

COMMENTS

SANCTIONING LAWLESSNESS: THE NEED TO APPLY WHISTLEBLOWER AND WRONGFUL DISCHARGE PROTECTIONS TO MEMBERS OF LIMITED LIABILITY COMPANIES

Stephanie Buck

I. INTRODUCTION

IN recent decades, courts have created public policy exceptions to the doctrine of employment-at-will, particularly to protect whistleblowers from retaliation for reporting misconduct of employers. Various federal and state statutes protecting whistleblowers have had the same effect. However, in *Bohatch v. Butler & Binion*, the Texas Supreme Court refused to apply a public policy exception to the at-will partnership.¹ Given the infancy of the limited liability company (“LLC”) as a business entity,² whether this holding will carry over to prevent public policy exceptions to the at-will LLC remains to be seen. This comment argues that the *Bohatch* holding is particular to partnerships and should not be applied to LLCs. Part II provides a basic overview of the partnership, LLC, and corporation while focusing on the liability and authority of their respective participants. Part III provides an overview of the history and purpose of whistleblower and wrongful discharge protections afforded to employees. Part IV reasons that unlimited personal liability, coupled with the broad apparent authority of partners, necessitates a need for utmost trust among partners and, consequently, a need for unhindered means of expulsion. This need of partnerships outweighs the public policy interest in preventing misconduct. Part V asserts that members of LLCs have limited liability, minimizing the need for trust between members. Thus, public policy interests should prevail, and protections for whistleblower members of LLCs should be derived from those afforded to employees. Part VI addresses potential arguments against providing members of LLCs with whistleblower protections. Last, part VII examines the Uniform Limited Liability Company Act (“ULLCA”) and the Uniform Partnership Act of 1997 (“RUPA”). In addition, part VII explores the Acts’

1. 977 S.W.2d 543, 546-47 (Tex. 1998).

2. The first limited liability company act was enacted in Wyoming in 1977. UNIF. LTD. LIAB. CO. ACT, Prefatory Note (1995).

usage of the “good faith and fair dealing” obligation as another means for courts to protect whistleblower members and partners by determining that such expulsions are performed in “bad faith,” rather than creating a public policy exception.

II. OVERVIEW OF BUSINESS ENTITIES

A. *Partnership*

The general partnership, the most basic and easily formed business entity, is governed in most states by an adoption of one of two uniform acts: The Uniform Partnership Act of 1914³ (“UPA”) or RUPA.⁴ How the courts will treat the partners’ rights and duties will depend on which act is currently adopted by the state. However, the core features of the partnership generally remain the same between the two acts.⁵ Absent contrary partnership agreements, these rules provide the default provisions.⁶ Under both acts, partners, without contrary agreement, function both as owners and managers and possess certain rights and obligations based on their status as each.⁷ This comment focuses on those rights and obligations that play a role in the concept of wrongful discharge and whistleblower protections: the personal liability flowing from ownership and the fiduciary duties and authority stemming from management powers.

1. *Liability*

Regardless of the applicable law, one of the most distinguishing characteristics of partnerships is the unlimited personal liability of partners. Under UPA, all partners are jointly and severally liable for torts committed in the ordinary course of the business by a partner.⁸ In addition, partners are jointly liable for the contractual obligations and debts of the partnership.⁹ Under RUPA, joint and several liability extends to partners for all obligations of the partnership.¹⁰ This comment later proposes that this possibility for partners to be held personally liable for actions of other partners, regardless of their own participation, greatly contributes to the need for the utmost confidence and trust among partners.

3. UNIF. PARTNERSHIP ACT (1914) (amended 1997) [hereinafter U.P.A.].

4. REV. UNIF. PARTNERSHIP ACT (1997) [hereinafter R.U.P.A.].

5. Both acts include the same definition of a partnership. U.P.A. § 6; R.U.P.A. § 101(6). Both Acts provide that partners are agents of the partnership U.P.A. § 9 (1); R.U.P.A. § 301(1), with some degree of personal liability. U.P.A. § 15; R.U.P.A. § 306.

6. U.P.A. § 8; R.U.P.A. § 103(a).

7. *See* R.U.P.A. § 401(f) (establishing partners’ status as managers); R.U.P.A. § 202(a) (acknowledging the status of partners as owners).

8. U.P.A. § 15.

9. *Id.*

10. R.U.P.A. § 306.

2. *Authority*

The unlimited liability of individual partners is coupled with great authority to bind the partnership to third parties. This power stems from the right of all partners to participate in the management of the partnership.¹¹ Though somewhat different in text, both UPA and RUPA establish similar provisions regarding the authority of partners.¹² Partners are agents of the partnership for the purpose of the partnership's business.¹³ Consequently, every partner has actual authority and, therefore, the right and power to bind the partnership.¹⁴ However, the partnership agreement can limit this authority by leaving only some partners with authority to act for the partnership or by limiting the scope of particular partners' authority.¹⁵ Although a partner's actual authority may be limited, the partner may still have the power to bind the partnership through the partnership law rendition of apparent authority.¹⁶ Acts of a partner "for apparently carrying on in the ordinary course the partnership business or for business of the kind carried on by the partnership" are binding on the partnership.¹⁷ Generally, one can view this idea as "apparent authority by position."¹⁸ In other words, the partnership's admission of the partner as such creates a reasonable belief by a third party that the partner has authority to act in carrying on the "ordinary course of business."¹⁹ A partner's actions bind the partnership if those actions appear to carry on partnership business in an ordinary way.²⁰ However, if the partner lacked any authority to act and the third party knew of this lack of authority, the act is not binding.²¹

Essentially, RUPA and UPA, as well as basic agency law, bestow partners with broad authority. Even if an individual partner lacks any actual authority via the partnership agreement, as an agent, a partner has apparent authority regarding the entire scope of the partnership's business and can still bind the entire partnership.²² Defrocking a partner of authority is difficult, especially in the case

11. U.P.A. § 18(e); R.U.P.A. § 401(f).

12. *See* U.P.A. § 9; R.U.P.A. § 301 (both noting that each partner has rights in the administration of the partnership).

13. U.P.A. § 9; R.U.P.A. § 301.

14. U.P.A. § 9; R.U.P.A. § 301.

15. R.U.P.A. § 301 cmt. 2.

16. Under general agency law, apparent authority is defined as "the power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations." RESTATEMENT (THIRD) OF AGENCY § 2.03 (Tentative Draft No. 2, 2001).

17. R.U.P.A. § 301(1).

18. DANIEL S. KLEINBERGER, *AGENCY, PARTNERSHIPS, AND LLCs: EXAMPLES & EXPLANATIONS* 286-87 (2d ed. 2002).

19. RESTATEMENT (THIRD) OF AGENCY § 3.03 cmt. e(2) (Tentative Draft No. 2, 2001) ("[E]ach partner's apparent authority is co-extensive with the scope of the partnerships's business.").

20. *Id.*

21. U.P.A. § 9; R.U.P.A. § 302.

22. U.P.A. § 9, R.U.P.A. § 301.

of apparent authority because it is based on third-party perception.²³ Without notice, third parties may reasonably presume the defrocked partner has authority for all acts that appear to be for carrying on the ordinary business of the partnership.²⁴ Thus, to truly eliminate a partner's apparent authority, without expulsion or dissolution, the partnership must notify *all* potential third parties.²⁵ In effect, partners have vast power to bind the partnership, and the removal of that power is an extremely daunting, if not impossible task.²⁶

3. *Fiduciary Duties*

Courts consistently recognize that a fiduciary relationship exists between partners with regard to all partnership matters.²⁷ In the classic case, *Meinhard v. Salmon*, Justice Cardozo described the nature of this relationship, stating that partners owe one another the "duty of finest loyalty."²⁸ Such a duty requires a strict standard of behavior of "[n]ot honesty alone, but the punctilio of an honor the most sensitive."²⁹ UPA contains no definitive statement of fiduciary duties. However, section 21 of UPA describes the partner's fiduciary duty "to account to the partnership."³⁰ Courts apply a variety of fiduciary duties to general partners on the basis of general agency principles that agents are fiduciaries.³¹ Generally, these duties consist of loyalty, care, good faith and fair dealing, and honesty or disclosure.³²

However, section 404 of RUPA attempted to craft more precise fiduciary duty provisions for partnerships. Section 404 of RUPA limits a partner's fiduciary duties to those of loyalty and care with an exhaustive list of what these duties include.³³ Although common law defines the duty of good faith and fair dealing as a fiduciary duty,³⁴ RUPA defines this as an "obligation," not a "duty," with which all partners must accord upon discharging duties or exercising rights.³⁵

23. U.P.A. § 9; R.U.P.A. § 301.

24. U.P.A. § 9; R.U.P.A. § 301.

25. KLEINBERGER, *supra* note 18, at 294.

26. *See* U.P.A. § 9(4); R.U.P.A. § 301(1). R.U.P.A. permits notification as sufficient for to infer a third party's knowledge of a lack of authority, while U.P.A. requires actual knowledge.

27. *See, e.g.,* *Couri v. Couri*, 447 N.E.2d 334, 337 (Ill. 1983) ("The basic partnership principles involved here are well settled. A fiduciary relationship existed between the partners and embraced all matters relating to the partnership business."); *Lorain Nat'l Bank v. Saratoga Apartments*, 572 N.E.2d 198, 200 (Ohio Ct. App. 1989) ("The trend throughout the country recognizes that a fiduciary relationship exists between partners and embraces all matters relating to the partnership business.").

28. 164 N.E. 545, 546 (N.Y. 1928).

29. *Id.*

30. U.P.A. § 21.

31. *See* RESTATEMENT (SECOND) OF AGENCY § 1(1) (1958).

32. 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, 114 (1997).

33. R.U.P.A. § 404.

34. *See, e.g.,* *Bohatch v. Butler & Binion*, 977 S.W.2d 543, 545 (Tex. 1998).

