"That's Not Fair!" Equitable Principles and Remedies That Can Help Your Business

By Andrew P. Botti - McLane Middleton

I. Equity vs Common Law

"If the law supposes that…the law is a ass – a idiot." So stated Mr. Brownlow in Dicken's *Oliver Twist,* upon learning that in the eyes of the law he was responsible for the actions of his wife. Brownlow went on: "the worst I wish the law is, that his eyes may be opened by experience[.]" Brownlow was expressing the frustration often felt by those facing a purely "legal" and overly simplistic remedy to often complex problems. The great jurist and Supreme Court justice, Oliver Wendell Holmes, Jr., wrote: "*The life of the law has not been logic: it has been experience….and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics*." Oliver Wendell Holmes, Jr., *The Common Law* (1881). Enter equity. Equity comes to us from the Roman law. Under the Roman system of justice, certain praetors (or judges) possessed the authority to put aside the rigid rules of the *ius civile* (civil law) "when their strict application would lead to results considered unfair or unresponsive to more advanced social conditions." Hans Julius Wolff, *Roman Law: An Historical Introduction* (University of Oklahoma Press 1951). The ancient concept of equity eventually made its way into the English legal system, to be administered there by the Chancery Courts. In feudal England,"[t]he King's Chancellor was given wide powers to prevent injustices or supply deficiencies where the common law was seen to operate unfairly." Sarah Worthington, *Equity, 2nd Edition* (Oxford University Press 2006), 8. Furthermore:

> The likelihood that the Common Law and Equity will deliver different responses to the same facts is exacerbated because, from the outset, the Common Law and Equity adopted quite different *remedial strategies.* The Common Law usually gives money remedies….Equity usually reacts differently. It typically orders the defendant to *do* something, perhaps to hand over an item of property, to specifically perform a contract, to cease creating a nuisance, to correct a document…and so forth.

Sarah Worthington, *Equity, 2nd Edition* (Oxford University Press 2006), 14 – 15. Fast-forward to America. Echoing Brownlow's sentiments, a New York jurist once explained: "Law without principle is not law; law without justice is of limited value. Since adherence to principles of 'law' does not invariably produce justice, equity is necessary." *Simonds* v. *Simonds*, 45 N.Y. 2d 233 (1978). Equitable principles are "unquestionably principles of right, justice and morality[.]" *Id.* The U.S. Supreme Court has stated: "Equity eschews mechanical rules; it depends on flexibility." *Holmberg* v. *Ambrecht*, 327 U.S. 392, 396 (1946). "In Massachusetts, instead of a distinct and independent Court of Chancery … we have certain chancery powers conferred upon a court of common law[.]" *Jones* v. *Newhall*, 115 Mass. 244, 251 (1874). Equity is said to act *in personam*, that is, to command someone to do something or refrain from certain actions, as opposed to simply awarding money damages. Therein lies equity's enormous power and inherent efficacy. For failure to comply with a court's order

may lead to severe consequences, such as contempt proceedings, *in terrorem* fines, and in the most extreme instances, a trip to the pokey! While equitable remedies are not perfect, and are at times inconsistently applied – ask ten people what is "fair" in a given situation and you will likely get five different answers – they remain a critical and highly effective means of redressing wrongs, particularly in the business context. What follows are some of the more prevalent and useful equitable concepts currently recognized and available.

II. "I Paid for That Property!" - The Resulting Trust

What if you pay for property, but do not hold legal title to same? Can you claim an ownership interest? A resulting trust may exist as a matter of law in your favor:

> The doctrine in regard to resulting trusts is settled by numerous decisions… When the money for the purchase of land is paid or furnished by one person, and the deed is taken in the name of another, there is a resulting trust created by implication of law in favor of the former.

