

**Corporate Law—Massachusetts Limits Tolling of Statute of Limitations for Breach of Fiduciary Duties in Closely Held Corporations—*Aiello v. Aiello*, 852 N.E.2d 68 (Mass. 2006)**

The statute of limitations for claims arising out of an alleged breach of fiduciary duty by members of a corporate board of directors is generally three years from the date the plaintiff knew or should have known of the alleged wrong.<sup>1</sup> For certain equitable reasons, courts and legislatures have provided exceptions to this sometimes harsh rule by tolling the statute of limitations and permitting claims beyond the three year period.<sup>2</sup> In *Aiello v. Aiello*,<sup>3</sup> the Massachusetts Supreme Judicial Court (SJC) considered whether to apply either the complete domination test or the disinterested majority test in determining adverse domination to toll the statute of limitations when a majority of the board of directors dominated the decision making.<sup>4</sup> The SJC announced that Massachusetts courts must apply the complete domination test when a corporate agent seeks to toll the statute of limitations.<sup>5</sup>

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1. See Joseph Mack, *Nullum Tempus: Governmental Immunity to Statutes of Limitation, Laches, and Statutes of Repose*, 73 DEF. COUNS. J. 180, 182 (2006) (discussing change in theory regarding commencement of statute of limitations); see also MASS. GEN. LAWS ch. 260, § 2A (2006) (defining period of limitation for tort claims). The Massachusetts statute requires that the statute commence within three years after the cause of action, but it does not define when the cause of action actually commences. Ch. 260, § 2A. The plaintiff knowledge requirement is a relatively new legal development. See Mack, *supra*, at 182. As little as thirty years ago, the statute of limitations began running at the time the defendant harmed the plaintiff, even if the plaintiff did not know about the harm until decades later. *Id.*

2. See *Protective Life Ins. Co. v. Sullivan*, 682 N.E.2d 624, 635 (Mass. 1997) (noting equitable tolling applies where plaintiff could not have obtained information essential to bring suit); see also MASS. GEN. LAWS ch. 260, § 7 (2006) (allowing statute of limitations tolled where plaintiff was minor child); *Developments in the Law Statutes of Limitations*, 63 HARV. L. REV. 1177, 1220-44 (1950) [hereinafter *Developments*] (explaining factors of equitable tolling). Courts of equity used laches as a remedy, while courts of law preferred statutes of limitations. *Developments, supra*, at 1183-84. The doctrine of laches places less emphasis on time elapsed since the claim occurred, whereas time restrictions govern statutes of limitations. *Id.* at 1184. Today little distinction exists between courts of equity and law, and the doctrine of laches has thus fallen out of use. *Id.* at 1183.

3. 852 N.E.2d 68 (Mass. 2006).

4. See *id.* at 71-72 (describing issue under consideration); see also Michael E. Baughman, *Defining the Boundaries of the Adverse Domination Doctrine: Is There Any Repose for Corporate Directors?*, 143 U. PA. L. REV. 1065, 1081-83 (1995) (noting adverse domination spawned complete domination and disinterested majority tests). The complete domination test requires the plaintiff to show that culpable directors completely dominated the board. Baughman, *supra*, at 1082. This test, however, has created further questions as to what degree of completeness courts require. *Id.* at 1082. A variant of this test is the “influential complete domination” test, wherein the court tolls the statute, even if one or two disinterested board members exist, because the other members exert extreme control and dissuade the disinterested members from suing. *Id.* While some jurisdictions apply the complete domination test, the trend is towards a disinterested majority test. *Id.* at 183. Under the disinterested majority test the plaintiff only has to show that a majority of culpable directors controlled the board. *Id.*

5. See 852 N.E.2d at 72 (deciding complete domination test better serves purpose of adverse domination

Joy Hyland and her three brothers each owned twenty-five percent of DeLuca's supermarkets, a family-owned supermarket that had been conducting business on Charles Street in Boston since 1966.<sup>6</sup> Each sibling was also a member of the four seat board of directors.<sup>7</sup> After Joy moved to Florida in 1984, the brothers assumed control of DeLuca's by attending to the daily responsibilities of the supermarket operation.<sup>8</sup> Without consulting Joy, the brothers obtained property, opened new locations, and developed separate companies with DeLuca's profits.<sup>9</sup> In March of 1994, Joy confronted her brothers regarding her low compensation, and despite hiring an accountant to examine the corporate books, Joy maintained an amicable relationship with her brothers until 1997.<sup>10</sup>

