Buyouts on Operating Performance and Value*, 24 J. FIN. ECON. 217, 217 (1989) (identifying premiums of 40%).

[10]*E.g.*, Kahn v. Lynch Commc'n, Sys., Inc., 638 A.2d 1110, 1116 (Del. 1994) (quoting Citron v. E.I. Du Pont de Nemours & Co., 584 A.2d 490, 502 (Del. Ch. 1990)) ("'Even where no coercion is intended, shareholders voting on a parent subsidiary merger might perceive that their disapproval could risk retaliation of some kind by the controlling stockholder. For example, the controlling stockholder might decide to stop dividend payments or to effect a subsequent cash out merger at a less favorable price, for which the remedy would be time consuming and costly litigation.'").

[11]*See id.* at 1115-17.

[12]*E.g.*, Mohsen Manesh, *Delaware and the Market for LLC Law: A Theory of Contractibility and Legal Indeterminacy*, 52 B.C. L. REV. 189, 195-96 (2011) (stating that a majority of publicly traded companies—including sixty percent of the Fortune 500—are incorporated in Delaware).

[13]*Lynch Commc'n,* 638 A.2d at 1117 (emphasis added) (citing Weinberger v. UOP, Inc., 457 A.2d 701, 710-11 (Del. 1985)) ("*Once again*, this Court holds that the *exclusive* standard of judicial review in examining the propriety of an interested cash-out merger transaction by a controlling or dominated shareholder is entire fairness.").

[14]*In re* Emerging Commc'n Inc. S'holders Litig., 2004 WL 1305745, at *10 (Del. Ch. May 3, 2004).

cash out the public shareholders be increased from $10.25 per share to $38.05 per share.[15]

In Delaware, publicly traded corporations cannot eliminate the traditional fiduciary duties owed to minority shareholders, and thus cannot avoid the reach of entire fairness.[16] However, when we turn to publicly traded non-corporate business associations (*i.e.*, LLCs and LPs) the issue becomes more complicated.[17] While entire fairness remains the default standard in the absence of an express provision in the operating agreement stating otherwise, the reciprocal is also true: operating agreements may provide that the managers owe *no* fiduciary duty to the

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[15] *Id.* at *24.

[16] *E.g.*, Mohsen Manesh, *Contractual Freedom Under Delaware Alternative Entity Law: Evidence from Publicly Traded LPs and LLCs,* 37 J. CORP. L. 555, 561-62 (2012) (footnotes omitted) ("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; cannot insulate all interested transactions from exacting entire fairness review . . . . [But] Delaware alternative entities, . . . can do all of these things."). In Delaware, corporate directors may be exculpated from monetary liability where the only allegation is a violation of the duty of care. DEL. CODE ANN. tit. 8, § 102(b)(7) (2012) (providing that a corporation may adopt a provision in its certificate of incorporation exculpating its directors from monetary liability for breach of their duty of care). The Delaware Supreme Court in *Emerald Partners v. Berlin*, explained:

> In 1986, Section 102(b)(7) was enacted by the Delaware General Assembly, following a "directors and officers insurance liability crisis and the 1985 . . . decision [of this Court] in *Smith v. Van Gorkom*." In *Van Gorkom*, we held that directors were personally liable in monetary damages for gross negligence in the process of decisionmaking. The purpose of Section 102(b)(7) was to *permit shareholders*—who are entitled to rely upon directors to discharge their fiduciary duties at all times—to adopt a provision in the certificate of incorporation to exculpate directors from any personal liability for the payment of monetary damages for breaches of their duty of care, *but not for duty of loyalty violations*, good faith violations and certain other conduct.

787 A.2d 85, 90 (Del. 2001) (second emphasis added) (citing Malpiede v. Townson, 780 A.2d 1075, 1095 (Del. 2001)). However, plaintiffs' attorneys are aware of this defense, and allege that approval of the going-private freeze-out violates the duty of loyalty as well, more often than not, defeating such exculpation defenses and keeping an issue of fact alive for trial. *In re* Tyson Foods, Inc. Consol. S'holder Litig., 919 A.2d 563, 597-98 (Del. Ch. 2007) (refusing to dismiss claim pursuant to exculpation clause where plaintiff alleged failure to disclose information violated the duty of care *and* loyalty).

[17] Indeed, it is a widely held misconception that all publicly traded companies are corporations. To the contrary, both limited partnerships (LPs) and limited liability companies (LLCs) can be publicly traded. *See* Manesh, *supra* note 12, at 191 & n.12 (discussing publicly traded LLCs and listing Fortress Investment Group, a publicly traded Delaware LLC, as an example). Non-corporate business associations are bought and sold on the NYSE, Nasdaq, and the over the counter market (OTC). *See infra* Appedix A-D (identifying publicly traded LPs and LLCs).

minority unitholders.[18] This may come as a surprise to those that purchase units in non-corporate business associations, who exercise no role in negotiating the operating agreement, and are unaware of such fiduciary elimination provisions;[19] yet they are deemed to have accepted them.[20] Many of these unit holders also invest in publicly traded corporations and assume that the same protections apply.

As a result of non-corporate business associations eliminating fiduciary duties via agreement, public investors in such entities are uniquely susceptible to going-private freeze-outs via merger. As the Delaware Court of Chancery stated in *In re Atlas Energy Resources, LLC*, a case involving the going-private freeze-out of Atlas Energy's public unitholders:

> Just as a merger between a parent and its corporate subsidiary inherently threatens the interests of minority shareholders, a merger between a parent and its publicly held limited liability company subsidiary inherently threatens the rights of minority unitholders. The difference is that, in the context of a limited liability company, the parties can specify by contract the protections, *or lack*

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[18]*See In re* Atlas Energy Res., LLC, Unitholder Litig., 2010 Del. Ch. LEXIS 216, at *23 (Del Ch. Oct. 28, 2010) (quoting Kelly v. Blum*,* 2010 WL 629850, at *12 (Del. Ch. Feb. 24, 2010)), *reprinted in* 36 DEL. J. CORP. L. 823, 834 (2011) ("[C]ontrolling members in a manager-managed LLC owe minority members the traditional fiduciary duties that controlling shareholders owe minority shareholders."). *But see generally* Ann E. Conaway & Peter I. Tsoflias, *Challenging Traditional Thought: No Default Fiduciary Duties in Delaware Limited Liability Companies After* Auriga, 13 J. BUS. & SEC. L. (forthcoming 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1969053 (asserting that fiduciary duties do not apply by default in Delaware alternative entities). For simplicity of discussion, this Article uses "operating agreement(s)" to refer both to LLC operating agreements and LP limited partnership agreements; this Article also uses "manager(s)" to refer to managers in a manager-managed LLC, as well as general partners in a LP; and uses "unitholder(s)" to refer to both members in an LLC and limited partners in a LP.

[19]Although a strong argument can be made that they *should* be aware, as the annual report on form 10-K for such companies will generally state in all bold letters:

> ***Our operating agreement contains provisions that reduce or eliminate duties (including fiduciary duties) of our manager and limit remedies available to shareholders for actions that might otherwise constitute a breach of duty. It will be difficult for a shareholder to challenge a resolution of a conflict of interest by our manager or by its conflicts committee.***

Apollo Global Mgmt., LLC, Annual Report (Form 10-K), at 60 (Mar. 9, 2012).

[20]DEL. CODE ANN. tit. 6, § 18-101(7)(b) (2012) (providing that a LLC operating agreement is enforceable against assignees, even where they did not sign it); DEL. CODE ANN. tit. 6, § 17-101(12)(b) (2012) (providing the same as to LPs).

> *thereof,* that they want the minority to have against such threats. If they do so, a court will respect the parties' freedom of contract and will not apply the default [fiduciary duties].[21]

The danger of going-private freeze-outs for public unitholders in non-corporate business associations is also recognized by ratings agencies when discussing the risk of investing in such entities.[22] Moody's raised the risk profile for twenty-six publicly traded limited partnerships that it monitors, relative to public corporations with comparable financial metrics, reasoning:

> Delaware law ([publicly traded limited partnerships] are generally established under Delaware partnership law) allows an [LP] to waive certain fiduciary duties of the GP directors to the common unitholders, and partnership agreements generally include such a waiver. As a result, 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. Unitholder suits are rare and generally unsuccessful.
>
> In our discussions with independent directors of GPs, many indicated they viewed their responsibility to common unitholders as similar to directors of a corporation to shareholders. However, a Delaware corporation is not permitted to waive the fiduciary duty of its directors to shareholders the way [LPs] can and do. So, while GP directors may view themselves as having a fiduciary duty to the [LP] common unitholders similar to that which corporate

[21]*Atlas Energy*, 2010 Del. Ch. LEXIS 216, at *34-*35 (emphasis added), *reprinted in* 36 DEL. J. CORP. L. at 838-39.

[22]*See* Special Comment, *Corporate Governance Structure of Master Limited Partnerships Carries Credit Risk*, MOODY'S INVESTORS SERV., 2-3 (June 2007) [hereinafter Moody's Comment], *available at* http://www.moodys.com/sites/products/AboutMoodysRatingsAttachments/2006600000441511.pdf. One shortcoming of the Moody's analysis is that it treats all publicly traded LPs the same, treating those LPs whose partnership agreements eliminate fiduciary duties (*i.e.*, Holly Energy Partners, L.P.) akin to those LPs whose partnership agreements retain traditional fiduciary duties (*i.e.*, Buckeye Partners, L.P.).

> directors have to shareholders, the two roles in fact carry distinctly different legal obligations.[23]

Part III of this Article discusses the case law evidencing the risks associated with investing in publicly traded non-corporate business associations. Part III begins with a discussion of *In re Atlas Energy Resources, LLC*, where the court held that, due to fiduciary elimination provisions in the operating agreement, the manager of a limited liability company only had to refrain from actions that it subjectively believed were against the interests of the public unitholders.[24] Likewise, Part III discusses the case of *Lonergan v. EPE Holdings LLC*, where the court held that, due to fiduciary elimination provisions in a limited partnership agreement, the general partner only had to refrain from acting with subjective "bad faith."[25]

Part IV of this Article moves beyond the case law evidence, and quantifies the problem through empirical analysis. Part IV examines the operating agreements of eighty-six publicly traded non-corporate business associations to see how many agreements contain those provisions that were troublesome for the public unitholder plaintiffs in *Atlas Energy* and *Lonergan*: this Article refers to these provisions as "special approval provisions," which create a strong presumption that no fiduciary duties were violated in a going-private freeze-out where the transaction is approved by independent directors,[26] and "fiduciary elimination provisions", which virtually foreclose any challenge to a going-private freeze-out on fiduciary grounds.[27] I conclude that 84.88% of publicly traded non-corporate business associations make use of special approval provisions;[28] and 52.32% of publicly traded non-corporate business associations make use of fiduciary elimination provisions.[29] Detailed findings are attached as Appendices A, B, C and D, however for quick reference, the below table presents a summary of my conclusions:

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[23] *Id.* at 2.

[24] *Atlas Energy*, 2010 Del. Ch. LEXIS 216, at *45, *reprinted in* 36 DEL. J. CORP. L. at 843.

[25] 5 A.3d 1008, 1021 (Del. Ch. 2010).

[26] *See id.* at 1020-21.

[27] *See id.* at 1018.

[28] *See infra* Table I.

[29] *See infra* Table I.

Table I
Provisions in Operating Agreements Limiting the Ability of Public Unitholders to Challenge Going-Private Freeze-Outs

Entity Type (sample size)	Special Approval Provisions	Fiduciary Elimination Provisions (Eliminate or Modify)	At Least One: Special Approval or Fiduciary Elimination
LLCs (17)	47.06%	29.41%	58.82%
LPs (69)	94.20%	57.97% (89.85%)	94.20%
LLCs and LPs (86)	84.88%	52.32% (77.90%)	**87.20%**

In short, over 87% of publicly traded non-corporate business associations present their investors with a unique susceptibility to going-private freeze-outs—a susceptibility that is beyond that experienced by investors in publicly traded corporations. It also must be noted that, while the danger is high for those that invest in publicly traded LLCs (58.82% make use of either a special approval or fiduciary elimination provision), it is even higher for those investing in publicly traded LPs (94.20% make use of either a special approval or fiduciary elimination provision).

II. THE DEFAULT FIDUCIARY DUTIES APPLICABLE TO A GOING-PRIVATE FREEZE-OUT

As the Delaware Court of Chancery stated in *Atlas Energy*, where public owners of an LLC challenged a going-private freeze-out, "in the absence of explicit provisions in a limited liability company agreement to the contrary, the traditional fiduciary duties owed by corporate directors and controlling shareholders [also] apply in the limited liability company context."[30] For that reason, the Author begins by asking what fiduciary

[30] 2010 Del. Ch. LEXIS 216, at *19 (citing Bay Ctr. Apartments Owner, LLC v. Emery Bay PKI, LLC, 2009 WL 1124451, at *8 (Del. Ch. Apr. 20, 2009)), *reprinted in* 36 DEL. J. CORP. L. at 832. Although some argue the matter is not entirely settled. *See* Mohsen Manesh, *What is the Practical Importance of Default Rules Under Delaware LLC and LP Law?* 2 HARV. BUS. L. REV. ONLINE 121, 122 (2012) (discussing that the Delaware Supreme Court has not ruled on the issue). Delaware Supreme Court Chief Justice Myron T. Steele argues that rather than traditional fiduciary duties being the default, Delaware LLCs should be

duties must corporate officers and directors comply with when moving forward with a merger that will eliminate public shareholders? After that, Part III discusses how the operating agreements of non-corporate business associations may eliminate or modify those fiduciary duties.

