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A Critique of the Second Circuit's Analysis of New York and New Jersey Joint Venture Law in *Arditi v. Dubitzky* and *Sagamore Corp. v. Diamond West Energy Corp*

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A CRITIQUE OF THE SECOND CIRCUIT'S ANALYSIS OF NEW YORK AND NEW JERSEY JOINT VENTURE LAW IN *ARDITI v. DUBITZKY* AND *SAGAMORE CORP. v. DIAMOND WEST* *ENERGY CORP.*

Robert Steinbuch†

When one party is encumbered with a liability, it will often look for another party to assume some of the costs. One method of forcing costs to be shared by another is to have a joint venturer contribute. Not surprisingly, when a liability arises, the liable party will be liberal in its interpretation of who among its relationships is a joint venturer, while a potential contributor will be conservative in its interpretation. Thus, it is important to identify analytical tools to determine if a joint venture exists. The first section of this article discusses the core legal elements of a joint venture and presents basic techniques for determining its existence. The second section discusses the majority view regarding the relationship between joint ventures and the corporations created to effect their purposes; the New York and New Jersey exception (the "Exception") to that view; and the Second Circuit's interpretation of the Exception. Under the Exception, which can potentially determine cost allocation, a valid joint venture and attendant liabilities cease to exist once the joint venture incorporates. The Second Circuit's interpretation has essentially permitted the rule to consume the Exception.

I. JOINT VENTURES

A. *Definition*

Although descriptions of joint ventures have varied and courts have been reluctant to formulate a precise definition of the term, some common elements in courts' treatment of joint ventures exist.¹ "A 'joint []venture,' as a legal concept, is of comparative[ly]

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¹ See generally 2 SAMUEL WILLISTON & WALTER H.E. JAEGER, A TREATISE ON THE LAW OF CONTRACTS § 318 (3d ed. 1959 & Supp. 1995); *Porter v. Cooke*, 127 F.2d 853 (5th

recent origin and is founded entirely on contract, either express or implied."² In addition to a contract asserting the creation of a joint venture, courts often require that certain elements be present in the relationship to find that a joint venture exists.³

Although its existence depends on the facts and circumstances of each particular case, and while no definite rules have been promulgated which will apply generally to all situations, the decisions are in substantial agreement that the following factors must be present:

- (a) A contribution by the parties of money, property, effort, knowledge, skill or other asset to a common undertaking;
- (b) A joint property interest in the subject matter of the venture;
- (c) A right of mutual control or management of the enterprise;
- (d) Expectation of profit, or the presence of "adventure," as it is sometimes called;
- (e) A right to participate in the profits; [and]
- (f) Most usually, limitation of the objective to a single undertaking or ad hoc enterprise.⁴

Accordingly, if disputes arise as to the existence of a joint venture contract, courts may look to see if any of the additional requisites of a joint venture are present. As a logical matter, the presence of these typical elements will not satisfy the first requirement of the test (i.e., a contract). As a practical matter, however,

Cir.), *cert. denied*, 317 U.S. 670, *reh'g denied*, 317 U.S. 710 (1942); *United States v. Standard Oil Co.*, 155 F. Supp. 121 (S.D.N.Y. 1957), *aff'd*, 270 F.2d 50 (2d Cir. 1959); *Harris v. Morse*, 54 F.2d 109 (S.D.N.Y. 1931).

² WILLISTON & JAEGER, *supra* note 1, § 318, at 553 (quoting *Rockett v. Ford*, 326 P.2d 787 (Okla. 1940)). See *Porter*, 127 F.2d at 858; *United States v. Consolidated Rail Corp.*, 729 F. Supp. 1461, 1469 (D. Del. 1990) ("one appellate court has stated a prerequisite to finding a joint venture is a 'willingness to be joint venturers, share control, and [a] division of profits and losses'" (citing *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 861 F.2d 155, 158 (7th Cir. 1988))); *Hellenic Lines Ltd. v. Commodities Bagging & Shipping Process Supply Co.*, 611 F. Supp. 665, 679 (D.N.J. 1988); *Standard Oil*, 155 F. Supp. at 148; *Universal Sales Corp. v. California Press Mfg. Co.*, 128 P.2d 665, 673 (Cal. 1942) ("Whether the parties to a particular contract have thereby created, as between themselves, the strict relation of joint adventurers or some other relation involving cooperative effort, depends upon their actual intention, which is determined in accordance with the ordinary rules governing the interpretation and construction of contracts.").

