Texas Pattern Jury Charges For Business Fiduciary Duties – Is It Time For A Change?

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I. INTRODUCTION

The purpose of a pattern jury instruction is to assist the bench and bar in preparing the court’s charge in jury cases. They provide definitions, instructions, and questions needed to create jury instructions in the applicable area of law.¹

Pattern jury instructions have a very important role to play in the judicial process. “First, they are designed to save judges and lawyers time, by eliminating the need to write new instructions for every trial. Second, they should reduce the number of appeals due to the use of incorrect instructions. Third, pattern instructions ensure that jurors across similar cases hear the same instructions regardless of the judge’s feelings about the case. This is important because judicial attitudes may affect jury verdicts. Finally, juror comprehension of the applicable law should be increased through the use of pattern instructions written in simple language.”²

Given the obvious benefits of pattern jury charges, it would seem that courts would frequently use them if they are available. This is not the case for the pattern jury charges related to fiduciary duties. A recent search on Lexis revealed 6,158 business and corporate law cases dealing with fiduciary duties in Texas. Of these 6000 plus cases, only eleven mentioned the pattern jury charges related to fiduciary duties. Granted, this was not a “scientific” search and the data collection method was inherently flawed.³ However, the miniscule number of cases that mention the pattern jury charges for fiduciary duties does suggest that courts are not using them.

To understand how well the Texas pattern jury charges for fiduciary duties work, we must first understand fiduciary duty law related to business entities in Texas. The first segment of this paper will examine Texas fiduciary duty law for business entities, both statutory and common, with an emphasis on documenting what duties are imposed on fiduciaries and how those duties are breached. Once the fiduciary duties are documented for each entity type, this paper will then examine the Texas pattern jury charges related to fiduciary duties of Texas business entities. Finally, the last section of the paper will analyze how well the pattern jury charges reflect Texas fiduciary duty law and make recommendations for improvement.

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³ For example, not all cases are documented in LexisNexis. Additionally, courts may use the pattern jury charges as but not mention them by name in the case write-up.
II. FIDUCIARY DUTY LAW FOR TEXAS BUSINESS ENTITIES

According to Black’s Law Dictionary, a fiduciary is someone who “is invested with rights and powers to be exercised for the benefit of another person.”\(^4\) The Texas Supreme Court in *Johnson v. Brewer & Pritchard, P.C.* “recognized that it is impossible to give a definition of the term that is comprehensive enough to cover all cases.” “[G]enerally speaking, it applies to any person who occupies a position of peculiar confidence towards another. It refers to integrity and fidelity. It contemplates fair dealing and good faith, rather than legal obligation, as the basis of the transaction.” Furthermore, “our courts have long recognized that certain fiduciary duties are owed by a trustee to a beneficiary of the trust, an executor to the beneficiaries of an estate, and an attorney to a client. We have historically held that partners also owe certain fiduciary duties to one another.”\(^5\)

A. Fiduciary Duty Law For General Partnerships

The existence of fiduciary duties between partners in a general partnership can be traced back to Justice Cardozo’s opinion in *Meinhard v. Salmon*\(^6\) concerning the fiduciary duties of managing partners. Justice Cardozo wrote that “[a]s managing partner of their partnership enterprise, respondent owed his partners even a greater duty of loyalty than is normally required.” In Texas, it is a matter of law that a “partner in a general partnership owes his co-partners the highest fiduciary duty recognized in the law.”\(^7\)

Under the Texas Business Organizations Code (TBOC), a partner owes duties of loyalty and care to the partnership and the other partners in the partnership.\(^8\) Additionally, in the operation or in winding up the partnership, the partner has an obligation to exercise those duties in good faith and in a manner the partner reasonably believes to be in the best interest of the partnership.\(^9\) Finally, each partner has a duty to disclose complete and accurate information concerning the partnership to the other partners.\(^10\)

TBOC further describes what the partner’s duties of loyalty and care entail. Under Section 152.205, a partner’s duty of loyalty includes refraining from competing with the partnership, dealing adversely with the partnership, or dealing on behalf of a person who has an adverse interest to the partnership. The partner also has special obligations during windup scenarios to account to and secure for the partnership property, profit, or other benefits derived by the partner.\(^11\)


\(^9\) Id. § 152.204(b).

\(^10\) Id. § 152.213.

