Using the Private Attorney General Theory to Protect Florida Charitable Corporations

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I. INTRODUCTION

A nonprofit corporation can be characterized as either a "public benefit" organization or a "mutual benefit" organization. Public benefit organizations, also referred to as charitable corporations or charities, exist to provide a benefit to society. Mutual benefit organizations, often referred to as membership organizations, exist to provide a benefit to their members. Florida, like many states, uses a "one size fits all" approach to determine who has standing to bring suit against directors of nonprofit corporations for breach of fiduciary duties. That is, for both mutual benefit and public benefit nonprofit corporations, states restrict the parties who have standing to challenge the actions of the directors on behalf of the corporation. Standing is granted

1. JAMES J. FISHMAN & STEPHEN SCHWARZ, NONPROFIT ORGANIZATIONS: CASES AND MATERIALS 74 (3d ed. 2006).
2. Id.
3. Id. at 74–75.
5. For example, the Georgia Nonprofit Corporations Code provides in relevant part: A corporation's power to act may be challenged: (1) [i]n a proceeding by a member against the corporation to enjoin the act; (2) [i]n a proceeding by the corporation, directly, derivatively, or through a receiver, trustee, or other legal representative, against an incumbent or former director, officer, employee, or agent of the corporation; or (3) [i]n a proceeding by the Attorney General under Code Section 14-2-1430.

GA. CODE ANN. § 14-3-304(b)(1)-(3) (Supp. 2006). Similarly, the Connecticut Revised Nonstock Corporation Act states in relevant part:

(b) A corporation's power to act may be challenged: (1) [i]n a proceeding by a member or director against the corporation to enjoin the act; (2) in a proceeding by the corporation, directly, derivatively or through a receiver, trustee or other legal representative, against an incumbent or former director, officer, employee or agent of the corporation; or (3) in a proceeding by the Attorney General to dissolve the corporation or to enjoin the corporation from the conduct of unauthorized affairs.

(c) In a member's or director's proceeding under subdivision (1) of subsection (b) of this section to enjoin an unauthorized corporate act, the court may enjoin or set aside the act, if equitable
only to members, directors, and legal representatives of the nonprofit corporation, as well as to the state’s attorney general. 6

In light of the distinctions between the two types of nonprofit corporations, this article proposes that the Florida Legislature include a standing provision in the Florida Not for Profit Corporation Act 7 that ensures that directors, of both mutual benefit and public benefit nonprofit corporations, are held accountable to all of the constituencies they serve. This article argues that Florida’s current approach, while adequately protecting the interests of mutual benefit nonprofit corporations, does not achieve for many public benefit nonprofit corporations its desired goal of protecting nonprofit corporations from the harmful acts of directors. Florida’s approach to standing leaves the actions of directors of public benefit nonprofit corporations virtually untouchable and unchallengeable. 8

This issue is especially timely given the recent approval of the Uniform Trust Code, 9 by the National Conference of Commissioners on Uniform State Laws, and Florida’s subsequent adoption of it. 10 The stated purpose of the Uniform Trust Code is to “provide [s]tates with precise, comprehensive, and easily accessible guidance on trust law questions.” 11 Because of a settlor’s special interest in a charitable trust, the drafters created section 405(c) of the Uniform Trust Code, which grants standing to a settlor of a charitable trust to sue the trustees for breach of fiduciary duty. 12 Charitable trusts and charitable corporations are both used to accomplish charitable pur-
Thus, given the similarities between the two, it is time for donors, and others with a special interest in a charitable nonprofit corporation, to be treated the same as their counterparts in the charitable trust arena and be given a comparable right to enforce the fiduciary duties of the directors of the corporation.

