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Fiduciary Duty Litigation in Closely Held Entities:

Corporations vs. LLCs

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INTRODUCTION

This paper focuses the differences between litigating those claims in a closely held corporation versus a limited liability company—a distinction that matters enormously in practice and that courts continue to work through.

Many of the issues we address also arise in Directors and Officers litigation for publicly traded companies, so this discussion has broader application than the closely held context alone.

The law governing fiduciary duties is broadly similar across states, but the details diverge in ways that can be outcome-determinative. Rather than a 50-state survey, we focus primarily on Delaware—because most states look to Delaware corporate law for guidance—and on Texas, which is actively positioning itself as a competing corporate law jurisdiction. We also address Ohio, Florida, and New York, which is where the panelists practice.

What follows is an overview of the governing legal principles. The panel discussion will address litigation strategy and tactics.

OVERVIEW OF FIDUCIARY DUTIES

THE BASIC FRAMEWORK

Directors and officers of a corporation owe two overarching fiduciary duties: the **duty of care** and the **duty of loyalty**.

The **duty of care** requires fiduciaries to inform themselves of material information before making a business decision and to act prudently in carrying out their responsibilities.

The **duty of loyalty** requires the fiduciary to avoid conflicts of interest, refrain from self-dealing, and act with undivided loyalty to the corporation.

See United Food & Commer. Workers Union v. Zuckerberg, 262 A.3d 1034, 1049–50 (Del. 2021).

These duties arise both by statute—*see, e.g.*, N.Y. Bus. Corp. Law § 717; Ohio Rev. Code § 1701.641—and through case law.

TO WHOM ARE THE DUTIES OWED?

As a general rule, directors' duties run to the *corporation*, not to individual shareholders or even a majority of the shareholders. *Gearhart Indus. v. Smith Int'l*, 741 F.2d 707, 721 (5th Cir. 1984); *Gusinsky v. Reynolds*, 2026 U.S. Dist. LEXIS 55060, at *17 (N.D. Tex.); *In re Est. of Poe*, 648 S.W.3d 277, 286–87 (Tex. 2022).

That foundational rule means individual shareholders ordinarily cannot bring a direct claim against a corporate fiduciary for breach of fiduciary duty—those claims belong to the corporation and are brought through a derivative suit. *Gearhart Indus.*, 741 F.2d at 721.

There are exceptions. Under Delaware law, the test for whether a claim is direct or derivative turns on two questions: (1) who suffered the alleged harm, and (2) who would receive the benefit of any recovery or remedy?

The stockholder's claimed direct injury must be independent of any alleged injury to the corporation, and the stockholder must demonstrate that the duty breached was owed directly to him or her. *Tooley v. Donaldson, Lufkin, & Jenrette, Inc.*, 845 A.2d 1031, 1039 (Del. 2004).

In publicly traded corporations, those situations are narrow—courts have recognized them primarily in cases of inseparable fraud wrapped in an otherwise permissible merger, or in disclosure duty claims. *Ark. Teacher Ret. Sys. v. Caiafa*, 996 A.2d 321, 323 (Del. 2010); *New Enter. Assocs. 14, L.P. v. Rich*, 292 A.3d 112, 149 (Del. Ch. 2023).

CLOSELY HELD CORPORATIONS: A DIFFERENT LANDSCAPE

In closely held corporations, the analysis changes substantially. When the same individuals control the board and hold the majority of shares, their use of that control to harm minority shareholders can give rise to direct claims.

The weight of authority holds that a majority shareholder owes fiduciary duties directly to minority shareholders in a closely held corporation:

