CADWALADER

Cadwalader, Wickersham & Taft LLP
www.cadwalader.com

Clients&FriendsMemo

Delaware Supreme Court Enforces Partnership Agreement's Unambiguous Exculpation Provision Waiving Fiduciary Duties and Presuming Good Faith When Relying on Advice of Counsel in Reversing $690 Million Damages Award to Minority Investors of Boardwalk Pipeline Partners LP

January 24, 2023

On December 19, 2022, Chief Justice Seitz issued an opinion for a unanimous Delaware Supreme Court, sitting *en banc,* reversing and remanding the Delaware Court of Chancery's decision in *Bandera Master Fund LP v. Boardwalk Pipeline Partners*, an action brought by former minority unitholders alleging breaches of the Boardwalk Pipeline Partners, LP ("Boardwalk") Partnership Agreement.[1] In its post-trial opinion, the Delaware Court of Chancery had found that Boardwalk's general partner, which "owned slightly more than 50% of" Boardwalk's units and indisputably exercised control over it,[2] orchestrated a "sham" trigger of a call right that permitted it to take the entity private by "manipulating" outside counsel to issue a legal opinion (one of the triggering events under the Partnership Agreement) in breach of the Partnership Agreement and awarded Plaintiffs nearly $700 million in damages. The Delaware Supreme Court reversed, finding that the Court of Chancery should have enforced the plain, unambiguous terms of the Partnership Agreement and finding that the general partner was entitled to exercise the call right when it reasonably relied on an opinion of counsel—notwithstanding the Court of Chancery's factual finding that the general partner acted "intentionally and opportunistically" in obtaining the opinion—and was exculpated from any damages under the Partnership Agreement. The Supreme Court's opinion serves as an important reminder of the broad contractual powers that parties have under the Delaware Revised Uniform Limited Partnership Act, including the right to impose expansive limits on the liability of controllers.

---

[1] *Boardwalk Pipeline Partners v. Bandera Master Fund LP*, No. 2018-0372, 2022 WL 17750348 (Del. Dec. 19, 2022).

[2] Pls.' Answering Br. in Opp. to Defs.' Mot. to Dismiss, *Bandera Master Fund LP v. Boardwalk Pipeline Partners*, No. 2018-0372, 2019 WL 2341786 (Del. Ch. May 28, 2019).

Background

Boardwalk is a natural gas transportation and storage business. Until it was taken private, its units were publicly traded on the New York Stock Exchange. Loews Corporation ("Loews") owned a majority of Boardwalk through an interlocking series of agreements in a master limited partnership ("MLP") structure under Delaware law. Loews owned a majority of Boardwalk's units through an entity called Boardwalk GP, LP (the "General Partner"), which in turn had its own general partner, Boardwalk GP, LLC ("GPGP"). GPGP was organized with a board of directors ("GPGP Board") and a sole member ("Sole Member"). The Sole Member, in turn, was a wholly-owned subsidiary of Loews, and its board ("the Sole Member Board") consisted of a majority of, and thus was controlled by, Loews insiders.

Boardwalk was organized pursuant to two principal documents: the Boardwalk Partnership Agreement ("Partnership Agreement") and the GPGP LLC Agreement ("LLC Agreement"). These organizational documents permitted the General Partner to exercise a take-private call right pursuant to a two-step framework: first, the General Partner must receive an Opinion of Counsel that the Partnership's MLP status "has or will reasonably likely in the future have a material adverse effect on the maximum applicable rate that can be charged to customers" ("Opinion Requirement");[3] and second, the General Partner must determine that the Opinion of Counsel was "acceptable" ("Acceptability Determination") in order to take action and exercise the call right. The Partnership Agreement also contained an exculpation provision (the "Exculpation Provision") immunizing the General Partner absent a "finding that it acted in bad faith or engaged in fraud[] [or] willful misconduct,"[4] and a reliance provision (the "Reliance Provision"), providing that "the General Partner was conclusively presumed to act in good faith if it took an action in reliance on the advice or opinion of legal counsel."[5]

In March 2018, the Federal Energy Regulatory Commission ("FERC") threw the energy markets into a period of regulatory uncertainty when it considered adjusting the rates that pipelines were permitted to charge shippers and reversing its position on certain tax policies that made MLPs an attractive investment vehicle. These policies significantly reduced Boardwalk's stock price, including a 7% drop in the value of its units in a single day, and prompted the General Partner to initiate the process for the Partnership Agreement's call provision to take Boardwalk private. Loews officials engaged the law firm Baker Botts LLP to render the Opinion of Counsel to proceed in exercising the call right. Baker Botts determined that the market conditions in fact constituted a material adverse effect and supported its opinion with a summary of financial data (including a Rate Model Analysis that made assumptions about the negative effects of FERC tax policy on

[3] 2022 WL 17750348, at *9.

[4] *Id.* at *15 n.186 (internal quotation marks omitted).

[5] *Id.* at *16.