For corporations, the starting point is the business judgment rule, whereby 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."[31] The reason for this presumption is relatively simple: "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

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required to opt-in to such fiduciary duties. Myron T. Steele, *Freedom of Contract and Default Contractual Duties in Delaware Limited Partnerships and Limited Liability Companies*, 46 AM. BUS. L.J. 221 (2009). The question featured prominently in the appeal of *Auriga Capital Corp. v. Gatz Properties, LLC*, which involves a breach of fiduciary duty action brought by minority members of LLC against majority owner/manager challenging purchase of company by manager at auction. 40 A.3d 839 (Del. Ch. 2012); *see* Tom Hals, *Delaware Supreme Court Judge Criticizes Strine 'Diatribe,'* THOMSON REUTERS NEWS & INSIGHT (Sept. 25, 2012), http://newsandinsight.thomsonreuters.com /Legal/News/2012 /09_-_September/Delaware_Supreme_Court_judge_criticizes_Strine __ diatribe_/; *see also* Conaway & Tsoflias, *supra* note 18, at 22-29 (evaluating the *Auriga* decision). Unfortunately, the Delaware Supreme Court refused to answer the question, and chastised the Court of Chancery for even discussing the issue:

> At this point, we pause to comment on one issue that the trial court should not have reached or decided. We refer to the court's pronouncement that the Delaware Limited Liability Company Act imposes "default" fiduciary duties upon LLC managers and controllers unless the parties to the LLC Agreement contract that such duties shall not apply. Where, as here, the dispute over whether fiduciary standards apply could be decided solely by reference to the LLC Agreement, it was improvident and unnecessary for the trial court to reach out and decide, *sua sponte*, the default fiduciary duty issue as a matter of statutory construction. . . .
>
> First, the Peconic Bay LLC Agreement explicitly and specifically addressed the "fiduciary duty issue" in Section 15, which controls this dispute. Second, no litigant asked the Court of Chancery or this Court to decide the default fiduciary duty issue as a matter of statutory law. In these circumstances we decline to express any view regarding whether default fiduciary duties apply as a matter of statutory construction. The Court of Chancery likewise should have so refrained.

Gatz Props., LLC v. Auriga Capital Corp., 2012 Del. LEXIS 577, *29-*30 (Del. Nov. 7, 2012).

[31]Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984), *overruled by* Brehm v. Eisner, 746 A.2d 244, 253 (Del. 2000) (overruled for other reasons); *see* Stephen J. Lubben & Alana J. Darnell, *Delaware's Duty of Care*, 31 DEL. J. CORP. L. 589, 601 (2006) (discussing the current status of the duty of care in Delaware).

judgment of the directors.'"[32] The business judgment presumption may only be overcome when board action rises to the level of gross negligence,[33] or the board is not informed.[34]

However, in "situations in which controlling stockholders negotiate a merger agreement with the target board to buy out the minority, [Delaware] decisional law emphasizes the protection of minority stockholders against unfairness."[35] That is to say, the entire fairness standard of review governs where the going-private freeze-out is accomplished via negotiated merger.[36] Entire fairness is a more exacting standard than the more traditional business judgment review.[37] As the

[32]Blue Dane Simmental Corp. v. Am. Simmental Ass'n, 1997 Mont. Dist. LEXIS 50, at *35-*36 (Jan. 3, 1997) (quoting Daniels v. Thomas, Dean & Hoskins, Inc., 804 P.2d 359, 367 (Mont. 1990)); *see* Gantler v. Stephens, 965 A.2d 695, 706 (Del. 2009) (refusing to substitute the court's judgment for that of the board if the board's decision can be ascribed to any rational business purpose); Seinfeld v. Slager, 2012 Del. Ch. LEXIS 139, at *16 (Del. Ch. June 29, 2012) (refusing to substitute the court's judgment for that of the board).

[33]*See* Oliver v. Bos. Univ., 2006 WL 1064169, at *20 (Del. Ch. Apr. 14, 2006), *reprinted in* 32 DEL. J. CORP. L. 242, 280 (2007). There is precedent for a finding of gross negligence where directors accepted a price "'far below what is found to be a fair one . . . .'" Lubben & Darnell, *supra* note 31, at 597 (quoting Allied Chem. & Dye Corp. v. Steel & Tube Co. of Am., 120 A. 486, 494 (Del. Ch. 1923)).

[34]Here, the seminal case is *Smith v. Van Gorkom*, 488 A.2d 858, 873 (Del. 1985), *overruled by Gantler*, 965 A.2d at 713 & n.54 (overruling *Gorkom* to the extent that it fails to hold "the 'cleansing' effect of such a ratifying shareholder vote is to subject the challenged director action to business judgment review, as opposed to 'extinguishing' the claim altogether"). *Van Gorkom* involved the freeze-out of public shareholders and their lawsuit alleging inadequate price. *Id.* at 863-64. The court found that the board of directors' agreement to an inadequate price violated the duty of care. *Id.* at 874. However, *Smith v. Van Gorkom* also placed a gloss over the duty of care, implying that a board could insulate itself against a claim for violation of the duty of care by conducting proper due diligence–and thus the case is as much about process as price. *Id.* The court held that a director must "act in an informed and deliberate manner in determining whether to approve an agreement of merger before submitting the proposal to the stockholders." *Id.* at 873. While not required, "an outside valuation study [would] . . . support an informed business judgment; [as would] . . . fairness opinions by independent investment bankers . . . ." *Id.* at 876. Trans Union's board of directors fell short of the foregoing standard. *Id*. at 878. All negotiations were conducted by Trans Union CEO Van Gorkom, who secretly wooed the buyer, offered up the company stock for $55/share (an amount he was willing to take for his shares, as he approached retirement), and then called a special meeting of the directors to rubber stamp the deal. *Id.* at 866-67.

[35]*In re* Pure Res., Inc., S'holders Litig., 808 A.2d 421, 436 (Del. Ch. 2002).

[36]*See* Kahn v. Lynch Commc'n Sys., Inc., 638 A.2d 1110, 1115-16 (Del. 1994) (negotiated two step freeze-out subject to entire fairness review); Emerald Partners v. Berlin, 726 A.2d 1215, 1221 (Del. 1999) (single step freeze-out subject to entire fairness); Rosenblatt v. Getty Oil Co., 493 A.2d 929, 937 (Del. 1985) (single step freeze-out merger subject to entire fairness); Weinberger v. UOP, Inc., 457 A.2d 701, 710 (Del. 1983) (single step freeze-out merger subject to entire fairness).

[37]*See* Citron v. E.I. Du Pont de Nemours & Co., 584 A.2d 490, 500 (Del. Ch. 1990), where the Delaware Court of Chancery rejected the defendants' contention that "DuPont's

Delaware Supreme Court described entire fairness in *Weinberger v. UOP, Inc.*:

> 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.[38]

The application of entire fairness to the going-private freeze-out was confirmed in the Delaware case *Kahn v. Lynch Communication Systems, Inc.*, where the Delaware Supreme Court held, "[e]ntire fairness remains the proper focus of judicial analysis in examining an interested merger, . . . because . . . the underlying 'interested' transaction requires careful scrutiny"[39]–although with some irony the plaintiff lost when the same court found that even under the more exacting review of entire fairness, the plaintiff still could not state a claim.[40] While the public shareholders challenging the going-private merger lost in *Lynch*,[41] by

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liability should be reviewed under the *less exacting business judgment standard*, because of (a) ratification by Remington's minority stockholders, (b) negotiation and approval by a committee of disinterested, independent directors, or (c) both."

[38] *Weinberger*, 457 A.2d at 711.

[39] *Lynch Commc'n*, 638 A.2d at 1116.

[40] *See* Kahn v. Lynch Commc'n Sys., Inc., 669 A.2d 79, 90 (Del. 1995). Alcatel, the majority shareholder of Lynch Communication Systems ("Lynch"), took Lynch private through a negotiated merger. *Lynch Commc'n*, 638 A.2d at 1113. Lynch was merged into its majority shareholder, Alcatel, and its public shareholders were cashed-out. *Id.* at 1111. Kahn, one of the cashed-out public shareholders, brought suit, arguing that Alcatel as the majority shareholder breached its fiduciary duty to the public shareholders, and that the merger was not entirely fair. *Id.* The Court of Chancery had not used entire fairness review, and the Delaware Supreme Court reversed and remanded the matter to the Court of Chancery to review the merger using the entire fairness standard. *Id.* at 1112. Upon remand, the Court of Chancery again found for the defendant, with the fairness of the price appearing to be the dispositive factor in the court's eyes. Kahn v. Lynch Commc'n Sys. Inc., 1995 WL 301403, at *2 (Del. Ch. Apr. 17, 1995). The court noted that it was a battle of the experts. *Id.* The court found that "the valuation prepared by plaintiffs' expert was flawed" and credited defendants' evidence on Lynch's value that "established that the $15.50 merger price was entirely fair." *Id.* Plaintiffs again appealed. *Kahn*, 669 A.2d at 80. This time the Delaware Supreme Court upheld the Court of Chancery, agreeing that the price was entirely fair. *Id.* at 90.

[41] *Kahn*, 669 A.2d at 90.

confirming the application of the entire fairness standard to going-private freeze-outs, the *Lynch* decision set the stage for later successful attacks.[42] Within the decade, a going-private freeze-out was successfully attacked in *In re Emerging Communications, Inc*., which involved the two-step going-private acquisition of the publicly owned shares of Emerging Communications, Inc. ("ECM"), a NYSE traded corporation.[43] The controlling shareholder and CEO of ECM was Jeffrey Prosser, who individually and through an affiliate, Innovative Communications Company, LLC ("Innovative"), owned a majority of ECM.[44] The freeze-out of the public shareholders of ECM was accomplished by merging ECM into Innovative and cashing-out the public shareholders (their shares were redeemed for cash).[45]

The reason that Prosser proffered for taking ECM private was the synergies that could be accomplished by merging ECM and Innovative.[46] The real reason was likely the personal economics of Prosser, who believed that ECM was undervalued.[47] In fact, ECM had gone public at $13.25 per share, and here was Prosser only five months later proposing to cash-out the public shareholders at $9.125 per share.[48] Prosser's financer confirmed that "[p]rivatization gave Prosser the opportunity to retain control at a price below the true market value of [ECM]."[49] This evokes the earlier concern of controlling owners taking the firm private when the market is depressed.[50]

The court scrutinized the going-private transaction to see if it was entirely fair.[51] Discussing whether the merger was the result of unfair dealing, the court examined the deal's timing, the independence of the

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[42]*See* Gesoff v. IIC Indus. Inc., 902 A.2d 1130, 1148, 1152 (Del. Ch. 2006) (explaining that in order to meet the entire fairness standard via establishing a special committee, the committee must act with informed diligence and seek the best result available for the shareholders; the court thereafter found the standard was not met).

[43]*In re* Emerging Commc'ns Inc. S'holders Litig., 2004 WL 1305745, at *1 (Del. Ch. May 3, 2004).

[44]*Id.*

[45]*Id.* at *6.

[46]*See id.* at *13.

[47]*Emerging Commc'ns*, 2004 WL 1305745, at *5 nn.6-7.

[48]*Id.* at *5.

[49]*Id.* at *7 (citation omitted) (internal quotation marks omitted).

[50]Brudney & Chirelstein, *supra* note 1, at 1366 ("[T]he element of sheer coercion is fatally objectionable. Others find unfairness in the circumstance that the firm, having gone public when the market was buoyant and high, now elects to go private when the same market is depressed, and will presumably go public again when the market averages recover.").

[51]*Emerging Commc'ns*, 2004 WL 1305745, at *9.

special committee, and the effectiveness of the special committee.[52] Beginning with the timing of the transaction, the court found that Prosser liquidated the public shareholders at a particularly poor time for those investors, when their shares were significantly undervalued.[53] The court held that the merger "benefited Prosser to the same extent that it disadvantaged the minority stockholders who were now being squeezed out of the enterprise."[54] Further, according to the court, the special committee was not truly independent.[55] The special committee was made up of three directors, Richard Goodwin, Shridath Ramphal, and John Vondras.[56] Each had been appointed to the board by Prosser and thus were "economically beholden to [him]."[57] Each received annual directors' fees of $100,000.[58]

The court also found that the special committee did not effectively look out for the interests of the minority shareholders.[59] Goodwin, Ramphal and Vondras were located in separate time zones,[60] had never met in person, and were not even able to meet via telephone.[61] Instead, they conducted their deliberations via mail correspondence, which inexplicably routed communications through Prosser's secretary.[62] As the court stated "[t]he result was to give Prosser access to the Committee's confidential deliberations and strategy."[63] The court continued: "[i]n fact, there was no effective bargaining, because Prosser held all the cards and misled [the special committee] into believing that [it] possessed . . . all the information that was material to negotiating a fair price."[64] Considering Prosser's refusal to even disclose the existence of the June

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[52] *Id.* at *10-*11.
[53] *Id.* at *32.
[54] *Id.*
[55] *Emerging Commc'ns*, 2004 WL 1305745, at *33.
[56] *Id.* at *41.
[57] *Id.* at *33.
[58] *Id.* at *34.
[59] *See Emerging Commc'ns*, 2004 WL 1305745, at *6.
[60] *See id.* ("Located on different continents and separated by a time difference of 14 hours, the three Committee members were never able to meet in person."). Richard Goodwin, who had served as law clerk to Supreme Court Justice Felix Frankfurter, lived in the United States. *See id.* at *2. Shridath Ramphal, Barrister at Law, had served as Secretary General of the British Commonwealth and lived in England. *See id*. Finally, John Vondras, an engineer, lived in Indonesia. *See id.* at *3.
[61] *Emerging Commc'ns*, 2004 WL 1305745, at *6.
[62] *Id.* at *8 n.27.
[63] *Id.* at *36.
[64] *Id.*

financial statements, the court stated, "[n]othing could have been further from the truth."[65]

Indeed, the special committee was provided incomplete information as to ECM's value.[66] Prosser provided the special committee with March projections that showed modest growth for ECM, despite the fact that June projections were available.[67] "The June projections forecasted substantially higher growth than did the March projections,"[68] and "[a]s a result, the Committee and its advisors believed–mistakenly–that the March projections were the most recent projections available."[69]

Given that the price offered to the shareholders was not the product of fair dealing, it is not surprising that the court found it was entirely inadequate.[70] While each public shareholder received $10.25 per share, the court found that the actual value of each share was $38.05 per share.[71] That is to say, Prosser gained complete control of ECM for one quarter of its value.[72] Following trial, judgment was entered against Innovative and Prosser, jointly and severally, in the amount of $56,341,843.[73]

Lynch's entire fairness review as followed in *In re Emerging Communications, Inc*. continues to be the law of Delaware.[74] For those

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[65]*Emerging Commc'ns*, 2004 WL 1305745, at *36.