35. R.U.P.A. § 404(d).

This obligation is based on contract concepts and the consensual nature of a partnership.³⁶ Rather than an independent duty, it is an ancillary obligation that exists when partners discharge all duties, including the fiduciary duties of loyalty and care.³⁷ RUPA intentionally left the term “good faith and fair dealing” undefined to allow courts to develop its meaning through case law.³⁸ This new perspective of “good faith and fair dealing,” along with the flexibility allotted to the courts in determining its exact meaning,³⁹ may give those jurisdictions adopting RUPA a new standpoint on expulsion of partners for whistleblowing.

4. *Expulsion*

As an agency relationship, partnerships are at-will in nature.⁴⁰ “[A]t the heart of the partnership concept is the principle that partners may choose with whom they wish to be associated.”⁴¹ A partnership at-will⁴² is a partnership created without a specified time or event upon which it will dissolve and it exists so long as the parties continue their mutual consent.⁴³ Because they maintain a voluntary relationship, partners always have the power, though not necessarily the right, to end their relationship with the partnership.⁴⁴ However, issues arise as to when the partnership itself can end that relationship involuntarily by expelling a partner.

Partners have no common law or statutory right to expel another member from the partnership.⁴⁵ To expel a partner, the partnership agreement must contain a provision for expulsion under certain conditions.⁴⁶ Both UPA and RUPA recognize the partnership’s ability to expel a partner pursuant to the partnership agreement.⁴⁷ The partnership agreement can provide the procedural means for expulsion as well as the grounds for expelling a partner.⁴⁸ Agreements can also allow for no-cause expulsion in which the expelling partners may expel another

36. *Id.* § 404 cmt. 4.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Bohatch*, 977 S.W.2d at 545.

41. *Gelder Med. Group v. Webber*, 363 N.E.2d 573, 577 (N.Y. 1977).

42. R.U.P.A. § 101(8).

43. 59 AM. JUR. 2D *Partnership* § 82 (2004).

44. R.U.P.A. § 602(a).

45. *Gelder*, 363 N.E.2d at 577 (upholding a no-cause expulsion provision contained in a partnership agreement); *Millet v. Slocum*, 167 N.Y.S.2d 136, 140 (N.Y. App. Div. 1957) (“Partners have no common-law or statutory right to expel or dismiss another partner from the partnership. They may, however, provide in their partnership agreement for expulsion under prescribed conditions which must be strictly applied.”).

46. *Cadwalader, Wickersham & Taft v. Beasley*, 728 So. 2d 253, 256 (Fla. Dist. Ct. App. 1998).

47. U.P.A. § 31(d), R.U.P.A. § 601(3).

48. *See, e.g., Fisher v. Parks*, 618 N.E.2d 1202, 1208-09 (Ill. App. Ct. 1993) (regarding the procedural requirements of expulsion provided within a partnership agreement).

without stating any reason for their actions.⁴⁹ Under these clauses, partnerships become especially at-will and, as a result, are potentially permitted to expel partners for reasons that may be against public interests as long as the expulsion is in accordance with the partnership agreement.⁵⁰ However, issues of good faith and fair dealing may come into play.

B. Corporations

The corporation lies at the other end of the business entity spectrum. As opposed to the general partnership, with ownership, liability, authority, and control possessed en masse by each partner, the corporate structure divides these elements between various categories of participants. However, the issue of whistleblowing applies only to corporate officers and employees.⁵¹

1. Liability

The limited liability of all corporate owners is one of the corporation's most distinguishing characteristics. As a separate entity, only the corporation itself is liable for corporate debts and obligations.⁵² The liability of shareholders, who are the ultimate owners of the corporation, is limited to their initial financial investment.⁵³ It is this limited liability that ultimately allows the whistleblower protections to extend up to corporate officers, who generally possess the greatest individual authority of corporate participants.⁵⁴

2. Authority

Authority in a corporation flows from the board of directors.⁵⁵ Borrowing from agency law, corporate law treats officers and employees as agents.⁵⁶ The board grants officers actual authority⁵⁷ and gives officers the greatest individual power to bind the corporation.⁵⁸ Similar to partners in general partnerships,

49. *Holman v. Coie*, 522 P.2d 515, 524 (Wash. Ct. App. 1974) (upholding the expulsion of a partner without cause pursuant to a partnership agreement).

50. *Id.* See also *Bohatch v. Butler & Binion*, 977 S.W.2d 543 (Tex. 1998) (at-will partnership agreement provided requirements for the means of expulsion but not the reasons for it).

51. See *id.* (refusing to apply whistleblower protection to a member of an at-will partnership).

52. MODEL BUS. CORP. ACT § 6.22 (1984) [hereinafter M.B.C.A.]

53. *Id.*

54. See M.B.C.A. § 8.41 (officers have the authority to perform duties set forth in bylaws and prescribed by the board of directors).

55. M.B.C.A. § 8.03.

56. *Herald Co. v. Seawell*, 472 F.2d 1081 (10th Cir. 1972) (establishing that officers have a quasi-fiduciary relationship to the corporation due to their agency status).

57. M.B.C.A. § 8.41.

58. *Penn v. Pemberton & Penn, Inc.*, 53 S.E.2d 823, 829 (Va. 1949) (“The responsibility of formulating general policies of a corporation is lodged in its board of directors. The duty of executing the plans of the board rests upon the officers selected or appointed by the directors.”).

officers also have extensive apparent authority,⁵⁹ which broadens their ability to bind the corporation.⁶⁰ Similar to partners, certain officers obtain broad apparent authority by position. Based upon the officer's position in the corporation, third parties can make general assumptions with regard to the officer's authority.⁶¹ The officer's appointment functions as the corporation's manifestation of authority. Under basic agency principles, this manifestation is necessary to establish a third party's reasonable belief in the officer's actual authority.⁶² By holding the position, an officer can bind the corporation without any actual authority through transactions within the ordinary scope of his particular position.⁶³ Presidents or chief executive officers ("CEOs"), who possesses similar authority of general partners, hold the most expansive apparent authority and can bind the corporation on all matters in the ordinary course of business.⁶⁴ Although authority emanates from the board, the fact that the board of directors can act only as a unit limits this authority.⁶⁵ Unlike officers, individual board members cannot act alone to bind the corporation without specific authority.⁶⁶

C. Limited Liability Companies

Unlike corporations and general partnerships, the LLC is a relatively new business entity. The first LLCs were formed under a Wyoming LLC statute in 1977.⁶⁷ However, LLCs became popular when a 1988 Internal Revenue Service ("IRS") ruling interpreted Wyoming's statute and established that the LLC would be taxed as a partnership.⁶⁸ Today, every state has adopted its own LLC legislation.⁶⁹ The LLC is a hybrid of the corporation and partnership entities, allowing for the tax benefits and flexible control of a partnership with the limited liability for owners of a corporation.⁷⁰ The typical state LLC act is a combination

59. *Prezioso v. Cameron*, 559 So. 2d 423, 423 (Fla. Dist Ct. App. 1990) (permitting a third party doing business with the corporation to rely on an officer's status alone to determine there was authority to bind the corporation in execution of mortgage instruments).

60. RESTATEMENT (THIRD) OF AGENCY § 3.03 cmt. e(1) (Tentative Draft No. 2, 2001).

61. ALAN R. PALMITER, *CORPORATIONS: EXAMPLES & EXPLANATIONS* 510 (4th ed. Aspen Publishers 2003).

62. RESTATEMENT (THIRD) OF AGENCY §§ 1.03, 3.03 (requiring that a third party's reasonable belief in an agent's authority must be traceable to some manifestation by the principal).

63. PALMITER, *supra* note 61, at 510.

64. *Powell v. MVE Holdings*, 626 N.W.2d 451, 458 (Minn. Ct. App. 2001) ("[B]ecause corporate presidents generally control and supervise a corporation's business ... contracts made by a corporation's president in the ordinary course of business are presumed to be within the president's authority.").

65. *Hecht v. Resolution Trust Corp.*, 635 A.2d 394, 398 (Md. 1994).

66. *Jackson v. County Trust Co.*, 6 A.2d 380, 382 (Md. 1939).

67. UNIF. LTD. LIAB. CO. ACT, Prefatory Note (1995). The Wyoming LLC statute is codified at WYO. STAT. ANN. §§ 17-25-101-136 (1989 & Supp. 1995).

68. Rev. Rul. 88-76, 1988-2 C.B. 360.

69. UNIF. LTD. LIAB. CO. ACT, Prefatory Note (1996) [hereinafter U.L.L.C.A.].

70. *Id.*

of provisions from partnership and corporate law.⁷¹ Thus, when adjudicating cases under LLC statutes, courts must determine whether to apply partnership or corporate precedent. Courts determine precedent based on the nature of the problem and based on the business form from which the statutory provision is obtained.⁷²

To provide consistency among the states with regards to LLC acts and to promote the development of precedential case law,⁷³ the Uniform Limited Liability Company Act⁷⁴ (“ULLCA”) was adopted in 1994 and amended in 1995. However, the majority of states had already adopted their own LLC acts by 1994.⁷⁵ The ULLCA had very limited acceptance among the states, partly because the act borrows many RUPA provisions and contains more partnership concepts than most existing state statutes.⁷⁶ Moreover, in many aspects, LLC statutes have become uniform without adopting ULLCA.⁷⁷

1. *Liability*

The LLC business form provides limited liability to all members, a benefit commonly associated with corporations.⁷⁸ The limited liability shield protects all participants, regardless of their participation in management of the business.⁷⁹ This permits flexibility in the internal management of the company while maintaining the liability shield for all members.⁸⁰ Thus, the LLC affords the benefits of the corporation, without corporate limitations, regulations, or taxation.⁸¹

2. *Authority and Management*

Absent contrary agreement, the ULLCA provides that an LLC is member-managed, and each member has equal rights in the company’s management and

71. David M. Hastings, Annotation, *Construction and Application of Limited Liability Company Acts*, 79 A.L.R. 5th 689 (2005).

72. *Id.*

73. U.L.L.C.A. Prefatory Note.

74. For simplicity, U.L.L.C.A. provisions will be used in this comment as typical examples of LLC regulation, but individual state statutes may differ. These variations in state statutes have minimal effect on the proposals presented in this article.

