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## Team Ventures: Air Technology Corp. v. General Electric Co.

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protected because they are "in essence public." In support of this argument, it can be said that the public interest in the suppression of crime demands such a limitation upon the right to privacy. But as has been observed, there are reasonable alternatives which accomplish the same result without the dangers inherent in giving the police license to search semi-public areas at will. In our society, the fourth amendment represents a monument to the belief that individual privacy is a paramount right. The *Smayda* decision seems to lose sight of the fact that this amendment was intended to prevent abuse of the innocent in the process of bringing law violators to justice. The words of Justice Douglas are apt:

This guarantee of protection against unreasonable searches and seizures extends to the innocent and guilty alike. It marks the right of privacy as one of the unique values of our civilization and, with few exceptions, stays the hands of the police unless they have a search warrant issued by a magistrate on probable cause supported by oath or affirmation.<sup>61</sup>

The *Smayda* decision is irreconcilable with these principles, and it is therefore submitted that the case is unsound.

Anthony D. Osmundson\*

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<sup>61</sup> McDonald v. United States, 335 U.S. 451, 453 (1948).

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### "TEAM VENTURES": *Air Technology Corp. v. General Electric Co.*

The "weapon system contracting" concept, evolved by the Air Force following World War II

is the governmental practice . . . of treating an entire weapon system, including all subcontracts and accessory equipment, as a single unit, and giving a single prime contractor or *team* the responsibility for the entire unit. In some instances this may be modified by dividing the job into several segments and designating one prime contractor or *team* to be responsible for each segment.<sup>1</sup>

#### *The Problem*

The term "team," frequently encountered in the cant of the defense industries, did not appear, in its defense-industry usage, in any reported case until 1964. In *Air Technology Corp. v. General Electric Co.*,<sup>2</sup> the Supreme Judicial Court of Massachusetts was called upon to adjudicate a dispute among team members.

The Air Force, some time after 1957, undertook the 477 L project to establish radiation monitoring stations to track the direction and yield of nuclear detonations by methods including the use of electromagnetic (EM) sensors. Air Technology (AT) had considerable experience in the detection of EM radiation,

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<sup>1</sup> Bergstrom, *Antitrust Immunity or Exemption for Activities Involving Government Contracts—"Weapons Systems" and "Team Bidding,"* 59 Nw. U.L. Rev. 433, 434 (1964). (Emphasis added.)

<sup>2</sup> 347 Mass. 613, 199 N.E.2d 538 (1964).

and in April, 1961, AT discussed the 477 L project with the Air Force, learning of eight companies, including General Electric (GE), which had done some preliminary work. AT communicated with all but one of these companies and expressed willingness to contribute toward any proposal which that company might submit to the Air Force.

In June, 1961, as a result of preliminary negotiations, GE and AT agreed to submit a team proposal, and in October, responding to an Air Force request for quotation on the 477 L system, GE submitted a proposal bearing on its covers the names of GE, AT, and three other firms, containing data furnished in part by AT. Early in November, GE was selected as prime contractor by the Air Force—not on the basis of its proposal, but rather on a statement of its expected performance. A contract was negotiated to become effective in February, 1962. GE subsequently refused to negotiate a subcontract with AT as a team member and built the EM sensor portion of the program itself, using in part the data contributed by AT. AT brought an action in equity (1) to restrain the defendant (GE) from using information supplied to it by AT, (2) to obtain a declaration that GE had committed breaches of a fiduciary relation to AT, and (3) for damages. The action was referred to a master, who found, among other things, that AT and GE had agreed that AT would be a team member participating in GE's proposal; that the use of the term "team" was more than a sales pitch; and that AT was entitled to recover damages for GE's breach of the agreement to negotiate with AT for a subcontract. Both parties appealed from the decree awarding AT damages for breach of contract but refusing to enjoin the use by GE of the data furnished by AT for the proposal.

The Supreme Court of Massachusetts held that the facts of *Air Technology*, although insufficient to establish the creation of a joint venture due to the lack of certain essential elements, were sufficient to create a "more limited joint undertaking by GE and AT, as team members"<sup>3</sup> While the court failed to discuss in depth the relationship between team members, it based its finding of liability upon GE's failure to perform its contractual responsibility as a team member. AT's prayer for injunctive relief was denied because the project was important to the national defense, and the court felt that with respect to this less formal joint undertaking, substantial redress could be afforded by the payment of money

