Joint Adventures -- The Sharing of Losses Dilemma

Martin E. Segal

Follow this and additional works at: http://repository.law.miami.edu/umlr

Recommended Citation
Martin E. Segal, Joint Adventures -- The Sharing of Losses Dilemma, 18 U. Miami L. Rev. 429 (1963)
Available at: http://repository.law.miami.edu/umlr/vol18/iss2/8
I. INTRODUCTION

The joint adventure' is a jural relationship that emerged from the confines of partnership law in the last decade of the nineteenth century. It was liberated from its earlier treatment as a special form of partnership by the American courts by being recognized as a separate type of business association. Notwithstanding this emergence, there is still great controversy as to the proper classification of the relationship, and the myriad of divergent attempts to define and identify the joint venture attest to its questionable posture in our legal environment.

The problem is not simply one of semantic cataloguing, however. Whether it is agreed that the joint adventure is a form of partnership or

1. The terms "joint adventure" and "joint venture" are synonymous and will be used interchangeably. See Myers v. Lillard, 215 Ark. 355, 220 S.W.2d 608 (1948).
2. In Ross v. Willett, 58 N.Y. 694, 27 N.Y. Supp. 785 (1894), the joint adventure was accorded the connotation of a distinct legal relationship. See also Buckmaster v. Grundy, 8 Ill. 626 (1846); Claffin v. Godfrey, 38 Mass. 1 (1838).
4. See Nichols, Joint Ventures, 36 VA. L REV. 425 (1950), wherein the author attempts to prove that there are no realistic differences between the partnership and the joint adventure. Contrast this with Jaeger, Partnership or Joint Venture?, 37 NOTRE DAME LAW. 138 (1961), in which the author states that it can no longer be successfully argued that the joint venture is merely a form of partnership. See also, Mechem, The Law of Joint Adventures, 15 MINN. L. REV. 644, 657 (1931).
categorically separate, there still must be a way to formulate a set of component elements by which the existence of the relationship, no matter what its characterization, can be more easily determined under varied factual circumstances. Courts generally concede that mutual control and joint proprietorship over the subject matter, sharing of profits, contribution of money or services, and a contract, express or implied, establishing the relationship are indicative of the joint venture. They are in marked disagreement, however, whether sharing of losses, or at least an agreement to share losses, is a necessary prerequisite to the existence of the relationship.

Strangely enough, the emphasis of all textual writers has been centered on the broad characterization problem of the joint adventure, and the inner difficulties engendered by the loss-sharing dilemma have been relegated to a terse statement to the effect that “the courts are split on this point.” It is the opinion of this writer that a detailed analysis of the loss-sharing problem, of which there has been a distinct paucity, is both necessary and timely.

This paper is divided into three sections: the first is a familiarization of the reader with the historical, definitional and physical characteristics of the joint adventure; the second is a detailed investigation into the varied treatment of sharing of losses by those jurisdictions rendering applicable decisions; and the third is an analysis and critique of the Florida cases.

5. In most instances, the two relationships may be referred to interchangeably since the governing legal principles are, more often than not, identical. In other words, wherever this substitution of terms appears, it should be assumed that the factual situation referred to was parallel with that of a partnership. For all practical purposes, the consequences of being held to one or the other are almost, if not quite, identical. Some distinctions have been made however, such as Jaeger, note 4 supra at 150; 33 HARV. L. REV. 852 (1920). In certain instances these distinctions become quite important. See 18 FORDHAM L. REV. 114, 126 (1949), wherein it is pointed out that the parties may not wish to merge their business affairs any more than is necessary for the completion of the joint project. They may not wish to be burdened by the permanency or legal formality of a partnership. In addition, there may be no desire to be mutually bound beyond the successful completion of the transaction in question.


7. See section III of this article's text infra.

8. Since a favorable determination of the issue of sharing of losses may well affect the designation of a given factual pattern before the court as joint venture or otherwise, detailed investigation is indeed a necessity. As to timeliness, see Taubman, What Constitutes a Joint Venture, 41 CORNELL L.Q. 640, 650 (1956), wherein he states:

The essence of joint venture is intent to associate for the time being, either by way of a single or determinable series of transactions or for a limited time. Modern commercial society increases the possibilities and opportunities for short-term association for profit. Concomitantly, speculation, the taking of risks for gain, increases. Rapid technological change forces certain branches of industry to seek a spreading of risk of loss. Interdependence, acceleration of transportation, and easier communication contribute to making short-term joint economic activity desirable, if not necessary. . . .
II. THE CONTOURS OF THE VENTURE

A. History

The joint adventure as a form of business association is steeped in antiquity, and was originally used as a commercial and maritime device to support large trading enterprises by the merchants and businessmen of ancient Egypt, Babylonia, Phoenicia and Syria. Various forms of associations, characteristically similar to both partnerships and joint ventures, developed to satisfy the needs for greater capital manifested by ancient society. Thus, when the Roman Empire was at its zenith, partnerships were utilized when the transaction of business required comparatively minimal amounts of capital, while a joint venture was used when a greater concentration of wealth was necessary. The early venture not only afforded the opportunity to raise large aggregates of capital, but also enabled the participating individuals to spread their risks accordingly.

With the expansion of commerce in England, the advantages of capital concentration and risk diffusion caused the joint venture to become popular. However, the legal concept of the relationship, rather than the business concept, was unsuccessful in freeing itself from the vise-like grip of general partnership law due to the lack of differentiation by the English common law between the two types of business associations. This merging of the relationships was a precursor of the difficulties that have been encountered by contemporary tribunals in categorization problems. Therefore, it was not until the relationship was used in America that its legal nature reached a stage of development equal to that of its business character.

Joint adventures are of modern origin, creatures of American courts, not recognized at early common law apart from partnerships, but now considered to be a status created by persons combining their properties or services in the conduct of an enterprise without forming a formal partnership.

B. Definitional Doldrums

Before attempting to define the joint adventure, it is necessary to lay a foundation by recognizing that it is a voluntary relationship, the

9. See Barnes, Economic History of the Modern World 14 (1937); Beard, History of the Business Man 12-29 (1938); Childe, The Life of the Ancient East (1929); Knight, Economic History of Europe 19 (1928).
10. See Gilbart, Lectures on Ancient Commerce 160 (1847); Rees, Summary of Economic Development 240 (1933).
11. See Ashley, Introduction to English Economic History and Theory 414 (1920); Gras, Business and Capitalism 41, 42 (1939).
13. The joint venture came to the United States with the industrial revolution and the heightened commerce of England. Despite very modest beginnings, its specialized attributes in applicable situations made its growth inevitable. See note 5 supra.
origin of which is wholly ex contractu. To create it, an agreement between the parties is essential and whether or not it exists depends entirely upon their intention, either express or implied. As a general rule, joint adventures are thought of in relation to a single undertaking, although the specific venture need not be one susceptible of immediate accomplishment. It is in the nature of a partnership limited to a particular venture, not general in operation or duration. However, no completely satisfactory definition has yet been formulated, since the joint adventure "is at best a nebulous concept whose boundaries are not precisely drawn." In most cases the courts have been content merely to determine whether the proven or conceded facts in the particular case constituted a joint venture, "depending on the terms of the agreement, the acts of the parties, the nature of the undertaking and other facts." Nevertheless, definitional attempts are numerous and their lack of uniformity attests to the elusive nature of the relationship.

