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UNENFORCEABLE FIDUCIARY DUTY LIMITATIONS:  
WHY DRAFTING PARTNERSHIP AGREEMENTS  
LIMITING THE DUTY TO DISCLOSE AND  
PARTNERSHIP OPPORTUNITY IS MORE PRECARIOUS  
AFTER TRIPLE FIVE OF MINNESOTA, INC. V. SIMON

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I. INTRODUCTION................................................................. 1485
II. STATUTORY LIMITATIONS ON PARTNERS’ FIDUCIARY
    DUTIES ........................................................................ 1487
    A. Introduction .................................................................. 1487
    B. Duty to Disclose............................................................ 1488
       1. UPA .......................................................................... 1488
       2. RUPA ...................................................................... 1488
       3. RULPA.................................................................. 1490
    C. Usurpation of a Partnership Opportunity ................... 1491
       1. UPA & RUPA: The Duty Generally ......................... 1491
       2. UPA & RUPA: Purpose for the Duty...................... 1492
       3. UPA & RUPA: Limiting the Duty ......................... 1492
       4. ULPA Duty & Waiver........................................... 1494
    D. Delaware’s Contractarian Freedom .......................... 1495
III. THE TRIPLE FIVE V. SIMON CASE......................... 1496
    A. Facts........................................................................... 1496
       1. Developing the Mall of America ......................... 1496
       2. Fiduciary Duty Limitation ................................... 1498
       3. Selling Part-Ownership in the Mall of America......... 1499
    B. The Triple Five v. Simon Trial Court Decision......... 1500
       1. Introduction.......................................................... 1500
       2. Fiduciary Duties .................................................... 1501
       3. Exculpatory Clause.............................................. 1502
       4. Breach of Fiduciary Duties ................................. 1503
          a. The Duty to Disclose.................................. 1503
          b. Usurpation of Partnership Opportunity ........ 1503
          c. Conduct Between Parties.......................... 1505
       5. Remedies............................................................. 1505
    C. The Triple Five v. Simon Eighth Circuit Decision..... 1505

1483
IV. COURTS’ INTERPRETATION OF FIDUCIARY DUTY

LIMITATIONS & WAIVERS ........................................................ 1506
A. Introduction .................................................................. 1506
B. Minnesota Cases ............................................................. 1508
1. Lipinski v. Lipinski ......................................................... 1508
2. Appletree Square I Ltd. Partnership v. Investmark, Inc. ........ 1510
C. Circuit Courts of Appeal Cases ...................................... 1511
1. Wartski v. Bedford ........................................................... 1511
2. Exxon Corp. v. Burglin ...................................................... 1511
D. Other Cases ................................................................... 1511
1. Singer v. Singer ............................................................... 1511
2. Sonet v. Timber Co. ......................................................... 1511
E. Harmonizing These Cases by Distinguishing Battles over Ownership ..................................................... 1511
F. Relevancy of These Cases ................................................. 1511

V. RIBSTEIN’S CRITICISMS OF THE TRIPLE FIVE V. SIMON DECISION ............................................................................. 1511

VI. THE SIGNIFICANCE OF TRIPLE FIVE V. SIMON FOR PARTNERSHIP LAW IN MINNESOTA................................................. 1511
A. Fiduciary Duty ................................................................ 1511
B. Statutory Law ................................................................. 1511
C. Remedies ...................................................................... 1511
D. Rights of Third Parties .................................................... 1511
E. Advice for Partners .......................................................... 1511

While partners are free to vary many aspects of their relationship . . . they are not free to destroy its fiduciary character.1

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Once a partnership has been formed, certain consequences follow as to the relations between the partners. First, the relationship of partners is that of mutual agents . . . . Second, the relationship is one of a fiduciary nature. Third, as to the specifics, the U.P.A. [Uniform Partnership Act]
I. INTRODUCTION

On Christmas morning, the eyes of two young brothers glistened with excitement as they unwrapped matching gifts: two sets of boxing gloves. Within moments, they cleared the furniture and Round 1 began. The fun ended with the first blow to the face. “You can’t do that!” shouted the recipient of the punch. To even things out, he sent a blow into his brother’s stomach. Competition turned to rage, and punches were replaced by kicking and screaming.2

Like some partners, these boys joined their endeavor with the understanding they could compete and need not disclose their moves to the other. But when one party thought the other went too far, he cried “foul,” and a referee was needed to resolve the dispute. Many partners agree to compete and agree to limit what they must disclose to each other. But when a fight ensues, courts decide whether the partners properly limited their fiduciary duties.

Under partnership law, partners may limit some of the fiduciary duties they owe to each other by drafting certain provisions into their partnership agreement. After Triple Five of Minnesota, Inc. v. Simon3 (Triple Five), however, partners may have difficulty knowing whether they can effectively limit their duty to disclose information material to the partnership and their duty not to usurp a partnership opportunity.4

In Triple Five, the Eighth Circuit held that a partnership agreement provision limiting fiduciary duties would not be given effect.5 The partnership agreement provided that “no partner shall be liable to any other partner except in the case of fraud or gross negligence.”6 Although the district court found no fraud or gross

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2. For this memory and the years of sparring that followed, the author would like to thank his brother, Jesse D. Hall, Deputy Public Defender, Office of the Colorado State Public Defender.
3. 404 F.3d 1088 (8th Cir. 2005).
4. See id.
5. Id. at 1096–1100.
6. Triple Five, 280 F. Supp. 2d at 901. The exculpatory clause in the
negligence, the district court and the Eighth Circuit held that enforcing this provision would have destroyed the fiduciary character of the partnership.\(^7\) Thus, the parties were held to a higher fiduciary standard than they had written into their partnership agreement.\(^8\) Despite the limitations in the partnership agreement, the defendants owed Triple Five various common-law fiduciary duties.\(^9\) Specifically, the defendants were found in violation of the duty to disclose and the duty not to usurp a partnership opportunity.\(^10\) As a result, the defendants lost managing control of the largest mall in America, along with millions in profits generated by the mall.\(^11\)

The holding in this case raises a question for all partners and potentially all parties in business together:\(^12\) to what extent may parties in business together limit their fiduciary duties without risking that the limitations will be held unenforceable?\(^13\)

**partnership agreement between Triple Five and the Simons provided the following:**

No Partner in this Partnership shall be liable to this Partnership, or to any partner for any act performed, or omitted to be performed, by it in the conduct of its duties as a Partner, if such act or omission is not performed or made fraudulently or with gross negligence. 

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\(^7\). Triple Five, 280 F. Supp. 2d at 901, aff'd, 404 F.3d at 1095–99.

\(^8\). Triple Five, 404 F.3d at 1095. The court noted that “Minnesota law imposes the highest duty of integrity and good faith on partners in their dealings with each other.” Id. (citing Vernier v. Forbes, 223 Minn. 69, 25 N.W.2d 704, 708 (1946)). Further, “[p]ersons burdened with such duties are fiduciaries by definition and fiduciaries may not usurp or divert for their own benefit business opportunities that properly belong to the partnership.” Triple Five, 404 F.3d at 1095 (citing Miller v. Miller, 301 Minn. 207, 219–20, 222 N.W.2d 71, 78 (1974)).

\(^9\). Triple Five, 280 F. Supp. 2d at 901.

\(^10\). Id. at 901–05 (addressing the duty to disclose); Id. at 905–07 (addressing the duty not to usurp a partnership opportunity).

\(^11\). See id. at 909–10.

\(^12\). Although the business entity limiting fiduciary duties in the *Triple Five* decisions was a partnership, the final holding may not be limited to partnerships. Other business entity forms include fiduciary duties, and attempts to limit such duties by contract may be subject to similar restrictions. For this reason, owners of other entity forms, such as LLCs, should ensure their fiduciary duty limitation provisions do not exceed what their courts will enforce.

2007] UNENFORCEABLE FIDUCIARY LIMITATIONS 1487

This note first examines the uniform acts applicable to partners' fiduciary duties and partners' ability to limit fiduciary duties, particularly the duty to disclose information and the duty not to usurp a partnership opportunity. Next is a summary of the facts of the Triple Five decision, the procedural history of the case, and the courts' analysis of the case. In light of the Triple Five decisions, this note examines related cases in Minnesota and other jurisdictions. This note then considers criticisms regarding fiduciary duty limitations and the Triple Five decisions. The note concludes with concerns over the ambiguous state of the law after Triple Five, offering advice for parties seeking to draft partnership agreements that limit fiduciary duties.

II. STATUTORY LIMITATIONS ON PARTNERS' FIDUCIARY DUTIES

A. Introduction

States have adopted, with some modifications, a number of model laws applicable to partnerships. The Uniform Partnership Act of 1914 (UPA) was the first of the uniform laws on partnerships to be promulgated and was adopted by every state except Louisiana. The Revised Uniform Partnership Act (RUPA) was promulgated in 1994 and amended in 1996 and 1997. Over thirty jurisdictions adopted RUPA to some extent. The Uniform Limited Partnership Act (ULPA-2001) was promulgated in 2001 and will likely be adopted by many states that enacted previous

Uniform Partnership Act and the Revised Uniform Partnership Act allow partners to limit their fiduciary duties without risking that the limitations will be held unenforceable.

14. See infra Part II.
15. See infra Part III.
16. See infra Part IV.
17. See infra Part V.
18. See infra Part VI.
19. UNIF. P'SHIP ACT (1914).
versions. Delaware, for example, utilizes these model laws in many ways, but Delaware gives great freedom to partners to limit or eliminate entirely the fiduciary duties they owe each other.

B. Duty to Disclose

1. UPA

UPA does not allow partners to modify their duty to disclose. UPA section 20 provides that “[p]artners shall render on demand true and full information of all things affecting the partnership to any partner or the legal representative of any deceased partner or partner under legal disability.” UPA does not expressly authorize partners to modify the fiduciary duty created by this section.