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<sup>3</sup> The court noted that "The use of the term 'team member' leads us to infer that the parties intended a *contractual association* in some form of joint undertaking. The master regarded this essentially as a joint venture. The subsidiary facts do not indicate that GE and AT intended that the prime contract was to be a joint venture within that indefinite term's ordinary usage. *AT was to be only a subcontractor. There was to be no such sharing in the profits of the prime contract, no such joint interest in particular assets, and no such joint control of performance* as would ordinarily exist in a joint venture in the usual sense. There was, however, *a more limited joint undertaking by GE and AT, as team members*, to obtain the prime contract for GE, with the expectation that AT would obtain benefits as a subcontractor. In this undertaking certain aspects of the usual joint venture did not appear. Nevertheless, both AT and GE made substantial contributions to the team effort in time and expenditure and risked the value to their preliminary work. Even if the arrangement did not constitute a typical joint venture GE [as controlling captain of the team] may be held to its contractual responsibility to AT as a team member." *Id.* at 624-25, 199 N.E.2d at 546-47. (Emphasis added.)

damages without injunctive relief. For purposes of convenience, the "more limited joint undertaking" as "team members" will be referred to hereafter as a "team venture," although that term is used nowhere in the opinion of the court.

This note will be limited to two important questions raised by the case: first, is the "team venture" analogous to a joint venture;<sup>4</sup> second, should the rights and liabilities of the parties be governed by the substantive law of joint ventures?

### *Is the "Team Venture" Analogous to a Joint Venture?*

A team venture, as found by the court, is something less than a joint venture.<sup>5</sup> Therefore, in order to define a team venture we must first define a joint venture.

It has been noted that the legal relationship known as a joint venture is a comparatively recent creature of the American courts and is still in the process of development, having no certain, satisfactory, all-inclusive definition or fixed boundaries.<sup>6</sup> Each case must be considered on its own facts, giving consideration to the usages and practices characteristic of the particular commercial undertaking sought to be labeled a joint venture.<sup>7</sup> The joint venture is contractual in nature, and an agreement, either express or implied, is essential to its creation.<sup>8</sup> Under this agreement, the parties must intend to create a joint venture;<sup>9</sup> however, little formality is required,<sup>10</sup> and the conduct of the parties,<sup>11</sup> as well as other facts and circumstances, will often justify the inference of such intention.<sup>12</sup> The court in *Air Technology* stressed the contractual nature of a team venture and indicated that a "contractual association" could be implied from the parties' conduct.<sup>13</sup>

<sup>4</sup> The court felt that it did not have to reach this question as it based liability on breach of contract. *Id.* at 625 n.16, 199 N.E.2d at 547 n.16.

<sup>5</sup> The court failed to find a joint venture because certain essential elements were lacking. It found instead a more limited joint undertaking (a team venture). Therefore, a team venture may be defined as a joint venture "less" certain essential elements. See note 3 *supra*.

<sup>6</sup> *Davis v. Webster*, 198 N.E.2d 883 (Ind. 1964). See generally Adkins, Gilpatric, & Abraham, *Corporate Joint Ventures in Operation*, 14 BUS. LAW. 285 (1959); Berle, *Developments in the Pattern of Corporate Joint Enterprise*, 14 BUS. LAW. 309 (1959); Jaeger, *Joint Ventures: Origin, Nature and Development*, 9 AM. U.L. REV. 1 (1960); Jaeger, *Joint Ventures: Membership, Types and Termination*, 9 AM. U.L. REV. 111 (1960); Mechem, *The Law of Joint Adventures*, 15 MINN. L. REV. 644 (1931); Mullen, *Joint Adventures*, 8 MD. L. REV. 22 (1943); Nichols, *Joint Ventures*, 36 VA. L. REV. 425 (1950); Taubman, *What Constitutes a Joint Venture*, 41 CORNELL L.Q. 640 (1956).

<sup>7</sup> *Accord*, *Frazell v. United States*, 213 F. Supp. 457 (W.D. La. 1963), *rev'd on other grounds*, 335 F.2d 487, *cert. denied*, 380 U.S. 961 (1964).

<sup>8</sup> *Accord*, *Richardson v. Walsh Constr. Co.*, 334 F.2d 334 (3d Cir. 1964); *Ellison v. Riddle*, 166 So. 2d 840 (Fla. 1964); *Southwest Drayage Co. v. Crawford Moving Vans, Inc.*, 377 S.W.2d 293 (Mo. 1964).

<sup>9</sup> *Accord*, *Stricklin v. Parsons Stockyard Co.*, 192 Kan. 360, 388 P.2d 824 (1964); *Southwest Drayage Co. v. Crawford Moving Vans, Inc.*, *supra* note 8.

<sup>10</sup> *Weinstock v. L. A. Carpet, Inc.*, 234 Cal. App. 2d 809, 44 Cal. Rptr. 852 (1965).

<sup>11</sup> *Ellison v. Riddle*, 166 So. 2d 840 (Fla. 1964).

