

LITIGATION ALERT

March 2011

► Message From The Chair



Douglas Cooper

Welcome to the March 2011 *Litigation Alert*, where we address one issue anchored in well-worn jurisprudence and another where the legal battles are almost certain to create new precedent.

In the first article, we discuss a recent RMF success relating to the elements necessary to create a joint venture. The second article deals with the collision between the public's desire for accessible energy and the potential for serious environmental hazard resulting from hydrofracking, an innovative new drilling technique.

I personally welcome your ideas for future issues. You may reach me at 516-663-6576 or dcooper@rmfpc.com.

RMF Successfully Opposes Joint-Venture Allegations

By Thomas A. Telesca, Esq.



Thomas A. Telesca

We recently represented the owner of a restaurant who terminated the restaurant's managers because they secretly opened a competing business nearby. The managers claimed that the termination was invalid because they were joint venturers with the owner and therefore were owners as well. Our client denied that he was partners with the managers and instead viewed them only as employees. The managers moved by order to show cause for a preliminary injunction to be reinstated as the restaurant's daily operators and sought

a temporary restraining order for the same relief. The restaurant's owner retained RMF to oppose the order to show cause.

New York courts have identified five necessary components of a valid joint venture: (1) two or more persons enter into an agreement for profit, (2) the parties intend to be associated as joint venturers, (3) each party contributes something of value to the venture, such as property, financing or skill, (4) each party has some degree of control over the venture and (5) the parties agree to share profits *and losses*.

The operating agreement between the owner and managers permitted the managers to share in the profits of the restaurant but specifically exempted them from losses. Therefore, we focused our defense on the fifth element of a valid joint venture.

New York law is unsettled as to what constitutes a loss-sharing agreement sufficient to create a joint venture. A minority of courts conclude that a joint venture may be created based upon an implied loss-sharing agreement among the venturers. In those cases, the courts have held that the loss-sharing element was satisfied where each venturer stood to lose if the joint venture were not successful. However, a majority of courts disagree with this approach and hold instead that when a putative joint venturer stands only to lose his or her contribution to the joint venture, the risk-of-loss element is indistinguishable from the separate requirement that each joint venturer make some contribution to the venture. These courts have held that the absence of an express agreement to share in the losses is fatal to the formation of a joint venture.

Because the operating agreement specifically shielded the managers from liability for losses, we argued with the support of the majority view that the fifth element was absent. The S.D.N.Y. agreed and denied the manager's request for a TRO. The Southern District's denial of the TRO foretold the likely outcome at trial – the operators' joint-venture claim was doomed. As a result, we were able to negotiate a favorable settlement for the restaurant's owner and avoid costly and protracted litigation.

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On The Horizon: The Battle Over Hydrofracking

By Adam Browser, Esq.



Adam Browser

Hydrofracking. Fracking. The Frac Act. Most people have never heard these terms. Others mistakenly believe that they are 21st century profanities. The truth, however, is that hydrofracking is a central component to the debate about energy, our environment and our economy. In the months ahead,

these terms will continue to creep into the public vernacular and will likely be the focus of substantial litigation both in New York and abroad.

Hydrofracking (or fracking) is a process of releasing natural gas trapped deep inside rock formations by blasting the rock with a high-pressure liquid mixed with sand and chemicals. Advances in hydrofracking have made New York State a significant producer of natural gas. New York sits atop part of the Marcellus shale formation, an expansive deposit of natural gas that extends underground across Ohio, West Virginia, Pennsylvania and the southern tier of New York. The New York State Department of Environmental Conservation estimates that between 168 and 516 trillion cubic feet of natural gas are contained in the Marcellus shale formation. To put that in perspective, New York State uses about 1.1 trillion cubic feet of natural gas a year. Accessing the Marcellus shale gas could provide New York with a local source of its

natural gas needs while still providing ample reserves to alleviate the nation's energy shortages. Also, it would be a great boon to areas of the state that have historically been economically depressed, bringing jobs, increasing revenue and expanding the tax base.

But problems and future litigation abound. Many are fearful that the drilling chemicals, extracted gas and radioactive by-products will contaminate the groundwater supply. Lawsuits have already been commenced in Pennsylvania claiming groundwater contamination caused by hydrofracking, and others are sure to follow.

Meanwhile, both federal and state legislators are beginning to address hydrofracking. Congress is considering The Fracturing Responsibility and Awareness of Chemicals Act, commonly known as the FRAC Act, which would require energy companies to disclose the chemicals they use to drill. Locally, the New York legislature is considering whether to extend the moratorium on hydrofracking imposed by Governor Paterson that is set to expire this May. The New York City Department of Environmental Protection has also taken a cautionary stance against hydrofracking.

If hydrofracking is permitted to proceed in New York, expect to see SEQRA claims brought to impede drilling, personal injury and property damage claims based on alleged ground water contamination, trespass and nuisance claims between adjoining landowners where hydrofracking takes place and a host of other legal claims.

Practice Pointer: Find Your Own "Headless Body Found in Topless Bar"

By Matthew F. Didora, Esq.

When it comes to the news, headlines sell papers, such as the one contained in the title to this Pointer published by the *New York Post*. Headlines grab the interest of would-be purchasers and drive them to pony up to learn the full story behind the witty quip. The same philosophy should be employed when drafting pleadings and other litigation documents: Lead with the most sensational facts that favor your side at the outset of your document. Doing so will immediately capture the judge's attention and will help persuade the judge that your client ought to prevail.



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