

1-1-2005

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Recommended Citation

10 Suffolk J. Trial & App. Advoc. 29 (2005)

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THE PARTNERSHIP FORM IN LITIGATION: A CASE STUDY

*Nelson P. Lovins**

The corporate form of doing business is a creature of twentieth century American law, and its application to close corporations has grown in popularity during the last fifty years. As a consequence, law schools spend very little time educating students in partnership jurisprudence, lawyers feel more comfortable with the corporate form, and a whole generation of lawyers has less familiarity with partnership law than its predecessors.

This article will examine the law of general partnership in the context of litigation. It will review selected sections of the Uniform Partnership Act and associated case law and discuss their application in litigation utilizing a hypothetical dispute. Finally, various remedies and techniques will be discussed that apply not only to partnership litigation, but business litigation generally.

I. CRASH COURSE FOR THE NOVICE

A. The Nature of the General Partnership

Unlike the corporation and the limited partnership, the general partnership is not an entity, but rather an association of individuals. In Massachusetts, the Uniform Partnership Act can be found in Chapter 108A.¹ Section 6 defines the general partnership as “an association of two or more persons to carry on as co-owners a business for profit... .”² Indeed, in

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¹ See MASS. GEN. LAWS ch. 108A, § 1 (2005). The Limited Liability Partnership was engrafted onto chapter 108A by amending sections 2, 6, 15, 18, 34, 3 and 40 and by adding sections 45-49 by chapter 281, st. 1995. See generally MASS. GEN. LAWS ch. 108A (2005).

² MASS. GEN. LAWS ch. 108A, § 6 (2005); see also UNINCORPORATED BUSINESS ASSOCIATIONS, AMERICAN CASEBOOK SERIES 426 (West Group 2002).

A longstanding debate among academicians is whether the partnership is best conceived of as an aggregate of its individual members or an entity separate and

Massachusetts the general partnership, with few exceptions, can only sue and be sued in the name of all the partners.³ However, Rule 17(b) of the Federal Rules of Civil Procedure provides for an entity approach in this connection.⁴ On the other hand, the limited partnership, a hybrid between the corporation and the general partnership, is considered an entity, and should be sued in its own name.⁵

B. Selected Sections of Chapter 108A and Applicable Case Law

1. Partnership Property and a Partner's Property Rights

The existence of a partnership is a matter of intent,⁶ and a sharing in the profits of the business is prima facie evidence of a partnership.⁷ Certainly, no written agreement is necessary.⁸

A partner has the right to have the partnership books of account maintained at the principal place of business and has the right to full information on demand.⁹ His rights to an accounting are set out in sections 21, 22 and 43 of chapter 108A.

The law distinguishes between property of the partnership and property rights of its partners. All property originally brought into the partnership or subsequently acquired, by purchase or otherwise, on account of the partnership is partnership property; and property purchased with partnership funds is partnership property, unless a contrary intention appears.¹⁰ On the other hand, a partner's property rights are the right to possess specific partnership property for partnership purposes, his share of the profits and surplus and his right to participate in the management of the

distinct from them. At the time when the drafting of the UPA was commenced, the common law generally reflected the aggregate approach. The first draft of the UPA, prepared by Dean James Barr Ames..., generally favored the entity approach. However, Dean Ames died and was replaced by William Draper Lewis who favored the aggregate approach. Lewis persuaded the Commissioners to change their approach to the aggregate theory,

Id. The Revised Uniform Partnership Act provides that "a partnership is an entity distinct from its partners." REVISED UNIF. P'SHIP ACT § 201(a).

³ *Shapira v. Budish*, 275 Mass. 120, 126-27 (1931).

⁴ FED. R. CIV. P. 17(b).

⁵ *Fusco v. Rocky Mountain I Invs. Ltd. P'ship*, 42 Mass. App. Ct. 441, 448 (1997).

⁶ *Cardullo v. Landau*, 329 Mass. 5, 8 (1952).

⁷ MASS. GEN. LAWS ch. 108A, § 7(4) (2005).

