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The Right to Control: Extending Maine's Traditional Vicarious Liability Rules to the Franchisor-Franchisee Relationship

BY KRISTINA M. BALBO

A franchisor's goals are simple: expand its business by licensing its trademark, trade name, or brand to franchisees while ensuring that its intellectual property maintains its value and integrity. It could, however, get more than it bargained for if it is held vicariously liable for the acts or omissions of its franchisees.

Vicarious liability, also called *respondeat superior*, is liability that a supervisory party, often an employer, incurs for the tortious conduct of a subordinate or employee. In order to impose vicarious liability upon a party, the existence of an employer-employee relationship typically must be shown. Where the subordinate party is deemed to be an independent contractor instead of an employee, the employer is generally shielded from liability for the subordinate's acts. For this reason, determining the nature of the relationship between the supervisor and his subordinates is crucial in establishing or disproving the existence of vicarious liability.

Maine courts have enumerated a list of eight factors to be considered and weighed in order to determine whether or not an independent contractor relationship exists. These factors, originally articulated in *Murray's Case*, 130 Me. 181, 186, 154 A. 352, 354 (1931), are

1. The existence of a contract for the performance by a person of a certain piece or kind of work at a fixed price;
2. Independent nature of the business or his distinct calling;
3. His employment of assistants with the right to supervise their activities;
4. His obligation to furnish necessary tools, supplies, and materials;
5. His right to control the progress of the work except as to final results;
6. The time for which the workman is employed;
7. The method of payment, whether by time or by job;
8. Whether the work is part of the regular business of the employer.

Of these factors, the most important is the "right to control." Although this "right to control" test is fairly straightforward in the typical employer-employee situation, the franchisor-franchisee relationship can throw a wrench in the works. The reason for this stems from the inherent nature of the franchise.

A franchisor's chief asset it offers to the franchisee is its trademark, the regulation of which is largely controlled by the Lanham Act. When a

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franchisor seeks to expand its business and license its trademark, the Lanham Act places an affirmative duty upon it to take reasonable measures to detect and prevent deceptive uses of its mark by its licensees. A franchisor who fails to adequately protect its mark runs the risk of having the federal registration of its trademark cancelled, rendering the intellectual property worthless. With this in mind, a franchisor must retain certain control when licensing its mark to a franchisee in order preserve the value of its trademark. This puts a franchisor in the delicate position of trying to exercise sufficient control over the franchisee to protect its trademark while at the same time ensuring that that degree of control will not render it vicariously liable for the actionable conduct of its franchisees.

The recent case of *Rainey v Langen*, 2010 ME 56, presented the Law Court for the first time with the issue of vicarious liability in the franchisor-franchisee context. TDBO, Inc. was an independent company and franchisee of Domino's Pizza, LLC. On July 25, 2004, plaintiff Paul Rainey was seriously injured when a car being driven by TDBO's pizza deliverer, Edward Langen, collided with Mr. Rainey's motorcycle. Rainey sued not only Mr. Langen and TDBO, but also sought to bring in Domino's on, *inter alia*, a theory of vicarious liability. Domino's Pizza won on summary judgment as to this issue at the Superior Court level, and the Law Court affirmed.

Although the Law Court upheld summary judgment for Domino's, it did not agree with the means by which the Superior Court had reached its decision. The Superior Court had couched the critical question as being whether the plaintiff would be able to show that Domino's had the right to control Langen himself. The Law Court explained that the correct inquiry was whether Domino's controlled TDBO. To the extent Domino's would be found vicariously liable for the acts of TDBO, it would necessarily also be held vicariously liable for the acts of TDBO's subagents, or employees, a situation referred to as "double vicarious liability."

The Law Court reviewed both its own general vicarious liability law and the franchisor-franchisee law in other jurisdictions in reaching its decision. One test the Law Court considered and rejected was the "instrumentality rule" that has been adopted by courts in states such as Kentucky, New Hampshire, Wisconsin, and New York. The instrumentality rule is narrower than the right to control test, and provides that a franchisor will only be held liable for the acts or omissions of its franchisee if it has control of or the right to control the daily operation of the specific aspect of the franchisee's business that is alleged to have caused the harm to a third party. Under this rule, then, a franchisor who has generally exerted control over the daily operations of its franchisee could nonetheless avoid vicarious liability if it has not exerted control in the specific area of the business from which the harm arose.

Instead, the Law Court adopted the traditional "right to control test." Although the Court acknowledged the concerns with control of trademarks, it determined that the "control" inquiries vis à vis vicarious liability and the Lanham Act were distinct. Trademark protection entails control of the end product, much like an employer who controls the final results, but not the methods, of an independent contractor. Because a franchisor need not control the day to day activities of its franchisee in order to regulate the uniformity and standardization of its products and services, a franchisor who does seek such control cannot hide behind its duties under the Lanham Act to insulate it from vicarious liability. Although the Law Court fell short of ruling that a franchisor who takes any measures of control beyond what is necessary for the protection of its trademark will necessarily incur vicarious liability, the implication is that a franchisor takes such steps at its own peril.

Although the Law Court may not have adopted the narrower instrumentality rule, the method in which the Court analyzed the underlying facts in *Rainey v. Langen* suggests that the Court is nonetheless very reluctant to impose vicarious liability upon franchisors for the acts of their franchisees. Indeed, what is interesting about this case is not so much the rule the Law Court has adopted, but rather the way in which it has applied it.

The Plaintiff presented the following facts to prove that Domino's Pizza retained sufficient control of

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is published quarterly to inform you of recent developments in the law, particularly Maine law, and to address current topics of discussion in your daily business. These articles should not be construed as legal advice for a specific case. If you wish a copy of a court decision or statute mentioned in this issue, please e-mail, write or telephone us.