Part II of this article explains what it means for a corporation to be recognized as a Florida charitable, public benefit, nonprofit corporation. Part III of the article explores the role of directors in Florida nonprofit corporations. Part IV of the article discusses the current state of Florida law regarding who has standing to bring suit for enforcement of the duties directors owe to nonprofit corporations. Part V of the article explains why Florida law must be changed if mutual benefit and public benefit corporations are to be treated similarly with respect to standing. Part VI of the article proposes that the Florida Not for Profit Corporation Act include a private attorney general provision which would allow those with a legitimate stake in the public benefit nonprofit corporation to enforce the duties of the directors. The proposal is based, in part, on the rationale used to grant standing to settlors in the charitable trust area. Finally, Part VII of the article concludes by calling for an amendment to the Florida Not for Profit Corporation Act which recognizes the special interests certain constituencies have in charitable corporations.

II. WHAT IS A CHARITABLE CORPORATION?

A corporation is a charitable corporation if it has been organized as a nonprofit corporation under state law and has complied with the requirements established by the Internal Revenue Code for charitable organizations. Thus, the nonprofit corporate status of a charitable corporation is determined by state law, while the charitable nature of the charitable corporation is established by federal law.

Complicating matters, the terms nonprofit and charitable are sometimes used as if they are interchangeable. Charitable corporations are, however, a subset of nonprofit corporations. All charitable corporations are nonprofit

corporations, but not all nonprofit corporations are charitable. While a corporation may be a nonprofit corporation, its purpose need not be charitable. Nonprofit corporations are simply corporations that can be distinguished from for-profit corporations, primarily, on the basis of one fact: no part of a nonprofit corporation’s profits may be distributed to owners of the corporation. Unlike for-profit corporations, nonprofit corporations must reinvest any profits in the corporation.

The Florida Not for Profit Corporation Act is found in chapter 617 of the Florida Statutes. Nonprofit corporations can be formed in Florida for many different purposes. In fact, section 617.0301 of the Florida Statutes includes a non-exclusive list of twenty-two permissible purposes for nonprofit corporations. According to the statute, nonprofit corporations may be organized for “charitable, benevolent, eleemosynary, educational, historical, civic, patriotic, political, religious, social, fraternal, literary, cultural, athletic, scientific, agricultural, horticultural, animal husbandry, and professional, commercial, industrial, or trade association purposes.” The defining characteristic of a Florida nonprofit corporation, like all nonprofit corporations, is that it does not distribute any part of its income or profit to members, directors, or officers. This characteristic distinguishes a nonprofit corporation from a for-profit or business corporation that may distribute its profits to its owners in the form of dividends paid to shareholders.

Charitable corporations are nonprofit corporations that have applied for and received recognition from the Internal Revenue Service as having complied with the requirements of section 501(c)(3) of the Internal Revenue Code. In order for an organization to qualify for charitable status under section 501(c)(3), five things must be true: 1) it must take the form of a corporation, community chest, fund, or foundation; 2) it must be organized and

17. See id.
18. Id.
19. Id. at 2. “Nonprofit organizations are not prohibited from making a profit. The prohibition is against the distribution of any profits to members, officers, or directors of the organization, or to other private individuals or entities.” Id.
22. Id. § 617.0301.
24. Compare id. § 607.06401(1), with § 617.01401(5).
operated primarily for a charitable purpose; 3) the net earnings of the organization may not inure to the benefit of a private person; 4) the organization may not engage in a substantial amount of lobbying activities; and 5) the organization must not be involved in any political campaigns. 29

A. Charitable Corporations Are Public Benefit Organizations

Corporations that satisfy both the requirements of chapter 617 of the Florida Statutes and section 501(c)(3) of the Internal Revenue Code are also referred to as “public benefit” organizations. 30 The corporations are public benefit organizations because they exist to provide a benefit to the public, or to some segment of the public, and not to provide a benefit to their owners, shareholders, members, or benefactors. 31 Historically, the goal of public benefit organizations was to alleviate poverty by feeding the poor, housing the homeless, caring for the elderly, tending to the sick, and engaging in other activities that involved the provision of essential goods and services to those who could not care for themselves. 32 Over time however, the concept of public benefit has expanded to also include other activities that provide a benefit to society. 33 The provision of education, both formal and informal, support of religion, advancement of science, and the elimination of prejudice and discrimination are all ways organizations can provide a benefit to society. 34 Additionally, organizations that promote the arts are considered public benefit organizations. 35 While the activities of these organizations may not be charitable, as the term is traditionally understood, they enrich society in ways that provide a benefit to the public. 36 Thus, museums, symphonies, and theater groups can be operated as charities. 37

