

***NON-COMPETE ISSUES IN CONNECTION
WITH THE SALE OF A BUSINESS***

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A. INTRODUCTION

In most instances, the sellers of stock in a business, or the individual owners of a business selling all of its assets, have been active participants in the business contributing to the value of that being purchased. As such, the sellers are in a position to control or affect the goodwill of the business. For that reason, a key component in the consideration given in connection with the sale of a business is often the seller's agreement to be bound by a covenant not to compete with the seller's former business.

B. ENFORCEABILITY OF NON-COMPETES IN CONNECTION WITH SALE OF A BUSINESS

1. Implied Non-Compete by Seller

Massachusetts courts have long recognized an implied agreement by the seller of a business not to compete with the purchaser in such a manner so as to diminish from the value of the business being sold. See, *United Tool and Industrial Supply Co. v. Torrissi*, 356 Mass. 103, 106-107 (1969); *Tobin v. Cody*, 343 Mass. 716, 722-21 (1962). The underlying rationale for implying such an agreement is that, absent such agreement, the purchaser will lose the valuable goodwill of the business being acquired. See, *United Tool*, supra ("And it follows that after a voluntary sale of goodwill the seller cannot engage in a competing business which will derogate from that sale").

2. Express Non-Compete from Seller

In order to avoid the uncertainties inherent in such implied agreements, express non-competition agreements are typically included in contracts for the sale of a business. In an asset sale arrangement, a prudent buyer will generally require this not only from the selling entity, but also from the individual owners of the selling entity. In a stock sale arrangement, it is the selling shareholders who would be asked to provide a non-compete.

As a general rule, the courts will enforce such agreements without the type of scrutiny provided to non-competes arising from an employer-employee relationship.¹ The courts will look less critically at such a non-compete covenant because it does not implicate an individual's

¹ In the employment context, a covenant not to compete is enforceable only if it is necessary to protect a legitimate business interest, reasonably limited in time and space, and consonant with the public interest – all viewed in light of the facts of each case. See, e.g., *Marine Contractors Co. v. Hurley*, 365 Mass. 280 (1974); *All Stainless, Inc. v. Colby*, 364 Mass. 773 (1974).

right to employment in the same degree as the employment context. See, Whitinsville Plaza, Inc. v. Kotseas, 378 Mass. 85 (1979); Wells v. Wells, 9 Mass.App.Ct. 321 (1980). More specifically, the courts have focused on the following factors in the business sale context:

- it is more likely that there was equal bargaining power between the parties (i.e., the parties entered into the agreement with the assistance of counsel and without compulsion – an element frequently not present in the employer-employee context.);
- the sale proceeds generally allow the seller a means of support without the immediate practical need to compete; and
- the seller is often paid a premium for agreeing not to compete.

Most importantly, where the sale of a business specifically includes goodwill, the courts have held that, “A broad non-competition agreement may be necessary to assure that the buyer receives that which he purchased.” See, Alexander & Alexander, Inc. v. Danahy, 21 Mass.App.Ct. 488, 496 (1986) (non-compete enforceable involving sale of goodwill inherent in an insurance agency).

The courts may engage in some limited scrutiny to ensure that the non-competition agreement ancillary to the sale of a business is consonant with the nature of the business and not contrary to public interest. However, this scrutiny is typically very relaxed. For example, in Wells v. Wells, 9 Mass.App.Ct. 321, 322 (1980), the buyer sought to enforce a non-compete against the seller of 50% stock in the company. The geographical limitation imposed by the non-compete was challenged under the theory that when the business was sold, it had no customers or offices in certain counties and, hence, no goodwill in those areas. Id. However, the Appeals Court found that the sellers could reasonably expect a plan for an expansion of their business and of their existing business activity and, therefore, upheld enforcement of the non-compete. Id. Similarly, in a recent Superior Court decision a five (5) year non-compete was held to be valid on its face because it was part of a non-compete clause that related to the sale of a business. Borden & Remington Corp. v. Banish, 1999 Mass.Super. LEXIS 477, 13-14 (Burnes, J.).

3. Hybrid Non-Competes (i.e., Seller/Employee)

There may be hybrid situations where the seller of a business joins the new enterprise as an employee for a specific period of time in order to provide continuity to the transition. In this hybrid situation, involving both the sale of a business and an employer-employee relationship,

the question arises as to which standard should apply. This issue was squarely addressed in Alexander & Alexander, Inc. v. Danahy, *supra*, where the Appeals Court flatly concluded that it would apply the lesser standard of review applicable to a non-solicitation type covenant arising out of the sale of a business.

“It is not at all unusual for the seller of a business to join the new enterprise in an employment capacity. There are obvious advantages to both sides which flow from such an arrangement. It enables the purchaser to carry on the old business with the least possible dislocation and loss of good will. Established customers of the business sold could be expected to patronize the successor business. And such an arrangement provides the seller with the opportunity to be productive in the work with which he is familiar, and to gain income. *We have no difficulty reaching the conclusion that, in reviewing the present covenants, we should apply the standards applicable to covenants arising out of the sale of a business.*” (Emphasis added)

(A copy of the Alexander & Alexander case is attached hereto as **ATTACHMENT A** for an excellent discussion of the rationale for enforcement of such non-competes.)

Consequently, in a hybrid situation the court will first look to see as to which aspect of the relationship the covenants primarily related and, then, apply the appropriate standard. Part of this analysis may also involve the nature and extent of the ownership interest of the seller/employee. For example, a company cannot require its employees to purchase one share of stock and require them to enter into a non-compete agreement, expecting it to be enforceable under the relaxed business acquisition standard rather than scrutinized under the employee-employer standard. *See, e.g., Bosley Medical Group v. Abramson*, 161 Cal.App.3d 284 (1984) (requiring “substantial” sale of shares in order to be viewed as part of a business sale).

4. Choice-of-Law/Other Jurisdictions

Where the acquisition involves a business in a state other than Massachusetts, you will want to review the law in that jurisdiction, even if the agreement designates Massachusetts law as controlling. In the event that the dispute winds up in a foreign jurisdiction, Massachusetts law could be rejected if it conflicts with the public policy of the foreign state.