2. RUPA

RUPA allows partners to modify their duty to disclose subject to restrictions. RUPA provides the duty to disclose under section 403(c). Under RUPA, the duty to disclose is not a fiduciary duty. RUPA section 403(c) provides the following:

Each partner and the partnership shall furnish to a partner, and to the legal representative of a deceased partner or partner under legal disability:

(1) without demand, any information concerning the partnership’s business and affairs reasonably required for the proper exercise of the partner’s rights and duties under the partnership agreement or this [Act]; and

(2) on demand, any other information concerning the partnership’s business and affairs, except to the extent the demand or the information demanded is

24. See Bromberg & Ribstein, supra note 22.
25. See Del. Code Ann. tit. 6, § 15-103 (2006) (“It is the policy of this chapter to give maximum effect to the principle of freedom of contract and to the enforceability of partnership agreements.”).
27. 2 Alan R. Bromberg & Larry E. Ribstein, Bromberg & Ribstein on Partnerships § 6.06(e), at 6:107 (Supp. 2005).
29. See Revised Unif. P’ship Act § 404(a) (“The only fiduciary duties a partner owes to the partnership and the other partners are the duty of loyalty and the duty of care . . . .”).
unreasonable or otherwise improper under the circumstances. 30

In its list of nonwaivable provisions, RUPA section 103 does not include the duty to disclose. 31 Thus, RUPA suggests that partners may waive the duty to disclose, with the exception that limitations on “the right of access to books and records” must be reasonable. 32 The definition of reasonable was left for the courts. 33 The waiver of such duties will be interpreted strictly and must not be used to protect wrongdoers from liability. 34 Some courts have implied that the duty to disclose cannot be waived, but the relevancy of these cases to this issue is questionable because of the unusual facts and law involved in the cases. 35

30. Id. § 403(c). RUPA’s Comments provide additional insight into section 403(c):
Subsection (b)(2) provides that the partnership agreement may not unreasonably restrict a partner or former partner’s access rights to books and records under Section 403(b). It is left to the courts to determine what restrictions are reasonable. See Comment 2 to Section 403. Other information rights in Section 403 can be varied or even eliminated by agreement.
Id. § 103 cmt. 3. RUPA’s Comments elaborate further in section 403:
Under Section 103(b)(2), a partner’s right of access to partnership books and records may not be unreasonably restricted by the partnership agreement. Thus, to preserve a partner’s core information rights despite unequal bargaining power, an agreement limiting a partner’s right to inspect and copy partnership books and records is subject to judicial review. Nevertheless, reasonable restrictions on access to partnership books and records by agreement are authorized. For example, a provision in a partnership agreement denying partners access to the compensation of other partners should be upheld, absent any abuse such as fraud or duress.
Id. § 405 cmt. 2.
31. See id. § 103; see also 2 Bromberg & Ribstein, supra note 27, § 6.06(e), at 6:107–08 (Supp. 2005).
32. Revised Unif. P’ship Act § 103(b)(2) (restricting partners only from “unreasonably restrict[ing] the right of access to books and records”); see also 2 Bromberg & Ribstein, supra note 27, § 6.06(e), at 6:107–08 (Supp. 2005).
35. Id. at 6:108 (discussing and dismissing such cases because they do not clearly stand for the proposition that the duty to disclose cannot be waived).
3. **RULPA**

Like RUPA, ULPA-2001 allows partners to modify their duty to disclose subject to restrictions. ULPA-2001 section 407(b) provides the following duty of general partners to disclose:

Each general partner and the limited partnership shall furnish to a general partner:

1. without demand, any information concerning the limited partnership’s activities and activities reasonably required for the proper exercise of the general partner’s rights and duties under the partnership agreement or this Act; and

2. on demand, any other information concerning the limited partnership’s activities, except to the extent the demand or the information demanded is unreasonable or otherwise improper under the circumstances.

Section 304 prescribes the duty of disclosure to limited partners. Waiver of the duty to disclose is restricted in ULPA-2001 section 110(b)(4):

A partnership agreement may not: . . . unreasonably restrict the right to information under Sections 304 or 407, but the partnership agreement may impose reasonable restrictions on the availability and use of information obtained under those sections and may define appropriate remedies, including liquidated damages, for a breach of any reasonable restriction on use.

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37. *See id.* § 304.
38. *Id.* § 110(b)(4). It is worth noting that a major exception to section 110(b)(4) is provided in sections 304(g) and 407(f). Section 304(g) allows those controlling the partnership (usually the general partner) to exercise some discretion regarding the information it will release to the limited partners: “The limited partnership may impose reasonable restrictions on the use of information obtained under this section. In a dispute concerning the reasonableness of a restriction under this subsection, the limited partnership has the burden of proving reasonableness.” *Id.* § 304(g). A similar provision is provided in section 407(f), which allows those controlling the partnership to exercise some discretion regarding the information released to general partners. *See id.* § 407(c). Thus, sections 304(g) and 407(f) may have the effect of limiting the information that the general partner, who is managing the partnership, must disclose to the other partners.
Thus, partners may waive the duty to disclose in the partnership agreement only if the waiver is reasonable.

C. Usurpation of a Partnership Opportunity

1. UPA & RUPA: The Duty Generally

Under UPA and RUPA, the duty to account for a partnership opportunity correlates with two similar duties found in the statutes. First, use of property owned by the partnership is limited to partnership purposes, which excludes personal use by the partners. Second, partners may not be compensated for the partnership’s work unless they agree otherwise. Consistent with these provisions, UPA and RUPA require that partners hold as trustee for the partnership any benefit derived from the partnership property or business. RUPA adds that “[a] partner

40. Revised Uniform Partnership Act § 204; Uniform Partnership Act § 8 (1914) (describing partnership property).
41. See Uniform Partnership Act § 25(2)(a) (“A partner, subject to the provisions of this Act and to any agreement between the partners, has an equal right with his partners to possess specific partnership property for partnership purposes; but he has no right to possess such property for any other purpose without the consent of his partners.”); Revised Uniform Partnership Act § 401(g) (“A partner may use or possess partnership property only on behalf of the partnership.”).
42. See Uniform Partnership Act § 18(f) (“No partner is entitled to remuneration for acting in the partnership business, except that a surviving partner is entitled to reasonable compensation for his services in winding up the partnership affairs.”); Revised Uniform Partnership Act § 401(h) (“A partner is not entitled to remuneration for services performed for the partnership, except for reasonable compensation for services rendered in winding up the business of the partnership.”).
43. Uniform Partnership Act § 21(1) (“Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property.”); Revised Uniform Partnership Act § 404(b)(1) (“A partner’s duty of loyalty to the partnership and the other partners is limited to the following: (1) to account to the partnership and hold as trustee for it any property, profit, or benefit derived by the partner in the conduct and winding up of the partnership business or derived from a use by the partner of partnership property, including the appropriation of a partnership opportunity.”). The comments to RUPA section 404(b) explain the following:

Section 404(b) provides three specific rules that comprise a partner’s duty of loyalty. Those rules are exclusive and encompass the entire duty of loyalty. Subsection (b)(1) is based on UPA Section 21(1) and continues the rule that partnership property usurped by a partner, including the misappropriation of a partnership opportunity, is held in
does not violate a duty or obligation under this [Act] or under the partnership agreement merely because the partner’s conduct furthers the partner’s own interest.”

2. UPA & RUPA: Purpose for the Duty

One purpose for the duty to account for a partnership opportunity is to prevent partners from misusing partnership assets and information for personal gain. A second purpose is to direct partners to use their energies to further the partnership rather than for personal gain.

3. UPA & RUPA: Limiting the Duty

Under UPA and RUPA, partners may draft their partnership agreement to limit the scope of partnership opportunities. For example, a partnership opportunity can be sharply limited to developing one property, leaving an adjacent property available for a partner to pursue individually. This limitation would be effective because the partnership involved only the first property, and the partners were aware at the outset that each could engage trust for the partnership. The express reference to the appropriation of a partnership opportunity is new, but merely codifies case law on the point. Under a constructive trust theory, the partnership can recover any money or property in the partner’s hands that can be traced to the partnership. As a result, the partnership’s claim is greater than that of an ordinary creditor. See Official Comment to UPA Section 21.

REvised unif. p’ship act § 404(b) cmt. 2 (citations omitted).
44. reVised unif. p’ship act § 404(e). Rupa explains the section: Subsection (e) is new and deals expressly with a very basic issue on which the UPA is silent. A partner as such is not a trustee and is not held to the same standards as a trustee. Subsection (e) makes clear that a partner’s conduct is not deemed to be improper merely because it serves the partner’s own individual interest.

That admonition has particular application to the duty of loyalty and the obligation of good faith and fair dealing. It underscores the partner’s rights as an owner and principal in the enterprise, which must always be balanced against his duties and obligations as an agent and fiduciary. For example, a partner who, with consent, owns a shopping center may, under subsection (e), legitimately vote against a proposal by the partnership to open a competing shopping center.

Id. cmt. 5.
45. 2 bromberg & rIBSTEIN, supra note 27, § 6.07(d), at 6:130.3 (Supp. 2006).
46. Id. at 6:130.3–4.
47. Id. at 6:135–35 (Supp. 2007).
48. Id. at 6:135 (citing e.g. Lipinski v. Lipinski, 227 Minn. 511, 35 N.W.2d 708 (1949); Mathis v. Meyers, 574 P.2d 447 (Alaska 1978)).
in outside activities.\(^49\) Moreover, partners may consent to specific transactions that would otherwise be deemed “partnership opportunities.”\(^50\)

RUPA section 103(b) provides the limits to modifying the duty of loyalty:

The partnership agreement may not:

| eliminate the duty of loyalty under Section 404(b) or 603(b)(3), but: (i) the partnership agreement may identify specific types or categories of activities that do not violate the duty of loyalty, if not manifestly unreasonable; or (ii) all of the partners or a number or percentage specified in the partnership agreement may authorize or ratify, after full disclosure of all material facts, a specific act or transaction that otherwise would violate the duty of loyalty.\(^51\) |

\(^49\) Id.

\(^50\) 2 BROMBERG & RIBSTEIN, supra note 27, § 6.07, at 6:151–52 (Supp. 2006) (citing UNIF. P'SHIP ACT § 21; REVISED UNIF. P'SHIP ACT § 103(b)(3)(ii)).

\(^51\) REVISED UNIF. P'SHIP ACT § 103(b). The RUPA authors note this section is:

intended to ensure a fundamental core of fiduciary responsibility. Neither the fiduciary duties of loyalty or care, nor the obligation of good faith and fair dealing, may be eliminated entirely. However, the statutory requirements of each can be modified by agreement, subject to the limitation stated in subsection (b)(3) through (5).

