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### ***A POTPOURRI***

#### **ILLINOIS EMPLOYERS ARE REQUIRED TO COMPLY WITH TERMS OF ORAL, AT-WILL EMPLOYMENT CONTRACTS**

Plaintiff, Dimple Kamboj (“Kamboj”), worked as a chemist in the Indianapolis office of Defendant Eli Lilly and Company (“Lilly”) from April 1999 until October 2003, when she moved to Chicago to take a new position in Lilly's sales force. Kamboj claimed that when she interviewed for the new position, her interviewer and soon-to-be supervisor, Sonia Newman (“Newman”), promised her the title of “senior sales representative” and promised that she would receive a salary increase of two pay grades, full tuition reimbursement for all of her MBA expenses, and relocation expenses.

Kamboj accepted the offer, moved to Chicago, and started the new sales position in October 2003. She was in sales training from October through December 2003, and she did not make her first solo customer calls until January 2004. In February 2004, during a ride-along with Newman, Kamboj first questioned the fact that her pay had not increased from what she had been making in her previous position as a chemist. Newman responded that she could not start Kamboj as a senior sales representative because she had no sales experience; however, Newman also told Kamboj during that conversation that she would “check into it again,” so Kamboj did not pursue the matter herself with Lilly’s human resources department (“HR”).

One month later, during a business review meeting, Kamboj again raised the issue of her job title with Newman, and again Newman told her she was not a senior sales representative because she lacked sales experience. Newman again said she would “check with” HR about Kamboj's concern about not being a senior sales representative. Kamboj never contacted HR herself because Newman always said she would handle it. By April 2004, Kamboj realized that she was not going to receive the title and salary that Newman allegedly promised her. During Kamboj's April performance review, Newman explained that Kamboj would not be eligible for a promotion to senior sales representative for three years. Kamboj considered this the final word on her position and title, but she continued to do her job, reasoning that if she performed well “the rewards would come later.”

In April 2005 Kamboj left her job. She claimed that she had been constructively discharged. She filed suit in Cook County Circuit Court, alleging, among other things, breach of oral contract by Lilly to employ her as a “senior sales representative,” to pay her an increased salary, and to reimburse her for all of her MBA expenses. Kamboj acknowledged that she was an “at-will” employee, meaning she had no fixed term of

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employment, and that, under Illinois law, employment contracts without fixed terms are presumed to be terminable at-will by either party without liability. However, Kamboj claimed that notwithstanding an employment contract is at-will and terminable at any time by either party, it is still a binding contract and the contract's other terms must be upheld.

Lilly denied an oral contract was ever reached. Lilly alternatively argued that even if an oral contract existed, Kamboj accepted its terms by continuing to work for a year after she realized that Lilly was not going to honor those terms. Lilly relied on Illinois case law which held that not only may an employer modify the terms of an at-will employment contract (including compensation terms) as a condition of continuance, but that the employee's continuance under the modified conditions is acceptance of the new terms. Lilly argued that this principle precluded relief entirely.

The court agreed with Kamboj that the absence of a specific term or duration of employment did not defeat her oral contract theory. The court stated that an "at will" contract is significant in that an employer can discharge an employee at any time. Nevertheless, an at-will contract is still a contract with binding terms. Although a plaintiff may not enforce the employment provision of an "at-will" contract, an employee can still demand benefits promised pursuant to an agreement with her employer. The "at-will" portion of the agreement means only that the employer may discharge an employee without a reason at any time. An "at-will" contract is still a contract and its terms are still binding.

Thus, the court agreed that Kamboj could assert a claim for breach of the *other terms or conditions* of her at-will employment contract, even though she would not be able to assert a claim for *termination* of that contract, or for a unilateral modification of that contract past any time of her acceptance of the modification without objection, which the court said was in March or April 2004 when Kamboj became aware that Lilly was not going to fulfill Newman's alleged promises.

The bottom line of this case is important for both employers and employees: promises made by employers to at-will employees who can be terminated at any time and for any reason or no reason at all are still enforceable promises. Our firm represents both employers and employees in employment issues such as these. If you have a question or need legal assistance, please call and ask for our employment practices department.

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**ACCOUNTING FIRM NOT LIABLE TO BANK FOR ERRORS IN AUDIT**

A recent Illinois Federal District Court case considered whether an accounting firm was liable to a bank for errors in its audit of the borrower. The court's holding – that the lender was required to consider the audit report as a whole, including the footnotes – is important to both auditors and lenders.

Brandon Apparel Group, Inc. ("Brandon") was a customer of Johnson Bank ("Bank"). In 1999, Brandon sought to obtain additional funding from the Bank, and it instructed its accountants, George Korbakes & Co., LLP ("Korbakes"), to give the Bank a copy of Brandon's audit report as prepared by Korbakes.