[66]*See id.* at *7.

[67]*Id.*

[68]*Id.*

[69]*Emerging Commc'ns*, 2004 WL 1305745, at *7.

[70]*See id.* at *38.

[71]*Id.* at *24.

[72]*See id.*

[73]*In re* Emerging Commc'ns, Inc. S'holders Litig., 2006 Del. Ch. LEXIS 25, at *1 (Del. Ch. Jan. 9, 2006) (entering final order and judgment).

[74]It should be noted while "entire fairness" is the governing rule, under certain circumstances, it can be avoided by use of various procedures that mirror *both* elements of an arms-length merger. *In re* Cox Commc'ns, S'holders Litig., 879 A.2d 604, 606 (Del. Ch. 2005). Those protections include approval (1) by a majority of the special committee and (2) a majority of the minority. *In re Cox Commc'ns*, 879 A.2d at 606. Further, while still unclear, it may be that freeze-outs accomplished by tender-offer require even less. *In re* CNX Gas Corp. S'holders Litig., 4 A.3d 397, 400 (Del. Ch. 2010). As pointed out by Professors Cain and Davidoff,

> [A]t the turn of the millennium . . . Delaware courts held that a majority shareholder could freeze-out and acquire a minority shareholding, avoiding "entire fairness" review if the acquisition was via tender offer rather than merger. The business judgment rule would apply and the court would not second-guess the sale price or process so long as certain requisites of process were followed, including consideration by a special committee of independent directors, and the inclusion of a non-coercive majority of minority condition in the tender offer. A controlling shareholder who otherwise followed certain

that invest in publicly traded corporations, the protections of entire fairness cannot be eliminated.[75] However, as will be discussed in detail in Part III below, the same cannot be said for those persons that invest in publicly traded non-corporate business associations. Both limited partnership and limited liability company operating agreements can eliminate fiduciary duties, and are binding on the public unitholders despite the fact that they did not negotiate or sign the document.[76] The result is that these public unitholders are uniquely susceptible to going-private freeze-outs.

III. HOW DELAWARE'S GENERAL ASSEMBLY MADE INVESTORS IN NON-CORPORATE BUSINESS ASSOCIATIONS UNIQUELY SUSCEPTIBLE TO GOING-PRIVATE FREEZE-OUTS

A. Gotham Partners, L.P.*, and Delaware's 2004 Amendments*

To understand why and how Delaware non-corporate business associations can eliminate fiduciary duties via their operating agreements–including those normally applicable in the going-private freeze-out context–some historical background is necessary. In *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.,* the Delaware Supreme Court upheld the decision of the Court of Chancery finding that a general partner breached fiduciary duties to the limited partnership's limited partners.[77] The foregoing was not remarkable. What was remarkable was that the Delaware Supreme Court thought it necessary to *overrule dicta* in the Court of Chancery decision:

> [We must address] one aspect of the Vice Chancellor's discussion . . . where [in dicta] he stated that section 17-1101(d)(2) "expressly authorizes the *elimination,* modification or enhancement of . . . fiduciary duties in the written agreement governing the limited partnership." It is

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procedural mechanisms could thus avoid "entire fairness" review.
Matthew D. Cain & Steven M. Davidoff, *Form Over Substance? The Value Of Corporate Process And Management Buy- Outs*, 36 DEL. J. CORP. L. 849, 873 (2011) (citations omitted). However, as will be seen in Part III, even those protections can be eliminated by non-corporate business associations.

[75] *See supra* note 16 and accompanying text.

[76] DEL. CODE ANN. tit. 6, § 18-101(7)(b) (2012) (providing that a LLC operating agreement is enforceable against assignees, even where they did not sign it); DEL. CODE ANN. tit. 6, § 17-101(12)(b) (2012) (providing same as to LPs).

[77] Gotham Partners, L.P. v. Hallwood Realty Partners, L.P., 817 A.2d 160, 164 (Del. 2002).

> at least the second time the Court of Chancery has stated in dicta that DRULPA at 6 *Del. C.* § 17-1101(d)(2) permits a limited partnership agreement to *eliminate* fiduciary duties.
>
> In our view, . . . this dictum should not be ignored because it could be misinterpreted in future cases as a correct rule of law. Accordingly, in the interest of avoiding the perpetuation of a questionable statutory interpretation that could be relied upon adversely by courts, commentators and practitioners in the future, we are constrained to draw attention to the statutory language and the underlying general principle in our jurisprudence that scrupulous adherence to fiduciary duties is normally expected.[78]

Soon thereafter, the Delaware General Assembly pushed back against the Delaware Supreme Court, sided with the Court of Chancery, and amended Delaware law to include the term "eliminate" in the statutory provisions regarding fiduciary duties in limited partnerships and limited liability companies.[79] Specifically, the Delaware General Assembly amended Delaware's Limited Partnership Law to allow limited partnerships to contractually eliminate fiduciary duties;[80] and amended

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[78]*Id.* at 167 (alterations in original) (footnotes omitted) (citations omitted). In a more recent case, the Delaware Supreme Court *again* chastised the Court of Chancery for unnecessarily opining as to fiduciary duties, this time, as to whether the Delaware Limited Liability Company Act imposes "default" fiduciary duties upon LLC managers and controllers. Gatz Props., LLC v. Auriga Capital Corp., 2012 Del. LEXIS 577, *29 n.62 (Del. Nov. 7, 2012). The Delaware Supreme Court stated that like in *Gotham Partners*, it was concerned that "'this dictum could be misinterpreted in future cases as a correct rule of law,' when in fact the question remains open." *Id*. (quoting Gotham Partners, L.P. v. Hallwood Realty Partners, L.P., 817 A.2d 160, 167 (Del. 2002)).

[79]DEL. CODE ANN. tit. 6, § 17-1101(d) (2012) (allowing for the elimination of fiduciary duties for LPs); DEL. CODE ANN. tit. 6, § 18-1101(e) (2012) (allowing for the elimination of fiduciary duties for LLCs).

[80]The Limited Partnership Act was amended by 74 Del. Laws, c. 265 (2004). Post-amendment, the Delaware LPA provides:

> 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) (emphasis added).

Delaware Limited Liability Company Act to allow limited liability companies to contractually eliminate fiduciary duties.[81]

The foregoing was the culmination of a larger battle that was taking place in academia, between a contractarian approach "that presumes that investors will privately order their business relationships in a governing contractual document" and in so doing would "reduce legal strife internally among investors, and deter judicial intermeddling";[82] and an anti-contractarian approach, which "argue[s], on equitable principles, that corporate managers should be subject to certain minimum standards of conduct embodied by the law of fiduciary duties."[83] In Delaware, the contractarians appear to have won, although Chief Justice Myron T. Steele of the Delaware Supreme Court stated in 2007 that "despite the clear language of then section 17-1101 . . . courts remain reluctant to leave the secure ground of fiduciary duty common law so well fleshed out in corporate governance decisions even in the face of a statute instructing them to do so."[84] While a reasonable

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[81]The Limited Liability Company Act was Amended by 74 Del. Laws, c. 275 (2004). Post amendment, the Delaware LLCA 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) (emphasis added).

[82]Sandra K. Miller, *A New Direction for LLC Research in a Contractarian Legal Environment*, 76 S. CAL. L. REV. 351, 353 (2003); *see* Henry N. Butler & Larry E. Ribstein, *Opting Out of Fiduciary Duties: A Response to the Anti-Contractarians*, 65 WASH. L. REV. 1, 6 (1990) ("[T]he existence of fiduciary duties and remedies for breach should be viewed as part of this contractual protection rather than contrary to the contractual theory of the corporation."); *see also* Conaway & Tsoflias *supra* note 18, at 29-30 (concluding that fiduciary duties should not apply by default in Delaware LLCs).

[83]Mohsen Manesh, *Legal Asymmetry and The End of Corporate Law*, 34 DEL. J. CORP. L. 465, 470 (2009); *see* Sandra K. Miller, *The Role of the Court in Balancing Contractual Freedom with the Need for Mandatory Constraints on Opportunistic and Abusive Conduct in the LLC*, 152 U. PA. L. REV. 1609, 1613 (2004) ("The primary message of this Article is that the courts are central to all LLC models, including Delaware's contractarian paradigm, and are leading the way toward balancing the interest in contractual freedom with the need to constrain opportunistic and deceptive conduct through the development of a minimum mandatory core of acceptable business conduct.").

[84]Myron T. Steele, *Judicial Scrutiny of Fiduciary Duties in Delaware Limited Partnerships and Limited Liability Companies*, 32 DEL. J. CORP. L. 1, 22 (2007); *see* Myron T. Steele, *supra* note 30, at 223 (discussing whether default fiduciary duties should apply to LPs and LLCs).

statement in 2007, this Author feels that the subsequent cases *In re Atlas Energy Resources, LLC*,[85] and *Lonergan v. EPE Holdings, LLC*,[86] discussed below, solidify Delaware's acceptance of the contractarian approach.

Some opined that the victory for the contractarians was a loss for minority unitholders, arguing that allowing the elimination of fiduciary duties would result in an erosion of trust in Delaware's business entity law. One scholar expressed his fears, stating:

> In the long run, permitting contracts to annul fiduciary duty will be tantamount to annulling fiduciary duty essentially whenever a controlling owner is involved in a business. Fiduciary duty burdens those with power; controlling owners will naturally seek to avoid those burdens when they have both the legal mandate and the negotiating power to do so.[87]

In short, because Delaware follows a contractarian approach to regulation of non-corporate business associations, investors in publicly traded LLCs and LPs are now uniquely susceptible to going-private freeze-outs. Depending on the language used in the applicable operating agreement, the traditional fiduciary protections illustrated in *In re Emerging Communications, Inc*. may not apply to those that invest in these alternative entities.[88] Upon reflection, this seems odd. If a town posted a 20mph speed limit in front of a school to protect children, but allowed trucks to exempt themselves, we would call that silly. Both speeding cars and speeding trucks pose a threat to children. Why treat them differently? Yet this is exactly what Delaware law does to public investors. Person A is protected because she invests in a publicly traded

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[85] 2010 Del. Ch. LEXIS 216 (Del. Ch. Oct. 28, 2010), *reprinted in* 36 DEL. J. CORP. L. 823 (2011).

[86] 5 A.3d 1008 (Del. Ch. 2010).

[87] Daniel S. Kleinberger, *Two Decades of "Alternative Entities": From Tax Rationalization Through Alphabet Soup to Contract as Deity*, 14 FORDHAM J. CORP. & FIN. L. 445, 465-66 (2009); Lyman Johnson, *Delaware's Non-Waivable Duties*, 91 B.U. L. REV. 701, 702 (2011) (arguing that permitting the "wholesale waiver" of fiduciary duties is objectionable).

[88] *See Atlas Energy*, 2010 Del. Ch. LEXIS 216, at *24 ("[U]nless § 7.9(a) or some other provision of the LLC Agreement explicitly disclaims America's duties as controlling unitholder of Energy or mandates that the conflict presented by the merger be resolved contractually, America owes the Energy's minority unitholders traditional fiduciary duties of care and loyalty with regard to the merger."), *reprinted in* 36 DEL. J. CORP. L. at 834.

Delaware corporation. Person B is not protected because she invests in a publicly traded non-corporate business association.

B. *Illustrating the Problem for LLCs*–Atlas Energy

The unique susceptibility to going-private freeze-outs for those that invest in publicly traded limited liability companies is best illustrated with reference to the 2010 Court of Chancery decision in *In re Atlas Energy Resources, LLC*.[89] Public unitholders of Atlas Energy Resources, LLC ("Energy") sued to enjoin a merger between Energy and Atlas America, Inc. ("America"), or alternatively for monetary damages, claiming that the Energy directors that approved the merger and recommended it to the unitholders violated their fiduciary duties to the minority unitholders.[90] By way of background, Energy was in the business of developing natural gas deposits "in the Marcellus Shale, a gas-rich geological formation located in parts of the Appalachian Mountains from Virginia to New York."[91] Energy paid large yearly distributions to its unitholders.[92] With the economic downturn in 2008, Energy's board of directors began to contemplate the merger of Energy into its primary unitholder, America, in order to "ceas[e] Energy's cash distributions so that the cash could be reinvested in development of the Marcellus Shale or put toward debt reduction."[93]

As a result of the merger, various pension funds' units in Energy were cashed-out with shares of America, and they (the pension fund plaintiffs) brought suit against the special committee of the board of directors that approved the merger and recommended it to the unitholders.[94] The fact that the public unitholders received shares, as opposed to cash, does not change the inequities involved in the transaction.[95] As is the case in most going-private freeze-outs, plaintiffs "argue[d] that America took advantage of its knowledge and control of Energy to time the merger in order to acquire Energy at a[] historically

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[89]*Id.*, *reprinted in* 36 DEL. J. CORP. L. at 823.

[90]*See id.* at *3, *reprinted in* 36 DEL. J. CORP. L. at 824.

[91]*Id.* at *7, *reprinted in* 36 DEL. J. CORP. L. at 826.

