What's in a Name? First Public Corp v Parfet *Confirms that Michigan Does Not Recognize "Joint Enterprises" in a Commercial Setting*

By Donald A. DeLong

Introduction

The recent Michigan Supreme Court decision in *First Public Corp v Parfet*[1] has clarified that while Michigan law recognizes "joint ventures" in a commercial business context, it does not recognize "joint enterprises." While the difference may appear to be a semantic one, the distinction is important. The court confirmed that in Michigan, when there is no writing to specify the business relationship between two or more persons or the writing is unclear or ambiguous, the parties must prove that a partnership or a "joint venture" exists. The elements for determining whether one of these two entities exists are well founded in Michigan law, and the courts will not allow parties to reach beyond these elements or to look to the law of other jurisdictions to find that a business relationship exists.

Background

Most commercial relationships between business people involve contracting parties who are dealing with one another on an arm's-length basis. However, in many cases it is important to determine whether this commercial relationship is more than just arm's-length. For example, it may be important to determine whether the parties have a fiduciary relationship to one another; one of the parties may seek contributions from the other in order to conduct the operations of the enterprise, one party may seek reimbursement for contributions to the enterprise or for the losses suffered by the enterprise, or third parties may seek to hold all the parties liable for the debts incurred by the enterprise. When there is a writing that spells out the parties' relationship, this determination is merely a matter of contract interpretation. However, when—as is frequently the case—the parties have not committed their relationship to writing or the writing is unclear or ambiguous, business practitioners and the courts must decide whether the parties have a business relationship that goes beyond the typical arm's-length relationship and, if so, the nature of that relationship. Michigan courts will look to the Michigan Uniform Partnership Act[2] (MUPA) and the common law to answer these questions.

The Michigan Uniform Partnership Act

A partnership is defined as "an association of 2 or more persons, which may consist of husband and wife, to carry on as co-owners a business for profit . . . ."[3] The language cited above reveals three elements that are needed to find that a partnership exists: (1) an association of two or more persons, (2) to carry on as co-owners, and (3) a business for profit. The MUPA also makes it clear that an association organized under any other statute enacted in Michigan is not a partnership.[4] Accordingly, if the parties have organized an association by filing articles of incorporation under the Michigan Business Corporation Act,[5] or by filing a certificate of limited partnership under the Michigan Revised Uniform Limited Partnership Act,[6] or by filing articles of organization under the Michigan Limited Liability Company Act,[7] the inquiry is directed to those statutes and not to the MUPA.

In *Byker v Mannes*[8] the Michigan Supreme Court stressed that the focus of the MUPA is on the relationship of the parties as evidenced by their actions. The *Byker* court made it clear that the subjective intent of the parties to form a partnership is not required:

"[I]n ascertaining the existence of a partnership, the proper focus is on whether the parties intended to, and in fact did, 'carry on as co-owners a business for profit' and not on whether the parties subjectively intended to form a partnership."[9] In *Byker*, the parties pursued various business enterprises over a number of years. When plaintiff made contributions and loans to the enterprise that were not matched by defendant, plaintiff eventually sued to recover from defendant one-half of the contributions made by plaintiff on the basis that they had entered into a partnership.[10] The supreme court found that even though defendant may have been unaware that he might be a partner, he could still be considered a partner of plaintiff. Therefore, in Michigan, if two or more parties intend to carry on a business for profit, for example, by contributing money to the enterprise and sharing profits and losses from the enterprise, the court will find that there is a partnership even if the parties do not have a written partnership agreement, do not call their relationship a partnership, or have not formulated an intent to form a legal entity called a "partnership."