In 1997, the siblings' uncle died and conveyed the DeLuca's supermarket property to Joy and her brothers in unequal shares.<sup>11</sup> Largely based on the unequal distribution of the property, several years of litigation followed, during which time each sibling engaged in suits with or against each other.<sup>12</sup> The judge eventually appointed a receiver to wind up and dissolve the business, and each sibling subsequently submitted a claim demanding an amount in excess of his or her pro rata share.<sup>13</sup> In her submission to the receiver, Joy alleged that her brothers received excessive compensation, diverted corporate opportunities, and engaged in self-dealing.<sup>14</sup>

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doctrine). The court determined that a majority of culpable directors was not in itself a justification for tolling the statute of limitations. *Id.* at 80.

6. *Id.* (describing undisputed facts presented at trial). Although the siblings owned the store, their uncle owned the property on which the supermarket was located. *Id.*

7. *Id.* The court treated each sibling as having an equal, twenty-five percent interest in the company, even though the siblings disputed how many shares each one actually acquired and when. *Id.* at 72 n.8.

8. *Id.* at 72 (noting brothers' responsibilities extended to store and corporation).

9. 852 N.E.2d at 72-73 (discussing brothers' various actions after Joy moved to Florida). In 1977, the brothers formed a general partnership and opened DeLuca's Market Back Bay on Newbury Street in Boston without consulting Joy. *Id.* at 72. The general partnership was a separate entity from the DeLuca's corporation, but all of the brothers received compensation from the corporation for their work at the Back Bay market. *Id.* Each brother also created a separate business that provided goods and services to the corporation. *Id.* at 73. The separate enterprises included a wine import business, a produce wholesale operation, and a consulting company. *Id.* Like the Back Bay market, each brother financed his side company with DeLuca's funds. *Id.*

10. *Id.* at 73. Joy became suspicious about the financial workings of the company after discovering that Gerald had paid himself a \$316,851 bonus upon returning to the company after a three year hiatus. *Id.* After a dispute, the board subsequently "voted to garnish Gerald's future earnings" to compensate for the bonus. *Id.* Joy became suspicious of the "financial workings of DeLuca's" during this dispute. *Id.* The brothers told Joy that the disparity existed because they were entitled to more compensation for running the business full-time after Joy moved to Florida. *Id.*

11. *Id.* (noting uncle placed property in trust). Gerald received a three-sevenths interest; Joy received two-sevenths; and Robert and Virgil each received one-seventh. *Id.*

12. *Id.* at 73-74 (outlining various actions siblings brought against each other).

13. 852 N.E.2d at 74 (noting receiver set May 17, 2002 as deadline for submissions).

14. *Id.* Joy claimed that her brothers received excess compensation and that they opened up additional businesses that directly competed with DeLuca's without seeking the consent of a disinterested board member. *Id.*

The receiver conducted his initial investigation and filed his report and recommendations on August 15, 2002.<sup>15</sup> The judge accepted the receiver's report and found the statute of limitations barred all of Joy's claims that accrued before May of 1999.<sup>16</sup> Additionally, the judge accepted the receiver's recommendation from a supplemental report filed in May of 2003, that Joy receive an extra \$250,000 over and above her pro rata share as compensation for the alleged abuses that occurred after May 17, 1999.<sup>17</sup> The judge approved the receiver's report, and on January 31, 2004, he dismissed the receiver and entered the judgment from which Joy's appeal follows.<sup>18</sup>

Traditionally, courts have treated closely held corporations the same as larger private or even publicly held corporations.<sup>19</sup> Courts have gradually begun noticing that the specific nature of closely held corporations makes them especially vulnerable to breaches of fiduciary duty, and have thus afforded greater protection to minority interests in such corporations.<sup>20</sup> Massachusetts has been especially sensitive to such issues and became one of the first states to

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15. *Id.* (commenting receiver sought rulings from judge regarding applicability of statute of limitations). The report detailed the receiver's finding that Joy had actual knowledge of her brothers' misconduct by 1994. *Id.* at 74-75.