[92]*See Atlas Energy*, 2010 Del. Ch. LEXIS 216, at *7 (indicating that unitholders received distributions of $0.61 per unit), *reprinted in* 36 DEL. J. CORP. L. at 826.

[93]*Id.* at *8-*9, *reprinted in* 36 DEL. J. CORP. L. at 827.

[94]*Id.* at *3, *13, *reprinted in* 36 DEL. J. CORP. L. at 824, 829-30.

[95]*See id.* at *36 ("With regard to price, Plaintiffs allege, *inter alia*, that the exchange ratio at which Energy's public unitholders received American stock under the merger agreement undervalued Energy and did not adequately compensate unitholders for the loss of cash distributions."), *reprinted in* 36 DEL. J. CORP. L. at 839.

low price."[96] Indeed, Energy went public at $21 per unit,[97] and was going-private for the stock equivalent of $15 per unit.[98] The plaintiffs also alleged that "the merger undervalued Energy's units because it failed to include a premium for the elimination of Energy's cash distributions and to account fully for the value of Energy's Marcellus Shale assets."[99]

The pension fund plaintiffs claimed that the members of the special committee violated their fiduciary duty to the minority because the merger "was not the result of a fair process and did not result in a fair price."[100] The court began its decision by pointing out that, in Delaware, an operating agreement may modify or even eliminate fiduciary duties.[101] The Energy operating agreement contained two relevant provisions: a provision that subjected potential conflicts of interest to special approval,[102] and a fiduciary elimination provision.[103] As to the special approval provision, Section 7.9(a) of the Energy operating agreement, provided:

> [W]henever a potential conflict of interest exists or arises between any Affiliate of the Company, on the one hand, and the Company or any Group Member, on the other, 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 Members, and shall not constitute a breach of this Agreement . . . or of any duty existing at law, in equity or otherwise, including any fiduciary duty, if the

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[96] *Atlas Energy*, 2010 Del. Ch. LEXIS 216, at *15 (alteration in original), *reprinted in* 36 DEL. J. CORP. L. at 830. "Plaintiffs allege that Energy had been, at the time, trading at an historic low, and contend that the ratio did not account for the company's future prospects." *Id.* at *36-*37, *reprinted in* 36 DEL. J. CORP. L. at 839-40.

[97] *Id.* at *4, *reprinted in* 36 DEL. J. CORP. L. at 825.

[98] *Id.* at *36, *reprinted in* 36 DEL. J. CORP. L. at 839.

[99] *Atlas Energy*, 2010 Del. Ch. LEXIS 216, at *15, *reprinted in* 36 DEL. J. CORP. L. at 830.

[100] *Id.* at *3, *reprinted in* 36 DEL. J. CORP. L. at 824.

[101] *Id.* at *18-*19, *reprinted in* 36 DEL. J. CORP. L. at 832.

[102] *See id.* at *21-*22, *reprinted in* 36 DEL. J. CORP. L. at 833-34.

[103] *See Atlas Energy*, 2010 Del. Ch. LEXIS 216, at *28, *reprinted in* 36 DEL. J. CORP. L. at 836. Further, there was a third provision that "eliminates directors' fiduciary duties (including those imposed by § 7.9(b)) when they decline to approve a merger, . . . [but] does not mention the duties of Energy's members or eliminate any fiduciary duties when the Board acts to approve a merger." *Id*.

> resolution or course of action in respect of such conflict of interest is approved by Special Approval . . . .[104]

As to the fiduciary elimination provision, the Energy operating agreement provided at Section 7.9(d):

> Except as expressly set forth in this Agreement or required by law, none of the Directors, nor any other Indemnitee shall have any duties or liabilities, including fiduciary duties, to the Company or any Member.[105]

The decision first discussed fiduciary duties as they apply to the controlling unitholder, America,[106] and then discussed duties applicable to the directors that composed the special committee that recommended the merger.[107] America argued that it was not subject to the traditional fiduciary duty standard applicable to corporate going-private mergers—entire fairness—but instead a contractually imposed standard.[108] The court found that there was no question that America was an affiliate of Energy for purposes of Section 7.9(a), and therefore the special approval provision would apply to interested transactions between America and Energy.[109] However, because the provision did not mention the public unitholders, the public unitholders were entitled to the default protection of entire fairness.[110]

Further, the fiduciary elimination provision for directors contained in Section 7.9(d) did not apply to America, because America was not a director, but instead the controlling unitholder.[111] Thus, for purposes of the claims against America, the court subjected the going-private freeze-out to entire fairness review.[112] As to price, plaintiffs proffered competing valuations that showed that they should have received a 15%

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[104] *Id.* at *21-*22 (quoting Energy's Limited Liability Company Agreement § 7.9(a)) (alterations in original), *reprinted in* 36 DEL. J. CORP. L. at 833.

[105] *Id.* at *39 (quoting Energy's Limited Liability Company Agreement § 7.9(d)), *reprinted in* 36 DEL. J. CORP. L. at 841.

[106] *See Atlas Energy,* 2010 Del. Ch. LEXIS 216, at *20-*40, *reprinted in* 36 DEL. J. CORP. L. at 833-41.

[107] *See id.* at *45-*52, *reprinted in* 36 DEL. J. CORP. L. at 843-47.

[108] *Id.* at *34, *reprinted in* 36 DEL. J. CORP. L. at 838.

[109] *See id.* at *21-*22, *reprinted in* 36 DEL. J. CORP. L. at 833-34.

[110] *See Atlas Energy,* 2010 Del. Ch. LEXIS 216, at *35, *reprinted in* 36 DEL. J. CORP. L. at 839.

[111] *See id.* at *28-*29, *reprinted in* 36 DEL. J. CORP. L. at 836-37.

[112] *Id.* at *35, *reprinted in* 36 DEL. J. CORP. L. at 839.

to 30% premium.[113] Accepting the accuracy of plaintiff's valuation, the court held, "[i]n light of the 0.3% premium they ultimately received, Plaintiffs have alleged facts suggesting that Energy's outstanding units were worth materially more than what the unitholders received under the merger agreement."[114] As to process, plaintiffs argued that while the merger was recommended by a special committee, America "withheld material information from the Special Committee and improperly influenced its deliberations."[115] Plaintiffs also alleged that the special committee's financial advisors were conflicted, having long standing relationships with executives at America.[116] Given plaintiff's specific allegations as to the lack of fair price and procedure, the court denied America's motion to dismiss.[117] That is to say, the court found that the action for breach of fiduciary duty could go forward against America.[118]

The individual directors that comprised the special committee that recommended the merger to the unitholders fared better with their proffered defense. Unlike defendant America, the fiduciary elimination provision, which applied to directors, shielded them from liability.[119] Because of the provision's reference to "any Member", the court found that "this language unambiguously eliminate[d] the traditional fiduciary duties of Energy's directors and officers [to the unitholders],"[120] and it follows "the only duties owed by the Individual Defendants are those set forth elsewhere in the LLC Agreement."[121] To that end, the operating

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[113] *Id.* at *37, *reprinted in* 36 DEL. J. CORP. L. at 840.

[114] *Atlas Energy,* 2010 Del. Ch. LEXIS 216, at *37, *reprinted in* 36 DEL. J. CORP. L. at 840.

[115] *Id.*, *reprinted in* 36 DEL. J. CORP. L. at 840.

[116] *Id.* at *38, *reprinted in* 36 DEL. J. CORP. L. at 840 (citing Am. Verified Compl., *In re* Atlas Energy Res., LLC Unitholder Litig., C.A. No. 4589, ¶¶ 104-110 (Dec. 26, 2009)).

[117] *Id.* at *36-*39, *reprinted in* 36 DEL. J. CORP. L. at 839-41.

[118] *See Atlas Energy,* 2010 Del. Ch. LEXIS 216, at *39, *reprinted in* 36 DEL. J. CORP. L. at 841.

[119] *Id.* at *39-*40, *reprinted in* 36 DEL. J. CORP. L. at 841.

[120] *Id.* (citing Lonergan v. EPE Holdings, 5 A.3d 1008, 1018 (Del. Ch. 2010)), *reprinted in* 36 DEL. J. CORP. L. at 841.

[121] *Id.* at *40, *reprinted in* 36 DEL. J. CORP. L. at 841. The court also stated that the plaintiff could state a colorable claim where they properly alleged that the action violated the implied covenant of good faith and fair dealing. *Atlas Energy,* 2010 Del. Ch. LEXIS 216, at *44-*45, *reprinted in* 36 DEL. J. CORP. L. at 843. However, the implied covenant of good faith and fair dealing does not replace traditional fiduciary duties, but is instead an extraordinary remedy where an action violates the underlying purpose of the contract. Wood v. Baum, 953 A.2d 136, 143 (Del. 2008). The Delaware Supreme Court stated in *Wood v. Baum* that:

> The implied covenant of good faith and fair dealing is a creature of contract, distinct from the fiduciary duties that the plaintiff asserts here. The

agreement provided that where the board of directors takes, or fails to take, any action the governing standard was one of good faith.[122] In turn, pursuant to the operating agreement, the good faith standard is met where the decision is in the best interest of the company.[123] "Thus, to state a claim for breach of the contractually defined fiduciary duty against the Individual Defendants, Plaintiffs must present allegations that Individual Defendants negotiated and ultimately approved the merger with America in a manner they *subjectively* believed was not in the best interests of Energy and its unitholders"[124]–a high burden for any plaintiff to meet.

As to specific allegations, the plaintiffs alleged that the individual defendants that comprised the special committee were not disinterested, because each member was promised a seat on the board of the corporation that would survive the merger.[125] Because of this conflict, the plaintiffs alleged, the special committee did not look to other possibilities besides a merger that might yield a higher return for the public unitholders.[126] The court found that while such claims "might suffice to state a colorable claim for breach of the traditional fiduciary duties of care and loyalty, they do not suggest the type of subjective bad faith required to state a claim under the duty imposed by § 7.9(b) of the LLC Agreement."[127] To meet that standard, the court continued, the members of the Special Committee would have had to believe they were acting *against* Energy's interest. [128] This was a hurdle that the pension fund plaintiffs could not meet.

> implied covenant functions to protect stockholders' expectations that the company and its board will properly perform the *contractual* obligations they have under the operative organizational agreements. Here, the Complaint does not allege any contractual claims, let alone a "bad faith" breach of the implied contractual covenant of good faith and fair dealing.

Id. (citations omitted). Unlike fiduciary duties, an operating agreement may not eliminate the implied covenant of good faith and fair dealing. DEL. CODE ANN. tit. 6, § 18-1101(e) (2012).

[122] *Atlas Energy,* 2010 Del. Ch. LEXIS 216, at *40 (citing Energy's Limited Liability Company Agreement § 7.9(b)), *reprinted in* 36 DEL. J. CORP. L. at 841.

[123] *Id.*, *reprinted in* 36 DEL. J. CORP. L. at 841-42.

[124] *Id.* at *45 (emphasis added), *reprinted in* 36 DEL. J. CORP. L. at 843.

[125] *Id.* (citing Am. Verified Compl., *In re* Atlas Energy Res., LLC Unitholder Litig., C.A. No. 4589, ¶ 49 (Dec. 26, 2009)), *reprinted in* 36 DEL. J. CORP. L. at 844.

[126] *Atlas Energy,* 2010 Del. Ch. LEXIS 216, at *45-*47, *reprinted in* 36 DEL. J. CORP. L. at 844.

[127] *Id.* at *46, *reprinted in* 36 DEL. J. CORP. L. at 844.

[128] *Id.* at *49-*50 (citing Am. Verified Compl., *In re* Atlas Energy Res., LLC Unitholder Litig., C.A. No. 4589, ¶ 49 (Dec. 26, 2009)), *reprinted in* 36 DEL. J. CORP. L. at 845-46.

C. *Illustrating the Problem for LPs*–Lonergan

Like limited liability companies, Delaware limited partnerships are uniquely susceptible to going-private freeze-outs as compared to their corporate brethren. This is best illustrated by the case of *Lonergan v. EPE Holdings, LLC*.[129] Lonergan sued on his own behalf, and on behalf of similarly situated public limited partners in GP Holdings, LP ("Holdings").[130] The general partner and its affiliates, who also owned a majority of the limited partnership interests in Holdings, decided to take it private through a merger.[131] Holdings public limited partners received limited partnership interests in the surviving entity ("Partnership").[132] They believed that the limited partnership interests that they received did not adequately compensate them for their lost interests in Holdings.[133]

Because of the conflicts inherent in the "going-private" transaction, Holdings formed a special committee of independent directors with full power to negotiate and approve the transaction.[134] Throughout the month of August, the special committee negotiated the exchange ratio of Partnership units for Holdings units.[135] The ratio increased from 1.37 (a premium of 2.6%) to 1.47 (a premium of 9.5%) to 1.50 (a premium of 11.8%).[136] The special committee agreed to the ratio.[137] Thereafter, Morgan Stanley issued a fairness opinion as to the price.[138]

The court observed, "[t]he complaint contains the types of allegations commonly advanced by stockholder plaintiffs when challenging a merger involving a corporation. In such a pleading, the plaintiff asserts claims for breaches of fiduciary duty."[139] Plaintiffs alleged that "[i]n agreeing to a sale without conducting a fair and adequate sales process, gathering information about the Company's net worth, or soliciting other bids, [the] Individual Defendants are allowing [Holdings] to be purchased at well below the Company's true value."[140]

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[129] 5 A.3d 1008 (Del. Ch. 2010).
[130] *Id.* at 1011.
[131] *Id.* at 1014.
[132] *Id.*
[133] *Lonergan*, 5 A.3d. at 1016.
[134] *Id.* at 1015.
[135] *Id.*
[136] *Id.*
[137] *Lonergan*, 5 A.3d. at 1015.
[138] *Id.*
[139] *Id.* at 1016.
[140] *Id.* (alterations in original) (citing Verified Compl., Longeran v. EPE Holdings

In dismissing plaintiff's claim against the general partner, the court began by stressing that two sections of the Holdings limited partnership agreement modify or eliminated fiduciary duties on the part of the general partner.[141] Section 7.9(e) stated:

> Except as expressly set forth in this Agreement, neither [Holdings GP] nor any other Indemnitee shall have any duties or liabilities, including fiduciary duties, to the Partnership or any Limited Partner and the provisions of this Agreement, to the extent that they restrict or otherwise modify the duties and liabilities, including fiduciary duties, of [Holdings GP] or any other Indemnitee otherwise existing at law or in equity, are agreed by the Partners to replace such other duties and liabilities of [Holdings GP] or such other Indemnitee.[142]

Section 7.10(d) further provided:

> Any standard of care and duty imposed by this Agreement or under the Delaware Act or any applicable law, rule or regulation shall be modified, waived or limited, to the extent permitted by law, as required to permit [Holdings GP] to act under this Agreement and to make any decision pursuant to the authority prescribed in this Agreement, so long as such action is reasonably believed by [Holdings GP] to be in, or not inconsistent with, the best interests of [Holdings].[143]

The court found that in light of the above provisions, "the only duties owed by Holdings GP flow from . . . contractual standards set forth in the Holdings LP Agreement . . . ."[144] The court found that no contractual violation existed.[145] An alternate reading of the case could

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LLC, C.A. No. 5856, ¶ 7 (Sept. 29, 2010)).

