BUSINESS LAW SECTION OF THE FLORIDA BAR
Direct v. Derivative Task Force White Paper

INTRODUCTION

The Florida Revised Limited Liability Company Act, Chapter 605, Florida Statutes ("RLLCA"), the Florida Business Corporation Act, Chapter 607, Florida Statutes ("FBCA"), and the Florida Revised Uniform Limited Partnership Act, Chapter 620, Florida Statutes ("FLPA"), each contain a statutory test for direct action standing. The FBCA was amended in 2019 to require a corporate shareholder to 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 corporation. This single-prong test is codified at Fla. Stat. § 605.0801 (for LLCs), Fla. Stat. § 607.0750 (for corporations),[1] and Fla. Stat. § 620.2001 (for limited partnerships).

Despite the enactment of the one-prong statutory test in 2019, Florida courts have continued to cite and apply a more restrictive, judicially created two-prong test for direct action standing, commonly known as the *Dinuro* test. This test, announced by the Third District Court of Appeal in *Dinuro Investments, LLC v. Camacho*, 141 So. 3d 731 (Fla. 3d DCA 2014), requires a plaintiff to show both (1) a "direct harm" that does not flow from an initial harm to the entity and (2) a "special injury" that is separate and distinct from injuries suffered by other owners. *Id.* at 739-40.

Courts applying *Dinuro* have also ruled that direct and derivative claims cannot be asserted in the same litigation, holding that a plaintiff cannot "in the same action sue in more than one distinct right or capacity." *DiSorbo v. Am. Van Lines, Inc.*, 354 So. 3d 530, 544 (Fla. 4th DCA 2023). This ignores the fact that many plaintiffs in entity litigation have facts that encompass both direct and derivative claims, and requiring separate proceedings duplicates work for parties, judges, and juries.

The Task Force originated out of concerns about the conflict between the one-prong statutory test and the judicially created *Dinuro* test and its progeny. The Task Force also identified issues with inconsistent application of the statutory test due to continued reliance on *Dinuro* and its progeny. The Task Force held numerous meetings to review and analyze the statutes and relevant case law, as well as statutes of other jurisdictions concerning standing in direct actions. As a result, the Task Force determined that amendments to Florida Statutes sections 605.0801, 605.0802, 607.0742, 607.0750, 620.2001, and 620.2002 would resolve the conflict between the statutes and the case law, reaffirm the intent for Florida to utilize a one-prong test for determining direct action standing, and authorize the joining of direct and

[1] Fla. Stat. §§ 605.0801 and 607.0750 also recognize an exception that is not the subject of the proposed amendment, and which would remain in effect: a plaintiff may bring a direct action where the injury results from a violation of a separate statutory or contractual duty owed to the member or shareholder, even if the injury is in whole or in part the same as the injury suffered or threatened to be suffered by the LLC or corporation.

derivative claims in a single proceeding, so long as they involve a common question of law or fact. The proposed statutory amendments will provide significant benefits to the administration of justice by, among other things: (i) providing a clear and concise statutory test for determining standing in direct action litigation, (ii) eliminating confusion or conflict created by varying judicial opinions, (iii) serving judicial economy, and (iv) allowing parties and counsel to far more easily assess and address standing questions prior to commencing litigation.

BACKGROUND

Origins of the Statutory Provisions

Florida's statutory framework for direct and derivative actions by entity owners is found in three parallel chapters of the Florida Statutes. First is the FLPA, enacted in 2005 (with an effective date of January 1, 2006 or January 1, 2007, depending on a partnership's date of formation or election), which led to the formation of the RLLCA. The RLLCA, which was modeled on the Revised Uniform Limited Liability Company Act, was enacted in 2013 (with an effective date of January 1, 2014 or 2015, depending on LLC's date of organization or election). The relevant section of the FBCA, which draws on concepts from the RLLCA,[2] was added through amendment in 2019 (with an effective date of January 1, 2020).

All three statutes contemplate a one-prong test for direct action standing. To properly maintain a direct action, the plaintiff 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 entity. § 605.0801(2)(a), Fla. Stat.; § 607.0750(2)(a), Fla. Stat.; § 620.2001(2), Fla. Stat. The statutes do not discuss "special injury," nor do they require a plaintiff to show a "special injury" distinct from the injuries of other owners to maintain a direct action. *Id.*[3]

The legislative intent of the RLLCA was to be modeled consistent with the Revised Uniform LLC Act, with the general understanding that Florida LLCs often operate as partnerships with liability shields to the members, hence the language in the FLPA. With this understanding and intent in mind, the RLLCA framers did not include a special injury test in determining whether direct action standing exists. With respect to corporations, the framers agreed direct action standing for Florida corporations should be consistent with and follow the provisions related to direct actions in Florida LLCs.

