

## MARCUM WORKPLACE CHALLENGE 2012

Firm staff participated once again in the Marcum Workplace Challenge. The event took place at Jones Beach with over 200 Long Island companies represented.



## THE TIME FOR JUSTICE:

Senior Partner **Anthony V. Curto** published a book titled, *THE TIME FOR JUSTICE*, which highlights the inequities that arise from the excesses in time required to resolve legal disputes and provides targeted 'time fixes' to correct the system. The book was reviewed favorably by the media including outlets such as FoxNews.com, the Huffington Post and Kirkus Reviews magazine.

For additional information visit [www.thetimeforjustice.com](http://www.thetimeforjustice.com)



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P R E S E N T S

# The COUNSELOR

## ENTERING INTO A JOINT VENTURE

By Anthony V. Curto and Joseph V. Cuomo

In today's competitive marketplace, entities often pursue business opportunities through collaborative efforts generally referred to as joint ventures. A joint venture—also known as a strategic partnership—is an undertaking, usually for a specific or limited purpose, in which two or more entities pool their assets and resources, and share in the risks and rewards of the enterprise. While such an endeavor can undoubtedly lead to various problems, many of them are foreseeable. Consequently, parties contemplating a joint venture can take precautionary measures to proactively address such issues.

This article outlines some of the major considerations that parties should think through before entering into a joint venture. As with most business ventures, preliminary considerations should include: a confidentiality agreement, a letter of intent, and due diligence. Here, subsequent considerations should be given to the structure of the venture, and the agreement that will govern its operation.

### Confidentiality Agreement

Parties to a joint venture usually exchange confidential information and should, therefore,

protect that information by executing a confidentiality agreement. These agreements—also known as nondisclosure agreements—are one of the most common agreements entered into by business entities.

They have many characteristics to consider; three of the key considerations are mutuality, explicit identification of the information that the parties seek to protect, and the term of the agreement. Mutuality is desired because mutual agreements typically provide each party with equal protection for their proprietary information. Explicit identification of what information is protected reduces the risk that the agreement will contain loopholes. The term of the agreement sets the parties' expectations regarding the length of time each will be subject to the agreement's restrictions.

### Letter of Intent

Parties contemplating a joint venture should also prepare either a letter of intent or a term sheet. These two documents are distinct from one another, however the difference is slight. Both are preliminary, typically non-binding, documents used to record the material terms of the joint venture. The documents are ordinarily used to guide in the preparation of the definitive agreement that will govern the venture's operation. Also, the letter of intent and term sheet serve the additional functions of: vetting key issues upfront, centralizing pertinent discussions into a single document for convenient review, and clarifying the rights and responsibilities of each party.

### Due Diligence

Parties should exercise due diligence by researching their potential joint venture partner. Public databases such as Westlaw and LexisNexis, and Internet searches via Google are just a few of the many resources available for this task. Additionally, rather than limit due diligence efforts to public searches, parties should always consider supplementing their investigations with a reference check and, in some circumstances, a private investigation.



Anthony V. Curto



Joseph V. Cuomo

### Structure of the Joint Venture

With regard to the structure of a joint venture, primary considerations include: business objectives, limitation of liability concerns, contributions of the parties to the venture, tax treatment, and ease of termination. Joint venture structures range from a simple handshake to the creation of a new business entity. However, undocumented verbal agreements, memorialized in nothing more than a handshake, can easily lead to a disastrous outcome. The more prudent approach is to have a contractual agreement govern the arrangement.

### Common Elements of a Joint Venture Agreement

Fundamental to any joint venture is its governing agreement, which—depending on the structure of the venture—can take many forms, including: a contractual agreement, a shareholders' agreement, an LLC operating agreement, a partnership agreement, a development agreement, a licensing agreement, or a marketing agreement, to name a few. Although distinguishable, these joint venture agreements address many of the same issues. The most significant of these common issues are: scope or purpose of the venture, geographic area or markets to be covered, type of product or service to be provided, identification of the parties and point person for each side, responsibilities of each party, contributions of or commitments regarding future contributions of each party, assignment or license of technology or intellectual property, ownership of jointly developed products or intellectual property, compensation or sharing of profits and losses for each party, sharing of the costs and risks of the venture, management of the venture, restrictions on transfers of interest in the venture, right of first refusal for future ventures, reversion rights, dispute resolution method (arbitration or mediation), term

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## ENTERING INTO A JOINT VENTURE Continued

and termination of the relationship, non-competition or exclusivity conditions, and non-disclosure requirements.

### Legal Representation

In joint venture situations in which the parties' bargaining strengths are approximately equal, the parties often retain one law firm to serve as legal counsel to the venture itself. The duties of a law firm under this scenario run to the venture, and not to any joint venture party on an individual basis. Alternatively, where one party has a more dominant position, it is common

for that party to use its own counsel to perform the legal work needed to create and structure the joint venture. Under this latter scenario, the less dominant partner would typically have its own counsel to look out for its specific interests.

