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Delaware Supreme Court Applies "Entire Fairness" to An MLP Conflict Transaction and A Lower Bar to "Bad Faith" Claims—But Decision Is Likely to Have Limited Impact— Brinckerhoff v. Enbridge Energy

In *Brinckerhoff v. Enbridge Energy Company, Inc.*, the plaintiff, an investor in the Enbridge Energy Delaware master limited partnership (the "MLP"), challenged a $1.2 billion transaction between the MLP and the controlling parent corporation ("Parent") of the MLP's general partner (the "GP"). The factual context was the repurchase by the MLP of an asset it had previously sold to Parent–with the repurchase at a significantly higher price, despite strong indications that the value of the asset had declined, and without the GP or its banker having considered the earlier sale as a comparable transaction. The Delaware Supreme Court, in an opinion written by Justice Seitz (March 20, 2017), reversed the Court of Chancery's dismissal of the case.

Background. In 2009, at Parent's instigation, the MLP sold to Parent, for $800 million, a two-thirds interest (the "Pipeline Interest") in a pipeline construction project (the "2009 Sale"). In 2014, Parent proposed that the MLP repurchase the Pipeline Interest, for $1 billion. A "special committee" of the GP, relying on an independent banker's fairness opinion, recommended the repurchase (the "2014 Repurchase"). After closing, Brinckerhoff, a public unitholder of the MLP, sued. (He also had sued after closing of the 2009 Sale, alleging that the sale price was too low; that earlier suit had been dismissed by the Court of Chancery). Brinckerhoff alleged that the 2014 Repurchase price was $200 million more than the 2009 Sale price, even though, he claimed, the value of the Pipeline Interest had decreased significantly–with a 20% decline in projected EBITDA, a slump in oil prices, the early end to a favorable tariff regime, and the exclusion from the 2014 Repurchase of valuable project expansion rights that had been included in the 2009 Sale.

The Court of Chancery, in an opinion written by Vice Chancellor Slights (April 29, 2016), dismissed the case, based on (i) the Enbridge LPA provisions disclaiming fiduciary duties of the GP and permitting approval of conflict transactions by the GP acting in good faith, and (ii) Brinckerhoff's not meeting the pleading standard for a valid claim of bad faith against the GP. The Delaware Supreme Court reversed. The case has been remanded to the Court of Chancery to determine: (i) whether the GP breached the LPA; (ii) if so, whether the GP acted in "good faith" (and will therefore be exculpated under the LPA); and (iii) if there were a breach, but the GP acted in good faith and so is exculpated, whether an equitable remedy should be ordered to redress the good faith breach.

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Key Points

- **The Supreme Court's rulings in the decision likely will have little impact on MLPs that operate under more typical limited partnership agreements**. Importantly, the Enbridge limited partnership agreement ("LPA") was *not* a modern-form LPA that contained "safe harbor" or other provisions establishing only minimal requirements for the general partner's approval of conflict transactions. The Court's application of an "entire fairness"-like standard to approval of the 2014 Repurchase was based on its interpretation of the specific, *atypical* provisions of the Enbridge LPA–and so should impact only MLPs operating under similar LPAs. The Court expressly reaffirmed in the opinion the well-established general approach of the Delaware courts to MLP cases, including that "safe harbors," if followed, will immunize conflicted transactions from judicial review.

- **"Entire Fairness Interpretation"–The entire fairness-like standard was applied based on the Supreme Court's interpretation of the specific, atypical provisions of the Enbridge LPA**. The Enbridge LPA permitted approval only of conflict transactions that the GP had determined to be "fair and reasonable," with the standard met if the GP "reasonably [(*i.e.*, objectively)] determined" that the transaction was on arm's length terms no less favorable than those available from third parties (the **"Section 6.6(e) Requirement"**). The court interpreted the Section 6.6(e) Requirement as establishing a standard equivalent to "entire fairness," and ruled that the facts pled supported a reasonable inference that the GP had breached the LPA by not meeting that standard.

- **The following holdings, while based on *typical* provisions in the Enbridge LPA, all flowed out of there having been a valid claim of breach by the GP**. Accordingly, these rulings, which reversed the Court of Chancery's holdings, should have little impact on MLPs that operate under LPAs which (as most do) include "safe harbors" or other provisions that establish standards that are easy for the general partner to meet and thus make breach by the general partner unlikely.

  - "Bad Faith-Breach Holding"–Notwithstanding a general good faith standard for the GP set forth in the LPA, bad faith was *not* a precondition to finding that the GP had breached the LPA.