There has always been a tension regarding the extent to which a partner’s fiduciary duty of loyalty can be varied by agreement, as contrasted with the other partners’ consent to a particular and known breach of duty. On the one hand, courts have been loathe to enforce agreements broadly “waiving” in advance a partner’s fiduciary duty of loyalty, especially where there is unequal bargaining power, information, or sophistication. For this reason, a very broad provision in a partnership agreement in effect negating any duty of loyalty, such as a provision giving a managing partner complete discretion to manage the business with no liability except for acts and omissions that constitute willful misconduct, will not likely be enforced. See, e.g., Labovitz v. Dolan, 545 N.E.2d 304 (Ill. 1989). On the other hand, it is clear that the remaining partners can “consent” to a particular conflicting interest transaction or other breach of duty, after the fact, provided there is full disclosure.

RUPA attempts to provide a standard that partners can rely upon in drafting exculpatory agreements. It is not necessary that the agreement be restricted to a particular transaction. That would require bargaining over every transaction or opportunity, which would be excessively burdensome. The agreement may be drafted in terms of types or categories of activities or transactions, but it should be reasonably specific.

A provision in a real estate partnership agreement authorizing a partner who is a real estate agent to retain commissions on partnership
Thus, RUPA allows partners to agree that the scope of the partnership excludes specific types of activities, allowing partners to take personal advantage of those opportunities, as long as these agreements are “reasonable.”

4. ULPA Duty & Waiver

Limited partners have no fiduciary duties to any other partner under ULPA-2001 section 305. General partners have a duty of loyalty under ULPA-2001 section 408(b), which was copied from, and is substantially the same as, RUPA section 404. Likewise, property bought and sold by that partner would be an example of a “type or category” of activity that is not manifestly unreasonable and thus should be enforceable under the Act. Likewise, a provision authorizing that partner to buy or sell real property for his own account without prior disclosure to the other partners or without first offering it to the partnership would be enforceable as a valid category of partnership activity.

Ultimately, the courts must decide the outer limits of validity of such agreements, and context may be significant. It is intended that the risk of judicial refusal to enforce manifestly unreasonable exculpatory clauses will discourage sharp practices while accommodating the legitimate needs of the parties in structuring their relationship.

\[\text{Id.} \ § 103 \text{ cmt. 4.} \]
\[\text{52. See id.} \ § 103(b). \]
\[\text{53. Revised Unif. Ltd. P’ship Act} \ § 305 (2001). \] This section provides the following:
(a) A limited partner does not have any fiduciary duty to the limited partnership or to any other partner solely by reason of being a limited partner.
(b) A limited partner shall discharge the duties to the partnership and the other partners under this [Act] or under the partnership agreement and exercise any rights consistently with the obligation of good faith and fair dealing.
(c) A limited partner does not violate a duty or obligation under this [Act] or under the partnership agreement merely because the limited partner’s conduct furthers the limited partner’s own interest.

\[\text{Id.} \ § 305(b) \text{ cmt. subsec. (b).} \]
\[\text{54. See Revised Unif. Ltd. P’ship Act} \ § 408. \] RULPA section 408(b) provides the following:
A general partner’s duty of loyalty to the limited partnership and the other partners is limited to the following:
(1) to account to the limited partnership and hold as trustee for it any property, profit, or benefit derived by the general partner in the conduct and winding up of the limited partnership’s activities or derived from a use by the general partner of limited partnership property, including the appropriation of a limited partnership opportunity;
ULPA-2001 section 110(b) essentially copies RUPA section 103(b) by prohibiting the elimination of the duty of loyalty but allowing partners to “identify specific types or categories of activities that do not violate the duty of loyalty, if not manifestly unreasonable,” and to establish a procedure for partners to ratify a violation of the duty of loyalty.\textsuperscript{56}

D. Delaware’s Contractarian Freedom

Delaware’s partnership statute is based on RUPA, with one significant exception.\textsuperscript{57} The statute provides that fiduciary duty waivers are enforceable: “A partnership agreement may provide for the limitation or elimination of any and all liabilities for breach of contract and breach of duties (including fiduciary duties) of a partner . . . .”\textsuperscript{58} The statute expressly explains that “the policy of this chapter [is] to give maximum effect to the principle of freedom of contract and to the enforceability of partnership agreements.”\textsuperscript{59}

\textsuperscript{56} REVISED UNIF. LTD. P’SHIP ACT § 110(b). This section provides the following:
A partnership agreement may not: . . . (5) eliminate the duty of loyalty under Section 408, but the partnership agreement may:
(A) identify specific types or categories of activities that do not violate the duty of loyalty, if not manifestly unreasonable; and
(B) specify the number or percentage of partners which may authorize or ratify, after full disclosure to all partners of all material facts, a specific act or transaction that otherwise would violate the duty of loyalty.

\textsuperscript{57} 2 BROMBERG & RIBSTEIN, supra note 27, § 6.07(h), at 6:162 (Supp. 2006).


\textsuperscript{59} DEL. CODE ANN. tit. 6, § 15-103(c). A longer quote from the statute may be helpful in understanding the operation of Delaware’s fiduciary duty waivers, which includes a requirement of “good faith and fair dealing” to prevent the use of waivers for malicious purposes:
(c) It is the policy of this chapter to give maximum effect to the principle of freedom of contract and to the enforceability of partnership agreements.
Delaware’s limited partnership statute includes a similar provision. As a result, Delaware’s statutes provide the most deference to partners seeking to reduce the fiduciary duties owed between partners.

III. THE TRIPLE FIVE V. SIMON CASE

A. Facts

1. Developing the Mall of America

The story of the Triple Five decisions begins with an idea to build the largest shopping mall in the United States—the Mall of America. The idea originated with four brothers: Raphael, Nader, Bahman, and Eskander Ghermezian. The brothers own Plaintiff Triple Five of Minnesota, Inc. (Triple Five). Previously, Triple Five developed the “largest indoor retail and entertainment

(d) A partner or other person shall not be liable to a partnership or to another partner or to another person that is a party to or is otherwise bound by a partnership agreement for breach of fiduciary duty for the partner’s or other person’s good faith reliance on the provisions of the partnership agreement.

(e) Unless otherwise provided in a partnership agreement, a partner or other person shall not be liable to a limited partnership or to another partner or to another person that is a party to or is otherwise bound by a partnership agreement for breach of fiduciary duty for the partner’s or other person’s good faith reliance on the provisions of the partnership agreement.

(f) A partnership agreement may provide for the limitation or elimination of any and all liabilities for breach of contract and breach of duties (including fiduciary duties) of a partner or other person to a partnership or to another partner or to another person that is a party to or is otherwise bound by a partnership agreement; provided, that a partnership agreement may not limit or eliminate liability for any act or omission that constitutes a bad faith violation of the implied contractual covenant of good faith and fair dealing.

Id. § 15-103(c)–(f).

60. 2 BROMBERG & RIBSTEIN, supra note 27, § 6.07(h), at 6:163 (Supp. 2005) (citing DEL. CODE ANN. tit. 6, § 17-1101 (2005)).


63. Id.

64. Id.
complex in the world:” the West Edmonton Mall in Edmonton, Alberta, Canada. In 1986, Triple Five owned the right to develop the land upon which the Mall of America was later built. To develop the Mall of America, Triple Five sought business partners. In 1987, the Teachers Insurance and Annuity Association (Teachers) brought substantial financing to the project in exchange for very favorable terms and a buy-sell right. At the same time, two brothers, the defendants Melvin and Herbert Simon, became involved in the project. The Simon brothers owned a number of real estate businesses, which were also named as defendants. The Simons also had a prominent and influential

65. Id.
66. Id. at 898.
67. Id.
68. Id. Teachers eventually paid $650 million in construction financing. Id.
69. See id. These favorable terms lowered the Teachers’ risk and made ownership of Teachers’ interest more valuable than the percentages owned by Triple Five or Simon:

Although the ownership of the Mall was split almost evenly between Teachers and [Mall of America Associates (MOAA), a partnership of which the Simon brothers and Triple Five each owned half], Teachers received all, or substantially all, of the profits from the Mall. According to the parties’ various agreements, because Teachers had supplied the equity for constructing the Mall, Teachers had a preference in any profits generated by the Mall. This preference took the form of a $683 million capital account. Teachers was guaranteed an eight-and-one-half percent annual return on this capital account, or approximately $58 million per year. Any income over and above the first $58 million would be split again among the parties, with Teachers once again having a preference for a percentage of this income. It is not disputed that the Mall has never generated $58 million in annual income and that, as a result, Teachers has always received the entire income generated by the Mall.

Teachers’ capital account also guaranteed that Teachers would be paid back for the money it put into the Mall if the Mall were ever sold or otherwise financed. For example, if the Mall were sold for $700 million, Teachers would be entitled to $683 million, with the remaining $17 million divided among the partners. If the Mall were sold for less than $683 million, Teachers would receive the entire purchase price and MOAA would receive nothing.

Id. at 898–99.
70. Id. at 898. Similar to the favorable financial terms that attached to the partnership interest owned by Teachers, Teachers also had a strategic advantage. Id. at 899. Teachers had the right, subject to some restrictions, to name a price for its ownership interest, forcing the other owners to either buy Teachers’ entire interest at that price or sell their own interest at that price. Id.
71. Id. at 898.
72. Id.
role within the Simon Property Group, Inc. (SPG), a publicly traded real estate investment trust, which was also a defendant.

The ownership of the mall involved a complex structure of business entities that can be summarized as follows. Teachers owned fifty-five percent in the Mall of America LP (MOAC LP). The remaining forty-five percent interest in MOAC LP was owned by the Mall of America Associates (MOAA), a partnership of which the Simon brothers and Triple Five each owned half. An entity owned by the Simon brothers was the managing general partner for MOAA.