\(^11\) Id. § 152.205.
The partner’s duty of care requires the partner to act with the care an ordinary prudent person would exercise in similar circumstances.\textsuperscript{12} TBOC gives the partner room to make mistakes, stating that by itself an error in judgment does not constitute a breach of the duty of care.\textsuperscript{13} Finally, the partner is presumed to satisfy the duty of care if they act on an informed basis in good faith and in a manner the partner reasonably believes is in the best interest of the partnership.\textsuperscript{14}

A partnership can enhance or restrict a partner’s fiduciary duties in its governing documents. For example, the partnership agreement can override fiduciary duties provided under TBOC or common law, so long as it does not unreasonably restrict a partner’s right to books and records or completely eliminate the duties of loyalty and care.\textsuperscript{15} The partnership agreement can, however, define specific types of activities that do not violate the duty of loyalty and define the standard by which the duty of care is measured (as long as they are not manifestly unreasonable).\textsuperscript{16} Finally, the governing documents of the general partnership may provide for insurance or other arrangement to indemnify a partner.\textsuperscript{17}

**B. Fiduciary Duty Law For Limited Partnerships**

In limited partnerships, general partners have fiduciary duties by law to the partnership, to other general partners, and to the limited partners.\textsuperscript{18} Some courts have analogized the duties of a general partner in a limited partnership to that of a trustee. In *Crenshaw*, the court found that “[i]n a limited partnership, the general partner acting in complete control stands in the same fiduciary capacity to the limited partners as a trustee stands to the beneficiaries of the trust.”\textsuperscript{19} According to TBOC 153.152, a general partner in a limited partnership has the same rights and liabilities as a partner in a general partnership unless limited by the partnership agreement.\textsuperscript{20}

\begin{itemize}
\item \textsuperscript{12} Id. § 152.206(a).
\item \textsuperscript{13} Id. § 152.206(b).
\item \textsuperscript{14} Id. § 152.206(c).
\item \textsuperscript{15} Id. § 7.001; Id. § 152.002(b).
\item \textsuperscript{16} Id. § 152.002(b).
\item \textsuperscript{17} Id. § 8.002.
\item \textsuperscript{18} Id. § 153.152.
\item \textsuperscript{19} *Crenshaw v. Swenson*, 611 S.W.2d 886, 890 (Tex. Civ. App. -- Austin 1980).
\end{itemize}
Whereas application of fiduciary duties of a general partner in a limited partnership is settled law, the existence of fiduciary duties of a limited partner in the partnership is still questionable. On one hand, the “defaulting” mechanism in the limited partnership code may provide fiduciary duties by filling the gaps with applicable sections of the general partnership chapter. Therefore, although TBOC does not explicitly address fiduciary duties for limited partners, an argument could be made that the duties owed by a partner in a general partnership also apply to limited partners.

On the other hand, TBOC Section 153.003(b) states that the powers and duties of a limited partner shall not be governed by a provision of Chapter 152 (general partnerships) that would be inconsistent with the nature and role of a limited partner. Furthermore, a limited partner shall not have any obligation or duty of a general partner solely by reason of being a limited partner. Additionally, TBOC specifically limits the liability for partnership obligations of a limited partner unless the limited partner is also a general partner or participates in the control of the business. However, if the limited partner does participate in control of the partnership, they are estopped from denying liability to a third party who transacted with the limited partnership reasonably believing that the limited partner was a general partner. Since applying personal liability to limited partners would be inconsistent with the nature of the limited partnership (assuming the limited partner does not fall within the exception under 153.102(a)), a logical conclusion is that one’s mere status as a limited partner does not impose fiduciary duties.

Case law also has not settled whether limited partners owe fiduciary duties to other limited partners. Court decisions have fallen on both sides of the question. However, historical case law seems to suggest

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that fiduciary duties of limited partners should be decided on a case-by-case basis, depending on the degree of control the limited partner exerts.28

Recent case law supports this conclusion. In a 2012 case, the first district court said that “a party’s status as a limited partner does not insulate that party from the imposition of fiduciary duties that arise when a limited partner also takes on a non-passive role by exercising control over the partnership in a way that justifies the recognition of such duties or by contract.”29

C. Fiduciary Duty Law For Limited Liability Companies

Having only been recognized in Texas as a valid entity type in 199130, the existence of fiduciary duties within limited liability companies (LLCs) is still not completely settled. Not only is there little case law dealing with the subject, but also neither the Texas Limited Liability Company Act (TLLCA) (replaced by TBOC), nor the TBOC explicitly define fiduciary duties for LLCs. However, the fact that there are TBOC statutes that address elements of fiduciary duty for LLCs suggests that they do exist.31

On the other hand, it is settled that governing authorities have fiduciary duties to third parties doing business with the LLC based on agency law. TBOC Section 101.254 provides that “each governing person of a limited liability company and each officer or agent of a limited liability company vested with actual or apparent authority by the governing authority of the company is an agent of the company for purposes of carrying out the company's business.” Furthermore, acts by the governing person for the purpose of carrying out the ordinary course of business bind the LLC unless the governing person does not have actual authority and the third party has knowledge of the person’s lack of actual authority.32

Apart from their duties related to their position as agents to external parties, the LLC’s governing authority should expect that they could be held to have fiduciary duties outside of agency law. TBOC “implicitly recognize[s] that such persons are charged with a duty of care in their decision making.”33 “[M]anagers in a manager-managed LLC and members in a member-managed LLC should expect to be held to fiduciary duties similar to the duties of corporate directors or general partners.”34


31 Miller, Fiduciary duties, exculpation and indemnification in Texas business organizations, supra note 20 at 7.


34 Miller, Fiduciary duties, exculpation and indemnification in Texas business organizations, supra note 20 at 1.
However, Texas courts have not yet held that a fiduciary relationship exists as a matter of law between members. In *Gadin v. Societe Captrade*, the court noted that the existence of a fiduciary duty is a fact-specific inquiry that takes into account the contract governing the relationship and the relationships between the parties. 

