

The “911” Business Emergency: How Best to Proceed When “It Hits the Fan”

By Andrew P. Botti - McLane Middleton (February 2021)

A Most Difficult Legal Dilemma

Businesses are often faced with “emergency” situations which may mean the destruction of the enterprise if immediate legal relief is not sought and obtained. The examples of such situations are endless, and often arise on a moment’s notice. Here are some real life examples which the author has dealt with:

Scenario 1

A star salesman under a valid non-compete agreement decides to “evaporate.” He lies about where he is going, and a few weeks later reappears as an employee of a major competitor. Indications are that he likely took confidential and proprietary customer information with him to share with his new employer.

Scenario 2

Several real estate salespeople resign from a brokerage all at once and go to work for a competitor located literally across the street. They are not subject to any employment agreements per se, but indications are that they have rifled through their previous brokerage’s files and removed or copied sensitive business and potential customer information.

Scenario 3

An investor/trustee turns millions of dollars of other peoples’ money over to another investor who then decides he is going to move the money off-shore. The investor/trustee finds out and wants to freeze the funds immediately and get them back before moved.

Scenario 4

A young and new CFO manages to slowly and surreptitiously syphon off nearly \$1 million dollars of his employers money over a two year period. The CEO was too busy with sales and administration to notice, and trusted the young man implicitly. One day, however, the CEO began to notice that the young CFO started to come to work driving very expensive and elaborate “muscle cars.” These vehicles were rare and sold for tens of thousands of dollars. They were priced well beyond the young CFO’s financial capacity. Upon review of the subject financials – without knowledge of the CFO – the approximate \$1 million dollar theft is discovered.

Each of the above scenarios is a real life situation with which the author was faced. In such circumstances, the typical “filing of a complaint” does not suffice given the sensitive nature of the materials at stake, as well as the difficulties of recovering money no longer in the possession of the owner. The Dicken’s “Bleak House” procedure simply does not work, and may in fact cause more harm by providing ample notice to the wrongdoer to “take the money (or proprietary information) and run!”

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An Effective Approach to the Business Emergency

The TRO or Temporary Restraining Order: Mass. R. Civ. P. 65(a)

This type of order “may be granted without written or oral notice to the adverse party or his attorney only if it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition.”

When filing papers for a TRO, the court reviewing same does not necessarily have to give the moving party a hearing. That is precisely what occurred in the case referenced above involving the millions of dollars which the holder of same threatened to move off shore. Counsel had to prepare the necessary verified complaint, request for TRO and Preliminary Injunction, and bring same to the clerk's office. The clerk instructed counsel to return to his office, and that he would be notified by phone as to the court's decision on the TRO. After a few hours, he was so notified, and returned to the clerk's office to obtain the endorsed order for service on the opposing party.

In state court the presiding judge will endorse and issue a “Summons and Restraining Order” which informs the recipient that a preliminary injunction hearing will be held within ten days, and that in the interim “we command you” to “desist and refrain from” whatever allegedly harmful action or activity the plaintiff is attempting to stop. At times plaintiff may also seek an emergency motion for expedited discovery which may be used at the preliminary injunction hearing. Defendant may do the same and ask that the injunction hearing be put off until the discovery has been completed.

The TRO is good for 10 days, unless the party served appears within 2 days seeking to have it removed.

The Preliminary Injunction – What's Its Function?

The ex-parte TRO – perhaps the best way to maintain the status quo prior to a full hearing – is typically accompanied by a short order of notice scheduling a hearing for a Preliminary Injunction within the 10 day period. Both parties are required to appear before the court with sworn affidavits and exhibits supporting their respective positions. Under the circumstances, hearsay rules may be relaxed when the record is considered.

Preliminary Injunction Standard

The Preliminary Injunction standard is well recognized. It is well-established under Massachusetts law that the grant of a preliminary injunction is appropriate upon a showing that: (1) the moving party has a likelihood of success on the merits; (2) irreparable harm will result from denial of the injunction; and (3) in light of the plaintiff's likelihood of success on the merits, the risk of irreparable harm to the plaintiff outweighs the potential harm to the defendant in granting the injunction. See *Packaging Indus. Group, Inc. v. Cheney*, 380 Mass. 609, 617 (1980); *T & D Video, Inc. v. City of Revere*, 423 Mass. 577, 580 (1996). When considering preliminary injunction motions, courts apply a balancing test, and when the balance between the relative risks of harm cuts in favor of the moving party, a preliminary injunction may properly issue. *Id.* In appropriate cases, courts may also consider “the risk of harm to the public interest” when determining whether to grant a preliminary injunction. *Brookline v. Goldstein*, 388 Mass. 443, 447 (1983).

The moving party must demonstrate: 1) irreparable harm; 2) a likelihood of success on the merits; 3) that the balance of harms favors the plaintiff; and that 4) the public interest favors the order sought. The moving party may also be required to post a bond covering costs incurred by the opponent should the injunction be denied.

Irreparable Harm is the Key to Success

[T]he showing of irreparable harm is perhaps the single most important prerequisite for the issuance of a preliminary injunction...and the moving party must show that injury is likely before the other requirements for an injunction will be considered...To establish irreparable harm, a party seeking preliminary injunctive relief must show that there is a continuing harm which cannot be adequately redressed by final relief on the merits and for which money damages cannot provide adequate compensation.... (Kamerling v. Massanari, 295 F.3d 206, 214 (2d Cir. 2002).