2. Fiduciary Duty Limitation

The MOAA partnership agreement between the Simon brothers and Triple Five included a general limitation on fiduciary

73. Id. The Simons’ prominent role within SPG is illustrated by a number of facts. The Simons’ family members, and companies controlled by them, own over twenty-one percent of SPG shares. Id. The Simon brothers are co-chairmen of SPG and hold the same title in all their other businesses involved in this litigation. Id. Melvin Simon’s son, defendant David Simon, is the CEO or executive vice president of all these businesses, including SPG. Id. Randall Foxworthy, also a defendant, is the executive vice president for corporate development for all of these businesses, including SPG. Id. Finally, the district court noted that the “[d]efendants did not differentiate among the various closely held Simon family entities," so the court allowed those entities to be liable despite the entities’ limited liability veils. Id. at 901.

74. Id. at 898.

75. Id. This is the complex ownership structure: Teachers converted its $650 million in construction financing into an equity investment in the Mall after construction was completed. Id.

In return for its investment, Teachers received an equity interest in Mall of America Company LP (“MOAC LP”), which is the managing partner and owner of 99% of Mall of America Company (“MOAC”). MOAC is the company that owns the Mall. MOAC LP is a partnership between Teachers, which owns 55% of MOAC LP, and Mall of America Associates (“MOAA”), which owns 45%. MOAA is a 50/50 partnership between Si-Minn Developers Limited Partnership (“Si-Minn LP”) and Triple Five. Si-Minn LP is the managing partner of MOAA. Si-Minn LP is comprised of a general partner, Si-Minn, Inc., and limited partners in the form of members of the Simon family, including Defendants Melvin and Herbert Simon. Si-Minn, Inc. is a wholly-owned subsidiary of Melvin Simon & Associates, Inc. These same parties owned similar percentage interests in the entertainment portion of the Mall, called Minntertainment Associates (“Minntertainment”).

76. Id.

77. Id.

78. Id.
It provided “that no partner shall be liable to any other partner except in the case of fraud or gross negligence.” This lawsuit arose out of circumstances surrounding Teachers’ sale of half of its ownership interest to SPG.

3. Selling Part-Ownership in the Mall of America

In March 1998, Teachers wrote in a letter to MOAA that Teachers would consider selling all or part of its interest in the Mall of America. Herbert Simon responded in a letter to Teachers, which was blind copied to Triple Five. In a forceful tone, the letter warned Teachers that the interests of the Simon brothers and Triple Five should be considered in such a sale; otherwise they would seek to enforce their rights to prevent a sale. According to Triple Five, this letter lulled them into thinking the Simon brothers were protecting their interests and were not seeking to buy Teachers’ interest. But at the same time, the Simon brothers were preparing to buy Teachers’ interest through their SPG entity. For the rest of the year, the Simon brothers kept Triple Five in the dark while preparing to buy Teachers’ interest.

In January 1999, SPG met with Teachers. After three months of negotiations with Teachers, Herbert Simon sent a letter to inform Triple Five that they were planning to purchase fifty percent of Teachers’ interest in the Mall of America through their SPG entity. The financing and terms were prepared so the deal could be finalized before Triple Five could obtain financing to participate in the deal. Moreover, the Simons did not invite Triple Five to participate. Based on these acts, Triple Five

79. Id. at 901.
80. See id. at 898.
81. Id. at 902.
82. Id.
83. Id.
84. Id.
85. Id. at 902–03.
86. See id.
87. Id.
88. Id. at 903.
89. Id.
90. Id.
asserted that the Simon brothers had usurped a partnership opportunity.\footnote{Id. at 905.}

Triple Five repeatedly requested information regarding the transaction from the Simon brothers.\footnote{Id. at 903–04.} The defendants refused them the information and even denied having some of the requested information.\footnote{Id.} Triple Five asserted that the Simon brothers violated the fiduciary duty of disclosure for failing to disclose information regarding the purchase.\footnote{Id. at 905.}

**B. The Triple Five v. Simon Trial Court Decision**

In the *Triple Five* decisions, the district court and the Eighth Circuit considered a number of issues.\footnote{Id. at 897–909.} For purposes of this article however, the discussion is focused primarily on the waiver of fiduciary duties.\footnote{See infra Part III.B.1–5.}

1. **Introduction**

Triple Five, the plaintiff, filed suit in federal district court against the defendants, brothers Melvin and Herbert Simon, their closely held businesses, and other parties in business with the Simons.\footnote{Triple Five, 280 F. Supp. 2d at 897–98.} The general question was whether the defendants violated fiduciary duties to Triple Five.\footnote{Id. at 899–900.} This question raised three main issues.\footnote{Id. at 900–07.} First, the court had to determine which parties owed fiduciary duties, which included determining whether the exculpatory clause limited the partners’ fiduciary duties.\footnote{Id. at 899–900.} Second, the court evaluated whether the defendants breached their fiduciary duties.\footnote{Id. at 900–07.} Third, the court sought to identify the proper remedies.\footnote{Id. at 908–10.}
2. Fiduciary Duties

In determining which parties owed a fiduciary duty, the court considered a number of legal principles. The court stated that fiduciary duties may be imputed to officers and directors of a general partner, including corporate general partners. Moreover, standards of conduct for managing partners apply both to managing partners, such as the Simons, and to those persons or entities holding themselves out as having authority or as having the right to take action for the partnership (as the Simons did in holding themselves out as having the authority to act for Triple Five). Finally, the court noted that a partnership is liable for the wrongful acts or omissions of a partner. Based on this, the district court held that the defendants named in Count I owed fiduciary duties to Triple Five.

Count I notably excluded SPG, the publicly traded corporation in which the Simon family had a minority interest and management involvement. The court, however, declared that the defendants cannot hide behind corporate formalities. The court stated that the defendants did not differentiate among their various closely held Simon family entities, and the court would not do so either. Thus, the veil limiting liability between the Simons and their entities was pierced, and fiduciary duties were imposed on all. The Eighth Circuit affirmed by expressly holding that “all of the Simon Defendants, including SPG, [had] a fiduciary responsibility to Triple Five.”

103. In short, the court considered fiduciary duties, apparent authority, principal liability, partnership liability, and piercing the corporate veil. See id. at 901–07.
104. Id. at 901.
105. Id.
106. Id. (citing MINN. STAT. § 323A.3-05; Sage Co. v. Ins. Co. of N. Am., 480 N.W.2d 695, 698 (Minn. Ct. App. 1992)).
107. Id.
108. Id. at 900; see also id. at 898 (explaining the Simons’ extensive involvement in SPG). On appeal, the Eighth Circuit further explained the holding that SPG owed Triple Five fiduciary duties. Triple Five of Minn., Inc. v. Simon, 404 F.3d 1088, 1096 (8th Cir. 2005).
110. Id.
111. See id.
112. Triple Five, 404 F.3d at 1096. While it is common for a corporation in a partnership to owe fiduciary duties like any other partner, what is noteworthy here is that SPG was not a partner with Triple Five, and yet the Simons’ fiduciary duties
3. Exculpatory Clause

Next, the court considered whether the defendants breached their fiduciary duties by their various acts and omissions involving the purchase of an ownership interest in the Mall of America. The defendants pointed to a clause in the partnership agreement providing that “no partner shall be liable to any other partner except in the case of fraud or gross negligence.” The court found that the conduct alleged did not constitute “fraud or gross negligence.” Still, the court noted that although parties are free to vary many aspects of their relationship, they are not free to destroy its fiduciary character. Accordingly, the court held that despite the partners’ agreement, the defendants owed Triple Five various common law fiduciary duties for which they could be liable.

113. Once the district court established that the Simons and their entities named as defendants shared common obligations of fiduciary duties to Triple Five, the court referred to all Simon defendants as “defendants” rather than listing each. For consistency and brevity, the term “defendants” is used here in the same way.
114. Triple Five, 280 F. Supp. 2d at 901–06.
115. Id. at 901.
116. Id.
117. Id.
118. Id.
4. Breach of Fiduciary Duties

The court analyzed three aspects of common-law fiduciary duties: (1) the duty to disclose negotiations, (2) usurpation of partnership opportunity, and (3) conduct between partners.

a. The Duty to Disclose

The court noted that the duty to disclose involves “a duty to render [un]to any partner on demand true and full information as to all things affecting the partnership.” Partners may not alter this duty by contract. Moreover, a partner has a ‘broad common-law duty to disclose all material facts,’ whether requested to do so or not. Here, the court found that the defendants concealed their negotiations from Triple Five, misled Triple Five into believing they were protecting their interest, and refused to disclose material details about the transaction, which are required in a timely manner. As fiduciaries, the defendants were obligated to provide Triple Five with all material information, regardless of whether Triple Five requested it. The failure to provide information constituted a breach of the defendants’ duty to disclose and harmed Triple Five by preventing Triple Five from participating in the transaction.

b. Usurpation of Partnership Opportunity

The court considered whether the defendants usurped a partnership opportunity in breach of their fiduciary duties when they purchased the additional ownership interest in the Mall of America, including placing their personal interest above that of the partnership. The court found that the offer to buy the interest was a partnership opportunity because Triple Five could afford the purchase, the seller, Teachers, never refused to deal with Triple Five, and the opportunity had a logical relationship to the

119. Id. at 902–05.
120. Id. at 905–07.
121. Id. at 907.
122. Id. at 901–02 (citations omitted).
123. Id. at 902–05.
124. Id. at 904 (citing Appletree Square I Ltd. P’ship v. Investmark, Inc., 494 N.W.2d 889, 892 (Minn. Ct. App. 1993)).
125. Id. at 904–05.
126. Id. at 905–07.
partnership’s interests. The fact that SPG, a publicly traded corporation, was purchasing the interest in the mall did not deter the court from imposing the defendants’ fiduciary duties on SPG. Thus, the defendants’ usurpation of this partnership opportunity was a breach of their fiduciary duties, principally the duty of loyalty.

The court also held that SPG’s act of taking a transaction fee was wrongful and that the defendants’ failure to disclose this fee was a breach of their fiduciary duty.

In a related matter, the court found insufficient evidence to support Triple Five’s claim that the defendants breached their fiduciary duties by failing to distribute proceeds from an alleged $25 million capital account to Triple Five.