Most states follow the principal that a non-compete agreement provided in connection with the sale of a business is generally enforceable (i.e., that it will not receive the same level of scrutiny as a non-compete contained in an employment agreement). Interestingly, this is true

even in California where there is an outright ban on non-competes. See, California Business & Professions Code, §16600 (“Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade or business of any kind is to that extent void”). One of the exceptions in the California statute applies when a shareholder, or member of a limited liability company, sells their ownership interest to another for valuable consideration. See, California Business & Professions Code, §§16601 and 16602.5.

C. DRAFTING CONSIDERATIONS FOR NON-COMPETES IN THE SALE OF A BUSINESS

Although there is a lesser degree of scrutiny given to a non-compete in connection with a business acquisition, the covenant should, nonetheless, be carefully drafted. (For purposes of illustration, attached hereto as **ATTACHMENT B** is a sample non-compete used in connection with the sale of a business.) However, there will always be issues and points for consideration to be discussed with the client prior to preparation of the non-compete document. Some of these are set forth below.

1. Where to Include Covenants?

One of the first considerations in drafting the non-compete is whether to include the covenants in the acquisition documents, or in an employment agreement, or in a separate stand-alone agreement.

Although it is important to reference the business acquisition so as to obtain the benefit of less critical judicial review, the inclusion of the non-compete within the acquisition document may permit seller to raise applicable contractual defenses to the enforcement of the covenant. Several recent Massachusetts decisions have refused injunctive relief where the former employee demonstrated a material breach of the employment contract by the employer. See, Lantar, Inc. v. Ellis, 1998 Mass.Super. LEXIS 560 (Gants, J.) (employer breached bonus arrangement); Karns v. Folio Exhibits, Inc., 2002 Mass.Super. LEXIS 140 (Fecteau, J.) (employer change in commission structure). Thus, the seller could assert he is excused from performance of the non-compete by asserting a breach by the buyer of any of the potentially numerous covenants, representations or warranties in the acquisition documents.

For this reason, it is preferable to obtain a separate agreement setting forth the non-compete covenants within the four (4) corners of that agreement. This contract, whether an

employment contract, consulting agreement, or simple non-compete, can make reference to its relationship with the acquisition, without the risk of tying it to other covenants.

2. What Types of Covenants Should be Included?

Even with a relaxed level of scrutiny certain considerations should be given to the scope of the non-compete covenants. The form shown as **ATTACHMENT B** contains the standard “holy trinity” of non-compete type restrictions: (1) the non-compete covenant, (2) the non-solicitation covenant, and (3) the non-disclosure covenant. Although it is beneficial from a buyer’s standpoint to have the protection of all three (3) types of covenants, it may be that the business being acquired does not require all. For example, if the business does not include services or sales functions then the non-solicitation of customer component may not be as important. Similarly, if there is little intellectual property or confidential information involved in the operation of the business then the non-disclosure component may be unnecessary. Remember, even under the more limited standard of review the covenants should not be patently overbroad so as to be deemed unreasonable.

On a final note, it may also be that “carve outs” on any one of these issues can be negotiated with the seller. For example, this could include carve outs for particular customers, certain aspects of the business, or certain territories. From an enforcement standpoint, the inclusion of such carve outs will shore up the argument for enforcement of the agreement since it shows that the covenants were negotiated and that there was bargaining power by both parties.

3. Consider a Post-Closing Payout as the Most Effective Means of Enforcing a Non-Compete.

Even a well drafted, and presumptively enforceable non-compete will only provide the parties seeking enforcement with a lawsuit and the expense and delay of protracted litigation. Even if the non-compete covenant is a valid and enforceable agreement, there is the possibility that injunctive relief is denied on the theory that there may be an adequate remedy at law against the wrongdoer. This could be disastrous since a preliminary injunction is often the most important remedy in a case seeking enforcement of a non-compete. By the time a judgment is obtained, the wrongdoer (along with his or her assets) may be beyond reach.

Accordingly, if a non-compete covenant is truly a significant component of the transaction then it may be worthy to consider payment of the purchase price over time, or some portion of it at a particular time, so as to ensure compliance with the non-compete. This can be

done by making the future compensation component conditioned upon compliance with the non-compete. At the end of the day, this may be the best incentive to ensure that the selling party does not steal back the business that has been acquired.

488 N.E.2d 22
 21 Mass.App.Ct. 488, 488 N.E.2d 22
 (Cite as: 21 Mass.App.Ct. 488, 488 N.E.2d 22)

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Alexander & Alexander, Inc. v.
 DanahyMass.App.,1986.
 Appeals Court of Massachusetts,Middlesex.
 ALEXANDER & ALEXANDER, INC.
 v.
 Robert F. DANAHY et al.^{FN1}

FN1. Rollins Burdick Hunter of
 Massachusetts, Inc.
 Argued Nov. 8, 1985.
 Decided Jan. 23, 1986.

Insurance brokerage, which had brought action based on covenants not to compete, moved for a preliminary injunction to enforce covenants not to compete against individual who had worked for insurance agency purchased by the brokerage and subsequently been employed by the brokerage as senior vice-president and president, and the competing insurance brokerage that had subsequently employed the individual. The Superior Court, Middlesex County, Paul K. Connolly, J., granted the motion, a single Appeals Court justice modified the injunction, and defendants appealed. The Appeals Court, Fine, J., held that: (1) sufficient factual material was provided to support issuance of preliminary injunction; (2) standards applicable to covenants not to compete arising out of sale of a business, rather than covenants arising out of employee-employer relationship, should be applied; (3) for purposes of preliminary injunctive relief, five years was not an unreasonably long period for covenants to run, it was not unreasonable to include prospective customers within the ban, references in covenants to customers without distinguishing particular kind of insurance purchased by customer did not make covenants unreasonably broad, and covenants were not unreasonably restrictive because they prevented individual from "receiving" business; and (4) preliminary injunctive relief against competitor which subsequently employed individual bound by the covenants was proper.