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TDBO to justify finding it vicariously liable:

1. Domino's provided its franchisees with the Manager's Reference Guide, a manual in excess of 750 pages, setting forth detailed guidelines for virtually every aspect of a store's operation;
2. The manual contained mandatory standards for delivery drivers, including requirements from minimum driver age to the use of mobile phones and radar and leaving keys in unoccupied vehicles;
3. All drivers were required to be trained and tested in accordance with a Domino's "Safe Delivery Program";
4. The manual provided for annual inspections by Domino's Franchise Regional Manual of these requirements, and prescribes serious sanctions for failing to meet the driving standards;
5. The franchise agreement provided that Domino's retained the right to terminate the franchisor-franchisee relationship if the franchisee failed to comply with either provisions in the franchise agreement or any other specification, standard or operating procedure if the franchisee failed to correct the failure within 30 days' after delivery of written notice.

The Law Court remained unpersuaded, and ruled as a matter of law that the quality control requirements and minimum operational standards, though numerous, fell short of reserving control over TDBO's day to day operations.

Interestingly, other jurisdictions that have ostensibly adopted the same rule as Maine would likely have found that the plaintiff in this case had at least created a sufficient factual dispute to avoid summary judgment. In *Parker v.Domino's Pizza, Inc.*, 629 So.2d 1026 (Ct.App.Fla. 1994), the Florida District Court of Appeal presented with nearly identical facts as those in Rainey reached the opposite conclusion. It described the Domino's manual as a "veritable bible for overseeing a Domino's operation" and that the Court would not rule as a matter of law that Domino's did not retain the right to control the means to be used by its franchisees to accomplish the required tasks. Id. at 1029.

Based on the *Rainey* decision, a franchisor who follows the traditional franchisor-franchisee model will be unlikely to incur vicarious liability for the acts of its franchisees. A franchisor may wish to consider the following:

1. The Franchise Agreement. This document is critical in outlining the relationship the franchisor and franchisee intend to have. A franchisor should explicitly state that the franchisee is an independent contractor, and that the franchisor will not be liable for a franchisee's acts. Although such language will not be conclusive, it is relevant evidence of a franchisor's intent to avoid vicarious liability, and evidence that the *Rainey* Court appeared to have taken very seriously.
2. A franchisor who wishes to provide its franchisees with detailed, comprehensive operational manuals should:
   a. Describe items as "informational" rather than "mandatory" where appropriate; and
   b. Declare any mandatory guidelines to be for the purpose of trademark protection.
3. A franchisor may retain the right to inspect the franchisee's business so long as the inspections do not constitute control into day-to-day operations. □

Kevin M. Gillis to Manage Statewide Employer Workers' Compensation Organizations

Attorney Kevin M. Gillis of NHD has become executive director or administrator of three statewide organizations comprised of employers and insurers. Those organizations are the Maine Workers' Compensation Coordinating Council, the Maine Council of Self-Insurers, and the Maine Self-Insurance Guarantee Association.

The Workers' Compensation Coordinating Council is an umbrella group of employers, insurers, self-insurance groups, and third-party administrators. The organization provides information to the employer/insurer community on developments in the area of workers' compensation which arise in the Legislature and before the Workers' Compensation Board, and with respect to decisions issued by hearing officers and by the Maine Supreme Court. The Coordinating Council represents the interests of its membership before the Workers' Compensation Board and the Legislature, and occasionally in litigation. Kevin will serve as Executive Director of the Coordinating Council, and his responsibilities will include regular attendance at Workers' Compensation Board meetings and at legislative sessions involving workers' compensation. Given recent political developments in the State, 2011 could prove to be a particularly interesting year in this area.

The Maine Council of Self-Insurers is an organization comprised of individual and group self-insurers. The Council represents the interests of its members on workers' compensation issues from the perspective of the self-insurance community, and on issues concerning the administration and regulation of individual and group self-insurance in the State. Kevin will serve as the Executive Director of the Council of Self-Insurers.

The Maine Self-Insurance Guarantee Association is an entity created by statute, of which all individual and group-self-insurers are members. The Association provides funding for payment of the claims of insolvent self-insurers, manages those claims through a third-party administrator, and manages funds provided through assessment of the self-insurance community. Kevin is serving as Administrator of the Self-Insurance Guarantee Association.

KEVIN M GILLIS

Kevin brings more than 30 years of experience in the field of workers' compensation to these positions, which includes involvement over several years in public policy developments involving the workers' compensation system. In addition to his new duties, Kevin will continue to provide service to NHD's clients on workers' compensation matters. □

New Executive Director for Workers' Compensation Board Nominated

Attorney Paul H. Sighinolfi of the Bangor firm Rudman & Winchell has been appointed by Governor LePage to serve as the new Executive Director the Workers' Compensation Board, following the retirement of Paul Dionne. Sighinolfi, 62, has been in practice since 1981 with a primary focus in workers' compensation defense. He has served as a member of the Board of Overseers of the Bar and is a trustee of the Lawyers' Fund for Client Protection. Together with Kevin Gillis and Steve Moriarty, he is a co-author of the "Maine Employer's Guide: Workers' Compensation". It is anticipated that a legislative confirmation hearing will be held at some point in February.

Paul has been confirmed by the legislative committee having jurisdiction over the Board, and is awaiting confirmation by the full Senate. □

Workers' Compensation – Law Court Decisions

BY STEPHEN W. MORIARTY

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Challenge to 14 day rule

Employers and insurers are all too familiar with the so-called "fourteen-day rule" set forth in Chapter 1 of the WCB Rules, which requires payment of benefits for total capacity in the event of a late Notice of Controversy. Although the statute itself does not require a NOC and does not mandate such a rigid penalty, the authority of the Board to adopt the Rule was upheld by the Law Court in *Bridgeman v. S. D. Warren Co.*, 2005 ME 38, 872 A.2d 961.