127. Id. at 905–06.
128. Id. at 906. The Eighth Circuit Court of Appeals explained why SPG, a publicly traded corporation, was liable despite the fact that the Simon family held only a minority interest in SPG’s stocks:

We are not unmindful of the difficulties faced by business people who are principals in related corporate entities. Burg v. Horn, 380 F.2d 897, 901 (2d Cir. 1967) (noting that courts must consider that individuals often serve on several boards and are subject to competing fiduciary duties). However, we agree with the district court that this case presents the worst kind of self-dealing and subterfuge. Although SPG is publicly traded, the connections between it and Si-Minn [(one of many closely held Simon entities named as Defendants)] are far too close for comfort. Even though SPG is a public company with an independent board of directors, its day-to-day decisions were being made by the same people who were decision-makers at Si-Minn. SPG officials used information gained in their capacities as Si-Minn directors (and MOAA operatives) to profit individually through SPG participation in this transaction. And, in the process they shirked their individual and partnership duties to Triple Five. Indeed, if SPG/Si-Minn had not used subterfuge to their substantial advantage, the deal with TIAA would not have been fully negotiated before it was communicated to Triple Five. Accordingly, we find that both Si-Minn and SPG owe a duty of integrity and good faith to Triple Five in this particular transaction. Because all of the Simon defendants, including SPG, have a fiduciary responsibility to Triple Five, we move on to examine the district court’s findings that they breached these responsibilities.

129. Triple Five of Minn. Inc. v. Simon, 404 F.3d 1088, 1196 (8th Cir. 2005).
130. Id. at 906–07.
c. Conduct Between Parties

The court briefly considered whether the parties’ behavior, “behavior one might expect to see on a playground,” was consistent with the very high duties the law imposes on partners. The court held that the defendants’ “nefarious” behavior failed to rise to the high standard required by law, but the court added a caveat that Triple Five’s behavior was not blameless.

5. Remedies

In response to the defendants’ breach of fiduciary duties, the court imposed a constructive trust on the purchased interest in the Mall of America, restored Triple Five’s opportunity to buy its share of the interest that SPG purchased from Teachers, ordered the Simons to disgorge Triple Five’s share of profits received from the Mall of America, and imposed other remedies. Most interestingly, the court amended the partnership agreements, changing the managing general partner from the defendants to Triple Five, which would take effect upon Triple Five’s payment for its share of the stocks that Teachers had sold to the Simons.

C. The Triple Five v. Simon Eighth Circuit Decision

The Eighth Circuit largely affirmed the district court. The court held that SPG owed Triple Five fiduciary duties, stating that

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132. Id. at 907.
133. This term is copied directly from the district court’s subsequent order. Triple Five of Minn. Inc. v. Simon, No. 99-1894 (PAM/RLE), 2004 U.S. Dist. LEXIS 39841, at *31 (D. Minn. Dec. 23, 2005); see infra note 238 (discussing the Simons’ “nefarious conduct”).
134. Triple Five, 280 F. Supp. 2d at 907.
135. The district court clarified in a later order that Triple Five had the opportunity to purchase the shares, but the disgorgement of profits was contingent upon Triple Five paying its share to purchase the shares. Triple Five of Minn. Inc. v. Simon, No. 99-1984 (PAM/RLE), 2003 U.S. Dist. LEXIS 22737, at *2 (D. Minn. Dec. 12, 2003). This is reasonable because Triple Five should not receive profits from a partnership opportunity unless it, as a partner, contributes towards the purchase price in the same amount that it would have had the partnership made the purchase.
137. Id. at 909 (holding that the partnership agreement would be modified to make Triple Five the managing partner); Triple Five, 2003 U.S. Dist. LEXIS 22737, at *2 (clarifying that Triple Five would be the managing partner only if Triple Five paid for its share of the stock purchase).
138. Triple Five of Minn., Inc. v. Simon, 404 F.3d 1088, 1096–1100 (8th Cir.)
SPG and the Simons were “too close for comfort.” The court affirmed that the defendants usurped a partnership opportunity and violated the duty to disclose.

As for the provision in the partnership agreement limiting the partners’ liability to each other in the absence of fraud or gross negligence, the court affirmed in one sentence that this would not limit fiduciary duties: “Finally, we agree with the district court’s conclusion that Minnesota partnership law prevents partners from contracting away their fiduciary obligations.”

The court also affirmed the decision to remove the partnership’s managing partner, replacing the Simons with Triple Five. The court reasoned that the Simons “did not conduct [themselves] in a manner befitting a managing partner.” Finally, the court reversed and remanded the calculation of remedies by requiring the Simons to pay half the Mall of America profits in question to Triple Five, noting that the district court had allocated too much to Triple Five.

IV. COURTS’ INTERPRETATION OF FIDUCIARY DUTY LIMITATIONS & WAIVERS

A. Introduction

Courts have a variety of approaches when interpreting partnership agreements that limit or waive fiduciary duties that partners owe to each other. Relevant to the Triple Five decisions

2005).

139. Id. The court explained that “[e]ven though SPG is a public company with an independent board of directors, its day-to-day decisions were being made by the same people who were decision-makers at’ the Simons’ businesses. Id.; see also supra note 73 (explaining the Simons’ extensive involvement in SPG); supra note 128 (quoting the Eighth Circuit’s explanation for holding that SPG owed Triple Five fiduciary duties).

140. Triple Five, 404 F.3d at 1096–97.

141. Id. at 1097.

142. Id. at 1097 (citing Appletree Square I Ltd. P’ship v. Investmark, Inc., 494 N.W.2d 889, 893 (Minn. Ct. App. 1993)).

143. Id. at 1100.

144. Id.

145. Id. at 1099–1100.

are cases involving usurpation of a partnership interest or a violation of the duty to disclose information material to the partnership.

Before reviewing the cases, a few observations are worth noting. First, before a court considers whether a partnership agreement limiting the right to disclosure or partnership opportunities should be given effect, the court will consider whether an opportunity actually belonged to the partnership. This is a threshold question because it determines what is within the scope of the partnership’s business. If information or opportunities do not relate to the partnership, a partner has no duty to present them to his partners.

Second, partners often disagree regarding the scope of their business, so it is no surprise that parties have difficulty predicting how a court will define the scope of the partnership. This is an especially important point for attorneys drafting partnership agreements and assisting partnerships as the scope of the business is defined over time.

Third, courts appear more comfortable limiting fiduciary duties based on the scope of a partnership’s business than limiting fiduciary duties based on a partnership agreement that seeks to opt out of fiduciary duties. While this is an important lesson for partners seeking prospectively to have their fiduciary duty limitations enforced, it is difficult in practice. That is, in practice, a partner or attorney will have difficulty defining the scope of a partnership prospectively because the scope of a partnership evolves as the business progresses.

The following cases demonstrate courts’ diverse treatment of partners’ attempts to limit their duty to disclose and allow

147. See, e.g., Appletree Square I Ltd. P’ship v. Investmark, Inc., 494 N.W.2d 889, 893, 894 (Minn. Ct. App. 1993) (willing to limit fiduciary duties based on the scope of a partnership’s business). A determination of the scope of a partnership’s business necessarily has the effect of limiting fiduciary duties because information or opportunities outside the scope of the partnership need not be disclosed to partners.

148. See, e.g., Lipinski v. Lipinski, 227 Minn. 511, 519–20, 35 N.W.2d 708, 713 (1949) (unwilling to limit fiduciary duties based on a partnership agreement that seeks to opt out of fiduciary duties); Triple Five, 404 F.3d 1088 (same). One reason courts may be more comfortable limiting fiduciary duties based on the scope of a partnership’s business is because this determination is a finding of fact, which is less susceptible to being overturned by an appellate court. By contrast, a holding regarding whether a fiduciary duty limitation clause should be given effect under law is a matter of law reviewed de novo by an appellate court.
usurpation of partnership opportunities. The first Minnesota case represents the notion that the scope of a partnership may be so limited that the acquisition of an asset leased by the partnership is not usurpation of a partnership opportunity, nor does it violate a duty to disclose. The second Minnesota case firmly stands for the proposition that partners may not agree to limit their duty to disclose to merely the duty to disclose upon demand. Similarly, the First Circuit case stands for the notion that a partnership agreement allowing partners to compete will be given no effect if a partner fails to disclose an opportunity that relates to the heart of the partnership’s business.

These cases are contrasted by three other cases. The Fifth Circuit case stands for the notion that sophisticated partners may waive their duty to disclose and may directly compete with each other. Similarly, the two subsequent cases stand for the principle that parties may waive their fiduciary duties in their partnership agreement to such an extent that courts will treat the partners as though they are not partners.

B. Minnesota Cases

1. Lipinski v. Lipinski

In a 1949 case, the Minnesota Supreme Court allowed a partner to secretly buy land used by his partnership, without a disclosure to his partners, and then lease the land back to his partnership.

In this case, the parties formed a partnership, subject to Minnesota’s version of the UPA, to engage in commercial fishing on leased property next to a lake. Next to this property was a
strip of land, owned by a third party, which they used for hauling the fish.\textsuperscript{156} Martin, one of the partners, had previously encouraged other partners to buy this strip of land to ensure their continued use of it, but they ignored his suggestions.\textsuperscript{157} Some time later, Martin heard some partners talk about ousting some partners so the remaining partners could have more profit.\textsuperscript{158} Worried that he might be ousted, Martin secretly purchased the strip of land to leverage his position in the partnership.\textsuperscript{159} Martin then requested rent payments for the partnership’s use of the land.\textsuperscript{160} The other partners sued, asserting that Martin never disclosed his intent to purchase the land nor did he seek their consent.\textsuperscript{161}

The Minnesota Supreme Court held that Martin did not violate a fiduciary duty when he bought the strip of land used by the partnership because Martin had told them about the land prior to his interest in buying it,\textsuperscript{162} and the purchase was outside the scope of the business.\textsuperscript{163} The court noted that the scope of the business was a “fishing enterprise and not an undertaking to acquire land, or to improve or develop real estate, or to sell or lease land to others.”\textsuperscript{164} The court observed that “[i]n determining their respective obligations, a court should always keep in mind the purposes for which the participants were associated and the manner in which the association was organized.”\textsuperscript{165} The court found nothing in the agreement suggesting that the enterprise had the object or purpose to acquire real estate.\textsuperscript{166}

Further, the court held that Martin did not buy the land “as the result of any information, priority, or advantageous position which he had obtained by virtue of the [partnership].”\textsuperscript{167} Because Martin had disclosed the possibility of buying the land and the partners had no interest in buying it, Martin had no duty to

\begin{itemize}
\item \textsuperscript{156} Id. at 513, 35 N.W.2d at 709–10.
\item \textsuperscript{157} Id. at 514, 35 N.W.2d at 710.
\item \textsuperscript{158} Id.
\item \textsuperscript{159} Id.
\item \textsuperscript{160} Id. at 521, 35 N.W.2d at 714.
\item \textsuperscript{161} Id. at 514–15, 35 N.W.2d at 710.
\item \textsuperscript{162} Id. at 521, 35 N.W.2d at 713–14.
\item \textsuperscript{163} Id. at 520, 35 N.W.2d at 715.
\item \textsuperscript{164} Id.
\item \textsuperscript{165} Id. at 522, 35 N.W.2d at 714.
\item \textsuperscript{166} Id.
\item \textsuperscript{167} Id. at 516, 35 N.W.2d at 711.
\end{itemize}
disclose his plan to buy it. Thus, this case stands for the notion that the scope of a partnership may be so limited that the acquisition of an asset leased by the partnership is not usurpation of a partnership opportunity, nor does it violate a duty to disclose.

