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

Elizabeth S. Miller
Professor of Law
M. Stephen and Alyce A. Beard Chair
in Business and Transactional Law
Baylor Law School
Waco, Texas

Douglas K. Moll
Beirne, Maynard & Parsons, L.L.P. Professor of Law
University of Houston Law Center
Houston, Texas

The University of Texas School of Law

2022 LLCs, LPs and PARTNERSHIPS

July 14-15, 2022

TABLE OF CONTENTS

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

Elizabeth S. Miller
Douglas K. Moll

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

Smith v. Insurance Adjusters Group, LLC, No. 2:21-cv-00068-JRG-RSP, 2022 WL 1517026 (E.D. Tex. Apr. 29, 2022).

Applying the five factors from the Texas Business Organizations Code that indicate the creation of a partnership, the court concluded that there were multiple genuine issues of fact and that the plaintiffs' summary-judgment evidence, if credited, provided sufficient support for the satisfaction of most of the factors. The court thus denied the defendants' motion for summary judgment on the issue of the creation of a partnership between the parties.

A central issue in this case was the plaintiffs' claim that Duane Smith and William Cox orally agreed to form a partnership in 2017 to conduct a public adjusting business for insurance claims. Smith and Cox began working together on public adjusting in 2017. On January 16, 2020, Smith and Cox both signed a handwritten "Letter of Intent," which stated that "[o]ur intent is to establish an equal partnership between Bill Cox & Duane Smith for Insurance Adjusters Group, LLC." Defendants Insurance Adjusters Group, LLC and Cox argued that Smith and Cox had discussed forming a partnership, but at most possessed an "agreement to agree [to form a partnership]," which the parties never consummated. The defendants filed a motion for partial summary judgment regarding the existence of a partnership. The court ultimately denied the defendants' motion because multiple genuine issues of fact existed.

The court evaluated whether a partnership existed based on the five non-exclusive factors in § 152.052 of the Texas Business Organizations Code. The court acknowledged that Texas case law indicates that more than one of the factors must be found in order to establish a partnership, but the court stated that the plaintiffs offered summary-judgment evidence that, if credited, could satisfy most of the factors. The court briefly addressed the summary-judgment evidence as to each factor.

The first factor is "receipt or right to receive a share of profits of the business." Tex. Bus. Orgs. Code § 152.052(a)(1). The plaintiffs presented evidence that Smith and Cox each had a right to receive half of the gross revenues from the venture. The defendants argued that gross revenues are distinct from profits, but the court stated that the defendants' argument was not a "persuasive distinction" in the context of the statute.

The second factor is "expression of an intent to be partners in the business." Tex. Bus. Orgs. Code § 152.052(a)(2). The court found that the Letter of Intent and affidavits by Smith and another plaintiff satisfied this factor.

The third factor is "participation or right to participate in control of the business." Tex. Bus. Orgs. Code § 152.052(a)(3). The court found that while this factor was "heavily contested," the plaintiffs' deposition and affidavit evidence arguably met this factor if credited.

The fourth factor is "agreement to share or sharing" in either the losses of the business or "liability for claims by third parties against the business." Tex. Bus. Orgs. Code § 152.052(a)(4). The plaintiffs attempted to provide evidence of their contribution to a settlement with a "former IAG independent contractor." The court stated that this factor was "far from fully developed" and that the court's evaluation of the evidence on this factor was not necessary to rule on the motion.

The fifth factor is "agreement to contribute or contributing money or property to the business." The plaintiffs presented evidence of a check that Cox signed in the amount of $50,000 with the memo line entry "IAG Buy in." The parties contested whether the check, itself, or only a copy, was actually delivered to the plaintiffs. Further, the parties did not negotiate the check. Smith also argued that he contributed property to the business in the form of business contacts leading to new assignments.

