<u>Some Things Can and Should Go Without Saying</u>
By Stephan L. Cutler, Esq.[1]
February 2, 2017

The Supreme Court of Delaware recently decided a case that contains some interesting lessons for those of us that draft partnership agreements and counsel partners on the application and interpretation of those agreements.

In Dieckman v. Regency GP LP, No. 208, 2016 (Del. Jan. 20. 2017), the Supreme Court considered whether the Delaware Court of Chancery was correct when it dismissed a limited partner/unitholder's ("**Plaintiff**") complaint challenging the $11 billion merger between Regency Energy Partners LP (a publicly-traded master limited partnership, "**Regency**") and an affiliate of Regency's general partner ("**Buyer**"). In order to address the conflict of interest presented by the merger, the general partner tried to rely on certain "safe harbor" provisions in Regency's partnership agreement that were specifically designed to address a conflict such as the one presented by the merger. Regency's partnership agreement contained two separate safe harbors, one of which was referred to as the "**Special Approval**" safe harbor which required that the merger transaction be reviewed and approved by a 2 member conflict committee, each of whom was independent (i.e. the members were prohibited from serving on affiliate boards and they needed to be independent according to the audit committee independence rules of the New York Stock Exchange). The other was the "**Unaffiliated Unitholder Approval**" safe harbor, which merely required that a summary of the merger transaction or a copy of the merger agreement be furnished to and approved by a majority of the unitholders outstanding that are not affiliated with Regency's general partner or such general partner's affiliates.

Although Regency's general partner only needed to satisfy one of the two safe harbors, the general partner sought and obtained Special Approval and then sought and obtained Unaffiliated Unitholder Approval. In order to induce the unitholders to grant Unaffiliated Unitholder Approval, Regency's general partner prepared a lengthy proxy statement that described the transaction and stated that Special Approval had already been obtained. Following the consummation of the merger, the Plaintiff filed a complaint in the Chancery Court alleging that Regency's general partner failed to satisfy either safe harbor because the Special Approval was issued by a conflict committee that was not independent and the Unaffiliated Unitholder Approval was based upon a proxy statement that failed to disclose the conflict committee's lack of independence when issuing the Special Approval. The Plaintiff alleged, among other things, that one of the two conflict committee members began evaluating the merger transaction while he was still a board member of an affiliate of the general partner, then resigned from the affiliate's board so that he could become a member of the conflict committee, only to be reappointed (on or about the same day the merger transaction closed) to the affiliate board seat that he vacated. The Plaintiff also alleged that the financial advisor

[1] Mr. Cutler is a partner in the Real Estate and Finance Department of Klehr Harrison Harvey Branzburg, LLP (Philadelphia, PA). This article has been prepared for general information purposes and is not, and is not intended to be, comprehensive in nature. Due to the general nature of the article's content, it should not be regarded as legal advice, nor should it be relied upon for any specific situation. Rather, you should consult with legal counsel with respect to any particular circumstances addressed in this article before taking any action. The publishing of this article does <u>not</u> create an attorney-client relationship between the author or his law firm and you.

to the conflict committee was chosen by Regency's CFO instead of the conflict committee, and that the financial advisor was likely to favor the Buyer because it was well known that the CFO would become the CFO of the Buyer or one of its affiliates post-merger.

In granting the general partner's motion to dismiss the Plaintiff's complaint, the Chancery Court never addressed the validity of the Special Approval and merely accepted the general partner's assertion that the Unaffiliated Unitholder Approval was valid despite the fact that the proxy statement failed to disclose the conflict committee's lack of independence. In reaching this decision, the Chancery Court focused on the fact that the partnership agreement disclaimed fiduciary duties (something that the Delaware Revised Uniform Limited Partnership Act ("**DRULPA**") expressly allows)[2]; that the general partner's only obligation under the partnership agreement was to furnish either a summary of the transaction or a copy of the merger agreement; and that upon fulfillment of that obligation, the general partner had no implied obligation to disclose the facts surrounding the formation of the conflict committee.

On appeal, the Supreme Court acknowledged that freedom of contract is given maximum effect under the DRULPA and that partners are free to eliminate any fiduciary duties among the partners and the partnership.[3] In other words, partners need to read the partnership agreement carefully and should not expect a court to come to their rescue when they realize after the fact that the partnership agreement was tilted against them from the start. However, the Supreme Court also noted that partners of publicly traded partnerships can still expect ambiguities in the partnership agreement to be resolved in a manner that maximizes the reasonable expectations of the partners, and that the implied contractual covenant of good faith and fair dealing applies under all circumstances.[4]

In reversing the Chancery Court, the Supreme Court stated that the Chancery Court focused too narrowly on the partnership agreement's minimal disclosure requirements, and that the focus should have been on the conflict resolution process itself - a process that, when conducted in accordance with the partnership agreement, serves to protect the general partner and unaffiliated unitholders from the inherent risks of a conflicted merger transaction and immunizes the merger transaction from judicial review. Accepting the facts pled by the Plaintiff (which the Supreme Court was obligated to do given the stage of the litigation), the Supreme Court concluded that neither safe harbor was available to the general partner because the conflict committee was not independent and the Unaffiliated Unitholder Approval was obtained on the basis of a false or misleading proxy statement. Although Regency's general partner was not required to issue a proxy statement in connection with its efforts to obtain Unaffiliated Unitholder Approval, having elected to do so, the general partner had an implied obligation to issue a proxy statement that did not undermine the safeguards afforded by the safe harbor, and that the inclusion of false or misleading information in the proxy statement tainted the process. The Supreme Court pointed out that "some aspects of the deal are so obvious to the participants that they never think, or see no need, to address them." The partnership agreement's failure to expressly state that the general partner would not try to seek refuge in the Unaffiliated Unitholder Approval safe harbor by furnishing false or misleading information is an example of such an obvious aspect of the deal. However, one is left with the impression that the Supreme Court would have upheld the Chancery Court's decision if Regency's

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[2] See 6 Del. C. §17-1101(d).
[3] See 6 Del. C. §17-1101(c) and (d).
[4] See 6 Del. C. §17-1101(d).

general partner had obtained the Unaffiliated Unitholder Approval solely on the basis of the minimal disclosures required by the partnership agreement, or on the basis of a proxy statement that either disclosed the conflicts that existed within the conflict committee when it issued the Special Approval or that failed to disclose anything at all about the conflict committee or the special approval.

The Dieckman case serves as a reminder to all of us that do this for a living, some things are so obvious, they go without saying, and sometimes, less is more.