

THREE TIPS WHEN ENTERING INTO A JOINT VENTURE

By:



Patrick Schach



David Treacy

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For any businessperson, the prospect of new business is always exciting. Sometimes, this enthusiasm results from the opportunity to work alongside another person or company in what's commonly known as a joint venture. Whether it's a manufacturer and a distributor or an event planner and a caterer, it frequently can make the most sense, and the most money, to join forces. But the enthusiasm of entering into a new business arrangement with a partner shouldn't overshadow the importance of getting it right; that is, making sure the venture is memorialized in an enforceable contract. Knowing, at the outset, exactly what each new partner is responsible for and what each brings to the table is not only sound business planning, but failing to adequately document the deal could nullify the whole arrangement. This could lead to lost profits and worse, costly litigation.

This is especially true in Kentucky. In a recent case concerning an insurance company and agent who attempted to enter into a joint venture, *Spears v. Kentucky Insurance Agency*, the Kentucky Court of Appeals found that the parties' agreement establishing the venture was unenforceable because it failed to adequately specify all "material and essential terms" of the agreement. Even though a signed letter agreement contained broadly what each party was responsible for, it left for another day the negotiation of certain provisions. When the insurance company backed out of the venture, litigation ensued to determine whether the failure to finalize the terms in the initial agreement meant that an enforceable deal never had been reached.

More than 13 years—and no doubt substantial expense—later, the court found that the parties' deal in *Spears* was no deal at all. By signing a contract that left certain matters unresolved, such as potential non-competition agreements, arbitration, and exit possibilities, the parties had undermined their entire venture. The court also noted that this is more likely to happen to Kentucky contracts. Other states have more forgiving law that would allow a court to consider a contract enforceable even if it does not contain all "material and essential" terms.

To avoid the parties' fate in the *Spears* case, we recommend that Kentucky businesses entering into joint ventures remember these three tips:



1) Take a page from grammar school- The requirement that a contract contain all material and essential terms to be enforceable is really a requirement that a contract answer five questions we all learned long ago: Who? What? When? Where? and How? A contract to enter into a joint venture should explain *who*, exactly, is involved and in what capacity, *what* the venture will include and what obligations are the parties agreeing to, *when* and for what duration the venture will last (and how it can be ended), *where* the venture will operate so that its footprint is understood, and, at least to a certain extent, *how* the parties will contribute resources to achieve the venture's goals. It may seem elementary, but reviewing a proposed agreement and seeing if it adequately answers these five questions can go a long way to ensure an agreement is enforceable.

2) Don't "agree to agree" in the contract- Parties can get into trouble by drafting a contract with many terms agreed to, but some left open for later negotiation or tweaking. This practice of "agreeing to agree" could be fatal. Kentucky law requires that a contract contain *all* "material and essential terms" to be enforceable. While the business realities of a situation may require that some terms be left open, each time a contract states that the parties will agree to this or that at some later time, it increases the likelihood that a court will find the missing terms to have been material and essential, and could thereby nullify the deal in its entirety. Thus, "agreeing to agree" only should be done when absolutely necessary – and the parties should move with haste to button-up those missing terms.

3) Get an attorney involved early on - While a good start, ensuring that a contract answers each of the five questions above, and refraining from "agreeing to agree," is not always enough. Kentucky law requires that each material and essential term be spelled out with a certain amount of specificity. Attorneys can negotiate and draft your contract to ensure that it adequately addresses all necessary terms with the required amount of detail and plans for the contingencies that may arrive on the front end of the parties' relationship. Having an attorney assist you early on may save you from having attorneys assist you down the road in a lawsuit with someone you thought was your partner.

Kentucky's law with respect to contract formation is much more rigid than that in other states. This can lead to greater uncertainty for those companies and businesspeople seeking to enter into joint ventures. Following the three suggestions above should result in an enforceable agreement, so your venture will be free to succeed without having to worry about whether you had a deal in the first place.