Finally, TBOC allows for the company agreement to “expand or restrict any duties, including fiduciary duties, and related liabilities that a member, manager, officer, or other person has to the company or to a member or manager of the company.” Additionally, although TBOC does not mention specific fiduciary duties for governing persons in the LLC, it does allow for limited liability for transactions between the LLC and its governing persons or officers if the material facts of the transaction are disclosed and approved in good faith by the company’s governing authority or members.

**D. Fiduciary Duty Law For Corporations**

Corporate fiduciary duties are derived from common law; they are not specifically defined in the Texas Business Organizations Code. Case law generally recognizes that directors and officers owe the corporation duties of obedience, care, and loyalty. Shareholders, on the other hand, generally do not have fiduciary duties to other shareholders except in very limited circumstances, such as when one shareholder dominates management of a close corporation.

Generally, directors are protected by the business judgment rule. In *Gearhart Indus. v. Smith Int’l.*, the court held that “a corporate director who acts in good faith and without corrupt motive will not be held liable for mistakes of business judgment that damage corporate interests.”

Despite the protections of the business judgment rule, *Gearhart* specified that the fiduciary status of corporate directors imposes the duties of obedience, loyalty, and due care. The duty of obedience

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39 There is split authority as to whether the duty of care exists as a separate standalone duty, as in *Gearhart Indus., Inc. v. Smith Int’l, Inc.* Another leading Texas corporation case, *Int’l Bankers Life Ins. Co. v. Holloway*, only speaks to the duty of loyalty (duty of care is subsumed within loyalty).

40 *Gearhart Indus., Inc. v. Smith Int’l, Inc.*, 741 F.2d 707, 719 (5th Cir. 1984).


42 *Gearhart Indus., Inc. v. Smith Int’l, Inc.*, 741 F.2d 707, 721 (5th Cir. 1984).

43 *Gearhart Indus., Inc. v. Smith Int’l, Inc.*, 741 F.2d 707, 719 (5th Cir. 1984).
requires a director to avoid ultra vires and fraudulent acts. However, “Texas courts have refused to impose personal liability on corporate directors for illegal or ultra vires acts of corporate agents unless” they participated or had actual knowledge of the acts.

The duty of loyalty requires the director to act in good faith and not allow his personal interests to prevail over the interests of the corporation. Additionally, the governing person will be held to an extreme measure of candor, unselfishness, and good faith. “A corporate fiduciary is under obligation not to usurp corporate opportunities for personal gain”; transactions where the governing person derives personal gain are subject to the closest examination.

Finally, the duty of care requires the director to “be diligent and prudent in managing the corporation’s affairs” to the same degree that “an ordinarily prudent man would use under similar circumstances.” Given the business judgment rule, the standard for duty of care is quite low. Even as early as 1889, the Texas Supreme Court in Cates v. Sparkman protected actions of directors and officers that were done “irregularly, negligently, or imprudently, or are within the exercise of their discretion and judgment” in running the corporation. The Cates Court further stipulated that interference by the court is only justified for ultra vires, fraudulent, and injurious practices, abuse of power, and oppression of the rights of minority shareholders.

Like limited liability companies, the Texas Business Organizations Code allows corporations to limit fiduciary duties of governing persons. TBOC 21.418 stipulates that the governing person will not be held liable as a matter of law if certain conditions are met (i.e. full disclosure by the interested person and approval in good faith by disinterested directors or shareholders). Even if the director or officer does not meet the conditions in 21.418, they can still escape liability by showing that the transaction was fair to the corporation.

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48 Id. at 576
50 Cates v. Sparkman, 73 Tex. 619, 11 S.W. 846, 849 (1889).
51 Id.; see also Pace v. Jordan, 999 S.W.2d 615 (Tex. App.—Houston [1st Dist.] 1999, pet. denied).
52 For a detailed history and analysis of 21.418, see Val D. Ricks, Texas’ So-Called “Interested Director” Statute, 50 S. Tex. L. Rev. 129 (2008).
TBOC also allows for the restriction of liability through exculpation\textsuperscript{53} and indemnification\textsuperscript{54} in the governing documents of the corporation. However, a corporation cannot exculpate a governing person for a breach of loyalty, acts or omissions not in good faith, or a transaction in which the person received an improper benefit.\textsuperscript{55} The exculpation statutes can be thought of as generally permitting the elimination of the monetary damages for breach of the duty of care.\textsuperscript{56} Similarly, a corporation cannot indemnify a governing person not acting in good faith or reasonably believing they were acting in the corporation’s best interest.\textsuperscript{57}