  - "Bad Faith-Exculpation Standard"–Where bad faith is undefined *for exculpation purposes*, the definition in a *general good faith standard* set forth in the LPA will be applied (unless the LPA clearly provides otherwise). In this case, that resulted in the application of a *lower standard* for making a valid claim of bad faith for exculpation purposes than the standard that the Court of Chancery had applied, making it easier for the plaintiff to make a valid claim of bad faith.

  - "Fairness Opinion Holding"–Where an LPA provides for a conclusive presumption of good faith for the general partner based on its reliance on a fairness opinion, the timing of, and substantive weakness in, the opinion can undermine the presumption.

  - "Equitable Remedies Holding"–Where an LPA provides for exculpation from monetary damages for a good faith breach (and does not exclude equitable remedies), post-closing equitable relief (such as rescission or reformation of the challenged transaction) may be available for a good faith breach. As we read the opinion, this holding appears to be limited to situations where the LPA imposes requirements that are judicially interpreted to be equivalent to an entire fairness-like standard.

- **The Supreme Court seems to have suggested the potential of aiding and abetting liability in connection with a general partner's *contractual* breach of an MLP agreement**. Previously, aiding and abetting liability generally has been applicable only in the context of *fiduciary duties*, not *contractual obligations*.

- **The Supreme Court ruled that a "Special Tax Allocation" that benefitted the GP did not breach the LPA**. Although part of the consideration for the 2014 Repurchase was an amendment to the LPA to provide for a tax allocation that would significantly benefit the GP, and would be significantly to the detriment of the public unitholders, the Court concluded that the amendment provision in the Enbridge LPA did not prohibit the amendment. This ruling reflects that the Court will not necessarily find a breach based solely on the fact that an action significantly benefits the general partner, to the detriment of the public unitholders.

Discussion

Notwithstanding the specific holdings, the Supreme Court expressly reaffirmed in the opinion the well-established general approach of the Delaware courts to MLP cases. The Court reaffirmed that MLP arrangements are contractual in nature and that, accordingly, an LPA (i) can disclaim all fiduciary duties of the general partner and replace them with contractual standards–which will then be the general partner's only obligations (other than the implied covenant of good faith, which, by statute, cannot be disclaimed, but which has been judicially interpreted to have only narrow applicability); (ii) can establish "safe harbor" procedures for approval of conflict transactions–which, if they are followed, will immunize the transactions from judicial review (even if the requirements imposed by the safe harbor provisions are extremely minimal); and (iii) can provide standards for the general partner's performance of its contractual duties and specify the remedies for any breaches.

"Entire Fairness Interpretation"–The entire fairness-like standard was applied based on the Supreme Court's interpretation of the specific, atypical provisions of the Enbridge LPA. The Court explained that each [of its MLP decisions is] based upon *significant nuanced substantive differences* among each of the specific [LPAs] at issue…." As noted, the Enbridge LPA was *not* a modern-form LPA with a state-of-art "safe harbor" that (typically) provides for approval of conflict transactions by an independent conflicts committee based on a *subjective judgment* about the transaction (a "Safe Harbor"). The Section 6.6(e) Requirement, which is not typical, was interpreted by the Court as establishing a "fiduciary contractual standard" that was "equivalent to 'entire fairness' in the corporate context," and that, therefore, mandated judicial review of the GP's approval of the 2014 Repurchase. As noted, this ruling should impact only MLPs operating under LPAs that contain provisions similar to the Section 6.6(e) Requirement.

"Bad Faith-Breach Holding"–The Supreme Court held that, notwithstanding a general good faith standard for the GP set forth in the LPA, bad faith was not a precondition to finding that the GP breached the LPA. The Supreme Court held that, unless an LPA clearly provides otherwise, *general good faith standards* in the LPA do *not* "modify" or "displace" any *specific affirmative obligations* set forth in the LPA provisions that specifically govern conflict transactions (such as, in the Enbridge LPA, the Section 6.6(e) Requirement). Thus, while good faith by the GP (which was defined, as is typical, as the GP "reasonably believing" that it was acting "in the best interests of the [MLP]") was a basis for *exculpation* of the GP from damages for breach, it was not a basis for determining *whether there had been a breach*. In other words, the breach of a specific affirmative obligation in an LPA with respect to approval of conflict transactions will be deemed by the Court to be a breach even if the general partner

had a reasonable belief that the conflicted transaction was in the best interests of the MLP. By contrast, the Court of Chancery had held that, because the LPA provided for a general standard of good faith and for exculpation for actions taken in good faith, the issue of any breach relating to approval of a conflict transaction could arise only after a judicial determination that the GP had acted in bad faith. The Supreme Court stated that this approach "leads to an unreasonable result no public investor would have considered possible when reviewing the LPA—that [the GP] is free to violate any specific LPA requirement so long as the breach is in good faith." "In fact," the Supreme Court wrote, "precisely because the Delaware Revised Uniform Limited Partnership Act (DRULPA) allows [LPAs] … to eliminate fiduciary duties, it is essential that unitholders be able to hold the general partner accountable for not complying with the terms of the [LPA]."