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The considerations above are not, however, the end of the inquiry into whether two or more persons have created a partnership. The MUPA provides additional guidance for determining the existence of a partnership in section seven, which states:

> In determining whether a partnership exists, these rules shall apply:
>
> (1) Except as provided by section 16, persons who are not partners as to each other are not partners as to third persons;
>
> (2) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not of itself establish a partnership, whether such co-owners do or do not share in profits made by the use of the property;
>
> (3) The sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived;
>
> (4) The receipt by a person of a share of the profits of the business is prima facie evidence that he is a partner in the business, but no such inference shall be drawn if such profits were received in payment:
>
> (a) As a debt by installments or otherwise,
>
> (b) As wages of an employe[e] or rent to a landlord,
>
> (c) As an annuity to a widow or representative of a deceased partner,
>
> (d) As interest on a loan, though the amount of payment vary with the profits of the business,
>
> (e) As the consideration for the sale of the good-will of the business or other property by installments or otherwise.[11]

As can be seen from the language above, with the exception of the reference to section 16[12] of the MUPA, the rules for interpretation are mostly in the negative; that is, the rules describe when a partnership does not exist even though the parties may otherwise be carrying on as co-owners a business for profit.

If a partnership is found to exist under the MUPA, the courts will look to the statute to determine the effect that this finding has. For example, every partner is an agent of the partnership and has the power to bind the partnership,[13] all partners are jointly and severally liable for all debts and liabilities of the partnership,[14] and each partner shall be repaid his or her contributions and must contribute toward the losses sustained by the partnership.[15] Therefore, the finding that two or more people have formed a partnership can have important consequences to the partners and third parties dealing with them.

Common Law

A review of the MUPA is not the end of the inquiry. Michigan courts have also recognized the commercial relationship of "joint venture" or "joint adventure"[16] between two or more parties. The courts have, generally, cited the following as the elements necessary to show the existence of a joint venture:

> (a) an agreement indicating an intention to undertake a joint venture;
>
> (b) a joint undertaking of . . . a single project for profit;

> [(c)] a sharing of profits as well as losses;
>
> [(d)] contribution of skills or property by the parties;
>
> [(e)] community interest and control over the subject matter of the enterprise.[17]

The Michigan courts have distinguished joint ventures from partnerships on the basis that joint ventures relate to a single transaction.[18] The key to a joint venture is an agreement between the parties reflecting their intent to associate themselves as joint venturers. For example, in *Goodwin*, the Michigan Supreme Court stated that the finding of a joint venture is *not* a question of law but instead is a question of fact to be derived from the agreement of the parties.[19] The court stated that the intention of the parties is determined by reference to the "ordinary rules governing the interpretation and construction of contracts."[20]

The import of a finding that a joint venture exists is similar to a finding that a partnership exists. While the courts will first look to the agreement between the parties to determine their relationship to one another and to third parties, the courts have stated that they will also examine the rules governing partnerships to determine the relationship between the parties.[21] Thus, the import of finding that a joint venture exists is similar to the finding that a partnership exists.

Finally, the Michigan courts have referred to another type of enterprise called a "joint enterprise."[22] This term has been used in the context of noncommercial relationships and has been defined as "'an undertaking to carry out a small number of acts or objectives, which is entered into by associates under such circumstances that all have an equal voice in directing the conduct of the enterprise.'"[23] Until the court of appeals decision in *First Public Corp*, the term "joint enterprise" had only been used in two circumstances. The first instance was to describe the relationship between the passenger and driver of an automobile.[24] In these cases, the courts were attempting to determine whether there was common responsibility for the automobile's negligent operation by holding the passenger liable along with the driver.

The second type of case recognizing "joint enterprises" involves the situation where municipalities share services, such as a police force. In *Berger v Mead*[25] plaintiff was a police officer working for the Royal Oak Police Department and the South Oakland Tactical Support Unit (SOTSU). Several cities supplied police officers, including plaintiff, to SOTSU under an agreement that provided, in part, that each municipality would pay its officers' salaries and that each municipality had an equal voice in SOTSU's operation. Plaintiff was shot during a training exercise for SOTSU. Plaintiff sued, among others, individual police officers who worked for other police departments in the area. These defendants responded by claiming that plaintiff's claims were barred as a result of the exclusive remedy of the Worker's Disability Compensation Act.[26] For defendants' defense to succeed, the court had to find that SOTSU was a joint venture or joint enterprise and that plaintiff was employed by the joint venture or enterprise.