⁸ *Id.* at § 6.

⁹ *Id.* at §§ 19, 20.

¹⁰ *Id.* at §§ 8(1), 8(2).

business.¹¹ A partner is a tenant in partnership with his co-partners. He is neither a tenant in common, nor a joint tenant. The distinctions are well delineated in the case of *Wills v. Wills*:¹²

When the English courts in early common law began to discuss the legal incidents of partners in partnership property, the concepts of joint tenancy and tenants in common were familiar. But these tenancies were not precisely applicable to partnerships. The attempt of the courts to escape inequitable results of applying the legal incidents of these tenancies to business partnerships produced “very great confusion.” The Uniform Partnership Law therefore ended this confusion by creating a new type of tenancy – a tenancy in partnership. Under this tenancy, a partner is a co-owner with his partners of specific partnership property holding as a tenant in partnership and his interest is his share of the profits and surplus. ... The interest of the partners in partnership property is *sui generis* and is neither that of joint tenants nor of tenants in common. The partners hold an interest in specific partnership property, not in joint tenancy, but as tenants in partnership. In short, a partner owns no personal specific interest in any specific property of the partnership; the partnership owns the property and the partner’s interest is an undivided interest as co-tenant in all partnership property as a “tenant in partnership.”¹³

What this means then is simple: a partner’s property rights with regard to the actual partnership property is not ownership in that property itself, but only a right to possess it for partnership purposes. His interest in the partnership is his share of the profits and surplus, and that interest is personal property.¹⁴

2. Dissolution, Wind Up and Termination

The concept of dissolution, wind up and termination often are confused. Dissolution is simply a change in the relationship caused by one of the partners ceasing to be associated in carrying on the business.¹⁵ Dissolution may be caused by any of the following events: termination of the

¹¹ *Id.* at, §§ 24, 25, 26.

¹² 750 S.W 2d 567 (Mo. Ct. App. 1988); *see also* *Shapira v. Budish*, 275 Mass. 120, 126-27 (1931).

¹³ *Wills*, 750 S.W.2d at 572-73 (internal citations omitted).

¹⁴ MASS. GEN. LAWS ch. 108A, §§ 25(2)(a), 26 (2005).

¹⁵ *Id.* at § 29.

partnership term; the express will of all the partners, either before or after any specified term; the express will of any one partner where there is no definite term (a partnership at-will), or in contravention of the agreement, where there is a definite term; the expulsion of any partner pursuant to any power conferred in the agreement; where the continued existence of the partnership becomes a violation of law; the death or bankruptcy of any partner; and the decree of a court.¹⁶ Dissolution does not inexorably lead to termination, as a wind-up period to complete the affairs of the partnership will precede termination and dissolution will not always lead the partnership into a wind-up.¹⁷ The rights and obligations of partners *inter sese* upon dissolution, wind-up and termination may be found in sections 31 through 38 and 40 and 42 of Massachusetts General Laws chapter 108A. However, five cases are very instructive: *Anastos v. Sable*,¹⁸ *Meehan v. Shaughnessy*,¹⁹ *Johnson v. Kennedy*,²⁰ *Page v. Page*²¹ and *Collins v. Lewis*.²²

In *Collins*, the court underscored the difference in the effect of termination when the partnership is at-will rather than for a term.²³ In either case, a partner may dissolve at any time. However, when the dissolution is in contravention of the agreement, the terminating partner will be liable for any damages flowing from a breach of the contract.

Although, a partnership at-will may be dissolved at any time by any of the partners with impunity from contract damages, the question here is whether damages founded on some other theory may be available. This was the question in both the *Page* and *Johnson* cases. In *Page*, the California court held that although a partner at-will has the unfettered right to dissolve, the right must be exercised in good faith because partners are fiduciaries *inter sese*.²⁴ At first blush, this holding seems to be in direct conflict with the pronouncement of the Supreme Judicial Court in the *Johnson* case. There, one of the partners decided to surreptitiously remove the partnership assets to a secret location just prior to the time that the partners were scheduled to sign a long-term partnership agreement.²⁵ The

¹⁶ *Id.* at §§ 31, 32.

