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Some Tort(e)s Don't Come From the Oven

By: Julie R. Rubin

I remembered it while stuck in traffic on Lombard Street on my commute home. I could hardly wait to get in the door. My feet were throbbing from killer heels and I hadn't yet changed out of my white poplin skirt, but no matter. That's why God made stain stick. Saturday night's half-eaten fig tart, with its lemony mascarpone cream, was too seductive for my frail will. The refrigerator door slack-jawed against the counter, I stood bathed in its cruel light, digging under the plastic wrap with my fork. I subscribe to the Standing Rule. If you eat it standing up, it does not count and therefore has no calories. (For your interest, the Rule does not discriminate and applies equally to standing over the sink and at the counter.) Some would call this denial. I call it delicious.

I was halfway to nirvana when the phone rang. Mouth full of buttery pâte brisée tart shell, I abandoned the fork for the phone. "Hello?" "Hi, Joanne. How are you doing? No, it's no trouble at all."

Joanne had been referred to me by an old pal of mine who said Joanne was in a jam and really needed help. In a moment of weakness I did the unthinkable and passed along my cell phone number. Joanne had received what I affectionately refer to as a Love Letter from a large D.C. law firm, threatening everything from financial ruin to public stoning.

Joanne heads a family-owned textiles supply company that serves hotels, restaurants and caterers in Maryland, Virginia and Washington, D.C. The company has been around a long time, but she had only been at the helm a few years since her father died and she lacked the savvy of a seasoned leader. The company had recently fallen on hard times too. The poor economy meant restaurant closings were up and people weren't throwing as many catered affairs.

As she explained the background facts, I could hear that Joanne was rattled, but angry – indignant even – that her company had been accused of unlawful and unethical business conduct. Her family's business was not like that.

Several months back, the company hired a new sales agent to replace a long term employee who took a job closer to home, because the gas guzzling commute from York to Baltimore had become too expensive. Joanne and her managers had interviewed several job

applicants, but were singularly impressed by Wayne, whose resume included many years of experience in the hotel and restaurant supply industry. He explained that his family had recently moved from Northern Virginia to Baltimore for his wife's job, he'd been out of work for a few months getting the family settled, but was eager for a place to land. It was a no-brainer.

Early in Wayne's employment, he proved he was a great hire and far exceeded expectations. It seemed he had contacts all over the place and was able to get appointments with potential customers Joanne's group has never before been able to get an audience with. In just three months, Wayne brought in an impressive number of restaurant accounts and even two hotels. And hotels are big money for Joanne's company. Just as Joanne's anxiety about the economy started to recede, she got hit with the Love Letter.

The letter was written on behalf of Wayne's former Virginia employer and flung phrases like "tortious interference with contract" and other unmentionables. It turns out Wayne had signed a bear of a restrictive covenant agreement while he was employed by the Virginia outfit. A copy of the agreement was enclosed in the letter. Sure enough, it included the triumvirate: non-compete, non-solicitation and non-disclosure provisions. Among other things, Wayne was bound not to engage in "the restaurant and hotel dry goods supply industry, including but not limited to kitchen and dining supplies, textiles and linens, and cleaning and housekeeping maintenance supplies" within a 100-mile radius from the former employer's principal place of business for one year following termination of his employment. He'd also agreed not to solicit the company's employees for hire and not to disclose or use any of its confidential information, including customer lists, targeted potential customers, and price lists. The agreement was thorough and well drafted. I might be able to develop an unenforceability argument, but – on its face – it was a tight contract.

The letter asserted that Wayne was in breach of the agreement by 1) working for my client, 2) soliciting customers of his former employer, and 3) using his knowledge of its prices and customer lists for my client's benefit. At the close of the letter, the lawyer threatened to sue Wayne for breach of contract and Joanne's company for interfering with the contract, and estimated damages in excess of a million dollars.

"But I didn't know he signed anything like that. Wouldn't I have to know there was a contract like that to be liable for interfering with it?" Joanne was correct. It is the plaintiff's burden of proof. The legal elements of the claim require the former employer to establish that my client had knowledge of the contract with Wayne. Joanne was relieved to know her company had a textbook defense – lack of knowledge. I explained to Joanne that I would draft a response to the demand letter setting out the fatal weaknesses of the threatened legal action, but I wanted her to know that storms like these rarely pass quietly by. Earnest denials usually fall on deaf ears, especially if a plaintiff's lawyer is the listener. And if Wayne's former employer had been hit hard enough by sales diverted to my client, a walk away was even less likely.

If I couldn't convince them to go away, I explained, the next step would likely be to negotiate a monetary settlement. Joanne was incredulous at the prospect of paying them a dime for something her company had not done. I understood her point well, and agreed, but nonetheless encouraged her to consider this a business decision – a question of dollars and cents.

The cost of a relatively small settlement would hurt a lot less than the jumbo-sized price tag of full-blown litigation. And, of course, there is always – *always* – the risk of losing. Regardless, after spending many thousands of dollars on litigation, even a judgment in my client's favor would be a pyrrhic victory. In litigation, the stalwart principles of the accused innocent are a prohibitively expensive luxury.

To make matters worse, Joanne had to deal with Wayne. If my client wanted to continue to employ Wayne, the settlement value and litigation risks would sizably increase. My client had a decision to make – let him go or take its chances. If Wayne remained an employee, he would have to engage separate counsel and my client would have to be prepared to part ways with and point fingers at its favorite new sales agent. I assured Joanne I would try to finagle a cheap, quick exit for her company and our conversation concluded.

The day after I responded to the demand letter, I met Joanne in my conference room to discuss her employment policies and practices. I wanted to make sure my client never again found itself in this position. So, I passed along some Rules of the Road:

Rule #1: Ask all job applicants if they have signed any restrictive covenants. If the answer is no, get them to certify that in writing. If the answer is yes, ask your lawyer to review it and to give you the thumbs up or down on hiring the candidate.

Rule #2: Distribute a policy to all new employees that prohibits using or bringing to the workplace any previous employer's property or materials. Better still, put it in your personnel manual and get all employees to sign an acknowledgment of receipt.

Rule #3: Do not turn a willfully blind eye to potential business torts. If your employee is suddenly awash in new sales, inquire. If your employee is consistently successful in helping the company underbid a competitor, inquire. If your employee is unusually helpful in recruiting new employees from one source, inquire. You get the idea.

Follow these Rules and you have a ready-made response to Love Letters like the one my client received. Equally, if not more, important, these protective measures demonstrate to courts that you keep your house in order. That goes a long way toward a judgment for the defense. If your employees are helping your business by injuring another, you are asking for trouble. Plus, courts are more and more willing to hear plaintiff arguments that a defendant competitor likely knew that a restrictive covenant was in place, because it's standard in a given industry.

There is no Standing Rule for business torts. Turning a willfully blind eye to calories only hurts your waistline. Turning a willfully blind eye to business torts hurts your bottom line.