<sup>12</sup> *Polikoff v. Levy*, 55 Ill. App. 2d 229, 204 N.E.2d 807 (1965).

<sup>13</sup> As seen note 3 *supra*, the court found a "contractual association" between the team members, and also noted that "What the parties intended is indicated by GE's subsequent conduct," *e.g.*, (1) listing AT in the letter of interest as a subcontractor,

In addition to the requirement of a contractual basis, certain additional requirements have traditionally been discussed by the courts in ascertaining whether or not the joint venture relationship exists in a particular case. These include: (1) the mutual sharing of profits and losses resulting from the venture; (2) a joint proprietary interest in the subject matter of the venture; and (3) the mutual right of control or management of the venture.<sup>14</sup>

The court in *Air Technology* found these traditional requirements lacking. But liability was imposed upon GE on the basis of a more limited joint undertaking, which this note has called a team venture. Thus it would seem that, relying on *Air Technology*, a court could find a team venture present even though the particular contractual association under consideration bore little resemblance to a joint venture. It is submitted that this is incorrect. This note will show that a team venture is practically analogous to a joint venture, so much so that the same substantive law should be applied to both types of contractual associations. Each of these traditional requirements will be considered separately to determine whether or not there is a valid basis in established precedent upon which the court in *Air Technology* could have concluded that the requirement was fulfilled under the facts of that case. If there is such a basis, it follows that a joint venture and a team venture should not be distinguished in regard to that requirement.

### *Contractual Relationship*

It has been seen that a joint venture is contractual in nature, requiring an intention of the parties to create a joint venture. It has also been seen that the court in *Air Technology* inferred a contractual association between AT and GE from their conduct. The court, in reaching the conclusion that there was no joint venture between AT and GE, stressed the fact that AT was to receive a subcontract from GE. It is submitted that a joint venture is not precluded by the fact that there is a subcontracting agreement between the joint venturers. One writer has pointed out the fact that "on various types of construction jobs, prime contractors and subcontractors are not infrequently associated on a joint venture basis. That is, one contractor will obtain a contract for the entire operation and then farm out various parts on a profit and loss arrangement."<sup>15</sup>

In *Rosen v. E. C. Losch, Inc.*,<sup>16</sup> the court stated that the mere fact that an agreement was captioned "subcontracting agreement" did not of itself show that

"team member," and the only potential source of the EM sensor; (2) designating AT's personnel as "the only individuals having program responsibility in the EM sensor field" (3) Hynes's [a GE employee] statements that showing AT as a second tier subcontractor was a "mistake," and that it was GE's "intention that AT would receive a sole source procurement for the EM sensor", (4) treating Dr. Clapp, Dr. Hillger [AT employees], and AT's DASA contract as team assets in the proposal presentation; (5) GE's early treatment of AT's material as entitled to protection [from another company]; (6) GE's assistance in and use of Dr. Clapp's research in the summer of 1961, and (7) the absence of any suggestion to AT prior to December, 1961, that other companies and (above all) GE, were to compete with AT [in AT's portion of the system]. 347 Mass. at 624 n.12, 199 N.E.2d at 546 n.12.

<sup>14</sup> See Jaeger, *Joint Ventures: Origin, Nature and Development*, 9 AM. U.L. REV. 1 (1960), citing 2 WILLISTON, CONTRACTS § 318A (3d ed. 1959) and cases cited therein.

<sup>15</sup> Jaeger, *Joint Ventures: Membership, Types and Termination*, 9 AM. U.L. REV. 111, 124 (1960).

<sup>16</sup> 234 Cal. App. 2d 324, 44 Cal. Rptr. 377 (1965).

a joint venture was not contemplated by the parties thereto. The court reasoned: "[I]t is the duty of the court to give effect to the intention of the parties where it is not wholly at variance with the correct legal interpretation of the terms of the contract, and a practical construction placed by the parties upon the instrument is the best evidence of their intention."<sup>17</sup> The court concluded that there was a joint venture between the parties despite the fact that their agreement was in the form of a subcontract.

The Supreme Court of Appeals of West Virginia, in *Ohio Builders' Supply Co. v. Wetzel Constr. Co.*,<sup>18</sup> wherein one company agreed to aid another company in obtaining a road construction contract from the State of West Virginia in return for a subcontract for a portion of the work, noted that: "The supply company comes into litigation, not as a subcontractor of the construction company, but more strictly as a coadventurer with it in the undertaking."

It would seem at this point that the primary difference between the usual prime contractor-subcontractor relationship and a joint venture or team venture is the fact that in the former relationship there is no intent of the parties to combine and act jointly, either as joint venturers (which is essential to a joint venture) or as a team (which is an essential element of a team venture). However, if this intent to combine and act jointly is present, either a joint venture or a team venture may be present under the subcontracting agreement. Thus, the fact that there was to be only a subcontracting agreement between AT and GE should not be considered a valid factor in distinguishing this contractual association from a joint venture. The two relationships are analogous to the extent that either may exist where there is a subcontracting agreement between the parties to the undertaking.