The court of appeals reviewed the six elements necessary to find the existence of a joint venture but stated that the two elements relating to a profit motive (i.e., "a single project for profit" and "a sharing of profits as well as losses") were not easily met.[27] The court then analyzed the cases of other jurisdictions and stated that, while some courts found a profit motive necessary, "a number of jurisdictions have labeled noncommercial joint ventures as joint enterprises."[28] The court then concluded that SOTSU was a joint enterprise and that the plainiff was an employee of the joint enterprise, and held that plaintiff's claims were barred by the exclusive remedy provisions of the Workers Disability Compensation Act.[29] Thus, in the *Berger* case, a Michigan court for the first time recognized a joint enterprise organized by entities not engaged in profit making, doing away with the need to prove that the parties were engaged in a project for profit and the sharing of profits as well as losses.

The key to a joint venture is an agreement between the parties reflecting their intent to associate themselves as joint venturers.

Applicability of Joint Enterprise in a Commercial Business Context

Until the Michigan court of appeals decision in *First Public Corp,* the elements used to determine whether a joint enterprise existed had not been used outside of the two types of cases described above, that is, in

automobile negligence cases and those applicable to municipalities involved in sharing resources.[30] In *First Public Corp,* the facts are important to understanding the later Michigan Supreme Court decision, so they will be described here in detail. First Public Corporation (First) claimed that defendant Caledonia, Inc. (Caledonia) breached its fiduciary duty to First.[31] The relationship between these parties involved locating investors with whom they could form an association to try and purchase International Research and Development Corporation (IRDC) or its assets. The trial court concluded that plaintiff asserted sufficient facts to go forward on the issue of whether there was a joint venture between First and Caledonia, but the trial court granted Caledonia's motion for summary disposition on the basis that the joint venture had been terminated by defendants.[32]

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The court of appeals agreed with the trial court's ruling but not with its analysis. The higher court found that there was no evidence of a partnership, and it could not find that a joint venture existed "because there is no evidence that the undertaking to find investors was in and of itself a project for profit."[33] Having found no evidence of a profit motive and thus no evidence of a partnership or joint venture, the court went further and cited the *Berger* case for authority that Michigan common law recognized joint enterprises and that the relationship between plaintiff and Caledonia was a joint enterprise.[34]

Having found that the parties were involved in a joint enterprise, the court of appeals analyzed whether one party terminated the joint enterprise and what effect that termination had on the relationship between the parties. The court found that Caledonia had terminated the joint enterprise and that as of the date of termination neither party had any further obligation to the other.[35] On this basis the court of appeals upheld the lower court's ruling.

Plaintiffs appealed to the Michigan Supreme Court, which upheld the court of appeals' decision but found that the court of appeals had erroneously recognized a new form of business enterprise: the "joint enterprise."[36] The supreme court stressed that the court of appeals should not have relied on *Berger*: "The alleged relationship in the present case was a *commercial* business relationship because it had a profit motive, unlike the arrangement in *Berger*. Accordingly, the citation of *Berger* as authority for recognizing a *commercial* business entity called a 'joint enterprise' is misplaced."[37]

The reasons the court gave for rejecting the use of a "joint enterprise" in a commercial context are compelling. First, the court relied on precedent. The court simply could not find any Michigan cases that recognized a separate commercial business entity called a "joint enterprise."[38] While the court found cases using the term "joint enterprise" in a commercial setting, it determined that when these courts did so they were really referring to either a joint venture or a partnership.[39] Furthermore, the court stated that it could find only one reference to this term in the compiled laws of Michigan—in statutes involving the lottery.[40] In short, the supreme court believed that neither Michigan case law nor statutory law supported the use of joint enterprises in a commercial setting.

