Reluctant Bedfellows: Can Fiduciary Obligations Among Mining Co-Venturers Be Effectively Disclaimed?

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Mining projects are often organized as joint ventures between multiple parties, each of which bring different assets, land positions, tolerance for risk, and capital contributions to the project. As time progresses and the project matures, continued participation in the joint venture may become undesirable due to a variety of possible internal changes, such as tolerance for risk and continued capital expenditures, and external factors, such as changes in the regulatory environment and commodity prices. What was once an optimistic and cooperative atmosphere among venturers can quickly change to a contentious atmosphere as the venture wraps up its business and each venturer attempts to protect its assets and capital contributions.

A joint venture generally has six critical characteristics: (1) a contribution by the venturers of money, property, effort, knowledge, skill, or other asset to a common undertaking; (2) a joint property interest in the subject matter of the venture; (3) a right of mutual control or management of the enterprise; (4) the expectation and sharing of profit; (5) a right to participate in the profits; and (6) a limitation on the objective to a single undertaking or ad hoc enterprise. These six characteristics create an intricate web of express and implied rights and obligations among venturers, including an implied duty of loyalty and honesty in the parties' dealings with each other and in respect to matters pertaining to the venture. Some courts have also found heightened fiduciary responsibilities for the venturer entrusted with the management of the venture's enterprise. The relationship among venturers was eloquently described by United States Supreme Court Justice Cardozo in the seminal 1928 case of *Meinhard v. Salmon* - "[j]oint adventurers, like copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. . . . Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions . . . . Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden

by the crowd." Despite many courts' uncompromising rigidity on this issue, the spectrum of joint venture fiduciary duties often can be effectively expressly disclaimed in a venture agreement.

When a venture terminates, or one or more co-venturer attempts to withdraw, one of the critical – and often litigated – issues that arises is whether contractual attempts to disclaim the creation of fiduciary obligations and duties is enforceable. Mining venture agreements will often state that the agreement does not create "any mining, commercial, or other partnership," and that the venturers are not the "agents or legal representatives" of each other. The agreement may further disclaim the creation of "any fiduciary relationship." Whether such express disclaimers and statements are enforceable against a disgruntled co-venturer attempting to prohibit a withdrawing venturer from pursuing a competitive land position is dependent upon often inconsistent and contradictory judicial decisions. Some courts readily uphold express disclaimers of fiduciary duties and relationships, while others have held such disclaimers void for public policy reasons or resort to the uniform law of partnerships for guidance. Thus, it is generally not enough to rely on an express contractual disclaimer without having first fully examined the relevant authorities in the jurisdiction of the venture.

In many jurisdictions, disclaimers of fiduciary duty are upheld provided the venture agreement was negotiated among sophisticated parties with comparable bargaining power. Express disclaimers are generally subject to standard contract interpretation principles and are deemed the expression of the contracting parties' intent. If the operative agreement expresses the intent of the parties to disclaim duties or obligations, many courts will enforce such provisions in the absence of bad faith, unconscionability, or acts contrary to public policy.

In the Fifth Circuit Court of Appeals case of *Exxon Corp. v. Burglin*, for example, the court recognized the existence of fiduciary duties among partners, but also enforced a contractual abrogation of the fiduciary duty of loyalty and disclosure after finding that "highly sophisticated parties . . . bargained for the terms of the agreement at arm's length with the assistance of counsel." Similarly, the United States District Court for the District of Colorado held in the case of *Dime Box Petroleum Corp. v. The Louisiana Land and Exploration Co.* that, "where, as here, experienced and sophisticated parties with equal bargaining power have fully negotiated a contract which specifically disavows a joint undertaking, no joint venture was formed and, thus, no fiduciary relationship was created . . . ." In July of this year, the United States District Court for the District of Alaska relied upon the *Dime Box* decision and upheld an express disclaimer of fiduciary duty after recognizing that economic efficiency is promoted when venturers with unrelated competing projects can expressly modify implied fiduciary duties and unite resources for a single venture project. Thus, there appears to be strong and growing support for effective express disclaimers of fiduciary duties in venture agreements.

Other courts, however, have refused to recognize a contractual disclaimer of fiduciary duties among partners and venturers. Some courts in

California and Minnesota, for example, have held that the fiduciary obligations with respect to matters fundamentally related to the business cannot be waived or contracted away in the operative agreement. Further, in the absence of relevant decisions involving joint ventures, many courts will look to the jurisdiction's law of partnership for guidance on disclaimers of fiduciary relationships. Under the many forms of the Uniform Partnership Act, a partnership agreement may not contractually "eliminate" the duty of loyalty, or "unreasonably reduce" the duty of care. While this statutory language may be persuasive in some jurisdictions, many courts recognize a substantive difference between the law of joint ventures and partnerships. Most courts will generally only apply the law of the Uniform Partnership Act by analogy when necessary to address a question not otherwise answered under the relevant agreement or the common law of joint ventures. Thus, one would argue, if the venture agreement expressly addresses the issue (by disclaimer) the "default" uniform partnership statute is inapplicable.

Importantly, even where express contractual disclaimers are enforceable in a dispute between co-venturers, such disclaimers may be ineffective in a claim brought by a third party. If a claim is brought by a third party against one or all of the venturers, most courts will disregard any disclaimer of fiduciary or other relationship among the parties and consider co-venturers *de facto* partners or fiduciaries for purposes of determining such third party claim. This often arises in disputes involving a claim by a third party that one venturer was the agent of its co-venturer, or of the venture itself.

While the relevant authorities in each jurisdiction should be thoroughly examined before crafting venture agreement language, many jurisdictions will uphold a disclaimer of fiduciary duties and relationships, as long as the venturers are sophisticated and experienced parties that negotiate with comparable bargaining power. Diligence must be exercised to ensure that any express disclaimer not be contrary to the public policy of the jurisdiction or cross the line into the murky waters of unconscionability. Further, the unwary draftsman runs the risk of providing an incomplete disclaimer of relevant fiduciary duties and relationships, and thereby potentially expressly preserving that which slipped through the cracks of an unartful disclaimer.

As with many contract provisions, a small amount of diligence at the inception of a mining venture agreement can be effective preventative medicine when a venture begins to wind-down. Correctly and carefully defining and limiting the nature of the relationship and obligations among venturers in the venture agreement can provide significant defensive arrows in the quiver of a venturer that is seeking a land position, asset acquisition, or new enterprise partners on a project that may be competitive with a former venture.