[141] *Lonergan*, 5 A.3d at 1017.

[142] *Id.* (alterations in original).

[143] *Id*. (alterations in original).

[144] *Id.*

[145] *Lonergan*, 5 A.3d. at 1017. Like in *Atlas Energy*, the court also stated that the plaintiff could state a colorable claim where the plaintiff properly alleged that the action violated the implied covenant of good faith and fair dealing. *Id*. at 1017-19. Delaware law provides that the operating 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, § 17-1101(f) (2012) (governing limited partnerships). As such, the only duty that a manager of such a non-corporate entity has, is the

find Section 7.9(e) qualified by (and subject to) Section 7.10(d). However, even if 7.9(d) governs, Delaware courts hold that the phrase "so long as such action is reasonably believed by [GP] to be in, or not inconsistent with, the best interests of the Partnership" requires that the GP not act with subjective "bad faith."[146] Thus, under either interpretation of the contractual language, plaintiff's allegations against the Holdings GP were destined to fail.

The court also found that any breach of fiduciary duty claim is foreclosed by Section 7.9(a) of the Holdings limited partnership agreement, which provided for special approval where a conflict of interest arises between the general partner and the limited partners:

> any resolution or course of action by [Holdings GP] or its Affiliates 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 agreement contemplated herein or therein, 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, . . .[147]

In turn, such special approval could only be questioned where plaintiff "allege[d] particularized facts from which this Court could infer that the members of the [special committee] acted arbitrarily or in bad faith"[148]–presumably, such bad faith standard arises from the intersection of Section 7.9(e) and Section 7.10(d), discussed above.[149] As such, plaintiffs failed in their attempt to challenge the going-private merger.[150]

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duty not to in bad faith violate the implied contractual covenant of good faith and fair dealing. But what does that mean? *See supra* note 121.

[146] *In re* K-Sea Transp. Partners L.P. Unitholders Litig., 2012 Del. Ch. Lexis 67, at *22-*23 (Del. Ch. Apr. 4, 2012). Also, it is important to note that the limited partnership agreement in *K-Sea* did not contain the broad "elimination" provision we see in *Lonergan*. *Lonergan*, 5 A.3d at 1020.

[147] *Lonergan*, 5 A.3d at 1020 (alterations in original) (quoting Holdings Limited Partnership Agreement § 7.9(a)).

[148] *Id*. at 1021.

[149] *See supra* notes 141-46 and accompanying text.

[150] *Lonergan*, 5 A.3d at 1022 (stating that the complaint failed to "raise a colorable challenge to the Special Approval decision").

D. *Some Preliminary Conclusions*

Before moving on to an empirical analysis of the elimination of fiduciary duties (specifically those that protect against going-private freeze-outs) by publicly traded non-corporate business associations, some preliminary conclusions are in order. In the corporate context, the entire fairness standard applies, as illustrated in *In re Emerging Communications, Inc*., where the court held that a two-step going-private acquisition of the publicly owned shares of Emerging Communications violated the entire fairness doctrine.[151] The entire fairness doctrine protects shareholder victims in going-private freeze-outs, allowing them to enjoin the merger, or more commonly, recover a fair price for their shares that takes into account market inefficiencies and a control premium.[152]

However, while the default rule is that the fiduciary duties owed to unitholders in non-corporate publicly traded business associations are "the same as the respective duties and obligations owed to a business corporation organized under the Delaware General Corporation Law and its shareholders by its officers and directors, respectively,"[153] such is not the case where the operating agreement provides for resolution of conflict of interest transactions through special approval or eliminates fiduciary duties outright, as permitted by Delaware law.[154] Both *Atlas Energy* and *Lonergan* make clear that the path to challenging a going-private freeze-out is significantly more difficult where the agreement contains a special approval provision. While the court in *Atlas Energy* found that the special approval provision did not apply to the particular set of facts presented in that case, it did affirm that in most cases, an unambiguous special approval provision will govern;[155] and the court in

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[151] *In re* Emerging Commc'ns Inc. S'holders Litig., 2004 Del. Ch. LEXIS 70, at *137 (Del. Ch. May 3, 2004).

[152] *Id.* at *155 (holding that the shares were worth $38.05 not $10.25 and awarding $27.80 per share to compensate the plaintiffs).

[153] TravelCenters of America LLC, Amended and Restated Limited Liability Company Agreement § 7.6(a), Current Report (Form 8-K), Exhibit 3.1 (May 19, 2010) [hereinafter TravelCenters Operating Agreement], *available at* http://files.shareholder.com/downloads/TA/2092849239x0xS1104659%2D10%2D29527/1378453/filing.pdf.

[154] DEL. CODE ANN. tit. 6, § 17-1101(d) (2012) (allowing the elimination of fiduciary duties for LPs); DEL. CODE ANN. tit. 6, § 18-1101(e) (2012) (allowing the elimination of fiduciary duties for LLCs).

[155] *In re* Atlas Energy Res., LLC, Unitholder Litig., 2010 Del. Ch. LEXIS 216, at *24-*26 (Del Ch. Oct. 28, 2010), *reprinted in* 36 DEL. J. CORP. L. 823, 834-35 (2011). However, because Section 7.9(a) did not mention the public unitholders, the public unitholders were held

Lonergan stated that special approval provisions "establish a weighty defense."[156]

Likewise, the path to challenging a going-private freeze-out is largely foreclosed where the agreement in question contains a fiduciary elimination provision. As the court stated in *Atlas Energy*, this recovery is generally foreclosed where agreement "language unambiguously eliminates the traditional fiduciary duties of . . . directors and officers,"[157] and as the court stated in *Lonergan,* "[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 [allow recovery] . . . . When parties exercise the authority provided by the LP Act to eliminate fiduciary duties, they take away the most powerful of a court's remedial . . . powers."[158]

With the foregoing in mind, Part IV examines the operating agreements of eighty-six publicly traded non-corporate business associations to see how many include special approval and fiduciary elimination provisions, and thus render their unitholders uniquely susceptible to going-private freeze-outs. The Author concludes that 84.88% of publicly traded non-corporate business associations make use of special approval provisions;[159] and 52.32% of publicly traded non-corporate business associations make use of fiduciary elimination provisions.[160]

IV. EMPIRICAL ANALYSIS OF THE ELIMINATION OF FIDUCIARY DUTIES IN THE PUBLICLY TRADED NON-CORPORATE ENTITY CONTEXT

A. *Existing Scholarship*

Two prior articles conduct an empirical analysis of contractual modification or elimination of the fiduciary duties applicable to non-corporate business associations in Delaware.[161] Professor Sandra Miller

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to be entitled to the default protection of entire fairness. *Id.* at *30-*35, *reprinted in* 36 DEL. J. CORP. L. at 837-39.

[156] Lonergan v. EPE Holdings, LLC, 5 A.3d 1008, 1021 (Del. Ch. 2010) (citing Brinckherhoff v. Texas E. Prods. Pipeline Co., LLC, 986 A.2d 370, 390 (Del. Ch. 2010)).

[157] *Atlas Energy,* 2010 Del. Ch. LEXIS 216, at *39-*40, *reprinted in* 36 DEL. J. CORP. L. at 841.

[158] *Lonergan*, 5 A.3d at 1018.

[159] *See supra* Table I.

[160] *See supra* Table I.

[161] Sandra K. Miller, Penelope Sue Greenberg, & Ralph H. Greenberg, *An Empirical Glimpse into Limited Liability Companies: Assessing the Need to Protect Minority Investors*, 43 AM. BUS. L.J. 609 (2006); Mohsen Manesh, *supra* note 16.

took a comprehensive look at the issue in 2006 through a practitioner survey.[162] She reported that 77% of respondents indicated that they drafted operating agreements for closely held LLCs that "limit[] or eliminate[] the duty of loyalty, duty of care, or other fiduciary duties."[163] Professor Miller's results for closely held LLCs should be compared to this Article's results–that 29.41% of publicly traded LLCs eliminate fiduciary duties in their operating agreement (*i.e.,* there appears to be a very real difference between the way that closely held and publicly traded limited liability companies draft their operating agreements).[164]

A more recent article written by Professor Mohsen Manesh takes a broad look at provisions impacting fiduciary duties in publicly traded non-corporate business associations.[165] If there is any shortcoming to Professor Manesh's very interesting work, it is that he attempts to use data drawn from publicly traded non-corporate business associations to draw conclusions about all non-corporate business associations, publicly traded and closely held alike.[166] Professor Manesh is not blind to the fact that he may be trying to cross an intellectual "bridge too far," admitting that the operating agreements of publicly traded non-corporate business associations "may, for various reasons, be unrepresentative of the smaller, closely held businesses that traditionally utilize the alternative entity form,"[167] and further, are not "representative of the broader alternative entity world, in which the vast majority of firms are small and closely held."[168]

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[162]Miller et al., *supra* note 161, at 624.

[163]*Id. But see* Miller, *supra* note 82, at 357, 422.

[164]*See supra* Table I.

[165]Manesh, *supra* note 16. Professor Manesh does not examine the frequency of special approval provisions, preventing comparison with this Article. However, he does examine provisions that eliminate or modify fiduciary duties, concluding that 88% of publicly traded LPs and LLCs do so. *Id*. at 558. This compares to my findings that 77.90% of publicly traded LPs and LLCs do so. *See supra* Table I. The difference is likely attributable to the fact that I sample 17 LLCs and 69 LPs, *see supra* Table I, while Professor Manesh samples 12 LLCs and 73 LPs, Manesh, *supra* note 16, at 567. A larger sampling of publicly traded LLCs will push the percentage down because publicly traded LLCs are more likely to retain corporate fiduciary duties. *See infra* Appendix B (reporting that only 29.41% of publicly traded LLCs sampled eliminated fiduciary duties).

[166]Manesh, *supra* note 16, at 567. Such a comparison is especially dangerous when one considers that Professor Miller's results found that 77% of closely held LLCs eliminated fiduciary duties, *see* Miller, *supra* note 161, at 624, yet this Author finds that that 29% of publicly traded LLCs eliminate fiduciary duties in their operating agreement, *see supra* Table I. Clearly there is reason to believe that closely held and publicly traded non-corporate business entities draft very different operating agreements vis-à-vis fiduciary duties.

[167]Manesh, *supra* note 16, at 567.

[168]*Id.* at 571-72.

In contrast, this Article examines provisions in publicly traded non-corporate operating agreements to draw conclusions about problems faced by investors in such entities; that is to say, the Author is engaged in an apples-to-apples analysis, and does not use provisions in publicly traded non-corporate operating agreements to draw conclusions about closely held entities. Indeed, this Article is the first to empirically examine special approval provisions and fiduciary elimination provisions in the operating agreements of publicly traded non-corporate business associations, and link those findings to an actual legal problem faced by investors in such entities–the going-private freeze-out.

B. *Methodology*

Contracts–especially operating agreements–are admittedly complicated.[169] A provision often takes on a different meaning once the reader considers cross-references and defined terms.[170] Similar provisions in two agreements can lead to different results, and it would be a work of folly to attempt to explain every possible permutation. However, that being said, the agreements reviewed by the Author are remarkably similar in structure and language.[171] By way of example, the fiduciary elimination provision (to the extent there is one) is almost always contained in Section 7.9 of the operating agreement in question, regardless of the law firm that drafts it, and the agreements use language that is remarkably similar, something akin to "neither Person X or Person Y shall have any duties or liabilities, including fiduciary duties, to Person Z"–allowing for certain generalizations that are necessary in an empirical endeavor.[172]

Collecting the actual data sample was straight-forward. With the help of his research assistant, the Author identified eighty-six publicly traded non-corporate business associations (seventeen LLCs and sixty-nine LPs) from lists compiled by NYSE[173] and NASDAQ.[174] These lists

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[169]*See, e.g.*, Kuroda v. SPJS Holdings, L.L.C., 971 A.2d 872, 883 (Del. Ch. 2009) (discussing the ambiguity within the provisions of the LLC agreement at issued).

[170]*See, e.g.*, *id*. (explaining that the defendants are not entitled to dismissal because of the ambiguity created when considering other provisions within the LLC agreement).

[171]*See* Appendix A-D (identifying the operating agreements surveyed).

[172]*See, e.g.*, Amended and Restated Agreement of Limited Partnership of Alliance Holdings GP, L.P. § 7.9(e), (Form 8-K), Exhibit 3.1 (May 17, 2006). Scholars refer to this "sameness" as mimetic isomorphism. *E.g.*, Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism And Collective Rationality in Organizational Fields*, 48 AM. SOC. REV. 147, 151 (1983).

