

Schwartz, Philip (Ptnr-Ftl)

From: Schwartz, Philip (Ptnr-Ftl)
Sent: Thursday, November 10, 2022 5:49 PM
To: 'Conti, Louis T (TPA - X36343, ORL - X25118)'; 'Cohn,Stuart R'; 'DWeidner@law.fsu.edu'; 'GTeblum@trenam.com'; 'vs21@fsu.edu'
Cc: 'Donna Litman'
Subject: RE: Direct & Derivative Action Updates

Lou,

We are already in a process to consider an appropriate fix of this issue (if a fix is necessary). It is not something we can or should change on the fly. That has never been the way the Business Law Section has operated. We do things in a deliberative fashion, and we make sure that all interested constituencies are part of the process, and that can't happen at this point in time for consideration of a proposal by the legislature during the 2023 legislative session. We have already been over this issue on multiple occasions.

This issue can wait one more year to make sure we fix it correctly. This is not an emergency.

Phil

From: Conti, Louis T (TPA - X36343, ORL - X25118) <louis.conti@hklaw.com>
Sent: Thursday, November 10, 2022 5:28 PM
To: Cohn,Stuart R <cohn@law.ufl.edu>; Schwartz, Philip (Ptnr-Ftl) <philip.schwartz@akerman.com>; DWeidner@law.fsu.edu; GTeblum@trenam.com; vs21@fsu.edu
Cc: Donna Litman <litmand@nova.edu>
Subject: RE: Direct & Derivative Action Updates

[External to Akerman]

So, in response to Phil, first, I can do 3 tomorrow or I can make time next week whenever everyone is available. More importantly, I disagree with waiting until the 2024 legislative session. I believe waiting until the 2024 session, (which means the law *may* not become effective until 2025), is way too long, and an unnecessary delay for the litigation which is currently pending and new litigation which will be initiated in 2023 (noting that any amendment will not be retroactive to pending litigation, but judges will recognize the import).

A significant number of highly respected trial lawyers and a few judges, have been asking for a change to both statutes' Direct Action provisions, arguing that the judges are having a difficult time reconciling the statutes with the case law evolving from *Dinuro v. Camacho in 2014* (which they view as having been the most careful judicial analysis of direct/derivative actions in Florida up to that point) and the opinions in *Strazzullo* in 2015, and *Ferk Family, LP v. Frank* in 2018.

Of course there is some controversy about the Dinuro opinion using "*special injury*" as part of the "two-prong test" which they enunciated (along with the contractual basis for direct claims). Putting aside the "special injury" requirement, which they later clarified as meaning an injury separate and distinct from the injury to the entity (which is in clause (a) of 605.0801 below), and which injury is separate and distinct from the injury to other shareholders or members. Some lawyers (including me) view that second aspect of distinction as not something that needs to be codified because it does not square with most statutes that only require that the injury may not flow from the same injury to the entity.

However, the one thing you will **NOT** find in Dinuro, is the yellow highlighted clause (below) which found its way into both our LLC and FBCA statutes while late in bill-drafting and without approval by the LLC Drafting Committee. To me, that seemed directly contrary to the holding in Dinuro, so I complained bitterly (but too late) about this being added to the LLC Act as non-uniform and non-Dinuro language, because it does nothing but muddy the water in distinguishing between direct from derivative claims.

Importantly, in 2018, the 3rd DCA decision in *Ferk Family, LP v Frank* made reference to its earlier opinion in *Dinuro v. Camacho* making it clear and confirming that a direct action **could not** be based on, or flow from, the initial harm to the company: "We held that such an action may be brought directly only if (1) there is a direct harm to the shareholder or members 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. *Id.* at 739-40 (citing *Citizens Nat'l Bank of St. Petersburg v. Peters*, 175 So. 2d 54, 56 (Fla. 2d DCA 1965)). However, *Camacho* also held 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." *Camacho*, 141 So. 3d at 740.

