AN LLC IS THE KEY: THE FALSE DICHOTOMY BETWEEN INADVERTENT PARTNERSHIPS AND THE FREEDOM OF CONTRACT

Joseph K. Leahy[*]

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* Professor of Law, South Texas College of Law—Houston. Thanks to Dan Kleinberger, Christine Hurt, and participants of the 2017 National Business Law Scholars Conference, including Joan Heminway, for their helpful input; to Doug Moll and Beth Miller for their support, advice, and extensive comments; and to Evan Seale and Cameron Keener for their tireless research assistance.

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"Sophisticated parties need the right to rely on written contracts . . . Partnership by ambush . . . goes against the freedom to contract guaranteed by the Texas Constitution."[1]

"We do not have unintended corporations, LLCs or LLPs in business, and we should not have unintended partnerships."[2]

"[A]n express disavowal of intent to form a partnership is not controlling."[3]

INTRODUCTION

The Texas Supreme Court is currently pondering "the hottest partnership case the Lone Star State has seen in years,"[4] which could have a dramatic effect on the law of partnership formation. The case—a Goliath versus Goliath dispute between two publicly-traded, Fortune 500 energy pipeline companies, with Plaintiff/Petitioner Energy Transfer Partners (ETP)[5] and Defendant/Respondent Enterprise Products Partners

1. Mark Curriden, *Appeals Court Reverses Energy Transfer's $535M Verdict Against Enterprise*, DALL. BUS. J. (July 19, 2017, 1:38 PM), https://www.bizjournals.com/dallas/news/2017/07/19/appeals-court-reverses-energy-transfers-535m.html (quoting David E. Keltner, counsel for Enterprise Products Partners, L.P., who was reacting to the appellate court decision in *Enterprise Products Partners, L.P. v. Energy Transfer Partners, L.P.*).

2. *Jury: Energy Transfer Partners and Enterprise Had Legal Partnership*, DALL. MORNING NEWS (Mar. 4, 2014, 9:22 PM), https://www.dallasnews.com/business/energy/2014/03/04/jury-energy-transfer-partners-and-enterprise-had-legal-partnership (quoting James A. Cisarik, Executive Vice President of Enterprise Products Partners, L.P., in a prepared statement in response to the jury verdict).

3. Letter from Elizabeth S. Miller to Michael P. Lynn, P.C. (June 6, 2014) (quoting Elizabeth S. Miller, professor of law at Baylor Law School and author of a treatise on Texas business organization law, in a letter to counsel for Energy Transfer Partners, L.P.), *reprinted in* Amicus Curiae Brief in Support of Petitioners at Exhibit C, Energy Transfer Partners, L.P. v. Enter. Prods. Partners, L.P. (*Energy Transfer Partners*), No. 17-0862 (Tex. Mar. 15, 2018) [hereinafter Hurt & Smith Amicus Brief] (submitted by Professor Christine Hurt & Dean D. Gordon Smith).

4. *See* Ladd Hirsch, *What Is a Texas Partnership: The Answer to Come Soon in the Case of ETP v. Enterprise Products Partners LP*, WINSTEAD BUS. DIVORCE (Feb. 27, 2017), https://www.winsteadbusinessdivorce.com/2017/02/texas-partnership-answer-come-soon-case-etp-v-enterprise-products-partners-lp/. The case has attracted the attention of numerous amici, as well. *See, e.g.*, Amicus Curiae Brief of the Chamber of Commerce of the United States of America et al., *Energy Transfer Partners*, No. 17-0862 (Tex. Sept. 27, 2019) [hereinafter Chamber of Commerce Amicus Brief]; Amicus Curiae Brief in Support of Respondents, *Energy Transfer Partners*, No. 17-0862 (Tex. Oct. 4, 2019) [hereinafter Sokolow Amicus Brief] (submitted by David Simon Sokolow); Amicus Brief in Support of Petitioners, *Energy Transfer Partners*, No. 17-0862 (Tex. Sept. 30, 2019) [hereinafter Rudd Amicus Brief] (submitted by Hon. Jim Rudd); Amicus Curiae Brief of John C. Ale, *Energy Transfer Partners*, No. 17-0862 (Tex. Sept. 6, 2019) [hereinafter Ale Amicus Brief]; Letter from Christine Hurt, Professor, J. Reuben Clark Law School, to Blake Hawthorne, Clerk, Supreme Court of Texas (Oct. 1, 2019); Letter from Hugh Rice Kelly to Blake Hawthorne, Clerk, Supreme Court of Texas (Sept. 27, 2019).

5. *See Fortune 500: 64—Energy Transfer Equity*, FORTUNE, http://fortune.com/fortune500/energy-transfer/ (last visited Nov. 25, 2019) (listing Energy Transfer Equity as number 64 on Fortune magazine's annual list of the largest American companies by revenue for 2018, prior to the October 2018 merger with

(Enterprise)[6]—is an appeal from *Enterprise Products Partners, L.P. v. Energy Transfer Partners, L.P.* (*Enterprise Products*).[7] In *Enterprise Products*, a Dallas appellate court issued a highly-publicized opinion[8] that overturned a widely-reported[9] half-billion dollar judgment (which resulted from an even larger jury verdict)[10] in favor of Plaintiff ETP.[11] In that verdict, the jury found: (1) that Enterprise and ETP created a general partnership "to market and pursue a pipeline project to transport crude oil,"[12] despite having agreed (in a non-binding letter of intent) not to be partners until both of their boards signed off on the deal; and (2) that Enterprise breached its duty of loyalty to ETP by developing an oil pipeline project with a competitor, Enbridge, Inc.[13]

In striking down the jury verdict, the *Enterprise Products* court held that Enterprise and ETP never formed a partnership *as a matter of law* because (1) the letter of intent contained valid conditions precedent to forming a partnership, and (2) those conditions precedent were neither satisfied nor waived.[14] The appellate court offered no other basis for holding that no

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ETP); *Ownership Structure*, ENERGY TRANSFER, https://www.energytransfer.com/ownership-structure (last visited Nov. 25, 2019) (explaining that, after ETP merged with Energy Transfer Equity, L.P. (ETE) in October 2018, the company became Energy Transfer, L.P., "one of the largest and most diversified portfolios of energy assets in the United States").

6. *See About Us*, ENTERPRISE PRODUCTS, https://www.enterpriseproducts.com/about-us (last visited Nov. 21, 2019) ("Enterprise Products Partners L.P. is one of the largest publicly traded partnerships and a leading North American provider of midstream energy services to producers and consumers of natural gas, NGLs, crude oil, refined products and petrochemicals."); *Fortune 500: 105—Enterprise Products Partners*, FORTUNE, http://fortune.com/fortune500/enterprise-products-partners/ (last visited Nov. 25, 2019) (listing Enterprise as number 105 on *Fortune* magazine's annual list of the largest American companies by revenue for 2018).

7. Enter. Prods. Partners, L.P. v. Energy Transfer Partners, L.P. (*Enterprise Products*), 529 S.W.3d 531 (Tex. App.—Dallas 2017, pet. granted).

8. *See, e.g.*, Charles Sartain & Chance Decker, *Pipeline Partnership Verdict Reversed*, GRAY REED: ENERGY & THE LAW (July 25, 2017), https://www.energyandthelaw.com/2017/07/25/pipeline-partnership-verdict-reversed/.

9. *See, e.g.*, Alison Frankel, *How Texas Oil Company Won $319 Million 'Common Law' Partnership Verdict*, REUTERS (Mar. 7, 2014), http://blogs.reuters.com/alison-frankel/2014/03/07/how-texas-oil-company-won-319-million-common-law-partnership-verdict/; *Jury*, *supra* note 2.

10. *See Jury*, *supra* note 2. The jury actually concluded that Enterprise owed ETP $814 million, consisting of $319 million in damages and $595 million in "disgorgement of the benefit wrongly gained by Enterprise." Brief of Appellees at xvi, *Enterprise Products*, 529 S.W.3d 531 (Tex. App.—Dallas 2017, pet. granted) (No. 05-14-01383-CV) [hereinafter ETP Appellee Brief]. However, the trial court "reduced the disgorgement award by almost 75%." *Id.* As a result, "[t]he trial court's judgment awarded ETP actual damages of $319,375,000 and disgorgement of $150 million"—for a total of $469,375,000. *Enterprise Products*, 529 S.W.3d at 533.

11. *See Enterprise Products*, 529 S.W.3d at 533 (reversing judgment for plaintiff ETP).

12. *Id.* at 536.

13. *Id.* at 536–37.

14. *Id.* at 533 (outlining the court's three conclusions as: "1. The unfulfilled conditions precedent in the parties' written agreements precluded forming the alleged partnership unless ETP obtained a jury finding that the parties waived those conditions precedent; 2. ETP's failure to request such a finding meant that it had to establish waiver of the conditions precedent as a matter of law; and 3. ETP did not prove as a matter of law that the parties waived the conditions precedent").

partnership existed.[15]

In particular, the court of appeals in *Enterprise Products* never suggested (and defendant Enterprise never argued on appeal)[16] that the evidence at trial was insufficient to support a finding of partnership formation *in the absence of* the parties' written agreements.[17] Further, while the appellate court decision in *Enterprise Products* explicitly turned on conditions precedent,[18] the logic of its reasoning is not limited to any particular type of contract clause.[19] Hence, the implication of the *Enterprise Products* decision is that, regardless of what contractual mechanism the parties use, if they *agree* not to form a partnership, no partnership will exist *as a matter of law*—even if there is sufficient evidence from which a jury could find that the parties satisfied the statutory definition of partnership as a *factual* matter.

This is not the law of Texas,[20] or any other state that has adopted the ["Revised"] Uniform Partnership Act (1997) (commonly known[21] as RUPA).[22] Nor is it the law in any state that retains the original Uniform

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15. *Id.* (offering only the aforementioned three grounds for its opinion).

16. *See* Brief of Appellant at 1, 4, 19–21, *Enterprise Products*, 529 S.W.3d 531 (Tex. App.—Dallas 2017, pet. granted) (No. 05-14-01383-CV) [hereinafter Enterprise Appellant Brief].

17. *Enterprise Products*, 529 S.W.3d at 537.

18. *Id.* at 533.

19. *See id.* at 540, 542.

20. *See* TEX. BUS. ORGS. CODE ANN. § 152.052(a); Ingram v. Deere, 288 S.W.3d 886, 895 (Tex. 2009). This Article will focus primarily on partnership formation under Texas law because the jury found that Enterprise and ETP formed a partnership under Texas law. *See Enterprise Products*, 529 S.W.3d at 531 (applying Texas partnership law). However, Texas partnership formation law remains consistent with the general law. *See* Christine Hurt, *Startup Partnerships*, 69 B.C. L. Rev. (forthcoming 2020) (manuscript at 19), https://papers.ssrn.com/abstract_id=3432595; *see also infra* notes 22–23 (discussing the two uniform partnership statutes).

The *Enterprise Products* appellate court did not address choice of law, nor is it clear whether the trial court addressed this issue. *See Enterprise Products*, 529 S.W.3d at 533. However, the courts probably were correct to apply Texas partnership law to Enterprise and ETP's dispute, despite some ambiguity in the law. *See infra* note 24 (explaining how location of chief executive office and headquarters can affect applicable law).

21. ALLEN DONN ET AL., REVISED UNIFORM PARTNERSHIP ACT § 1202 (2019–2020 ed.) ("Notwithstanding the [ULA's] preference, the Act has been popularly known as the 'Revised Uniform Partnership Act' or 'R.U.P.A.' This is the pattern of popular usage.").

22. *See* Tiffany A. Hixson, Note, *The Revised Uniform Partnership Act—Breaking Up (or Breaking Off) Is Hard to Do: Why the Right to "Liquidation" Does Not Guarantee a Forced Sale Upon Dissolution of the Partnership*, 31 W. NEW ENG. L. REV. 797, 809 (2009) (discussing the history of RUPA's drafting). RUPA was completed in 1992, approved by the American Bar Association in 1994, and formally adopted by the Uniform Law Commission (ULC) in 1997. *Id.*

To date, thirty-nine states and the District of Columbia have adopted some version of RUPA. *See* ALA. CODE § 10A-8A-1.08 (Westlaw through Act 2019-540); ALASKA STAT. ANN. § 32.06.960 (West, Westlaw through Nov. 27, 2019 of the 2019 1st Reg. Sess. and 2019 1st Spec. Sess. of the 31st Leg.); ARIZ. REV. STAT. ANN. § 29-1003 (Westlaw through 1st Reg. Sess. of the 54th Leg. (2019)); ARK. CODE ANN. § 4-46-103 (West, Westlaw through 2019 Reg. Sess. of the 92nd Ark. Gen. Assemb.); CAL. CORP. CODE § 16103 (West, Westlaw through ch. 860 of the 2019 Reg. Sess.); COLO. REV. STAT. ANN. § 7-64-103 (West, Westlaw through 2019 Reg. Sess.); CONN. GEN. STAT. ANN. § 34-303 (West, Westlaw through 2019 Jan. Reg. Sess. and 2019 Jul. Spec. Sess.); DEL. CODE ANN. tit. 6, § 15-103 (West, Westlaw through ch. 219 of the 150th Gen. Assemb. (2019–2020)); D.C. CODE ANN. § 29-601.04 (West, Westlaw

through Sept. 11, 2019); FLA. STAT. ANN. § 620.8103 (West, Westlaw through 2019 1st Reg. Sess. of the 26th Leg.); HAW. REV. STAT. ANN. § 425-103 (West, Westlaw through Act 286 of the 2019 Reg. Sess.); IDAHO CODE ANN. § 30-23-105 (West, Westlaw through 2019 1st Reg. Sess. of the 65th Idaho Leg.); 805 ILL. COMP. STAT. ANN. 206/103 (West, Westlaw through P.A. 101-591); IOWA CODE ANN. 486A.103 (West, Westlaw through 2019 Reg. Sess.); KAN. STAT. ANN. § 56a-103 (West, Westlaw through July 1, 2019, 2019 Reg. Sess.); KY. REV. STAT. ANN. § 362.1-103 (West, Westlaw through 2019 Reg. Sess. and 2019 1st Extraordinary Sess.); ME. REV. STAT. ANN. tit. 31, § 1003 (Westlaw through 2019 1st Reg. Sess. and ch. 531 of the 1st Spec. Sess. of the 129th Leg.); MD. CODE ANN., CORPS. & ASS'NS § 9A-103 (West, Westlaw through 2019 Reg. Sess. of the Gen. Assemb.); MINN. STAT. ANN. § 323A.0103 (West, Westlaw through Jan 1, 2020, 2019 Reg. Sess. and 1st Spec. Sess.); MISS. CODE ANN. § 79-13-103 (West, Westlaw through 2019 Reg. Sess.); MONT. CODE ANN. § 35-10-106 (West, Westlaw through 2019 Sess.); NEB. REV. STAT. ANN. § 67-404 (West, Westlaw through 1st Reg. Sess. of the 106th Leg. (2019)); NEV. REV. STAT. ANN. § 87.4316 (West, Westlaw through 80th Reg. Sess. (2019)); N.J. STAT. ANN. § 42:1A-4 (West, Westlaw through L.2019, c. 267 and J.R. No. 22); N.M. STAT. ANN. § 54-2A-110 (West, Westlaw through 1st Reg. Sess. of the 54th Leg. (2019)); N.D. CENT. CODE ANN. § 45-13-03 (West, Westlaw through 66th Gen. Assemb.); OHIO REV. CODE ANN. § 1776.03 (West, Westlaw through Files 1 to 18 of the 133rd Gen. Assemb. (2019–2020)); OKLA. STAT. ANN. tit. 54, § 1-103 (West, Westlaw through 1st Reg. Sess. of the 57th Leg. (2019)); OR. REV. STAT. ANN. § 67.042 (West, Westlaw through 2018 Reg. Sess. and 2018 Spec. Sess. of the 79th Leg. Assemb.); 15 PA. STAT. AND CONS. STAT. ANN. § 8415 (West, Westlaw through 2019 Reg. Sess. Act 75); S.D. CODIFIED LAWS § 48-7A-103 (Westlaw through 2019 Sess. Laws, Exec. Order 19-1 and Supreme Court Rule 19-18); TENN. CODE ANN. § 61-1-103 (West, Westlaw through 2019 1st Extraordinary Sess. of the 111th Tenn. Gen. Assemb.); UTAH CODE ANN. § 48-1d-106 (West, Westlaw through 2019 1st Spec. Sess.); VT. STAT. ANN. tit. 11, § 3203 (West, Westlaw through Acts of the Reg. Sess.); VA. CODE ANN. § 50-73.81 (West, Westlaw through 2019 Reg. Sess.); WASH. REV. CODE ANN. § 25.05.015 (West, Westlaw through 2019 Reg. Sess.); W. VA. CODE ANN. § 47B-1-3 (West, Westlaw through 2019 Reg. Sess. and 2019 1st Extraordinary Sess.); WIS. STAT. ANN. § 178.0105 (West, Westlaw through 2019 Act 5); WYO. STAT. ANN. § 17-21-103 (West, Westlaw through 2019 Gen. Sess.). The most recent state to adopt RUPA was Pennsylvania in 2017. 15 PA. STAT. AND CONS. STAT. ANN. § 8415 (West, Westlaw through 2019 Reg. Sess. Act 75). Further, a bill that would enact RUPA in South Carolina is pending in committee. *See* S. Comm. 0193, 2018 Leg., 122d Sess. (S.C. 2018).

However, unlike UPA, RUPA "has not been adopted with any degree of uniformity." Paul Powell, Comment, *Dissociating the Fiduciary: Duty Revisions and the Resulting Confusion in Idaho's New Partnership Law*, 36 IDAHO L. REV. 145, 147 (1999) (citing Thomas R. Hurst, *Will the Revised Uniform Partnership Act (1994) Ever Be Uniformly Adopted?*, 48 FLA. L. REV. 575, 576 (1996)).

Texas adopted an early version of RUPA as the Texas Revised Partnership Act (TRPA) in 1993, effective in 1994. *See Ingram*, 288 S.W.3d at 894. TRPA was later recodified in the Texas Business Organizations Code (TBOC), largely unaltered. *See id.* at 895, n.4; 19 ELIZABETH S. MILLER & ROBERT A. RAGAZZO, TEXAS PRACTICE: BUSINESS ORGANIZATIONS § 7:13 (3d ed. 2018) (noting that the TBOC "recodified in essentially identical terms" the duties between partners provisions of TRPA). Texas's definition of partnership under TRPA/TBOC tracks almost exactly the definition of UPA and RUPA. *See infra* note 27 (noting the partnership definitions under UPA and RUPA). However, the Texas approach to partnership formation, differs slightly in that it asks courts to balance five factors to determine whether the definition is satisfied. *See* Hurt, *supra* note 20, at 19.

More recently, in 2011 (with updates in 2013), the ULC attempted to "harmonize" RUPA with other uniform business organization acts in connection with the drafting of the Uniform Business Organizations Code (UBOC). *See infra* note 47 (noting how revisions to RUPA in 2011 and 2013 have changed fiduciary duties). This resulted in substantial revisions to the language in the provisions related to fiduciary duties, and to the language in those provisions that relates to the elimination of fiduciary duties in particular; the provisions relating to fiduciary duties also were renumbered. *See infra* note 47 (explaining the RUPA revisions). Accordingly, although the ULC continues to describe RUPA as the same act after the amendments—their preferred citation is Uniform Partnership Act (1997) (last amended 2013)—it makes better sense to distinguish between this new version of RUPA and the prior version that was in effect for nearly two decades and that has been adopted in thirty-seven states, especially because parts of the latest version have only been adopted in two states. *See* UNIF. P'SHIP ACT (1997) (last amended 2013). This is particularly true when dealing with Texas law, since TRPA—and therefore TBOC—is based on a close

Partnership Act of 1914 (UPA).[23]

In Texas,[24] as elsewhere (under both UPA and RUPA), business people

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cousin to the RUPA 1997 version. *See infra* notes 27–31 and accompanying text (noting the similarities between TRPA and RUPA).

Therefore, all references to RUPA in this Article will refer to the widely (if non-uniformly) adopted 1997 version; any references to the 2011 and 2013 versions of RUPA will be designated as Harmonized RUPA or HRUPA.

23. *See* J. William Callison, *Blind Men and Elephants: Fiduciary Duties Under the Revised Uniform Partnership Act, Uniform Limited Liability Company Act, and Beyond*, 1 J. SMALL & EMERGING BUS. L. 109, 113 (1997) (noting that UPA, drafted by the National Conference of Commissioners of Uniform State Laws (NCCSL), the ULA's predecessor, "was enacted in substantially identical form in all states (other than Louisiana)").

Texas, a late adopter of UPA, "substantially adopted [its] major provisions" in 1961 as the Texas Uniform Partnership Act (TUPA). *Ingram*, 288 S.W.3d at 894; *see generally* Alan R. Bromberg, *Texas Uniform Partnership Act—The Enacted Version*, 15 SW. L.J. 386 (1961) (detailing UPA as adopted in Texas). TUPA was Texas's partnership statute from 1961 until it was replaced by TRPA in 1994. *See Ingram*, 288 S.W.3d at 894.

UPA remains the law in ten states: Georgia (GA. CODE ANN. § 14-8-1 (West, Westlaw through 2019 Sess. of the Gen. Assemb.)); Indiana (IND. CODE ANN. § 23-4-1-18 (West, Westlaw through 2019 Reg. Sess. of the 121st Gen. Assemb.)); Massachusetts (MASS. GEN. LAWS ANN. ch. 108A, § 1 (West, Westlaw through ch. 88 of the 2019 1st Ann. Sess.)); Michigan (MICH. COMP. LAWS ANN. § 449.1 (West, Westlaw through P.A. 2019, No. 123, 2019 Reg. Sess., 100th Leg.)); Missouri (MO. REV. STAT. § 358.010 (West, Westlaw through 2019 1st Reg. and 1st Extraordinary Sess. of the 100th Gen. Assemb.)); New Hampshire (N.H. REV. STAT. ANN. § 304-A:18 (Westlaw through ch. 345, 2019 Reg. Sess.)); New York (N.Y. P'SHIP LAW § 1 (McKinney, Westlaw through L.2019, ch. 491)); North Carolina (N.C. GEN. STAT. ANN. § 59-31 (West, Westlaw through S.L. 2018-145, 2018 Reg. and Extra Sess.)); Rhode Island (7 R.I. GEN. LAWS ANN. § 7-12-12 (West, Westlaw through ch. 310, 2019 Reg. Sess.)); and South Carolina (S.C. CODE ANN. § 33-41-10 (Westlaw through 2019 Sess.). However, as of this writing, a bill is pending to adopt RUPA in the South Carolina legislature. *See* S. Comm. 0193, 2018 Leg., 122d Sess. (S.C. 2018).

24. In the absence of a valid choice of law provision, a partnership is governed by Texas law if its "chief executive office" is located in Texas. *See* TEX. BUS. ORGS. CODE ANN. § 1.002(57) (noting that a domestic general partnership is a nonfiling entity); *id.* § 1.103 (noting that for nonfiling entities, "the law governing the entity's formation and internal affairs is the law of the entity's jurisdiction of formation"); *id.* § 1.002(43) (defining "jurisdiction of formation," as a default rule, to be "the jurisdiction in which the entity has its chief executive office"); *id.* § 1.105 (defining "internal affairs" to include "the rights, powers, and duties of its governing authority, governing persons, officers, owners, and members").

Unfortunately, the term "chief executive office" is defined neither in TBOC nor in the Uniform Commercial Code, from which the drafters borrowed the term. *See* MILLER & RAGAZZO, *supra* note 22 § 7:14 n.7 ("The concept of 'chief executive office' comes from . . . the Texas Uniform Commercial Code and is not defined."); Allan Vestal, *Choice of Law and the Fiduciary Duties of Partners Under the Revised Uniform Partnership Act*, 79 IOWA L. REV. 219, 231 (1994) (explaining that the term chief executive office in RUPA "is borrowed from Article 9 of the Uniform Commercial Code [(UCC)] . . . however, the term is not defined in the [UCC] or its official comments"). Further, while a Texas partnership is required to keep any of its books and records at its chief executive office, *see* TEX. BUS ORGS. CODE ANN. § 152.212(b), it seems doubtful that inadvertent partnerships, in which the partners do not realize they are partners, would know to follow this rule—so it makes little sense to use it for choice of law purposes, *see* Vestal, *supra* note 24, at 238 (criticizing RUPA's use of the chief executive office choice of law rule as applied in particular to inadvertent partnerships).

Yet, that said, it appears that the drafters of the TRPA believed that the "chief executive office" referred to the partnership's principal place of business, which was the standard under the TUPA. *See* MILLER & RAGAZZO, *supra* note 22, § 7:14 n.7 (citing TEX. REV. CIV. STAT. ANN. art. 6132b-4.03 (expired), Comment of the Bar Committee–1993, which explains that the rule that the partnership's books and records, if any, must be kept at the partnership's chief executive office "continues the rule of TUPA . . . which refers to the partnership's principal place of business") ("The drafters apparently contemplated that the partnership's 'chief executive office' and 'principal place of business' would

may not defeat partnership formation *as a matter of law* simply by stating—in a contract or otherwise—that they are not partners.[25] Rather, partnership formation always poses a *factual* question:[26] Are these business people co-owners of a for-profit business?[27]

In Texas, answering this definitional question requires that the finder of fact balance five statutory factors[28] (and perhaps other, nonstatutory factors[29]), including the intent to be partners (or not). No factor is dispositive.[30] If the factfinder concludes that the parties are co-owners of a for-profit business, they are partners *regardless* of what they call themselves and *regardless* of any contracts between them[31]—*unless* (as explained below)

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ordinarily constitute the same location."); *see also* TEX. REV. CIV. STAT. ANN. art. 6132b-1.05 (expired), Comment of the Bar Committee–1993 (explaining that under TRPA, as a default rule, "the law of the state in which the partnership has its chief executive office" governs the partnership; that "[t]he reference to the partnership's chief executive office is drawn from [the] UCC" and that, although "like in the UCC, the term 'chief executive office' is not defined, [it] would be the location that would normally be associated with the partnership").

Here, it is not clear that Enterprise and ETP created a chief executive office for their potential joint venture; however, both companies, are headquartered in Texas. *See Contact Information*, ENTERPRISE PRODUCTS PARTNERS, L.P., https://www.enterpriseproducts.com/royalty-relations/contact-information (last visited Nov. 25, 2019) (noting that Enterprise is headquartered in Houston, TX); *Contact Us*, ENERGY TRANSFER LP, https://www.energytransfer.com/contact/ (last visited Nov. 25, 2019) (noting that ETP's successor is headquartered in Dallas, TX). Therefore, unless most of the work on Enterprise and ETP's joint venture occurred out of state, Texas is the state "that would normally be associated with" their venture. *See* TEX. REV. CIV. STAT. ANN. art. 6132b-1.05 (expired), Comment of the Bar Committee–1993.