[173]*Listings Directory*, N.Y.C. STOCK EXCH., http://www.nyse.com/about/listed/lc_all_

were then compared against similar lists compiled by other scholars to identify any gaps.[175]

Next, the Author gathered each publicly traded non-corporate business association's operating agreement, which are publicly available and readily accessible. The Securities Act of 1933 requires that the operating agreement of all publicly traded companies (corporate and non-corporate alike) be accessible to the public,[176] and because it is the policy of the Securities and Exchange Commission to "encourage the continued development of company Web sites as a significant vehicle for the dissemination to investors of important company information,"[177] such documents are readily available through each company's investor relations pages.[178]

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overview.html (last visited on Sept. 30, 2012).

[174]*Company List (NASDAQ, NYSE, and AMEX)*, NASDAQ, http://www.nasdaq.com/screening/company-list.aspx (last visited on Sept. 30, 2012).

[175]*Compare* Manesh, *supra* note 16, at Appendix A (examining eighty-five companies, comprised of twelve LLCs and seventy-three LPs), *with supra* Table I (examining seventeen LLCs and sixty-nine LPs).

[176]The Securities Act of 1933, requires:

> [U]nless previously filed and registered under the provisions of this subchapter, and brought up to date, (a) a copy of its articles of incorporation, with all amendments thereof and of its existing bylaws or instruments corresponding thereto, whatever the name, if the issuer be a corporation; (b) copy of all instruments by which the trust is created or declared, if the issuer is a trust; (c) a copy of its articles of partnership or association and all other papers pertaining to its organization, if the issuer is a partnership, unincorporated association, joint-stock company, or any other form of organization; . . .

Securities Act of 1933, 15 U.S.C. § 77aa(31) (2006).

[177]Commission Guidance on the Use of Company Web Sites, Exchange Act Release No. 34-58288, 73 Fed. Reg. 45862, 45874 (Aug. 1, 2008) (to be codified at 17 C.F.R § 241).

[178]To that end, SEC regulations encourage publicly traded firms to make annual, quarterly, and current reports available via website. Regulation S-K requires that a company disclose:

> Whether you make available free of charge on or through your Internet website, if you have one, your annual report on Form 10-K, quarterly reports on Form 10-Q, current reports on Form 8-K (§ 249.308 of this chapter), and amendments to those reports filed or furnished pursuant to Section 13(a) or 15(d) of the Exchange Act . . . as soon as reasonably practicable after you electronically file such material with, or furnish it to, the SEC;
>
> (ii) If you do not make your filings available in this manner, the reasons you do not do so (including, where applicable, that you do not have an Internet website);
>
> (iii) If you do not make your filings available in this manner, whether you voluntarily will provide electronic or paper copies of your filings free of charge upon request.

Regulation S-K, Item 101(e)(iv), 17 C.F.R. § 229.101(e)(4)(i) (2008). Private regulatory agencies like NASDAQ also strongly encourage availability via website. NASDAQ requires:

> Each Company (including a limited partnership) shall make

Once the operating agreements were gathered, the Author searched each for the type of provisions that have played major roles in the going-private freeze-outs in *Atlas Energy* and *Lonergan*. For limited liability companies, discussed in Part IV.C, these included special approval provisions, fiduciary elimination provisions, or provisions that adopt corporate standards. For limited partnerships discussed in Part IV.D, these included special approval provisions, fiduciary elimination provisions or fiduciary modification provisions.

C. *An Empirical Analysis of LLCs*

1. Special Approval Provisions

As more fully set forth at Appendix A, 47.06% of limited liability company operating agreements contain special approval provisions that govern conflicts between directors and public unitholders.[179] Typical language includes:

> Unless otherwise expressly provided in this Agreement, whenever a potential conflict of interest exists or arises between any of the Principals, one or more Directors or their respective Affiliates, on the one hand, and the Company, any Group Member or any Member other than an Initial Member, on the other, any resolution or course of action by the Board of Directors or its Affiliates in respect of such

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> available to Shareholders an annual report containing audited financial statements of the Company and its subsidiaries (which, for example, may be on Form 10-K, 20-F, 40-F or N-CSR) within a reasonable period of time following the filing of the annual report with the Commission. A Company may comply with this requirement either: . . .
>
> (c) by posting the annual report to Shareholders on or through the Company's website . . . .

Nasdaq Listing Rules, NASDAQ STOCK MKT., § 5250(d)(1) (2012), *available at* http://nasdaq.cchwallstreet.com/NASDAQTools/PlatformViewer.asp?selectednode=chp%5F1%5F1%5F4%5F2&manual=%2Fnasdaq%2Fmain%2Fnasdaq%2Dequityrules%2F. NYSE makes it mandatory. *See Website Requirements*, N.Y.C. STOCK EXCH., § 307 (2012) (making a publicly accessible website mandatory), *available at* http://nysemanual.nyse.com/LCMTools/PlatformViewer.asp?selectednode=chp%5F1%5F4%5F7&manual=%2Flcm%2Fsections%2Flcm%2Dsections%2F.

[179] As discussed by the court in *Atlas Energy*, one way that an operating agreement may limit the fiduciary duties of directors in going-private mergers is to provide that conflicts require special approval. *See In re* Atlas Energy Res., LLC, Unitholder Litig., 2010 Del. Ch. LEXIS 216, at *22-*24 (Del. Ch. Oct. 28, 2010), *reprinted in* 36 DEL. J. CORP. L. 823, 833-34 (2011).

> conflict of interest shall be permitted and deemed approved by all Members, 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 Special Approval . . . . [180]

The foregoing provision places the resolution of any conflict arising from a going-private merger in the hands of a special committee.[181] Interestingly, in addition to covering conflicts between the directors and the public unitholders, the foregoing provision also covers conflicts between the controlling unitholder and the public unitholders.[182] That is to say, both directors and the controlling unitholder are protected from claims for breach of fiduciary duty in the case of a challenged going-private transaction. Provisions that cover conflicts between public unitholders on the one hand, and both directors and the controlling unitholder on the other hand, are less common, appearing in 29.41% of limited liability company operating agreements.[183]

To the Author's knowledge, a special approval provision as broad as the one above has yet to be applied in the publicly traded limited liability company context (recall that the special approval provision reviewed in *Atlas Energy* did not cover conflicts with public unitholders).[184] However, there is no reason to believe that its

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[180]Fortress Inv. Group, LLC, Fourth Amended and Restated Limited Liability Company Agreement § 5.20(a), Quarterly Report (Form 10-Q), Exhibit 3.3 (Aug. 10, 2009) [hereinafter Fortress LLC Agreement], *available at* http://www.sec.gov/Archives/edgar/data/1380393/000119312509170332/dex33.htm.

[181]The Fortress LLC Agreement states: "'Special Approval' means, with respect to any transaction, activity, arrangement or circumstance, that (i) it has been specifically approved by a majority of the members of the Conflicts Committee [*i.e.*, special committee] acting in good faith . . . ." *Id*. § 1.1.

[182]This outcome can be reached by adding "Principal" to the list of protected persons, *i.e.*, "whenever a potential conflict of interest exists or arises between any of the Principals, one or more Directors or their respective Affiliates, on the one hand . . . ." *Id*. § 5.20(a). In turn the Principals are the "Initial Members." *Id.* § 1.1. Initial members are typically synonymous with the controlling unitholder.

[183]*See infra* Appendix A.

[184]*Atlas Energy,* 2010 Del. Ch. LEXIS 216, at *35, *reprinted in* 36 DEL. J. CORP. L. at 839. As a result, in *Atlas Energy*, the court reviewed the going-private merger using the entire-fairness standard. *Id.* at *35-*36, *reprinted in* 36 DEL. J. CORP. L. at 839. However, many operating agreements contain special approval provisions that are more inclusive, providing that conflict transactions that harm members–such as going-private mergers–are subject to contractual resolution via special approval. *See, e.g.*, *id.* at *35, *reprinted in* 36 DEL.

interpretation would vary from that afforded special approval provisions in limited partnership agreements, *to wit*, if the special committee approves the going-private merger, there is a strong presumption that a transaction complies with fiduciary requirements.[185] Interestingly, far fewer LLC operating agreements contain a special approval provision (47.06%) than LP agreements (94.20%).[186]

2. Fiduciary Elimination Provisions

As more fully set forth at Appendix B, 29.41% of limited liability company operating agreements eliminate fiduciary duties outright as permitted by Delaware law.[187] As discussed above, in Delaware an operating agreement may provide for a broad waiver of all fiduciary duties, which would, of course, include those fiduciary duties that would normally attach in the case of a going-private merger.[188] Typical language includes:

> Except 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 bound by this Agreement, and the provisions of this Agreement, to the extent that they restrict or otherwise modify or eliminate the duties and liabilities, including fiduciary duties, of the Manager or any other Indemnified Person otherwise existing at law or in equity, are agreed by the Members to replace such other duties and liabilities of the Manager or such other Indemnified Person.[189]

J. CORP. L. at 839 ("[I]n the context of a limited liability company, the parties can specify by contract the protections, or lack thereof, that they want the minority to have against such threats. If they do so, a court will respect the parties' freedom of contract and will not apply the default standard of review.").

[185] *See* Lonergan v. EPE Holdings, LLC, 5 A.3d 1008, 1020 (Del. Ch. 2010).

[186] *See infra* Appendix A & Appendix C.

[187] *See* DEL. CODE ANN. tit. 6, § 18-1101(e) (2010) (providing for the elimination of fiduciary duties).

[188] *Id.*

[189] Apollo Global Mgmt., LLC, Amended and Restated Limited Liability Company Agreement § 6.22(e), Registration Statement (Form S-1), Exhibit 3.2 (Feb. 18, 2011) [hereinafter Apollo LLC Agreement], http://www.sec.gov/Archives/edgar/data/1411494/000119312511040468/ds1a.htm#toc35308_150.

The court in *Atlas Energy* found that almost identical language "unambiguously eliminates the traditional fiduciary duties of Energy's directors and officers."[190] Under such a reading, no action for breach of fiduciary duty could go forward.[191] Interestingly, the percentage of limited liability company operating agreements that contain an elimination provision (29.41%) is significantly below the percentage of limited partnership agreements that contain such a provision (57.97%).[192]

3. Adoption of Corporate Standards

Most LLC operating agreements do not eliminate fiduciary duties. As set out more fully in Appendix B, 70.59% of LLC operating agreements adopt those fiduciary duties that would be applicable to a corporation.[193] Typical language includes:

> The duties (including fiduciary duties) and obligations owed to the Company and to the Shareholders by the Officers and Directors shall be the same as the respective duties and obligations owed to a business corporation organized under the Delaware General Corporation Law and its shareholders by its officers and directors, respectively.[194]

In this latter group, controlling unitholders and managers must fully comport with the duties applicable to corporations, as set forth in Part III

[190] *Atlas Energy,* 2010 Del. Ch. Lexis 216, at *39-*40, *reprinted in* 36 DEL. J. CORP. L. at 841.

[191] *See id.*, *reprinted in* 36 DEL. J. CORP. L. at 841. Interestingly, the court went on to find that liability could attach if the directors subjectively believed that the action was not in the best interest of the company, yet approved it anyway, based on Section 7.9(b) of the LLC Agreement which provided:

> 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 of 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.

Id. at *40 (quoting Energy's Limited Liability Company Agreement § 7.9(b)), *reprinted in* 36 DEL. J. CORP. L. at 841.

[192] *See infra* Appendix A & Appendix D.

[193] *See infra* Appendix B.

[194] Travel Centers Operating Agreement, *supra* note 153, § 7.6(a).

above.[195] Indeed, a limited liability company may take this approach to attract investors that would otherwise be deterred by the investment risk inherent in a limited liability company that eliminates fiduciary duties.[196] Another reason for the willingness of 70.59% of limited liability companies to adopt the full panoply of corporate fiduciary duties may be that most[197] of these companies are traded on the NYSE or NASDAQ, which do not require, but recommend, that the operating agreement of each member prohibit conflicts of interest, usurping company opportunities, misappropriation of company assets, and waste.[198] But again, these are recommendations, and self-regulatory organizations "have been reluctant to endorse any particular set of governance policies and practices in part because of the state-based nature of governance in this country."[199]

D. *An Empirical Analysis of LPs*

1. Special Approval Provisions

As can be seen in Appendix C, 94.20% of limited partnership operating agreements have special approval provisions governing conflicts between the general partner and limited partners. Typical language is similar to that employed by limited liability company agreements:

> (a) [W]henever a potential conflict of interest exists or arises between the General Partner or any of its Affiliates, on the one hand, and the Partnership, any Group Member or any Partner, on the other hand, any resolution or course of action by the General Partner or its Affiliates in respect of such conflict of interest shall be permitted and, to the fullest

[195] *See infra* Appendix B.

[196] CML V, LLC v. Bax, 28 A.3d 1037, 1043 (Del. 2011) ("Ultimately, LLCs and corporations are different; investors can choose to invest in an LLC, which offers one bundle of rights, or in a corporation, which offers an entirely separate bundle of rights.").

[197] The exceptions are Copano Energy, LLC, Kaanapali Land, LLC, Oaktree Capital Group, LLC, which are traded over the counter (OTC). *See infra* Appendix B.

[198] *See Listed Company Manual*, N.Y.C. STOCK EXCH., § 303A.10 (2012), *available at* http://nysemanual.nyse.com/lcm.

[199] *Recommendations From The National Association Of Corporate Directors: Concerning Reforms in the Aftermath of the Enron Bankruptcy*, NAT'L ASS'N OF CORP. DIRS. (May 3, 2002), http://web.archive.org/web/20100420230625/http://www.nacdonline.org/nacd/enron_recommendations.asp.