Vacated in part, and as so modified, affirmed.
 West Headnotes

[1] Appeal and Error 30 **842(8)**

30 Appeal and Error
30XVI Review

30XVI(A) Scope, Standards, and Extent, in General
30k838 Questions Considered
30k842 Review Dependent on Whether Questions Are of Law or of Fact
30k842(8) k. Review Where Evidence Consists of Documents. Most Cited Cases

Appeal and Error 30 **954(1)**

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k950 Provisional Remedies
30k954 Injunction
30k954(1) k. In General. Most Cited

Cases

Appeals Court, in reviewing issuance of preliminary injunction, accords weight to judge's exercise of discretion in issuing injunction, but to the extent that the order was based upon documentary evidence, Appeals Court draws its own conclusions.

[2] Injunction 212 **140**

212 Injunction
212IV Preliminary and Interlocutory Injunctions
212IV(A) Grounds and Proceedings to Procure
212IV(A)4 Proceedings
212k140 k. Form and Requisites of Application in General. Most Cited Cases
 If all factual material provided to support issuance of preliminary injunction consisted of allegations made on information and belief, the material would be insufficient to support issuance of the injunction.

[3] Injunction 212 **147**

212 Injunction
212IV Preliminary and Interlocutory Injunctions
212IV(A) Grounds and Proceedings to Procure
212IV(A)4 Proceedings
212k147 k. Counter Affidavits and Other Evidence. Most Cited Cases
 Factual material provided to support issuance of preliminary injunction, which included allegations in verified complaint on basis of personal knowledge of existence of noncompetition agreements and background circumstances, and copy of newspaper advertisement identifying individual bound by noncompetition agreements as president of

competitor, and affidavits establishing that competitor intended to compete and had knowledge of the relevant terms of the noncompetition agreements, were sufficient to support issuance of preliminary injunction against individual and competition precluding competition, even though allegations of widespread violations of the covenants not to compete were based only on information and belief.

[4] Injunction 212  14

212 Injunction

212I Nature and Grounds in General

212I(B) Grounds of Relief

212k14 k. Irreparable Injury. Most Cited Cases

Unexplained delay in seeking relief for allegedly wrongful conduct may indicate an absence of irreparable harm and may make an injunction based upon that conduct inappropriate.

[5] Injunction 212  141

212 Injunction

212IV Preliminary and Interlocutory Injunctions

212IV(A) Grounds and Proceedings to Procure

212IV(A)4 Proceedings

212k141 k. Time for Application. Most Cited Cases

Delay of 17 months after individual bound by noncompetition agreements joined competitor before bringing action to enforce covenants not to compete was not so egregious as to form basis for denial of any injunctive relief, where individual had provided assurances he would abide by his contractual commitments not to compete, there was an effort made by the individual to negotiate a modification of the covenants, and suit to enforce covenants was filed within four months after advertisement featuring the individual working for competitor began to appear and within two months after former client wrote to say it had switched its business to competitor.

[6] Contracts 95  116(1)

95 Contracts

95I Requisites and Validity

95I(F) Legality of Object and of Consideration

95k115 Restraint of Trade or Competition in Trade

95k116 In General

95k116(1) k. In General. Most Cited Cases

Noncompetition covenants arising out of the sale of a business should be enforced more liberally than such covenants arising out of an employer-employee relationship.

[7] Good Will 192  6(1)

192 Good Will

192k4 Sale or Other Transfer

192k6 Rights and Liabilities of Parties

192k6(1) k. In General. Most Cited Cases

Even in the absence of an express covenant not to compete, when sale of business includes goodwill, an agreement by the seller not to depreciate the value of goodwill may be implied to prevent seller from taking back that which he purported to sell.

[8] Contracts 95  116(1)

95 Contracts

95I Requisites and Validity

95I(F) Legality of Object and of Consideration

95k115 Restraint of Trade or Competition in Trade

95k116 In General

95k116(1) k. In General. Most Cited Cases

Contracts 95  118

95 Contracts

95I Requisites and Validity

95I(F) Legality of Object and of Consideration

95k115 Restraint of Trade or Competition in Trade

95k118 k. Preventing Disclosure of Trade Secrets. Most Cited Cases

Postemployment restraints on ability to compete must be scrutinized carefully to see that they go no further than necessary to protect employer's legitimate interests, such as trade secrets or confidential customer information, where they affect ordinary employee, as such employee typically has only his own labor or skills to sell and often is not in a position to bargain with his employer.

[9] Injunction 212  138.39

212 Injunction

212IV Preliminary and Interlocutory Injunctions

212IV(A) Grounds and Proceedings to Procure

212IV(A)3 Subjects of Relief

212k138.36 Contracts

212k138.39 k. Noncompetition

Covenants or Agreements. [Most Cited Cases](#)

For purposes of preliminary injunctive relief, standards applicable to covenants not to compete arising out of the sale of a business, rather than those applicable to employer-employee relationship, should be applied to covenants that were included in written agreement for sale of insurance agency that were contemplated by agreement to commence running with termination of employment of individual who was bound by the covenants, as goodwill was of great importance in the insurance brokerage business, broad noncompetition agreement would be important part of any agreement to sell insurance agency, usual inequality of bargaining power between employer and employee was not present when the covenants were entered into, and proceeds of the sale provided ample cushion for individual for period during which covenants were to be in effect.

[\[10\] Contracts 95](#)  [117\(2\)](#)

[95](#) Contracts

[95I](#) Requisites and Validity

[95I\(F\)](#) Legality of Object and of Consideration

[95k115](#) Restraint of Trade or Competition in Trade

[95k117](#) General or Partial Restraint

[95k117\(2\)](#) k. Limitations as to Time and Place in General. [Most Cited Cases](#)

Any covenant restricting competition is to be enforced only to the extent that it is reasonable in time and space, necessary to protect legitimate interests, and not an obstruction of the public interest.