2. Appletree Square I Ltd. Partnership v. Investmark, Inc.

In a 1993 case, the Minnesota Court of Appeals would not give effect to a partnership agreement that replaced a partner’s duty to disclose all material information affecting the partnership with a duty to disclose such information only after another partner made a request.

In this case, sophisticated parties formed their partnership under the 1976 RULPA as enacted in the Minnesota Statutes. The partners’ agreement limited the partners’ duty of disclosure by stating that the general partners would “provide the partners with all information that may reasonably be requested.”

The general partners sold their fifteen-story office building to the limited partners. Years after the sale, the limited partners learned that the building was contaminated with asbestos, which prompted this suit.
In considering the partners’ agreement to waive the duty to disclose without demand, the court acknowledged that under Minnesota’s 1976 RULPA statute, “[p]artners may change their common law and statutory duties by incorporating such changes in their partnership agreement.” 174 But the court then held that the general partners could not “replace their broad duty of disclosure with a narrow duty to render information upon demand” because that “would destroy the fiduciary character of their relationship, and it would also invite fraud.” 175

The court reasoned that, “[u]nless partners knew what questions to ask, they would have no right to know material information about the business.” 176 Further, it said, “where the major purpose of a contract clause is to shield wrongdoers from liability, the clause will be set aside as against public policy.” 177 Thus, the court concluded that the provision limiting the duty to disclose would be given no effect. 178

C. Circuit Courts of Appeal Cases

1. Wartski v. Bedford

In a 1991 decision very similar to the Triple Five decisions, the First Circuit refused to allow one partner to buy an interest in the partnership from other partners without disclosing the opportunity to the remaining partner, despite a provision in a partnership agreement expressly allowing the partners to compete. 179

In this case, an inventor and a businessman formed a limited partnership in 1981 under Massachusetts law to develop a device for motor vehicles. 180 Both men were general partners with other limited partners. 181 The partnership agreement provided that the “[g]eneral [p]artners shall not be prevented from engaging in other activities for profit, whether in research and development or

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174.  Id. at 893.
175.  Id.
176.  Id.
177.  Id.
178.  See id. at 893–94.
180.  Id. at 14–15.  Inventor Heinz Wartski was the plaintiff, and businessman Terence Bedford was the defendant.  See id. at 14.
181.  Id. at 15.
otherwise, and whether or not competitive with the business of the partnership.”

When the business appeared to fail, the businessman bought the limited partners’ interest in the partnership to obtain control of the business and the invention. The court found the businessman failed to disclose to the inventor his purchase of the limited partners’ interest in the partnership, which prevented the partner from participating in the purchase.

The court considered a provision in the partnership agreement stating “general partners shall not be prevented from engaging in other activities for profit, whether in research and development or otherwise, and whether or not competitive with the business of the partnership.” First, the court doubted that the partners actually intended this language to include the technology which was the heart and soul of the partnership venture and the brainchild of the other partner. Second, the court declared that even if the provision included the heart and soul of the partnership, a partnership agreement “cannot nullify the fiduciary duty owed by [the businessman] to the partnership.”

The court explained that “[t]he fiduciary duty of partners is an integral part of the partnership agreement whether or not expressly set forth therein . . . [which] cannot be negated by the words of the partnership agreement.” Thus, this case stands for the notion that a partnership agreement allowing partners to compete will be given no effect if a partner fails to disclose an opportunity that relates to the heart of the partnership’s business.

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182. Id. at 20.
183. Id. at 16–17. The court observed that the businessman sought “to obtain for himself the exclusive right, title and interest to the patent rights to an invention and its technology, which was the heart and soul of the partnership venture and the brainchild of the other partner.” Id. at 20.
184. Id. at 19. The businessman “admitted under examination by Wartski’s attorney at trial that his disclosures to Wartski were not complete.” Id.
185. Id. at 20.
186. Id.
187. Id.
188. Id. (citing Labovitz v. Dolan, 545 N.E.2d 304, 310 (Ill. App. Ct. 1989)). The court added, “or to put it another way: ‘Exculpatory provisions of corporate articles create no license to steal. They do no more than to validate otherwise invalid agreements if such agreements are shown to be fair.’” Id. (citing Irwin v. West End Dev. Co., 342 F. Supp. 687, 701 (D. Colo. 1972)).
2. Exxon Corp. v. Burglin

The Fifth Circuit decision in Exxon is contrary to both the Wartski and Triple Five decisions. Applying Alaska law, the Fifth Circuit held that a general partner was not liable for violating the duty to disclose information it kept secret from limited partners because the duty to disclose was limited in their agreement.189

In Exxon, sophisticated parties formed their limited partnership expressly subject to Alaska law.190 Essentially, the partnership agreement provided that “[t]he general partner must furnish the limited partners with information necessary to evaluate their interests, unless the general partner believed the information was confidential.”191 The court noted that the partnership agreement was between parties competing in the oil industry who were highly sophisticated parties, bargaining at arms length, with assistance of legal counsel, who paid substantial sums of money for giving up the right to disclosure.192

The lawsuit arose because the general partner learned about the value of an oil field owned by the partnership but did not disclose this to the limited partners when the limited partners offered to sell their interests in the partnership to the general partner.193 The parties made the sale based on an agreement expressly stating that the limited partners were selling without knowing the future profit potential of the oil fields.194 The sale agreement also gave the limited partners an option to have an

189. Exxon Corp. v. Burglin, 4 F.3d 1294, 1300–02 (5th Cir. 1993).
190. Id. at 1298.
191. Id. at 1300. The partner’s agreement provided “no Limited Partner shall have the right to any confidential information concerning the status of the Leases.” Id. at 1299. The agreement further provided that:
   The General Partner shall not be obligated to furnish any information concerning subsurface structure, reserves or other information concerning the Leases which the General Partner believes would be in the best interest of the Partnership or of the General Partner to be kept confidential. However, . . . the General Partner will furnish to the Limited Partners all nonconfidential information relevant to the evaluation to the Partnership Interest of each Limited Partner, such as reserves, projected rate of production, etc.

Id. at 1299–1300.
192. Id. at 1299.
193. Id. at 1297.
194. Id. The contract provided that the parties’ agreement was “based on data available today without knowing the results” of oil field tests. Id.
independent consultant examine the fairness of the offer, which they failed to do. 195

The court found that the partnership agreement recognized that the partnership had “an inherent need for secrecy to protect itself from outside competition” and the general partner had an “individual need to protect its interests from the limited partners.” 196 Accordingly, the court gave effect to the parties’ agreement, including the fiduciary duty limitations, and held that the general partner “was under no duty to disclose” the information that it deemed confidential. 197 Thus, this case stands for the notion that sophisticated parties may waive their duty to disclose and may directly compete with their partners.

D. Other Cases

1. Singer v. Singer

In a 1981 case, the Oklahoma Court of Civil Appeals held that a partner in an oil production partnership did not violate a fiduciary duty when it purchased land within the area of the partnership’s interest because of a provision in the partners’ agreement: 198

Each partner shall be free to enter into business and other transactions for his or her own separate individual account, even though such business or other transaction may be in conflict with and/or competition with the business of this partnership. Neither the partnership nor any individual member of this partnership shall be entitled to claim or receive any part of or interest in such transactions, it being the intention and agreement that any partner will be free to deal on his or her own account to the same extent and with the same force and effect as if he or she were not and never had been members of this partnership.

195. Id. The contract granted the limited partners the option to “select a mutually acceptable consultant to make an independent assessment of Exxon’s offer,” for which the general partner would pay half the cost. Id.
196. Id. at 1299.
197. Id. at 1300.
199. Id. at 768.
The court explained that the partners had a contractual right to compete with partners “as if there never had been a partnership.” Accordingly, it held that the partners contracted away the “right to expect a noncompetitive fiduciary relationship with any of its partners.”

2. Sonet v. Timber Co.

In 1998, a Delaware court held that general partners seeking to convert their limited partnership to a real estate investment trust, which benefited them but harmed a limited partner, did not owe common-law fiduciary duties to the limited partner. Because the parties had the right to alter their fiduciary duties, the partnership agreement’s limitations on fiduciary duties would be given full effect as long as the provisions were clear and unambiguous. The court explained that “principles of contract preempt fiduciary principles where the parties to a limited partnership have made their intentions to do so plain.” While this case aligns with others discussed here supporting the notion that partners may limit their fiduciary duties, it goes further by explicitly stating that contractual principles may override fiduciary duties in an unincorporated business entity. This “contractarian” view is consistent with a myriad of Delaware cases.

