



IN THE SUPREME COURT OF THE STATE OF DELAWARE

BANDERA MASTER FUND LP,)
BANDERA VALUE FUND LLC,)
BANDERA OFFSHORE VALUE)
FUND LTD., LEE-WAY FINANCIAL)
SERVICES, INC., and JAMES R.)
MCBRIDE, on behalf of themselves)
and similarly situated BOARDWALK)
PIPELINE PARTNERS, LP)
UNITHOLDERS,)

Plaintiffs Below,
Appellants,

v.

BOARDWALK PIPELINE)
PARTNERS, LP, BOARDWALK)
PIPELINES HOLDING CORP.,)
BOARDWALK GP, LP,)
BOARDWALK GP, LLC, and)
LOEWS CORPORATION,)

Defendants Below,
Appellees.

No. 439, 2024

Case Below: Court of Chancery of the
State of Delaware
C.A. No. 2018-0372-JTL

AMICUS CURIAE BRIEF

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Dated: January 30, 2025

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STATEMENT RE AMICUS CURIAE

The signers of this Amicus Brief are present, past and incoming leaders of three national legal organizations primarily concerned with describing and maintaining standards for legal opinions in business law practice: TriBar Opinion Committee, Working Group on Legal Opinions Foundation and the American Bar Association Business Law Section Legal Opinions Committee. In those positions, the signers have a special interest in ensuring that the standards for legal opinions are correctly described and applied by courts.

The views expressed in this Amicus Brief are solely the views of the individual signers and do not represent the views of the legal organizations or the law firms with which they are associated.

ARGUMENT

A. Introduction

Legal opinions are an important part of American financial and transactional markets because they give recipients and other parties confidence in the legality of the actions taking place. They have been given by lawyers for more than 100 years, initially relating to the issuance of municipal bonds to finance railroad expansion. For legal opinions to continue to serve their important purpose, the integrity of legal opinions must be preserved. A key aspect of that integrity is the understanding that the legal opinion is “fair and objective” or, in other words, that the legal opinion is given in good faith and reflects the objective professional judgment of the lawyers in the law firm giving the opinion (the “opinion giver”).

The existing opinion literature, including treatises, bar group reports, case law and attorney ethics rules, establishes the standards under which opinions are given and received. These standards include an overriding requirement that legal opinions, including those given to satisfy conditions that affect the rights of third parties (like the one in *Bandera*¹), must be fair and objective. It is important in preserving the integrity of legal opinions that court decisions relating to legal opinions recognize this standard.

¹ We refer to this case and its related opinions as “*Bandera*.”

To this end, as further discussed below, we are asking this Court to clarify what may be divergent views in Delaware court opinions relevant to the fair and objective standard for legal opinions. Specifically, we are asking this Court to recognize the standards established by the existing opinion literature, often referred to as “customary practice,”² and to approve the Court of Chancery’s recognition of those standards as applied to the type of legal opinion involved in this case. We believe that doing so would not fundamentally alter the legal environment in which legal opinions are prepared but rather would be consistent with and supportive of that legal environment. In this brief, we are not addressing the merits of the litigation that is the subject of appeal or the extent to which this Court may choose to examine whether the opinion in question was given in good faith or met the fair and objective standard, nor are we questioning the deference standard for judicial review of a legal opinion or what effect, if any, to give to a contractual provision that offers protection to a party who relies on the advice of counsel in accepting a legal opinion.

² Customary practice for legal opinions consists of “customary usage” (which identifies the meaning of an opinion) and “customary diligence” (which identifies the work required to give an opinion). See Multi-Bar Groups, *Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions*, 63 *Bus. Law.* 1277 (2008).

B. Divergent Decisions of the Delaware Courts

Divergent decisions of this Court and the Court of Chancery relating to opinion practice are problematic because opinion givers look to Delaware decisions for guidance on opinion practice, as to which there is limited authority. In the Court of Chancery’s Post-Trial decision (the “Post-Trial Decision”),³ the court determined that the opinion at issue was not rendered in good faith (the “Breach Holding”). This Court, in holding for the defendants on certain issues and remanding (the “Supreme Court Decision”),⁴ did not reverse the Court of Chancery decision on the Breach Holding.