[\[11\] Injunction 212](#)  [138.39](#)

[212](#) Injunction

[212IV](#) Preliminary and Interlocutory Injunctions

[212IV\(A\)](#) Grounds and Proceedings to Procure

[212IV\(A\)3](#) Subjects of Relief

[212k138.36](#) Contracts

[212k138.39](#) k. Noncompetition

Covenants or Agreements. [Most Cited Cases](#)

For purposes of preliminary injunctive relief, five years was not an unreasonably long period for covenant not to compete to run as to individual who held high level positions in insurance agency which was purchased, in insurance brokerage which purchased the agency, and in brokerage's competitor; magnitude of the insurance agency sale was significant, with stock offered in exchange for agency being worth approximately \$2,200,000, and goodwill was significant to insurance brokerage business.

[\[12\] Injunction 212](#)  [138.39](#)

[212](#) Injunction

[212IV](#) Preliminary and Interlocutory Injunctions

[212IV\(A\)](#) Grounds and Proceedings to Procure

[212IV\(A\)3](#) Subjects of Relief

[212k138.36](#) Contracts

[212k138.39](#) k. Noncompetition

Covenants or Agreements. [Most Cited Cases](#)

For purposes of preliminary injunctive relief, including prospective customers within ban of covenant not to compete applicable to individual who held high level position in insurance agency, held high level positions in insurance brokerage which purchased agency, and subsequently held high level position in brokerage's competitor was reasonable, as purchaser of insurance agency had a legitimate interest in extending its business to those prospective customers.

[\[13\] Injunction 212](#)  [138.39](#)

[212](#) Injunction

[212IV](#) Preliminary and Interlocutory Injunctions

[212IV\(A\)](#) Grounds and Proceedings to Procure

[212IV\(A\)3](#) Subjects of Relief

[212k138.36](#) Contracts

[212k138.39](#) k. Noncompetition

Covenants or Agreements. [Most Cited Cases](#)

For purposes of preliminary injunctive relief, reference in covenants not to compete to insurance brokerage's customers, without distinguishing the particular kind of insurance purchased by the customer through the brokerage, did not make the covenants not to compete unreasonably broad as they applied to individual who held high level position in the brokerage, as the brokerage had a legitimate expectation that it might in the future sell an existing customer a new line of insurance.

[\[14\] Injunction 212](#)  [138.39](#)

[212](#) Injunction

[212IV](#) Preliminary and Interlocutory Injunctions

[212IV\(A\)](#) Grounds and Proceedings to Procure

[212IV\(A\)3](#) Subjects of Relief

[212k138.36](#) Contracts

[212k138.39](#) k. Noncompetition

Covenants or Agreements. [Most Cited Cases](#)

For purposes of preliminary injunctive relief, covenants not to compete were not unreasonably restrictive to the extent that they prevented bound individual, who had been high level executive with insurance brokerage to whom covenants not to

compete ran, from “receiving” business even in the absence of any direct or indirect participation by him in obtaining business for competitor for which he worked, where the individual held prominent executive positions in both brokerages, his association with competing brokerage which subsequently employed him had been widely publicized, and there was no clear reason why the individual should not be held to his bargain.

[15] Injunction 212  212

212 Injunction

212VI Writ, Order, or Decree

212k207 Final Judgment or Decree

212k212 k. Persons Concluded. [Most Cited Cases](#)

Depending upon the circumstances, a stranger to a noncompetition agreement who is aware of the agreement may be enjoined from violating the agreement.

[16] Injunction 212  138.39

212 Injunction

212IV Preliminary and Interlocutory Injunctions

212IV(A) Grounds and Proceedings to Procure

212IV(A)3 Subjects of Relief

212k138.36 Contracts

212k138.39 k. Noncompetition

Covenants or Agreements. [Most Cited Cases](#)

Preliminary injunctive relief against insurance brokerage that hired individual bound by covenants not to compete with respect to competing insurance brokerage was proper, where brokerage knew the full extent of individual's noncompetition agreements when he was hired, individual acting as president played a dominant role in the brokerage and was in a position to exert influence over its activities, individual was closely identified with the brokerage in the mind of the public because of brokerage advertisements, and brokerage could avoid the injunction if individual left the brokerage or individual were to be moved into a position other than president.

[17] Injunction 212  138.39

212 Injunction

212IV Preliminary and Interlocutory Injunctions

212IV(A) Grounds and Proceedings to Procure

212IV(A)3 Subjects of Relief

212k138.36 Contracts

212k138.39 k. Noncompetition

Covenants or Agreements. [Most Cited Cases](#)

Trial judge did not abuse his discretion by concluding that preliminary injunctive relief enforcing covenants not to compete should be granted to insurance brokerage against individual who was bound by the covenants and competitor which employed him, and in concluding that money damages would not provide adequate remedy to plaintiff insurance brokerage, in light of the respective chances of success on the merits by parties.

[18] Injunction 212  138.39

212 Injunction

212IV Preliminary and Interlocutory Injunctions

212IV(A) Grounds and Proceedings to Procure

212IV(A)3 Subjects of Relief

212k138.36 Contracts

212k138.39 k. Noncompetition

Covenants or Agreements. [Most Cited Cases](#)

In determining whether preliminary injunctive relief enforcing covenants not to compete should be granted to plaintiff insurance brokerage, the public interest should have been considered.

[19] Injunction 212  138.39

212 Injunction

212IV Preliminary and Interlocutory Injunctions

212IV(A) Grounds and Proceedings to Procure

212IV(A)3 Subjects of Relief

212k138.36 Contracts

212k138.39 k. Noncompetition

Covenants or Agreements. [Most Cited Cases](#)

Fact that preliminary injunction enforcing covenants not to compete against individual formerly employed by insurance brokerage and competing insurance brokerage allegedly deprived insurance buying public of their right to select broker of their choice did not constitute a sufficiently significant public interest to justify refusing to enforce the noncompetition covenants, where the injunction was not a significant restraint on ordinary competition in light of number of competing firms in the industry and size of market still available to enjoined competitor, bound individual freely signed agreement which included a provision that brokerage would be entitled to injunctive relief, with the benefit of counsel and for substantial consideration, and competitor, which knew of the existence of the covenants, had at least constructive notice of the provision regarding brokerage's right to an injunction.