Although the lack of an all-inclusive definition of the term "joint adventure" is recognized, it is often described as "an association of two or more persons to carry out a single business enterprise for profit, for which purpose they combine their property, money, effects, skill and knowledge." Equally numerous are statements to the effect that it is a special combination of two or more persons, where profit is jointly sought in a specific venture which lacks any partnership or corporate designation. This latter definition recognizes the gradual metamorphosis of the joint adventure from an early assimilation into partnerships evolving to a non-identical relationship with an accepted legal personality. Though separate concepts, the close partnership ties return whenever one focuses on the applicable law governing a typical venture problem.

15. Thus, it is not a status created or imposed by law. See Hyman v. Regenstein, 258 F.2d 502, 503 (5th Cir. 1958); Coral Gables Sec. Corp. v. Miami Corp., 123 Fla. 172, 166 So. 555 (1936); Fitzhugh v. Thode, 221 Iowa 533, 265 N.W. 893 (1936); Whan v. Smith, 130 Kan. 9, 285 Pac. 589 (1930); Carbeneau v. Peterson, 1 Wash. 2d 104, 95 P.2d 1039 (1939).

16. This follows from the fact that since the sine qua non of the relationship of joint adventure is a contract, the determinative intentions and understandings of the parties must be disclosed therein. See Hyman v. Regenstein, supra note 15; Summers v. Hoffman, 341 Mich. 686, 69 N.W.2d 198 (1955); Lampe v. Tyrell, 200 Wash. 589, 94 P.2d 193 (1939); 2 Williston, Contracts chs. 3-5 (3d ed. 1959).

17. Perhaps the most frequently asserted distinction between the partnership and the joint adventure is the fact that the former "is usually created to carry on a specific type of business for profit over a long period of time, while a joint venture is usually formed for the purpose of a single business transaction." Fishback v. United States, 215 F. Supp. 621, 625 (S.D.S.D. 1963). See also Tidewater Constr. Co. v. Monroe County, 107 Fla. 648, 146 So. 209 (1933); McCann v. Todd, 203 La. 631, 14 So.2d 469 (1943).


It is sometimes difficult, and often unnecessary, to distinguish in particular cases between joint adventures and partnerships, since the relations of the parties to a joint adventure and the nature of the association are so similar and closely akin to a partnership that it is commonly held that their rights, duties, and liabilities are to be tested by rules which are closely analogous to, and generally substantially the same as, those which govern partnerships. . . . The outstanding difference between a joint adventure and a partnership is that the former relates to a single transaction, although it may comprehend a business to be continued over several years, while the latter relates to a general and continuing business of a particular kind, although there may be a partnership for a single transaction. . . .

Other definitional variations might be given, but their only function would be to indicate the essential characteristics various jurisdictions attribute to the relationship. Suffice it to say that even though the term joint adventure connotes a semantic blur, defining it is still "easier than identifying it, for each case depends upon its own facts."22

C. Physical Composition—the Identity Problem

There is no uniformity of opinion or determinative precedent as to the explicit composition of a joint adventure. The ultimate determination of whether certain individuals are engaged in the relationship depends upon their intention,24 the best evidence of which is the contractual agreement between the parties and the construction they have given it by words or conduct. The crucial point then, is the question of what factors the various jurisdictions have deemed significant in evidencing the requisite intent.

Besides the universally accepted precept that there be a contractual basis26 for the joint adventure, certain additional elements are generally agreed upon as being essential to its existence:

1. a single or ad hoc business transaction rather than a general and continuous enterprise;28
2. a right of mutual control or voice in the management of the enterprise and its attendant affairs;27

24. Whether the parties to a particular contract have thereby created, as between themselves, the relation of joint adventurers, or some other relation, depends upon their actual intention, which is to be determined in accordance with the ordinary rules governing the interpretation and construction of contracts. Bryce v. Bull, 105 Fla. 336, 343, 143 So. 409, 411 (1932).
25. See note 15 supra.
27. Balestrieri & Co. v. Commissioner, 177 F.2d 867 (9th Cir. 1959); Peoples v. Seamon,
(3) a joint contribution by the parties and a community of interest in these assets of the common undertaking;28
(4) an expectation of making a profit from the venture;29 and
(5) a joint right of participation in any profits derived.30
Several of these elements, perhaps all, will frequently appear in the joint adventure, although it cannot be affirmatively stated that one of them, standing alone, will be sufficient to create the relationship.

The chameleon-like character of the venture is embodied in the wide diversity of opinion concerning the necessity of sharing of losses between the co-adventurers as an incident to the relationship.31 Examination of the cases will reveal the utter lack of any uniform treatment of this element and a marked divergence in the views propounded by the jurisdictions examined. If it is accepted that the problem of identifying the venture surpasses that of its definition, then it can be said that the loss-sharing controversy occupies an even higher rung on this ladder of difficulties inherent in the relationship of joint adventure.

III. EXPLORING THE AREA OF LOSS-SHARING

The central theme of sharing of losses has been interpreted by the courts into a multitude of conflicting viewpoints. The jurisdictions align themselves, as to whether loss-sharing by the parties is essential to the existence of a joint adventure, in the following manner:

A. Losses must be shared for a joint adventure to exist.
   1. There must be an agreement, express or implied, to share in the losses incurred by the enterprise.32

249 Ala. 284, 31 So.2d 88 (1947); Livingston v. Twyman, 43 So.2d 354 (Fla. 1950); Boyd v. Hunter, 104 Fla. 561, 140 So. 666 (1932); Klaber v. Klaber, 131 So.2d 98 (Fla. 2d Dist. 1961).
29. This is the so-called element of “adventure,” which differentiates the joint adventure from the joint enterprise. In the latter relationship, no anticipation of making a profit is deemed essential and it encompasses a much broader area of joint undertakings. See LaMar v. Lechlider, 135 Fla. 703, 185 So. 833 (1939); Sappenfield v. Mead, 338 Ill. App. 236, 87 N.E.2d 220 (1949); 2 WILLISTON, CONTRACTS § 318B (3d ed. 1959). Contra, West v. Soto, 85 Ariz. 255, 336 P.2d 153 (1959).
30. It appears that the absence of profit-sharing is indicative of a relationship lacking a community of interest, such as that of employer-employee. See Pollard v. Browder, 126 So.2d 310 (Fla. 2d Dist. 1961); Tusant v. Weitz, 195 Iowa 1386, 191 N.W. 884 (1923). See also Taylor v. Brindley, 164 F.2d 235 (10th Cir. 1947).
31. See section III of this article’s text infra, and the various viewpoints examined therein.
2. If one party furnishes the capital of the enterprise and the other his services, an agreement to share losses is not necessary since they will be deemed shared by the very nature of the undertaking.\textsuperscript{83}

B. Sharing of losses is not a necessary prerequisite.

1. Sharing of losses is not an incident of, and is not indispensable to, the existence of a joint adventure.\textsuperscript{84}

