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## Associate Attorney Susceptible to Suit by Law Firm Partner

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## Court finds homeowner's policy is a policy of vehicle insurance

Brettman countered that the court should follow the reasoning of the court in *Allstate Insurance Co. v. Eggermont*, 535 N.E.2d 1047 (Ill. App. Ct. 1989), where the court held a household exclusion inapplicable under § 143.01(a). Examining a policy and a household exclusion almost identical to Brettman's, the *Eggermont* court held that the policy was indeed one of vehicle insurance because it contained a large number of exceptions to its vehicle exclusion, and thereby provided limited liability vehicle coverage. In addition, the court found that the lawnmower which caused the injury was a vehicle under § 4. Therefore, despite the fact that the policy was entitled a "homeowner's policy," the lawnmower was a vehicle, the policy was one of "vehicle insurance," and the court applied § 143.01(a).

Brettman's homeowner's policy included a

vehicle exclusion and exceptions to the exclusion identical to those in *Eggermont*. Additionally, in both *Eggermont's* and Brettman's policies, the Family Liability Protection coverage section included a definition of an insured person intended for use in connection with coverage of vehicles. The court in the present case agreed with the court in *Eggermont* that the provisions included in Brettman's policy suggested that the policy contemplated coverage of vehicular liability, at least in some circumstances.

The court held that the Allstate homeowner's insurance policy issued to Brettman was a policy of vehicle insurance and applied § 143.01(a), nullifying the household exclusion. Consequently, household exclusions barring insurance coverage for physical or property damages, when the benefits of the coverage "would accrue directly or indirectly to an insured person," are inapplicable under Illinois law, when the policy is also one for vehicle insurance.

## Associate attorney susceptible to suit by law firm partner

by Michael Foster

In *Kramer v. Nowak*, 1995 WL 753857 (D. Pa.), the district court for the Eastern District of Pennsylvania recognized a cause of action for negligence in representing clients, brought by supervising attorneys against subordinate attorneys. Additionally, the court held that dismissal of a contribution claim for attorney malpractice is not required, under the principle of *respondeat superior*, based on determination that the attorney against whom contribution is sought was in fact an employee and not an independent contractor.

### Client unhappy with award

While in his final semester at Rutgers University Law School, Jeffrey Nowak ("Nowak") was hired by attorney Steven Kramer ("Kramer") to work on a large antitrust case, *Lightning Lube, Inc. v. Witco Corp.*, 802 F. Supp. 1180 (D.N.J. 1992), then pending in federal court. Upon admission to the New Jersey bar, Nowak's name was listed as an associate on the Kramer firm's letterhead. For approximately five years, Nowak worked out of Lightning Lube's office in New Jersey, all the while under the

direction of Kramer, from either his New York or Philadelphia office. Nowak prepared and submitted numerous documents on behalf of Kramer for Lightning Lube. Of particular significance was a motion for prejudgment interest in the amount of four million dollars.

Lightning Lube eventually prevailed in its litigation with Witco Corporation but was dissatisfied with the 11.5 million dollar judgment recovered. Lightning Lube filed a malpractice suit against Kramer alleging that his negligent representation resulted in Lightning Lube receiving a significantly smaller judgment than merited by its

claims.

### **Malpractice judgment prompts partner to sue associate**

The malpractice claim resulted in an award of \$440,000 against Kramer. Subsequently, Kramer filed suit against Nowak for contribution asserting that the malpractice judgment was a repercussion of Nowak's conduct while he was an independent contractor for Lightning Lube. Specifically, the conduct complained of was a miscalculation of prejudgment interest. Kramer's complaint also included negligence and breach of contract claims. In response, Nowak moved to dismiss or, alternatively, for summary judgment on the following grounds: (1) Nowak was Kramer's employee and not an independent contractor; as there had been no finding that Nowak and Kramer were joint tortfeasors, the contribution claim should be dismissed; (2) the complaint asserted no duty owed by Nowak to Kramer and, hence, the negligence claim fails; and (3) the breach of contract claim did not specify any contractual provision that Nowak failed to perform.

The court, pursuant to Federal Rule 12(b), construed the motion with respect to all claims, as one for summary judgment in light of its uncertainty as to how the motion had been understood by both sides. As such, the remainder of the opinion was devoted to highlighting the legal principles which governed the court's ultimate resolution of the summary judgment motion. The decision was stayed to allow for submission of supplementary

materials by the respective parties.

