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INFORMATION MEMO
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# Employment Law's "Hulk"-Like Superhero — The Faithless Servant Doctrine — Just Got Stronger

One of the many joys of parenthood is the opportunity to relive one's childhood. To a parent who grew up on the old-school comic books, the steady roll-out by Marvel Studios of big budget super-hero movies offers a unique bonding opportunity with one's children, which can take place over a uniquely unhealthy massive bowl of movie theater popcorn (with the glee from the experience outweighing the fear of the hyper-caloric intake).

My kids frequently ask me about my favorite superhero. To me it is undoubtedly Hulk, a character who metes out just-desserts — an admirable goal for a management-side employment lawyer (the side of angelic innocence). Hulk is not Hulk unless provoked. As Bruce Banner he is a quintessential good guy, just like all of us in the world of Human Resources.

That brings us to Hulk's relationship with employment law. We need a Hulk when our employees steal from us, harass other employees, take our trade secrets, and secretly compete against us. But in the real world where does one find a muscle-bound green skinned superhero that is pretty much indestructible? Enter the faithless servant doctrine.

In New York, the faithless servant doctrine is more than one hundred years old. This doctrine, a subspecies of the duty of loyalty and fiduciary duty, requires an employee to forfeit all of the compensation he/she was paid from his/her first disloyal act going forward. The doctrine applies to a wide-array of employee misconduct, including unfair competition (*Maritime Fish Products, Inc. v. World-Wide Fish Products, Inc.*, 100 A.D.2d 81, 474 N.Y.S.2d 281 (1st Dep't 1984)), sexual harassment (*Astra USA Inc. v. Bildman*, 455 Mass. 116, 914 N.E.2d 36 (2009)), insider-trading (*Morgan Stanley v. Skowron*, 2013 WL 6704884 (S.D.N.Y. 2013)), theft (*William Floyd Union Free School District v. Wright*, 61 A.D.3d 856, 877 N.Y.S.2d 395 (2d Dep't 2009)), and off-duty sexual misconduct (*Colliton v. Cravath, Swaine & Moore, LLC.*, 2008 WL 4386764 (S.D.N.Y. 2008)).

As the faithless servant doctrine becomes more well-known, the full breadth of its power continues to be litigated. Specifically, just how much damage can this doctrine inflict? Disloyal employees have argued that forfeiture under the doctrine should be limited to a so-called "task-by-task" apportionment. Under this argument, if an employee earns for example $200,000 a year and steals $20,000 over five months in four separate transactions, the remedy is a return of the stolen funds and a salary forfeiture of a day's pay on each of the four days of misconduct. But, whatever superficial appeal this argument may have, once the employee steals we enter Hulk's world, and Hulk does not deliver justice with surgical precision. Rather, in the immortal words of Captain America, Hulk "smashes."

In *William Floyd Union Free School District v. Wright*, 61 A.D.3d 856, 877 N.Y.S.2d 395 (2d Dep't 2009) (argued by the author of this article), the Second Department rejected the task-by-task apportionment argument, holding: "Where, as here, defendants engaged in repeated acts of disloyalty, complete and permanent forfeiture of compensation, deferred or otherwise, is warranted under the faithless servant doctrine." The forfeiture in that case included all salary and deferred compensation, including paid health and life insurance in retirement. Turning back to our hypothetical, the faithless servant doctrine requires not only the return of the $20,000 stolen, but also forfeiture of all of the salary paid to the employee after the first theft and any related deferred compensation, such as contractual payments owed upon retirement.

Despite the *William Floyd* decision, disloyal employees have tried in earnest to limit the scope of the forfeiture. On June 2, 2016, the Third Department added strength and vigor to the faithless servant doctrine in a case where an employee committed repeated acts of theft. In *City of Binghamton v. Whalen* (also argued by the author of this article), the Court reaffirmed the strict application of the faithless servant doctrine: "We decline to relax the faithless servant doctrine so as to limit plaintiff's forfeiture of all compensation earned by the defendant during the period of time in which he was disloyal." The Court specifically noted that the faithless servant doctrine is designed not merely to compensate the employer, but also to create a harsh deterrent against disloyalty by employees. The Court ordered the disloyal employee to pay back $316,535.54 (which was all of the compensation earned by the employee during the nearly six-year period of disloyalty), and held that the employer was relieved of the obligation to provide the disloyal employee with health insurance benefits earned through his employment.

The City of Binghamton decision solidifies the Hulk-like power of the faithless servant doctrine — a remedy that serves up justice with "smashing" deterrent impact.

If you have any questions about this Information Memo, please contact Howard M. Miller, any of the attorneys in our Labor and Employment Law Practice, or the attorney in the firm with whom you are regularly in contact.

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