2. A venture relationship may exist wherein there is an express agreement not to share losses.\textsuperscript{85}

It must be emphasized that, in reality, no clear-cut alignment is present, since many jurisdictions have rendered decisions espousing different theories of loss-sharing without any attempt to reconcile the views. Thus, there have been no reversals on the loss-sharing issue primarily because there is so much confusion and incongruity that the courts cannot crystalize a basis for their decisions. It is not uncommon in synthesizing the cases to discover that two or more are in direct conflict.\textsuperscript{86} Indeed, this writer has found no decision in which the court examined the multitude of loss-sharing theories and attempted to catalogue them for the purpose of providing some semblance of order. The basic uncertainty and indecision of the courts on the issue of sharing of losses may well stem from the failure to relegate properly the various factual situations into their appropriate categories.

\begin{itemize}
\item Eagle Star Ins. Co. v. Bean, 134 F.2d 755 (9th Cir. 1943) (Washington law); Reid v. Shaffer, 249 Fed. 553 (6th Cir. 1918); Tate v. Knox, 131 F. Supp. 514 (D. Minn. 1955); Pigg v. Bridges, 352 S.W.2d 28 (Mo. 1961); Warwick v. Stockton, 55 N.J. Eq. 61, 36 Atl. 488 (1897); Usdan v. Rosenblatt, 93 N.Y.S.2d 862 (Sup. Ct. 1949); Devereaux v. Cockrel, 179 Ore. 229, 170 P.2d 727 (1946); Whistone v. Purdue, 107 Ore. 86, 213 Pac. 1014 (1923); Smith v. Grenadler, 203 Va. 740, 127 S.E.2d 107 (1962).
\item By comparing notes 32-36, note the discrepancies and overlapping in California, Florida, Missouri, New York and Texas.
\end{itemize}
A. Losses Must Be Shared

1. LOOK TO THE AGREEMENT

a. Express Agreement to Share Losses

Many early decisions made the blanket declaration that there had to be an express agreement to share in both profits and losses in order for a relationship to be considered a joint adventure. This approach apparently was a carryover from the accepted principle that a contractual agreement was necessary to establish the venture relationship. Indeed, some courts still follow this rigid approach, as evidenced by the recent case of Fullerton v. Kaune, wherein the court stated:

A joint adventure is formed when, by agreement between the parties to the joint adventure, the parties combine their money, property or time in the conduct of some particular business deal, agreeing to share jointly in the profits and losses of the venture.

b. Implied Loss-Sharing Provision

Other decisions required that an agreement, express or implied, to share in the profits and losses of the venture must always be present. Thus, some early decisions held that should a provision for sharing of losses be omitted in the purported venture agreement, the law would supply an implied provision to the effect that the parties must share losses. However, it is necessary to point out that the question of loss-sharing has been troubling the courts since the very emergence of the joint adventure concept. While some early cases required a loss-sharing agreement, others laid down broad principles to the effect that parties could be held to be co-adventurers although some were not to become liable for any share of the losses if the business proved unsuccessful.

For example, in Warwick v. Stockton, the plaintiff sold exclusive rights to sell and manufacture certain inventions to the defendant, who was to provide all the necessary capital for the enterprise and pay the plaintiff half the profits. Upon the plaintiff’s suit for an accounting based on a theory of partnership, the court held the relationship to be one of joint adventure, wherein a receiver would not be appointed in the absence of fraud or mismanagement endangering the joint assets.

[N]or is there anything in the agreement to indicate the . . .

37. See Florence v. Fox, 193 Iowa 1174, 188 N.W. 966 (1922).
38. 72 N.M. 201, 382 P.2d 529 (1963).
39. 382 P.2d 529, 532 (N.M. 1963).
42. 55 N.J. Eq. 61, 36 Atl. 488 (1897).
[plaintiff] was to become liable for any share of the losses if the business was unsuccessful . . . . [T]he relations were not those of partners, but of a mere common interest in a joint adventure in which one party took all the risk of loss, and the other party had a share of the profits, if any.⁴³

The tenor of these early decisions was that a partnership required sharing of losses, while a joint adventure could exist without it. In those jurisdictions subscribing to this view, the initial cases are still good law and exemplify one of the views which has prevailed since its rendition. The later decisions, which adhere to this liberal non-requisite loss-sharing view, will be examined in a subsequent section.⁴⁴

Since, in many instances, the agreement that purported to form the basis of a joint adventure had no express provision for sharing of losses, those jurisdictions that established loss-sharing as a prerequisite to the existence of the relationship were apparently barred from sustaining an assertion of joint adventure. However, the concept of an implied or inferred agreement to share losses, wherein the venture relationship could be saved, developed early in the law and is prevalent today. As early as 1884, it was held that:

it is not necessary, in order to constitute a partnership, that there be an express agreement that each party shall bear a share of any losses which may occur in the business. This may be inferred from the other provisions of the contract, and the nature of the business, and the relation of parties to the business to be transacted.⁴⁵

It is interesting to note the discrepancies between this case, and the early cases indicating that loss-sharing was not indispensable to the existence of the venture relationship. In the latter, a partnership was distinguished from a joint adventure by virtue of whether losses were shared. In this decision, the word partnership is used synonymously with venture terminology, indicating that both relationships require some type of agreement to share losses. Inconsistencies such as these make the area of joint adventures such a perplexing one that rather than diminishing the difficulties, they are compounded as more and more decisions are rendered.

Those jurisdictions which advocate the theory of an implied loss-sharing provision recognize its existence whenever the venture agreement is silent in that respect. They reason that since the joint adventure is a matter of contract, with attendant rights and duties created thereunder, every co-adventurer is bound by his relation to his associates to share

⁴³. Id. at 65, 36 Atl. at 489-90. See also, Reid v. Shaffer, 249 Fed. 553 (6th Cir. 1918), wherein the parties were held to be joint adventurers rather than partners because there was no sharing of losses between them.

⁴⁴. See "Loss-Sharing Not Required," section III B(1) infra.

with them the losses sustained. The usual presumption is that the parties intended to share losses in the same proportion as they share the profits.\textsuperscript{46} However, in the recent decision of Hughes v. Bond,\textsuperscript{47} a different interpretation was given to the sharing ratio.

In Hughes, three individuals entered into an agreement that did not contain a loss-sharing provision, due to the fact that they did not contemplate the occurrence of any losses. Nevertheless, the court upheld the relationship as a joint adventure, and ruled that the net losses should be prorated among the parties. Thus, each co-adventurer had to contribute one-third of the losses, notwithstanding their profit-sharing arrangement or whether one of them did more work than the others. In addition to this novel loss-sharing ratio, Hughes illustrates how a venture problem is treated if the parties "contemplate no losses."

In Fishback v. United States,\textsuperscript{48} another recent decision, a taxpayer argued that he was entitled to capital gains treatment on a sale of property. If the court deemed the vendee to be a joint adventure, the character of the property as a capital asset would have been lost.\textsuperscript{49} The taxpayer asserted that no venture existed due to the lack of an agreement to share losses. However, the court held the relationship to be a joint venture even though there was no express agreement to share losses by finding that the parties' failure to contemplate losses resulted in a loss provision being implied from the general risk-sharing character of the relationship.

