

# Dieckman and Mesirov Highlight That Differences in Limited Partnership Agreements Impact Aiding-and-Abetting Claims

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> See page 3 for implications

Two decisions from the Court of Chancery — *Dieckman v. Regency GP LP*, C.A. No. 11130-CB (Del. Ch. Feb. 20, 2018) and *Mesirov v. Enbridge Energy Co.*, C.A. No. 11314-VCS (Del. Ch. Aug. 29, 2018) — emphasize a significant distinction between Delaware limited partnership agreements (LPAs) that expressly eliminate all fiduciary duties and those that merely supply a contractual standard that replaces traditional fiduciary duties.

While both decisions deny motions to dismiss primary liability claims for breach of a LPA, the Court of Chancery reached opposite conclusions on whether an aiding-and-abetting claim was viable. These different conclusions are attributable to the court's interpretation of how each LPA contractually addressed fiduciary duties. The LPAs in both cases utilized a contractual governance structure that replaces common law fiduciary duties with contractual standards. However, one LPA, in *Dieckman*, expressly eliminated all fiduciary duties, while the other LPA, in *Mesirov*, modified but did not eliminate all fiduciary duties.

## General LPA Principles

The two rulings are best understood in the context of Delaware law on limited partnerships. As first explained in *In re USACafes, L.P. Litigation*, in a Delaware limited partnership, those who control a general partner, which may include the directors of a general partner that is a corporation, may owe common law fiduciary duties to the limited partnership because they control the limited partnership's property.

However, under 6 *Del. C.* § 17-1101(d), a Delaware limited partnership may include provisions in its LPA that expand, limit or eliminate the default common law fiduciary duties. When an LPA validly eliminates these duties, the LPA creates a purely contractual relationship, which (compared to a fiduciary relationship) provides limited partners with fewer avenues to seek redress. Under general principles of contract law in Delaware, only a party to a contract may be sued for breach of that contract and there is no claim for aiding and abetting a breach of contract. Therefore, in a purely contractual relationship, a limited partner may seek to enforce only the terms of the LPA against parties to the LPA.

In this context, the viability of aiding-and-abetting claims against financial advisors or directors of a general partner hinges on whether the LPA expressly eliminates all fiduciary duties. The Court of Chancery's approach to this critical inquiry is illustrated by the following comparison of the *Dieckman* decision, involving an express elimination of all fiduciary duties that foreclosed aiding-and-abetting claims, and the *Mesirov* decision, involving a mere modification of fiduciary duties in favor of contractual standards that, as opposed to eliminating all fiduciary duties, created contractual fiduciary duties that left the door open for aiding-and-abetting claims.

## Dieckman

In *Dieckman*, the Court of Chancery addressed claims brought by a unitholder of Regency Energy Partners, LP (Regency) challenging Regency's merger with its parent entity. The plaintiff asserted that Regency's general partner breached the Regency LPA by approving the merger without believing it was in the best interests of Regency. The plaintiff also brought, among others, claims against the directors and the indirect owner of Regency's general partner for aiding and abetting the general partner's breach of the Regency LPA.

Interpreting the Regency LPA, the court determined that it “eliminated fiduciary duties” and that the parties to the Regency LPA had established a purely contractual relationship. Therefore, the court granted the motion to dismiss the aiding-and-abetting claims against the directors and the indirect owner of Regency’s general partner on the grounds that “a theory of aiding and abetting a breach of contract is unavailable in this case.” The court’s finding turned on the following provision, Section 7.9(e) of the Regency LPA:

Except as expressly set forth in this Agreement, neither the General Partner nor any other Indemnitee shall have any duties or liabilities, including fiduciary duties, to the Partnership or any Limited Partner and the provisions of this Agreement, to the extent that they restrict, eliminate or otherwise modify the duties and liabilities, including fiduciary duties, of the General Partner or any other Indemnitee otherwise existing at laws or in equity, are agreed by the Partners to replace such other duties and liabilities of the General Partner or such other Indemnitee.

The court denied the motion to dismiss the primary claim against Regency’s general partner for breach of Section 7.9(b) of the Regency LPA, which “replaced [fiduciary duties] with a contractual obligation requiring the General Partner to subjectively believe that its actions were in the best interests of the Partnership.”