The statutes as amended in 2019 (effective 1/1/2020) are fatally flawed, because although they tried to codify case law, they failed, in large part because of the addition of the highlighted clause in 605.0801 (which is also in the 2020 FBCA s. 607.0750 (2)(b) as follows:.

S. 605.0801. Direct Action by member (effective 1/1/2020)

(1) Subject to subsection (2), a member may maintain a direct action against another member, a manager, or the limited liability company to enforce the member's rights and otherwise protect the member's interests, including rights and interests under the operating agreement or this chapter or arising independently of the membership relationship.

(2) A member 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 limited liability company; or (b) An actual or threatened injury resulting from a violation of a separate statutory or contractual 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 limited liability company.

Fla. Stat. § 605.0801 Amended by 2019 Fla. Laws, ch. 90,s 255, eff. 1/1/2020. Added by 2013 Fla. Laws, ch. 180,s 2, eff. 1/1/2014.

The pre-2020 LLC Act statutory provision (605.0801) was as follows and conforms to the Uniform Law language from RULLCA):

605.0801 Direct action by member (effective pre 1/1/2020)

(1) Subject to subsection (2), a member may maintain a direct action against another member, a manager, or the limited liability company to enforce the member's rights and otherwise protect the member's interests, including rights and interests under the operating agreement or this chapter or arising independently of the membership relationship.

(2) A member maintaining a direct action under this section must plead and prove an actual or threatened injury that is not solely the result of an injury suffered or threatened to be suffered by the limited liability company.

History.—s. 2, ch. 2013-180.

The 2020 FBCA provision:

607.0750 Direct action by shareholder.—

(1) Subject to subsection (2), a shareholder may maintain a **direct action** against another shareholder, an officer, a **director**, or the company, 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 that is not solely the result of an injury suffered or threatened to be suffered by the corporation; or

(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.**

History.—s. 82, ch. 2019-90; s. 19, ch. 2020-32.

The pre-2020 FBCA statutorily addressed only Shareholder Derivative Actions:

607.07401 Shareholders' derivative actions.—

(1) A person may not commence a proceeding in the right of a domestic or foreign corporation unless the person was a shareholder of the corporation when the **transaction** complained of occurred or unless the person became a shareholder through transfer by operation of law from one who was a shareholder at that time.

(2) A complaint in a proceeding brought in the right of a corporation must be verified and allege with particularity the demand made to obtain **action** by the board of directors and that the demand was refused or ignored by the board of directors for a period of at least 90 days from the first demand unless, prior to the expiration of the 90 days, the person was notified in writing that the corporation rejected the demand, or unless irreparable injury to the corporation would result by waiting for the expiration of the 90-day period. If the corporation commences an investigation of the charges made in the demand or complaint, the court may stay any proceeding until the investigation is completed.

(3) The court may dismiss a **derivative** proceeding if, on motion by the corporation, the court finds that one of the groups specified below has made a determination in good faith after conducting a reasonable investigation upon which its conclusions are based that the maintenance of the **derivative** suit is not in the best interests of the corporation. The corporation shall have the burden of proving the independence and good faith of the group making the determination and the reasonableness of the investigation. The determination shall be made by:

(a) A majority vote of independent directors present at a meeting of the board of directors, if the independent directors constitute a quorum;

(b) A majority vote of a committee consisting of two or more independent directors appointed by a majority vote of independent directors present at a meeting of the board of directors, whether or not such independent directors constitute a quorum; or

(c) A panel of one or more independent persons appointed by the court upon motion by the corporation.

(4) A proceeding commenced under this section may not be discontinued or settled without the court's approval. If the court determines that a proposed discontinuance or settlement will substantially affect the interest of the corporation's shareholders or a class, series, or voting group of shareholders, the court shall direct that notice be given to the shareholders affected. The court may determine which party or parties to the proceeding shall bear the expense of giving the notice.