\section*{2. LOSS-SHARING IRRESPECTIVE OF THE AGREEMENT}

\textbf{a. Contributions of Money and Services}

Although an express or implied agreement to share losses is usually present, a factual pattern frequently occurs wherein one party furnishes services and the other provides the necessary capital for the enterprise. Unlike the other facets of loss-sharing, this situation has been accorded a degree of uniformity in that when it arises, a loss-sharing \textit{agreement} is usually not held necessary to the existence of the venture relationship.\textsuperscript{50} Even though a sharing of the losses is deemed essential, the term "'loss'
does not necessarily mean actual 'monetary loss.'” Thus, where the nature of the undertaking is such that one party furnishes money and the other time, labor and knowledge, “an agreement to share the profits may stamp it as a joint adventure, although nothing is said about sharing the losses,” since, in the event of a loss, one party “may lose his money and the other his work on the failure of the venture.” Since the courts reason that a loss-sharing agreement is actually involved in this type of enterprise, the fact that there is no specific agreement to bear a proportion of the losses does not negative the existence of the relation.

An issue that frequently arises in these cases of service and money contributions is whether the party contributing his skills is liable to his associates if financial losses are sustained in the venture. Normally, he is not liable since each person has sustained a corresponding loss—i.e., labor on the one hand, and money on the other. However, difficulties frequently arise from the intricate interpretations concerning whether the adventurer contributing services owns any interest in the property contributed by the non-service party, and could thus be held liable for its replacement in the event of the enterprise suffering losses. An example is *Masterson v. Allen,* wherein the plaintiff furnished money for the enterprise and the defendant contributed services. Losses resulted, and the plaintiff sought contribution from the defendant for the debts of the partnership. The court held that the partnership property was exclusively made up of the use of the plaintiff’s money and the defendant’s services; therefore, the defendant could not be held for the replacement of the former.

In partnership, where work is contributed on one side and money on the other, the partner from whom the money comes may contribute only the use of the money or the property of it. If he contributes the use of it, and still keeps his property in the principal, so that the joint stock is to be considered as made up of the labor of one partner and the use of the other’s money, it is plain that, supposing the principal to be safe, it belongs to him, and that, supposing it to be lost, he alone bears the loss. The other partner who contributes work, since as the case is put, he had no claim to the principal money or any part of it,

56. Heran v. Hall, 40 Ky. (1 B Mon.) 159 (1840).
57. The converse does not appear to be true, however, since profitable operations usually result in the non-service party’s getting all his money back before any profits are divided, instead of only receiving a share of the capital he furnished.
59. As previously pointed out, the partnership and venture relationships may be interpreted synonymously under applicable factual circumstances. See note 22 supra and accompanying text.
cannot be obliged to make good any part of the loss, or to bear any share of it...

Thus, it is obvious that if the non-service party contributes the "property" of his funds, rather than the "use," the joint stock of the venture is made up of both money and labor, upon which each of the parties have a common claim. Therefore, if the property is lost, the party contributing services can be held for a share of the loss since he owned an individual interest in the property. Fortunately, the courts usually accept a money-labor undertaking as satisfying the loss-sharing requirement on its face, rather than delving into the semantic complexities detailed above.

b. Loan Situations

Similar problems arise whenever one party advances money to an enterprise in return for a share in the profits at a higher percentage than the legal interest rate. The issue is whether the undertaking is a joint adventure or a loan tainted with usury. If it is the latter, there can be no recovery of the principal sum advanced or the expected share in profits. The crux of the problem revolves around the fact that the courts are divided in these cases where the party furnishing capital is guaranteed "repayment regardless of loss." It appears that those courts which require sharing of losses also advocate the necessity of the principal sum being subjected to the hazards of loss in the venture. They reason that since the money advanced is returnable in any event, it is not subject to loss and any assertion of joint adventure or partnership must fail. In reaching this result, the courts often conclude that the transaction was, in fact, a loan in the form of a venture agreement, executed by way of shift or contrivance to conceal usury.

The position of those courts which do not recognize sharing of losses

60. Masterson v. Allen, 69 S.W.2d 539, 542 (Tex. Civ. App. 1934). (Emphasis added.) It should be noted how unworkable the court's approach was, in that the result in each case would vary according to whether the non-service party contributed the property, or use of his money. However, no standards for such a determination were presented, nor did the court indicate that it recognized the characterization difficulties inherent in their interpretation of the problem.

61. Ibid.

62. The usual situation is that in which one individual makes advancements under an agreement to share in earnings of, or income from, the enterprise, in lieu of, or in addition to, interest. As a practical matter, the rate of return will exceed the maximum specified in the jurisdiction's usury statute. Thus, in these jurisdictions if repayment is guaranteed, the principal sum is not in danger and the transaction will be characterized as a loan, rather than a joint adventure. In re Starer's Estate, 20 Wis. 2d 268, 121 N.W.2d 872 (1963). See Griffin v. Kelly, 92 So.2d 515 (Fla. 1957); Cooper v. Rothman, 63 Fla. 394, 57 So. 985 (1912); Dublin v. Veal, 341 S.W.2d 776 (Ky. 1960) (creditor's entire profit or return must be put in jeopardy); Boone v. Andrews, 30 Ohio C.C. 166 (1907).

63. See Dubos v. Jones, 34 Fla. 539, 16 So. 392 (1894).

64. See Crowson v. Cody, 209 Ala. 674, 96 So. 875 (1923); Diversified Enterprises, Inc. v. West, 141 So.2d 27 (Fla. 2d Dist. 1962).
as an essential element of a joint adventure, in connection with loans, is illustrated by the landmark case of *Orvis v. Curtiss*. In that decision, the parties jointly agreed to buy stock and opened a joint account for that purpose. The plaintiff agreed to furnish the necessary money, and net profits were to be divided equally. In addition, the defendant guaranteed that the plaintiff would not lose, and assured him of a profit of not less than 5,000 dollars. A large loss resulted from the undertaking, which the defendant paid. Subsequently, the plaintiff sued for his 5,000 dollars and the defendant asserted that the transaction was a usurious loan. The court held for the plaintiff, establishing their relationship as co-adventurers or co-partners.

It is plain that the defendant's purpose was not to borrow money, but to deal in stocks. The plaintiff's purpose was to buy stocks at the defendant's risk. He took care also to make such an agreement with the defendant as would exempt him from all possible loss. He may have made a hard and unconscionable bargain with the defendant, but it is evident that both parties dealt with each other at arm's length, and whatever else may be said about the transaction, the usury statute has no application whatever to it. It was a joint venture or partnership between two persons to deal in property in order to make profit.

