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Shareholder Duties and Disputes in Closely-Held Corporations in Massachusetts Revisited[1]

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In 2007, the *Massachusetts Law Review* published *Shareholder Duties and Disputes in Closely-Held Corporations in Massachusetts* ("*Shareholder Duties*"),[2] a review and analysis of the law governing closely-held Massachusetts corporations.[3] This body of law can differ — sometimes significantly — from the law governing closely-held entities formed in other states as well as the law governing non-closely-held Massachusetts entities. Over the past decade, while the fundamental principles have remained the same, Massachusetts courts have refined and built upon those principles and addressed previously unresolved issues, including developing a body of law to govern closely-held Massachusetts limited liability companies.[4] Court decisions regarding closely-held entities, while applying established principles, are often fact-specific, with the facts and equities of a particular situation frequently dictating the ultimate outcome.[5] Guided by the format of *Shareholder Duties*, this article will remind the reader of the governing principles and authorities, review recent decisions, discuss unresolved issues, and provide practical suggestions for practitioners.[6]

I. The General Standards and Basic Rules

The leading case regarding the duties of shareholders in closely-held Massachusetts corporations remains *Donahue v. Rodd Electrotype Co. of New England Inc.*[7] In *Donahue*, a case discussed extensively in *Shareholder Duties*, the Supreme Judicial Court (SJC) applied the general law of partnerships to so-called "close" corporations, namely those entities with "(1) a small number of shareholders; (2) no ready market for the corporate stock; and (3) substantial majority stockholder participation in the management, direction and operation of the corporation."[8] Shareholders in a closely-held corporation "owe one another a strict fiduciary duty" and must act with "utmost good faith and loyalty."[9] Those duties, as the SJC held in *Wilkes v. Springside Nursing Home Inc.*,[10] are tempered by the doctrine that actions that harm another shareholder will be allowed if they have a "legitimate business purpose" and there is no practical "less harmful alternative."[11]

The law regarding closely-held Massachusetts corporations is not the same as general Massachusetts corporate law. In the closely-held context, Massachusetts courts have added on extra layers of rights and duties because of the special nature of the closely-held entity. Thus, for example, in a Massachusetts close corporation, the shareholders owe duties to the corporation *and to one another*.[12] Those

1. My thanks to Payal Salsburg of Laredo & Smith, LLP, for her assistance with this article.

2. 91 Mass. L. Rev. 138 (2007).

3. The terms "closely-held" and "close" have the same meaning in this context. This article will use both terms interchangeably.

4. In many respects, the word "owner" is a more accurate means of describing those covered by the rules regarding closely-held entities. The owners of a corporation are shareholders or stockholders (Mass. Gen. Laws ch. 156D, § 1.40 (2005)); the owners of a limited liability company are members (Mass. Gen. Laws ch. 156C, § 2 (2005)); and the owners of a limited liability partnership are partners (Mass. Gen. Laws ch. 108A, §§ 2 and 45 (2011)). The management structures differ for each form of entity.

A corporation's shareholders elect directors, who are charged with the overall management of the entity. Mass. Gen. Laws ch. 156D, §§ 1.40(a), 8.03 (2005). The directors then elect officers, who manage the corporation's day-to-day affairs. Mass. Gen. Laws ch. 156D, § 8.40 (2005). Every corporation must have a president, treasurer, and secretary (the same person can serve in more than one office). Mass. Gen. Laws ch. 156D, § 8.40 (2005).

In a limited liability company, the members may select a manager or managers, who then function as a combination of directors and officers. Mass. Gen. Laws ch. 156C, § 24 (2005). A limited liability company also can (but is not required to) create officers or others to carry out the duties of the managers. *Id.*

In a limited liability partnership, the partners govern and have the authority to act for the partnership. Mass. Gen. Laws ch. 108A, § 45 (2011). A limited liability partnership functions like a traditional partnership except that the liability of individual partners is limited rather than joint and several. Mass. Gen. Laws ch. 108A, § 15 (2011).

5. *See, e.g.,* Selmark Assocs. Inc. v. Ehrlich, 467 Mass. 525, 526 (2014) (in a case involving a close corporation the court began its ruling with the observation that "[t]his case is, like many, factually intense."). *Selmark Associates* involved a determination of what effect various agreements among the parties had on "the otherwise applicable duties of parties in a close corporation . . . ." *Id.* at 539. This made the factual analysis particularly important.

6. The format is similar but not identical to the one used in *Shareholder Duties*. The captions used in the original article have been modified in some instances and sections where there have been few developments have been merged or omitted.

7. 367 Mass. 578 (1975).

8. *Id.* at 586.

9. *Id.* at 593 & n.18; *Shareholder Duties* at 139.

10. 370 Mass. 842 (1976).

11. *Id.* at 842, 851.

12. Int'l Bhd. of Elec. Workers Local No. 129 Benefit Fund v. Tucci, 476 Mass. 553, 561 (2017) (citations omitted).

same duties carry over to their roles as directors (and other actions that they take in connection with the corporation). This is in contrast to the general rule of Massachusetts corporate law "that a director of a Massachusetts corporation owes a fiduciary duty to the corporation itself, and not its shareholders . . . ."[13] It also is important to note that the law governing Massachusetts closely-held entities is not necessarily the same as the law of entities formed in other states.[14] The duties owed among owners of a close corporation to one another and to the corporation apply to all owners, majority and minority, thus requiring all owners to abide by the same rules.[15] These duties remain in effect for all owners even if one owner violates them. As the SJC explained, "[a]llowing a party who has suffered harm within a close corporation to seek retribution by disregarding its own duties has no basis in our laws and would undermine fundamental and long-standing fiduciary principles that are essential to corporate governance."[16] The court added that "[i]f shareholders take it upon themselves to retaliate any time they believe they have been frozen out, disputes in close corporations will only increase. Rather, if unable to resolve matters amicably, aggrieved parties should take their claims to court and seek judicial resolution."[17]

As practitioners in this area can attest, closely-held entities, even highly profitable ones, sometimes do a substandard job of adhering to the necessary corporate formalities, such as meetings (or consents in lieu of meetings) and record-keeping. The problems often start at the inception of the business when the founders may be unaccustomed to proper or good corporate governance and money may be tight, leading to less attention being paid to legal issues. An entity may be formed by the owners themselves (perhaps with the assistance of a non-lawyer professional, such as an accountant or a company that provides online assistance for individuals forming an entity) without documentation other than the articles of organization (or the certificate of organization for a limited liability company or certificate of registration for a limited liability partnership) on file with the Massachusetts Secretary of State. Even the amount of stock (or the percentage of membership or partnership interest) held by each owner can be unclear. As the entity grows, it may not have an attorney who regularly represents it, leading to a lack of attention to ongoing recordkeeping. Much of this may not be an issue until a problem or dispute arises, at which point the lack of documentation can cost the entity and its owners far more in time and expense than they would have spent getting the entity's legal affairs in order in the first instance.