****24 *489** John K. Markey, for Rollins Burdick

Hunter of Massachusetts, inc.
Jerome Gotkin (Steven M. Sayers & Gordon P. Katz with him) for plaintiff.
Paul W. Goodrich, James J. Moran, Jr., & Joanne P. Keating, for Robert F. Danahy, submitted a brief.
Richard D. Glovsky & Sharon D. Meyers, for Kevin M. Daly, submitted a brief.

Before GRANT, ARMSTRONG and FINE, JJ.
**25 *489 FINE, Justice.

[1] This case involves a dispute among several major forces in the insurance brokerage business in Massachusetts. A Superior Court judge allowed a motion for a preliminary injunction to enforce covenants not to compete. A single justice of this court modified the injunction. From the order as further modified (see note 4, *infra*) the defendants have appealed. We *490 apply the standards for appellate review of the issuance of a preliminary injunction set forth in [Packaging Indus. Group, Inc. v. Cheney](#), 380 Mass. 609, 615-616, 405 N.E.2d 106 (1980). Thus, while we accord weight to the judge's exercise of discretion, to the extent that the order was based upon documentary evidence, we draw our own conclusions. See [Edwin R. Sage Co. v. Foley](#), 12 Mass.App.Ct. 20, 25-26, 421 N.E.2d 460 (1981). The conclusions we have drawn lead us to affirm.

The plaintiff, Alexander & Alexander, Inc. (A & A), a Massachusetts corporation, is an insurance brokerage firm operating in Massachusetts. It is a wholly owned subsidiary of Alexander & Alexander Services, Inc. (A & AS), a Maryland corporation engaged in the insurance brokerage business nationwide and overseas. On November 20, 1984, A & A filed suit against Robert F. Danahy and his employer, Rollins Burdick Hunter of Massachusetts, Inc. (RBH).^{FN2} RBH, a Massachusetts corporation engaged in the insurance brokerage business in Massachusetts, is also a subsidiary of a large national insurance agency (Combined Insurance Company of America). RBH is a competitor of A & A's.

^{FN2}. Kevin M. Daly, also a former A & A employee and now an employee of RBH, was also named as a defendant. He was included in the preliminary injunction, and he joined in the appeal. However, by stipulation between Daly and A & A, the suit against Daly has been dismissed, and he has agreed to abide by the noncompetition covenant which was part of his employment agreement with A & A. Because of that stipulation, and because Daly (unlike

Danahy) is a salesman and not in a managerial position at RBH, we view a continuation of the injunction against RBH concerning Daly's covenant not to compete as unnecessary.

A & A made the following allegations in its complaint. In 1979, Danahy was president and principal stockholder of the John T. Keyes Insurance Agency, Inc. (KIA). On August 3, 1979, A & A, A & AS, KIA and Danahy agreed to an arrangement which in its essence accomplished a transfer to A & A of all of KIA's assets, including its good will, in exchange for stock in A & AS worth approximately \$2,200,000. The written agreement covering this transaction included the following provisions:

*491 5.5.2 For a period of five years after termination of [Danahy's] employment with A & A, [Danahy] will not, directly or indirectly, solicit, sell, serve, divert or receive insurance business to or from any customer or actively solicited prospective customer of KIA as of [August 3, 1979];

5.5.3 For a period of five years after termination of [Danahy's] employment with A & A, [Danahy] will not, directly or indirectly, solicit, sell, serve, divert or receive insurance agency, insurance brokerage, actuarial, or employee-benefit reporting business to or from any corporation, partnership or other person which was a customer or actively solicited prospective customer of any A & AS office in which [Danahy] worked on a full-time basis within one year prior to termination of his employment and which customer or prospect was such a customer or prospect of A & AS within one year prior to the date of such termination.

Also included in the agreement was a provision that A & A would be entitled to an injunction restraining any breach of the covenants. KIA thereafter dissolved, and the A & AS shares were distributed to KIA's shareholders, consisting of Danahy and members of his family. Danahy personally received A & AS stock worth approximately \$1,500,000.

Upon the execution of the agreement, Danahy became employed by A & A. First he worked as a senior vice president and, for a short time in 1983, as president. Throughout his employment with A & A, **26 Danahy was active in producing insurance business. In the spring of 1983, while still an A & A employee, Danahy was awarded additional stock in A & A's parent company. In consideration for that stock and for his continued employment by A & A, on May 24, 1983, Danahy executed an additional noncompetition agreement. It provided that for two

years after the termination of his employment with *492 A & A ^{FN3} he would not “in any capacity whatsoever ... solicit, sell, service, divert, accept or receive” insurance business from any customer or active prospect of A & A's which he had handled, serviced, or solicited during the two years prior to the termination of his employment.

^{FN3}. That two-year period has now expired. Thus, the question of the validity of the preliminary injunction, insofar as it prohibited violations of that covenant, is moot. No argument has been made that the injunction should be extended to give A & A the benefit of having the covenant enforced for a full two-year period. See Wells v. Wells, 9 Mass.App.Ct. 321, 328, 400 N.E.2d 1317 (1980).

On June 28, 1983, Danahy notified A & A by letter that he was resigning from A & A to join RBH. RBH was aware of Danahy's noncompetition agreements. In his letter of resignation, Danahy wrote, “In my new position with another respected insurance broker, I will fully comply with all contractual commitments to A & A.” The next day, Danahy began work as president of RBH and, since at least July 30, 1984, he has also been a director of that company. At various times after his departure from A & A and before suit was filed, Danahy attempted unsuccessfully to negotiate exceptions to the noncompetition covenants. Assurance was given by Danahy to A & A that he would not violate the agreements. Nevertheless, for the benefit of himself and RBH, according to A & A's allegations, Danahy has violated the covenants and continues to do so. The alleged violations include soliciting from, and conducting business with, A & A customers and prospective customers, and encouraging one Edward W. Marvel, Jr., a former A & A employee, to join RBH.

The plaintiff's complaint was signed by the managing vice president of A & A, who verified that all the allegations were true to his personal knowledge, except for those relating to KIA's liquidation and violations of the covenants, which allegations he believed to be true.