Bailey v. *Hemenway*, 147 Mass. 326, 327 – 328 (1888). "Where land conveyed by one person to another is paid for with the money of a third, a trust results to the latter, which is not within the statute of frauds." *McDonough* v. *O'Niel,* 113 Mass. 92, 95 (1873). In *Davis* v. *Downer*, 210 Mass. 573, 575 (1912), the SJC found that a resulting trust arose where a partnership, comprised of the plaintiff and his brother, made an initial down payment for a lot which was then conveyed to a third party, the brothers' mother. Four years later the firm paid the mortgages – executed by the mother - for the balance of the purchase price. The Court held:

> These facts are sufficient to establish a resulting trust under the well recognized equitable principle, that where one pays for real estate but the conveyance is to another, a resulting trust arises in favor of the one who pays the purchase price against the grantee named in the deed, the later being treated as subject to all the obligations of a trustee, notwithstanding the statute of frauds.

Id. The fact that the grantee executed the mortgages was of no moment because it had been agreed *ab initio* that the partnership would pay them, which it did. *Id*. at 575. ("the grantee was thereby exonerated from all liability, and the entire consideration really was paid by the partners.") *See also Caron* v. *Wades*, 1 Mass. App. Ct. 651, 655 (1974) ("[t]he doctrine of resulting trusts rests on the presumption that 'he who supplies the purchase price intends that the property bought shall inure to his own benefit and not that of another, and that the conveyance is taken in the name of another for some incidental reason'"); *Gerace* v. *Gerace,* 301 Mass. 14, 18 (1938) (resulting trust arose where plaintiff agreed to pay mortgage note on real estate, although title was held by another).

II. "You Took What I Gave" - Account Stated

You should always check your bills, as well as the amounts paid toward same. The concept of account stated precludes a party from complaining that amounts consistently paid and accepted on bills were incorrect, even though the amounts paid and the bills rendered don't jive: The concept of "account stated" had been explicated in several definitions. For example, it has been defined as an agreement between parties who have had previous transactions of a monetary character that all the items of the accounts representing such transactions are true and that the balance struck is correct, together with a promise, express or implied, for the payment of such balance:

> It has also been defined as agreement between two parties which constitute a new and binding determination of the balance due on indebtedness arising out of previous transactions of a monetary character, containing a promise, express or implied that the debtor shall pay the full amount of the agreed balance to the creditor.(*See Canadian Ace Brewine Co.* v. *Swiftsure Beer Co.* (1958), 17 Ill. App. 2d 54, at 60, 149 N.E. 2d 442.) The agreement mentioned in these definitions must, of course, manifest the mutual assent of the debtor and creditor...The meeting of the parties minds upon the correctness of an account is usually the result of one party rendering a statement of account and the other party acquiescing thereto... *The form of the acquiescence or assent is immaterial, however, and the meeting of minds may be inferred from the conduct of the parties and the circumstances of the case.* (*See Pure Torpedo Corp.* 327 I11. App. at 32-33, 63 N. E. 2nd 600.) For example, where a statement of account is rendered by one party to another and is retained by the latter beyond a reasonable time without objection, *the retention of the statement of account without objection within a reasonable time constitutes an acknowledgement and recognition by the latter of the correctness of the account and establishes an account stated. (citations omitte*d) (*emphasis added).*

Motive Parts Co. of America, Inc. v. Robinson, 53 Ill.App.3d 935, 369 N.E.2d 119, 122 (Ill. App. 1977). "The assent necessary to make out an account stated … may be either express or implied." *Milliken* v. *Warwick*, 306 Mass. 192, 196 (1940). While often viewed in the context of a plaintiff seeking to establish the existence of a debt, "the doctrine of account stated may be raised by …a defendant seeking to prevent the reopening of a paid account...". *In re Rockefeller Centr Properties*, 272 B.R. 524, (Bankr. SDNY 2000), aff'd 46 Fed App. 40 (2d Cir. 2002). In *Malkov Lumber Company* v. *Wolf*, 3 Ill. App. 3d 52, 278 N.E. 2d. 481 (1971) a judgment for defendant was reversed where the evidence showed that for more than 5 years plaintiff performed by shipping materials to defendant and invoicing defendant for same. In reversing the trial court based upon an account stated, the Appeals Court held:

> That there was a meeting of the minds of the parties as to the correctness of the account balance is shown by the implied acquiescence of Forman upon his receipt of monthly statement of the status of the account and his failure to register an objection thereto.