¹⁷ *Id.* at § 30; *Adams v. United States*, 218 F. 3d 383, 388 (5th Cir. 2000); *see also infra* notes 43-47 and accompanying text (discussing valuation of a partner's interest when he dissolves in contravention of the agreement where the remaining partners choose to continue the business rather than to liquidate).

¹⁸ 443 Mass. 146 (2004).

¹⁹ 404 Mass. 419 (1989).

²⁰ 350 Mass. 294 (1966).

²¹ 55 Cal. 2d 192 (Cal. 1961).

²² 283 S.W.2d 258 (Tex. Civ. App. 1955).

²³ *Id.*

²⁴ *Page*, 55 Cal. 2d at 196.

²⁵ *Johnson*, 350 Mass. at 295-96.

plaintiff claimed the dissolution was wrongful and that he was entitled to damages.²⁶

The *Johnson* court first decided that negotiations for a term agreement did not alter the fact that the partnership was at-will.²⁷ Accordingly, the court stated, “in a partnership of indefinite duration, any partner may dissolve the firm at any time.”²⁸ Citing to chapter 108A, section 38(1) of the Massachusetts General Laws, the court said that because the termination of an at-will partnership, “however unseemly in manner and method,”²⁹ was not wrongful, the plaintiff was entitled to his full share. This rather strict language in *Johnson* appeared to have choked off any possible argument based on fiduciary obligations. However, when the Supreme Judicial Court decided the seminal case of *Meehan v. Shaughnessy*,³⁰ it provided helpful clarification:

The wrongful conduct described in §§ 31 and 38 consists of dissolving the partnership before its term. We have noted that the dissolution of a partnership at will, “however unseemly in manner and method, [is] not a legal wrong.” This statement from *Johnson* recognizes that dissolution of a partnership at will is not “wrongful” or “in contravention of the agreement” within the meaning of either § 31 or § 38, and is therefore not a “legal wrong” that would trigger the remedies of § 38 (2). ... We emphasize that the § 38 (2) remedy is in addition to, and distinct from, the remedy provided by § 21 for wrongdoing which is not connected with a premature dissolution.³¹

The recent case of *Anastos v. Sable*³² has clarified the rights of partners who dissolve in contravention of a partnership agreement.³³ In that case, one of three partners filed a petition to dissolve under section 32 prior to the term of the agreement and sued for the value of his partnership interest.³⁴ The other partners counter-claimed for the damages incurred as a result of the wrongful dissolution.³⁵ The elements of these damages were

²⁶ *Id.* at 296.

²⁷ *Id.* at 298.

²⁸ *Id.*

²⁹ *Id.*

³⁰ 404 Mass. 419 (Mass. 1989).

³¹ *Meehan*, 404 Mass. at 429 n.6; *see also* *Holmes v. Darling*, 213 Mass. 303 (1913); *In re Curran*, 157 B.R. 500 (Bankr. D. Mass. 1993).

³² 443 Mass. 146 (2004).

³³ *Id.*

³⁴ *Id.* at 147.

³⁵ *Id.*

the subject of a stipulation.³⁶ Because the remaining partners chose to continue the business as a going concern, the question as to value was whether it was a one-third liquidation value or a discounted value.³⁷ The trial judge found that because the remaining partners wanted to continue and the plaintiff's interest was a minority interest with restrictions on control, the value of the plaintiff's interest was less than one-third of the partnership net assets.³⁸

Whether to use a liquidation or going concern method when a partner dissolves in contravention of the agreement and the remaining partners wish to continue presented a question of first impression on appeal.³⁹ In these circumstances, the remaining partners may elect to continue.⁴⁰ The plaintiff nevertheless asserts that the liquidation method (net assets value of each share) is proper.⁴¹

