

Client Alert

Corporate Practice Group

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Dallas Court Reverses *Enterprise v. ETP* Verdict, Reaffirming Efficacy of Conditions Precedent

On July 18, 2017, the Dallas Court of Appeals (the “Court”) reversed the more than \$535 million jury verdict against Enterprise Products Partners L.P. (“Enterprise”), leaving Energy Transfer Partners, L.P. (“ETP”) empty-handed. That sound you just heard was contract lawyers and many would-be midstream joint venturers breathing a collective sigh of relief. Since 2014, companies doing business in Texas have worried that binding partnerships may have been inadvertently formed, despite express language to the contrary. The Court affirmed this week what many practitioners believed to be the law of the land when it reversed the jury verdict and upheld the parties’ letter agreement that there could be no binding or enforceable obligations because their respective boards did not approve the partnership and definitive agreements had not been negotiated or executed.

BACKGROUND

In early 2011, ETP and Enterprise, both builders and operators of oil and gas pipelines, began discussing a pipeline to transport crude oil from Cushing, Oklahoma to Houston, Texas. The parties agreed to explore the viability of such a pipeline and, to this end, negotiated and executed three written agreements, including a Nonbinding Term Sheet and Letter Agreement (the “Letter Agreement”). The Letter Agreement provided that “*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...have been executed.*” Thereafter, representatives of each of ETP and Enterprise participated in an “open season” to attract long-term shipping commitments on their potential pipeline. The commitments obtained during open season ultimately fell short of the parties’ agreed minimum commitment requirement. Shortly after open season closed, Enterprise contacted ETP and terminated its participation in the project.

Two weeks before open season ended, Enterprise had discussions with Enbridge (US) Inc. (“Enbridge”) regarding a Cushing-to-Houston pipeline. These conversations were not disclosed to ETP. The day after Enterprise terminated its participation in the project with ETP, Enterprise agreed to work with Enbridge on a Cushing-to-Houston pipeline. Shortly thereafter, ETP sued Enterprise for breach of joint enterprise and fiduciary duty.

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In 2014, a Dallas jury found that a partnership had been formed and that Enterprise failed to comply with its duty of loyalty as a partner and awarded ETP damages. The Texas Business Organizations Code (the “Code”) sets forth a five-part test for determining whether a partnership (an “association...to carry on a business for profit”) has been formed: (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.ⁱ Looking to the parties’ conduct, and applying these five factors in a totality of the circumstances test, the jury found that a partnership was formed notwithstanding the limiting language of the Letter Agreement. The jury further concluded that, as a partner to ETP, Enterprise breached its duty of loyalty by pursuing a similar pipeline project with Enbridge. The result? A whopping \$535.8 million award in favor of ETP.

OPINION

The issue the Dallas Court of Appeals considered on appeal was whether “the trial court erred by denying Enterprise’s motions for directed verdict and JNOV because the parties’ written agreements contained unperformed conditions precedent that as a matter of law precluded the forming of the disputed partnership.”ⁱⁱ While the trial court looked to the five-factor test for determining if a partnership had been created, the Court noted that those five factors are not exclusive. The Court looked also to Section 152.003 of the Code, which says that principles of law and equity – including the law of conditions precedent – supplement statutory principles of partnership law. The Court noted that conditions precedent “place an impediment on the parties’ ability to ‘create any binding or enforceable obligations.’”ⁱⁱⁱ

The Letter Agreement between Enterprise and ETP required two things before a partnership would be created: approvals of the respective parties’ boards and the negotiation, execution and delivery of definitive agreements. The Court held that those requirements were conditions precedent. The Court further concluded that “unperformed conditions precedent to forming a partnership will prevent the partnership from forming unless the parties waive the performance of the conditions precedent or other rules of law or equity nullify them.”^{iv}

It was undisputed that the conditions precedent were not performed. ETP had to demonstrate, then, that such conditions had been waived. The Court found that the testimony did not conclusively establish that the parties waived the two conditions precedent to the formation of a partnership. Accordingly, the Court reversed the trial court’s judgment as to ETP’s claims and rendered judgment that ETP take nothing.

KEY TAKEAWAYS

“Non-binding” provisions do actually mean something in Texas and may protect parties from creating an obligation to complete a deal until definitive agreements have been executed and other expressly provided conditions precedent satisfied. A couple of best practices should be kept in mind in this regard. First, all preliminary documents, including term sheets and letters of intent, should continuously and unambiguously assert that there is no binding obligation of either party to move forward with a deal until certain conditions precedent have been met. Second, since a party’s subsequent actions can unintentionally waive conditions precedent, preliminary agreements should also include “no waiver” provisions that require any waivers of the conditions precedent to be in writing (and not orally, or by virtue of the parties’ subsequent course of conduct).

Contract lawyers across Texas breathed a sigh of relief after the Court’s reversal, but the saga might not be over. We will keep an eye on the Texas Supreme Court to see if ETP appeals this week’s ruling.

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ⁱ TEX. BUS. ORGS. CODE ANN. § 152.052(a) (West 2012).

ⁱⁱ *Enterprise Prod. Partners, L.P. v. Energy Transfer Partners, L.P.*, No. 05-14-01383-CV, 2017 WL 3033312, at *1, (Tex. App. – Dallas July 18, 2017) (mem. op.).

ⁱⁱⁱ *Id.* at *7.

^{iv} *Id.*