28. Organizations that are recognized as having satisfied the requirements of section 501(c)(3) of the Internal Revenue Code are commonly referred to as charitable organizations. See Fishman & Schwarz, supra note 1, at 74. In order to be considered a 501(c)(3) organization, the purpose of the organization must be “religious, charitable, scientific, testing for public safety, literary, . . . education[, . . . foster[ing]] national or international amateur sports competition, . . . or the prevention of cruelty to children or animals.” I.R.C. § 501(c)(3).

29. See id. Throughout this paper, corporations that have been recognized as section 501(c)(3) organizations will be referred to as charities or charitable organizations.

30. Fishman & Schwarz, supra note 1, at 74.

31. Id. at 75.

32. See generally id. at 87–89 (discussing charitable purposes).

33. See id. at 89.

34. Exemption Requirements, supra note 15.


36. See id.

37. See id.
B. Charitable Corporations Are a Subset of Tax Exempt Organizations

Charitable corporations are often referred to as tax exempt organizations because the income of these organizations is exempt from federal income tax.\(^{38}\) The Internal Revenue Code provides that corporations are subject to an annual income tax.\(^{39}\) Charitable corporations, however, are exempt from this tax pursuant to section 501(a) of the Internal Revenue Code.\(^{40}\) In addition to the exemption of the charity’s income from federal income taxation, donors to certain charities are generally entitled to deduct the amount of their charitable donations from the income on which they will have to pay federal income tax.\(^{41}\) This deduction is available to donors to nonprofit organizations that are also recognized as section 501(c)(3) organizations, as well as certain other tax exempt organizations.\(^{42}\) However, donations to most other types of tax exempt organizations are not deductible from the donor’s taxable income.\(^{43}\)

Furthermore, Florida law provides preferential tax treatment to charitable corporations in the areas of property, sales, use, and income taxes.\(^{44}\) Property owned by an exempt entity and exclusively used for “educational, literary, scientific, religious, charitable, or governmental purposes”\(^{45}\) is exempt from Florida’s property tax.\(^{46}\) Florida charities are also exempt from paying state sales and use tax.\(^{47}\) Finally, the only taxable income earned by a Florida charity is income that is derived from any commercial activity undertaken by the charity that is unrelated to its charitable purpose.\(^{48}\) Therefore,

\(^{39}\) Id. § 11(a). “A tax is hereby imposed for each taxable year on the taxable income of every corporation.” Id.
\(^{40}\) Id. § 501(a). “An organization described in [§ 501(c)(3)] shall be exempt from taxation . . . .” Id.
\(^{41}\) I.R.C. § 170(a)(1). “There shall be allowed as a deduction any charitable contribution . . . .” Id. The Internal Revenue Code limits the amount of the deduction to 50% or less of the donor’s taxable income. Id. § 170(b)(1)(A).
\(^{42}\) See id. § 170(c). The code also allows a donor donating to governmental bodies, veterans’ organizations, fraternal organizations, and cemetery companies to deduct the contributions from the donor’s adjusted gross income. Id.
\(^{43}\) See I.R.C. § 170(a) and (c).
\(^{45}\) Id. § 196.012(1).
\(^{46}\) Id. § 196.192.
\(^{47}\) See id. § 212.08(7)(p). “Also exempt from the tax imposed by this chapter are sales or leases to organizations determined by the Internal Revenue Service to be currently exempt from federal income tax pursuant to s. 501(c)(3) of the Internal Revenue Code. . . .” Id.
\(^{48}\) See Fla. Stat. § 220.13(2)(h). “‘Taxable income,’ in the case of an organization which is exempt from the federal income tax by reason of s. 501(a) of the Internal Revenue Code, means its unrelated business taxable income . . . .” Id.
any income generated by the charitable activities of the organization—for example, tuition charged for education—is not subject to Florida income tax.49