The Supreme Judicial Court said that when a partner dissolves in contravention of the agreement, the other partners have two options.⁴² They may either terminate and recover damages from the wrongdoer or they may continue, if they wish, and pay the wrongdoer "*the value of his interest in the partnership* at the dissolution, less any damages recoverable."⁴³ The court said that under sections 38(2)(a)(I) and (II), had the remaining partners chosen to terminate, the plaintiff would have been entitled to his net asset value less any damages.⁴⁴ However, because the defendants chose to continue the business, the plaintiff's rights were governed by section 38(2)(c)(II).⁴⁵ That section excludes good will from the value of the departing partner's interest and, the court reasoned, were it intended to apply to partnership assets at liquidation, good will would not have been mentioned.⁴⁶ The court concluded that the going concern method was correct for valuation purposes under the circumstances.⁴⁷

³⁶ *Id.* at 148.

³⁷ *Id.* at 147-48.

³⁸ *Id.*

³⁹ *Anastos*, 443 Mass. at 149.

⁴⁰ *Id.*; see also MASS. GEN. LAWS ch. 108A, § 38(2)(b) (2005).

⁴¹ *Anastos*, 443 Mass. at 149.

⁴² *Id.* at 150.

⁴³ *Id.* (quoting MASS. GEN. LAWS ch. 108A, § 38(2)(b)) (emphasis in original); see also MASS. GEN. LAWS ch. 108A, § 38(2)(a) (2005).

⁴⁴ *Anastos*, 443 Mass. at 150.

⁴⁵ *Id.*

⁴⁶ *Id.* at 150-52.

⁴⁷ *Id.* at 152.

C. The Requisites for an Injunction

The judicial attitude toward preliminary injunctive relief has changed substantially over the last twenty years. Today, it is extremely rare to obtain *ex parte* relief; and creative arguments by defendants concerning the absence of irreparable harm, even where there is a likelihood of success, may nevertheless win the day.

In 1980, the Supreme Judicial Court announced that an injunction may issue where a plaintiff enjoys a reasonable likelihood of success on the merits of the case; is suffering and, absent the requested relief, will continue to suffer irreparable harm; and where the balancing of harms and public interest favor the issuance of the injunction.⁴⁸ In Massachusetts, the bedrock for the issuance of an injunction had always been adequacy of legal remedy. In other words, if the damages remedy were available to a plaintiff, then a court sitting in equity would not exercise its jurisdiction. With the adoption of the Massachusetts Rules of Civil Procedure in 1975 and the blurring of the lines between law and equity, “adequacy of legal remedy” began to lose its luster, at least as a catch phrase. Nevertheless, it is alive and well within the notion of “irreparable harm.” In other words, if a respondent can demonstrate the availability of damages, the plaintiff may not have a case of irreparable harm and no injunction should issue.

II. THE HYPOTHETICAL CASE

In reading the facts of the case, it is important to remember that partners owe one another a fiduciary duty *inter sese*. In the now familiar case of *Donahue v. Rodd Electrotape*,⁴⁹ the Supreme Judicial Court announced that shareholders in a close corporation owe a duty to one another of utmost good faith and loyalty.⁵⁰ In so deciding, the court said that this was the same duty owed by partners *inter sese*.⁵¹ Thus, partners do not owe one another merely a duty of good faith and loyalty, but rather *utmost* good faith and loyalty.⁵²

A. The Facts

Jan and David have been partners for nearly twenty years. About fifteen years ago, they reduced their agreement to writing, making it clear they were operating as partners under the Massachusetts version of the

⁴⁸ *Packaging Indus. Group v. Cheney*, 380 Mass. 609, 617 (1980); *see also* *GTE Prod. Corp. v. Stewart*, 414 Mass. 721, 723 (1993).

⁴⁹ 367 Mass. 578 (1975).

⁵⁰ *Donahue*, 367 Mass. at 598.

⁵¹ *Id.* at 587.

⁵² *Id.* at 598; *see generally* *Meinhard v. Salmon*, 249 N.Y. 458 (1928).

Uniform Partnership Act. About ten years ago, they were lovers for a brief period. This fact will become an issue in the litigation, albeit a minor one. Both have married since that time.