### **Mesirov**

In *Mesirov v. Enbridge Energy Co., C.A. No. 11314-VCS* (Del. Ch. Aug. 29, 2018), the Court of Chancery addressed claims brought by a unitholder of Enbridge Energy Partners, L.P. (EEP) challenging EEP’s repurchase of an asset that EEP previously had contributed to a joint venture with its parent five years before. The plaintiff alleged that EEP’s general partner breached the provision of the EEP LPA that required that the transaction be “fair and reasonable” to the partnership. The plaintiff also alleged that the directors of EEP’s general partner and the financial advisor that advised EEP in the transaction aided and abetted the general partner’s breach.

The court’s construction of the EEP LPA turned on the following provision, Section 6.10(d):

Any standard of care and duty imposed by this Agreement or under the Delaware Act or any applicable law, rule or regulation shall be modified, waived or limited as required to permit the General Partner to act under this Agreement . . . and to make any decision pursuant to the authority prescribed in this Agreement, so long as such action is reasonably believed by the General Partner to be in the best interests of the Partnership.

Relying on Delaware Supreme Court decisions interpreting the same language, including *Brinckerhoff v. Enbridge Energy Co.*, No. 273, 2016 (Del. Mar. 28, 2017), the court concluded that this provision “modifies, waives, or limits common law duties in favor of a contractual scheme that imports familiar fiduciary standards” or, in other words, this provision “eliminates any [common law fiduciary] duties that otherwise exist and replaces them with a contractual fiduciary duty.” Under this interpretation, the court explained that “the fact that the aiding and abetting claim is tied to a contractual duty does not necessarily defeat the claim.” Rather, “[w]hen a contract embraces a fiduciary standard of conduct, . . . one who aids and abets a breach of that standard can be held liable for aiding and abetting a breach of a ‘contractual fiduciary duty.’” Therefore, the court found that the aiding-and-abetting claims were “conceptually viable.”<sup>1</sup>

<sup>1</sup> Regarding the substance of the aiding-and-abetting allegations, the court found that the plaintiff adequately stated a claim by alleging that the financial advisor manipulated its valuation to support a fairness opinion that completely ignored a comparable transaction involving the exact same asset and the same parties five years prior. Importantly, the court noted that there were no allegations of any conflict-driven misconduct as was at issue in *In re Rural Metro Stockholders Litigation*, and that its holding that an aiding-and-abetting claim adequately was stated was “a far cry from predicting that Plaintiff will prevail in the Herculean task of supporting the pled facts in discovery or proving them at trial.” Nonetheless, even in the absence of any transactional conflicts, the court concluded that the combination of allegations against the financial advisor, including that it had created an informational vacuum, used fully baked financial projections to support its fairness opinion, failed to consider a precedent transaction involving the same asset and had a long-standing relationship with the limited partnership’s parent/counterparty, stated a claim for aiding and abetting a breach of fiduciary duty.

The distinction between *Mesirov* and *Dieckman* is subtle but significant. In both *Mesirov* and *Dieckman*, the court found that the LPAs each established a contractual standard that governed in the place of common law fiduciary duties. And in both cases, the court found that the primary claims for breach of the governing contractual standard

survived dismissal. However, to assess the viability of aiding-and-abetting claims, the court looked to the precise provisions of each LPA to determine whether each LPA expressly eliminated all fiduciary duties, which would foreclose any aiding-and-abetting claims.

## Implications

The Court of Chancery's recent decisions in *Dieckman* and *Mesirov* highlight the impact of a significant distinction between limited partnership agreements that expressly eliminate all fiduciary duties and those that replace common law fiduciary duties with contractual standards:

- Limited partnership agreements that expressly eliminate all fiduciary duties are distinct from those that merely replace common law fiduciary duties with contractual standards, and this distinction may have important consequences, including with respect to secondary liability claims for aiding and abetting.
- If a limited partnership agreement uses language that expressly eliminates all fiduciary duties, based on *Dieckman*, there can be no claim for aiding and abetting a breach of the agreement under Delaware law.
- However, based on *Mesirov*, if the agreement does not expressly eliminate all fiduciary duties, then the agreement may create a contractual fiduciary duty that can support a claim for aiding and abetting.