75. U.L.L.C.A. Prefatory Note.

76. ROBERT W. HAMILTON & JONATHAN R. MACEY, *CASES AND MATERIALS ON CORPORATIONS INCLUDING PARTNERSHIPS AND LIMITED LIABILITY COMPANIES* 208 (8th ed. 2003).

77. Larry E. Ribstein & Bruce H. Kobayashi, *LLCs, LLPs and the Evolving Corporate Form*, 66 U. COLO. L. REV. 947, 947 (1995).

78. HAMILTON & MACEY, *supra* note 76, at 200.

79. *Id.* at 15. As opposed to the limited partnership, for instance, in which the limited partner, generally afforded the liability shield, may become personally liable for certain business obligations if he (or she) participates in the control of the business. R.U.P.A. § 303.

80. HAMILTON & MACEY, *supra* note 76, at 15.

81. *Id.*

conduct.⁸² This is essentially identical to a general partnership.⁸³ Consequently, most decisions can be made by a majority.⁸⁴ However, unlike partnerships, an LLC can choose its governance structure and opt for a manager-managed structure, which is similar to a limited partnership or corporation. This form empowers only managers, and not mere members, with the inherent rights and duties connected with management.⁸⁵ Unlike the ULLCA, most LLC state statutes provide the corporate-type, manager-managed form as the default.⁸⁶

The designation of the LLC as member or manager-managed generally determines who the agents are in the LLC and, as a result, who possesses authority to bind the company.⁸⁷ Absent a contrary agreement in a member-managed LLC, each member is an agent and has authority to bind the company.⁸⁸ In a manager-managed LLC, only the managers have such power.⁸⁹ The members are typically not agents without some other actual authority granted to them.⁹⁰ Members of a member-managed company and managers of a manager-managed company also have apparent authority regarding all acts “for apparently carrying on in the ordinary course the company’s business.”⁹¹ The member-managed/manager-managed distinction can cause confusion, especially with regard to apparent authority. Because non-managing members of manager-managed LLCs “do not have the apparent authority to bind the company,”⁹² third parties cannot automatically assume that a member of an LLC possesses authority to bind the company for acts apparently in the ordinary course of business.⁹³ Thus, a third party must determine whether a member is from a member or manager-managed company.⁹⁴ Regardless, in LLCs, either managers or members have broad authority to bind the company, which is equivalent to that of general partners.⁹⁵

3. Duties

The formation of the LLC as either member-managed or manager-managed determines the duties of individuals within the company. In a member-managed

82. U.L.L.C.A. § 203(a)(6).

83. U.L.L.C.A. § 404(a)(1).

84. *Id.* § 404(a)(2).

85. *Id.* § 404(b)(1).

86. HAMILTON & MACEY, *supra* note 76, at 208.

87. *Id.* § 203 official cmt.

88. *Id.* § 301.

89. *Id.* § 301(b)(1).

90. *Id.*

91. *Id.* § 301(a)-(b).

92. *Id.* § 301 cmt.

93. Mitchel Hampton Boles & Susan Pace Hamill, *Agency Powers and Fiduciary Duties Under the Alabama Limited Liability Company Act: Suggestions for Future Reform*, 48 ALA. L. REV. 143, 154 (1996).

94. However, existing agency law will determine the scope of the member’s apparent authority where the LLC statute does not. *Id.*

95. *See* U.L.L.C.A. § 301.

LLC, members, as agents, have fiduciary duties of loyalty and due care.⁹⁶ In a manager-managed LLC, the managers have the same duties arising from their agency status.⁹⁷ Courts perceive the obligation of good faith and fair dealing⁹⁸ under the ULLCA as a contract-based, ancillary obligation rather than a separate fiduciary duty. This is due to the ULLCA's adoption of RUPA's fiduciary duty and obligation provisions, despite the fact that LLCs have both partnership and corporate characteristics.⁹⁹ Because members of manager-managed LLCs are not agents of the company, many statutes hold that there is no fiduciary relationship. Thus, members in these types of LLCs have no fiduciary duties based on their membership alone.¹⁰⁰

4. *Expulsion*

As with the partner relationship, LLCs are at-will in nature, and, by default, will be held to terminate at-will unless a duration is specified.¹⁰¹ A member of an LLC generally has the power to dissociate rightfully or wrongfully from the LLC.¹⁰² The ability for an LLC to expel a member is consistent with this at-will nature.¹⁰³ Expulsion can only occur if the operating agreement contains a provision for expulsion and the members perform the expulsion in accordance with the agreement.¹⁰⁴ As with partnerships, the agreement can provide for a no-cause expulsion, allowing members to expel another member for any reason or no reason at all.¹⁰⁵ Under the ULLCA, managers of manager-managed LLCs can only be removed by a "vote, approval, or consent of a majority of the members."¹⁰⁶

III. PROTECTIONS FOR WHISTLEBLOWERS: EXCEPTIONS TO EMPLOYMENT-AT-WILL

Current whistleblower protections apply only to "employees."¹⁰⁷ Though definitions of the term "employee" may vary, the employment relationship

96. U.L.L.C.A. § 409(a).

97. *Id.* § 409(h)(2).

98. *Id.* § 409(d).

99. Callison, *supra* note 32, at 162.

100. *See* U.L.L.C.A. § 409(h)(1).

101. *Id.* § 203 cmt.

102. *Id.* § 602(a).

103. *Id.* § 601.

104. *See* Brazil v. Rickerson, 268 F. Supp. 2d 1091, 1099 (D. Mo. 2003).

105. *See* McGee v. Best, 106 S.W.3d 48, 65 (Tenn. Ct. App. 2002) (holding that a member of an LLC was not wrongfully terminated "where there [was] no provision in the Operating Agreement [that stated that members] could be terminated only for cause").

106. U.L.L.C.A. § 404(b)(3)(i).

107. This article does not attempt to focus on the specific definition of an employee or explore when less powerful members of LLCs begin approaching "employee" status. Rather, these provisions should be applied to members of LLCs to serve the same public policy purposes as when applied to employees.

generally requires an employer-principal's control or right to control the physical conduct of an employee-agent.¹⁰⁸ As an agency relationship, employment is an at-will relationship.¹⁰⁹ Thus, both parties may terminate the relationship at will, and employers can dismiss employees for good cause, no cause, or bad cause.¹¹⁰ This doctrine is deeply rooted in U.S. history;¹¹¹ however, in the latter half of the twentieth century, courts and legislatures developed exceptions to the doctrine.¹¹² These exceptions were created to prohibit terminations of employees that were contrary to public policy and the public interest.¹¹³

All fifty states have enacted some type of law limiting employers' rights to terminate at-will employees,¹¹⁴ and there are statutory protections for whistleblowers in the vast majority of states.¹¹⁵ The federal government has enacted over twenty-five laws that protect whistleblowers,¹¹⁶ including statutes created to protect federal employee whistleblowers¹¹⁷ and anti-retaliation provisions within statutes to help further a statute's cause.¹¹⁸ Because these laws prohibit employers from discharging or retaliating against employees who report or object to wrongdoing in the workplace, they function to deter workplace misconduct, particularly by the employer, by giving employees a statute-based cause of action.

In *Petermann v. International Brotherhood of Teamsters Local 396*, a California court of appeals first recognized the tort of wrongful discharge in violation public policy.¹¹⁹ The court held that an employer could be liable for wrongful discharge after firing an employee for his refusal to commit perjury, based on the public policy of encouraging truthful testimony.¹²⁰ This public policy exception to the traditional employment-at-will doctrine allows a terminated employee to recover damages if the employer fired the employee for reasons contrary to public policy or the interests of society.¹²¹ Though there is no exact definition of public policy, *Petermann* explored the term and noted that it is

108. RESTATEMENT (SECOND) OF AGENCY § 2 (1958).

109. *Shoppe v. Gucci Am. Inc.*, 14 P.3d 1049 (Haw. 2000).

110. *Payne v. Western & Atl. R.R. Co.*, 81 Tenn. 507, 520 (Tenn. 1884) (overruled on other grounds).

111. See Deborah A. Ballam, *Exploding the Original Myth Regarding Employment-At-Will: The True Origins of the Doctrine*, 17 BERKELEY J. EMP. & LAB. L. 91, 94 (1996).

112. See Deborah A. Ballam, *Employment-At-Will: The Impending death of a Doctrine*, 37 AM. BUS. L.J. 653, 654 (2000); Elletta Sangrey Callahan & Terry Morehead Dworkin, *The State of State Whistleblower Protection*, 38 AM. BUS. L.J. 99, 105-106 (2000).

113. SHAWE & ROSENTHAL, LLP, EMPLOYMENT LAW DESKBOOK § 259.04 (Elizabeth Torphy-Donzella & Bruce S. Harrison eds., 2003).

114. *Id.*

115. MARK ROTHSTEIN & LANCE LIEBMAN, EMPLOYMENT LAW: CASES AND MATERIALS 1000 (5th ed. Foundation Press 2003).

116. SHAWE & ROSENTHAL, *supra* note 113, § 259.04[5].

117. Whistleblower Protection Act of 1989, 5 U.S.C. § 2303 (2006).

118. See, e.g., Occupational Safety and Health Act, 29 U.S.C. § 660(c) (2006); Clean Air Act, 42 U.S.C. § 7622(a) (2006).

119. 344 P.2d 25 (Cal. Ct. App. 1959).

120. *Id.* at 27-28.

