

Preliminary Thoughts re Direct Actions
(To: Philip Schwartz & Gary Teblum)

The issue for the Subcommittee to consider is whether a shareholder may bring a direct action under section 607.0750(2)(a) by alleging (1) direct harm alone or (2) direct harm and special injury (the two prong test from Strazzulla). This same question applies to a member of a limited liability company under 605.0801(2)(a) (Dinuro) or a partner in a limited partnership under 620.0201(2).

The language in the statutes is derived from two uniform acts, and the authority cited in the comments to those acts supports the single “prong” test, while the judicial rules of Dinuro and Strazzulla, which did not construe the statutory language, require the two-prong test. See excerpts from ULPA § 901 & ULLCA § 801. The MBCA provides an alternative test based on harm and proximate cause. See excerpts from MBCA § 8.31.

In *Dinuro Investments, LLC v. Camacho*, 141 So.3d 731, 733 (Fla. 3d DCA 2014), the Third District Court of Appeal held that in order for a member of a limited liability company:

to bring suit against other members of an LLC individually, a member must allege either (1) direct harm and special injury; or (2) a special contractual or statutory duty owed from the defendant member to the plaintiff member.

Fla. Stat. § 605.0801 did not apply to the case.

In *Strazzulla v. Riverside Banking Co.*, 175 So.3d 879, 886 (Fla. 4th DCA 2015), the Fourth District Court of Appeal held that:

in order for shareholders to bring a direct action in their individual capacity, the complaint must satisfy a two prong test and allege both a direct harm and a special injury, or must meet the exception of alleging a special duty to the individual shareholders.

Fla. Stat. § 607.0750 did not apply to the case.

Fla. Stat. § 607.0750(2)(a) provides:

(2) A shareholder maintaining a direct action under this section must plead and prove either:

(a) An actual or threatened injury that is not solely the result of an injury suffered or threatened to be suffered by the corporation,

(b) An actual or threatened injury resulting from a violation of a separate statutory or contractual duty owed by the alleged wrongdoer to the shareholder,

even if the injury is in whole or in part the same as the injury suffered or threatened to be suffered by the corporation.

Similar language also applies to a member of a limited liability company under Fla. Stat. § 605.0801(2)(a) and a partner of a limited partnership under Fla. Stat. § 620.2001(2).

IF the intent was to codify Dinuro & Strazzulla, the Glitch bill might be the appropriate time to clarify that these statutes require pleading and proof of both direct harm and special injury.

Suggested language:

Fla. Stat. § 607.0750(2) provides:

(1) Subject to subsection (2), a shareholder may maintain a direct action against another shareholder, officer, director, or the company (**change to corporation**), to enforce the shareholder's rights and otherwise protect the shareholder's interests, including rights and interests under the articles of incorporation, the bylaws, or this chapter or arising independently of the shareholder relationship.

(2) A shareholder maintaining a direct action under this section must plead and prove either:

(a) An actual or threatened injury resulting in or that will result in direct harm and special injury¹ **that is not solely the result of an injury suffered or threatened to be suffered by the corporation,**

(b) An actual or threatened injury resulting from a violation of a separate statutory or contractual duty owed by the alleged wrongdoer to the shareholder, **even if the injury is in whole or in part the same as the injury suffered or threatened to be suffered by the corporation.**

The language highlighted in yellow in (2)(a) is from the uniform limited partnership and LLC acts and supports only the direct harm test. Consideration should be given to deleting it because of this and codifying the Dinuro/Strazzulla two-prong test. If deleted, the question is whether the language highlighted in green in (2)(b) also should be deleted to codify the Dinuro/Strazzulla alternative test.

In addition, the language in the MBCA makes it clear that a director's liability for monetary damages under 8.31(1) is further limited by the burden of proof test (harm + proximate cause). If the Glitch bill includes a change in (2), should we mention in the commentary this potential interplay between 607.0750 & 607.0831 in the case of a direct action against a director for "any

¹ Should we add to whom? Neither case did.

statement, vote, decision to take or not take action or any failure to take any action, as a director” covered by 607.0831? See 607.0831(1)(b)4.