The Court has now accepted a case on appeal which raises a challenge to the fourteen-day rule. In *Doucette v. Hallsmith/Sysco Food Services, Inc.*, 2010 ME 138 (December 23, 2010), the presiding hearing officer had awarded total incapacity benefits for a period exceeding five years based upon a NOC which was recorded one day late due to a technical difficulty with electronic filing. The employer immediately filed a Notice of Appeal with the Court together with a Motion to Stay Enforcement of the Board's Decree on the grounds that the award was erroneous and unjust and constituted a windfall recovery to the employee. The employer also asked the Court to order that the proceeds be placed in escrow pending final decision on the appeal.

The Court ruled (undoubtedly correctly) that it had no authority under the statute to stay the decision of the Board, and that it similarly had no authority to create a remedy to protect the employer's funds if an appeal were successful. To its credit the Court recognized "the urgency of the issue presented for appeal" and in a highly unusual move treated the Motion to Stay as if it was a Petition for Appellate Review. The Court then immediately granted the Petition for Appellate Review, even though the employee had never been given an opportunity to file the customary response, and established an expedited briefing schedule and fixed February 9, 2011 as the date for oral argument.

It is possible that the Court will either modify or reverse *Bridgeman*, but as always it is impossible to forecast the outcome with any reliability. At the very least, however, the Court will have another opportunity to examine the unanticipated consequences of the strict application of the penalty provisions of the fourteen-day rule.

Third party lien

Section 107 of the Act provides that there shall be a lien upon the proceeds of a recovery obtained against a third party responsible for an occupational injury sustained by an employee. Such a recovery, whether by verdict or settlement agreement, frequently is in excess of the amount of workers' compensation benefits paid to date. In such cases an employer has a continuing lien against excess proceeds from the third party, but the Court has held in *McKeeman v. Cianbro Corp.*, 2002 ME 144, 804 A.2d 406 that the amount of the future lien must be reduced by an employer's proportionate share of the fees and costs of collection. While the Court indicated that the proportionate share of fees and costs should be based upon the extent of future liability relieved by the lien, it recognized the obvious reality that it may be difficult in some circumstances to determine the amount of the future benefit. The *McKeeman* Court did not suggest any method by which the costs for the lien holiday could be calculated.

Of course, the primary problem is the fact that the statute itself is silent upon the lien holiday and the method by which the costs of collection may be calculated. The extraordinary complexity of this issue is illustrated in the Court's recent decision in *Construction Services Workers' Compensation Group Self Insurance Trust v. Stevens*, 2010 ME 108, 8 A.3d 688. In that case the employee settled a third party claim substantially in excess of the compensation benefits paid to date, and the trust responsible for payment of the workers' compensation benefits filed suit in Superior Court seeking a determination of its rights for benefits previously paid as well as a finding that it would not be responsible for payment of fees for future costs of collection until additional benefits became due. The procedural history of the case is unusually complex, and is beyond the scope of this article. Briefly, the Court ruled that the Superior Court did not have sufficient evidence in the absence of a decision from the Board to rule upon the employee's future entitlement to benefits. The Court's analysis was strained, and it did not suggest how either the Board or the Superior Court could in a subsequent proceeding determine the extent of future entitlement to benefits. Nevertheless, the matter was remanded to the lower court for further proceedings.

Although the decision of the Court was unanimous, Justice Jabar wrote a concurring opinion in which his clear grasp of the complex issue was plainly apparent. He initially observed that the Trust was entitled to immediate repayment for benefits paid to date, less the costs of collection, and faulted the Superior Court for not having so ordered. More importantly, he recognized the inherent impossibility of determining future workers' compensation entitlement due to the fluctuating nature of incapacity over the course of an employee's lifetime. He recognized that this difficulty could be overcome by providing for payment of costs and fees for the lien holiday as benefits actually became due. Justice Jabar endorsed this approach, known by the Latin phrase "*pari passu*", and would have allowed the Trust "to pay its proportionate share of the costs and attorney fees attributable to its relief from payment of future benefits as those benefits accrue".

Since the Court's decision, the Employee has filed a petition with the Board to seek a determination of the extent of future benefits relieved by the lien holiday, and the underlying lawsuit remains pending in Superior Court. It remains to be seen whether the Superior Court will await the outcome of the Board proceeding or whether it will proceed forward with its own analysis in accordance with the remand order.

Going and coming: travel to litigation events

In accordance with the well-established "going and coming rule", the Court has consistently held that injuries sustained while commuting to and from work are not compensable. Various exceptions to the rule have been recognized, one of which is for injuries sustained while traveling to a medical appointment to obtain treatment as the result of an occupational injury. See, *Moreau v. Zayre Corp.*, 208 A.2d 1289 (Me. 1979). In a recent claim the Court had an opportunity to consider whether an injury sustained in an automobile accident while en route to a scheduled mediation conference was compensable.

In *Feiereisen v. Newpage Corp.*, 2010 ME 98, 5 A.3d 669, the claimant had sustained several injuries for the employer, including a gradual back injury while working in a light duty position. A mediation conference was scheduled in connection with all claimed injuries, and the employee was injured in an accident while on his way to the conference. The employee filed a Petition for Award alleging the automobile accident as an additional occupational injury. The presiding hearing officer denied the Petition, and in a 5 – 2 decision the Court denied the employee's appeal.

The majority reasoned that even though attendance at the mediation conference was mandatory, it was nevertheless not "reciprocal to any employer action or obligation". The Court cited its earlier opinion in *Dorey v. Forster Manufacturing Company*, 591 A.2d 240 (Me. 1991), in which benefits were denied to a claimant who was injured while on employment premises retrieving documents related to an earlier workers' compensation claim. In affirming the decision of the Board, the majority broadly held that "injuries occurring during attendance at dispute resolution events are not compensable in a workers' compensation scheme". The Court's rationale is obviously broad enough to cover formal hearings as well as mediations.