E. Harmonizing These Cases by Distinguishing Battles over Ownership

One attempt to harmonize these seemingly disparate decisions could be made by distinguishing a partner’s disclosure and competition with the partnership generally, from a partner’s disclosure and competition with another partner regarding the

200. Id. at 772.
201. Id.
203. Id.
204. Id. at 322.
206. See Sonet, 722 A.2d 319 at 322 (recognizing that “it [is] a correct statement of law that principles of contract preempt fiduciary principles where the parties to a limited partnership have made their intentions to do so plain” and that “Delaware cases routinely uphold this view of limited partnership law”).
purchase of a partner’s interest. Under the first, a partner desires to compete in the same market as the partnership, such as by opening a restaurant in the same neighborhood as the partnership’s restaurant. It is easy to think of valid reasons for this, such as when the partners already own competing restaurants in the neighborhood and want to start another one together.

But when partners compete over the purchase of a third partner’s interest, the battle is only between partners. It is difficult to think of any good that could come from allowing partners to keep secrets and compete for ownership of the partnership. Based on this distinction, a partnership agreement should be allowed to override a duty not to compete with the partnership generally, but partners should not be allowed to modify their fiduciary duties when it comes to ownership interests in the partnership.

Thus, this attempt to harmonize these seemingly disparate decisions is appealing, but unfortunately is unworkable with the cases here. First, \textit{Wartski v. Bedford} held that partners may not buy an interest in the partnership from other partners without disclosing the opportunity to the remaining partner despite a provision in a partnership agreement expressly allowing the partners to compete. The \textit{Triple Five} holding was similar. But \textit{Exxon Corp. v. Burglin} in the Fifth Circuit and \textit{Sonet v. Timber Co.} in Delaware both held that partners could waive their fiduciary duties in relation to acquiring ownership interests. As a result, any attempt to harmonize these cases under this distinction appears unworkable.

\subsection*{F. Relevancy of These Cases}

These cases present a wide range of outcomes. Some favor allowing parties to limit their fiduciary duties, while others favor applying fiduciary duties despite partnership agreements to the contrary.

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207. \textit{See, e.g.}, Jeffrey F. Ghent, \textit{Partner’s Breach of Fiduciary Duty to Copartner on Sale of Partnership Interest to Another Partner}, 4 A.L.R. 4th 1122 (1981) (presenting a variety of cases on the general topic of a partner’s duty to other partners in the sale of another partner’s ownership interest in the partnership).
208. 926 F.2d 11 (1st Cir. 1991).
209. \textit{Id.} at 20.
210. 404 F.3d 1088, 1096–97 (8th Cir. 2005).
These conflicting views create uncertainty in the law. As a result, partners may be discouraged from drafting partnership agreements that provide substantial limitations on fiduciary duties. Thus, some partners are stuck with an agreement that is less than they would like. This burden may decrease their profits and increase their transaction costs.

For example, profits are decreased if sophisticated companies who compete with each other cannot establish a partnership at all, because the law prevents them from eliminating their duty to disclose. Additionally, transaction costs are increased by hiring lawyers and accountants to form and operate new business entities, such as a Delaware LLC, that has greater ability to limit fiduciary duties. Of course, those who seek to impose fiduciary duties despite contrary partnership agreements would argue that these costs are worthwhile to protect parties from abuse.

V. RIBSTEIN’S CRITICISMS OF THE TRIPLE FIVE V. SIMON DECISION

Larry E. Ribstein, an authority on fiduciary duties and an advocate of “contractarian” rights, has criticized the Triple Five decisions. Ribstein wrote that it was curious that the court distinguished contractual liability from fiduciary liability. In his comment, Ribstein highlights the district court’s bifurcated consideration of these two issues. The first issue would be whether the exculpatory clause would limit liability from a breach of duties that arose from the contract. The second issue would be whether the exculpatory clause could override the fiduciary duties imposed by statute and the common law. In a state where the power to contract overrides the imposition of fiduciary duties

212. While it is true that RUPA allows partners to place at least some limits on the duty to disclose, the cases here demonstrate that courts may not be so generous. Thus, despite RUPA, sophisticated parties that need to significantly limit the duty to disclose, such as Exxon did, may find that a partnership is not feasible because it would not be profitable. See Exxon, 4 F.3d 1294.
214. Id.
215. See id. The court treated these issues separately because it granted a motion to bifurcate the contractual and equitable issues. See Triple Five, 404 F.3d at 1094 (“The district court bifurcated the legal and equitable claims, and tried the equitable issues in a bench trial.”).
216. See Triple Five, 404 F.3d at 1094.
217. See id.
by statute or common law, there is no need to separate these issues because the exculpatory clause has the power to limit duties otherwise imposed by statute, common law, or the contract.\(^{218}\)

Ribstein’s second criticism questions why the court in *Triple Five* failed to address another provision in the parties’ agreement.\(^{219}\) Ribstein writes,

> [T]he court did not discuss another provision of the agreement, Article XI (G):

> Each Partner . . . may engage in, acquire and possess, without liability or account ability to the other Partner, . . . investments and interests of every nature and description, independently or with others, including but not limited to, any interests or investments similar to or in competition with the Partnership’s business except those which are involved in the development or operation of the Project or Property. No Partner shall be liable to another Partner for failing to offer to the Partnership or the other Partner, or for appropriating or profiting from, any business opportunity, except for those which involve utilization of the Real Estate or which are necessary to the Project.\(^{220}\)

This provision appears to relate to an interest, such as the interest in the Mall of America that Teachers sold to SPG.\(^{221}\) But the court may not have addressed this provision because it decided that the language excluded Teachers’ interest.

That is, the first part of the provision expressly excluded “interests or investments . . . which are involved in the development or operation of the Project or Property.”\(^{222}\) Here, the Teachers’ interest in the Mall of America plainly involved “operation of the Project or Property.”\(^{223}\)

Similarly, the second part of the provision expressly excludes business opportunities, “which involve utilization of the Real Estate or which are necessary to the Project.”\(^{224}\) Thus, neither part of this provision gave the partners the right to compete for the Teachers’

\(^{218}\) This, of course, assumes that the partnership agreement met the requirement of being clear and unambiguous regarding the parties’ intent to limit fiduciary duties. See Sonet v. Timber Co., 722 A.2d 319, 322–26 (Del. Ch. 1998).

\(^{219}\) IDEOBLOG, supra note 213.

\(^{220}\) See Id.

\(^{221}\) Id.

\(^{222}\) Id.

\(^{223}\) Id.

\(^{224}\) Id.
interest. For these reasons, the fact that the court did not address this provision appears to have little consequence on fiduciary duty law.

But Ribstein’s criticisms in this area are not limited to the *Triple Five* decisions. In *Bromberg and Ribstein on Partnership*, the authors criticize RUPA as “perverse” for the way it limits fiduciary duty waivers. Even more substantial is Ribstein’s challenge to the traditional imposition of fiduciary duties on partnerships, regardless of the partners’ desire. Ribstein has instead pushed for allowing sophisticated parties to, first, agree they may compete for opportunities otherwise belonging to the partnership and, second, limit their duty to disclose. At least one circuit court agrees.

**VI. THE SIGNIFICANCE OF *TRIPLE FIVE V. SIMON* FOR PARTNERSHIP LAW IN MINNESOTA**

The saga of the *Triple Five* decisions has great significance for partnership law in Minnesota. The case greatly expanded the application of fiduciary duties. Moreover, it bolstered courts’

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225. See id.
226. The duty to disclose is not a fiduciary duty under RUPA. *See Revised Unif. P’ship Act § 404 (1997) (amended 2005)* (“The only fiduciary duties a partner owes to the partnership and the other partners are the duty of loyalty and the duty of care . . . .”).
227. 2 Bromberg & Ribstein, *supra* note 27, § 6.07(h), at 6:164 (Supp. 2005) (explaining that RUPA’s restrictions on fiduciary duty limitations are perverse for many reasons, such as how on one hand, RUPA will give no effect to limitations that are not “specific” even if a court deems them “reasonable,” but on the other hand, RUPA will give effect to “unreasonable” limitations that are not “manifestly unreasonable”).
229. See id.
231. Fiduciary duties were expanded because they were no longer restrained by fiduciary duty limitation provisions in partnership agreements such as the one in *Triple Five v. Simon*. *See Triple Five of Minn., Inc. v. Simon*, 280 F. Supp. 2d 895, 901 (D. Minn. 2003); *see also supra* Part III.A.2 (quoting the language of the fiduciary duty limitation in the parties’ partnership agreement). *Triple Five* also stands for the notion that the fiduciary duties of a publicly traded company can extend to the partner of one of its minority owners because of the control the partner has in the corporation. *Triple Five of Minn., Inc. v. Simon*, 404 F.3d 1088,
equitable authority to rewrite partnership agreements, including those that affect the rights of third parties not involved in the case.

A. Fiduciary Duty

The enforcement of fiduciary duties has long protected partners. The expansion of fiduciary duties, however, may have consequences.

*Triple Five* stands for the proposition that fiduciary duty limitations of the type involved in *Triple Five* are void. Thus, partners of partnerships with such fiduciary duty limitations, at least in Minnesota, now have greater duties than if those limitations had effect. That is, these partners are now subject to fiduciary duties unrestrained by their fiduciary duty limitations. As a result, individuals or businesses with fiduciary duties to more than one business may find themselves with conflicting fiduciary duties, just as the Simons did. These conflicting duties may even be imposed on publicly held corporations.

The Simons' partnership and their involvement in SPG caused the Simons to owe fiduciary duties to both Triple Five and SPG. Further, the court held that a publicly traded company can owe fiduciary duties to the partner of one of its minority owners because of the control the partner has in the corporation.

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232. This reference is to Teachers, which was not a party in the case but found itself with a new managing partner, Triple Five, instead of its original managing partner, the Simons. *See Triple Five*, 280 F. Supp. 2d at 909. This was a result of the court using its equitable power to change the managing partner, which in effect rewrote the partnership agreement regarding this aspect. *See Exxon*, 4 F.3d at 1297.

233. The Eighth Circuit recognized this problem when noting that it was “not unmindful of the difficulties faced by business people who are principals in related corporate entities.” *Triple Five*, 404 F.3d at 1096 (citing *Burg v. Horn*, 380 F.2d 897, 901 (2d Cir. 1967)); *see also Triple Five*, 280 F. Supp. 2d at 906 (providing this quote in its larger context). But for the Eighth Circuit, this concern was outweighed by concerns that the connections between the publicly owned SPG corporation and the Simons were “far too close for comfort” and “this case present[ed] the worst kind of self-dealing and subterfuge.” *Triple Five*, 404 F.3d at 1096 (demonstrating that the closeness was a significant factor in the Eighth Circuit’s explanation for holding that SPG owed Triple Five fiduciary duties); *see also Triple Five*, 280 F. Supp. 2d at 898–901 (explaining the Simons’ extensive involvement in SPG).