The primary reason that charities and their donors are entitled to preferential tax treatment is that they provide a benefit to society.50 Charitable corporations are thought to alleviate the burdens of government by providing goods and services to the public that the government and for-profit organizations—two other types of societal institutions that provide goods and services to the public—cannot, or will not, provide in sufficient quantities.51 Governments may not be able to provide the goods or services because it would not be efficient for government to do so. In addition, it may not be appropriate for government to provide the goods and services if it would involve entanglement with religion. For-profit organizations may not be interested in providing many of the goods and services provided by charitable corporations because there is no significant profit to be made by doing so.52 In exchange for the contributions they make to society—both by lessening the burdens of government and by increasing the quality of life of its citizens—charities and their donors are treated favorably by state law and the Internal Revenue Code.53

C. Charitable Corporations Distinguished from Mutual Benefit Corporations

Charitable corporations must be distinguished from mutual benefit nonprofit corporations. Rather than benefiting the public, mutual benefit corporations exist to provide a benefit to members of the organization.54 Like charitable nonprofit corporations, mutual benefit nonprofit corporations are governed by chapter 617 of the Florida Statutes.55

Mutual benefit nonprofit corporations may be recognized as tax exempt organizations for tax purposes as well. Section 501(c) of the Internal Revenue Code delineates organizations, other than charities, whose income is exempt from the federal income tax.56 Business leagues, social clubs, labor

49. See id.
50. See FISHMAN & SCHWARZ, supra note 1, at 327–28 (discussing the rationale for charitable tax exemptions).
51. See id. at 43–44 (explaining the rationale for the nonprofit sector).
52. See id.
53. See id. at 327–28.
54. Id. at 74.
organizations, and horticultural organizations are just a few of the different types of organizations listed in section 501(c). Homeowners associations and political organizations are also tax exempt organizations pursuant to other sections of the Internal Revenue Code. Donations to mutual benefit tax exempt organizations are not deductible from the donor’s taxable income.

III. ROLE OF DIRECTORS IN NONPROFIT CORPORATIONS

A nonprofit corporation is governed by a board of directors. It is the members of the board of directors who collectively guide the nonprofit corporation’s operations. Perhaps most importantly, directors are charged with knowing the purpose of the nonprofit corporation they serve and with working within the law to achieve and maximize this purpose.

A. Fiduciary Relationship

It is generally recognized that the relationship between the director of a nonprofit corporation and the corporation is a fiduciary one. As a result, directors owe three major fiduciary duties to the charity. The first duty is the duty of obedience. According to this duty, directors of nonprofit corpo-

57. See id. Mutual benefit organizations listed in this section include: labor, agricultural or horticultural organizations, business leagues, chambers of commerce, recreational clubs, and fraternal beneficiary societies. Id.
58. See id. § 528.
59. See id. § 527.
60. See HOPKINS, A LEGAL GUIDE, supra note 35, at 30.
61. FLA. STAT. § 617.0801 (2006). “All corporate powers must be exercised by or under the authority of, and the affairs of the corporation managed under the direction of, its board of directors . . . .” Id.
62. Id.
63. GUIDEBOOK FOR DIRECTORS OF NONPROFIT CORPORATIONS 6 (George W. Overton & Jeannie Carmedelle Frey eds., 2d ed. 2002).
65. BRUCE R. HOPKINS, LEGAL RESPONSIBILITIES OF NONPROFIT BOARDS 2 (2003) [hereinafter HOPKINS, LEGAL RESPONSIBILITIES].