Second, the court did not want to recognize a separate business entity where the characteristics of the new entity, as distinguished from partnerships or joint ventures, could not be or were not spelled out.[41] The supreme court was reluctant to open a Pandora's box by allowing the courts to recognize a new type of business enterprise. The supreme court stated that it was reluctant to "make law," which it felt should be left to the legislature.[42]

After disposing of the court of appeals analysis and its erroneous recognition of what the supreme court referred to as a new business relationship, the supreme court upheld the judgment of the court of appeals on the grounds that plaintiff failed to produce "any jury-submissible evidence regarding either a partnership or a joint venture."[43]The supreme court did not address the court of appeals finding that there was no profit motive in the present case and that the lack of a profit motive was the reason, or at least one of the reasons, why the court of appeals found that the parties had not created a joint venture. The supreme court simply ignored this part of the court of appeals opinion. Therefore, the supreme court's decision leaves open the question of whether a joint enterprise may be created in a nonprofit relationship between persons or entities otherwise engaged in profit making. In other words, would a joint enterprise be recognized where two for-profit entities

engaged in a joint nonprofit project? The supreme court's decision simply does not address this question; its decision is limited to rejecting the recognition of "joint enterprises" in a commercial business relationship.

Significance of the Supreme Court's Decision

It may initially seem that the *First Public Corp* decision merely cleared up a semantic ambiguity, that is, that the courts had used the terms "joint venture" and "joint enterprise" interchangeably. However, the significance of this case is more profound. First, *First Public Corp* makes it clear that the Michigan Supreme Court will not allow the expansion of this area of the law. When business people enter into a relationship that one or the other of them claims rises to the level of a partnership or joint venture, they must prove all of the elements set forth in the MUPA or the common law governing joint ventures.

The other significance of this decision is that it may inadvertently limit the ability of people outside of a commercial context to claim that they are engaged in a joint enterprise. The supreme court in *First Public Corp* may have restricted the applicability of joint enterprises in a noncommercial setting by severely limiting the reach of the *Berger* case. This can be seen by the court's interpretation of the *Scarney*[44] case as referring to joint venture or partnership, even though the parties in *Scarney* were a group of doctors organized to provide care to the poor, hardly a profit-making enterprise.[45] The Supreme Court's decision could lead to the conclusion that two for-profit entities engaged in a joint nonprofit project are not engaged in a partnership or joint venture because the critical "profit" element is missing and that they are not engaged in a joint enterprise because *Berger* only applies when the parties are nonprofit entities. Whether this is the result remains to be seen.

Perhaps the most important impact of *First Public Corp* is to highlight the importance of having a detailed written agreement that specifies the relationship between the parties and what law they intend to apply. Are the parties forming a partnership or a joint venture; and if they are forming a joint venture, do they want partnership law to apply to fill in the gaps of the contract? Rather than forming a partnership, the parties to a proposed joint venture should consider organizing the enterprise as a limited liability company. Businesses can organize a limited liability company to operate the joint venture business without being concerned about being liable for the debts of the partnership or joint venture, subjecting the assets of each parties' businesses to the debts of the joint venture. The limited liability company, unlike the partnership or limited partnership, may appoint a manager without exposing the manager to personal liability. Like a partnership and limited partnership, the limited liability company may allocate profits, losses, and distributions in a flexible manner that might appeal to the parties to a joint venture. Finally, the limited liability company can be used by C corporations to organizes less than 80 percent owned subsidiaries, and still obtain pass-through tax treatment.[46] For all of these reasons, a limited liability company is an excellent choice to organize a joint venture.

In the noncommercial context it is even more important to have a detailed written contract because the law is even less certain when the parties are not engaged in a profit-making enterprise. In the noncommercial context it would be inappropriate to use the MUPA to fill in the gaps since the MUPA is oriented toward the commercial profit-making enterprises. As a result, the agreement in the noncommercial context should strive to not leave any gaps. In other words, the nonprofit joint venture agreement should be as complete as possible, and the parties should consider organizing a nonprofit corporation or other nonprofit entity to conduct the joint enterprise to avoid liability and confusion.

