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## Connecticut Supreme Court Explains Remedies Available to Employers Winning Breach of Duty of Loyalty Claims against Employees

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In [\*Wall Systems, Inc. v. Pompa\*](#), No. SC19734 (Mar. 7, 2017), the Connecticut Supreme Court explained the legal and equitable remedies available to employers that win breach of duty of loyalty claims against their current or former employees.

The defendant, William Pompa, worked for the plaintiff, Wall Systems, Inc., a building contractor, as a division head. His job duties included finding jobs for Wall Systems with general contractors, estimating and bidding on jobs, hiring and negotiating with subcontractors, overseeing work, ensuring proper billing, and other duties. He was considered part of Wall Systems' management team.

After a change in ownership of Wall Systems in 2005, the defendant became dissatisfied with his compensation and began working for a subcontractor that had done business with Wall Systems. As part of his work for that subcontractor, the defendant received compensation of almost \$90,000. He never informed Wall Systems that he was working for the subcontractor during the same time period he was working for Wall Systems. Eight of the thirty-five jobs that he estimated for the subcontractor were jobs for which Wall Systems also submitted bids; however, there was no evidence that Wall Systems lost any work to the subcontractor.

Wall Systems learned the defendant had been working for the subcontractor, and the subcontractor terminated him for demanding kickbacks from Wall Systems' subcontractors. The defendant added extra work to the subcontractors' contracts, thereby increasing the cost of those jobs, and demanded that one-half of that additional amount be paid to him.

Wall Systems sued Pompa for breach of his duty of loyalty by charging kickbacks to subcontractors and performing work for himself while he was working and being paid by Wall Systems. Wall Systems also claimed conversion, statutory theft, unjust enrichment, and fraud and sought damages of more than \$500,000, treble damages for statutory theft, and a constructive trust over the defendant and his spouse's assets.

After hearing the evidence, the trial court found the defendant breached his duty of loyalty to Wall Systems by engaging in a kickback scheme with a contractor. The court also found the defendant's actions constituted conversion, statutory theft, unjust enrichment, and fraud. To calculate damages, the court totaled the \$14,400 associated with the kickback scheme and, due to the statutory theft claim, tripled those damages for an award of \$43,200. The court found the defendant's actions were

intentional and awarded attorney's fees of almost \$25,000. The court also awarded prejudgment interest of almost \$20,000. Finally, the court ordered a constructive trust on a bank account jointly owned by the defendant and his spouse. All parties appealed.

On appeal, the Supreme Court reiterated that employees owe their employers a duty of loyalty, including the duty not to compete or disclose confidential information. The Court explained that the duty of loyalty includes the duty to refrain from acquiring materials from third parties, including secret commissions and kickbacks, which might cause an employee to act at the expense or detriment of his or her employer. An employer proving an employee's breach of the duty of loyalty has a variety of remedies.

### **RESTITUTION/UNJUST ENRICHMENT**

The Court explained that an employer may invoke equitable remedies when seeking monetary damages, particularly where the employer has difficulty proving damages. If an employee realizes a material benefit from a third party in connection with a breach of the duty of loyalty, then the employee may be ordered to deliver that benefit to the employer. As explained by the Court, an employee who breaches the duty of loyalty may be required to disgorge any profit or benefit received as a result of the disloyal activities, regardless of whether the employer suffered a corresponding loss.

Based on the facts presented at trial, the Court affirmed the damages award of \$43,200. It reasoned that Wall Systems failed to prove the loss of any jobs from the defendant's actions, and disgorging the defendant's benefits from his kickback scheme was appropriate.

### **FORFEITURE OF COMPENSATION**

An employer also may seek forfeiture of the employee's compensation, as an equitable remedy, because the compensation during the period when the employee was disloyal was, in effect, unearned. The Court noted that forfeiture of compensation normally is apportioned or limited to the time when the employee engaged in disloyal activity. As stated by the Court, "[W]e conclude that permitting disgorgement of material benefits as a discretionary matter, after consideration of all the facts and circumstances, is both the proper and superior approach." The Court also noted that, when proving harm to the employer is difficult or when the employee does not earn a profit from the breach, disgorgement of compensation may be the only available remedy. Finally, the Court noted that disgorgement of compensation may serve a "valuable deterrent effect" to employees to show them a significant adverse consequence will follow their breach of the duty of loyalty.

Based on the facts presented at trial, the Court affirmed the trial court's decision against forfeiture of the defendant's compensation. Wall Systems sought the complete forfeiture of all compensation received by the defendant from Wall Systems and the subcontractor during the five-year period when the defendant had been working for the subcontractor. The trial court refused, and the Supreme Court affirmed. The Court noted that Wall Systems provided no evidence to allow the court to apportion the defendant's time working for both Wall Systems and the subcontractor. There also was no evidence that the defendant's work for the subcontractor occurred during his workdays for Wall Systems. In the absence of any proof of loss, the Court refused to award a complete forfeiture of the defendant's salary for that five-year period.

### **CONSTRUCTIVE TRUST**

The court may order a constructive trust on an employee's profits when that employee profits through breach of a duty of loyalty. A constructive trust allows a claimant to assert ownership on specifically identifiable property or traceable product. A claimant seeking a constructive trust must identify the property in the hands of the defendant; otherwise, imposition of a constructive trust is improper.

In this case, there was no evidence that the defendant deposited the kickback funds into his joint bank account owned by him and his spouse. Wall Systems argued that the court should infer that he deposited those funds into the account. The trial court agreed, but the Supreme Court disagreed. In reversing the trial court, the Court characterized the inference that the kickback funds were deposited as conjecture.

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For more information, or if you have questions about how the issues raised in this legal update affect your policies, practices, or other compliance efforts, please contact one of the following lawyers in the firm's [Labor, Employment, Benefits + Immigration Group](#):

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