25. *See* Hurt, *supra* note 20. Some old cases suggest otherwise. In a subsequent article, the author expects to argue that UPA/RUPA invalidated these old cases. As a result, the author plans to argue that any modern case that replies on these old cases is wrong—a rogue decision that should be overruled for failing to pay heed to the governing statute. On appeal, Enterprise contends that "[c]ourts in commercial hubs like New York and Chicago have been explicit on this point, predictably enforcing agreements that impose conditions on the formation of a legally binding relationship." Enterprise Appellant Brief, *supra* note 16, at 24 (citing, e.g., Arcadian Phosphates, Inc. v. Arcadian Corp., 884 F.2d 69, 72 (2d Cir. 1989)). None of these cases held that two parties may contract around partnership as a matter of law.

26. *See Ingram*, 288 S.W.3d at 897 ("Each case must rest on its own particular facts . . . ."); Hurt, *supra* note 20, at 20 n.94.

27. *See* UNIF. P'SHIP ACT § 6(1) (NAT'L CONFERENCE OF COMM'RS OF UNIF. STATE LAWS 1914) ("A partnership is an association of two or more persons to carry on as co-owners a business for profit."); UNIF. P'SHIP ACT § 202(a) (UNIF. LAW COMM'N 1997) ("[T]he association of two or more persons to carry on as co-owners a business for profit forms a partnership, whether or not the persons intend to form a partnership.").

28. *See* BUS. ORGS. § 152.052(a) ("Factors indicating that persons have created a partnership include . . . ."); Hurt, *supra* note 20, at 29.

29. *See* Hurt, *supra* note 20, at 29 (explaining why the five factors are not necessarily exclusive).

30. *See Ingram*, 288 S.W.3d at 891 (explaining that the determination of whether a partnership exists "should be made by examining the totality of the circumstances in each case, with no single factor being either necessary or sufficient to prove the existence of a partnership").

31. BUS. ORGS. § 152.051(b)(1) (providing that, if the statutory definition is satisfied, the parties are partners "regardless of whether . . . [they] intend to create a partnership"); *accord* UNIF. P'SHIP ACT § 202(b)(1) (UNIF. LAW COMM'N 1997) (providing that, if the statutory definition is satisfied, the parties are partners regardless of whether or not they intend to form a partnership); *see also id.* § 202, cmt. 1 ("The addition of the phrase, 'whether or not the persons intend to form a partnership,' merely codifies the universal judicial construction of UPA Section 6(1) that a partnership is created by the association of persons whose intent is to carry on as co-owners a business for profit, regardless of their subjective

they have formed a filing entity, such as a limited liability company (LLC), to govern their business.[32] In short, partnerships can be formed accidentally.[33]

Hence, the appellate court was wrong to hold that *some* evidence of the parties' intent *not* to be partners—a condition precedent in a (nonbinding) term sheet—trumped all *other* evidence on the intent factor, and all evidence on the *other four* factors, *as a matter of law.*[34]

Yet, setting aside the partnership statutes and the case law, one might question the wisdom of allowing parties to form partnerships by accident, particularly if they do not wish to be partners. In fact, in *Enterprise Products*, the Defendant Enterprise premised its entire appeal on that exact policy argument: that denying sophisticated parties the right to opt out of unintended partnerships undermines Texas's strong policy in favor of the freedom of contract.[35] This policy argument is perhaps best summed up by the quotes at the outset of this Article by David E. Keltner, Enterprise's lawyer, and James A. Cisarik, one of its vice presidents, which urge that inadvertent partnerships are inconsistent with the freedom of contract, and therefore, they must be eliminated.

However, the dichotomy Enterprise poses—between accidental partnerships and the freedom of contract—is a false one. Further, allowing sophisticated parties to contract around partnership as a matter of law could seriously harm unsophisticated parties. This Article explains why.

First, this article addresses the parade of horribles that Respondent Enterprise and its amici claim will occur if the Texas Supreme Court upholds

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intention to be 'partners.' Indeed, they may inadvertently create a partnership despite their expressed subjective intention not to do so. The new language alerts readers to this possibility.").

32. *See* Hurt, *supra* note 20, at 56.

33. Claire M. Dickerson, *Is It Appropriate to Appropriate Corporate Concepts: Fiduciary Duties and the Revised Uniform Partnership Act*, 64 U. COLO. L. REV. 111, 111 n.1 (1993) ("Partnerships may be formed . . . unintentionally. . . . If the objective criteria for a partnership are satisfied, the relationship will be a partnership, whatever the parties' subjective intent."); *see also* 1 JAMES D. COX & THOMAS LEE HAZEN, TREATISE ON THE LAW OF CORPORATIONS § 1:7 (3d ed. 2018) (footnotes omitted) ("Parties to a business venture may believe they are operating in one form but may act in such a way as to result in an inadvertent partnership and the unlimited liability that follows therefrom.").

In light of this, this Article frequently uses the terms "inadvertent," "accidental," or "unintentional" partnership to emphasize this lack of intent.

Some Texas cases use the term "de facto" partnership to describe this same concept—basically, a partnership formed because the partners satisfied the definition of partnership as a factual matter, regardless of whether or not they intended to be partners or even knew that they were partners. *See, e.g.*, *Ingram*, 288 S.W. 3d at 898. However, this Article mainly uses the aforementioned to emphasize that people can form a partnership even if they purport to agree, by contract or otherwise, that they are *not* partners.

34. Some old cases holding to the contrary, in Texas and elsewhere, were wrongly decided, in violation of those statutes. The author plans to address this in a future article.

35. *See, e.g.*, Brief of Respondent, Energy Transfer Partners, L.P. v. Enter. Prods. Partners, L.P., No. 17-0862 (Tex. Oct. 29, 2018) [hereinafter Enterprise Respondent Brief]. Several amici—presumably invited to participate in the litigation by Respondent Enterprise—have sounded the same alarm. *See, e.g.*, Chamber of Commerce Amicus Brief, *supra* note 4, at 4 (arguing that, if sophisticated businesses are denied the ability to contract around partnership as a matter of law, "the threat of inadvertent partnerships would chill vital business activity").

the trial court's judgment in favor of Petitioner ETP.[36] According to Enterprise (and its "friends"), allowing the jury verdict for ETP to stand will undermine the freedom of contract, destroy sophisticated parties' ability to define their business relationships, cause chaos among businesses operating in Texas, and lead companies to cease doing business here.[37] As a result, Enterprise asks the Texas Supreme Court to rewrite the established law of unintentional partnerships by holding that two sophisticated parties can contract around partnership *as a matter of law*.[38]

In fact, the sky will not fall if the Texas Supreme Court retains the doctrine of accidental partnership because, as ETP explains in its reply (and several amici have affirmed), that doctrine is fully consistent with the freedom of contract.[39] Yet, ETP's analysis of this issue is incomplete and leaves out perhaps the best argument against Enterprise's "freedom of contract" contention. Indeed, there is a *better* way to avoid inadvertent partnerships than simply agreeing *not* to become partners, as Enterprise and ETP did.[40] Sophisticated parties that are exploring the possibility of a joint venture can avoid forming a partnership, easily and with relative certainty, if they (1) form a filing entity for their nascent venture and (2) specify that this entity will be the exclusive vehicle for their joint venture.[41] Hence, Enterprise and ETP did not accidentally fall into a partnership because inadvertent partnerships negate the freedom of contract; rather, if they unintentionally became partners, it was because they used the wrong method to avoid becoming partners in the first place. This error is easily corrected by future potential joint venturers.

Second, this Article addresses a policy issue that no brief in the *Enterprise Products* case has addressed, except in passing:[42] how the appellate court's decision undermines critical "off the shelf" protections that partnership law provides to *un*sophisticated parties.[43]

General partnership is the default co-owned for-profit business organization,[44] and partnership law therefore provides a system of

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36. *See infra* text accompanying notes 160–162 (noting how easily parties can avoid unintended partnerships).

37. Enterprise Respondent Brief, *supra* note 35, at 1, 42, 44–47; *see infra* text accompanying notes 77 and 80–81 (noting that Enterprise believes parties should be able to contract around partnership).

38. Enterprise Respondent Brief, *supra* note 35, at 1.

39. *See* Petitioners' Reply Brief on the Merits, at 3–6, 12–23, *Energy Transfer Partners*, No. 17-0862 [hereinafter ETP Petitioner Reply Brief].

40. *See supra* Introduction (discussing cases that consider inadvertent partnership formation).

41. *See infra* Part I (overviewing concepts of inadvertent partnership and freedom of contract).

42. Numerous amicus briefs were submitted in response to this author's brief. *See, e.g.*, sources cited *supra* note 4 (citing multiple amicus briefs from individuals and groups). Only one such brief addressed this issue, and then only in passing. *See* Chamber of Commerce Amicus Brief, *supra* note 4, at 26.

43. *See infra* Part II.C (reviewing the *Enterprise Products* appellate court opinion and the default protection of unsophisticated parties).

44. *See* Gary S. Rosin, *The Entity–Aggregate Dispute: Conceptualism and Functionalism in Partnership Law*, 42 ARK. L. REV. 395, 401 (1989) ("Both the language and history of the UPA reflect the adoption of a general aggregate concept of partnerships as associations of partners, rather than as

implied-in-law rules, including fiduciary duties,[45] for co-owned for-profit businesses that fail to create their own governing rules.[46] Many of these rules may be modified or eliminated by contract; however, in Texas—and in other jurisdictions that have adopted the same version of RUPA as Texas[47]—fiduciary duties, including the duty of loyalty, cannot be eliminated (but can be modified).[48] This is true regardless of the sophistication of the partners.

If sophisticated parties, that develop their own rules to govern their business relationships could opt out of partnership as a matter of law, so too could *un*sophisticated parties who have developed no such rules.[49] Not only would this allow unsophisticated parties to avoid fiduciary duties entirely, but it would also deny them the default statutory framework that the legislature created for them.[50] This would either force courts to fashion ad hoc rules for, or imply agreements between, unsophisticated parties who opted out of partnership but have failed to create their own rules. Moreover, it would leave unsophisticated parties who intend to be partners, and who trusted their co-owners to act as partners, uncertain whether they are protected by fiduciary duties.[51] Either result would defeat the legislature's

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separate legal persons . . . ."). Although one could describe a partnership as a business "entity," that is not always strictly true as UPA purports to treat a partnership as an association of individual partners with no separate legal existence. *See id.* That is to say, under UPA, a partnership of individuals A, B and C can be called "ABC Partnership" but that name simply refers to the group of partners themselves, not a legal person separate from those partners. *See id.* Whether or not UPA succeeded in denying that the partnership was a separate legal entity was subject to some debate in the academy. *See id.* at 400 ("Yet, over seventy years after the adoption of the UPA, many commentators argue that the UPA is ambiguous or that it reflects a compromise between the aggregate and the entity concepts.").

By contrast, RUPA and TBOC explicitly describe a partnership as a legal entity separate and apart from the individual partners. *Compare* UNIF. P'SHIP ACT § 201 (UNIF. LAW COMM'N 1997) ("A partnership is an entity distinct from its partners."), *with* TEX. BUS. ORGS. CODE ANN. § 152.056 (using the same phrase as UPA).

45. *See infra* note 214 and accompanying text (noting that the author uses the traditional term for such duties despite some debate about whether it remains the proper terminology in Texas). The author expects to address that issue in a later article.

46. *See infra* Part II.A (discussing the purpose of partnership law for governing rules).

47. *See* Ingram v. Deere, 288 S.W.3d 886, 894–95. RUPA has two major versions, the original RUPA, which developed from 1992–1997, and HRUPA, which developed in 2011–2013. DONN ET AL., *supra* note 21, § 103. Texas adopted a non-uniform version of the original RUPA. *Ingram*, 288 S.W.3d at 894. HRUPA substantively revised—and renumbered—the RUPA provisions that deal with fiduciary duties and waiver thereof; one of the major changes is that HRUPA now purports to allow for the elimination of the duty of loyalty. *Compare* UNIF. P'SHIP ACT § 103(b)(3) (UNIF. LAW COMM'N 1997) (last amended 1997) (allowing modifications to the duty of loyalty "if not manifestly unreasonable"), *with* UNIF. P'SHIP ACT § 103(b) (UNIF. LAW COMM'N 1997) (last amended 2013) (allowing elimination of the aspects of the duty of loyalty stated in the rule "[i]f not manifestly unreasonable"). Accordingly, only states that have adopted RUPA, as opposed to HRUPA, follow the same "modification but no elimination" rule as TBOC.

48. *See infra* Part II.A.2 (discussing how Texas partnership law imposes fiduciary duties to protect unsophisticated parties).

49. *See infra* Part II (discussing the ability to opt out of partnership).

50. *See infra* Part II (discussing how unsophisticated parties will be unprotected if inadvertent partnerships eliminated).

51. *See infra* Part II (discussing the uncertainty regarding fiduciary duties).

purpose of adopting the partnership statute (and incorporating the duties that developed at common law) as the default law for co-owned for-profit businesses.

In short, Enterprise has it exactly backwards: in many business relationships, the possibility of de facto partnerships enhances rather than undermines certainty.[52]

Third, this Article responds to Enterprise's not-so-subtle suggestion that the Texas business bar endorses the elimination of inadvertent partnerships, which Respondent Enterprise describes as "partnership by ambush."[53] Even if the jury verdict for ETP surprised some experienced Texas business lawyers, that does not necessarily mean that all such lawyers were dismayed at the verdict or believe that accidental partnerships should be eliminated; the articles and presentation that Respondent proffers simply do not support that conclusion.[54] Although other lawyer commentary (including amicus briefs filed in response to this author's own amicus brief)[55] exists that is even more critical, such articles (like those Respondent cites) likely represent only the views of lawyers for sophisticated businesses, and therefore, ignore the voices of *un*sophisticated business people.[56]

Moreover, regardless of what Texas business lawyers think, Texas partnership law *teachers* were neither surprised nor upset at the jury verdict for ETP. The author of this Article conducted an anonymous survey of professors who teach partnership law at Texas law schools.[57] The survey asked whether, prior to the trial court's judgement below, the professors believed that two parties (sophisticated or otherwise) could contract around partnership as a matter of law. The answer (of those who responded) was an overwhelming "no."[58] The survey also asked whether these professors believed that parties (sophisticated or not) should be able to contract around partnership as a matter of law simply by agreeing that they are not partners. Again, the unambiguous answer (of those who responded) was "no."[59] While

52. Another amicus in the case makes this same point. *See* Amicus Brief of Bobby Riley, Energy Transfer Partners, L.P. v. Enter. Prods. Partners, L.P., No. 17-0862 (Tex. Mar. 1, 2019) (arguing that partnership law's default rules provide important protections to small-time oil patch operators who cannot afford to draft agreements at each state of a potential venture).

53. Enterprise Respondent Brief, *supra* note 35, at 44.

54. *See infra* Part II.D (noting that the jury verdict in *Enterprise Products* did not surprise experienced business lawyers).

55. *See infra* Part II.D (discussing the briefs).

56. *See infra* Part II.D.2 (noting that the Respondents ignored the plight of unsophisticated parties).

57. *See infra* Part II.D.2.b (noting the author's survey of Texas law school professors).

58. *See infra* Part II.D.2.b (describing survey answers).

59. *See infra* Part II.D.2.b (describing survey answers). Subsequent to the acceptance of this Article for publication, one Texas law professor, David Simon Sokolow, filed an amicus brief on behalf of Respondent Enterprise in which he argued that parties should be able use conditions precedent to contract around partnership formation as a matter of law. *See* Sokolow Amicus Brief, *supra* note 4. Presumably, Professor Sokolow did not fill out the survey. Even so, adding his opinion to the mix changes little: Texas partnership law professors who weighed in on this issue still overwhelmingly agreed with Petitioner ETP. *See infra* Part II.D.2.b (describing survey answers).

these are simply opinions, they are learned ones, and they should provide a counterweight to the views of lawyers who may have less experience with the partnership statute and a strong desire to provide certainty for their clients.

Finally, this Article urges that, if the Texas Supreme Court upholds the appellate court's elimination of accidental partnerships for parties who attempt to contract around partnership, the Court should, at a minimum, structure its holding so that unsophisticated parties do not suffer[60]—by affirming on alternative grounds,[61] limiting its holding to sophisticated parties, [62] or by holding that any party opting out of partnership must do so in writing after full disclosure.[63] If the Court fails to do this, the Texas Legislature should create such a rule by statute.[64]

Yet, neither of these solutions is optimal.[65] The best result would be for the Texas Supreme Court to overrule the appellate court's opinion and hold that parties cannot contract around partnership as a matter of law simply by agreeing not to be partners; rather, to contract around partnership, such parties must first form a filing entity.

The remainder of this Article is organized into three parts and a brief conclusion. Part I establishes that there is no dichotomy between inadvertent partnership and freedom to contract by: (1) showing that an LLC is easy to form and if the LLC agreement so states, easy to exit or end;[66] (2) explaining that creating a filing entity like an LLC to govern a business means that the business will not (absent unusual facts) be treated as a general partnership;[67] and (3) describing how the LLC business form offers owners vast freedom of contract, including the ability (if the LLC is formed under Delaware law) to completely eliminate all fiduciary duties (but not the contractual duty of good faith and fair dealing, which the parties are unlikely to eliminate anyway).[68]

Part II addresses the harm to *un*sophisticated parties that could occur if sophisticated parties are permitted to contract around partnership as a matter of law. This part starts by describing how partnership is the default co-owned business organization and how partnership law therefore is intended to provide partners with a common set of (mostly) default rules[69] and (in most jurisdictions) mandatory fiduciary duties to govern their business

60. *See infra* Part III (noting the protections that may be utilized by sophisticated parties).
61. *See infra* Part III.A.1 (evaluating the merits of such a potential holding).
62. *See infra* Part III.A.2 (evaluating the merits of such a potential holding).
63. *See infra* Part III.A.3 (evaluating the merits of such a potential holding).
64. *See infra* Part III (explaining different ways to protect unsophisticated parties by statute).
65. *See infra* Part III (discussing the problems with judicial and legislative solutions).
66. *See infra* Part I.A (describing how to form and exit an LLC).
67. *See infra* Part I.A (explaining why forming an LLC prevents formation of a general partnership).
68. *See infra* Parts I.A.1.a.i–ii (emphasizing the freedom of contract given to LLC owners).
69. *See infra* Part II.A (describing the purpose of partnership law).

relationships.[70] Next, this Part explains how unsophisticated parties could opt out of forming a partnership—or be subject to claims that they have done so[71]—leading such parties to lose the protection of partnership's default rules and mandatory fiduciary duties or face uncertainty about whether those rules and duties will protect them.[72] Part II also debunks the claim that Texas business experts disapprove of inadvertent partnerships by presenting the results of a survey of Texas business law professors[73] and analyzing why the lawyers who expressed surprise at the jury verdict for ETP cannot be expected to consider the interests of unsophisticated parties.[74]

Finally, Part III describes alternative, but less protective, potential holdings for the Texas Supreme Court, if the Court were to uphold the Dallas appellate court's *Enterprise Products* opinion.[75] Further, this Part urges that, if the Court fails to protect unsophisticated parties, the Texas Legislature ought to amend the partnership statute to do so.[76]

I. INADVERTENT PARTNERSHIP AND THE FREEDOM OF CONTRACT: A FALSE DICHOTOMY

On appeal, Enterprise posits that the Texas Supreme Court faces a stark choice: it must decide "whether the law will confirm businesses' agreements to structure their endeavors as they see fit" or "compel a partnership that the businesses have, themselves, refused to create."[77] This is a false choice. Even if, as Enterprise asserts (and ETP denies), Enterprise and ETP initially "refused to create" a partnership, a decision upholding the jury's finding that Enterprise and ETP became de facto partners by conduct would do nothing to undermine the ability of other sophisticated parties to structure their own business relationships "as they see fit."[78]

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70. *See infra* Part II.A.2 (explaining the fiduciary duties that Texas partnership law imposes on parties).

71. *See infra* Part II.B (elaborating on the proposition that unsophisticated parties should be treated the same as sophisticated parties).

72. *See infra* Part II (describing the effects of the Dallas appellate court's ruling on unsophisticated parties).

73. *See infra* Part II.D.2.b (providing a solution to those lawyers fearful of accidental partnership formation).

74. *See infra* Part II.D.2.a (analyzing the reactions of lawyers after learning of the jury verdict for ETP).

75. *See infra* Part III.A (describing how the Texas Supreme Court can protect unsophisticated parties).

76. *See infra* Part III.B (describing how the Texas Legislature can protect unsophisticated parties).

77. Enterprise Respondent Brief, *supra* note 35, at 1.

78. Amicus Brief in Support of Petitioners at 8, 24, Energy Transfer Partners, L.P. v. Enter. Prods. Partners, L.P., No. 17-0862 (Tex. Oct. 19, 2017) [hereinafter Leahy Amicus Brief] (submitted by Joseph K. Leahy). According to Enterprise, the jury found that Enterprise and ETP in fact *intended* to be co-owners of a for-profit business—i.e., partners—*despite* their prior written statements to the contrary. *Id.* Whether or not this point is true is beyond the scope of this Article.

Rather, even assuming that Enterprise and ETP did not intend to be partners at the outset and did not intend to owe each other fiduciary duties, the two pipeline companies accidentally formed a partnership not because of some "partner trap" but because they chose the wrong way to avoid partnership. If Enterprise and ETP wished to avoid a partnership and the resulting fiduciary duties, then these companies should have formed a Delaware LLC (or perhaps even a Texas LLC) and agreed that it was the exclusive vehicle to govern their potential business relationship.[79] This Part explains why.

A. The (Better) Road Not Taken: Forming an LLC

Enterprise contends that allowing a jury to find that two sophisticated parties formed a partnership in contravention of their prior legal agreements would deny such parties the ability to structure their business relationships and undermine their freedom to contract.[80] That is to say, Enterprise argues that, unless sophisticated parties can contract around partnership formation *as a matter of law*, they will be unable to plan their business affairs as they see fit. Allowing sophisticated parties to fall into inadvertent partnerships, Respondent argues, will therefore cause "chaos" among businesses that wish to explore joint ventures, and eventually, lead companies to stop doing business in Texas.[81]

Nothing could be farther from the truth. Enterprise's "freedom of contract" argument is premised on an implicit, but highly mistaken assumption: the *only* way for parties who are exploring the possibility of doing business together to avoid forming a partnership is to agree *not* to be partners.[82] In fact, there is a better way. If Enterprise and ETP wished to avoid

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79. JOHN C. ALE, PARTNERSHIP LAW FOR SECURITIES PRACTITIONERS § 2:4 (2018 ed.). That is not to say that Enterprise and ETP were wrong to deny that they were partners. Rather, the point is that merely denying partnership is not *by itself* enough to avoid partnership. Enterprise and ETP should have denied that they were partners *in addition to* forming an LLC to make it perfectly clear that they wished for any joint venture they formed to be governed by the applicable LLC act, not the Texas partnership act.

Further, as a precaution, Enterprise and ETP could have agreed that, in the event that they had *already* formed a partnership, that the partnership would be wound up and its business would be continued by their LLC. *See* TEX. BUS. ORGS. CODE ANN. §§ 11.051(2), 11.057(a) (explaining that an at-will general partnership winds up if a majority-in-interest of partners who have not assigned their interests agree to wind up). Alternatively, Enterprise and ETP could have taken the precaution of adopting, as part of their LLC company agreement, a written plan to convert any partnership that they may have formed into their LLC. *Id.* § 10.101(a), (b) (allowing one domestic entity to convert into another, or into a non-code organization, by adopting a written plan of conversion); *id.* § 10.103 (providing the requirements of a plan of conversion); *id.* § 1.002(10), (22), (56) (defining "conversion," "domestic entity," and "non-code organization"). In short, a belt-and-suspenders approach is often the best way to avoid forming a partnership. *See* ALE, *supra* note 78, §2:4 (advising parties who wish to avoid forming partnerships to use multiple contract clauses to achieve their goal).

80. *See* Enterprise Respondent Brief, *supra* note 35, at 42–47.

81. *See id.* at 42.

82. *See id.*

forming a partnership with relative certainty, they should have taken two simple steps at (or near) the outset of their negotiations: (1) form a filing entity, such as an LLC, and (2) designate that entity as the sole vehicle for their (possible) joint venture. If ETP and Enterprise had done so, they could have easily avoided partnership and the resulting fiduciary duties.

The remainder of this Part explains: (1) the ease (and *de minimis* expense) of forming[83] and exiting an LLC (if the LLC company agreement so provides);[84] (2) how forming an LLC negates partnership formation,[85] except in unusual circumstances not applicable here; and (3) how an LLC permits its owners broad contractual freedom,[86] including the freedom to eliminate fiduciary duties.[87]

1. An LLC Is Easy and Inexpensive to Form, and Easy to Exit

a. Forming an LLC: Two Simple Steps

There is no doubt that creating a filing entity—in particular, an LLC—is both easy and inexpensive.[88]

i. Forming a Texas LLC

In Texas, where Enterprise and ETP did business, forming an LLC under the Texas Business Organizations Code (TBOC) involves just two quick steps—both of which can be done online.[89]

First, one fills out and signs a brief form, the "certificate of formation."[90] The Texas Secretary of State has posted a generic certificate of formation, Form 205, on its website that is easily downloaded and filled out; that form is three pages long with three pages of instructions.[91] Or the process may be

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83. *See infra* Part I.A.1.a.i–ii (explaining how to form an LLC).

84. *See infra* Part I.A.1.a.iii (explaining how to exit an LLC).

85. *See infra* Part I.A.2 (explaining why forming an LLC prevents formation of a general partnership).

86. *See infra* Part I.C (describing the vast contractual freedom provided by an LLC).

87. *See infra* Part II.C.1 (explaining how an unsophisticated party can eliminate fiduciary duties).

88. Subsequent to this Article being accepted for publication, one amicus has argued (and another has asserted in passing) that forming an LLC is time-consuming and/or expensive. *See* Ale Amicus Brief, *supra* note 4, at 20–23 (so arguing); Chamber of Commerce Amicus Brief, *supra* note 4, at 24 (so asserting in passing). These arguments are spurious. *See infra* Part II.D.2.b (discussing Ale's arguments).