## “TOP 10” JOINT VENTURE ISSUES While contemplating the considerations discussed above, parties entering into a joint venture should bear in mind that:

1. A good agreement cannot fix a bad relationship so it is essential to consider the parties' compatibilities.
2. The motivation and commitment of each party will have a direct impact on the venture's success or failure.
3. The contributions of each partner should be defined in a straightforward and clear manner because convoluted responsibilities will prove problematic.
4. "Breaking up is hard to do," but prenuptial-type provisions can serve to relax the difficulties of dissolution.
5. It is crucial for each partner to have a long-term perspective because one-night stands rarely work.
6. Clear and realistic objectives backed by a detailed business plan are a recipe for success. Remember, "He who fails to plan, plans to fail."
7. Impasse resolution procedures should be implemented to avoid deadlocks, which can be fatal to business ventures.
8. Due to the issue prone nature of intellectual property, it should be handled more judiciously than tangible property.
9. Conflicts-of-interest should be considered and protected against beforehand.
10. Parties always need a channel or mechanism for communication.

JOINT VENTURES PROVIDE BUSINESSES WITH A WIDE ARRAY OF OPPORTUNITIES, BUT THEIR VARIATIONS AND COMPLEXITIES CAN BE INTIMIDATING. BY GIVING CAREFUL THOUGHT TO ALL OF THE CONSIDERATIONS HIGHLIGHTED ABOVE, PARTIES CAN SAFEGUARD AGAINST MANY OF THE ISSUES THAT MAY ARISE.

## Articles & Publications

The Firm and its attorneys have been recognized in several leading publications recently, including:

### NEW YORK MAGAZINE

The Firm was listed in the national magazine's special section of the "New York Area's Top Ranked Law Firms 2012."

### LONG ISLAND BUSINESS NEWS

**Daniel P. Deegan** was quoted in the article titled "Expired Ban on Retail Benefits a Boost for IDAs" for his representation of Simon Property Group in the Walt Whitman mall expansion. **Anthony B. Barton** was listed as a "Who's Who in Corporate Law" and **William F. Bonesso** was listed as a real estate professional "Ones to Watch."

### NEWSDAY

**Judy L. Simoncic** was quoted recently for her representation of Cozir Corp. in their application to open a franchise of Camp Bow Wow.

### NEW YORK REAL ESTATE JOURNAL

**Kathleen Deegan Dickson**, **Judy L. Simoncic**, **Andrea Tsoukalas** and **Kathryn Sammon Burns** were profiled in the annual "Women in Real Estate" section of this publication.

**Aaron Gershonowitz's** article titled "Purchasers of Real Property May See Changes in the Environmental Investigations" was recently published.

### PRESENTATIONS

**Jeffrey D. Forchelli** presented on land use & zoning to the Columbian Lawyers Association at a recent meeting.

**Andrea Tsoukalas** moderated and **Gregory S. Lisi, Esq.** presented on Labor Law - Hours & Wages to the Long Island Gasoline Retailers Association (LIGRA).

**Thomas D. Glascock** presented "Key Compliance Points and Disclosure Considerations" at a recent National Business Institute (NBI) seminar.

**Aaron Gershonowitz** was a panelist for a Continuing Legal Education (CLE) seminar titled "Participating in New York's State Environmental Quality Review Act (SEQRA) Process."

## Awards



The Friends of Hempstead Plains organization based at Nassau Community College honored Managing Partner Jeffrey D. Forchelli at their Seventh Annual Prairie Benefit. (LEFT to RIGHT) Top: **Mary E. Mongioi, Esq.**, **Nina McCann, Michael Stromberg, Esq.**, **Gregory S. Lisi, Esq.** and **Susan J. Deith, Esq.** Bottom: **Virginia Kawochka, Kathleen Dickson, Esq.**, **Honoree Jeffrey D. Forchelli, Eli Elbaum, Esq.** and **Warren S. Arthur, Esq.**



The Nassau County Bar Association's Labor and Employment Committee honored **Russell G. Tisman** with the 2012 Distinguished Professional Achievement Recognition award.

## REAL ESTATE/LAND USE & ZONING

**WILLIAM F. BONESSO** secured approvals from the Town of Huntington Zoning Board of Appeals to permit the construction and operation of a new Westy Self-Storage facility in East Northport. Through community outreach to the neighboring property owners and local civic association, Mr. Bonesso gained support for the three story self-storage development project.

**DANIEL P. DEEGAN** and **BRIAN J. HUFNAGEL** overturned the award of a vendor contract by the Levittown Union Free School. The school district awarded the contract for food and snack services to a competitor of the firm's client. The case received coverage in the Long Island Press. After hearing oral argument, Justice Karen V. Murphy (Nassau County Supreme Court) ordered the school district to cancel the award and reissue the request for proposal as demanded by our client Dover Gourmet Corporation

**ANDREA TSOUKALAS** and **WILLIAM F. BONESSO** secured Town of Smithtown approvals for a Bahama Breeze Restaurant in the Smith Haven Mall. The Board of Zoning Appeals granted variances to the Darden family restaurant which provides for both indoor and outdoor dining and live entertainment in the Caribbean-themed eatery.