The two dissenting justices noted that *Dorey* was decided before the adoption of the Workers' Compensation Act of 1992 and the introduction of mandatory mediation as part of the dispute resolution process. Observing that participation in mediation was required of both parties to a claim, the dissenters wrote that such attendance was inherent in the contract of employment and that another exception should have been recognized to the going and coming rule for attending proceedings before the Board. □

Farthing Decision Further "Clarifies" UM Offset Issue

By James D. Poliquin

In the Fall 2010 Newsletter, I reported on the recent decision in *Tibbetts v. Dairyland Ins. Co.* regarding various UM offset and allocation issues. That article noted that the then pending case of *Farthing v. Allstate Ins. Co.* involved the issue of whether contract language addressing offset was relevant to the determination of what offset an insurer may be entitled to take.

The recent decision in *Tibbetts* contained language that suggested that an offset against policy limits rather than a claimant's total damages was mandated by statute even if the insurance policy language addressing offset provided an insured with a greater benefit in cases where total damages exceeded all available coverages. Based on the generally accepted principle that an insurer can provide greater benefits to an insured than those benefits minimally required by statute, I predicted that the court would enforce unambiguous contractual language that allowed the insurer to take an offset only against total damages rather than against lower policy limits. I was wrong. Apparently, at least in this area, insurers can contractually promise whatever they want and it makes no difference.

Farthing was injured in a motor vehicle accident resulting in total damages exceeding $125,000. The tortfeasor's liability coverage of $100,000 was split into five equal shares, with Farthing receiving $20,000. Farthing had UM coverage with Allstate with a $100,000 per person limit. Allstate paid $80,000 in UM coverage representing the $100,000 policy limit less the $20,000 actually received from the liability insurer. Farthing contended that Allstate should not have taken the $20,000 offset against policy limits because the Allstate policy language only provided for an offset against total damages. Since total damages exceeded $125,000, a $20,000 offset against total damages would have exposed the full UM limit of $100,000.

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The Law Court declined to address the meaning of the Allstate policy language, holding that the language made no difference because Maine's UM statute required an offset against policy limits in this situation. As I indicated in the *Tibbetts* article, "A decision prohibiting insurers from providing more lenient offsets than they could claim by statute would be very unusual in this area of the law."

The *Farthing* decision is perplexing on several fronts. First, the *Farthing* case specifically implicated § 2902(6) regarding multiple claimants depleting liability coverage that otherwise is equal to or greater than the amount of UM coverage. Since there were multiple claimants, the tortfeasor would be viewed as underinsured because Farthing received only $20,000 of the liability coverage, an amount less than Farthing's UM coverage limit. Section 2902(6) expressly authorizes a reduction in UM coverage limits by the amount received from the tortfeasor plus any unexpended liability insurance proceeds. Significantly, § 2902(6) ends with the following sentence: "This subsection does not prohibit an insurer from providing greater amounts of underinsured vehicle coverage than are required under this section." Inexplicably, neither § 2902(6) nor this sentence are even mentioned in the Law Court opinion specifically addressing the very issue of whether an insurer can contractually provide a greater benefit via offset to the insured than is otherwise allowed by statute.

In support of its decision, the Law Court recited the general principle that the objective of Maine's UM statute is to place injured persons in the same position they would be in if the tortfeasor had liability coverage equal to or greater than that person's UM coverage. The Law Court labels this equivalency the "goal" of the UM statute, observing that any result that gives an injured party a "greater recovery" would be "directly contrary" to this "goal." This goal apparently transcends in importance the goal of enforcing unambiguous contractual promises made by insurers to insureds. Although the Allstate contract language ultimately may have been interpreted as authorizing an offset against policy limits in any event, the Court's decision in *Farthing* authorizes insurers to ignore unambiguous contractual promises to refrain from taking an offset unless and until an insured obtains full recovery. In other words, even unambiguous offset language precluding an offset except as necessary to avoid double recovery or "duplicate payment" apparently can be ignored under the authority of the *Farthing* decision.

As noted above, the Law Court reaches this result in *Farthing* without any citation to the language in § 2902(6) explicitly addressing the issue and without any reference, casual or otherwise, to the generally accepted principle that statutes of this nature regulating insurance establish minimum requirements with insurers free to provide greater protections or benefits unless doing so actually violated public policy., e.g. an insurable interest limitation The Law Court in *Farthing* conflates the concept of a statutory "goal" with the entirely different issue of whether an insurer voluntarily surpassing that "goal" somehow violates public policy.

Most insurers with language allowing an offset only to the extent necessary to avoid "duplicate payment" have applied the offset against a claimant's total damages and not policy limits when total damages exceed all available insurance. There is no question that was the intent of ISO when the "duplicate payment" language replaced the older "amount paid" language. Under the authority of *Farthing*, insurers apparently now can ignore their contractual language with respect to the UM offset issue and take that offset against policy limits even if doing so leaves the insured less than fully compensated. Despite this unusual decision, insurers should not assume that in other contexts contractual language that provides an insured with more rights or greater benefits than otherwise required by statute will not be enforced. □

Tax Relief Act of 2010 Provides Significant Federal Estate Tax Relief

By Kathryn M. Longley-Leahy

The Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act of 2010 (known as "the Tax Relief Act of 2010"), passed by Congress and signed into law by President Obama on December 17, 2010, provides U. S. taxpayers (and their estate planning attorneys) with long awaited estate tax planning guidance by finally articulating what the gift and estate tax laws will be, at least for the next two years. In contrast to the federal estate tax planning uncertainty that has handicapped estate planning efforts for the past several years, and causing estate plans to include planning provisions to address a wide range of legislative possibilities including the elimination of the federal estate tax as of January 1, 2010, the possible return of pre-2001 estate tax legislation that was, without Congressional legislation, to become effective on January 1, 2011, and the rumored, and potentially retroactive, Congressional enactment of a new estate tax legislation, the constitutional basis of which would likely face further challenge, the Tax Relief Act of 2010 provides both tax planning certainty and tax relief for the next two years.

