

# NEW JERSEY LAWYER

## Employee pirates a threat? There are defenses

**T**here is hardly an industry sector or professional practice that isn't pressed to find solid new employees, especially tenured ones who need little training and bring their own books of business. This environment, coupled with an uneven economic recovery, makes competitors think about raiding one another's ranks. Most business people and many professional practitioners believe at-will employees without a signed restrictive covenant limiting their right to work for the competition is fair game. That belief is incorrect.



**The Law  
and  
More**  
**David S. Barmak**

A recent New Jersey case, *Movado Group v. Swiss Army Brands*, is instructive. Executives and professional practitioners should take note: This case gives real teeth to standards of commonly accepted morality and fair dealing — what the court called “rules of the game” — that caution an assault on a competitor's employees. At the same time, the case confirms that businesses that have been victimized do have an offensive strategy, *even* if employees don't have signed restrictive covenants.

The Movado Group, a high-end New Jersey-based manufacturer of watches and other fine jewelry, sells to a network of dealers through its own sales force as well as an independent force.

Its competitor, the Swiss Army company (SA), is a high-end multi-national corporation. Most Movado and SA products are sold by the same retailers. SA had employed a direct employee sales team, but in 1998 changed its approach, believing an

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independent sales force could be more efficient. Sometime in 2000, SA decided its sales structure was ineffective and would return to a direct employee sales force. Since it had been some time since it had such a force, it had to quickly staff that department.

Susanne Rechner, a defendant in this case, began working for Movado in 1998 and was vice president of national accounts. In her position, Rechner considered certain information confidential including retail and advertising plans, new product lines, and special discount and rebate plans or sales inducements. She later testified she would not have wanted any of that information to have fallen into the hands of Movado's competitors. She also testified she would not have wanted anyone in her national sales force to have revealed leads of her customers.

In early 2000, Rechner was contacted by a headhunter and discussed the possible openings at SA. She decided to leave Movado and became responsible for SA's worldwide sales and marketing. She set out to hire a direct sales force comprised of people she knew and could rely on to be loyal to her.

Here's the body count:

- Despite denials, Rechner contacted and hired sales representative Shelly Moore who serviced Movado's largest account. Investigation revealed Rechner made 93 telephone calls.

- She placed 64 calls to another former co-worker, Heather Smyth, Movado's director of field operations, who joined SA as director of national sales. With Rechner, she contacted the very same customers she was working with at Movado.

- Within one month of hiring Moore, SA hired another Movado account representative who had been handling national accounts in Texas. All these employees and several others hired by SA testified they had been contacted by one or more former Movado employees now working for SA. Most of that hiring took place within just two months.

- Movado's VP of field sales was contacted and hired by Rechner and began working at SA the next day. This was the final crushing blow to Movado. While both the VP of field sales and Rechner denied contact, actual telephone records revealed they spoke seven times that year. Further investigation revealed that while the VP of sales was still employed by Movado, he was sending e-mail to co-employees about their working for SA. When he left, most of the sales force followed.

In all, SA hired 11 key Movado sales people, constituting about 40 percent of Movado's direct sales force. None had

restrictive covenants or contracts of employment and all were considered by the court as at-will employees.

Movado's counsel accused SA of intentionally interfering with Movado's business and attempting to grab employees, their trade secrets and information to gain an unfair advantage. Rechner assured SA's CEO she wasn't raiding Movado. Believing her, he told Movado that Rechner had not initiated contact with any of the hired people and reassured Movado it had no intention of soliciting Movado employees.

The CEO later testified at his deposition that he wouldn't think it ethical to steal Movado's personnel. He made that position clear in a memo to all his employees and was assured by Rechner no solicitations were ever made. However, more pirating occurred and those losses were devastating to Movado, which instituted a lawsuit against SA alleging tortious interference with prospective economic advantage.

#### **Into the courtroom**

SA defended this lawsuit by arguing that since the employees were at will, they were free to work wherever they wanted without restriction. SA argued it could actively solicit any employees from any competitor. Based on that theory, SA moved for summary judgment.