The Dinuro Test

In 2014, one year after the RLLCA was enacted and one year before it became fully effective, the Third District Court of Appeal decided *Dinuro Investments, LLC v.*

[2] The remainder of the FBCA draws on concepts from the Model Business Corporations Act.

[3] Both the RLLCA and the FBCA have an exception to the direct harm test for statutory or contractual duties, but that portion of the statutes is not subject to, and will not be affected by, this proposed amendment.

Camacho, 141 So. 3d 731 (Fla. 3d DCA 2014). *Dinuro,* which was initiated with the trial court in 2011 based on events that occurred in 2010 and 2011, was decided under Florida's earlier version of a limited liability company act, Chapter 608, Florida Statutes. In *Dinuro*, the court comprehensively synthesized prior Florida precedent into a two-prong test for direct action standing. Under this test, a plaintiff may bring a direct action only if: (1) there is a "direct harm" to the plaintiff such that the alleged injury does not flow from an initial harm to the entity; and (2) there is a "special injury" to the plaintiff that is separate and distinct from injuries sustained by other owners. The *Dinuro* court explained that the "direct harm" prong requires a comparison between the plaintiff's injury and the entity's injury. In other words, if the damages are related to damages first sustained by the entity, the claim is derivative. The "special injury" prong requires a comparison between the plaintiff's injury and the injuries, if any, of other owners. The plaintiff must show a loss "substantially different" from those sustained by fellow members or shareholders.

Post-Dinuro Case Law

Florida courts have continued to apply the *Dinuro* two-prong test even after the enactment of the one-prong tests in Sections 605.0801(2)(a) and 607.0750(2)(a). For example, in 2015, the Fourth District Court of Appeal adopted the *Dinuro* two-prong test in *Strazzulla v. Riverside Banking Co.*, 175 So. 3d 879 (Fla. 4th DCA 2015).[4] The Third District Court of Appeal confirmed *Dinuro* three years later in *Ferk Family, LP v. Frank*, 240 So. 3d 826 (Fla. 3d DCA 2018), and again in 2020 with *Arbitrage Fund v. Petty*, 307 So. 3d 119 (Fla. 3d DCA 2020). In *Petty*, the parties conceded that § 607.0750 codified *Dinuro* but disagreed on how to interpret it. The court in *Petty* then relied on *Dinuro* and scholarly literature rather than the statutory text. The Third District most recently affirmed *Dinuro* in 2025. *Benes v. De La Aguilera*, aff'd, 2025 WL 322291 (Fla. 3d DCA 2025). Federal courts have also applied the *Dinuro* test rather than the statutory test. *See Feng v. Walsh*, 2020 WL 5822420 (S.D. Fla. Sept. 14, 2020); *Snyder v. Formerly B 3 Group, Inc.*, 2024 WL 2724435 (M.D. Fla. May 28, 2024).

The *Petty* decision warrants particular attention because, in addition to applying the *Dinuro* framework, it extended *Dinuro* to equity freeze-out claims, which has created additional uncertainty. The *Petty* court, applying the *Dinuro* framework, concluded that a forced cash-out and alleged inadequate merger consideration constituted a derivative harm because those injuries purportedly flowed from the undervaluation of the entity as a whole. While the court conceptualized the merger as functionally equivalent to an asset sale, an important distinction exists between an "asset sale" and a "merger." In a true asset sale, inadequate consideration would in fact diminish the value of the corporation, thus indirectly reducing the value of shareholders' equity and creating a derivative harm. However, a merger does not involve a "sale" but rather a transfer, and a shareholder does not "sell" shares in a merger. Rather, because shares are converted into the right to receive merger

[4] *Strazzulla* was decided in 2015 based on fraud that occurred in 2008. Thus, § 607.0750, Fla. Stat. did not apply.

consideration, a freeze-out eliminates the shareholder's individual ownership interest, voting rights, and economic stake in the enterprise, making the harm direct. *Petty* thus creates further confusion.