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The audit report contained several errors. One error was the description of a claim in a lawsuit brought by Brandon as a “contra liability” which erroneously inflated Brandon’s assets. Another error was to classify sales made by Brandon’s licensees as sales by Brandon, which made it appear Brandon’s sales were greater than they actually were. In all, the Bank lent more than \$10,000,000 to Brandon, all of which was lost when Brandon went out of business. The Bank sued Korbakes, claiming the errors in the audit contributed to the Bank’s loss. Notwithstanding the errors in the audit report, the Court held the Bank could not recover from the accounting firm.

The Court cited an Illinois statute that protects accountants from liability to third-parties for errors unless the accountants have expressly acknowledged that the third-party may rely on the accountant’s audit report or opinion. The Court continued, however, to expressly point out that the audit report was *not* misleading. The Court cited a footnote accurately disclosed the “contra liability” as a claim in a lawsuit. The Court also concluded the Bank was not entitled to rely on the auditor’s characterization of the claim as an assurance by the auditor that Brandon would win its suit and if so obtain and thereby collect a substantial award. The Court also pointed out that a footnote disclosure identified “the amount of the licensee’s contribution to Brandon’s sales numbers,” thereby making it clear the sales figures included the licensee’s sales.

Based on this analysis, the Court held the Bank “had no right to ignore the footnotes in the report, which together with the numbers in the report gave the reader an accurate picture of Brandon’s financial situation.”

This decision also stands for the proposition that banks cannot rely on an auditor’s opinion unless the opinion specifically authorizes the bank to so rely. Further, this decision underscores that lenders must consider an audit report in its entirety, including the notes to the report. On March 20, 2007, the Illinois Supreme Court, in a case relating to another large accounting firm, similarly held that in order for a non-client plaintiff to prevail in a case against an accountant for negligence, the non-client plaintiff must show that the primary purpose and intent of the accountant-client relationship was to benefit or influence the non-client.

Our practice includes the representation of commercial lenders and borrowers. Please do not hesitate to telephone us if have any questions regarding borrowing or loaning money, or the use or interpretation of financial statements in connection therewith.

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**WHEN MAY A FORMER EMPLOYEE SOLICIT  
HIS FORMER EMPLOYER’S CUSTOMERS?**

The general rule in Illinois is that, in the absence of an express contract, a taking of a customer list, or fraud, a former employee may not properly be enjoined from soliciting his former employer’s customers whom he served during his employment. An Illinois court has stated:

Our free economy is based upon competition. One who works for another cannot be

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compelled to erase from his mind all of the general skills, knowledge, acquaintances and the over-all experience which he acquired during the course of his employment. The success of a person who is engaged in sales depends largely upon his personal friendships and the confidences inherent therein. Absent special circumstances, such persons cannot be prevented from seeking out customers of his former employer when he has entered into a competing business or gone to work for a competitor. If a salesman has agreed to a restrictive covenant in his employment contract, or if he has fraudulently and surreptitiously copied or removed lists of customers from a prior employer or if the names of actual or potential customers are confidential, not subject to memory, are not publicly listed or otherwise readily obtainable, then, under proper circumstances, such salesman might be enjoined from soliciting business from the customers of his prior employer. Absent such circumstances, however, there can be no such prohibition.

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**IRD ADDS INSULT TO (FINANCIAL) INJURY**

Income in respect of a decedent (“IRD”) is taxable income to which a decedent was entitled before his or her death, but which was not actually paid before death. IRD applies to assets where the income is deferred rather than paid out immediately, assets such as IRAs, annuities, and government savings bonds. IRD is taxed to the recipient, and for that reason is referred to as “in respect of” the decedent.

The tax effects of IRD can be onerous. Consider the following example: The decedent has an estate of \$5,000,000, including a \$100,000 IRA. The estate tax allocable to the IRA is \$45,000. The beneficiary of the IRA, who is in a 35% income tax bracket, would pay \$35,000 in income taxes when he or she withdraws the funds from the IRA. The total tax liability on the \$100,000 IRA is \$80,000!

There are a few strategies to help alleviate the effect of IRD rules. First, a decedent should plan his estate so that there is no federal estate tax, or to reduce the amount of potential IRD by lifetime drawdowns of the IRD asset.

Secondly, when the asset generating the IRD is an IRA, the IRA owner should consider exchanging the IRA for a lifetime annuity and using some portion of the annual annuity payment to fund an irrevocable life insurance trust for beneficiaries who will receive their bequest both IRD and estate tax free. Alternatively, the IRA owner could use some portion of the required annual IRA distribution to fund the trust. An IRA beneficiary can also disclaim the IRA in whole or in part in favor of successor beneficiaries in a lower income tax bracket.

