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Delaware LLCs In New York Real Estate Transactions: Waiver of Fiduciary Duties

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This article is the third in a four-part series that examines issues surrounding the use of Delaware Limited Liability Companies (LLCs) for real estate transactions in New York.

The [first article](#) discussed some of the general factors that should be taken into account in choosing that entity form for such transactions; the [second](#) reviewed considerations in choosing a forum for the resolution of disputes arising under the operating agreement of a Delaware LLC that is formed for the purpose of a New York real estate transaction.

This third article will explore a key aspect of Delaware law that is often among the reasons parties choose to organize as a Delaware LLC: the state's liberal rules concerning waivers of fiduciary duties. What can such a waiver accomplish, and is it a good idea?

Delaware Law on Waivers of Fiduciary Duty

The best way to understand Delaware law regarding waivers of fiduciary duty is through a comparison with New York law. New York takes a somewhat protectionist approach: parties may not contractually eliminate or limit "the liability of any manager [of a New York LLC] if a judgment or other final adjudication adverse to him or her establishes that his or her acts or omissions were in bad faith or involved intentional misconduct or a knowing violation of law or that he or she personally gained in fact a financial profit or other advantage to which he or she was not legally entitled." N.Y. Limited Liability Company Law §417(a)(1).

Because a claim for breach of fiduciary duty must always involve some kind of misconduct (see, e.g., *Golobe v. Mielnicki*, __ N.Y.3d __, 2025 WL 864512, *3 (Mar. 20, 2025)) and usually also involves some kind of bad faith (see, e.g., *Biondi v. Beekman Hill House Apt. Corp.*, 94 N.Y.2d 659, 666-67 (2000)), the statute's references to "bad faith" and "intentional misconduct" are generally understood to have the practical effect of invalidating any attempt to waive the fiduciary duties owed by managers of a New York LLC. See, e.g., *Agarwal v. Jain*, 2024 WL 3433747, *3 (Sup. Ct. N.Y. Cnty. Jul. 24, 2024) (parties cannot waive claims for breach of fiduciary duty that "sound of intentional misconduct"); accord 4D N.Y. Prac., Comm. Litig. in New York State Courts, §104:22 (an attempt to waive the fiduciary duties owed by managers of a New York LLC will "most likely" be "ineffective").

Delaware law takes a different approach: one that is "explicitly contractarian, and fundamentally regards and enforces the limited liability company agreement as a contract." *In re Coinmint, LLC*, 261 A.3d 867, 890 (Del. Ch. 2021) (cleaned up). In keeping with this approach, Delaware's LLC statute expressly permits the members of a limited liability company to "expand[] or restrict[] or eliminate[]" any duties, "including fiduciary duties"—provided only that "the limited liability company agreement may not eliminate the implied contractual covenant of good faith and fair dealing." 6 Del.C. §18-1101(c); see *Marubeni Spar One, LLC v. Williams Field Servs.* -

Gulf Coast Co., L.P., 2020 WL 64761, *10 (Del. Ch. Jan. 7, 2020) (“The parties to LLC agreements are free ... to impose or eschew what duties they like; indeed, that is one of the advantages of the LLC form of entity.”). It further allows members to limit or eliminate “any and all liabilities for breach of contract and breach of duties (including fiduciary duties)” except for “a bad faith violation of the implied contractual covenant of good faith and fair dealing.” 6 Del.C. §18-1101(e).

Under Delaware law, the implied contractual covenant of good faith and fair dealing has nothing to do with fiduciary duties; it is a contract principle that addresses “contractual gaps” that “neither party anticipated.” *Nemec v. Shrader*, 991 A.2d 1120, 1125-26 (Del. 2010). The operating agreement of a Delaware LLC may thus limit managers’ fiduciary duties in any way the parties may choose, including by eliminating them altogether.

Given this difference, one might expect New York courts to be unwilling to enforce waivers of fiduciary duty with respect to Delaware LLCs. But the opposite is true: despite the limits that New York law imposes on waivers of fiduciary duty, New York courts regularly enforce such waivers when they are contained in the operating agreement of a Delaware LLC that specifies that it is governed by Delaware law. See, e.g., 111 W. 57th Inv. LLC v. 111 W57 Mezz Inv. LLC, 192 A.D.3d 618, 621 (1st Dept. 2021); *accord Kagan v. HMC-New York, Inc.*, 94 A.D.3d 67, 71-72 (1st Dept. 2012).