The motion for preliminary injunctive relief against Danahy and RBH was heard on November 26, 1984. In addition to the verified complaint, the judge had before him extensive memoranda and various affidavits filed by the defendants. In addition, the

judge was presented with a copy of an advertisement*493 for RBH which all parties conceded had appeared in the Boston Globe and elsewhere in the summer of 1984. Photographs of Danahy (identifying him as president of RBH), Marvel, and Kevin M. Daly, another former A & A employee (see note 2, *supra*), appeared in the advertisement along with a list of new RBH accounts, among which were some former A & A clients. On December 14, 1984, the judge entered an order enjoining both Danahy and RBH from violating the terms of the noncompetition covenants. In a careful memorandum of decision, the judge considered the likelihood of A & A's success on the merits and balanced the risk of irreparable harm to the plaintiff against the risk of harm to the defendants. A motion by RBH for reconsideration, supported by additional affidavits, was heard on January 2, 1985, and denied. After a hearing before a single justice of this court, the injunction was modified on January 29, 1985, so as to refer only to customers specified on lists which were to be provided by A & A, which lists were to be treated as confidential. We were informed at oral argument that such a list has been agreed to by the parties. It includes A & A's customers as of the relevant date and slightly in excess of one hundred of A & A's active prospects. The single justice also remanded the case to the motion judge for further consideration of the issue of security under Mass.R.Civ.P. 65(c), 365 Mass. 833 (1974). On remand,**27 a surety bond in the amount of \$500,000 was ordered and filed by A & A. ^{FN4}

^{FN4}. The order was again modified in the Superior Court on March 14, 1985, with A & A's assent, to allow RBH to accept insurance business from two companies on the agreed list of customers.

Preliminary Matters.

We deal first with two issues raised by the defendants on appeal which do not go to the merits of the controversy. The defendants argue first that the factual material before the court provided insufficient support for issuance of the injunction because some of the allegations in the verified complaint were made not on personal knowledge but on information and belief, and the complaint was not supported by affidavits.

[2][3] None of the parties requested an evidentiary hearing. A preliminary injunction is usually based upon affidavits, but it *494 may be based upon a

verified complaint. [Mass.R.Civ.P. 65](#). See [K-2 Ski Co. v. Head Ski Co.](#), 467 F.2d 1087, 1088 (9th Cir.1972). The defendants' contention would have merit if all that supported the order were allegations made on information and belief. See [Bowles v. Montgomery Ward & Co.](#), 143 F.2d 38, 42 (7th Cir.1944); [Marshall Durbin Farms Inc. v. National Farmers Organization, Inc.](#), 446 F.2d 353, 357 (5th Cir.1971). That is not the case here, however. The facts alleged in the verified complaint on the basis of personal knowledge establish the existence of the noncompetition agreements and the background circumstances. The facts are not controverted. Nor is the fact of RBH's newspaper advertisements controverted or the correspondence in which the parties discussed the agreements after Danahy joined RBH. The verified complaint and the affidavits together clearly establish that RBH and A & A are in competition with each other; that Danahy serves as RBH's president and is involved in the production of new business; that RBH, under Danahy's direction, intends to compete with A & A for A & A's active prospects, and with A & A's existing customers for different insurance product lines; that Danahy, as RBH's president, had contact with representatives of at least one of A & A's former customers; that Marvel, for over twelve years a broker employed by A & A, left A & A and joined RBH as a broker in December of 1983; and that RBH had knowledge of the relevant terms of Danahy's noncompetition agreements with A & A.

That the allegations of widespread violations of the covenants by Danahy were based only on information and belief in these circumstances ought not to defeat A & A's right to preliminary injunctive relief. One would not expect an A & A official to possess extensive direct personal knowledge of those facts. Moreover, the purpose of the injunction is to prevent whatever future violations are likely to occur.

[4][5] Further, the defendants argue that it was not proper to award A & A injunctive relief because it waited seventeen months after Danahy joined RBH before bringing this action. Unexplained delay in seeking relief for allegedly wrongful conduct may indicate an absence of irreparable harm and may make an injunction*495 based upon that conduct inappropriate. See [USAchem, Inc. v. Goldstein](#), 512 F.2d 163, 168-169 (2d Cir.1975); [Klauber Bros. v. Lady Marlene Brassiere Corp.](#), 285 F.Supp. 806, 808 (S.D.N.Y.1968); [11 Wright & Miller, Federal Practice & Procedure: Civil § 2948](#), at 438 (1973). The delay here was not without justification, however. When he terminated with A & A in June

of 1983, Danahy assured his former employer that he would abide by his contractual commitments not to compete. A & A could reasonably rely on that assurance until it had knowledge to the contrary. Beginning in the summer of 1983, there was an effort made by Danahy to negotiate a modification of the covenants. It wasn't until October 2, 1984, that one former client wrote A & A to say that it had switched its business to RBH. The RBH advertisement featuring Danahy, Marvel and Daly began to appear in August of 1984. Suit was filed in November, 1984, accompanied by an immediate**28 request for an injunction. The period covered by the agreements being a finite one, the defendants apparently benefited from the delay. In any event, what delay there was was not so egregious as to form the basis for denial of any injunctive relief. Parties to a business dispute deserve praise, not penalty, for attempting to negotiate their differences before knocking on the courthouse door.

The Merits.

We caution at the outset that our comments deal only with the likelihood of A & A's ultimate success on the merits. A full trial of the issues is contemplated. Evidence may unfold at the trial on any of the issues discussed justifying a different result.

1. *Whether the covenants not to compete should be viewed primarily as arising out of the sale of the business or out of the employment relationship.* The covenants in issue were included in the written agreement for the sale of the business. But the agreement also contemplated that Danahy would be employed by A & A, and the period during which the covenants were to run was to begin with the termination of that employment. Thus, the covenants not to compete arose out of an arrangement that had aspects of both a sale of a business and a contract of employment.