#### *Profit Sharing*

Although the parties to a joint venture need not share equally,<sup>19</sup> or in the same manner,<sup>20</sup> it is generally stated that a mutual sharing in the profits of the joint venture is essential to its existence.<sup>21</sup> Some jurisdictions have indicated that profit sharing is not a controlling factor, even though it is included in the agreement, but is merely to be considered among all of the other facts and circumstances.<sup>22</sup> There is also dictum that the purpose of making a direct profit is not an essential element of the joint venture.<sup>23</sup> Many jurisdictions also require a sharing of losses, although this was not mentioned by the court in *Air Technology*.<sup>24</sup>

<sup>17</sup> *Id.* at 331, 44 Cal. Rptr. at 381.

<sup>18</sup> 108 W. Va. 354, 151 S.E. 1 (1929).

<sup>19</sup> *Accord*, *Davis v. Webster*, 198 N.E. 2d 883 (Ind. 1964).

<sup>20</sup> *Accord*, *Davidson v. Shaffer*, 153 Kan. 661, 113 P.2d 90 (1941).

<sup>21</sup> *Accord*, *Fishback v. United States*, 215 F. Supp. 621 (D.S.D. 1963); *Polikoff v. Levy*, 55 Ill. App. 2d 229, 204 N.E.2d 807 (1965); *Bender v. Bender*, 144 Mont. 470, 397 P.2d 957 (1965).

<sup>22</sup> *First Mechanics Bank v. Commissioner*, 91 F.2d 275 (3d Cir. 1937); *U.S. Fidelity & Guarantee Co. ex rel. Reedy v. American Surety Co.*, 25 F. Supp. 280 (M.D. Penn. 1938).

<sup>23</sup> *Chisholm v. Gilmore*, 81 F.2d 120 (4th Cir. 1936).

<sup>24</sup> See *Holt v. Queen City Loan & Investment, Inc.*, 377 S.W.2d 393 (Mo. 1965); *C. C. Roddy, Inc. v. Carlisle*, 391 S.W.2d 765 (Tex. 1965); *Robinson Transp. Co., Inc. v. Hawkeye—Security Ins. Co.*, 385 P.2d 203 (Wyo. 1963). *Contra*, *First Mechanics*

However, the court did stress, in concluding that there was no joint venture between AT and GE, that AT was not to share in the profits of the prime contract.

It has been urged that

AT's expected profit under the subcontract could be construed as a sufficient share in the profits of the prime contract to warrant finding the relationship of joint adventurers. The mode of participation "in the fruits of the undertaking may be left to the agreement of the parties" and they could arguably have chosen the subcontract device as their method of sharing the profits.<sup>25</sup>

The traditional view, however, is that in a joint venture the profit must be joint. There is no joint venture where the parties earn a several profit.<sup>26</sup> It would thus seem that the element of profit sharing is a valid distinguishing factor between a joint venture and a team venture.

Therefore, the mutual undertaking of the parties may be classified as a joint venture if there is a joint sharing of the profits of the prime contract, while the undertaking should be classified as a team venture if each member of the undertaking earns a several profit. In order to share jointly in the profits of the prime contract, the parties must share directly in the profits of the prime contract per se. This may arise in two situations: (1) where all of the members of the undertaking are in privity of contract with the Government, *i.e.*, where the contract is let to the members jointly, and (2) where there is no privity of contract between the Government and all of the members of the undertaking, as in the case of subcontractors, but all of the members are to receive a percentage of the profits of the prime contract. In this latter situation, the subcontracting members of the undertaking designate one member to act as prime contractor and to contract with the government for the benefit of all of the members. The prime contractor takes the contract as a constructive trustee for the other members, as in the situation where one member of a joint venture, taking legal title to real or personal property for the benefit of the joint venture, is held to be a constructive trustee of the property so held.<sup>27</sup> If the parties to the undertaking do not share jointly in the profits of the prime contract per se, either directly or on a percentage basis, the profit earned by each member is indirect and several; hence there is a team venture. Indirect sharing in the profits of the prime contract will usually exist under a subcontract, and it may be concluded, therefore, that in the normal defense-industry situation, a team venture, not a joint venture, will be found where there is a contractor-subcontractor relationship.<sup>28</sup>

*Bank v. Commissioner*, 91 F.2d 275 (3d Cir. 1937); *Fishback v. United States*, 215 F. Supp. 621 (D.S.D. 1963); *Sterns v. Williams*, 72 Idaho 276, 240 P.2d 833 (1952); *Tate v. Ballard*, 243 Minn. 353, 68 N.W.2d 261 (1954); *Las Vegas Mach. & Eng'r Works v. Roemisch*, 67 Nev. 1, 213 P.2d 319 (1950).