The court stated that it was clear that many genuine issues of fact existed. According to the court, "It is also not clear that, when this evidence is presented in its full development at trial, a reasonable trier of fact could not find that a partnership existed for all or part of the time period at issue." Thus, the court denied the defendants' motion for partial summary judgment.

Bodine v. First Co., Case No. 3:20-CV-3116-BT, 2021 WL 5505562 (N.D. Tex. Nov. 24, 2021).

The magistrate judge granted the defendants' motion to dismiss the plaintiffs' duty-of-loyalty claim. The magistrate concluded that plaintiffs failed to sufficiently allege that a relationship of trust and confidence existed or that a partnership had been formed.

Plaintiffs Matt and Jason Bodine, DBS Associates, Inc. ("DBS"), and DABCO brought various claims against defendants Jim Nation, Jeff Evans, Ryan Bricarell, and First Co., including a claim for breach of the duty of loyalty. First Co. was a Texas corporation that manufactured parts and products for heating, ventilation, and air conditioning systems; Nation, Evans, and Bricarell were employees of First Co.

First Co. sold parts and products to distributors, called "Manufacturer's Representatives," who then sold the parts and products to contractors. DBS was a California corporation, owned by the Bodines, that served as one of First Co.'s Manufacturer's Representatives from 1994 until 2018. DABCO was a warehousing business that allegedly operated as an unregistered partnership between the Bodines, DBS, and the defendants for almost 20 years.

Plaintiffs alleged that, starting in 1998, defendants gradually increased lead times for First Co. inventory purchased by DBS in order to force plaintiffs to enter into DABCO. Plaintiffs further alleged that, beginning in 2017, defendants launched an effort to force plaintiffs to quit their relationship with defendants. This effort to "force [p]laintiffs to surrender" was allegedly waged with false statements, increased prices, and increased lead times. According to plaintiffs, this years-long conspiracy culminated when Evans sent Bricarell to be trained by plaintiffs on their marketing setup. After completing this training, plaintiffs alleged that "[d]efendants, and each of them, had decided that they had learned enough from [p]laintiffs to supply a confidence level of being able to run a renamed version of DBS on their own, without DBS's founders." According to plaintiffs, this allowed defendants to terminate their contract with DBS and to end the "DABCO relationship" six months later. Plaintiffs asserted that this termination, which they admitted was proper under DBS's contract with First Co., revealed the ongoing scheme perpetrated by defendants.

Plaintiffs asserted that defendants breached a fiduciary duty of loyalty stemming from (a) an informal relationship of trust and confidence and (b) a de facto partnership. The magistrate judge granted the defendants' motion to dismiss:

> Plaintiffs next assert claims ... based on an alleged fiduciary relationship between Defendants and DBS. Here, Plaintiffs once again assert that Defendants owed them a fiduciary duty due to "Plaintiffs[‘] ... vulnerable position relative to Defendants." They further argue that Defendants breached this duty by terminating DBS's Manufacturer's Rep contract and then pursuing DBS's customer base. Plaintiffs assert a similar claim based on an alleged fiduciary relationship between Defendants and DABCO. This fiduciary relationship, according to Plaintiffs, was a result of the "de facto Partnership" between Plaintiffs and Defendants, wherein Plaintiffs were dependent on Defendants in order to operate a viable business. Plaintiffs allege that Defendants breached this particular fiduciary duty by allowing Plaintiffs to spend money "to ascertain whether the Plaintiffs' warehousing and distribution model was successful," while planning all along to end the partnership as soon as it became profitable.
>
> Fiduciary duties attach in formal fiduciary relationships—such as partnerships—and in special relationships of trust and confidence. As discussed above, special relationships must be based on more than one party's unilateral, subjective sense of trust and confidence in the opposing party. And in order for fiduciary duties to attach, a special relationship must exist before and apart

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

Also available as part of the eCourse
2022 LLCs, LPs and Partnerships eConference

First appeared as part of the conference materials for the
31st Annual LLCs, LPs and Partnerships session
"Case Law Update"