The duties of the board of directors of a nonprofit organization can be encapsulated in the three Ds: Duty of care, duty of loyalty, and duty of obedience. Defined by case law, these are the legal standards against which all actions taken by directors are held. They are collective duties adhering to the entire board and require the active participation of all board members. Accountability can be demonstrated by showing the effective discharge of these duties.
Id. (emphasis omitted).
66. Id. at 4.
rations must obey the articles of incorporation and the bylaws of the corporation, and remain faithful to the mission and goals of the corporation.67

The second duty, the duty of loyalty, requires the directors to act in the best interest of the charitable corporation.68 This duty requires directors to resolve any conflicts of interests with the corporation in favor of the corporation.69 This duty also requires directors to avoid usurping opportunities that the corporation may wish to obtain.70

The duty of care is the third duty owed to the corporation by its directors.71 The duty of care requires directors to devote to the corporation the time needed to actually manage its affairs.72 It also requires directors to educate themselves about the issues facing the corporation and the consequences of decisions they make on behalf of the corporation.73 In addition, the duty of care imposes upon directors a responsibility to discover and expose any acts that may inflict harm upon the corporation.74

B. Florida Statute Concerning Directors’ Fiduciary Duties

Florida, like many other states, has codified the duty of care for directors of nonprofit corporations.75 Section 617.0830 of the Florida Statutes provides:

(1) A director shall discharge his or her duties as a director, including his or her duties as a member of a committee:

(a) In good faith;

(b) With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and

(c) In a manner he or she reasonably believes to be in the best interests of the corporation.76

67. Id.
68. Id. at 3. See PHELAN & DESIDERIO, supra note 13, at 4-7.
70. 1 MARILYN E. PHELAN, NONPROFIT ENTERPRISES: CORPORATIONS, TRUSTS, AND ASSOCIATIONS § 4:06 (2000).
71. HOPKINS, LEGAL RESPONSIBILITIES, supra note 65, at 3.
72. See id.; GUIDEBOOK FOR DIRECTORS OF NONPROFIT CORPORATIONS, supra note 63, at 19.
73. See id.
74. See id.
This section, however, has only been cited a few times by Florida courts ruling on disputes.\textsuperscript{77} Therefore, there is very little guidance available to determine how it will be applied in particular situations.

C. \textit{Florida Case Law Concerning Directors' Fiduciary Duties}

The vast majority of Florida cases involving the duties of directors of nonprofit corporations involve non-charitable nonprofit corporations, specifically condominium and homeowners' associations.\textsuperscript{78} Careful analysis of the relevant cases reveals that Florida courts treat the duties more broadly, as fiduciary duties that involve obedience, loyalty, and care without identifying or labeling them as such.\textsuperscript{79} For example, in \textit{Penthouse North Ass'n v. Lombardi},\textsuperscript{80} the Supreme Court of Florida found that a condominium association could bring an action against its directors when the directors, who also leased property to the nonprofit corporation, included a rent escalation clause in the lease without informing the members of the association.\textsuperscript{81} The Court recognized that directors who "us[e] their position[s] to enrich themselves at the expense of the [nonprofit corporation]" are in breach of their fiduciary duties.\textsuperscript{82} Likewise, in \textit{Taylor v. Wellington Station Condominium Ass'n},\textsuperscript{83} the Court denied a director's motion for summary judgment when members of the nonprofit condominium association alleged that the director "acted solely at the urging of the developer in order to achieve financial gain."\textsuperscript{84} In \textit{Taylor}, the director of the nonprofit corporation was also an officer of the for-profit developer of the condominium.\textsuperscript{85} In addition to allegedly acting in the best interest of the developer, rather than in the best interest of the condominium association, it was argued that the director never attended the condominium association's board meetings.\textsuperscript{86} By denying the

