LLC Directors' and Managers' Obligations—Key Principles, Practice Points and the Recent Delaware Decisions

There are now more than twice as many entities formed in Delaware as LLCs and other alternative entities as are formed as corporations. Private equity funds and hedge funds often are formed as LLCs or limited partnerships to take advantage of the structural flexibility and tax treatment available. A key advantage is the ability to modify or eliminate traditional corporate-type fiduciary duties and, specifically, to facilitate conflicted transactions which arise due to the fund managers' various roles in managing multiple funds. Below we outline the key principles relating to the obligations of LLC directors under Delaware law, offer related practice points, and briefly discuss the relevant recently issued Delaware decisions. (Where we refer to LLCs, the same generally pertains to other alternative entities such as limited partnerships; where we refer to LLC directors, the same generally pertains to LLC managers and to general partners of limited partnerships.)

Key Principles

- **Broad authority of LLC directors.** LLC agreements typically expressly confer very broad authority on LLC directors to operate the LLC in their discretion, including with respect to transactions in which they and/or the controlling member who appointed them is self-interested. The underlying judicial premise in these cases (often reiterated by the court in its opinions) is that, when an investment is made in a non-corporate entity, the investor is "consciously choosing" to give up the protection of fiduciary duties in exchange for specifically negotiated contractual protections. Thus, the courts have been disinclined to "read in" obligations that are not clearly stated in the agreement. (We note that, in an article published in 2014, Chief Justice Strine and Vice Chancellor Laster questioned the validity of this premise; argued that minority investors in alternative entities typically do *not* actually negotiate terms; and advocated that the Delaware statute should be amended to make the duty of loyalty non-waivable.)

- **Difference from the corporate context.** As is well known, in Delaware, in the *corporate* context, the common law has established that directors owe fiduciary duties of due care and loyalty to the corporation and its stockholders, and these duties cannot be disclaimed or modified by agreement. Although LLC directors have fiduciary duties pursuant to statute, given that the entities are themselves created by contract, the duties can—and typically *are*—modified or entirely disclaimed by agreement. When an LLC agreement clearly disclaims all statutory fiduciary duties of the directors, the directors' duties are limited to (i) those expressly set forth in the agreement and (ii) those that a court deems to arise under the implied covenant of good faith and fair dealing (which adheres to every contract and, by statute, cannot be waived or modified).

- **Limited application of the implied covenant of good faith and fair dealing**. Generally, the implied covenant of good faith is deemed applicable by the Delaware courts only under quite limited circumstances—thus, typically, LLC directors' only obligations are those that are expressly set forth in the LLC agreement. The implied covenant has been deemed applicable only if there is (a) a "gap" in the agreement because the parties did not consider an *un*anticipatable event that has arisen *and* (b) evidence as to what the parties would have agreed had they considered the possibility of that event arising. (However, in a recent case involving an alternative entity, the Court of Chancery expanded the applicability of the implied covenant to a *forseeable* event when the parties failed to express the terms that would apply only because they were "too obvious to need expression.")

- **Meaning of "good faith" in the context of the *implied covenant*.** Importantly, "good faith" in the context of the implied contractual covenant has been viewed by the court differently than "good faith" as part of the corporate fiduciary duty of loyalty. In the context of the implied contractual covenant, the concept has been limited to a requirement that a party not take action to defeat the expectations clearly implied by the explicit terms of an agreement—and has *not* encompassed the concept applicable in the corporate fiduciary context of acting as a loyal fiduciary to advance the best interests of the stockholders. In recent cases, the court has reiterated that, even if there is a gap in the agreement, the implied covenant "does not establish a free-floating requirement that a party act in some morally commendable sense." Rather, "good faith" in this context "entails faithfulness to the scope, purpose, and terms of the parties' contract"; and "fair dealing" "does not imply equitable behavior…[; rather,] it simply means actions consonant with the terms of the parties' agreement and its purpose." Moreover, the court has written, the implied covenant does not impose "obligations from [the court's] own notions of justice or fairness," but, instead, determines whether, from the contract terms, it can be determined "what the parties themselves would have agreed to had they considered the issue in their original bargaining positions at the time of contracting." (We note that, nonetheless, in the infrequent cases in which the court, in the context of an LLC agreement in which fiduciary duties have been disclaimed, *has* found the implied covenant of good faith to be applicable, the backdrop has been alleged facts that have indicated that the challenged conduct constituted "arbitrary" or "deceitful or manipulative" conduct the purpose of which was "to harm" the other investors or "to deprive them of the fruits of their bargain.")