As a brief background, the Economic Growth and Tax Relief Reconciliation Act (EGTRRA) passed by Congress in 2001 gradually phased out the federal estate tax to its complete elimination as of January 1, 2010.

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Congressional regulations, however, required that EGTRRA, as legislation impacting federal revenue, be revisited by Congress within ten years of its 2001 enactment. If not revisited by Congress within the ten year period, EGTRRA would "sunset" as of December 31, 2010 and the federal estate tax laws in effect prior to 2001 would be reinstated with gusto as of January 1, 2011. A return to the pre-2001 estate tax legislation would have resulted in the federal estate exclusion amount dropping to $1.0 million, down from $3.5 million in 2009, while the top estate tax rate would have increased to the pre-2001 high of 55%. Congress, over a year ago, vowed to "fix" the federal estate tax by enacting new estate tax legislation, perhaps making it retroactive back to January 1, 2010, which may or may not have survived constitutional challenge; however, it was in the final days of the past Congress, days before the sun-setting of the 2001 EGTRRA and hours before Congress began its holiday recess, that the new federal estate tax legislation was passed. While a comprehensive review of the Tax Act of 2010 is beyond the scope (and space) of this article, several key estate tax provisions set forth in the new law are worth mentioning.

The major estate tax change enacted by the 2010 Tax Relief Act is the increase in the federal estate tax basic exclusion amount (the "BEA") to $5.0 million, meaning that the estate of any U.S. taxpayer who becomes deceased between 2010 and 2012 with assets valued at less than $5.0 million will, generally speaking, not be subject to *federal* estate tax. Tied to the increased federal exclusion amount is the reunification of the gift and estate tax laws that now allow each taxpayer the opportunity to gift up to the full amount of the $5.0 million federal exclusion during lifetime, without incurring either a federal gift or estate tax on the transfer of assets.

A second major change introduced by the 2010 Tax Relief Act is the concept of the 'portability" of a deceased spouse's unused basic exclusion amount. As in the past, assets passing directly from one spouse to another spouse - by gift during lifetime or upon death of the first spouse - do not result in a gift or estate tax liability due to the unlimited marital deduction available to spouses; however, the Tax Relief Act of 2010 introduces for the first time the "Deceased Spousal Unused Exclusion Amount", or "DSUEA" (pronounced "*deesooay*"). DSUEA allows "portability" of the unused basic exclusion amount between spouses such that the estate of the second deceased spouse is permitted to take advantage of the federal exclusion amount that was not "used" by the estate of the first deceased spouse. This dramatic change enables spouses together to transfer up to $10 million tax-free. As an example of how the DSUEA concept works, consider the following example: If spouse #1 becomes deceased and spouse #1's "taxable" estate is $2.0 million, spouse #1's unused federal estate tax exemption is $3.0 million ($5.0 million basic exclusion amount available, less the $2.0 million basic exclusion amount used, or $3.0 million). The $3.0 million DSUEA can be added to the $5.0 federal basic exclusion amount available to the estate of the spouse #2 upon spouse #2's death. Using the prior example, upon the death of spouse #2, spouse #2's federal exclusion amount becomes the basic $5.0 million + the additional $3.0 million DSUEA, or $8.0 million. Note that the DSUEA in only available for gifts made or decedents who become deceased on or after January 1, 2011, and is scheduled to expire on December 31, 2012. Like any tax legislation, the portability concept has both planning possibilities and pitfalls for the unwary. For the DSUEA to be available, the personal representative for the deceased spouse must (a) file a timely estate tax return; (b) computing the DSUEA on the return; and (c) make an irrevocable election allowing the DSUEA to be used. The Technical Explanation issued by the Joint Committee on Taxation appears to limit the use of the DSUEA to that of "the last deceased spouse's DSUEA" for those who survive more than one deceased spouse.

Despite the new "portability" of the federal unused exclusion amount, Maine taxpayers must keep in mind when reviewing their estate plan that the State of Maine, like 20 other states, still has its own estate tax that imposes a tax on Maine estates exceeding $1 million that pass to a non-spouse. Currently, Maine does not allow for the portability of the first spouse's unused exemption amount, and the adoption is the portability concept by the State of Maine is not likely. Accordingly, Maine residents may still want to consider the use of a 'bypass' or 'credit shelter' trusts that is funded with the assets of the first deceased spouse for the lifetime benefit of the surviving spouse. Such an approach has the advantage of allowing each spouse to fully shelter up to $1.0 million each, or $2.0 million together, against Maine estate taxation. For those married Maine residents whose estates exceed the $5.0 million federal exclusion amount, consideration should be given to creating an estate plan that fully utilizes up to the full $5.0 million federal exclusion amount while deferring any Maine estate tax until the death of the surviving spouse. The Maine legislature has not addressed whether Maine will allow the first deceased spouse to fully utilize the benefits of the increased federal exemption while simultaneously deferring the payment of any Maine estate tax until the death of the surviving spouse by funding a "gap trust" (also known as the "Maine QTIP Trust") for the sole benefit of the surviving spouse during his/her remaining lifetime. The "gap" refers to the difference between the $5.0 million federal exclusion amount available in 2011 and the $1.0 million Maine exclusion amount currently in effect. In 2009 and 2010, Maine limited the maximum value of the "gap trust" to $2.5 million, a level that is likely to continue in 2011. The use of a testamentary trust has the advantage of sheltering the appreciation of assets against inclusion in the estate of a surviving spouse, and could also be helpful in situations where a taxpayer wants to protect or benefit children from a previous marriage, or provide for a special needs child through a supplemental needs trust or protect assets from creditors.