<sup>25</sup> Note, 6 BOSTON COLLEGE INDUSTRIAL & COMMERCIAL L. REV. 331, 334 (1965).

<sup>26</sup> *Accord*, *Swann v. Ashton*, 330 F.2d 995 (10th Cir. 1964); *United States v. Standard Oil Co.*, 155 F. Supp. 121 (S.D.N.Y. 1957).

<sup>27</sup> See *Boxill v. Boxill*, 201 Misc. 386, 111 N.Y.S.2d 33 (Sup. Ct. 1952).

<sup>28</sup> As has been seen, an indirect profit sharing precludes finding a joint venture. Such indirect profit sharing will usually exist under a subcontracting agreement. If there were no subcontracting agreement, and the parties were co-prime contractors, there would be privity of contract between the parties and the Government, and the profit would be direct. The interposition of the prime contractor between the subcontractor and the government prevents this direct profit sharing from resulting; hence a "team venture" is established.

*Joint Proprietary Interest*

Generally, in a joint venture there must be a joint proprietary interest in the subject matter of the venture or property engaged therein.<sup>29</sup> The test for determining whether or not a joint proprietary interest exists sets forth two requirements.<sup>30</sup> First, the parties must have joined their property, interests, skills, and risks in such a manner that for the purpose of the venture their respective contributions have become as one. To satisfy this requirement, however, "joint adventurers do not have to be co-owners of the property used in the business of the joint adventure; the property may be owned by only one of the joint adventurers and its use only devoted to the purpose of the joint adventure."<sup>31</sup> Second, the commingled property and interests must be made subject to use by each of the associates for their joint benefit. While the *Air Technology* court based its finding of no joint venture between AT and GE partly on the fact that there was no joint interest in particular assets, the court found that: (1) GE treated Dr. Clapp, Dr. Hillger (AT employees) and AT's DASA contract as team assets in the proposal presentation to the Air Force; (2) at an earlier date GE had treated AT's data as entitled to protection due to its proprietary nature; (3) GE had assisted in and used Dr. Clapp's research in the summer of 1961, (4) both AT and GE made substantial contributions to the team effort in time and expenditures and risked the value of their preliminary work.<sup>32</sup>

The court could have concluded that this conduct constituted a sufficient joinder of skills, interests, and risks so that for the purpose of the particular venture AT's and GE's respective contributions became as one, thus fulfilling the first requirement of the test. Both AT and GE had access to the data of the other contained in the team proposal, so long as it was used for the purpose of the venture,<sup>33</sup> thereby fulfilling the second requirement.

Since both requirements of the test have been fulfilled, it is submitted that there were sufficient facts present to justify the court in finding a joint proprietary interest in a particular asset, the team proposal. Under this analysis, there would always be a joint proprietary interest in a team venture because the parties always combine together and pool their individual assets, usually knowledge or skill, in furtherance of the team objective. A joint proprietary interest, an essential element, must always be present in a joint venture. Therefore, it follows that the element of a joint proprietary interest should not be considered a distinguishing factor.

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<sup>29</sup> *Accord*, *Swann v. Ashton*, 330 F.2d 995 (10th Cir. 1964); *Richardson v. Walsh Constr. Co.*, 334 F.2d 334 (3d Cir. 1964); *Bender v. Bender*, 144 Mont. 470, 397 P.2d 957 (1965).

<sup>30</sup> *Sadwith v. Lantry*, 219 F Supp. 171 (S.D.N.Y. 1963).

<sup>31</sup> *Hayes v. Muller*, 245 La. 356, 158 So. 2d 191 (1963). *Accord*, *In the matter of Cadillac Oil Co.*, 227 F Supp. 397 (S.D. Cal. 1964); *Strucklin v. Parsons Stockyard Co.*, 192 Kan. 360, 388 P.2d 824 (1964).

<sup>32</sup> 347 Mass. at 624 n.12, 625, 199 N.E.2d at 546 n.12, 547.

<sup>33</sup> In fact, GE used the data of AT in developing its own prototype system. This was one of the factors considered by the court in holding GE liable for breach of contract, since the use of the data was outside the purpose of the venture. 347 Mass. at 625, 199 N.E.2d at 546.