- **Meaning of a *general "good faith" standard* expressed in an agreement.** An LLC agreement frequently includes a provision stating that the directors must "act in good faith." Critically, the meaning of "good faith" in this context will be whatever it is defined as being in the agreement. For example, an agreement may define "good faith" for this purpose as the directors acting in what they *believe* to be the best interests of the LLC (a "subjective good faith" standard, which is satisfied so long as the directors actually had such belief; or it may be defined as the directors acting in what they *reasonably* believe to be the best interests of the LLC (an "objective good faith" standard, which is satisfied if the directors had a reasonable basis for the belief). In many agreements, although there is a general good faith standard, there are safe harbor procedures set forth which, if satisfied, provide a *conclusive* *presumption* of good faith under certain circumstances (for example, for approval of conflicted transactions).

- **Risk of ambiguity based on the interrelationship of provisions.** LLC agreements often include a disclaimer of fiduciary duties, a general standard of subjective good faith for the directors, exculpation for directors other than for acts taken in bad faith, a conclusive presumption of good faith for actions taken in reliance on experts (such as reliance on a fairness opinion), and safe harbor provisions (providing a conclusive presumption of good faith with respect to self-interested transactions if they have been approved by a conflicts committee). When the court has found an LLC agreement to be unclear or ambiguous, it has most often been as a result of a lack of clarity with respect to the interrelationship among these various provisions relating to the directors' obligations.

- **Lack of awareness by minority investors.** In our experience, notwithstanding disclosure to minority investors at the time they invest, they often are surprised—for example, when the board approves a transaction in which the directors (and/or the controller who appointed them) are self-interested—that the directors not have fiduciary duties to the LLC or the investors, that the general good faith standard of conduct does not require that the directors act in the best interests of the investors expected, and that the directors have broad authority to approve conflicted transactions.

- **Importance of drafting.** As the judicial focus in these cases is on the precise terms of the entity's governing agreement, the most critical factor in seeking to avoid future disputes and litigation uncertainty is to ensure that the agreement includes "state-of-the-art" provisions that reflect the parties' intent. As reflected in the discussion of recent cases that follows, most of the litigation in this area relates to LLC agreements that do *not* reflect modern forms of LLC or limited partnership agreements. State-of-the-art provisions, which take into account the most recent judicial contractual interpretations, will clearly: disclaim all fiduciary duties; *define* any general "good faith" standard of conduct; not include language in the exculpation or indemnification provisions that can suggest that some fiduciary duties may continue; and provide safe harbor procedures for approval of conflicted transactions (with a well-defined standard for evaluation of the transaction and specified requirements with respect to eligibility for committee members). The specific drafting is critical and small wording differences can lead to very different judicial results. Chief Justice Strine and Vice Chancellor Laster have written that, while LLC agreements "coalesc[e] around particular features and concepts," this "superficial standardization" is "overwhelmed by diversity in implementation," which "limits the efficacy of precedent and creates fertile opportunities for future litigation."

Practice Points

- **More flexibility than in the corporate context.** While Delaware law relating to *corporate* fiduciary duties and exculpation for personal liability has been transformed over the past several years, resulting in even less potential than previously for liability of corporate directors, the LLC (or other alternative entity) format still offers even more flexibility for directors *when the governing agreement is properly drafted and followed*.

- **Minority investor awareness before investing.** Persons considering a minority investment in a non-corporate entity should read and understand the offering materials and the governing agreement before investing. Often, under the governing agreement, directors, managers and general partners have no fiduciary duties to the other investors and have very broad discretion, including with respect to conflicted transactions.