### **Associate or independent contractor**

The court did resolve whether Nowak was in Kramer's employ since both parties had treated the motion as seeking summary judgment, not dismissal, with regard to particular issue. In support of his contention regarding Nowak's independent contractor status, Kramer directed the court's attention to the fact that Lightning Lube paid Nowak his salary. Notwithstanding, the court noted that under New Jersey law, it is the control retained by the employer over the other's work which determines whether one is an independent contractor. Nowak was required to fax a daily log of his work to Kramer and submit all drafts to Kramer for approval; was instructed on how to proceed with various assignments; and all documents filed in the Lightning Lube litigation bore Kramer's name only. Additionally, Kramer made the arrangements concerning Nowak's pay and accommodations. The court held that Nowak was not an independent contractor due to the extensive supervision retained by Kramer over Nowak's work. The court pointed out that even Kramer's own letterhead listed Nowak as an associate of the firm. Nevertheless, the court did not believe such a conclusion mandated dismissal of the suit. The court emphasized that the principle of *respondeat superior*, relied upon by Nowak, does not preclude an employer from seeking contribution from an employee; instead it only establishes an

employer's liability with respect to an injured third party.

Turning next to New Jersey's contribution law, N.J.S.A. Sec. 2A:53A-1, and the New Jersey Supreme Court's interpretation of that statute, the district court found that because New Jersey treats a principal and agent as a "single tortfeasor," contribution actions are not allowed between employer and employee unless it can be shown that the employee acted for his own personal gain. Therefore, the court instructed that unless Kramer could produce evidence demonstrating that he and Nowak had proceeded as independent "economic entities" in preparing the prejudgment interest motion, summary judgment would be granted in favor of Nowak with respect to the contribution claim.

### **Nature of the tort**

Kramer alleged that Nowak negligently and "tortiously" prepared the prejudgment interest motion. Although Kramer's complaint failed to articulate what duties Nowak owed and in what fashion those duties were breached, the court construed the negligence claim as encompassing those duties generally owed by agents to their principals. Accordingly, Nowak owed Kramer a duty to perform his obligations with the requisite skill and care common to the profession. In assessing the circumstances when a partner in a law firm may sue an associate for an alleged breach of duty, the court found came across very little precedent to guide its decision.

Recognizing the signifi-

cance of an attorney's primary and uncompromising duty to his or her client, the court cautiously evaluated whether the imposition of other duties is appropriate in this setting. Relying on *Pollack v. Lytle*, 175 Cal. Rptr. 81 (Cal. Ct. App. 1981), the court concluded that public policy considerations do not justify immunizing associate attorneys from suits brought by their employers. The court conceded that associates may face a dilemma if and when their duty to their client conflicts with a corresponding duty to their firm. The court recognized, however, that many professions confront and successfully manage similar conflict of interest problems. Such concern, in the court's view, does not rationalize creating an attorney exception to the general principles of agency law where none exists for other professions.

### Rule 11 Application

Citing the Restatement (Second) of Agency (§ 82-104), the court determined that if Kramer authorized Nowak's conduct in calculating the prejudgment interest at issue, then Nowak was not subject to any resulting liabilities. Kramer claims not to have approved the motion before it was filed, but the court noted that Nowak, as was standard practice between Kramer and Nowak, signed Kramer's name to the motion. Consequently, Kramer's signature, under Federal Rule 11, amounts to a representation that he made a reasonable inquiry as to whether the motion was warranted by both law and fact. The district court stated that it would reject Kramer's argument that he "completely delegated" the preparation of the prejudgment motion to Nowak, unless Kramer produced

sufficient evidence demonstrating that he neither endorsed Nowak's alleged negligence nor could have discovered the miscalculation of the prejudgment interest through reasonable inquiry, as required by Rule 11.

Finally, the court observed that Kramer's breach of contract claim asserted an implied duty on the part of Nowak to exercise ordinary knowledge and skill in the execution of his professional responsibilities. The court found this standard of care to be identical to that at issue in the tort claim, and therefore both claims were equally contingent upon whether Kramer could show that he did not sanction Nowak's alleged negligence and could not have discovered that the prejudgment interest calculation was inaccurate through reasonable inquiry.

## *Ice cream retailer held to be incidental beneficiary of competitor's lease*

by Jennifer L. Schilling

In *MBD Enterprises, Inc. v. American Nat'l Bank of Chicago*, 655 N.E.2d 1061 (Ill. App. Ct. 1995), a yogurt retailer filed a breach of contract claim against the landlord of a shopping center and sought injunctive relief and specific performance against another tenant of the shopping center. The court held that the plaintiff yogurt retailer did not have a cause of action for breach of contract when the defendant landlord leased space to Frosty Putter, a full service restaurant which included yogurt and ice cream on its menu. The court also held that the plaintiff could not obtain injunctive relief or specific performance to invoke the terms of Frosty Putter's lease, which prohib-

ited sale of ice cream and yogurt in its building. The court found that the plaintiffs were merely incidental beneficiaries to Frosty Putter's lease, and, therefore, had no authority to enforce its provisions.

The plaintiff, MBD Enterprises, Inc., which does business as Love That Yogurt, entered into a 10 year lease with American National Bank of Chicago ("defendant landlord") for retail space in the Park Center Shopping Center ("Center"). The plaintiff leased space in Building M of the Center for the purpose of selling yogurt and ice cream. The lease specifications restricted the defendant landlord from leasing other space in the Center to an operation whose "principal business is the