Parties forming a Delaware LLC for the purpose of engaging in a New York real estate transaction can therefore be confident that if they choose to waive or limit fiduciary duties, that waiver or limitation will be honored in the New York courts.

Why Waive Fiduciary Duties?

Parties to the operating agreement of a Delaware LLC formed to engage in a New York real estate transaction can waive fiduciary duties, but should they? Shouldn’t a manager owe some duties to the LLC and its members?

Usually the answer is yes. But Delaware law gives parties the flexibility to replace fiduciary duties with contractual duties of their choosing. Often these include contractual duties to refrain from self-interested transactions or from intentional misconduct or gross negligence. Although such contractual duties may come close to mirroring the fiduciary duties the parties expressly waived (see, e.g., *Smith v. Scott*, 2021 WL 1592463, *10 (Del. Ch. Apr. 23, 2021)), the ability to choose and control the scope of those duties—rather than being bound by a scope that is determined by potentially-evolving case law—may be attractive.

Moreover, having duties that are expressly contractual rather than fiduciary could have significant implications in the event of litigation, where the absence of fiduciary duties may affect the availability of certain remedies.

For example, New York courts generally will not award punitive damages on a claim for breach of contract (see *Colt v. Nathan Littauer Hosp.*, 236 A.D.3d 1216, 1219 (3d Dept. 2025) (collecting cases)), but may do so on a claim for breach of fiduciary duty (see *Hall v. Middleton*, 227 A.D.3d 590, 591 (1st Dept. 2024), lv. denied, 43 N.Y.3d 902 (2025)). This dichotomy appears to apply even where the underlying relationship is governed by Delaware law. See *Barrett v. Toroyan*, 28 A.D.3d 331, 333 (1st Dept. 2006). As well, in the absence of a fiduciary relationship there can be no claim for an equitable accounting. See *Metropolitan Bank & Trust Co. v. Lopez*, 189 A.D.3d 443, 446 (1st Dept. 2020); *Koblence v. Aster Jewels, Inc.*, 2021 WL 2028599, *3 (Sup. Ct. N.Y. Cnty. May 21, 2021).

And although under both New York law and Delaware law a person who is not a party to a fiduciary relationship can be liable for aiding and abetting the fiduciary's breach of duty (see *Wei v. Zhang*, 2025 WL 1565356, *19 (Del. Ch. June 3, 2025); *Dar v. SAJ Transp. Northeast LLC*, 235 A.D.3d 581, 583 (1st Dept. 2025)), neither state recognizes a cause of action for aiding and abetting a breach of contract (see *Markovitz v. Friedman*, 144 A.D.3d 993, 996 (2d Dept. 2016); *Allen v. El Paso Pipeline GP Co., LLC*, 113 A.3d 167, 193 (Del. Ch. 2014), aff'd, 2015 WL 803053 (Del. 2015)).

Thus, by replacing fiduciary duties with contractual duties parties can better control not only the scope of the duties themselves but also the range of available relief in the event of a breach.

A final note of caution: although Delaware law freely permits parties to waive fiduciary duties, it will not infer such a waiver lightly. A provision in a Delaware LLC's operating agreement that is intended to waive fiduciary duties must be "plain and unambiguous"; if it is not, "the interpretive scales tip in favor of preserving fiduciary duties." *Manti Holdings, LLC v. The Carlyle Group Inc.*, 2022 WL 444272, *2 (Del. Ch. Feb. 14, 2022) (collecting cases; cleaned up). As a result, parties who wish to take advantage of Delaware's flexibility in this regard must make that intention clear in their agreement.

The Take-Away

Provisions that fully eliminate fiduciary duties and replace them with contractual ones are obviously not for everybody. But they can be a useful tool in the right circumstances. An understanding of what such provisions can accomplish is key to determining whether such a provision is desirable in any given transaction. If it is, careful drafting is crucial in order to ensure both that fiduciary duties are effectively waived and that the contractual duties that replace them are clearly delineated. Such care will minimize the possibility of unwelcome surprises in the event of litigation.

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