- **Definition of the scope of the board's discretion.** The scope of the board's discretion (including "sole discretion") should be defined as clearly as possible to avoid any ambiguity. A grant of discretion to a board generally will be subject to exercise in good faith unless the agreement clearly specifies a different standard. In *Miller* (discussed below), where "sole discretion" was granted to the directors, a critical factor in the court's finding that the implied covenant was *not* applicable was that the agreement language, in the court's view, indicated that the parties had considered the potential for action by the controller that might favor the controller's interests and had specifically addressed it by limiting the board's discretion with respect to a sale *to a controller*, but not limiting the board's discretion with respect to any sale *to an unaffiliated party*. If "sole" discretion is granted, any limitations on that discretion should be clearly stated; and a controller should seek to include a statement that the specified limitations are the only ones intended by the parties.

- **Limiting the role of the implied covenant of good faith.** As noted, the implied covenant adheres to every contract and cannot be waived or modified; however, as discussed, the covenant is rarely invoked by the court to "read in" provisions that the parties did not expressly set forth in the agreement. All reasonably anticipatable events should be considered any intended protections for the minority investors should be expressly included. While we have not seen this provision in any agreement, in an effort to further limit the potential of the implied covenant being invoked, a provision could be included that states that the agreement reflects all of the minority protections intended by the parties, that they parties believe that there are no "gaps" in the agreement, and that, to the extent that any gap may develop, the parties mutually intend that any gap be filled by the directors in their sole discretion and notwithstanding any possible self-interest.

- **Need to seek to eliminate ambiguity arising from the interrelationship of provisions.** Any ambiguity in the drafting of an alternative entity governing agreement can lead not only to future disputes between the parties but also opens the door to possible invocation by the court of the implied covenant of good faith. A frequent source of ambiguity is the interrelationship among the various provisions relating to disclaimer of fiduciary duties, a general good faith standard, exculpation and indemnification provisions, and provisions governing conflicted transactions. State-of-the-art provisions—which clearly and unambiguously reflect the parties' intentions and which take into account the most recent judicial pronouncements on these types of provisions—should be utilized. The duties of LLC directors will be most clearly circumscribed where the LLC operating agreement expressly disclaims all fiduciary duties; states that any good faith standard is limited to subjective good faith or to good faith only as required under the implied covenant of good faith and fair dealing; excludes from exculpation or indemnification only actions not taken in accordance with the good faith standard set forth in the agreement; and provides clear safe harbors for conflicted transactions, with conclusive presumptions of good faith for reliance on experts or approval by a conflicts committee (with a subjective good faith standard for the committee's determination, and without any qualifications relating to the reliance on experts).

- **Wide latitude in crafting safe harbors, but compliance with the process is key.** While an LLC agreement can provide for very limited obligations of the directors in connection with affiliated transactions, the process established in the agreement *must be followed*; and the directors will be advantaged to the extent that, notwithstanding the elimination of fiduciary duties by contract, the conflicts committee takes its job seriously and functions well. ***Conflict committee members should:***

  - meet the independence requirements for membership set forth in the LLC agreement;
  - know the standard set forth in the LLC agreement for the committee's approval of the transaction;
  - ensure that they have the information necessary to make a determination that meets the standard for approval;
  - be appropriately engaged in the process of considering the transaction;
  - consider retaining independent financial and legal advisors (and, if advisors are retained, consider retaining them before the financial terms of the transaction are "fully baked"); ask questions to ensure that the advice and analyses are understood; consider obtaining a fairness opinion or legal opinion; and remain in control of the committee process;
  - consider whether to negotiate the terms of the conflicted transaction with the parent company (unless the determination is clear, some level of negotiation is often advisable as a basis for forming a good faith judgment about the transaction); and
  - make a determination that meets the standard for approval (tracking the language set forth in the LLC agreement with respect to the standard of approval), and memorialize their determination in the formal record of the committee's deliberations.