The two partners are well known local designers of women's clothing with distinct, but complementing styles. After working together for a short period, they decided to open a small retail location, where they have remained until the time of the litigation. From that site, they have designed and sold their creations. The clothing was produced at various off-site locations and by various manufacturers based on the designs and patterns of the partners.

A summary of the provisions of the agreement in corresponding numbered paragraphs follows below:

1. Establishment of the partnership under the name of Jan and David Creations.
2. That the partnership has already been in existence for a number of years.
3. That the partnership shall continue until terminated as herein provided.
4. Assets were to be divided into three categories – assets purchased by the partnership, each of the partners and jointly by the partners. The capital accounts would then reflect these values.
5. Net profits were to be shared according to a formula. Certain designs were done individually and others were done jointly. After all of the cost of goods and expenses of production were determined, each partner's profits were determined on a net basis. As a result, the more prolific the partner, the greater the share of the profits.
6. Salaries and draws were based on the above formula, which could be reduced by the cost of any employee hired to cover for any partner absent from the business for more than thirty days.
7. The partners had day-to-day joint management of the business and had no authority for extraordinary action without the consent of all the partners.
8. The books were to be maintained at the principal office of the business and each partner was to have access at all times.
9. The partnership could be "terminated and dissolved" (*sic*) upon a ninety-day notice prior to the end of any fiscal year to terminate at the end of such year. "Upon termination . . . , the affairs shall be wound up." (*sic*). The assets would then be liquidated and the net proceeds distributed in accordance with parties' capital accounts.

In January through March of both 2003 and 2004, Jan resided in Florida with her then fiancé. Despite this time away from the business, she continued to create designs and remained in contact with both the sales staff and David. She was charged with the extra salaries paid to the sales people who substituted for her sales functions.

In early 2004, David began to complain about Jan's absence from the business. Jan believed this was motivated by David's jealousy over Jan's fiancé. Because her future plans contemplated winters in Florida, she offered him extra time off during the summers. But David found this unacceptable. Finally, beginning in May 2004, the two partners began to exchange buy-out proposals, which continued throughout the summer.

A key sticking point in these proposals was the nature of the legal property in the clothing designed by each designer. David's position was that he, rather than the partnership, owned the clothing designed by him and that he ought to be able to remove it to his new planned location. Jan's view was that, regardless of who designed the clothing, all of it was a partnership asset and, absent an agreement, it all should be liquidated at auction or a going-out-of-business sale, with the proceeds distributed thereafter in accordance with the capital accounts formula in section 9 of the agreement.

In July 2004, David notified Jan of his intent to dissolve, effective on December 31. However, because he became completely frustrated with his inability to strike a deal with Jan during the summer, he removed all "his" inventory without notice and after hours on the Friday evening before Labor Day. Jan immediately filed her action, seeking an injunction and damages. Among other things, she asked for an immediate return of the inventory to the business location of the partnership, asserting that it needed to be liquidated (preferably at a going-out-of-business sale, which she claimed would bring the highest value) with the proceeds applied in accordance with the agreement, and a prohibition against the removal of any additional inventory. David responded by claiming that Jan failed to show irreparable harm and was, therefore, not entitled to an injunction.

B. The Analysis

Although the partnership was reduced to a signed agreement, the agreement did not contain any definite term for its existence. Indeed, it included a mechanism for dissolution and termination, albeit inartfully drafted. Furthermore, David can argue that under *Johnson v. Kennedy* removal of the partnership assets⁵³ to another location is not wrongful

⁵³ Apparently, in anticipation of an argument that he has acted wrongfully, he claims he has the right to remove "his" creations based on that part of the agreement that sets draws and profits based on a production formula. This argument is not likely to prevail as it

(“however unseemly in manner and method”), because of the at-will nature of the partnership agreement. Jan, on the other hand, may argue that even if this is an at-will partnership, dissolution by any means other than that articulated in the agreement is wrongful. In other words, had no mechanism existed, David’s actions may well have come within the protections of the *Johnson* case. But, David breached an agreement containing a specific term. Simply stated, the method and timing for dissolution and liquidation were specifically provided for.