Unlike corporate officers and directors, the law provides for no fiduciary duties between co-shareholders, even in close corporations.\textsuperscript{58} In \textit{Willis v. Donnelly}, the Texas Supreme Court found that “a co-shareholder in a closely held corporation does not as a matter of law owe a fiduciary duty to his co-shareholders. Instead, the existence of such a duty depends on the circumstances.”\textsuperscript{59} However, majority shareholders may owe limited fiduciary duties to minority shareholders if they dominate

\begin{thebibliography}{9}

\bibitem{54} Id. § 8.101.
\bibitem{55} Id. § 7.001(c).
\bibitem{56} Miller, \textit{Fiduciary duties, exculpation and indemnification in Texas business organizations, supra} note 20 at 5. See also Tex. Bus. Orgs. Code Ann. § 7.001(b) (Vernon 2008).
\bibitem{59} \textit{Willis v. Donnelly}, 199 S.W.3d 262 (Tex. 2006).
\end{thebibliography}
control over the business or in cases of minority shareholder oppression. Whether the actions of the majority shareholder constitute oppressive behavior is usually a question of law for the court.

### III. Pattern Jury Charges for Texas Business Fiduciaries

Texas has three primary pattern jury charges related to fiduciary duties in a business context: PJC 104.1, PJC 104.2, and PJC 104.3. As will be explained below, use of the pattern jury charges should be very limited. In most situations, these instructions lead to a questionable statement of the law; in some cases, they lead to a completely incorrect statement of the law.

The stated purpose of PJC 104.1 is to help the jury determine if an informal fiduciary relationship exists. According to the pattern jury charge, an informal fiduciary relationship exists if one party justifiably places their trust and confidence in another party to act in their best interest. Informal relationships are distinguished from formal fiduciary relationships, such as attorney-client, principal-agent, and partner-partner, which are fiduciary relationships as a matter of law.

Comments to the pattern jury charges suggest that once it is determined that a fiduciary duty exists, either by law or by the fact finder through PJC 104.1, pattern jury charges PJC 104.2 and PJC 104.3

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61 New York courts have found oppressive conduct when “the majority’s conduct substantially defeats the expectations that objectively viewed were both reasonable under the circumstances and were central to the minority shareholder’s decision to join the joint venture.” Additionally, the Oregon supreme court found that oppressive conduct was “burdensome, harsh and wrongful conduct, a lack of probity and fair dealing in the affairs of the company to the prejudice of some of its members, or a visible departure from the standards of fair dealing, and a violation of fair play on which every shareholder who entrusts his money to a company is entitled to rely.” Davis v. Sheerin, 754 S.W.2d 375, 381 (Tex. App. – Houston [1st Dist.] 1988, writ denied).

62 Id. at 380.

63 PJC 104.1 – Question and Instruction—Existence of Relationship of Trust and Confidence

Question – “Did a relationship of trust and confidence exist between Don Davis and Paul Payne? A relationship of trust and confidence existed if Paul Payne justifiably placed trust and confidence in Don Davis to act in Paul Payne’s best interest. Paul Payne’s subjective trust and feelings alone do not justify transforming arm’s length dealings into a relationship of trust and confidence.

Answer “Yes” or “No.”


64 Id.

65 PJC 104.2 – Question and Instruction—Breach of Fiduciary Duty With Burden on Fiduciary
should be used to determine if the fiduciary breached their duty. Additionally, the charges should be modified to include “additional duties imposed by statute, contract, or common law on a particular fiduciary relationship.”

PJC 104.2 addresses cases where the burden is on the fiduciary to show that they did not breach their fiduciary duty, such as an agent accused of a breach of loyalty. On the other hand, PJC 104.3 addresses cases where the burden is on the other party (“beneficiary”) to show that the fiduciary breached their duty. The pattern jury charge comments suggest that PJC 104.3 should be used when a presumption of

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Question – Did Don Davis comply with his fiduciary duty to Paul Payne?

[Because a relationship of trust and confidence existed between them,] [As Paul Payne’s attorney,] [Because they were partners,] [As Paul Payne’s agent,] Don Davis owed Paul Payne a fiduciary duty. To prove he complied with his duty, Don Davis must show –

a. The transaction[s] in question was fair and equitable to Paul Payne; and
b. Don Davis made reasonable use of the confidence that Paul Payne placed in him; and
c. Don Davis acted in the utmost good faith and exercised the most scrupulous honesty toward Paul Payne; and
d. Don Davis placed the interests of Paul Payne before his own, did not use the advantage of his position to gain any benefit for himself at the expense of Paul Payne, and did not place himself in any position where his self-interest might conflict with his obligations as a fiduciary; and
e. Don Davis fully and fairly disclosed all important information to Paul Payne concerning the transaction[s].

Answer “Yes” or “No.”

COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES—BUSINESS, CONSUMER, INSURANCE, EMPLOYMENT PJC 104.2 (2010) (Breach of Fiduciary Duty with Burden on Fiduciary).

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Question – Did Don Davis fail to comply with his fiduciary duty to Paul Payne?

