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## Ice Cream Retailer Held to be Incidental Beneficiary of Competitor's Lease

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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

sale of yogurt or ice cream.” In addition, the agreement expressly prohibited the landlord from leasing space to businesses such as Bressler’s, Baskin & Robbins, T.C.B.Y or similar operations.

Two months after the plaintiff executed its lease, the defendant landlord entered into a lease with Frosty Putter for retail space in Building P of the Center. Frosty Putter leased the space to operate an indoor miniature golf and full service restaurant. The terms of Frosty Putter’s lease agreement included a stipulation that “no business whose business is the sale of frozen yogurt shall be allowed in any location other than Building M,” which was the plaintiff’s building. Items available at Frosty Putter’s restaurant included ice cream and yogurt, as well as other items such as chicken, shrimp, lasagna, hamburgers, hot dogs, salads, soup and chili.

The plaintiff brought an action against the defendant landlord for breach of contract and sought an injunction and specific performance against the defendant, Frosty Putter. The trial court denied the plaintiff’s recovery and issued summary judgment in favor of the defendants. On appeal, the plaintiff had two theories of recovery. First, the plaintiff alleged that the exclusive right to sell ice cream and yogurt was designated for Building M under the provisions of its lease, and the defendant landlord breached these terms when it leased space to Frosty Putter, which sold ice cream and yogurt in Building P. Second, the plaintiff contended that the sale of frozen yogurt in Frosty Putter’s building, Building P, violated the stipulations of Frosty Putter’s lease agreement, which prohibited the sale of frozen yogurt in any location other than Building M.

### **Court interprets “principal business” clause**

On the first issue, the court held that the defendant landlord did not breach the lease. In the lease, the defendant landlord agreed only to refrain from leasing to another retailer whose “principal business” was the sale of yogurt or ice cream. Exclusive right to sell such products was not granted in the lease agreement. Rather, the defendants only promised to refrain renting space to businesses like Bressler’s, Baskin & Robbins, T.C.B.Y. or any similar business whose principal business is the sale of ice cream and yogurt

products. Frosty Putter’s operation included an indoor golf course and a full service restaurant, which merely included ice cream and yogurt on the menu among various other items. The court reasoned that Frosty Putter is not in the principal business of selling ice cream and yogurt because only 15% of its business was derived from the sale of these items. The court held that the small percentage of Frosty Putter’s ice cream and yogurt sales did not constitute a principal business operation under the ordinary and commonly accepted meaning of the term, and, therefore, the agreement stipulated in plaintiff’s lease was not violated.

### **Incidental beneficiaries have no rights**

Under the plaintiff’s second theory for recovery, the plaintiff argued that Frosty Putter’s sale of frozen yogurt in Building P directly violated the terms stipulated in Frosty Putter’s lease, which restricted the sale of frozen yogurt to Building M. The plaintiff sought to enjoin the sale and specifically enforce the terms of Frosty Putter’s lease. The plaintiff contended that it had the authority to enforce the provision as a third party beneficiary of Frosty Putter’s lease. The court held that the plaintiff could not enforce the conditions of the lease because it only held the position of an “incidental beneficiary.” Unlike an intended beneficiary, an incidental beneficiary is not intended to receive a benefit from the performance of the agreement, and, therefore, has no rights under a third party beneficiary contract theory. The court found that the plaintiff was merely an incidental beneficiary with no rights under Frosty Putter’s lease and held as a matter of law that the plaintiff could not enforce any provision of that lease.

Therefore, the plaintiff was denied relief on both theories of recovery. The court held that the defendant landlord did not breach the provision of the plaintiff’s lease because it only restricted the renting of space to another business whose principal business was the sale of ice cream or frozen yogurt. Frosty Putter does not engage in the sale of ice cream or yogurt as its principal business, and, therefore, the defendant landlord did not breach the plaintiff’s lease. Further, the plaintiff had no grounds to enforce the conditions of Frosty Putter’s lease because the plaintiff was merely an incidental beneficiary. The court affirmed summary judgment in favor of the defendants.