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The Direct-Derivative Divide in Florida Shareholder Litigation

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Abstract

This Article analyzes the evolving jurisprudence surrounding the classification of shareholder claims in Florida business entity litigation. Shareholder and member lawsuits take one of two forms: direct claims, which allege personal harm to the entity owner, and derivative claims, which seek redress on behalf of the entity. While both aim to deter insider misconduct and ensure accountability, the procedural posture and practical consequences of each are dramatically different. Direct claims allow shareholders immediate access to judicial relief. Derivative claims, by contrast, impose significant procedural hurdles that often preclude review on the merits. The proper classification of a claim is therefore critical, yet Florida courts have struggled to articulate a consistent framework, leading to doctrinal ambiguity and unpredictability. This Article surveys the key decisions that have shaped Florida's approach, identifies the underlying sources of doctrinal tension, and proposes a unified framework to bring clarity and coherence to shareholder standing in the state.

Introduction

Entity litigation proceeds through one of two procedural vehicles: direct claims and derivative claims. A direct claim is brought by a shareholder or member to vindicate a personal right. A derivative claim, on the other hand, is asserted on behalf of the entity, with the plaintiff granted temporary authority to control the litigation in the entity's name. Although both forms of litigation serve the broader goal of insider accountability, they differ substantially from the plaintiff's perspective. A direct claim offers the plaintiff a straightforward path to judicial review of the underlying allegation. A derivative claim, in contrast, requires the plaintiff to navigate a series of procedural hurdles before reaching the merits. A great deal rides on getting the classification right; a misstep can lead to immediate dismissal, often without leave to amend.

With no definitive guidance from the Florida Supreme Court, lower courts have taken the lead in shaping a workable framework for classifying shareholder claims. Just over a decade ago, the Third District Court of Appeal undertook a comprehensive survey of Florida case law and articulated a two-prong test, along with a narrow exception, in an effort to bring some structure to the issue.[1] That test, first set out in *Dinuro Investments, LLC v. Camacho*,[2] continues to be cited by Florida courts, even after a legislative amendment that removed one of the prongs from the governing statutes. The continued invocation of the discarded prong reflects just one of several unresolved questions that still cloud Florida's approach to claim classification.

The following illustrative example helps spotlight several areas where Florida law remains unsettled. Imagine three entrepreneurs founding a business together, each receiving one-third of the entity's ownership interests and a seat on its governing body. For a time, operations run smoothly. Eventually, however, one owner becomes concerned about alleged self-dealing by the other two.[3] Under both the *Dinuro Investments* framework and its statutory codification, this scenario is treated as one that supports only a derivative cause of action. That classification dooms the complaint from the outset, as the majority owners stonewall the derivative pathway through their control of the board. Still, the minority owner is not entirely without hope. The exception to the rule permits a direct claim when a contractual or statutory duty is owed to the plaintiff. In response, the aggrieved owner pores over the governing documents, looking for language that might support a direct right of action. But here too, doctrinal ambiguity persists. Some provisions seem to imply an individual right, even if they stop short of explicitly granting a direct claim. Should such language suffice? And how should courts reconcile this question with

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1 Part II, *infra*.

2 Dinuro Investments, LLC v. Camacho, 141 So.3d 731 (Fla. 3rd DCA 2014).

3 Claire Hill & Brett McDonnell, *Sanitizing Interested Transactions*, 36 DEL. J. CORP. L. 903, 904 (2007) ("Interested transactions can arise in many circumstances, including compensation of directors and top executives, management buyouts, and freezeouts of minority shareholders. Those who control a corporation can use many different methods to transfer value to themselves.").

the similar ambiguity that arises when statutory rights appear to benefit shareholders individually?

Now consider a more complex twist. Suppose that instead of routine self-dealing, the majority owners push through a merger that forces the minority owner to relinquish his ownership rights.[4] Or perhaps they authorize a new issuance of equity, allocating shares either to themselves or to close allies. In either case, the minority owner's stake is significantly diluted, and he is left parsing conflicting case law to determine whether he has a direct or derivative claim. The wrong choice can prove fatal to the case.

These issues carry substantial real-world consequences. Florida ranks as the fourth-largest economy in the United States by gross domestic product,[5] and recent scholarship confirms that its number of business entities tracks accordingly.[6] The figure is even more striking when focusing on Limited Liability Companies (LLCs).[7] While we may aspire to a world of perpetual harmony among business owners, history tells a different story. Careful drafting can certainly anticipate points of friction and provide contractual mechanisms that leave all parties satisfied. But eventually, they will arrive at a fork in the road no one foresaw, and disagreement will follow.[8] When that day comes, parties will look for guidance on the initial claim classification issue. This Article aims to provide that guidance.

Two preliminary observations are in order before turning to the core analysis. The first concerns the analytical overlap between corporate and LLC litigation. While Florida is home to

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[4] While merger can take various forms, they typically involve the target entity being absorbed into the surviving entity, with the target's owners receiving consideration approved by a majority vote. Once the transaction is approved, even dissenting owners are compelled to surrender their ownership rights.

[5] Abigail Tierney, *Real Gross Domestic Product (GDP) of the United States in 2023, by State*, Statista (Oct. 15, 2024), https://www.statista.com/statistics/248053/us-real-gross-domestic-product-gdp-by-state/#statisticContainer.

[6] Andrew Verstein, *The Corporate Census* (March 6, 2025), at 30-31, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5154952 ("It is common to fear Nevada and Texas may prevail if Delaware stumbles. But the surprising winners are not the ones familiar to the corporate federalism debates. Figure 7 demonstrates that Delaware's 21st century weakness has coincided with substantial growth in California and Florida charters… Most notably, Florida is the dark horse champion. Rarely do corporate law scholars discuss the rise of Florida as the leading jurisdiction for incorporations for almost all of the last 40 years.").

[7] *Yearly Statistics From 2014 to Present*, Sunbiz.org (April 4, 2025), https://dos.fl.gov/sunbiz/about-us/yearly-statistics/ (from 2014 to 2024, the number of yearly domestic incorporations has decreased from 102,412 to 76,373, while the number of yearly LLC formations has increased from 197,286 to 526,4750.

[8] This statement is reinforced by the shifting litigation patterns that Delaware has experienced. The marked rise in LLC and LP formation saw a corresponding rise in organization document disputes that were adjudicated by the Delaware courts. *See* Randall S. Thomas, Robert B. Thompson & Harwell Wells, *Delaware's Shifting Judicial Role in Business Governance*, 77 BUS. LAW. 971, 981 (2022) ("The reasons for the expansion of contractual governance litigation are more complex, but generally reflect the greater prevalence of LLCs among business entities in general and in Delaware, which has become home to many new such entities in recent years… This growth in contractual governance cases contributes to another important feature in the Chancery Court docket in 2018: the shifting balance between public company and private company litigation.")

some publicly traded corporations,[9] they are far outnumbered by closely held corporations, most of which resemble LLCs in structure and ownership. In both forms, equity is typically concentrated in the hands of a few owners, and both are governed by detailed statutory default rules combined with broad contractual flexibility. These shared features justify a unified analytical approach to claim classification. Florida case law routinely applies principles interchangeably between corporations and LLCs, and a recent legislative amendment that harmonized the direct standing provisions across both entity types reinforces this practice.

The second involves the Delaware-sized elephant in the room. Given its dominant role in American corporate law, Delaware has developed the most sophisticated and far-reaching body of case law in the field.[10] Florida, like many jurisdictions, often looks to Delaware for doctrinal guidance.[11] Unsurprisingly, this Article draws on Delaware precedent in developing several of its arguments. But on several key issues, it urges a departure. In those instances, this Article advocates for a Florida-specific jurisprudence that reflects the state's legislative choices and underlying policy commitments.

The rest of the Article is structured as follows. Part I outlines the conceptual and procedural differences between direct and derivative claims in entity litigation. Part II surveys the most influential appellate decision to date, *Dinuro Investments*, which introduced a judicial test that continues to shape Florida law. Part III reviews the subsequent case law and legislative activity, highlighting the major developments while reserving critical assessment. Part IV offers that assessment, advancing a cohesive framework to resolve lingering doctrinal uncertainty and improve clarity moving forward. The Article concludes with a brief summary of the proposed reforms.

I. Direct and Derivative Entity Litigation

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[9] Lucian Arye Bebchuk & Alma Cohen, *Firms' Decisions Where to Incorporate*, 46 J. L. & ECON. 383, 391 (Table 2) (2003) (depicting how the 165 Florida-incorporated corporations made up just over 2.5% of all US publicly traded corporations in 1999).

[10] Zohar Goshen & Sharon Hannes, *The Death of Corporate Law*, 94 N.Y.U. L. REV. 263, 264 (2019) ("More than half of publicly traded firms are incorporated in Delaware, and in many law schools in the United States, Delaware corporate law has become virtually synonymous with American corporate law."). For the benefits that arise from a formidable body of case law, see Michael Klausner, *Corporations, Corporate Law, and Networks of Contract*, 81 VA. L. REV. 757 (1995).

[11] See, *e.g.*, Orlinsky v. Patraka, 971 So.2d 796, 802 (Fla. 3d DCA 2007) ("While there is no Florida case law on point with respect to the issue of a majority shareholder's alleged breach of fiduciary duty in termination of the employment of a minority shareholder or in paying unequal salaries, we find Dweck v. Nasser, 2005 WL 3272363 (Del. Ch.), cited by Orlinsky in his brief, to be persuasive.") and Bancor Group, Inc. v. Rodriguez, 2022 WL 2916857 at *7 (S.D. Fla., June 14, 2022) ("Florida courts have turned to Delaware law for guidance in the shareholder derivative suit context, making Delaware case law relevant to the instant case. See *First American Bank and Trust v. Frogel*, 726 F. Supp. 1292, 1298 (S.D. Fla. 1989).").

The corporate form creates unavoidable agency costs.[12] Since powerful insiders do not fully internalize the cost of their actions,[13] they might exert less than maximum effort or push forward self-dealing transactions that leave shareholders short-changed. Shareholders are granted various legal rights to keep insiders in check.[14] Each of these rights, however, is fraught with shortcomings that undermine its effectiveness.

Take shareholders' right to vote for directors, for instance.[15] The threat of removal or non-reappointment is theorized to ensure that directors remain attentive to shareholders' interests. In practice, shareholders almost always vote in favor of incumbent directors: [16] their miniscule share ownership combines with prohibitively high coordination costs to disincentivize them from organizing a competing slate.[17] Or consider shareholders' right to sell their shares.[18] If management underperforms, a large swath of the shareholder base will attempt to sell, causing the share price to drop. Once the price falls below a certain threshold, an outside bidder should inevitably swoop in to purchase a controlling stake of shares.[19] The threat of an outside bidder, and the unspoken consequence to incumbents' continued employment, however, is irrelevant for

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[12] John Armour, Henry Hansmann, & Reinier Kraakman, *Agency Problems and Legal Strategies*, in THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH, 29 (3rd. ed., 2017) (Kraakman et. al., eds.) ("[A]n "agency problem" – in the most general sense of the term – arises whenever one party, termed the "principal", relies upon actions taken by another party, termed the "agent", which will affect the principal's welfare. The problem lies in motivating the agent to act in the principal's interest rather than in the agent's own interest.").

[13] The canonical modeling of this insight is credited to Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

[14] Julian Velasco, *The Fundamental Rights of the Shareholder*, 40 U.C. DAVIS L. REV. 407 (2006) (providing a taxonomy for the various shareholder rights).

[15] Fla. Stat. 607.0721(1) ("… [U]nless the articles of incorporation or this chapter provide otherwise, each outstanding share, regardless of class or series, is entitled to one vote on each matter submitted to a vote at a meeting of shareholders. Only shares are entitled to vote.")

[16] Of the 38 seats demanded by activists in the ten proxy battles the occurred over U.S. corporations during 2024, activists won only 6 of them. See Barclays Shareholder Advisory Group – 2024 Review of Shareholder Activism, at p. 23.

[17] Arthur R. Pinto & James A. Fanto, UNDERSTANDING CORPORATE LAW 145 (6th. Ed., 2023) ("Proxy fights are infrequent and often fail because shareholders are passive. The passivity of widely dispersed shareholders, their failure to exercise voting rights, and their inability to network even if they desire to do so has been described as involving a "collective action" problem. This passivity can be viewed as a form of rational apathy.").

[18] Fla. Stat. 607.0627(1) ("The articles of incorporation, the bylaws, and agreement among shareholders, or an agreement between shareholders and the corporation may impose restrictions on the transfer or registration of transfer of shares of the corporation."). Absent a restriction of the type enumerated in the provision, shares are freely transferable.

[19] Itai Fiegenbaum, *Taking Corwin Seriously*, 26 LEWIS & CLARK L. REV. 791, 822-3 (2022) ("Manne's seminal observation that a company's share price reflects the market's assessment of managerial competence illuminates the relationship between voting power and agency costs: Conditioning a director's appointment and continued incumbency on shareholder approval is theorized to ensure devotion to shareholder interests. Fear of retribution at the corporate ballot, or a lack thereof, should be observable by a host of financial parameters and, ultimately, the share price.") (footnotes omitted).

privately held corporations and for corporations with a controlling shareholder.[20] Even for publicly traded corporations without a control block, the law grants insiders almost unlimited discretion in fending off a hostile bid.[21] The market for corporate control is far less formidable in practice than it appears in theory.

Which leaves us with shareholders' right to sue. The threat of a lawsuit is a renowned accountability mechanism.[22] Shareholder litigation includes an additional trait that overcomes some of the constraints that limit their other rights: Instead of waiting for the annual director elections or the perfect combination of a depressed share price and non-combative board, a lawsuit can be commenced whenever a cause of action arises.[23]

Shareholder litigation, of course, is not without its own issues. The primary concern relates to the characterization of a shareholder's claim. To be sure, shareholders are afforded the right to redress the harm that they personally suffered.[24] This is known as a direct claim, which may, in certain circumstances, be aggregated via the class action mechanism.[25] In most cases, however, even a loss of share value does not equate with a personal harm suffered by a

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[20] Shares of privately held corporations, by definition, do not trade on a public market, and incumbents therefore have no fear of an unwanted ouster, regardless of how the corporation is being managed. And because of the existence of a control block of shares at a publicly traded corporation, an outside bidder will not be able to replace the incumbents against their will, regardless of the price that the shares are trading at.

[21] Air Product & Chemicals v. Airgas, Inc. 16 A.3d 48, 129 (Del. Ch. 2011) ("As this case demonstrates, in order to have any effectiveness, [poison] pills do not—and can not—have a set expiration date. To be clear, though, this case does not endorse "just say never." What it does endorse is Delaware's long-understood respect for reasonably exercised managerial discretion, so long as boards are found to be acting in good faith and in accordance with their fiduciary duties (after rigorous judicial fact-finding and enhanced scrutiny of their defensive actions). The Airgas board serves as a quintessential example. Directors of a corporation still owe fiduciary duties to *all stockholders*—this undoubtedly includes short-term as well as long-term holders. At the same time, a board cannot be forced into *Revlon* mode any time a hostile bidder makes a tender offer that is at a premium to market value. The mechanisms in place to get around the poison pill—even a poison pill in combination with a staggered board, which no doubt makes the process prohibitively more difficult—have been in place since 1985, when the Delaware Supreme Court first decided to uphold the pill as a legal defense to an unwanted bid. That is the current state of Delaware law until the Supreme Court changes it."). While the validity of defensive measures such as the poison pill has not been adjudicated in Florida, I note that Fla. Stat. 607.0830(6) allows directors to consider any factors they deem relevant in discharging their fiduciary duties. This provision would enable directors to adopt anti-takeover mechanisms and keep them in place for as long as they hold a good faith belief is necessary.

[22] Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968) (explaining that rational actors will weigh the probability of getting caught multiplied by the potential penalty against the anticipated gains that arise out of breaking the law or committing a civil wrong. Deterrence is achieved when the probability-adjusted penalty is greater than the anticipated gains). *Accord* Charles R. Korsmo, *Delaware's Retreat from Judicial Scrutiny of Mergers*, 10 U.C. IRVINE L. REV. 55, 61 (2019) ("It is certainly possible that the deal-making norms built up since the 1980s will persist even after the legal landscape has shifted to eliminate the possibility of post-closing damages. It seems less likely, however, that managers and directors were moved to obey these norms by their respect for the wisdom of Delaware's judges than that they were motivated by fear of their sanctions. As that fear subsides, it would be naïve to expect these norms to persist unaltered.").

[23] In fact, shareholders are granted the right to sue for injunctive relief even before the expected harm has materialized; see Fla. Stat. § 607.0750(2) (direct claim for either actual or threatened injury).

[24] Fla. Stat. § 607.0750.

[25] Florida Rules of Civil Procedure 1.220.

shareholder. This seeming contradiction becomes clearer if one recalls that insiders' fiduciary duties are typically owed to the corporation, rather than any individual shareholder. When a breach occurs, direct harm is usually borne by the corporation, which holds the legal right to pursue its claim. Shareholders seeking to act on its behalf must do so by way of a distinct mechanism known as a derivative lawsuit.[26]

While both types of claims are intended to promote accountability, they are hardly equivalent from the plaintiff's viewpoint. The relative ease of a direct claim is best appreciated against the backdrop of the procedural hurdles inherent in the derivative setting.