  Notwithstanding the definition of independence set forth in the LLC agreement, the more independent (and the more experienced) the members of the conflicts committee are, the more protective the process may be from a legal point of view. If the agreement provides a clear safe harbor process (based on conflicts committee approval or otherwise) and that process is followed—and, as highlighted in *Dieckman* (discussed below), there is no "deception" in obtaining the conflicts committee approval—then, based on compliance with the safe harbor, any challenge to the transaction should be dismissed at the pleading stage of litigation.

- **Attention to specific phrases when drafting.** Drafting of an alternative entity governing agreement should take into consideration the most recent judicial pronouncements on these types of agreements, including with respect to the interpretation of specific phrases. For example, we note the following:

  - ***"Unless the board otherwise determines":*** When a specified procedure for making a determination is subject to the caveat "unless the board otherwise determines," that phrase may be interpreted by the court as suggesting some implied fiduciary-type duty of the board (as discussed below relating to *Capone*).

- ***"Sole discretion":*** There is a possibility of the court finding that the implied covenant of good faith applies when a provision authorizes a board to use "sole discretion"—unless it is clear that the parties considered and addressed the potential for self-interested action inherent in an exercise of sole discretion (as discussed below relating to *Miller*).

- ***"Gross negligence" exclusion:*** The court possibly could interpret an exclusion from the exculpation or indemnification provision for "gross negligence" as suggesting that the parties may have intended corporate law fiduciary duty concepts to apply (given that gross negligence is the traditional standard for pleading and proving a breach of the fiduciary duty of care under business judgment rule review). Under this interpretation, an LLC manager could be sued for a breach of the duty of care notwithstanding the waiver of fiduciary duties (and, ironically, notwithstanding the fact that in the corporate context the claim would not survive the pleading stage based on an exculpatory provision in the charter). Accordingly, where fiduciary duties are disclaimed, concepts that could suggest that they may persist should be avoided.

Recent Delaware Decisions

ETE **(May 17, 2018)—The decision underscores that the protections of a safe harbor provision for conflicted transactions may be lost if the board does not comply with the precise terms of the provision.** The Court of Chancery ruled that the conflicts committee safe harbor was not available as the committee had initially been established with three members, two of whom were ineligible to serve under the terms of the limited partnership agreement—and, although only the one eligible member actually served, the committee had never been formally reconstituted. We note that the court may have been influenced in this case by the overall negative factual context, including the inexperience and ineffectiveness of the sole director who served on the committee. The court found that (i) absent the safe harbor protection, the LPA terms required that conflicted transactions be "fair and reasonable" to the partnership and (ii) the defendants had not established that the transaction (a private offering of securities primarily to insiders) was fair. The court awarded only nominal damages, however, because the unitholders were not actually harmed (as the value of their units had increased significantly after the challenged transaction due to an improvement in conditions in the energy market).

MHS Capital v. Goggin **(May 10, 2018)—The decision highlights the importance of careful drafting of the LLC agreement given that ambiguity in the interrelationship of the provisions can provide a basis for the court to reject dismissal of breach of contract claims.** The Court of Chancery, at the pleading stage, rejected dismissal of the plaintiff's breach of contract claim against the LLC manager, who allegedly had diverted LLC interests and funds to enrich himself and his friends. The LLC was entitled to receive certain assets it had purchased in a bankruptcy sale but the LLC manager allegedly had (a) directed the bankruptcy court to deliver some of the assets to other companies owned by the manager and his friends and (b) used LLC funds to pay significant fees to an attorney who represented the manager's (and not the LLC's) interests. The manager contended that the breach of contract claims should be dismissed on the basis that the exculpatory clause of the LLC agreement provided that he could not be liable for monetary damages. The court rejected the motion to dismiss, finding that it was unclear under the agreement how the provision setting forth the general standard of care required of the manager ("good faith and ordinary care") was "meant to work with the exculpatory clause, which purports to eliminate all damages."