In Massachusetts state court, a preliminary injunction is typically decided on the papers, i.e., verified complaint; affidavits and exhibits, and after oral argument by counsel. However, the presiding judge has the authority and ability to require live testimony from the parties. In fact, in the first scenario set forth above, the presiding judge was relatively new to the bench. He had never decided a preliminary injunction, and wanted to be able to assess the credibility of the witnesses before deciding whether to enforce the existing non-compete. As a result, the parties and their counsel were given two days to prepare their witnesses and cross-examinations. A live "mini-trial" of sorts was then held before the court, and legal memoranda submitted after closing arguments.

After a few days, the court issued a written order in favor of the moving party seeking to enforce the non-compete. In federal court, it is not at all unusual for the judge to take live testimony on motions for preliminary injunctions.

The preliminary injunction issued by the Massachusetts state court has no time limit other than the one imposed by the court's order. Depending on the subject matter of the injunction, the order may be in effect for several years, and the court may require period hearings to review the status of the order.

Civil Contempt Looms in the Background

A party obtaining an injunction and then learns it has been violated may file a motion seeking a showing as to why the non-compliant party should not be held in contempt by the court issuing the order. If the court finds a party in contempt, it may order the contemnor to pay all fees and costs. The court may order a coercive per day fine, or ultimately jail time until compliance is done. Even non-parties that willfully aid and abet the violation of a preliminary injunction may be held in contempt. When actual notice of the injunction has been properly served, employees, officers, agents and counsel of the enjoined entity may be held in contempt for willfull violation of the court's order.

An Interlocutory Appeal is Real in Massachusetts

Under Massachusetts procedure, as party subject to an injunction may, under c. 231, s. 148 appeal the injunctive relief ordered to a Single Justice of the Appeals Court. Often times, no hearing is granted by the Single Justice, and a ruling is made on the papers alone. The single justice has the authority to affirm, modify or reverse the injunctive relief ordered below. On one occasion, a Single Justice did overturn the ruling below, having found

that the Superior Court had not applied the correct legal standard. On another occasion, the Single Justice did grant us a hearing, but ultimately did not overrule or change the injunctive relief ordered below. It is possible under Mass. G. L. c. 211, s. 3 to appeal the order of the Appeals Court Single Justice to a Single Justice of the Supreme Judicial Court, but such appeals are rare.

The After Hours Route: There When Necessary

Under Massachusetts law, a party, via initial contact with the state police, may have access to a Superior Court judge after hours and on a weekend. This access includes requests related to business disputes. G.L. c. 211B, s. 9(vi). The undersigned did in fact utilize this after hours emergency procedure to obtain an injunction concerning the possession of certain financial assets until a full hearing could be conducted on the merits. The "on call" judge will typically contact opposing counsel as well concerning any interim order.

Outcomes of the Above Scenarios

Here is ultimately what happened in the cases referenced above:

Scenario 1

As referenced above, the judge was a relatively new appointee and had never had case where a party was seeking to enforce a valid non-compete via injunctive relief. Consequently, the court ordered live testimony from the departed salesman, his new boss who had to come to Massachusetts from California, as well as two of the Plaintiff's officers. Both direct and cross-examinations were conducted for several hours, and various exhibits submitted. Opening and closing arguments were allowed. Within several days, the court granted the injunction sought by plaintiff which prohibited defendant from working for the competing venture, among other things.

Scenario 2

The departed salespersons were seen as having taken confidential and proprietary business information belonging to the Plaintiff broker. They were ordered to return all such information, and did so. The court also ordered that they were forbidden from working for the new brokerage for a certain amount of time.

Scenario 3

An ex parte Temporary Restraining Order was issued by the U.S. District Court prohibiting defendant from moving any of the money it had received from Plaintiff. At the preliminary injunction hearing, the defendant did not offer an affidavit, but only a legal memorandum in opposition to the Plaintiff's request for an immediate return of all funds. Such an order was granted within 24 hours, and all funds returned to the owners forthwith.

Scenario 4

Realizing that it was unlikely to recover the stolen funds, Plaintiff sought an order requesting that all the vehicles purchased by the CFO be seized immediately. Plaintiff had learned that the cars were being kept in a locked storage facility. So, at the time of the injunction hearing – where defendant failed to show-up – the court did order seizure of the vehicles. A sheriff was attending the hearing and he immediately brought the order to the

driver of a car carrier parked across the street from the storage facility. The locks were cut, and the cars seized. The vehicles were eventually sold by plaintiff to recover a portion of the stolen funds.

The Broad Uses of Injunctive Relief

As long as one can demonstrate that money damages alone will not suffice, injunctive relief is a powerful legal tool which often ends the dispute where the relief is granted. This allows plaintiff to avoid a long, expensive draw-out legal procedure.

Injunctive relief can be used to enforce valid contracts and restrictive covenants, protect assets, fight trademark and trade dress infringement, resolve shareholder disputes, reach assets, freeze bank accounts and many other quick and effective legal remedies.

About Andrew P. Botti

Andrew represents corporations, smaller businesses, and family owned and operated enterprises in complex business and employment-related issues. He advises management and business owners/operators on business disputes, shareholder issues, employee discrimination claims, 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 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 was appointed to the Massachusetts Economic Development Planning Council by Governor Charlie Baker. The Council's mission was to develop a written comprehensive economic development policy for Massachusetts, and construct a strategic plan for its implementation. The plan was eventually signed into law by the Governor.

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 (now known as the New England Business Association) 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). He was previously a litigation partner at Donovan Hatem LLP, and a Senior Associate at Burns & Levinson, LLP.

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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. Driven by the firm's depth of sophisticated legal expertise and an unwavering commitment to client service, McLane Middleton has built collaborative and lasting relationships with a broad spectrum of domestic and international clients. McLane Middleton is guided by the principle that attorneys and staff should be active participants in the communities in which we live and work.