16. *Id.* at 75. The judge accepted the receiver's evaluation of when Joy had actual knowledge and fixed the start of the statute of limitations as May 17, 1999. *Id.* Additionally, the judge rejected Joy's assertion that the court should apply the complete domination test in adverse domination cases. *Id.*

17. 852 N.E.2d at 76. The court allowed Joy to receive these extra funds because the statute of limitations did not bar those claims that accrued within three years of bringing the suit. *See id.* at 75 (noting judge found claims accruing more than three years before May 17, 2002 time barred). The court did not, however, find that the statute barred claims subsequent to May 17, 2002. *See id.*

18. *Id.* at 76. Joy appealed the court's judgment, its December 2002 order denying her assertion of complete domination, and its denial of her motion to reconsider that order. *Id.*

19. *See* MELVIN A. EISENBERG, CORPORATIONS AND OTHER BUSINESS ORGANIZATIONS 256 (9th ed. 2005) (noting early close corporation litigation grew from inflexibility of corporate statutes aimed at large corporations); Note, *Statutory Assistance for Closely Held Corporations*, 71 HARV. L. REV. 1498, 1498 (1958) [hereinafter *Statutory Assistance*] (finding state law presented challenges to owners who wanted to run corporation like partnership). Legislators primarily wrote state laws for large corporations with a separation between ownership and management. *See Statutory Assistance, supra*, at 1498. In contrast, an integration of ownership and management is more typical in closely held corporations. *Id.*

20. *See* *Galler v. Galler*, 203 N.E.2d 577, 583-84 (Ill. 1964) (defining closely held corporations as those with few stockholders and limited market for shares); EISENBERG, *supra* note 19, at 246 (describing modern close corporations as distinct subset of private corporations); *see also* Diane L. Saltoun, *Fortifying the Directorial Stronghold: Delaware Limits Director Liability*, 29 B.C. L. REV. 481, 483 (1988) (noting prior court decisions favored management whereas recent decisions more favorable to shareholders); Note, *Freezing Out Minority Shareholders*, 74 HARV. L. REV. 1630, 1634-35 (1961) [hereinafter *Freezing Out*] (finding various litigation enabled minority interest to obtain fair value for shares through appraisal mechanisms); *Statutory Assistance, supra* note 19, at 1498 (stating characteristic of closely held corporation). Today, characteristics such as a limited number of shareholders, integration of ownership and management, and restrictions on the transferability of shares, all typify closely held corporations. *See* EISENBERG, *supra* note 19, at 246. Some state legislatures have provided statutory protection for these corporations, rather than leaving construction of their definition to the judiciary. *See id.* at 256-57. Delaware has enacted a statute which allows any corporation to qualify as closely held, provided that no more than thirty shareholders exist, the charter restricts transferability, and the corporation does not make any of its shares available through public offerings. DEL. CODE ANN. tit.8, § 342 (1999) (detailing provisions of legislative strategy); EISENBERG, *supra*, at 336 (discussing Delaware statute).

break from traditional corporate theory, affording minority interests in closely held corporations protection by finding a heightened fiduciary duty between shareholders.<sup>21</sup> Virtually all state and federal jurisdictions have now begun treating closely held corporations more like general partnerships and less like publicly held corporations.<sup>22</sup>

Statutes of limitations have existed since the beginning of the modern legal system and, in some limited forms, actually predate most modern systems.<sup>23</sup> The purpose and length of a statute of limitation varies depending upon the historical time, subject matter of the underlying suit, and jurisdiction.<sup>24</sup> In