"Bad Faith-Exculpation Standard"–"Waste"-like standard for pleading "bad faith" (in the context of determining whether exculpation for a breach was available) was rejected—and a lower bar for making a valid claim of bad faith was applied. Having determined that the GP may have breached the Section 6.6(e) Requirement, the Supreme Court proceeded to determine whether the GP had acted in bad faith and therefore would not be exculpated for damages arising from the breach. While the Enbridge LPA (as is typical) provided a general standard of good faith for the general partner, defined as a reasonable belief that an action was "in the best interests of the [MLP]," the LPA (also as is typical) did *not* provide a definition of good faith for purposes of determining whether the GP would be exculpated for breach of any specific affirmative obligation set forth in the LPA. The Court of Chancery had applied a pleading standard for bad faith, for purposes of determining whether exculpation was available, that the Supreme Court characterized as similar to the "waste" concept in the corporate context–*i.e.*, that the GP's decision to approve the conflict transaction was "so far outside the bounds of reasonable judgment as to essentially have been explicable only on the ground of bad faith."

The Supreme Court acknowledged that it had affirmed that standard in an earlier decision in this litigation; and characterized judicial precedent on pleading standards for bad faith as "confusing." Stating that it was "now chang[ing] course," the Court applied a *lower standard* for bad faith to determine exculpation–*i.e.,* that the GP had "reasonably [(*i.e.*, objectively)] determined that its action was in the best interests of the [MLP]." This standard, the Court explained, "appl[ied] the definition of bad faith that is commonly used in our entity law *and [was] incorporated into the Enbridge LPA*" (emphasis added). Absent express language in the LPA to the contrary, the Court concluded that "the concept of good faith was intended to be used consistently throughout the LPA"; thus, the definition in the *general* good faith standard was imported to the pleading standard for bad faith in connection with exculpation. We note that, although the "best interests" standard sets a lower bar for bad faith (making exculpation less available) than the "waste"-like standard did, it is not clear that there is a *significant* difference between the two standards. We note, also, that, unless a breach is established, there is no issue as to exculpation. *Thus, as discussed above, the holding is likely not to be relevant to MLPs operating under LPAs that provide Safe Harbors or other provisions that make breach by the general partner unlikely.*

"Fairness Opinion Holding"–The Supreme Court rejected a presumption of good faith based on reliance on a fairness opinion, due to the timing and nature of the opinion. Like most LPAs, the Enbridge LPA provided for a conclusive presumption of good faith by the GP to the extent that it relied on the opinion of an advisor that it reasonably believed to be qualified. Although there was no Safe Harbor provision for approval by an independent conflicts committee, and no requirement in the LPA that a committee evaluate a conflicted transaction, the GP had formed a "special committee" to evaluate the 2014 Repurchase. The committee was comprised of three GP directors, one of whom was also a director

of Parent. The committee did not negotiate Parent's proposed sale price, but, based on the recommendation of the committee's financial advisor, negotiated for an increase in the MLP's retained interest (from the one-quarter interest proposed by Parent to a one-third interest, to which Parent then agreed.) The advisor conducted various analyses, including a comparable transactions analysis that evaluated 27 comparable transactions, but not including the 2009 Sale, despite a requirement in the Enbridge LPA that "prior and similar" transactions be considered by the GP in connection with its approval of a conflict transaction. The advisor provided a fairness opinion; the committee recommended the transaction; and the GP approved it.

The Supreme Court questioned whether the GP's reliance on the fairness opinion had been "in the manner contemplated" by the LPA given that the opinion was delivered after the transaction was already (in the Court's words) "fully baked." The Court may have been suggesting that reliance on a fairness opinion would support a good faith presumption only if the banker had been engaged to participate in negotiation, or a valuation, of the transaction—and not to provide a confirmatory, after-the-fact kind of opinion. "If [the banker] had been charged in the first instance to value the [Pipeline] Interest, and the [GP] had reasonably relied on [the] valuation to set the sale price, [the banker's] role and the [GP's] reliance on its valuation might be a more comfortable fit [with the LPA's] reliance language," the Court wrote. In addition, the Court appeared to believe that alleged substantive weaknesses in the fairness opinion (particularly, the banker's failure to consider the 2009 Sale as a comparable transaction) called into question whether the GP could have "reasonably believed" that the advisor was "professionally equipped" to deliver the opinion.