**B. Sharing of Losses Is Not Necessary**

1. **Loss-Sharing Not Required**

In addition to the early cases indicating that sharing of losses was not a necessary prerequisite to the existence of a joint adventure, some jurisdictions still indicate a strong liberality in following this viewpoint. In *Smith v. Grenadier*, a subcontractor and installment purchaser of excavating machinery entered into a verbal rental agreement whereby the subcontractor was to make the monthly payments on the machinery although the purchaser would retain title to the equipment when all payments had been made. Any amounts received by the subcontractor in excess of his expenses in the excavation project were his profits. The problem before the court was whether there was a jury question on the issue of joint adventure between the purchaser and the subcontractor in order to determine whether the purchaser would be liable for the subcontractor's negligence in crushing the child of the plaintiff. The court held

---


68. Reid v. Shaffer, 249 Fed. 553 (6th Cir. 1918); Warwick v. Stockton, 55 N.J. Eq. 61, 36 Atl. 488 (1897).

69. "It is not necessary to the existence of a joint venture that the parties share losses as well as profits." Usdan v. Rosenblatt, 93 N.Y.S.2d 862, 863 (Sup. Ct. 1949). See note 34 supra.

that there was a sufficient issue of fact as to the existence of a joint venture to justify submitting it to the jury.

By the arrangement, Grenadier [the purchaser] was getting the equipment paid for, which the jury could find was a profit or benefit to him derived from the project. Thus we cannot say, as a matter of law, a joint adventure did not exist.\textsuperscript{71}

This statement indicated that a venture could exist as long as the parties would be benefitted, no consideration of losses being necessary at all. Other cases have also indicated that, if all other elements are present, a joint venture may exist even though one party, as between himself and his co-adventurer, may participate in the profits and be immune from losses.\textsuperscript{72} It would seem that these courts seek to effectuate the venture as evidenced by the intention of the parties, regardless of the fact that other courts rigidly require losses to be shared.\textsuperscript{78}

2. AGREEMENT NOT TO SHARE LOSSES

A corollary of the doctrine not requiring the co-adventurers to share losses is the theory set forth by some courts that the parties may determine by agreement, that as between themselves the risk of loss is to be assumed by one or more of the parties exclusively.\textsuperscript{74} This is in direct contrast to the view necessitating an agreement to share losses and illustrates a liberality in not requiring loss-sharing, combined with a restrictive tenor under which the particular loss-bearing ratio agreement is deemed essential. Since the basis of the undertaking is the venture agreement, these courts reason that it is the logical repository for all loss considerations and, in those jurisdictions that do not regard loss-sharing as essential, the agreement should articulate the non-requisite viewpoint. Normally, the venture agreement will state that one or more of the parties is exempt from all possible loss, or words of similar import, thereby eliminating liability for possible financial reversals.\textsuperscript{76}

\textsuperscript{71} Id. at 745, 127 S.E.2d at 111.

\textsuperscript{72} For representative language, see Whetstone v. Purdue, 107 Ore. 86, 213 Pac. 1014 (1923).

\textsuperscript{73} Compare notes 32 and 34 supra. It must be re-emphasized that the gradations and distinctions between the cases are never clear-cut. An example is the situation in Oklahoma, where E.D. Bedwell Coal Co. v. State Industrial Comm’n, 11 P.2d 527, 531 (Okla. 1932), stated that a joint adventure be "held to exist when one of the parties, while entitled to share in the profits, if any, was not obligated for any loss." Thirty years later, Pfeider v. Smith, 370 P.2d 17 (Okla. 1962), held that an agreement to share losses must always be present. Complexities of this sort are nowhere more prevalent than in Florida. See section IV of this article's text infra.

\textsuperscript{74} See note 35 supra.

\textsuperscript{75} There is a noticeable overlapping between the decisions eliminating loss-sharing by agreement, and the loan cases guaranteeing repayment regardless of loss. See primarily, Orvis v. Curtiss, 157 N.Y. 657, 52 N.E. 690 (1899); Salter v. Havivi, 215 N.Y.S.2d 913 (Sup. Ct. 1961).
IV. THE FLORIDA SYNTHESIS—PROBLEMS UNLIMITED

Florida's position epitomizes what may best be termed as "the height of confusion." The cases make the blanket assertion that a loss-sharing provision is a necessary prerequisite to the existence of a joint adventure. However, upon examination, they reveal blatant contradictions and inconsistencies that lend credence to the conclusion that the state courts desire a loss-sharing requirement, but are unable to formulate a consistent and logical means of attaining that end. The decisions are interspersed with instances of express agreements for sharing of losses, implied provisions and some containing no specificity whatsoever. An examination of the cases not only illustrates the difficulties encountered, but also emphasizes the importance of this requirement. Thus, the absence of a showing of sharing of losses has, more so than that of any other element, caused the Florida courts to conclude that some type of entity or relationship was established by the parties other than a joint adventure.

Florida's law of joint ventures is comparatively recent, and, preliminary to viewing the decisions creating the loss-sharing problem, it would be well to examine early Florida pronouncements.

The first Florida decision recognizing the general legal nature of the joint adventure was Proctor v. Hearne. Its basis was a foreclosure suit against co-adventurers, and following the two definitions usually proposed for the relationship, the supreme court took notice of the close affinity between partnerships and joint ventures, recognizing that the governing principles were substantially the same. The court went on to state:

As respects the character of the business undertaken, the principal difference between a partnership and a joint adventure is that the former term is generally used to characterize a general and continuing joint venture, while the latter term usually, though not necessarily, designates a single joint venture consisting of one transaction.

Inherent in this statement was a novel misconception of the nature of the two relationships. While most courts were still immersed in the belief that the joint adventure was no more than a specific type of partnership, the Florida court seemed to say that a partnership was a continuing type of joint venture. Thus, rather than define the character of the venture relationship in terms of partnership law, the court did the converse, making the partnership appear to be a subdivision of the broad category

---


77. 100 Fla. 1180, 131 So. 173 (1930).

78. For some differences that have been propounded, see Jaeger, Joint Ventures, 9 AM. U.L. Rev. 1, 17 (1960); Comment, 18 Fordham L. Rev. 114, 119-22 (1949).

79. Proctor v. Hearne, 100 Fla. 1180, 1187, 131 So. 173, 176 (1930).
known as joint adventure. This semantic oversight was corrected by implication some twenty-seven years later.80

One year after the Proctor decision, in Willis v. Fowler,81 the importance of the intention of the parties in determining the nature of the undertaking and the fiduciary character of the venture relationship were set forth. The high integrity required of co-adventurers was re-emphasized by the Florida Supreme Court twenty-two years after Willis in a case wherein one joint adventurer fraudulently purchased property without making adequate disclosure of the details of the transaction to his co-adventurers.82 In considering his action, the court recognized that joint adventurers owe to one another the duty of the finest and highest loyalty as long as the relationship continues. It concluded by reiterating the oft-cited statement of Judge Cardozo in Meinhard v. Salmon:83

Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior . . . . Conduct subject to that reproach does not receive from equity a healing benediction.84

Of prime importance is the statement in Willis, where the court mentioned sharing of losses for the first time in its consideration of whether a transaction was within the rules governing joint adventures, one of which is the aforementioned fiduciary duties of the parties. After reiterating the general characteristics of the venture relationship, the court stated: "The joint adventurers are entitled to share in the profits, and must also share the losses, if any, which result."85 As substantiation for this principle, it cited Proctor v. Hearne.86 However, a thorough perusal of the latter decision reveals no similar statement, either expressly made or intimated. This remarkable fact can be interpreted in either of two ways. First, it could be advanced that the court in Willis was conclusively establishing the necessity for sharing of losses and merely cited to Proctor in which the joint adventure concept was initially treated. However, is it not more logical to view the erroneous reference as evidencing the fact that the ostensible loss-sharing requirement was in actuality a mere statement of the view of other jurisdictions, and since this precept was not advanced in Proctor, the Willis case is not determinative on this point? If this is the case, the most-cited Florida decision