The Massachusetts courts have adopted a practical approach in such situations, looking to other sources of information, such as an entity's income tax returns, to determine key issues, such as the percentage of ownership each individual has in the entity. An unpublished decision of the Appeals Court in *Houser Buick Inc. v. Houser*[18] illustrates this practical approach. In *Houser*, a closely-held corporation filed suit against one of its shareholders for breach of fiduciary duty.[19] After an adverse judgment, the shareholder claimed that the action against him had not been properly authorized by the corporation because "bringing a suit against a director is such an extraordinary act that it requires a meeting and vote of the directors."[20] Relying on the SJC's holding in *Samia v. Central Oil Co. of Worcester*,[21] the Appeals Court panel rejected that argument.[22] Without condoning the absence of formalities often seen with closely-held businesses, the court refused to permit the director who had been complicit in this informality, including years without any formal directors' meetings, to use this same informality as a shield against allegations of misappropriation.[23] "Where rights of creditors or other outsiders are not involved, actions taken without compliance with corporate formalities have frequently been held to bind shareholders."[24] While the *Houser* court appropriately allowed the realities of the situation to govern, the arguments made by the dissident shareholder (and the resultant time and attorneys' fees) could have been avoided in their entirety had the proper formalities been observed at the outset.

13. *Id.* One other exception to the general rule is "where a controlling shareholder who also is a director proposes and implements a self-interested transaction that is to the detriment of minority shareholders, a direct action by the adversely affected shareholders may proceed." *Id.* at 562. Delaware, in contrast to Massachusetts, "has a history of asserting that directors stand in a fiduciary relation to stockholders of the company . . . ." *Id.* at 563. In *Tucci*, this meant that the claims of the shareholders in this publicly-held Massachusetts entity needed to be brought derivatively. *Id.* at 562-63.

14. *See* K. Kusiak and E. Davis, "Gaining the Advantage in Close-Corporation Disputes: Examining Key Differences between Massachusetts and Delaware Fiduciary Duty Law," 97 Mass. L. Rev. 23 (2015) for a thorough discussion of the differences between Massachusetts and Delaware law in the close corporation context (Delaware being the formation jurisdiction of choice for many corporate lawyers).

15. Zimmerman v. Bogoff, 402 Mass. 650, 657 (1988); Donahue v. Rodd Electrotype Co. Inc., 367 Mass. 578, 593 n.17 (1975); *Shareholder Duties* at 140.

16. Selmark Assocs. Inc. v. Ehrlich, 467 Mass. 525, 552-53 (2014).

17. *Id.* at 553 (citations omitted). The rationale for this ruling is that the courts are the appropriate forum to resolve claims of unfair conduct, and self-help is not appropriate. While perhaps understandable in the abstract, it ignores the difficulties that a minority shareholder can face if she is a victim of a breach of fiduciary duty and can lead to some seemingly harsh results. Take, for example, the shareholder whose employment is wrongfully terminated. Resort to the courts can take months or years (although preliminary injunctive relief might alleviate that delay if it is available). She needs to earn a living and so takes a job with a competitor. In doing so, she can be charged with breach of fiduciary duty. So, her alternatives are stark — follow the court's required procedures and be unable to support herself or her family, or take new employment and be subject to a claim against her (perhaps at the same time that she is pursuing her own breach of fiduciary duty claim). Neither is a particularly attractive alternative. It also is at odds with the general duty that an aggrieved party has to mitigate its damages.

18. No. 15–P–823, 2016 WL 1079402 (Mass. App. Ct. March 18, 2016) (unpublished per Rule 1:28).

19. *Id.* at *1.

20. *Id.*

21. 339 Mass. 101 (1959).

22. *Houser*, at *1.

23. *Id.*

24. *Id.* (*citing* Pitts v. Halifax Country Club Inc., 19 Mass. App. Ct. 525 (1985)); *see* O'Brien v. Pearson, 449 Mass. 377 (2007) (absent clear corporate action setting stock holdings, jury found that O'Brien "was a forty eight per cent shareholder in the corporation…."). In its opinion, the *O'Brien* court noted that the articles of organization were filed "without detailing the shareholder distribution." *Id.* at 379. Typically, however, the articles of organization do not identify the shareholders or their ownership percentages in an entity.

A. The Owner-Employee

One of the hallmarks of the closely-held entity is that the owners are often employees of the entity. Indeed, employment may be how the owners receive a return on their investment in the business. This leads to difficulties when the basic rules of employment in Massachusetts, such as that of employment generally being "at will" unless contractually altered, clash with the rights of owners to derive benefit from the business through the employment relationship.

While there is a heightened standard of scrutiny when the employment of a shareholder-employee is terminated, a pair of Superior Court decisions, *Bensetler v. Data Plus Inc.*[25] and *Holland v. Burke*,[26] serves as a reminder that any entitlement to employment is not unlimited. In *Bensetler*, a husband and wife were employees and shareholders of a closely-held business.[27] The marriage foundered and, during the divorce process, the husband terminated the wife's employment.[28] Although the court rejected some of the stated reasons for the discharge, it ruled that certain other ones were sufficient cause for termination and that "[m]aintaining a disgruntled, non-contributing, and self-serving employee such as Mrs. B. on the company's payroll was not in the company's best interest . . . [and] there was no effective alternative course of action less harmful to Mrs. B. that could have been taken . . . ."[29] In *Holland*, a case involving the allegedly improper termination of an owner's employment and the misappropriation of funds by the other owners, the court noted that "[w]hether there is a freeze out in this situation depends on the shareholders' reasonable expectations of benefit."[30] There, the terminated shareholder-employee, unlike the other shareholder-employees, was not experienced in the business, did not establish "that he had a reasonable expectation of continued employment" and did not show "that a guaranty of employment was a major reason for his investment of capital, or that he was relying on employment . . . or his livelihood."[31] "Rather, the credible evidence established that Holland's primary motivation in joining the enterprise was to invest in the land and the two businesses, an interest which Holland retains by virtue of his stock ownership."[32] Without an expectation of employment as a return for investment, depriving one of employment is not a freeze out. Both cases illustrate that whether the termination of a shareholder-employee is improper depends on the particular facts and circumstances of each case.[33]

Sometimes, however, the employment relationship will be governed by an agreement among the owners or a separate employment agreement. In those circumstances, the contract will govern under the rules discussed in the section below on agreements among owners.