Two core principles justify the restrictions governing derivative litigation. First, the board of directors is entrusted with managing the corporation,[27] and this broad authority naturally includes decisions on whether to initiate or dismiss legal action.[28] Second, allowing shareholders unrestricted access to the courts would force corporations to expend valuable resources defending against potentially baseless claims.[29]

At the same time, the ability to threaten litigation remains one of the most powerful tools available to vulnerable shareholders. Elimination of the derivative litigation avenue would deprive shareholders of an important accountability mechanism. The procedural safeguards in derivative litigation should be viewed not as absolute barriers, but as checkpoints designed to screen out meritless claims that attempt to bypass board authority.

The demand requirement represents the first major obstacle for prospective plaintiffs. Under Florida Business Corporation Act (FBCA) Section 607.0742, the initial complaint on behalf of the corporation must specify the shareholder's demand on the board to take corrective

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[26] James Talcott, Inc. v. McDowell, 148 So. 2d 36, 37 (Fla. 3d DCA 1962) ("As a general rule, an action to enforce corporate rights or to redress injuries to the corporation cannot be maintained by a stockholder in his own name or in the name of the corporation, but must be brought by, and in the name of the corporation itself. However, under certain circumstances a stockholder may bring a stockholders' derivative action, which is an action in which a stockholder seeks to sustain in his own name a right of action existing in the corporation. The corporation is the real party in interest, the stockholder being only a nominal plaintiff.").

[27] Fla. Stat. § 607.0801(2) ("All corporate powers shall be exercised by or under the authority of the board of directors of the corporation, and the business and affairs of the corporation shall be managed by or under the direction of, and subject to the oversight of, its board of directors, subject to any limitation set forth in the articles of incorporation or in an agreement authorized under s.607.0732.").

[28] Kaplan v. Peat, Marwick, Mitchell & Co., 540 A.2d 726, 730 (Del. 1988) ("Because the shareholders' ability to institute an action on behalf of the corporation inherently impinges upon the directors' power to manage the affairs of the corporation the law imposes certain prerequisites on a stockholder's right to sue derivatively") and Zucker v. Hassell, 2016 WL 7011351, *1 (Del. Ch. Nov. 30, 2016) ("As this Court has explained often, choses-in-action are simply items of property belonging to the corporation, which in our model are under the control of the board of directors of the corporation, to exploit however the directors see fit in the exercise of their business judgment").

[29] In re AbbVie Inc. S'holder Derivative Litigation, 2015 WL 4464505, *6 (Del. Ch., July 21, 2015) ("This Court has long recognized that derivative litigation is burdensome to companies, by way of the direct costs of the litigation, including advancement and indemnification obligations, as well as indirect costs, such as distraction to management and the board, and possible detriment to employee moral").

action or else explain why she did not do so.[30] While the statute does not mandate a specific format for the demand, shareholders who fail to submit a written request to the full board explaining what action is being sought risk running afoul of this requirement.[31] And failure to comply leads to a dismissal of the complaint.[32]

Derivative litigation, by default, reinforces directorial authority. Rather than being neutral, the demand requirement places the shareholder at a tactical disadvantage. Upon receiving a demand, the board is required to conduct an investigation before issuing its response.[33] While the response need not provide a point-by-point rebuttal of every allegation, it must demonstrate board familiarity with the concerns raised.[34] In the absence of any precedence to the contrary, it seems likely that Florida will follow the jurisdictions that apply business judgement rule deference to the board's response to the demand.[35]

Overcoming the business judgment rule's presumption of board propriety is an exceptionally high hurdle. To prevail, shareholders must plead particularized facts that create reasonable doubt as to whether the board's response was made in accordance with its fiduciary

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30 The "demand futility" exception recently returned to Florida following a 45-year absence. The current subsection 607.0742, which includes a demand futility exception, became effective on January 1, 2020. Prior to that Florida was a "universal demand" jurisdiction after the repeal of the now-defunct section 608.131 that became effective January 1, 1976.

31 Dutch v. Gordon, 481 So.2d 1235, 1236 (Fla. 3d DCA 1985) ("A demand directed to a lawyer who may have represented the corporation, or condominium association, and certain individuals in a prior action is insufficient for several reasons. First, it was not directed to the nonprofit corporation, or condominium association, second, it did not demand that the corporation, or association, do anything, and lastly, it demanded that the writer of the letter receive certain funds from individuals within seven days. This cannot suffice as an appropriate demand which would require the officer of a corporation, or an association, to exercise a judgment in regard thereto.")

32 Rappaport v. Scherr, 322 So.3d 138, 144 (Fla. 3d DCA 2021) ("Accordingly, because D. Scherr failed to comply with the pre-suit demand requirement, we must reverse and remand with instructions for the trial court to dismiss the Second Amended Complaint.").

33 Kaplan, 540 A.2d at 727 ("When a corporation takes a position regarding a derivative action asserted on its behalf, it cannot effectively stand neutral").

34 *See* Levine v. Smith, 591 A.2d 194, 214 (Del. 1991) ("While a board of directors has a duty to act on an informed basis in responding to a demand…, there is obviously no prescribed procedure that a board must follow") and Baron v. Siff, 1997 WL 666973, *3 (Del. Ch. Oct. 17, 1997) ("The refusal letter's failure to state that the Board held a meeting and failure to contain a point-by-point response to all allegations in the demand letter does not stand for the proposition that the Board did not consider the demand before refusing it… The Board's detailed responses to several of plaintiff's allegations reveal its familiarity with the issues plaintiff raised").

35 Grimes v. Donald, 673 A.2d 1207, 1219 (Del. 1996) (rev'd on other grounds in Tooley v. Donaldson, Lufkin, & Jenrette, 845 A.2d 1031 (Del. 2004) ("If a demand is made and rejected, the board rejecting the demand is entitled to the presumption of the business judgment rule unless the stockholder can allege facts with particularity creating a reasonable doubt that the board is entitled to the benefit of the presumption").

duties.[36] Successfully challenging the presumption that directors upheld their duty of care requires showing an almost irrational response to the demand.[37]

Challenging the board's response on duty of loyalty grounds presents an equally daunting task. Delaware precedent treats the act of making demand as a "tacit concession" that a majority of the board is independent enough to evaluate the claims objectively.[38] As a result, allegations of a loyalty breach hinge on a showing of "bad faith," requiring a plausible inference that the directors deliberately disregarded the corporation's best interests.[39] In Florida, it appears that plaintiffs will have to prove that the board's response was accompanied by a "conscious disregard for the best interest of the corporation" in order to escape the reach of the exculpation provision.[40] Regardless, overturning the board's response on the basis of a breach of the duty of loyalty requires an extraordinarily egregious set of facts.[41]

Acknowledging the inherent absurdity of allowing a conflicted board to pass judgement on suing itself, the law provides shareholders with a direct avenue to derivative litigation. When demand is deemed futile, shareholders may circumvent the demand requirement and proceed directly with a lawsuit in the corporation's name. This, however, necessitates casting doubt on

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[36] Espinoza v. Dimon, 124 A.3d 33, 36 (Del. 2015) ("… Delaware law on the relevant topic is settled, and requires that the decision of an independent committee to refuse a demand should only be set aside if particularized facts are pled supporting an inference that the committee … breached its duty of loyalty, or breached its duty of care, in the sense of having committed gross negligence").

[37] McPadden v. Sidhu, 964 A.2d 1262, 1274 (Del. Ch. 2008) ("Gross negligence has been defined as 'conduct that constitutes reckless indifference or actions that are without the bounds of reason'"). Similar to Delaware, Florida exculpates any damage that results from both negligent and grossly negligent behavior; see Fla. Stat. § 607.0831(1)(b).

[38] Spiegel v. Buntrock, 571 A.2d 767, 777 (Del. 1990) ("By electing to make a demand, a shareholder plaintiff tacitly concedes the independence of a majority of the board to respond. Therefore, when a board refuses the demand, the only issues to be examined are the good faith and reasonableness of the investigation")

[39] In re Walt Disney Co. Derivative Lit., 907 A.2d 693, 755 (Del. Ch. 2005) ("A failure to act in good faith may be shown, for instance, where the fiduciary intentionally acts with a purpose other than that of advancing the best interests of the corporation, where the fiduciary acts with the intent to violate applicable positive law, or where the fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties"), *aff'd* In re Walt Disney Co. Derivative Lit., 906 A.2d 27, 67 (Del. 2006). While Florida does not adopt the "not in good faith" statutory language that the Delaware courts used to evolve their jurisprudence, it appears that the FBCA's "conscious disregard for the best interest of the corporation" reaches an identical result; Fla. Stat. § 607.0801(2). For a history of Delaware's "good faith" jurisprudence, see Stephen M. Bainbridge, et. al., *The Convergence of Good Faith and Oversight*, 55 UCLA L. REV. 559, 564-566 (2008).

[40] Fla. Stat. § 607.0831(1)(b)(4).

[41] Rich v. Chong, 66 A.3d 963 (Del. Ch. 2013) (denying the defendant's motion to dismiss where the special committee investigating the plaintiff's demands held no meetings, released no reports, and eventually was left with no members).

the impartially of at least half the board.[42] The high factual burden required to meet this exception greatly limits its practical utility.[43]

Shareholders confronting the demand requirement also grapple with significant informational disadvantages. While informational asymmetries are common in civil litigation, court-ordered discovery typically serves to level the playing field.[44] However, derivative plaintiffs receive no such benefit when pleading demand futility. Despite lacking access to pre-trial discovery, they are still required to present particularized facts sufficient to withstand the corporation's inevitable motion to dismiss.[45]

Successfully bypassing the demand requirement does not grant the shareholder an unconditional right to maintain the corporation's right of action. While a board's debilitating self-interest may warrant suspending its authority to manage the lawsuit, the fundamental allocation of corporate power remains intact. If circumstances change to restore the court's confidence in the corporation's response, control of the litigation may be reassigned from the shareholder-plaintiff.

The FBCA identifies three pathways for such judicial reconsideration. While conflicts of interest may compromise a board's ability to fairly evaluate a shareholder complaint, that alone does not support discarding the efficiencies of centralized decision-making. Instead, the statute grants boards the authority—backed by a majority of disinterested directors—to move for dismissal.[46] That authority extends to board committees composed of a sufficient number of

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[42] After years of competing doctrinal strands for demand futility, the Delaware Supreme Court adopted a universal demand futility test; see United Food & Commercial Workers Union & Participating Food Indus. Employers Tri-State Pension Fund v. Zuckerberg, 262 A.3d 1034, 1058-59 (Del. 2021). This test was recently applied by a Florida court; see Bancor Group, Inc. v. Rodriguez, 2022 WL 2916857 at *7 (S.D. Florida, June 14, 2022). Report and recommendation substantially adopted in Bancor Group, Inc. v. Rodriguez, 2022 WL 2915887 (S.D. Florida, July 25, 2022).

[43] See, e.g., Donald C. Clarke, *Three Concepts of the Independent Director*, 32 DEL. J. CORP. L. 73, 102-108 (2007) (depicting Delaware's contextual approach to director independence and disinterestedness); Usha Rodrigues, The *Fetishization of Independence*, 33 J. CORP. L. 447, 464-469 (2008) (same).

[44] Erica Gorga & Michael Halberstam, *Litigation Discovery and Corporate Governance: The Missing Story About the "Genius of American Law"*, 63 EMORY L. J. 1383, 1391 (2014) ("Modern discovery rules refashioned civil procedure, creating a long phase of adversarial, direct party-on-party fact investigation that has become the focus of U.S. litigation. During litigation discovery, parties wade through millions of documents, take dozens (and, in large cases, even hundreds) of witness depositions, subpoena third parties for information and testimony, hire experts and produce expert reports – and do all of this before trial with almost no involvement by a judge.").

[45] For an explanation of how the Delaware's enhancement of shareholders' "books and records" information rights enabled them to bolster their pleadings in a manner that made it more likely to survive the inevitable motion to dismiss, *see* Roy Shapira, *Corporate Law, Retooled: How Books and Records Revamped Judicial Oversight*, 42 CARDOZO L. REV. 1949, 1963-1973 (2021) (depicting Delaware's liberalization of the DGCL § 220 "books and records" requests) and Roy Shapira, *A New Caremark Era: Causes and Consequences*, 98 WASH. U. L. REV. 1857 (2021) (documenting the causal relationship between increased information rights and the expansion of the Caremark doctrine).

[46] Fla. Stat. § 607.744(2)(a). The accompanying text paraphrases the statutory provision, which should be read in its entirety.

qualified directors.[47] The last option allows the corporation to petition the court to appoint independent evaluators tasked solely with assessing the complaint's merits.[48] The final route stems from the longstanding principle that reliance on expert opinions align with a fiduciary's proper exercise of her duties.[49]

The policy considerations that justify allowing either qualified directors or trusted individuals to dismiss the lawsuit reflect the same concerns that underlie the demand requirement: balancing director accountability with the need to deter meritless strike suits. However, there are two key distinctions that justify heightened judicial scrutiny at this junction. Unlike the demand requirement, which applies before a lawsuit is initiated, the request for dismissal comes into play after a derivative suit is already underway, and demand has been deemed futile. At this stage, the theoretical risk of director liability transitions into a tangible threat. Second, it must be remembered that the qualified directors have a working relationship with the defendant directors and that the independent evaluators are chosen by the whole board. One does not have to be overly cynical to question the ability of these individuals to disregard any preconceived notions they have toward the corporate defendants and the underlying merits of the complaint.[50] It is for these reasons that the FBCA stipulates that the corporation retains the burden of proof regarding the qualification, good faith, and reasonable inquires that were made by the group responsible for the motion to dismiss.[51]

In contrast with the multiple procedural obstacles that hamper derivative plaintiffs, shareholders asserting a direct claim face an unimpeded path to the courthouse. Since the legal claim belongs to the individual shareholder, and not the corporation, the question of board authority over the ensuing litigation does not arise and the demand requirement has no bearing.[52] Nor does a direct claim provide an apparatus through which the corporation can take back control of the litigation. Representative shareholders initiating a class-action lawsuit enjoy direct access to the courtroom and the right to litigate the claim until the eventual judicial resolution.

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47 Fla. Stat. § 607.744(2)(b). The accompanying text paraphrases the statutory provision, which should be read in its entirety.

48 Fla. Stat. § 607.744(3). The accompanying text paraphrases the statutory provision, which should be read in its entirety.

49 Accord Fla. Stat. § 607.0830(3)-(5).

50 Zapata Corp. v. Maldonado, 430 A.2d 779, 787 (Del. 1981) ("[N]otwithstanding our conviction that Delaware law entrusts the corporate power to a properly authorized committee, we must be mindful that directors are passing judgment on fellow directors in the same corporation and fellow directors, in this instance, who designated them to serve both as directors and committee members. The question naturally arises whether a "there but for the grace of God go I" empathy might not play a role.").

51 Fla. Stat. § 607.744(1). The Florida approach contradicts jurisdictions that grant Business Judgment Rule deference to Special Litigation Committee decisions; see, e.g., Auerbach v. Bennett, 47 N.Y.2d 619 (N.Y. 1979).

52 Fla. Stat. § 607.750(1).

This section contrasts the primary shareholder litigation procedures.[53] From the parties' perspective, a direct and derivative claim are far from interchangeable. Plaintiffs favor the unfettered courtroom access that a direct claim affords, while defendants benefit from the procedural hurdles embedded in derivative litigation. The next section sets the stage for the forthcoming analysis of Florida by examining the most comprehensive judicial framework for distinguishing between the two causes of action.

II. Dinuro Investments, LLC v. Camacho

The preceding Section highlighted how the nature of the claim impacts the litigation dynamics. The stakes are high when determining whether a claim is classified as derivative or direct. This Section depicts the most comprehensive analysis of Florida law on this issue to date. While the decision addresses the nature of the claim in the LLC context, subsequent case law has no qualms about applying the holding of Dinuro Investments LLC, v. Camacho (Dinuro Investments) to corporations as well.[54]

At the heart of the complaint in Dinuro Investments lies a failed real estate venture. Three LLCs contributed equal resources and acquired an equal ownership interest in a newly-formed entity, San Remo Homes, LLC (San Remo). San Remo was thereafter used as the ownership vehicle to purchase and develop real estate projects in Homestead and Florida City. San Remo obtained the necessary financing for these purchases through a loan from Ocean Bank, which received security interests in the purchased projects. During this time period, one of the San Remo investors concurrently served as a director of Ocean Bank.

An unfortunate bear housing market made it difficult for San Remo to meet its loan repayment obligation. A subsequent renegotiation with Ocean Bank postponed the repayment date, contingent upon a capital influx by the San Remo members. Two of the members agreed to pay their portion of the required capital contribution. The third member, Dinuro Investments LLC (Dinuro), refused, resulting in a default of the loan.

The non-Dinuro San Remo members cooperated to purchase the outstanding loan from Ocean Bank. Dinuro declined the opportunity to join and opted instead to pursue an ultimately failed attempt to purchase the loan by itself. The non-Dinuro members subsequently instituted

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[53] For the avoidance of doubt, derivative litigation in the LLC setting largely mimic the corporation derivative litigation procedures detailed above; see Fla. Stat. § 605.801-805.

