March 2015 | Volume 7 | Issue 3

BEATTY & WOZNIAK, P.C.
ENERGY IN THE LAW

AS I DO AND NOT AS I SAY: AVOIDING AN INADVERTENT JOINT VENTURE OR PARTNERSHIP

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As we approach April Fools Day, it is a good time to provide an update and cautionary reminder concerning the inadvertent formation of an implied partnership or joint venture. As discussed in our August newsletter, an implied partnership or joint venture may be formed based only upon the parties' conduct and even despite express written language to the contrary. *See* Texas Jury Finds a "Common Law Partnership," Court Orders Costly Divorce. [view] Since July, two other decisions provide further cautionary lessons with respect to the formation of implied partnerships which may be formed despite: (1) the lack of a written agreement; (2) the existence of only a standard sales agreement; and (3) express disclaimers in a letter of intent.

The Colorado Uniform Partnership Law defines a partnership as "an association of two or more persons to carry-on as co-owners of a business for profit." *See* C.R.S. 7-60-106. Generally, joint ventures are treated as general partnerships for a single enterprise, and there is well-established precedent in most jurisdictions setting forth the requirements for joint venture and general partnership formation. Colorado courts look for the following three elements to be present to find the existence of a joint venture or partnership: (1) joint interest in a property by the parties to be held as partners; (2) agreement by such parties to share in the profits and losses of the venture; and (3) actions or conduct by the parties showing cooperation in the project. Most jurisdictions have established a similar multi-factor test. For example, the Texas Business Organization Code adopted a five factor test that was established in Texas common law requiring: (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 losses and liabilities; and (5) the agreement to contribute or the contribution of money or property to the business. *See* Tex. Bus. & Org. Code § 152.052(a).

As is evident from the factors listed above, a partnership need not be established by a written agreement, but may be formed by the mere conduct of the parties. Determining whether or not the relevant parties intended to form a partnership in the absence of a written agreement is a fact-intensive exercise and not all of the relevant factors need to be present under the circumstances. While courts often focus on evidence demonstrating the parties' intent to form a partnership, some jurisdictions may find a partnership in the absence of specific intent if the totality of the circumstances and the satisfaction of other factors are sufficient to show the formation of a partnership. Critical persuasive factors in finding an implied partnership include: (1) the partners holding themselves out to the public as partners (e.g. letterhead or advertising); (2) joint property ownership or sharing; (3) conducting transactions as partners and sharing in profits and/or

liabilities and losses; and (4) pooling funds or making payments jointly. Three recent decisions in three different jurisdictions provide interesting discussions on the formation of implied partnerships.

First, in a January 2015 decision in the Connecticut case of *Veilleux v. Central Rigging and Transfer, LLC*, a motion for summary judgment was denied because evidence of companies sharing employees and equipment over an extended period of time created a genuine issue of material fact regarding the creation of an implied partnership. This was despite the fact that the companies kept separate bank accounts, owned the equipment separately, kept separate financial records, filed separate tax returns and had no written agreement to form a partnership of joint venture.

Second, in a December 2014 decision in the Illinois case of *Hiatt v. Western Plastics, Inc.*, a motion for summary judgment was denied because of the existence of a genuine issue of material fact regarding the creation of an implied partnership. The parties in *Hiatt* had entered into an equipment manufacturing and sale agreement that contained a not-so-artfully drafted "independent contractor" provision. That provision stated that neither party was "the agent of the other for any purpose whatsoever" and prohibited the parties from binding one another with respect to any third party. But because the provision did not explicitly state that the parties are not engaged in a joint venture or partnership, the court did not find the "independent contractor" provision determinative. In addition to the lack of an express disclaimer, the manufacturing and sale agreement had numerous other clauses that the court considered evidence of intent to carry on a joint enterprise. Most significantly were express contract provisions providing that: (1) the parties would work together to design new products; (2) the parties would work together to implement cost improvements in processes and overhead; (3) the buyer would have approval rights for changes in the manufacturing process; and (4) the seller would not manufacture, process or sell products that were similar in specification or design to any other party. Subsequent to the execution of the manufacturing and sale agreement, the parties' cooperative conduct in administering the agreement provided further evidence of a possible implied partnership.

Third, and perhaps the most surprising recent decision regarding implied partnerships is the July 2014 Texas case of *Energy Transfer Partners, LP et al. v. Enterprise Products Partners, L.P. et al.*. This case has become infamous as it involves a jury finding of an implied partnership despite the fact that the parties had executed a letter of intent (with a "non-binding" term sheet attached) that clearly stated that neither it nor the term sheet create any binding or enforceable obligations between the parties. The letter of intent also stated that no binding obligations would arise unless and until the parties receive board approvals and execute definitive agreements. These clear disclaimers (that are often standard in commercial agreements) and the failure of express conditions precedent were not persuasive in a summary judgment motion. The court held that the parties' close working relationship, joint marketing efforts, and public references to a "50/50 JV" were sufficient to create a genuine issue of material fact. The jury proceeded to award the plaintiff more than $500 Million for breach of fiduciary duties arising out of a partnership. *See* Texas Jury Finds a "Common Law Partnership," Court Orders Costly Divorce for further discussion. [view] Not surprisingly, Enterprise has appealed this decision, and the case is currently pending before the Court of Appeals of Texas, Fifth District.

When one considers the various circumstances that courts rely upon to find sufficient evidence of an implied partnership, care should be taken in drafting any type of binding or non-binding commercial commitment, and caution should be observed in conduct with enterprise counter-

parties. Despite the decision in *Energy Transfer Partners, LP et al*., clearly drafted disclaimers and carefully crafted contract commitments and covenants remain the primary method of avoiding an unwanted implied partnership. In potentially complex commercial transactions, a waiver of each party's right to bring a cause of action for breach of fiduciary duties and/or partnership formation may be appropriate. Public statements, marketing efforts, and proposals to share employees, equipment or other property should be considered carefully as they could be construed as evidence of an implied partnership. All parties engaged or considering being engaged in a commercial enterprise with another party should prudently choose the language used by company representatives to describe the commercial enterprise to third parties and to the enterprise counter-party.

For further information regarding conduct likely to lead to a finding of a joint venture, please contact Jeff Becker.