Id at 55. In the circumstances of an account stated, "[t]he action is founded not upon the original contract, but upon the promise to pay the balance ascertained." *Pure Torpedo Corporation* v. *Nation*, 327 Ill. App. 28, 34 (1945) citing *Dick* v. *Zimmerman*, 207 Ill 636, 639. I once used this concept to effectuate a very good settlement. Our client had been delivering goods for a major retailer for nearly ten years, and billing the retailer for his services on a monthly basis. The manager of the warehouse where our client loaded his truck would review the bills, approve them for payment, and then send them to headquarters where a check was cut and sent to the delivery service. Not once during this ten year time period were the amounts set forth on the bills questioned by the retailer. Then, someone at the retailer's headquarters noticed that the calculations on the bills did not jive with the one set forth in the delivery services contract. Nevertheless, because the retailer had never questioned the amount on the bills or the calculation methodology, the retailer – after several days of trial – agreed to accept by way of settlement only a fraction of the reimbursement it was seeking from the delivery company.

III. "It's Too Late to Change Your Mind" – Equitable Estoppel

If you sit on your hands too long, you may be compelled to stay there. "Even if [plaintiff] has not waived a known right, he may be estopped from enforcing it." *Saverslak* v. *Davis Cleaver Produce Co.* , 606 F.2d 208, 213 (1979) ("[t]he principles of waiver and estoppel support the notion that a party to a contract may not lull another into false assurance that strict compliance with contractual duty will not be required, and then sue for non-compliance.") In *Saverslak* the court of appeals estopped plaintiff from enforcing trademark rights under the express provision of a written contract.

> This seven-year period of silent acquiescence in the face of ample opportunity to protest alone evinces Saverslak's intent to relinquish a known right. The acceptance of royalties makes that intent crystal clear[.]
>
> Alternatively, we hold that regardless of whether Saverslak waived his paragraph 22 rights, he is estopped from enforcing them. We may reasonably assume that Saverslak's silent acquiescence and acceptance of royalties led Davis-Claver to believe that paragraph 22 would no longer be enforced and that it could safely continue to omit the trademark. Had Saverslak instead raised a timely objection the matter might have been resolved with minimum expense and effort. Under these circumstances, we can not allow him to cash in on the false assumption he created and on which the defendant relied to its detriment.
>
> *Id.*
> Equitable estoppels arises through a party's voluntary conduct whereby he is precluded from asserting his rights against another who in good faith relied on such conduct and was therefore led to change his position to his detriment (Phillips vs. Elrod (1985), 135 Ill. 3d. 70, 88 Ill. App. Dec. 47, 478 N.E. 2d 1078, 1082.) Unlike waiver, estoppel focuses not on the obligor's intent, but rather on the effects of his conduct on the obligee. (*Saverslak* v. *Davis-Cleaver Produce Company* (7th Cir. 1979), 606 F. 2d 208,213, *cert. denied* (1980), 444 U.S. 1078, 100 S. Ct. 1029, 62 Ed, 2d 762.)