The concurring opinion to the Supreme Court Decision (the “Concurring Opinion”) stated:

The issues presented regarding the Breach Holding were the focal point of the case and are important to both practitioners and their corporate clients. The Breach Holding has the potential to fundamentally alter the legal environment in which opinions of counsel are prepared.⁵

³ *Bandera Master Fund LP v. Boardwalk Pipeline Partners, LP*, 2021 WL 5267734 (Del. Ch. Nov. 12, 2021).

⁴ *Boardwalk Pipeline Partners, LP v. Bandera Master Fund LP*, 288 A.3d 1083 (Del. 2022).

⁵ The concurring opinion also criticized the Post-Trial Decision for not applying the deference standard for legal opinions set forth in the *Williams Cos., Inc. v. Energy Transfer Equity, L.P.*, 2016 WL 3576682 (Del. Ch. June 24, 2016), *aff’d*, 159 A.3d 264 (Del. 2017), and for substituting its opinion for that of the law firm

288 A.3d at 1124.

In the Court of Chancery decision on remand (the “Remand Decision”),⁶ the court stated:

[T]he Post-Trial Opinion grounded the standards it used to evaluate bad faith with citations to standard resources that opinion givers follow. Because opinion givers follow these sources, the trial court considered [the opinion law firm’s] departures from them when making its finding of bad faith. . . . Second, the Post-Trial Opinion did not create any new path for lawyer liability.

2024 WL 4115729, at *33 (citations omitted).

As we discuss, we believe that the Breach Holding does not have the potential effect suggested by the Concurring Opinion, and we urge this Court to confirm that the Post-Trial Decision, as further explained in the Remand Decision, based on the Court of Chancery’s view of the facts, correctly described existing customary opinion practice as it applies to the particular legal opinion being addressed.

designated to give the opinion. The Court of Chancery responded to this criticism in its Remand Decision.

⁶ *Bandera Master Fund LP v. Boardwalk Pipeline Partners, LP*, 2024 WL 4115729 (Del. Ch. Sept. 9, 2024).

C. Customary Practice for Legal Opinions

The customary practice for legal opinions was first articulated in a report of the TriBar Opinion Committee in 1979,⁷ which was updated in 1998.⁸ The literature, which is primarily focused on third-party closing opinions, is now extensive. *See* 2021 WL 5267734, at *53 n.16. That literature, in addition to focusing on the fair and objective standard, is relevant to the determination of good faith, an essential element of the fair and objective standard, as discussed below.⁹

Legal opinions are professional judgments of lawyers intended for reliance by opinion recipients and others entitled to rely on the opinion. A law firm providing a legal opinion predicts how the highest court of the jurisdiction whose law is covered would rule on the issue addressed by the opinion based on the law and facts understood to be applicable. Doing so requires the lawyer to put aside advocacy for the client and to render a fair and objective opinion. *See* Restatement (Third) of the Law Governing Lawyers (the “Restatement”), § 95, Comment c, (2000).

⁷ TriBar Opinion Committee, *Legal Opinions to Third Parties: An Easier Path*, 34 *Bus. Law.* 1891 (1979).

⁸ TriBar Opinion Committee, *Third-Party “Closing” Opinions*, 53 *Bus. Law.* 592 (1998).

⁹ *See Williams Cos.*, note 5, *supra*, at *11 (“[whether the opinion is issued] in good faith, that is, based on [the opinion giver’s] independent expertise as applied to the facts of the transaction”).

The Restatement, treatises and bar group reports dealing with legal opinions discuss customary opinion practice primarily in the context of third party closing opinions, which are opinions delivered to a party who is not the opinion giver's client, usually as a condition to the recipient's obligation to complete a financial transaction. A recipient of a third party opinion typically is represented by its own counsel and is able to reject a legal opinion that it believes does not meet the requirement of the agreement under which it is delivered. Nevertheless, opinions to clients and other opinions that are not third party closing opinions are for the most part subject to the same principles of customary practice that apply to third party closing opinions. In particular, the requirement that the opinion be fair and objective is fully applicable to legal opinions of the type in *Bandera*, namely, an opinion that is delivered to the opinion giver's client to satisfy a contract condition but affects the rights of third parties with interests adverse to the client's interests.