While the Tax Relief Act of 2010 is retroactive to January 1, 2010, the new law gives the estate of a 2010 decedent an option of (1) automatically becoming subject to the retroactive federal estate tax law with the $5 exclusion amount AND the 'step-up' in basis of the estate's assets as of the decedent's date of death, or (2) electing out of the "automatic" application of the new estate tax law and, instead, be subject to the pre-2010 Tax Relief Act estate tax (i.e. no federal estate tax, but with appreciated assets "owned by the decedent" as of the date of death receiving a only a modified carryover basis ($1.3 million for non-spousal beneficiaries and $3 million for spousal beneficiaries). While estates of taxpayers who became deceased in 2010 before the new estate tax legislation was enacted had the benefit of the elimination of the federal estate tax for 2010, such estates also carried the burden of the elimination, with certain exceptions, of the 'step up' in tax basis for income tax purposes to which pre-2010 estates had been entitled. As an example, if taxpayer X purchased an asset in 2000 for $100, and that asset increased in value to $500 as of the taxpayer's death in 2010, the estate's basis in the asset would be the taxpayer's "carry-over" basis of $100, rather than the 'step-up' basis as of the date of death of $500. The Tax Relief Act of 2010 allows the estates of taxpayers who became deceased in the 2010 estate tax transition year to choose how the estate is to be taxed for federal estate tax purposes, and how the basis in its assets are to be calculated.. While the choice is clear for estates under $5 million not to elect out of the first road and to "pay estate tax," considerable analysis may need to be done to decide which road to choose for the lowest overall tax consequences for estates above $5 million.

Unless a personal representative elects not to have the federal estate tax apply, the federal estate tax return (IRS Form 706) must be filed by the later of: (a) nine months after the date of death; or (b) nine months after the December 17, 2010 date of the enactment of the Tax Relief Act of 2010 - which is September 17, 2011. Since September 17, 2011 falls on a Saturday, taxpayers will likely have until Monday, September 18, 2011 to file the federal estate tax return. It is worth noting that Maine Revenue Services has not yet ruled on whether it will allow an automatic extension of the Maine estate tax filing deadline which is currently nine-month after the decedent's date of death; however, preliminary discussions with Maine Revenue Services representatives suggest that an extension will be permitted upon written request that includes a reasonable basis for seeking an extension for the filing of Maine's estate tax return.

Estate planning is necessarily done on a long-term, often life-long, basis. While many persons are not affected by estate, gift, and generation skipping transfer taxes, for those taxpayers who are subject to either the Maine or the federal estate tax, or have a Will, trust and/or estate plan that was written and signed with reference to the former federal estate tax legislation, a current review of estate planning documents is essential. Estate planning documents that are especially impacted include those containing trust funding formulas, definitions, and other features which may not work satisfactorily, if at all, given the changes in the federal estate tax, at least for the next two years. □

Internal Revenue Service Issues Proposed Amendments to the "Rewards and Awards" Payable to Persons Providing Information on Violations of Tax Laws

By Kelly M. Hoffman

KELLY M. HOFFMAN

On January 18, 2011, the Internal Revenue Service (IRS) and the Treasury Department issued proposed amendments to the Internal Revenue Code's Regulation Section 301.7623-1, which discusses the payment of awards and rewards for information relating to violations of tax laws.

Currently, Internal Revenue Code Section 7623 provides that awards and rewards may be paid for information that leads to the detection of underpayments of tax, the bringing to trial of persons guilty of violating (or conspiring to violate) tax laws, or the collection of proceeds as the result of administrative or judicial action. Regulation Section 301.7623-1(a) also provides that the amounts collected by reason of the information provided (and therefore the basis upon which award and reward amounts are calculated) include: (1) amounts collected because of the information provided; and (2) amounts collected prior to receipt of the information when the information leads to the denial of a refund that would otherwise have been paid.

The proposed amendments to Regulation Section 301.7623-1(a) clarify two points. First, the Regulations would include claims made by informants that prevent the IRS from issuing a refund to an attempted defrauder under Code Section 7623(a) and (b). This means that if a person contacts the IRS to report that a taxpayer is attempting to defraud authorities and this information stops the IRS from issuing a refund (that otherwise would have been paid), the IRS may issue a reward to the informant.

Second, the Regulations would amend the definitions of "proceeds of amounts collected" and "collected proceeds," for purposes of Code Section 7623, to include a reduction of an overpayment credit balance. Thus, if the information provided by a person to the IRS results in a reduction of an overpayment credit balance used to satisfy a tax liability incurred by the defrauding taxpayer, the IRS will determine the informant's reward from the "collected proceeds," which will include, among other things, the overpayment credit balance amount.

These proposed amendments to the current law broaden the basis for awards and rewards that may be issued by the IRS to informants. Notwithstanding these amendments, the IRS retains discretion as to whether an award or reward will be issued, after its review of "all relevant factors." Treas. Reg. § 301.7623-1 (c). Also, the IRS may only decide to issue a reward or award, when one is not otherwise provided by federal or state law. Treas. Reg. § 301.7623-1 (a)(1).

The IRS has asked that comments on these proposed amendments be received by April 17, 2011. Submissions may be mailed to CC:PA:LPD:PR (REG-131151-10), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044 or submitted electronically via the Federal eRulemaking Portal at www.regulations.gov including IRS-REG-131151-10 in the subject line.