Wald v. *Chicago Shippers Association*, 175 Ill. App 3d 607, 622 (1988). "The overarching purpose of the doctrine is to prevent results contrary to 'good conscience and fair dealing, and its application is governed by 'no rigid criteria.'" *Micro Networks Corp.* v. *HIG Hightec, Inc*., 195 F.Supp.2d 255, 266 (D. Mass. 2001). In *Micro Networks*, a preferred corporate shareholder of an high tech company was estopped from asserting that it had consent rights over the corporation's sale of its stock. The shareholder claimed that it never saw a revised Securities Purchase Agreement attachment which did not give it consent rights, even though it had signed the final form SPA without objection. The court found: "If Hightec possessed the extensive veto rights it claims, its representative on Micro Network's Board of Directors had a duty to be forthright with the Board so that it could inform prospective purchasers of preferred stock of Hightec's unassailable position with respect to major corporate transactions." *Id*. at 267.

IV. "That's My Stuff!" – Equitable Replevin

You are not limited in obtaining only the monetary value of certain property – you may be able to get the thing itself back. Under G.L. c. 214, § 3, the Superior court has "equitable jurisdiction to order redelivery of goods or chattels taken or detained from the owner, without requiring the owner first to establish inadequacy of the legal remedy." Bishop, Vol. 17A , *Mass. Practice Series (Prima Facie Case – Equitable Replevin)*, (West 2009) § 49.5, quoting reporter's note to Mass. R. Civ. P. 65.2. "The common law authorities establish the proposition that an officer may break into a building, such as that here involved, for the purpose of seizing a chattel upon a writ of replevin." *Broomfield* v. *Checkoway*, 310 Mass. 68, 69 (1941). The president of a company once came to me and reported that he recently discovered that his CFO stolen over $1 million dollars from his company. His suspicions were aroused when he and other employees noticed that the CFO had started driving to work in very expense antique "muscle cars" from the late sixties and early seventies. These vehicles often sold for nearly six figures, depending upon the particular make and model. We discovered that several of these expensive vehicles were being kept by the defendant in a certain locked storage facility. We were able to obtain an order from the Superior Court directing the appropriate Sheriff – waiting across the street from the storage facility with several deputies, bolt cutters, and car carriers - to seize the subject vehicles. In another case, the seller of a business sought to repossess its physical assets as the buyers failed to pay the full purchase price. The agreement called for periodic payments toward the price of the equipment and the goodwill of the company. The buyers made a few of the required payments, and then stopped paying altogether, while holding onto the equipment. We were able to obtain an order from the Superior Court directing the buyers to turn over to the seller all the physical assets of the business, which they did promptly.

V. "That's Not What I Meant!" – Reformation of Contract

As the saying goes, "nothing is written in stone." This is particularly true in certain circumstances. "As a general rule, reformation of an instrument may be warranted not only by fraud or by mutual mistake, but also by a mistake of one party …which is known to the other party[.]" *Torrao* v. *Cox,* 26 Mass. App. Ct. 247, 250 (1988). "It has been said more generally that '[i]f one of the parties mistakenly believes that the writing is a correct integration of that to which he had expressed his assent and the other party knows that it is not, reformation may be decreed.'" *Id*. at 251 (citing Corbin, Contracts s. 614 at 730 (1960); *Mates* v. *Penn Mut. Life Ins. Co.*, 316 Mass. 303, 306 (1944) ("[a] mistake made by one party to the knowledge of the other is equivalent to a mutual mistake.") Our courts have tremendous equitable powers in this respect. I recently had a non-compete enforcement case where the contract at issue called for a 2 year non-compete period, and an all-New England geographical scope. After hearing the evidence in the form of affidavits, the court enforced the non-compete against a former sales employee, but limited the period to one year, and cut the geographic scope back to one state only. The court felt that these new parameters were enough to protect the goodwill of the business seeking full enforcement of the contract's terms.