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21. See *Demoulas v. Demoulas Super Markets, Inc.*, 677 N.E.2d 159, 179 (Mass. 1997) (stating closely held corporations resemble partnerships); see also *Donahue v. Rodd Electrotype Co. of New England*, 328 N.E.2d 505, 515 (Mass. 1975) (declaring closely held corporation directors owe higher duty to shareholders than public corporation directors); Kenneth J. Mickieqicz & C. Forbes Sargent III, *Demoulas v. Demoulas Super Markets, Inc.: Directors' and Shareholders' Duty of Loyalty in Self-Dealing Transactions Involving Corporate Opportunity*, 42 BOSTON B.J. 16, 16 (1998) (recognizing *Donahue* as starting point for establishing heightened fiduciary duties in closely held corporations in Massachusetts); Douglas K. Moll, *Shareholder Oppression in Close Corporations: The Unanswered Question of Perspective*, 53 VAND. L. REV. 749, 760 (2000) (finding *Donahue* seminal case on issue of minority protection in closely held corporations); Charles W. Murdock, *The Evolution of Effective Remedies for Minority Shareholders and its Impact Upon Valuation of Minority Shares*, 65 NOTRE DAME L. REV. 425, 434 (1990) (finding Massachusetts one of first states to impose fiduciary duty between shareholders in close corporations). In *Donahue*, after the defendant corporation purchased certain shares from its president at a price much higher than market value, the only minority shareholder in the corporation tendered her shares for the same price. *Donahue v. Rodd Electrotype Co. of New England*, 328 N.E.2d 505, 510-11 (Mass. 1975). The corporation would not buy the minority shareholder's shares and she subsequently brought suit. *Id.* The SJC sided with the minority interest and concluded that the integration between management and ownership and the lack of a ready market for shares imputed a heightened fiduciary duty between shareholders of closely held corporations. *Id.* at 511. Otherwise, the SJC noted, majority shareholders in closely held corporations could subject minority interests to "freeze-out" schemes designed to control and dominate the minority. *Id.* at 513.

22. See, e.g., *Helms v. Duckworth*, 249 F.2d 482, 486 (D.C. Cir. 1957) (rebutting contemporary presumption of minimal duty between shareholders with regards to close corporations); *Donahue v. Rodd Electrotype*, 328 N.E.2d 505, 515 (Mass. 1975) (drawing parallel between close corporations and partnerships); *Meiselman v. Meiselman*, 295 S.E.2d 249, 256-57 (N.C. 1982) (finding corporate financial policy favoring majority shareholders breached fiduciary duty owed to minority shareholders). See generally Brauch Gitlin, Annotation, *When Is Corporation Close, or Closely-Held, Corporation Under Statutory Law*, 111 A.L.R. 5th 207, §2[a] (2003) (commenting closely held corporations impute heightened fiduciary duties similar on majority shareholders). In *Donahue*, the court held that partners owe one another the standard of utmost good faith and loyalty. *Donahue v. Rodd Electrotype*, 328 N.E.2d 505, 515 (Mass. 1975). As owners and managers of a closely held corporation, their business resembles a co-adventure. *Id.* The court in *Duckworth* stated that "[i]n an intimate business venture . . . stockholders of a close corporation occupy a position similar to that of joint adventurers and partners." *Helms v. Duckworth*, 249 F.2d 482, 486 (D.C. Cir. 1957). These fiduciary duties resemble those required in partnerships. Compare *Gitlin*, *supra*, at § 2[a] (discussing fiduciary duties in close corporations), with *Donahue v. Rodd Electrotype*, 328 N.E.2d 505, 515 (Mass. 1975) (discussing similarities between partnerships and closely held corporations, and imposing strong fiduciary duty for both).

23. See *Developments*, *supra* note 2, at 1177 (noting historical progression of statutes of limitations). Statutes of limitations originated under Roman law and continue to exist in modern European and American law today. *Id.*

24. See 1 CALVIN W. CORMAN, *LIMITATION OF ACTIONS* § 1.1, at 5-6 (1991) (noting tension between procedural nature of limitations and underlying substantive rights); *Developments*, *supra* note 2, at 1177-80 (finding statutes of limitations vary across different areas of law and jurisdiction); see also Matthew G. Dore, *Statutes of Limitation and Corporate Fiduciary Claims: A Search for Middle Ground on the Rule/Standards*

Massachusetts, a statute of limitations lasting three years controls most personal actions sounding in tort.<sup>25</sup> This, however, raises the issue of when to start counting the three-year period.<sup>26</sup> The simplest and perhaps most obvious answer is to let the statute run from the date the alleged harm took place.<sup>27</sup> More recently, however, courts have moved towards tolling the statute of limitations until the plaintiff had, or should have had, knowledge of the harm.<sup>28</sup>