[54] In addition, a significant amendment to the Florida Business Corporation Act amended the Florida Limited Liability Company Act in a manner that harmonized the statutory treatment of derivative claims for corporations and LLCs; see Modifications to Chapter 607 of the Florida Statutes and to Certain Sections of Other Florida Entity Statutes (dated June 26, 2019).

foreclosure actions and emerged as sole owners of the properties. When the dust settled, Dinuro found itself with only an ownership interest in an entity devoid of assets.

Dinuro filed a host of complaints against the co-members, their related entities that bought the properties at the foreclosure sale, and even Ocean Bank. The trial court concluded that Dinuro lacked standing to pursue the claims directly and therefore dismissed the complaint. Dinuro's appeal provided the Third District Court of Appeal with an opportunity to "provide clarity on a complicated point of law."[55]

The Court of Appeal's characterization of Florida law on this issue qualifies as an understatement.[56] The court identified three distinct approaches that were used by Florida courts in the last 50 years: the direct harm test; the special injury test; and the duty owed test.[57]

The direct harm test is the test applied by the majority of jurisdictions, including Delaware.[58] The direct harm approach assesses whether the shareholder's alleged injury stems from harm inflicted on the corporation itself. This requires the court to weigh the shareholder's injury against the corporation's and determine whether they are distinct. Under this framework, a shareholder may only pursue a direct claim if the alleged damage is independent of any corporate injury and if the corporation has no standing to seek recovery on its own behalf. The upside of this approach lies in its apparent simplicity.[59] The downside is that it classifies all misappropriation or embezzlement of corporate assets as a derivate harm, therefore requiring aggrieved shareholders to traverse the derivative apparatus.

A different approach adopted in other jurisdictions is referred to as the "special injury" test. The crux of the examination lies in whether the plaintiff's alleged harm is distinct from that suffered by the other shareholders. Under this approach, a plaintiff must show that their loss is meaningfully different from those sustained by their peers to proceed with a direct claim. While this test offers greater flexibility for individual claims in closely held corporations and limited liability companies, it is also more challenging to apply. Whether an injury qualifies as "special" is a notoriously murky inquiry, lacking clear-cut criteria and prone to subjective interpretation.

And finally, some Florida courts apply the "duty owed" test. This approach examines statutory and contractual obligations to determine whether a specific duty was owed to an individual shareholder or member, or whether it was owed to the entity as a whole. By

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55 Dinuro Investments, at 735.

56 Dinuro Investments, at 739 ("[T]he current Florida doctrine explaining which actions should be maintained directly and which must be brought derivatively is incredibly opaque, the application often varying from case to case depending on the facts.").

57 Dinuro Investments, at 738 ("Florida law, as it currently stands, embraces none of these tests individually, but utilizes all three to determine whether an action can be brought directly. As the Florida Supreme Court has not established a rule on this issue, a determination of the current standard of law requires the synthesis of nearly fifty years of case law developed in the Florida Courts of Appeal.").

58 Tooley v. Donaldson, Lufkin & Jenrette, Inc., 845 A.2d 1031 (Del. 2004).

59 I add the "apparent" qualifier since the direct harm test yields inconsistent results when examining claims of equity or voting dilution; see Part III.C and IV.C *infra*.

emphasizing party autonomy, the "duty owed" test grants the greatest flexibility, allowing members to contractually define when direct suits are permissible. However, many corporate documents, operating agreements, and statutes fail to specify the nature and recipient of fiduciary duties, leaving courts with little guidance. In such cases, the test can be ambiguous, leading to conflicting interpretations that support either a direct or derivative action.

Confronted with decades of doctrinal uncertainty, the Third District Court of Appeal distilled a half-century of precedent into a unified framework for distinguishing between direct and derivative claims. The resulting standard holds that a plaintiff may proceed with a direct action only when two conditions are met: first, the alleged harm must be direct to the shareholder or member, rather than a downstream consequence of harm to the company itself; and second, the plaintiff must have suffered a special injury that is distinct from any harm sustained by other shareholders or members.[60] Only when both prongs are satisfied may the prospective plaintiff bypass the demand requirement and proceed with a lawsuit on their own behalf.

And the Court of Appeal did not stop there. Recognizing the limits of the rigid two-prong test, the court carved out a narrow exception. Even in the absence of direct harm or special injury, a shareholder may still pursue a direct claim if they can show that an individual defendant owed them a special duty arising from a contractual or statutory obligation.[61]

Applying the newly-proclaimed rules to the facts of the case, the Court of Appeal found that Dinuro failed to satisfy both the two-prong test and its exception. It is true that Dinuro emerged from this ordeal as the owner of an asset-less entity; it is also true that the two non-Dinuro members were able to retain ownership of those assets. Those facts alone, however, only demonstrate that Dinuro suffered a special injury, which is the second prong of the two-prong test. Identification of a direct harm remains a prerequisite to a direct claim. Dinuro's ownership stakes were devalued as a result of the sale of assets. This devaluation, however, derives from the devaluation of San Remo, which has been rendered assetless. Absent a showing of direct harm, the first prong remains unsatisfied; and without it, the newly minted standard cannot be met.

The Court of Appeal likewise rejected Dinuro's attempt to invoke the exception to the two-prong test. As is typical of LLCs formed by sophisticated parties, Dinuro and its co-members memorialized their arrangement in a detailed operating agreement, which included specific remedies for a contractually-defined default. Dinuro pointed to a clause allowing non-defaulting members to pursue "any other remedies available at law or equity" as evidence of a

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[60] Dinuro Investments at 739-40 ("In our view, the only way to reconcile nearly fifty years of apparently divergent case law on this point is by holding that an action may be brought directly only if (1) there is a direct harm to the shareholder or member such that the alleged injury does not flow subsequently from an initial harm to the company **and** (2) there is a special injury to the shareholder or member that is separate and distinct from those sustained by the other shareholders or members.") (emphasis in original).

[61] Dinuro Investments at 740 ("We also find there is an exception to this rule under Florida law. A shareholder or member need not satisfy this two-prong test when there is a separate duty owed by the defendant(s) to the individual plaintiff under contractual or statutory mandates… Thus, if the plaintiff has not satisfied the two-prong test (direct harm and special injury) or demonstrated a contractual or statutory exception, the action must be maintained derivatively on behalf of the corporation or company.").

contractual duty owed to it directly. The Court of Appeal was unpersuaded by this line of reasoning: the contractual language simply confirmed that the contractual remedies are not exhaustive. The provision preserves a member's ability to seek additional relief consistent with Florida's statutory and common law, but it does not provide an automatic bypass of the derivative requirement. Had the parties wished to provide a direct cause of action, such language would undoubtedly have been inserted in the operating agreement.[62]

In short, Dinuro failed to satisfy either the newly announced test or its exception and thus lacked standing to proceed with a direct claim. Because it also failed to submit a demand, the Court of Appeal affirmed the trial court's dismissal of the complaint. In the years since its adoption, Florida courts have continued to apply, and occasionally stretched, the *Dinuro Investments* framework. At the same time, the Florida legislature enacted a statutory codification that departed in a key respect from the decision's language. The next Part traces how these judicial and legislative developments have shaped the evolving doctrine.

III. Post-Dinuro Developments

The previous Section depicted the *Dinuro Investments* decision and its attempt to impose order on Florida's muddled caselaw on the proper classification of a shareholder claim. This Section turns to the key decisions that followed, tracing how courts have applied the two-prong test across a variety of factual settings. Taken together, these decisions reveal how courts have interpreted and implemented the *Dinuro Investments* framework in practice, thereby setting the stage for the analysis that follows.

A. What's Left of the Special Injury Requirement?

Under *Dinuro Investments*, a plaintiff seeking to bring a direct claim must demonstrate both a direct harm to their ownership interests and a "special injury" not shared by the other shareholders. Although edge cases continue to test the boundaries of this standard, the inquiry into the nature of the harm proceeds through a relatively settled analytical framework. A share reflects a residual claim to the corporation's assets and future earnings. When the corporation's assets increase, so does the value of a share; when those assets decline, share value falls in

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[62] Dinuro Investments at 742 ("Conspicuously missing from the operating agreement is any provision stating that the members liable to each other for breaches of the terms of the operating agreement. Absent such a stipulation, we presume individual members are **not** liable for obligation or decisions of the company, as limited liability is one of the paramount reasons for forming an LLC.") (emphasis in original).

tandem. Harm of this kind is deemed derivative, as it flows from the injury to the entity itself.[63] To satisfy *Dinuro Investments*' first prong, a shareholder must show that the harm asserted does not merely mirror the diminished value of the corporation's assets but arises independently of it.

Identifying a "special injury" that befalls a shareholder is more amorphous, and Florida courts have addressed that issue only sparingly. This sub-Section surveys the limited number of times in which courts have wrestled with the second prong of the *Dinuro Investments* test. As will become evident, the analysis is further complicated by a subsequent statutory amendment that, at a minimum, casts doubt on the continued viability of the special injury requirement.

This Article will introduce the statutory wrinkle in due course. The depiction of the case law concerning the special injury requirement begins with Strazzulla v. Riverside Banking Co., which was handed down by the Fourth District Court of Appeal just over a year after *Dinuro Investments*.[64] The origins of the dispute trace back to the 2007 financial crisis, which dominated national headlines as a wave of venerable financial institutions crumbled under the weight of toxic assets.[65] Chief among the culprits were high-risk, asset-backed securities, which underwrote the subprime mortgages fueling the housing boom.[66] When the real estate market collapsed, these loans defaulted *en masse*, forcing banks to absorb staggering losses.

The fall of Bear Stearns under similar circumstances loomed large in the minds of those attending the March 2008 general assembly of Riverside Banking Company's (Riverside Banking) shareholders. After the meeting adjourned, several shareholders confronted members of the board's investment committee who were in attendance and demanded to know whether Riverside Banking was exposed to the same class of toxic, asset-backed securities. According to the complaint, the directors responded with an emphatic no. Reassured by this response, the shareholders declined an opportunity to redeem their shares for cash. This turned out to be a grave mistake.

Contrary to the directors' reported statements, Riverside Banking was significantly exposed to the assets that had brought down its Wall Street counterparts. The bank's losses proved

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63 El Paso Pipeline GP Co., LLC v. Brickenhoff, 152 A.2d 1248, 1261 (Del. 2016) ("[C]laims of corporate overpayment are normally treated as causing a harm solely to the corporation and, thus, are regarded as derivative. In Tooley terms, the harm is to the corporation, because such claims naturally assert that the corporation's funds have been wrongfully depleted, which, though harming the corporation directly, harms the stockholders derivatively so far as their stock loses value.") (quotation marks and footnotes omitted).

64 Strazzulla v. Riverside Banking Company, 175 So.3d 879 (Fla. 4th DCA 2015).

65 For a blow-by-blow account of the events that led to J.P. Morgan's acquisition of Bear Stearns, see Marcel Kahan & Edward Rock, *How to Prevent Hard Cases from Making Bad Law: Bear Stearns, Delaware, and the Strategic Use of Comity*, 58 EMORY L. J. 713, 716-721 (2009).

66 Itai Fiegenbaum, *Caremark's Politics*, == CARDOZO L. REV. ==, ==-== (forthcoming, 2025) ("The increased mortgage securitization at some of the country's most venerable financial institutions precipitated the [financial] crisis. In plain English, banks would lump together mortgages of ostensibly similar risk under the ownership of specialized entities. Investors in those entities profit from their slice of the revenue generated by the loans. The originating banks benefited from discounting to present value the stream of future payments while minimizing the damage that would accrue by non-payment of isolated loans. So long as the mortgages were being paid off, this financial alchemy benefits everyone. An unfortunate downturn in the real estate market caused the house of cards to come crashing down.").

catastrophic. As the value of those holdings plummeted, the bank was pushed into bankruptcy. Had the shareholders opted to redeem their shares following the general assembly, they could have salvaged $6 million. Instead, their entire investment went up in smoke.

Because *Dinuro Investments* is not a binding precedent, the Fourth District Court of Appeal first seized the opportunity to formally adopt its two-prong test and the accompanying exception as the governing framework.[67] The court then turned to the task of evaluating the complaint under that standard. As this case illustrates, a single factual narrative can support multiple theories of liability, making the presentation of allegations in the complaint all the more critical.[68] Riverside Bank's collapse is undisputed. One plausible allegation might assert that the directors should be held liable for failing to exercise adequate oversight during the lead-up to the collapse.[69] Another might fault them for approving an investment portfolio that was too heavily weighted toward risky asset-backed securities.[70] Yet both of those theories of liability support only a derivative action: The shareholder's stock became worthless because the bank's assets were wiped out, not due to any independent injury.

But those were not the theories advanced in the shareholders' complaint. Instead, the claim centered on an alleged misrepresentation concerning the bank's exposure to asset-based securities. Whatever managerial failings the complaint described served only as a backdrop to the misrepresentation itself. Framed this way, the plaintiffs managed to satisfy both prongs of the *Dinuro Investments* test. The directors' alleged statement, made during an informal exchange following the general assembly, had no bearing on the corporation's assets. The alleged harm – the missed opportunity to salvage six million dollars – was personal and direct, satisfying the first prong of the *Dinuro Investments* test. That same misrepresentation also met the second prong. The statement was allegedly made to less than a handful of shareholders immediately following the general assembly, while the rest of the shareholder base remained unaware. The injury, therefore, was unique to the plaintiffs.

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67 *Strazzulla*, at 884-5 ("After reviewing prior cases in our district, we agree with the Third District and adopt a two-prong test as follows: In order for shareholders to bring a direct action in their individual capacity, the shareholders must allege both a direct harm and a special injury. The two-prong test is consistent with our prior decisions requiring both a direct harm and a special injury… A shareholder may bring an individual action as an exception to the two-prong test where there is a separate statutory or contractual duty owed by the wrongdoer to the individual shareholder.").

68 *Strazzulla*, at 885 ("To resolve the question of whether Shareholders have standing to file the present case as a direct action, we must look to the actual allegations contained in Shareholders' amended complaint to determine whether it properly alleges both a direct harm and a special injury.").

69 This type of complaint is known as *Caremark* claim, named for the influential Delaware decision that recognized that fulfillment of a director's fiduciary duties requires active monitoring over the corporation. For an assessment of the Caremark doctrine's applicability in Florida, *see* Itai Fiegenbaum, *Director Oversight in Florida: Getting the Balance Right*, FLORIDA L. REV. FORUM (forthcoming).

70 In contrast to the previous example, an allegation here would focus on a breach of a fiduciary duty that arose as part of an active decision to include these assets in the bank's portfolio, rather than in their monitoring function. As the directors are seemingly unconflicted in the decision, plaintiffs would have a difficult time in overcoming the presumption of the business judgment rule; *accord* Kamin v. American Express Co., 383 N.Y.2d 807 (N.Y. Sup. Ct., 1976) (dismissing a complaint against a questionable investment decision by the board of directors).

Similar to most Florida shareholder dispute cases, *Strazzulla* was handed down in the context of a closely held corporation. The next case, Arbitrage Fund v. Petty, demonstrates the application of the *Dinuro Investments* test in the context of a publicly traded corporation.[71] The dispute in Arbitrage Fund arose out of a cash-out merger involving Exatech, a publicly traded corporation. There is nothing inherently suspect about a cash-out merger; it allows shareholders to liquidate their investment at a price they find acceptable. Ordinarily, all shareholders would receive equal consideration, and the board's goal would align with shareholders' desire in securing the highest price per share.

But a transactional wrinkle triggered concern. As part of the final agreement, Exatech's largest shareholders were granted the option to "roll over" their equity into the post-merger entity and retain their positions within it. That structural twist altered the incentive landscape. Unlike cashed-out shareholders, who naturally seek to maximize the buyout price, those retaining equity in the new entity had reason to prioritize their long-term prospects over short-term gain.[72] The plaintiffs, who were among the shareholders forced to cash out, alleged that this misalignment skewed the deal process, culminating in the board's acceptance of a lower-priced offer that disproportionately benefited the rolling-over shareholders.

With these allegations on the table, the Third District Court of Appeal was tasked with classifying the nature of the plaintiff's claims under the *Dinuro Investments* framework. In doing so, the court evaluated three alleged harms suffered by the plaintiff: the inadequate price received in the cash-out, the inability to participate in the concessions afforded to the dominant shareholders - most notably continued employment in the post-merger entity - and the inability to receive rollover equity in exchange for their Exatech shares. The court reasoned that the harm stemming from the inadequate price and lost employment opportunities flowed from the alleged undervaluation of the corporation as a whole, rendering the injury derivative in nature.[73] By contrast, the inability to exchange Exatech shares for rollover equity constitutes a direct harm that arises independently of any injury suffered by the corporation itself.[74] Having identified a

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71 Arbitrage Fund v. Petty, 307 So.3d 119 (Fla. 3rd DCA 2020).

72 The underlying concern is that shareholders granted rollover equity may be willing to accept a lower cash-out price in exchange for a more favorable rollover conversion ratio. When those shareholders also serve on the board or wield influence over its composition, that concern extends to the corporation's negotiating agents and the integrity of the transaction itself. In Delaware, transactions of this sort would be evaluated under the enhanced scrutiny standard of review; see Revlon v. MacAndrews & Forbes Holdings, 506 A.2d 173 (Del. 1986).