(5) On termination of the proceeding, the court may require the plaintiff to pay any defendant's reasonable expenses, including reasonable attorney's fees, incurred in defending the proceeding if it finds that the proceeding was commenced without reasonable cause.

(6) The court may award reasonable expenses for maintaining the proceeding, including reasonable attorney's fees, to a successful plaintiff or to the person commencing the proceeding who receives any relief, whether by judgment, compromise, or settlement, and require that the person account for the remainder of any proceeds to the corporation; however, this subsection does not apply to any relief rendered for the benefit of injured shareholders only and limited to a recovery of the loss or damage of the injured shareholders.

(7) For purposes of this section, "shareholder" includes a beneficial owner whose shares are held in a voting trust or held by a nominee on his or her behalf.

History.—s. 67, ch. 89-154; s. 148, ch. 90-179; s. 19, ch. 97-102; s. 11, ch. 2003-283.

Note.—Former s. 607.0740.

The 2020 language did include an important part of the Dinuro case which I was fine with adding to the statute: to wit, sub-clause (a) and the addition of the first part of sub-clause (b) " (b) an actual or threatened injury resulting from a violation of a separate statutory or contractual duty owed by the alleged wrongdoer to the member,..." However, the most egregious problem IMHO, was the addition of the last clause in sub-clause (b) even if the injury is in whole or in part the same as the injury suffered or threatened to be suffered by the limited liability company, since that language eliminates the clear demarcation between what is a Derivative claim (one made on behalf of the entity where the injury is to the entity and where the remedy flows to the entity), and what is a direct claim (injury to the member that does NOT flow from the injury to the entity).

Perhaps foolishly, but I believe we can get consensus rather quickly, to either:

- (i) remove only the highlighted clause from both statutes because it so muddies the water, leaving the balance of the existing provisions without adding anything further, or
- (ii) we go back to the pre-2020 Uniform Act LLC language and leave it to the courts to follow or modify the case law arising from Dinuro until the Florida Supreme Court decides the issue. Essentially, not attempting to further define what constitutes a Direct action beyond the fundamental demarcation that distinguishes direct from derivative actions and the obvious aspects of Dinuro, which is what we have in the pre-2020 LLC Act.

I'm open to both avenues, or any third avenue, to try to fix the language, based on the feedback we get from Biz Lit within BLS, and the Trial Law and Appellate Sections of the Bar.

There are extensive citations to Dinuro in subsequent Florida case law if you Shepardize (I realize this quaint term dates me as a dinosaur).

Best regards,

Louis T. M. Conti | Holland & Knight

Partner

Holland & Knight, LLP

100 N. Tampa Street, Suite 4100 | Tampa FL 33602

Main 813.227.8500 | Direct 813.227.6343 | Mobile 407.257.8777

louis.conti@hklaw.com | www.hklaw.com

From: Cohn,Stuart R <cohn@law.ufl.edu>

Sent: Thursday, November 10, 2022 1:37 PM

To: philip.schwartz@akerman.com; DWeidner@law.fsu.edu; Conti, Louis T (TPA - X36343, ORL - X25118) <louis.conti@hklaw.com>; GTebulum@trenam.com; vs21@fsu.edu

Subject: Re: Direct & Derivative Action Updates

[External email]

Adding my two cents --- I agree with Lou that the two statutory provisions raise interpretive issues. This is through no fault of the last-minute drafting efforts imposed on us. It is a function of some lack of clarity in the case law as to a definitive standard, other than the obvious. I also agree with Phil that we need input from those who litigate such matters.

I believe that we were right initially to have no such provision (as per the Model Acts, Delaware, etc.). The standards ought to be left to judicial development, and it appears to me that courts on a case-by-case basis have managed fairly well in separating the direct from the derivative actions. I don't know what the political fallout would be if we proposed to eliminate the provisions from both 607 and 605, but I think that would be an improvement.