[6][7][8] *496 It is important to identify at the outset to which aspect of the arrangement the covenants not to compete primarily related. This is because there are considerations which dictate that noncompetition covenants arising out of the sale of a business be enforced more liberally than such covenants arising out of an employer-employee relationship. See [Wells v. Wells](#), 9 Mass.App.Ct. 321, 400 N.E.2d 1317 (1980), and authorities cited at 324-325; [Restatement \(Second\) of Contracts § 188](#) (1981). In the former situation there is more likely to be equal bargaining power between the parties; the proceeds of the sale

generally enable the seller to support himself temporarily without the immediate practical need to enter into competition with his former business; and a seller is usually paid a premium for agreeing not to compete with the buyer. Where the sale of the business includes good will, as this sale did, a broad noncompetition agreement may be necessary to assure that the buyer receives that which he purchased. Even in the absence of an express covenant not to compete, in such circumstances an agreement by the seller not to depreciate the value of good will may be implied so as to prevent the seller from taking back that which he purported to sell. [Tobin v. Cody](#), 343 Mass. 716, 720-724, 180 N.E.2d 652 (1962). [United Tool & Industrial Supply Co. v. Torrisi](#), 356 Mass. 103, 106-107, 248 N.E.2d 266 (1969). [Mohawk Maintenance Co. v. Kessler](#), 52 N.Y.2d 276, 283-287, 437 N.Y.S.2d 646, 419 N.E.2d 324 (1981). On the other hand, an ordinary employee typically has only his own labor or skills to sell and often is not in a position to bargain with his employer. Postemployment restraints in such cases must be scrutinized carefully to see that they go no further than necessary to protect an employer's legitimate interests, such as trade secrets or confidential customer information. See [Marine Contractors Co. v. Hurley](#), 365 Mass. 280, 287-288, 310 N.E.2d 915 (1974); [National Hearing Aid Centers, Inc. v. Avers](#), 2 Mass.App.Ct. 285, 288-291, 311 N.E.2d 573 (1974).

It is not at all unusual for the seller of a business to join the new enterprise in an employment capacity. There are obvious advantages to both sides which flow from such an arrangement. It enables the purchaser to carry on the old business with the least possible dislocation and loss of good will. Established *497 customers of the business sold could be expected to patronize the successor business. And such an arrangement provides the seller with the opportunity to be productive in the work with which he is familiar, and to gain income.

[9] We have no difficulty reaching the conclusion that, in reviewing the present covenants, we should apply the standards applicable to covenants arising out of the sale of a business. **29 [Pitman v. J.C. Pitman & Sons](#), 324 Mass. 371, 374, 86 N.E.2d 649 (1949). Accord [Kraft Agency, Inc. v. Del Monico](#), 110 A.D.2d 177, 494 N.Y.S.2d 77, 81-82 (1985). See Levin, Non-Competition Covenants in New England: Part II, 40 B.U.L.Rev. 210, 227-228 (1960). Good will is of great importance in the insurance brokerage business. Customers have repeated and multiple insurance needs. Prompt

service, integrity, and loyalty are of some importance to customers who would tend to rely on key personnel who have demonstrated those qualities in the past. A broad noncompetition agreement would be an important part of any agreement to sell an insurance agency. The agreement of which the covenants were part provided that the covenants were "granted to A & A to protect [the] good will" enjoyed by A & A and that the covenants were "not severable from such good will." True, it was the good will of KIA which was sold, and that good will may have diminished to some extent over the years following the dissolution of that corporation. Nevertheless, Danahy's association with A & A during those years must have meant that some of KIA's good will remained. Moreover, the usual inequality of bargaining power between employer and employee was not present when these noncompetition covenants were entered into. The proceeds of the sale provided an ample cushion for Danahy for the period during which the covenant was to be in effect, whether that period be the five years immediately following the sale or some five-year period after Danahy's employment with A & A ceased. In short, the covenants not to compete were treated as an integral part of the agreement for the sale of the business, and there is no reason for us to view them as something other than what they purport to be.

[10] *498 2. *Validity of the covenants.* Our characterization of the covenants as ones arising primarily out of the sale of a business does not necessarily lead us to conclude that the covenants would be fully enforceable as written. Although we look less critically at such covenants, and although the elements that must be considered differ, any covenant restricting competition is to be enforced only to the extent that it is reasonable in time and space, necessary to protect legitimate interests, and not an obstruction of the public interest. See [Whitinsville Plaza, Inc. v. Kotseas](#), 378 Mass. 85, 102-103, 390 N.E.2d 243 (1979); [Wells v. Wells](#), 9 Mass.App.Ct. at 323-325, 400 N.E.2d 1317. We proceed to examine the defendants' claim of unreasonableness in terms of these criteria.

[11] Considering the magnitude of the sale, the significance of good will to this type of business, and the high level position Danahy held in both business entities, we are not convinced that five years is an unreasonably long period for the covenant to run. We note, however, that only a temporary order is in issue. Trial may be had well within the five-year period. On a more complete record a judge may determine that the longest period the covenants could

reasonably run would be something less than five years. If so, there will be time later to shape the appropriate form of injunctive relief.

[12][13] It was not unreasonable to include prospective customers within the ban. A & A had a legitimate interest in extending its business to them. See Wells v. Wells, 9 Mass.App.Ct. at 326, 400 N.E.2d 1317; Kroeger v. Stop & Shop Cos., 13 Mass.App.Ct. 310, 317, 432 N.E.2d 566 (1982). The references in the covenants to A & A's customers, without distinguishing the particular kind of insurance purchased by the customer through A & A, do not make the covenants unreasonably broad. A & A would have a legitimate expectation that it might in the future sell an existing customer a new line of insurance.

[14] The most troublesome claim is that the covenants are unreasonably restrictive because they prevent Danahy from *receiving* business even in the absence of any direct or indirect participation by him in obtaining the business for RBH. Thus, if a present or former customer of KIA or A & A should wish, because of genuine dissatisfaction with A & A or another insurance*499 **30 firm, to move its business, Danahy would, by the terms of the covenant, be barred from accepting that business. There is conflicting authority as to enforceability of covenants not to compete to the extent that they prohibit merely accepting or receiving business. For cases holding that such acts may be enjoined, see Girard v. Rebsamen Ins. Co., 14 Ark.App. 154, 685 S.W.2d 526 (1985), and Kraft Agency, Inc. v. Del Monico, 494 N.Y.S.2d at 83. For cases holding that such injunctive relief is improper, all of which cases, however, concern covenants arising out of employment relationships not involving the sale of a business, see Evans Labs. v. Melder & Cingolani, 262 Ark. 868, 871, 562 S.W.2d 62 (1978); Singer v. Habif, Arogeti & Wynn P.C., 250 Ga. 376, 377, 297 S.E.2d 473 (1982); and Diamond Match Division v. Bernstein, 196 Neb. 452, 243 N.W.2d 764 (1976).