NHD Attorneys listed as New England "Super Lawyers"

The 2010 edition of New England Super Lawyer & Rising Stars, a Thomson Reuters Service, has listed the following attorneys as either New England Super Lawyers or Rising Stars. Special recognition also goes to Peter DeTroy, who is listed in the Top 100 New England Super Lawyers list. □

New England Super Lawyers 2010

Jonathan W. Brogan
Personal Injury Defense: General

Peter J. DeTroy
Professional Liability: Defense

Stephen Hessert
Workers' Compensation

Mark G. Lavoie
Personal Injury Defense: Medical

James D. Poliquin
Insurance Coverage

New England Rising Stars 2010

Doris V.R. Champagne
Workers' Compensation

John R. Veilleux
Personal Injury Defense: General

Recent Decisions From The Law Court

By David P. Very

Law Court continues to explore special relationship cases

The Law Court once again addressed the issue of special relationships for a negligent supervision claim in the case of *Gniadek v. Camp Sunshine at Sebago Lake, Inc.*, 2011 ME 11 (January 13, 2011). Camp Sunshine provides a traditional summer camp experience for children with chronic or life-threatening illnesses and their immediate families. Katie Gniadek, age 17, had attended the camp for several years with her mother. Michael Newton, age 58, applied to be a camp volunteer in 2005 and the camp received favorable feedback from his references and he was hired. During that summer, an 18-year old female volunteer complained to the camp director that she was uncomfortable with Mr. Newton as he had stopped by her room, brought her a gift, invited her for lunch, and talked about his girlfriend's daughter. Newton admitted that he was trying too hard to be friendly and the director indicated that he should limit his contact with the girl. The director at that point requested a criminal background check and driver history check on Newton which came back clean. Newton's supervisor also indicated that she had not seen him doing anything unusual.

On Gniadek's last day, Newton gave her a card and a gift and asked if they could stay in touch. Gniadek agreed and Newton gave her his contact information. With Gniadek's mother's permission, the Camp gave out a contact list to all the volunteers and campers which included Gniadek's contact information.

Two months after the Camp ended, Newton called Gniadek to invite her to go with him to New York to visit a family who had attended Camp. At that time, Newton was no longer a volunteer for the Camp and the Camp had no knowledge of these plans. Gniadek's mother understood that they were going to be spending the night at a home of a former Camp volunteer in New York and gave her permission. Instead of staying with other volunteers, Gniadek and Newton stopped at a Connecticut motel and, during the time, Newton sexually assaulted Gniadek. Newton was convicted of sexual assault and was sentenced to five years in jail.

Gniadek filed a complaint against Camp Sunshine and Newton. The Camp's motion for summary judgment was granted and Gniadek appealed.

The Law Court first addressed the question as to whether there was a sufficient special relationship between the Camp and Gniadek to make out a claim for negligent supervision. The Court indicated that it had only found such a special relationship in two previous cases, one involving the sexual abuse of a parochial school student and altar boy under the daily supervision and control of a priest, and the other involving the sexual abuse of a patient with a serious mental condition by his hospital social worker. The Court stated that in both of those instances, the relationship was marked by a great disparity of position and influence between the parties.

DAVID P. VERY

In the instant case, the Law Court found that the Camp did not have a relationship that amounted to a special relationship. Ultimately, the Court found, Gniadek's relationship with the Camp was indistinguishable from that of other campers. The Court found that the Camp did not exercise influence over Gniadek as the Diocese did with the altar boy or as the hospital did with the mental patient. The Court stated that the Camp had a limited presence in Gniadek's life and, thus, it was not marked by a great disparity of position and influence between the parties.

The Law Court further held that there was no custodial relationship between the Camp and Gniadek. The Court noted that the scope of the duty arising from a custodial relationship is circumscribed by temporal and geographic limitations. For example, the Court held that a common carrier is under no duty to one who has left the vehicle and ceased to be a passenger, nor is an innkeeper under a duty to a guest who is injured or endangered while he is away from the premises. Likewise, the Court held that Gniadek had left the Camp over two months before Newton sexually assaulted her and, thus, there was no longer a custodial relationship.

Finally, the Law Court addressed the issue as to whether the Camp was liable on the theory that it affirmatively created a risk to Gniadek. The Court held that a party is required to guard against the intentional misconduct of others where the party's own affirmative act has created or exposed the other to a recognizable high degree of risk of harm through such misconduct, which a reasonable man would take into account. For example, where the party is brought into contact or association with the other a person whom the party knows or should know to be peculiarly likely to commit intentional misconduct, under circumstances which afford a peculiar opportunity or temptation for such misconduct. In this case, the Law Court held that Newton's known character, past conduct, and tendencies did not include conduct demonstrating a particularly high risk that he would sexually assault a camper. His interaction with the female volunteer counselor was insufficient to establish that he posed a "peculiar risk" of committing a sexual assault. The Court further found that making available a contact list that included Gniadek's contact information also did not create a "peculiar opportunity" for misconduct, as it was nowhere alleged that Newton could not have obtained Gniadek's phone number even without the contact list. Further, Gniadek's mother had consented to inclusion on the list. Therefore, the Law Court upheld that Camp Sunshine had no duty to protect Gniadek at the time that Newton sexually assaulted her.

Tom Marjerison of Norman, Hanson & DeTroy, LLC represented Camp Sunshine in this matter.

Law Court addresses proof required for claim of intentional infliction of emotional distress

Luke Huber and Elizabeth Lyman began a romantic relationship in 1991 that lasted until 2006. Starting in 1995, Lyman alleged that Huber became very commanding to her and intimidating to the point that she feared him and his anger. His actions made her feel inadequate and withdrawn. While Lyman alleged that Huber would regularly yell, scream, and swear at her and make hurtful comments to her, he never physically abused her. Lyman finally ended the relationship and left the home they were sharing.