³ WILLISTON & JAEGER, *supra* note 1, § 318A, at 556.

⁴ WILLISTON & JAEGER, *supra* note 1, § 318A, at 563-65 (citations omitted). See *Hellenic Lines*, 611 F. Supp. at 679; see also *Consolidated Rail*, 729 F. Supp. at 1469; *Shell Oil Co. v. Prestidge*, 249 F.2d 413, 415-16 (9th Cir. 1957); *George D. Horning v. McAleenan*, 149 F.2d 561, 566 (4th Cir.), *cert. denied*, 326 U.S. 761 (1945); *Consolidated Fisheries Co. v. Consolidated Solubles Co.*, 112 A.2d 30, 35, *reh'g denied*, 113 A.2d 576 (Del. 1955); *Albert Packing Corp. v. Fickling Properties*, 200 So. 907, 908 (Fla. 1941).

their presence allows courts to infer the existence of the joint venture contract. This "leap of faith" or "argument from existence" analysis, however, does not state that the essential elements prove the agreement, but simply implies that since the elements are there, the agreement must exist despite the fact that there is no independent evidence to support it. This distinction is of little comfort to practitioners who are less concerned about a court's reasoning than about its conclusion.

B. Ancillary Tools

The statute of frauds and tax laws could aid in determining whether or not a joint venture was formed. Simply looking for the actual written joint venture contract or examining parties' tax returns could provide the added evidence necessary to determine if a joint venture exists.

It is a fundamental principle of contract law that when both sides reach an agreement as to the terms of a deal, they are bound regardless of whether the agreement is oral or written.⁵ However, due to the many difficulties of enforcing oral agreements, most jurisdictions in the United States have enacted a statute of frauds, which requires that certain types of agreements be in writing in order to be enforceable.⁶ These include, *inter alia*, contracts for

⁵ RESTATEMENT (SECOND) OF CONTRACTS § 4 (1981) ("A promise may be stated in words either oral or written, or may be inferred wholly or partly from conduct.")

⁶ See, e.g., ALA. CODE §§ 7-2-201, 8-9-1 (1993); ARIZ. REV. STAT. ANN. § 44-101 (West 1994); CAL. CIV. CODE § 1624 (West 1985 & Supp. 1996); COLO. REV. STAT. ANN. §§ 38-10-101, -106 (West 1990); CONN. GEN. STAT. ANN. § 52-550 (West 1991 & Supp. 1996); DEL. CODE ANN. tit. 6, §§ 1-206, 2-201, 8-319 (1993); D.C. CODE ANN. § 28-3501 (1991); FLA. STAT. ANN. § 689.01 (West 1994), § 725.01 (West 1988); GA. CODE ANN. § 13-5-30 (1982 & Supp. 1995); 740 ILL. COMP. STAT. 80/1, 80/2 (West 1993); IOWA CODE ANN. § 622.32 (West 1950); KAN. STAT. ANN. § 33-101 (1986); KY. REV. STAT. ANN. § 355.2-201 (Michie 1987); ME. REV. STAT. ANN. tit. 11, §§ 1-206, 2-201, 8-319 (West 1995), tit. 33, § 51 (West 1988); MASS. GEN. LAWS ANN. ch. 106, §§ 1-206, 2-201, 8-319 (West 1990), ch. 259, § 1, ch. 260, § 13 (West 1992); MINN. STAT. ANN. §§ 513.01, 513.03 (West 1990); MISS. CODE ANN. § 15-3-1 (1995); MO. ANN. STAT. § 432.010 (West 1992); NEB. REV. STAT. ANN. §§ 36-103, 36-107, 36-202 (Michie 1993); NEV. REV. STAT. ANN. §§ 111.205, 111.210, 111.220, 111.235 (Michie 1993); N.H. REV. STAT. ANN. §§ 382-A:1-206, 382-A:2-201, 382-A:8-319 (1994); N.J. REV. STAT. §§ 12A:1-206, 12A:2-201, 12A:8-319 (1962), § 25:1-1 (1940 & Supp. 1996); N.M. STAT. ANN. § 46-2-13 (Michie 1989); N.Y. GEN. OBLIG. LAW § 5-701 (Consol. Supp. 1996); N.Y. U.C.C. LAW §§ 1-206, 2-201 (McKinney 1993 & Supp. 1996), § 8-319 (McKinney 1990); N.C. GEN. STAT. §§ 22-1, 22-4 (1986); N.D. CENT. CODE § 9-06-04 (Supp. 1995), § 47-10-01 (1978); OHIO REV. CODE ANN. §§ 1301.12, 1302.04, 1335.01, 1335.04-05 (Banks-Baldwin 1993); OKLA. STAT. ANN. tit. 15, §§ 136, 324-325, tit. 16, § 4 (West 1991); 33 PA. CONS. STAT. ANN. § 1 (West 1967); R.I. GEN. LAWS §§ 6A-1-206, 6A-2-201, 6A-8-319 (1992); S.C. CODE ANN. §§ 32-3-10, 32-3-20 (Law Co-op. 1991); S.D. CODIFIED LAWS § 43-32-5 (Allen Smith 1983), § 53-8-2 (Michie 1990); TENN. CODE ANN. § 29-2-