Boardwalk's rate case) and a detailed memorandum in support of its conclusion. The General Partner also commissioned an opinion from the law firm Skadden, Arps, Slate, Meagher & Flom LLP, which confirmed that the Sole Member could make the determination to satisfy the Acceptability Determination and that it would be reasonable for the Sole Member, on behalf of the General Partner, to accept the Baker Botts Opinion of Counsel. The Sole Member thereafter found the Opinion of Counsel reasonable, accepted the Opinion of Counsel, and directed the General Partner to exercise the call right. Boardwalk purchased the units for $12.06 per common unit, a transaction of approximately $1.5 billion in total, which closed July 18, 2018.

Bandera, a former minority holder of Boardwalk, filed an amended class action complaint on October 14, 2020, alleging that Boardwalk had breached the Partnership Agreement when it exercised the call right, and that the Boardwalk defendants were not exculpated from damages because the Sole Partner acted in bad faith or engaged in fraud or willful misconduct when it relied on Baker Botts' "contrived" Opinion of Counsel, which the lower court agreed was a product of "motivated reasoning" and a "flawed imitation" of a bona fide opinion.[6] On November 12, 2021, after denying Boardwalk's motion for summary judgment and holding a four-day trial, the Court of Chancery issued its post-trial decision finding the Boardwalk defendants liable and awarding Plaintiffs nearly $690 million in damages, plus fees and interest. The damages award reflected the difference between the take-private transaction price and the court's approximation of a fair value of $17.60 per unit, multiplied by the number of units held by non-Loews entities or affiliates (nearly 124.5 million). Boardwalk appealed the decision to the Delaware Supreme Court, and Bandera cross-appealed to claim higher damages.

On December 19, 2022, the Delaware Supreme Court reversed. In its opinion, the Court began by detailing the flexibilities that sponsors of MLPs enjoyed under Delaware law and reaffirmed its precedents, including *Dieckman v. Regency GP LP*, which clarified that investors "must rely on the express language of the partnership agreement to sort out the rights and obligations" and are not owed the presumption of non-contractual fiduciary duties.[7] The Court thus narrowed its focus to the take-private provision of the Partnership Agreement, noting that "[t]he Partnership Agreement allowed Boardwalk to exercise the call right to its advantage—and to the disadvantage of the minority unitholders—free from fiduciary duties,"[8] and that Boardwalk effectively made "full use of the MLP structure to limit fiduciary duties and to consolidate governing power in its general partner."[9] Given the General Partner's presumption of good faith in relying on the advice of counsel, the Supreme Court enforced the Partnership Agreement's presumption after finding that

---

[6] *Id.* at *14.

[7] *Id.* at *17 (citing 155 A.3d 358, 366 (Del. 2017)).

[8] *Id.* at *9.

[9] *Id.* at *17.

the General Partner reasonably relied on Skadden's opinion, and found that the General Partner was exculpated from any damages.[10]

Takeaways

1. **Courts will enforce terms of a partnership agreement that substantially limit controller liability, even when the controller's conduct disadvantages minority investors.** The Delaware Supreme Court found that the General Partner's call right, while disadvantageous to minority unitholders, was not only permissible but expressly and unambiguously contemplated by the terms of the Partnership Agreement. The minority investors also were aware that the General Partner's fiduciary duties had been contractually eliminated. From the time Loews took Boardwalk public in 2005, its structure took full advantage of the organizational flexibilities Delaware law provides to MLPs, and Boardwalk consistently and unambiguously detailed not only the elimination of fiduciary duties to its unitholders through its approximately 12 years of public filings, but also reiterated in great detail the General Partner's authority and potential conflicts vis-à-vis common unitholders. For example, Boardwalk repeatedly disclosed in its SEC filings that the call rights reserved to the General Partner may result in minority unitholders being forced to "sell your common units at an undesirable time or price," "favor[ing] [the General Partner's] interests to your detriment."[11] Here, the Court noted, Boardwalk's public filings provided ample notice to investors that the General Partner owed them no fiduciary duties and expressly disclosed the General Partner's authority to exercise the call right.

2. **Courts will review corporate organizational documents "together" to enforce unambiguous contractual terms.** The Court of Chancery found that the terms of the Partnership Agreement were ambiguous as to which entity may exercise the Acceptability Determination because the Partnership Agreement was silent regarding how the General Partner would determine the acceptability of the Opinion of Counsel. Construing the terms against Boardwalk and in favor of the investors, the Court of Chancery held that the Opinion of Counsel should have been directed to the GPGP Board and not the Sole Member. The Supreme Court reversed, holding that the Partnership Agreement squarely "placed the acceptability determination in the hands of the General Partner."[12] The Supreme Court reasoned that although the Partnership Agreement was silent on this issue, the LLC Agreement made clear that the General Partner maintained the exclusive authority to exercise the call right. In so finding, the Supreme Court emphasized that the MLP's overall governance structure "work[s] together to spell out how the General Partner managed Boardwalk."[13]

3. **Where a partnership agreement mandates the reliance on an opinion of counsel, a second opinion may help insulate sponsors from claims of contractual breach.** In finding that the Opinion of Counsel was "contrived" and not executed in good faith, the Court

[10] *Id.* at *27.

