KIRKLAND **ALERT**

August 3, 2017

Unanimous Texas Court of Appeals Reverses Controversial Jury Verdict — No "Common Law" Business Partnership in Texas

On July 18, 2017, the Court of Appeals for the Fifth District of Texas at Dallas reversed an over $450 million trial judgment in *Enterprise Products Partners, L.P. v. Energy Transfer Partners, L.P.*, 05-14-01383-CV, 2017 WL 3033312 (Tex. App. — Dallas July 18, 2017, no pet. h.). In doing so, the court reaffirmed common practices to avoid the creation of partnerships or joint ventures in the midstream industry, as well as the the enforcement of plain contractual language and the waiver of theories not presented to the jury under Texas law.

The Dallas Court of Appeals recently enforced commonly used contract language to avoid the creation of partnership or joint ventures in the mid-stream industry.

Case Summary

In 2011, Enterprise approached ETP about working together to build a pipeline transporting crude oil from Cushing, Oklahoma, to refineries in Houston, Texas. ETP agreed to work with Enterprise on determining the viability of the project. Prior to beginning work, the two parties signed three preliminary agreements; (1) a Confidentiality Agreement; (2) a Letter Agreement; and (3) a Reimbursement Agreement. Importantly, the Letter Agreement contained two conditions precedent that had to be met before a partnership could exist: (i) approvals by both parties' boards of directors and (ii) executed and delivered definitive agreements for the "Transaction."

After executing the agreements, ETP and Enterprise tried to secure enough suppliers during open season to make the line economically feasible. The parties learned that shippers were not interested in a pipeline from just Cushing to Houston, but rather from Canada to Houston. The two parties devised a plan to be able to provide this service, but when open season closed, only one shipper had agreed to use their proposed pipeline. Three days later, Enterprise contacted ETP and terminated its participation in the project. The definitive terms were never negotiated or executed, and the respective boards of each company never gave their approval.

Two weeks prior to the end of open season, Enterprise had begun discussions with Enbridge, a company that operated a pipeline system from Alberta to Cushing. When Enterprise and ETP failed to secure sufficient funds, Enterprise successfully partnered with Enbridge on a Cushing to Houston pipeline.

ETP sued Enterprise for breach of its duty of loyalty under Texas law as a partner of ETP. At trial, the jury found that Enterprise was in a general partnership with ETP and that it breached its duty of loyalty pursuant to that partnership. ETP was awarded actual damages of over $300 million and disgorgement of $150 million of Enterprise's profits.

On appeal, the Court of Appeals of the Fifth District reversed, holding that no partnership between the parties was created as a matter of law because (1) the conditions precedent to creating a partnership contained in the Letter Agreement had not been met; and (2) ETP did not request a jury finding waiver of these conditions precedent and they were not waived as a matter of law.

Takeaways

Transactional

The *Enterprise* court's ruling reaffirms best practices in the midstream industry to disclaim a binding partnership or other joint venture relationship through the use of term sheets, letters of intent, and indications of interest during the documentation of preliminary joint venture, partnership, and other multi-member platform arrangements. While the court's ruling does not guarantee that the express language of such preliminary documents will always supersede the actions of the parties, it reaffirms and provides greater certainty that thoughtfully crafted term sheets and other preliminary documents that contain conditions precedent to the formation of a partnership or joint venture will be given significant weight in determining whether such binding arrangements have been formed. Based on the court's ruling, when drafting preliminary, non-binding documents regarding joint ventures, partnerships and other multi-member platforms, best practices recommendations include the following:

The ruling reaffirms and provides greater certainty that thoughtfully crafted term sheets and other preliminary documents will be given significant weight in determining whether such binding arrangements have been formed.

1. Express and unambiguous "non-binding" language disclaiming the creation of a joint venture, partnership or other binding arrangement, unless and until, specifically delineated conditions precedent contained within the preliminary agreement have been satisfied or expressly waived in writing, including any necessary board or investment committee approvals and execution of mutually agreeable definitive documentation.

2. Specific disclaimers of fiduciary duties, including the duty of loyalty.

3. Clear language providing that no conditions precedent will be deemed to have been waived, including orally (i.e., a "no oral modifications" clause) or by the conduct of the parties, except pursuant to a written agreement specifically waiving such condition.

4. Inclusion of the "non-binding" and "no modifications/waiver" language in each preliminary document to ensure consistency across documents.

Litigation

The *Enterprise* court's ruling also reiterated that under Texas law: (i) courts will enforce the plain language of preliminary agreements as the primary source of the parties' intent; and (ii) independent grounds of recovery or defense, such as waiver, must be presented to the jury or be deemed waived.

First, as the *Enterprise* court's ruling demonstrates, words matter to Texas courts, which will enforce the plain language of even otherwise "non-binding" agreements according to the terms provided. As a result, in drafting and interpreting preliminary agreements, parties must pay close attention to the language used — particularly in defining terms in the agreement — to ensure that it reflects the party's intent. So it is written, so will it be done.

In drafting preliminary agreements, parties must pay close attention to the language used to ensure that it reflects their intent.

Second, be careful to avoid a waiver of waiver. It can often be tempting not to submit jury instructions on alternative theories of recovery or defense, especially where a trial judge has rendered legal rulings in one's favor on the issue. You do so at your peril. As *Enterprise* demonstrates, if the trial court's legal holding is reversed on appeal, failure to have submitted that theory to the finder of fact below will result in waiver.

If you have any questions about the matters addressed in this *Kirkland Alert*, please contact the following Kirkland authors or your regular Kirkland contact.

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