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TO: *Pro Bono* Information

CLIENT-MATTER N^o: N/A

FROM: M. Vincent Pazienza, Esq.

SUBJECT: *Derivative or Direct Action Under Florida Law*

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When a shareholder considers a cause of action against a corporation bound by Florida law, a preliminary determination should be made as to if the action will be direct or derivative.

In Florida, a derivative law suit is a cause of action initiated by a shareholder of the target corporation to enforce a right of action that exists on behalf of the corporation, essentially seeking to redress an injury suffered by the corporation or its shareholders generally.

This is to be contrasted with a direct law suit, which is an action initiated by a shareholder against a target corporation in which the remedy sought is for a specific injury suffered directly by that particular shareholder, rather than one generally applicable to all shareholders. The State of Florida utilizes the “separate and distinct injury test” to determine if a particular shareholder may bring a direct action. Under the “separate and distinct injury test,” the shareholder must be able to prove that he, she, or it was the victim of an injury that is “separate and distinct” from any injury sustained by other shareholders.

Under Fl. Stat. Ann. § 607.07401, a complaint filed by a shareholder on behalf of the corporation as a derivative action must be verified and alleged with particularity. Furthermore, the written demand made to obtain action by the target corporation’s Board of Directors must have been either refused or ignored by the Board of Directors for a period of at least Ninety (90) days from the first demand (unless the shareholder was notified in writing of a rejection or irreparable injury would result to the target corporation if the action were delayed by the Ninety (90) day period.) Another important factor is that, *once an action has been commenced under Fl. Stat. Ann. § 607.07401, it cannot be discontinued or settled without court approval.*

It is important to have a bona fide belief and supporting evidence for any such derivative claim, as Fl. Stat. Ann. § 607.07401(5) states that a court may require a plaintiff who filed a complaint without reasonable cause may be compelled to pay the defendant’s reasonable expenses, including reasonable attorneys’ fees. However, if one does have such bona fide reasonable belief, Fl. Stat. Ann. § 607.07401(6) provides a corollary to Section 5, as the court may also award reasonable expenses and attorneys’ fees to a successful plaintiff or shareholder that commenced the proceeding and obtained any relief, whether by judgment, compromise or settlement (although Section 6 is inapplicable if the relief awarded is for the benefit of injured shareholders only and limited to a recovery of the loss or damage of the injured shareholders.)

PazLaw™ has helped guide numerous corporations throughout Florida, Maryland, and internationally, and we hope that this brief introduction to the concept of direct versus derivative actions in Florida has been useful. We assist small-to-medium size businesses with a comprehensive suite of services tailored to each client’s specific needs and budget, and welcome the opportunity to speak with you at your convenience.

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