the sale of land, agreements that will not be fully performed within one year, promises to answer for the debt of another, agreements modifying written contracts, contracts for the sale of goods in excess of \$500, contracts for the sale of personal property in excess of \$5,000, and contracts for the sale of securities.⁷

If a contract falls within a jurisdiction's statute of frauds, it will usually only be enforceable if the agreement is in writing and the writing specifies the parties and subject matter of the contract.⁸ Accordingly, if the alleged joint venture falls within the scope of the statute of frauds, the absence of a written agreement could be evidence that a joint venture does not exist. However, this analysis is of limited usefulness because of the lack of clarity as to the applicability of the statute of frauds to joint venture agreements.⁹ Moreover, the statute of frauds can also be satisfied by partial performance.¹⁰ Thus, if a court finds evidence that the parties were acting as if they were bound by an agreement that would normally require a writing under the statute of frauds, the court may choose to enforce the agreement even absent a writing. For example, if an oral contract for the sale of goods worth \$10,000 requires ten installment payments, two or three payments could constitute

101 (Supp. 1995); TEX. BUS. & COM. CODE ANN. § 26-01 (West 1987); UTAH CODE ANN. §§ 25-5-1, 25-5-9 (1995); VT. STAT. ANN. tit. 9A, §§ 1-206, 2-201, 8-319 (1994), tit. 12, § 181 (1973 & Supp. 1995), §§ 182-183 (1973); VA. CODE ANN. §§ 11-1, -2 (Michie 1993), §§ 55-2, -3 (Michie 1986); WASH. REV. CODE ANN. § 5.52.010 (West 1995), § 19.36.010 (West 1989), § 62A.1-206 (West Supp. 1996), § 62A.2-201 (West 1995), § 62A.8-113 (West Supp. 1996), § 64.04.010 (West 1994); W. VA. CODE § 36-1-1 (1985), § 48-3-9 (1995), § 55-1-1 (1994); WIS. STAT. ANN. § 240.10 (West Supp. 1995), § 241.02 (West 1987), § 241.025 (West Supp. 1995), § 241.09 (West 1987), §§ 401.206, 402.201, 408.319 (West 1995), § 704.03 (West 1981); WYO. STAT. ANN. § 34.1-3-119 (Michie 1996).

⁷ N.J. REV. STAT. § 25:1-5 (1940 & Supp. 1996); N.Y. GEN. OBLIG. LAW § 5-701 (Consol. Supp. 1996). See, e.g., *Inter-City Tire & Auto Center, Inc. v. Uniroyal, Inc.*, 701 F. Supp. 1120, 1125 (D.N.J. 1988), *aff'd*, 888 F.2d 1380 (3d Cir. 1989), *aff'd sub nom. Uniroyal, Inc. v. Erbesch*, 888 F.2d 1382 (3d Cir. 1989); *Kahn v. Massler*, 140 F. Supp. 629, 643 (D.N.J. 1956), *aff'd*, 241 F.2d 47 (3d Cir. 1957).