To prove Don Davis failed to comply with his fiduciary duty, Paul Payne must show –

a. The transaction[s] in question [was/were] not fair and equitable to Paul Payne; or
b. Don Davis did not make reasonable use of the confidence that Paul Payne placed in him; or
c. Don Davis failed to act in the utmost good faith or exercise the most scrupulous honesty toward Paul Payne; or
d. Don Davis placed his own interests before Paul Payne’s, used the advantage of his position to gain a benefit for himself at the expense of Paul Payne, or placed himself in any position where his self-interest might conflict with his obligations as a fiduciary; or
e. Don Davis failed to fully and fairly disclose all important information to Paul Payne concerning the transaction[s].

Answer “Yes” or “No.”

COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES—BUSINESS, CONSUMER, INSURANCE, EMPLOYMENT PJC 104.3 (2010) (Breach of Fiduciary Duty with Burden on Beneficiary).

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66 PJC 104.3 – Question and Instruction—Breach of Fiduciary Duty With Burden on Beneficiary

67 Id. at 120.

68 Id. at 121.
unfairness does not arise and the burden of persuasion therefore does not shift to the fiduciary. A general partnership is an example of when the burden is on the plaintiff to show that the other partner breached their fiduciary duties; therefore, TPC 104.3 should be used.

IV. PROBLEMS WITH THE CURRENT FIDUCIARY DUTY PATTERN JURY CHARGES

As shown below, there are many problems with the current fiduciary duty pattern jury charges. PJC 104.1, PJC 104.2, and PJC 104.3 are incoherent, utilize outdated and inapplicable sources, and do not relate to current statutory or common law for Texas business entities.

A. PJC 104.1 has virtually no applicability to Texas business entities.

Despite the general advantages of pattern jury charges, use of PCJ 104.1 (existence of relationship of trust and confidence) could create confusion and erroneous jury instructions in many cases. PJC 104.1 was designed to address situations where there is an informal relationship of “trust and confidence” between two parties. Comments to the jury charge suggest that this type of relationship “may arise from moral, social, domestic, or purely personal relationships.”

Using the “trust and confidence” standard for determination of the existence of a fiduciary duty is incorrect when the fiduciary relationship exists as a matter of law. For example, this standard should never be used in situations involving directors or officers to their corporations, between general partners, and between general partners and limited partners. Even for simple principal-agent relationships, the “trust and confidence” standard is incorrect. According to Green v. H&R Block, the agent is a fiduciary of the principal as a matter of law. Additionally, the Restatement (Third) of Agency defines an agent as a fiduciary. Thus, the “trust and confidence” standard is generally inapplicable to fiduciary duties within business entities.

Additionally, application of PJC 104.1 for limited partnerships, limited liability companies, and close corporations is questionable. For these entity types, the existence of a fiduciary relationship is a fact question. However, in a limited partnership, the imposition of a fiduciary duty on a limited partner turns on the degree of control the partner exerts on the partnership. It has nothing to do with the “trust and confidence” that the other limited partners placed in that partner. Additionally, like limited partnerships, the existence of fiduciary duties between members of an LLC depends on the degree of control they exert. Finally, in close corporations, the imposition of fiduciary duties on a shareholder depends on the degree of domination of the corporation by the shareholder or in cases of minority shareholder oppression. The “trust and confidence” standard is simply inadequate even for situations where the application of a fiduciary duty isn’t a matter of law.

69 Id. at 122.

70 Id. at 123.


72 Restatement (Third) of Agency §1.01 (2006).
B. PJC 104.2 and 104.3 are outdated and do not reflect current law

In order to assess the general applicability of PJC 104.2 and PJC 104.3, one must determine how well the pattern jury charges reflect the fiduciary duty law for each entity type. As will be shown, the pattern jury charges do not match current law because the sources used to create the charges are outdated and inapplicable to modern business entities.

1. Outdated and inapplicable sources

Like PJC 104.1, PJC 104.2 and PJC 104.3 do not reflect current business entity fiduciary duty law. One reason for the mismatch may be that most of the cases used to derive the pattern jury charges are older than the defining cases for each entity type. For example, for both PJC 104.2 and PJC 104.3, the most recent case cited as a source was decided in 1992; most of the sources used were decided before the early 1950’s. The following cases shown below are cited as sources for PJC 104.2 and PJC 104.3.73

<table>
<thead>
<tr>
<th>Source</th>
<th>Year Decided</th>
<th>Type of Relationship</th>
</tr>
</thead>
<tbody>
<tr>
<td>Stevens County Museum v. Swenson</td>
<td>1974</td>
<td>Lawyer and client</td>
</tr>
<tr>
<td>Fit-Gerald v. Hull</td>
<td>1951</td>
<td>Unrelated parties in a joint venture</td>
</tr>
<tr>
<td>Crim Truck &amp; Tractor Co. v. Navistar Intern Trans Corp</td>
<td>1992</td>
<td>Franchisee and franchisor</td>
</tr>
<tr>
<td>Slay v. Burnett Trust</td>
<td>1945</td>
<td>Trustee to beneficiaries</td>
</tr>
<tr>
<td>Kinzbach Tool Co. v. Corbett-Wallace Corp.</td>
<td>1942</td>
<td>Sales transaction between 2 corps</td>
</tr>
<tr>
<td>Johnson v. Peckham</td>
<td>1938</td>
<td>Partners in a GP</td>
</tr>
<tr>
<td>Thigpen v. Locke</td>
<td>1962</td>
<td>Debtor and creditor</td>
</tr>
</tbody>
</table>