73 Arbitrage Fund, at 125-6. We will revisit the issue of equity dilution in Sections III.C and IV.C. For now, it is sufficient to note that the court's finding that equity dilution constitutes harm to the corporation, rather than directly to the shareholders, is not devoid of criticism.

74 Arbitrage Fund, at 126 ("[T]he Unaffiliated Shareholder's inability to retain any stock in the new entity, whereas the Affiliate Shareholder and Officers did retain some -preserving their investment, was clearly a harm that flowed first and only to the Unaffiliated Shareholders (and others similarly situated), and not the Corporation, its stock value, or other assets. The corporation could not sue to recover anything from this loss. Is so far as all counts directly or indirectly alleged this particular harm, they sufficiently pleaded a direct harm for which the Unaffiliated Shareholder has standing to sue directly under Dinuro.").

direct harm, the court then turned to the question of whether that harm satisfied *Dinuro Investments*' second prong as well.

This presented in important interpretive question: What does *Dinuro Investments* contemplate in its use of the word "special"? The defendants, unsurprisingly, urged a reading that equates "special" with "unique," arguing that only a shareholder who alone suffered the alleged harm could satisfy the second prong. Because the largest shareholder received nearly all the rollover equity, the plaintiffs belonged to a broader group of shareholders excluded from the benefit. If that entire class suffered the same injury, the argument goes, then the plaintiff's harm is, by definition, not distinct. The Court of Appeals rejected that argument. While "special" could be construed narrowly to mean a harm exclusive to the plaintiff, *Dinuro Investments* did not adopt a definition that requires complete singularity.[75] A harm may be "distinct" even if shared by a subset of shareholders. That approach rests on sound normative footing: a stricter rule would insulate a wide range of misconduct, such as misrepresentations targeting a definable group, from judicial scrutiny. Worse still, it would render class actions futile and erode shareholder litigation as a mechanism of accountability.[76] In short, the Third District Court of Appeal found that the plaintiff met both prongs of the *Dinuro Investments* test and remanded the case for further proceedings consistent with that ruling.

B. Statutory or Contractual Duty Owed?

The previous sub-Section outlined the major contours of Florida's two-prong test for distinguishing between direct and derivative claims. This sub-Section turns to the exception: even where plaintiffs cannot satisfy the test, a direct action may still proceed if the plaintiff can show that a separate duty was owed to them under a contractual or statutory obligation.[77]

The analysis begins with *Dinuro Investments* itself. As we recall, the allegations there arose from a dispute among three members of an LLC. As the court emphasized, LLCs are governed by a powerful instrument: the operating agreement.[78] One of the defining features of

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[75] Arbitrage Fund, at 127 ("To the contrary, Dinuro did not adopt the stricter standard advanced here by the Affiliated Shareholders and Officers.").

[76] *Id*. ("The stricter test advanced here would be anything but flexible, not just in the context of closely held corporations, but especially in the case of larger corporations not so held. It would render direct class actions impossible, since, to obtain certification, the test would require members of a sub-class of shareholders singled out for mistreatment by another not to share a similar or identical injury among themselves, which is nevertheless the entire point of seeking class certification in this context.").

[77] This exception has been codified in both the Florida Business Corporation Act and the Florida Limited Liability Company Act; see Fla. Stat. § 607.750(2)(b) and Fla. Stat. § 605.0801(2)(b). The sections were amended in tandem with the intent of creating a shared test for both entities.

[78] Dinuro Investments, at 741 ("An operating agreement is a contract… However, unlike a typical bilateral contract, where both signing parties owe duties to one another, operating agreements establish a more complicated and nuanced set of contractual rights and duties. Indeed, the effect of an operating agreement on members of the

the LLC structure is the parties' broad contractual freedom to decide how the entity will be governed.[79] That discretion, the court reasoned, extends to the ability to define the scope of fiduciary duties,[80] whether by narrowing them, expanding them, or waiving them altogether.[81]

In its attempt to invoke the exception, Dinuro pointed to language in the operating agreement governing the parties' rights and obligations in the event of default.[82] The Court of Appeals, however, found this argument unconvincing. The cited provision – allowing members to pursue "any other remedies available at law or equity" – had to be read in context. Adjacent provisions spelled out specific remedies in the event of default, and the catch-all language merely clarified that those remedies were not exclusive. Crucially, the provision said nothing about a member's right to bring a direct action for breach of the agreement. Its silence on that point, the court reasoned, reflected the absence of any bargained-for right to bypass the ordinary requirement of a direct injury.[83] Having failed to demonstrate both a non-derivative harm and a direct contractual duty owed, Dinuro could not satisfy either the two-prong test or its exception. The trial court's dismissal was accordingly affirmed.

The next case on this subject is Ferk Family, LP v. Frank.[84] The dispute arose from a failed venture to manufacture, market, and sell a medical device designed to treat hemorrhoids. The entrepreneurs behind Med-Rite Laboratories, LLC (Med-Rite) sought additional financing and eventually secured over $1 million in investor funding. As one would expect from a venture of that scale, the parties entered into a carefully negotiated operating agreement. Among other

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limited liability company and third parties is largely establish by [the Florida Limited Liability Company Act]…"). (citations omitted).

79 This principal is codified in the LLC statute's rules of construction. See Fla. Stat. § 605.0111(1) ("It is the intent of this chapter to five maximum effect to the principle of freedom and to the enforceability of operating agreements.").

80 Dinuro Investments, at 741 ("[T]he signing parties to an operating agreement may very well decide that no individual member owes the other members any duties whatsoever, and that those duties are owed only to the company. When analyzing a claim for breach of an operating agreement, the precise terms of the agreement are critical.").

81 While this statement is undoubtedly correct with regards to LLCs, the Florida Business Corporation Act does not codify a pathway for parties that wish to change the scope of the fiduciary duties owed by officers and directors. In other words, Fla. Stat. § 605.0105(4) has no direct comparison in the corporation statute.

82 Dinuro Investments, at 742 ("**12.4. Additional Effects of Default.** In the event of a Member's default under this Agreement, the LLC and the Members may, at their election, pursue any and all remedies provided under this Agreement or any other remedies available at law or equity… If the non-defaulting Members of the LLC refrain from enforcing any remedy available under this Agreement against a defaulting Member, they shall not be deemed to have waived the default.")

83 *Id*. ("Conspicuously missing from the operating agreement is any provision stating that the members shall be directly liable to each other for breaches of the terms of the operating agreement. Absent such a stipulation, we presume individual members are **not** liable for obligations or decisions of the company, as limited liability is one of the paramount reasons for forming an LLC."). The courts evocation of limited liability in this context is puzzling, as limited liability acts as a barrier against outside creditors attempting to hold owners liable for the entity's obligations and ordinarily has nothing to do with regards to causes of action among the entity's owners and managers.

84 Ferk Family, LP v. Frank, 240 So.3d 826 (Fla. 3d DCA 2018).

things, the agreement designated specific individuals as managers and outlined the procedures for their removal.

Another provision would later become a focal point of the litigation. While members in an LLC may freely transfer their right to receive distributions,[85] the default rule bars the transfer of voting or managerial rights without express authorization.[86] This restriction naturally depresses the marketability of a membership interest, as buyers would demand a discount for an interest that carries no influence over the company's affairs. To mitigate that issue, operating agreements sometimes permit the free transfer of voting rights. But that approach carries its own risk: unlike shareholders in a publicly traded corporation, members of an LLC, especially a closely-held one, often care deeply about who their co-owners are. A common compromise is the inclusion of a right of first refusal, which allows existing members to match any proposed transfer before it closes.[87] Med-Rite's operating agreement included such a clause. Notably, however, the right applied only to transfers of *membership interests* in Med-Rite and not to transfers of *ownership interests in a member entity*.

A careful look at the facts is critical to understanding the court's resolution. One of the investors, Ferk, held 26.49% membership interest in Med-Rite and possessed the right to appoint one of the company's four managers. As tensions mounted among the parties, one of the other managers notified Ferk that he was being removed from his managerial role; this removal was purported to be in accordance with the operating agreement. While Ferk was contesting the validity of his removal, he covertly purchased the ownership interests of another Med-Rite member - an entity whose sole asset was a 16.21% membership interest in Med-Rite. This maneuver gave Ferk de-facto control over more than 42% of the company's voting power. The significance of that threshold will become clear in due course.

The dispute led to litigation, and the trial court ruled against Ferk on both fronts: the enforceability of his purchase of ownership interests in the other Med-Rite member and the validity of his ouster as a manager. The Third District Court of Appeal reversed on both counts. Its analysis underscored the importance of precise contractual drafting.

The right of first refusal was comprehensively addressed in the operating agreement. By its express terms, the provision applied only when members contemplated transferring their **direct** membership interests in Med-Rite. At the time of drafting, it was well known that one of the members was an entity, whose sole purpose was ownership of the Med-Rite membership interests. Yet the agreement failed to address the potential transfer of ownership interests in that

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85 Fla. Stat. § 605.0502(1)(a) codifies the default rule regarding the free transferability of a member's transferable interest.

86 Fla. Stat. § 605.0502(1)(c).

87 A right of first refusal, sometimes called a right of first offer, is a contractual provision that requires a party that is interested in selling its ownership interests to offer the same terms to the other existing co-owners. Rights of first refusal are beneficial to all sides: the selling owner ensures full liquidity, while the other owners have the contractual right to vet potential co-owners. The precise terms of the right of first refusal vary in accordance with the parties' agreement.

entity-member.[88] While some jurisdictions permit courts to consider the parties' intent more freely, Florida law adheres closely to the text.[89] Where a contractual provision is unambiguous, Florida courts enforce it as written. Here, the right of first refusal was triggered only by the transfer of membership interests, and not by a transfer of ownership in the entity holding them. Accordingly, Ferk's acquisition was deemed valid and enforceable.[90] With that purchase, he secured voting control over more than 40% of Med-Rite's membership interests.

It is at this juncture that the strategic value of Ferk's passage of the 40% ownership threshold becomes apparent. The operating agreement contained two seemingly equivalent avenues for the removal of managers, and once again, the court was called upon to resolve a dispute over contractual interpretation. Under the agreement, "Members holding a Majority of Interest" were empowered to remove managers. Both "Members" and "Majority of Interest" were defined in the operating agreement. Contrary to the clear-cut and common-sense definition of "Member," "Majority of Interest" included two alternative formulations: at least 60% of the membership voting interest, or at least 60% of the managers. Since Ferk's removal had been approved by 75% of the managers but only 29% of the membership voting interests, the parties naturally disagreed over whether both definitions stood on equal footing.

The operating agreement's express call for a context-based interpretation guided the Court of Appeal's resolution. While "Majority of Interest" could, in isolation, refer to either standard, the provision governing removal of managers explicitly vested that power to the members. That plain-language context, the court reasoned, resolved any ambiguity: the voting threshold must refer to 60% of membership interests, not of managers.[91] Additional provisions, which at first glance appeared similarly ambiguous, were also clarified through this contextual approach, which further reinforced the court's conclusion.[92]

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88 This discrepancy is especially jarring in light of the fact that the operating agreement addressed the issue of permittable ownership transfers to "affiliates" of members who are entities.

89 Ferk Family, LP at 834 ("Under well-established principles of contract interpretation, the clear and unambiguous terms of an agreement should be given their plain meaning and enforced accordingly.").

90 Ferk Family, LP at 834 ("We conclude that Melendez was not required to comply with the Operating Agreement before transferring his own interest in Mas-Rite to the Ferk Family. He did not transfer Mas-Rite's interest in Med-Rite, and thus, the provisions of section nine in the Operating Agreement were never triggered.").

91 Ferk Family, LP at 835-6 ("The definition of "Majority in Interest" is clearly one such instance which, when viewed in context, would allow for only one interpretation as it relates to removal of a Manager. The Agreement cannot be read to allow the removal of a Manager by the "affirmative vote or presence of greater than 60% of the Managers," because section 5.1(e) plainly authorizes removal only "by the **Members** holding a majority in Interest.") (emphasis in original). Analogizing a manager-managed LLC to a corporation leads to a similar result. Under well-settled corporate law rules, the authority to remove directors is reserved for shareholders, not other directors; see Fla. Stat. § 607.0808. The founders of Med-Rite adopted a management structure that is similar to a corporate board, and it stands to reason that absent clear drafting intent, the LLC should follow basic corporation principals for removing the members of the board-like body.

92 Ferk Family, LP at 836. The Court of Appeal applied the context-based reading of the contract in order to solve apparent ambiguities regarding quorum requirements and the approvals necessary to effectuate a merger or sale of all assets.

But this complex factual backdrop must be channeled through the proper cause of action, which brings us back to the focus of this sub-Part. Ferk alleged that the other managers breached a fiduciary duty by attempting to remove him from his position. That claim immediately encounters a doctrinal snag: fiduciary duties are typically owed to the entity, not to individual shareholders or members. The proper claimant would therefore be Med-Rite itself, and any attempt to enforce that duty must typically proceed as a derivative action.[93] One way around that procedural barrier is to identify a viable direct claim for breach of a direct contractual duty owed, which is precisely what Ferk sought to do here.

Under *Dinuro Investments*, that route requires more than a generalized claim; it demands a clear contractual basis for a direct right of action. Specifically, the agreement must contain language that affirmatively permits members to enforce its terms in their individual capacity. The Court of Appeal found such language in Section 11.12 of the operating agreement. Titled "Additional Remedies," the section provides that "nothing herein contained is intended to, nor shall it limit or affect, any other rights in equity or any rights at law or by statute or otherwise of any Member aggrieved as against the other Members, for breach or threatened breach of any provision thereof." Though framed in the negative, the court held that this language met *Dinuro Investments*' requirement for a *conspicuous* recognition of direct member claims under the agreement.[94]

We close this sub-Part with *DiSorbo v. American Van Lines, Inc.*, a case that underscores the procedural significance of the direct-versus-derivative distinction by highlighting its interaction with state constitutional law.[95] Under the Florida Constitution, the right to a jury trial extends to legal claims at common law, but not to equitable claims.[96] In corporate disputes, that means direct claims may be tried before a jury, while derivative claims will not. A complaint, of course, can include both claims that justify a jury trial and those that do not. When the facts underlying the two types of claims are interwoven, the jury must decide on the overlapping factual issues.[97]

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93 Ferk Family, LP at 836 ("Even if this conduct constituted a breach of contract, we must still determine whether affirmance is nonetheless warranted due to the trial court's additional finding that Ferk Family's claims were derivative, and therefore, not cognizable in Florida.").

94 Ferk Family, LP at 837 ("[I]n the present case, the Operating Agreement unequivocally provides that Members who are aggrieved by other Members may bring direct claims for breach of the provisions of the Operating Agreement.").

95 DiSorbo v. American Van Lines, Inc., 354 So.3d 530 (Fla. 4th DCA 2023).

96 Fla. Const. article I, § 22.

97 Billian v. Mobil Corp., 710 So.2d 984, 992 (Fla. 4th DCA 1998) ("Unless waived, a jury must make findings concerning all facts which are common to the legal and equitable claims before the trial court may consider granting an equitable remedy. Where the fact issues decided by a jury in an action at law are sufficiently similar to the fact issues on a related equitable claim, the trial court is bound by the jury's findings of fact in making its ruling on the equitable claim. Legal and equitable issues are "sufficiently similar" or "intertwined" if a jury, in order to return a verdict in an action at law, would necessarily have to decide a fact issue of the legal claim which is also a required element of an equitable claim.") (citations omitted).

This brief aside on a quirk of Florida constitutional law brings us back to *DiSorbo*, which centers on an unfortunate dispute between two brothers, Anthony and Aldo. Along with their two cousins, the brothers formed an LLC to purchase a 54,000 square-foot warehouse. After some time, Anthony proposed buying out the cousins, leaving the company solely in the hands of the two brothers.

The dispute between the siblings traces back to a $200,000 loan that the LLC secured to finance the cousins' buyout. This financing arrangement came as a surprise to Aldo, who later claimed he believed Anthony was using personal funds for the purchase. In addition to alleging conversion, Aldo accused Anthony of orchestrating a series of self-dealing transactions. After consolidating control, Anthony caused the LLC to lease the warehouse to one of his other businesses at below-market rates. That business then subleased portions of the space to a third party at a significantly higher rate, pocketing the spread for itself.

This background explains why the Fourth District Court of Appeal reversed the trial court's ruling on procedural grounds. At the trial level, the court stayed the direct action and proceeded to trial on the derivative claims. That, the Court of Appeal held, was error. When the underlying facts are interwoven, defendants have a constitutional right to have a jury decide those facts. Here, the trial court's factual findings on the derivative claim foreclosed Aldo's constitutional right to a factual determination by a jury.

Anthony naturally argued that all of Aldo's claims were derivative by nature and therefore did not implicate any individual right. The Court of Appeal disagreed. Applying both the *Dinuro Investments* framework as well as the FLLCA statutory language at the time the events took place,[98] the court found that Aldo's claims justified a direct claim for two reasons. First, Anthony's use of the LLC's funds to buy out the cousins increased his ownership percentage at Aldo's expense. Aldo's subsequent dilution, reasoned the court, represents a unique harm that justifies a direct claim.[99] The unique challenges presented by equity dilution claims will be further explored in Part III.C and Part IV.C *infra*.

