

Schedule 2

The Latest Bandera Decision

On December 10, 2025, the Delaware Supreme Court issued the fourth in a series of opinions in the *Bandera* litigation involving a legal opinion that was the basis for calling the interests of limited partners in a public master limited partnership (*Bandera Master Fund LP v. Boardwalk Pipeline Partners, LP*, 2025 WL 3537343 (Del. 2025)). Because, as described below, the Supreme Court remanded the case to the Court of Chancery for further proceedings, it likely is not the last opinion. However, the Supreme Court decision should put to rest that part of the litigation that deals with the standards applicable to legal opinions.

An article on the latest *Bandera* decision is planned for the next issue of the ABA Legal Opinions Committee newsletter, *In Our Opinion*, but in view of the decision's recency, I thought it useful send a description of the decision to the listserv to inform committee members and generate reactions.

Background

As we know, the *Bandera* litigation involved claims, including for breach of contract and tortious interference, against the partnership, the general partner, and the sole member of the general partner for calling the limited partner interests at a depressed price based upon an opinion of counsel that allegedly did not satisfy the condition of the limited partnership agreement (the "LP Agreement") for exercise of the call right. The LP Agreement authorized the call of the limited partner interests so that the general partner could take the partnership private in the event that the Federal Energy Regulatory Commission ("FERC") changed its regulations in a way that made it no longer advantageous to operate a pipeline company as a master limited partnership. Exercise of the call right was conditioned on the partnership's receiving an "Opinion of Counsel" that the partnership's status as a pass-through tax entity will reasonably likely have a material adverse effect on the maximum applicable rate that can be charged to customers as a result of FERC action. "Opinion of Counsel" was defined as a written opinion of counsel acceptable to the general partner. The LP Agreement also exculpated the general partner and others from damages, except for actions

in bad faith, and provided that actions taken in reliance on the advice or opinion of counsel is conclusively presumed to have been done in good faith.

After considerable efforts and pressure from the client, the law firm retained to provide the legal opinion called for by the LP Agreement delivered its opinion, which contained several key assumptions. Separate counsel retained to advise on whether the general partner should consider the legal opinion acceptable advised the board of the general partner's sole member that "it would be within the reasonable judgment of [the sole member] to find" the legal opinion acceptable. Shortly after completion of the call of the limited partner interests, FERC issued an order revising its proposed action in a way that meant that FERC's actions would not have any effect on the partnership's recourse rates.

Prior Decisions

In the initial decision, the Court of Chancery found that the opinion was contrived in order to reach its result, relied on counterfactual assumptions and assumptions that were tantamount to the legal conclusions, and was neither given by the law firm nor accepted by the general partner in good faith (*Bandera Master Fund LP v. Boardwalk Pipeline Partners, LP*, 2021 WL 5267734 (Del. Ch. Nov. 12, 2021), rev'd and remanded, 288 A.3d 1083 (Del. 2022)). Accordingly, the Court held that the opinion condition and acceptability condition for the call of the limited partner interests under the LP Agreement were not satisfied and therefore that the general partner breached the LP Agreement in calling the interests. It awarded almost \$700 million to the plaintiffs.

On appeal, the Delaware Supreme Court, without addressing the opinion issue, found that the general partner was exculpated under the LP Agreement from liability in accepting the opinion and relying on it based upon the advice of counsel (*Boardwalk Pipeline Partners, LP v. Bandera Master Fund LP*, 288 A.3d 1083 (Del. 2022)). The Supreme Court therefore reversed the Court of Chancery decision and remanded the case for consideration of the remaining claims.

On remand, the Court of Chancery repeated its findings about the opinion and, after struggling with the implications of the Supreme Court's exculpation holding and how it affected its finding that the opinion was not rendered in good faith, the Court concluded that the Supreme Court's ruling that the general partner was deemed under the LP Agreement to have acted in good

faith so as to be entitled to exculpation meant that there was no breach, and so dismissed the remaining claims (*Bandera Master Fund LP v. Boardwalk Pipeline Partners, LP*, 2024 WL 4115729 (Del. Ch. Sept. 9, 2024)). In doing so, the Court stated that if the Supreme Court intended something else, it could so indicate on appeal.

Supreme Court Decision

In its recent decision on the appeal of the Court of Chancery’s decision, the Supreme Court confirmed that its prior ruling was limited to exculpation of the general partner for accepting the opinion and did not address whether the opinion had been given in good faith so that the opinion condition was satisfied. In addressing that issue, the Supreme Court found support for the Court of Chancery’s findings and therefore reversed that court’s decision on remand and again remanded the case for further proceedings. In a key passage, the Supreme Court stated:

We agree with the Court of Chancery's statement of the standard for assessing whether an opinion of counsel that serves as a condition precedent to a contractual right or obligation is given in good faith. It is consistent, in our view, with customary opinion practice, in which “the lawyer's duty is to provide a fair and objective opinion.”

The Supreme Court cited the Restatement (Third) of the Law Governing Lawyers, §95, Comment Am. L. Instit. (2000), and stated:

We recognize that the excerpts from the Restatement quoted here are taken from a section devoted to evaluations undertaken for a third person and not, as here, the lawyer's client. We see no legal reason why these principles should not apply with equal force when a lawyer renders an opinion that affects the economic interests of nonclients who have no role in the opinion process.

Importantly, the Supreme Court then added:

The Boardwalk defendants’ current position—that so long as a critical opinion of counsel is followed by a second opinion deeming the first one to be “acceptable,” the first opinion need not have been issued in good faith—is, as we see it, an unacceptable end run around *Williams*.

A number of present, past and incoming leaders of opinion bar groups filed an Amicus Curiae brief with the Delaware Supreme Court (available on the Legal Opinion Resource Center under “Other Publications and Articles of Interest” ([here](#))), apprising the Supreme Court of the

standards applicable to legal opinion and encouraging it to confirm that the Court of Chancery was correct in stating that legal opinions had to be “fair and objective” and that it correctly described existing customary practice applicable to the type of legal opinion involved in the case.

Conclusion

A key message from the *Bandera* decisions is that lawyers should use caution in including a non-third party opinion as a condition to closing a transaction or enabling other action to be taken, having in mind that when the time comes they could face pressure from their client to give – or, in some cases, not give - that opinion. When a legal opinion, including a traditional third party closing opinion, is included as a condition to closing a transaction or permitting other action to be taken, the law firm that is to give the opinion should make sure that it is an opinion it believes it will be able to give. When the time comes to give the opinion, the lawyers should make sure they are comfortable that the opinion meets the standard of being fair and objective and given in good faith, including resisting any client pressures that bring doing so into question.