⁸ See, e.g., N.J. REV. STAT. § 25:1-5 (1940 & Supp. 1996); N.Y. GEN. OBLIG. LAW § 5-701 (Consol. Supp. 1996).

⁹ *Compare Sugar Creek Stores, Inc. v. Pitts*, 604 N.Y.S.2d 407, 408 (N.Y. App. Div. 1993) ("While an oral agreement may be sufficient to create a joint venture relationship, the Statute of Frauds applies to joint ventures, which, as here, have a stated term of more than one year." (citations omitted)) *with Blank v. Nadler*, 533 N.Y.S.2d 891, 892 (N.Y. App. Div. 1988) ("It is well[-]settled that an oral agreement may be sufficient to create a joint-venture relationship and that the Statute of Frauds is generally inapplicable thereto." (citations omitted)).

¹⁰ See *Banker's Trust Co. v. Steenburn*, 409 N.Y.S.2d 51, 61-62 (N.Y. Sup. Ct. 1978), *aff'd*, 418 N.Y.S.2d 723 (N.Y. App. Div. 1979).

partial performance, and the court may enforce the contract.¹¹

Additionally, joint ventures sound in partnership law and, thus, similar rules apply to both relationships when determining respective parties' obligations.¹² Federal tax law deems a joint venture equivalent to a partnership and requires joint ventures to pay taxes as if they were partnerships.¹³ Thus, an examination of the parties' filings should provide evidence as to whether the participants intended to be joint venturers.

II. JOINT VENTURES AS CORPORATIONS

Whether the persons deciding to create an organization to effectuate a joint enterprise (the "organizing parties") properly follow the procedures of incorporation, and do in fact form a corporation, will not in itself determine the permanence of the joint venture.¹⁴ The permanence will depend initially on whether the jurisdiction allows joint ventures to take the form of a corporation. If it does not, then the joint venture gives way to the corporate form and no confidential fiduciary duty exists among the shareholders.¹⁵ Consequently, liability among the organizing parties is limited, and equitable claims, such as those for an accounting, cannot be brought by one of the former joint venturers (presently shareholders) against any of the others. If, however, the jurisdiction allows a joint venture to take the form of a corporation,

¹¹ See *Ebker v. Tan Jay Int'l, Ltd.*, 739 F.2d 812, 828 (2d Cir. 1984), *aff'd*, 930 F.2d 909 (2d Cir.), *cert. denied*, 502 U.S. 853, *reh'g denied*, 502 U.S. 1000 (1991).

¹² WILLISTON & JAEGER, *supra* note 1, §§ 318, 318B, at 550-52, 585-616; *Walter v. Holiday Inns, Inc.*, 784 F. Supp. 1159, 1167 n.10 (D.N.J. 1992), *aff'd*, 985 F.2d 1232 (3d Cir. 1993); *Roberts v. Craig*, 268 P.2d 500, 504 (Cal. Dist. Ct. App. 1954); *Lesser v. Smith*, 160 A. 302, 304 (Conn. 1932); *Ross v. Willett*, 27 N.Y.S. 785, 786 (N.Y. Sup. Ct. 1894).

¹³ WILLISTON & JAEGER, *supra* note 1, § 318B, at 585. See *Stuart v. Willis*, 244 F.2d 925, 928 (9th Cir. 1957) ("A joint venture as defined by the Internal Revenue Code is a partnership * * * [sic] through or by means of which any business, financial operation, or venture is carried, and which is not, within the meaning of this title, a trust or estate or corporation.") (citation omitted); *Boone v. United States*, 374 F. Supp. 115, 120 (D.N.D. 1973).

¹⁴ The organizing parties can be real persons or legal persons, i.e., corporations. Corporations are generally empowered to form partnerships or joint ventures with other corporations. See, e.g., N.J. STAT. ANN. § 14A:3-1(m) (West 1969); N.Y. BUS. CORP. LAW § 202(a)(15) (McKinney 1986). Of course, the fact that corporations can become members of partnerships does not make the aggregation of the partners itself a corporation. The issue here is whether an arrangement between two or more persons or corporations, or any combination thereof, can itself take the form of a corporation, yet remain a joint venture with all of the attendant responsibilities and liabilities.