121. SHAWE & ROSENTHAL, *supra* note 113, § 259.05.

a “principal of law which holds that no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good.”¹²² The court also acknowledged that public policy consists of principles of law that restrict contract or private dealings for the common good.¹²³

Both whistleblower statutes and the common law public policy exception vary significantly from state to state. Whistleblower statutes can vary in the type of person protected, to whom he or she must report, and the nature of the underlying activity.¹²⁴ Similarly, states provide various forms of public policy exceptions to employment-at-will; a few states provide no common law remedy at all.¹²⁵ Courts may provide a broad range of protection for discharge, limit it to particular circumstances, or limit the source from which the public policy is derived, such as for criminal acts alone.¹²⁶ Generally, public policy exceptions protect four types of people: those that have (1) refused to act in an unlawful manner; (2) attempted to perform a duty prescribed by statute; (3) exercised a right specifically conferred by law; or (4) reported employer misconduct—the “whistleblower.”¹²⁷

Despite the existence of the wrongful discharge cause of action, courts are often reluctant to alter employment-at-will relationships.¹²⁸ Courts will often refuse to create exceptions to employment-at-will on the basis that legislatures should create public policy exceptions.¹²⁹ For example, in *Weider v. Skala*, the Court of Appeals of New York declined to adopt the idea of wrongful discharge in violation of public policy because “such a significant change in the law is best left to the legislature.”¹³⁰

A recent whistleblower provision within the Sarbanes-Oxley Act attempts to eliminate the “patchwork and vagaries” of current state laws regarding whistleblowers by creating uniform protections for those who report auditing and accounting fraud.¹³¹ The Act expands federal whistleblower protections, subjecting companies that retaliate against fraud whistleblowers to significant criminal liability.¹³² The Act was in response to incidences such as the Enron

122. *Petermann*, 344 P.2d at 27 (quoting *Safeway Stores v. Retail Clerks Int’l Ass’n*, 261 P.2d 721, 726 (Cal. 1953)).

123. *Id.*

124. SHAWE & ROSENTHAL, *supra* note 113, § 259.04[5][b].

125. *See, e.g.*, *Wieder v. Skala*, 609 N.E.2d 105, 107 (N.Y. 1992).

126. SHAWE & ROSENTHAL, *supra* note 113, § 259.05[a]-[b].

127. ROTHSTEIN & LIEBMAN, *supra* note 115, at 921.

128. *Sabetay v. Sterling Drug*, 506 N.E.2d 919, 923 (N.Y. 1987).

129. *See* *Murphy v. Am. Home Prods.*, 448 N.E.2d 86, 89 (N.Y. 1983).

130. *Wieder*, 609 N.E.2d at 110 (quoting *Sabetay*, 506 N.E.2d at 923).

131. William R. McLucas & Mark M. Oh, *Whistleblowing: Protection of Corporate Officials and Employees Who Provide Evidence of Fraud Under the Sarbanes-Oxley Act of 2002*, in *CORPORATE GOVERNANCE 2004*, at 61, 72 (PLI Corporate Law & Practice, Course Handbook Series No. B-1411, 2003) (quoting 148 CONG. REC. S7391, S7430 (daily ed. July 26, 2002)).

132. *Id.* at 64.

scandal and occurred at the peak of an ongoing trend for accountability and responsibility of corporate entities.¹³³

IV. COURTS' REFUSAL TO PROTECT WHISTLEBLOWING PARTNERS IN *BOHATCH V. BUTLER & BINION*

In *Bohatch v. Butler and Binion*,¹³⁴ the Texas Supreme Court addressed the issue of implementing a public policy exception to the partnership-at-will doctrine. The court decided that those protections afforded to whistleblowing employees should not extend to whistleblowing partners.¹³⁵

In that case, Colette Bohatch, a partner of the law firm Butler & Binion, reported to the managing partner what she, in good faith, believed to be over-billing by another partner.¹³⁶ The District of Columbia Rules of Conduct, applicable to both attorneys in the case, required attorneys to report any misconduct of fellow partners.¹³⁷ Failure to do so would have resulted in disciplinary action against Bohatch. After her report, Bohatch was expelled from the partnership.¹³⁸ The partnership agreement for the firm provided for expulsion. However, because there were no provisions regarding the grounds for expulsion, the clause was, in effect, a no-cause expulsion provision.¹³⁹ Bohatch brought suit against the firm for breach of fiduciary duty and breach of the partnership agreement.¹⁴⁰

In its opinion, the Texas Supreme Court gave three main points of focus for refusing to give Bohatch a cause of action as a whistleblower: (1) the definition of "good faith"; (2) the at-will nature of partnerships; and (3) the need for utmost trust and confidence between partners.

First, the court recognized that the partner relationship "is fiduciary in character, and imposes upon all the participants the obligation of loyalty to the joint concern and of the utmost good faith, fairness, and honesty in their dealings with each other with respect to matters pertaining to the enterprise."¹⁴¹ The court cited various cases containing examples of grounds for expulsion found not to be in breach of fiduciary duty.¹⁴² For example, a partnership could expel a partner without a breach of fiduciary duty if based on a legitimate business purpose.¹⁴³ The court also cited cases holding that partners could be expelled "to protect

133. E.g., Joan Colson, Comment, *Rule of Ethics or Substantive Law: Who Controls and Individual's Right to Choose a Layer in Today's Corporate Environment*, 38 J. MARSHALL L. REV. 1265, 1266 (2005).

134. 977 S.W.2d 543 (Tex. 1998).

135. *Id.* at 547.

136. *Id.* at 544.

137. *Id.* at 549.

138. *Id.* at 545.

139. *Id.* at 546.

140. *Id.* at 544.

141. *Id.* at 545 (quoting *Fitz-Gerald v. Hull*, 237 S.W.2d 256, 264 (Tex. 1951)).

142. *Id.* at 546.

143. *Id.*

relationships both within the firm and with clients,¹⁴⁴ as well as cases holding that partnerships could expel a partner to resolve a “fundamental schism,” without violating the duty of good faith.¹⁴⁵ In noting these cases, the court affirmed the appellate court’s finding that to violate a fiduciary duty and, thus be in “bad faith,” the expulsion must be for “self-gain.”¹⁴⁶ The court then analogized the case to instances where expulsions occurred for business purposes or resolution of policy disputes. Thus, the Texas Supreme Court determined that partnerships could expel a partner for bringing accusations against another partner without a breach of fiduciary duty.¹⁴⁷

Second, the court relied on the at-will nature of partnerships in justifying its refusal to create a limited duty for partners to retain a whistleblowing partner. The court stated, “partners have no obligation to remain partners [because] at the heart of the partnership concept is the principle that partners may choose with whom they wish to be associated.”¹⁴⁸

Last, the court focused on the need for confidence and trust among partners, stating that “a partnership exists solely because the partners choose to place personal confidence and trust in one another.”¹⁴⁹ The court further reasoned that the charges Bohatch made “may have a profound effect on the personal confidence and trust essential to the partner relationship. Once such charges are made, partners may find it impossible to continue to work together to their mutual benefit and the benefit of their clients.”¹⁵⁰ The court found the trust relationship necessary to the mere existence of the partnership, which could not survive accusations by one partner against another.¹⁵¹

Ultimately, the court refused to recognize that the fiduciary relationship of partners requires an exception to the at-will partnership¹⁵² and found that public policy requires no duty for a partnership to retain a whistleblower partner.¹⁵³ The court found that the interests of partnerships in having the utmost trust and personal confidence among partners outweighed the public interest in discouraging non-compliance with the rules of professional conduct.¹⁵⁴ Therefore, the need to expel partners in order to maintain trust within the firm, coupled with the at-will nature of partnerships, prevented the creation of an exception to that at-will nature based on public policy interests.¹⁵⁵

144. Bohatch v. Butler & Binion, 977 S.W. 2d 543, 546 (Tex. 1998).

145. *Id.* (quoting Waite v. Sylvester, 560 A.2d 619, 623 (N.H. 1989)).

146. *Id.* at 545.

147. *Id.* at 546.

148. *Id.* at 545 (quoting Gelder Med. Group v. Webber, 363 N.E.2d 573, 577 (N.Y. 1977)).

149. *Id.* at 546.

150. *Id.* at 546-47.

151. *Id.* at 547.

152. *Id.* at 546-47.

153. *Id.*

154. Bohatch v. Butler & Binion, 977 S.W.3d 543, 546-47 (Tex. 1998).

155. *Id.*

V. BROAD APPARENT AUTHORITY AND PERSONAL LIABILITY OF PARTNERS
AS THE BASIS FOR LACK OF WHISTLEBLOWER PROTECTION

The *Bohatch* court focused on the at-will nature of partnerships when refusing to impose a duty on partnerships to retain a whistleblower partner.¹⁵⁶ However, this has little weight when one considers that the employment relationship is also at-will in nature, and protections for whistleblowers have created an exception. Though hesitant in some situations, courts have recognized circumstances in which public policy interests prevail over the at-will nature of employment.¹⁵⁷ Yet, in *Bohatch*, a strong public policy interest, evidenced by a code of conduct, failed to create an exception to at-will partnerships.¹⁵⁸

It would be far too simple to contend that the *Bohatch* court was simply wrong and that courts should treat at-will employment and at-will partnerships equally. Rather, this comment reasons that it is the distinguishing characteristics of partnerships, beyond that of their at-will nature, which exclude the adoption of public policy exceptions in this area. It is the broad apparent authority of partners coupled with their unlimited personal liability that ultimately outweighs public interests in limiting the at-will nature of the relationship. Because this combination of features is particular to partnerships, not LLCs, the court's refusal to apply public policy exceptions to partnerships in *Bohatch* should not prevent their application to LLCs.

The Texas court in *Bohatch* also found that the partnerships' interest in utmost trust and confidence between partners necessitated uninhibited expulsion, which outweighed public policy.¹⁵⁹ Courts found personal confidence essential to the very existence of the partnership; without it, partners would find it impossible to continue to work together.¹⁶⁰ This need for utmost personal trust and confidence is the result of the broad apparent authority and unlimited liability particular to partners, and it distinguishes partnerships from LLCs when weighing interests of public policy against the at-will nature of the entity.

Other courts have recognized the special relationship between partners, which results in a need for utmost personal confidence and trust¹⁶¹ and the need for unrestrained expulsion. In *Holman v. Coie*, the Court of Appeals of Washington acknowledged that "[t]he foundation of a professional relationship is personal confidence and trust. Once a schism develops, its magnitude may be exaggerated

156. *Id.*

157. *Gantt v. Sentry Ins.*, 824 P.2d 680, 684 (Cal. 1992) (overruled on other grounds) ("Indeed, following the seminal California decision in *Petermann v. International Brotherhood of Teamsters* ... the vast majority of states have recognized that an at-will employee possesses a tort action when he or she is discharged for performing an act that public policy would encourage, or for refusing to do something that public policy would condemn.") (internal citation omitted).