B. Diverting Corporate Opportunities

An owner of a closely-held business may not divert corporate opportunities away from the business without full disclosure and approval by the entity. But, as with other fiduciary duties, this too can be modified by agreement.[34] In *Pointer v. Castellani*,[35] the SJC held that where an operating agreement stated that a company had a limited business purpose and that its members were specifically permitted "to conduct any other business or activity whatsoever" a member was free to take an opportunity that was "not involved within [the company's] line of business."[36] Thus, as in other areas of the law involving closely-held businesses, agreements among members or shareholders will often control and can limit or expand their rights and duties.

C. Which Law Applies

The *Donahue* rules only apply to Massachusetts entities.[37] Whether an entity is a Massachusetts entity depends on its state of incorporation.[38] Even if a business has its base of operations in Massachusetts, *Donahue* will not apply unless the entity is formed as a Massachusetts domestic entity.[39] Thus, what seemingly can be a minor decision — the state in which the entity should be initially incorporated or registered — can have enormous ramifications should a dispute among the owners arise.[40]

25. No. 012109, 2008 WL 4926048, 24 Mass. L. Rptr. 628 (Mass. Super. Ct. Oct. 14, 2008) (Roach, J.).

26. No. BACV200500122A, 2008 WL 4514664, 24 Mass. L. Rptr. 5551 (Mass. Super. Ct. June 18, 2008) (Connon, J.).

27. *Bensetler*, at *1 and 3.

28. *Id.* at *3-4.

29. *Id.* at *6.

30. *Holland*, at *6. *Holland* involved both a limited liability company and corporations. *See id.*

31. *Holland*, at *7.

32. *Id.*

33. *See* Clay v. J.L. Hammett Co., No. 12–P–285, 2012 WL 5832460 (Mass. App. Ct. Nov. 19, 2012) (unpublished per Rule 1:28) (affirming lower court's ruling that bonuses paid to shareholder/employees in connection with sale of company were permissible because "no facts in the summary judgment record would establish a violation of the business judgment rule. Indeed, the only evidence was that the bonus payments were reasonable.").

34. "The existence of a contract 'does not relieve stockholders of the high fiduciary duty owed to one another in all their mutual dealings,' but where the parties have defined in a contract the scope of their rights and duties in a particular area, good faith action in compliance with that agreement will not implicate a fiduciary duty." Merriam v. Demoulas Super Mkts., Inc., 464 Mass. 721, 727 (2013).

35. 455 Mass. 537, 555-56 (2009).

36. *Id.* at 555-56.

37. Harrison v. NetCentric Corp., 433 Mass. 465 (2001); *see* Nahass v. Harrison, 207 F. Supp. 3d 96, 102 (D. Mass. 2016).

38. *NetCentric*, 433 Mass. at 470-72. The *NetCentric* court distinguished its prior ruling in Demoulas v. Demoulas Super Mkts., Inc., 424 Mass. 501 (1997). *NetCentric*, 433 Mass. at 470-72. In *Demoulas*, the court applied a "functional approach" in ruling that Massachusetts law governed "because the company involved was formed originally in Delaware but later merged into a Massachusetts corporation." *Id.* at 470. Thus, the *Demoulas* ruling is an exception to the general rule that the law of the state of incorporation governs and it will take extraordinary circumstances for a court to stray from that rule. *See id.*

39. An entity is formed by filing the appropriate papers with the Secretary of State in the state of incorporation along with the requisite filing fee. An entity can then register to do business in another state by filing the appropriate papers with that state's Secretary of State, again along with that state's filing fee. Thus, an entity based in Massachusetts can be formed in Delaware and then registered as a foreign corporation doing business in Massachusetts. The entity will be a Delaware entity, not a Massachusetts entity.

40. *See* K. Kusiak and E. Davis, "Gaining the Advantage in Close-Corporation Disputes: Examining Key Differences between Massachusetts and Delaware Fiduciary Duty Law," 97 Mass. L. Rev. 23 (2015).

Of note in *NetCentric* was that while the parties' "stock and noncompetition agreements provide that they are governed by Massachusetts law" that did not mean that Massachusetts law governed the internal affairs of the entity.[41] Thus, two different state's laws came into play — Delaware law for issues involving breach of fiduciary duty and Massachusetts law for the stock and noncompetition agreements. In this regard, *NetCentric* should serve as a cautionary reminder to practitioners to consider the choice of law issue carefully in both forming the entity and creating agreements among its owners and between the company and its owners.

Petrucci v. Esdaile,[42] a decision from the Business Litigation Session of the Superior Court, illustrates the importance of carefully crafting any choice of law provisions in agreements among shareholders. In *Petrucci*, the parties' limited liability company operating agreement stated that "[t]his Agreement and the application or interpretation hereof, shall be governed exclusively by the laws of the State of Delaware, and specifically the Act" which, as the court held, meant Delaware's limited liability company statute.[43] The court held that Massachusetts law governed with respect to issues concerning the statute of limitations even though the operating agreement stated that it was governed by Delaware law.[44] The court found that the parties' "choice-of-law provision does not expressly address limitations periods and, for that reason, does not control which State's statute of limitations applies here."[45] The court then used Massachusetts's functional approach to determining the applicable statute of limitations to conclude that the Massachusetts statute of limitations controlled — a ruling that allowed contract-related claims to survive a statute of limitations challenge.[46] Thus, while Delaware law governed the standards for the parties' internal disputes, Massachusetts law controlled when such claims had to be made.