Has David dissolved in contravention of the agreement where no term was provided, but where he failed to follow the mandated mechanism? If he has acted in contravention of the agreement, then Jan may be entitled to damages for breach of the agreement. On the other hand, if the dissolution did not violate the agreement, then Jan may nevertheless be entitled to damages under section 21 of Massachusetts General Laws chapter 108A (assuming David profits from the assets he removed and they are found to be partnership assets) even if contract damages are not available.

David’s claim that he has not acted wrongfully because the inventory he removed is “his inventory” is unlikely to prevail,⁵⁴ because property acquired on account of the partnership is partnership property under section 8(1) and he has the right to possess partnership property only for partnership purposes.⁵⁵ If this is correct, then David has converted partnership property; however, because damages should be available for conversion, this notion may interfere with the issuance of an injunction. On the other hand, if Jan can persuade the court that the liquidation of all, rather than part, of the property (at an auction or going-out-of-business sale) would bring greater proceeds, but that the damages are not calculable, she may obtain the injunction. Additionally, Jan may argue that paragraph 9 of the agreement contemplates an orderly liquidation that she is being denied and that this loss is also not susceptible of a damage calculation.⁵⁶ In any

is clear the partners were working for the partnership and creating partnership assets.

⁵⁴ See *supra* note 53.

⁵⁵ MASS. GEN. LAWS ch. 108A, § 25(2)(a) (2005). A partner’s interest in the partnership is his share of the profits and surplus. *Id.* at § 26.

⁵⁶ “Injunctive relief is appropriate when damages are difficult to measure.” A.W. Chesterton, Inc. v. Chesterton, 907 F. Supp. 19, 23 (D. Ma. 1995). See also *New Boston Sys., Inc. v. Joffe*, No. 93-6343 1993 Mass. Super. LEXIS 108 Mass. (Nov. 28, 1993) (Volterra, J.) (commenting that “[D]amages would be much more difficult to calculate and therefore present the type of irreparable harm ideally suited to a preliminary injunction.”). The rule of law in *Chesterton* is amply supported by other precedent as well. For instance, in *Davis v. New England Railway Publishing Company*, 203 Mass. 470 (1909), plaintiff complained he was omitted from a directory purporting to list all reputable express delivery companies in the Boston area. *Id.* at 477. By being left out of the directory, the plaintiff said, the impression was created that he simply did not exist with the result that business was diverted away from him. *Id.* at 478. The Supreme Judicial Court overruled a demurrer saying, “It is peculiarly a case for equitable relief. ... The extent of the injury cannot be

event, a court should issue an order prohibiting the removal of any further property. If Jan is unsuccessful in obtaining an order for the return of the property, she may want to consider asking for the appointment of a receiver to take possession of all the partnership property to liquidate the same. This should accomplish her purposes without an injunction, as the receiver will take possession of all partnership assets and liquidate the same. Finally, if David has removed the books and records, an injunction should be available ordering their return, as the books and records are to be maintained at the principal office, accessible at all times and all the partners have equal rights in the management of the business both as a matter of law and under the agreement.⁵⁷

On the question of the issuance of an injunction, irreparable harm⁵⁸ and likelihood of success have been discussed above. The court will next need to balance the risk of irreparable harm to the plaintiff, if the injunction does not issue, against any potential irreparable harm to the defendant

measured accurately in an attempt to assess damages.” *Id.* at 478-79. *See also* Hull Mun. Lighting Plant v. Massachusetts Mun. Wholesale Elec. Co., 399 Mass. 640 (1987) (stating damages inadequate where injury to plaintiff threatens the very existence of the business); Allied Mktg. Group Inc. v. CDL Mktg. Inc., 878 F.2d 806, 810 (5th Cir 1989); Union Nat’l Life Ins. Co. v. Tillman, 143 F. Supp. 2d 638 (N.D. Miss. 2000); Eutectic Welding Alloys Corp. v. Zeisel, 11 F.R.D. 78, 80 (D.N.J. 1950) (holding failure of ongoing business irreparable harm).

