BEWARE: YOU MAY NOT HAVE A DIRECT CLAIM AGAINST YOUR BAD-ACTING CO-SHAREHOLDER OR CO-MEMBER

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It is inevitable. When co-owners (whether members of a limited liability company or shareholders of a corporation) split-up or reach the split-up point, one inevitably thinks the other or others have wronged him, that the other or others have breached their fiduciary duty to him. Beware. Two fairly recent cases from Florida appellate courts make it clear that such claims may not be available.

In *Dinuro Investments, LLC v. Camacho*, 141 So.3rd 731 (Fla. 3DCA 2014), the Third District Court of Appeal was faced with what was a seemingly egregious fact pattern. Three investors owned a real estate development company that itself owned several parcels of property. When the development company found itself in financial trouble, two of the investors used separate corporations to purchase the Notes and Mortgages outstanding on the development company's property from the lender and then foreclosed on the Notes, erasing the assets of the original development company and thereby eliminating the property interests of the third investor. The third investor filed suit for various causes of action against the individuals and the corporations involved in the Note purchase and foreclosure.

After synthesizing many years of Florida law, the Court in *Dinuro Investments* held that an individual member or shareholder may not maintain a cause of action in his individual capacity against other members or shareholders, unless various specific criteria are met. The Court found that an individual member or shareholder lacks standing "to sue individually for damages arising out of its status as a member of a company unless the damages arise from a direct harm and special injury, or if there is a separate duty owed from the Defendant to the Plaintiff Member." *Dinuro Investments* at 743. As the Court made quite clear, for a shareholder or member to sue (1) there must be a direct harm to the shareholder or member, meaning that the alleged injury does not flow from an initial harm to the company, and (2) there must be a special injury to the shareholder or member, that is, an injury separate and distinct from the type of injury sustained by the other shareholders or members. *Id.* 739-40. This is true even where, as in *Dinuro Investments*, the only other shareholders or members were the alleged bad actors. There is an exception to this two-pronged rule only when there is a separate statutory or contractual duty owed by the defendant directly to the complaining individual.

The separate duty exception is really quite narrow. The statutes governing the duties of officers and directors of corporations and managers of manager-managed and members of member-managed limited liability companies provide that the duties are owed to the company and, in the limited liability company context, also to the members. Importantly, there is no independent statutory duty to the members or shareholders. Operating Agreements rarely include provisions where members are directly liable to each other for breaches of the provisions of the operating agreement. Thus, the exception is rarely available.

In *Strazzulla v. Riverside Banking Company*, 175 So.3rd 879 (Fla. 4DCA 2015), the Fourth District Court of Appeal expressly agreed with the test enunciated in *Dinuro Investments.* In Strazzulla, the Court did find direct harm and special injury, as the claims did not flow through the company or to all the shareholders, but the test was applied. Thus, for a wronged member or shareholder to have a breach of duty claim, that breach of duty

cannot be something that flows to or through the entity itself and cannot be based upon the mere position of the defendant party as controlling the entity harmed by his actions.

For more information on this topic, please contact the author, Ben Zuckerman, on the firm's Dispute Resolution Team.

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