D. The Applicability of *Donahue* to New Types of Legal Entities

Massachusetts courts have applied the *Donahue* standards to limited liability companies. In *Pointer v. Castellani*,[47] although the entity in question was a limited liability company, the court applied *Donahue's* rules of fiduciary duties of shareholders of closely-held corporations to the entity.[48] Interestingly, the court used the word "corporation" rather than "company," leading to the conclusion that it views these different forms of entities interchangeably for purposes of applying closely-held entity law.[49]

E. The Identity of the Client

Lawyers who work with closely-held entities must consider the question: Who is the client? This question must be asked both at the onset of the relationship and then again as significant matters arise. The answers are not always easy.

Often, the client is the entity.[50] But that does not address the related problem of the inherent conflict in any agreement involving two or more people that their interests differ in some respect. Who does the attorney then represent?

The easiest course of action is for each of the entity's owners to have his or her own separate counsel. But that may not be a very practical approach for a new entity with limited resources. An attorney who suggests that a host of lawyers or law firms must be involved soon may not have a client at all or, perhaps even worse, a client who decides to do nothing rather than incur the added expense of additional lawyers.[51]

There is no perfect solution to this dilemma and the appropriate approach will vary from case to case and also depend on the nature of the relationship among the owners and the agreement in question. Regardless of the approach, full disclosure should be made, preferably in writing. If the owners are in a more adversarial situation, disclosure may not suffice and the individual owners should be urged to consult with their separate attorneys (at least to review what has been drafted) and, if the attorney is representing the entity, the attorney should make clear that she does not represent anyone individually.[52]

The issue of the identity of the client came to the forefront in *Bryan Corp. v. Abrano*,[53] and led to lengthy litigation resulting in the disqualification of counsel for one of the owners. *Abrano* involved a dispute among the family members/owners of a closely-held corporation.[54] In 2014, the company had retained a law firm to represent it in a lawsuit brought by a former company consultant.[55] Several months later, two of the company's owners contacted the same law firm about representing them individually in connection with their dispute with the third owner.[56] The law firm agreed to represent the two individual owners; at the same time, the law firm advised all the

41. *NetCentric*, 433 Mass. at 472 n.10.

42. No. 1684CV03998BLS2, 2017 WL 3080555, 34 Mass. L. Rptr. 304 (Mass. Super. Ct. June 1, 2017) (Salinger, J.). This case was featured in a front-page article in *Massachusetts Lawyers Weekly.* Mass. Lawyers Weekly, Vol. 46, Issue 25 (June 19, 2017).

43. *Id.* at *2.

44. *Id.* at *3.

45. *Id.*

46. *Id.*

47. 455 Mass. 537 (2009).

48. *Id.* at 539, 549-51; *see generally* Beninati v. Borghi, 90 Mass. App. Ct. 556 (2016).

49. While the first sentence of the court's decision stated that "[t]he plaintiff, Bernard J. Pointer, was part owner of Fletcher Granite Company LLC, a closely-held corporate entity," the court later stated that it was "uncontested that FGC is a close corporation…." *Id.* at 538, 549. The *Pointer* court is not the only Massachusetts appellate court to use terminology related to corporations in the context of closely-held entities. In One to One Interactive LLC v. Landrith, 76 Mass. App. Ct. 142 (2010), the court began its opinion with the statement that "[f]ormer founders of an Internet start-up company, One to One Interactive LLC (OTO or company), sued each other for claims arising out of internal disputes and the eventual demise of their closely-held corporation." *Id.* at 143 (emphasis added). A limited liability company, however, is not technically a corporation.

50. Rule 1.13 of the Massachusetts Rules of Professional Conduct governs the ethical duties of a lawyer who represents an entity.

51. Take, for example, a situation where a mother and her children or three siblings are trying to put together a new business. The statement from the lawyer that each one must have his or her own attorney is likely to be met with strong resistance.

52. Having each owner have his or her counsel review any agreement before it is signed can be very helpful should later disagreements arise. Of course, the difficulty is in persuading clients with limited resources that they need separate counsel.

53. 474 Mass. 504 (2016).

54. *Id.* at 505-06.

55. *Id.* at 506.

56. *Id.*

owners that there might be a conflict of interest between them and the company and, if a conflict developed, the law firm would withdraw from the pending litigation.[57] Three weeks later, the law firm announced its intent to resign as counsel for the company in the lawsuit.[58] The law firm subsequently represented one of the owners in litigation against the third owner and in another lawsuit brought by the company against a third party.[59] The company then moved to disqualify the law firm, and the lower court granted the motion.[60] An appeal accepted for direct appellate review before the SJC followed.[61]

Relying on the Massachusetts Rules of Professional Conduct, the SJC reasoned that at the time the law firm agreed to represent the two owners, it should have known "that their interests were adverse to, or were likely soon to become adverse to, those of the company and, in these circumstances, both the duty of loyalty and Rule 1.7 required it to decline representation, or at least seek the informed consent of the company."[62] The court specifically rejected the argument that at the time the law firm agreed to represent the individual owners, there was no conflict between those owners and the company.[63] Even if no actual conflict existed, the potential for conflict existed, requiring the law firm to decline the representation or obtain informed consent for the representation. Nor could the firm eliminate the conflict by withdrawing from its representation of the company. The court held that

> a firm may not undertake representation of a new client where the firm can reasonably anticipate that a conflict will develop with an existing client, and then choose between the two clients when the conflict materializes. Both the duty of loyalty and the rules clearly forbid such conduct.[66]

In a similar vein, in another close corporation case, the failure to carefully identify the client led to a Superior Court ruling that emails between an attorney and his clients/minority shareholders were not protected by the attorney-client privilege because the clients had shared them with their brother who, while also was a shareholder and only nominally adverse to them in litigation against another family member, was not represented by their attorney.[67] There, the clients unsuccessfully argued that the brother also was a client; the court rejected that theory, ruling that there was neither an express nor an implied attorney-client relationship between the brother and the attorney.[68] As a result, the privilege was waived when the communications were shared and the court ordered the communications to be produced.[69]

The issue of the identity of the client also comes into play when there is litigation among owners and questions arise as to whether communications with counsel are privileged and whether certain corporate constituents are entitled to access corporate attorney-client privileged communications.[70] In *Chambers v. Gold Medal Bakery Inc.*, the court ruled that where certain shareholders' interests were adverse to the corporation's interests in certain litigation, those shareholders were "not entitled to privileged or protected information relating to the two litigations."[71] In so ruling, however, the court cautioned that "[t]he judge or discovery master should take particular care to distinguish Gold Medal's privileged communications… from the underlying facts of Gold Medal's financial health and status, information that may have been generated irrespective of litigation."[72] The court added that "[w]e stress that no one factor or combination of factors is dispositive in determining when a director has interests adverse for attorney-client privilege purposes, particularly in the unique context of a close corporation. The analysis is 'fact specific and necessarily depends upon the circumstances of each case.'"[73]

A law firm's involvement in a dispute among owners of a closely-held entity can trigger later claims against the law firm itself.[74] In *Baker*, the plaintiffs were minority members of a closely-held

57. *Id.* at 506-07.