As a practical matter, the difference between accepting and receiving business, on the one hand, and indirectly soliciting on the other, may be more metaphysical than real, particularly where Danahy held prominent executive positions in KIA and A & A and is now president of RBH, and where his association with RBH has been widely publicized. We recognize that, construed to bar mere receipt of business, the agreement may be an impediment to Danahy's employment in the insurance brokerage business in the type of high level customer

development position he holds with RBH. He agreed to the terms, however, in what appears at this preliminary stage of the proceedings to have been a fair bargain freely entered into with the benefit of counsel. No clear reason has emerged at this stage of the proceedings why Danahy should not be held to his bargain.

3. *Whether the injunction may extend to RBH.* RBH claims that, even if the injunction is proper to prevent Danahy from violating his covenants, it is overbroad because it prevents RBH, a stranger to the covenants, from engaging freely in the insurance brokerage business through its other employees. The order enjoins each of the parties from violating the terms of the noncompetition covenants. The injunction against RBH, however, is only as broad as Danahy's noncompetition agreement. As president and a director, Danahy is closely identified *500 with the corporate entity. The injunction against RBH would dissolve of its own weight should Danahy leave RBH. Should Danahy assume a different role in RBH's business, the effect of the injunction on RBH and its other insurance salesmen would also change. If Danahy were to become a sales representative, without over-all responsibility for RBH's sales performance and without supervisory authority over other members of the sales force, RBH would be free, through its other sales personnel, to do business which the injunction presently prohibits.

[15][16] RBH knew the full extent of Danahy's noncompetition agreements when Danahy was hired. Depending upon the circumstances, a stranger to a noncompetition agreement who is aware of the agreement may be enjoined from violating the agreement. Old Corner Bookstore v. Upham, 194 Mass. 101, 106, 80 N.E. 228 (1907). Suburban Coat, Apron & Linen Supply Co. v. LeBlanc, 300 Mass. 509, 512, 15 N.E.2d 828 (1938). Sulmonetti v. Hayes, 347 Mass. 390, 396, 198 N.E.2d 297 (1964). Ingredient Technology Corp. v. Nav, 532 F.Supp. 627, 632 (E.D.N.Y.1982). West Shore Restaurant Corp. v. Turk, 101 So.2d 123, 128-129 (Fla.1958). Bates Chevrolet Corp. v. Haven Chevrolet, Inc., 13 A.D.2d 27, 31, 213 N.Y.S.2d 577 (N.Y.1961), aff'd 13 N.Y.2d 644, 240 N.Y.S.2d 759, 191 N.E.2d 290 (1963). Wells v. Powers, 354 S.W.2d 651, 654 (Tex.Civ.App.1962). It is true that all the cases cited involved either business entities created for the purpose of competing, or parties who, because of a family or other close relationship, were viewed as the "alter ego" of a party to the agreement. We do not think, however, that the right to have a third party enjoined from violating a noncompetition agreement

is necessarily limited to those particular situations. What is reasonable must be decided on a case by case basis. The facts in this case are yet to be proved. Among the relevant facts that persuade us that A ****31** & A is likely to prevail ultimately against RBH are the facts that Danahy, as president, plays a dominant role in RBH and is in a position to exert influence over its activities, and that, because of the advertisements, Danahy is closely identified with RBH in the mind of the public. This injunction does no more than ***501** to prevent RBH from obtaining benefits from Danahy's violation of the noncompetition covenants.

[17] 4. *Balancing of the risk of irreparable harm to the respective parties.* The trial judge did not abuse his discretion in the way he balanced the risk of harm to the parties in light of their respective chances of success on the merits, in concluding that the balance cut in favor of the plaintiff, and in concluding that money damages would not provide an adequate remedy to the plaintiff.

[18][19] Absent from the judge's discussion, however, was any reference to the public interest, a factor which ought to have been considered. See All Stainless, Inc. v. Colby, 364 Mass. 773, 778, 308 N.E.2d 481 (1974). Relying on Merrill Lynch, Pierce, Fenner & Smith, Inc. v. de Liniere, 572 F.Supp. 246, 249 (N.D.Ga.1983), the defendants argue that the injunction deprives the insurance buying public of the right to select the broker of their choice, a right they ought to be able to exercise freely. See also Alexander & Alexander, Inc. v. Wohlman, 19 Wash.App. 670, 687, 578 P.2d 530 (1978). But compare O'Sullivan v. Conrad, 44 Ill.App.3d 752, 758, 3 Ill.Dec. 383, 358 N.E.2d 926 (1976). Based upon our reading of Danahy's supplemental affidavit, which describes how the insurance brokerage business operates, we would not necessarily equate the customer-insurance broker relationship with the client-stockbroker relationship discussed in Merrill Lynch, Pierce, Fenner & Smith, supra. Nor, in light of the number of competing firms in the industry and the size of the market still available to RBH, is the injunction a significant restraint on ordinary competition.

We note that Danahy, with the benefit of counsel and for substantial consideration, freely signed the agreement which included a provision that A & A would be entitled to an injunction in the event of a breach or a threatened breach of the noncompetition covenants. RBH, knowing of the existence of the covenants, had at least constructive notice of the

provision regarding A & A's right to an injunction. While such a provision would not require a court to issue an injunction in the absence of equitable considerations justifying that relief, its existence is a factor properly added to the scale in weighing the equities.

***502** For the reason indicated in note 2, *supra*, that part of the modified order enjoining RBH from violating the terms of the noncompetition agreement between A & A and Daly is to be vacated, and, as so further modified, the order is affirmed.

So ordered.

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