Finally, an IRD beneficiary should remember to take the income tax deduction in the amount of the estate tax paid. In the above example, the \$100,000 of IRD income would be reduced by \$45,000 (the amount of the estate tax paid), such that the income is \$55,000, and the tax thereon (at 35%) would be \$19,250. When added to the estate tax paid, the total tax is \$64,250, still a substantial amount of tax.

Potential IRD situations require careful consideration and planning. If you need to review IRD issues or your estate plan in general, please do not hesitate to telephone us.

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## PRESERVING ELECTRONIC INFORMATION IN LITIGATION

On March 6, 2007, the Wall Street Journal reported that Intel Corp. (“Intel”) failed to maintain certain e-mails relevant to Advanced Micro Devices, Inc.’s (“AMD”) antitrust suit against Intel because an automatic purge procedure deleted e-mails on Intel’s computer system every 35 days. While Intel directed certain employees to segregate relevant e-mails so that they would not be purged, not all employees followed such direction.

Intel’s failure to preserve the e-mails could negatively affect the AMD litigation because of the December 1, 2006, amendment to the electronic discovery rules contained in the Federal Rules of Civil Procedure. Under the amendment, Intel’s failure to properly maintain and produce electronic information may result in fines which may range into the tens of millions of dollars and/or a direction to a jury to assume the missing electronic information contains evidence that would be negative to Intel’s case.

In order to ensure compliance with the new electronic discovery rules and thus avoid the harsh consequences of failing to comply with them, businesses must do the following:

- Preserve electronically stored information in the same manner as paper documents.
- Implement an electronic information retention policy (the “Policy”) that sets forth the appropriate storage procedures for electronic information relevant to an emerging legal issue or problem.
- Once litigation is *reasonably anticipated* or *notice* of potential litigation is received, a “litigation hold” should be implemented which should ensure that all electronic information, including electronic information contained in offline storage materials and external electronic information sources such as PDAs and laptop computers, is properly stored and not deleted or destroyed pursuant to a regularly scheduled purge or destruction of electronic records procedure.
- Once a Policy is in place, be sure that all persons subject to the Policy are aware of the same and understand their responsibilities under the Policy. Thereafter, there should be follow-up that confirms that all persons are complying with the Policy, including the litigation hold requirements to maintain all electronic information relevant to possible litigation.
- Once a request for electronic information is received, be sure that all responsive electronic information is located, properly stored, and produced.

By implementing a Policy and training personnel regarding it, a party can help ensure that electronic information is properly maintained in the event litigation occurs at some point in the future. If you have a question about the maintenance of electronic information, please telephone a member of the firm.

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**IMPLIED AND UNSIGNED AGREEMENTS ARE (USUALLY) ENFORCEABLE**

As business and employment relationships become increasingly more complex, a written agreement setting forth the terms of the parties' agreement becomes all the more important. Problems often result when the parties fail to appropriately document their understandings. In such instances, the parties' understandings may only be implied by their discussions, correspondence, or written agreements never executed by the parties. In such cases, the question arises as to whether an enforceable agreement exists. The answer to this question is usually "yes," as the cases discussed below demonstrate.

In *Vandevier v. Mulay Plastics, Inc.*, a sales representative sought to collect unpaid commissions pursuant to an oral agreement. The sales representative claimed he was entitled to a 5% commission on all sales, but was only paid 1%-5% commissions over a seven year period. In determining whether an enforceable contract existed, the court stated, "(w)here the terms of a contract are unclear, or where there is an oral agreement, a meeting of the minds may be inferred from the construction the parties themselves give the contract, as evidenced by their actions." Accordingly, the court refused to enforce the oral contract for a 5% commission asserted by the sales representative because the testimony of the parties demonstrated they each understood the terms of such agreement differently. Thus, the court concluded the lower commission arrangement, evidenced by the acceptance of payments under the lower commission schedule for seven years, was the enforceable contract between the parties.

In *Landers-Scelfo v. Corporate Office Systems, Inc.*, Corporate Office Systems, Inc. ("COS") agreed to pay Theresa Landers-Scelfo ("Scelfo") commissions according to a formula set forth in a letter COS sent to Scelfo when she was hired. Thereafter, COS, and the firm to which COS outsourced its human resource duties, paid Scelfo commissions consistent with the compensation formula until approximately one year prior to her termination. In Scelfo's suit to collect her commissions, the court found an employment agreement can be entirely implicit such as when an entity pays a worker according to a demonstrable formula for work done. Thus, an agreement exists where the parties manifest assent to a transaction by either their words or their actions. Accordingly, the COS letter constituted an enforceable employment agreement because the parties' actions demonstrated their assent to it.