In our view, the Court's approach in this case to the fairness opinion, and to the timing, nature and extent of the banker's involvement, *likely is limited to the particular fact situation,* including (a) the atypical terms of the Enbridge LPA and (b) the fact that, in the Court's view, neither the GP nor the banker appeared to meet the LPA's express requirements for conflict transactions. First, neither the banker nor the GP considered a prior transaction for the very same assets—notwithstanding that the LPA (atypically) expressly required consideration of "similar or related" transactions. Second, the GP did not determine, and the banker did not opine as to, whether the transaction was "fair and reasonable"—notwithstanding that the LPA (atypically) expressly required that the GP do so. (As noted, the LPA defined "fair and reasonable" as meaning that the transaction was on terms at least as favorable as third party arm's length terms—while the banker's opinion stated that the transaction was "fair to the [MLP] and its common unitholders.") In addition, the proposed transaction was, on its face, problematic in relation to the prior transaction, with no financial or other factors offered to explain the different pricing.

Further, we note that, as a practical matter, in the more typical case involving a Safe Harbor based on subjective determinations by the general partner or a committee, there generally would be no need to depend on any presumption of good faith to avoid breach by the general partner.

"Equitable Remedies Holding"–The Supreme Court held that post-closing equitable relief may be available to remedy a good faith breach. The Supreme Court held that the Enbridge LPA's exculpation of the GP from monetary damages for good faith breaches did not preclude post-closing *equitable* remedies for such breaches. *As we read the opinion, this holding is limited to those situations in which the LPA provides for an entire fairness-like standard for approval of conflict transactions*. The Court stated: "[The Enbridge GP] face[d] potential liability for breach of [the Section 6.6(e) Requirement], under a contractual fiduciary standard similar if not identical to entire fairness. As we held in [*Gotham Partners v. Hallwood Realty* (2002)], *such contractual standards* can subject the general partner to equitable relief" (emphasis added). The Supreme Court stated that the Court of Chancery has "broad discretion to craft

a[n equitable] remedy to address the wrong," and that these could include reformation or rescission of the transaction. "Whether an equitable remedy should be ordered will depend on the Vice Chancellor's assessment of the equities, which include the practicality of an equitable remedy given the passage of time, and the ability to order equitable relief tailored to the harm caused by a breach of the LPA." The Court also noted that equitable remedies would not be available where the LPA expressly precludes them.

Suggestion that there may be potential aiding and abetting liability in connection with a general partner's breach of an LPA. Brinckerhoff had argued that the Court of Chancery erred when it dismissed his claims against certain defendants for "secondary liability" in connection with the GP's alleged breach of the LPA. With respect to the claims not dismissed against the remaining defendants (all of whom were directors of the GP or its affiliates, and some of whom served on the special committee that approved the 2014 Repurchase), the Supreme Court wrote: "Because the secondary liability claims raise interesting issues that would benefit from a more fully developed record, we will await the Court of Chancery's determination of these issues." That sentence has prompted some commentators to surmise that the Court may be suggesting a new openness to potential aiding and abetting liability in connection with general partner breaches of LPAs.

Generally, Delaware law has applied the concept of aiding and abetting liability for breaches of *fiduciary duties*, and not for *breaches of contract*. Previous decisions have indicated that, in the partnership context—if the parties eliminate default fiduciary duties and establish a purely contractual relationship—they are deemed to have chosen to limit themselves to pursuing contractual remedies only against the contractual parties. Accordingly, we expect that the suggestion of the possibility of aiding and abetting liability for the director defendants in *Brinckerhoff* is linked to the Court's view that an entire fairness-like standard applied to the GP's conduct. We note that recent Delaware decisions have emphasized the narrow circumstances under which aiding and abetting liability may be imposed even in the context of fiduciary duties, with scienter (*i.e.*, actual intent to do harm) being a prerequisite.

Special Tax Allocation did not breach the LPA. Part of the consideration provided by the MLP for the 2014 Repurchase was an agreement to amend the LPA to provide for a "Special Tax Allocation," which would divert certain gross income from Parent to the public unitholders (in order to offset a $410 million capital gain that the GP would incur on sale of the Pipeline Interest back to the MLP). The plaintiff alleged that there was "hundreds of millions of dollars" of benefit to Parent from the Allocation and that it was significantly financially detrimental to the public unitholders. The plaintiff claimed that the amendment breached the Enbridge LPA's prohibition on amendments that would "enlarge the obligations" of the public unitholders. The Supreme Court, evaluating the claim d*e novo*, interpreted the word "obligation" as used in the LPA to mean obligations *to the MLP.* There was not a breach, the Court held, because the Allocation enlarged the limited partners' liability to pay taxes, but did not enlarge their obligations to the MLP.