58. *Id.* at 507.

59. Bryan Corp. v. Abrano, 474 Mass. 504, 507-08 (2016).

60. *Id.* at 508-09.

61. *Id.* at 509. Although not discussed in the opinion, the appeal was interlocutory in nature because judgment had not yet entered in the lower court. It was before the SJC because the court had granted a request for direct appellate review. *Id.* at 509. Interlocutory appeals are permitted in cases involving the disqualification of counsel. *See* Borman v. Borman, 378 Mass. 775, 778-81 (1979).

62. *Abrano*, 474 Mass. at 510. Rule 1.7 of the Massachusetts Rules of Professional Responsibility provides that:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client; or
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
>
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
>
> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (2) the representation is not prohibited by law;
>
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
>
> (4) each affected client gives informed consent, confirmed in writing.

In *Abrano*, the court used the most recent version of the rule because the changes to the rule in 2015 were not substantive. *Abrano*, 474 Mass. at 510 n.9.

63. *Id.* at 512.

64. Bryan Corp. v. Abrano, 474 Mass. 504, 512-14 (2016). Only a disinterested company representative would have been in a position to provide the informed consent for the company. *Abrano*, 474 Mass. at 515 n.11

65. *Id.* at 515.

66. *Id.* at 516.

67. Mirra v. Mirra, No. 1484CV03857BLS2, 2017 WL 2784835 34 Mass. L. Rptr. 247 (Mass. Super. Ct. Apr. 26, 2017) (Salinger, J.), reported in *Massachusetts Lawyers Weekly* (May 8, 2017) (front-page story).

68. *Id.*

69. *Id.* at *3.

70. Chambers v. Gold Medal Bakery Inc., 464 Mass. 383 (2013); see Comment, 95 Mass. L. Rev. 234 (2013) (by the author).

71. *Id.* at 384.

72. *Id.* at 392.

73. *Id.* at 395-96.

74. Baker v. Wilmer Cutler Pickering Hale & Dorr LLP, 91 Mass. App. Ct. 835, 836 (2017).

Massachusetts limited liability company.[75] They alleged that "the majority members secretly retained the attorneys, one of whom is the daughter of a majority member, to, at least ostensibly, represent the closely-held company" in developing a plan to merge the Massachusetts entity into a new Delaware entity, "all for the purpose of eliminating significant protections afforded minority members under the Massachusetts company's operating agreement."[76] The Appeals Court reversed a Superior Court decision dismissing the case against the defendant law firms and individual attorneys, ruling that the complaint stated sufficient facts regarding claims "for breach of fiduciary duty, aiding and abetting tortious conduct, civil conspiracy, and violation of G.L. c. 93A" to survive a motion to dismiss.[77] The court relied on a ruling of the SJC "that counsel for a close corporation can owe a fiduciary duty to individual shareholders."[78] Here, the court concluded that the plaintiffs had alleged sufficient facts to support the claim that the lawyers and the law firms had duties to both the corporation and the individual owners, even though they never interacted with the individual minority owners.[79]

Identifying the client is a difficult but extremely important issue for counsel for a closely-held entity. Although litigation among the owners is the most extreme example of where conflict exists, there are numerous other situations where similar conflicts arise. Counsel must carefully meet his or her ethical obligations while not losing sight of the practical issues facing the entity and its owners.

F. Agreements among Owners

Shareholder agreements are specifically recognized both by Massachusetts statute and case law.[80] Such agreements can cover a wide array of issues, including how to deal with death, disability, internal management and compensation, retirement or termination of employment and how to resolve internal disputes. Some of these issues, such as employment, may be the subject of a separate agreement rather than included in the shareholder agreement.

While shareholder agreements will be enforced — and in that regard can, in certain circumstances, eliminate a challenge to an action based upon a claim of breach of fiduciary duty — that enforcement is strictly limited to the terms of the agreement.[81] In *Selmark Associates Inc. v. Ehrlich*,[82] the SJC was asked to construe "the duties fellow shareholders and directors of a close corporation owe to each other in a context where contractual agreements exist defining in part their relationships…."[83] The court reiterated the rule that "when the challenged conduct at issue in a case is clearly contemplated by the terms of the parties' written agreements, we have declined to find liability for breach of fiduciary duty."[84] The court added, however, that "[w]hen the contract does not entirely govern the other shareholders' or directors' actions challenged by the plaintiff, a claim for breach of fiduciary duty may still lie."[85]

Applying the principle of strict adherence to the terms and scope of the agreement, the court held that there was no governing employment contract between the corporation and the minority shareholder because that contract had expired by its terms years earlier and at that point the employee became an employee at will.[86] Therefore, the shareholders still owed one another fiduciary duties in connection with the minority shareholder's claims relating to the termination of his employment.[87] Nor did the existence of other agreements replace the fiduciary duties owed to the employee because those agreements did not expressly deal with employment after the employment agreement ended and before a right to conversion of stock contained in one of those other agreements (a conversion agreement) ripened (the conversion agreement only created a right to an employment agreement *after* conversion of the stock).[88]

Yet, when the terms of an agreement are specific and on point, they will control. In *Balles v. Babcock Power Inc.*,[89] a senior management employee was terminated "when it was discovered that he was engaged in an ongoing extramarital affair with a young female subordinate."[90] The company argued that the termination was "for cause."[91] Carefully construing the stockholders' agreement, the court held that the termination was not permitted under the precise terms of the agreement, which listed what constituted cause and allowed in some instances for an opportunity to cure any wrongful conduct, which opportunity had not been provided.[92] The court rejected the claim that such an opportunity would have been futile, an exception which, the court, held, "notably, is quite narrow…."[93] *Balles* is a reminder of the importance of the precise language used in agreements among owners of close corporations.