Sources this old are not useful for analyzing fiduciary relationships in modern business entities. Fiduciary duty law for directors and officers in corporations is a good example of how obsolete the pattern jury charges are. Although the seminal corporation case in Texas, *Int’l Bankers Life Ins. Co. v. Holloway* was decided in 1963, the current pattern jury charges do not accurately reflect corporate fiduciary law. Although *Holloway* discussed fiduciary duties of directors and officers related to the

73 Stephens County Museum, Inc. v. Swenson, 517 S.W.2d 257 (Tex. 1974); Fitz-Gerald v. Hull, 237 S.W.2d 256 (Tex. 1951); Crim Truck & Tractor Co. v. Navistar Int’l Transp. Corp., 823 S.W.2d 591 (Tex. 1992); Slay v. Burnett Trust, 187 S.W.2d 377 (Tex. 1945); Kinzbach Tool Co. v. Corbett-Wallace Corp., 160 S.W.2d 509 (Tex. 1942); Johnson v. Peckham, 120 S.W.2d 786 (Tex. 1938); Thigpen v. Locke, 363 S.W.2d 247 (Tex. 1962);
corporation\(^\text{74}\), some of the peripheral aspects of corporate fiduciary law, such as fiduciary duties between shareholders, were not decided until the 1980’s.\(^\text{75}\) As a result, PJC 104.2 and PJC 104.3 do not speak to shareholder oppression as a factor in determining breach of fiduciary duties in suits between shareholders.

The pattern jury charges are similarly outdated for limited liability companies, general partnerships, and limited partnerships. For example, LLCs weren’t even available in the United States until 1977, when a Texas oilman introduced the entity type in Wyoming; Texas legalized it as a valid entity type in 1991.\(^\text{76}\) Thus, the LLC entity type is too new to be reflected in the pattern jury charges.

Although general partnerships and limited partnerships have been around much longer than LLCs, fiduciary duties are still being defined today for these entity types. For example, \textit{McBeth v. Carpenter}, a major Texas case dealing with fiduciary duties of general partners and limited partners, was decided in 2009\(^\text{77}\). Given that the latest source for the pattern jury charges was decided in 1992, PCJ 104.2 and PCJ 104.3 do not reflect current law for these entity types.

Another important reason the pattern jury charges do not reflect current business entity law is that the source cases primarily relate to agent-principal, contract, or third party relationships. The only case listed as a source for PJC 104.2 and PJC 104.3 that concerns fiduciary duties within a business entity is \textit{Johnson}, dealing with fiduciary duties between partners in a general partnership, which was decided in 1938. None of the source cases concern fiduciary duties between directors or officers and their corporation, between shareholders, between governing authority and their LLC, between members of an LLC, or between limited partners in a limited partnership.

2. Mismatch to current business entity fiduciary duty law

Out of all the business entity types, the closest “fit” for the current pattern jury charges is fiduciary duty law for general partnerships. For example, TBOC (152.205 - .206) states that a partner has a duty not to deal adversely or compete with the partnership. This ties directly to PJC 104.2(d)\(^\text{78}\) and PJC 104.3(d) and is reasonably related to (a)\(^\text{79}\), (b)\(^\text{80}\), and (c)\(^\text{81}\) of PJC 104.2 and PJC 104.3. Additionally, TBOC 152.213

\(^{74}\) Int’l Bankers Life Ins. Co. v. Holloway, 368 S.W.2d 567, 576 (Tex. 1963)

\(^{75}\) Davis v. Sheerin in 1988; Gearhart in 1984


\(^{77}\) McBeth v. Carpenter, 565 F.3d 171 (5th Cir. 2009).

\(^{78}\) PJC 104.2(d) – “Don Davis placed the interests of Paul Payne before his own, did not use the advantage of his position to gain any benefit for himself at the expense of Paul Payne, and \textit{did not place himself in any position where his self-interest might conflict with his obligations as a fiduciary}…”

\(^{79}\) PJC 104.2(a) – “The transaction[s] in question was fair and equitable to Paul Payne…”

\(^{80}\) PJC 104.2(b) – “Don Davis made reasonable use of the confidence that Paul Payne placed in him…”
requires disclosure of information to the partnership. This requirement ties directly to PJC 104.2(e) and PJC 104.3(e). For similar reasons, PJC 104.2 and PJC 104.3 may be applicable to a general partner in a limited partnership.