89. *See Formation of Texas Entities FAQs*, OFF. TEX. SECRETARY OF ST., https://www.sos.state.tx.us/corp/formationfaqs.shtml (last visited Nov. 26, 2019) ("Certificates of formation can be filed online through SOSDirect 24 hours a day, 7 days a week.").

90. *See* TEX. BUS. ORGS. CODE ANN. § 1.002(22) (defining "[f]iling entity" to include "a domestic entity that is a corporation, limited partnership, [or] limited liability company," among others); *id.* § 3.001(a) ("[T]o form a filing entity, a certificate of formation . . . must be filed . . . .").

91. *Form 205—Certificate of Formation—Limited Liability Company*, OFF. TEX. SECRETARY ST., https://www.sos.state.tx.us/corp/forms/205_boc.pdf (last visited Nov. 26, 2019) [hereinafter *Form 205*].

done entirely online using a program called "SOS Direct."[92]

To complete the certificate of formation, the parties only need to provide a limited amount of information about themselves and their LLC:

(1) the name of the LLC;[93]
(2) that the entity is an LLC[94] (which is already stated on Form 205[95]);
(3) the purpose of the LLC[96] (but "any lawful purpose" is sufficient[97]);
(4) the LLC's registered agent and its registered office in Texas;[98]
(5) whether the LLC will be managed by managers, or by its owners[99] (which are called "members"[100]);
(6) the name and address of each initial manager,[101] or if the members will manage the LLC, the name and address of each initial member;[102] and,
(7) the name, address, and signature of one "organizer"[103] (analogous to an "incorporator" in corporate law, which can be any person with the capacity to contract, including a corporation).[104]

Second, the parties must file the certificate of formation with the Texas Secretary of State and pay a fee of $300.[105] Once this second step is complete, the LLC exists.[106] Although members of an LLC often draft company agreements (also known as "LLC agreements") to customize the rules governing their business, such agreements need not be finalized at the outset of an LLC because they can be amended at any time.[107] Thus, if parties have already agreed on some terms for their LLC agreement but are still negotiating over others, they can create their LLC with a bare bones LLC agreement in place and add new terms once those terms are finalized.[108]

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92. *Formation of Entities FAQs*, *supra* note 89 ("Certificates of formation can be filed online through SOSDirect . . . .").
93. BUS. ORGS. § 3.005(a)(1).
94. *Id.* § 3.005(a)(2).
95. *See Form 205*, *supra* note 91 (defining purpose as "all lawful purposes for which a limited liability company may be organized under" the TBOC).
96. BUS. ORGS. § 3.005(a)(3).
97. *Id.* § 2.001.
98. *Id.* § 3.005(a)(5).
99. *Id.* § 3.010(1).
100. *Id.* § 1.002(52), (53).
101. *Id.* § 3.010(2).
102. *Id.* § 3.010(3).
103. *Id.* §§ 3.005(a)(6), 3.004(b).
104. *Id.* § 3.004(a) ("Any person having the capacity to contract for the person or for another may be an organizer of a filing entity."); *id.* § 1.006(14) ("organizer" is synonymous with "incorporator").
105. *Id.* §§ 3.001(a), 4.001(a)(2), 4.002(a), 4.152(1), 4.154.
106. *Id.* §§ 3.001(c), 4.051.
107. *See id.* §§ 101.001(1), 101.052, 101.053.
108. *Id.* § 101.053.

ii. Forming a Delaware LLC to Do Business in Texas

Forming a Delaware LLC is arguably even easier than forming a Texas LLC because while it requires the same two steps as in Texas, the certificate of formation to be filed in Delaware requires less information.[109] In Delaware, there is no requirement that the parties state a purpose or list the initial members or managers of the LLC.[110] Further, the filling fee for a Delaware LLC is only $70.[111] As a result, if the business owners wish to keep their initial business negotiations secret, a Delaware LLC would be a better choice than a Texas LLC because the potential owners and managers of the potential joint venture need not be publicly disclosed at the outset.

However, if that LLC were going to transact business in Texas—like Enterprise and ETP presumably did by seeking shipping commitments in Texas—there is a little more work to do. Once the Delaware LLC begins transacting business in Texas, it must register with the Texas Secretary of State as a foreign filing entity.[112] The application to register as a foreign LLC transacting business in Texas requires much of the same information that is required to form a Texas LLC—including a business purpose (which may be "any lawful business") and the name of all managers.[113] Filing this registration costs $750.[114] Therefore, once a Delaware LLC begins transacting business in Texas, it can no longer keep its purpose or management confidential.[115]

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109. *How to Form a New Business Entity*, DEL., https://corp.delaware.gov/howtoform/ (last visited Nov. 26, 2019). The certificate of formation for a Delaware LLC, which is available online, can be filed by fax or mail with the Delaware Secretary of State's Division of Corporations. *See id.*

110. DEL. CODE ANN. tit. 6, § 18-201 (2019).

111. *Id.* § 18-1105.

112. BUS. ORGS. §§ 1.002(29), 9.001(a)(1). The TBOC does not define "transacting business." *Id.* § 1.002. Instead, it provides a list of activities that do not, in themselves, constitute transacting business. *Id.* § 9.251.

113. *Id.* §§ 1.002(35)(A)(iii), 9.004. This application must contain: (1) the Delaware LLC's name (and if required by law, the name under which it will transact business in Texas); (2) the LLC's formation date; (3) an indication that it is a valid LLC under Delaware law; (4) its business purpose and an indication that it is authorized to pursue that purpose under Delaware law; (5) the date the LLC "began or will begin to transact business in" Texas; (6) the address of the LLC's principal office; (7) the address of its initial registered office, and the name and address of the initial registered agent for service of process in Texas; (8) "the name and the address of each of the [LLC's] governing persons"; and (9) an indication that the Texas Secretary of State is appointed agent of the LLC for service of process in Texas. *Id.* § 9.004(b).

114. *Id.* §§ 4.152(3), 4.154. Filing entities are also subject to an annual franchise tax. TEX. TAX CODE ANN. § 171.001(a). For a Delaware LLC, the tax is $300 per year. tit. 6, § 18-1107(b) (2019). For an LLC formed in or doing business in Texas, *see* TAX § 171.001(a), the tax is .075% of "taxable margin," *id.* § 171.002(a), which is calculated based on revenue, *id.* § 171.101. An LLC governing a nascent joint venture with no revenue would, therefore, pay no margin tax in Texas. *Id.* § 171.101.

115. *See supra* note 108 and accompanying text. Presumably, this would not have been a problem for the parties in *Enterprise Products*, Enterprise and ETP, which trumpeted their relationship when they began seeking shipping commitments. *See* ETP Petitioner Reply Brief, *supra* note 39, at 20.

iii. An LLC Agreement Can Allow Members to Exit or Dissolve an LLC

Sophisticated parties who are considering a business relationship undoubtedly want to be able to end their negotiations promptly, with no strings attached, if they decide not to move forward with their joint venture. Forming an LLC allows them to do exactly that, so long as they make it clear in their LLC agreement.[116] Not only is an LLC easy to create, but it also can be easy to exit or end.[117]

The Delaware LLC statute permits a member to withdraw from and/or dissolve an LLC if the LLC agreement so provides.[118] Although the Texas LLC statute is more roundabout, the rule is essentially the same: a member of a Texas LLC may withdraw from or initiate a winding up (i.e., dissolution) of the LLC only if and to the extent permitted by the LLC agreement (or the certificate of formation).[119]

Accordingly, sophisticated parties who form either a Delaware LLC or a Texas LLC to avoid forming a partnership would have the flexibility to end their negotiations at any time, and exit the LLC, so long as they specify in the LLC agreement that a member may withdraw from and cause the winding up (i.e., the dissolution) of the LLC at any time.[120]

2. Forming an LLC Negates Partnership Formation

If two parties that are exploring a joint venture form an LLC to govern their nascent business relationship, their relationship will by definition never ripen into a partnership. Even if a factfinder later concludes that the parties were co-owners of a for-profit business, the applicable partnership statute (be it in Texas or elsewhere) precludes a finding of partnership absent unusual

116. *E.g.*, DEL. CODE ANN. tit. 6, § 18-603 (2019).

117. *See id.*

118. *Id.* ("A member may resign from [an LLC] only at the time or upon the happening of events specified in a [LLC] agreement and in accordance with the [LLC] agreement."); *id.* § 18-801(a)(1)–(3) (An LLC is dissolved either "[a]t the time specified in, [u]pon the happening of events specified in" the LLC agreement, or "upon the vote . . . of members who own more than 2/3 of" the LLC's profits, unless a different number is specified in the LLC agreement).

119. *See* BUS. ORGS. § 101.107 (a member of an LLC "may not withdraw"); *id.* § 101.552(a) (an LLC winds up upon the vote of a majority of its members); *id.* § 101.052(c) (the LLC company agreement may modify any provision in the LLC statute not listed in §101.054); *id.* § 101.054 (not listing § 101.107 or § 101.552); *id.* § 101.051 (any provision that may be contained in an LLC company agreement "may alternatively be included in the certificate of formation"); MILLER & RAGAZZO, *supra* note 22, § 20:11 (explaining the rule that members of a Texas LLC may not withdraw is simply a "default rule that may be modified by the company agreement"); *id.* § 21:2 ("A vote of a majority of all members is generally required to approve a voluntary winding up unless otherwise provided by the company agreement or certificate of formation.").

120. *See supra* note 113 and accompanying text. Upon withdrawal or dissolution of the LLC, absent a noncompete agreement, the former LLC member may be able to compete with the business venture contemplated by the LLC. *See, e.g.*, Touch of Italy Salumeria & Pasticceria, L.L.C. v. Bascio, No. 8602-VCG, 2014 WL 108895, at *6 (Del. Ch. Jan. 13, 2014) (mem. op.).

circumstances that sophisticated parties can easily avoid.

a. Filing Entities Are, By Definition, Not Partnerships

Under Texas law (which is patterned after RUPA[121]), organizations formed under any statute *other* than the partnership statute are exempted from the definition of "partnership," even if those organizations otherwise satisfy that definition.[122]

The unambiguous effect of this provision in Texas (and elsewhere) is to exempt filing entities from the definition of partnership.[123] As a result, when parties form a filing entity for their co-owned, for-profit business, they are *not* partners.[124] Texas courts recognize this and regularly hold that co-owned businesses governed by filing entities are not partnerships.[125]

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121. *See* UNIF. P'SHIP ACT § 202(a) (UNIF. LAW COMM'N 1997) ("Except as provided by Subsection (b), the association of two or more persons to carry on as co-owners a business for profit forms a partnership . . ."); *id.* § 202(b) ("An association formed under a statute other than this [Act], a predecessor statute, or a comparable statute of another jurisdiction is not a partnership under this [Act].").

122. *See* BUS. ORGS. § 152.051(b) (defining partnership as "an association of two or more persons to carry on a business for profit as owners creates a partnership," "[e]xcept as provided by Subsection (c)"); *id.* § 152.051(c) (stating that "[a]n association . . . is not a partnership if it was created under a statute other than" the Texas general or limited partnership statutes, their predecessors, or another jurisdiction's partnership statute).

123. *See* MILLER & RAGAZZO, *supra* note 22, § 6:6 (citing BUS. ORGS. § 152.051(c)) (explaining that the Texas partnership statute "provisions addressing . . . creation of a partnership make clear that an entity formed under a statute other than [the partnership statute] is not a partnership, thus avoiding any argument that [the partnership statute] applies to [an] . . . [LLC], or other form of entity formed under another statutory scheme"); John C. Ale & Buck McKinney, *Stumbling into Partnerships: How Bands, Business Owners and Strategic Allies Find Themselves in Inadvertent Partnerships*, 43 TEX. J. BUS. L. 465, 467 (2009) ("If the parties properly have filed a . . . formation document . . . then in almost every instance their relationship will be treated as [an] . . . [LLC] . . . . The statute governing [LLCs] controls the [LLC's] internal affairs . . . .").

124. *See* J. WILLIAM CALLISON & MAUREEN A. SULLIVAN, PARTNERSHIP LAW & PRACTICE § 5:1 (2018) ("RUPA § 202(b) provides . . . [that] an association formed under another statute is not a partnership . . . . Thus . . . [LLCs] are not partnerships."); DONN ET AL., *supra* note 21 (commenting on UNIF. P'SHIP ACT (1997) § 202 (UNIF. LAW COMM'N), the Revised Uniform Partnership Act (RUPA) analog to BUS. ORGS. CODE § 152.051(c)) ("It may seem too obvious to state . . . that if co-owners of a business form . . . [an LLC], the [LLC] statute [will] control rather than . . . R.U.P.A."); CHRISTINE HURT & D. GORDON SMITH, BROMBERG & RIBSTEIN ON PARTNERSHIP § 2.01 (2d ed. 2014 & 2015 Supp.) ("An association formed under a statute other than [UPA or RUPA] is not a partnership, even if the . . . requisites of partnership are met.").

125. *See, e.g.*, Super Starr Int'l, L.L.C. v. Fresh Tex. Produce, L.L.C., 531 S.W.3d 829, 839–40 (Tex. App.—Corpus Christi 2017, no pet.) (applying BUS. ORGS. § 152.051(c) to hold that a Texas LLC was an LLC and not a partnership, despite offhand references to the LLC as a "partnership"); Lentz Eng'g, L.C. v. Brown, No. 14-10-00610-CV, 2011 WL 4449655, at *3–5 (Tex. App.—Houston [14th Dist.] Sept. 27, 2011, no pet.) (mem. op.) (citing BUS. ORGS. § 152.051(c) for the proposition that "[a]n association or organization is not a partnership if it was created under the statute governing the formation of LLCs," and upholding the trial court's finding that no partnership existed when the business owners intended to form, and did form an LLC, to govern their business, despite that the owners engaged in some conduct to further the LLC's formation); Robbins v. Payne, 55 S.W.3d 740, 748 (Tex. App.—Amarillo 2001, pet. denied) (relying on the predecessor to BUS. ORGS. § 152.051(c), which was recodified in TBOC unchanged—and affirming the trial court's directed verdict of no partnership where the business owners intended to form and did form a corporation to govern their business).

b. Exceptions Where Courts Find a Partnership to Exist in Addition to a Filing Entity Do Not Apply to Parties Who Are Considering a Joint Venture

Sometimes disgruntled owners (or creditors) of a business governed by a filing entity argue that the filing entity's owners formed a partnership in addition to their filing entity. In the absence of evidence of a separate partnership, courts applying Texas law have rejected such claims.[126] The same is true of courts applying the law of other jurisdictions.[127]

To date, no case (so far as this author is aware) has applied Texas law to hold that co-owners[128] of a filing entity formed a partnership in addition to their filing entity.[129] However, courts in other jurisdictions, have sometimes so held; such holdings appear to be relatively rare, though.[130]

Moreover, cases in other jurisdictions where courts have held that a partnership exists between the owners of a filing entity in addition to the filing entity itself generally involve situations completely unlike the facts in *Enterprise Products*. Such cases typically arise in three situations. In the first situation, the filing entity's owners operate their business as a partnership *before* forming a filing entity, and the court concludes that the partnership continued to exist after the filing entity was formed and that the filing entity

126. *See, e.g.*, Duncan v. Allen, No. 9:15-CV-29, 2016 WL 4467674, at *5 (E.D. Tex. Aug. 24, 2016) (relying on BUS. ORGS. § 152.051(c) to conclude that, absent evidence of an overarching partnership separate from the LLCs that the parties formed to govern their business, no such partnership existed).

127. *See* DONN ET AL., *supra* note 21, at 143, n.66 (citing examples); HURT & SMITH, *supra* note 124, § 2.01, at 2–6, n.5 (same).

128. Courts applying Texas law, however, have on occasion held that a *non*-owner of a filing entity formed a partnership with the owners of the filing entity. *See, e.g.*, *In re* Hernandez, 565 B.R. 367, 377–78 (Bankr. W.D. Tex. 2017), *aff'd in part*, *vacated in part sub nom. In re* Quiroz Hernandez, No. 15-50173-RBK, 2019 WL 2402998 (Bankr. W.D. Tex. Jun. 3, 2019) (holding that members of an LLC formed a Texas partnership with a prospective member of the LLC by sharing profits from, and control of, the business). Such cases are inapplicable here because both Enterprise and ETP would be members of any LLC that they formed.

129. One Texas court has come close to so holding, albeit when applying Arkansas law—and when ignoring the exclusion from the statutory definition. *See, e.g.*, BP Auto. LP v. RLJ-McLarty-Landers Auto. Grp., No. 06-16-00041-CV, 2017 WL 817185, at *7, *8–12 (Tex. App.—Texarkana Mar. 2, 2017, no pet.) (mem. op.) (applying Arkansas law). In *BP Automotive LP v. RLJ-McLarty-Landers Automotive Group*, the court denied the motion of the defendant, an alleged partnership between several individuals, which had moved for summary judgment on the grounds that it did not exist as an entity separate from an LLC holding company and several underlying LLCs (that apparently were owned by the holding company). *Id.* at *1–4. Although it was not clear from the decision who owned membership interests in the holding LLC, it appeared that the individuals who alleged to be partners might all own interests in that LLC. *Id.* In its decision, the appellate court briefly cited, but did not apply or discuss, Arkansas's version of RUPA § 202(b) and BUS. ORGS. § 152.051(c). *Id.* at *7. Instead, the court addressed plaintiff's contention that the trial court was wrong to deny summary judgment because the supposed partnership had made a judicial admission, in a separate proceeding, that it existed as a partnership separate from the LLC. *Id.* at *8. The trial court held that this prior judicial admission, and the fact that individual defendants had occasionally described the overarching business as a partnership, as sufficient basis to deny summary judgment on the question of a separate partnership. *Id.* Because the *BP Automotive* court denied summary judgment without addressing RUPA § 202(b) exclusion, it is of little precedential value, even in Arkansas.

130. *See* DONN ET AL., *supra* note 21, at 146–49, nn.81–90 (citing cases from other jurisdictions holding that co-owners of a business formed a partnership in addition to their filing entity).

was simply a vehicle for operating the partnership.[131] In the second situation, the filing entity's owners engage in a separate, new business *in addition* to the business governed by the filing entity, and the court holds that this new business was a partnership separate from the filing entity.[132] In the third situation, the filing entities' owners operate a single, overarching business through the use of multiple filing entities, and the court holds that the overarching business constituted a partnership separate and apart from the underlying filing entities.[133]

None of these situations are remotely similar to the case of Enterprise and ETP, wherein two sophisticated parties wanted to explore the possibility of a single, specific joint venture.[134] Unlike the foregoing situations, Enterprise and ETP could have formed an LLC *at the outset* of their negotiations and agreed that the LLC would be the *exclusive* vehicle for the specific joint venture about which they were negotiating.[135] As a result, there would be no factual basis for a jury to conclude that Enterprise and ETP formed a partnership *in addition to* their filing entity.[136]

When parties form an LLC at the outset of their business negotiations and specify in the LLC's governing documents that any business arising out of their negotiations will be governed solely by their LLC, courts in Texas (and elsewhere[137]) will respect their decision to govern their business as an LLC rather than a partnership.[138] Hence, if Enterprise and ETP had formed an LLC at the outset of their negotiations and indicated that they wished for

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131. *See id.* at 144 n.71, 146–47 n.80 (citing examples). Some cases involve more than one situation. *See, e.g.*, Duncan v. Allen, No. 9:15-CV-29, 2016 WL 4467674, at *4–5 (E.D. Tex. Aug. 24, 2014). In *Duncan*, the court rejected the plaintiff's claim that both the first and third situations applied. *Id.*

132. *See* DONN ET AL., *supra* note 21, at 147 n.81 (citing example).

133. *See id.* 147–48 nn. 82–90 (citing examples).

134. *See* Petitioners' Brief on the Merits at 46, Energy Transfer Partners, L.P. v. Enter. Prods. Partners, L.P., No. 17-0862 (Tex. Sept. 7, 2018) [hereinafter ETP Petitioner Brief] (describing Enterprise and ETP's planned joint venture). Moreover, sophisticated parties who were contemplating multiple joint ventures could either form a different LLC for each such venture, or specify at the outset of the negotiations for each that they intended for the resulting venture, if it went forward, to be governed as an LLC, not as a partnership. *See* Hurt, *supra* note 20, at 13–15.

135. *See* Hurt, *supra* note 20, at 56–57. Even if Enterprise and ETP failed to form an LLC at the precise outset of their negotiations and conducted some business before forming their LLC, this does not necessarily mean that they formed a partnership. *See Duncan*, 2016 WL 4467674, at *7 (citing Lentz Eng'g, L.C. v. Brown, No. 14-10-00610-CV, 2011 WL 4449655 at *5 (Tex. App.—Houston [14th Dist.] Sept. 27, 2011, no pet.)). "[M]erely engaging in business activities prior to creating an LLC does not itself create a separate partnership" that continues after the LLC is formed. *Id.*

Further, if Enterprise and ETP had *any* concern that they might have formed a partnership by conduct before they created an LLC for their nascent joint venture, they could have taken the "belt and suspenders" precautions described above. *See* ALE, *supra* note 79, § 2.4 (explaining that parties who wish to avoid forming a partnership should use multiple contract clauses).

136. *See* Hurt, *supra* note 20, at 57–58.

137. *See* DONN ET AL., *supra* note 21.

138. *See, e.g.*, Super Starr Int'l, L.L.C. v. Fresh Tex Produce, L.L.C., 531 S.W.3d 829, 839–40 (Tex. App.—Corpus Christi 2017, no pet.) (rejecting argument that LLC formed by the parties to govern their business was a partnership where the parties' "operating agreements reflect [their] intent that the LLC would be a limited liability company, not a partnership").

that LLC to govern their potential business relationship, there is little doubt that their relationship would have been governed by the relevant LLC statute, not the Texas partnership statute.[139]

In sum, the Texas partnership statute itself points to the best way for potential co-owners of a for-profit business to avoid becoming partners.[140] If the parties simply agree *not* to be partners *without* forming a filing entity, they may in fact become partners if the factfinder concludes that their relationship satisfies the statutory definition.[141] However, if the parties form a filing entity to govern their potential business venture (and, to be perfectly clear, *also* deny that they are partners), they will not be partners even if they satisfy the statutory definition.[142] Absent unusual circumstances not applicable here, courts will only apply the inadvertent partnership doctrine to co-owners of a business who have attempted to avoid forming *any* business entity at all.[143] If the business owners have decided to govern their business as a filing entity rather than a partnership, courts will respect that decision because the partnership statute commands it.[144]

B. Members and Managers of an LLC Can Eliminate Fiduciary Duties by Contract

In its appellate briefs, Enterprise admitted that if it ever agreed to move forward in the pipeline business with ETP, the resulting business would be governed by an LLC "with detailed agreements . . . disclaim[ing any] fiduciary duty."[145] This is exactly what Enterprise and ETP should have done at the outset of their negotiations.[146]

There is no doubt that members of a Delaware LLC can entirely eliminate *any and all* fiduciary duties owed by managers and/or managing members of the LLC and replace those duties with duties defined by contract.[147] The applicable provision of the Delaware LLC statute is explicit

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139. *See* Hurt, *supra* note 20, at 57–58.

140. *See id.*

141. *See id.*

142. *See id.*

143. *See* MILLER & RAGAZZO, *supra* note 22, § 6.11 (explaining that a partnership may exist implicitly unless a writing is required under the Texas Statute of Frauds provisions); Hurt, *supra* note 20, at 13–14.

144. *See* Hurt, *supra* note 20, at 57–58.

145. Enterprise Respondent Brief, *supra* note 35, at 7.

146. Hurt, *supra* note 20, at 57–58.

147. *See* DEL. CODE. ANN. tit. 6, § 18-1104 (West 2019). Fiduciary duties apply, by default, to all managers and managing members of a Delaware LLC. *See id.* ("[T[he rules . . . relating to fiduciary duties . . . shall govern."); Brent J. Horton, *Modifying Fiduciary Duties in Delaware: Observing Ten Years of Decisional Law*, 40 DEL. J. CORP. L. 921, 934 (2016) ("[I]t is now well accepted that absent a provision in the uncorporation agreement to the contrary, common law fiduciary duties apply to . . . limited liability companies."); Mohsen Manesh, *Damning Dictum: The Default Duty Debate in Delaware*, 39 J. CORP. L. 35, 43–48, 67–68 (2013) (describing Delaware decisions leading up to enactment of § 18-1104).

that fiduciary duties may not just be restricted but eliminated: "To the extent that, at law or in equity, a member or manager . . . has duties (including fiduciary duties) to a [LLC] or to another member or manager . . . the member's or manager's . . . duties may be expanded or restricted *or eliminated* by provisions in the limited liability company agreement . . . ."[148]

Further, courts in Delaware (and elsewhere) have not been shy about recognizing that this provision allows full elimination of all fiduciary duties.[149] As the Delaware Court of Chancery has explained: "The Delaware [LLC] Act permits parties to an LLC agreement to eliminate fiduciary duties that members or managers would otherwise owe to one another."[150] Further, it is possible that the members of a Texas LLC could eliminate any fiduciary duties owed by managers and managing members. TBOC provides for broad modification of fiduciary duties in an LLC, but speaks in terms of expansion or restriction of such duties, and does not explicitly permit elimination of such duties.[151] Yet, "'[e]limination' may well be implicit in the concept of

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The same is probably true of LLCs formed under Texas law, although the statute itself is silent on the issue. *See* MILLER & RAGAZZO, *supra* note 22, § 20:37 ("[T]he [Texas] Business Organizations Code does not directly address the duties owed by managers and members," but rather "implies that managers and members may owe certain duties by virtue of other provisions that allude to the possibility of duties or are premised on the assumption that duties may exist.").

148. tit. 6, § 18-1101(c) (2019) (emphasis added). The legislative history of the Delaware LLC Act is particularly unambiguous on this issue because the Delaware legislature amended the Act to add the words "or eliminated" after the Delaware Supreme Court questioned, in dicta, whether a statute written using the same "restrict or expand" language as the current Texas LLC statute allowed for full elimination of fiduciary duties. Auriga Cap. Corp. v. Gatz Props., 40 A.3d 839, 851 (Del. Ch. 2012) (citing Gotham Partners, L.P. v. Hallwood Realty Partners, L.P., 817 A.2d 160, 168 (Del. 2002)) ("Following our Supreme Court's holding in *Gotham Partners*, which questioned whether default fiduciary duties could be fully eliminated in the limited partnership context when faced with similar statutory language . . . the General Assembly amended . . . the LLC Act to permit the eliminat[ion] of default fiduciary duties in an LLC agreement."); *accord* Manesh, *supra* note 147, at 39–41 (describing the same events).