Where shareholders of a closely-held corporation do not in advance establish the terms and conditions of permissible outside work performed by directors, officers or shareholders, a court will not read into their agreement a provision that curtails such activity where such outside engagement does not pose a conflict of interest to the

75. *Id.*

76. *Id.*

77. *Id.* at 837.

78. *Id.* (relying upon Schaeffer v. Cohen, Rosenthal, Price, Mirkin, Jennings & Berg PC, 405 Mass. 506, 513 (1989)).

79. *Id.* at 842-47. The court appeared particularly troubled by the allegations that one of the attorneys was the daughter of one of the majority owners, the secret nature of the attorneys' role, and that the attorney's actions appeared to be directly adverse to the interests of the minority owners. Baker v. Wilmer Cutler Pickering Hale & Dorr LLP, 91 Mass. App. Ct. 835, 849 (2017). The Appeals Court also allowed the claim under General Laws chapter 93A, with its potential for multiple damages and attorney's fees, to proceed. *See id.* at 849-51.

80. Mass. Gen. Laws ch. 156D, §§ 7.30–7.32 (2005). The statute places some limits on the agreements, such as that they must be set forth in the articles of organization or signed by the shareholders and approved by the corporation and that they are only valid for 10 years unless the agreement provides otherwise. Id. The statute applies to all corporations, not just closely-held ones. *See id.*

81. *See* Butts v. Freedman, No. 1584CV03652BLS2, 2017 WL 6395705, *3 (Mass. Super. Ct. Oct. 27, 2017) (Sanders, J.) ("It is true that a contract (like an operating agreement) can limit or even eliminate these fiduciary obligations.")

82. 467 Mass. 525 (2014).

83. *Id.* at 526.

84. *Id.* at 537.

85. *Id.* at 537-38.

86. *Id.* at 536.

87. *Id.*

88. 467 Mass. 525, 538-39 (2014).

89. 476 Mass. 565 (2017).

90. *Id.* at 566.

91. *Id.* at 567.

92. *Id.* at 570-80. The detail involved in the court's discussion is worthy of independent review by practitioners in this area, particularly those involved in crafting such agreements, as a guide to the level of detail that may be scrutinized by a reviewing court.

93. *Id.* at 577.

corporation (such as taking for personal gain work that might otherwise inure to the benefit of the corporation) and does not diminish the shareholder's capacity to generate revenues for the corporation.[94] In *McGrath v. Braney*, three shareholders of an accounting firm alleged that the fourth shareholder had breached his fiduciary duties to them by (1) deceiving them about his status as a compensated board director of a local bank, (2) diverting his time, attention, and best efforts away from the accounting firm, and (3) failing to turn over his earnings from the local bank to the closely-held corporation.[95] The trial court found in favor of the fourth shareholder, explaining that "neither the Articles of Organization nor the By-Laws contained any restrictions on what a shareholder could or could not do beyond the singular limitation that all shareholders needed to be duly licensed CPAs in good standing in the Commonwealth of Massachusetts."[96] Despite their protests to the contrary, each of the three complaining shareholders engaged in "substantial amounts of outside activity unrelated to the business of the firm," albeit only the fourth shareholder's activity generated any actual compensation.[97] The evidence demonstrated that the shareholder's position as a board director for the local bank was conspicuously posted on the corporation's website, disclosed annually on various regulatory filings, and listed on the accounting firm's malpractice insurance application.[98] Moreover, the shareholder exceeded two of the other three shareholders in his economic productivity for the firm.[99] Thus, without any agreement specifically restricting outside business activities or obligating individual shareholders to turn over all income derived from outside activities to the corporation, the shareholder was free to engage in such activity.[100]

In *Merriam v. Demoulas Super Markets Inc.*,[101] the SJC held that the minority shareholders of a Subchapter S corporation[102] could sell their shares consistent with the agreements contained in the corporation's articles of organization and bylaws, regardless of whether the buyer's ownership would terminate the corporation's status as a Subchapter S corporation. Because the articles of organization did not contain any restrictions on stock transfers that required the corporation's Subchapter S status to be maintained, and the shareholders had not elected to restrict transfers in a separate stock restriction agreement or by amendment to the articles of organization, the court found it entirely proper for a trial court to decline the invitation to impose such restrictions after the fact. Moreover, where the articles of organization did not contain a pre-emptive right of first refusal to the company, neither principles governing fiduciary duty nor the implied covenant of good faith and fair dealing would insert such a term where the parties chose not to do so themselves.[103]

II. Remedies

A. Derivative Actions

Although it did not involve a closely-held entity, *International Brotherhood of Electrical Workers Local No. 129 v. Tucci*[104] presents a useful summary of general Massachusetts law governing derivative actions, how such actions differ from direct actions, and the rules that must be followed in bringing a derivative action. The court noted that "[w]e continue to adhere to the view that whether a claim is direct or derivative is governed by whether the harm alleged derives from the breach of a duty owed by the alleged wrongdoer — here the directors-to the shareholders or the corporation."[105]

The importance of standing — and hence whether a claim is direct or derivative — in the context of actions brought against shareholders was highlighted yet again in *DeCroteau v. DeCroteau*.[106] In *DeCroteau*, a corporation was owned by three brothers: 51 percent by Joseph and the remaining 49 percent collectively by Mark and Michael.[107] The corporation owned and operated a funeral home on property rented from a limited liability company owned solely by Mark and Michael.[108] When the lease to the property expired, Mark and Michael listed the property for sale, thus allegedly risking the existence and operation of the corporation and jeopardizing Joseph's livelihood.[109]

Acting in his individual capacity, Joseph sued his brothers.[110] He sought a preliminary injunction, which was denied.[111] On appeal, the court ruled that Joseph had not demonstrated that he had standing to bring most of the claims directly in the lawsuit, ruling that

> DeCroteau Corporation, not the plaintiff, is the tenant of DBR. DeCroteau Corporation, not the plaintiff, owns and operates the funeral home business. Consequently, the plaintiff's claims, other than the count for breach of fiduciary duty . . . and the claims regarding the creation of a resulting trust or imposition of a constructive trust, belong to DeCroteau Corporation, an entity separate and distinct from the plaintiff.[112]

Thus, only the direct claims were allowed to proceed.