¹⁵ See, e.g., *Weisman v. Awnair Corp. of America*, 144 N.E.2d 415, 418 (N.Y. 1957).

then the court must determine whether the organizing parties intended the joint venture to continue even after the enterprise in question was incorporated.¹⁶ In this regard, the interposition of a corporation will not negate the existence of a joint venture, "[b]ut it is an important consideration in that direction and will be conclusive in the absence of compelling factors to the contrary."¹⁷ If the jurisdiction allows joint ventures to take the form of a corporation, and both the joint venture and the corporation are valid, then the parties to the joint venture shall be liable to each other as joint venturers, while the incorporated venture shall have limited liability as to third parties.¹⁸ Indeed, the majority view is that, while a partnership may not take the form of a corporation, a joint venture may. In these jurisdictions, individuals or corporations can form a corporation as a joint venture, resulting in limited liability as to third parties but not as between themselves.¹⁹ Thus, whether the jurisdiction allows joint ventures to take the corporate form is critical. It will determine the type of liability that the relevant parties face.

A. *The New York and New Jersey Exception*

A minority of jurisdictions refuse to recognize as valid a joint venture in the form of a corporation.²⁰ In *Weisman v. Awnair Corp. of America*,²¹ the New York Court of Appeals held that "the rule is well[-]settled that a joint venture may not be carried on by individuals through a corporate form."²² In its decision, the *Weisman* court relied on the New Jersey state case of *Jackson v. Hooper*.²³ In *Jackson*, the court held that it would violate public policy to allow a corporation to maintain the corporate veil against the public, but not allow its shareholders the same protection for disputes among

¹⁶ *United States v. Standard Oil Co.*, 155 F. Supp. 121, 150 (S.D.N.Y. 1957), *aff'd*, 270 F.2d 50 (2d Cir. 1959).

¹⁷ *Id.*

¹⁸ WILLISTON & JAEGER, *supra* note 1, § 318C, at 619.

¹⁹ WILLISTON & JAEGER, *supra* note 1, § 318C, at 619. See *Enos v. Picacho Gold Mining Co.*, 133 P.2d 663, 667 (Cal. Dist. Ct. App. 1943); *Hathaway v. Porter Royalty Pool, Inc.*, 295 N.W. 571, 577-78, *amended by* 299 N.W. 451 (Mich. 1941).

²⁰ WILLISTON & JAEGER, *supra* note 1, § 318C, at 619.

²¹ 144 N.E.2d 415 (N.Y. 1957).

²² *Id.* at 418. See *Yonofsky v. Wernick*, 362 F. Supp. 1005, 1022 (S.D.N.Y. 1973) ("When joint adventurers carry on their business through a corporate entity[,] they cease being joint adventurers and assume the rights, duties and obligations of stockholders." (citing *Weisman*, 144 N.E.2d at 449)); *Noto v. Cia Secula di Armanento*, 310 F. Supp. 639, 646 (S.D.N.Y. 1970); *Bevilacque v. Ford Motor Co.*, 509 N.Y.S.2d 595, 599 (N.Y. App. Div. 1986).

²³ 75 A. 568 (N.J. 1910).

themselves.²⁴ Thus, these courts hold that once a joint venture incorporates, the joint venture ceases to exist and the parties become only shareholders. They are no longer fiduciaries to each other and no longer personally liable. A result is that the very powerful equitable relief available to partners and joint venturers, receipt of an accounting, is not available to the organizing parties.

B. *The Second Circuit's View*

The Second Circuit's interpretation of the Exception severely limits the force of *Weisman*. In *Arditi v. Dubitzky*,²⁵ the Second Circuit stated that the laws of New York and New Jersey are for all practical purposes identical with regard to joint ventures.²⁶ The court, restricting *Weisman* and *Jackson*, held that joint venture obligations can exist among members of a corporation if it is the intention of the parties that the corporation simply be a means of carrying out the joint venture.²⁷ Since *Arditi* is the Second Circuit's interpretation, it is persuasive but not binding on either of these state courts. More importantly, the *Arditi* court relied on cases not strongly supportive of its viewpoint. In fact, the *Arditi* court cited the New York and New Jersey state court cases of *Macklem v. Marine Park Homes, Inc.*,²⁸ *M.P.E. Holding Corp. v. Freeman's Dairy, Inc.*,²⁹ *Loverdos v. Vomvouras*,³⁰ and *Fortugno v. Hudson Manure Co.*³¹ to support its proposition that the *Weisman/Jackson* line has been restricted.