149. *See, e.g.*, Miller v. HCP & Co., No. 2017-0291-SG, 2018 WL 656378, at *8 (Del. Ch. Feb. 1, 2018) (mem. op.).

150. *Id.*; *see also, e.g.*, Fisk Ventures, L.L.C. v. Segal, No. 3017-CC, 2008 WL 1961156, at *11 (Del. Ch. May 7, 2008) (quoting DEL. CODE ANN. tit. 6, § 18-1101(c)); *accord* R. FRANKLIN BALOTTI & JESSE A. FINKELSTEIN, DELAWARE LAW OF CORPORATIONS AND BUSINESS § 20:9 (discussing DEL. CODE ANN. tit. 6, § 18-1101(c) which states: "[An LLC] company agreement may provide for the limitation or elimination of any and all liabilities of a member [or] manager . . . to a Delaware LLC or to another member or manager . . . .")) (holding that the LLC agreement, which purported to "eliminate[] fiduciary duties to the maximum extent permitted by law by flatly stating that members have no duties other than those expressly articulated in the Agreement," eliminated fiduciary duties "in accordance with Delaware law"); MILLER & RAGAZZO, *supra* note 22, § 20:42 (citing DEL. CODE ANN. tit. 6, §§ 18-1101(c), (e)) ("[T]he Delaware LLC statute . . . expressly permit[s] the elimination of fiduciary duties . . . in the [LLC] company agreement.").

151. *See* TEX. BUS. ORGS. CODE ANN. § 101.401(emphasis added) ("The company agreement of [an LLC] may *expand or restrict any duties*, including fiduciary duties, and related liabilities that a member [or] manager . . . has to the [LLC] or to a member . . . .").

'restriction.'"[152] Indeed, one Texas appellate court has suggested as much, albeit in dicta.[153]

Therefore, if (as Respondent suggests) the entire point of avoiding partnership was to avoid owing each other fiduciary duties, Enterprise and ETP could have obtained that result with near certainty by forming a Delaware LLC (or with somewhat less certainty, by forming a Texas LLC) and waiving all fiduciary duties.[154] If Enterprise and ETP had formed an LLC as the vehicle to explore a joint venture, they could have defined the duties that they owed each by contract, almost without limitation.[155]

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152. MILLER & RAGAZZO, *supra* note 22, § 20:42 n.4. Even if Texas courts do not ultimately conclude that TBOC allows members of a Texas LLC to eliminate all fiduciary duties, it is plausible that the courts will hold that such members may eliminate *liability* for a breach of such duties, including the duty of loyalty. *See id.* § 20:42 (urging that "the legislative development and breadth of the LLC provision strongly signal that there is more latitude to eliminate duties and liabilities" with LLCs than with corporations, for which neither the duty of loyalty nor liability therefor can be eliminated); *id.* at n.4 (explaining that BUS. ORGS. § 7.001(d), which permits waiver of liability for breach of certain fiduciary duties for all Texas business entities, describes § 101.401 as allowing "limitation or elimination of liability . . . to [an] additional extent"); *accord* Byron F. Egan, *Fiduciary Duties of Corporate Directors and Officers in Texas*, 43 TEX. J. BUS. L. 45, 348 (Spring 2009) ("[T]he legislative history and scope of . . . the precursor to TBOC § 101.401, indicate that there may be more latitude to exculpate Managers and Members for conduct that would otherwise breach a fiduciary duty . . . than under provisions of the TBOC . . . relating . . . to corporations.").

153. Allen v. Devon Energy Holdings, L.L.C., 367 S.W.3d 355, 396 (Tex. App.—Houston [1st Dist.] 2012, pet. granted, judgm't vacated w.r.m.) (opining that the TBOC leaves members "free to expand or eliminate . . . any and all potential liability of [the LLC's manager], as they saw fit"); *accord* MILLER & RAGAZZO, *supra* note 22, § 20:42 n.5 (analyzing the holding in *Allen*). The *Allen* court "held that the manager's actions violated his fiduciary duty as defined in the operating agreement"—and thus, to date, no Texas court has actually enforced a waiver of fiduciary duty by LLC members. *See Allen*, 367 S.W.3d at 411; H. Justin Pace, *Contracting Out of Fiduciary Duties in LLCs: Delaware Will Lead, but Will Anyone Follow?*, 16 NEV. L.J. 1085, 1109 (2016) (analyzing *Allen*, 367 S.W.3d at 396).

154. *See Allen*, 367 S.W.3d at 396.

155. *See* Connelly v. State Farm Mut. Auto. Ins. Co., 135 A.3d 1271, 1274 (Del. 2016) (explaining some requirements like dealing in good faith may not be avoided). One difference, in terms of applicability and waiver of duties, between a Delaware LLC company agreement and a contract under Texas law relates to the question of good faith and fair dealing, which can arise as an implied covenant or a tort-based duty, but either way is *not* fiduciary in nature. This difference is probably of little significance, however.

Delaware common law implies a covenant of good faith and fair dealing "in every contract," *Connelly*, 135 A.3d at 1274, and the company agreement of a Delaware LLC "may not eliminate" this covenant, DEL. CODE ANN. tit. 6, § 18-1101(c) (2019). Further, although the company agreement of a Delaware LLC may eliminate all liability for members and/or managers who breach the implied covenant by dealing unfairly, such an agreement may not limit liability for such persons who act in bad faith. *See id.* § 18-1101(e) ("[A]n LLC agreement may provide for the limitation or elimination of any and all liabilities for . . . breach of duties . . . of a member, manager . . . to [an LLC] or to another member or manager . . . provided, that [an LLC] 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."). Hence, the members and managers of a Delaware LLC cannot entirely eliminate the liability for bad faith conduct.

By contrast, "Texas law does not imply a covenant of good faith and fair dealing in every contract." Childers v. Pumping Sys., Inc., 968 F.2d 565, 568 (5th Cir. 1992) (citing English v. Fischer, 660 S.W.2d 521, 522 (Tex. 1983)). Rather, in Texas, this covenant is implied by statute only in contracts governed by the Uniform Commercial Code (UCC). *See* TEX. BUS. & COM. CODE ANN. § 1.304 ("Every contract or duty within this title imposes an obligation of good faith in its performance and enforcement."); *id.* § 1.201(20) (defining "good faith" as "honesty in fact and the observance of reasonable commercial

C. The Delaware LLC Provides Maximum Contractual Flexibility

If Enterprise and ETP had agreed to form a Delaware LLC to govern their potential joint venture, they would have enjoyed near-total freedom to define the terms of their potential joint venture.[156] The Delaware LLC statute has few mandatory rules, and is "designed to permit members maximum

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standards of fair dealing"). Further, in Texas, "[a] common law duty of good faith and fair dealing does not exist in all contractual relationships." Subaru of Am., Inc. v. David McDavid Nissan, Inc., 84 S.W.3d 212, 225 (Tex. 2002). Rather, in Texas, the common law implies a tort-based duty of good faith and fair dealing "when a contract creates or governs a special relationship between the parties." *Id.* Such a special relationship may exist "where there is unequal bargaining power between the parties and a risk exists that one of the parties may take advantage of the other based upon the imbalance of power, e.g., insurer–insured . . . ." Byron F. Egan, *Choice of Entity Decision Tree*, STATE BAR TEX. PROF. DEV. PROGRAM, 14TH ANNUAL CHOICE, GOVERNANCE & ACQUISITION OF ENTITIES, 181 n.939 (2016) [hereinafter *Decision Tree*] (citing Arnold v. Nat'l Cty. Mut. Fire Ins. Co., 725 S.W.2d 165, 167 (Tex. 1987)). Presumably then, an agreement *not* to be partners between two highly sophisticated companies would give rise to neither a contractual covenant nor a tort-based duty of good faith and fair dealing, unless the contract is otherwise governed by the UCC.

However, it is less clear that the members or managers of a Texas LLC are subject to a mandatory duty of good faith and fair dealing that would prevent them from eliminating liability for bad faith conduct. The Texas LLC statute does not explicitly provide for a duty of good faith and fair dealing between members and/or managers. *See* MILLER & RAGAZZO, *supra* note 22, § 20:37 (explaining that the Texas LLC act "does not directly address the duties owed by managers and members."). Experts believe that such a duty does exist for members and managers of an LLC. *See Decision Tree*, *supra* note 155, § 5.4 n.939 (opining that "it is likely that the duty of good faith and fair dealing exists" between managers and members of a Texas LLC); *cf.* MILLER & RAGAZZO, *supra* note 22, § 20:37 (explaining that the Texas LLC act "implies that managers and members may owe certain duties by virtue of other provisions that allude to the possibility of duties or are premised on the assumption that duties may exist."). Yet, any such duty between members and/or managers of a Texas LLC *clearly* can be "restrict[ed]" in the company agreement. *See* BUS. ORGS. CODE § 101.401 ("The company agreement of [an LLC] may expand or restrict any duties . . . and related liabilities that a member [or] manager . . . has to the [LLC] or to a member . . . ."). Further, just as with the elimination of fiduciary duties, it is plausible to read the language allowing the "restrict[ion]" of duties to include the power to eliminate this duty. *See id.*

Indeed, because Texas law—unlike Delaware law—does *not* imply a duty of good faith and fair dealing into every contact, it makes little sense to imply such duty into a company agreement signed by sophisticated parties with relatively equal bargaining power. Accordingly, if such parties form an LLC for the purpose of defining their business relationship solely by contract, and if such parties explicitly waive the duty of good faith and fair dealing, a court ought to give effect to that waiver.

Therefore, if sophisticated parties forming an LLC wish to eliminate any obligation to act in good faith and fair dealing, a Texas LLC might be a better choice than a Delaware LLC—albeit with the risk that they might not be able to eliminate fiduciary duties as they could with a Delaware LLC.

That said, the inability to eliminate the duty of good faith and fair dealing in a Delaware LLC probably has little practical effect on sophisticated parties' freedom to use that entity to govern their affairs as they see fit. The Delaware LLC is a popular business entity precisely because of the contractual flexibility it provides. *See* Franklin A. Gevurtz, *Why Delaware LLCs?*, 91 OR. L. REV. 57, 105 (2012) (explaining why Delaware is a popular state in which to form an LLC). There is no reason to believe that the inability to exculpate bad faith conduct places a damper on that popularity. While it makes sense that sophisticated parties might seek relief from the duty of loyalty, which requires that they place the interests of the firm ahead of their own. *See supra* notes 133–41 and accompanying text (describing fiduciary duties, including the duty of loyalty). It seems unlikely that any party who wishes to inspire trust in its potential business partners would negotiate for the ability to act in bad faith.

156. *See* ROBERT L. SYMONDS, JR. & MATTHEW J. O'TOOLE, DELAWARE LIMITED LIABILITY COMPANIES § 9.01[B], at 9 (2015) ("Virtually any management structure may be implemented through [an LLC's] governing instrument.").

flexibility in entering into an agreement to govern their relationship."[157] Indeed, that act explicitly states that its policy is "to give the maximum effect to the principle of freedom of contract" for its members.[158] This is a key reason that business lawyers choose to form Delaware LLCs.[159]

As a result, every argument that Enterprise makes on appeal about the inadvertent partnership doctrine impeding the freedom to contract is false. It is not, as Enterprise argues, "essential that sophisticated parties be empowered to prevent surprise partnerships by contracting for conditions that must exist as a prerequisite to partnership formation."[160] Rather, sophisticated parties can easily accomplish the same result by forming an LLC. Nor does the accidental partnership doctrine "make it impossible even for the most sophisticated businesses to contract against unwanted partnerships" or to "ever know whether they are in a partnership until a jury tells them."[161] In fact, sophisticated parties can easily avoid forming unwanted partnerships and design their relationships as they see fit by forming an LLC instead of attempting simply to disclaim partnership.

II. ELIMINATING INADVERTENT PARTNERSHIPS WOULD LEAVE UNSOPHISTICATED PARTIES UNPROTECTED

Enterprise's "freedom of contract" argument is not only false, it is also ironic. Enterprise asserts that the inability to contract around unintended partnerships as a matter of law places sophisticated persons "in a legal limbo," where they "cannot know whether they are partners until a jury decides."[162] That is exactly backwards. It is Enterprise that would place business people—unsophisticated ones—"in a legal limbo" by making them uncertain whether they are partners or not.[163]

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157. Elf Atochem N. Am., Inc. v. Jaffari, 727 A.2d 286, 293 (Del. 1999); *see also* BALOTTI & FINKELSTEIN, *supra* note 150, § 20:4 ("Freedom of contract is a fundamental principle underlying the [Delaware LLC] Act . . . . The Act's basic approach is to permit members to have the broadest possible discretion in drafting their [LLC] agreement . . . . Many of the Act's most fundamental provisions are expressly made subject to modification in a [LLC] agreement.").

The Texas LLC act also has few mandatory provisions, allowing owners great leeway in structuring their relationship. *See* MILLER & RAGAZZO, *supra* note 22, § 18:5 ("The Texas [LLC] statute . . . provides . . . only . . . a relatively short list of items . . . that cannot be waived or modified.").

158. tit. 6, § 18-1101(b).

159. *See* Gevurtz, *supra* note 155, at 105 (concluding, after surveying attorneys about where they form LLCs and why, that "the freedom of contract (including the ability to waive fiduciary duties)" was one of the "[t]he top two reasons for forming LLCs in Delaware"); Sandra K. Miller & Yvonne L. Antonucci, *Default Rules and Fiduciary Duty Waivers in Alternative Entities: Policy Issues and Empirical Insights*, 42 J. CORP. L. 147, 166–67 (2016) (explaining that empirical research shows that practicing lawyers view contractual freedom as "a benefit of Delaware law").

160. Enterprise Respondent Brief, *supra* note 35, at 26.

161. *Id.* at 27.

162. *Id.* at 2.

163. *See* Dickerson, *supra* note 33, at 149–51.

If sophisticated business co-owners could contract around partnership as a matter of law, so could *un*sophisticated business co-owners. This possibility would mean that co-owners of a business who have no written partnership agreement—and who therefore depend, knowingly or not, on the protections of partnership law—"cannot know whether they are partners until a jury decides."[164] This uncertainty for unsophisticated business owners is far more problematic, in light of the underlying purpose of partnership law, than any potential uncertainty that the existence of accidental partnerships could plausibly cause to sophisticated business owners.[165]

To explain why, this Part briefly addresses: (A) the underlying purpose of partnership law; (B) why partnership law (in most jurisdictions) imposes non-waivable fiduciary duties on partners; and (C) the forms—written, oral, and implied—that an agreement *not* to be partners could take.

A. The Purpose of Partnership Law Is to Provide Governing Rules for Co-Owned Businesses that Did Not Create Their Own

1. Partnership Is the Default Co-Owned Business Organization

Partnership is the only co-owned, for-profit business organization that can be formed without filing a document with the state.[166] This is intentional. Partnership is the default co-owned, for-profit business form.[167] This means that partnership law governs the rights and duties of the owners and managers (and, in some instances, creditors) of any co-owned, for-profit business that is not formed as a filing entity like a corporation or an LLC.[168]

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164. Enterprise Respondent Brief, *supra* note 35, at 2.

165. *See* Dickerson, *supra* note 33, at 149–51.

166. *See id.* (footnotes omitted) ("Partnerships, but not corporations, can be formed by inadvertence, or without having complied with any formality and without even having the subjective intention to do so . . . [these] two attributes belong to the partnership alone. A person cannot avoid personal liability as a partner and cannot eliminate the risk of becoming a partner by inadvertence."); *id.* at 151 n.203 ("Neither the UPA nor RUPA requires formalities for formation.").

167. *See* MILLER & RAGAZZO, *supra* note 22, § 6:6 ("A partnership is the default business structure for multiowner businesses . . . .").

168. *See id.* (explaining that partnership law "encompasses every business arrangement that" satisfies the definition of partnership "with the exception of those entities excluded by virtue of their formation under another statutory scheme"). It also means that it is impossible for businesspeople to obtain perfect certainty about formation of a partnership. Inherent in partnership law, as in any default regime, is the necessity that the line between formation and non-formation *cannot* be a bright line rule. *See* Donald J. Weidner, *A Perspective to Reconsider Partnership Law*, 16 FLA. ST. U.L. REV. 1, 3–4 (2007). If it were, people would be able to circumvent it, and in so doing, find themselves with no governing regime. The drafters of UPA understood and intended this result. *See id.* William Draper Lewis, a key framer of UPA, wrote that:

> [T]he "fundamental characteristic" of partnership law was that it is a residual body of law that governs all relationships that are not "statutory in origin." . . . [T]he uncertainty about whether given arrangements will constitute partnerships . . . "lies in the fundamental characteristic which distinguishes partnerships from every other business association. All other business associations are statutory in origin. They are formed by the happening of an event designated

Unfortunately, it is all too common for unsophisticated parties to go into business together without a detailed agreement as to their rights and duties.[169] Rather than leave such parties without governing rules to cover all common situations, or allow judges to impose ad hoc rules on such parties after the fact, partnership law provides a common governance system for all co-owned businesses that have not opted out by forming a filing entity.[170] Thus, partnership law reflects a policy judgment that co-owned, for-profit businesses that fail to adopt the rules of a particular filing entity must nonetheless be subject to a common set of rules (although, as described below, many are default rules).[171] Operating a co-owned for-profit business without *any* system of governance is simply not permitted.[172]

Partnership has served as the default for-profit business organization for centuries.[173] It first developed at common law, but was widely codified in the twentieth century[174] when almost every state adopted the Uniform Partnership Act (UPA) of 1914.[175] Texas, a late adopter of UPA, "substantially adopted [its] major provisions" in 1961.[176]

> in a statute as necessary to their formation. . . . Partnership is the residuum, including all forms of co-ownership, of a business except those business associations organized under a specific statute." . . . If no formal act is necessary to establish a partnership, it will not always be "easy to determine whether the acts proved indicate co-ownership of a business."

Id. (footnotes omitted).

169. *See* Vestal, *supra* note 24, at 238 (footnote omitted) ("One unique feature of partnership law is that inadvertent business associations come within the sweep of the statutory scheme. In such partnerships, there is no formal partnership agreement, and typically there are few agreements of any type between inadvertent partners."). Often, co-owners will agree to some basic rules but fail to create rules for unanticipated situations. For example, they may agree how to share profits but not losses. Partnership law provides a standard rule for this. *See* TEX. BUS. ORGS. CODE ANN. § 152.202(b)(2) (outlining the default rule for sharing losses).

170. *See* Vestal, *supra* note 24, at 238 ("In [inadvertent] partnerships . . . . the default provisions of the partnership law become especially important in determining the rights and duties of the partners inter se.").

171. *See id.*

172. *See, e.g.*, BUS. ORGS. § 3.101 (stating that "the governing authority of a domestic entity manages and directs the business and affairs of the domestic entity").

173. *See* Tamar Frankel, *Fiduciary Law*, 71 CAL. L. REV. 795, 795 n.3 (1983) (citing JUDSON A. CRANE & ALAN R. BROMBERG, LAW OF PARTNERSHIP, 11 (1968)) (explaining that partnerships existed at common law by the late thirteenth century).

174. *See* Dickerson, *supra* note 33, at 114 ("The modern era for partnerships began essentially with the UPA, finally drafted in 1914. This statute represents the culmination of efforts to bring statutory order to what had been a purely common law domain."); *see generally* Mary Szto, *Limited Liability Company Morality: Fiduciary Duties in Historical Context*, 23 QUINNIPIAC L. REV. 61, 86–113 (2004) (exploring the history of fiduciary duties from ancient times, through its development in trust law, agency law, and partnership law, and the influence of partnership law fiduciary duties on corporate fiduciary duties); John Morey Maurice, *A New Personal Limited Liability Shield for General Partners: But Not All Partners Are Treated the Same*, 43 GONZ. L. REV. 369, 371–86 (2007) (exploring the history of partnership law).

175. *See* Callison, *supra* note 23, at 113 ("The UPA . . . was enacted in substantially identical form in all . . . states (other than Louisiana) . . . .").

176. Ingram v. Deere, 288 S.W. 3d 886, 894 (Tex. 2009); *see generally* Bromberg, *supra* note 23.

Many of the rules imposed by UPA are default rules, meaning that partners can contract around them by agreement.[177] Sophisticated parties who know that they are partners will often draft detailed partnership agreements to do exactly that. Yet, to the extent that partners agree on their own system of rules, partnership's default rules are unnecessary. Hence, at bottom, UPA's core purpose is to provide a system of implied-in-law rules to govern for-profit businesses that have no rules of their own—especially inadvertent partnerships, whose owners may have no idea they are partners.[178]

177. *See* UNIF. P'SHIP ACT § 18 (UNIF. LAW COMM'N 1914) ("The rights and duties of the partners . . . shall be determined, subject to any agreement between them, by the following rules . . . .").

178. *But see* MILLER & RAGAZZO, supra note 22, § 42:1. Skeptics might wonder whether any legitimate businesses actually exist as inadvertent partnerships today. After all, even in Texas, which has no state income tax, partnerships are required to file an "informational" *federal* partnership tax return with the Internal Revenue Service (IRS), despite that the partnership itself pays no tax and the tax status is "passed through" to the partners. *See id.* ("[U]nder Subchapter K of the Internal Revenue Code. . . . [A] partnership is required to file a separate 'information return' to reflect the receipts and expenditures of the business. No tax, however, is paid with this return; the net income or loss from partnership operations is allocated among the partners and then carried directly over to each partner's own tax return. This approach is often referred to as a 'flow-through' or 'pass-through' approach to taxation."); INTERNAL REVENUE SERV., *Partnerships*, IRS, https://www.irs.gov/businesses/small-businesses-self-employed/partnerships (last updated May 30, 2019) ("A partnership must file an annual information return to report the income, deductions, gains, losses, etc., from its operations, but it does not pay income tax. Instead, it 'passes through' any profits or losses to its partners. Each partner includes his or her share of the partnership's income or loss on his or her tax return."). Further, each individual partner must file an income tax return with the IRS and pay federal income tax on their income if they earn more than a certain minimum threshold (which is $12,000 in 2018), regardless of whether they eventually owe income tax. *See* 26 U.S.C. § 6012(a)(1)(A) (requiring individuals to file a tax return unless their gross income does not exceed a threshold amount); Calloway v. Comm'r, 691 F.3d 1315, 1336 (11th Cir. 2012) ("[I]t is the taxpayers' gross income, not their tax liability, that triggers the filing requirement under 26 U.S.C. § 6012(a)(1)(A)."); INTERNAL REVENUE SERV., *Publication 501 (2018), Dependents, Standard Deduction, and Filing Information*, IRS, https://www.irs.gov/publications/p501#en_US_2018_publink1000270109 (last updated Jan. 7, 2019). Thus, at first glance, one might suppose that unless each partner simply hides her income and illegally pays no taxes, the IRS presumably will discover the issue and demand that the partnership file a return. Further, legitimate partnerships must follow other formalities—such as obtaining a federal tax identification number (EIN). INTERNAL REVENUE SERV., *Do You Need an EIN?*, IRS, https://www.irs.gov/businesses/small-businesses-self-employed/do-you-need-an-ein (last updated July 16, 2019). One might believe that these obligations presumably would alert the partners as to the nature of their business organization.

Yet, even setting aside the question of the stringency of IRS enforcement, it seems plausible that a legitimate partnership in which the partners reported their income to the IRS could fly under the radar for some time. If the partners simply divided up income and expenses, and each partner filed her own separate income tax return and used her own home address as the business address, the IRS would not necessarily know that the business is a partnership rather than a sole proprietorship. Sole proprietorships with no employees need not file income tax returns or obtain EINs. *See id.*; INTERNAL REVENUE SERV., *Form SS-4 & Employer Identification Number (EIN) 1*, IRS https://www.irs.gov/faqs/small-business-self-employed-other-business/form-ss-4-and-employer-identification-number-ein/form-ss-4-employer-identification-number-ein-1 (last updated Sept. 20, 2019).

2. Texas Partnership Law Imposes Fiduciary Duties to Protect Unsophisticated Parties Who Cannot Protect Themselves

a. Fiduciary Duties Developed at Common Law and Were Enshrined in TUPA

Fiduciary duties have always been a key component of partnership law.[179] These duties developed under the common law of partnership, which was based on the law of agency, which in turn borrowed from the law of trusts.[180] Fiduciary duties require the fiduciary act with the "highest degree of honesty and loyalty toward another person and in the best interests of the other person."[181] In light of this definition, fiduciary duties obviously have a moral component.[182] Yet, they also arguably are an efficient governance mechanism for agency and partner relationships.[183]

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179. CRANE & BROMBERG, *supra* note 173, at 389. ("Fiduciary duties are among the most important aspects of partnership."); *see also* Michael Haynes, *Partners Owe to One Another a Duty of the Finest Loyalty . . . . Or Do They? An Analysis of the Extent to Which Partners May Limit Their Duty of Loyalty to One Another*, 37 TEX. TECH L. REV. 433, 435 (2005); 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, 460–61 (2008) (citing, *inter alia*, JOSEPH STORY, COMMENTARIES ON THE LAW OF PARTNERSHIP §§ 172, 174–81 (William S. Hein & Co., Inc. 1980) (1841)) ("It has been hornbook law for centuries that a partnership inherently and inescapably involves fiduciary duties among the partners. Until quite recently, fiduciary duty has been the unquestioned lodestar of partnership law in the United States.").

180. *See generally* LARRY E. RIBSTEIN & ROBERT R. KEATINGE, RIBSTEIN AND KEATINGE ON LIMITED LIABILITY COMPANIES § 9:4 (Westlaw 2019); Dickerson, *supra* note 33, at 115 ("The concept of fiduciary duty, in its classical form, originated in the law of trusts."); Szto, *supra* note 174, at 86–113 (exploring the historical development of fiduciary duties); *see also* Allan W. Vestal, *Fundamental Contractarian Error in the Revised Uniform Partnership Act of 1992*, 73 B.U. L. REV. 523, 524 (1993) (discussing the evolution of the law regarding fiduciary duty).

181. *Fiduciary Duty*, BLACK'S LAW DICTIONARY (10th ed. 2014).

