

## Employee's Secret Competition with Employer Breached Duty of Loyalty, New Jersey Court Finds

By Eric G. Guglielmotti

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New Jersey recognizes the right of a worker to *prepare* to compete with his or her employer even while in the employer's employ, provided the preparation does not involve taking the employer's confidential and proprietary information and property. However, New Jersey also recognizes that the worker owes a duty of undivided loyalty to act solely for — and in the best interests of — his or her employer. The worker's right, therefore, does not curtail his duty to his employer, a New Jersey Appellate Division court has confirmed. *Baseline Services, Inc. v. Kutz*, 2011 N.J. Super. Unpub. LEXIS 2309 (NJ App. Div. Aug. 25, 2011) (per curiam). Finding against the disloyal employee, the Court ordered him to pay his former employer the lost net profit on the contract it did not obtain because of his conduct.

In *Baseline Services*, James Nicoludis and Darren Kutz were former employees of Baseline Services, Inc., a mechanical services company. Baseline sued Nicoludis, Kutz and the company one of them formed to compete with the plaintiff, alleging breach of the duty of loyalty, tortious interference with prospective economic advantage, and tortious interference with a business relationship.

From 2002 through 2006, Nicoludis and Kutz were the primary Baseline employees performing services for Global Pharmaceutical Sourcing Group ("GPSG"). In early 2006, Nicoludis left Baseline and started CSI, a direct competitor and rival of Baseline. In October 2006, Baseline submitted a confidential bid, which included the profit margin, for GPSG's 2007 annual contract. The bid also was sent to Kutz. CSI submitted a competing bid to GPSG that undercut Baseline's numbers. Kutz continued to meet with GPSG in late 2006, giving the appearance he was working on behalf of Baseline. GPSG awarded the contract to CSI in January 2007, and Kutz resigned from Baseline and joined CSI.

The trial court, following a bench trial, dismissed all claims against Nicoludis. However, it found Kutz liable to Baseline on all claims and CSI liable for tortious interference with prospective advantage and with a business relationship, and entered judgment in favor of Baseline against them in the amount of \$47,600, a reasonable amount of damages based upon Baseline's prospective profits from the GPSG contract. The defendants appealed, arguing that Baseline failed to meet its burden of proof on liability and damages.

In affirming the decision against Kutz, the Appellate Court concluded, "The unrefuted evidence established that, while still employed by Baseline, Kutz actively solicited the 2007 GPSG contract for CSI, Baseline's competitor. It is also clear from the information contained in the GPSG emails and in the testimony provided by GPSG employees that Kutz' plan . . . was revealed to them and had the intended effect of 'selling' CSI to them." However, as to the judgment entered against CSI, the Appellate Division reversed, finding that Baseline's evidence failed to illustrate any "malice" on the part of CSI. Lastly, the Appellate Division affirmed the trial court's finding of damages.

The duty of loyalty, noted the Appellate Court, "consists of certain very basis and common sense obligations. An employee must not while employed act contrary to the employer's interest. And, during that period of employment, an employee has a duty not to compete with his or her employer." The Court reiterated the well-established principle that during employment, an employee "may not breach the undivided loyalty he owes his employer while still employed, by soliciting his employer's customers or other acts of secret competition." In this case, while employed by Baseline, Kutz helped CSI to bid against Baseline for a contract. The Court concluded this unmistakably breached the duty of loyalty.

Employers often face competition by former employees soliciting clients or employees on behalf of their new employers. An employee's establishing the groundwork for competitive services may not be unlawful activity. When the employee acts on behalf of himself or herself or another and competes with an existing employer, the conduct breaches the duty of loyalty and the resulting punishment may be to require the disloyal employee or competitor to disgorge the profits obtained from the breach. Employers should

### Meet the Author



[Eric G. Guglielmotti](#)

In Memoriam  
Berkeley Heights 908-795-5202  
Email

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