158. *Bohatch*, 977 S.W.2d at 547.

159. *Id.* at 546-47.

160. *Id.*

161. *See Tucker v. Ellbogen*, 793 P.2d 592, 597 (Colo. Ct. App. 1989) ("Partners stand in a relationship of trust and confidence to each other."); *Heller v. Hartz Mountain Indus., Inc.*, 636 A.2d 599, 603 (N.J. Super. Ct. Law Div. 1993) ("relationship is one of trust and confidence").

rightfully or wrongfully to the point of destroying a harmonious accord. When such occurs, an expeditious severance is desirable.”¹⁶² Perhaps this relationship is best described by the saying that “when a businessman selects a partner, he comes dangerously close to the situation he faces when he selects a wife.”¹⁶³

The intimate relationship between partners is easy to see in the historical, tight-knit, smaller general partnerships where partners work closely together and share equal rights and duties.¹⁶⁴ “[T]his conception of partnership, however, is incongruent with current mega-partnerships.”¹⁶⁵ Partnerships have evolved in both size and complexity with some reaching up to 700 members with locations across the globe.¹⁶⁶ Given these changes in partnerships, it is difficult to rationalize the need for utmost trust and confidence among partners simply based on their intimate relationship. Yet, courts continue to note the existence of such a need.¹⁶⁷ Therefore, it seems that it is not the intimacy of the partner relationship, nor the size of the partnership itself, that requires the need for utmost trust.

Consequently, this comment reasons that it is the particular situation a partner puts himself into upon becoming a partner—that of unlimited personal liability for the obligations of the partnership—that creates this need for utmost trust. Not only does the partner have unlimited liability for these obligations, but other partners, by their very status, have great authority to create such obligations.¹⁶⁸ As previously asserted, it is this unlimited personal liability coupled with broad apparent authority that creates a need for the utmost trust and confidence among partners. For instance, courts can find a single partner personally liable for the liabilities of the partnership, which other partners can create through their extensive authority. Thus, there is a great need to trust those that can create these liabilities.

It follows that the need for partnerships to provide their own means of expulsion of partners is essential to this notion of utmost trust. Because partners can eventually be held personally liable for the actions of other partners, they need to be able to expel members that they do not trust. The infringement on the at-will nature of the partnership has vast negative effects because not only must partners retain a partner whom they do not trust, but they can still be held personally liable for the binding actions of the partner.¹⁶⁹ The difficulty in

162. *Holman v. Coie*, 522 P.2d 515, 524 (Wash. Ct. App. 1974).

163. *Hishon v. King & Spalding*, 467 U.S. 69, 77-78 (1984) (quoting Senator Cotton’s defense of a Title VII amendment to Congress, 110 CONG. REC. 13,085 (1964)).

164. See Joel Bannister, *In Search of a Title: When Should Partners be Considered “Employees” for Purposes of Federal Employment Antidiscrimination Statutes?*, 53 U. KAN. L. REV. 257, 276 (2004) (commenting on the evolution of partnerships away from those “whose organizational structure inherently limits the control of the partnership over its partners”).

165. *Id.*

166. *Id.* (noting the increase of the King & Spalding partnership from 100 to 700 attorneys).

167. See *Holman*, 522 P.2d at 524 (“The foundation of a professional relationship is personal confidence and trust.”); *Boswell v. Gillett*, 295 S.W.2d 758, 763 (Ark. 1956) (“A partnership is a relationship of trust and confidence.”).

168. See U.P.A. § 9; R.U.P.A. § 301.

169. U.P.A. § 15; R.U.P.A. § 306 (establishing partners’ personal liability).

defrocking a partner of apparent authority leaves the remaining partners virtually helpless with their own personal properties at stake.

Courts must balance the interest of the partnership in easily expelling partners against the public policy interests in preventing and discouraging misconduct. The *Bohatch* court recognized the strong policy implications for protecting a whistleblower partner of a law firm, such as Colette Bohatch, but found these interests outweighed by the need for trust among partners.¹⁷⁰

We are sensitive to the concern expressed by the dissenting Justices that “retaliation against a partner who tries in good faith to correct or report perceived misconduct virtually assures that others will not take these appropriate steps in the future.” However, the dissenting Justices do not explain how the trust relationship necessary both for the firm’s existence and for representing clients can survive such serious accusations by one partner against another.¹⁷¹

Thus, partnerships’ need for utmost trust, which flows from the individual partners’ inherent authority and unlimited personal liability, is not outweighed by public policy.¹⁷²

In addition, partnerships can hire employees, who, as agents, can bind the partnership through actual or apparent authority.¹⁷³ Partners have some interest in trusting their employees because employee acts that are binding on the partnership can ultimately result in personal liability of the partners.¹⁷⁴ However, the apparent authority of employees differs greatly from that of partners. Generally, employees have little or no apparent authority¹⁷⁵ compared to the broad apparent authority general partners possess from their status as partners.¹⁷⁶ Furthermore, employees may also have apparent authority based upon their position under basic agency law principles.¹⁷⁷ However, the scope of this authority will generally be extremely limited, as a third party’s reasonable belief that the employee has authority only extends to “acts typical of an agent in such a position.”¹⁷⁸ Conversely, the scope of a partner’s apparent authority is vast and “co-extensive with the scope of the partnership’s business.”¹⁷⁹ In order to bind the partnership, an act of a partner must only have the appearance of carrying on

170. *Bohatch v. Butler & Binion*, 977 S.W.2d 543, 547 (Tex. 1998).

171. *Id.* (citation omitted).

172. *Id.*

173. RESTATEMENT (THIRD) OF AGENCY § 3.03 cmt. e(2) (Tentative Draft No. 2, 2001).

174. U.P.A. § 15; R.U.P.A. § 306.

175. 2 WILLIAM MEADE FLETCHER & CAROL A. JONES, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 481 (perm. ed. rev. vol. 2006).

176. *See* R.U.P.A. § 301(1) (all partners have authority for acts “for apparently carrying on in the ordinary course of the partnership business”).

177. RESTATEMENT (THIRD) OF AGENCY § 2.03 cmt. b (Tentative Draft No. 2, 2001) (“[A] principal’s appointment of an agent in a particular position is a substantial basis for apparent authority.”).

178. *Id.* § 2.03 cmt. b.

179. *Id.* § 3.03 cmt. e(2).

the business in the ordinary way.¹⁸⁰ While the apparent authority of employees is limited to the authority generally associated with their specific position,¹⁸¹ partners' apparent authority parallels the business of the partnership.¹⁸²

The termination of the apparent authority of employees also lacks the problems experienced in attempting to defrock partners of their apparent authority. Apparent authority ends only when it is no longer reasonable for a third party to believe an agent has actual authority to act regardless of the termination of actual authority.¹⁸³ Due to the vast apparent authority of partners,¹⁸⁴ third parties, without notice of a partner's lack of actual authority, can reasonably presume a partner has authority so long as the act appears to be in the ordinary course of business.¹⁸⁵ Thus, to defrock a partner of this broad apparent authority, the partnership would have to notify all potential third parties.¹⁸⁶ On the contrary, employees have little or no apparent authority,¹⁸⁷ and their potential to create liabilities for the partnership through such means is limited. If an employee does have apparent authority by position, this will be fairly insignificant relative to that of partners because authority will only reach "acts typical of an agent in such a position."¹⁸⁸ Consequently, because employees can rarely create partnership liabilities based upon their positions, a partnership can essentially terminate any apparent authority by providing notice of the termination to third parties with whom the employee had previously dealt.¹⁸⁹ Because of the lesser apparent authority of employees as well as the ease in terminating this authority relative to partners, it follows that a partnership has less of an interest in trusting employees than it does in the utmost trust required among partners.

One can contrast this need of utmost trust within partnerships to corporations at the opposite end of the business entity spectrum. As previously asserted, it is the combination of broad apparent authority and unlimited liability in partnerships that creates the need for utmost trust and ease of expulsion that outweighs public interests in creating an exception to the at-will nature of partnerships. Thus, in corporations, the limited liability of the shareholders who are the essential owners of the corporation mitigates this need. Officers of a corporation are most similar to general partners because the officers hold the bulk of authority to bind the corporation. Like partners, they have apparent authority by their very status as officers, and thus, a broad ability to bind the

180. R.U.P.A. § 301(1).

181. RESTATEMENT (THIRD) OF AGENCY § 1.03 cmt. c (Tentative Draft No. 2, 2001).

182. *Id.* § 3.03. cmt. e(2).

183. *Id.* § 3.11(1)-(2).

184. *See* R.U.P.A. § 301(1).

185. *Id.*

186. KLEINBERGER, *supra* note 18, at 294.

187. 2 FLETCHER & JONES, *supra* note 175, § 481.

188. RESTATEMENT (THIRD) OF AGENCY § 2.03 cmt. b (Tentative Draft No. 2, 2001).

189. *Id.* § 3.11 cmt. c.

corporation.¹⁹⁰ However, unlike partners, officers have whistleblower protections¹⁹¹ despite this broad authority to create liabilities for the corporation.

The corporation and the board of directors have some need for trust and confidence in these officers who effectively have authority to bind the corporation comparable to that of general partners.¹⁹² Through their very status, certain officers can create liabilities for the corporation.¹⁹³ As a result, the corporation needs to trust them completely and have efficient means of officer removal if there is a lack of this confidence and trust. This is evident in the various statutes permitting officer removal without cause¹⁹⁴ as well as the allowance of no-cause removal provisions in corporate bylaws.¹⁹⁵ Yet, despite this need for trust and efficient removal of officers, public policy ultimately prevails over this interest.

Consequently, officers have a cause of action for wrongful discharge in violation of public policy as well as protections under whistleblower statutes.¹⁹⁶ It follows that the limited personal liability for shareholders allows public policy interests to outweigh their interest in unhindered removal of officers. With only the assets of the corporation at stake, there is less need to remove officers without question.

