

# Michigan Law Review

---

Volume 46 | Issue 1

---

1947

## PRINCIPAL AND AGENT-COMPENSATION OF UNFAITHFUL AGENT

Edwin M. Deal S.Ed.  
*University of Michigan Law School*

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Labor and Employment Law Commons](#)

---

### Recommended Citation

Edwin M. Deal S.Ed., *PRINCIPAL AND AGENT-COMPENSATION OF UNFAITHFUL AGENT*, 46 MICH. L. REV. 112 (1947).

Available at: <https://repository.law.umich.edu/mlr/vol46/iss1/18>

This Regular Feature is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

PRINCIPAL AND AGENT—COMPENSATION OF UNFAITHFUL AGENT—  
Plaintiff, manager of defendant's mechanical division under a contract requiring him to devote all his efforts to this employment and providing that he would share the profits and losses of the division equally with defendant as his only compensation, sued to recover a balance of \$42,991.90 in his favor after his discharge by defendant. The contract provided that on "any termination" of plaintiff's employment his account should be adjusted and any credit balance paid him, but defendant contended that plaintiff had forfeited his right to compensation by secretly engaging in a partnership in competition with defendant. The trial court found that defendant was not substantially harmed by this activity but

dismissed plaintiff's bill for an accounting. On appeal, *held*, reversed. The infidelity of plaintiff as an agent should not, as between him and his principal, entail consequences in the matter of compensation which his principal has agreed should not follow from it, although plaintiff will be charged with the entire \$1,630.74 profit of his secret occupation and, in addition, any damages defendant may be able to prove at the second trial. *Walsh v. Atlantic Research Associates, Inc.*, (Mass. 1947) 71 N.E. (2d) 580.

It is familiar law that an agent must conduct himself with utmost fidelity to the interests of his principal<sup>1</sup> and that it is a breach of this duty for him to devote time and effort to competing interests.<sup>2</sup> If an agent acquires a benefit through breach of his duty of loyalty, the principal is entitled to recover what he has so received or its value, and also the amount of damages thereby caused him.<sup>3</sup> Another measure designed to secure performance of this duty is the denial of compensation to a disloyal agent, although there are no absolute rules in this field and much is left to the discretion of the court.<sup>4</sup> An example of the extent to which a court may exercise its discretion in such cases is found in the holding of the Oklahoma Supreme Court<sup>5</sup> that a disloyal agent who failed to inform his principal that a third party had broken the contract which the agent negotiated between the principal and the third party might recover compensation but at a reduced rate fixed arbitrarily by the court. A well-known Louisiana case<sup>6</sup> held an agent entitled to compensation for a period during which he had been successfully persuading his principal's employees to enter a competing business and at the same time failing to secure renewals of the contracts between the principal and its regular clients. On the other hand, several recent cases have denied all compensation to a disloyal agent<sup>7</sup> or allowed the principal to recover salary

<sup>1</sup> MECHEM, AGENCY, 3d ed., §297, p. 190 (1923).

<sup>2</sup> MECHEM, AGENCY, 3d ed., §303, p. 195 (1923).

<sup>3</sup> RESTITUTION RESTATEMENT, §138, p. 556 (1937); 2 AGENCY RESTATEMENT, §403, p. 922, and §407(1), p. 931 (1933).

<sup>4</sup> "The question whether a fiduciary who has not been entirely faithful will be denied compensation to which he would otherwise be entitled ultimately rests in the discretion of the court." *Shulkin v. Shulkin*, 301 Mass. 184 at 193, 194, 16 N. E. (2d) 644 (1938), 118 A.L.R. 629 (1938). See also, *Johnson v. Powers*, 188 Okla. 508, 111 P. (2d) 191 (1941).

<sup>5</sup> *Johnson v. Powers*, 188 Okla. 508, 111 P. (2d) 191 (1941).

<sup>6</sup> *Jones v. Ernst & Ernst*, 172 La. 406, 134 S. 375 (1931). A recent holding that a disloyal agent was entitled to compensation is *Willis v. Van Woy*, 155 Fla. 465, 20 S. (2d) 690 (1945), where the agent secured property at \$37,500, telling his principal the price was \$75,000 and intending to keep the difference.