\begin{itemize}
  \item 76. Fla. Stat. § 617.0830(1)(a)-(c).
  \item 77. See, e.g., Fox v. Prof'l Wrecker Operators of Fla., Inc., 801 So. 2d 175, 180–81 (Fla. 5th Dist. Ct. App. 2001) (concerning a civil case involving a breach of a fiduciary duty); State v. Justice, 624 So. 2d 402, 404 n.8 (Fla. 5th Dist. Ct. App. 1993) (concerning a criminal case involving an alleged theft by a director of a nonprofit corporation).
  \item 78. See, e.g., Penthouse N. Ass'n, Inc. v. Lombardi, 461 So. 2d 1350, 1351 (Fla. 1984); Taylor v. Wellington Station Condo. Ass'n Inc., 633 So. 2d 43, 44 (Fla. 5th Dist. Ct. App. 1994).
  \item 79. See generally Penthouse N. Ass'n, 461 So. 2d at 1350; Taylor, 633 So. 2d at 43.
  \item 80. 461 So. 2d 1350 (Fla. 1984).
  \item 81. Id. at 1352.
  \item 82. Id. at 1351.
  \item 83. 633 So. 2d 43 (Fla. 5th Dist. Ct. App. 1994).
  \item 84. Id. at 44.
  \item 85. Id.
  \item 86. Id. at 44 n.1.
\end{itemize}
director's motion for summary judgment, the Court found that the director's actions and inactions could constitute a breach of fiduciary duties. 87

Two cases involving charitable nonprofit corporations also discuss generally directors' fiduciary obligations to their charities. 88 In State ex rel. Butterworth v. Anclote Manor Hospital, Inc., 89 the court found that directors of a nonprofit corporation had breached their fiduciary duties by selling the nonprofit corporation's assets—a hospital and two undeveloped parcels of land—for less than fair market value to a for-profit corporation they owned. 90 While not describing these fiduciary breaches as breaches of the duties of obedience, loyalty, and care, the court recognized that the directors were acting in ways that were inconsistent with the nonprofit corporation's articles of incorporation. 91 Similarly, in Word of Life Ministry, Inc. v. Miller, 92 the court found that directors of a church were not entitled to summary judgment on a suit brought by the church and members of the congregation for attempting to amend the bylaws of the church, a nonprofit corporation, in such a way that would allow them to dissolve the nonprofit corporation and take control of the church's assets. 93 The court found that a cause of action had been stated for a breach of fiduciary duty by the directors and stated that "[a] corporation must act in accordance with its articles of incorporation and duly adopted by-laws." 94 In addition, the court in Word of Life Ministry, Inc. found that summary judgment was inappropriate when the complaint alleged that the directors had "acted in furtherance of their own personal interests rather than in the Church's best interests." 95

IV. ENFORCEMENT OF DIRECTORS' DUTIES

When directors of a nonprofit corporation have breached their fiduciary duties to the corporation, it is the corporation that is injured. 96 The injury

87. Id. at 44–45.
89. 566 So. 2d 296 (Fla. 2d Dist. Ct. App. 1990).
90. Anclote Manor Hosp., Inc., 566 So. 2d at 297.
91. Id. at 299. "The attorney general presented sufficient competent evidence to sustain the trial court's finding that the appellee's improperly used the corporation's articles of incorporation when they sold the corporation's assets..." Id. at 298–99.
94. Id. at 363.
95. Id. at 366.
96. See Fishman & Schwarz, supra note 1, at 176.
results from assets or opportunities that belong to the corporation being misused in a way that interferes with the corporation’s ability to fulfill its mission. The harm may reduce the funds available to the corporation for use in its operations because the directors have spent the money in ways that are not aligned with the corporation’s purpose. The harm may also cause the corporation to miss out on opportunities that are aligned with the corporation’s purpose because the directors have taken the opportunities for themselves. In addition to hurting the corporation financially, the injury may also harm the corporation’s reputation, making it more difficult for the corporation to operate in the community. The corporation can only be protected if there are individuals who are entitled to bring suit against the directors, on behalf of the corporation, for the unlawful acts committed by the directors in the name of the corporation.

