



## Supreme Judicial Court Prohibits Extension Of Non-Solicit Period In Lieu of Awarding Damages

On January 14, 2020, the highest court in the Commonwealth held that, while a former shareholder and employee of a closely-held company breached a restrictive covenant with the company, the trial judge's decision to extend the restrictive covenant beyond its plain terms was erroneous under the circumstances.

The *Automile Holdings, LLC v. McGovern* case involved an "anti-raiding" restrictive covenant between an automotive dealership group and its former executive and minority shareholder. The closely-held company was owned by three individuals for over ten years when, after a dispute arose regarding a decision to sell the company, McGovern (the minority shareholder) was terminated as an employee. At the time of his termination, McGovern did not have a right to redeem his minority interest in the company. He was also not subject to a noncompete agreement.

Automile's employees were free to compete upon their departure – but, the restrictive covenant prevented McGovern from raiding the company of its key employees after his termination.

In negotiating a fair market value buyout of his illiquid interest in the closely-held company, McGovern agreed to enter into a restrictive covenant prohibiting him from soliciting or hiring employees from Automile for a defined period of time. The restriction prevented him from "raiding" the company by targeting and soliciting key employees to work for him. The agreement provided that a breach by McGovern would entitle the company to "all damages and remedies available under applicable law," as well as the entry of injunctive relief without the need to prove irreparable harm. Despite the restriction, however,

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### Firm News



Payal Salsburg

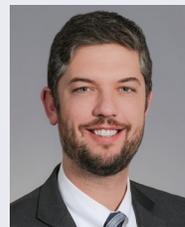


Marc Laredo

Congratulations to Payal Salsburg on her elevation to partnership. She will continue her practice in business litigation, corporate advice, and white collar criminal defense.

Marc Laredo is named to the Boston Bar Association's inaugural Law Firm Leadership Forum.

Payal Salsburg and Marc Laredo presented a CLE program titled *Litigating Derivative Suits in Closely-Held Business* at the Boston Bar Association.



Matthew Kane

Matthew Kane is named an Associate Editor on the Board of Editors for the Massachusetts Law Review.

Matthew Kane and Payal Salsburg are appointed as hearing officers for the Massachusetts Board of Bar Overseers.



Jessica Conklin

Jessica Conklin spoke to high school students at Boston University Academy about the career path that led her to become a government investigations and Title IX practitioner.

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McGovern hired numerous employees from Automile and the company brought suit for damages and sought an eighteen-month extension of the “anti-raiding” provision.

After a five-day jury-waived trial, the judge concluded that the restrictive covenant was enforceable because it was intended to prevent the loss of key employees – a legitimate business interest. However, the judge recognized that it was difficult to enter an injunction to protect this particular kind of business interest after the soliciting or hiring has already occurred. Thus, in declining to enjoin McGovern’s new company (and essentially causing hardship on the solicited employees), the judge instead concluded that (a) Automile was entitled to the money damages it could prove as a result of the raiding, and (b) Automile was entitled to a one-year extension of the restrictive covenant. The judge made no findings as to the amount of damages, but post-trial filings by Automile valued the restrictive covenant at \$2 million.

On appeal, the SJC concluded that the former executive had in fact committed a breach of the covenant by hiring key employees from the company. The SJC noted that, as a general matter, Automile’s employees were free to compete upon their departure – and, McGovern was free to compete with Automile so long as he did not use his inside knowledge of salary structure and internal management dynamics to raid Automile’s key employees.

In rejecting the one-year extension of the restriction, however, the SJC recognized that Automile would not receive the value of its purchase price for McGovern’s minority interest if the restrictive covenant were not enforced. Nevertheless, the SJC concluded that extending the scope of a restrictive covenant beyond its plain terms would be proper only if the party seeking to extend the terms of the restrictive covenant demonstrates that money damages were inadequate. The SJC recognized that quantifying the harm caused by breach of a restrictive covenant is “particularly difficult and elusive,” especially if, as in Automile, “the clock continues to tick on the time limit governed by the restrictive covenant.” But the SJC was constrained by the plain language of the covenant, which contained an unambiguous expiration date. The SJC was ultimately unwilling under the circumstances to alter the terms of the parties’ agreement – another reminder to take great care when drafting agreements affecting closely held entities.

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