Exceptions to a strict application of the statute of limitations have developed, which would toll the limitation for certain equitable reasons.<sup>29</sup> For example, in corporate law, the theory of adverse domination has developed to check the power of the board of directors.<sup>30</sup> In the corporate setting, adverse domination tolls the statute of limitations when a plaintiff can prove that the corporation was incapable of bringing suit against itself because the culpable

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*Continuum*, 63 BROOK. L. REV. 695, 701 (1997) (recognizing statute of limitations issues taking substantive role no longer merely procedural defense).

25. MASS. GEN. LAWS ch. 260, § 2A (2006) (declaring three year statute of limitations for tort claims). In Massachusetts, to recover for a personal injury arising out of tort, the plaintiff must bring the claim within three years from the date the action accrues. *Id.*; *see, e.g.*, *Doe v. Harbor Schs.*, 843 N.E.2d 1058, 1065 (Mass. 2006); *Demoulas v. Demoulas Super Markets, Inc.*, 677 N.E.2d 159, 172 (Mass. 1997); *Kennedy v. Goffstein*, 815 N.E.2d 646, 648 (Mass. App. Ct. 2004) (applying three year limitation in various types of tort claims).

26. *See Doe v. Harbor Schs.*, 843 N.E.2d 1058, 1065 (Mass. 2006) (discussing difficulties in determining when plaintiffs claim accrued).

27. *See Doe v. Harbor Schs.*, 843 N.E.2d 1058, 1065 (Mass. 2006) (asserting general rule is three years beginning from date of injury); *Cannon v. Sears Roebuck & Co.*, 374 N.E.2d 582, 584 (Mass. 1978) (holding in products liability cases three years begin at time of injury); CORMAN, *supra* note 24, at 11-12 (outlining purpose of statutes of limitations); *see also* Baughman, *supra* note 4, at 1070 (commenting purpose of statutes of limitation to prevent surprise on unsuspecting defendants); Mack, *supra* note 1, at 181 (noting statutes of limitation clear dockets, punish sleeping plaintiffs, and protect defendants from stale claims).

28. *See Bowen v. Eli Lilly & Co.*, 557 N.E.2d 739, 740-41 (Mass. 1990) (noting inherent unfairness in rule barring plaintiff's claim before actual or constructive realization of accrual); *Kennedy v. Goffstein*, 815 N.E.2d 646, 648 (Mass. App. Ct. 2004) (holding Massachusetts statute begins accruing when plaintiff knew or should have known defendant caused harm); 2 CORMAN, *supra* note 24, at § 11.1 (noting discovery rule attempts to reduce harsh effects of statute of limitations application). *But see Lattuca v. Robsham*, 812 N.E.2d 877, 884 (Mass. 2004) (holding constructive knowledge insufficient to establish running of statute of limitations).

29. *See Hecht v. Resolution Trust Corp.*, 635 A.2d 394, 399 (Md. 1994) (adopting discovery rule to mitigate unfairness in strict statute of limitations application); *Doe v. Harbor Schs.*, 843 N.E.2d 1058, 1065-66 (Mass. 2006) (establishing accruing statute of limitations conditional upon actual knowledge in breach of fiduciary duty claims); *see also* Mack, *supra* note 1, at 182 (discussing courts' response to harsh statutes of limitations by tolling in equitable situations). Most courts today do not bar injuries which do not surface for years. Mack, *supra* note 1, at 182. Under modern statute of limitations jurisprudence, the burden on the defendant and delays to the court are less important than the plaintiff's right to have his day in court. *Id.*