*Joint Control*

Generally, in a joint venture, the parties thereto must have a mutual right of control of the venture.<sup>34</sup> The court in *Air Technology* found no mutual right of control between AT and GE. There is, however, authority for the proposition that joint control, while a circumstance to be considered along with all of the other surrounding facts and circumstances, is not an essential element of a joint venture.<sup>35</sup> It has also been suggested that consultation with the other members of the joint venture is sufficient to establish the relationship,<sup>36</sup> and it has been clearly established that even though a joint venturer may entrust actual control of the project to his co-venturer, the project will still remain a joint venture.<sup>37</sup>

The court in *Eagle Star Ins. Co. v. Bean*,<sup>38</sup> finding an implied entrusting of control, noted:

In the instant case, the contract between O'Leary and the company did not indicate that O'Leary had no right of control or no voice in the operations of the enterprise. It did provide that actual control of the dismantling operations would be in the company. We think this is merely the case where one of the parties entrusted actual control to another, and that fact does not negative the holding that there was a joint venture.<sup>39</sup>

Therefore, those jurisdictions which require joint control of the undertaking may establish that element by applying the entrusting theory.

The language of *Eagle Star* applies equally well to *Air Technology*. In their agreement, the parties did not indicate that AT was to have no control or voice in the operation of the venture; however, they did agree that GE was to be the team captain with prime contract responsibilities (in other words, to have actual control of the performance of the prime contract). Thus, there was an implied entrusting by AT to GE of actual control of the team venture. Therefore, since joint control must be present to find a joint venture, and can always be found to be present in a team venture by application of the implied entrusting analysis, the element of joint control of performance is not a distinguishing factor.

It must be concluded that the joint venture and the team venture are, to a certain extent, analogous. Summarized briefly, it may be said that:

(1) Both the joint venture and the team venture are contractual in nature, requiring an intent to act jointly.

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<sup>34</sup> *Sadwith v. Lantry*, 219 F. Supp. 171 (S.D.N.Y. 1963); *Polikoff v. Levy*, 55 Ill. App. 2d 229, 204 N.E.2d 807 (1965); *Holt v. Queen City Loan & Investment, Inc.*, 377 S.W.2d 393 (Mo. 1965); *C. C. Roddy, Inc. v. Carlisle*, 391 S.W.2d 765 (Tex. 1965).

<sup>35</sup> See *Seymour v. Wildgen*, 137 F.2d 160 (10th Cir. 1943); *Davidson v. Shaffer*, 153 Kan. 661, 113 P.2d 90 (1941).

<sup>36</sup> *Klenschmidt v. United States*, 146 F. Supp. 253 (D. Mass. 1956).

<sup>37</sup> *Accord*, *Rosen v. E. C. Losch, Inc.*, 234 Cal. App. 2d 324, 44 Cal. Rptr. 377 (1965); *Wittner v. Metzger*, 72 N.J. Super. 438, 178 A.2d 671 (1962). 30 AM. JUR. *Joint Ventures* § 40 (1940) notes that: "The requisite of equality in joint control does not render impossible the delegation of the duties of management to one of the participants in a joint adventure. The rights of the parties with respect to the management of the enterprise may be fixed by agreement and, once having been fixed, may be changed by agreement, without doing violence to the requirement of joint control."

<sup>38</sup> 134 F.2d 755 (9th Cir. 1943).

<sup>39</sup> *Id.* at 758.

(2) Either a joint venture or a "team venture" may exist under a subcontract.

(3) The key distinction between a joint venture and a team venture is the profit-sharing element. In the team venture profit sharing is indirect, with each team member earning a several profit, while in the joint venture the profit sharing is direct, with each joint venturer sharing jointly.

(4) A joint proprietary interest and joint control of performance are not distinguishing factors. As essential elements, they must always be present in a joint venture, and factually, they will always be present in a team venture, although theoretically, not essential, according to *Air Technology*.

Having distinguished the joint venture from its shadow relation the "team venture," and found that they are to a large extent analogous, we turn to the second important question raised by the holding of the court in *Air Technology*.

*Should the Rights and Liabilities of the Team Members Be Governed by the Substantive Law of Joint Ventures?*

What are the purposes underlying the development and use of the joint venture as a mode of conducting business? If the purposes for the development and use of the team venture are identical, does it not follow that the same body of substantive law should apply to both? The proposition that where two relationships are similar in characteristics and purpose they should be governed by the same general substantive law is not without precedent. An analogous situation existed in the development of the substantive law of joint ventures. Historically, joint ventures developed as a limited type of partnership.<sup>40</sup> A traditional partnership contemplated a continuing business association,<sup>41</sup> while a joint venture has been defined as a partnership for a limited purpose.<sup>42</sup> When the particular purpose, such as the construction of a particular road or building, is accomplished the joint venture is ended. It is quite understandable that the substantive law of both relationships is quite similar,<sup>43</sup> since the relationships are so similar in nature. One court, in applying this reasoning, has noted:

It seems to me that under the New Jersey law, the juridical concept, commonly called a joint venture, is graduated like a spectrum from a partnership ad hoc through various forms of fiduciary business relationships into an agency with contingent remuneration to the agent, as was the case here. Indeed, it matters little what the precise definition of a joint venture may be for the fiduciary relationship always arises from it, as it does from an agency, and the remedial sequelae are of the same kind.<sup>44</sup>

One writer, in discussing the purposes of the joint venture, notes that one of the basic underlying purposes in the development and recognition of the joint

<sup>40</sup> *Accord*, *Edlebeck v. Hooten*, 20 Wis. 2d 83, 121 N.W.2d 240 (1963).