Second, and of particular relevance to this sub-Part, the court recognized a contractual basis for a direct action. Although claims of self-dealing of the type alleged here are generally derivative, the LLC's operating agreement imposed an express obligation on members to act "in good faith." The court concluded that Anthony's conduct, though no doubt harmful to the LLC, violated that contractual obligation. On that basis, Aldo was permitted to proceed directly against his brother.

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[98] Fla. Stat. § 605.0801(2). That section later amended to eliminate *Dinuro Investments*' second prong. The significance of that amendment will be evaluated in Part IV.A *infra*.

[99] DiSorbo at 543 ("Notably, this alleged injury did *not* flow first to the company and only secondarily to Aldo. Rather, the Fourth Amended Complaint alleged that Aldo suffered a dilution of his ownership percentage in ASAP from 50% to 32.5%, making him a minority owner instead of an equal owner. This was a special injury to Aldo that was separate and distinct from that experienced by Anthony – the dilution harmed only Aldo and did not harm Anthony.") (emphasis in original).

This sub-Part traced the evolving contours of *Dinuro Investments*' two-prong test. While *Dinuro Investments* insisted that a direct contractual right of action must be stated in a "conspicuous" manner, subsequent decisions have adopted a more relaxed approach. Courts have recognized a direct claim even where the supporting provision was framed in the negative, and, in more extreme cases, have permitted such claims to proceed based solely on a party's breach of a generic contractual obligation to act "in good faith." These doctrinal shifts will be explored further in Part IV.B *infra*.

C. Equity Dilution as a Direct or Derivative Claim?

Identifying a derivative claim is relatively straightforward when traditional forms of self-dealing or misappropriation of corporate assets are alleged. If proven, such conduct results in a reduction of the corporation's assets, which in turn diminishes the value of each share. Because a share represents a proportional claim on the corporation's residual value,[100] any erosion of those assets directly affects its worth. The harm felt by the shareholder stems from the reduction in the corporation's assets, and, barring the existence of one of the exceptions, a subsequent lawsuit may only be pursued through a derivative action brought on the corporation's behalf.

There are other types of corporate conduct, however, that can leave shareholders short-changed. In addition to their entitlement to the residual value of the firm, shareholders also possess the right to vote at the shareholders meeting.[101] This collective voting power enables shareholders to veto significant board-proposed transactions,[102] and, most importantly, to elect the board of directors.[103] The right to elect directors is often considered the most fundamental shareholder power, as it is the mechanism through which shareholders ensure that corporate decision-makers remain aligned with their interests.[104] This right to elect directors is what underlies the common reference to shareholders as the "owners" of the corporation.

While it is well established that a decline in share value caused by a reduction in corporate assets gives rise to a derivative claim, the effect of diminished shareholder voting power has

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100 Fla. Stat. § 607.0601(2)(b).

101 Fla. Stat. § 607.0601(2)(a).

102 See, *e.g.*, Fla. Stat. § 607.1003(2)(a) (shareholder approval as a requirement to amend the articles of incorporation), Fla. Stat. § 607.1103(2)(a) (shareholder approval as requirement to approve a merger), Fla. Stat. § 607.1202(2)(a) (shareholder approval as a requirement to dispose of substantially all of the corporation's assets), and Fla. Stat. § 607.1402(2)(a) (shareholder approval as a requirement to dissolve the corporation).

103 Fla. Stat. § 607.0728(1).

104 Itai Fiegenbaum, *Taking Corwin Seriously*, 26 LEWIS & CLARK L. REV. 791, 822 (2022) ("Corporate law's myriad rules and regulation are designed to bridge the misalignment gap between equity investors and those entrusted with managing their property. Even well-meaning fiduciaries are vulnerable to the natural tendency to shirk one's duties or push forward a strategy that is tenuously aligned with share-value maximation. Shareholder voting rights are designed to keep them in check… Conditioning a director's appointment and continued incumbency on shareholder approval is theorized to ensure devotion to shareholder interests.")

vexed Florida courts. In *DiSorbo*, such equity dilution was treated as direct harm.[105] Yet in a similar scenario, the Circuit Court of the Eleventh Judicial Circuit reached the opposite conclusion.[106]

The litigation in *Benes* arose from a recapitalization effort by U.S. Century Bank (U.S. Century). Prior to the recapitalization, several private equity funds held two classes of preferred shares. This capital structure posed significant challenge to U.S. Century's contemplated public offering. First, the outstanding preferred shares carried a substantial liquidation preference, which would weigh heavily on the bank's balance sheet. Second, a simplified capital structure was expected to be more attractive to public investors, who could more easily evaluate the pricing of U.S. Century's shares in the upcoming offering.

The recapitalization was carried out through an exchange transaction, a streamlined process by which a corporation can replace its existing classes of shares.[107] The transaction at hand allowed two classes of non-voting preferred shares to exchange their shares and, in return, receive Class A voting shares.

The exchange transaction triggered the dispute. Effectuating the exchange required the issuance of additional Class A shares, thereby increasing the total number of outstanding voting power. The increase in issued voting shares necessarily leads to a decrease in the relative voting power of the previously outstanding Class A shares.[108] In response, several Class A shareholders filed individual actions and sought to certify themselves as class representative for all Class A shareholders.

The Circuit Court correctly rejected the argument that the share exchange was *ultra vires*. The absence of specific authorization for share exchanges involving the preferred share classes in U.S. Century's articles of incorporation did not preclude the board from effecting such a transaction if it provides value and aligns with the bank's long-term objectives.[109] The court then

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[105] See footnote 95-99 and corresponding text.

[106] Benes v. De La Aguilera, 2023-019611-CA-01 (Circ. Court of the 11th Judicial Circuit in and for Miami-Dade County, FL, Dec. 27, 2023); order affirmed Benes v. De La Aguilera, 2025 WL 322291 (Fla. 3rd DCA 2025).

[107] William K. Sjostrom, Jr., MERGERS AND ACQUISITIONS LAW 9 (2nd ed., 2022) ("In a share exchange, bidder acquires all the outstanding stock of target by operation of the law in exchange for the deal consideration that it pays directly to target's shareholders. As a result, target ends up as a wholly owned subsidiary of bidder. This is very similar to what happens in a stock purchase. The difference between the two is that with a share exchange, instead of each shareholder deciding individually whether to sell his or her shares to bidder, target shareholders vote on the deal. If enough shares vote in favor of the deal (the voting requirement under the MBCA is more votes for than against), all shareholders must participate. In other words, a shareholder cannot refuse to sell his or her shares to bidder."). Share exchanges in Florida are codified in Fla. Stat. § 607.1102-1103.

[108] For example, if a shareholder owns 100 shares and the total number of outstanding shares is x, her voting power is represented by the fraction $100/x$. After the issuance of y additional shares, her voting percentage becomes $100/(x+y)$. Any increase in the denominator (the total number of issued shares), without a corresponding increase in the numerator (the number of shares owned), necessarily reduces the shareholder's relative voting power.

[109] Benes, at 5 ("The Florida Business Corporation Act (Chapter 607, the "Act") specifies those terms which must be included in a corporation's articles; for example, the number of shares of each class and series that the corporation is authorized to issue and its business purpose… The articles must also describe the "rights" possessed by each class of shareholders… The Articles here satisfy those requirements. But no section of the Act requires a

turned to the central issue of this sub-Part: whether equity dilution gives rise to a direct cause of action.

The Circuit Court offered several reasons to support its conclusion that the harm from dilution was derivative in nature. First, it applied precedent from Florida decisions holding that equity dilution does not constitute a separate and distinct injury.[110] The rule that the Circuit Court distilled from these cases is that the harm at issue is a form of overpayment: U.S. Century was able to eliminate a substantial liquidation preference from its balance sheet in exchange for additional shares, but it issued too many shares to accomplish that goal. In the court's view, this was simply a case of shareholders dissatisfied with a bad bargain, where the price of eliminating $114 million in liquidation preference, namely, the issuance of new shares, was too high.[111] Retiring the debt *increased* the value of U.S. Century's assets, and the change in share value, according to the court, *derives* from that increase.

The plaintiffs contended that the per-share increase would have been greater had the bank issued fewer shares, and the court evaluated this argument through the lens of Delaware law. Under previous Delaware precedent, a direct claim based on equity dilution was available only when the issuance effects a transfer of control.[112] Because the plaintiffs failed to demonstrate either a loss of control or a corresponding shift to another shareholder group, the court concluded that the dilution did not give rise to a direct injury.[113] The Circuit Court's reasoning on this issue will be examined further in Part IV.C.

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corporation's articles to enumerate the specific terms applicable to potential future voluntary stock exchange transactions. Thus, neither Florida law nor the Articles prevented the Bank from retiring the $114 million in debt it owed to the preferred shareholders by offering them the opportunity to convert their preferred stock for common stock from the Bank's treasury. To the contrary, the Exchange Transaction fell comfortably within the Bank's express and implied powers under the existing Articles (which did not limit its ability to exchange stock to retire debt) and the Act to manage the preferred and its affairs as a commercial bank. Defendants were not required to further amend the Articles (beyond authorizing the issuance of additional shares of common voting stock, which was done … to authorize the Exchange Transaction, and there was nothing for Defendants to submit to a vote of the holders of Class A voting common stock."). We will return to the issue of whether Class A voting stock should have been entitled to a class vote in Part IV.C.").

110 The Circuit Court referenced TMV Corp. v. Lander Co., Inc. 2008 WL 11333695 (S.D. Fla. June 30, 2008), Rosenberg v. Ladenburg Thalmann Financial Services, 28 Fla. L. Weekly. Supp. 820a (Miami-Dade Cty. Cir. Ct. Oct. 27, 2020) as well as Delaware's Brookfield Asset Mgmt., Inc. v. Rosson, 261 A.3d 1251 (Del. 2021) for the proposition that equity dilutions trigger a derivative claim. We will revisit the proper classification of an equity dilution in sub-Part IV.C *infra*.

111 Benes, at 10 ("In essence, Plaintiffs' complaint is one of a corporate over-payment: the Bank allegedly gave up too much common stock from its treasury in exchange for retiring the preferred stock and associated $114 million debt (the benefits of which, were also experienced *pro rata* by Plaintiffs… If indeed the Bank made a bad deal in connection with the Exchange Transaction, any purported loss of economic value flowed first to the corporation, and only affected Plaintiffs indirectly, in the form of a *pro rata* reduction in the value of their stock, which flowed from a decrease in the overall value of the Bank itself.").

112 Gentile v. Rosette, 906 A.2d 91 (Del. 2006), *overruled* in Brookfield Asset Mgmt., Inc. v. Rosson, 261 A.3d 1251 (Del. 2021).

113 Benes, at 12 ("[P]laintiffs' attempts to lump together their interests and shares with those of the putative class members, on the one hand, and the collective interests and shares of the Funds, on the other hand, are unsupportable as a matter of law. Plaintiffs' argument that as a putative class, they went from collectively enjoying "majority" control

An additional aspect of the Circuit Court's reasoning will also be revisited in sub-Part IV.C. The *Dinuro Investments* framework recognizes an exception where the alleged harm arises from contractual or a *statutory* duty owed to the plaintiff. Although the plaintiffs in *Benes* could not point to a contractual duty, they relied on a statutory right under the FBCA, which provides for a class vote, designated in the statute as a "voting group,"[114] when certain actions disproportionately affect a particular class of shares.[115] The Circuit Court dismissed the request for a class vote without explanation.[116] This unexplained rejections raises interpretive questions that warrant further analysis in the discussion that follows.

IV. Entity Litigation in Florida: Doctrinal Clarification and Legislative Coherence

The previous Part surveyed the key Florida cases interpreting the *Dinuro Investments* framework, including its exception and the unique challenges posed by shareholder voting dilution and elimination. This Part undertakes a closer analysis of the jurisprudence and includes specific recommendations to clarify the law and better guide courts, practitioners, and corporate planners. It also gives further consideration to the impact of the 2020 legislative amendment, examining how its departure from the *Dinuro Investments* framework reshapes the claim classification inquiry.

A. Eliminating the Special Injury Requirement

This sub-Part examines the judiciary's continued invocation of *Dinuro Investments*' second prong.[117] That reliance is, to some extent, understandable: The Third District Court of Appeal

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over the Bank prior to the Exchange Transaction, to the Funds collectively enjoying "majority" control after the Exchange Transaction … is a conclusory fiction, as nothing remotely suggests that the 300 plus putative class members over "controlled" anything.").

114 Fla. Stat. § 607.01401(78).

115 Fla. Stat. § 607.1004(1).

116 Benes, at 7 ("Defendants were not required to further amend the Articles (beyond authorizing the issuance of additional shares of common voting stock, which was done…) to authorize the Exchange Transaction, and there was nothing for Defendants to submit to a vote of the holders of Class A voting common stock.").

117 The following list of post-January 1, 2020 cases either quote *Dinuro Investments*' two-prong test or reference the pages in which it was proclaimed in their analysis of the cause of action: Chengari v. Banyan Cay Resort Fund, LLC, 2024 WL 5088707 at 2 (S.D. Fla. November 13, 2024), Schmitz v. Schmitz, 401 So.3d 416, 427 (Fla. 3rd DCA 2024), In re Sticky Holsters, Inc., 2024 WL 3359368 at 6 (M.D. Fla., July 10, 2024), Snyder v. Formerly B 3 Group, Inc., 2024 WL 2724435 at 4 (M.D. Fla., May 28, 2024), United States ex rel. CLJ, LLC v. Halickman, 2024 WL 89559 at 10 (S.D. Fla., February 29, 2024), Snyder v. HMS Technologies, Inc. 2024 WL 493086 at 4 (M.D. Fla., February 8,

conducted a commendable and comprehensive review of more than fifty years of Florida case law on the subject. Nevertheless, as this sub-Part will demonstrate, there are compelling reasons to eliminate the "special injury" requirement from Florida's entity litigation framework altogether.

The most compelling argument against the continued use of *Dinuro Investments*' second prong is legislative intent, as reflected in the plain language of Florida's statutes that govern both corporations and LLCs. *Dinuro Investments* was handed down in 2014, the same year that the Corporations, Securities, and Financial Services Committee of the Florida Bar Business Law Section established a subcommittee tasked with modernizing the state's entity statutes.[118] The subcommittee's work culminated in a comprehensive proposal that was approved by the Business Law Section's executive council, submitted to the Florida legislature in 2018, and formally considered during the 2019 legislative session. The resulting bill, which largely tracks the subcommittee's recommendations, passed both chambers unanimously and was signed into law by Governor DeSantis on June, 2019, taking effect on January 1, 2020. Crucially, although the statutory amendments codify the issue of direct standing, they make no reference to *Dinuro Investments*' "special injury" requirement.[119] Florida law is unequivocal on this point: when the statute speaks clearly, courts must apply its text as written.[120]

Even if the statutory text was unpersuasive, eliminating the special injury requirement aligns with the broader reforms to shareholder litigation adopted in Florida's statutory overhaul. Among the most consequential changes was the reintroduction of the "demand futility" exception.[121] Without this reform, every derivative action would require a shareholder to first make demand on the board, even if the full board itself were implicated in the alleged misconduct![122] This quirk in derivative procedure grants the alleged wrongdoers the first opportunity to quash the complaint.

2024), Head Kandy, LLC v. McNeill, 2023 WL 7323284 at 14 (S.D. Fla., November 7, 2023), Goldsten v. Firer, 2022 WL 3161835 at footnote 2 (S.D. Fla., June 17, 2022), Christoff v. Inglese, 2022 WL 103564 at 3 (M.D. Fla., January 11, 2022), Cook County Land Ventures, LLC v. Moonspinner Condominium Association, Inc. 2021 WL 5015631 at 1 (N.D. Fla., February 17, 2021), and Feng v. Walsh, 2020 WL 5822420 at 15 (S.D. Fla., September 14, 2020).

[118] Business Law Section of the Florida Bar, Modifications to Chapter 607 of the Florida Statutes and to Certain Sections of Other Florida Entity Statutes (June 26, 2019).

[119] Fla. Stat. § 607.0750(2)(a). The major overhaul to the FBCA included a modification to the Florida LLC statute to ensure consistency in recognizing a direct cause of action; see Fla. Stat. § 605.0801(2)(a).

[120] Edwards v. Thomas 229 S0.3d 277, 283 (Fla., 2017) ("The polestar of a statutory construction analysis is legislative intent. To discern legislative intent, this Court looks first to the plain and obvious meaning of the statute's text, which a court may discern from a dictionary. If that language is clear and unambiguous and conveys a clear and definite meaning, this Court will apply that unequivocal meaning and not resort to the rules of statutory interpretation and construction.") (citations omitted).

[121] Fla. Stat. § 607.0742(2)(c).

[122] Curiously, this is the approach recommended by the Model Business Corporation Act (MBCA); see MODEL BUS. CORP. ACT ANN. §7.42 (requiring universal demand). The MBCA is published by the Business Law Section of the American Bar Association and serves as a ready-made corporation act template for jurisdictions to enact. The American Bar Association's website reports that thirty-six jurisdictions, including Florida, have modeled their corporate code on the MBCA. As stated above, Florida's 2020 statutory amendment rejected the MBCA's universal demand framework.