[11] *Id.* at *5, *6.

[12] *Id.* at *19.

[13] *Id.*

of Chancery focused on the substance of Baker Botts' advice, explaining that counterfactuals, motivated reasoning, and artificial factual predicates did not adequately support a bona fide Opinion of Counsel. The Court of Chancery described the Skadden opinion as an "opinion about an opinion" and a "whitewash" of the Baker Botts opinion. The Supreme Court held that "under the Partnership Agreement and LLC Agreement, the proper focus" of its review "was on the Sole Member and the opinion it received from Skadden."[14] Skadden found the Baker Botts Opinion reasonable and advised that the Sole Member Board would be acting reasonably if it accepted the Baker Botts Opinion. The Sole Member Board followed Skadden's advice and exercised the call right. Having reasonably relied on Skadden's advice, the General Partner, through the Sole Member, was "conclusively presumed to have acted in good faith and is exculpated from damages."[15] Notably, the Supreme Court explained that there was "nothing disqualifying about Skadden giving an 'opinion about an opinion,'" especially where, as here, Skadden provided an opinion advising that it was reasonable for the General Partner to accept the Baker Botts opinion, "having full knowledge of Baker Botts' analytical framework, including its assumptions, models, and its interactions with Boardwalk's officers."[16] The Supreme Court also noted that Plaintiffs never directly challenged the Skadden opinion, nor did they argue that Skadden acted in bad faith. In light of the Supreme Court's guidance on an "opinion about an opinion," partnerships may consider a similar provision to give additional protection when authorizing broad decision-making authority in the MLP context. Even without a contractual mandate, decision-makers acting on behalf of a partnership may consider obtaining an "opinion about an opinion" as additional support (and potentially protection against possible litigation) for selected action.

4. **Internal law firm communications that conflict with, or call into question, the conclusions of a subsequently-rendered legal opinion do not necessarily undermine the opinion's legitimacy or demonstrate bad faith.** The Supreme Court observed that lawyers often explore many sides of arguments when developing their legal advice because that's "what attorneys do," and such deliberations as to potential ambiguities or nuances in the operating agreements do not themselves render those agreements ambiguous.[17] That being said, given that the process for and reasonableness of the legal opinions provided here were the core issue in dispute, there was extensive discovery into Baker Botts' and Skadden's fact-gathering processes and the development of their legal theories and analyses. As a result, companies should be mindful to retain independent counsel when seeking such opinions in order to ensure that counsel maintains its independence and avoids undue influence by senior company executives or others, and to allow such counsel broad access to information.

5. **Courts will enforce contractual limitations on monetary damages.** The Supreme Court held that the Court of Chancery erred in finding the General Partner liable for damages. The Supreme Court, relying on the unambiguous terms of the Partnership Agreement's Exculpation and Reliance Provisions, found that the Exculpation Provision shielded the General Partner from monetary liability absent fraud, bad faith, or willful misconduct. Importantly, the

---

[14] *Id.* at *27.

[15] *Id.*

[16] *Id.* at *26.

[17] *Id.* at *23.

Reliance Provision stated that the General Partner was to be "conclusively" presumed to have acted in good faith if it took action in reliance on the advice of an opinion of legal counsel. Because the Supreme Court reversed the Court of Chancery's finding that the General Partner did not act in good faith because it relied both on the opinions of Baker Botts and Skadden, the General Partner was appropriately exculpated for exercising the take-private call right.

6. **Courts may apply a more deferential standard of review to challenges to legal opinions.** In a concurring opinion, two justices would have found erroneous the Court of Chancery's finding that the Baker Botts opinion was made in bad faith, a factual determination that the majority did not reach. The concurring justices would have held that the Court of Chancery improperly analyzed the Baker Botts opinion *de novo*, as opposed to applying the requisite deferential standard afforded by the Court's precedent in *Williams Companies v. Energy Transfer Equity*, which held that the Court's role is "to determine whether [counsel's determination] . . . is in good faith . . . based on [counsel's] independent expertise as applied to the facts of the transaction" and prohibits the court from "substitut[ing] [its] judgment."[18] Thus, because they would have decided that the Opinion of Counsel was not delivered in bad faith, the concurring justices would have reversed the Court of Chancery's Opinion Requirement holding on that separate ground.

Please click here for the full opinion.

* * *

If you have any questions, please feel free to contact any of the following Cadwalader attorneys.

Jason Halper	+1 212 504 6300	jason.halper@cwt.com
Jared Stanisci	+1 212 504 6075	jared.stanisci@cwt.com
Sara Bussiere	+1 212 504 6255	sara.bussiere@cwt.com
Elizabeth Gorman	+1 212 504 6437	elizabeth.gorman@cwt.com
Dillon Carlin	+1 212 504 6207	dillon.carlin@cwt.com

[18] *Id.* at *30 (Valihura, J., concurring) (citing Nos. 12168, 12337, 2016 WL 3576682, at *11 (Del. Ch. June 24, 2016), *aff'd,* 159 A.3d 264 (Del. 2017)).