<sup>41</sup> *Accord*, *Fishback v. United States*, 215 F Supp. 621 (D.S.D. 1963).

<sup>42</sup> *Accord*, *Sadwith v. Lantry*, 219 F Supp. 171 (S.D.N.Y. 1963); *Anderson v. Steurer*, 391 S.W.2d 839 (Mo. 1965).

<sup>43</sup> *Accord*, *Orlopp v. Willardson Co.*, 232 Cal. App. 2d 750, 43 Cal. Rptr. 125 (1965); *Polikoff v. Levy*, 55 Ill. App. 2d 229, 204 N.E.2d 807 (1965); *Stricklin v. Parsons Stockyard Co.*, 192 Kan. 360, 388 P.2d 824 (1964). See also Comment, 18 *FORDHAM L. REV.* 114 (1949).

<sup>44</sup> *Cray, McFawn & Co. v. Hegarty, Conroy & Co.*, 27 F Supp. 93, 99 (S.D.N.Y. 1939).

venture was the need to take advantage of the knowledge and specialized skills of the members of the venture.<sup>45</sup> This also is the primary purpose of the "team venture." For example, suppose that the X Company and the Y Company decide to work together for the purpose of producing a new aircraft for the government. The design of the aircraft calls for an entirely new concept in fabrication of the airframe and an entirely new concept in the propulsion system. Since the X Company has prior experience in the field of propulsion, it is to have responsibility for that phase of the aircraft, while the Y Company, having prior experience in the airframe field, is to have responsibility for that phase. For either the X Company or the Y Company to have built both the propulsion system and the airframe would not have been feasible, since neither had experience in the field of the other. By working together, they can produce an excellent end product, at the lowest possible cost to the Government. How should this "working together" for the limited purpose of producing the aircraft be classified? One writer<sup>46</sup> has suggested that there are three alternative methods of contracting with the Government:

(1) The "Pure Weapon System" procurement method, by which centralized control of the design, development, and production is obtained by making the prime contractor the responsible focal point for consolidation of all efforts. For example: "Convair was given a contract for development of the B-58 supersonic bomber, with power to subcontract, but with the Air Force exercising authority over the choice of subcontractors in the light of their ability and background."<sup>47</sup>

(2) The "Associate Primes" procurement method, where instead of a single prime contractor, there are selected a number of major associate primes, each of whom is responsible for a complete subsystem. For example:

In the case of the Atlas missile, Convair manufactured the airframe and was also responsible for testing and integration of the entire system. Rocketdyne of North American Aviation produced the engines. General Electric's Defense System Department manufactured the radio-inertial guidance system, and American Bosch Arma was responsible for later all-inertial guidance. General Electric's Missile and Space Vehicle Department had charge of the re-entry vehicle.<sup>48</sup>

(3) The "Team" method of procurement, wherein a major prime contractor will team up with a number of subcontractors and submit a team bid on the entire system. For example: "In the case of the Dyna-Soar system, major contractors (Boeing and Martin) teamed up with a number of subcontractors and

<sup>45</sup> "In spite of the tremendous growth of corporations in the United States, the joint venture has, in recent years, been utilized for purposes very similar to those which brought about its development historically. Individuals, co-partnerships and even corporations have joined or attempted to join in what they have called joint ventures for purposes of pooling capital and carrying out large industrial and financial projects

In other instances the resources of an individual contractor may be adequate for him to perform and finance the contract, but the job may be one involving types of construction, with some of which the individual contractor may not have had experience. Where such a condition exists other contractors who have had the necessary experience may be brought in and the job undertaken as a joint venture." Nichols, *Joint Ventures*, 36 VA. L. REV. 425, 428-29 (1950).

<sup>46</sup> Bergstrom, *supra* note 1, at 436-37.

<sup>47</sup> *Id.* at 436.

<sup>48</sup> *Id.* at 429.

submitted bids on the entire weapon system. In that case, final contract award was made to both teams, with one team being awarded the contract for the airframe and the other the contract for the booster."<sup>49</sup> (Perhaps this variation forms a fourth category which could be designated the "Associate Team Method.")