Not only must an owner party bring a claim in the correct capacity — direct or derivative — the owner also must have been an

94. McGrath v. Braney, No. 10–1603A, 2014 WL 1588714 (Mass. Super. Ct. Apr. 3, 2014) (Gordon, J.).

95. *Id.* at *1.

96. *Id.* at *3.

97. *Id.* at *5-6.

98. *Id.* at *8-9.

99. *Id.* at *12-13, 15.

100. McGrath v. Braney, No. 10–1603A, 2014 WL 1588714, *15 (Mass. Super. Ct. Apr. 3, 2014) (Gordon, J.).

101. 464 Mass. 721 (2013).

102. Subchapter S is a federal tax code election that a corporation can make to avoid double taxation. Many closely-held corporations elect to be a subchapter S corporation so that there is only one level of tax. Whether a subchapter S election is appropriate is a question for the entity's accountant or an attorney familiar with the tax laws. There are specific rules regarding the election that need to be carefully followed. Any discussion of the appropriateness of such an election is well beyond the scope of this article.

103. *See also* Fronk v. Fowler, 456 Mass. 317, 331-32 (2010); Butler v. Moore, No. 10-10207-FDS, 2015 WL 1409676 (D. Mass. Mar. 26, 2015) (Stearns, J.).

104. 476 Mass. 553 (2017); *see* D. Parke, "Recent Massachusetts decision addresses shareholder remedies," Mass. Lawyers Journal 27 (May/June 2017).

105. *Id.* at 563 n.14.

106. 90 Mass. App. Ct. 903 (2016).

107. *Id.* at 903.

108. *Id.*

109. *Id.*

110. *Id.* at 904.

111. *Id.*

112. DeCroteau v. DeCroteau. 90 Mass. App. Ct. 903, 904 (2016).

owner at the time of the wrongdoing (or ownership transferred to her as a matter of law) and throughout the litigation process in order to have standing.[113] In *Mirra v. Mirra*,[114] for example, the court ruled that shareholders lacked standing because they had not been shareholders at the time of the alleged wrongdoing.[115] Nor were the shareholders saved by the "'continuing wrong' doctrine"

> because every wrongful transaction may be viewed as a continuing wrong to the corporation until remedied, …the 'test to be applied in such situations concerns whether the wrong complained of is in actuality a continuing one or is one which has been consummated … [W]hat must be decided is when the specific acts of alleged wrongdoing occur, and not when their effect is felt.[116]

Moreover, as discussed in *Shareholder Duties*, even if an owner has standing by virtue of ownership at the time of wrongdoing, the right to bring a derivative action is lost if the owner loses her ownership interest.[117]

B. Damages and Equitable Relief

Measuring damages often is a critical issue in shareholder disputes. That task can be complicated, involving expert testimony and challenges as to speculation.[118] Illustrative of this issue is the SJC's holding in *Selmark Associates*, where the court reversed a judgment awarding damages on account of speculation and duplicative damages.[119] The court also reversed the lower court's ruling that there had been a violation of the Massachusetts unfair and deceptive trade practices statute, General Laws ch. 93A,[120] holding that the rule in *Szalla v. Locke*,[121] which held that claims under chapter 93A do not apply to intra-corporate disputes, applied even though the parties' dispute involved more than one entity.[122]

Multiple considerations come into play in the determination of damages. For example, in *One to One Interactive LLC v. Landrith*,[123] the Appeals Court held that post-breach developments (in this case "up to the time that the balloon payment was due") "are relevant to the consideration of what Landrith would have been able to recover 'but for' the breach of fiduciary duty."[124] In *Rubin v. Murray*,[125] the Appeals Court found no abuse of discretion in the trial judge ordering the return of an alleged overpayment of extra compensation and compelling the declaration of dividends.[126] Moreover, even a transaction that is profitable for all shareholders can still be challenged on the grounds that it involved a breach of fiduciary duty and damages flowed from that breach.[127]

C. Dissolution of the Entity

In certain instances, dissolution of the entity may be a solution to deadlock among the shareholders of a corporation. General Laws ch. 156D, § 14.30 "allows any shareholder or group of shareholders who hold forty per cent of 'the total combined voting power of all the shares of [a] corporation's stock outstanding' and are 'entitled to vote on the question of dissolution' to petition the Superior Court for dissolution of the corporation on the basis of director or shareholder deadlock."[128] The corporate dissolution statute was examined by the SJC in *Koshy v. Sachdev*,[129] where the court held that "[a] judge may allow a petition for dissolution due to deadlock between a corporation's directors only in cases of 'true deadlock.'"[130]

> To establish the existence of a 'true deadlock' between directors, the petitioning party must prove that (1) 'the directors are deadlocked in the management of the corporate affairs'; (2) 'the shareholders are unable to

113. Mass. R. Civ. P. 23.1; Billings v. GTFM LLC, 449 Mass. 281, 282 (2007). Rule 23.1 of the Massachusetts Rules of Civil Procedure provides that a derivative complaint "shall allege that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law from one who was a stockholder or member at such time."

114. No. 1484CV03857–BLS2, 2017 WL 439586, 34 Mass. L. Rptr. 31 (Mass. Super. Ct. Jan. 31, 2017) (Salinger, J.).

115. *Id.* at *5 ("The Massachusetts Business Corporation Act provides that '[a] shareholder may not commence or maintain a derivative proceeding unless the shareholder ... was a shareholder of the corporation at the time of the act or omission complained of [.]' …. This is known as the 'contemporaneous ownership requirement.'"

116. Id. (*quoting* Blasband v. Rales, 971 F.2d 1034, 1046 (3d Cir. 1992)) (citations omitted). The *Mirra* court noted that the exception to the contemporaneous ownership requirement that one who obtains an ownership interest through "transfer by operation of law from one who was a shareholder at the time of the allegedly wrongful act or omission" was not applicable here. *Mirra*, slip op. 5 n. 4.