A. Florida Not for Profit Corporation Act Provisions Concerning Standing

Florida law grants standing only to a few specific individuals who challenge actions of directors that may constitute breaches of the nonprofit corporation directors’ fiduciary duties. Section 617.0304 of the Florida Statutes provides in relevant part:

(2) A corporation’s power to act may be challenged:

(a) In a proceeding by a member against the corporation to enjoin the act;

97. See id. at 176–79.
98. Id. at 176.
99. Id. at 205–06.
100. See, e.g., David Kidwell, Charity Director Used Funds for Personal Benefit, MIAMI HERALD, Apr. 18, 2004, at A1. Camillus House, a Miami, Florida charity providing housing, meals, medical, and rehabilitation services to the homeless, is an example of how a charity’s reputation can be damaged by the action or inaction of a board of directors. Id. In March 2004, Dale A. Simpson, the former executive director of Camillus House, was forced to resign after he used the assets of the charity to renovate his own homes. Id. According to the Miami Herald, “[b]lind trust and lax oversight” on the part of the board of directors allowed Mr. Simpson to misuse the charity’s funds. Camillus House Scandal Is a Wake-Up Call, MIAMI HERALD, Apr. 20, 2004, at 24A. “The board must be deeply engaged in Camillus’ inner workings if it is to shore up public trust.” Id.
(b) In a proceeding by the corporation, directly, derivatively, or through a receiver, trustee, or other legal representative, or through members in a representative suit, against an incumbent or former officer, employee, or agent of the corporation; or

(c) In a proceeding by the Attorney General, as provided in this act, to dissolve the corporation or in a proceeding by the Attorney General to enjoin the corporation from the transaction of unauthorized business.

(3) In a member’s proceeding under paragraph (2)(a) to enjoin an unauthorized corporate act, the court may enjoin or set aside the act, if equitable and if all affected persons are parties to the proceeding, and may award damages for loss (other than anticipated profits) suffered by the corporation or another party because of enjoining the unauthorized act. 103

In Florida, only members, directors, or legal representatives of a non-profit corporation in a derivative suit, and the attorney general, have standing to challenge a nonprofit corporation’s power to act on behalf of the corporation. 104 In determining how the attorney general will be apprised of possible fiduciary breaches by directors of nonprofit corporations, Florida Statutes section 617.2003—Proceedings to Revoke Articles of Incorporation or Charter or Prevent Its Use—states:

If any member or citizen complains to the Department of Legal Affairs that any corporation organized under this act was organized or is being used as a cover to evade any of the laws against crime, or for purposes inconsistent with those stated in its articles of incorporation or charter, or that an officer or director of a corporation has participated in a sale or transaction that is affected by a conflict of interest or from which he or she derived an improper personal benefit, either directly or indirectly, and shall submit prima facie evidence to sustain such charge, together with sufficient money to cover court costs and expenses, the department shall institute and in due course prosecute to final judgment such legal or equitable proceedings as may be considered advisable either to revoke the articles of incorporation or charter, to prevent its improper use, or to recover on behalf of the corporation or its un-

103. Id. § 617.0304(2)-(3).
104. See id. § 617.2003.
known beneficiaries any profits improperly received by the corporation or its officers or directors.\textsuperscript{105}

This provision codifies the practice which allows citizens of the state to contact the Office of the Attorney General of Florida, also known as the Department of Legal Affairs,\textsuperscript{106} with concerns and questions about nonprofit corporations.\textsuperscript{107}

**B. Statutory Provisions Do Not Adequately Protect All Nonprofit Corporations**

Section 617.2003 of the *Florida Statutes* appears to provide an avenue for private citizens to ensure that directors of nonprofit corporations honor their fiduciary duties.\textsuperscript{108} However, the provision allows the Department of Legal Affairs to exercise its discretion in determining which of the concerns voiced by citizens will be pursued.\textsuperscript{109} As a result, breaches of fiduciary duties by directors may not be challenged if the Department of Legal Affairs declines to exercise its discretionary authority.\textsuperscript{110} This may happen for a number of reasons, including “[s]taffing problems and a relative lack of interest in monitoring nonprofits.”\textsuperscript{111} As a result, it has been said that “attorney general oversight [is] more theoretical than deterrent.”\textsuperscript{112} Moreover, Florida’s Attorney General’s office, unlike those in several other states,\textsuperscript{113} has not created a separate charities section or unit to handle and coordinate