Under this classification of government procurement methods, the "Pure Weapon System" method is not a joint undertaking at all since there is no intention of the parties to combine in any other manner than contractor and subcontractor. It has been seen that in order to have either a joint venture of a team venture there must be an intent to combine either as joint venturers or as team members.

The "Associate Primes" method should be characterized as a joint venture because there is a direct sharing of the profits of the prime contract per se. The contract is let to them jointly, and each Associate is in privity of contract with the Government; hence a joint profit is earned. As has been seen, the element of profit sharing is the key distinguishing factor between a joint venture and a "team venture."

The "team" method offers two alternatives, depending upon the agreement of the parties in setting up the "team." If the parties agree that each member is to share in a percentage of the profits of the prime contract per se, but under the subcontract, not all members are in privity of contract with the Government, there would be direct profit sharing, the profits would be joint, and the relationship should be classified as a joint venture, assuming that all of the other requisite elements are present. If, on the other hand, there is no sharing in the profits of the prime contract per se on a percentage basis, each team member would earn a several profit, and a team venture would be established.

Whether the X Company-Y Company combination referred to earlier is a joint venture or a "team venture" depends upon two factors. First, was there a subcontracting agreement between the parties? If not, the combination should be characterized as an "Associate Primes" agreement, and as seen above, should be classified as a joint venture. If there was a subcontracting agreement between the parties, the combination could be either a joint venture or team venture, depending upon whether there was a joint profit or a several profit earned by the Companies. If a joint profit was earned, the relationship should be classified as a joint venture. If a several profit was earned, the relationship should be classified as a team venture.

The most important result of extending the substantive law of joint ventures to team ventures would be that the requirement that the members act in the utmost good faith in their relations with each other would be applicable. The traditional joint undertaking is fiduciary in nature and imposes upon all the participants the obligation of loyalty to the joint concern and the utmost good faith in their dealings with each other with respect to matters pertaining to the enterprise.<sup>50</sup> As a result of this requirement of good faith, equitable relief is always available between the parties to a joint venture<sup>51</sup> and should be available to team members. This equitable relief generally takes two forms: injunctive relief to

<sup>49</sup> *Id.* at 437.

<sup>50</sup> *Memhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545 (1928).

<sup>51</sup> *Chapman v. Dwyer*, 40 F.2d 468 (2d Cir. 1930).

prevent breaches of this fiduciary relationship, and an accounting of profits<sup>52</sup> earned by the joint undertaking. In *Air Technology*, injunctive relief was denied because, the court reasoned, the interests of national defense required the utilization of AT's data. It is submitted that this result was reached entirely independent of any considerations of the nature of the undertaking. It is based entirely upon the fact that AT, through its dealings with GE and other companies, had lost its right to have the data protected since it had failed to protect the proprietary nature of the data by affixing the proper proprietary designation to the data. An accounting was not possible under the facts of *Air Technology*, in the absence of an extension of the substantive law of joint ventures, because the court found no joint venture.

The extension of the substantive law of joint ventures to team ventures would also allow legal relief in proper cases. One joint venturer may sue another at law for damages. For example, where a member of a joint venture has been injured by his associates' breach of contract<sup>53</sup> (as was the case in *Air Technology*), fraud or deceit,<sup>54</sup> or conversion to his own use of the joint property or some part of it,<sup>55</sup> and the amount of plaintiff's claim is capable of ascertainment and computation by a jury,<sup>56</sup> he may bring an action at law to redress his grievance.

It cannot be disputed that these protective remedies, applicable to joint ventures, are equally necessary in a team venture relationship to protect the members from abuses of the fiduciary relationship resulting from the joint undertaking. It is submitted that this reason alone should be enough to bring about an extension of the substantive law of joint ventures to their shadow relation, the team venture.

### *Conclusion*

In conclusion, it is submitted that the substantive law of joint ventures should be applied to team ventures. The only real distinction between the two relationships is the profit-sharing element. The major reason that this factor should not result in a different treatment is that the purposes of the two relationships are identical. Also, the team venture members need the protection of the fiduciary principles that are applied to joint ventures.

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<sup>52</sup> *Sadwith v. Lantry*, 219 F Supp. 171 (S.D.N.Y. 1963).

<sup>53</sup> *Barlin v. Barlin*, 145 Cal. App. 2d 390, 302 P.2d 457 (1956).

<sup>54</sup> *Hey v. Duncan*, 13 F.2d 794 (7th Cir. 1926).

<sup>55</sup> *Miller v. Rau*, 216 Cal. App. 2d 68, 30 Cal. Rptr. 612 (1963).

<sup>56</sup> *Mitchell v. Reolds Farms Co.*, 268 Mich. 301, 256 N.W 445 (1934).

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