Macklem was decided at the trial level in 1955 before the *Weisman* opinion was issued, and affirmed in 1960 after *Weisman* was decided. To support its proposition that *Macklem* is distinguished from *Weisman*, the *Arditi* court cited the unattributed quote that the corporation was "merely * * [sic] an adjunct of a joint venture."³² This quote, however, does not appear in the *Macklem* opinion. The trial court in *Macklem* concluded that the parties did not intend to carry on the venture as stockholders in a corporation.³³

²⁴ *Id.* at 571. See WILLISTON & JAEGER, *supra* note 1, § 318C, at 619-20; Ault & Wiborg of Canada v. Carson Carbon Co., 160 So. 298, 300 (La. 1935).

²⁵ 354 F.2d 483 (2d Cir. 1965).

²⁶ *Id.* at 485.

²⁷ *Id.* at 487.

²⁸ 191 N.Y.S.2d 374 (N.Y. Sup. Ct. 1955), *aff'd mem.*, 191 N.Y.S.2d 545 (N.Y. App. Div. 1959), *appeal dismissed*, 165 N.E.2d 201 (N.Y.), *aff'd*, 170 N.E.2d 455 (N.Y. 1960).

²⁹ 232 N.Y.S.2d 639 (N.Y. Sup. Ct. 1962).

³⁰ 200 N.Y.S.2d 921 (N.Y. Sup. Ct. 1960).

³¹ 144 A.2d 207 (N.J. Super. Ct. App. Div. 1958).

³² *Arditi v. Dubitzky*, 354 F.2d 483, 486 (2d Cir. 1965).

³³ *Macklem*, 191 N.Y.S.2d at 376.

Further, the court held that “[i]t is very likely, under the facts as developed at the trial, that were this an action brought by a creditor of [the parties to the joint venture] the ‘corporate veil’ would be ‘pierced.’”³⁴ It also held that “[t]he incorporators were ‘dummies’ and apparently no corporate meetings were held and no stock issued,”³⁵ and that the party seeking a distribution of stock was prohibited by state law from receiving stock for his services.³⁶ Although *Macklem* may provide support for the *Arditi* opinion, the irregularities with the corporation in question seem to have been critical to the court’s analysis. As a result, the applicability of *Macklem* to cases involving valid corporations is dubious.

M.P.E. Holding Corp. and *Loverdos* clearly support *Weisman*, despite the *Arditi* court’s reliance on them. Conversely, *Fortugno* provides some support, albeit limited, for *Arditi*. The *Fortugno* court, using equity, despite the “lack of precedent,” held that the “partnership’s stock ownership was not for the purpose of participating in corporate affairs in the normal manner, but was resorted to in order to simply make each corporation an instrumentality or department of the integrated family enterprise.”³⁷ The *Arditi* court claimed to be following precedent when it cited *Fortugno*.³⁸ Ironically, the *Fortugno* court disavowed the existence of any precedent on the issue.³⁹

The Second Circuit further demonstrated how overreliance on, and the misapplication of, precedent can be detrimental in *Sagamore Corp. v. Diamond West Energy Corp.*⁴⁰ Therein, the court again relied on unsupportive case law. The court indicated that almost as soon as the ink was dry on the *Weisman* opinion, the New York courts began to retreat from the rule laid out therein.⁴¹ The parties in *Sagamore* validly formed a joint venture and then formed a corporation to effect the venture.⁴² The court held that the rule in New York under such circumstances is that when parties to a joint venture merge the entire joint venture agreement into the corporation, the enterprise is governed by corporation law.⁴³ How-

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Fortugno v. Hudson Manure Co.*, 144 A.2d 207, 217 (N.J. Super. Ct. App. Div. 1958).