Finally, in *Hedlund and Hanley, LLC v. The Board of Trustees of Community College District No. 508*, the Board of Trustees of Community College District No. 508 (the "District") retained Hedlund and Hanley, LLC ("Hedlund and Hanley"), a law firm, to pursue an accounting malpractice claim (the "Litigation"). Hedlund and Hanley drafted a fee agreement, which provided for a bonus payment upon the successful outcome of the Litigation. Hedlund and Hanley forwarded the fee agreement to the District for execution, but the District never executed it. Accordingly, Hedlund and Hanley was forced to file suit to collect the bonus after obtaining a successful outcome in the Litigation. In holding that Hedlund and Hanley was entitled to the bonus, the court found that Hedlund and Hanley's billing to the District according to the fee schedule set forth in the fee agreement and the District's payment of such fees over a four year period demonstrated the District's assent to the fee agreement. Consequently, the unsigned fee agreement was enforceable.

If you have a question about whether an implied or unsigned agreement is enforceable, please telephone a member of the firm.

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**FIDUCIARIES MUST DIVERSIFY MANAGED ASSETS**

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There was a time when a fiduciary could simply purchase treasury bonds or place assets in a bank savings account – doubtless, safe investments – and be confident that no beneficiary could complain that the assets were unwisely invested. Over the years, however, investment theory has evolved, and courts and legislatures have come to hold fiduciaries to a different standard. Now a fiduciary can be held responsible for damages to a beneficiary for failure to diversify a portfolio or to use investment strategies to protect against concentration in a particular asset.

The Uniform Prudent Investor Act (“UPIA”), which has been enacted in Illinois and many other states, recognizes that under modern investment theory, diversification and managed risk play important roles in asset management, and therefore recognizes the duty of a fiduciary to diversify a portfolio. In one recent case brought under ERISA laws, a fiduciary was found liable for failure to diversify a portfolio because the trustee invested 70% of the portfolio in US treasury bonds. The court ordered the plan trustee to refund its fees, and ordered the payment of damages based on the return a well-diversified portfolio would have achieved.

Further, if a portfolio is concentrated in a particular asset or assets that cannot be sold for one reason or another, hedging strategies should be considered in order to reduce risk. In another case, a plaintiff held \$8,000,000 of a publicly-traded stock in his portfolio, but the stock was subject to restrictions resulting from a merger. The shareholder asked the trustee about hedging the position against the volatility of the stock, but was told it was not possible because of the restrictions. After the stock’s price dropped precipitously, the shareholder sued the trustee. The court awarded the shareholder damages, noting that the trustee could have instituted hedging strategies, such as a “collar,” to limit the downside risk.

The UPIA has several requirements of which fiduciaries must be cognizant, including:

- The fiduciary is required to consider tax consequences of investment decisions and strategies.
- The trustee must exercise reasonable efforts to determine the facts relating to the investment and management of the trust assets.
- Trustees who have special expertise must use it in the management of the assets.
- All fiduciaries have a duty of loyalty, by which they are required to serve the best interests of their beneficiaries. Trustees must seek the most advantageous pricing and terms for administrative services.
- All costs related to the portfolio must be appropriate and reasonable under the circumstances.

Please do not hesitate to call us if you have any questions about a trustee’s obligation to diversify an asset portfolio or fiduciary duties in general.

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From *The Lawyer Joke Book*:

Corrupt businessman's telegram:  
RESULTS OF MY CASE?

Attorney's response:  
JUSTICE HAS TRIUMPHED!

Businessman's telegram:  
APPEAL IMMEDIATELY

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Mrs. Pelegriano needed a lawyer and began flipping through the Yellow Pages. Finally she came across Schwartz, Schwartz, Schwartz, and Schwartz. She dialed the number and said, "Good morning, is Mr. Schwartz there?"

A man replied, "No, ma'am, he's out playing golf."

"Well, then, I'll speak to Mr. Schwartz."

"Sorry, ma'am, he's not with the firm anymore; he's retired."

"Very well, let me speak to Mr. Schwartz, please."

"He's away in Detroit, ma'am, won't be back for a month."

"Ah, I see. May I speak to Mr. Schwartz, in that case?"

"Speaking."

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Two little girls were having a heated argument.

Said Mindy, "My dad's better. He's an important carpenter. He makes buildings."

Replied Carol, "Oh, yeah? Well, my dad's a lawyer. He makes loopholes."

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