$319M Verdict In Dallas Pipeline Trial Stuns Industry

By Jess Davis

Law360, Dallas (March 04, 2014, 8:42 PM ET) -- A Dallas jury’s more than $319 million verdict on Tuesday against Enterprise Products Partners LP for breaching an informal partnership agreement to develop a crude oil pipeline stunned the energy industry, and it could force oil and gas companies to use more caution in forming new deals, energy attorneys say.

After a monthlong trial, the jury found Enterprise had formed a partnership in 2011 with Energy Transfer Partners LP to build a nearly 500-mile crude oil pipeline from Cushing, Okla., to refineries near the Gulf of Mexico and that it breached that partnership when, after a failed open season on the pipeline, it pulled out and launched plans a month later to build a similar pipeline with Enbridge USA Inc.

Enterprise argued throughout the trial that ETP was trying to create a “partnership by ambush” because early agreements signed by the parties contained no exclusivity clause and referred to their working relationship as nonbinding and subject to securing enough shipping commitments to make building the line worthwhile.

The jury found Enbridge was not part of a conspiracy to break up the original pipeline deal, but it determined in a 10-2 verdict that Enterprise owed ETP $319.38 million in fair compensation for the breach and could be liable for up to $595 million in disgorgement for the benefit Enterprise received, depending on which remedy ETP chooses to pursue.

“It’s a heck of a verdict and it really ought to scare the crap out of people,” said Randy Burton of Burleson LLP, an energy attorney who didn’t work on the case.

Burton said if the parties believed they had committed only to work together in an exploratory effort not intended to bind anybody, it’s “pretty scary” that, without written agreements, a jury found a partnership existed and had been breached. He said the verdict sends the message that energy companies need to tone down the language they use informally and not refer to their working relationship as a partnership or joint venture unless they intend to be bound by those commitments.

“This should be a wake-up call for anybody in the business to be sensitive about what they’re saying,” Burton said. “Not only should you be very careful about the representations you make in writing or orally to third parties about these sorts of commitments, you have to make extremely careful representations to each other in these agreements about how much of a commitment you have.”

ETP argued throughout the trial that although it signed a nonbinding agreement as it discussed launching the pipeline with Enterprise, the nature of its working relationship then evolved. ETP executives told jurors that after an initial press release was sent out saying the partnership with Enterprise would be formed in the future, subject to securing enough shipping commitments, their business arrangements transformed into a full-blown partnership.

ETP introduced evidence that it committed to share project costs and profits, that its staff worked jointly with Enterprise engineers and salesmen to develop the pipeline route...
and try to lock down commitments, and that in marketing materials and presentations to potential customers, Enterprise clearly held itself out as a partner with ETP despite the lack of a formal written agreement. Lawyers for ETP say they're confident the jury verdict will stand and that they proved a partnership agreement existed and bound Enterprise not to breach its duty to ETP by jumping ship to join with Enbridge.

Enterprise plans to contest the verdict and said in a statement Tuesday the jury's finding challenges its ability to secure certainty in its business relationships by putting agreed and negotiated terms in writing and being able to be sure those agreements will be honored down the road.

"We do not have unintended corporations, LLCs or LLPs in business, and we should not have unintended partnerships," Enterprise said after the verdict.

But Doug Moll, who teaches business law at the University of Houston Law Center, said Texas partnership law is broad and makes the intent of the parties a relatively insignificant factor in determining whether they're bound as partners, compared to other factors outlined in the Texas partnership statute, like sharing profits, control and liabilities. Writing "we do not intend this to be a partnership" 1,000 times doesn't mean the conduct of the parties can't change that into a valid partnership, he said.

"There is a disconnect between the world thinking you have to agree to be partners and the law clearly stating you do not," Moll said.

Jim Reed of Gray Reed & McGraw PC, a Houston-based energy attorney, said without knowing the details of the evidence presented, the jury verdict surprised him because ETP had an uphill battle to prove the existence of a partnership without the kind of detailed written agreement common in the industry. Reed said it's typical for energy executives to use words like "we are partnering on this deal" or "we are moving forward as partners" and for them to use the term "joint venture" loosely, not intending to reflect a binding commitment existed.

"I think if this verdict stands up you're going to hear in-house lawyers and other lawyers telling people those aren't terms that should be used," Reed said.

He said he will counsel his clients to be more careful and to include in their emails and other communications from time to time as the project develops that there is not a binding joint venture or binding partnership without a written agreement signed by authorized representatives of each client.

"To obtain that result to me is significant and in the future — and even if the case is reversed for some reason — I still think it could have an impact that lawyers should advise clients to be real careful about using those words in presentations," Reed said.

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