30. *See Fed. Deposit Ins. Corp. v. Dawson*, 4 F.3d 1303, 1309 (5th Cir. 1993) (relying on modern trends in adverse domination law rather than sparse Texas law); *Farmers & Merchs. Nat'l Bank v. Bryan*, 902 F.2d 1520, 1522-23 (10th Cir. 1990) (noting other federal courts recognize adverse domination as equitable tolling doctrine). The degree of control culpable directors must have over the corporation is a central question in the adverse domination doctrine. *Farmers & Merchs. Nat'l Bank v. Bryan*, 902 F.2d 1520, 1522-23 (10th Cir. 1990); *see also* *Demoulas v. Demoulas Super Markets, Inc.*, 677 N.E.2d 159, 176 (Mass. 1997) (asserting adverse domination evolved because corporate wrongdoers would not sue themselves). A corporation controlled by disinterested directors is presumed not to be able to sue itself. *Demoulas v. Demoulas Super Markets, Inc.*, 677 N.E.2d 159, 176 (Mass. 1997).

directors controlled the corporation.<sup>31</sup> Two competing theories have surfaced regarding the required level of domination.<sup>32</sup> A disinterested majority test places less of a burden on the plaintiff seeking to toll the statute of limitations, while the complete domination test sets the bar higher.<sup>33</sup> In Massachusetts, little authority exists as to which adverse domination test courts should apply, and the few cases that considered the issue do not offer a bright line rule.<sup>34</sup>

In *Aiello v. Aiello*, the SJC determined that the complete domination test provided adequate protection for minority shareholders.<sup>35</sup> The statute of limitations began running before May 17, 1999, notwithstanding the fact that all of Joy's brothers, the perpetrators of the abuse, remained in complete control of the corporation long after this date.<sup>36</sup> The SJC further ruled that Joy represented a disinterested director and that her presence on the board sufficed to defeat the complete domination test.<sup>37</sup> The court determined that even though Joy had been in Florida for many of the years during the corporate abuse, she had or should have had knowledge of the wrongdoing, and either way, she satisfied the knowledge standard.<sup>38</sup> The court reasoned that waiting

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31. See *Resolution Trust Corp. v. Farmer*, 865 F. Supp. 1143, 1151 (E.D. Pa. 1994) (noting one cannot reasonably expect a corporation to sue itself while wrongdoers control); Baughman, *supra* note 4, at 1066 (providing framework for adverse domination).

32. See Baughman, *supra* note 4, at 1081-83 (comparing complete domination and disinterested majority tests).

33. See *Int'l Rys. of Cent. Am. v. United Fruit Co.*, 373 F.2d 408, 414 (2nd Cir. 1967) (describing clear principle of complete domination requires plaintiff to show board's full domination); *Resolution Trust Corp. v. Farmer*, 865 F. Supp. 1143, 1156 (E.D. Pa. 1994) (finding, in complete domination, burden on plaintiff to show no disinterested director capable of suing); *Fed. Sav. & Loan Ins. Corp. v. Williams*, 599 F. Supp. 1184, 1194 (D. Md. 1984) (concluding disinterested majority test better approach and more in line with principles of equitable tolling); see also *Hecht v. Resolution Trust Corp.*, 635 A.2d 394, 402 (Md. 1994) (outlining disinterested majority test). The disinterested majority test presumes that because the interested directors dominate the board, no one can file suit. *Hecht v. Resolution Trust Corp.*, 635 A.2d 394, 402 (Md. 1994). Conversely, the complete domination test requires the plaintiff to show that the board did not contain even a single disinterested director. *Id.* at 403; cf. *Lutherland, Inc. v. Dahlen*, 53 A.2d 143, 157 (Pa. 1947) (recognizing presence of one super-dominant board member precludes other members from suing).

34. See *Demoulas v. Demoulas Super Markets, Inc.*, 677 N.E.2d 159, 176-77 (Mass. 1997) (discussing adverse domination but not relying on it in ruling). The court in *Demoulas*, however, points out that the most common form of adverse domination is the disinterested majority test. *Id.* at 176. *But see Berish v. Bornstein*, No. BACV198800372A, 2006 WL 2221924, at \*10 (Mass. Super. May 22, 2006) (declining to apply adverse domination to condominium association); *Arthaud v. Brignati*, No. 980800B, 1999 WL 674328, at \*3 (Mass. Super. Aug. 6, 2004) (deciding adverse domination not applicable to condominium board of trustees).