Lyman filed a multi-count complaint against Huber and while the Court granted summary judgment to the Defendant on the negligent infliction of emotional distress claim, the Court awarded judgment in Lyman's favor on the intentional infliction of emotional distress claim for over $100,000. Huber appealed.

On appeal, in *Lyman v. Huber*, 2010 ME 139 (December 28, 2010), the Court reiterated the four elements to recover on a claim of intentional infliction of emotional distress. First, the defendant must intentionally or recklessly inflict severe emotional distress; second, the conduct must be so extreme and outrageous as to exceed all possible bounds of decency and must be regarded as atrocious, utterly intolerable in a civilized society; third, the actions of the defendant must cause the plaintiff emotional distress; and fourth, the emotional distress suffered by the plaintiff must be so severe that no reasonable person could be expected to endure it. Huber argued that the Court erred in finding severe emotional distress and argued that Lyman experienced emotional upset more akin to common stress and anxiety caused by everyday events and that the breakdown of romantic relationships is an area of emotional injury which does not and should not involve lawsuits and courts.

The Law Court indicated that the level of emotional distress required to make out a case for intentional infliction of emotional distress imposes an objective standard of proof. The Court indicated that establishing that a plaintiff's emotional suffering qualifies as "severe" normally requires proof of manifestations of the emotional harm such as shock, illness or other bodily harm, unless the defendant's conduct is found to have been so extreme and outrageous that proof of bodily harm is not needed. The Court further stated that in most instances, proof of objective symptoms will require expert testimony to establish that a Plaintiff's emotional injury qualifies for a diagnosis such as shock, post-traumatic stress disorder, or some other recognized medical or psychological disease or disorder. The Court indicated that this standard prevents recovery for emotional injuries that are anything less than severe.

In the instant case, the Court indicated that while Lyman described feeling inadequate, withdrawn, socially paralyzed, fearful, and intimidated by Huber's controlling and compulsive behavior and her friends described her as being guarded, jumpy, and withdrawn, those findings did not support that Lyman suffered emotional distress so severe that no reasonable person could be expected to endure it. The Court pointed out that she did endure the distress as evidenced by the fact that she successfully managed her own business, she met the demands of daily living, she never requested assistance from the police or other public officials, and she did not seek treatment from a medical or mental health professional. Therefore, the Law Court held that the Superior Court erred as a matter of law in finding that Lyman had established the fourth element of the tort, and because all four elements were not satisfied, the judgment for Lyman was vacated.

In reaching this decision, the Court noted that a civil action for intentional infliction of emotional distress may be available to some victims of domestic abuse. However, the Court stated that their application and development of a civil action in the context of domestic relationships must take into account the sad reality that dysfunctional domestic relationships are not uncommon among society. The Court indicated that if the elements of proof governing actions for intentional infliction of emotional distress are left vague or set too low, the Court risks elevating all dysfunctional domestic relationships into potential damages actions. □

New Associate: Katlyn M. Davidson

We are pleased to announce that Katlyn Davidson has joined the firm in January, 2011, as an associate attorney. She is a native of Maine, having grown up in Bath and Yarmouth. She graduated summa cum laude from Fairfield University in 2005 with a B.A. in International Studies. She participated in the University's Honors Program and is a member of the University's chapter of Phi Beta Kappa. While in college, she spent a year abroad studying in Florence, Italy and Rennes, France.

Katlyn received her law degree from Vanderbilt University Law School in 2009. While there, she served on the law school's Moot Court Board Managing Council as an Associate Justice for the Intramural Competition. Katlyn also served as the Policy Project Coordinator for the Women Law Students Association. In that role, she planned and coordinated a panel discussion regarding the legality of school mandates requiring middle school girls to receive the Gardasil vaccine. During law school, she interned with the United States Attorney's Office for the District of Maine and participated in the law school's Civil Practice Clinic, where she successfully appealed the Social Security Administration's denial of a client's application for disability benefits.

KATLYN M. DAVIDSON

Following graduation from law school, Katlyn worked in the Federal Defender's Office for the District of Maine. There, she assisted in the defense of criminal defendants in federal court.

Katlyn currently lives in Freeport with her husband Andrew, also a Maine native. She is a mentor volunteer with the group My Sister's Keeper. It is a small, grassroots organization that mentors and assists women transitioning back into community life from incarceration. In her free time, Katlyn enjoys vegetable gardening, cooking, snowshoeing, and enjoying the Maine landscape. □

KUDOS

JIM POLIQUIN has been named by "Best Lawyers" as the Lawyer of the Year for 2011 in Portland for appellate practice and insurance law. **PETER DeTROY** has been similarly honored for criminal defense; white collar.

KELLY HOFFMAN spoke at a seminar in December in Portland on limited liability companies and ethical considerations in the formation of a LLC.

FRED HOWARD, husband of Russ Pierce's legal assistant, Pat, was a recipient of WCSH TV's "6 Who Care Award" for his work with South Portland Health Services and with the Southern Maine Area Agency on Aging and its "Meals on Wheels" program.

ADRIAN KENDALL has been appointed as co-chair of the International Practice Section of the Maine State Bar Association. Adrian's practice focuses significantly on commercial and corporate matters and he frequently provides counsel to his client's on international transactions, including licensing, sales representation, distribution, manufacturing, and supply arrangements.

DAVE HERZER has been appointed as a member of the Professional Ethics Committee of the Maine State Board of Bar Overseers.

LANCE WALKER gave a presentation to the Mixed Marshal Arts Authority of Maine on the challenges and opportunities currently facing the MMAA. Lance will serve as a consultant to the Authority, which is a new state agency charged with the responsibility of regulating professional MMAA competitions. □

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