Separation of Direct and Derivative Claims

The RLLCA, FBCA, and FLPA do not expressly contemplate asserting direct and derivative claims in a single litigation. However, appellate courts applying *Dinuro* have ruled that plaintiffs in entity litigation cannot combine direct and derivative claims in a single action. *DiSorbo*, 354 So. 3d at 544. The rationale is that the plaintiff would be asserting rights in a different capacity (individual versus on behalf of the entity), and thus the actions cannot be joined absent express consent of the parties or by filing separate suits that are subsequently joined through consolidation. *Id.*

Despite its ruling and citing Florida Rule of Civil Procedure 1.110(g) for the proposition that direct and derivative actions should not be filed together, the *DiSorbo* court acknowledges exceptions to the separation. The first exception occurs when parties consent to joining the actions or waive the separation. The second exception would be consolidation of separately filed actions pursuant to Florida Rule of Civil Procedure 1.270: if a plaintiff filed separate suits that involve a common question of law or fact, the plaintiff could simply move to consolidate the actions.

Beyond the exceptions recognized in *DiSorbo*, existing Florida law and plain text interpretations of the Rules of Civil Procedure provide support for permitting direct and derivative claims in a single proceeding, especially if a statute expressly provides for the joinder.

The Supreme Court of Florida has upheld statutory joinder provisions that are consistent with existing court rules. *Agency for Health Care Administration v. Associated Industries of Florida, Inc.*, 678 So. 2d 1239 (Fla. 1996). The Florida Supreme Court, citing Rule 1.110(g), noted that "[j]udicial efficiency is promoted when similar legal issues can be ruled upon in one proceeding." *Id.* at 1255. The Court further noted that, because the Act created an independent cause of action, the challenged provision "simply allows the State to aggregate its own claims arising from this new cause of action." *Id.*

The Supreme Court of Florida has also recognized that when the Legislature creates substantive rights, it may include related procedural provisions without infringing on the Court's rulemaking authority under Article V, Section 2 of the Florida Constitution. In *Caple v. Tuttle's Design-Build, Inc.*, 753 So. 2d 49 (Fla. 2000), the Court held that a foreclosure statute creating new substantive rights did not unconstitutionally encroach on the Court's rulemaking authority because "the statute creates substantive rights and any procedural provisions are directly related to the definition of those rights." *Id.* at 54. The Court emphasized that it has "consistently rejected constitutional challenges where the procedural provisions were intertwined

with substantive rights." *Id.* (citing *Smith v. Dep't of Ins.*, 507 So. 2d 1080, 1092 n.10 (Fla. 1987); *VanBibber v. Hartford Accident & Indem. Ins. Co.*, 439 So. 2d 880 (Fla. 1983)).

Additionally, and as touched on in the *AHCA* decision, Florida Rule of Civil Procedure 1.110(g) permits a pleader to "set up in the same action as many claims or causes of action or defenses in the same right as the pleader has," and further provides that "[a] party may also state as many separate claims or defenses as that party has, regardless of consistency and whether based on legal or equitable grounds or both." While some courts have interpreted Rule 1.110(g) as requiring separation of direct and derivative claims into separate actions, *see DiSorbo*, 354 So. 3d at 544, the Rule's express language broadly authorizes the assertion of multiple claims in a single action, including claims that may be grounded in different legal or equitable theories.

It is important to note that, under the proposed statutory amendments, even in situations where direct and derivative claims would be able to be properly brought in a single proceeding, the direct claims would be considered part of only the direct actions while the derivative claims would be considered part of only the derivative actions. As such, the existing continuing statutory provisions that do not permit a derivative action from being discontinued (such as by being dismissed) or settled without court approval (i.e., 607.0745(1) and 605.0806(1)), should be viewed as applying only to the derivative claims in such single proceeding; and the parties will be entitled to discontinue (such as by dismissal) or to settle any one or more of the direct claims in such single proceeding without having to secure court approval.

With the *Dinuro* cases currently requiring separate litigations for direct and derivative claims arising from the same facts, courts are imposing significant and unnecessary burdens on all parties and on the courts. Separating actions forces plaintiffs to file duplicative lawsuits, compels defendants to respond to overlapping allegations in multiple proceedings, and requires judges to preside over multiple cases involving substantially identical facts and witnesses. The proposed statutory amendments would eliminate this inefficiency by authorizing the joinder of direct and derivative claims in a single proceeding when the claims involve a common question of law or fact, thereby promoting judicial economy and reducing the costs and burdens of litigation for all participants.

REVIEW OF OTHER JURISDICTIONS' STATUTES RELATING TO DIRECT ACTION STANDING

The Task Force identified five states, apart from Florida, that have enacted statutes or have judicial precedent of varying specificity concerning direct standing: Delaware, Nevada, Tennessee, Texas, and Wyoming. None of these jurisdictions have adopted the "special injury" test outlined in *Dinuro*, and most have simply split the "direct harm" test into its own two-prong test that requires the plaintiff show direct

harm by proving (1) who suffered the alleged harm and (2) who would receive the benefit of recovery.