35. 852 N.E.2d at 79 (ruling complete domination adequately balances public policy). The court focused on Joy's dual role as a shareholder and disinterested director with knowledge of her brothers' bad acts. *Id.* at 80-81. Such knowledge and standing mitigates unfairness in not tolling the statute of limitations. *Id.* at 81.

36. 852 N.E.2d at 78, 80 (concluding majority of culpable directors not, in itself, justification for tolling statute of limitations).

37. *Id.* at 82 (concluding Joy did not meet burden of showing complete domination by brothers). The SJC upheld the lower court's reliance on the receiver's report to determine that Joy was aware of the malfeasances in March of 1994. *Id.* at 74, 82-83.

38. See *id.* at 75 (upholding lower court's finding that Joy's personal claims began accruing prior to May 17, 1999, notwithstanding fiduciary duty). *But see Doe v. Harbor Schs.*, 843 N.E.2d 1058, 1065 (Mass. 2006) (citing *Akin v. Warner*, 63 N.E.2d 566 (Mass. 1945)) (affirming plaintiff's reliance on fiduciary relationship).

for a disinterested majority to assume control of a board of directors in a closely held corporation would effectively halt the running of the statute of limitations in all minority shareholder initiated suits.<sup>39</sup>

Even though the SJC correctly determined the date of Joy's actual knowledge of the corporate abuse, its use of the complete domination test is overly burdensome on plaintiffs.<sup>40</sup> The SJC erred by disregarding Joy's contention that adopting the complete domination test, rather than the disinterested majority test, places less of a burden on the defendant to rebut the plaintiff's showing of total domination, ignoring the special situation of closely held corporations.<sup>41</sup> The court placed too much emphasis on the fact that Joy was a disinterested shareholder who could have induced the corporation to sue.<sup>42</sup> The SJC should have weighed more heavily the fact that Joy was motivated by bonds of family and not merely fiduciary ties.<sup>43</sup> The culpable directors owed Joy a duty of utmost good faith as a shareholder and as a co-adventurer in their small family business.<sup>44</sup>

Because Massachusetts courts have been vigilant in protecting minority interests in closely held corporations, the SJC should have afforded Joy more protection.<sup>45</sup> In doing so, the court should have balanced Joy's minority

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One who stands in a fiduciary relationship can expect the other side to act with utmost good faith and loyalty. *Id.* at 1065.

39. See 852 N.E.2d at 82-83 (affirming lower court decision); see also *Donahue v. Rodd Electrottype*, 328 N.E.2d 505, 511 (Mass. 1975) (asserting small, tight knit group, essential characteristic of board of directors in closely held corporation).

40. See 852 N.E.2d at 78 (affirming *Demoulas* determination that complete domination test stricter of two tests); see also *Fed. Deposit Ins. Corp. v. Dawson*, 4 F.3d 1303, 1309-10 (5th Cir. 1993) (recognizing complete domination test proves tougher on plaintiffs seeking to toll statute); cf. *Developments*, *supra* note 2, at 1235 (favoring equitable suspension over rigid application of statute of limitations when legislative purpose not frustrated).

41. See 852 N.E.2d at 402 (rejecting Joy's assertion regarding burden of proof); *supra* note 31 and accompanying text (deciding complete domination test puts higher burden on plaintiff than disinterested majority test); see also *infra* note 43 and accompanying text (describing need for loyalty in close corporations).

42. See *Baughman*, *supra* note 4, at 1095-99 (discussing how derivative actions do not vitiate adverse domination pursuant to discovery rule); see also 852 N.E.2d at 72 (concluding Joy's ability and motivation to sue barred tolling of statute of limitations). A shareholder who wants to initiate an action on behalf of a corporation, called a derivative action, must make a demand that the board pursue the suit first, unless the demand would be futile. *Baughman*, *supra* note 4, at 1096. The shareholder must plead the futility of the action with specificity, but without the aid of discovery. *Id.* To bring a derivative action as a shareholder, Joy would have had to initiate a suit requiring a heightened pleading standard without discovery. 852 N.E.2d at 72; cf. *Gitlin*, *supra* note 22, at § 2[a] (noting shareholders can elect direct action rather than derivative based on status as close corporation).