VI. "It's Pay-back Time!" – Money Had and Received

"An action for money had and received lies to recover money which should not in justice be retained by the defendant, and which in equity and good conscience should be paid to the plaintiff." *Cannon* v. *Cannon*., 69 Mass. App. Ct. 414, 423 (2007). "The right to recover does not depend upon privity of contract, but on the obligation to restore that which the law implies should be returned, where one is unjustly enriched at another's expense." *Rabinowitz* v. *People's Nat. Bank*, 235 Mass. 102 (1920). A client reported that he has been enticed by

a private fund manager's promises of high yields in very short time spans. The client - an investment manager himself – turned over millions of dollars of his client's money to the private fund manager. The money was supposed to reside in one investment vehicle, but was placed as promised. When the client learned this and asked for the money back, the investment manager refused to return it! Using the principal above, as well as those of unjust enrichment and restitution, I was able to convince the federal court in Boston to order the freezing of the account at a bank in California where the money was located. The court further ordered that the funds be returned to the client within a specified period.

VII. "But You Said You Would Do It" – Specific Performance

Obtaining a court order directing someone to follow through on the express terms of a contract may be far more valuable than seeking money damages for a breach. " 'It may be taken to be settled in this commonwealth that the question whether a contract will be specifically enforced depends upon the question whether the thing contracted for can be purchased by the plaintiff, and whether damages are an adequate compensation for the breach.'" *Rigs* v. *Sokol*, 318 Mass. 337, 342 (1945). "It is settled by our decisions and by the great weight of authority that the right to specific performance …by way of injunction not lost because the contract contains a provision for the payment of a penalty on liquidated damages in the event of a breach." Id. at 342-343. In *Rigs*, the court affirmed the order below which required the defendants to execute a lease for the premises and a bill of sale transferring the good will, fixtures and personal property of a business to the plaintiff, under an agreement to buy same, which the seller refused to honor. "There is a growing tendency to give the promisee the actual performance for which he bargained, if he prefers it, instead of a substitute in damages, where damages are not the equivalent of the performance." *Sanford* v. *Boston Edison Co*., 316 Mass. 631, 634 (1944). In *Butterick Pub. Co.* v. *Fisher*, 203 Mass. 122 (1909) the court affirmed an injunction prohibiting a retailer from selling any make of patterned clothing other than that supplied by the plaintiff, as had been agreed in a contract between the parties. A typical example of such specific performance is found in the circumstances of enforcing the express terms of a non-compete agreement. I recently was called upon to put on live testimony – to have a mini-trial of sorts – in order to hold a departing sales employee to the terms of his non-compete. The employee had lied about his next job to hide the fact that he was going to work for a direct competitor of my client. After several days of testimony, the court allowed the employer's request that the non-compete agreement be enforced. In another case, a major builder of coal processing plants was stymied when one of its vendors failed to produce and deliver on time a series of multi-ton feed tanks. The builder cancelled the contract as a result of the vendor's failure to perform as agreed. Under the circumstances, the contract allowed that the builder had the right to request that the vendor send the uncompleted feed tanks to a new vendor for timely completion. The vendor refused. We were able to proceed to court and obtain an order for specific performance, *i.e*., directing the non-performing vendor to deliver up the incomplete feed tanks to a new manufacturer, as called for in the original contract.

VIII. "Get Me Outa Here!" – Rescission of Contract

You may be able to "get out while the gettin' is good" if you come to find out the other side cannot perform**.** " A court, in the exercise of its equitable discretion, typically rescinds an agreement only upon a showing of fraud, accident, mistake or some type of gross inequitable conduct which renders the contract void *ab initio.*" *PLAY, Inc*. v. *Nike, Inc*., 1 F.Supp.2d 60, 65 (D. Mass. 1998). "Rescission is an equitable remedy, and, whenever possible, the result should be to return the parties to the status quo ante." *Ann & Hope, Inc.* v. *Muratone,* 42 Mass. App. Ct. 223, 230 (1997). "[P]laintiff seeking rescission of a contract must generally 'restore or offer to restore all that he received under [the contract].'" *Id.* In *Ann & Hope*, the court affirmed the rescission of a contract between the