Delaware

Delaware has no statutory provision governing direct claims for either LLCs or corporations. The right to bring a direct action in Delaware is a matter of common law. The controlling standard is the *Tooley* test, announced in *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004), which asks two questions: (1) who suffered the alleged harm—the entity or the individual owner? and (2) who would receive the benefit of any recovery—the entity or the individual owner? Delaware does not impose a "special injury" requirement. Its derivative action framework for LLCs is found in Sections 18-1001 through 18-1004 of the Delaware Limited Liability Company Act, and for corporations in § 327 of the Delaware General Corporation Law. As the Court of Chancery noted in *Bamford v. Penfold, L.P.*, 2020 Del. Ch. LEXIS 79, the LLC derivative action provisions were modeled on the corporate derivative suit, and corporate case law applies equally to LLC derivative claims.

Nevada

Nevada's statutes do not expressly address direct claims for either LLCs or corporations. Courts in Nevada rely on the *Tooley* test, which was adopted by the Nevada Supreme Court in *Parametric Sound Corp. v. Eighth Judicial District Court*, 133 Nev. 417, 401 P.3d 1100 (2017). The *Tooley* test, as applied in Nevada, asks two questions: (1) who suffered the alleged harm, and (2) who would receive the benefit of the recovery. Like Delaware, Nevada does not impose a "special injury" requirement.

Tennessee

Tennessee does not have a statutory provision for direct claims by LLC members or shareholders. Tennessee uses the *Tooley* test to distinguish direct from derivative actions, as confirmed in *Keller v. Estate of McRedmond*, 495 S.W.3d 852 (Tenn. 2016), and reaffirmed in *Houghton v. Malibu Boats, LLC*, 2025 Tenn. LEXIS 439 (Tenn. 2025). Under the *Tooley* test as applied in Tennessee, a court examines who suffered the harm and who would receive the benefit of the recovery.

Texas

Texas does not have a statutory provision for direct claims by LLC members or corporate shareholders. On the other hand, Texas's derivative action statutes for LLCs (§§ 101.451–101.463) and corporations (§§ 21.551–21.563) are among the most detailed in the country, and include specialized provisions for closely held entities. For closely held LLCs (fewer than 35 members with no publicly traded interests) and closely held corporations, the standing and demand requirements of the derivative action statutes do not apply, and courts may, "if justice requires," treat a derivative

proceeding as a direct action and order recovery to be paid directly to the plaintiff. This closely held entity exception has no equivalent in Florida law.

Texas case law has not established a single definitive test like *Tooley* or *Dinuro* for distinguishing direct from derivative claims, in part because the closely held entity provisions reduce the practical significance of the classification for many disputes. Courts have generally held that to recover individually, a stockholder "must prove a personal cause of action and personal injury."

Wyoming

Wyoming has adopted a direct action statute for LLCs that closely tracks the Revised Uniform LLC Act that served as the model for Florida's RLLCA. Wyoming Statute § 17-29-901 provides that a member may maintain a direct action against another member, a manager, or the LLC, and 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." This is a single-prong test, substantively identical to § 605.0801(2)(a).[5] For corporations, the Wyoming Business Corporation Act does not have a specific direct-claims statute. Instead, direct claims are determined by common law and specific statutory provisions creating individual shareholder rights.

DISCUSSION

Objectives of the Amendments

The proposed amendments to Sections 605.0801, 605.0802, 607.0742, 607.0750, 620.2001, and 620.2002 seek to eliminate the conflict between the judicially created *Dinuro* test and the statutes. The amendments also seek to authorize the joining of direct and derivative actions in a single litigation in select circumstances. To accomplish this, the proposed amendments would add language expressly providing that the one-prong statutory test, *i.e.*, direct harm, is the exclusive test for direct action standing in Florida and that no additional common law or judicially created requirements, including the *Dinuro* two-prong test, may be imposed. The amendments would not alter the substantive standard nor remove the contractual or statutory duty exception. The amendments would simply affirm that the standard already enacted by the Legislature is the one courts must apply.

In practical terms, the amendments would maintain the first prong of the *Dinuro* test, as that prong is already in the statute. The proposed amendments, by including additional and express language, would remove the second prong of *Dinuro* that requires the plaintiff to show a "special injury" that is "separate and distinct" from those of other owners. The proposed amendments would also eliminate the analysis set forth in *DiSorbo* that holds direct and derivative claims cannot be joined

[5] However, notably, Wyoming's statute does not include the separate statutory or contractual duty exception found in § 605.0801(2)(b).

in a single action, and would affirmatively bestow on plaintiffs the right to bring direct and derivative claims in a single action when the claims involve a common question of law or fact.