Non-competition agreements to protect good will are enforced on this basis. As the Supreme Judicial Court has explained:

The policy of the law is that business men should keep their contracts, and not turn the contractee over to the uncertain remedy of an action at law for damages for non-performance.” ... The basis of the equitable relief is that the damages suffered or to be suffered are irreparable, or that an action at law would not afford adequate damage. ... Applying the rule to the facts shown by the report, it is plain the exercise of the defendant’s business by him alone or in association with others in the City of Boston would probably interfere with the tendency, from habit, of customers to resort to the plaintiff to obtain the services which he furnished and they were accustomed to receive at his office; ... *and the damages which he would be able to prove would be inadequate, and unsubstantial, for the reason that the basis for the computation would be too speculative, conjectural or uncertain.*

Edgecomb v. Edmonston, 257 Mass. 12, 18-19 (1926) (quoting Feigenspan v. Nizolek, 65 A. 703, 707 (1907)) (citations omitted, emphasis added); *see also* Lufkin’s Real Estate, Inc. v. Aseph, 349 Mass. 343, 346 (1962) (commenting “It is the practical difficulty of establishing monetary damages which is the basis for the equitable relief afforded by the specific enforcement of this type of contract”) (quoting from Snelling & Snelling of Massachusetts, Inc. v. Wall, 345 Mass. 634, 635 (1963)).

⁵⁷ MASS. GEN. LAWS ch. 108A, §§ 19, 24 (2005); *see supra* paragraphs 7 and 8 of the partnership agreement between Jan and David.

⁵⁸ *See* Packaging Indus. Group v. Cheney, 380 Mass. 609, 617 (1980) (concluding irreparable harm is that harm that cannot be vindicated on final judgment).

by the entry of the requested relief.⁵⁹ Finally, the plaintiff here should argue that the public has an interest in seeing that contracts are enforced.

III. SOME TECHNIQUES AND REMEDIES TO BE CONSIDERED IN BUSINESS LITIGATION GENERALLY

A. Injunctive Relief

The injunction is a powerful and frequently used tool in business litigation and the litigator will need to be familiar with *Packaging Industries v. Cheney*⁶⁰ and its progeny as well as Rule 65 under the Massachusetts and Federal Rules of Civil Procedure.⁶¹ One element of Rule 65 frequently overlooked, especially in Massachusetts courts, is the requirement of security. The rule mandates that no injunction “shall issue except upon the giving of security by the applicant ... for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.”⁶² Although the Massachusetts rule allows for this requirement to be waived upon the showing of “good cause,” respondents infrequently raise the issue and the courts rarely consider the matter voluntarily. If an injunction does issue and the court has failed to require the posting of security (a requirement under Rule 65), respondent’s counsel should ask the court to order it. There are those cases where the respondent’s inability or refusal to post the security will cause the injunction to fail, even in the face of a legitimate basis for its issuance.

B. Reach and Apply

There are two types of bills to reach and apply – the traditional non-statutory bill and the statutory remedy provided by chapter 214, section 3 of the Massachusetts General Laws.⁶³ The former is available after judgment when the execution is returned unsatisfied, although no judgment is necessary where the debtor is insolvent.⁶⁴ The statutory bill is “in the nature of an equitable trustee process” and can be used to restrain the transfer

⁵⁹ *Id.* at 617-18.

⁶⁰ 380 Mass. 609 (1980).

⁶¹ The business litigator also should be familiar with MASS. GEN. LAWS ch. 231 § 118, par.1., which provides for emergency relief in the Appeals Court (single justice) from the granting or denying of an injunction. *See also* 28 U.S.C. §§ 1292(a)(1) and (b) (2005).

⁶² FED. R. CIV. P. 65(c); MASS. R. CIV. P. 65(c).

⁶³ *See generally In re Rare Coin Galleries of Am., Inc. v. Vinick & Young*, 862 F.2d 896 (1st Cir. 1988).