retailer and a company which was to provide extended warranty services to customers purchasing goods from the retailer. Under the contract at issue, Ann & Hope was to purchase preprinted warranty cards from defendant and resell them to consumers who purchased major appliances. If repairs to those appliance became necessary, the warranty company was supposed to pay the repair shops directly. It failed to do so. In fact, many of the repair shops billed Ann & Hope directly, and the warranty company refused to reimburse the retailer after it paid these repair bills. The warranty company also charged Ann & Hope for many more warranty cars than it actually wound up delivering. In this case, "the judge determined that rescission was the appropriate remedy due to the difficulty of calculating monetary damages and the practical impossibility of evaluating the parties' continued performance under the contract." In so doing the plaintiff was called upon to restore to the defendant all it had received under the contract, while the plaintiff was entitled to "get back" all it had lost – a value of well over $2 million dollars.

IX. "What's Yours is Mine" – Constructive Trust

"A constructive trust may be said to be a device employed in equity, in the absence of any intention of the parties to create a trust, in order to avoid the unjust enrichment of one party at the expense of the other where legal title to the property was obtained by fraud or in violation of a fiduciary relationship or arose where information confidentially given or acquired was used to the advantage of the recipient at the expense of the one who disclosed the information." *Barry* v. *Covich*, 332 Mass. 338, 342 (1955). "[O]ur present tendency is to extend its availability not only where there has been a breach of a relationship long recognized as fiduciary but also where there has been the wrongful use of information confidentially given to one for a particular purpose and where instead it has been employed for an entirely different purpose to the gain of the one receiving the information and the detriment of the other." *Id*. at 343."When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee." *Simonds* v. *Simonds*, 45 N.Y. 2d 233 (1978). I was able to use this equitable principle to recover money which was transferred wrongfully out of a corporate account to a personal bank account. A former employee and family member of a small family owned and operated business falsely held himself out as presently employed by the company and was able to convince bank personnel that he had authority to transfer money out of the corporate account. He did, in fact, transfer out tens of thousands of dollars to his own personal bank account from the company's account. I was able to obtain an order essentially freezing the money taken, and then ordering the money replaced into the original corporate account.

X. "Give That Back!" – Unjust Enrichment/Restitution/*Quantum Meruit*

"Restitution is an equitable remedy which a person who has been unjustly enriched at the expense of another is required to repay the injured party." *Keller* v. *O'Brien*, 425 Mass. 774, 778 (1997). "A determination of unjust enrichment is one in which '[c]onsiderations of equity and morality play a large part.'" *Metropolitan Life Ins. Co*. v. *Cotter*, 464 Mass. 623, 644 (2013). In fact, unjust enrichment "is defined as 'retention of money or property of another against the fundamental principles of justice or equity and good conscience.'" *Santagate* v. *Tower*, 64 Mass. App. Ct. 324, 329 (2005). "Restitution is appropriate 'only if the circumstances of its receipt or retention are such that, as between the two persons, it is unjust for [one] to retain it.'" *Id*. at 643. Claims for restitution have been allowed "in circumstances involving fraud, bad faith, violation of trust," or in business torts such as "unfair competition and claims for infringement of trademark or copyright…and …in disputes arising from quasicontractual relations." *Id*. at 644. "A quasi contract or a contract implied in law is an obligation created by the law 'for reasons of justice, without any expression of assent and sometimes even against a clear expression

of dissent[.]'" *Salamon* v. *Terra*, 394 Mass. 857, 859 (1985). A quasi contract 'is not really a contract, but a legal obligation closely akin to a duty to make restitution.'" *Id*. *Quantum meruit* allows one to recover the fair and reasonable value of services rendered even in the absence of an enforceable express contract. "Quantum meruit is thus a theory of recovery based on an underlying premise of one party's unjust enrichment." *Waste Stream Environmental, Inc*. v. *Lynn Water and Sewer Commission*, 15 Mass. L. Rptr. 723 (2003).