80. See Kislak v. Kreedian, 95 So.2d 510 (Fla. 1957).
81. 102 Fla. 35, 136 So. 358 (1931).
82. Donahue v. Davis, 68 So.2d 163 (Fla. 1953).
83. 249 N.Y. 458, 164 N.E. 545 (1928).
84. Donahue v. Davis, 68 So.2d 163, 171 (Fla. 1957).
86. 100 Fla. 1180, 131 So. 173 (1930).
on loss-sharing,\textsuperscript{87} which was predicated upon the misguided \textit{Willis} case, is equally misguided. Carrying this rationale one step further, all subsequent cases which based their view of loss-sharing requirements on these errors could be considered non-persuasive, facilitating a clear opportunity to re-evaluate Florida's true position. As a practical matter, however, the Florida Supreme Court has not questioned the matters discussed here and seems content to utilize the \textit{Willis} case as precedent for the requirement of sharing of losses.

In \textit{Bryce v. Bull},\textsuperscript{88} sharing of losses was mentioned again and the creative intent of the parties was re-emphasized. The existence of the joint venture relationship was deemed to be dependent upon the actual intention of the parties. By utilizing the ordinary rules governing the interpretation and construction of contracts, the nature of the relationship the parties had intended to exist between themselves could be determined. The court then proceeded to indicate the troubles that lay ahead as far as loss-sharing was concerned, by making two extremely confusing and contradictory statements.

The first was made in considering the fact that the defendants intended to organize in the future a corporation to buy certain land and, in so doing, any land-purchase contracts they executed were not to bind them individually.

\begin{quote}
If the intent to do those things which constitute a joint adventure exists, the parties will be joint adventurers, notwithstanding they also intended to avoid personal liability that attaches to joint adventurers.\textsuperscript{89}
\end{quote}

The court found the existing relationship to be a joint adventure, and would therefore seem to have said that the results flowing from the intention of the parties were of sole importance and any facts indicating the desire to avoid personal obligations would be of no moment.

In the second statement, the court quoted with approval from \textit{Ruling Case Law} and stated:

\begin{quote}
The courts will not countenance ingenious contrivances for giving persons the whole of the advantages of a partnership, without subjecting them, as they thought, to any of the liabilities, and an agreement which attempts to carry out a joint venture for the mutual profit of the adventurers and evade their responsibility for losses may be enforced and construed as creating a partnership.\textsuperscript{90}
\end{quote}

Does this not seem to say that an agreement in which the intent of the

\textsuperscript{87} Albert Pack Corp. v. Fickling Properties, 146 Fla. 362, 200 So. 907 (1941).
\textsuperscript{88} 106 Fla. 336, 143 So. 409 (1932).
\textsuperscript{89} Id. at 344, 143 So. at 411.
\textsuperscript{90} Id. at 344, 143 So. at 412.
parties is to create a joint adventure, but which lacks a loss-sharing provision, cannot be given a venture interpretation? By the same token, is not the supreme court of Florida indicating that the establishment of a joint venture cannot be effectuated absent a provision whereby the parties will be responsible for losses? The later cases would seem to substantiate an affirmative reply to these questions. However, we are left with the fact that the first statement of the court indicates that only intention is determinative, while the latter quotation expresses the primary importance of responsibility for losses. This inconsistency cannot be explained away; rather, let it be said that this initial confusion will be given heightened emphasis in the cases that follow.

A final comment is in order concerning the statement that an agreement which contemplates responsibility for losses being "evaded" may create a partnership rather than a joint adventure. As has been previously noted, the two relationships are deemed to be quite similar, but from the practical standpoint of the parties involved, the former causes them to be equally responsible for losses incurred, while the latter may allow some of them to avoid liability for losses if a loss provision is not required. In addition, if the word "evade" is interpreted to mean that the agreement was silent with respect to sharing of losses, the court indicated that a joint venture relationship probably would not be created. In the next Florida decision, however, the supreme court indicated that loss-sharing may be implied in the absence of an express provision, thus saving the venture relationship.

_Tidewater Constr. Co. v. Monroe County_ expressedly considered a loss-sharing problem and delineated certain applicable principles. In that case, the plaintiff, a corporate paving company, was to oil road surfaces for another corporation which was constructing roads for the county. Under their agreement, the plaintiff was to share the profits with the defendant, was not expressly or impliedly responsible for any losses that might ensue, and had no control over the work done. In addition, there was no community of interest in the capital used in the business, and the plaintiff was under no duty to contribute toward the necessary capital to do the job undertaken by the defendant. Under these circumstances, the court held the relationship to be that of contractor-subcontractor, thus allowing the plaintiff to recover on contracting bonds given by the construction company to Monroe County. The court recognized

that joint adventurers are entitled to share in the profits, and _must_ also share the losses, if any; ... that although there may not be any express agreement that the parties shall share in the losses, if any, this must have been _implied_ from the agreement made, and the circumstances surrounding its execution, as

---

91. See notes 22 and 78 supra, and accompanying text.
92. 107 Fla. 648, 146 So. 209 (1933).
having been within the contemplation and intention of the parties. Of course, where the agreement is in writing and free from ambiguity or doubt, its legal effect must be determined as a matter of law, and the intention of the parties gathered therefrom.\textsuperscript{93}

The loss-sharing superstructure had now begun to take shape in that the court recognized that, (a) joint adventurers must share losses, and (b) the basis of such an obligation must either be in the express terms of the venture agreement or derived by a circumstantially implied provision. Since the agreement in the instant case was clear on its face and lacked a loss-sharing provision, none would be implied and any purported venture was not sustainable.

The case most widely cited to stand for the proposition that “one of the indispensable factors in proving a co-adventure is the responsibility of the parties to it for the losses as well as their right to share in the profits” is \textit{Albert Pack Corp. v. Fickling Properties}.\textsuperscript{94} In that case, the defendant purchased property through the plaintiff corporation for resale, and any resulting profits were to be divided between the two entities. The money for the enterprise was furnished by the defendant, and the plaintiff neither contributed capital or services, nor was found to share in any loss which might have resulted. The plaintiff corporation sued for an accounting respecting the profits resulting from the sale of the subject property, relying upon a theory of joint adventure. In denying relief, the court held that participation in losses, one of the essential elements of joint adventure, was absent. In so holding, the categorization of loss-sharing was expanded beyond \textit{Tidewater}\textsuperscript{95} through the following words:

\begin{quote}
In the contract . . . there was no \textit{express agreement} with reference to any hazard that the plaintiff took or any loss that it might suffer in the event that the property should be eventually sold for less than the amount paid for it. No provision was adopted from which this risk could be \textit{implied} and no investment was made by it from which loss [actually] could be suffered . . . .\textsuperscript{96}
\end{quote}

Thus, loss-sharing could have been satisfied by an express provision, by the presence of a provision from which risk of loss could be implied or, actions of the parties making them susceptible to loss, irrespective of the venture agreement. The court obviously inferred that had the plaintiff actually risked the loss of invested capital, his duty to share in losses would have been deemed satisfied and the assertion of joint adventure sustained. Standing alone, this addition of a third means of fulfilling ele-

\begin{footnotes}
\item 93. \textit{Id.} at 653, 146 So. at 211. (Emphasis added.)
\item 94. 146 Fla. 362, 365, 200 So. 907, 908 (1941).
\item 95. \textit{Supra} note 92.
\item 96. \textit{Supra} note 94 at 365, 200 So. at 908. (Emphasis added.)
\end{footnotes}
mental requirements does no more than accentuate the evolving complexity of loss-sharing. However, the new "acts of the parties" category is quite disturbing when we consider statements by Florida's legal encyclopedias concerning sharing of losses.