The disincentives for plaintiffs are obvious: a shareholder must marshal evidence of wrongdoing and present it to the very individuals accused of committing it, all while knowing that courts will likely defer to the board's response.[123] The 2020 revision rightly eliminated universal demand to reestablish shareholder litigation as a viable mechanism for insider accountability. Removing the special injury requirement supports that overarching objective.

This observation is best understood against the backdrop of the few post-*Dinuro Investments* cases in which plaintiffs managed to plead a special injury and proceed with a direct claim. Recall that in *Strazzulla*, the director-defendants allegedly made a false representation to a small subset of shareholders. Even then, the directors argued that no shareholder suffered a singular injury, an interpretation that survives a plain reading of *Dinuro Investments*' second prong. While the court did not reject the "special injury" requirement outright, it properly downplayed the meaning of "special," acknowledging that such an injury may affect more than one shareholder. The *Arbitrage Fund* court went further. There, a cash-out merger effectively wiped out the public float, creating precisely the type of harm the class action mechanism is designed to address. The court correctly remarked that insisting each shareholder demonstrate a singular injury would sound a death knell for shareholder class actions, and with it, a vital tool for insider accountability. Taken together, these decisions reflect a clear judicial trend to narrow the scope of this doctrinal remnant, even absent the compelling argument that *Dinuro Investments*' second prong lacks statutory grounding. The combined force of statutory reform and judicial minimalization leads to one conclusion: the special injury requirement no longer serves a meaningful role in Florida entity litigation and should be formally abandoned.[124] Building on that conclusion, the next sub-Part identifies an additional insight from the case law survey that further reinforces the alignment between the judicial reasoning and the overarching philosophy behind the 2020 statutory reforms.

B. Conceptualizing the Direct Claim Exception

In contrast to the previous sub-Part, there is no dispute regarding the validity of *Dinuro Investments*' exception, which was codified in the 2020 statutory reform.[125] Disagreement arises, however, over what is required to establish a direct contractual right of action. While the *Dinuro*

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123 *Accord* Itai Fiegenbaum, *Caremark's Fractured State*, 80 BUS. LAW. 59, 73 (2024) (finding zero judicial decisions adjudicating director oversight claims in the 17 jurisdictions that adopted the MBCA's broad director exculpation framework. A plausible inference from this data is that plaintiffs in such jurisdictions recognize that a claim challenging exculpated behavior will be summarily dismissed and therefore have no incentive to even commence litigation. Query how much vigor a resource-constrained director exerts on oversight when there is no financial consequence for getting it wrong.).

124 I note that while Delaware is the most famous jurisdiction to remove the "special injury" requirement for a direct claim, it is not the only one; see Keller v. Estate of McRedmond, 495 SW3d 852, 876-877 (Tenn. 2016) (compiling case law from other jurisdictions that adopt Delaware's *Tooley* standard).

125 Fla. Stat. § 607.0750(2)(b) for corporations and Fla. Stat. § 605.0801(2)(b) for LLCs. For the avoidance of doubt, both codifications were enacted as part of the major overhaul of the Florida entity statutes.

Investments court insisted that the right must be "conspicuous" on the face of the contract, later decisions have proven far more permissive. In *Ferk Family*, for instance, the court relied on a contractual provision that merely failed to preclude a direct action, rather than finding a provision that "conspicuously" grants one.[126] And in *DiSorbo*, the court went further still, identifying a direct claim from the boilerplate obligation of "good faith" common to nearly all operating agreements. These decisions seem at odds with the core understanding of what derivative harm represents. This sub-Part undertakes the difficult task of conceptualizing this doctrinal shift and justifying it in light of the shortcomings inherent in the derivative framework.

The court's recognition of a direct contractual right of action in *DiSorbo* exemplifies the doctrinal slippage that has crept into the post-*Dinuro Investments* landscape. Among the allegations was that Anthony's related entity paid below-market rent to the jointly owned LLC, only to sublease part of the space at a higher rate and pocket the spread. On its face, this is a textbook derivative claim. The underpaid rent and retained profits belong to the LLC,[127] not to any individual member. Aldo's interests declined in value because of the harm inflicted on the entity itself. Nevertheless, the court located a direct right of action on a boilerplate "good faith" clause common to virtually all operating agreements. How can such a result be squared with the prevailing doctrinal framework?

The answer lies in the court's instinct to reach an equitable and efficient resolution. To appreciate this rationale, consider a regime in which the exception to the derivative claim rule did not exist, and every harm to the entity, without exception, must proceed as a derivative claim. Under that regime, Aldo would be required to pursue his complaint through the derivative mechanism. By default, he would need to first file a demand with the LLC's managers. It is hardly speculative to assume that the managers would find a reason not to initiate a lawsuit against themselves.[128] Recognizing the absurdity of asking insiders to approve litigation against their own conduct, Aldo's claim would likely fall under the demand futility exception, given Anthony's majority control over the LLC's managerial rights.[129] But even that would not ensure judicial review of Aldo's allegations. Both the Florida LLC and corporation statutes provide a procedure through which the entity may reclaim control of the litigation.[130] Although judicial oversight is intended to ensure objectivity, the reality is that whoever controls the appointment of qualified managers or independent professionals retains at the very least a tactical advantage.[131]

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126 For completeness' sake, Ferk Family did bargain for a contractual right to elect managers and for a specific procedure for their removal. As signatories to the operating agreement, they had direct standing to sue for enforcement of these agreed-upon provisions.

127 Fla. Stat. § 605.04091(2)(a).

128 James D. Cox & Harry L. Munsinger, *Bias in the Boardroom: Psychological Foundations and Legal Implications of Corporate Cohesion*, 48 L. & CONT. PROB. 83 (1985) (explaining the social dynamics inherent in a group setting, resulting in an affinity amongst the in-group and distrust against the out-group).

129 Fla. Stat. § 605.0802(2).

130 Fla. Stat. § 605.0804.

131 *Accord* Lisa Fairfax, *The Uneasy Case for the Insider Director*, 96 IOWA L. REV., 127, 158 (2010) ("[D]irectors may feel beholden to their fellow directors because those directors nominate them and therefore control their ability to remain on the board. In fact, studies reveal that CEOs often dominate the director-nomination process,

Finally, even if Aldo clears each of these procedural hurdles and prevails on the merits, any recovery would return to the LLC. The implications of that outcome are difficult to overstate. Even if Anthony is ordered to repay the amounts he siphoned off, the money would go back to the LLC over which he still exercises majority control. Aldo's interest in the LLC may increase in value, but he would remain at Anthony's mercy when trying to extract that value. All of Aldo's effort, expense, and risk would produce no tangible benefit unless Anthony permitted it. The court's pursuit of an equitable resolution justifies its departure from doctrinal consistency.

The preceding analysis is not confined to LLCs, whose existence is grounded in the philosophy of expansive contractual freedom.[132] Although corporations in general lack the same breadth of contractual autonomy,[133] they too are governed by foundational documents of a contractual nature. Schmitz v. Schmitz is a recent example in which the Third District Court of Appeal interpreted a corporation's bylaws to permit a direct cause of action for harm that, under the accepted framework, would typically be deemed derivative.[134] The corporation in question was founded by the family patriarch in 1946. Before his death, he amended the bylaws to appoint himself and his three sons as directors for life. The bylaws also expressly provided that each brother was entitled to equal compensation and benefits from the corporation, while specifically disallowing commissions or any alternative forms of compensation. Upon each brother's death, those bylaw entitlements would pass to his widow.

Even the most carefully constructed plans can falter in the face of family rivalry. The widows of two deceased brothers grew suspicious of the sole management of the last surviving brother and demanded access to the corporation's financial records. His refusal led to a bitter trial that uncovered millions of dollars in payments he directed either to himself or to entities he controlled. Among the issues raised on appeal was the nature of the claims. The trial court awarded the widows individual damages for the wages and dividends that the brother paid himself but held that the remaining unauthorized self-dealing transactions constituted harm on the corporation that could only be addressed through a derivative action.

The Third District Court of Appeal reversed the trial court's ruling on that issue. Its rationale rested on the contractual nature of the "equal compensation" bylaw provision, which the last

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causing directors to feel beholden to CEOs. Thus, the director-selection process does little to incentivize effective monitoring and instead increases the potential for managerial and CEO capture. The too, this process enhances the structural bias within the boardroom because it increases the extent to which directors view their fate as linked with their fellow directors. Therefore, the director-selection process impedes the ability of directors to be truly independent.") (footnotes omitted). While the quoted text refers to directors in a publicly traded corporation, it rings even truer for chosen representatives at smaller business entities such as a typical LLC.

132 Fla. Stat. § 605.0111(1).

133 This statement is qualified by the fact that corporate statutes permit corporations to adopt far-ranging contractual arrangements if agreed upon by all shareholders; see, *e.g.*, Fla. Stat. § 607.0732. A recent amendment to Delaware's corporate code goes even further, allowing boards to enter into binding contracts that cedes their authority without shareholder approval; see DEL. COD. ANN. tit. 8 § 122(18).

134 Schmitz v. Schmitz, 401 So.3d 416 (Fla. 3rd DCA 2024). While the corporation at the heart of the proceedings was incorporated in Illinois, the Third District Court of Appeal applied the *Dinuro Investments* framework to discern the nature of the claim.

remaining brother had clearly breached. The bylaws reflected a prior shareholder agreement and stated that no sibling was entitled to receive any benefit that was also not extended to the others or their heirs. The brother's self-dealing transactions violated this contractual commitment. On that basis, the widows were permitted to proceed with a direct cause of action, even though it was the corporation that suffered financial harm from the misconduct.[135] While doctrinal purists might object, since nearly every unauthorized self-dealing transaction violates corporate documents or the statutes, the appellate court, like the court in *DiSorbo*, was likely motivated by considerations of fairness. Treating the harm as derivative would have returned at least part of the recovery to the wrongdoer, a result that would have undermined any meaningful sense of justice.

A reasonable objection to the preceding analysis deserves consideration. Corporate and LLC structures are designed to confer limited liability on equity holders and to insulate decisionmakers from personal exposure.[136] These protections reflect a deliberate policy choice to incentivize entrepreneurial risk-taking and facilitate capital formation. Without limited liability, investors would be hesitant to fund the ventures of founders who lack personal wealth. And if their bottom dollar was at risk, those same founders would be deterred from pursuing new business ideas altogether. Limited liability thus plays a central role in promoting economic growth. That logic appears to have influenced the *Dinuro Investments* court's reluctance to recognize a direct right of action on the facts before it.[137]

The *Dinuro Investments* court, however, appears to conflate two conceptually distinct issues. Limited liability relates to the relationship between entity owners and third party creditors; it protects owners' personal assets from claims arising out of the entity's unpaid debts. That principle has little bearing on the issue of whether one owner may pursue a direct cause of action against another for a breach of intra-entity agreements. When analyzing that question, other legal doctrines provide more appropriate guidance.

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135 *Id*., at 427 ("Here, both the breach of contract and breach of fiduciary duty counterclaims were founded on the unanimity provision of the shareholders' agreement, incorporated into the bylaws, which requires not only that all executives receive the same "benefits, compensation or emoluments" from SDC, but also that all of SDC's investments and expenditures be approved by all three executives. The agreement vested these rights not in the shareholders generally, but in John, Michael, and Thomas specifically as directors for life, to be automatically assumed by their surviving spouses (Lucila, Joan, and Chery) after their deaths. Thus, the injury pertained not merely to John's self-dealing at the expense of the company, but also Joan and Cheryl's inability to participate in the management of SDC by approving its investments and expenditures. The counter-complaint includes specific allegations to this effect, including expressly seeking damages for investments made without the approval of the other directors, and these claims are not equivalent to seeking damages for diminution of the value of SDC, which Joan and Cheryl never asserted.").

136 See Fla. Stat. § 607.0622(1) (limited liability for shareholders) and Fla. Stat. § 605.0304 (limited liability for members and managers).

137 *Dinuro Investments*, at 742 ("Conspicuously missing from the operating agreement is any provision stating that the members shall be directly liable to each other for breaches of the terms of the operating agreement. Absent such a stipulation, we presume individual members are **not** liable for obligation or decisions of the company, as limited liability is one of the paramount reasons for forming an LLC. Section 608.4227 of the Florida Statutes specifically provides that members are typically shielded from individual liability for their involvement with an LLC unless the terms of the articles of organization or the operating agreement provide otherwise.") (bold in original).

The operating agreement, corporate articles, and bylaws are contractual in nature. Although the entity is formally a party to these instruments, they are executed by the entity's owners and reflect the rights and obligations among them. A breach of those agreements does not occur in a vacuum; it necessarily stems from the conduct or omission of a party bound by the contract. In this context, limited liability is not the operative principle. The relevant doctrine is that liability flows to the party who breaches the contract. A more fitting analogy lies in the statutory or doctrinal carve-outs that strip limited liability when a shareholder or member personally commits a wrongful act.[138] The same logic supports imposing direct responsibility for contractual breaches among co-owners.

This sub-Part's endorsement of judicial flexibility in recognizing direct causes of action is tempered by two important caveats. First, the liberal approach to carving out exceptions from the derivative framework must rest on a contractual foundation. In other words, a court's willingness to permit a direct claim must be anchored in language contained in the operating agreement or the corporation's governing documents.

This is not to suggest that a direct claim based on a statutory duty is prohibited. To the contrary, such claims are a foundational element of entity litigation jurisprudence. It is well established that shareholders and members may directly enforce statutory rights, such as the entitlement to inspect entity records or receive a declared but undistributed dividend.[139] The concern arises, however, from the language in the LLC statute and certain corporate law dicta suggesting that fiduciary duties run not only to the entity but also to fellow owners.[140] If interpreted expansively, this principle risks collapsing the distinction between direct and derivative harm, allowing the statutory exception to swallow the rule.

The concern is illustrated by Wishinsky v. Choufani.[141] There, one member of an LLC launched a competing venture through his wholly-owned entity. The remaining member, understandably aggrieved, filed a suit alleging a breach of fiduciary duty. The trial court

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138 The Model Business Corporation Act's section on limited liability clarifies that limited liability does not extend to potential liability arising from the shareholder's owns acts or conduct; see MODEL BUS. CORP. ACT ANN. §6.22(b). While the Florida entity statutes have not copied this formulation from the model act, that entity owners face potential liability for their own problematic conduct is an established feature in Florida law; *see* Candyman Kitchens, Inc. v. Sandcrafters LLC, 2018 WL 6434058 (M.D. Fla., December 7, 2018) (denying LLC's sole member's motion to dismiss based on the fact that potential liability would arise from her alleged tortious conduct) and Eagle v. Benefield-Chappell, Inc., 476 So.2d 716 (Fla. 4th DCA 1985) (imposing liability on shareholders for their fraudulent activities).

139 See Fla. Stat. § 607.1602 (inspection of records by shareholders) and Fla. Stat. § 607.06401 (distribution to shareholders).

140 See Fla. Stat. § 605.04091(1) (fiduciary duties of loyalty and care run to the LLC and to the members) and Tillis v. United Parts, Inc. 395 So.2d 618, 619 (Fla. 5th DCA 1981) ("An application of these principles to facts similar to those in this case illustrated by Donahue v. Rodd Electrolyte Company New England, Inc., 328 N.E.2d 505 (1975). There is was held that the stockholders in a close corporation owed each other the same fiduciary duty as that owed by one partner to another in a partnership and that the action of controlling stockholders in authorizing purchase of stock by the corporation for themselves without granting an equal opportunity to minority stockholders to sell shares for the same price constituted a breach of that fiduciary duty.").

141 278 So.3d 803 (Fla. 5th DCA 2019).

dismissed the complaint on the grounds that it was pled as a direct claim. The Fifth District Court of Appeal reversed, relying on statutory language specifying that fiduciary duties in LLCs extend not only to the entity but also to fellow members.[142]

The *Wishinsky* court's reasoning raises doctrinal concerns. Even within a framework that favors broader recognition of direct causes of action, the derivative form remains the default mechanism for addressing harm to the entity. Contractual terms reflect the parties' deliberate intent to override or supplement the statutory baseline and to govern their affairs directly. It follows that parties should be able to enforce those terms directly, without resorting to derivative litigation. That same rationale does not translate to statutory fiduciary duties, which by their nature are public default rules rather than bespoke private agreements. In recognizing a direct claim for a breach of a default fiduciary duty, the court improperly elevates that provision over the derivative suit requirement, an equally fundamental statutory principle, without a similarly compelling justification.

Viewed through that lens, *DiSorbo* and *Wishinsky* warrant divergent assessments despite their superficial similarity. In *DiSorbo*, the brothers expressly bargained for the good-faith performance of their contractual obligations. Anthony's self-dealing plainly breached that agreement, and Aldo was appropriately granted a direct claim. If that result appears unpalatable, the remedy lies in transaction planning: drafters wishing to avoid direct actions can simply omit language that imposes individualized obligations that are enforceable outside the derivative framework. *Wishinsky*, by contrast, presents no such contractual foundation. Although the LLC statute codifies a duty of loyalty, it does so qualified terms that narrow Cardozo's famously sweeping articulation.[143] The result is a statutory default of uncertain scope layered atop an already ambiguous fiduciary standard. In such cases, where the governing documents are silent, judicial adherence to the derivative framework remains the more prudent course.