In considering that motion, the court set forth the elements of a cause of action for tortious interference for economic advantage: 1) a protected interest, which need not amount to an enforceable contract, but must at least amount to a reasonable expectation of economic advantage; 2) intentional interference with that protected interest without justification and with malice; 3) the reasonable likelihood the anticipated benefit from the protected interest would have been realized but for the interference; and 4) economic damage as a result.

The court recognized that the cause of action for tortious interference with prospective economic advantage protects the right to pursue one's own business, calling or occupation free from undue influence. The tort also protects a party's interest in reasonable expectations of economic advantage and must allege facts that demonstrate a protectable interest, such as a prospective economic or contractual relationship. For example, it is generally recognized that at-will employees have a protectable interest in their job.

Most interesting about the court's opinion is that the trial judge went one step further and discussed the standards of unjustified or malicious interference. The court said the standard must be flexible and focus on a defendant's actions not generally but in the context of the circumstances of the case. Malice is inferred when harm is inflicted intentionally and without justification or excuse. The court found there are "rules of the game," generally accepted standards of common morality, beyond which business entities should not go. According to the New Jersey Supreme Court in *LaMorte Burns & Co. v. Walters*, "there can be no tighter test of liability in this area than that of the common conception of what is right and just dealing under the circumstances."

#### **Justification**

The court, also saying a competitor's conduct is not justified simply because it was motivated by profit, determined a defendant claiming a business-related excuse must justify not only its motive and purpose, but also the means used. The court said just because there's an at-will employment relationship, it doesn't permit a third party's tortious interference. Therefore, justification for the defendant's conduct must rely on facts independent of the at-will status.

In denying summary judgment, the trial judge said unfair competition similar to tortious interference and employee piracy requires evidence of bad faith or malicious conduct and determined there were many areas where Movado could prove Rechner solicited or instructed other people to solicit Movado employees. The question wasn't whether the solicitation took place, but whether SA used unjustified and improper means to induce employees to abandon Movado.

The court also held that:

- Movado would have to produce some evidence that raised a reasonable inference SA intentionally set out to harm it, raid its sales force or otherwise violate the rules of the game;
- at the very least a *prima facie* showing had been made that Movado's loss of revenue and manpower were not merely incidental consequences of SA's hiring decision, but were the ultimate consequences envisioned and constructed by Rechner and her cohorts;
- hiring under these circumstances was conduct a jury could conclude violated the rules of the game. The court also noted Rechner's deceit to her own employer as well as her recruitment and solicitation of employees while still employed at Movado. The court also noted that not every Movado employee was solicited, but select ones that led to the inference there was a planned campaign against Movado. SA argued that even if its motive was to harm Movado, its conduct was justified because it was exercising its right to compete. However, the court disposed of that argument by referring to the way SA hired those employees.

#### **The trial**

The case was tried before a Bergen County jury at about the same time as Martha Stewart's trial and during the height of the Enron disclosures and other corporate acts of malfeasance. The jury heard each employee testify and saw the damning evidence of telephone calls and e-mail contradict prior deposition testimony. Jurors determined SA, in fact, did violate the rules of the game and Movado was able to convince the jury it lost sales as a result of these raids.

The jury gave Movado everything it sought even though there was some speculation about total sales lost. A verdict of more than \$2 million was entered.

The moral of this is to advise clients they must have restrictive covenants with employees as a condition of continued employment. These are generally enforceable as long as the restrictions are reasonable regarding time and place. Like the restrictive covenant, a nonsolicitation of co-workers clause must be similarly reasonable.

If a court finds such restrictions unreasonable, some states, including New Jersey, don't permit revisions to the provision. Either the court will enforce the provision fully or invalidate it fully. All new employees must sign an employment contract as a condition of hiring and all current employees must sign a contract as a condition of continued employment. Reasonable restrictive covenant and nonsolicitation of co-worker provisions also should be inserted into employee handbooks for the entire staff.

The current atmosphere in America appears to be working against corporate misconduct. As jurors are drawing a line in the sand, clients must be made aware that business as usual will no longer be condoned. While these cases are generally fact-sensitive, clients still must be forewarned about the dangers involved.