- *Delaware: Innovate 2 Corp. v. Motorsport Games Inc.*, 2022 U.S. Dist. LEXIS 56112, at *15 (D. Del.) ("A controlling shareholder owes fiduciary duties to minority shareholders").
- *New York:* Majority shareholders have a duty to provide good and prudent management in the welfare and best interests of the corporation and its shareholders as a whole. *Matter of Kenneth Cole Prods., Inc.*, 2013 N.Y. Misc. LEXIS 4026, at *11, quoting *Alpert v. 28 Williams St. Corp.*, 63 N.Y.2d 557, 572 (1984).
- *Ohio:* Claims by minority shareholders against those who control the majority and use that control to deprive minority shareholders of the benefits of their investment may be brought as direct, individual actions. *Crosby v. Beam*, 47 Ohio St. 3d 105 (1989).
- *Other states* reaching the same conclusion include Minnesota, Utah, Indiana, Maryland, and West Virginia.
- Texas is the notable exception. The Texas Supreme Court has never formally recognized a fiduciary duty between majority and minority shareholders in a closely held corporation, though it has acknowledged that minority shareholders may seek equitable relief through a derivative action. *Cardiac Perfusion Servs. v. Hughes*, 436 S.W.3d 790, 791 n.1 (Tex. 2014).
- Limited liability companies can be subject to the same principle. Courts in Delaware, New York, Ohio, and other states have held that controlling members in a manager-managed LLC owe minority members the same fiduciary duties that controlling shareholders owe minority shareholders in a closely held corporation—unless the operating agreement says otherwise. *In re Atlas Energy Res.*, 2010 Del. Ch. LEXIS 216, at *19 (Del. Ch. 2010); *Onyx Asset Mgt., LLC v. Sing Fina Corp.*, 2016 N.Y. Misc. LEXIS 2696; *Abdelnour v. McGowan*, 2012 Ohio Misc. LEXIS 14, at *17; *but see Anton v. Petras,* 2025-Ohio-2861, ¶66 (8th Dist.) (the "only fiduciary duties a member owes" to the company or another member of the company are the duties of loyalty and care set forth in subsections (B) and (C) of the statute.").

THE PHRASE — "UNLESS THE OPERATING AGREEMENT SAYS OTHERWISE" — IS THE CRITICAL DIFFERENCE BETWEEN THE TWO ENTITY FORMS. CORPORATIONS VS. LLCS: THE KEY STRUCTURAL DIFFERENCE

The most important distinction between litigating corporate fiduciary duty claims versus a limited liability company is that in a corporation, fiduciary duties are largely *judicially imposed* and cannot easily be contracted away. In an LLC, the operating agreement controls, and parties have broad freedom to impose, modify or eliminate fiduciary duties by agreement.

As the Court stated in *Atlas Energy*: "parties to a limited liability agreement can contractually expand, restrict, modify, or fully eliminate the fiduciary duties owed by the company or its members, subject to certain limitations. By contrast, **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 apply** in the limited liability company context." 2010 Del. Ch. LEXIS 216, at *18-19 (emphasis added).

WHAT THE UNIFORM LLC ACT ALLOWS

The Uniform Limited Liability Company Act (ULLCA) reflects this freedom. It provides that the operating agreement may, if not manifestly unreasonable:

- Alter or eliminate aspects of the duty of loyalty;
- Identify specific categories of activities that do not violate the duty of loyalty;
- Alter the duty of care (but may not authorize conduct involving bad faith, willful misconduct, or knowing violation of law); and
- Alter or eliminate any other fiduciary duty.

ULLCA § 105(d)(3) (2006, as amended 2013).

Courts in states that have adopted the ULLCA or similar statutes have enforced broad fiduciary waivers consistently. In *Creative Union, LLC v. Beke, Inc.*, 2026 U.S. Dist. LEXIS 26214, at *16–17 (S.D. Fla. 2026), the court upheld a complete waiver of a managing member's fiduciary duties, holding that the waiver was not manifestly unreasonable and that the operating agreement effectively displaced state-law duties. New Jersey has similarly upheld such waivers as commonplace and widely accepted. *Qin Lamme v. Client Instant Access, LLC*, 2022 N.J. Super. Unpub. LEXIS 714, at *6.

THE LITIGATION TAKEAWAY

For in-house counsel managing or overseeing LLC litigation, the operating agreement is the **first document to read**. The threshold question is not what duties apply under state law—it is what the agreement has retained, modified, or eliminated. A well-drafted operating agreement waiving fiduciary duties will foreclose most breach-of-duty claims and redirect the litigation to breach of contract, which carries different burdens, different damages theories, and a very different jury appeal.