**RICHARD A. BLUMBERG, DANIELLE TRICOLLA** and **WILLIAM F. BONESSO** were instrumental in protecting Simon Properties right to advertise products and services in the Smith Haven Mall. After being presented with the extensive research and persuasive arguments put forth by our attorneys, the Village of Lake Grove recognized that it could not regulate and prohibit such advertising. Mr. Bonesso then negotiated an agreement with the village going forward to prevent the issue from arising in the future.

**JACK L. LIBERT** and **ELI ELBAUM** successfully defended the Village of Lynbrook in an Article 78 Proceeding challenging a decision of the Village Board of Zoning Appeals claiming that the decision was arbitrary and capricious. Justice Diamond dismissed the petition holding that the board's decision was rational.

**ELI ELBAUM** obtained multiple sign variances from the Town of North Hempstead Board of Zoning Appeals for the Tiffany & Co store located in the Americana Shopping Center in Manhasset.

**ELI ELBAUM** obtained multiple variances enabling an industrial client to convert approximately 7,000 square feet of warehouse space to office space in a 67,000-square-foot building.

**WILLIAM F. BONESSO** secured approvals from the Town of Hempstead for two new restaurants

at the Roosevelt Field Mall. Mr. Bonesso obtained a site plan approval for the newly constructed Seasons 52 restaurant and a waiver of formal site plan approval for The Capital Grille restaurant, which replaced Legal Seafood.

## BANKING AND FINANCE

**JAMES C. RICCA** and **FRANK DAVIS** negotiated and closed \$2.9 Million construction financing for a residential condominium project located in Westhampton Beach, New York.

**JAMES C. RICCA** negotiated and closed a \$31.5 Million mortgage loan representing New York Community Bank for a commercial condominium located in New York County.

**KATHRYN SAMMONS BURNS** litigated a foreclosure action on behalf of an institutional lender where a business loan was secured by residential real property. The Borrower attempted to assert foreclosure defenses applicable to residential mortgage loans, Ms. Sammon Burns however successfully argued that the protections afforded residential loans did not apply to business loans, secured by residential property. The Court struck the Defendants' Answer and Affirmative Defenses.

**JAMES C. RICCA** negotiated and closed a \$2.1 Million mortgage loan secured by a retail shopping center located in Port Washington, New York.

## CORPORATE AND COMMERCIAL

**ANTHONY B. BARTON** represented Midtown Endodontics, P.C., in its purchase and financing of the assets of Endodontic Consulting, P.C.

**ANTHONY B. BARTON** represented Alash Realty, LLC in connection with its refinancing and consolidation of three (3) loan facilities relating to businesses in Queens, Nassau County and Suffolk County, NY.

**ANTHONY B. BARTON** represented Premier Endodontics of Patchogue, PLLC in its purchase and financing of the assets of Suffolk Endodontics, P.C.

## LITIGATION

In a case handled by **ANTHONY V. CURTO** and **DANIELLE B. GATTO**, the New York State Appellate Division, Second Judicial Department, affirmed the decision of the Supreme Court, County of Nassau, granting their client's motion to dismiss a petition seeking dissolution of a corporation. The Appellate Division found that the Petitioner lacked standing to bring the dissolution petition.

In a case handled by **DONALD JAY SCHWARTZ** and **DANIELLE B. GATTO**, the New York State Appellate Division, Second Judicial Department, affirmed the decision of the Supreme Court,

County of Suffolk, granting to their client, Cablevision, summary judgment against the Southampton Car Wash, to prevent its unauthorized use of Cablevision's property. Mr. Schwartz and Ms. Gatto made a motion for summary judgment asking the lower court to grant that relief as a matter of law. The car wash cross-moved for summary judgment claiming that their use of Cablevision's property was legal based upon the law of adverse possession and a prescriptive easement. The Supreme Court, granted Cablevision's motion and denied the car wash's cross-motion and directed that the car wash remove a driveway they had paved on Cablevision's property in addition to other fixtures. The Appellate Division affirmed the lower court's order granting full relief to Cablevision and finding the car wash's adverse possession and prescriptive easement arguments to be without merit.

## TAX CERTIORARI

The Tax Certiorari Department headed by **JOHN V. TERRANA** has continued its successful pursuit of property tax refunds and savings for all types of commercial real estate. Here are some recent results:

- A \$240,000 refund for a co-op complex in Glen Cove;
- A \$200,000 refund for a warehouse in Hauppauge;
- A \$300,000 refund for an apartment complex in Amityville;
- A \$1,700,000 refund/savings settlement for an industrial building in Bethpage

## RECENT APPOINTMENTS

James C. Ricca has been Re-Appointed Chair of the Banking Law Committee of the Queens County Bar Association.

Mary E. Mongioi has been appointed Nassau County Bar Association's Vice Chair of the Real Property Committee.

Thomas D. Glascock has been appointed to the Adults and Children with Learning and Developmental Disabilities (ACLD) Audit Committee.