***Eames v. Quantlab* (May 1, 2018)—The decision reflects the ambiguity that can arise with respect to the interrelationship of various provisions within and among agreements relating to a general partner's duties—as well as the court's general predilection for narrow interpretation of the rights of minority investors in non-corporate entities.** The Court of Chancery granted the defendants' motion to dismiss the plaintiffs' claims that, under (i) the limited partnership agreement and (ii) the LLC agreement governing the general partner, the limited partners had the right to remove and replace the general partner. The LPA provided that admission of a new general partner required the consent of the limited partnership units and the consent of the existing general partner. The LPA also provided that, absent removal for cause, a general partner could not be removed unless there was at least one remaining general partner. The LLC agreement governing the general partner (GP) provided that each of GP's managers (B and Eames) could act alone to transact business "for the benefit" of GP—but could not, without the consent of the other, take any act that would make it impossible for GP to carry on its or the limited partnership's ordinary business or make a major change in the principal business of either. The court held that Eames' purported consent on behalf of GP to the appointment of a new general partner was invalid, as the consent of both managers of GP was required because the removal was *not* for GPs benefit and changed its business. The court reasoned that adding a general partner caused GP to cease being <u>*the*</u> general partner, and to become instead just <u>*a*</u> general partner, of the limited partnership. The court wrote: "While certain of the limited partners may now be displeased with their inability to direct [the limited partnership]'s day-to-day business, this arrangement reflects a bargained-for allocation of interests and influence."

***Capone v. LDH* (Apr. 25, 2018)—The decision reflects that, notwithstanding the disclaimer of fiduciary duties in the agreement, inclusion of certain types of phrases can be interpreted by the court as suggesting an intention of the parties that the directors have duties beyond those specified in the agreement.** The Court of Chancery reasoned that, although the LLC agreement provided that membership units to be purchased from terminated employees would be valued by the LLC board as of a specified date, when new information (which became available after the specified date but before the units were purchased) clearly indicated that the board's valuation had significantly undervalued the units, the board had an *implicit* duty to revise the valuation. The court, at the pleading stage, denied the defendants' motion to dismiss, emphasizing that the valuation provision included the caveat that the valuation was to be produced as specified "unless otherwise determined by the board" (which, according to the court, suggested that the board had discretion that perhaps should have been exercised).

***Leaf Invenergy v. Invenergy Wind* (Apr. 19, 2018)—The decision highlights the importance of expressly memorializing the parties' expectations in specific terms in the LLC agreement (in this case, with respect to a liquidated damages remedy for a breach of the agreement).** The LLC agreement provided that the company could not engage in a sale of assets without the consent of certain of its members unless those members would achieve at least a specified agreed rate of return (the "target multiple"). The Court of Chancery found, at the pleading stage, that the agreement had been breached by the LLC board when it sold assets without the consent of one of these members; and that the clear expectation of the LLC and that member had been that, if such a breach occurred, the company would pay the member an amount equal to the target multiple. However, after a trial to determine the proper remedy for the breach, the court awarded the member only nominal damages of $1 because (i) the LLC agreement itself did not contain a provision clearly stating what the damages would be and (ii) the member did not suffer harm from the breach (because the asset sale that had been effected without its consent was at an "attractive price" that increased the value of its LLC interest). The court wrote: "The parties' subjective beliefs about a remedy are not controlling unless they are implemented in a remedial provision in an agreement, such as a liquidated damages clause." Here, "the parties did not memorialize their subjective beliefs about the expected remedy in a contractual provision."

***Miller v. HCP* (Feb. 1, 2018)—The decision highlights the contrast between LLC and corporate law, with the court commenting that if the case had been decided in the corporate context, the directors would have had a fiduciary duty under *Revlon* to seek to maximize the price of the company on its sale (and the judicial standard of review for the challenged transaction would have been entire fairness).** The Court of Chancery rejected the plaintiff's contention that the implied covenant of good faith required that the controller-dominated board had to seek to maximize the price of the company on its sale to an unaffiliated third party. Although the sale was to an unaffiliated third party, the controller's interests allegedly were not aligned with the other investors' interests, as the LLC operating agreement's "waterfall" provisions allocated to the controller almost all of the proceeds up to $30 million on a sale of the company and almost none of the proceeds above that (resulting in the controller having no incentive to obtain a price above $30 million). The LLC agreement granted "sole discretion" to the board with respect to a sale of the company so long as the sale was to an unaffiliated third party. The court rejected the plaintiff's argument that, under the implied covenant of good faith, the manager had a duty to seek to maximize the price when the company was sold to the unaffiliated third party. The court reasoned that there was no gap in the agreement as to the board's discretion relating to a sale to an unaffiliated third party—to the contrary, sole discretion was expressly granted under the agreement for sales other than to insiders. Moreover, the court stated, even if there had been a gap, it was anticipatable that the board might not conduct an auction in connection with a sale to an unaffiliated third party given that, based on the waterfall provisions in the LLC agreement itself, it was clear that the controller had no incentive to obtain a sale price above $30 million.