On the other hand, there is no protection in the pattern jury charges for a mere error in judgment. Additionally, the “utmost good faith” and “most scrupulous honesty” standards called for by PJC 104.2 and PJC 104.3 do not coincide with current law. Taken together, the pattern jury charges place a much higher standard on the fiduciary, being difficult if not impossible to meet. Thus, application of PJC 104.2 and PJC 104.3 to general partners is questionable.

For a limited partner in a limited partnership, it is not entirely clear what fiduciary duties are owed and how they are breached. This is an area that is still evolving in the law. However, it is clear based on TBOC that if the limited partner acts as a general partner or exerts sufficient management control over the partnership that they will be held to general partner standards. They are also estopped from denying liability to a third party transacting with the partnership if the third party reasonably believes that, based on the conduct of the limited partner, that the limited partner was a general partner. There is no mention of degree of control or estoppel as factors for consideration in the current pattern jury charges. Thus, the charges are inapplicable to cases involving limited partners.

Similar to limited partnerships, fiduciary duty law is still evolving for LLCs. For example, there is still some question as to the duties owed by governing authority to members or whether fiduciary duties even exist between members of an LLC. However, given fiduciary duty law for LLCs should exhibit similarities to corporate fiduciary law, the pattern jury charges are most likely inapplicable to LLCs.

The pattern jury charges have very little connection to fiduciary duty law for corporations. For example, at common law, directors and officers have three fiduciary duties: duty of obedience, duty of care, and duty of loyalty. A governing person breaches the duty of obedience for fraudulent or ultra vires acts. Similarly, at common law, a director of officer can be found in breach of the duty of care if they have not diligently and prudently managed the corporate affairs. Although the requirements for duty of care are greatly tempered by the business judgment rule, they are still factors for consideration in corporate fiduciary law. The requirements for duty of obedience and duty of care are not found in the pattern jury charges.

The duty of loyalty imposed on directors and officers is similar to the requirements in the pattern jury charges, but nonetheless also incorrect. At common law, directors and officers must act in good faith and not allow their personal interests to prevail over the interests of the corporation. These

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81 PJC 104.2(c) – “Don Davis acted in the utmost good faith and exercised the most scrupulous honesty toward Paul Payne...”

82 PJC 104.2(e) – “Don Davis fully and fairly disclosed all important information to Paul Payne concerning the transaction[s]...”
requirements can be found in PJC 104.2 and PJC 104.3 (c)\textsuperscript{83} and (d).\textsuperscript{84} Unlike PJC 104.2 and PJC 104.3 (a)\textsuperscript{85} and (e)\textsuperscript{86}, however, at common law directors and officers are not required to show fairness or full disclosure unless they are interested in the transaction. On the contrary, under TBOC 21.418, interested directors and officers can escape liability by law if they can show the transaction was fair or that the transaction was fully disclosed and fully approved by a disinterested board of directors or shareholders. Thus, unlike PJC 104.2 and PJC 104.3, at common law the required elements for breach of fiduciary duty are different depending on whether the director or officer was interested in the transaction. Furthermore, if the director is interested in the transaction but they are able to meet the requirements of TBOC 21.418, they are not liable \textit{by law}. In that case, jury instructions are not needed at all because the matter is no longer a fact question.

The pattern jury instructions also do not reflect the law determining breach of fiduciary duties between shareholders. As noted above, fiduciary duties between shareholders have only been found when one of the shareholders sufficiently dominates the firm or in cases of minority shareholder oppression. PJC 104.2 and PJC 104.3 do not mention domination or oppression as a factor for consideration.

Despite the questionable applicability of the pattern jury charges in general partnerships, limited partnerships, LLCs, and corporations, they do seem to work well for cases based on simple agent-principal relationships. It was for these types of cases that PJC 104.2 and PJC 104.3 were designed. On the other hand, the pattern jury charges do not account for the impact of indemnification or exculpation provisions in partnership agreements, company agreements, shareholder agreements or other governing documents of the business entities. If any of these exist in a given case, they will generally trump common or statutory law and must be included for consideration in the jury charge.

C. The danger of the pattern jury charges as they exist today

Thankfully, it appears that use of PJC 104.1, 104.2, and 104.3 in business entity fiduciary duty cases has been limited. However, several courts have used the pattern instructions and consequently applied the incorrect rule of law. Even more alarming, there are most likely many other cases where the instructions were used as a “go-by” and not mentioned by name. The danger is that once a court has used the pattern jury instructions and applied an incorrect rule of law, precedent is set.

\textsuperscript{83} PJC 104.2(c) – “Don Davis acted in the \textit{utmost good faith} and exercised the \textit{most scrupulous honesty} toward Paul Payne...”

\textsuperscript{84} PJC 104.2(d) – “Don Davis placed the interests of Paul Payne before his own, \textit{did not use the advantage of his position to gain any benefit for himself at the expense of Paul Payne}, and did not place himself in any position where his self-interest might conflict with his obligations as a fiduciary...”