117. *Shareholder Duties* at 148. If a merger or other action was taken solely to eliminate a derivative claim, that act might give rise to a claim of fraud that would defeat the lack of standing claim. Kolancian v. Snowden, 532 F. Supp. 2d 260, 262-63 (D. Mass. 2008). The SJC reaffirmed the important distinction between direct and derivative actions in Fronk v. Fowler, 456 Mass. 317, 332 (2010). Although *Fronk* involved a partnership, its holding relied upon, and applies with equal force to, shareholders' disputes. *Id.* at 332 n.23. The failure to bring a derivative action, along with other failures on the merits, led the court to affirm a trial court award of attorneys' fees for bringing a frivolous action. *Fronk* should be a cautionary note for attorneys, both because of the difference between direct and derivative actions and because of the court's holding regarding attorneys' fees.

118. *See, e.g., Selmark Associates*, 467 Mass. at 542-47.

119. *Id.*

120. Mass. Gen. Laws ch. 93A, § 11 (2006).

121. 421 Mass. 448 (1995).

122. *Selmark Associates*, 467 Mass. at 549-551; compare Beninati v. Borghi, 90 Mass. App. Ct. 556, 566-67 (2016) (third parties who interact with insider wrongdoers could be held liable under chapter 93A). Two other cases are worthy of note in the area of damages. In one, the SJC reaffirmed that how earnings in closely-held corporations are measured can be important in divorce cases. J.S. v. C.C., 454 Mass. 652 (2009). In the other, the previously discussed *Pointer* case, the court reaffirmed its holding in Brodie v. Jordan, 447 Mass. 866 (2006) that a forced sale was not a remedy for a freeze-out. Pointer, 455 Mass. at 822. The *Pointer* court also discussed the important issue of contractual indemnification in an operating agreement and held that the plaintiff had a right to be indemnified. *Id.* at 821-22.

123. 76 Mass. App. Ct. 142 (2010).

124. *Id.* at 150-53. The *Landrith* court also noted that equity claims can, at the judge's discretion, be sent to the jury. Id. at 146 n.8.

125. 79 Mass. App. Ct. 64 (2011).

126. A federal district court decision illustrates the broad powers that a court has to fashion equitable relief (subject to limitations such as the one set forth in Brodie). Butler v. Moore, 246 F. Supp.3d 466 (D. Mass. 2017) (Stearns, J.), vacated in part by No. 10-10207-FDS, 2017 WL 2294071 (May 25, 2017).

127. *O'Brien,* 449 Mass. at 386.

128. Mass. Gen. Laws ch. 156D, § 14.30 (2005); *see Shareholder Duties* at 150-51.

129. 477 Mass. 759 (2017); *see* Comment, 99 Mass. L. Rev. 69 (2018).

130. *Id.* at 765 (citations omitted).

break the deadlock'; and (3) 'irreparable injury to the corporation is threatened or being suffered. . . . If the petitioning party can establish a 'true deadlock,' then the statute vests the judge with the discretion to order dissolution as a remedy.[131]

Delving deeply into the facts, the court ruled that "the utter impasse as to fundamental matters of corporate governance and operation shown to exist in these circumstances gave rise to a state of 'true deadlock' such that the remedy of dissolution provided by the statute is permissible."[132] The determination as to whether the court should exercise its discretion to dissolve the corporation was left to the trial court on remand.[133]

The court listed four factors to be used in determining the existence of true deadlock: (a) "whether irreconcilable differences between the directors of a corporation have resulted in 'corporate paralysis'";[134] (b) "the size of the corporation at issue ….[since] deadlock is more likely to occur in a small or closely-held corporation, particularly one where ownership is divided on an even basis between two shareholder-directors";[135] (c) if "a party has manufactured a dispute in order to engineer a deadlock . . . [in which case], a court should view the party's claim with skepticism";[136] and (d) the "degree and extent of distrust and antipathy between the directors."[137]

Significantly, the court held that while chapter 156D allows for an orderly dissolution, "it also authorizes lesser remedies, such as a buyout or the sale of the company as an ongoing entity."[138] While dissolution (and its companion remedies of buyout or sale) is only useful in certain limited circumstances, the statute provides a useful set of remedies in cases of true deadlock among equal owners of a corporation.

III. Practical Considerations and Future Trends

In many ways, owners of closely-held businesses in Massachusetts control their own destinies when it comes to determining the rules by which they will be governed. They decide in the first instance whether or not to be governed by Massachusetts law by their choice of the state of incorporation and then their choices of law (both substantive and procedural) and forum that they make in their shareholder, employment and other agreements (although unless they are advised properly by counsel they may not be aware of the significant considerations involved in these decisions).

Given the enforceability of agreements among owners — even if they are in conflict with the common law fiduciary duties owed by the owners to one another and the entity — it would seem imprudent in most instances for owners of closely-held businesses not to have detailed agreements among themselves. Yet, for many reasons, including inertia, cost, and the fear of causing strife, owners often do not have such agreements, leading to uncertainty and costly litigation. The critical lesson for any lawyer who represents a closely-held entity is that the lawyer should urge the owners to create the appropriate agreements at the outset of the relationship and then encourage the owners to revisit their agreements periodically, especially if circumstances and relationships change.[139]

Not every situation will require the same type of agreement or agreements. In most cases, an owners' agreement should address four key issues — death, disability, ceasing to work because of retirement or termination of employment, and a mechanism for the owners to buy out one another if they no longer can get along. Whether other types of agreements, such as an employment agreement, are warranted will depend on the particular situation and the interests of the owners, which might be quite different in this regard. Even the most carefully crafted agreement will not prevent disputes that may arise among owners of closely-held businesses, but a well-framed agreement can provide guidance and order to resolving disputes when they do arise.

Closely-held businesses offer significant benefits to their owners — entrepreneurship, a greater ability to control one's future, and the opportunity to build a sustainable, multi-generational enterprise to name just a few. But with those benefits come the inevitable disputes and changed circumstances — disagreements among the owners, death, and disability, among others. It is in planning for those situations and then resolving them when they do arise that the law governing closely-held entities is so important. Practitioners and business owners alike would be well-advised to become familiar with Massachusetts law on closely-held entities.

131. *Id.* (citations omitted).

132. *Id.* at 760.

133. *Id.*

134. *Id.* at 766.

135. Koshy v. Sachdev, 477 Mass. 759, 766-70 (2017).

136. *Id.* at 767.

137. *Id.* at 767-68.

138. *Id.* at 771.

139. Of course, for every rule there is an exception and there may be circumstances where the parties' best interests are served by no agreement at all or one that covers some, but not all, of these issues.