If this were a seminar on drafting, we would spend more time on the pros and cons of waiving all fiduciary duties in the operating agreement. For now, the point is that those choices made at drafting time are the ones that define the litigation landscape years later.

LITIGATION CONSIDERATIONS

ADVANCEMENT OF DEFENSE COSTS

ADVANCEMENT VS. INDEMNIFICATION: THE DISTINCTION THAT MATTERS

Advancement and indemnification are related but fundamentally different remedies, and the distinction matters practically.

Indemnification is a post-disposition remedy—it applies after the underlying proceeding ends, based on whether the director or officer met the applicable standard of conduct.

Advancement is an interim remedy—it requires the company to pay litigation expenses *as they are incurred*, before any determination on the merits. As the Delaware Supreme Court put it, advancement "provides corporate officials with immediate interim relief from the personal out-of-pocket financial burden of paying the significant ongoing expenses inevitably involved with investigations and legal proceedings." *Homestore, Inc. v. Tafeen*, 888 A.2d 204, 211 (Del. 2005). The policy rationale is to "enhance the reliability of litigation outcomes involving directors and officers by assuring a level playing field." *Ridder v. Cityfed Fin. Corp.*, 47 F.3d 85, 87 (3d Cir. 1995).

The Southern District of New York captured it well: "the critical point about advancement—as distinguished from indemnification after the fact—is that its value is that it is granted or denied while the underlying action is pending. It protects the ability of the employee to mount a defense by safeguarding his ability to meet his expenses at the time they arise, and to secure counsel on the basis of such assurance." *United States v. Stein*, 452 F. Supp. 2d 230, 271–72 (S.D.N.Y. 2006).

MANDATORY VS. PERMISSIVE: OHIO AND DELAWARE

In Ohio, advancement is **mandatory**. Once a corporation receives the required undertaking from the director, it must advance expenses unless the articles or regulations specifically opt out. *Miller v. Miller*, 132 Ohio St. 3d 424, 435 (2012).

In Delaware, advancement is **permissive by default**—the statute authorizes it but does not require it. *Miller v. Palladium Indus.*, 2012 Del. Ch. LEXIS 292, at *8. In practice, however, sophisticated Delaware entities almost universally include advancement provisions in their bylaws, and those contractual commitments are strictly enforced.

THE JP MORGAN / JAVICE CASE STUDY

No recent case illustrates the stakes of advancement more vividly than the *Javice* matter.

JP Morgan Chase acquired Charlie Javice's company for $175 million. After the acquisition, an internal investigation revealed she had fabricated user data to inflate the company's apparent value. She was terminated for cause, prosecuted, convicted of fraud, and sentenced to 85 months in federal prison with a restitution obligation approaching $300 million.

When the investigation began, Javice sought advancement of her defense costs under the applicable bylaws. JP Morgan refused. A Delaware court ordered advancement. Through late 2025, JP Morgan had advanced approximately **$115 million** in legal fees and expenses—including $13 million incurred *after* her conviction. An institution defrauded of $175 million had paid nearly two-thirds of that amount defending the persons who defrauded it.

JP Morgan moved to terminate its advancement obligations, documenting a pattern of questionable expenditures that included:

- $530 on gummy bears
- More than $3,000 on first-class airline tickets
- $581 on a dinner featuring a $161 seafood tower
- $25,800 on hotel upgrades
- $284 on a car ride covering half a mile
- Spotify charges, personal care items, and a $75 suitcase from a tourist souvenir shop
- Hotel stays blocks from the attorney's own office

The motion was denied.

The result is consistent with Delaware's advancement jurisprudence. Delaware courts have repeatedly held that the advancement stage "is not the proper stage for a detailed analytical review of the fees, whether in terms of the strategy followed or the staffing and time committed." *White v. Curo Tex. Holdings, LLC*, 2017 Del. Ch. LEXIS 39, at *14. The governing standard is commercial reasonableness, assessed at a high level of generality—not line-by-line. *Danenberg v. Fitracks, Inc.*, 58 A.3d 991, 997 (Del. Ch. 2012). Courts have also cautioned that a company that has committed to advancement should not be permitted to "manufacture persnickety disputes over the reasonableness of the attorneys' fees sought." *Weil v. Vereit Operating P'ship, L.P.,* 2018 Del. Ch. LEXIS 48, *32.