182. *See* Reza Dibadj, *The Misguided Transformation of Loyalty Into Contract*, 41 TULSA L. REV. 451, 471 (2006); Dickerson, *supra* note 33, at 120; Tamar Frankel, *Fiduciary Law*, 71 CAL. L. REV. 795, 830 (1983); Melanie B. Leslie, *Trusting Trustees: Fiduciary Duties and the Limits of Default Rules*, 94 GEO. L.J. 67, 70 (2005); Lawrence E. Mitchell, *The Death of Fiduciary Duty in Close Corporations*, 138 U. PA. L. REV. 1675, 1725 (1990); Marleen A. O'Connor, *How Should We Talk About Fiduciary Duty? Directors' Conflict-of-Interest Transactions and the ALI's Principles of Corporate Governance*, 61 GEO. WASH. L. REV. 954, 966–69 (1993).

183. Fiduciary duties developed as an efficient way to police bad agent behavior. Rather than force principals to anticipate every situation where agents can do harm and create a detailed system of rules to deal with each situation, fiduciary duties govern agents with one simple but infinitely flexible command: "place the best interest of the business ahead of your own." U.S. West, Inc. v. Time Warner, Inc., Civ. A. No. 14555, 1996 WL 307445, at *21 (Del. Ch. June 6, 1996) (explaining why fiduciary duties are efficient); Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J. L. & ECON. 425, 427 (1993) (comparing fiduciary duties to contract obligations).

Because partners can act on behalf of the partnership, they are often described as both agents and principals of the firm. *See* Cox v. Hickman, 11 Eng. Rep. 431, 446 (HL 1860); CRANE & BROMBERG, *supra* note 173, at 389 ("[E]ach partner is, roughly speaking, both a principal and an agent, both a trustee and a beneficiary, for he has the property, authority and confidence of his copartners, as they do of him. He shares their profits and losses, and is bound by their actions. Without the protection of fiduciary duties,

UPA addressed fiduciary duties only briefly, leaving courts to continue to develop them based on the common law.[184] However, UPA left little doubt that partners owed each other fiduciary duties.[185] Indeed, UPA § 21(1), "a codification of existing common law,"[186] explicitly describes partners as fiduciaries.[187] The TUPA adopted this UPA provision verbatim.[188] Hence,

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each is at the others' mercy."). As a result, fiduciary duties also are an efficient way to govern partnerships—especially informal partnerships between unsophisticated partners.

However, the mere fact that fiduciary duties are an efficient way to govern agency and partnership relationships has led some scholars and courts to suggest that they are simply default terms. *See, e.g.*, Auriga Cap. Corp. v. Gatz Props., 40 A.3d 839, 853 (Del. Ch. 2012) ("The common law fiduciary duties that were developed to address those who manage business entities were, as the implied covenant, an equitable gap-filler."); Francis S. Fendler, *A License to Lie, Cheat, and Steal? Restriction or Elimination of Fiduciary Duties in Arkansas Limited Liability Companies*, 60 ARK. L. REV. 643, 650 (2007) (footnote omitted) (citing FRANK K. EASTERBROOK & DANIEL FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 34 (1991)) ("[O]ften the parties fail to bargain expressly about mechanisms to constrain the potential for abuse by those actually managing the business. . . . Fiduciary-duty rules operate in no-actual-bargain cases as a set of 'off the rack' default rules. The law presumes these rules to approximate what most parties would have agreed to if they had considered the matter. In other words, the law of fiduciary obligation is viewed as expressing the terms of a hypothetical bargain."). This is not necessarily so; fiduciary duties could be both efficient and mandatory.

184. *See* DONN ET AL., REVISED UNIF. P'SHIP ACT § 404 cmt. 1 (explaining that, unlike RUPA, "UPA . . . touches only sparingly on a partner's duty of loyalty and leaves any further development of the fiduciary duties of partners to the common law of agency"); Callison, *supra* note 23, at 113 (footnote omitted) (explaining that UPA, "prior to the recent promulgation of RUPA, does not contain a definitive statement of partner fiduciary duties"); Claire Moore Dickerson, *From Behind The Looking Glass: Good Faith, Fiduciary Duty & Permitted Harm*, 22 FLA. ST. U. L. REV. 955, 1001 (1995) ("[T]he UPA does not expressly refer to the fiduciary duty of loyalty . . . ."); Steven A. Waters, *Partnerships*, 49 SMU L. REV. 1205, 1208–09 (1996) ("The statutory support for the existence of fiduciary duties is more cryptic than explicit. . . . Nevertheless, Texas common law is well-established that strong fiduciary duties are owed by general partners to each other, [and] to their partnership . . . ."); Donald J. Weidner & John W. Larson, *The Revised Uniform Partnership Act: The Reporters' Overview*, 49 BUS. LAW. 1, 16 (1993) (emphasis in original) ("The UPA has no duty of care provision. Nor does the term *duty of loyalty* even appear in the UPA.").

185. *See* Callison, *supra* note 23, at 113 ("UPA states that agency law principles, presumably including fiduciary principles derived from agency law, apply to partnerships."); Dickerson, *supra* note 184, at 1001 ("[T]he courts have found in [UPA's] language a broad-based fiduciary duty, including, in particular, a duty of loyalty."); Dickerson, *supra* note 33, at 114 ("Section 21 of the UPA deals most directly with fiduciary duty. However, [it] makes no broad provision for such a duty; instead, its wording specifically creates only the duty of a partner to account for his or her profits derived directly from the partner's relationship with the partnership or its assets. Nevertheless, the courts have extracted broad-based fiduciary duties, including particularly a duty of loyalty, from that narrow language."); Weidner & Larson, *supra* note 184, at 16–17 (explaining that UPA "contain[s] a number of provisions that can be interpreted as a broad duty of loyalty"); *see also* Haynes, *supra* note 179, at 439–41 (explaining that a pre-UPA case, Latta v. Kilbourn, 150 U.S. 524, 539–49 (1893), contained a "comprehensive formulation of fiduciary duties" that were "compiled" from prior cases, and how those cases later "found [their] way" into UPA § 21); *id.* at 471 ("Prior to [UPA], a partnership relationship was undeniably fiduciary. [UPA] confirmed the fiduciary nature of a partnership.").

186. Haynes, *supra* note 179, at 441 ("Section 21 was, for the most part, a codification of existing common law."). UPA changed the common law with regard to other areas of the law not relevant here. *See id.* at 441 n.78.

187. *See* UNIF. P'SHIP ACT (UNIF. LAW COMM'N 1914) § 21(1) (providing that every partner is "[a]ccountable as a [f]iduciary" for profits derived from transactions related to the partnership).

188. *See* TEX. UNIF. P'SHIP ACT § 21(1), 57th Leg., R.S., ch. 158, 1961 Tex. Gen. Laws 289, 294 (expired), *codified at* TEX. REV. CIV. STAT. ANN. art. 6132b, § 21(1) (expired) (same as UNIF. P'SHIP ACT

there can be no doubt that the common law and TUPA (following UPA) imposed fiduciary duties on all partners.[189]

b. The Duty of Loyalty Protects Partners—Especially Unsophisticated Ones—from Opportunism

The paramount fiduciary duty is the duty of loyalty.[190] This duty demands a higher standard of conduct from partners than the law demands of those who negotiate at arm's length.[191] As then-Judge Benjamin Cardozo famously[192] wrote, over nine decades ago:

> [C]opartners, owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate.[193]

"The scope of this duty is to not only act solely for the partnership's benefit, but also to refrain from taking advantage of his position by using information, assets, or opportunities acquired by or afforded to him as a result of his position as a partner."[194] In short, the duty of loyalty requires that a partner

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§ 21(1) (UNIF. LAW COMM'N 1914)); *see also* Alan R. Bromberg, *The Proposed Texas Uniform Partnership Act*, 14 SW. L.J. 437, 448 (1960) (quoting proposed TUPA § 21(1), which is the same as UPA § 21(1)); CANE & BROMBERG, *supra* note 172, at 386, 390–91 (stating that Texas enacted proposed TUPA sections not mentioned therein verbatim, and not mentioning proposed TUPA § 21(1)).

189. *See* MILLER & RAGAZZO, *supra* note 22, § 7:12 (describing the Texas case law as "replete with references to the partner as a fiduciary"); Erin Larkin, Comment, *What's in a Word? The Effect on Partners' Duties After Removal of the Term "Fiduciary" in the Texas Revised Partnership Act*, 59 BAYLOR L. REV. 895, 898 (2007) (citing Bohatch v. Butler & Binion, 405 S.W.2d 597, 602 (Tex. App.—Houston [14th Dist.] 1995), *aff'd* 977 S.W.2d 543, 545 (Tex. 1998)) (stating "partners undeniably owed one another a fiduciary duty" under the common law and TUPA).

190. *See* Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928).

191. *See id.*

192. Larry E. Ribstein, *Are Partners Fiduciaries?*, 2005 U. ILL. L. REV. 209, 251 (2005) (describing *Meinhard*'s "punctilio" paragraph as "[p]erhaps the most famous judicial expression of fiduciary duties"); *see also* Callison, *supra* note 23, at 113 ("*Meinhard* has been the basis of much judicial rhetoric . . . .").

193. *Meinhard*, 164 N.E. at 546; *see also* Birnbaum v. Birnbaum, 539 N.E.2d 574, 576 (N.Y. 1989) (citations omitted) (quoting Albright v. Jefferson Cty. Nat'l Bank, 53 N.E.2d 753, 756 (N.Y. 1944)) ("[A] fiduciary owes a duty of undivided and undiluted loyalty to those whose interests the fiduciary is to protect. This is a sensitive and 'inflexible' rule of fidelity, barring not only blatant self-dealing, but also requiring avoidance of situations in which a fiduciary's personal interest possibly conflicts with the interest of those owed a fiduciary duty. Included within this rule's broad scope is every situation in which a fiduciary, who is bound to single-mindedly pursue the interests of those to whom a duty of loyalty is owed, deals with a person 'in such close relation [to the fiduciary] . . . that possible advantage to such other person might . . . consciously or unconsciously' influence the fiduciary's judgment."); Callison, *supra* note 23, at 113 ("*Meinhard* has been the basis of much judicial rhetoric . . . .").

194. Haynes, *supra* note 179, at 438.

acting on behalf of the partnership "place the interests of the partnership ahead of his own."[195]

A key purpose of the duty of loyalty is to protect partners who are not able to protect themselves from opportunistic, sharp-dealing co-partners.[196] When taken in conjunction with the de facto partnership doctrine, the duty of loyalty prohibits a partner from behaving opportunistically toward her co-partner(s) and then denying that the partnership ever existed in the first place.[197]

A duty of loyalty also is particularly necessary among partners (i.e., co-owners of a partnership), as compared to among shareholders (i.e., co-owners) of a corporation, due to the differences in the liability rule and operation of these two business organizations. Unlike in a corporation, where co-owners have limited liability for corporate debts and often are passive shareholders, general partners have unlimited liability for partnership debts,[198] and they may actively manage the business.[199] Thus, unlike in a

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195. Egan, *supra* note 155, at 135 (citing *Meinhard*, 164 N.E. at 546); *accord* Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 880 (1988) ("[A] fiduciary must be loyal to the interests of . . . (the beneficiary). The fiduciary's duties go beyond mere fairness and honesty; they oblige him to act to further the beneficiary's best interests. The fiduciary must avoid acts that put his interests in conflict with the beneficiary's.").

In the agency context, the duty of loyalty requires that the agent "act solely for the benefit of the principal in all matters connected with his agency." RESTATEMENT (SECOND) OF AGENCY § 387 (AM. LAW INST. 1958)).

196. *See* J. Dennis Hynes, *Fiduciary Duties and RUPA: An Inquiry into Freedom of Contract*, 58 LAW & CONTEMP. PROBS. 29, 37 n.38 (1995) (quoting Letter from Melvin A. Eisenberg, Prof. Univ. of Cal. Sch. Of Law at Berkley to the Nat'l Conference of Comm'rs on Unif. State Laws (July 17, 1992)) (arguing that it is difficult for "contracting parties to adequately assess the future costs and benefits in a fluid long-term relationship" and that an "opportunistic partner could . . . exploit" others in the absence of fiduciary duties); Vestal, *supra* note 180, at 562 ("[T]he ability to opt out of fiduciary duties would foster exploitation and abuse. . . . of relatively unsophisticated [partners]."); Donald J. Weidner, *RUPA and Fiduciary Duty: The Texture of Relationship*, 58 LAW & CONTEMP. PROBS. 81, 99–100 (Spring 1995) (advocating "mandatory minima" fiduciary duties to address "asymmetries" in partner bargaining power); *see also* Christopher Hanno, *The Other "F" Word: Fiduciary Duties, Fiduciary Waivers, and the Delaware Limited Liability Company*, 52 S. TEX. L. REV. 101, 111–12 (2010) (considering whether "less sophisticated members of an LLC [get] the benefit of their expected bargain" in waiving fiduciary duties, and arguing that "[t]he ability to limit or eliminate fiduciary duties should be confined to those parties who retain legal counsel or those that are sophisticated or knowledgeable of Delaware corporate law"); Peter Molk, *How Do LLC Owners Contract Around Default Statutory Protections?*, 42 J. CORP. L. 503, 505 (2017) (describing the value of fiduciary duties to unsophisticated LLC members); Kleinberger, *supra* note 179, at 465 ("Fiduciary duty attaches to particular contractual relationships for the same basic reason applicable in other contexts—to proscribe and constrain abuses of power.").

197. *See* HURT & SMITH, *supra* note 124, § 2.01[C] at 2–9 ("Characterizing a business relationship as a partnership allows purported part[ners] to assert fiduciary duty claims against other purported part[ners] . . . . The de facto partnership doctrine is a safeguard against former partners behaving opportunistically and then disclaiming the partnership relationship.").

198. *See* TEX. BUS. ORGS. CODE ANN. § 152.304(a); Dickerson, *supra* note 33, at 149 ("Owners of partnerships, but not of corporations, have personal liability for the losses of their business.").

199. *See* BUS. ORGS. § 152.203(a); Haynes, *supra* note 179, at 437 (quoting ALAN R. BROMBERG & LARRY E. RIBSTEIN, BROMBERG AND RIBSTEIN ON PARTNERSHIP § 6.07(a)(1) (2004)) (explaining that the fiduciary duties are necessary because "one partner alone 'has the agency power to commit partnership

corporation, partner misconduct that harms the partnership financially could potentially lead to disastrous financial consequences for the other partners.

c. TBOC, Following RUPA, Prohibits Elimination of the Fiduciary Duty of Loyalty to Protect Unsophisticated Parties

Although UPA did not specify, courts applying it regularly held that partner fiduciary duties were mandatory and could not be eliminated.[200] UPA is therefore best (but not unanimously[201]) understood as mandating the fiduciary duty of loyalty.[202] Partners could, upon full disclosure, permit their co-partners to engage in specific conduct that otherwise would have breached the duty of loyalty; however, broadly-worded, prospective waivers of the duty of loyalty were not permitted.[203]

In the 1990s, partnership law experts, under the auspices of the American Bar Association, updated and revised UPA to create RUPA. These experts (and other scholars) debated whether to allow partners to entirely eliminate their fiduciary duties—including the duty of loyalty—on the theory that sophisticated partners should be able to arrange their business affairs as they see fit.[204] Those who argued against this position took the view that a

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assets and to create partnership and individual liabilities,'" making it "necessary to provide rules that circumscribe the exercise of the partners' managerial discretion.").

200. *See, e.g.*, Saballus v. Timke, 460 N.E.2d 755, 760 (Ill. App. Ct. 1983).

201. Some commentators, citing cases which they view as allowing partners to waive fiduciary duties under UPA, have argued that UPA did not mandate fiduciary duties. *See, e.g.*, Hynes, *supra* note 196, at 41–43 (discussing, *inter alia*, Singer v. Singer, 634 P.2d 766 (Okla. Ct. App. 1981)); Larry E. Ribstein, *The Revised Uniform Partnership Act: Not Ready for Prime Time*, 49 BUS. LAW. 45, 57–58 (1993) (same). I think the best reading of such cases is that they did not reflect a general waiver of fiduciary duties. Further, I see no room for broad waivers in Judge Cardozo's "finest loyalty" language in *Meinhard*. Hence, I believe UPA mandated fiduciary duties. *Accord* Dickerson, *supra* note 184, at 973, n.75 (disputing Ribstein's interpretation of *Singer*); Allan W. Vestal, *Advancing The Search For Compromise: A Response To Professor Hynes*, 58 LAW & CONTEMP. PROBS. 55, 57–60 nn.12–18 (1995) (disputing Hynes's interpretation of *Singer* and refuting his argument that fiduciary duties were merely default rules under UPA).

202. *See* Dickerson, *supra* note 184, at 1001 (footnote omitted) ("[U]nder the UPA this duty of loyalty is mandatory and can be waived only if the beneficiary knows all relevant facts about the fiduciary's proposed act and consents to the waiver. The fiduciary cannot obtain a blanket waiver for the future."); Vestal, *supra* note 201, at 57–60, nn.12–18 (arguing that prior to adoption of RUPA, fiduciary duties were mandatory, not default, rules).

203. *See* Dickerson, *supra* note 184, at 1001; *see also* UNIF. P'SHIP ACT (UNIF. LAW COMM'N 1914) § 21(1) (emphasis added) ("Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him *without the consent of the other partners* from any transaction connected with . . . the partnership . . . .").

204. *See* COX & HAZEN, *supra* note 33, § 1:7; Dennis J. Callahan, *Medieval Church Norms and Fiduciary Duties in Partnership*, 26 CARDOZO L. REV. 215, 270–75 (2004); Callison, *supra* note 23, at 117–23 (describing this debate); Haynes, *supra* note 179, at 449–54 (same); Kleinberger, *supra* note 179, at 461 (same).

This debate is generally described as being between two sides, the "contractarians," who stressed freedom of contract above all else and therefore advocated that fiduciary duties should be viewed simply as default rules that can be entirely eliminated, and the "fiduciarians," who viewed fiduciary duties as inherent in the nature of partnership which should not be waivable. *See* Dickerson, *supra* note 33, at 132–

regime in which partners could waive their fiduciary duties would be particularly harmful to unsophisticated parties—"the very parties [RUPA] is designed to protect."[205]

Ultimately, these partnership law experts decided on a compromise:[206] RUPA would allow for "broad modification"—but not elimination—of partner fiduciary duties.[207] Accordingly, with regard to the duty of loyalty, RUPA states that: "The partnership agreement may not . . . eliminate the duty of loyalty . . . [but] may identify specific types or categories of activities that do not violate the duty of loyalty, if not manifestly unreasonable . . . ."[208]

TRPA, enacted in 1993[209] and subsequently re-codified into TBOC,[210] adopted RUPA's compromise language (also adopted by thirty-eight other states)[211] with regard to modification of fiduciary duties almost

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33, 134–35 (describing contractarians' view that corporate fiduciary duties should be optional and describing fiduciarians' view that corporate fiduciary duties should be mandatory). However, some also identify a middle group of scholars, or "centrists," who "occupy the middle range," and "accept the contractarians' view of the corporation as an essentially contractual relationship," but also share the fiduciarians "concern that inherent inequities in the market place make meaningful contracting impossible." *Id.* at 132.

For a relatively comprehensive list of the articles on both sides, see Mark J. Loewenstein, *Fiduciary Duties and Unincorporated Business Entities: In Defense of the "Manifestly Unreasonable" Standard*, 41 TULSA L. REV. 411, 411 n.1 (2006).

205. Vestal, *supra* note 180, at 556–57 ("The contractarian formulation jeopardizes unsophisticated participants, inadvertent partners, partners with insufficient resources to retain counsel and enter into lengthy negotiations, and individuals with inadequate experience . . . . the very parties, at least in the rhetoric of the drafters [RUPA] is designed to protect.").

206. *See* Kleinberger, *supra* note 179, at 461–62 (explaining that RUPA "sided with tradition, while nonetheless making clear that the partnership agreement had great powers to regulate the partners' relation *inter se*."); Weidner & Larson, *supra* note 184, at 18 ("[RUPA] Section 404 is a compromise on an extraordinarily controversial topic. . . . Section 404 is a compromise that, on the one hand, continues the use of the term *fiduciary* and the language of duty of loyalty and, on the other hand, confines their application."); Weidner, *supra* note 196, at 86 ("RUPA reflects a compromise between those individuals who wanted to eliminate completely the language of fiduciary obligation and those who insisted that it be preserved without change.").

207. DONN ET AL., *supra* note 21, § 103 ("A reasonable reading is that Section 103(b)(3) permits broad contractual modifications of the statutory duty of loyalty, both in type and sweep, as long as the modifications do not completely eliminate the duty."); Weidner & Larson, *supra* note 184, at 1 ("RUPA provides an irreducible core of fiduciary duties among partners.").

208. UNIF. P'SHIP ACT § 103(b)(3) (UNIF. LAW COMM'N 1997). The language prohibiting elimination of the other fiduciary duty, the duty of care, is similar but does not explicitly say that it cannot be eliminated. *See id.* § 103(b)(4) (partners cannot "unreasonably reduce the duty of care").

209. *See* Ingram v. Deere, 288 S.W.3d 886, 894 (Tex. 2009).

210. *See* Larkin, *supra* note 189, at 901 n.31 (explaining that when TRPA was recodified in TBOC, "as indicated in the BOC revisor's comments, the legislature intended no substantive change").

211. *See supra* note 21 (discussing how RUPA was adopted by the Uniform Law Commission in 1997 and subsequently codified by thirty-eight states). Delaware takes a different approach because, unlike RUPA, Delaware's general partnership statute follows the lead of its LLC statute and allows for the elimination of liability for a breach of any fiduciary duties, but not the duties themselves. *See* DEL. CODE ANN. tit. 6, § 15-103(f) (2009) ("A partnership agreement may provide for the limitation or elimination of any and all liabilities for . . . breach of duties (including fiduciary duties) of a partner . . . to a partnership or to another partner . . . ."); COX & HAZEN, *supra* note 33, § 1:7 (citing DEL. CODE ANN. tit. 6, § 17-110(d) (2009)) ("The Delaware partnership statute goes even further in permitting the elimination of fiduciary duties. In contrast to the approach to corporations, the Delaware partnership

verbatim.[212] TBOC states in relevant part: "A partnership agreement . . . may not . . . eliminate the duty of loyalty . . . [but] partners . . . may identify specific types . . . or categories of activities that do not violate the duty of loyalty if . . . not manifestly unreasonable."[213] Thus, TBOC permits modification—but not elimination—of a partner's (likely still "fiduciary"[214]) duty of loyalty.

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statute permits such contractual provisions without limiting them to duty of care violations."); ROBERT R. KEATINGE & ANN E. CONAWAY, KEATINGE AND CONAWAY ON CHOICE OF BUSINESS ENTITIES § 9:3 (2018 ed.); *see also* DEL. CODE ANN. tit. 6, §15-103(f) (2009) ("Any liability from a breach of the duties or a breach of contract in general may be limited or eliminated by a Delaware partnership agreement.").

More recently, RUPA was amended, with little fanfare, to lift the "manifestly unreasonable" language in the provision that allows parties "to identify specific types or categories of activities that do not violate the duty of loyalty." *See* UNIF. P'SHIP ACT § 105(d)(3)(B) (UNIF. LAW COMM'N 1997) (last amended 2013). It was also amended to permit partners to "eliminate aspects of the duty of loyalty" imposed by statute (i.e., the prohibitions on self-dealing and stealing corporate opportunities"[i]f not manifestly unreasonable" to do so); *see id.* §§ 105(d)(3)(A), 409(b).

It is not clear to what extent these amendments are intended to change RUPA's prior formulation; however, the comment to the revised RUPA does state that the amendments were intended to "reject[] the ultra-contractarian notion that fiduciary duty within a business organization is merely a set of default rules." UNIF. P'SHIP ACT (UNIF. LAW COMM'N 1997, last amended 2013) § 105(d)(3) official cmt. It therefore seems that, even as amended, RUPA is intended to stand in contrast to the Delaware partnership statute. *See id.*

212. *Compare* UNIF. P'SHIP ACT § 404 (UNIF. LAW COMM'N 1997) (using expanded language for partners' standards of conduct), *with* TEX. BUS. ORGS. CODE ANN. § 152.205 (using similar language). TBOC also adopted RUPA's summary of the duty of loyalty "virtually verbatim." Haynes, *supra* note 179, at 435.

213. BUS. ORGS. § 152.002(b)(2). Presumably, the Texas Legislature's decision to adopt RUPA's compromise language was deliberate, since it adopted a customized version of RUPA. *See Ingram*, 288 S.W.3d at 894 n.3.

214. *See* MILLER & RAGAZZO, *supra* note 22, § 7:13. It is not certain that the duty of loyalty remains fiduciary in nature under TBOC. On the one hand, unlike RUPA, TRPA (and, therefore, TBOC) does not use the term "fiduciary" to describe a partner's duty of loyalty—a deletion that was deliberate, according to TRPA's bar committee commentary. *See id.* (discussing this commentary).

On the other hand, when partners act as agents of the partnership, they are fiduciaries under the common law. *See* Elizabeth S. Miller, *Partner Duties Under Common Law and the Texas Business Organizations Code*, 68 THE ADVOC. (TEXAS) 18, 18 (2014) (explaining that TBOC "expressly characterizes a partner as an 'agent,' . . . [so] a partner may be viewed . . . as . . . a fiduciary"). TBOC allows for this possibility by defining the duty of loyalty to "includ[e]" certain requirements, *see* BUS. ORGS. § 154.205, unlike RUPA, which "limit[s]" the duty to those same requirements. *See* Miller, *supra* note 213, at 28 n.63 ("[I]n describing the duty of loyalty as 'including' the aspects enumerated in section 152.205, [TBOC] clearly leaves a court room to go beyond the statute" unlike RUPA.).