I had a case where a major gasoline processer/retailer reported complaints from customers who had attempted to use its gas credit card at a certain location. The would-be customers were told that by those managing this specific station that only cash was accepted. Upon investigation via drive-by inspection, the retailer learned that a sign with its well-known name was being used to identify the station as one of its retail location when it was not. Somehow, the sign had remained on site even though the location had not been a true location of the gasoline processer/retailer for many years. We proceeded to court on theories of unfair competition and restitution, since the gas station was falsely claiming to sell our client's well-known brand of gasoline, when in fact it was selling unbranded gas the location. We obtained an order from the court which not only instructed the station to remove the signs, but also to pay substantial restitution for having improperly traded on our client's well-known name.

XI. "Can You Explain That?" – Declaratory Judgment

A party to a private contract may maintain a suit in equity for a judicial declaration as to the rights of the parties under the agreement. *Zaltman* v. *Daris,* 331 Mass. 458 (1954). This equitable power has been codified under state statute. See G.L. c. 231A. "In proceedings under the declaratory judgment act, it is the duty of the judge to adjudicate the decisive issues involved in order that the controversy between the parties should be finally settled." *Id.* at 462. A federal analogue exists, the purpose of which has been explained:

> The purpose of the Act is to enable a person who is reasonably at legal risk because of an unresolved dispute, to obtain judicial resolution of that dispute without having to await the commencement of legal action by the other side. It accommodates the practical situation wherein the interest of one side to the dispute may be served by delay in taking legal action. However, the controversy must be actual, not hypothetical or of uncertain prospective occurrence.

BP Chemicals Ltd v. *Union Carbide Corp.*, 4 F.3d 975, 977 (Fed. Cir. 1993); 28 U.S.C. §2201. Declaratory judgment actions are used to resolve disputes over patent rights, whether insurance companies have a duty to defend under a given policy, and to settle disagreements over the meaning and extent of terms contained in private contracts. For example, parties may hotly dispute the meaning and effect of certain terms and conditions to an agreement, and the consequent performance of a party thereunder. If so, either party may ask the court to interpret the contract terms, and fashion a remedy consistent with said interpretation.

XII. "What's Mine is Mine" – Equitable Receivership

"Jurisdiction to appoint a receiver of a corporation upon the petition of a simple contract creditor cannot be doubted in this Commonwealth." *New England Theatres* v. *Olympia Theatres*, 287 Mass. 485, 492 (1934). "A receivership is an equitable remedy designed to protect and preserve the assets of a corporate debtor for those creditors who the court ultimately decides are entitled to them." *Charlette* v. *Charlette Bros. Foundry, Inc.*, 59

Mass. App. Ct. 34, 45 (2003) "[R]eceivership is not meant to *determine* or *confer* liability on the corporation or order payment of debts. Rather, receivership is a prophylactic measure to protect assets, *in the event that* a particular creditor can prove that the corporation is liable on a debt." *Charlette* v. *Charlette Bros. Foundry, Inc.*, 59 Mass. App. Ct. 34, 46 (2003) (emphasis in original). Such a receivership is not, however, only for the benefit of the petitioning creditor. I had a case where I represented a fairly large creditor of a company that suddenly stopped paying its bills. We learned that the debtor was selectively paying an assortment of other creditors, but not our client. We had received many assurances in writing acknowledging the debt, and promising to pay it – but little money. Concerned that we were "last in line" for payment, we petitioned the court to have a receiver appointed immediately, and the court agreed. The receiver was empowered to take possession of all the debtors books and records, and essentially determine what assets were available to pay which creditors. In essence, the receiver took control of the company, and ultimately "wound down" the business with the court's imprimatur.

