IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-10784

ALBERT ODMARK, Trustee of U/W
Florence F. Tucker, ET AL.,

Plaintiffs-Appellants,

versus

MESA LIMITED PARTNERSHIP, ET AL.,

Defendants-Appellees.

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VINCENT GERARDO, ET AL.,

Plaintiffs-Appellants,

versus

MESA LIMITED PARTNERSHIP, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Texas
(3:91 CV 2376 X c/w 3:92 CV 112 X)

(June 19, 1995)

Before GARWOOD, JOLLY, and BARKSDALE, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:[*]

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[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

This class action lawsuit requires us to interpret the agreement governing the defendant, Mesa Limited Partnership (now defunct), and to decide whether, in converting this former partnership into corporate form, it or its codefendants--T. Boone Pickens and his Pickens Operating Co., the general partners of the limited partnership--breached the agreement or violated state or federal law. The plaintiffs, holders of Preference Units of the defendant, Mesa Limited Partnership, as of October 4, 1991, seek $164 million in damages, contending that the defendants breached the limited partnership agreement and breached their fiduciary duties in carrying out the conversion, and failed to disclose certain features of Mesa's conversion, thereby violating federal securities laws. The district court rejected the claims of the plaintiffs and granted summary judgment. Finding no reversible error, we affirm.

A

The details of the conversion are amply described in the opinions of the district court and the Delaware chancery court in a prior proceeding styled In re Mesa Ltd. Partnership Preferred Unitholders Litig., 1991 WL 262669, *1-*4 (Del.Ch.), 17 Del. J. Corp. L. 1244, 1247-52; we need not recount those details here, except as they become necessary to our discussion. Our review of a grant of summary judgment is de novo. E.g., Omnitech Int'l v. Clorox Co., 11 F.3d 1316, 1322-23 (5th Cir.) cert. denied, __ U.S. __, 115 S.Ct. 71 (1994). It is well-settled that, to avoid summary

judgment, the nonmoving party--the plaintiffs--must create a genuine dispute of material fact. Little v. Liquid Air Corp., 37 F.3d 1069, 1075-76 (5th Cir. 1994) (en banc). The plaintiffs' argument that ambiguities in the meaning of the provisions should be resolved by a jury is unavailing in this respect, because Delaware law--by the terms of the agreement, the applicable law in its interpretation--treats matters of contract interpretation as questions of law. Playtex FP, Inc. v. Columbia Cas. Co., 622 A.2d 1074, 1076 (Del. 1992). As such, the meaning of the limited partnership agreement can be determined by a court on summary judgment.

B

(1)

The complaint filed by the plaintiffs charges the defendants with numerous violations of federal securities laws, breaches of the limited partnership agreement, and breaches of fiduciary duties in connection with the conversion of the limited partnership to corporate form.[1] The primary claims of the plaintiffs, we find,

[1]Specifically, the complaint charges that the defendants violated federal securities laws by knowingly

- stating in the proxy that a majority vote was sufficient to approve the conversion;
- not stating that a supermajority vote is required to approve an amendment to the agreement unless the defendants receive a legal opinion of independent counsel that amendment would not cause the limited partnership to be treated as an association taxable for federal income tax purposes;
- not disclosing that the legal opinion received from Baker & Botts did not excuse the supermajority requirement

depend on essentially two aspects of the conversion: the fact that it was not approved by a supermajority, and an alleged inadequacy in the legal opinion rendered by Baker & Botts. The plaintiffs base their arguments concerning the supermajority requirement on § 16.3 of the agreement, which provides as follows:

> Unless approved by the General Partners and by Limited Partners holding at least 90% of the LP Units held by Limited Partners, no amendment to this Agreement shall be permitted unless the Partnership has received an Opinion

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because
(a) Baker & Botts was not independent counsel and
(b) such an opinion could not be obtained because the transaction will convert the limited partnership into a corporation and, as such, will be taxed as a corporation;

- not disclosing that the preferred unitholders had a right to certain distributions upon dissolution of the limited partnership, and that the amendment would deprive them of that right; and
- not disclosing a conflict of interest of a financial consultant of the limited partnership and the role that the consultant played in effecting the conversion.

The complaint alleges that the defendants breached the limited partnership agreement by

- failing to obtain an opinion of independent counsel that the amendment to the partnership agreement required as a part of the conversion would not cause the partnership to be taxed as a corporation;
- failing to obtain supermajority approval of the transaction; and
- not providing for the payment of the preferred unit distributions, as the partnership agreement requires.

The complaint alleges that the defendants Boone Pickens and Pickens Operating Co. breached their fiduciary duties to the preferred unitholders by

- issuing a proxy that contains misleading statements and omissions as set forth above;
- carrying out the conversion in breach of the limited partnership agreement, as set forth above.

Finally, the complaint alleges, as an additional breach of fiduciary duties, that the conversion constituted self-dealing and was unfair because of numerous conflicts of interests among the involved parties.

> of Independent Counsel that such amendment . . . would not cause the Partnership or any Operating Partnership to be treated as an association taxable as a corporation for federal income tax purposes.

Obviously, under the terms of this provision, if the legal opinion is adequate under the agreement, the supermajority requirement is an irrelevancy that we need not consider. If, on the other hand, the legal opinion is not adequate, the defendants cannot escape liability.[2] Consequently, we can resolve the primary claims of the plaintiffs by focusing on the alleged inadequacies of the legal opinion.