Either way, Texas appellate courts continue to describe a partner's duties under TBOC as fiduciary duties. *See* MILLER & RAGAZZO, *supra* note 22*,* § 7:13 ("[C]ourts applying . . . the duties owed under [TBOC] have . . . continued to characterize the duties as 'fiduciary' in nature."). So has the Texas Supreme Court, albeit possibly in dicta. *See* M.R. Champion, Inc. v. Mizell, 904 S.W.2d 617, 618, n.1 (Tex. 1995) (reasoning that "[p]artners owe each other . . . a duty in the nature of a fiduciary duty," and applying TRPA to a case covered by TUPA because "the principles as they apply to this case have not changed"). Moreover, although the Texas Supreme Court declined, in one case, to address whether TRPA changed the fiduciary nature of a partner's duties, it also reaffirmed, in the same case, that "under the common law of most jurisdictions, including Texas, agency . . . gives rise to a fiduciary duty. . . . 'to act solely for the benefit of the principal . . . .'" Johnson v. Brewer & Pritchard, P.C., 73 S.W.3d 193, 200 (Tex. 2002) (quoting RESTATEMENT (SECOND) OF AGENCY § 387 (AM. L. INST. 1958)). Hence, regardless of whether TBOC itself imposes "fiduciary" duties, a partner likely remains a fiduciary under the common law when acting on behalf of the partnership. *See id.*

duty of loyalty.[215] Both the Texas Supreme Court[216] and one appellate court[217] have recognized this.[218]

RUPA's drafters retained fiduciary duties, and the duty of loyalty in particular, in large part because those duties reflect the realities of informal businesses, in which owners typically place great trust in their co-owners.[219] These informal businesses are exactly the sort of firms that typically become de facto partnerships, governed by partnership law without the co-owners knowing it. Thus, RUPA—and TBOC, which adopted the same compromise—mandate fiduciary duties like the duty of loyalty for partners because those duties comport with informal business owners' expectations about how their co-owners will act (even if none of the co-owners know their business is technically a partnership).[220]

A thorough evaluation of this issue is beyond the scope of this article and debate is better left to a later piece. Yet, either way, fiduciary or not, a partner's duty of loyalty *cannot* be eliminated under TBOC. This stands in stark contrast to the rule for members of a Delaware LLC. *See Johnson*, 73 S.W.3d at 200.

215. *See* MILLER & RAGAZZO, *supra* note 22, § 7:15 (explaining that, under TBOC, "the dut[y] of loyalty . . . may not be eliminated in the partnership agreement," but the partners "may by agreement identify specific types or categories of activities that do not violate the duty of loyalty . . . if . . . the provisions are not manifestly unreasonable").

216. *See Ingram*, 288 S.W.3d at 892 n.1 (describing the duty of loyalty as "unwaivable" under TRPA).

217. *See* Starkey v. Graves, 448 S.W.3d 88, 98–99 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (noting that duty of loyalty cannot be disclaimed entirely under TBOC).

218. Unfortunately, two Texas courts have incorrectly upheld agreements that disclaimed fiduciary duties without even bothering to discuss the governing statute. *See* Hardwick v. Smith Energy Co., 500 S.W.3d 474, 484–85 (Tex. App.—Amarillo 2016, pet. granted, judgm't vacated w.r.m.) (giving effect to the parties' agreement to waive fiduciary duties without addressing whether they were partners, and erroneously citing BUS. ORGS. § 152.002(b)(2) for the proposition that agreements must be enforced, without mentioning its prohibition on eliminating the duty of loyalty); Strebel v. Wimberly, 371 S.W.3d 267, 281–85 (Tex. App.—Houston [1st Dist.] 2012, pet. denied) (applying a limited partnership agreement in which partner disclaimed fiduciary duties while failing to mention TBOC's prohibition on eliminating the duty of loyalty). The Texas Supreme Court should decisively overrule these rogue decisions that ignore the governing statute. *See* Hurt, *supra* note 20.

219. Weidner, *supra* note 196, at 84 (reporter of RUPA explaining that "small partnerships often are created quite informally . . . . [with] no written partnership agreement or [an] agreement [that] might only address selected aspects of the partnership" and partners consisting of "people who . . . typically place a great deal of trust in one another"); *accord* Callison, *supra* note 23, at 119 n.56 ("The fiduciarian view is grounded neither in any statute nor in any interpretation of what the role of a partnership statute ought to be . . . . Instead, the view is based on observations of how humans do and ought to behave, and on the belief that law should (and that the common law sometimes does) fulfill normative goals."); Hynes, *supra* note 196, at 54 (explaining that RUPA's drafters mandated fiduciary duties because of a "desire to protect the unsophisticated from sharp dealers"); *see also* Mariana Pargendler, *Modes of Gap Filling: Good Faith and Fiduciary Duties Reconsidered*, 82 TUL. L. REV. 1315, 1326 (2008) ("Because the law assumes that most partners would prefer to have their relationships governed by a duty of care and loyalty, partners owe each other such duties . . . .").

220. This is particularly true in businesses where the co-owners view themselves as partners. *See* Dickerson, *supra* note 33, at 155 ("The word 'partner' carries a connotation of social intimacy not found in 'shareholder.' The emphasis is on trust.").

d. The Two Paths: General Partnership or LLC

Since TRPA's adoption, the LLC has "[r]is[en] from near obscurity" to become "the most popular form of new business entity."[221] The explosion of LLCs has been particularly notable in Delaware, where more LLCs are formed each year than all other entities combined.[222]

The rise of the LLC means that there are now two clear paths for co-owners of a for-profit Texas business with regard to customization of their business relationship and the waiver of fiduciary duties: path one is to form a general partnership under Texas law (either intentionally or not), which (like RUPA) allows some customization and allows owners to modify, but not eliminate, their fiduciary duties.[223] Alternatively, path two is to form an LLC (particularly in Delaware, but possibly in Texas), which allows owners greater contractual freedom, including the ability to completely eliminate fiduciary duties and replace those duties with rules created entirely by contract.[224]

This two-path system is precisely what RUPA's drafters intended (although they may not have foreseen the LLC's explosive growth).[225] This two-path system also makes good sense as a bright line rule to protect unsophisticated parties. Since partnerships can be formed inadvertently (usually, one would expect, by unsophisticated parties who are not advised by competent counsel), partners are protected by fiduciary duties. By contrast, an LLC can only be formed intentionally, by filing a certificate of formation with the state (presumably by parties who are sophisticated enough to enlist the advice of experienced counsel). As a result, no one can *accidentally* form a business entity—the LLC—in which fiduciary duties can

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221. Rodney D. Chrisman, *LLCs Are the New King of the Hill: An Empirical Study of the Number of New LLCs, Corporations, and LPs Formed in the United States Between 2004–2007 and How LLCs Were Taxed for Tax Years 2002–2006*, 15 FORDHAM J. CORP. & FIN. L. 459, 459–60 (2010) (concluding that, in 2007, the formation of LLCs "outpace[d] the number of new corporations formed by a margin of nearly two to one"); *see also* Kleinberger, *supra* note 179, at 446 ("Almost everywhere in the United States, more limited liability companies are formed each year than are corporations."); *id.* at 457 (indicating that LLC formations outpace corporation formations—and LLCs outnumber corporations—in Delaware, New York, Texas, etc.). For a history of the LLC, see generally Susan Pace Hamill, *The Origins Behind the Limited Liability Company*, 59 OHIO ST. L.J. 1459 (1998); Kleinberger, *supra* note 179, at 447–55.

222. *See* Andre G. Bouchard, *The Delaware Court of Chancery's 225th Anniversary*, 73 BUS. LAW. 953, 957 (2018) ("Over the past decade, Delaware LLCs have accounted for more than two-thirds of all new entities formed in Delaware."); Ann E. Conaway, *Lessons To Be Learned: How the Policy of Freedom to Contract in Delaware's Alternative Entity Law Might Inform Delaware's General Corporate Law*, 33 DEL. J. CORP. L. 789, 801–02 (2008) (explaining that, since 1992, when Delaware enacted its LLC statute, more LLCs have formed in Delaware than all other types of business associations combined).

223. *See* BUS. ORGS. § 152.801. If the partners wish to avoid vicarious personal liability for the firm's debts, they can register the partnership as a limited liability partnership. *See id.*

224. *See* Miller v. HCP & Co., No. 2017-0291-CC, 2018 WL 656378, at *8 (Del. Ch. Feb. 1, 2018).

225. *See* Weidner, *supra* note 196, at 81–82 (footnote omitted) ("The basic mission of RUPA is to serve small partnerships . . . . If [parties] do not like RUPA's minimalist mandatory rules, they may adopt a different form of organization.").

be completely waived.[226] Unsophisticated parties (particularly those who go into business without first considering what business organization to form, but also those who intend to be partners but do not have money to spend on detailed, written partnership agreements) will typically form a partnership, the business form in which fiduciary duties are mandatory.

In sum, the fundamental purpose of partnership law is to provide unsophisticated parties with a system of rules to govern their businesses and fiduciary duties to protect them from sharp dealing by other partners.[227] This was true under the common law and TUPA, and it remains true today under TBOC.[228] Moreover, TBOC, working in conjunction with the Delaware (and possibly Texas) LLC statute, allows parties to opt out of partnership law and opt in to LLC law.[229] Doing so provides parties with: (1) maximum flexibility to write their own governing rules; and (2) in Delaware (and possibly in Texas) the ability to completely eliminate fiduciary duties. This is the freedom to contract in action: sophisticated parties who want greater flexibility and the full elimination of fiduciary duties can agree to form an LLC.

B. Whatever Sophisticated Parties Can Do, So Can Unsophisticated Parties

Although Enterprise and ETP signed a written agreement in an attempt to avoid partnership, such agreements need not be reduced to writing. As a general matter, contracts can be oral or implied unless the Statute of Frauds requires that they be in writing.[230] Neither that statute,[231] nor the TBOC[232] (nor UPA or RUPA) contains any requirement that an agreement not to be partners must be in writing.[233] Hence, unless the relevant facts otherwise implicate the Statute of Frauds (e.g., if the "agreement . . . is not to be

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226. *Accord* BUS. ORGS. § 101.001(1) (stating that a "company agreement" may be "written or oral"); *see* DEL. CODE ANN. tit. 6, § 18-101(7) (2019) (defining the LLC "company agreement" to mean "any agreement . . . written, oral or implied, of the member or members as to the affairs of" an LLC). In theory, such a waiver could be oral or even implied, since an LLC's company agreement need not be in writing; however, courts generally require that such waivers be explicit. *See infra* note 242 (discussing the need for explicit waivers).

227. *See* Hynes, *supra* note 196, at 54.

228. *See* BUS. ORGS. § 152.002.

229. *See id.* § 152.002(c)–(d).

230. *Id.* § 26-01(a).

231. *See id.* § 26-01(b).

232. *Id.* § 151.001(5) (stating a "[p]artnership agreement" can be "written or oral").

233. Accordingly, a partnership agreement can be oral or implied, unless prohibited by the Statute of Frauds. *See* MILLER & RAGAZZO, *supra* note 22, § 6:11 ("An oral or implied-in-fact agreement forming a partnership is usually effective . . . to create the partnership," unless a writing is "required under the Texas Statute of Frauds."). However, an agreement *not* to be partners is probably *not* a "partnership agreement," since it is not an "agreement . . . of the partners concerning a partnership." BUS. ORGS. § 151.001(5) (defining a "partnership agreement" as such). It makes good sense that a partnership agreement need not be in writing, because many partnerships arise inadvertently and are governed informally.

performed within one year"[234]), an agreement *not* to be partners could be oral or implied.[235]

What's more, if sophisticated parties can contract around partnership as a matter of law, so can *un*sophisticated parties, since TBOC's default rules for partnerships do not vary based on partner sophistication.[236]

Therefore, if sophisticated parties like Enterprise and ETP could avoid partnership in a written agreement, then *un*sophisticated business co-owners also could do so by agreement—whether that agreement is written, oral, or implied.[237]

C. The Appellate Court's Ruling Will Lead Unsophisticated Parties to Lose Partnership Law's Protections or Face Uncertainty

1. Unsophisticated Parties Could Avoid the Partnership Statute's Default Rules and Mandatory Fiduciary Duties

If parties could contract around partnership as a matter of law, unsophisticated co-owners of an informal business could agree (in writing or otherwise) that they are not "partners" *without* forming a filing entity or drafting a partnership agreement. Not only would this allow unsophisticated parties to *indirectly* avoid the mandatory fiduciary imposed by TBOC, but it also would leave such parties without any system of rules to govern themselves. This would thwart partnership law's core purpose and undermine the legislature's policy choice to create a common set of rules for all co-owned for-profit businesses. When disputes arose (as they inevitably would), courts would be forced to fashion rules out of whole cloth for businesses governed neither by TBOC's rules for partnerships nor its rules for filing entities; alternatively, courts might imply extensive governing agreements between the parties.[238] This ad hoc rule-making would undermine uniformity in business organization law and create uncertainty for informal businesses who opt out of partnership law without creating a system of rules to govern their businesses.[239] This is precisely the mess that TBOC's default

234. *See* TEX. BUS. & COM. CODE ANN. § 26.01(b)(6).

235. *See* BUS. ORGS. § 151.001(5).

236. *See id.*

237. *See id.*

238. For an example of courts implying agreements between business co-owners who failed to do so themselves, see generally Val D. Ricks, *Service Partner Capital Agreements: The Leading Cases and a Response to Critics*, 12 U. PA. J. BUS. L. 1 (2009) (discussing cases in which courts have implied agreements between capital partners and service partners to allocate all losses to the capital partner, thereby altering the default rule in UPA/RUPA that all partners share losses equally).

239. *Cf.* LEO E. STRINE, JR. & J. TRAVIS LASTER, *The Siren Song of Unlimited Contractual Freedom*, RES. HANDBOOK ON P'SHIPS, LLCS AND ALTERNATIVE FORMS OF BUS. ORGS. (Robert W. Hillman & Mark J. Lowenstein eds., 2015) (describing the opinion of two Delaware jurists that, in an analogous situation—the waiver of fiduciary duties and crafting of "bespoke" contractual duties in LLC company agreements—the lack of uniformity can lead to uncertainty and the possibility for further litigation).

partnership rules were intended to avoid.[240]

2. Unsophisticated Parties Could Be Found to Have Orally or Implicitly Waived Their Fiduciary Duties

In addition, if business co-owners could opt out of partnership simply by agreeing not to be partners, the protections that the two-path system provides to unsophisticated parties would be seriously undermined. A disgruntled business owner could always falsely claim that she and her co-owners orally or implicitly agreed not to be partners. If a jury ends up believing the lying partner, her co-owners would lose the protection of Texas partnership law. This would mean that unsophisticated business owners could, in effect, orally or implicitly waive fiduciary duties. That cannot happen if the business were a Texas partnership, since the TBOC prohibits outright waiver.[241] Further, it probably could not happen if the business were an LLC, because courts generally hold that waivers of fiduciary duties must be done so explicitly, in writing.[242]

Even if a factfinder would eventually see through the unscrupulous co-owner's lies, the co-owners would—in Enterprise's words—not "know whether they are in a partnership until a jury tells them."[243] If agreements not

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240. The Chamber of Commerce's amicus brief fails to grasp this point. *See, e.g.*, Chamber of Commerce Amicus Brief, *supra* note 4, at 25. It matters not whether two unsophisticated parties agree not to be partners, or agree not to become co-owners, or agree not to become partners or co-owners until the happening of a specified event. Regardless, by doing any of the foregoing, they can proceed—as a factual matter—to be co-owners of a business for profit and yet, under the Chamber's view, a court would have to conclude based on their agreement that they were not partners. So what law would govern their business? In the absence of an agreement providing for a detailed set of rules, a court will be required to imply rules—which is precisely the messy result that partnership law's default rules were intended to avoid.

241. *See* BUS. ORGS. § 152.002(b)(2).

242. *See* F. HODGE O'NEAL & ROBERT B THOMPSON, CLOSE CORPORATIONS AND LLCS: LAW AND PRACTICE § 9:47 (rev. 3d ed. 2004 & 2018 Supp.) ("Where the [company] agreement does not explicitly restrict or eliminate the default applicability of fiduciary duties, the traditional fiduciary duty applies."); RIBSTEIN & KEATINGE, *supra* note 180, § 12:4 ("[D]efault duties remain under the Delaware [LLC] statute except to the extent the agreement explicitly disclaims or limits them."); *see, e.g.*, Paige Capital Mgmt., L.L.C. v. Lerner Master Fund, L.L.C., No. 5502-CS, 2011 WL 3505355, at *31 (Del. Ch. Aug. 8, 2011) (footnote omitted) (stating that the Delaware LLC statute "permits the waiver of fiduciary duties [but] such waivers must be set forth clearly"); Kelly v. Blum, No. 4516-VCP, 2010 WL 629850, at *10 n.70 (Del. Ch. Feb. 24, 2010) ("Having been granted great contractual freedom by the LLC Act, drafters of and parties to an LLC agreement should be expected to provide . . . clear and unambiguous provisions when they desire to expand, restrict, or eliminate the operation of traditional fiduciary duties.").

243. Enterprise Respondent Brief, *supra* note 35, at 27; *see* 57 TEX. JUR. 3D *Partnership* § 153 (2019) (footnotes omitted) ("The party alleging the existence of a partnership has the burden of proving such contention by a preponderance of evidence."); J. CARY BARTON, TEXAS PRACTICE GUIDE: BUSINESS ENTITIES § 19:43 (2018 ed.) (citing Lain v. ZC Specialty Ins. (*In re* Senior Living Props., L.L.C.), 309 B.R. 223 (Bankr. N.D. Tex 2004)) ("The party asserting the existence of a partnership bears the burden of proof, and must establish the existence of the partnership by a preponderance of the evidence.").

It is ironic that the Chamber's brief calls this argument "a slender reed." Chamber of Commerce Amicus Brief, *supra* note 4, at 26. Respondent Enterprise's entire "partnership by ambush" argument is premised on essentially this same concern: that, unless parties can contract around partnership as a matter

to be partners are dispositive, co-owners of informal businesses could *always* reach a jury with after-the-fact claims that they had orally or implicitly agreed not to be partners because the burden of proof of establishing the existence of a partnership is on the proponent of partnership,[244] and courts generally do not make credibility determinations on summary judgment.[245] This would leave honest owners of informal co-owned businesses—who naturally expect (even if they do not know they are partners) that they can trust their co-owners to place the firm's interests ahead of their own—uncertain about the rules governing their businesses.[246]

3. Unsophisticated Parties Who Believe They Are Partners Would Be Forced to Sign Written Partnership Agreements

Allowing parties to contract around partnership as a matter of law would not just affect unsophisticated parties, who would otherwise be *inadvertent* partners. Unsophisticated co-owners of for-profit businesses who *intended* to be partners in de facto Texas partnerships also would face uncertainty.

Many co-owners of informal, for-profit businesses know about partnership law and expect that their businesses are governed by it; yet to save money, such co-owners often operate without a written partnership agreement and without regularly consulting a business lawyer.[247] The appellate court's holding means that such parties would *always* be open to after-the-fact arguments by unscrupulous co-owners that they had agreed, orally or implicitly, not to form a partnership in the first place.[248]

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of law, one party can always claim—falsely—that the parties went beyond their agreement and formed a partnership by conduct, meaning that parties can never know whether they are in a partnership "until a jury tells them." *See* Enterprise Respondent Brief, *supra* note 35, at 27. Respondent wants to make partnership formation for sophisticated parties a legal issue rather than a factual issue, in order to take the issue away from juries. *See id.* This author wants to do the same thing for unsophisticated parties, so that they cannot contract around partnership as a matter of law.

244. *See* Enterprise Respondent Brief, *supra* note 35, at 27.

245. *See* Griffith v. Conard, 536 S.W.2d 658, 659 (Tex. App.—Corpus Christi 1976, writ denied) (citing Gulbenkian v. Penn, 252 S.W.2d 929, 931 (1952); and then citing Lyons v. Paul, 321 S.W.2d 944, 951 (Tex. App.—Waco 1958, writ ref'd n.r.e.)) ("Upon a motion for summary judgment the trial court must determine if there are any issues of fact to be tried and all doubts as to the existence of a genuine issue as to a material fact must be resolved against the party moving for summary judgment. It is not the duty of the court to weigh the evidence or determine its credibility and thus try the case on the summary judgment evidence.").

246. Research suggests that business executives favor a default duty of loyalty. *See* Miller & Antonucci, *supra* note 159, at 164 (describing a survey of CEOs which indicates that business executives favor a default duty of loyalty).

247. The same is true for some *sophisticated* business people. For example, in the oil exploration business, established, long-time operators may "know and rely on Texas partnership law" and choose not to "paper each evolution of every stage of a rapidly-developing project partnership" because to do so would be "prohibitively expensive." *See, e.g.*, Riley Amicus Brief, *supra* note 52, at 9 (entrepreneur who heads up a family oil exploration business, so arguing).

248. *See Griffith*, 536 S.W.2d at 659.

Under current law, agreements not to be partners are not binding if a factfinder concludes that the parties otherwise satisfied the definition of partnership, applying the five-factor test for partnership.[249] The appellate court's decision would completely upend this law and leave business co-owners who have no written partnership agreement without any certainty that their business relationships are in fact partnerships.[250] If this happened, every informal business in which the owners believe they are partners would be advised to immediately sign a written agreement declaring that they are partners to ward off future claims by disgruntled co-owners that they had orally agreed otherwise.

Partners who did not promptly adopt such an agreement would be left deeply uncertain about the rules that govern their business. If a court were to conclude that they were never partners, then that would only begin the inquiry about the rules that govern the business. The court could conclude that the parties were merely contracting at arms' length. Or, the court could find that the parties orally or implicitly agreed to other rules to govern their co-owned business; if so, the court would then have to decide the content of these supposed oral or implied rules. This is precisely the type of ad hoc decision making that the partnership statute is designed to avoid.

In sum, the appellate court's holding would cause unsophisticated owners of informal businesses to face the exact same uncertainties that Enterprise erroneously claims sophisticated parties would face if the trial court's judgment were upheld.[251] If business co-owners can contract around partnership as a matter of law, then business co-owners who would be de facto partners under current law (whether or not they realize it) could waive their fiduciary duties indirectly, intentionally or otherwise, by opting out of the partnership law regime. In addition, every informal business in which the owners believe they are partners would be advised to draft written agreements affirming that they *are* partners in order to protect themselves from subsequent claims that they had orally or implicitly agreed *not* to be partners.

Either situation would undermine the core purpose of the partnership statute, which was enacted to provide default rules and mandatory fiduciary duties for informal businesses co-owned by unsophisticated parties. In light of that purpose, this uncertainty for unsophisticated parties is far more problematic than any plausible uncertainty that the trial court's judgment would cause for sophisticated parties. To avoid this situation, the Supreme Court should reverse the appellate court's holding that parties can contract around partnership as a matter of law.

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249. *See* TEX. BUS. ORGS. CODE ANN. § 152.052(a).

250. *Compare Griffith*, 536 S.W.2d at 659 (discussing the impact of partnership agreements not reduced to writing), *with* BUS. ORGS. § 152.052(a) (discussing the factors indicating when a partnership has been created).

251. *See Griffith*, 536 S.W.2d at 659.

D. Texas Business Lawyers Who Disagree Are Wrong

Not every Texas business lawyer holds this view. Media coverage in the aftermath of the jury verdict revealed that some Texas business lawyers were "surprised" by the jury verdict.[252] Further, as this article was being prepared for publication, several Texas business lawyers filed amicus briefs on Enterprise's behalf.[253] The arguments these lawyers make are wrong and should be rejected.

1. The Texas Business Bar Is Not Shocked By Inadvertent Partnerships

Enterprise attempted to use lawyer commentary on the jury verdict to its advantage in its brief to the Texas Supreme Court, relying on them to make overwrought pronouncements worthy of Chicken Little about the jury verdict's effect on Texas businesses. For example, Enterprise dramatically proclaimed that the trial court's judgment for ETP "sent shockwaves through the business and legal communities" and "created grave uncertainty" for Texas businesses.[254] Enterprise also contended that the appellate court's reversal of the trial court's judgment "restored order to Texas partnership law" by "appl[ying] long standing Texas law."[255] Elsewhere, Enterprise forebodingly predicted that victory for ETP would lead companies to "[a]void doing business in Texas."[256]

In so asserting, Enterprise essentially attempted to invoke the Texas business bar as an imaginary amicus on its side, rejecting the jury verdict as "partnership by ambush."[257] Citing three articles and a presentation,[258]

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252. *See, e.g.*, Alison Frankel, *How Texas Oil Company Won $319 Million 'Common Law' Partnership Verdict*, REUTERS (Mar. 7, 2014), http://blogs.reuters.com/alison-frankel/2014/03/07/how-texas-oil-company-won-319-million-common-law-partnership-verdict/; Natalie Posgate, *Jury: Energy Transfer Partners and Enterprise Had Legal Partnership*, DALL. MORNING NEWS (Mar. 4, 2014, 9:22 PM), https://www.dallasnews.com/business/energy/2014/03/04/jury-energy-transfer-partners-and-enterprise-had-legal-partnership; Sartain & Decker, *supra* note 8.

253. *See* Ale Amicus Brief, *supra* note 4; Sokolow Amicus Brief, *supra* note 4; Letter from Hugh Rice Kelly to Blake Hawthorne, *supra* note 4.

254. *See* Enterprise Respondent Brief, *supra* note 35, at 1.

255. *Id.* at 1–2; *see also id.* at 45 (asserting that the appellate court "restor[ed] sanity to Texas commercial law").

256. *Id.* at 45.

257. *Id.* at 44.

258. *See id.* at 18–19, 44–45, apps. 8–11 (reproducing three articles followed by a PowerPoint presentation: (1) Stephen Crain, *Partnership Verdict in Dallas: You May Be Married and Not Know It*, ENERGY LEGAL BLOG (Mar. 6, 2014), https://www.energylegalblog.com/blog/2014/03/06/partnership-verdict-dallas-you-may-be-married-and-not-know-it (blog from law firm Bracewell's website); (2) Joshua L. Fuchs & William R. Taylor, *Oil and Gas Partnership by Ambush: The Challenges of Disclaiming a Partnership or Joint Venture in Texas*, JONES DAY (Mar. 2014), https://www.jonesday.com/Oil-and-Gas-Partnership-by-Ambush-The-Challenges-of-Disclaiming-A-Partnership-or-Joint-Venture-in-Texas-03-31-2014/ (blog on law firm Jones Day's website); (3) *Actions Speak Louder Than Words or Partnership by Ambush?: Formation of Partnerships in Texas After* ETP v. Enterprise, BAKER BOTTS (Apr. 22, 2014), http://www.bakerbotts.com/insights/publications/2017/07/actions-speak-louder (blog on law firm Baker

Enterprise asserted that "[l]awyers across the state reacted with alarm" to the Enterprise jury verdict,[259] and posited that "[e]very corporate counsel and Texas commercial litigator" who was aware of the decision was concerned about how it would affect his or her clients.[260]

This is rhetorical nonsense. A handful of critiques does not a crisis make. The Texas business bar filed no amicus brief with the Supreme Court in support of Enterprise's interpretation of the law. Although three Texas business lawyers (including the former Chairman of the Business Law Section of the State Bar of Texas and its Partnership Law Committee) did file briefs on Enterprise's behalf, none of the three purported to represent anything other than his own beliefs—and none of the three used the any of the extreme language that Enterprise used in its brief.[261] One of those amicus briefs, which carefully explains the law of inadvertent partnership, was written by two law professors who are the current authors of a widely respected treatise on partnership law.[262]

Moreover, Enterprise's characterization of the lawyer commentary it cites was simply incorrect. If one looks past the catchy headlines, the cited writings do not actually sound alarmed about—and do not even directly criticize—the trial court's judgment; nor do they decry the existence of unintentional partnerships or call for their elimination.[263] Rather, these writings offer sober and thoughtful analyses of the trial court's decision and advice about how to avoid forming accidental partnerships.[264] The dire predictions of chaos or businesses leaving Texas are Enterprise's own prognostications.[265]

Botts's website); and (4) James L. Rice III et al., *Avoiding the "Partner Trap": How to Prevent Being Bound by a Non-Binding Letter of Intent*, http://blogs.reuters.com/alison-frankel/files/2014/03/etpventerprise-sidleypresentation.pdf (consisting of PowerPoint slides written by lawyers from Sidley Austin LLP).