³⁸ *Arditi v. Dubitzky*, 354 F.2d 483, 485 (2d Cir. 1965).

³⁹ *Fortugno*, 144 A.2d at 217.

⁴⁰ 806 F.2d 373 (2d Cir. 1986).

⁴¹ *Id.* at 378.

⁴² *Id.* at 374, 376.

⁴³ *Id.* at 378.

ever, when parties to a joint venture form a corporation to carry out one or more of the joint venture's objectives and intend the joint venture to exist along with the corporation, the rights and duties under the joint venture agreement still exist.⁴⁴ Like *Arditi*, the *Sagamore* rule is bifurcated. It allows joint venture obligations to exist after incorporation in some situations, but not others. However, the *Sagamore* rule appears more constrained than the one set out in *Arditi*. The *Sagamore* court seems only to allow the intervention of a corporation into a joint venture if the corporation has a limited focus.

As in *Arditi*, the case law cited by the *Sagamore* court does not strongly support its holding. The *Sagamore* court relied on *Arditi*⁴⁵ and *Macklem*,⁴⁶ on four cases that held that a joint venture no longer exists when it is merged into the ensuing corporation,⁴⁷ and on two cases that the court contended demonstrate that a joint venture and corporation can exist simultaneously.⁴⁸

The reliance by the *Sagamore* court on the above four cases as support for the claim that there is a bifurcated standard under New York law was misplaced. Two of these cases rest squarely on *Weisman*, which mandates the Exception and, therefore, does not allow for the bifurcated rule.⁴⁹ Under *Weisman*, joint venture obligations simply do not exist after incorporation.⁵⁰ Of course, *Weisman* supports the half of the bifurcated rule preventing joint venture liability after incorporation, but *Weisman* swallows and prevents the exemption *Sagamore* tries to develop. It is one thing for the *Sagamore* court to simply state that *Weisman* goes too far, and then restrict the *Weisman* holding. It is wholly different to claim that *Weisman's* progeny have limited *Weisman*, when they clearly have not. *Miglietta v. Kennecott Copper Corp.*⁵¹ and *Farber v. Romano*,⁵² also cited in the *Sagamore* opinion, rest their decisions upon *Manacher v.*

⁴⁴ *Id.*

⁴⁵ *Sagamore*, 806 F.2d at 378.

⁴⁶ *Id.*

⁴⁷ *Id.* (citing *Beck v. General Tire & Rubber Co.*, 469 N.Y.S.2d 785 (N.Y. App. Div. 1983), *appeal dismissed*, 469 N.E.2d 102 (N.Y. 1984); *Judelson v. Weintraub*, 390 N.Y.S.2d 455 (N.Y. App. Div. 1977); *Miglietta v. Kennecott Copper Corp.*, 266 N.Y.S.2d 936 (N.Y. App. Div. 1966); *Farber v. Romano*, 232 N.Y.S.2d 285 (N.Y. Sup. Ct. 1962)).

⁴⁸ *Id.* at 378-79 (citing *Triggs v. Triggs*, 385 N.E.2d 1254 (N.Y. 1978); *Shapolsky v. Shapolsky*, 279 N.Y.S.2d 747 (N.Y. Sup. Ct. 1966), *aff'd*, 282 N.Y.S.2d 163 (N.Y. App. Div. 1967)).

⁴⁹ *See Beck*, 469 N.Y.S.2d at 786; *Judelson*, 390 N.Y.S.2d at 456.

⁵⁰ *See Beck*, 469 N.Y.S.2d at 786; *Judelson*, 390 N.Y.S.2d at 456.

⁵¹ 266 N.Y.S.2d 936 (N.Y. App. Div. 1966).

⁵² 232 N.Y.S.2d 285 (N.Y. Sup. Ct. 1962).

*Central Coal Co.*⁵³ *Manacher*, relying on *Jackson*, concluded that a joint venture agreement can run

[A]long side of the path of the corporation[, but] [w]hen the two merge . . . and relief is sought upon the ground that the corporation has become a mere agency or instrumentality for the performance of an independent agreement of joint adventurers or partners[,], the aggrieved party is relegated to his rights as a stockholder and may not sue in his individual capacity.⁵⁴

The *Manacher* court aptly summed up its decision as follows: "Individuals may enter into partnership agreements or joint ventures independent of the corporate form but they may not organize a corporation for the purpose of carrying on a joint venture."⁵⁵ Thus, *Manacher* only appears to have provided for a qualification to the Exception in limited situations where a joint venture has organized a corporation to effect one part of a multifaceted joint venture.