It is important to note the difference between an “employee” and an “officer.” It would be far too simple to say that officers are, at least to some degree, “employees” of the corporation and, therefore, receive whistleblower protections. The relationship of the individual to the corporation differs between these positions. Officers function *as* the corporation,¹⁹⁷ “a mere employment, however liberally compensated, does not rise to the dignity of office.”¹⁹⁸ The manner of creation of the job between officers and mere employees varies as well. The charter or bylaws create an officer position and the board elects the officer, while an officer generally creates employment of others.¹⁹⁹ “One, deriving its existence from the other, and being dependent upon that other for its continuation, is necessarily restricted in its powers and duties.”²⁰⁰

The power to bind the corporation is most important. Like partners, officers, as opposed to employees, have broad apparent authority by their positions to

190. *Id.* § 3.03 cmt. e(1).

191. *See generally* *Murcott v. Best Western Int’l, Inc.*, 9 P.3d 1099 (Ariz. Ct. App. 2000) (suit for wrongful discharge brought by whistleblowing officer of non-profit corporation).

192. *See* RESTATEMENT (THIRD) OF AGENCY § 3.01 cmts. e(1), e(2) (Tentative Draft, 2001) (commenting on the apparent authority of officers and partners based on their positions).

193. For example, the president can generally bind the corporation for contracts made in the ordinary course of business. *Powell v. MVE Holdings, Inc.*, 626 N.W.2d 451, 458 (Minn. Ct. App. 2001).

194. *See, e.g.*, *Leson Chevrolet, Inc. v. Trapp*, 391 So. 2d 1371, 1373 (La. Ct. App. 1980).

195. *See generally* *Griffith v. Sprowl*, 91 N.E. 25 (Ind. Ct. App. 1910).

196. *See generally* *Murcott*, 9 P.3d at 1099.

197. 18B AM. JUR. 2d *Corporations* § 1342 (2004).

198. *Vardeman v. Penn. Mut. Life Ins. Co.*, 54 S.E. 66, 67 (Ga. 1906) (clarifying that the terms officer and employee are not interchangeable).

199. *Id.*

200. *Id.*

create corporate liabilities.²⁰¹ This distinction plays a role in the degree of trust shareholders must possess in officers as opposed to employees; officers have much more extensive ability to injure the corporation through binding obligations.²⁰² Although officers are within the broad definition of “employees,”²⁰³ and are arguably under more control from the corporation than a partner from the partnership, this has little effect on their apparent authority to bind the corporation.²⁰⁴ The corporation must have a greater degree of trust and confidence in them and, thus, a greater interest in easily expelling them if that confidence is lacking. Yet, this need for unimpeded rights of expulsion is constrained by public policy exceptions and whistleblower protections.²⁰⁵

VI. MEMBERS OF LLCs SHOULD RECEIVE WHISTLEBLOWER PROTECTIONS

As previously suggested, only the combination of expansive apparent authority based on position and unlimited personal liability can create the need for a level of requisite trust and unhindered expulsion substantial enough to outweigh public policy interests. Accordingly, members or managers of LLCs should receive wrongful discharge and whistleblower protections due to members’ limited liability. The current existence of protections, or lack thereof, offered to the other participating actors in partnerships and corporations supports this contention.

One can see the existence of expansive apparent authority as grounds for refusing whistleblower protections when comparing the employee of a partnership to a partner of a partnership. The law affords the employee protections while it does not afford the partner the same protections. Clearly, because there is personal liability of the partners, there is a need to trust employees who also function as agents of the partnership and create liabilities. However, this authority is limited.²⁰⁶ Employees, as such, are subject to the control of their partnership employer.²⁰⁷ More important, employees lack the broad apparent authority that partners have by their mere status as general partners.²⁰⁸ Therefore, the need of confidence and trust in employees is greatly

201. *See* *Howe v. Provident Loan & Investment Co.*, 265 N.W. 255, 258 (Neb. 1936) (jury instruction presuming that employees had the same apparent authority to enter agreements as executive officers was found to be erroneous).

202. *See* 2 FLETCHER CYCLOPEDIA OF PRIVATE CORP. § 481 (2005) (employees have little or no apparent authority).

203. M.B.C.A. § 1.40(8).

204. For example, the president of the corporation, although an employee, has apparent authority similar to that of partners for acts apparently in the ordinary course of business. *See* *Powell v. MVE Holdings, Inc.*, 626 N.W.2d 451, 458 (Minn. Ct. App. 2001).

205. *See, e.g.,* *Murcott v. Best Western Int’l, Inc.*, 9 P.3d 1099 (Ariz. Ct. App. 2000) (wrongful discharge suit brought by an officer).

206. 2 FLETCHER CYCLOPEDIA OF PRIVATE CORP. § 481 (2005).

207. 27 AM. JUR. 2D *Employment Relationship* § 3 (2004).

208. Employees’ authority based on their position only extends to “acts typical of an agent in such a position.” RESTATEMENT (THIRD) OF AGENCY § 2.03 cmt. b (Tentative Draft No. 2, 2001).

limited, as they do not have the broad, virtually irremovable, authority as partners.²⁰⁹ It follows that a partnership has less of an interest in removing employees without hindrance, and courts allow public policy interests to prevail over the at-will employment relationship. In contrast, the partner possesses expansive apparent authority²¹⁰ and the partnership has the need of utmost trust and confidence among partners as well as a means of unquestioned expulsion.²¹¹

Similarly, one can see the effect of personal liability, or lack thereof, when contrasting corporate officers and general partners who possess comparable expansive apparent authority by position.²¹² Therefore, corporations and partnerships, respectively, have a need to trust these parties. The major difference lies in the fact that partners have unlimited personal liability²¹³ as opposed to corporate shareholders, whose liability is limited to their investment.²¹⁴ Thus, the interest of partners in personal trust and confidence among each other is much greater because of what is at risk.

Because members of LLCs lack personal liability, the law should protect them by wrongful discharge and whistleblower provisions. Without this liability, the interest in personal confidence and trust among members is diminished and should be outweighed by public policy interests in preventing misconduct. Unlike partnerships, the LLC lacks the need for the “personal confidence and trust essential to the partner relationship”²¹⁵ that is “necessary ... for the [partnership’s] existence.”²¹⁶ The reasoning in *Bohatch* is particular to partnerships and their need for easy expulsion of distrusted partners based on their vulnerable position. The limited liability of LLC members lessens the risk. Consequently, this decreased personal risk also lessens the LLC’s interest in the ability of unhindered expulsion of members. Thus, this interest in expulsion is no longer strong enough to outweigh public policy interests because the members are liable only up to their investment.

Generally, courts adopt either corporate or partnership law when dealing with issues regarding LLCs, depending on whether the aspect of the LLC at issue is more corporate- or partnership-like.²¹⁷ In regard to wrongful discharge protections, the effect of limited liability of members of LLCs, as opposed to partnerships, carries great weight in establishing the level of trust and confidence necessary among participants. Because of this, courts should abstain from applying partnership law, and particularly the *Bohatch* holding, to LLCs; rather,

The scope of a partner’s apparent authority is “co-extensive with the scope of the partnership’s business. *Id.* § 3.03. cmt. e(2).

209. KLEINBERGER, *supra* note 18, at 294 (stating that a partnership must generally notify all potential third parties to defrock a partner of apparent authority).

210. RESTATEMENT (THIRD) OF AGENCY § 3.03 cmt. e(2) (Tentative Draft No. 2, 2001).

211. *See Bohatch v. Butler & Binion*, 977 S.W.2d 543, 546-47 (Tex. 1998).

212. RESTATEMENT (THIRD) OF AGENCY § 3.03 cmts. e(1), e(2) (Tentative Draft No. 2, 2001) (noting the apparent authority of corporate officers and partners).

213. U.P.A. § 15; R.U.P.A. § 306.

214. M.B.C.A. § 6.22.

215. *Bohatch*, 977 S.W.2d at 546-47.

216. *Id.* at 547.

217. Hastings, *supra* note 71, § 2(a).

they should look to corporate law and the wrongful discharge protections afforded to officers. LLC members (or managers in a manger-managed LLC) are similar to corporate officers in that they possess broad apparent authority to bind the entity. Furthermore, in both LLCs and corporations, the entity “owners” are only liable up to their investment. Therefore, just as officers of a corporation, LLC members should be afforded wrongful discharge and whistleblower protections. With the lack of personal liability, and hence limited interest in unhindered rights of expulsion, public policy interests should prevail.

VII. POTENTIAL BASES FOR DENYING WHISTLEBLOWER PROTECTIONS TO MEMBERS OF LLCs

Thus far, the focus of this comment’s analysis has been on the asserted basis for *not* applying whistleblower and wrongful discharge protections to parties other than employees. This is consistent with the focus in *Bohatch*, finding that this basis was the need for utmost trust and confidence among partners.²¹⁸ Given the strong similarities of employees and officers to members of LLCs, as well as the policy reasons for the very existence of whistleblower statutes and public policy exceptions to at-will employment, courts should regard LLCs in the same way they regard at-will employees and officers. Therefore, courts should not ask *why* these protections should be extended to members of LLCs—but *why not?*

The argument that LLCs are at-will in nature is of little influence in concluding that members should not receive whistleblower protections. The employment at-will doctrine is deeply rooted in American history, but courts have found exceptions necessary.²¹⁹ The interest of a member in choosing with whom he shares his membership is comparable to employers’ interests in running a business with the employees (and officers) and in a manner as they deem fit.²²⁰ Absent contrary agreement, employment, LLCs, and partnerships all exist as at-will agency relationships. However, only in the employment context are there exceptions to this at-will status when courts find that public policy interests outweigh the interests in the at-will relationship.²²¹ Thus, there must be characteristics of partnership and LLC relationships that greatly distinguish them from the employment relationship to an extent that public policy interests are either not a concern or are outweighed by interests in a truly at-will relationship. As proposed throughout this article, with regard to partnerships, these characteristics are the combination of apparent authority and personal liability of partners. Since members of LLCs lack the personal liability of partners, some other justification for any refusal to extend them protection must exist.