XIII. "The Best Offense is a Good Defense" – Equitable Defenses

1. Laches

Justice delayed may be justice denied. "There is no hard and fast rule as to what constitutes laches. If there has been an unreasonable delay in asserting claims or if, knowing his rights, a party does not seasonably avail himself of means at hand for their enforcement, but suffers his adversary to incur expense or enter into obligations or otherwise change his position, or in any way be inaction lulls suspicion of his demands to the harm of the other, or if there has been actual or passive acquiescence in the performance of the act complained of, then equity will ordinarily refuse her aid for the establishment of an admitted right, especially if an injunction is asked." *Stewart* v. *Finkelstone,* 206 Mass. 28, 36 (1910). "Laches has been defined as 'the neglect for an unreasonable and unexplained length of time …to do what in law should have been done[.]'" *Weiner* v. *Board of Registration of Psychologists*, 416 Mass. 675, 678 (1993). "Mere lapse of time although an important is not necessarily a decisive consideration." *Stewart*, 206 Mass. at 36. What constitute unreasonable delay in taking the appropriate action really depends on the circumstances of the case. However, "one cannot fiddle while Rome burns." If a party is well aware of a harmful or potentially damaging situation, one must act promptly. For example, if you are going to ask a court to enforce a non-compete agreement where you have learned of a violation of same, you can't wait for months to do so. If you do, the court may refuse to enforce a valid agreement simple because you initially stood by and did nothing.

2. Unclean Hands

"'She who comes into equity must come with clean hands'…[T]hus 'the doors of equity' are closed 'to one tainted with inequitableness or bad faith relative to the matter in which [s]he seeks relief, however improper may have been the behavior of the' other party." *Fidelity Management & Research Co*. v. *Ostrander*, 40 Mass. App. Ct. 195, 200 (1996). "[W]hile 'equity does not demand that its suitors shall have lead blameless lives'…as to other matters, it does require that they shall have acted fairly and without fraud or deceit as to the controversy in issue." *Id.* Thus, it's important to keep in mind that improper conduct on behalf of one seeking an equitable remedy may very well disqualify that person or entity from receiving the requested relief.

About Andrew P. Botti

Andrew represents corporations, smaller businesses, and family owned and operated enterprises in complex business and employment-related disputes. He advises management and business owners/operators on shareholder disputes, employee discrimination and commercial litigation matters. He has tried numerous cases to verdict in both state and federal court, and has appeared before various administrative and legislative agencies such as the Massachusetts Commission Against Discrimination. Andrew has also testified before the Joint Committee on Labor and Workforce Development of the Massachusetts legislature regarding the efficacy of "An Act Relative to Non-competition Agreements," and has been actively involved in the debate over recent efforts to eliminate non-competes in their entirety.

Andrew has been appointed to the Massachusetts Economic Development Planning Council by Governor Charlie Baker. The Council's mission is to develop a written comprehensive economic development policy for Massachusetts, and construct a strategic plan for its implementation.

In December 2014, Andrew was appointed by Governor-Elect Charlie Baker to the Baker-Polito Transition Team Subcommittee on Jobs and the Economy. In this capacity, Andrew helped prepare findings and recommendations for the new administration.

Andrew is currently a member of the Board of Directors of AIM, the Associated Industries of Massachusetts. Founded in 1915, AIM is the oldest and largest statewide association working to serve and foster the business interests of Massachusetts employers. He formerly served as Chairman of the Board of SBANE, the Smaller Business Association of New England, from 2009 - 2011. SBANE was founded in 1938 to promote and foster the interests of smaller businesses throughout the 6 state region.

Andrew received his J.D. from Northeastern University (1991) and B.A. from Columbia University (1983). Previously he was a Partner at Colucci Norman, LLP in Beverly, MA as well as a Partner, Donovan Hatem LLP in Boston, MA.

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About McLane Middleton

Founded in 1919, McLane Middleton is one of New England's premier full-service law firms with offices in Manchester, Concord, and Portsmouth, New Hampshire, as well as Woburn and Boston, Massachusetts.

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McLane Middleton is guided by the principle that attorneys and staff should be active participants in the communities in which we live and work.