*Florida Jurisprudence* states:

Parties to an agreement are not coadventurers where the agreement has no provision, either express or implied, for the sharing of losses. A contract that lacks a provision, either express or implied, for sharing possible losses does not form the basis for the relation of joint adventure, even though profits are to be divided.

*Florida Law and Practice* makes a similar pronouncement:

An essential element in order to establish the relationship of the parties as that of joint adventurers is that it is necessary that there be an agreement to share jointly on some agreed basis not only the profits but also the losses. Where the agreement is silent with respect to the division of the profits and losses or is uncertain in its terms, the court has repeatedly refused to characterize the arrangement as that of joint adventure.

Both these treatises place the rule within the confines of the agreement creating the purported joint adventure. Their sole reference to a loss-sharing provision, express or implied, as an essential element of the venture relationship, accentuates by omission the fact that there is a total lack of recognition of an "acts of the parties" situation. This point is further emphasized by the fact that *Florida Jurisprudence* cites *Albert Pack* as substantiating authority for the statement limiting the loss-sharing requirement to an express or implied provision. As we have seen, this was not the case. The only reasonable explanation this writer can advance for this seemingly obvious inconsistency is the fact that perhaps, rather than recognizing a separate subdivision of loss-sharing, the "implied provision" area was simply broadened to encompass both the facets of the venture agreement and the external circumstances surrounding its execution. Though logical enough, this approach was not pursued by the court in subsequent decisions. It could have adopted a definite categorization of loss-sharing and greatly lessened the confusion surrounding the venture concept, but failed to do so.

*Uhrig v. Redding* involved a partner's suit for an accounting. Pursuant to a verbal agreement, the defendant supplied all the capital for breeding and raising livestock and the plaintiff furnished his time, effort

---

97. 18 FLA. JUR. Joint Adventures § 8 at 438, 439 (1958).
98. Id. at 484 n.13.
99. 14 FLA. LAW & PRACTICE Joint Adventures § 7 at 140 (1960). (Emphasis added.)
100. Supra note 94.
101. 150 Fla. 480, 8 So.2d 4 (1942).
and skill in managing the business. The agreement provided that each party should have a one-half interest in all the assets of the business and profits realized were to be shared equally. Totally lacking, however, was any mention of loss-sharing. Nevertheless, the court held a "partnership" existed, based primarily upon the intention of the parties and the following interpretation of sharing of losses:

Appellant [plaintiff] supplied the labor, experience and skill, appellee the necessary capital. Any profit was to be shared equally. Losses would also be shared, for in the event of loss, appellant would have exercised his skill and effort in vain, and appellee would have to suffer diminishment of his capital investment. 102

There could certainly be no doubt now that a new category of loss-sharing had indeed been suggested by Albert Pack, and clearly adopted in Uhrig. By the very nature of the relationship between the parties supplying capital and services, losses would be deemed shared even without any specific reference to this factor in the parties’ agreement. In addition, the term "loss" was interpreted for the first time, and was made to extend beyond mere monetary loss, encompassing the diminishment of whatever had been contributed by the respective parties. 103 It would appear then, at this juncture, that the outline of loss-sharing consisted of three categorical divisions:

A Express agreement to share losses
B Implied loss-sharing provision
C Loss-sharing irrespective of the venture agreement
   (1) Acts of the parties from which loss could actually be sustained—Albert Pack
   (2) Nature of the relationship determined by the contribution of the parties—Uhrig

The pressing question was—Would the Florida Supreme Court finally treat subsequent decisions in a manner consistent with their loss-sharing pronouncements uttered thus far? Confusingly enough, the next case provided a negative answer, while the decision immediately following it was disposed of in a manner thoroughly consistent with Uhrig.

The factual situation in Beckett v. Pierce 104 was quite complex. The plaintiff investigated the investment possibilities of a purchase of the stock of Piggly-Wiggly Corporation, and planned to negotiate the transaction and eventually manage the successor corporation. The defendants were to help finance the project, with the plaintiff’s contribution being limited to his knowledge and services. Subsequently, following a

102. Id. at 484, 8 So.2d at 6.
103. For similar cases, see note 33 supra.
104. 157 Fla. 184, 25 So.2d 486 (1946).
rejection of an original offer to purchase formulated by the plaintiff, the defendants secretly purchased the stock and the plaintiff sought to hold them as constructive trustees due to an alleged violation of their fiduciary obligations as joint adventurers. However, it appeared that there was no actual agreement between the parties, written or otherwise, and the defendants had actually offered the plaintiff his share of the stock at their cost. It was obvious that no venture was present in the absence of an agreement to enter into such a relationship, and the plaintiff was in no way damaged by the acts of the defendants. The disconcerting feature of this case, however, was the court's statement that, "we do not glean... an agreement for joint adventure, not to mention the manner of distribution of losses were the enterprise to fail, another indispensable factor."105

One would have thought that, following Uhrig, a factual pattern in which one party furnished the capital for the enterprise and the other his knowledge and skills, would have arbitrarily satisfied the sharing of losses requirements to which the Florida courts have so steadfastly adhered. This was not the case, however, since the court in Beckett indicated that not only was an agreement for joint adventure lacking, but in addition, losses were not shared. It would certainly have been more reasonable to decide against the plaintiff on the former ground and to hold that the second element was satisfied due to the reasoning in Uhrig. Rather than diminishing, it seemed that the confused contradictions and inconsistencies were being compounded and increased with alarming frequency.

In Russell v. Thielen,106 the Uhrig case was almost identically tracked. It involved a suit for an accounting by real estate developers against owners of a subdivision based upon an alleged joint adventure in the development and sale of the subdivided lots. The only agreement between the parties was an oral one, and the court recognized that it was not sufficient, standing alone, to indicate a joint adventure. However, the holding was still joint venture, rather than exclusive sales agency, based upon the manifested intent of the parties and a view of all the relevant facts which included one party supplying the necessary funds and the others furnishing the labor, experience and skill. The court stated:

Losses under such circumstances would be shared, for in the event of a loss the party supplying the "know how" would have exercised his skill in vain and the party supplying the capital investment would have suffered diminishment.107

It becomes evident that the mere contributions of the parties, in those

105. Id. at 191; 25 So.2d at 489.
106. 82 So.2d 143 (Fla. 1955).
107. Id. at 146.
limited factual patterns in which this interpretation is applicable, furnishes automatic satisfaction of loss-sharing requirements and obviates any difficulties they might have engendered. Is this really the case however? The wording of the court is perfectly explicit in stating that losses would be shared. However, a recent Florida case, next to be examined, adds what may be termed the last straw of utter confusion to this already muddled picture.