Bandera involved a contract claim by limited partners whose interests in the Boardwalk limited partnership were called by the general partner under circumstances unfavorable to the limited partners. The limited partners claimed that the call was not authorized by the limited partnership agreement. The general partner defended on the basis that it obtained and accepted a legal opinion that met the requirements of the limited partnership agreement and acted in reliance on that opinion and on the advice of another law firm as to the reasonableness of that

reliance. The general partner then maintained that doing so entitled it to a conclusive presumption under the limited partnership agreement that it acted in good faith and thus was absolved from liability. This Court held that the reliance on the advice of counsel in accepting the legal opinion and calling the limited partners' interests entitled the general partner to the protection afforded by the limited partnership agreement.

The Post-Trial Decision did not directly address the question whether the general partner engaged in willful misconduct. Instead, it considered whether the conduct of the law firm in giving the legal opinion was appropriate under the circumstances. The court concluded that the legal opinion given was a "contrived opinion" not rendered in good faith, noting that the general partner actively participated in obtaining that opinion.

The Post-Trial Decision referred specifically to deficiencies in the opinion as follows:

Outside counsel knowingly made unrealistic and counterfactual assumptions, knowingly relied on an artificial factual predicate, and consistently engaged in goal oriented reasoning to get to the result Loews wanted. . . [including the following:] that regulatory proposals were sufficiently final to trigger the Call Right, even though everyone knew the proposals were not final. . . . [and] that the proposals were reasonably likely to have a material adverse effect on Boardwalk's rates, even as Boardwalk stated in its comments to FERC that it was impossible to determine the effect on Boardwalk's rates until FERC made a decision on the treatment of ADIT.

2021 WL 5267734, at *2.

In addition, in determining that the opinion was not given in good faith, the court applied a “purpose” test, holding that the opinion did not meet the purpose contemplated by the limited partnership agreement provision related to the call, citing *Gerber v Enter. Prods. Holdings*,¹⁰ a decision of this Court relating to a “fairness opinion and holding that an implied covenant of good faith applied and was not met.”

As noted above, the Post-Trial Decision refers to a number of authorities regarding third party closing opinions. That decision appropriately considers those authorities to be applicable to the issues presented by the non-third party closing opinion involved in *Bandera*. In the Remand Decision, the court states that the Post-Trial Decision:

grounded the standards it used to evaluate bad faith with citations to standard resources that opinion givers follow. Because opinion givers follow these sources, the trial court considered [the opining law firm’s] departure from them when making its finding of bad faith.

2024 WL 4115729, at *33 (citations omitted).

¹⁰ 67 A3d 400 (Del. 2013).

The Post-Trial Decision focused in significant part on the use in the opinion of “counterfactual assumptions” as not being in accordance with customary practice for legal opinions. However, the court stated the following:

If [the law firm] had only stretched once or twice or made an isolated counterfactual assumption, then it would not be possible to reject the Opinion. Under those circumstances the court might have disagreed with [the law firm’s] assessments but those disagreements would not have been sufficient to support a lack of good faith.

2021 WL 5267734, at *71.

The above statement appears to recognize that any failure to follow customary practice was attributable to considerations of fairness and objectivity in the specific context of the opinion rather than asserting any blanket rule against the use of counterfactual assumptions in opinions generally.

D. Current Opinion Practice Is Adequate to Deal with Situations Like *Bandera*

Whether or not a third party closing opinion or another type of opinion is being prepared, lawyers within a law firm giving the opinion do so with customary practice in mind and with the knowledge that the fair and objective standard must be observed. Compliance with the fair and objective standard requires that the circumstances applicable to the particular opinion, including the type of legal opinion, be evaluated.

1. Third-Party Closing Opinions.

Lawyers giving legal opinions understand that a third party closing opinion, by its nature, provides important guardrails to assure that the opinion will be fair and objective. The recipient of the opinion typically is represented by counsel and can reject the opinion if it does not satisfy the agreement's requirements. However, even when the recipient is represented by its own counsel and can reject the opinion, the failure to disclose facts relevant to the opinions given may result in an opinion that is regarded as misleading or a half-truth, and thus not fair and objective, with resulting liability.¹¹ A lawyer giving a third party closing opinion in a customary form to be relied on by a recipient who is not represented by counsel may have additional responsibilities, including a duty to provide explanations of technical terms and matters unstated in the opinion that are understood to be applicable as a matter of customary practice.¹²

¹¹ See *Dean Foods Co. v. Pappathanasi*, 2004 WL 3019442 (Mass. Super. Ct. Dec. 3, 2004); *Roberts v Ball, Hunt, Hart, Brown & Baerwitz*, 57 Cal. App. 3d 104 (Cal. Ct. App. 1976).

