



Supreme Court of Texas affirms: no surprise or accidental partnerships under Texas law

Corporate Alert

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On January 31, 2020 the Texas Supreme Court issued a unanimous decision in *Energy Transfer Partners, L.P. v. Enterprise Products Partners, L.P.* affirming the Dallas Court of Appeals' reversal of a \$535+ million judgment against Enterprise.

There are several key takeaways from this important opinion.

- First, Texas law will respect the stated intent of parties to a written agreement to form a partnership only upon the occurrence of conditions precedent.
- Second, such agreements are still subject to attack on commonly accepted contract defenses, if applicable, including waiver or modification of conditions precedent.
- And, third, the opinion offers no holding relating to potential claims by third parties which may allege the existence of a partnership. In other words, the holding is limited to the parties "as between themselves."

The judgment followed a jury verdict in 2014 in a Dallas County district court finding that Energy Transfer and Enterprise

were *de jure* partners in a pipeline joint venture and that Enterprise had breached its partnership duty of loyalty by allegedly marketing and pursuing the pipeline opportunity without Energy Transfer.

The parties' written agreements, including a Confidentiality Agreement, a Letter Agreement and Non-Binding Term Sheet, and a Reimbursement Agreement, all acknowledged that the parties were still exploring doing business together and that no agreement about the parties' relationship was reached yet. For example, the Confidential Agreement stated that, until a "definitive agreement" was reached, no party would be "under any legal obligation of any kind whatsoever" with respect to the proposed joint venture. Similarly, the Term Sheet explained that the Letter Agreement created no "binding or enforceable obligations" between the parties regarding the proposed venture unless and until their respective boards of directors approved and final, definitive agreements were negotiated and executed.

The lower court, relying on Texas's partnership statute, determined that the agreements not to be bound were not conclusive but instead, were simply evidence for intent, which is only one of five factors set forth in Section 152.051(b) of the Texas Business Organizations Code to determine whether a partnership exists.

In 2009, the Texas Supreme Court had explained that the Section 152.051(b) "does not by its terms give the parties' intent or expression of intent any greater weight than the other factors" and that parties can form a partnership despite their intent not to do so. However, in the same opinion, the Court also expressed skepticism about whether the legislature intended to create "accidental or surprise partnerships."

After recognizing its previous opinion from 2009 and discussing additional background law, the Texas Supreme Court ultimately relied on Section 152.003 to support its holding here. That Section states "[t]he principles of law and equity and the other partnership provisions supplement this chapter unless otherwise provided by this chapter or the other partnership provisions." The Court concluded that Section 152.003 authorized the application of Texas's "deeply ingrained" respect for freedom of contract to the question of partnership formation. The Court also noted that a contrary holding would have "detrimental economic consequences" to Texas and would result in "constant litigation."

Accordingly, the Court held that "[a]n agreement not to be partners unless certain conditions are met will ordinarily be conclusive on the issue of partnership formation as between the parties."

In a caveat, however, the Court noted that the presumption of conclusiveness can be overcome. It explained that conditions precedent can be waived or modified by word or deed just as in any other agreement, but that it was incumbent on a plaintiff to seek an appropriate jury finding if waiver or modification were in issue, which Energy Transfer did not do in this case. The Court also noted that evidence probative of a *general* intent to form a partnership would not necessarily be probative of an intent to waive or modify a specific condition precedent.

The brevity and unanimity of this decision should be read as strong signals about Texas courts' willingness to enforce long-standing and broadly-applied principles of freedom of contract.

The case is No. 17-0862; *Energy Transfer Partners, L.P., et al. v. Enterprise Products Partners, L.P., et al.*; In the Supreme Court of Texas. The opinion is available [here](#).

Find out more about the implications of this decision by contacting either of the authors, or your usual DLA Piper attorney.

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