Second, the expansive approach to recognizing direct contractual claims is justified by Florida's institutional context. The state's derivative framework lacks a mechanism for directing monetary recovery to aggrieved shareholders rather than to the entity. In jurisdictions with a robust oppression remedy, courts can craft relief that compensates harmed shareholders

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142 *Id*., at 804-5 ("[A] manager owes the statutory duties of loyalty, care, and good faith and fair dealing to the members of an LLC… Appellant's constructive fraud action sufficiently alleges the breach of these duties… Therefore, based on the four corners of the fifth amended complaint, we conclude that count I sufficiently alleges a direct cause of action against Appellee pursuant to the special duty statutory exception.").

143 *Compare* Meinhard v. Salmon, 249 N.Y. 458, 464 (N.Y. 1928) ("Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter that the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.") with Fla. Stat. § 605.04091(5) (a manager or member of an LLC does not violate a fiduciary duty solely because the conduct furthers his own self-interest).

directly.[144] Florida's version of that doctrine, however, does not fill that role.[145] If alternative mechanisms emerge, originating either by legislative activity or judicial decree, the rationale for expanding the contractual exception will weaken. Until then, and subject to the prior caveat, this Article endorses the judiciary's broad approach.

C. Affirming a Direct Claim for Equity Elimination and Dilution

The last sub-Part turns to the doctrinal treatment of equity elimination and dilution. Both actions have the potential to divert value away from shareholders, but in distinct ways.[146] Equity elimination, sometimes referred to as a cash-out, requires shareholders to surrender their ownership at a price approved by the majority, even if a disgruntled shareholder believes the compensation is inadequate.[147] Equity dilution, by contrast, does not terminate ownership. Instead, existing shareholders retain their shares, but the issuance of additional equity reduces their relative voting power and economic stake.[148] Florida law lacks a clear statement on whether these harms support a direct cause of action. This sub-Part argues that they do and urges Florida courts to recognize both equity elimination and dilution as valid grounds for direct shareholders claims.

The analysis begins with equity elimination, which presents a more straightforward path to the correct conclusion. For the most recent articulation of Florida law, we return to *Arbitrage*

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144 *See generally*, Cardiac Perfusion Services, Inc. v. Hughes, 436 SW3d 790, 792 (Tex. 2014) ("[A] minority shareholder in a closely held corporation may recover relief, in some cases individually as well as on behalf of the corporation, through a derivative action for breach of fiduciary duties… [T]he legislature has enacted special rules to allow its shareholders to more easily bring a derivative suit on behalf of the corporation, … [a]nd when justice requires, the court may treat a derivative action on behalf of a closely held corporation as a direct action brought by the shareholder for the shareholder's own benefit, and award any recovery directly to that shareholders.") (quotations omitted).

145 Pierce Schultz, Minority *Shareholder Oppression in Florida: Legal Insights and Protections*, 99 FL. BAR J. 38 (May/June 2025), available at https://www.floridabar.org/the-florida-bar-journal/minority-shareholder-oppression-in-florida-legal-insights-and-protections/#u6dc3 (detailing the toothlessness of the Florida oppression remedy).

146 Vladimir Atanasov, Bernard Black, & Conrad S. Ciccotello, *Law and Tunneling*, 37 J. CORP. L. 1, 5-6 (2011) ("Equity tunneling increases the controller's share of the firm's value, at the expense of minority shareholders, but does not directly change the firm's productive assets or cash flows. Examples of equity tunneling include dilutive equity issuances and freeze-outs of minority shareholders. If one describes a firm as a grove of apple trees, which grow better together than apart, these tunneling techniques can be described as follows: cash flow tunneling can be seen as stealing some of this year's crop of apples; asset tunneling out of the firm involves stealing some of the trees which could potentially make the remaining trees less valuable; and equity tunneling would involve stealing claims to ownership of the grove.") (all quotations omitted).

147 The cash-out can be achieved by several different procedures. The most common is a merger in which the shareholders of the target corporation relinquish their shares for cash consideration. The target corporation is thereafter absorbed by the acquiring corporation and ceases to exist. This Article argues that all transactions that result in equity elimination justify a direct cause of action to the eliminated shares, regardless of the chosen transactional structure.

148 Since a share's voting and economic power are always relative to the number of outstanding shares, each additional issuance necessarily decreases an existing share's relative power.

Fund.[149] As discussed earlier, the plaintiffs in that case challenged a cash-out merger that terminated their equity interests while allowing the controlling shareholders to retain ownership in the post-merger entity and continue their employment. The Third District Court of Appeal held that neither the elimination of equity interests nor the continued employment arrangements constituted direct harm to the cashed-out shareholders. The court reached a different conclusion with respect to the roll-over option, which was made available only to members of the controlling group. The inability of the common shareholders to participate in that opportunity amounted to a direct injury and supported a direct cause of action that could be brought on a class-wide basis.

This sub-Part takes no issue with the court's conclusion regarding the roll-over option. The inability to participate in the equity roll-over is a harm borne by the shareholders themselves, not the corporation. That said, it remains necessary to address the court's reasoning for rejecting a direct claim based on the equity elimination itself, as well as the controlling group's ability to secure continued employment in the post-merger entity.

The *Arbitrage Fund* court's conclusion that equity elimination constitutes only derivative harm is clearly misguided and should be overturned at the earliest opportunity.[150] Shares represent both an entitlement to vote on certain corporate matters and a residual claim to the corporation's assets after satisfying non-equity obligations.[151] Once issued, shares become the personal property of the shareholder. They are not treated as corporate assets and are therefore not represented as such on the corporation's balance sheet.[152] If a corporation purchases its own shares, those shares revert to authorized but unissued status, stripped of any rights.[153] Because issued shares are not assets of the corporation, the entity is agnostic about the price for which they are sold.[154] It follows that an underpayment for shares as part of a forced equity elimination inflicts harm on the shareholder alone and supports a direct cause of action. This principle should be firmly embedded in Florida law without further delay.

The conclusion that post-merger employment concessions for members of the control group support only a derivative claim is similarly flawed. The *Arbitrage Fund* court analogized these

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149 See footnotes 71-76 and corresponding text.

150 Arbitrage Fund at 125 ("Here, it is clear that the Unaffiliated Shareholder's inability to obtain a higher price for its shares, if harmful at all, first flowed to – and actually devalued – the Corporation, there existing only one type of stock, all of which suffered from the price difference. This only secondarily affected the Unaffiliated and Affiliated Shareholders alike.") (footnote omitted).

151 Fla. Stat. § 607.0601(2) (stating that a corporation's articles of incorporation must authorize shares that have unlimited voting rights and entitlement to the corporation's net assets after dissolution).

152 Robert J. Rhee, ESSENTIAL CONCEPTS OF BUSINESS FOR LAWYERS 25-6 (3rd. ed., 2020).

153 Fla. Stat. § 607.0631(1).

154 Of course, the corporation can fund purchases by issuing shares to the seller. A share overpayment in that scenario can be likened to an overpayment of cash, thereby decreasing the amount of the corporation's assets. The Article will shortly discuss the topic of equity dilution and explain why a share overpayment nonetheless represents a direct harm.

side-agreements to corporate mismanagement that diminishes the value of corporate assets.[155] In doing so, it relied on Fritz v. Fritz,[156] which did classify allegations of mismanagement and self-dealing as derivative harm. That comparison, however, is misplaced for several reasons. First, the *Fritz* court applied the two-prong test from *Dinuro Investments* to conclude that the harm flowed first to the entity. While that analysis may have been appropriate at the time, *Fritz* predated the 2020 statutory amendment, which codified a different standing rule that omitted *Dinuro Investments*' "special injury" requirement. *Fritz*'s precedential value is therefore limited.[157] Second, and more critically, *Fritz* addressed the classic scenario where self-dealing harms the corporation directly. That general principle, while correct, is inapplicable to the claims advanced in *Arbitrage Fund*. There, the plaintiffs alleged that their shares were eliminated at an unfairly low price. A share's value is tied to the corporation's overall asset base. When those negotiating the sale stand to receive personal benefits from the buyer, their incentives may diverge from those of the shareholder class. In such cases, there is legitimate concern that the negotiators may accept a discounted price for the shares in exchange for favorable personal treatment.[158] That concern applies equally to employment concessions and equity roll-over rights. There is no principled reason for the *Arbitrage Fund* court to have treated the two differently. Both support a direct claim.

However, the *Arbitrage Fund* court's inconsistent treatment of conceptually similar side-arrangements pales in comparison to the more fundamental flaw in its reasoning. Equity elimination, by its nature, inflicts direct harm on shareholders, regardless of whether certain target shareholders or officers receive additional concessions.

This conclusion aligns with the broader policy goals that shareholder litigation is meant to serve. A hypothetical cash-out of all equity holders illustrates the point. Suppose every shareholder receives identical consideration per share, and the fiduciaries negotiating the transaction do not receive any special benefit. Even under these facts, shareholders remain

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155 Arbitrage Fund at 125-6 ("As to the Affiliated Shareholders and Officers' personally favorable concessions obtained from the prevailing bidder, such as continued off ice or paid employment in the new entity, their harm also flowed first to the corporation, devaluating or dilapidating its net worth and assets, and only secondarily to all shareholders alike. As a variety of mismanagement, such concessions first affected the assets of the Corporation, which could sue to recover the loss.").

156 219 So.3d 234 (Fla. 3rd DCA 2017).

157 *See* Sub-Part IV.A *supra*.

158 In re LNR Property Corp. Shareholders Litig., 896 A.2d 169, 176 (Del. Ch. 2005) ("[W]hen a controlling shareholder stands on both sides of a transaction, he or she is required to demonstrate [his or her] utmost good faith and most scrupulous inherent fairness of the bargain. Accordingly, in an interested cash-out merger transaction where the controlling shareholder is as much a buyer as a seller, no court could be certain whether the transaction terms fully approximate what truly independent parties would have achieved in an arm's negotiation.") (quotations and citations omitted). A cash-out in which directors of a Florida corporation receive a side-payment from the buyer will most likely require the sell-side directors to prove the transaction's fairness, thereby mimicking the Delaware result. See Fla. Stat. § 607.0832(1)(a) (defining "Director's conflict of interest transaction") and Fla. Stat. § 607.0832(3)(a) (clarifying the uniform fairness requirement for all "Director's conflict of interests transactions.").

vulnerable to conflicts of interest.[159] They may reasonably fear that the negotiating agents skewed the process in favor of a preferred bidder, even for a lower price.[160] Such shareholder challenges are known as *Revlon* claims, a reference to the Delaware decision that established the legal framework for reviewing a board's conduct in the context of a corporate sale.[161]

A procedural feature of shareholder litigation underscores why cash-out challenges must be treated as direct claims.[162] As explained earlier, derivative harm requires that any recovery be awarded to the corporation. That principle was one of the justifications for recognizing expansive direct claims in the context of minority shareholders or members in a closely held LLC. It applies with equal force in a cash-out scenario. If the claim is classified as derivative, then conventional doctrine holds that the remedy belongs to the corporation. But this creates a fundamental problem. At the conclusion of the cash-out, the target corporation no longer exists because of a merger, or it survives solely as a wholly owned subsidiary of the acquirer. In that situation, forcing the wrongdoers to compensate the corporation is functionally equivalent to having them compensate themselves, while the truly injured shareholders receive nothing. To avoid this absurdity, *Revlon* claims and other challenges to cash-outs are properly understood as alleging direct harm.[163]

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159 *See In re* Dollar Thrifty S'holder Litig., 14 A.3d 573, 597 (Del. Ch. 2010) ("The heightened scrutiny that applies in [the intermediate standard of review] contexts are, in large measure, rooted in a concern that the board might harbor personal motivations in the sale context that differ from what is best for the corporation and its stockholders. Most traditionally, there is the danger that top corporate managers will resist a sale that might cost them their managerial posts, or prefer a sale to one industry rival rather than another for reasons having more to do with personal ego that what is best for stockholders.") (footnotes omitted).

160 While market forces are generally assumed to keep the corporation's board honest, the elimination of the shareholders represents a "final period interaction." This distinction is significant, as the allure of future rewards and the threat of retaliation no longer combine to keep the directors in check; see Sean J. Griffith, *Deal Protection Provisions in the Last Period of Play*, 71 FORDHAM L. REV. 1899, 1942 (2003) ("The last period problem is a recognized phenomenon in game theory and rational choice economics. Cooperative undertakings predictably deteriorate in the last period because participants are more likely to pursue selfish objectives once they recognize that the system of rewards and punishments favoring cooperation during the life of the enterprise soon will no longer apply. In game theory, this phenomenon is most visible in the final period of 'social dilemma' games, such as the prisoner's dilemma.").

161 Revlon, Inc. v. MacAndrews & Forbes Holdings, 506 A.2d 173 (Del. 1986); *see* Matthew D. Cain, Sean J. Griffith, Robert J. Jackson, Jr. & Steven Davidoff Solomon, *Does* Revlon *Matter? An Empirical and Theoretical Study*, 108 CALIF. L. REV. 1683, 1684-85 (2020) ("The *Revlon* doctrine has reached almost mythical status… *Revlon* is one of the few cases every corporate lawyer knows. The case been cited thousands of times in Westlaw. It is covered in every corporations casebook and has been the subject of hundreds of law review articles.") (footnotes omitted).

162 Another potential problem with requiring cashed-out shareholders to proceed via the derivative mechanism stems from the contemporaneous ownership requirement to maintain standing. In some jurisdictions, once a shareholder sells her shares, either voluntarily or as part of forced cash-out, she loses her standing to pursue a derivative claim; see El Paso Pipeline GP Co. v. Brinckerhoff, 152 A.3d 1248, 1265 (Del. 2016). While the Florida statute does not specify continued ownership as a condition to standing, there is no telling how the case law might evolve on this issue; see Fla. Stat. § 607.0741(1) (clarifying who is eligible to commence a derivative proceeding).

163 Brookfield v. Asset Management, Inc. v. Rosson, 261 A.3d 1251, 1276-7 (Del. 2021) ("… Revlon[] provide[s] a basis for a direct claim for stockholders to address fiduciary duty violations in a change of control context. And as we observed in El Paso, equity holders confronted by a merger in which derivative claims will pass to the buyer have the right to challenge the merger itself as a breach of the duties they are owed.") (footnotes and quotations

The sub-Part now turns to equity dilution, which typically occurs when a corporation issues additional shares.[164] Admittedly, the argument that dilution should also give rise to a direct claim presents more of an uphill battle than the case for equity elimination. Florida case law is inconsistent on this point, and the position advanced here departs from current Delaware precedent. Nevertheless, the recommendation that follows rests on a firm analytical foundation.

The analysis begins with a return to the judicial decisions in *DiSorbo* and *Benes*. In *DiSorbo*, one brother used LLC funds to acquire a greater percentage of membership interests at the other's expense. Even though the transaction was financed with entity assets, the Fifth District Court of Appeal held that the resulting dilution constituted a direct injury. By contrast, the court in *Benes* reached the opposite conclusion in an equity dilution claim. There, a bank carried out a share exchange that led to the issuance of additional common shares, which diluted the voting and economic rights of the existing common shareholders.

The direct claim for the equity dilution in *DiSorbo* is readily defensible. The dilution did not stem from the issuance of new interests, as is typical, but rather by using LLC assets to buy out former members and transferring their ownership interests to Anthony. Technically, the use of LLC assets to purchase entity interests is a "distribution" that was made available to only one member.[165] A core principle of entity law is that distributions must be made proportionately among all members of the same equity class. The requirement for proportional distribution is a statutory entitlement,[166] and when a distribution favors only a subset of members, those excluded are entitled to bring a direct claim to enforce their right.

By contrast, the *Benes* court's reasoning for treating equity dilution as derivative harm suffers from several flaws. The first is tied to the specific features of the bank's multi-tiered capital structure and should not be generalized to all dilution scenarios. As previously noted, the plaintiffs in *Benes* also raised the issue of a statutory class vote.[167] The relevant "voting group" provisions are triggered when a distinct class of shares suffers a unique harm that a majority vote would otherwise be able to impose.[168] To protect the interests of the affected class, the FBCA grants that group a standalone veto right. This right applies even when the articles of incorporation are silent or even when they explicitly eliminate the class's voting rights altogether.

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omitted). Examples of cash-out mergers that were challenged via a direct claim include: In re Orbit/FR, Inc. S'holders Litig., 2023 WL 128530 (Del. Ch. Jan. 9, 2023), Firefighters' Pension Sys. Of City of Kansas City, Missouri Tr. V. Presidio, Inc., 251 A.3d 21 (Del. Ch. 2021), and Parnes v. Bally Ent. Corp., 722 A.2d 1243 (Del. 1999).

164 To be sure, shareholders can bargain for preemptive rights to maintain their ownership percentage. Absent such provision, however, shareholders do not have an entitlement to preemptive rights; see Fla. Stat. § 607.0630.

165 *See* Fla. Stat. § 605.0102(17) (defining distribution).

166 *See* Fla. Stat. § 605.0404(1) (default proportional distributions to LLC members).

167 *See* footnotes 114-5 and corresponding text.

168 Fla. Stat. § 607.1004. Examples include: changing the designations, rights, or preferences of the affected class; creating a new class with superior distribution or liquidation rights; or cancelling or otherwise affecting a class's rights to an accumulated but undeclared distribution.

