

Commercial Counsel

HAPPY NEW YEAR

All of us at KMKSC wish all our clients and readers a happy, healthy and prosperous 2008.

Although every New Year brings a new trading period and offers potential for growth and prosperity, we feel that this year success may require particular vigilance on the part of businesses.

THE EARLY BIRD GETS THE WORM

The New Year has dawned amid questions about the vitality of the US and global economies. Key economic indicators suggest that consumer spending may be under pressure. The Department of Commerce reported that new home sales declined 9% in November to a 12 year low, while the National Association of Realtors reported that pending sales of existing homes fell by 2.6% in the same month and the insurance industry cited a 35% rise in defaults on privately insured mortgages. The housing market figures are matched by increases in bankruptcy activity: the American Bankruptcy Institute reported that consumer bankruptcies increased 40% in 2007 to 801,800 filings. Taken together, these indicators seem to raise issues about consumer confidence and the prospects for consumer-led growth in 2008.

The US is not the only country witnessing such trends. The global accounting giant KPMG recently predicted a 19% rise in bankruptcy filings in the United Kingdom during 2008. One of KMKSC's attorneys attending an informal gathering of politicians and business leaders in the UK in December learned that government and industry alike expected 2008 to be a more difficult trading environment than recent years throughout Western Europe. Exports represented over 10% of the US GDP (approx. \$1,757bn per annum) going into 2007, according to the Economist magazine. If true, reduced demand for US exports could exacerbate the business impact of a slowdown in domestic consumer demand.

In a stagnating economy, business failures are more likely, and therefore the critical importance of vigilant and early enforcement of debtors' obligations becomes even more vital: truly "the early bird gets the worm." **Tardy collection efforts risk prior evaporation of debtors' financial assets.** As a law firm founded in the depths of the Great Depression, we have no qualms reminding clients that the mantra of

General Discussion Relating to Business Legal Issues

The information contained herein is not provided as legal advice. Legal advice should be sought as to any factual and legal issue.

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successful revenue collection, "**act early and act vigorously,**" is doubly essential for businesses looking to survive and thrive in the harsher economic environment of today.

SIX KMKSC ATTORNEYS – SUPER LAWYERS AGAIN

For the second year in succession, KMKSC attorneys Steve Kailas, Bob Gegios, Matt Gerdisch, Dave Chartier and Jordan Reich were named Super Lawyers "in the top 5%" of Wisconsin attorneys by *Super Lawyer Magazine*. We salute them for this achievement, as well as Bill Fischer who was named a Rising Star. We also thank our colleagues in the profession and our clients for nominating so high a proportion of our attorneys for such prestigious recognition.

NATURAL GAS REFUND CASES ADVANCE

The federal Ninth Circuit Court of Appeals has issued four significant decisions favorable to companies seeking refunds for natural gas overcharges. Among the potential beneficiaries are Wisconsin companies represented by KMKSC in an antitrust class action commenced by KMKSC last year on behalf of a number of large natural gas users.

The four cases on appeal arise out of the natural gas price spikes that occurred in 2000 and 2001. During that time, gas prices for many companies increased from around \$3 to over \$10 per decatherm.

The federal government investigated the price increase, and determined that traders at U.S. energy companies engaged in price manipulation of indexes, particularly those published in *Inside FERC* and *Gas Daily*. During those years, many companies in Wisconsin had gas contracts linked to those indexes. The government's investigation led to criminal charges against many traders, and over \$4 billion dollars in fines against companies in the natural gas marketing industry. Reportedly, this fine is one of the largest the federal government has ever levied on an industry.

Numerous lawsuits have been commenced in several states relating to this price spike, including the case commenced in Wisconsin by KMKSC last December. KMKSC represents the plaintiffs in the lawsuit, all of which are significant industrial users of natural gas, and the defendants are all major energy

companies or their subsidiaries that marketed natural gas.

The Ninth Circuit decisions released in September address the question of whether the "Filed Rate Doctrine" bars some or all of the plaintiffs' claims for refunds or damages.

Gas marketers in these cases have argued that the doctrine applies in these cases, and bars plaintiffs' claims, because the federal government continues to regulate some gas sales. Gas purchasers in these cases have argued that the doctrine does not apply, because the gas market has been largely deregulated, and because most retail transaction prices for the last decade have been set by market forces.

The Ninth Circuit's decisions in four related cases all reject the gas marketers' arguments and ruled in favor of the commercial gas purchasers. The decisions indicate that the Filed Rate Doctrine does not bar claims based on false reporting of transactions to publishers of price indices. This is significant, because such "false reporting" claims play a key role in these cases, including in the Wisconsin class action case. As a result of the Ninth Circuit decision, KMKSC was able to force the defendants to withdraw a motion for summary judgment that the defendants had made on one of two antitrust claims in the case. While the ultimate resolution of the Wisconsin case may still be far off, these recent decisions are significant positive developments.

If you have questions about the case, or questions about antitrust law, contact Alexander "Sandie" Pendleton (apendleton@kmksc.com, (414) 962-5110).

KMKSC JOINS THE AFN

Pursuing our commitment to resolving critical business issues for clients, we continue to enhance our ability to deliver for our clients. In such a spirit, our Foreclosure Division recently joined the American Legal & Financial Network (AFN), a significant national real estate mortgage foreclosure industry grouping. Our Foreclosure Division also implemented significant new software capabilities to augment management information available to clients. Marie Flannery (mflannery@kmksc.com, (414) 962-5110) is happy to answer any questions regarding our real estate mortgage foreclosure services to lenders.



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LATEST SPEECHES AND PRESENTATIONS BY KMKSC ATTORNEYS

- December 4th, 2007 - "**Helping In-house and Outside Counsel Successfully Navigate Electronic Discovery**" – 31st Annual Corporate Practice Institute Legal Seminar, Presenter and Program Chair, Robert L. Gegios, Milwaukee, Wisconsin.
- December 7, 2007 – "**Evolving Pleading Standards And Their Significance**" The impact of recent US Supreme Court Decisions on federal pleading requirements, Lorman Education Services, Presenter and Program Chair, Robert L. Gegios, Milwaukee, Wisconsin.

You can keep tabs on forthcoming presentations in the Events section of our Website, www.kmksc.com. Many of our presentations are open events designed for business rather than legal audiences.

MOST RECENT PUBLICATIONS BY KMKSC ATTORNEYS

- "**Evolving Pleading Standards After Twombly: A Muddle Within A Mess**," Robert L. Gegios and Stephen D.R. Taylor, Lorman Educational Services, December 2007.
- "**Critical Issues That Keep Corporate Counsel Awake At Night: Electronic Discovery**," Robert L. Gegios and Stephen D.R. Taylor, Corporate Practice Institute, December 2007.
- "**When Your Electronic Information May Become Your Enemy**," Robert L. Gegios and Stephen D. R. Taylor, special supplement to *Creditors' Edge*, January 2008.

If you would like another member of your organization to receive *Commercial Counsel*, or an article, please contact Vicki Miller at (414) 962 5110 or at vmiller@kmksc.com.

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