218. *Bohatch*, 977 S.W.2d at 546.

219. See Ballam, *supra* note 112, at 654.

220. ROBERT N. COVINGTON & KURT H. DECKER, *EMPLOYMENT LAW IN A NUTSHELL* 330 (2d ed. 2002).

221. *D’Ulisse-Cupo v. Bd. of Dirs. of Notre Dame High Sch.*, 520 A.2d 217, 218 (Conn. 1987) (finding “no cause of action ... because the doctrine of wrongful discharge protects only employees at will”).

The unequal bargaining power existing between employer and employee is one potential justification for providing protection to employees but not members of LLCs. Although employment at-will is based on a principle of mutuality, the employer's threat of discharge of the employee is more serious than an employee's threat of quitting because it is generally easier for an employer to replace a low-level employee than it is for the employee to find a new job.²²² This inequality of bargaining power led to the creation of the tort of wrongful discharge in violation of public policy.²²³ In light of this, it could be viewed that wrongful discharge protections exist only to protect employees who are powerless to contract for employment other than at-will.

Yet, the name of the tort itself evidences that its very purpose goes well beyond protections for individuals: wrongful discharge *in violation of public policy*. Courts and legislatures carved out exceptions to at-will employment because the public policy of the states necessitated them.²²⁴ This public policy exception "embodies the principle that employees' acts who enhance or promote clearly expressed public policies should be protected,"²²⁵ and "employers should not be able to use their power as employers to subvert public policy."²²⁶ For a wrongful discharge, some matter of public policy must be involved and not merely a personal dispute between employer and employee.²²⁷ Similarly, courts generally refrain from intervening in terminations that are the product of "internal employment disputes" that are not sufficiently "public."²²⁸ In many jurisdictions, this public policy element is effectuated by a requirement for a connected source of law.²²⁹ In *Gantt v. Sentry Insurance*,²³⁰ the California Supreme Court clearly explained the public policy purpose behind the wrongful discharge cause of action:

[A]t root, the public policy exception rests on the recognition that in a civilized society the rights of each person are necessarily limited by the rights of others and of the public at large; this is the delicate balance which holds such societies together. Accordingly, while an at-will employee may be terminated for no reason, or for an arbitrary or irrational reason, there can

222. ROTHSTEIN & LIEBMAN, *supra* note 115, at 986-87.

223. Ballam, *supra* note 112, at 657.

224. David Culp, *Whistleblowers: Corporate Anarchists or Heroes? Towards a Judicial Perspective*, 13 HOFSTRA LAB. & EMP. L.J. 109, 117 (1995).

225. COVINGTON & DECKER, *supra* note 220, at 330.

226. Callahan & Dworkin, *supra* note 112, at 106.

227. E.I. DuPont de Nemours & Co. v. Pressman, 679 A.2d 436, 442 (Del. 1996) (holding that termination for questioning the propriety of a supervisor's business practice did not implicate public policy).

228. ROTHSTEIN & LIEBMAN, *supra* note 115, at 1001.

229. Sequoia Ins. Co. v. Superior Court, 16 Cal. Rptr. 2d 888, 893 (Cal. Ct. App. 1993) (requiring that a constitutional or statutory provision "sufficiently describe" prohibited conduct for the public policy requirement to be met); Jersey v. John Muir Med. Ctr., 18 Cal. Rptr. 2d, 807, 817-18 (Cal. Ct. App. 2002) (holding that wrongful discharge actions could not declare public policy without a constitutional or statutory provision).

230. 824 P.2d 680 (Cal. 1992).

be no right to terminate for an unlawful reason or a purpose that contravenes fundamental public policy. Any other conclusion would sanction lawlessness, which courts by their very nature are bound to oppose.²³¹

One can see this same function in whistleblower protections included within federal legislation as adjuncts to the statutes' primary objectives.²³² The whistleblower provisions function to effectuate the policy goals created in the legislation; they are not simply to prevent employers from using their power to fire employees for what some would perceive as a bad reason.²³³ For example, the Sarbanes-Oxley Act contains a provision protecting whistleblowers who report financial wrongdoings in public companies to effectuate its purpose in protecting investors by ensuring reliability of corporate disclosures.²³⁴ This was in direct response to accounting fraud scandals such as WorldCom and Enron.²³⁵ The Act clearly exemplifies the use of whistleblower protections to further a specific policy rather than merely to protect employees.²³⁶

Given the purpose of public policy exceptions and whistleblower statutes, courts should not refuse members of LLCs these protections merely because courts presume that they are on equal footing as other members. Applying these protections to members of LLCs would further the same policy goals advanced by the protections afforded to employees. If whistleblower protections exist to prevent employers from using their power to undermine public policy, there seems to be no justification why these protections should not extend to members of LLCs simply because every member is on equal footing.

It is also of little consequence that members of LLCs are "owners," rather than mere employees of the company. The court did not base its refusal to apply public policy exceptions to whistleblower partners in *Bohatch* because of the partners' status as owners. Rather, the court based its decision on the need for utmost trust and personal confidence among each other.²³⁷ The law in the corporate arena also evidences this assertion that any denial of whistleblower protection does not turn on ownership. Corporate officers can, and generally do, own stock in their corporation, making them owners of the corporation as well. Yet, officers consistently receive protection as whistleblowers.²³⁸ Member managers of manager-managed LLCs are virtually indistinguishable from officers in this aspect; they function as management for the company while also existing as part owners.²³⁹ This further suggests the application of whistleblower

231. *Id.* at 686-87.

232. Callahan & Dworkin, *supra* note 112, at 103.

233. *Id.*

234. ROTHSTEIN & LIEBMAN, *supra* note 115, at 1000.

235. *Id.*

236. HAMILTON & MACEY, *supra* note 76, at 716.

237. *Bohatch v. Butler & Binion*, 977 S.W.2d 543, 546-47 (Tex. 1998).

238. *See Johnson v. World Color Press, Inc.*, 498 N.E. 2d 575, 580 (Ill. App. Ct. 1986) (refusing to "create a class of employees who are excluded from recovering under retaliatory discharge" provisions).

239. U.L.L.C.A. § 404 cmt. (explaining that members in a manager-managed company have no rights in management unless they are also managers).

protections to manager-managed LLCs. Their centralized management, coupled with the limited liability of ownership, resembles the corporate structure, which affords whistleblower protections to management and officers.²⁴⁰

Holding LLC members liable for the expulsion of a whistleblower member would only further prevent misconduct in the LLC realm and serve the public interest by encouraging members to report misconduct. Members stand in a closer relationship with each other than members and employees do.²⁴¹ A member would be aware of another's misconduct within the LLC. Furthermore, lower employees may not have contact with members and would be unaware of such misconduct. Thus, it would serve the public interest better if the law protected the members from expulsion upon reporting the misconduct.

The slow deterioration of the employment-at-will doctrine through public policy exceptions, whistleblower statutes, and collective bargaining agreements²⁴² exemplifies the need to regulate those with authority and control in business entities. The trend toward corporate responsibility, such as illustrated by the Sarbanes-Oxley Act, further exemplifies this need. Applying protections to members of LLCs is consistent with these trends. Given the vast number of LLCs in existence, along with their broad expansion,²⁴³ a strong means of preventing misconduct is inevitable and necessary. By allowing members or managers of LLCs to remove others for purposes that are illegal or in contradiction to public policy, courts will be "sanctioning the lawlessness,"²⁴⁴ they are bound to oppose.

VIII. FIDUCIARY DUTIES AND USAGE OF "GOOD FAITH" TO AFFORD PROTECTION TO WHISTLEBLOWERS

Absent legislation, courts are hesitant to alter the at-will employment relationship through wrongful discharge.²⁴⁵ Consequently, they will likely have the same reluctance to interfere with the at-will LLC by expanding wrongful discharge principles. However, beyond the wrongful discharge tort and whistleblowing legislation, courts may also have another means of protecting whistleblowing members of LLCs, as well as partners, through the "good faith and fair dealing" obligation in RUPA and the ULLCA. UPA contains virtually no mention of fiduciary duties, and the duty of good faith arises only in the requirement that a partner's expulsion be "bona fide" in accordance with the partnership agreement provisions.²⁴⁶ Also, no express language exists in the Act

240. *Johnson*, 498 N.E.2d at 576, 580 (allowing a corporate senior vice president and chief financial officer to recover under a claim of retaliatory discharge).

241. *See* U.L.L.C.A. § 404 (explaining the equal rights of members in an LLC).

242. *See generally* Ballam, *supra* note 112.

243. *See* HAMILTON & MACEY, *supra* note 76, at 203 (estimating "that as of December 31, 1995, more than 210,000 business ventures had chosen the LLC business form").

244. *Gantt v. Sentry Ins.*, 824 P.2d 680, 685 (Cal. 1992).

245. *Weidner v. Skala*, 609 N.E.2d 105, 110 (N.Y. 1992); *Sabetay v. Sterling Drug, Inc.*, 506 N.E.2d 919, 923 (N.Y. 1987).

246. U.P.A. § 31.

prohibiting any exclusion of this duty in the partnership agreement.²⁴⁷ Given the lack of reference in UPA, it is necessary to look at the definition established through the common law, such as the court did in *Bohatch*.²⁴⁸

Under UPA, courts generally view good faith and fair dealing as a fiduciary duty, coupled with the duty of loyalty.²⁴⁹ Due to the ability to contract away or reduce these fiduciary duties under UPA, courts generally hold that a partnership can expel a partner for whatever cause. However, the expulsion must be in accordance with the provisions of the partnership agreement²⁵⁰ and not for the “self-gain” of the expelling partners.²⁵¹ Hence, partners have no real claim for a breach of fiduciary duty outside these circumstances. Those cases where courts have found a breach of duty are still generally based on one of these two violations.²⁵² Ultimately *Bohatch*, also decided under UPA, determined that the fiduciary duty of good faith does not protect whistleblower partners.²⁵³

Compared to UPA, RUPA and the ULLCA take a very different approach to fiduciary duties, especially the requirement of good faith and fair dealing. Instead of a fiduciary *duty*, under RUPA and the ULLCA, good faith and fair dealing is an *obligation*²⁵⁴ that runs ancillary to other fiduciary duties. In addition, this obligation applies to every partner’s (or member’s) discharge of a duty or exercise of a right under the partnership agreement.²⁵⁵ It is a contract-based obligation placed on partners (or members) based on the contractual nature of their relationship, rather than a fiduciary duty arising from the special relationship between partners (or members) themselves.²⁵⁶ Two characteristics of the obligation of good faith and fair dealing included within RUPA and the

247. *Id.*

248. *Bohatch v. Butler & Binion*, 977 S.W.2d 543, 546-47 (Tex. 1998).