259. Enterprise Respondent Brief, *supra* note 35, at 44.

260. *See id.* ("Every corporate counsel and Texas commercial litigator aware of [the *Enterprise*] verdict . . . has asked: How can companies protect against the risk of a partnership by ambush if they cannot contract around it?"); *id.* at 18–19 (citing four commentaries).

261. *See generally* Ale Amicus Brief, *supra* note 4; Letter from Hugh Rice Kelly to Blake Hawthorne, *supra* note 4. Other Texas business lawyers did file amici on behalf of business organization clients (either for-profit or non-profit), but such briefs purported to express the views of those organizations, not their counsel. *See, e.g.*, Chamber of Commerce Amicus Brief, *supra* note 4; Amicus Curiae Brief of Plains Pipeline L.P. in Support of Respondents Energy Transfer Partners, L.P. v. Enter. Prods. Partners, L.P., No. 17-0862 (Tex. Sept. 24, 2019); Amicus Brief of Targa Resources Corp. In Support of Respondents, *Energy Transfer Partners*, No. 17-0862 (Tex. Sept. 24, 2019).

262. *See* Hurt & Smith Amicus Brief, *supra* note 4.

263. *See* Enterprise Respondent Brief, *supra* note 35, at app. 8–11.

264. *See id.*

265. *See id.* at 44. Indeed, it appears that the entire concept of "partnership by ambush" was dreamed up by Enterprise's counsel. *See* Jess Krochtengel, *$319M Verdict in Dallas Pipeline Trial Stuns Industry*, LAW360 (Mar. 4, 2014, 8:42 PM), https://www.law360.com/articles/515386 (emphasis omitted) ("Enterprise argued throughout the trial that ETP was trying to create a 'partnership by ambush' . . . ."). A Westlaw search on Oct. 29, 2019, revealed just one use of the term "partnership by ambush"—a 2016 article by Enterprise's lead counsel. *See* Mike Lynn, *Letters of Intent—Stories from the Courthouse*, 4 ROCKY MOUNTAIN MIN. L. FOUND. *A-1, *A-40 (2016).

In any event, Texas business lawyers have filed amicus briefs in support of both Petitioner and Respondent—and each side has influential "friends."[266] For example, while one of Respondent's amici authors a partnership law handbook for securities lawyers, [267] two of Petitioner's amici, both law professors, author a highly-regarded treatise on partnership law.[268] Further, while one of Respondent's amici oversaw the state bar committee that drafted the TRPA, one of Petitioner's amici was the legislator who oversaw its enactment.[269] In short, Respondent's claim that Texas business lawyers widely reject the trial court opinion, and believe that sophisticated parties must be allowed to contact around partnership as a matter of law, is squarely controverted by numerous Texas-admitted business lawyers who filed amici on Petitioner's behalf saying just the opposite.

2. Other Negative Views Exist, but Ought to Be Dismissed

That said, further research suggests that if Enterprise was looking for articles in which lawyers express disdain for unintended partnerships, it missed a couple. Two articles (written by the *same* journalist)—one written in the wake of the jury verdict[270] and the other written after the verdict was reversed on appeal[271]—do, in fact, quote a handful of lawyers as expressing either surprise at or scorn for (if not outright fear of) inadvertent partnerships.[272] Further, after this Article was first submitted for publication,

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266. *See Case 17-0862*, SUP. CT., TEX. JUD. BRANCH, http://www.search.txcourts.gov/Case.aspx?cn=17-0862&coa=cossup (Texas Supreme Court's online case docket for *Enterprise Products* case, listing—as of January 12, 2020—amicus briefs filed in support of both Petitioner ETP and Respondent Enterprise).

267. *See* Ale Amicus Brief, *supra* note 4 (amicus brief submitted by author of JOHN C. ALE, PARTNERSHIP LAW FOR SECURITIES PRACTITIONERS (2018 ed.)).

268. *See* Hurt & Smith Amicus Brief, *supra* note 3 (amicus brief submitted by authors of HURT & SMITH, *supra* note 124).

269. *Compare* Ale Amicus Brief, *supra* note 4, at xi (amicus brief submitted by Vice Chairman of the Partnership Law Committee of the State Bar of Texas when it prepared TRPA), *with* Rudd Amicus Brief, *supra* note 4, at xi (amicus brief submitted by chairman of the Texas House of Representatives subcommittee that developed the TRPA).

270. *See* Krochtengel, *supra* note 265. Despite that the Krochtengel article initially casts the jury verdict in a negative light, it makes sense that Enterprise did not cite the article in its brief because the article goes on to quote a law professor who correctly describes the law of inadvertent partnerships. *See infra* note 304 and accompanying text (discussing the ideas in the article).

271. *See* Jess Krochtengel, *Texas Partnership Ruling Lets Midstream Cos. Breathe Easier*, LAW360 (July 20, 2017, 9:52 PM), https://www.law360.com/articles/945835/texas-partnership-ruling-lets-midstream-cos-breathe-easier (quoting Stuart Zisman of King & Spalding LLP who "works closely with midstream companies" as describing the trial court's ruling as "specifically treacherous for the midstream space" and as "creat[ing] a lot of uncertainty in the marketplace"; and, by contrast, describing the appellate court's ruling as "very reassuring to the midstream sector").

272. *See* Krochtengel, *supra* note 265 (quoting "Randy Burton of Burleson LLP, an energy attorney who didn't work on the case" as saying: "It's a heck of a verdict and it really ought to scare the crap out of people," and paraphrasing Burton as saying that "if the parties believed they had committed only to work together in an exploratory effort not intended to bind anybody, it's 'pretty scary' that, without written agreements, a jury found a partnership existed and had been breached"); *id.* (quoting "Jim Reed of Gray

several business-oriented non-profit organizations[273]—and one law professor[274]—filed briefs that echoed Enterprise's alarm at the trial court's decision.

The Supreme Court ought to ignore these lawyers' views. First, these lawyers apparently have not considered the simple alternative described above: that parties exploring potential joint ventures can avoid forming partnerships by forming LLCs. Second, professors who teach partnership law in Texas reject these lawyers' views.[275] Third, these lawyers do not represent the interests of unsophisticated owners of informal businesses—the very people who require the protection of inadvertent partnerships.

a. Lawyers Who Fear Inadvertent Partnerships Apparently Fail to Contemplate Forming LLCs

Any lawyer who fears that her client will form an inadvertent partnership with another person while they are exploring a joint venture can seek to protect her client by, inter alia, forming an LLC for the potential joint venture at the very outset. As described above, this will all but ensure that the lawyer's client will not become partners with the potential joint venturer.[276]

Yet, the lawyers quoted above who dislike inadvertent partnerships do not appear to have contemplated that possibility.[277] Not one mentioned the pros (or any possible cons) of forming an LLC.[278] Indeed, one of the attorneys quoted above actually admitted that he had no idea what else Enterprise and ETP's attorneys could have done to avoid partnership.[279]

Absent a convincing argument that potential joint venturers should not form an LLC, lawyers who express fear inadvertent partnerships without contemplating forming an LLC should be ignored.

Reed & McGraw PC, a Houston-based energy attorney," claiming that "the jury verdict surprised him"); Krochtengel, *supra* note 271 (quoting "Stuart Zisman of King & Spalding LLP [describing the trial court's ruling as] 'specifically treacherous for the midstream space'" by "creat[ing] a lot of uncertainty in the marketplace" and conversely describing the appellate court ruling as "very reassuring to the midstream sector"); *id.* (quoting "Jack Luellen of Husch Blackwell LLP" as stating "[f]rom a drafting perspective, I don't know what you would have done differently" than what the parties did and paraphrasing him as stating that "the appellate ruling strikes a better balance").

273. *See, e.g.*, Chamber of Commerce Amicus Brief, *supra* note 4, at 4.

274. *See* Sokolow Amicus Brief, *supra* note 4.

275. *See infra* App'x (noting Texas partnership law professors' survey answers).

276. *See supra* Part I (describing how to avoid potential inadvertent partnerships).

277. *See supra* notes 265–271 (quoting lawyers' reactions to the *Enterprise Products* verdict).

278. *See supra* notes 265–272 (discussing articles about the reactions to the *Enterprise Products* verdict). Indeed, of the many articles written by practicing lawyers that advise businesspeople how to avoid forming inadvertent partnerships, *not one* even mentions forming an LLC. *See* sources cited *supra* notes 265–272 (same).

279. *See supra* note 271 (quoting Jack Luellen).

b. Forming LLCs Is Not A "Significant" Expensive for Most Businesses—and Particularly Not for Massive Pipeline Companies

In response to this author's amicus brief, John Ale filed an amicus brief in which he argued that sophisticated parties wishing to avoid forming a partnership should not be required to form an LLC because doing so is too expensive.[280] This argument is specious.

In fact, contrary to Mr. Ale's claim, the cost of forming an LLC for a potential joint venture is not "significant" but "negligible" [281]—particularly for massive, publicly-traded pipeline companies that are exploring joint ventures possibly worth hundreds of millions of dollars in revenue, but even for mid-sized companies that are exploring joint ventures possibly worth tens of thousands of dollars.

First, Mr. Ale is incorrect to claim that "[n]o fees are required to enter into a contract."[282] True, entering into a contract requires no filing with—and therefore, no payment of a filing fee to—the Secretary of State. Yet, for any sophisticated business, a lawyer will likely have a hand in drafting every contract or in at least reviewing a term sheet drafted by the business team; even if that lawyer is inside counsel, her time is not free. Even if the company has developed a tried-and-true standard form agreement, best practice requires that a lawyer review the form to see whether changes are necessary.

By contrast, an LLC can be filed literally by filling out a two-page form. While a sophisticated business will undoubtedly incur some legal expense in the filing of an LLC, there is no reason to believe that such lawyer time plus the filing fee for a Texas LLC will cost any more than the lawyer time necessary to review a contract or term sheet.[283] But even if it requires exactly the same lawyer time, the extra expense of filing an LLC will be $300 for a Texas LLC or $820 ($70 filing fee plus $750 for registering to do business in Texas) for a Delaware LLC. For businesses of any large size, this amount is

280. *See* Ale Amicus Brief, *supra* note 4, at 20–23. The U.S. Chamber of Commerce also makes this assertion in passing, but there is no substance to its argument, other than reiterating Mr. Ale's argument. *See* Chamber of Commerce Amicus Brief, *supra* note 4, at 24 (citing Mr. Ale's brief). At bottom, the Chamber's argument is that forming an LLC is an unnecessary formality that should be eliminated because it is a burden on business. *See id.* This is not an argument about what the law is—it is an argument about what the law should be, and a poor one at that, because it ignores the statute and the importance of providing a default set of rules to unsophisticated parties. *See id.*

281. *Cf.* Ale Amicus Brief, *supra* note 4, at 20–22.

282. Ale Amicus Brief, *supra* note 4, at 21.

283. Moreover, unlike for contract drafting, there exist many free online resources that will help people walk through the steps of forming an LLC. *See, e.g.*, LLC U., https://www.llcuniversity.com/texas-llc/ (last visited Nov. 21, 2019); Stephen Fishman, *Hose to Form an LLC in Texas*, NOLO, https://www.nolo.com/legal-encyclopedia/texas-form-llc-31745.html (last visited Nov. 26, 2019). Further, there are numerous companies that, for a few hundred dollars, will form an LLC. *See, e.g.*, LEGALZOOM, https://www.legalzoom.com/business/business-formation/llc-overview.html (last visited Nov. 26, 2019). These resources make forming an LLC relatively inexpensive even to small businesses that cannot afford experienced legal counsel.

undoubtedly *insignificant*; a single client dinner might cost more.[284]

Second, Mr. Ale offers no basis to conclude that record-keeping and filing tax returns for an LLC is a "significant cost and expense that does not arise in a purely contractual arrangement,"[285] because again he ignores the costs in a contract-only arrangement. Although there undoubtedly would be some cost to keep track of the LLC's expenses, there is no reason to believe that cost would be *significantly* more than the cost to keep track of those same expenses in the absence of an LLC.[286] Further, while filing a separate tax return for a LLC tax undoubtedly costs money, again the cost is probably around $600.[287] Yet, that's not $600 *more* than for a contract; adding these same expenses to the businesses' own tax return if no LLC were formed also would cost something.

Third, Mr. Ale is incorrect to argue against forming an LLC because preparing and filing franchise tax returns and reports "involves significant cost and expenses . . . even if the entity is not yet generating revenues."[288] An LLC formed in Texas, but with no revenue, will pay no franchise tax in Texas.[289] As such, that LLC will (in most cases) only be required to fill out a simple, one-page "No Tax Due" form and a second, simple, one-page "Public Information Form"—and those forms are not due until one year after the LLC is formed.[290] Hence, all that is required for formation of an LLC is the filling out of a simple, two-page "Texas Nexus Questionnaire" within thirty days of formation.[291] (All of these forms are required, in most instances, to be filled out online.) For an LLC with little revenue to report and calculate, filling out these briefs forms is nothing short of a breeze.

Fourth, Mr. Ale also is wrong to state that "the parties must negotiate and agree to a company agreement" in order to start up an LLC—and that such an agreement "must address many more issues than a simple contract to share costs."[292] Many LLCs are formed without ever drafting an LLC agreement, and (as described above), no such agreement is required by law to be drafted at the outset of an LLC. The only two provisions that are absolutely mandatory are a provision that permits a member to withdraw

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284. As Mr. Ale points out, LLCs also pay to retain registered agents. Ale Amicus Brief, *supra* note 4, at 21. However, a quick web search reveals that this can be obtained for $49 per year. This is the definition of a *de minimis* cost.

285. *See* Ale Amicus Brief, *supra* note 4, at 21.

286. Presumably, a massive pipeline company keeps the expenses for its various business units separate, in order to assess their profitability.

287. A brief web search indicates that the average partnership tax return costs $635 in 2014; filing the tax return of a short-lived LLC with no revenue might cost even less than that today.

288. *See* Ale Amicus Brief, *supra* note 4, at 22.

289. *See* sources cited *supra* note 114 (explaining the tax structure for LLCs).

290. *See, e.g.*, *Texas LLC: How to File a No Tax Due Report & Public Information Report*, LLC U., https://www.llcuniversity.com/texas-llc/annual-report (last updated Mar. 19, 2019).

291. *See Questionnaires for Franchise Tax Accountability*, TEX. COMPTROLLER, https://comptroller.texas.gov/taxes/franchisequestionnaire.php (last visited Nov. 26, 2019).

292. *See* Ale Amicus Brief, *supra* note 4, at 22.

from the LLC and—assuming that the joint venturers' purpose for forming an LLC is to avoid owing each other fiduciary duties—a provision waiving fiduciary duties to the extent permitted by law. Such provisions are quite common, however, and if outside counsel does not already have a workable form agreement, these provisions can be drafted once and re-used repeatedly in future joint ventures. Thus, although there are some startup costs of drafting such provisions, a company that forms many joint ventures will soon have a standard form LLC agreement which it can use as the starting point for the LLC agreements in all future joint ventures it wants to form as LLCs.

Moreover, just as he does in every other instance, Mr. Ale ignores the comparative cost of attempting to contract around partnership. First, to the extent that the parties attempt to waive fiduciary duties in their initial contract or term sheet (a "belt and suspenders" type approach suggested by Mr. Ale), drafting such a provision for an LLC agreement will require little extra time and expense. Further, the parties will not be required to spend time drafting condition precedents to partnership formation, as Enterprise argues that they drafted in this case, because instead they will simply draft language which states that they wish for any potential business that they form to operate under the auspices of the LLC. Finally, to the extent that the parties have already finalized the terms of their relationship, that language can be placed in the company agreement rather than the term sheet.

Fifth, Mr. Ale is wrong to argue that "[b]usinesses that consider literally dozens, or even hundreds, of potential transactions a year would have to incur [the costs of forming an LLC] *for each one*."[293] This hyperbolic statement could not be farther from the truth. Simply "consider[ing]" a transaction does not place one in jeopardy of becoming partners, and therefore, there would be no need to form an LLC for every transaction that a business merely considered.[294] Moreover, as explained above, potential joint venturers could avoid forming an LLC at the precise outset of their negotiations and still have any partnership that they may have formed subsumed into their LLC. LLCs would need only to be formed in potential joint ventures in which the parties proceeded to the point where they took tangible steps that a court could deem to be a partnership—such as signing a term sheet, starting to market and meet with potential clients together, etc. More cautious firms might decide to form an LLC earlier, while more frugal firms might delay forming the LLC until later. But either way, firms will be able to "consider" many business relationships without actually forming an LLC.

Ultimately, forming an LLC may cost one or two thousand dollars for those ventures that move far enough forward that inside counsel worries they may have crossed the line to a partnership. This is mere pennies for companies like Enterprise and ETP, and it is highly affordable even for

293. *See* Ale Amicus Brief, *supra* note 4, at 23.
294. *See id.*

midsized or small companies. But forming an LLC is like insurance—nobody likes the cost, but you are paying for safety. The alternative, which is less expensive, is to simply avoid acting like partners.

c. Texas Professors Who Teach Partnership Law Agree That Partners Cannot Contract Around Partnership

It is not by accident that professors with expertise in Texas partnership law have repeatedly filed amicus briefs on behalf of Petitioner ETP in *Enterprise Products*, and no such expert has filed a brief supporting Respondent Enterprise. Professors who teach business organizations law in Texas do not view inadvertent partnerships as "partnership by ambush."[295] Rather, such professors recognize that longstanding law, in Texas and elsewhere, permits the formation of inadvertent partnerships and deems written disclaimers of partnership ineffective if contrary to the actual facts.[296] Indeed, Texas business law professors understand that Enterprise has it exactly backwards: the trial court's judgment was consistent with "longstanding" Texas partnership law and the appellate court's verdict threw the law into "chaos" by injecting "uncertainty" into the process.[297] Moreover, Texas business law professors know that the trial court's verdict did not undermine sophisticated parties' ability to plan their affairs because such parties can easily avoid partnership by forming a filing entity as described above.[298]

We know this because the author of this Article surveyed Texas business law professors in March 2019 about contracting around partnership under Texas law.[299] The author sent the survey to thirty-eight Texas business law professors.[300] Nine professors responded anonymously to the survey. Eight of the respondents stated that they either currently teach or have taught partnership law.[301] These partnership law teachers unanimously agreed that,

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295. *See supra* note 24 and accompanying text (introducing partnership by ambush); *infra* app. (survey results).

296. *See infra* app. (questions 1 & 8 results).

297. *See infra* app. (question 1 results).

298. *See infra* app. (question 8 results).

299. *See* Hurt, *supra* note 20, at 45.

300. *Id.* The Texas law schools included in the survey were: St. Mary's School of Law, SMU Dedman School of Law, the University of Houston Law Center, the University of Texas School of Law, Texas A&M University School of Law, Baylor Law School, Texas Tech University School of Law, UNT Dallas College of Law, Thurgood Marshall School of Law, and South Texas College of Law-Houston. For each school, the author sent the survey to every professor who, based on a brief review of the school's website, appeared to teach business entities law.

The survey was sent to Professor Sokolow, who submitted an amicus brief on Respondent Enterprise's behalf. It is not known whether he took the survey or not, since the survey responses remain anonymous to this author. However, since he presumably teaches partnership law as part of the Business Associations class that he typically teaches every other semester, it appears that he either did not take the survey or he changed his mind since he took the survey.

301. *See infra* app. (questions 9 & 10 results).

on hypothetical facts similar to the *Enterprise Products* case, two parties (sophisticated or not) could *not* contract around partnership as a matter of law; instead, the partnership formation issue should go to a jury.[302] Further, each such professor opined that neither sophisticated nor unsophisticated parties should be able to contract around partnership as a matter of law simply by signing an agreement not to be partners.[303]

Indeed, one of the news articles (which Enterprise unsurprisingly did not cite) that initially casts inadvertent partnerships in a negative light also quotes a Texas law professor who has written a treatise on closely held entities as stating that the parties' intent is "a relatively insignificant factor in determining whether they're bound as partners"—even if the parties say it in writing "1,000 times."[304]

Thus, even if some Texas business lawyers were surprised or dismayed at the jury verdict, many Texas professors who teach partnership law were not.[305]

d. Speaking Up for Unsophisticated Parties

In the final analysis, however, any "alarm" that Texas business lawyers raised about inadvertent partnership likely had little to do with whether they took a course on partnership law and everything to do with the clients that they represent. The lawyer commentary that Enterprise cited for the

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302. *See infra* app. (questions 1, 4 & 5 results with one such professor viewing the contract as binding but waivable by conduct).

303. *See infra* app. (question 8 results).

304. *See* Krochtengel, *supra* note 265 ("Doug Moll, who teaches business law at the University of Houston Law Center, said Texas partnership law is broad and makes the intent of the parties a relatively insignificant factor in determining whether they're bound as partners, compared to other factors outlined in the Texas partnership statute, like sharing profits, control and liabilities. Writing 'we do not intend this to be a partnership' 1,000 times doesn't mean the conduct of the parties can't change that into a valid partnership . . . ."). Professor Moll was surveyed for this article, but his survey responses, if any, remain anonymous to the author.

305. In light of this survey, one might wonder whether Texas lawyers who view inadvertent partnerships with alarm studied partnership law at a Texas law school. In fact, it is likely that they did not study it at all. Unfortunately, too few students who take business law courses actually study partnership or LLC law. *See generally* Mark J. Loewenstein, *Reflections on Teaching Business Associations: The Case for Teaching More Agency and Unincorporated Business Entity Law*, 59 ST. LOUIS U. L.J. 641, 648 (2015).

What then, can be said about the views of Professor Sokolow, the sole professor who presumably teaches partnership law as part of his Business Associations course, and yet, urges that sophisticated parties should be able to contract around partnership as a matter of law? His primary argument seems to be that sophisticated parties ought to be able to contact around partnership so long as third parties' interests are not implicated. *See* Sokolow Amicus Brief, *supra* note 4, at 8. While the common law permitted parties to contract around partnership as between themselves but not as to third parties, UPA and RUPA explicitly eliminated that distinction. *See* Hurt, *supra* note 20, at 28–30. Hence, his argument appears to be merely stating his preference as a professor of contract law, rather than his expertise as a professor of partnership law. Indeed, nowhere does he state that he believes that the law *does* permit parties to contract around partnership law as a matter of law; rather, he seems to argue the law *should* permit this. In short, his brief is best characterized as expressing normative views about, not a description of, Texas law.

proposition that de facto partnerships represent a "partner trap" or "partnership by ambush" was all written by lawyers at large, prestigious law firms: Baker Botts, Bracewell & Giuliani, Sidley & Austin, and Jones Day.[306] Big firms like those presumably represent primarily sophisticated businesses that can afford expensive lawyers. Thus, it stands to reason that such firms would prioritize the interests of their sophisticated business clients over the interests of unsophisticated businesses (unlikely to afford representation by large firms) that depend on the partnership statute's default rules and mandatory fiduciary duties.

None of the articles that addressed the jury verdict, including those cited by Enterprise in its brief, polled lawyers who regularly represent unsophisticated businesses (if such lawyers even exist). If they did poll lawyers who represent owners of informal businesses in fiduciary duty litigation, there is little doubt that they would not urge the Texas Supreme Court to eliminate the de facto partnerships that protect their clients from opportunism.

The Court should therefore avoid changing the law of accidental partnerships because any such change would be unnecessary for sophisticated parties, that can form LLCs and detrimental to unsophisticated parties—the very people that partnership law is intended to protect.

III. ALTERNATIVE WAYS TO PROTECT UNSOPHISTICATED PARTIES

If the Texas Supreme Court does not reverse the appellate court's *Enterprise Products* decision, then the Court should, at a minimum, address the concerns raised above. If the Court does not do so, then the Texas Legislature should step in. This Part briefly explores those possibilities.

A. The Texas Supreme Court

If the Texas Supreme Court holds that Enterprise and ETP contracted around partnership as a matter of law, it could still limit any potential harm to unsophisticated parties. There are several potential approaches that might work. First, the Court could uphold the appellate court's ruling on the narrow ground that ETP failed to obtain a jury finding that Enterprise waived their condition precedent, as required by Texas trial procedure.[307] Second, the

306. *See* sources cited *supra* note 258 (listing the works presented by those four firms). Similarly, the leading lawyers who submitted amicus on behalf of Respondent Enterprise also undoubtedly all represent the interests of large, sophisticated businesses. Hugh Rice Kelly is the former General Counsel of behemoth Reliant Energy, and currently runs a non-profit organization devoted to "tort reform"; John C. Ale is the General Counsel of NYSE-traded Southwestern Energy; Reid C. Wilson represents the Houston Realty Business Coalition, an organization of over 200 leaders in the commercial real estate industry. None of these amici purport to represent the interests of small or unsophisticated business people.

307. *See* Enter. Prods. Partners, L.P. v. Energy Transfer Partners, L.P., 529 S.W.3d 531, 541 (Tex. App.—Dallas 2017, pet. granted) (*Enterprise Products*) ("Enterprise asserts that ETP had the duty to

Court could explicitly limit its holding to sophisticated parties. Third, the Court could opine that any agreement to avoid partnership must be in writing. Unfortunately, all of these options, while facially appealing, are ultimately problematic.