¹² *Restatement (Third) of the Law Governing Lawyers*, § 95, Comment c, (2000) ("A lawyer providing an evaluation purporting to be a fair and objective evaluation does not function as an advocate for the legal or factual position of the lawyer's client. Unless otherwise required or permitted by the terms under which the evaluation is given, the lawyer's duty is to provide a fair and objective opinion."); *id.*, Comment e ("If unrepresented parties may be entitled to rely on an opinion, the lawyer providing it should disclaim through statements in the opinion that the opinion conforms to the contract pursuant to which it is provided, if that is the case.").

2. Other Types of Legal Opinions.

Some legal opinions, such as the one in *Bandera*, are not third party closing opinions. The parties affected by the opinion in *Bandera*, the limited partners, were subject to a limited partnership agreement to which they became parties by purchasing publicly traded securities. The opinion given under the agreement was provided to a client by a law firm chosen by the client under the terms of the agreement, which gave the limited partners no role in the opinion process. Moreover, the economic interests of the client as the recipient of the opinion and of the limited partners in the context for which the opinion was to be given under the agreement were directly opposed. Under those circumstances, parties whose interests are affected in the manner presented in *Bandera* are entitled to expect that the opinion giver will comply with the fair and objective standard.

3. Relevance of Context in Determining What is Fair and Objective.

What is fair and objective in the context of a third party closing opinion may well not be fair and objective in the context of other types of legal opinions, like the one in *Bandera* in which the parties affected by the opinion had no right to reject it.

Opinion assumptions and limitations are ordinarily not problematic in the context of a third party closing opinion because the recipient, with the aid of its counsel, typically is in a position to negotiate specific opinion requirements and can reject an opinion at closing if it fails to meet those requirements. In those

circumstances, an opinion giver is free, in accordance with customary practice, to include assumptions and limitations, as long as in doing so the opinion is not misleading. It is up to the opinion recipient, with the advice of its counsel, to decide whether to accept the opinion, notwithstanding that it might not meet the agreement's requirements.¹³

Opinions that cannot be rejected, such as the one in *Bandera*, require a more exacting application of the fair and objective standard. In those circumstances, assumptions and limitations that affect the opinion's meaning and the work required to give it, even when disclosed, could prevent the opinion from meeting the fair and objective standard. In addition, to meet the fair and objective standard in those circumstances, the opinions also should be understood to require that the legal opinion fulfill the purpose for which it is to be given under the agreement providing for it.

E. The Court Should Affirm Customary Practice and Reconcile Divergent Delaware Decisions

Any description of opinion practice is complex in view of the wide variety of legal opinions given and the different contexts in which they are given. The Post-Trial Decision should be read as consistent with existing customary opinion practice

¹³ See Multi-Bar Groups, *Statement of Opinion Practices*, 74 *Bus. Law.* 801, 807 (2019), Section 5.5 (Factual Assumptions).

when considered in the context in which the legal opinion at issue was given, a non-third party closing opinion given to satisfy a condition affecting the rights of third-parties not in a position to reject the opinion. Opinion givers recognize the difference between (i) third party closing opinions and other legal opinions that the recipient or party affected can reject and (ii) legal opinions, like the one in *Bandera*, that the recipient or party affected cannot reject. Opinions that cannot be rejected require a more exacting application of the fair and objective standard. Therefore, the Post-Trial Decision should be read, not as varying customary practice applicable to third party closing opinions or to other types of legal opinions when the recipient or party affected can reject the opinion, but rather as applying customary practice appropriately to the type of opinion involved in *Bandera*.

CONCLUSION

In connection with addressing the questions on appeal before it, we ask this Court to recognize the importance of maintaining the integrity of legal opinions by clarifying what appear to be divergent decisions of the Delaware courts in this case and by affirming the application of the fair and objective standard to legal opinions as described above. We believe that the Post-Trial Decision, as further explained in the Remand Decision, based on the Court of Chancery's view of the facts, accurately reflected customary opinion practice, including the fair and objective standard, as applicable to the type of opinion involved in *Bandera*. It would be helpful to legal opinion practice generally if this Court, regardless of how it rules on the merits, confirmed that the Post-Trial Decision correctly described existing customary opinion practice as applicable to the particular legal opinion being addressed in that decision and did not vary customary practice applicable to other legal opinions.

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*Filing on behalf of the Opinion Bar
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Dated: January 30, 2025

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