

# LITIGATION ALERT

Summer 2011

## ► Message From The Chair



**Douglas A. Cooper**

Welcome to the Summer 2011 edition of the *RMF Litigator*, which is published by the Litigation Department at Ruskin Moscou Faltischek, P.C. In this issue, we update you on recent developments in New York's

jurisprudence regarding non-compete agreements, highlight the activities and accomplishments of RMF's litigators over the last several months and identify upcoming speaking events on current issues by RMF's litigators. We welcome your feedback on our publication as well as your ideas for future issues.

The RMF Litigation Department is the largest commercial litigation practice on Long Island. Ruskin Moscou litigators regularly team with area practitioners, out-of-state lawyers and in-house counsel alike, covering all manner of business disputes. For more than forty years, we have represented clients in federal and state courts throughout New York and the country and before all forums and tribunals, state and federal, international and domestic. Please contact us if we can be of assistance.



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## The Unpredictable World of New York's Non-Compete Jurisprudence

By Douglas J. Good, Esq.



**Douglas J. Good**

Imagine IBM's surprise when, in February of this year, Federal Judge Loretta Preska denied it a preliminary injunction to halt competition by a former high-level employee. That individual, Giovanni Visentin, served on IBM's Integration and Values Team (I&VT), "a leadership group that develops IBM's corporate strategy," and was General Manager of IBM's Integrated Technology Services Division.

In January 2011, Visentin resigned from IBM to accept a senior position with Hewlett Packard. IBM sued to enforce the non-competition agreement Visentin signed that contained a one-year restriction against working for a competitor and sought a preliminary injunction.

Surely, IBM expected the court would issue the injunction. A little more than two years earlier, IBM sued Mark Papermaster who had left to take a job with Apple. Papermaster had worked in IBM's Systems and Technology Group and had been Vice President of two different units in that group. He, too, was a member of the I&VT. Papermaster had signed a non-compete agreement virtually identical to the one signed by Visentin. Judge Kenneth Karas, sitting in the same federal district that decided Visentin's case, granted a preliminary injunction enforcing the non-compete agreement.

So why the different outcomes? Both defendants were former high-level, IBM employees; both were members of its elite I&VT; both had signed virtually the same non-compete agreement; both resigned to work for direct competitors of IBM. One (Papermaster) was preliminarily enjoined from working for the competitor; the other (Visentin) was not.

Analysis of the two opinions points up the following differences (among others) between the two cases. Papermaster was a top technology expert; Visentin was more of a business manager than a technical expert. That meant that Papermaster had greater familiarity with IBM's alleged trade secrets in chip design and processor architecture.

Also, IBM reacted to the two resignations differently. While Visentin offered to stay on for some weeks to transition, IBM instead dispatched security to his home to retrieve his company laptop computer. When Papermaster resigned, IBM offered him a substantial salary increase and also offered to pay him for a year if he agreed not to work for Apple.

What are the lessons to be learned from these two cases? First, when it comes to non-competes, one size does not fit all. Perhaps if Visentin's non-compete agreement were drafted to recite the specifics of Visentin's value to IBM and the competitive threat he presented, IBM may have had greater success.

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## The Unpredictable World of New York's Non-Compete Jurisprudence

Second, IBM's reactions to the two departures were drastically different. It is difficult to assess the impact on the cases' outcomes, but mention of IBM's reactions in both decisions indicates that those facts played some role in the courts' determinations.

And the final lesson: New York law in the non-compete area is not clearly delineated. In the case of IBM, in two seemingly identical cases, the courts reached opposite conclusions. These cases highlight the importance to employers of having competent counsel at each stage of the process: drafting appropriate agreements, counseling on how to deal with employee departures and other breaches and making the best presentations in court when litigation is unavoidable.

## Practice Pointer: Advocate Within Point Headings

By Matthew F. Didora, Esq.

Page limits and maximum-word counts make space within a brief a precious commodity. Thus, the litigator must be careful not to waste any space with words that do not advance the client's case. Point headings provide a prime location to summarize the winning arguments of your client's case – oftentimes in ALL CAPITALS and bold print. For example, rather than denoting a section of your appellate brief as “The Lower Court's Order,” tell the appellate court right in the section heading why that decision was correct if you are the respondent or incorrect if the appellant.

## RMF Litigators in the News

- New York Times, August 27, 2011  
*State Judges Get 27% Raise Over 3 Years*, quotes Mark S. Mulholland.
- New York Times, July 18, 2011  
*Commission to Set Raises for Judges in New York State is Flooded with Suggestions*, quotes Mark S. Mulholland.
- New York Law Journal, July 12, 2011  
*OCA Urges up to 41% Pay Raise for Judges*, mentions commission member Mark S. Mulholland.
- Long Island Business News, July 8-14, 2011  
*New York's Absurd Laws*, quotes E. Christopher Murray.
- Levittown Tribune, June 16, 2011  
*Pro Bono Lawyers Honored for Service to Domestic Violence Victims*, mentions Joseph R. Harbeson, Matthew F. Didora and William McDonald as honorees.
- Long Island Business News (LIBN.com), May 13, 2011  
*Movers & Shakers*, article and picture of Matthew F. Didora.

## Recent RMF Victories

- *Givati v. Air Techniques, Inc.* (Supreme Court, Nassau County). Mark S. Mulholland and Matthew F. Didora obtained a defense verdict in favor of Air Techniques, Inc. following a multi-day, non-jury trial before the Honorable Timothy S. Driscoll in a case challenging the inventorship of sophisticated X-Ray scanning technology.
- *Zere v. The Parr Organization* (Supreme Court, Suffolk County). E. Christopher Murray obtained a \$300,000 judgment on behalf of Zere Real Estate Services, Inc., representing a broker's fee for Zere's role in placing The Parr Organization as the general contractor for the construction of the Touro Law School building in Central Islip, New York.
- *Verderber v. Commander Enterprises Centereach, LLC* (Supreme Court, Nassau County; Appellate Division, Second Department). Plaintiffs, who were members of the defendant LLC, transferred their membership interests to a third party. Melvyn B. Ruskin, Douglas A. Cooper and Matthew F. Didora represented the LLC and its majority member and argued that plaintiffs' transfer triggered an option clause in the LLC's operating agreement in favor of the majority member to purchase plaintiff's interests at an agreed-upon price. Both the Supreme Court, Nassau County (Honorable Ira B. Warshawsky), and a unanimous panel of the Appellate Division, Second Department, agreed with RMF and held that plaintiffs were required to transfer their interests to the majority member in exchange for the price calculated using the formula in the operating agreement.
- Jeffrey M. Schlossberg obtained the dismissal of a disability-discrimination claim filed with the Equal Employment Opportunity Commission by an RMF client's former employee.

## Upcoming RMF Speaking Events

- On October 26, 2011 at RMF, Jeffrey M. Schlossberg and Kimberly B. Malerba will deliver a presentation on the use of social media in the workplace. Free CLE credits available.
- On November 30, 2011 at RMF, Douglas A. Cooper and Matthew F. Didora will discuss the nuts and bolts of the deposition process and effective techniques for taking and defending depositions. Free CLE credits available.

To register for these events, email [info@rmfpc.com](mailto:info@rmfpc.com) or call 516-663-5353.

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