This background sets the stage for revisiting the *Benes* court's treatment of the statutory voting issue. One statutory basis for a class vote is an amendment to the articles of incorporation that "[e]ffect[s] an exchange or reclassification … of all or part of the shares of *another* class into the shares of the class."[169] According to the court's opinion, U.S. Century sought and obtained general shareholder approval to amend the number of authorized shares in its articles of incorporation. The Circuit Court dismissed the request for a class vote without providing any explanation.[170] It is possible that the bank had only a single class of voting shares, in which case a class vote would have been superfluous. Even so, judicial clarity on this point would have advanced the goal of guiding future transactional planners and ensuring predictable application of the statute. In any event, the potential triggering of a class vote under FBCA § 607.1004 exemplifies the kind of statutory duty that, if violated, gives rise to a direct claim.

This Article contends that the plaintiffs in *Benes*, like shareholders in any equity dilution scenario, are entitled to assert a direct claim, even in the absence of a multi-class capital structure that would trigger a statutory class vote. To support this conclusion, we revisit the precedents cited by the *Benes* court and demonstrate why those authorities are inapplicable to the question before it.

Benes cited several Florida cases for the proposition that the decline in share value, standing alone, constitutes derivative rather than direct harm to the shareholders. Its reliance on *TMV Corp. v. Lander Co., Inc.*, is particularly tenuous for several reasons.[171] To start, *TMV Corp.* is not an equity dilution case. It involved an appeal from a bankruptcy decision that denied a sole shareholder's attempt to pursue arbitration outside the bankruptcy proceedings filed by its corporate subsidiaries. Approximately six months before bankruptcy, the subsidiaries entered into distribution agreements that included indemnification provisions requiring the distributor to cover losses arising from misrepresentations or breaches. Although the shareholder was not a party to the distribution agreement, it signed a joinder and consent to its terms. On that basis, the shareholder asserted a direct cause of action that would avoid the automatic stay triggered by the bankruptcy filing. The District Court affirmed the Bankruptcy Court's denial of the claim.

Crucially, *TMV Corp*. relied on earlier Florida precedent that required shareholders pursuing a direct claim to establish both a special duty owed by the wrongdoer and a separate and distinct injury. While that framework may have been defensible at the time, given the lack of clarity in the case law, *Benes* was decided in the last days of 2023 – several years after the 2020 statutory amendment that codified a different standard. Its continued reliance on a case that referenced the outdated test was therefore misguided.

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169 Fla. Stat. § 607.1004(1)(b) (emphasis added).

170 Benes, at 7 ("Defendants were not required to further amend the Articles (beyond authorizing the issuance of additional shares of common voting stock, which was done…) to authorize the Exchange Transaction, and there was nothing for Defendants to submit to a vote of the holders of Class A voting common stock.").

171 TMV Corp. v. Lander Co., Inc., 2008 WL 11333695, at *6 (S.D. Fla. June 30, 2008) ("under Florida law, the dilution of a value of shareholder's stock in a company, without more, is insufficient to establish a 'separate and distinct' injury.").

But that pales in comparison to the more fundamental issue: *TMV Corp.* is not an equity dilution case. The dispute centered on whether the sole shareholder of bankrupt subsidiaries had a direct cause of action based on the joinder agreement they had signed. If this fact pattern were analyzed under current law, it would fall squarely within the contractual duty exception now codified in the statute. *TMV Corp.* offers no meaningful guidance on the central question in *Benes*, which is whether equity dilution constitutes direct or derivative harm.

Another case cited by the *Benes* court is equally unhelpful in supporting its conclusion against recognizing a direct claim for equity dilution. In Kammona v. Onteco Corp., the central allegation was securities fraud.[172] Under the rules of civil procedure, plaintiffs must plead the factual basis for fraud with particularity.[173] Additionally, securities fraud claims are subject to heightened pleading standards. The pro se plaintiff relied exclusively on the corporation's press releases to substantiate his allegation. That evidentiary showing fell far short of the demanding standard, and the fraud claim was easily dismissed.

A similar fate befell the claim for equity dilution arising from reverse stock splits.[174] Because *Kammona* predated both *Dinuro Investments* and the 2020 statutory codification, the District Court relied on precedent that required shareholders to demonstrate both a separate and distinct injury to sustain a direct claim. The *Kammona* court acknowledged that equity dilution could constitute a direct harm, but concluded that since the harm was experienced by all shareholders, it no longer qualified as distinct and therefore could not support a direct action.[175] Taken to its logical extreme, this reasoning would permit direct claims only when the challenged conduct affected no more than a handful of shareholders, effectively nullifying the availability of class actions. This overly restrictive interpretation was rightly excluded from 2020 statutory amendment. Even without reference to the statutory amendment, *Arbitrage Fund* minimized the distinct harm inquiry due to its incompatibility with the class action mechanism.[176] Despite relying on *Arbitrage Fund* for the general assessment of identifying a direct claim, *Benes* ignored its reasoning regarding the importance of maintaining a pathway to a class action. In sum, the *Benes* court misguidedly relied on *Kammona*'s outdated reasoning while overlooking the statutory and doctrinal developments that rendered it inapplicable.

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172 Kammona v. Onteco Corp., 962 F. Supp. 2d 1299 (S.D. Fla, July 19, 2013).

173 Fed. R. Civ. P. 9(b).

174 A reverse stock split is typically effectuated through an amendment to the articles of incorporation that consolidates multiple shares of the same class into a single share. For example, a 100-to-1 reverse split would convert every 100 shares of common stock into one share. Reverse splits are often used to increase the trading price of individual shares. Although the process may appear straightforward, it creates potential for shareholder harm when an investor holds a number of shares that does not divide evenly under the consolidation ration. In such cases, the amendment may authorize the elimination of fractional shares, resulting in an involuntary ownership dilution.

175 Kammona, at 1303 ("To the extent Plaintiff's voting rights were affected by the dilution of his equity through reverse stock splits, he would be allowed to bring a direct claim; however, all stockholders in Onteco could make the same argument.").

176 See footnotes 75-6 and corresponding text.

After dispensing with the cited Florida cases and explaining their lack of support to the issue at hand, we now turn to the positive argument for recognizing equity dilution as direct harm. The operative inquiry, drawn from the statutory framework, is whether the shareholder has suffered an injury that "is not solely the result" of harm to the corporation. In a typical equity dilution scenario, the corporation issues additional shares, thereby reducing the relative ownership interests of existing shareholders. It is a stretch to claim that this issuance harms the corporation. By definition, the corporation receives cash or some other form of consideration in exchange for the newly issued shares.[177] A corporation does not own its shares, and they are not recorded as assets on its balance sheet. Following the issuance, the corporation's net assets increase, while nothing of value is given in return. It is unclear how an influx of cash without a corresponding outflow of assets constitutes harm to the corporation.[178] One could speculate that the shares were sold at a discount, and that the corporation forfeited the opportunity for a higher price.[179] Even if such a claim were cognizable under the statute, it would not displace the direct harm suffered by the shareholders.

The following examples illustrate the crux of the argument. A share issuance may cause direct harm to a shareholder through voting dilution, economic dilution, or both. Consider a newly formed corporation with two shareholders, Able and Bravo. Each contributes $100 for one share, and because the corporation has not commenced operations, each share has a book value of $100. Now assume that the board determines that an additional $200 in capital is required to launch the business. Able is unable to contribute more funds, but Bravo agrees to purchase two additional shares for $200. The corporation now holds $400 in assets and has four outstanding

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177 Fla. Stat. § 607.0621(2) (the board of directors may issue shares for consideration consisting of any tangible or intangible property or benefit to the corporation).

178 James An, *The Distinction Between Direct and Derivative Shareholder Claims*, 93 GEO. WASH. L. REV. 289, 313 (2025) ("[T]o the extent that a dilutive offering entails any negative effects, such effects fall solely upon previous shareholders. This is because when a corporation undergoes a stock offering, the corporation's net assets and total equity value do not shrink – instead, they either grow (in cases in which the corporation received something in exchange for the new stock) or, at worst, stay constant (in cases in which the corporation received nothing in exchange for the new stock. Therefore, in cases of dilution, there is no valid derivative claim, as the corporation suffered no harm or injury through which shareholders could be derivatively harmed. Instead, properly analyzed under the lens of corporate harm, all claims relating to such dilutions can only be direct claims.") (footnotes omitted).

179 *Id.*, at 314-5 ("According to the Delaware court, in stock overpayment cases, corporate harm supposedly derives from exchanging high-value treasury stock for a low-value asset. However, this conception is flawed because unissued treasury stock has no value at all from a corporate balance sheet perspective and is not an asset of the corporation in any meaningful sense. Otherwise, a corporation could increase its value – and increase its existing shareholders' wealth – simply by creating more unissued shares. To the extent that an equity issuance ever constitutes overpayment, it is not the corporation's assets that are offered as the overpayment but rather those of the existing shareholders. But, absent a corporate harm, there is little rationale for drawing derivative claims from such fact patterns.") (footnotes omitted) and Christine J. Chen & Carson Zhou, *Tooley Brooks No Exceptions – Equity Dilution is Direct*, 26 U. PENN. J. BUS. L. 1, 31 (2023) ("The strongest rebuttal in favor of treating dilution claims as derivative is that the company can at least sell treasury and authorized stock for consideration. So, accepting lower payment for stock when the company could have pressed for a higher price inflicts an entity-level opportunity cost. But Tooley's first prong asks "who suffered the alleged harm" from a challenged transaction, not who gets the benefit… [E]ven if one accepts that opportunity cost accrues to the entity, that does not erase the separate injury to stockholders caused by a redistribution of their economic and voting rights – an injury that does not affect corporate value. At most, then, this would give rise to a dual-natured claim.").

shares. Each share retains a book value of $100. Able still owns one share, but his voting power has been diluted from 50% to 25%. The corporation is indifferent to its shareholders' identity and relative voting power, and Able should be entitled to a direct claim to assert the harm suffered from this issuance.[180]

Contrast that with a scenario in which the corporation raises only $120 dollars through the issuance of two new shares, again purchased solely by Bravo. The corporation now holds $320 in assets, with four shares outstanding, resulting in a per-share book value of $80. Able's voting power again drops from 50% to 25%, but unlike in the prior example, the economic value of his shares has also declined – from $100 to $80. That $20 reduction has not vanished; it now resides in the increased book value of Bravo's shares.[181] In this scenario, Able has suffered both voting and economic dilution, and should be entitled a direct claim to address each harm.

To be sure, this recommendation departs from prevailing Delaware authority. Although Delaware case law on the issue is somewhat muddled, the general rule has been that equity issuances give rise to derivative, rather than direct, harm.[182] Over time, Delaware courts recognized an exception, permitting direct claims where the equity issuance resulted in a transfer of control to a new shareholder group.[183] This appears to explain why the *Benes* court considered whether the share exchange altered control of the bank. Regardless, that exception was explicitly foreclosed in 2021, several years before *Benes* was decided. Under Delaware's current framework, all equity issuances are treated as inflicting harm solely on the corporation and must proceed derivatively.[184]

Although Delaware remains the dominant voice in corporate law, this Article urges Florida courts to reject its position on equity dilution and adopt a more analytically coherent alternative.[185] As shown above, equity issuances can cause direct harm by diminishing a shareholder's voting power, economic interest, or both. Delaware's unwillingness to revisit its

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180 This is not to say that the issuance is necessarily void or fraudulent. The board of directors is authorized to issue new shares, and absent a compelling allegation of a fiduciary breach, the issuance should be assessed via the business judgment rule standard of review. The Article contends that the plaintiff should be granted a direct cause of action to plead a fiduciary breach and the resulting damage.

181 The two issuances have resulted in $320 in assets for the corporation. Each of the four issued shares has a book value of $80. Bravo, who has paid an aggregate of $220 for three shares, now owns share with a total book value of $240.

182 Chen & Zhou, footnote 179 supra, at 4 ("… *Brookfield* reaffirmed reasoning in the former line of cases holding that equity dilution claims are derivative, even though that conclusion too is a special injury holdover. Indeed, both *Tooley* and *Brookfield* expressly rejected the idea that whether a claim is direct or derivative should be informed by whether an injury accrues to only some as opposed to all stockholders. But by virtue of seven decades of repetition, the "traditional" or "classical" view that equity dilution claim are derivative is now firmly entrenched as blackletter Delaware law despite Tooley's exclusive application.") (footnote omitted).

183 Gentile v. Rosette, 906 A.2d 91 (Del. 2006).

184 Brookfield Asset Mgmt., Inc. v. Rosson, 261 A.3d 1251 (Del. 2021).

185 This recommendation aligns with my efforts to promote a Florida-specific framework for evaluating potential director oversight liability; *accord* Itai Fiegenbaum, *Director Oversight in Florida: Getting the Balance Right*, FLORIDA L. REV. FORUM (forthcoming).

doctrine has drawn criticism and may be attributable to institutional dynamics that do not apply in Florida. As an incorporation hub, Delaware faces an outsized volume of shareholder litigation, including a significant number of low-merit lawsuits filed primarily to extract settlements that benefit plaintiffs' attorneys rather than the shareholder class.[186] Legal developments that constrain this dynamic, such as the narrowing of direct claim eligibility, can be understood as a response to this litigation environment.[187] Florida, by contrast, has not experienced a similar influx of strike suits and therefore has no reason to replicate Delaware's restrictive approach. In addition, Delaware doctrine is uniquely attuned to public corporation litigation:[188] Delaware can be strict in allowing shareholder claims to proceed under the knowledge that alternative accountability forces will help rein in misbehaving insiders without the need for costly litigation.[189] By contrast, Florida doctrine should be geared toward privately held entities, in which the threat of punishment from other markets does not overcome the allure of self-serving behavior. For these reasons as well, Florida courts should follow *DiSorbo*, not *Benes*, and recognize equity dilution as a legitimate basis for a direct claim.

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[186] See Jill E. Fisch, et al., *Confronting the Peppercorn Settlements in Merger Litigation: An Empirical Analysis and a Proposal for Reform*, 93 TEX. L. REV. 537 (2014) (documenting the near-ubiquitous shareholder challenge following a merger announcement and subsequent settlement dynamic) and Elliot J. Weiss & Lawrence J. White, *File Early, Then Free Ride: How Delaware Law (Mis) Shapes Shareholder Class Actions*, 57 VAND. L. REV. 1797 (explaining the litigation dynamics in merger challenges).

[187] Other examples include the expanded availability of shareholder voting and independent director approval to lower the standard of review for conflict transactions and more exacting judicial oversight of settlement agreements to ensure they produce a benefit to the shareholders, and not just the plaintiff's attorneys. *See* In re Trulia Stockholder Litig., 129 A.3d 884 (Del. Ch. 2016) (requiring that settlements provide a benefit to shareholders as a condition to their approval), Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304 (Del. 2015) (holding that shareholder approval reinstates business judgment rule review for challenged mergers governed by the intermediate standard of review), Kahn v. M & F Worldwide Corp., 88 A.3d 635 (Del. 2014) (providing a framework to reinstate business judgment rule review for controlling shareholder freezeouts, which are otherwise governed by the entire fairness standard of review).

[188] *Accord* Stuart R. Cohn, *Dover Judicata: How Much Should Florida Courts be Influenced by Delaware Corporate Law Decisions?* 83 FLA. BAR J. 20 (2009) ("The prominence of Delaware courts should not, however, lead to an overly submissive attitude or one that gives undue influence to Delaware decisions. To be sure, relevant Delaware decisions should be carefully considered and, on occasion, can be substantially persuasive. Nevertheless, there are considerable differences between Florida and Delaware that ought to provide caution to Florida courts… Many of the principal Delaware decisions deal with publicly-held corporations. In contrast, Florida has relatively few publicly-held companies incorporated in this state. Much of our corporate litigation involves small corporations with few shareholders.").

[189] Stephen M. Bainbridge, *Unocal at 20: Director Primacy in Corporate Takeovers*, 31 DEL. J. CORP. L. 769, 785 (2006) ("Corporate directors operate within a pervasive web of accountability mechanisms that substitute for monitoring by residual claimants. A variety of market forces provide important constraints. The capital and product markets, the internal and external employment markets, and the market for corporate control all constrain shirking by firm agents.").

V. Conclusion

Florida law on entity litigation has undergone meaningful evolution since *Dinuro Investments* laudable attempt to clarify the boundary between direct and derivative claims. Yet a decade later, significant ambiguity remains. Courts continue to cite *Dinuro Investments'* two-prong test, despite a legislative amendment that excised one of its core requirements. At the same time, judicial practice has drifted from the doctrinal rigidity of *Dinuro Investments*, especially when equitable considerations or institutional deficiencies in the derivative framework make the direct cause of action a more sensible vehicle. These developments, combined with a uniform codification of direct standing in Florida's main business entity statutes, signal a turning point in Florida's approach.

This Article has argued for a coherent, statutory-grounded framework that recognizes the erosion of the "special injury" prong, embraces a more practical interpretation of the contractual exception, and treats equity elimination and dilution as valid bases for direct claims. These clarifications would not only bring doctrinal consistency, but also better serve the functional goals of shareholder litigation: accountability, deterrence, and access to justice. As Florida continues to grow as a hub for business activities, its legal infrastructure must be able to meet the demands of increasingly complex intra-entity disputes. The recommendations offered here aim to advance that goal by aligning judicial doctrine with statutory design and commercial reality.