> extent permitted by law, deemed approved by all Partners, and shall not constitute a breach of this Agreement, of any Group Member Agreement, of any agreement contemplated herein or therein, 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 . . . .[200]

In the context of limited partnerships, one early Delaware decision, *Brickell Partners*, held that where the special approval provision is unambiguous, the sole protection of the limited partners are provided by the special committee review, and that such "'[s]pecial [a]pproval' is 'conclusive[]' evidence of the 'fair[ness] and reasonableness' of a conflict transaction, and bars any challenge to the transaction based on . . . default principles of law or equity."[201] This led commentators to conclude that "such approval would in effect prevent any judicial scrutiny."[202] However, post-*Brickell Partners*, Delaware courts have held that while "[the Special Approval] provisions establish a weighty defense, the syllogism of 'if [special] approval, then judgment for the defendants' does not automatically follow. [Such an] absolutist interpretation of a special approval provision . . . is 'much too simplistic.'"[203] The better conclusion is set forth in *Lonergan*, discussed above, that "special approval" creates a strong presumption that a transaction complies with fiduciary requirements.[204] To overcome this presumption, "plaintiff would need to allege particularized facts from which [Delaware courts] could infer that the members of the [special committee] acted arbitrarily or in bad faith."[205]

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[200]Legacy Reserves, LP, Amended and Restated Agreement of Limited Partnership § 7.9(a), Registration Statement (Form S-1), Appendix A (May 12, 2006) [hereinafter Legacy Reserves Agreement], http://www.sec.gov/Archives/edgar/data/1358831/000095012906005439/h36179sv1.htm#235.

[201]Brickell Partners v. Wise, 794 A.2d 1, 4 (Del. Ch. 2001) (quoting El Paso Partnership Agreement § 6.9).

[202]Manesh, *supra* note 16, at 586 (citing Gerber v. Enter. Prods. Holdings, LLC, 2012 WL 34442, at *12-*13 (Del. Ch. Jan. 6, 2012); *Brickell Partners*, 794 A.2d at 4; John Goodgame, *Master Limited Partnership Governance*, 60 BUS. LAW. 471, 497-98 (2005)).

[203]Brinckerhoff v. Texas E. Prods. Pipeline Co., LLC, 986 A.2d 370, 390 (Del. Ch. 2010) (quoting U.S. Bank Nat'l Assoc. v. U.S. Timberlands Klamath Falls, L.L.C., 2004 WL 5388052, at *12 (Del. Ch. Dec. 22, 2004)).

[204]*See* Lonergan v. EPE Holdings, LLC, 5 A.3d 1008, 1020 (Del. Ch. 2010) (explaining that if the proposed transaction satisfied special approval then the it *shall* be permitted and deemed approved by all partners).

[205]*Id.* at 1021.

That challenging special approval is possible—even if extremely difficult—was confirmed in the most recent Delaware case interpreting a special approval provision in the LP context. In *Gerber v. EPE Holdings, LLC*, the Court of Chancery was facing "yet another action involving a master limited partnership agreement" with a special approval provision that "purports to allow the general partner to engage in an otherwise self-interested transaction without breaching any duty owed to the partnership or the limited partners."[206] The court dismissed the shareholder's action challenging their freeze out, finding that even if the special approval required the conflicts committee to act in good faith, such good faith was itself contractually limited to "believ[ing] that the determination or other action is in the best interests of the Partnership."[207] Such belief need only be subjective.[208] That is to say, to prevail, a complainant "must allege that defendants have acted in a manner they subjectively believed was not in the best interests of [the limited partnership] and its unitholders."[209] An example would be "[t]he knowing authorization of a payment well in excess of the value of what was acquired."[210] Of course, the court did not elucidate what it meant by "well in excess" or "value".

2. Fiduciary Elimination Provisions

As can be seen in Appendix D, 57.97% of limited partnership operating agreements contain a broad statement eliminating fiduciary duties. Such a provision generally reads as follows:

> Except as expressly set forth in this Agreement or required by law, neither the General Partner nor any other Indemnitee shall have any duties or liabilities, including fiduciary duties, to the Partnership or any Limited Partner 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

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[206] 2013 Del. Ch. LEXIS 8, *2 (Del. Ch. Jan. 18, 2013).
[207] *Gerber*, 2013 Del. Ch. LEXIS 8, at *30.
[208] *Id.*
[209] *Id.* at *31
[210] *Id*. at *34.

> agreed by the Partners to replace such other duties and liabilities of the General Partner or such other Indemnitee.[211]

As in the case of limited liability companies discussed above, the foregoing "unambiguously eliminates the traditional fiduciary duties of Energy's directors and officers."[212] Interestingly, in *Lonergan*, which applied a similar provision, it was limited by a further contractual provision stating that the GP must "reasonably believed by [GP] to be in, or not inconsistent with, the best interests of [company]."[213] Such modification provisions (as opposed to elimination provisions) are discussed below. It is rare that modification and limitation provisions appear together,[214] as it leads to apparent conflicting duties.

3. Fiduciary Modification Provisions

As can be seen in Appendix D, 31.88% of LP operating agreements contain a fiduciary modification provision. Such a provision reads as follows:

> Any standard of care and duty imposed by this Agreement or under the Delaware Act or any applicable law, rule or regulation shall be modified, waived or limited . . . as required to permit the General Partner to act under this Agreement . . . so long as such action is reasonably believed by the General Partner to be in, or not inconsistent with, the best interests of the Partnership. [215]

Delaware courts hold that the foregoing provision modifies traditional fiduciary duties, to wit, it "does not waive fiduciary duties altogether, [but] [i]nstead, . . . substitutes a different, more narrow duty: [the] GP may not exercise its discretion in a manner inconsistent

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[211]Legacy Reserves Agreement, *supra* note 200, § 7.9(e).

[212]*In re* Atlas Energy Res., LLC, Unitholder Litig., 2010 Del. Ch. LEXIS 216, at *39-*40 (Del. Ch. Oct. 28, 2010), *reprinted in* 36 DEL. J. CORP. L. 823, 841 (2011).

[213]*Lonergan*, 5 A.3d. at 1017 (quoting Holdings Limited Partnership Agreement § 7.10(d)).

[214]Of the 69 limited partnership agreements I reviewed, none contained both provisions.

[215]Plains All American Pipeline, LP, Third Amended and Restated Agreement of Limited Partnership § 7.10(d), Current Report (Form 8-K), Exhibit 3.1 (Sept. 3, 2009), available at http://agreements.realdealdocs.com/Limited-Partnership-Agreement/AMENDMENT-NO-6-TO-THE-THIRD-AMENDED-AND--2473875/.

with the best interests of the Partnership as a whole."[216] As to what that means, Delaware courts are not consistent, but one thing is clear: it is a high burden for the plaintiff to meet. In *In re K-Sea Transportation Partners L.P.*, the Court of Chancery found that for the public unitholders to prevail in the face of such language, they must show that the GP acted with "bad faith."[217] However, the Court of Chancery in *In re Inergy L.P.*, faced with identical language, discussed the merits of the limited partners' action against the general partner in terms reminiscent of entire fairness.[218] The court refused to grant a preliminary injunction, finding that the procedure for approving the merger (a special committee of one) and the price were likely fair.[219] Given the apparent conflict between *In re K-Sea* and *In re Inergy*, the Author categorizes those contracts that state that the general partner meets his fiduciary duty where he "reasonably believed [his actions] to be in, or not inconsistent with, the best interests of the Partnership" as modifying traditional fiduciary protections, not eliminating them.

V. CONCLUSION

This Article is the first to examine—through the cases of *Atlas Energy* and *Lonergan*—how investors in publicly traded non-corporate business associations are uniquely susceptible to going-private freeze-outs due to the fact that LLC and LP agreements often contain special approval provisions and fiduciary elimination provisions. The impact of these provisions is to "limit [or eliminate] remedies available to [unitholders] for actions that might otherwise constitute a breach of duty, [making it] difficult for a [unitholder] to challenge a [going-private freeze-out]."[220]

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[216] *In re* K-Sea Transp. Partners L.P. Unitholders Litig., 2012 Del. Ch. Lexis 67, at *22-*23 (Del. Ch. Apr. 4, 2012); *see also In re* Inergy L.P. Unitholder Litig., 2010 Del. Ch. LEXIS 217, at *50-*51 (Del. Ch. Oct. 29, 2010) (finding the "sole discretion" standard is subject to the "reasonable belief" standard).

[217] *K-Sea,* 2012 Del. Ch. LEXIS 67, at *23.

[218] *Inergy*, 2010 Del Ch. LEXIS 217, at *52 ("[U]nder the standard of review imposed by § 7.6(e), any transaction that comes within its ambit must be 'fair and reasonable' . . . ."). *Lonergan* is distinguishable due to the fact that in addition to the "reasonable belief" provision, the agreement also contained a broad provision waiving all fiduciary duties. 5 A.3d. at 1020.

[219] *Inergy*, 2010 Del Ch. LEXIS 217, at *54-*55 ("I find nothing suspicious with Inergy GP's decision to appoint a one-man ISC.")

[220] Apollo Global Management, LLC, Annual Report (Form 10-K), at 60 (Mar. 9, 2012).

Further, this Article goes beyond a theoretical exposition of the problem, and measures the percentage of publicly traded non-corporate entities with operating agreements that actually contain special approval provisions and fiduciary elimination provisions.[221] I find that 47.06% of limited liability companies[222] and 94.20% of limited partnerships[223] (cumulatively 84.88%)[224] have operating agreements with special approval provisions, creating a strong presumption that a transaction complies with fiduciary requirements. Further, 29.41% of limited liability companies[225] and 57.97% of limited partnerships[226] (cumulatively 52.32%)[227] have operating agreements that eliminate fiduciary duties altogether. When one considers limited liability companies and limited partnerships together and simply asks whether their operating agreements have at least one of the foregoing discussed provisions, the answer is "yes" in 87.20% of the cases.[228] That is to say, almost nine of every ten publicly traded non-corporate business associations present their investors with a unique susceptibility (beyond that experienced by investors in publicly traded corporations) to going-private freeze-outs.

While currently this issue is limited to the identified eighty-five non-corporate business associations, it has the potential to grow exponentially. In Delaware, the formation of non-corporate business associations greatly outpaces corporations.[229] Specifically, in 2011, non-corporate business associations as a percentage of new businesses formed were 75%.[230] Historically, the only limitation on the growth of publicly traded non-corporate business associations is federal tax law, which for reasons that are beyond the scope of this paper, limit the kinds of business that can adopt the non-corporate business association form, be publicly traded and still receive pass-through tax treatment, to those where the income is purely passive–usually the oil and gas

[221] *See infra* Appendix A-D.
[222] *See infra* Appendix A.
[223] *See infra* Appendix C.
[224] *See supra* Table I.
[225] *See infra* Appendix B.
[226] *See infra* Appendix D.
[227] *See supra* Table I.
[228] *See supra* Table I.
[229] *2011 Annual Report*, DEL. DEP'T OF STATE DIV. OF CORPS. (2011), *available at* http://corp.delaware.gov/2011CorpAR.pdf; *see also* Rodney D. Chrisman, *LLCs Are The New King Of The Hill,* 15 FORDHAM J. CORP. & FIN. L. 459, 489 (2010) ("The LLC has replaced the corporation as the most commonly formed new business entity in the United States.").
[230] *See 2011 Annual Report*, *supra* note 229.

industry.[231] However, with the current talk of tax reform and simplifying the tax code, that limitation could quickly disappear, and with it, any limitation on the growth of publicly traded non-corporate business associations, for the oil and gas industry, and beyond.[232]

APPENDIX A

LLCS–WHICH OPERATING AGREEMENTS SUBJECT CONFLICTS TO SPECIAL APPROVAL?

This Appendix summarizes which publicly traded LLC operating agreements subject conflicts of interest to special approval. A review of all operating agreements for publicly traded LLCs reveals three approaches to conflicts between public unitholders on one hand, and directors or controlling unitholders on the other: (1) some allow for special approval of conflicts between unitholders and directors ("Conflicts With Directors"), (2) some further allow for special approval of conflicts between unitholders and controlling unitholders ("Conflicts with Controlling Unitholders"), and (3) some do not allow for special approval ("None"). A company may fall into this last category because it does not provide for special approval (is silent), or where it does have a special approval provision, but it does not include conflicts with unitholders, as was the case in *Atlas Energy*.

	Limited Liability Company Name	**Operating Agreement Version**	**Conflicts With Directors**	**Conflicts With Controlling Unitholders**	**None**
1	Apollo Global Management, LLC	2007	X		
2	Copano Energy, L.L.C.[233]	2010			X
3	Constellation Energy Partners LLC	2006			X

[231] Robert P. Rothman, *Translating Corporate Concepts into the Language of LLCs*, 61 TAX LAW. 161, 235 n.227 (2007) (citing IRC § 7704(c)).

[232] Larry E. Ribstein, *The Uncorporation's Domain*, 55 VILL. L. REV. 125, 131 (2010) ("Changing tax law to enable broader use of publicly traded partnerships therefore could significantly affect firms' choice between the corporate and uncorporate forms.").

[233] Similar to the operating agreement in *Atlas Energy*, the Copano Energy, LLC operating agreement does not include public unitholders in the class of conflicted transactions covered by the special approval provision, instead covering only situations where "conflict[s] of interest exists or arises between one or more Directors or their respective Affiliates, on the one hand, and the Company or any Group Member, on the other." Copano Energy, LLC, Fourth Amended and Restated Limited Liability Company Agreement of Copano Energy, L.L.C. § 7.9(a), Current Report (Form 8-K), Exhibit 3.1 (July 21, 2010). For that reason it is classified as "none".