43. See *Donahue v. Rodd Electrottype*, 328 N.E.2d 505, 511-12 (Mass. 1975) (noting disloyalty in close corporations based on integration of ownership may cause fighting and dissolution). Much of the acrimonious litigation spawned from closely held corporation cases directly relates to the bonds of family and friendship that unite owners of close corporations. See *id.*

44. See *supra* note 22 and accompanying text (imputing to closely held corporations similar duty of utmost good faith found in partnerships).

45. See *supra* note 21 and accompanying text (charting Massachusetts heightened fiduciary duty policy in close corporations).

interests with the structure and protection of the corporate form.<sup>46</sup> For example, the court determined that Joy had knowledge of her brothers' abuse at the same time she involved herself in amicable meetings with her brothers.<sup>47</sup> If Joy had actual knowledge of her brothers' concealment of hundreds of thousands of dollars, she likely would not have participated in such meetings.<sup>48</sup> The court therefore should have continued its trend of protecting minority rights by allowing discovery into the substance of these meetings to determine if Joy's brothers pressured or persuaded her to drop any planned litigation.<sup>49</sup>

The court correctly recognized that where adverse domination is proved, the court should eschew strict adherence to the statute of limitations in favor of equitable tolling.<sup>50</sup> Tolling the statute of limitations in certain situations allows justice to be served with minimal intrusion on a defendant's rights.<sup>51</sup> Such situations include fraud or where the defendant obstructs the plaintiff from obtaining information about the harm.<sup>52</sup> In these situations, particularly in closely held corporations, where the mere presence of a disinterested director will not overcome strict dominance, the legal decision to run the statute of limitations should not depend on such a singular presence.<sup>53</sup>

Competing interests dominated this case: providing finality in a civil case on the one hand and protecting the position of the plaintiff as a minority interest on the other. By requiring that the plaintiff prove the stricter test of complete dominance, the court has effectively precluded the tolling of the statute of limitations in close corporation cases. In situations where the plaintiff holds a minority interest, the determination of when to toll the statute of limitations should rest on a fact specific inquiry into the nature of the relationship between the minority and majority interest holders. This focus would more adequately

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46. Compare *Donahue v. Rodd Electrotype Inc.*, 328 N.E.2d 505, 516 (Mass. 1975) (noting fiduciary duties demand utmost loyalty and good faith), and *Freezing Out*, *supra* note 20, at 1630-31 (discussing minority shareholders susceptible to majority "freeze-outs"), with *Saltoun*, *supra* note 20, at 485 (discussing court's reluctance to impose will on corporate form and interfere on behalf of shareholders).

47. See *supra* note 10 and accompanying text (discussing lower court's factual findings).

48. See *supra* note 10 and accompanying text (noting Joy aware of brothers' other business ventures as of March 1994). The court accepted the lower court's finding that these conversations with her brothers and her accountant's investigations amounted to knowledge. 852 N.E.2d at 78. Based on the limited knowledge she had at the time, however, it would have been impractical for Joy to sue because she would have had to do so as a shareholder and thereby abandon her attempt, as a director, to find out the details of her brothers' business practices. See *id.* at 82 (noting different factors used to determine whether informed director can sue).

49. See 852 N.E.2d at 82 (noting court should consider "emotional and physical intimidation" in determining informed director's ability to sue). The court focuses on the specific dates at which Joy became aware of the claims she had against her brothers but does not inquire as to her reasons for not filing suit and for continuing to discuss these issues with her brothers. *Id.* at 74-75.

50. See *id.* at 78-79 (recognizing adverse domination as form of equitable tolling); see also *Mack*, *supra* note 1, at 182 (emphasizing equitable consideration as basis of tolling decision).

51. See *Mack*, *supra* note 1, at 182 (noting where harm hidden delay of action tolerated in assessing statute of limitations).

52. See *CORMAN*, *supra* note 24, at § 8.2 (outlining common equitable tolling considerations).

53. See *Donahue v. Rodd Electrotype*, 328 N.E.2d 505, 513 (recognizing difficulty for minority interest to challenge majority interest in derivative action).

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protect a disinterested board member holding a minority interest by shifting the focus away from the legal ability to sue and onto the personal inability to do so.

*John R. Leonard*