The underlying facts of the cases cited in this article reveal the importance of this issue. Workers employed by the joint venture or partnership may attempt to avoid the exclusive remedy provided by the Worker's Disability Compensation Act. One party to the enterprise may attempt to recover losses from the other parties. One party is bound by the acts of the other party to the enterprise and may be personally liable for the injuries caused by or resulting from the actions of one or more of the other parties. These matters are too important to leave to chance or the courts.

[T]he supreme court's decision leaves open the question of whether a joint enterprise can be created in a nonprofit relationship between persons or entities otherwise engaged in profit making.

NOTES

1. 468 Mich 101, 658 NW2d 477 (2003), *vacating in part and aff'g in part* 246 Mich App 182, 631 NW2d 785 (2001).

2. MCL 449.1 et seq.
3. MCL 449.6(1).
4. MCL 449.6(2).
5. MCL 450.1101 et seq.
6. MCL 449.1101 et seq.
7. MCL 450.4101 et seq.
8. 465 Mich 638, 648, 641 NW2d 210 (2002), *on remand*, 668 NW2d 909 (Mich Ct App Feb 25, 2003) (unpublished).
9. 465 Mich at 653.
10. *Id.* at 641.
11. MCL 449.7.
12. MCL 449.16(1). This section is entitled "partnership by estoppel; liability" and provides, in part, "When a person, by words spoken or written or by conduct, represents himself . . . as a partner in an existing partnership or with 1 or more persons not actual partners, he is liable to any such person to whom such representation has been made, who has on the faith of such representation, given credit to the actual or apparent partnership . . . ."
13.MCL 449.9(1).
14.MCL 449.15.
15.MCL 449.18.
16. Only the term "joint venture" will be used in the remainder of this article.
17. *Meyers v Robb*, 82 Mich App 549, 557, 267 NW2d 450 (1978) (citing *Goodwin v SA Healy Co*, 383 Mich 300, 174 NW2d 755 (1970); *Hathaway v Porter Royalty Pool Inc*, 296 Mich 90, 295 NW 571 (1941)).
18. *Goodwin*, 383 Mich at 308 (citing *Fletcher v Fletcher*, 206 Mich 153, 172 NW 436 (1919)).
19. 383 Mich at 309.
20. *Id.* (citing *Gleichman v Famous Players-Laskey Corp*, 241 Mich 266, 217 NW 43 (1928)).
21. *Brewer v Stoddard*, 309 Mich 119, 14 NW2d 804 (1944).
22. *Berger v Mead*, 127 Mich App 209, 338 NW2d 919 (1983).
23. *Id.* at 216 (quoting 48 CJS *Joint Ventures* §3).
24. *Boyd v McKeever*, 384 Mich 501, 185 NW2d 344 (1971).
25. 127 Mich App 209, 338 NW2d 919 (1983).
26. MCL 418.131.
27. *Berger*, 127 Mich App at 216.
28. *Id.*
29. *Id.* at 216–217
30. In an older case, *Scarney v Clarke*, 282 Mich 56, 275 NW 765 (1937), the court used the term "joint enterprise" to apply to an association of physicians who organized themselves to provide medical services to the poor.
31. *First Public Corp*, 246 Mich App at 185. The court of appeals frustratingly does not state exactly how it was that Caledonia breached its fiduciary duty.
32. *Id.* at 185–186
33. *Id.* at 188.
34. *Id.*
35. *Id.* at 191.
36. *First Public Corp*, 486 Mich at 108.
37. *Id.* at 105–106.
38. *Id.* at 106.
39. *Id.*
40. *Id.* at 107.
41. *Id.*
42. *Id.*
43. *Id.* at 108.
44. *Scarney*, supra n28.
45. *First Public Corp*, 468 Mich at 107.
46. If the subsidiary of a parent C corporation is less than 80 percent owned and is organized as a C corporation, the parent corporation may not consolidate the subsidiaries' income on the parent's income tax return, and thus, distributions from the subsidiary to the parent will be subject to a double tax.

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