<sup>7</sup> *Steinmetz v. Kern*, 375 Ill. 616, 32 N. E. (2d) 151 (1941) (agent seeking to profit by deceiving his principal as to how the affairs of her apartment building were being handled); *Sundland v. Korfund Co., Inc.*, 260 App. Div. 80, 20 N. Y. S. (2d) 819 (1940) (agent stealing from principal during the period covered by the compensation sought); *Stein v. Steiner*, 289 Ill. App. 618, 7 N. E. (2d) 505 (1937) (agent who had introduced principal to a prospective client later sought to procure the sale for a competitor); *Lamdin v. Broadway Surface Advertising Corp.*, 272 N. Y. 133, 5 N. E. (2d) 66 (1936) (agent seeking payment in due bills rather than cash where he received secret commission from due bill brokers on all due bills his principal discounted).

already paid,<sup>8</sup> even though this may have resulted in an unexpected windfall to the principal. It is immaterial in the application of this rule whether or not the principal suffers loss as the result of the agent's disloyalty,<sup>9</sup> and it has been held that a partner is entitled to his regular share of the secret profits for which he must account<sup>10</sup> on the theory that the parties are thereby placed in the position in which they would have been had there been no disloyalty, although this holding, in effect, allows him his normal compensation for disloyal activity. There is disagreement as to the foundation of the rule, some courts and writers saying that its basis is the public policy in removing the danger of temptation from the agent's way,<sup>11</sup> while Massachusetts and other jurisdictions deny compensation to unfaithful agents on the ground that payment is not due for service improperly performed.<sup>12</sup> Courts holding to the latter theory may allow a disloyal agent to recover for services properly rendered for which the compensation is apportioned in the contract, but not for services tainted with intentional disloyalty.<sup>13</sup> Had Massachusetts not belonged to this group, it would have been hard for the court in the principal case to have justified giving effect to the contract between the parties in allowing the unfaithful agent to recover his compensation: although the agent's infidelity would not exclude recovery under the broad terms of the contract,<sup>14</sup> the policy against an enticement for the agent is still applicable. Nevertheless, a court following the public policy theory might well have reached the same result reached by the court in the principal case on the theory that the disloyalty in this case did not substantially affect the agency relationship.<sup>15</sup>

*Edwin M. Deal, S.Ed.*

<sup>8</sup> *Anderson Cotton Mills v. Royal Mfg. Co.*, 221 N. C. 500, 20 S. E. (2d) 818 (1942) (agent to sell buying secretly on his own account).

<sup>9</sup> *Steinmetz v. Kern*, 375 Ill. 616 at 621, 32 N. E. (2d) 151 (1941): "An agent is entitled to compensation only on a due and faithful performance of all his duties to his principal. In the application of this rule it makes no difference whether the result of the agent's conduct is injurious to the principal or not as the misconduct of the agent affects the contract from considerations of public policy rather than of injury to the principal." See also, 1 *MECHEM, AGENCY*, 2d ed., §1589, p. 1189 (1914).

<sup>10</sup> *Shulkin v. Shulkin*, 301 Mass. 184, 16 N. E. (2d) 644 (1938).

<sup>11</sup> *Steinmetz v. Kern*, 375 Ill. 616, 32 N. E. (2d) 151 (1941); 1 *MECHEM, AGENCY*, 2d ed., §1589, p. 1189 (1914).

<sup>12</sup> Principal case, 71 N. E. (2d) 580 at 586, "Even in cases of strict trust and where the trustee is not helped by any provision of the contract, there is no absolute rule that he should lose his compensation, and when he does lose it this is not upon the theory of a penalty, but is upon the theory that he should not be paid for improper service."

<sup>13</sup> "The American Law Institute finds the basis for refusal of compensation to a trustee not in the theory of a penalty, but in the theory that payment is not due for service improperly performed. . . . Apparently on similar reasoning, a disloyal agent may have compensation which is apportioned by the contract of employment to services properly performed." *Lydia E. Pinkham Medicine Co. v. Gove*, 303 Mass. 1 at 4, 20 N. E. (2d) 482 (1939). See also, 2 *AGENCY RESTATEMENT*, §456, p. 1075 (1933).

<sup>14</sup> "Upon any termination of Walsh's employment his account shall be adjusted . . ." Principal case at 582. (Italics supplied.)

<sup>15</sup> *Sundland v. Korfund Co., Inc.*, 260 App. Div. 80, 20 N. Y. S. (2d) 819 at 821 (1940), "where the dishonesty of a servant is of such character as to justify