***Morris v. Spectra Energy* (June 27, 2017)—The decision reflects the potential that the court may find a breach of the implied covenant in the context of a conflicted transaction that is, on its face, "patently unfair and unreasonable."** The Court of Chancery found it likely, at the pleading stage, that the general partner of a master limited partnership had breached its express contractual obligation to act in good faith in connection with a sale, by the MLP to the indirect parent of its general partner, of an asset that the purchaser already had publicly committed to contribute to a joint venture at a much higher valuation than it was paying the MLP for the asset. The difference between the two prices was about half a billion dollars. Although the transaction had, we note, apparently been approved as specified under the MLP agreement, the court found that the large facial disparity between the alleged value of the asset sold and the price paid for it gave rise to a reasonable inference that the general partner had approved the transaction in bad faith. The MLP agreement required that the general partner (GP) make determinations "in good faith," which was defined as a subjective belief by GP that the action taken was in the best interests of the MLP. The agreement provided a *rebuttable* presumption of good faith by GP with respect to any conflicted action that was approved by a conflicts committee and provided a *conclusive* presumption of good faith by GP with respect to any action taken in reliance on an expert opinion. The court identified the threshold issue as whether the *rebuttable* presumption applicable to conflicted transactions or the *conclusive* presumption relating to reliance on expert opinions governed with respect to the transaction. The court acknowledged the general contract interpretation principle that more specific provisions (such as a provision relating to conflicted transactions) override more general provisions (such as an "overarching" good faith standard), and acknowledged Delaware Supreme Court precedent holding that a general *conclusive* presumption of good faith arising from reliance on advisors trumps a specific conflict provision's *rebuttable* presumption of good faith. The court emphasized, however, that the judicial precedents do not represent "totemic statements," as the court's interpretation of an agreement in any case will depend on the "precise language" of the specific agreement and a reading of the agreement as a whole. In this case, the court ruled, the *rebuttable* presumption applicable to conflicted transactions applied. The court stated that, given the "broad contractual freedoms" afforded to alternative entities and the limited bargaining power of unitholders, ambiguities in the agreement should be resolved in favor of the unitholder. Perhaps most tellingly, the court wrote: "[W]hen sophisticated entities intend to provide a conclusive presumption in a conflicts situation, they know how to draft such a provision." Thus, the court found a pleading stage inference of a breach of GP's contractual obligation of good faith. (The court also ruled that the implied covenant of good faith was not applicable as there was no gap to be filled in the agreement because GP's conduct was to be evaluated under the good faith standard set forth in the agreement.)

