

## Texas Justices Say Contract Is King In \$535M Pipeline Fight

By **Keith Goldberg**

*Law360 (January 31, 2020, 10:18 PM EST)* -- The Texas Supreme Court elevated written contracts between parties over the state's partnership law when it declined Friday to reinstate a \$535 million judgment against Enterprise Products Partners LP over a soured pipeline development deal with Energy Transfer Partners LP.

The court said the Texas partnership statute doesn't trump or supersede written agreements, letting Lone Star State companies breathe a sigh of relief knowing they won't risk entering into an "accidental partnership" if they've agreed certain conditions must first be met to create a partnership. And the decision creates a higher bar for parties to argue such contractual conditions were waived, meaning fewer disputes like this one will make it to trial.

The court didn't clarify what constitutes a partnership under the Texas Business Organizations Code, but it did make clear what companies can do to avoid creating one.

"It's a primacy of contract approach, which to me was not that surprising from the Texas Supreme Court," said Lyndon Bittle, a trial and appellate partner at Carrington Coleman Sloman & Blumenthal LLP. "They're always emphasizing the freedom of contract and that you shouldn't have partnership by surprise."

Wasting few words in a 15-page opinion, Chief Justice Nathan L. Hecht wrote for a unanimous court that no partnership between ETP and Enterprise could have been formed because they never met the partnership-triggering conditions in an agreement between the two companies to market a crude oil pipeline.

Enterprise later developed a pipeline along a similar route with Enbridge Inc., and ETP claimed it was a jilted partner whose relationship with Enterprise had evolved into a full partnership despite their initial marketing agreement.

But Enterprise called it "partnership by ambush" and convinced a lower appellate court in 2017 to wipe out the blockbuster verdict. ETP's appeal to the Texas Supreme Court drew a slew of amici briefs from oil and gas companies and Texas business groups backing Enterprise.

ETP argued that Enterprise's conduct transformed the nature of their working relationship because it

satisfied the principles for partnership formation outlined in a five-factor test in the Texas Business Organizations Code.

The Texas Supreme Court rejected that argument Friday, saying that Section 152.003 of the TBOC expressly authorizes that partnership formation rules are supplemented with "principles of law and equity."

"Perhaps no principle of law is as deeply engrained in Texas jurisprudence as freedom of contract," Justice Hecht wrote. "We hold that parties can contract for conditions precedent to preclude the unintentional formation of a partnership under Chapter 152 [of the TBOC] and that, as a matter of law, they did so here."

That's a concise and straightforward conclusion, attorneys say.

"Regardless of what the Texas statute says, the court said when you have that in writing and it's clear, that's conclusive," said Jonathan Baughman, who chairs McGinnis Lochridge's oil and gas group.

The court also took a narrow view of what evidence would be sufficient to prove companies waive partnership-triggering contractual conditions, saying "only evidence directly tied to the condition precedent is relevant" and ETP hadn't provided such evidence.

"That sets a pretty high bar for a party wanting to argue waiver," said Baker Botts LLP energy litigation partner Louie Layrisson.

Combined with the court's conclusion that partnership-triggering conditions in agreements can be enforced as a matter of law, attorneys say it's more likely that partnership formation disputes will be decided by a judge at the summary judgment stage and not a trial jury.

"It's going to shut the door on litigation before it begins or create a higher bar that's going to prevent many of these disputes that are percolating now or in the future from ever reaching a jury," said Jackson Walker LLP trial and appellate partner Richard Howell.

While the Texas Supreme Court affirmed the primacy of contracts over Texas partnership law, that doesn't mean the law is now toothless, attorneys say. The TBOC's partnership formation guidelines are still relevant to individuals and smaller, less-sophisticated companies that might not have armies of lawyers drawing up documents like ETP and Enterprise.

"What was important to the court was to show that you can contract around anything," McKool Smith PC principal Willie Wood said. "But they didn't want to do violence to the possibility that parties might want to change their relationship in the middle of a project."

Yet the court made clear it believes that Texas partnership law isn't meant to displace decades of common law that has repeatedly stated that freedom of contract is a bedrock principle in the state, attorneys say.

"That is a decision that offers more predictability and more stability for the business community, in terms of, 'OK, now we know how to draft agreements in a way to avoid surprises,'" Layrisson said. "A well-written condition precedent in a preliminary agreement will be enforced by the courts."

ETP is represented by Jeremy Fielding of Kirkland & Ellis LLP, Michael Lynn, Chris Akin and David Coale of Lynn Pinker Cox & Hurst LLP, Nina Cortell and Kelli Bills of Haynes and Boone LLP and Craig Enoch and Melissa Lorber of Enoch Kever PLLC.

Enterprise is represented by David Keltner and Marianne Auld of Kelly Hart & Hallman LLP, David Beck, David Gunn, Russel Post and Jeff Golub of Beck Redden LLP, P. Michael Jung of Clark Hill Strasburger and Wallace B. Jefferson and Rachel Ekery of Alexander Dubose & Jefferson LLP.

The case is Energy Transfer Partners LP et al. v. Enterprise Products Partners LP et al., case number 17-0862, in the Texas Supreme Court.

--Editing by Kelly Duncan and Jill Coffey.