Phillips v. United States Fid. & Guar. Co.\textsuperscript{108} is a most perplexing decision. The defendant issued an employee's fidelity bond, insuring against employee dishonesty up to 10,000 dollars. In consideration of the premium paid, the insurer was obligated to indemnify the plaintiff for all losses sustained during the insurance period, except that the insuring agreements did not apply to "loss, damage or destruction caused or contributed to by any fraudulent, dishonest or criminal act committed by a partner of the assured. . . ."\textsuperscript{109} The term employee was defined in the insurance agreement as one compensated by salary and directed by the assured. Subsequently, the plaintiff entered into an agreement with B, whereby the plaintiff would furnish the capital necessary to the business of transportation brokerage, and B's contribution was to be the management and operation of the enterprise. In addition, the parties were to divide the net profits, B was to draw a weekly salary, was referred to as an employee, and had employee withholding taxes paid for him by the plaintiff. There was no mention of sharing of losses. Some time later, B wrongfully converted checks payable to him for the business, and the plaintiff filed suit charging that B was an employee and, due to his acts, the plaintiff should recover under the terms of the fidelity bond. The defendant moved to dismiss on the ground that the agreement between the plaintiff and B was not covered by the terms of the policy. The trial court ruled for the defendant, even though the plaintiff had alleged that B had no responsibility to share the losses of the business, and was therefore not a partner or co-adventurer of the plaintiff. The appellate court reversed the lower tribunal, holding that the absence of a provision under which the parties clearly intended that B should share in the losses of the enterprise was fatal to the defendant's contentions.

If the court had merely determined that there was no joint adventure due to the strong indication of a contrary intent by the repeated references to "employee" in the agreement between the plaintiff and B, the conclusion would be completely justifiable. However, the reason that the decision is so troubling and one that contravenes the principles overwhelmingly established by the Uhrig and Russell cases, is the fact that its basis was the lack of a loss-sharing provision. Had it not been es-

\textsuperscript{108} 155 So.2d 415 (Fla. 2d Dist. 1963).
\textsuperscript{109} Id. at 416.
tablished by the Florida Supreme Court that sharing of losses requirements could be satisfied irrespective of the actual venture agreement? Indeed, the defendant was of the same opinion as this writer, since it based its case upon the fact that sharing of losses was included in the undertaking between the plaintiff and B due to the Uhrig case, and cited in its behalf the same passage previously alluded to.\(^\text{110}\) However, this court rejected the defendant's contentions by distinguishing the instant case, in that here, "there was no contemplation in the agreement for . . . [B] to share losses."\(^\text{111}\)

Could not the same be said of Uhrig and Russell? In both of those cases, the agreement between the parties, as here, was totally devoid of any reference to loss-sharing and not susceptible to any such inference. The loss requirement was met outside the agreement, indeed, without considering it. By the very fact that the contributions of the parties were funds on the one hand, and services on the other, losses were unequivocally deemed to have been shared. In the instant case, did not the plaintiff furnish the necessary capital and B his services? Is not this case a tacit overruling of both Uhrig and Russell, as far as the loss-sharing issue is concerned?

If there was any doubt about the answer to the latter question, one only had to read a little further in the Phillips opinion to see that the whole concept of the loss issue was changed:

"Share of losses" means to be responsible or liable for the losses created by the venture and liability, if any, to creditors or third parties.\(^\text{112}\)

These words connote monetary loss, a term expressly deemed to be not completely necessary in both the Uhrig and Russell cases. In other words, by the instant case, the Second District had interpreted the law of Florida, respecting sharing of losses, to mean only those losses provided for either expressly or impliedly within the four corners of the venture agreement, thus ignoring all the decisions rendered after the Albert Pack case. Phillips can be interpreted in no way other than a direct abrogation of reasoning previously set forth by our highest court. However, no mention of conflict is made. Perhaps the only consolation is that all decisions examined in this article, other than Phillips, were rendered by the Florida Supreme Court and thus overruling of the latter is still possible.

V. OVERVIEW

The condition of Florida law, concerning the sharing of losses, is indeed a remarkable conglomeration of inconsistencies and judicial

\(^{110}\) See note 102 supra and accompanying text.

\(^{111}\) Phillips v. United States Fid. & Guar. Co., 155 So.2d 415, 419 (Fla. 2d Dist. 1963).

\(^{112}\) Ibid.
question marks. Indeed, the Florida cases not only typify the nationwide confusion engendered by the loss-sharing concept, but magnify it to a considerable extent. Perhaps the only assertion that may be made without fear of contradiction is that Florida appears to require loss-sharing as a necessary prerequisite to the existence of the joint adventure relationship. How it is to be recognized and in what manner it must be presented and satisfied are more difficult questions which have not, as yet, been satisfactorily answered.

VI. Conclusion

The sharing of losses problem permeates joint adventures and due to the "judicial vacillation in the interchangeable application of the joint venture and partnership concepts" and the similarity of applicable legal principles between the two relationships, it may be termed a source of mutual vexation. However, the general acceptance of this unitary identity of partnership as joint venture, and vice-versa, may obscure the importance and usefulness of the latter relationship as a separate concept and, by the same token, may becloud a vital element upon which its existence depends—that of loss-sharing. Whether a particular jurisdiction adopts an affirmative or negative viewpoint with respect to the indispensability of loss-sharing will both determine the character of the undertaking before the court and the fortunes of the litigants responsible for its formation. As already pointed out, an individual may furnish the money for an enterprise, relying upon assertions by the other parties to the effect that he will be handsomely repaid, regardless of any loss. If there are financial reversals and litigation for the return of his funds ensues, his fortunes rest solely upon, all other factors being equal, whether the forum state requires sharing of losses. If so, the transaction most probably will be labeled a usurious loan and the monies advanced will be forfeited. Similar examples may be readily furnished by resort to the reader's imagination. What then, can and should be done to aid the courts in reaching logical and judicially consistent results on the issue of sharing of losses?

It could be submitted that since the basis of the relationship is contractual, prime consideration should be given the intent of the parties in entering into the transaction in question. No rigid set of required elements will ever do justice to the myriad of factual circumstances encounterable. Similarly, an ad hoc determination in each case based upon a court's interpretation of intent will produce even more confusion than that which exists at the present time.

The only other alternative appears to be a conscious effort on the part of the bench toward recognizing the contours of loss-sharing and

113. 18 Fordham L. Rev. 114, 119 (1949).
114. See notes 62-67 supra and accompanying text.
the categorical divisions established by judicial edict. Thus, some semblance of order could be fashioned out of this maze of contradictions and inconsistencies, fostering a realistic approach to a current legal problem area.

Martin E. Segal