Finally, the *Sagamore* court relied on *Arditi, Triggs v. Triggs*,⁵⁶ *Shapolsky v. Shapolsky*⁵⁷ and *Fromkin v. Merrall Realty, Inc.*,⁵⁸ to support the proposition that parties to a joint venture, in forming a corporation to carry out one or more of its objectives, may reserve certain rights *inter sese* under their agreement.⁵⁹

As with previously discussed cases, *Fromkin* rests upon and supports *Weisman*.⁶⁰ *Triggs* does not involve a joint venture, but simply deals with an agreement between corporate shareholders regarding a stock purchase option.⁶¹ *Shapolsky* involves a unique factual situation that seems to have dictated the outcome. In that case, plaintiff and his brother, the defendant, agreed to purchase real estate for speculation and to take title to such in the name of several corporations.⁶² Plaintiff contended that his brother never gave him stock certificates in the aforementioned corporations.⁶³ The court merely held that this was not a derivative action, and

⁵³ 131 N.Y.S.2d 671 (N.Y. App. Div. 1954), *aff'd*, 125 N.E.2d 431 (N.Y. 1955).

⁵⁴ *Id.* at 676.

⁵⁵ *Id.* at 677.

⁵⁶ 385 N.E.2d 1254 (N.Y. 1978).

⁵⁷ 279 N.Y.S.2d 747 (N.Y. Sup. Ct. 1966), *aff'd*, 282 N.Y.S.2d 163 (N.Y. App. Div. 1967).

⁵⁸ 225 N.Y.S.2d 632 (N.Y. App. Div.), *appeal denied*, 183 N.E.2d 770 (N.Y. 1962).

⁵⁹ *Sagamore Corp. v. Diamond West Energy Corp.*, 806 F.2d 373, 378-79 (2d Cir. 1986).

⁶⁰ *Fromkin*, 225 N.Y.S.2d at 635.

⁶¹ *Triggs*, 385 N.E.2d at 1254.

⁶² *Shapolsky*, 279 N.Y.S.2d at 749.

⁶³ *Id.* at 749-50.

plaintiff could maintain an action against his brother for the stock certificates, as plaintiff's right to recovery had its origin independent of and extrinsic to the corporate entity.⁶⁴

Finally, in a recent federal district court case in New York, *Zahr v. Wingate*,⁶⁵ the court explicitly followed *Weisman* and its progeny. *Zahr*, however, did not specifically address *Arditi* and *Sagamore*. Therefore, we cannot be sure whether the court, in properly following New York precedent, recognized its departure from the Second Circuit's view of the law.

III. CONCLUSION

The Second Circuit should follow *Zahr* and its proper adherence to New York law. *Weisman* created the Exception whereby joint ventures could not incorporate, but the Second Circuit weakened the Exception to the point of virtual elimination. Like any United States Court of Appeals reviewing a district court's interpretation of state law, the Second Circuit is in a delicate position thrust upon it by the principles of federalism embodied in the Constitution. Such a court must take pains to interpret the state law as the state court would. If the court is unsure of the state law or the state has not addressed a particular issue, the court can certify a question for state court review. Rewriting the state law, however, is inappropriate. This, though, is exactly what the Second Circuit has done. The Second Circuit should revisit the issue and revitalize *Weisman*.

⁶⁴ *Id.* at 751.

⁶⁵ 827 F. Supp. 1061, 1068-69 (S.D.N.Y. 1993) ("It is axiomatic that individuals may not, as a matter of law, operate a business entity as a partnership for the purposes of defining their rights vis-a-vis each other while concurrently holding the entity out to the general public as a corporation." (citing *Weisman v. Awnair Corp. of America*, 144 N.E.2d 415, 418 (N.Y. 1957) and *Jackson v. Hooper*, 75 A. 568, 571 (N.J. 1910))).