\textsuperscript{85} PJC 104.2(a) – “The \textit{transaction[s] in question was fair and equitable} to Paul Payne...”

\textsuperscript{86} PJC 104.2(e) – “Don Davis \textit{fully and fairly disclosed} all important information to Paul Payne concerning the transaction[s]...”
Lundy v. Masson is a good illustration of how courts have incorrectly used the pattern jury charges to 1) determine if a fiduciary relationship exists using PJC 104.1, and 2) determine if it has been breached using PJC 104.2.

In 2001, Marcus Masson, an orthopedic upper extremity surgeon, formed Global LLC to produce orthopedic surgical devices. Lundy was one of the four initial members of the limited liability company. Lundy was also hired to be President of Global LLC, commanding a $200,000 salary and a 20% ownership stake in Global. Global LLC was then changed to a corporation.

Over the next couple of years, the relationship between Masson and Lundy deteriorated as Lundy refused to provide financial statements to Masson. When Masson did finally obtain Global’s financials in 2003, he learned the company was $1.6 million in debt. Later, a court appointed receiver determined that Global had no remaining employees, no money in its bank accounts, no insurance, no inventory capable of being sold, and the accounts receivable were uncollectable. Masson filed suit against Lundy for breach of fiduciary duty; the court appointed receiver cross-claimed on behalf of Global against Lundy also for breach of fiduciary duty.87

The first part of the trial dealt with Masson’s personal charge against Lundy for breach of fiduciary duty. In instructing the jury, the court utilized PJC 104.1 to determine if a fiduciary duty existed between Lundy and Masson based on a relationship of trust and confidence.88 The court then instructed the jury that if the fiduciary relationship existed, they were to determine if Lundy had breached his duties to Masson based on questions derived from PJC 104.2.89

The second part of the trial dealt with Global’s charge against Lundy for breach of fiduciary duty. The jury was first instructed that Lundy, as President of Global, had a fiduciary duty to Global as a matter of law.90 Because Lundy was presumed to have fiduciary duties to Global, the jury was only instructed to determine if Lundy breached those duties based on PJC 104.2.91

The Lundy court applied the pattern jury charges as they were written. However, doing so meant the court applied the incorrect rule of law. For example, in Masson’s personal charge against Lundy, the court used PJC 104.1 to determine the existence of Lundy’s fiduciary duty to Masson because of their contractual relationship.92 However, due his position as President of Global Corporation, Lundy was a fiduciary by law. Furthermore, even if the court determined that Lundy’s fiduciary duty to Masson was

88 Id. at 502.
89 Id. at 505.
90 Id. at 507.
91 Id. at 508.
92 Id. at 502.
based on his position of President of Global LLC rather than Global Corporation, he still would have been liable because he had actual authority. The court should not have used PJC 104.1 because the existence of Lundy’s fiduciary duty was not a jury question.

The Lundy court’s application of PJC 104.2 to determine if Lundy breached his fiduciary duty to Global Corporation was also improper. As shown above, PJC 104.2 and PJC 104.3 do not reflect fiduciary duty law for corporations. Because the pattern jury charges were available, the court used them to craft the questions for the jury and applied the incorrect rules of law.

V. CONCLUSIONS AND RECOMMENDATIONS

Based on the lack of similarity between business entity fiduciary duty law and the current pattern jury charges, the best solution is a complete re-write of the pattern jury charges. As they are currently written, the pattern jury charges will lead to an incorrect statement of law in cases involving limited partnerships, limited liability companies, and corporations, and a questionable statement of law for general partnerships.

In the meantime, the pattern jury charges may work as a “stop-gap measure” (with great caution) for general partners, whether in a general partnership or limited partnership. They also might work in cases involving governing authority and outside parties where the fiduciary relationship is based on agency law. It remains to be seen whether the pattern jury charges will work for relationships between limited partners or between members of an LLC. These are areas of law that are still evolving.

On the other hand, the current pattern jury charges will not work for fiduciary duty cases involving corporations. The pattern jury charges do not consider the requirements for the duties of obedience and care; in addition, they are deceptively similar, but fundamentally different, for the duty of loyalty. Additionally, the charges do not consider the special requirements of domination or oppression required to prove breach of fiduciary duty between shareholders.

If a complete re-write is infeasible, the usefulness of the pattern jury charges can be greatly enhanced by making the following three improvements. First, comments should be added to the pattern jury charges calling attention to any contractual impacts on fiduciary duties, such as company agreements, partnership agreements, or other governing documents. The requirements to show a breach of fiduciary duty can be completely different if the fiduciary has been contractually exculpated or indemnified. Second, comments should be added noting that caution should be used when utilizing the pattern jury charges for relationships between limited partners in a limited partnership and between members in a LLC. Given the current uncertainty in the fiduciary duty law for these cases, the pattern jury charges as written may or may not apply. Finally, comments should be added to PJC 104.2 and PCJ 104.3 noting that they are generally not applicable in corporate cases. Making these simple changes will help the pattern jury charges be more useful, understandable, and accurate.