

**CASE LAW UPDATE:
A SURVEY OF RECENT TEXAS
PARTNERSHIP AND LLC CASES**

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Case Law Update: A Survey of Recent Texas Partnership and LLC Cases

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I. Introduction

This paper summarizes recent Texas cases involving issues of partnership and limited liability company law. This paper only includes cases that have appeared since the paper for last year's program was prepared. Case law surveys that include cases from prior years are available on Professor Miller's profile page at the Baylor Law School web site.

II. Recent Texas Cases Involving Partnerships

A. Creation/Existence of General Partnership

Energy Transfer Partners, L.P. v. Enterprise Products Partners, L.P., 593 S.W.3d 732 (Tex. 2020).

The court held that Texas law permits parties to conclusively agree that, as between themselves, no partnership will exist unless certain conditions are satisfied. Because the parties made such an agreement, the court upheld the court of appeals' reversal of the trial court's judgment, which was based on the jury's finding that the parties created a partnership applying the five-factor test set forth in the partnership statute.

In March 2011, Enterprise Products Partners, L.P. and Enterprise Products Operating LLC (collectively, "Enterprise") approached Energy Transfer Partners, L.P. and Energy Transfer Fuel, L.P. (collectively, "ETP") about converting a pipeline known as Old Ocean into one that could move oil south from Cushing, Oklahoma. ETP owned Old Ocean, but Enterprise held a long-term lease on it. Converting the pipeline to a pipeline for transporting oil and extending it the rest of the way to Cushing would require a large investment from the parties and commitments from customers. The parties agreed to explore the viability of the project, which they referred to as "Double E." In three written agreements, they stated that neither party would be bound to proceed until each company's board of directors had approved the execution of a formal contract.

A confidentiality agreement entered into in March 2011 included a provision that the parties would not be under any legal obligation other than the matters specifically agreed to in the confidentiality agreement "unless and until a definitive agreement between the Parties with respect to the Potential Transaction has been executed and delivered."

In April 2011, the parties signed a Letter Agreement with an attached "Non-Binding Term Sheet." The Letter Agreement stated:

Neither this letter nor the JV Term Sheet create any binding or enforceable obligations between the Parties and, except for the Confidentiality Agreement ..., no binding or enforceable obligations shall exist between the Parties with respect to the Transaction unless and until the Parties have received their respective board approvals and definitive agreements memorializing the terms and conditions of the Transaction have been negotiated, executed and delivered by both of the Parties. Unless and until such definitive agreements are executed and delivered by both of the Parties, either [Enterprise] or ETP, for any reason, may depart from or terminate the negotiations with respect to the Transaction at any time without any liability or obligation to the other, whether arising in contract, tort, strict liability or otherwise.

The third agreement entered into by the parties was a Reimbursement Agreement signed in April 2011. That agreement provided the terms under which ETP would reimburse Enterprise for half the cost of the project's engineering work, and it recognized that the parties were "in the process of negotiating mutually agreeable definitive agreements" for the project and stated that nothing in it would "be deemed to create or constitute a joint venture, a partnership, a corporation, or any entity taxable as a corporation, partnership or otherwise." ETP's

pleadings acknowledged that “the parties had not yet formed a partnership” when the parties entered into these agreements.

As of May 2011, the parties had formed an integrated team to pursue Double E. During the spring and summer, they marketed Double E to potential customers as a “50/50 JV” and prepared engineering plans for the project. Because a federal rule governing new interstate pipelines requires an “open season” of 30 to 45 days in which shippers are asked to commit to daily barrel volumes and tariffs, the parties needed shipping commitments of at least 250,000 barrels a day for ten years at a tariff of \$3.00 per barrel if Double E was going to be viable. The first open season was unsuccessful, and the parties extended the open season twice. On August 12, the last day of the second extended open season, Chesapeake Energy Corp. committed to ship 100,000 barrels daily. ETP hoped that Chesapeake’s commitment would attract other shippers who had been holding out, but Enterprise had begun preparing its exit by resuming negotiations with Enbridge, a Canadian company with whom Enterprise had previously had discussions that did not materialize. Enterprise ended its relationship with ETP orally on August 15 and in writing a few days later.

The next month, ConocoPhillips announced that it would sell its interest in the Seaway pipeline, and Enbridge bought the interest, making Enbridge co-owner of the pipeline with Enterprise. Enterprise and Enbridge obtained an anchor shipper commitment from Chesapeake, which resulted in their securing many additional commitments during the open season. Enterprise and Enbridge invested billions to reverse the direction of the pipeline and make other modifications needed to move oil from Cushing to the Gulf. The new pipeline, known as Wrangler, opened in June 2012, and was a financial success.

ETP sued, alleging that it had formed a partnership with Enterprise to “market and pursue” a pipeline through their conduct, and Enterprise breached its statutory duty of loyalty by pursuing the Wrangler project with Enbridge. The jury found that “ETP and Enterprise [had] create[d] a partnership to market and pursue a pipeline project to transport crude oil from Cushing, Oklahoma to the Gulf Coast” and further found that Enterprise had not complied with its duty of loyalty. The jury found that ETP suffered \$319,375,000 in compensatory damages and that the value to Enterprise of the benefit gained as a result of its misconduct was \$595,257,433. The trial court reduced the disgorgement award to \$150 million and otherwise rendered judgment on the verdict for ETP for a total of \$535,794,777 plus post-judgment interest.

The Dallas Court of Appeals reversed and rendered judgment for Enterprise on the basis that the Texas Business Organizations Code (TBOC) allows parties to contract for conditions precedent to partnership formation and that the Letter Agreement created two conditions that were not met: (1) execution of “definitive agreements memorializing the terms and conditions of the Transaction”, and (2) approval of the definitive agreements by the boards of each of the parties. The court of appeals concluded that ETP had the burden either to obtain a jury finding that the conditions were waived or to prove waiver conclusively, which it failed to do. ETP appealed to the Texas Supreme Court, which granted review.

The Texas Supreme Court began its analysis by reviewing provisions of Chapter 152 of the TBOC that address creation of a partnership. Under § 152.051(b), “an association of two or more persons to carry on a business for profit as owners creates a partnership, regardless of whether: (1) the persons intend to create a partnership; or (2) the association is called a ‘partnership,’ ‘joint venture,’ or other name.” Under § 152.052(a):

Factors indicating that persons have created a partnership include the persons’:

- (1) receipt or right to receive a share of profits of the business;
- (2) expression of an intent to be partners in the business;
- (3) participation or right to participate in control of the business;
- (4) agreement to share or sharing:
 - (A) losses of the business; or
 - (B) liability for claims by third parties against the business; and
- (5) agreement to contribute or contributing money or property to the business.

The court further pointed out that § 152.003 provides that “[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 reviewed its previous analysis of the five-factor statutory test in *Ingram v. Deere*, in which the court traced the evolution of Texas partnership law from the early common law to the current statutory provision,

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