The 2026 decision in *Panzura Holdings, LLC v. Stelfox* reaffirms this framework. At the advancement stage, the court "undertakes a less scrutinizing look at the requested fees and expenses." 2026 Del. Ch. LEXIS 132, at *7–8. Questions of precision and integrity of fee submissions belong at the indemnification stage—not advancement. *Id.*

OTHER ADVANCEMENT RULES IN-HOUSE COUNSEL SHOULD KNOW

Allocation is not required at the advancement stage. Defense costs need not be allocated between advanceable and non-advanceable proceedings before final disposition. *HLTH Corp. v. Agric. Excess & Surplus Ins. Co.*, 2008 Del. Super. LEXIS 280, at *38; *Kerbs v. Bioness Inc.*, 2022 Del. Ch. LEXIS 193, at *7; *Danenberg*, 2012 Del. Ch. LEXIS 4, at *7. Allocation happens—if at all—at the indemnification stage.

Fees on counterclaims are advanceable. Where a director or officer asserts counterclaims arising from the same dispute, the costs of pursuing those counterclaims may be advanceable as well. *Citadel Holding Corp. v. Roven*, 603 A.2d 818, 824 (Del. 1992).

Cross-applicable fees are wholly advanceable. Where fees would have been incurred independently in defense of the advanceable proceeding, they are fully advanceable even if they also benefited a non-advanceable matter. *Javice v. JPMorgan Chase Bank, N.A.*, 2024 Del. Ch. LEXIS 45, at *3–4.

Ability to repay is irrelevant. Advancement is not contingent on the fiduciary's financial ability to repay unless the corporation specifies otherwise in its governing documents. *Reddy v. Elec. Data Sys. Corp.*, 2002 Del. Ch. LEXIS 69, at *4 (Del. Ch.); *Westbrook v. Swiatek*, 2010-Ohio-2868, ¶42 (5th Dist. Ohio).

BURDEN OF PROOF

The applicable burden of proof in fiduciary duty litigation varies by jurisdiction, and the difference is not trivial.

In **Delaware**, the plaintiff must prove breach and resulting damages by a **preponderance of the evidence**. *Glick v. KF Peckslаnd LLC*, 2017 Del. Ch. LEXIS 806, at *47.

In **Ohio**, the burden is **clear and convincing evidence**—a meaningfully higher standard. *Newcomer v. Nat'l City Bank*, 2014-Ohio-3619, ¶48 (6th Dist.); *see also* Ohio Rev. Code §§ 1701.59, 1701.641.

The burden calculus is further complicated in duty-of-loyalty cases and other claims that trigger entire fairness review. When entire fairness applies, the fiduciary bears the burden of proving both fair process and fair price—a standard that operates on top of the baseline evidentiary burden. Getting clear on which standard applies, and who bears it, is a foundational element of case assessment in any fiduciary duty matter.

CLOSING THOUGHTS

Fiduciary duty litigation in closely held entities rewards careful attention to entity form, jurisdiction, and governing documents. A few practical themes cut across all of these cases:

- **Read the operating agreement first.** In LLC disputes, the agreement defines the entire fiduciary duty landscape. What the parties contracted for at formation may be far more important than what the default law provides.
- **Know your jurisdiction on direct vs. derivative standing.** The answer to that question shapes everything—who sues, what they can recover, and what procedural hurdles they face.
- **Take advancement seriously, and early.** Companies that have granted broad advancement rights face substantial financial exposure before any merits determination. The *Javice* case is an extreme example, but the underlying dynamic is common. Clients should understand their advancement obligations before disputes arise.
- **Know your burden of proof.** Preponderance vs. clear and convincing evidence is a material difference in case strategy, damages assessment, and settlement positioning.

We look forward to the panel discussion.