Brinckerhoff v. Enbridge Energy **(Mar. 20, 2017**)—**The case involved interpretation of a *<u>non</u>*-state-of-the-art limited partnership agreement (which did not provide safe harbors for affiliated transactions).** The Delaware Supreme Court, overturning the Court of Chancery decision below, interpreted the limited partnership agreement as imposing a "fair and reasonable" standard for self-interested transactions, and thus ruled that the Court of Chancery's dismissal of the plaintiff's claims at the pleading stage was improper. The master limited partnership had re-purchased from its general partner an asset that it had recently sold to the general partner at a significantly lower price—despite strong evidence that the value of the asset had actually significantly declined since the time of the sale to the general partner. The Court of Chancery, in the decision below, held that the LPA's general good faith standard modified and overrode the separate, more specific provisions such as the "fair and reasonable" standard for affiliated transactions). The court interpreted the general good faith standard as requiring a *subjective* belief by the general partner that an action was in the best interests of the MLP—and as therefore requiring, for the plaintiff to prevail, that the board's actions were taken in bad faith and amounted to the equivalent of "waste." The Supreme Court overruled the decision below and held that the general good faith standard *operated in the spaces between the LPA's specific provisions*—that is, was applicable only to the extent that there was *not* a more specific applicable provision. Therefore, the Supreme Court ruled, the affiliated repurchase transaction was governed by the provision that imposed the specific obligation that affiliated transactions be objectively fair and reasonable. Moreover, the Supreme Court interpreted the general good faith standard differently—finding that it was more consistent with the overall terms of this particular agreement that it meant a *reasonable* belief that the action taken was in, or not inconsistent with, with best interests of the MLP (rather than the lower standard for good faith used by the Court of Chancery, which would have required that the action was so beyond the bounds of reason as to be inexplicable other than by bad faith and, so, was similar to "waste"). The Supreme Court also held that the board's reliance on a fairness opinion did not result in a conclusive presumption of good faith under the LPA, as the LPA provided that "*reasonable* reliance" was required—and, given the alleged errors of the banker, whether the reliance in this case had been reasonable presented a question of fact requiring discovery.

Importance of the factual context. While, as discussed, the court extends a high degree of deference to LLC and partnership agreement provisions, importantly, the facts and circumstances can very much affect the court's result. For example, in *El Paso* (2015), in the context of extremely negative facts relating to the conflict committee's process, the court concluded that the committee did not satisfy the safe harbor requirement of a subjective belief that the transaction at issue was in the best interests of the MLP. The transaction involved a purchase of assets by the MLP from its general partner's parent—at a price significantly higher than the MLP had paid for the same type of assets from the general partner's parent only months earlier and notwithstanding a significant decline in the market for this type of asset.

Emphasizing the incomplete, inaccurate, and "manipulative" nature of the information provided to the committee by its financial advisor, as well as the committee's ignoring the fact that information it had relating to the MLP's other recent dropdown transactions, and the committee members apparently not even understanding the terms of the transaction, the court's view appeared to be that the committee did not have a base of information upon which it was even *possible* to form a subjective belief as to whether the transaction was in the MLP's best interests. It is to be noted that, in addition, there were contemporaneous emails among the committee members that indicated that they *actually* believed that the transaction would *not* be in the best interests of the partnership.

Dieckman (2016) provides another example. The Delaware Supreme Court ruled that, although the conflicts committee members technically had met the independence requirements of the safe harbor provision, the committee's approval of the transaction at issue was not effective because of "deceptive," "manipulative" and "misleading" conduct by the general partner. As one example, to satisfy the independence requirement for committee members that they not be directors of any affiliates of the general partner, the general partner had one MLP director selected to serve on the committee resign his directorship with one of the general partner's affiliates just before the committee was formed and to rejoin just after the committee process ended. The court also held that the safe harbor based on approval by the unaffiliated unitholders had not been satisfied because the disclosure that an "independent" conflicts committee had approved the transaction did not reveal the members' conflicts of interest. The court rejected the lower court's determination that the express obligation of the general partner to act "in good faith" did not impose any disclosure obligation beyond the minimal disclosure requirement specifically set forth in the agreement. The court stated that, once the general partner went beyond the minimal disclosure requirements set forth in the partnership agreement and instead issued a comprehensive proxy statement, it had an obligation under the implied covenant of good faith not to mislead the unitholders to "induce" them to approve the transaction. The court focused on the safe harbor process in its entirety and found that the language implicitly required the general partner to act in a manner that would not undermine the (minimal) protections afforded to the unitholders in connection with the safe harbor process. Finally, in one 2018 decision, the Court of Chancery found that the implied covenant of good faith was applicable where, in the court's view, the controller of an LLC was responsible for the gap in an agreement and held that it therefore would be inequitable for the controller to benefit from the gap.

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