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From: louis.conti@hklaw.com
Sent: Tuesday, October 29, 2019 7:28 PM
To: Schwartz, Philip (Ptnr-Ftl); GTeblum@trenam.com
Subject: 605.0801 and 607.0750 Direct Actions concern

Phil and Gary,

Can we please set up a call later tomorrow (if you have some time) to discuss the new language added to 605.0801(2)(b): An actual or threatened injury resulting from a violation of a separate statutory duty owed by the alleged wrongdoer to the member, *“even if the injury is in whole or in part the same as the injury suffered or threatened to be suffered by the LLC”*. (emphasis added to highlight the new clause). Obviously, this clause is not Uniform LLC Act language.

The same language was added to new section 607.0750(2)(b) which otherwise adopted the LLC Act language before this amendment. Obviously, this clause is not Model Act language.

I understand this was added late in the legislative process, as a concession to our sponsor, after the Bill which the Drafting Committee approved was filed. As we all know, that seems to be when things can be added in haste but regretted for a while.

The commentary says this new, non-uniform law, non-model act, clause, was added to 2(b) “to bring it into conformity with recent Florida case law on this topic, and particularly the holdings in *Dinuro Investments, LLC v. Camacho and Strazzulla, et.al. v. Riverside Banking Company et. al.* (citations omitted).

My apologies for bringing this up now, but I was asked today what was meant by this language and why it was added to the LLC Act, so after Gary and I had a lunch presentation, I looked at it for the first time this afternoon. I am deeply concerned that we have muddied the water significantly by adding this clause to our LLC and Corporate Acts.

The added clause is not justified nor required by the *Dinuro* nor *Strazzulla* opinions, and it deviates significantly from national statutory and case law on the distinction between direct and derivative actions. In fact, the added clause can be read to directly conflict with or even eliminate the essence of the two-pronged test requiring a harm which is separate and distinct from the harm suffered by the LLC or corporation.

The case law speaks for itself as the two-prong test and exception for a separate statutory or contractual duty owed to the plaintiff, which is what was included in our LLC Act. The fact that courts could look at *Dinuro* and *Strazzulla* to assess how to apply the two-pronged test plus the exception, should have sufficed, as this additional clause does NOT appear anywhere in the holdings of those two cases.

In my view, this clause does not serve our LLC or Corporation Acts well.

Perhaps we can come up with language more directly consistent with the case law, although I would still prefer to leave it to the courts until the Florida Supreme Court determines there is a conflict.

Thanks, Lou

The excerpt below is from the *Strazzulla* case and it addresses and cites to the holdings in *Dinuro*:

The Dinuro court noted that, “Florida courts also recognize an exception to the Peters test when an individual member or manager owes a specific duty to another member or manager apart from the duty owed to the company.” Id. (citations omitted). After further surveying Florida law, the court adopted a two-prong test with an exception for a special duty as follows: 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. . . . We also find that 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. Dinuro, 141 So. 3d at 739-40 (emphasis in original) (citations omitted).

B. Fourth DCA Cases 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. See Fort Pierce Corp., 671 So. 2d at 207 (holding “stockholders may bring a suit in their own right to redress an injury sustained directly by them individually and which is separate and distinct from that sustained by other stockholders.”); see also Chemplex Fla. v. Norelli, 790 So. 2d 547 (Fla. 4th DCA 2001). 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. See Braun v. Buyers Choice Mortg. Corp., 851 So. 2d 199, 203 (Fla. 4th DCA 2003) (“Generally, a shareholder cannot sue in the shareholder’s name for injuries to a corporation unless there is a special duty between the wrongdoer and the shareholder, and the shareholder has suffered an injury separate and distinct from that suffered by other shareholders.”). This approach provides a consistent framework and also “comports with general standards of corporate and LLC law by protecting individuals from the obligations arising out of their relationship to the company, while also allowing the parties greater freedom to contractually set their respective obligations.” Dinuro, 141 So. 3d at 740.

With respect to the underlying injuries, the amended complaint alleges that if the Shareholders had “been told the truth, [the Shareholders] would have redeemed [their] shares at the then prevailing rate of \$550 per share.” The amended complaint further alleges that “[b]ecause these investments were not disclosed, however, [Shareholders] did not redeem these shares before the buyback program ended in May 2008,” and the shares are essentially worthless. Although the amended complaint alleges mismanagement of the Bank, these allegations regarding the mismanagement and subsequent decline in stock value only provide context to the separate misrepresentation claims. With respect to the first prong, direct harm, a shareholder can bring a direct suit only if the damages are unrelated to the damages sustained by the company, and if the company would have no right to recover in its own action. Dinuro, 141 So. 3d at 736. Here, the alleged harm from the misrepresentation claims are direct to Shareholders and could not belong to the Corporation. Moreover, it is clear under Shareholders’ theory that the Corporation would have no right to recover in its own action against the Directors. Therefore, the first prong is met. With respect to the second prong, we must determine whether Shareholders’ injuries are separate and distinct from the other shareholders. Here, the alleged injuries are based upon Shareholders being fraudulently induced to not sell their stock. This injury was distinct from any injury suffered by other shareholders, who did not receive these same representations. Therefore, the second prong also has been met.

III. Conclusion We hold 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. In the present case, Shareholders’ amended complaint properly alleged both a direct harm and a special injury.¹ Therefore, we reverse the trial court’s order dismissing their amended complaint with prejudice and granting final summary judgment. We further remand this matter to the trial court for additional proceedings consistent with this opinion.

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