The proposed amendments would not alter the standards or procedures applicable to derivative actions. The RLLCA's derivative action provisions (§§ 605.0802–605.0806) and the FBCA's derivative action provisions (§§ 607.0741–607.0747) would remain fully in effect, including the pre-suit demand requirements, the special litigation committee process, the court-approval requirements for settlement or dismissal, and the rules governing proceeds and expenses. The proposed amendments to portions of those statutes are designed to consistently allow a plaintiff to maintain direct and derivative claims in the same action.

Judicial Application of the Amendments

The proposed amendments, while designed to eliminate the special injury test, are designed with judicial economy in mind and are designed to give courts the ability to determine, after sufficient discovery is conducted, whether a claim is direct, derivative, both, or neither. Determining whether a claim is direct or derivative often depends on several factual inquiries that cannot be fully resolved at the pleading stage. By preserving the statutory framework and eliminating the judicially created "special injury" overlay, the proposed amendments enable courts to assess the nature of the plaintiff's injury based on a developed factual record, rather than dismissing claims at the outset under *Dinuro*'s more restrictive two-prong test. This approach is consistent with the text and intent of the existing statutes, which require the plaintiff to "plead and prove" its injury.

Fee Awards in Derivative Litigation

Importantly, nothing in the proposed amendments alters, diminishes, or otherwise adversely affects the existing fee-granting provisions applicable to derivative litigation in the RLLCA and FBCA. Those provisions remain fully operative and unmodified by the proposed statutory changes. The proposed amendments address standing and joinder issues only, and plaintiffs pursuing derivative claims will continue to have access to the same fee-recovery mechanisms currently available under Florida law.

Consistency with Florida Rules, Supreme Court Precedent, and Statutory Definitions

The proposed amendments are consistent with Florida Rules of Civil Procedure 1.110(g) and 1.270, which permit a party to assert multiple claims or causes of action in the same proceeding, and permits joinder of claims when they involve a common question or law or fact. The proposed amendments operate within this existing procedural framework. Moreover, the Supreme Court of Florida's decision in *AHCA* makes clear that a statutory joinder provision that is consistent with existing court rules does not infringe on the Court's rulemaking authority. And as the Court

confirmed in *Caple*, procedural provisions that are intertwined with substantive rights created by the Legislature are constitutionally permissible.

Because the proposed amendments create a new substantive right—the right to bring direct and derivative claims together in a single proceeding—and the joinder provision is directly related to the exercise of that right, the amendments fall squarely within the Legislature's constitutional authority.

Finally, the proposed amendments to Chapter 607, Florida Statutes aim to promote consistency in the FBCA and its defined terms. Chapter 607 currently uses the terms "derivative action," "derivative proceeding," and "derivative suit" interchangeably. *See, e.g.*, § 607.0208(4)(b) ("derivative action or proceeding"); § 607.0745(1) & (2) ("derivative action"); § 607.0750(1) ("direct action"); § 607.0831(3)(a) ("[i]n an action other than a derivative suit"). The Task Force agrees these terms are used interchangeably throughout Chapter 607. Thus, the amendment proposes to add the terms "derivative action" and "derivative suit" to the definition of "derivative proceeding" set forth in Section 607.01401(17). This change will bring uniformity and align with the current use of these terms in Chapter 607.

CONCLUSION

The proposed amendments to Sections 605.0801, 605.0802, 607.0742, 607.0750, 620.2001, and 620.2002, Florida Statutes, are narrow, targeted legislative fixes to a conflict between statutory text and judicial precedent. The *Dinuro* test, while a well-intentioned judicial effort to bring structure to direct and derivative litigation, adds a "special injury" test not contained in the statutes and that no other surveyed jurisdiction imposes. The proposed amendments would restore the Legislature's one-prong test as the exclusive standard for direct action standing, eliminate the confusion and inconsistency generated by the *Dinuro* overlay, and bring Florida into alignment with the Revised Uniform LLC Act and the approach taken by other major commercial jurisdictions—both of which recognize the Legislature's authority to include procedural provisions that are intertwined with the substantive rights it creates. At the same time, by creating a statutory right to bring direct and derivative claims in the same proceeding when they involve a common question of law or fact, the proposed amendments would promote judicial economy, reduce duplicative litigation, and provide clarity to parties and counsel.