(2)

The plaintiffs argue that the opinion does not constitute "an Opinion of Independent Counsel that . . . the Partnership or any Operating Partnership [would not be] treated as an association taxable as a corporation for federal income tax purposes," which, by the terms of the limited partnership agreement, is a prerequisite for this conversion. The opinion issued by Baker & Botts states simply and succinctly that "[a]pproval of the transaction, the amendments to the Partnership Agreement," and one other action not relevant here, "will not cause the Partnership or any Direct Subsidiary to be treated as an association taxable as a

[2]We should note that, in addition to § 16.3(a), § 16.4(c) of the limited partnership agreement similarly requires "an Opinion of Independent Counsel that such action . . . would not cause the Partnership or any Operating Partnership to be treated as an association taxable as a corporation for federal income tax purposes" before any particular action may be taken at a meeting of the limited partnership.

corporation for federal income tax purposes." The plaintiffs contend that (1) the opinion is deficient in itself because it does not address the tax consequences of the conversion and (2) Baker & Botts is not "Independent Counsel" and thus not capable of rendering an adequate opinion.

We consider first whether the substance of the opinion is deficient. The agreement requires that the opinion address the tax consequences of an action on "the Partnership or any Operating Partnership." The plaintiffs argue that these terms do not refer merely to Mesa Limited Partnership, but also refer to Mesa, the business entity, including its successor corporation. The plaintiffs thus argue that the agreement requires the legal opinion to take into account the tax consequences of the transaction on the business entity once it has converted into corporate form.

We cannot accept their argument. Delaware law requires that we give the words of this provision of the limited partnership agreement their precise meaning. See, e.g., Boesky v. CX Partners, L.P., 1988 WL 42250, *9, 14 Del. J. Corp. L. 230, 246 (Del. Ch.) ("In construing the meaning of words used in a limited partnership agreement, I am mindful of the fact that agreements of this kind are technical documents typically drafted by sophisticated commercial practitioners. While such persons are surely capable of failing to express an intention clearly or of overlooking an eventuality, by and large the attempt is to use language with precision. In the long run, there is great utility in the attempt

by courts, when called upon to interpret such documents, to read the words used precisely.") The limited partnership agreement is unambiguous. The terms "Partnership" and "Operating Partnership" are terms of art that are specifically defined in the agreement. "Partnership" refers to "the limited partnership created by this Agreement," and "Operating Partnership" refers to limited partnerships featuring the Partnership as the sole limited partner. Neither of these terms can be read to require anything more than the opinion actually rendered by Baker & Botts.[3] Moreover, the opinion is indisputably correct--the plaintiffs do not even contend that the limited partnership was treated at any time as an association that is taxable as a corporation for federal income tax purposes.

Having determined that the limited partnership agreement lends itself to only one interpretation, and that the legal opinion rendered by Baker & Botts was adequate in the light of that determination, we turn to the question whether asserted conflicts involving Baker & Botts rendered inadequate a legal opinion that is

[3]Moreover, the terms "partnership" and "limited partnership" have specific meanings under Delaware law that do not overlap with "corporation." See Del. Code Ann. tit. 6 §1506 (partnership) and § 17-101(8) (limited partnership); compare Del. Code Ann. tit. 8 § 101 et seq. (corporation). We should note also that, because no competent counsel could produce an opinion to the effect that conversion to corporate form would not subject the business to corporate taxes, the plaintiff's reading of "Partnership" has the effect of preventing completely the conversion of the limited partnership to corporate form, a result we find to be most unlikely.

otherwise adequate. The plaintiffs argue that the opinion is not adequate because it must have been rendered by "independent counsel" and Baker & Botts was not "independent counsel" because it had certain conflicts of interest. We find that we need not consider this argument. The opinion received by the limited partnership is the only plausible opinion that any competent legal counsel could render. Whether the partnership received the opinion from Baker & Botts or some other law firm is, therefore, no longer material in assessing the propriety of the transaction. Accordingly, to the extent that Baker & Botts may not have been independent counsel--an issue upon which we express no opinion--any of the asserted conflicts of interest could not have affected the interests of the plaintiffs. To the extent that the limited partnership agreement may have been breached in this respect, in these circumstances it clearly would be a de minimis technicality. We therefore find it unnecessary to consider on the merits the question whether Baker & Botts was "independent counsel."

C

Our analysis to this point disposes of the claims that the defendants breached § 16.3(a) of the agreement, and, in failing to disclose this breach, violated federal securities laws; and that they violated their fiduciary duties in completing the transaction in breach of the limited partnership agreement. The limited partnership agreement simply does not have the meaning advanced by the plaintiffs.

In addition, to the extent that the plaintiffs claim nondisclosure of other aspects of the transaction, including the elimination of the rights of the preferred unitholders to receive certain distributions upon dissolution, and the conflicts of interest presented by the involvement of various parties, we find these claims are meritless. The proxy materials contain a comprehensive and balanced description of the all aspects of the transaction and its consequences for all interested parties. And, because a majority of the unitholders approved the actions of the defendants in the light of these disclosures, the unitholders can be said to have ratified these actions, rendering meritless any remaining claim that the defendants committed a breach of fiduciary duties. See, e.g., In re Mesa Ltd. Partnership Preferred Unitholders Litig., 1991 WL 262669 at *7, 17 Del. J. Corp. L. at 1256.

D

For the above reasons, we AFFIRM the judgment of the district court.

A F F I R M E D.