Practice Points

- **Planning for a conflict transaction**. A general partner, and a committee (if any), when planning for a conflict transaction, should review the LPA with counsel so that the relevant requirements are understood and can be complied with. The planning must take into account the specific provisions of the particular LPA, as well as the "overall scheme" of the LPA, which indicates the intent of the parties. The general partner, and a committee (if any), as well as the banker, should carefully follow the standards and procedures set forth in the LPA.

- **Safe Harbors**. If an LPA provides a Safe Harbor (which typically requires only that a conflicts committee comprised of one or more directors of the GP (who are not also directors or officers of affiliates of the GP) *subjectively believes* that the transaction is in, or is not inconsistent with, the best interests of the partnership), then, the only avenues for challenge of a conflict transaction are that: (a) the Safe Harbor procedural requirements were not followed; (b) there is contemporaneous evidence that the committee did not actually have the subjective belief that the transaction was in the best interests of the MLP, even though it said it did; or (c) arguably, that the committee's subjective judgment had *so* little foundation as to not meet even the minimal standard of having formed an actual subjective judgment.

- **Consider a general partner's overall economic interest**. In structuring or negotiating the terms of a conflict transaction, the general partner and any committee should evaluate the net economic cost, if any, to the general partner of more favorable terms to the MLP, taking into account *all* of the general partner's and its affiliates' direct and indirect economic interests in the transaction (including the general partner interest, limited partner interests and incentive distribution rights).

- **Timing and substance of a banker's fairness opinion**. The general partner (or a committee, if any) should review the LPA to understand the specific requirements for reliance on a fairness opinion, as well as the impact of this reliance. The timing and nature of the engagement should "fit" with the type of reliance contemplated by the LPA. The banker's work and opinion should follow the specific standard set forth in the LPA. The general partner (or any committee) should review the banker's work and ask any follow-up questions relating to the banker's work and/or the LPA standards being met.

- **Importance of considering comparable transactions**. While the Enbridge LPA expressly required the consideration of "prior similar or related transactions," and most LPAs do not so require, there are other recent cases in which the failure by the general partner (or committee) and/or its banker to consider a previous similar transaction (such as a prior recent sale for the same or very similar assets) was a focal point of judicial criticism.

- **Buyer-beware approach for MLP investors**. Potential investors in an MLP should read and understand the LPA provisions before investing. Investors are often surprised, after the fact, at the broad discretion that a general partner has, particularly with respect to conflict transactions, and that, typically, the general partner has no fiduciary duties.

- **LPA drafting–Provisions to consider, based on this decision**. The drafting should be clear and unambiguous with respect to the general partner's obligations and the circumstances under which the general partner may have liability. MLPs operating under older-form LPAs without a Safe Harbor may want to consider the possibility of amending the LPA to add a Safe Harbor. As discussed, in the case of MLPs operating under LPAs *with* a Safe Harbor, it is far more unlikely that a breach would arise, obviating the need for additional amendments. However, based on *Brinckerhoff,* the following provisions should be considered when drafting a new LPA (or for extra protection if otherwise amending an LPA that already contains a Safe Harbor):

    - Expressly exclude post-closing equitable remedies under all circumstances.

    - Define broadly the circumstances under which a good faith presumption would arise from reliance on an advisor–including providing that a presumption of good faith will arise based

on reliance on an advisor that the general partner (or any committee) subjectively believes to be qualified to render the opinion.

- Consider defining "good faith" (for the general standard and/or the standard applicable to exculpation) based on the "waste" concept (*i.e.*, actions that are not so far beyond the bounds of reasonable judgment as to be inexplicable on any ground other than bad faith), rather than a "best interests" concept.

- "Fair and reasonable" standard. If an LPA provides a "fair and reasonable" standard, rather than a Safe Harbor, for approval of conflicted transactions, and the LPA will not be amended to include a Safe Harbor but can otherwise be amended, the following amendments could be considered so that the standard would not be interpreted as equivalent to "entire fairness": making any determinations based on the subjective (rather than the "reasonable") belief of the decision-maker (whether the general partner or a committee); expressly giving the decision-maker broad discretion in determining whether the standard is met; and not undermining that broad discretion with specific requirements, such as an evaluation of what terms would be available from third parties.

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