249. *See, e.g.*, *Few v. Few*, 122 S.E.2d 829, 836 (S.C. 1961) (“[P]artners are treated as fiduciaries each to the other and ... their relationship [is] one of mutual trust and confidence, imposing upon them ... requirements of loyalty, good faith and fair dealing.”); *St. Joseph’s Reg. Health Ctr. v. Munos*, 934 S.W.2d 192, 197 (Ark. 1996) (acknowledging partners’ fiduciary duty of loyalty and “utmost good faith and fair dealing”).

250. *Lawlis v. Kightlinger & Gray*, 562 N.E.2d 435, 442-43 (Ind. Ct. App. 1990) (“Where the remaining partners in a firm deem it necessary to expel a partner ... in a partnership agreement freely negotiated and entered into, the expelling partners act in ‘good faith’ regardless of motivation if that act does not cause a wrongful withholding of money or property legally due the expelled partner”).

251. *Heller v. Pillsbury Madison & Sutro*, 58 Cal. Rptr. 2d 336, 348 (Cal. Ct. App. 1996) (in regard to expulsion of partners, “[b]ad faith ... means only that partners cannot expel another partner for self-gain”) (quoting *Bohatch*, 905 S.W.2d at 602); *Leigh v. Crescent Square, Ltd.*, 608 N.E.2d 1166, 1170 (Ohio Ct. App. 1992).

252. *See Ehrlich v. Howe*, 848 F. Supp. 482, 492 (S.D.N.Y. 1994) (finding a breach of good faith when an expelled partner was not notified of a meeting for the vote of his potential expulsion, because the partnership agreement required that expulsion be brought “before the partnership” for a unanimous vote); *Cadwalader, Wisckersham & Taft v. Beasley*, 728 So. 2d 253, 256-59 (Fla. Dist. Ct. App. 1998) (finding expulsion of firm partners for the financial benefit of others to be a breach of fiduciary duty).

253. *Bohatch v. Butler & Binion*, 977 S.W.2d 543, 547 (Tex. 1998).

254. R.U.P.A. § 404(d); U.L.L.C.A. § 409(d).

255. R.U.P.A. § 404 cmt. 4.

256. *Id.*

ULLCA may afford new protection to whistleblowing partners and members of LLCs. First, the good faith and fair dealing obligation is mandatory and cannot be waived.²⁵⁷ Second, drafters intentionally left the term undefined in both acts, which allows broad discretion in the courts.²⁵⁸

Both the ULLCA and RUPA provide that the operating agreement or partnership agreement may not eliminate the obligation of good faith and fair dealing.²⁵⁹ Thus, the obligation cannot be contracted away by the parties. However, the standards of measuring the performance of the obligation may be prescribed if not unreasonable.²⁶⁰ The permanence of this obligation essentially takes the good faith analysis beyond that performed in previous cases decided under UPA. Generally, those cases found that as long as a partner was expelled in accordance with the provisions in the partnership agreement, the expulsion was not in bad faith.²⁶¹ However, under RUPA and the ULLCA, the partnership or operating agreement cannot eliminate the good faith and fair dealing obligation by setting up standards for expulsion.²⁶² Good faith is not met simply because an expulsion was in accordance with the partnership agreement. Courts must look beyond the expulsion provisions in the agreement and “delve into the motives and intentions behind the expulsion to see if they comport with the obligation of good faith and fair dealing.”²⁶³ Through this obligation of good faith and fair dealing, courts may afford protection to whistleblowing partners and members in states adopting RUPA or the ULLCA. Because courts cannot eliminate the requirement, courts may decide to look to the motives for expulsion, not just procedures, and determine that the LLC or partnership performed an expulsion in bad faith, regardless of the performance of procedural requirements.

Although courts cannot eliminate the good faith and fair dealing obligation,²⁶⁴ courts in states adopting RUPA or ULLCA can determine what the obligation itself requires.²⁶⁵ In RUPA, the drafters intentionally left the meaning of “good faith and fair dealing” undefined in the act to “allow courts to develop their meaning based on the experience of real cases.”²⁶⁶ The ULLCA also contains the obligation of good faith and fair dealing without a fixed definition.²⁶⁷ The

257. *Id.*

258. R.U.P.A. § 404, U.L.L.C.A. § 409.

259. R.U.P.A. § 103(b)(5); U.L.L.C.A. § 103(b)(4).

260. *Id.*

261. See Robert M. Phillips, Comment, *Good Faith and Fair Dealing under the Revised Uniform Partnership Act*, 64 U. COLO. L. REV. 1179, 1215 (1993) (“[A]n action for breach of good faith will not lie when the terms defining the expulsion process have been adhered to by the expelling partners.”).

262. See R.U.P.A. § 103(b)(5); U.L.L.C.A. § 103(b)(4).

263. Donald James Nettles, Comment, *Do We Really Need Expulsion Procedures in Partnership Agreements: The Inadequacies of Partnership Law as it Relates to Law Partnerships*, 25 J. LEGAL PROF. 209, 215 (2001).

264. R.U.P.A. § 103(b)(5); U.L.L.C.A. § 103(b)(4).

265. R.U.P.A. § 404 cmt. 4.

266. *Id.*

267. U.L.L.C.A. § 409.

meaning of this newly adopted obligation of good faith and fair dealing in the ULLCA and RUPA is not “firmly fixed under present law.”²⁶⁸ Thus, courts in jurisdictions adopting these acts should not be limited to the standards promulgated under common law and UPA.²⁶⁹

Under common law and UPA, good faith and fair dealing are fiduciary duties²⁷⁰ that require only that an expulsion not be done for “self-gaining” purposes.²⁷¹ Under RUPA and the ULLCA, courts can develop their own meanings for the obligation beyond self-dealing. Courts can use the good faith and fair dealing obligation, without definition or constraint, as a catchall provision to provide a cause of action to those injured by the actions of a fellow partner or member whose moral behavior is in question.²⁷² By giving courts broad discretion to determine the meaning of good faith and fair dealing, RUPA and the ULLCA will potentially enable courts to strike down misconduct by partners and members that does not violate one the listed fiduciary duties²⁷³ or does not meet the self-dealing element required for a breach of good faith under previous common law and UPA standards.²⁷⁴

This comment proposes that courts in jurisdictions adopting RUPA or the ULLCA should use the good faith and fair dealing obligation as a means of striking down expulsion of whistleblowing partners or members of LLCs. Because this requirement is mandatory and cannot be eliminated, courts should look beyond the partnership or operating agreements to the actual motives for expulsion and determine if they are in bad faith. With broad discretion in determining their own definition of good faith and fair dealing,²⁷⁵ courts can include expulsion of whistleblowing partners within their definition of “bad faith,” despite the precedent set by *Bohatch* and other cases decided under common law and UPA. Thus, courts can effectively provide protection for whistleblowing partners and members of LLCs, regardless of the existence of no-cause provisions and the performance of procedural requirements established in the partnership or operating agreement. Moreover, these protections would exist without redefining the statutory concept of a whistleblower or the tort of wrongful discharge.

268. R.U.P.A. § 404 cmt. 4.

269. See Nettles, *supra* note 263, at 214.

270. See *Bohatch v. Butler & Binion*, 977 S.W.2d 543, 545 (Tex. 1998).

271. *Id.* (quoting the court of appeals that “bad faith ... means only that partners cannot expel another for self-gain”).

272. Jean H. Toal & W. Bratton Riley, *Fiduciary Duties of Partners and Limited Liability Company Members Under South Carolina Law: A Perspective from the Bench*, 56 S.C. L. REV. 275, 288 (2004).

273. See R.U.P.A. § 404 (providing the exhaustive list of fiduciary duties owed by partners).

274. See, e.g., *Bohatch*, 977 S.W.2d at 545.

275. R.U.P.A. § 404 cmt. 4.

IX. CONCLUSION

The vast number of LLCs today, along with their continuing rapid growth, necessitates the prevention of misconduct among members and managers. Courts and legislatures created whistleblower statutes and public policy exceptions to employment at-will for that very reason—to deter and curtail wrongdoing in business entities. Thus, they would serve this same function in the LLC arena as an exception to the at-will nature of LLCs.

Courts should avoid the tendency to simply analogize the *Bohatch* holding to LLCs and refuse to extend any protections to whistleblowing members. LLCs have one very distinguishing characteristic from partnerships—the limited liability of all members. It is this characteristic that prevents interests in trust and confidence among members from outweighing policy interests. Without personal liability coupled with broad apparent authority, the public interest in preventing misconduct must prevail. For that reason, whistleblower protections and wrongful expulsion exceptions should be created and applied to members of LLCs.

However, in those states adopting the ULLCA or RUPA, courts may have an alternative route to afford these protections without the complications of new statutory provisions or public policy exceptions via the “good faith and fair dealing” requirement. The drafters left this to the interpretation of individual courts, allowing them to strike down expulsions of whistleblowing members or partners for being done in “bad faith.”

The ongoing push for responsibility and accountability in the corporate realm heralds a similar need in the LLC arena. There are various routes courts and legislatures may take to protect whistleblowing members of LLCs. It would be a mistake to let the precedent of *Bohatch* prevent courts from taking further action to prevent misconduct at the member and manager level of LLCs.