Stu

Stuart R. Cohn
Emeritus Professor of Law
Levin College of Law
University of Florida
(352) 378-9821
(352) 328-8519 (cell)

Preferred Address:
5105 NW 47th Lane
Gainesville, FL 32606

From: philip.schwartz@akerman.com <philip.schwartz@akerman.com>

Sent: Thursday, November 10, 2022 12:59 PM

To: DWeidner@law.fsu.edu <DWeidner@law.fsu.edu>; louis.conti@hklaw.com <louis.conti@hklaw.com>; GTebulum@trenam.com <GTebulum@trenam.com>; vs21@fsu.edu <vs21@fsu.edu>; Cohn,Stuart R <cohn@law.ufl.edu>

Subject: RE: Direct & Derivative Action Updates

[External Email]

Don,

I am happy to have a call tomorrow, but I want you to understand where I think we are as a Business Law Section in considering this issue. For background, the language added to the statute on this topic during the 2019 legislative session was not part of our original proposal to update and modernize the FBCA, but rather was an issue raised during the 2019 legislative session by one of the key Florida Senate leaders whose support we needed to adopt our proposal. At the same time, that Senator left it to the BLS to decide what language to propose, and the language adopted (which was supposed to statutorily adopt the holdings in the Dinuro and the Strazulla cases) was largely drafted by members of the Section's Business Litigation Committee.

When concerns about the wording of what had been adopted in s. 607.0750 and revised 605.0801 began to come up (probably sometime in late 2020 or early 2021), we started a dialogue on the topic in the Chapter 607 drafting committee (which was the group that promulgated the proposal to update and modernize the FBCA that was adopted during the 2019 legislative session and became effective January 1, 2020), we decided to take this issue up again and sought input on what the issue was and how we might fix it. However, when we had an extensive discussion on the issue over several meetings at the drafting subcommittee level, there appeared to be no consensus on what the problem with the statute was and how to fix it. As a result, we elected to take up another project first (consideration of a Florida version of Subchapter E of Article I of the MBCA dealing with ratification of defective corporate actions and overissues of securities) and come back to a review of this issue once that project was finished. Thus, it has been our intent to get information from interested lawyers and return to consideration of this issue early next year, with the view that it will take time not only to determine what the issue is and how to fix it, but also to get buyoff on the solution from all interested constituencies.

My own view at this point is that there is an issue with the statutory language in 607.0750 and 605.0801, but that we need to engage in a deliberative process to find the right answer and convince all of the various constituencies with an interest in this issue (including our Section's business litigators) what the issue is and how we ought to fix it (and get everyone's buyoff on the fix). That is not something that we can, in my view, do on the fly in order to make a proposal to the legislature on this topic for consideration during the 2023 legislative session. The only thing I know that everyone appears to agree on is that whatever standard we adopt needs to apply to both corporations and LLC.

Put another way, I am happy to engage in a discussion on the direct vs. derivative conundrum (whether this week, next week or early next year), and as always I welcome your participation in this process, but I need to make sure that everyone understands that we are not trying to fix this issue during the 2023 legislative session, but rather to bring a thoughtful proposal to the legislature for consideration during the 2024 legislative session.

Please let me know if you want to talk tomorrow.

Phil

Philip B. Schwartz

Akerman LLP | 201 East Las Olas Boulevard, Suite 1800 | Ft. Lauderdale, FL 33301
D: 954 468 2455 | C: 305 790 3536 | F: 305 349 4833
philip.schwartz@akerman.com

From: Donald Weidner <DWeidner@law.fsu.edu>

Sent: Thursday, November 10, 2022 11:36 AM

To: Schwartz, Philip (Ptnr-Ftl) <philip.schwartz@akerman.com>; louis.conti@hklaw.com; GTebulum@trenam.com; Vivekka Suppiah <vs21@fsu.edu>; cohn@law.ufl.edu

Subject: RE: Direct & Derivative Action Updates

[External to Akerman]