⁶⁴ *Wax v. Monks*, 327 Mass. 1, 3 (1951); *First Nat’l Bank v. Nichols*, 294 Mass. 173, 182-83 (1936).

of intangible or equitable property in the hands of the debtor or some third party and then, post judgment, to reach and apply the property in satisfaction of the plaintiff's claim.⁶⁵ Strictly speaking, however, it is not the statutory action for a reach and apply that creates the equitable lien, but rather the granting of the injunction.⁶⁶ As such, the applicant for an injunction will be obligated to demonstrate the four requirements mandated by *Packaging Industries*.⁶⁷

The remedy provided by Massachusetts General Laws chapter 214, section 3(6) is a statutory action whose elements will need to be supported for a plaintiff to prevail on a claim of likelihood of success. The statute requires that there be a "debt" and that the property sought to be restrained must be "unavailable for ordinary attachment or levy."⁶⁸ Essentially, a "debt" is a claim for damages, which, although unliquidated, is capable of being ascertained by mathematical calculation.⁶⁹ Under this section, a partner may be restrained from withdrawing any portion of his interest in the surplus and profits in his partnership and the same may be reached and applied in satisfaction of a debt; and where a judgment has issued, the business of the partnership may even be enjoined or interrupted.⁷⁰ Accordingly, in the hypothetical case above, if the court declines to order the return of the property on the theory that damages are available for the defendant's conversion,⁷¹ the plaintiff should seek a statutory reach and apply against defendant's interest in the partnership to the value of the converted goods.

IV. CONCLUSION

Although the general partnership has somewhat fallen out of favor over the last fifty years, there still exist many good reasons for its use in a business context. For example, unlike the new LLC,⁷² the general partnership has developed a very mature body of jurisprudence that lends a certain

⁶⁵ *Phoenix Ins. Co. v. Abbott*, 127 Mass. 558, 560 (1879); see also MASS GEN. LAWS ch. 214, § 3(6) (2005); Michael C. Gilleran, *Massachusetts Prejudgment Security Devices: Attachment, Trustee Process, and Reach and Apply*, 69 MASS. L. REV. 156, 169 (1984).

⁶⁶ *In re Osgood*, 203 B.R. 865 (Bankr. D. Mass. 1997); *In re Borofsky*, 138 B.R. 345 (Bankr. D. Mass. 1992). The reach and apply vehicle should also be available in federal cases. See FED. R. CIV. P. 64.

⁶⁷ 380 Mass. 609 (1980).

⁶⁸ *In re Rare Coin Galleries*, 862 F.2d at 904.

⁶⁹ *Garsson v. Am. Diesel Engine Corp.*, 310 Mass. 618, 621 (1942).

⁷⁰ See also MASS. GEN. LAWS ch. 108A, § 28 (2005).

⁷¹ Plaintiff should also consider an application under section 1 of Massachusetts General Laws chapter 214, which provides for equitable replevin. Arguably, the fact that damages may be available for the conversion should not defeat plaintiff's request for a return of the property, if her application is made on behalf of the partnership.

⁷² MASS. GEN. LAWS ch. 156C (2005).

sense of comfort to practitioners. There are no filings or franchise fees required of a general partnership as with the corporation, LLC and limited partnership; or for that matter any required record keeping or statutory maintenance, unless mandated by the partnership agreement. Indeed there is no requirement of a formal agreement. Of course, in the absence of such an agreement, the statute will govern the parties' rights and obligations. Finally, if lack of formality and direct participation in management is important to the participants, the general partnership is well suited to the real estate investment. Tax benefits flow directly through to the partners. It is true that the same pertains to the sub-s corporation, the LLC and the limited partnership; however, each of those vehicles carries with it one or more of the impediments referenced above.

While the general partnership is clearly not appropriate in all situations (no one business form is), the partnership should be considered for its ease of use in the right circumstances. It can be a low-maintenance vehicle; and for those concerned about tort liability, the responsible business person is likely to purchase adequate insurance in any event.