235. *Id.* (holding that the SPG corporation owed fiduciary duties to Triple Five because of the control the Simons had in SPG).
type of conflict had great consequences, as the SPG shareholders and the Simons realized.

Similarly, partners in multiple enterprises may find themselves owing fiduciary duties to multiple entities that eventually have competing interests. While business people may try to plan for the possibility of conflicting fiduciary duties by general contractual limitations on fiduciary duties, courts often disregard such clauses—even when written by sophisticated parties, as in the agreement between Triple Five and the Simons. The result is that people are prevented from participating in ventures that could eventually compete, limiting potential investment and business development.

But some may argue that these economic consequences could be outweighed by the economic benefits that proceed from people’s confidence in the protections offered by a broad application of fiduciary duties. It is also possible that the final holding in Triple Five could be limited to cases in which the court finds that a partner has engaged in "nefarious conduct." 238

B. Statutory Law

The effect that Triple Five will have on the application of statutory partnership law in Minnesota is uncertain. Triple Five and the Simons joined together in a limited partnership, presumably subject to RULPA and its UPA backdrop. But the court relied more on the common law than statute. Moreover, when the court applied statutes, it applied both the UPA and RUPA, 240 citing the UPA for "the duty to account," 241 RUPA for the

236. This includes corporations that are partners in a partnership. See id.

237. In Triple Five, the parties were "sophisticated business partners," Triple Five, 280 F. Supp. 2d at 907, who drafted their partnership agreement with a general contractual limitation on fiduciary duties. See id. at 901; see also supra text accompanying note 6 (quoting the language of the partnership agreement).

238. Triple Five of Minn., Inc. v. Simons, No. 99-1894 (PAM/RLE), 2004 U.S. Dist. LEXIS 39841, at *31 (D. Minn. Dec. 23, 2005) (referring to the Simons' "nefarious conduct"); Triple Five, 404 F.3d at 1096 (calling the Simons’ conduct "the worst kind of self-dealing and subterfuge"). But as bad as these acts were, it is worth noting the acts did not rise to the level of fraud. See id. at 1096 (noting that "the district court specifically found that there was no fraud, gross negligence, or misappropriation of funds").

239. See REvised uniF. LTD. P’Ship Act § 1105 (1976) ("In any case not provided for in this [Act] the provisions of the Uniform Partnership Act govern.").

240. Critics may question whether the court’s reliance on both UPA and RUPA was haphazard or whether it was in reference to events occurring at various times,
proposition that “a partnership is liable for the wrongful acts or omissions of a partner,” and the UPA for a partner’s “duty to render to any partner on demand true and full information as to all things affecting the partnership.” The Eighth Circuit holding in *Triple Five* suggests that Minnesota partnerships cannot rely merely on statutory language specific to their entity; they must also consider the weight and attention the court gives to the common law.

C. Remedies

The courts in the *Triple Five* decisions assumed the power to rewrite a partnership agreement and replace the managing partner with a limited partner. ULPA-2001 and UPA provide no authority for the court to amend a partnership agreement and remove a general partner from the management role unless based on an agreement of the partners. Even Justice Cardozo in *Meinhard v. Salmon* refused to upset Salmon’s management and control of the business. The district court cited no authority for such a remedy, but instead presumably relied upon the court’s equitable powers. This power to rewrite partnership agreements has enormous and
far-reaching effects on partnership law, partners’ profits and finances, control of partnerships, and the rights of third parties transacting with partnerships or working in collaboration with partnerships because it disregards the clear intent of the partners and upsets others’ reliance on their arrangement.\(^{249}\) Maybe this extreme equitable remedy, however, is only reserved for partners with the most “nefarious conduct.”\(^{251}\)

### D. Rights of Third Parties

The *Triple Five* case is significant for third parties like Teachers and SPG’s shareholders. Teachers became bound under a new managing partner in violation of its partnership agreement.\(^{252}\)

249. This refers to other partners, such as Teachers. See *infra* Part VI.D.

250. For example, this could include businesses who have established a relationship with the general partner to provide services to the partnership. The switch to a new general partner could result in the loss of business or the failure to renew a contract because the new general partner has other service providers it would prefer to use.

251. See cases cited *supra* note 238 (discussing the Simons’ “nefarious conduct”).

252. The fact that Teachers became bound to a new managing partner raises concerns for Teachers’ right to have the managing partner to which it originally agreed. See *Triple Five*, 280 F. Supp. 2d at 909 (ordering modification of the partnership agreement to make Triple Five the managing partner). Teachers’ expectation interest in having the Simons as the managing partner was upset when the court modified the partnership agreement. But the Eighth Circuit explained that “[Teachers’] hands were not exactly unsullied” because Teachers failed to disclose to Triple Five its negotiations with the Simons and SPG. *Triple Five*, 404 F.3d at 1100. However, Teachers was not a party to this litigation, so it was not present to explain or defend itself. See *Triple Five of Minn., Inc. v. Simon*, No. 99-1984 (PAM), 2004 U.S. Dist. LEXIS 11673, at *5 (D. Minn. June 24, 2004) (“The parties chose not to include Teachers in this litigation.”).

Initially, the effect of upsetting Teachers’ expectation interest resulted in little change for Teachers for two reasons. First, the parties agreed that a Simon business would continue as property manager of the Mall of America. Id. Second, the district court noted that although Triple Five became the managing partner, the court did not order a change in the Mall of America’s property management company:

> It was not the Court’s intent in the Order to require any changes in the day-to-day management of the Mall. Thus, it is the Court’s expectation that the current managers of the Mall will remain in place. Those managers may continue to make ordinary business decisions on behalf of the Mall. The injunction requires that the managers receive written permission from Triple Five only for decisions outside the ordinary course of business.

Id. at *10. Still, Triple Five had the right as managing partners to replace the property management company, but this right was stayed during appeal to the...
Likewise, the majority of SPG shareholders suffered harm because a few key members of SPG had fiduciary duties to another business. Under the final *Triple Five* decision, similarly situated shareholders and limited partners will be required to protect themselves. But another view is that the court has protected them by removing managing partner with a history of “nefarious conduct.” Either way, this case has had a profound effect beyond the rights of partners and potentially third parties.

E. Advice for Partners

How can partners protect themselves? Partners who want full fiduciary duties to apply to their partnership should have no concern under the *Triple Five* decisions because fiduciary duties will apply by default. But partners seeking to limit fiduciary duties are in a more precarious position because of the uncertainty in ascertaining whether a court would enforce the language they place in their partnership agreement to limit their fiduciary duties.

Eighth Circuit. *Id.* at *23–25. Further, the district court noted that the property manager was owned by the Simons and the property management fees were excessive. *See id.* For these reasons, Triple Five would very likely replace the property manager. This change, along with all other changes that Triple Five could make as managing partner, suggests the significance for Teachers to have a new managing partner. Accordingly, Teachers’ expectation interest was upset by the court, but this still may have been best for two reasons.

First, as previously noted, Teachers had unclean hands, so it was not in a strong position to insist on its right to its expectation interests. Second, the dysfunctional relationship between the parties suggests that a trust or dissolution were the only other alternatives to making Triple Five the managing partner. Indeed, the court considered dissolving the partnership: “Given the untenable relationship between the parties, the Court strongly urges the parties to dissolve the dysfunctional partnership. However, a court-ordered dissolution is premature and inappropriate.” *Id.* at *22.

Many SPG shareholders probably had no knowledge of the Simons’ acts. Moreover, some may have had no knowledge of the conflicts of interest that existed for the Simons. That is, the Simons had fiduciary duties to SPG for their positions at SPG, and the Simons also had fiduciary duties to their privately held entities that owned interest in the Mall of America. But to be fair, there are reasons SPG shareholders should be exposed to this liability.

First, whether SPG shareholders had knowledge of the Simons’ acts or not, the shareholders would still benefit from them if the court had not intervened. Second, by the very nature of investing, shareholders accept liability for wrongful acts of the corporation or its agents up to the amount of their investment. Said differently, the shareholders had accepted liability for the acts of the corporation’s agents.

254. *See* cases cited *supra* note 238 (discussing the Simons’ “nefarious conduct”).
The uniform partnership laws provide some advice for ways to limit fiduciary duties, and the Exxon\textsuperscript{255} decision provides more aggressive methods, albeit more risky.

For example, under RUPA section 103(b), “the partnership agreement may identify specific types or categories of activities that do not violate the duty of loyalty, if not manifestly unreasonable.”\textsuperscript{256} Likewise, Exxon suggests that partners may increase the likelihood that their fiduciary duty limitations will be enforceable if their partnership agreement is between parties already in competition, who are highly sophisticated parties, bargaining at arms length, with assistance of legal counsel, and if the partner giving up the right to disclosure is financially compensated for this.\textsuperscript{257}

But whether partners follow the advice of the statutes, or opt for the more aggressive approach under Exxon, courts may still apply the common law, especially when a court perceives that equity requires it. This is demonstrated by Triple Five and other cases discussed here, which had a variety of outcomes despite the uniformity of statutory law. Accordingly, courts appear more likely to give effect to fiduciary duty limitations that comply with the applicable partnership statute when the partners do not use the limitations in a way that appears wrongful or deceptive.

The Triple Five decisions have implications for all Minnesota partnerships and people involved with them. It remains unclear whether these decisions were an earthquake for partnership law in Minnesota or merely extreme measures required for exceptionally nefarious conduct in a partnership. As a result, drafting partnership agreements limiting the duty to disclose and the duty not to usurp partnership opportunities has become more precarious since the Eighth Circuit’s decision in Triple Five.

\textsuperscript{255} 4 F.3d 1294 (5th Cir. 1993).
\textsuperscript{256} REVISED UNIF. P’SHP ACT § 103(b) (1997) (amended 2005).
\textsuperscript{257} Exxon, 4 F.3d at 1298–99.