4	Ellington Financial LLC	2009	X		
5	Fortress Investment Group LLC	2009	X	X	
6	Kaanapali Land, LLC	2002			X
7	Kinder Morgan Management, LLC	2002			X
8	KKR Financial Holdings LLC	2009			X
9	Linn Energy, LLC	2010			X
10	Macquarie Infrastructure Company LLC	2007			X
11	Municipal Mortgage & Equity, LLC	2002			X
12	Niska Gas Storage Partners LLC	2010	X		
13	NuStar GP Holdings, LLC (f/k/a Valero GP Holdings, LLC)	2006	X	X	
14	Oaktree Capital Group, LLC	2011	X	X	
15	Och-Ziff Capital Management Group LLC	2007	X	X	
16	TravelCenters of America LLC[234]	2010	X	X	
17	Vanguard Natural Resources, LLC	2007			X
	TOTALS		8 (47.06%)	5 (29.41%)	9 (52.94%)

APPENDIX B

LLCS–WHICH OPERATING AGREEMENTS ELIMINATE FIDUCIARY DUTIES?

This Appendix summarizes the various approaches of publicly traded LLC operating agreements to those fiduciary duties that traditionally run from the managers to the unitholders. A review of all operating agreements reveals two approaches: (1) outright elimination, and (2) adoption of corporate defaults, that is to say, full fiduciary duties.

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[234] A broad coverage of both the directors and the controlling unitholder is accomplished by the use of "and/or," Travel Centers Operating Agreement, *supra* note 153, § 7.5(a), which has been labeled the "conjunctive-disjunctive crutch of sloppy thinkers." Blue Cross v. Atl. Mut. Ins. Co., 2011 U.S. Dist. LEXIS 4892, at *43 n.14 (D. Idaho Jan. 19, 2011) (quoting Raine v. Drasin, 621 S.W.2d 895, 905 (Ky. 1981)); Moran v. Shern, 208 N.W.2d 348, 352 n.4 (Wis. 1973) (quoting Emp'rs' Mut. Liability Ins. Co. v. Tollefsen, 263 N.W. 376, 377 (Wis. 1935)) ("It is manifest that we are confronted with the task of first construing 'and/or,' that befuddling, nameless thing, that Janus-faced verbal monstrosity, neither word nor phrase, the child of a brain of some one too lazy or too dull to express his precise meaning, or too dull to know what he did mean."). Such language is generally construed against the drafter. Newlon v. Newlon, 220 S.W.2d 961, 963 (Ky. 1949). As such, it is possible that the Travel Centers Operating Agreement should be categorized "none."

The latter category may be implicated because of express adoption, or because the contract is silent.

	Limited Liability Company Name	Operating Agreement Version	Eliminated	Adopt Corporate Default
1	Apollo Global Management, LLC	2007	X	
2	Copano Energy, L.L.C.	2010		X
3	Constelation Energy Partners LLC	2006	X	
4	Ellington Financial LLC	2009		X
5	Fortress Investment Group LLC[235]	2009		X
6	Kaanapali Land, LLC	2002		X
7	Kinder Morgan Management, LLC	2002		X
8	KKR Financial Holdings LLC	2009		X
9	Linn Energy, LLC	2010		X
10	Macquarie Infrastructure Company LLC	2007		X
11	Municipal Mortgage and Equity, LLC	2002		X
12	Niska Gas Storage Partners LLC	2010	X	
13	NuStar GP Holdings, LLC (f/k/a Valero GP Holdings, LLC)	2006		X
14	Oaktree Capital Group, LLC	2011	X	
15	Och-Ziff Capital Management Group LLC	2007		X
16	TravelCenters of America LLC	2010		X
17	Vanguard Natural Resources, LLC	2007	X	
	TOTAL		5 (29.41%)	12 (70.59%)

[235] The Author categorizes an agreement as adopting corporate fiduciary duties even where it limits the applicability of fiduciary duties to certain specific activities not related to going-private freeze-outs, such as allowing members or partners to engage in outside activities. For example, despite the fact that Section 5.24 of Fortress Investment Group, LLC's operating agreement limits the traditional fiduciary prohibition on competing activities, I still categorize it as adopting corporate defaults because it does not have a provision eliminating all fiduciary duties or eliminating fiduciary duties in the context of a merger. *See* Fortress LLC Agreement, *supra* note 180, § 5.24.

APPENDIX C

LPS – WHICH LIMITED PARTNERSHIP AGREEMENTS SUBJECT CONFLICTS TO SPECIAL APPROVAL?

This Appendix summarizes which publicly traded LPs subject conflicts to special approval. A review of all operating agreements for publicly traded LPs reveals two approaches to conflicts between public unitholders on one hand, and general partners on the other hand: (1) some allow for special committee resolution of conflicts between unitholders and general partners ("All"), and (2) at the other end of the spectrum, some do not provide for special approval ("None"). A company may fall into this latter category because it does not provide for special approval (is silent), or where it does have a special approval provision, but it does not include conflicts with unitholders.

	Limited Partnership Name	Partnership Agreement Version	All	None
1	Alliance Holdings GP, L.P.	2006	X	
2	Alliance Resource Partners, L.P.	2005	X	
3	American Midstream Partners, LP	2011	X	
4	AmeriGas Partners L.P	2009	X	
5	Atlas Energy, L.P.	2011		X
6	Atlas Pipeline Partners, L.P.	2004	X	
7	Atlas Resource Partners, L.P.	2012	X	
8	Boardwalk Pipeline Partners, L.P.	2008	X	
9	BreitBurn Energy Partners, L.P.	2006	X	
10	Brookfield Infrastructure Partners, L.P.	2007	X	
11	Buckeye Partners, L.P.	2010	X	
12	Calumet Specialty Products Partners, L.P.	2006	X	
13	Cedar Fair, L.P.[236]	2004		X
14	Cheniere Energy Partners, L.P.	2007	X	
15	Chesapeake Midstream Partners, L.P.	2010	X	
16	Crosstex Energy, L.P	2007	X	
17	CVR Partners, LP	2011	X	
18	DCP Midstream Partners, LP	2006	X	
19	Eagle Rock Energy Partners, L.P.	2010	X	
20	El Paso Pipeline Partners, L.P.	2007	X	

[236]The operating agreement of Cedar Fair, L.P. does allow for a procedure whereby disinterested members of the board of directors of the general partner may approve conflicts. However, the resolution of the conflict must be "reasonable and appropriate," which would appear to require adherence to full fiduciary duties. Cedar Fair, LP, Fifth Amended and Restated Agreement of Limited Partnership of Cedar Fair, L.P. § 6.12, Proxy Statement (Schedule 14A), Exhibit A (Mar. 23, 2004).

21	Enbridge Energy Partners, L.P.	2006	X	
22	Energy Transfer Partners, L.P.	2009	X	
23	Energy Transfer Equity, L.P.	2006	X	
24	Enterprise Products Partners L.P.	2010	X	
25	EV Energy Partners, L.P.	2006	X	
26	Exterran Partners, L.P.	2006	X	
27	Ferrellgas Partners, L.P.	2003	X	
28	Genesis Energy, L.P.	2010	X	
29	Global Partners LP	2009	X	
30	Holly Energy Partners, L.P.	2004	X	
31	Icahn Enterprises, L.P	1987	X	
32	Inergy Midstream, L.P.	2011	X	
33	Kinder Morgan Energy Partners, L.P.	2007	X	
34	KKR & Co. L.P.	2010	X	
35	Legacy Reserves LP	2006	X	
36	LRR Energy, L.P.	2011	X	
37	Magellan Midstream Partners, L.P.	2009	X	
38	Markwest Energy Partners, L.P.	2008		X
39	Martin Midstream Partners L.P.	2009	X	
40	Memorial Production Partners LP	2011	X	
41	Mid-Con Energy Partners, LP	2011	X	
42	ML Macadamia Orchards, L.P.	1989		X
43	Natural Resource Partners L.P.	2010	X	
44	NGL Energy Partners LP	2011	X	
45	NuStar Energy L.P.	2003	X	
46	Oiltanking Partners, L.P.	2011	X	
47	ONEOK Partners, L.P.	2006	X	
48	Oxford Resource Partners LP	2010	X	
49	PAA Natural Gas Storage, L.P.	2010	X	
50	Penn Virginia Resource Partners, L.P.	2011	X	
51	Pioneer Southwest Energy Partners L.P.	2008	X	
52	Plains All American Pipeline, L.P.	2001	X	
53	QR Energy, LP	2010	X	
54	Regency Energy Partners LP	2006	X	
55	Rentech Nitrogen Partners, L.P.	2011	X	
56	Rhino Resource Partners LP	2010	X	
57	Rose Rock Midstream, L.P.	2011	X	
58	Spectra Energy Partners, LP	2007	X	
59	Star Gas Partners, L.P.	2006	X	
60	StoneMor Partners, L.P.	2008	X	
61	Suburban Propane Partners, L.P.	2006	X	
62	Sunoco Logistics Partners L.P.	2010	X	
63	TC PipeLines, LP	2009	X	
64	Terra Nitrogen Company, L.P.	2005	X	
65	Tesoro Logistics LP	2011	X	
66	The Blackstone Group L.P.	2007	X	
67	Transmontaigne Partners L.P.	2006	X	
68	Western Gas Partners, LP	2008	X	
69	Williams Partners L.P.	2005	X	
	TOTALS		65 (94.20%)	4 (5.80%)

APPENDIX D

WHICH LIMITED PARTNERSHIP AGREEMENTS ELIMINATE FIDUCIARY DUTIES?

This Appendix summarizes the various approaches of publicly traded LPs to those fiduciary duties that traditionally run from the general partner to the unitholders. A review of all operating agreements for publicly traded LPs reveals three approaches: (1) outright elimination ("Elimination"), (2) modification of fiduciary duties ("Modified"), and (3) default to full fiduciary duties ("Full"). More often than not, an agreement falls into the final category because it is silent as to fiduciary duties.

	Limited Partnership Name	Partnership Agreement Version	Eliminated	Modified	Full
1	Alliance Holdings GP, L.P.	2006	X		
2	Alliance Resource Partners, L.P.	2005		X	
3	American Midstream Partners, LP	2011	X		
4	AmeriGas Partners, L.P	2009		X	
5	Atlas Energy, L.P.	2011			X
6	Atlas Pipeline Partners, L.P.	2004		X	
7	Atlas Resource Partners, L.P.	2012	X		
8	Boardwalk Pipeline Partners, LP	2008	X		
9	BreitBurn Energy Partners, L.P.	2006	X		
10	Brookfield Infrastructure Partners L.P.	2007			X
11	Buckeye Partners, L.P.	2010			X
12	Calumet Specialty Products Partners, L.P.	2006	X		
13	Cedar Fair, L.P.	2004			X
14	Cheniere Energy Partners, L.P.	2007	X		
15	Chesapeake Midstream Partners, L.P.	2010	X		
16	Crosstex Energy, L.P	2007		X	
17	CVR Partners, LP	2011	X		
18	DCP Midstream Partners, LP	2006	X		
19	Eagle Rock Energy Partners, L.P.	2010	X		
20	El Paso Pipeline Partners, L.P.	2007	X		
21	Enbridge Energy Partners, L.P.	2006		X	
22	Energy Transfer Partners, L.P.	2009		X	
23	Energy Transfer Equity, L.P.	2006	X		
24	Enterprise Products Partners L.P.	2010		X	
25	EV Energy Partners, L.P.	2006	X		
26	Exterran Partners, L.P.	2006	X		
27	Ferrellgas Partners, L.P.	2003		X	
28	Genesis Energy, L.P.	2010		X	
29	Global Partners LP	2009	X		
30	Holly Energy Partners, L.P.	2004	X		
31	Icahn Enterprises, L.P	1987			X
32	Inergy Midstream, L.P.	2011			X
33	Kinder Morgan Energy Partners, L.P.	2007		X	
34	KKR & Co. L.P.	2010	X		
35	Legacy Reserves LP	2006	X		
36	LRR Energy, L.P.	2011	X		

37	Magellan Midstream Partners, L.P.	2009		X	
38	Markwest Energy Partners, L.P.	2008		X	
39	Martin Midstream Partners L.P.	2009		X	
40	Memorial Production Partners LP	2011	X		
41	Mid-Con Energy Partners, LP	2011	X		
42	ML Macadamia Orchards, L.P.	1989			X
43	Natural Resource Partners L.P.	2010		X	
44	NGL Energy Partners LP	2011	X		
45	NuStar Energy L.P.	2003		X	
46	Oiltanking Partners, L.P.	2011	X		
47	ONEOK Partners, L.P.	2006		X	
48	Oxford Resource Partners, LP	2010	X		
49	PAA Natural Gas Storage, L.P.	2010	X		
50	Penn Virginia Resource Partners, L.P.	2011		X	
51	Pioneer Southwest Energy Partners L.P.	2008	X		
52	Plains All American Pipeline, L.P.	2001		X	
53	QR Energy, LP	2010	X		
54	Regency Energy Partners LP	2006	X		
55	Rentech Nitrogen Partners, L.P.	2011	X		
56	Rhino Resource Partners LP	2010	X		
57	Rose Rock Midstream, L.P.	2011	X		
58	Spectra Energy Partners, LP	2007	X		
59	Star Gas Partners, L.P.	2006		X	
60	StoneMor Partners, L.P.	2008	X		
61	Suburban Propane Partners, L.P.	2006		X	
62	Sunoco Logistics Partners L.P.	2010	X		
63	TC PipeLines, LP	2009		X	
64	Terra Nitrogen Company, L.P.	2005		X	
65	Tesoro Logistics LP	2011	X		
66	The Blackstone Group L.P.	2007	X		
67	Transmontaigne Partners L.P.	2006	X		
68	Western Gas Partners, LP	2008	X		
69	Williams Partners L.P.	2005	X		
	TOTALS		40 (57.97%)	22 (31.88%)	7 (10.14%)