1. Upholding on Alternative Grounds

At first glance, the best option for the Court is to simply hold that ETP failed to obtain a jury finding that Enterprise waived their condition precedent, an alternative theory that Enterprise vigorously argued in its briefs.[308]

Under Texas Rule of Civil Procedure 279, ETP was required to obtain a jury finding on any "independent theory" of defense that Enterprise did not prove conclusively," or else that theory was waived upon appeal.[309] As a result, "if waiver of the conditions precedent was an independent ground of . . . defense by ETP and ETP did not conclusively prove waiver of the conditions precedent, then ETP waived that . . . defense, and Enterprise [should] prevail[]."[310] The *Enterprise Products* court, purporting to follow Texas Supreme Court precedent, concluded that "waiver is an independent ground" when applied to conditions precedent.[311] Since ETP neither obtained a jury finding as to waiver nor proved waiver conclusively, the appellate court therefore held that ETP waived any waiver argument.[312]

The facial appeal of this alternative ground for upholding the appellate court's decision is that it would not necessarily eliminate all inadvertent partnerships because it is merely a procedural argument. In the future, parties that signed an agreement not to be partners absent the occurrence of some condition, but that wanted to prove an accidental partnership was nonetheless formed, would simply have to request a jury finding at trial that the condition precedent was waived by conduct.

Unfortunately, there are at least two problems with so holding. First, such a holding would be theoretically problematic as a matter of partnership

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request a jury question or instruction on waiver of the conditions precedent."); *id.* at 545 (applying TEX. R. CIV. P. 279) ("[W]e conclude that ETP waived its waiver theory by failing to obtain a jury finding on the waiver theory. Because the conditions precedent were not performed and ETP did not conclusively prove the parties waived the conditions precedent, there was no partnership between Enterprise and ETP.").

308. *See* Enterprise Respondent Brief, *supra* note 35, at 21–23, 51–62.

309. *See id.* at 53 (quoting TEX. R. CIV. P. 279) ("[U]pon appeal all independent grounds of recovery or of defense not conclusively established under the evidence and no element of which is submitted or requested are waived.").

310. *Id.* at 23.

311. *Enterprise Products*, 529 S.W.3d at 542 (citing Island Recreational Dev. Corp. v. Republic of Tex. Sav. Ass'n, 710 S.W.2d 551, 554 (Tex. 1986); and then citing Washington v. Reliable Life Ins. Co., 581 S.W.2d 153, 157–58 (Tex. 1979)) (holding that waiver is an independent theory and thus requires a finding if the party alleging it seeks a judgment on that basis).

312. *See id.* at 545.

law because it would imply—incorrectly—that a contract to deny partnership is legally binding on the parties (unless it is waived). In order for waiver of a condition precedent to be a valid theory of recovery, a contract to deny partnership must have the legal effect of defeating partnership in the first place. Since it does not, waiver of such a contract is legally irrelevant. That is to say, the bottom-line question that the finder of fact must answer is not whether a valid condition precedent to partnership was waived by conduct, but rather, whether the parties' conduct satisfied the statutory definition of partnership, regardless of their agreement.[313]

A second problem with this alternative holding is that it does not square with Rule 279. That Rule only requires that parties request a separate jury finding on "*independent* grounds of recovery."[314] Waiver of a condition precedent can be an independent ground for recovery or defense—if the facts of the underlying waiver are *different* than the facts underlying the case in chief.[315] But here, as ETP explained in its reply,[316] waiver was not, by any stretch of the imagination, independent from ETP's case in chief. Rather, waiver was simply a different (but less theoretically sound[317]) way of describing the *exact same* factual basis for recovery as ETP's case in chief—i.e., Enterprise and ETP's conduct satisfied the statutory definition of partnership despite their prior agreement not to be partners. Fact finders do not decide the law, and therefore, it would be absurd for Rule 279 to require a separate jury finding on waiver of the condition precedent, which is simply a different (and erroneous) legal theory for recovery based on *precisely the same* facts as the case in chief.

Thus, although the Texas Supreme Court could purport to follow precedent and hold that waiver of a condition precedent is an independent ground of recovery, doing so would undermine partnership law and stretch Rule 279 too far. The Court should therefore rely on a different ground for its decision.

2. Explicitly Limiting Its Holding to Sophisticated Parties

Alternatively, if the Texas Supreme Court holds that Enterprise and ETP contracted around partnership as a matter of law, the Court could limit the

313. *See* Hurt, *supra* note 20, at 34.Thanks to Doug Moll for helping the author see this point clearly.

314. TEX. R. CIV. P. 279 (emphasis added).

315. For example, in a contract case where the defendant's main argument was that it had performed the contract, waiver would be an "independent ground" for recovery because there is little overlap in the facts between those two theories.

316. *See* ETP Petitioner Reply Brief, *supra* note 39, at 32 ("A 'waiver' question independent of the partnership-formation question would have been a duplicative intent (or improper inferential rebuttal) question, as the inquiry for waiver in this context is intent (or lack of intent) to form a partnership despite the 'conditions precedent.' That intent inquiry is part of, and necessarily referable to, the partnership-formation finding, including the parties' 'expressions of intent.'").

317. *See generally* Hurt, *supra* note 20.

harm to unsophisticated parties by limiting its holding to sophisticated parties. This could be done implicitly, if the Court were to focus all of its reasoning on the importance of sophisticated parties being able to define their relationships by contract,[318] or explicitly, if the Court were to explicitly limit its holding to sophisticated parties and cast doubt on whether the same rule should apply to unsophisticated parties.[319]

Yet, such language would be dicta and would provide little comfort to unsophisticated parties who could not be certain that they could rely on it in future cases. Further, such reasoning would invite litigation by parties who are not obviously sophisticated or unsophisticated, and could force appellate courts to expend judicial resources distinguishing between parties that are sophisticated and those that are unsophisticated for purposes of contracting around partnership.

Worse, creating different rules of partnership law for parties of different sophistication would break new ground in partnership law. Partnership law applies generally to all competent, legal persons regardless of their level of sophistication; no provision in either uniform statute imposes different rules on partners or potential partners based on whether they are sophisticated or not. If the Texas Supreme Court were to create such a distinction out of whole cloth for contracting around partnership, it could lead to unintended consequences, wherein lower courts might apply other partnership law provisions differently based on partners' varying sophistication levels.

3. Holding That All Agreements Not to Be Partners Must Be in Writing

A final way to avoid harm to unsophisticated parties would be for the Texas Supreme Court to opine that contracts not to be partners must be fully informed and in writing. A possible precedential basis for this ruling would be the analogous rule in Delaware that any waiver of a fiduciary duty must be explicit and in writing.[320] This would certainly be dicta, because the issue was neither presented on appeal nor argued by either party.[321] If the Court worded its holding strongly enough, perhaps appellate courts might be inclined to heed it.

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318. *See, e.g.*, Hardwick v. Smith Energy Co., 500 S.W.3d 474, 485 (Tex. App.—Amarillo 2016, pet. granted, judgm't vacated w.r.m.) (citations omitted) ("Courts must honor the contractual terms that parties use to define the scope of their obligations and agreements . . . . This is especially true when the contractual limitation arises from an arms-length business transaction between sophisticated businessmen.").

319. *See supra* Part II (describing the plight of unsophisticated parties).

320. *See supra* text accompanying note 242 (explaining that a waiver of fiduciary duty must be in writing in certain circumstances).

321. *See* Enter. Prods. Partners, L.P. v. Energy Transfer Partners, L.P., 529 S.W.3d 531, 541, 545 (Tex. App.—Dallas 2017, pet. granted) ("ETP did not plead that the two conditions precedent were performed or that they were excused by waiver," and holding that "ETP waived its waiver theory by failing to obtain a jury finding on the waiver theory.").

Yet, such a rule would hamper sophisticated parties and be inadequate to protect unsophisticated ones. First, this requirement would open sophisticated parties to claims that their counter parties, no matter how sophisticated, had not been fully informed (and this will often be a fact question).[322] But second, such a rule would provide little benefit to unsophisticated parties who agree not to be partners but do not agree to any other legal regime to govern their business relationship. Partnership law is, to some extent, paternalistic towards unsophisticated parties in that it creates a default set of rules for people who agree on none, on the assumption that such rules would be best for the parties who cannot agree on rules of their own (and perhaps, they would have even preferred the default rules if they had thought about them).[323] This paternalism is efficient because in the absence of default rules, the courts would be tempted to imply contractual rules between the parties or interpret the duty of good faith and fair dealing broadly (albeit perhaps not so broadly in Texas) to cover sharp practices and hard dealing. It makes little sense to allow unsophisticated parties to opt out of partnership without opting in to another legal regime with default rules or creating their own regime with a written agreement. Few courts will believe that the parties wanted a relationship with no rules, and the courts will then be forced to create an ad hoc system to govern each "non-partnership" based on implied agreements and the implied covenant of good faith and fair dealing.[324] This will lead to the same mess that the partnership statutes were enacted to avoid.

B. The Texas Legislature

If the Texas Supreme Court holds that the parties can contract around partnership as a matter of law, the Texas Legislature should step in to protect unsophisticated parties.

The easiest way for the Texas Legislature to do this would be to add a provision to the partnership statute, patterned after similar provisions elsewhere in the TBOC, with language like this: "Any agreement not to be general partners, or to be general partners only upon the occurrence of a condition precedent, is not enforceable unless the agreement is in writing and signed by all parties to the agreement."[325]

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322. *See* Hurt, *supra* note 20 and accompanying text (citing Ingram v. Deere, 288 S.W.3d 886, 898 (Tex. 2009)) (discussing how the definition of partnership was met as a factual matter).

323. *See supra* Part II.A (discussing partnership law in general and how rules are provided to govern businesses when the business did not create their own rules).

324. *See supra* text accompanying note 160 (noting that leaving a party with no governing rules or allowing judges to impose ad hoc rules after the fact would not happen under existing partnership law).

325. *See* TEX. BUS. ORGS. CODE ANN. § 152.002(b)(2) (noting similar language for determining if a partnership is created via agreement).

Such a provision would protect unsophisticated parties from later claims that they agreed orally or implicitly not to be partners. Moreover, a bright line rule like this would be easy to enforce.

Yet, such a provision would not protect unsophisticated parties from waiving the partnership statute's protections without full information about the consequences of that decision. While it would be possible to add language to a statute which requires that unsophisticated parties be informed about the effect of agreeing not to be partners, unless the statute specified the language to be used, litigation would undoubtedly arise about whether an unsophisticated party received adequate disclosure.

In any event, such a provision would do nothing to stop unsophisticated parties from opting out of partnership without creating their own rules to govern their relationship. This will no doubt cause unsophisticated parties who believe that they have been taken advantage of to claim that they had implicit understandings with their co-partners that prohibited the unfair conduct. Or, in jurisdictions (unlike Texas) where every contract contains an implied covenant of good faith and fair dealing, such parties would often claim that any perceived unfair treatment breached that covenant.[326] This would force courts to spend judicial resources defining implied-in-fact agreements between parties who opted out of partnership's implied-in-law default rules and stretching the covenant of good faith and fair dealing to address unfair conduct better suited to be addressed by fiduciary duties.

As a result, even if the Texas Legislature were to mandate that parties could only contract around partnership in writing, it would be possible for unsophisticated parties to create a relationship with no rules and force the courts to create them rather than reverting to default partnership rules. Accordingly, the better solution would be what UPA and RUPA's rule has been all along: to prohibit parties from contracting around partnership in the first place.

CONCLUSION

In conclusion, there is no need for the Texas Supreme Court (or any other court in any other jurisdiction) to choose between freedom of contract and inadvertent partnerships. That dichotomy is false. Sophisticated businesses can easily avoid becoming partners, and can arrange their business affairs as they see fit by forming LLCs—especially in Delaware (but also possibly in Texas).

As such, there is no reason to rewrite the law of accidental partnerships or undermine the default rules and fiduciary duties that partnership law provides for unsophisticated parties. The Texas Supreme Court should

326. *See supra* note 160 (discussing Delaware and Texas law regarding good faith and fair dealing as implied covenants).

respect established partnership law and overturn the *Enterprise Products* decision.

APPENDIX: SUMMARY OF SURVEY RESULTS

A Survey of Texas Business Law Professors: Contracting Around Partnership in Texas
This survey is based on the following hypothetical:

ABC and XYZ are publicly-traded, Delaware-chartered business entities that operate exclusively in Texas. Each has highly sophisticated management and experienced legal counsel.

In anticipation of exploring what they describe as "a potential joint venture" that would wholly occur in Texas, ABC and XYZ sign a written agreement.

The agreement states that "ABC and XYZ agree, in exchange for valuable consideration, that they have no intent to become partners, are not partners, and will not become partners while seeking customers for a potential joint venture."
(ABC and XYZ make no other agreements.)

After signing the aforementioned agreement, ABC and XYZ begin to seek customers for their "potential joint venture."

While ABC and XYZ are seeking customers, a dispute arises between the two. ABC promptly sues XYZ.

In the lawsuit, ABC alleges that it and XYZ formed a general partnership by conduct. (Neither party raises the issue of whether the partnership has wound up.)

At trial, ABC presents evidence which could lead a reasonable juror to conclude that, while ABC and XYZ were seeking customers, they:
(1) received revenue commitments from potential customers and agreed to share any profits derived from such revenue;
(2) expressed, to the potential customers and to each other, an intent to be partners;
(3) participated in the control of the process of seeking revenue commitments;
(4) agreed to share any losses and/or liability for claims by potential customers; and
(5) agreed to both contribute money to the process of seeking potential customers.

After trial, a properly-instructed jury finds that ABC and XYZ became general partners while seeking potential customers.

Question 1 Results

Q1: XYZ moves for judgment notwithstanding the verdict (JNOV). XYZ's sole argument in support of its JNOV motion is that the trial judge should not have allowed ABC's case to go to the jury due to the parties' agreement not to be partners. (In its motion, XYZ *does not dispute:* (1) that in the absence of the parties' agreement, there would be sufficient evidence to create a jury question as to whether ABC and XYZ are general partners under Texas law; or (2) that, if ABC was required to (a) present evidence that the parties waived their agreement or (b) obtain a separate jury finding on such waiver, ABC did so properly.) Based on your understanding of Texas partnership law *as it existed in 2014* (prior to any decision in the *Enterprise Products v. ETP* case), how should the trial court decide XYZ's motion?	The court should grant XYZ's JNOV motion because the parties' agreement not to be partners is binding. (If you wish, please feel free to explain further below.)[327]	11.11% (1/9)[328]
	The court should deny XYZ's JNOV motion because, although the parties' agreement not to be partners was binding, the parties may have waived that agreement by conduct. (If you wish, please feel free to explain further below.)	11.11% (1/9)
	The court should deny XYZ's JNOV motion because the parties' agreement not to be partners was simply an expression of the parties' intent and not dispositive as to the formation of a partnership, which is controlled by statute. (If you wish, please feel free to explain further below.)	77.78% (7/9)
	The court should grant XYZ's JNOV motion for some other reason. (Please explain briefly below.)	0% (0/9)
	The court should deny XYZ's JNOV motion for some other reason. (Please explain briefly below.)	0% (0/9)
	I do not believe that there is a clear answer to this question under the Texas partnership statute and/or caselaw as it existed in 2014. (Please explain briefly below.)	0% (0/9)
	I do not know the answer, or I have no opinion. (If you wish, please explain briefly below.)	0% (0/9)

327. This answer is from Survey Respondent #5, the only survey respondent who has never taught partnership law. The professor's answers are therefore excluded from the brief.

328. Only one respondent, Respondent #9, explained his/her answers.

Question 2 Results

Q2: Would your answer to Question 1 differ if the lawsuit arose between XYZ and one of the potential customers, rather than between ABC and XYZ? (Please note: Question 1 does not address the issue of whether ABC and/or XYZ might be estopped from denying partnership.	Yes, I would now conclude that XYZ's JNOV motion should be denied, and the question of partnership should go to the jury. (If you wish, please explain why below.)	11.11% (1/9)[329]
	Yes, I would now conclude that XYZ's JNOV motion should be granted, and the question of partnership should not go to a jury. (If you wish, please explain why below.)	0% (0/9)
	No, I would still conclude that XYZ's JNOV motion should be denied, and the question of partnership should go to the jury. (If you wish, please explain why below.)	88.89% (8/9)
	No, I would still conclude that XYZ's JNOV motion should be granted, and the question of partnership should not go to a jury to decide. (If you wish, please explain why below.)	0% (0/9)
	I do not believe that there is a clear answer to this question under the Texas partnership statute and/or caselaw as it existed in 2014. (Please explain briefly below.)	0% (0/9)
	I do not know the answer, or I have no opinion. (If you wish, please explain briefly below.)	0% (0/9)

329. Answer of Survey Respondent #5, who has never taught partnership law.

Question 3 Results

Q3: Would your answer to Question 1 differ if ABC and XYZ had agreed orally, rather than in writing, not to be partners? (Please ignore any potential application of the Statute of Frauds to this question. Please only address business organizations law.)	Yes, I would now conclude that XYZ's JNOV motion should be denied, and the question of partnership should go to the jury. (If you wish, please explain why below.)	11.11% (1/9)[330]
	Yes, I would now conclude that XYZ's JNOV motion should be granted, and the question of partnership should not go to a jury. (If you wish, please explain why below.)	0% (0/9)
	No, I would still conclude that XYZ's JNOV motion should be denied, and the question of partnership should go to the jury. (If you wish, please explain why below.)	88.89% (8/9)
	No, I would still conclude that XYZ's JNOV motion should be granted, and the question of partnership should not go to a jury to decide. (If you wish, please explain why below.)	0% (0/9)
	I do not believe that there is a clear answer to this question under the Texas partnership statute and/or caselaw as it existed in 2014. (Please explain briefly below.)	0% (0/9)
	I do not know the answer, or I have no opinion. (If you wish, please explain briefly below.)	0% (0/9)

330. Answer of Survey Respondent #5, who has never taught partnership law.

Question 4 Results

Q4: Would your answer to Question 1 differ if, at the time the parties signed their agreement not to be partners, ABC's management was unsophisticated and was not advised by experienced legal counsel?	Yes, I would now conclude that XYZ's JNOV motion should be denied, and the question of partnership should go to the jury. (If you wish, please explain why below.)	0% (0/9)
	Yes, I would now conclude that XYZ's JNOV motion should be granted, and the question of partnership should not go to a jury. (If you wish, please explain why below.)	0% (0/9)
	No, I would still conclude that XYZ's JNOV motion should be denied, and the question of partnership should go to the jury. (If you wish, please explain why below.)	88.89% (8/9)
	No, I would still conclude that XYZ's JNOV motion should be granted, and the question of partnership should not go to a jury to decide. (If you wish, please explain why below.)	11.11% (1/9)[331]
	I do not believe that there is a clear answer to this question under the Texas partnership statute and/or caselaw as it existed in 2014. (Please explain briefly below.)	0% (0/9)
	I do not know the answer, or I have no opinion. (If you wish, please explain briefly below.)	0% (0/9)

331. Answer of Survey Respondent #5, who has never taught partnership law.

Question 5 Results

Q5: Would your answer to Question 1 differ if, at the time the parties signed their agreement not to be partners, both ABC and XYZ had unsophisticated management that was not advised by experienced legal counsel?	Yes, I would now conclude that XYZ's JNOV motion should be denied, and the question of partnership should go to the jury. (If you wish, please explain why below.)	0% (0/9)
	Yes, I would now conclude that XYZ's JNOV motion should be granted, and the question of partnership should not go to a jury. (If you wish, please explain why below.)	0% (0/9)
	No, I would still conclude that XYZ's JNOV motion should be denied, and the question of partnership should go to the jury. (If you wish, please explain why below.)	88.89% (8/9)
	No, I would still conclude that XYZ's JNOV motion should be granted, and the question of partnership should not go to a jury to decide. (If you wish, please explain why below.)	11.11% (1/9)[332]
	I do not believe that there is a clear answer to this question under the Texas partnership statute and/or caselaw as it existed in 2014. (Please explain briefly below.)	0% (0/9)
	I do not know the answer, or I have no opinion. (If you wish, please explain briefly below.)	0% (0/9)

332. Answer of Survey Respondent #5, who has never taught partnership law.

Question 6 Results

Q6: Would your answer to Question 1 differ if, (1) rather than agreeing not to be partners, ABC and XYZ agreed not to become partners except upon the occurrence of some condition precedent (such as both parties' boards of directors signing a partnership agreement) occurs; and (2) that condition precedent did not occur?	Yes, I would now conclude that XYZ's JNOV motion should be denied, and the question of partnership should go to the jury. (If you wish, please explain why below.)	0% (0/9)
	Yes, I would now conclude that XYZ's JNOV motion should be granted, and the question of partnership should not go to a jury. (If you wish, please explain why below.)	0% (0/9)
	No, I would still conclude that XYZ's JNOV motion should be denied, and the question of partnership should go to the jury. (If you wish, please explain why below.)	77.78% (7/9)
	No, I would still conclude that XYZ's JNOV motion should be granted, and the question of partnership should not go to a jury to decide. (If you wish, please explain why below.)	11.11% (1/9)[333]
	I do not believe that there is a clear answer to this question under the Texas partnership statute and/or caselaw as it existed in 2014. (Please explain briefly below.)	11.11% (1/9)
	I do not know the answer, or I have no opinion. (If you wish, please explain briefly below.)	0% (0/9)

333. Answer of Survey Respondent #5, who has never taught partnership law.

Question 7 Results

Q7: Would your answer to Question 1 differ under a different state's partnership law? (Check as many answers as you believe apply.)	Yes, I believe that the answer would be different in a state that has adopted the original Uniform Partnership Act. (Please explain your answer below.)	0% (0/9)
	Yes, I believe that the answer would be different in a state that has adopted the Revised Uniform Partnership Act without revisions. (Please explain your answer below.)	0% (0/9)
	Yes, I believe that the answer would be different in _____. (Please explain your answer below.)	0% (0/9)
	No, I believe that Texas partnership law is consistent with the general law.	77.78% (7/9)
	I do not believe that there is a clear answer to this question in other states. (Please explain briefly below.)	0% (0/9)
	I do not know the answer, or I have no opinion. (If you wish, please explain briefly below.)	22.22% (2/9)[334]

334. One of these is the answer of Survey Respondent #5, who has never taught partnership law.

Question 8 Results

Q8: Regardless of how you answered the questions above based on Texas law as of 2014, do you believe that anyone should be able to contract around partnership as a matter of law simply by signing an agreement not to be partners? (Check as many answers as you believe apply.)	Yes, anyone should be able to contract around partnership as a matter of law simply by signing an agreement not to be partners. (If you wish, please explain your answer below.)	0% (0/9)
	Yes, but only parties that are sophisticated and/or advised by experienced legal counsel should be able to contract around partnership as a matter of law simply by signing an agreement not to be partners. (If you wish, please explain your answer below.)	0% (0/9)
	Yes, people should be able to contract around partnership simply by signing an agreement not to be partners—but only as between themselves, not as to third parties. (If you wish, please explain your answer below.)	11.11% (1/9)[335]
	No, no one should be able to contract around partnership as a matter of law simply by signing an agreement not to be partners. (If you wish, please explain your answer below.)	66.67% (6/9)
	No, no one should be able to contract around partnership as a matter of law simply by signing an agreement not to be partners because people can avoid partnership by forming a filing entity such as an LLC, which is excluded from the definition of partnership. (If you wish, please explain your answer below.)	22.22% (2/9)[336]

335. Answer of Survey Respondent #5, who has never taught partnership law.

336. Survey Respondent #8 choose both this answer and the prior answer, which is encompassed within this answer.

Question 9 Results

Q9: Do you teach, or have you ever taught, partnership law—and if so, for how long?	Yes, I taught, or have been teaching, partnership law for 1-5 years.	0% (0/9)
	Yes, I taught, or have been teaching, partnership law for 6-15 years.	33.33% (3/9)
	Yes, I taught, or have been teaching, partnership law for 16-25 years.	22.22% (2/9)
	Yes, I taught, or have been teaching, partnership law for more than 25 years.	33.33% (3/9)
	No, I have never taught partnership law.	11.11% (1/9)[337]

Question 10 Results

Q10: If you teach (or have taught) partnership law, do (or did) you teach Texas- specific partnership law?	Yes, I currently teach partnership law, and when I do, I teach both the general law and Texas-specific law.	44.44% (4/9)
	Yes, I currently teach partnership law, and when I do, I teach only the general law.	33.33% (3/9)
	Yes, I currently teach partnership law, and when I do, I teach only Texas-specific law.	0% (0/9)
	Yes, I previously taught partnership law (but no longer do), and when I did, I taught both the general law and Texas- specific law.	0% (0/9)
	Yes, I previously taught partnership law (but no longer do), and when I did, I taught only the general law.	11.11% (1/9)
	Yes, I previously taught partnership law (but no longer do), and when I did, I taught only Texas-specific law.	0% (0/9)
	I have never taught partnership law.	11.11% (1/9)[338]
	My answer does not fall into one of these categories. (Please explain briefly below.)	0%

337. Answer of Survey Respondent #5.
338. Answer of Survey Respondent #5.

Explanations (All Questions)

Q1 The challenge here is that during 2014 I was not paying that close attention to Texas Partnership Law. So, my answer is based off of my general knowledge and understanding of partnership law. In this situation—I think the big concern in granting the motion is—doing so allows parties to contract around what is understood to be a "legal fall back" entity in the absence of a clear and formal business structure. Partnership formation in the absence of a formal declaration has always been a substance over form analysis. I understand the argument for two "Big Boys" to decide how they want their legal relationship to be. That's all well and good until (as here)—disputes arise and then liability has to be sorted out. And the fair and equitable way—(and the one I think courts will uphold) — is the substance over form argument. If you are walking and talking like a duck, you should be treated as such, even if you try and call or characterize your structure as something else.[339]

Q2 My argument for denying the motion would be even stronger if a 3rd party were involved. A lot of the joint and several liability that comes from [p'ships] is there to protect 3rd parties. So—if 3rd party rights are adversely affected due to the determination that the parties have NOT formed a partnership—in my mind that strengthens the argument and the justification for the finding of a partnership if the parties' conduct does, in fact, lend toward that conclusion.

Q3 In my mind, an oral agreement simply strengthens the argument for the finding of a [p'ship] if their conduct and interaction warranted such a finding

Q4 Again—a stronger argument toward the finding of a partnership given the relative bargaining position of the parties no longer standing on equal footing.

Q6 In my mind—it would and should almost always be a substance over form argument. If you don't want to be treated as a partner, your conduct should reflect that desire. If in essence and in substance you are behaving as partners behave, then you should deal with the legal consequences of such.

Q8 To me, there will always be a disconnect if you try and characterize your relationship in writing one way but in substance you are something else. I would not be in favor of being able to contract around what you actually are in substance. If you don't want to be treated as partners then make sure that in substance you are interacting in the matter in which partnerships door take the extra step and form some other type of formal entity

Q10 I don't teach Texas-Specific but teach from [RUPA].

339. All explanations are from Survey Respondent #9.