Litigating Company Agreements and How to Avoid Common Pitfalls

Texas's $2.7 trillion dollar economy is built on the backbone of company, partnership, and member agreements that rely on the Texas Business Organizations Code ("TBOC") to dictate the rights and duties of respective stakeholders. Nevertheless, conflicts frequently arise over the meaning of the parties' agreement and what the TBOC or Texas courts have to say about those disputes. Recent statutory reforms, most notably Senate Bill 29 ("SB 29," effective May 14, 2025), and a fast-evolving body of case law have added additional complexity, raising the stakes for lawyers who draft, advise on, and litigate these agreements.

This article offers a practical roadmap for avoiding the pitfalls that repeatedly trigger litigation. Drawing on the latest TBOC amendments, the new Business Judgment Rule ("BJR") codifications, and instructive appellate decisions, this article identifies common drafting and litigation issues and suggested solutions for attorneys to minimize such issues and increase the likelihood of enforcing the parties' original agreement.

I. Common Issues Litigating Fiduciary Claims

A. Defining Fiduciary Duties and the Business Judgment Rule

Issue: The most common claim in litigation for mismanagement or conflicts between members, partners, or management is a breach of fiduciary duty, but SB 29's changes are likely to drastically impact the litigation landscape because fiduciary duties may be eliminated in certain contexts and the codification of the BJR creates a rebuttable presumption and new pleading standards for LLCs and LPs, when applicable.

Applicable Law:

Elimination of Duties

Ordinarily, "Texas upholds parties' contractual freedom to narrow general fiduciary duties consistent with statutory minimum requirements." *Primexx Energy Opportunity Fund, LP v. Primexx Energy Corp*., 709 S.W.3d 619, 636 (Tex. Bus. Ct.—Austin 2025), reconsideration denied, 713 S.W.3d 416 (Tex. Bus. Ct. 2025). "Unless otherwise provided by statute or law, duties owed by an agent to his or her principal may be altered by agreement." *Id.* Prior to SB 29, the TBOC allowed for the restriction or expansion of any duties but did not expressly allow the elimination of all duties.

Now, SB 29 has amended the TBOC to expressly allow LLC agreements to eliminate any duties, including fiduciary duties, and related liabilities that a member, manager, officer, or other person has to the company. TEX. BUS. ORGS. CODE ANN. § 101.401. Likewise, SB 29 allows an LP agreement to eliminate "any or all of the duty of loyalty under Section 152.205, the duty of care under Section 152.206, and the obligation of good faith under Section 152.204(b)." TEX. BUS. ORGS. CODE ANN. § 152.002(e).

Even after SB 29, general partnership agreements cannot eliminate the duties of loyalty and care or obligation to carry out duties in good faith, but general partnership agreements can define what conduct does not violate these duties, as long as "not manifestly unreasonable." *Id.* at § 152.002(b)(1)–(3). Some partnership agreements require a finding of fraud, gross negligence, or willful misconduct to constitute a breach of such duties, and courts that have currently upheld those terms. *See, e.g.*, *Jerry L. Starkey, TBDL, L.P. v. Graves*, 448 S.W.3d 88, 106–07 (Tex. App.—Houston [14th Dist.] 2014, no pet.).

SB 29's Codification of the Business Judgment Rule

SB 29's codification of the BJR automatically applies to LLCs with "a class or series of voting membership interests listed on a national securities exchange." *Id. a*t § 101.256(a). Other LLCs may opt-in to this BJR codification by adding it to their company agreement. *Id.* For LPs, this BJR codification automatically applies to "a partnership that has a class or series of partnership interests listed on a national securities exchange." *Id.* at § 152.006(a). Other LPs may opt-in to the BJR codification by including it in their partnership agreement. *Id.* at § 152.006(b).

Previously, Section 152.206 of the TBOC incorporated a modest version of the BJR "as its care duty standard." *Primexx*, 709 S.W.3d at 652. Section 152.206 states:

> (a) A partner's duty of care to the partnership and the other partners is to act in the conduct and winding up of the partnership business with the care an ordinarily prudent person would exercise in similar circumstances.
> (b) An error in judgment does not by itself constitute a breach of the duty of care.
> (c) A partner is presumed to satisfy the duty of care if the partner acts on an informed basis and in compliance with Section 152.204(b).

TEX. BUS. ORGS. CODE ANN. § 152.206. In *Primexx*, the First Division of the Texas Business Court held that "the parties' arm's-length sale standard as a matter of law satisfied TBOC § 152.206(a)'s care duty" concerning a disputed transaction. SB 29's codification differs from the version of the BJR codified in Section 152.206 in three major ways.

First, the BJR presumption applies not just to the duty of care, but to all duties under statutory or common law as well as the governing documents. The BJR codification provides that a member, officer, partner, or other person exercising control on behalf of the LLC or LP is presumed to have *acted in good faith* ***and*** *in compliance with their duties* (whether under the TBOC, common law, or the governing agreement) ***and*** *the governing documents*. TEX. BUS. ORGS. CODE ANN § 101.256; § 153.163. The statute says that the BJR presumption is in addition to any legal presumption arising under common law or this code, and the BJR presumption does not

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