Thanks, Phil. I'd be glad to meet after 3 tomorrow if that would help. Or sometime next week, although I am slammed through Wednesday. Or, Lou and I can have a sidebar. Thanks again. Don

Donald J. Weidner | Dean Emeritus | Alumni Centennial Professor
FLORIDA STATE UNIVERSITY | COLLEGE OF LAW

425 W. Jefferson Street | Tallahassee, FL 32306-1601

T: 850-644-4834 | F: 850-644-7527

[E-mail](#) | [Website](#) | [Bio](#) | [vCard](#)

From: philip.schwartz@akerman.com <philip.schwartz@akerman.com>

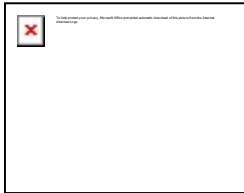
Sent: Thursday, November 10, 2022 11:30 AM

To: Donald Weidner <DWeidner@law.fsu.edu>; louis.conti@hklaw.com; GTeblum@trenam.com; Vivekka Suppiah <vs21@fsu.edu>; cohn@law.ufl.edu

Subject: RE: Direct & Derivative Action Updates

Unfortunately, tomorrow won't work for me for this call other than after 3 PM. If possible, I would ask that we hold this discussion early next week.

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From: Donald Weidner <DWeidner@law.fsu.edu>

Sent: Wednesday, November 9, 2022 9:41 PM

To: Conti, Louis T (TPA - X36343, ORL - X25118) <louis.conti@hklaw.com>; Gary I. Teblum <GTeblum@trenam.com>; Vivekka Suppiah <vs21@fsu.edu>; Cohn, Stuart R <cohn@law.ufl.edu>; Schwartz, Philip (Ptnr-Ftl) <philip.schwartz@akerman.com>

Subject: RE: Direct & Derivative Action Updates

[External to Akerman]

Thanks, Lou. Yes, I am available Friday, within those times. Preferably in the morning, but I can do either. Thanks. Sorry I had to miss today's meeting. Don

Donald J. Weidner | Dean Emeritus | Alumni Centennial Professor

FLORIDA STATE UNIVERSITY | COLLEGE OF LAW

425 W. Jefferson Street | Tallahassee, FL 32306-1601

T: 850-644-4834 | F: 850-644-7527

[E-mail](#) | [Website](#) | [Bio](#) | [vCard](#)

From: Conti, Louis T (TPA - X36343, ORL - X25118) <louis.conti@hklaw.com>

Sent: Wednesday, November 9, 2022 4:45 PM

To: Gary I. Teblum <GTeblum@trenam.com>; Vivekka Suppiah <vs21@fsu.edu>; Cohn, Stuart R <cohn@law.ufl.edu>; Phil Schwartz <philip.schwartz@akerman.com>; Donald Weidner <DWeidner@law.fsu.edu>

Subject: RE: Direct & Derivative Action Updates

Friday between 9:00 -12 noon, and 2:00 - 4:00 pm works for me.

Anyone else available on Friday, and if so, when within the above windows?

Louis T. M. Conti | Holland & Knight

Partner

Holland & Knight, LLP

100 N. Tampa Street, Suite 4100 | Tampa FL 33602

Main 813.227.8500 | Direct 813.227.6343 | Mobile 407.257.8777

louis.conti@hklaw.com | www.hklaw.com

[Add to address book](#) | [View professional biography](#)

From: Gary I. Teblum <GTeblum@trenam.com>

Sent: Wednesday, November 9, 2022 4:14 PM

To: Conti, Louis T (TPA - X36343, ORL - X25118) <louis.conti@hklaw.com>; Vivekka Suppiah <vs21@fsu.edu>

Cc: Donald Weidner <DWeidner@law.fsu.edu>; Cohn, Stuart R <cohn@law.ufl.edu>; Phil Schwartz <philip.schwartz@akerman.com>

Subject: RE: Direct & Derivative Action Updates

[External email]

Lou,

I have a pretty busy day tomorrow. My only open windows tomorrow are 9 to 9:45, 11 to 11:45 and possibly 4-5.

However, I am currently wide open on Friday from 9 to 4 – so I would prefer Friday.

Gary



GARY I. TEBLUM | ATTORNEY

Dir: 813-227-7457 | Cell: 813-727-8610 | Fax: 813-227-0457 | [email](#) | [vcard](#) | [bio](#)

101 East Kennedy Boulevard, Suite 2700, Tampa, FL 33602

Main: 813-223-7474 | www.trenam.com

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From: Conti, Louis T (TPA - X36343, ORL - X25118) <louis.conti@hklaw.com>

Sent: Wednesday, November 9, 2022 3:52 PM

To: Vivekka Suppiah <vs21@fsu.edu>

Cc: Donald Weidner <DWeidner@law.fsu.edu>; Cohn, Stuart R <cohn@law.ufl.edu>; Gary I. Teblum <GTeblum@trenam.com>; Phil Schwartz <philip.schwartz@akerman.com>; Conti, Louis T (TPA - X36343, ORL - X25118) <louis.conti@hklaw.com>

Subject: RE: Direct & Derivative Action Updates

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Vivekka,

Nice to meet you electronically and thank you for joining in our call today. Glad to hear that Don and you are considering the confusion caused by the Direct Action provisions in the current Florida LLC Act s. 605.0801 (below) and Corporation Act s. 607.0750, and more importantly, have you considered subsequent case law and/or developed appropriate language to address the confusion?

S. 605.0801.

(1) Subject to subsection (2), a member may maintain a direct action against another member, a manager, or the limited liability company to enforce the member's rights and otherwise protect the member's interests, including rights and interests under the operating agreement or this chapter or arising independently of the membership relationship.

(2) A member 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 limited liability company; or **(b)** An actual or threatened injury resulting from a violation of a separate statutory or contractual 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 limited liability company.**

Fla. Stat. § 605.0801 Amended by 2019 Fla. Laws, ch. 90,s 255, eff. 1/1/2020. Added by 2013 Fla. Laws, ch. 180,s 2, eff. 1/1/2014.

IMHO, the last minute statutory revisions in 2019 (effective 1/1/2020) which were intended to codify the opinions in Dinuro & Strazzulla, has caused more confusion for courts and litigants than the case law both before, and after, the opinions in Dinuro in 2014 and Strazzulla in 2015, and the statutory language needs to be addressed ASAP.

Curious to hear Don's views, and looping in Stu Cohn, Phil Schwartz and Gary Teblum (as Co-Chairs of the 607 Drafting Committee), to see if they are available, so we can try to set up a call tomorrow or Friday to discuss this further.

Thanks for reaching out.

Louis T. M. Conti | Holland & Knight

Partner

Holland & Knight, LLP

100 N. Tampa Street, Suite 4100 | Tampa FL 33602

Main 813.227.8500 | Direct 813.227.6343 | Mobile 407.257.8777

louis.conti@hklaw.com | www.hklaw.com

[Add to address book](#) | [View professional biography](#)

From: Vivekka Suppiah <vs21@fsu.edu>

Sent: Wednesday, November 9, 2022 2:09 PM

To: Conti, Louis T (TPA - X36343, ORL - X25118) <louis.conti@hklaw.com>

Subject: Direct & Derivative Action Updates

[External email]

Dear Mr. Conti,

I am a second-year law student at Florida State and I am currently working as a research assistant for Dean Weidner.

I was tasked with attending today's call and jotting down any pertinent updates on direct and derivative actions under the LLC Statutes. Do you have any additional insight? I am still not sure if these amendments removing the Dinuro test codification are set in stone.

Happy to jump on a call or another task force meeting to get a better handle on this, whenever your schedule permits.

Thank you,
Vivekka

Vivekka Suppiah, MSc

J.D. Candidate, Class of 2024

Florida State University College of Law

vs21@fsu.edu

(813) 997-8648

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