\textsuperscript{105.} Id. (emphasis added).
\textsuperscript{108.} See Fla. Stat. § 617.2003. The first sentence allows for any *citizen* to lodge a complaint. Id.
\textsuperscript{109.} See id. “[T]he [D]epartment shall institute and . . . prosecute . . . proceedings as may be considered . . .” Id.
\textsuperscript{110.} Id.
\textsuperscript{111.} FISHMAN & SCHWARZ, supra note 1, at 248.
\textsuperscript{112.} Id.
\textsuperscript{113.} See COUNCIL ON FOUNDS. & FORUM OF REG’L ASS’NS OF GRANTMAKERS, GOVERNMENT REGULATION OF CHARITIES—AN OVERVIEW 9 (2006), http://www.givingforum.org/cgi-bin/doc_rep/public/file.pl/3666/regpuboverview.pdf (discussing how states like Pennsylvania, California, and Ohio have established charity sections in their attorney general offices).
charity oversight work, thereby increasing the likelihood that concerns about fiduciary breaches will not be handled in a timely fashion, if ever.\textsuperscript{114}

C. \textit{Shortcomings of Florida's Approach}

Florida's approach to standing to bring suit against directors of nonprofit corporations for breach of statutory duties does not achieve its desired goals.\textsuperscript{115} While adequately protecting the interests of a mutual benefit nonprofit corporation, this approach leaves the actions of directors of public benefit nonprofit corporations virtually untouchable and unchallengeable.\textsuperscript{116}

When directors of a mutual benefit corporation, such as a country club, homeowners' association, or labor union, breach their fiduciary duties, those who are most affected by the breach—the members of the corporation—are empowered by the \textit{Florida Statutes} to bring suit against the directors on the corporation's behalf.\textsuperscript{117} This right, which has been granted to the members, has been analogized to the right of shareholders of a for-profit corporation to bring suit against its directors for breach of fiduciary duties in a derivative action.\textsuperscript{118} In \textit{Larsen v. Island Developers, Ltd.},\textsuperscript{119} members of the Fisher Island Club, a nonprofit corporation that operated and maintained the residential condominium community facilities, brought a derivative action against the corporation.\textsuperscript{120} Reversing the trial court's dismissal of the members' complaint, the court stated that the right of members to bring a derivative action on behalf of a nonprofit corporation comes from the common law.\textsuperscript{121} According to the court, it is an equitable remedy that provides "relief from 'faithless directors and managers.'"\textsuperscript{122} Thus, even though the not-for-profit corporation statute, in effect at that time, did not provide for derivative actions against directors of nonprofit corporations, the common law did.\textsuperscript{123}

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{114} See Mary Grace Blasko et al., \textit{Standing to Sue in the Charitable Sector}, 28 U.S.F. L. Rev. 37, 47–49 (1993).
  \item \textsuperscript{115} See, e.g., Fox v. Prof'l Wrecker Operators of Fla., Inc., 801 So. 2d 175, 180 (Fla. 5th Dist. Ct. App. 2001). Though Florida recognizes standing for members of nonprofit corporations for breach of fiduciary duties, the directors of the nonprofit corporation are essentially immune from civil liability. \textit{Id.}
  \item \textsuperscript{116} See \textit{id.} at 180–82.
  \item \textsuperscript{117} Larsen v. Island Developers, Ltd., 769 So. 2d 1071, 1072 (Fla. 3d Dist. Ct. App. 2000).
  \item \textsuperscript{118} Fox, 801 So. 2d at 180.
  \item \textsuperscript{119} 769 So. 2d 1071 (Fla. 3d Dist. Ct. App. 2000).
  \item \textsuperscript{120} \textit{id.} at 1071–72.
  \item \textsuperscript{121} \textit{id.} at 1072.
  \item \textsuperscript{122} \textit{id.} (quoting Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 548 (1949)).
  \item \textsuperscript{123} Larsen, 769 So. 2d at 1072.
\end{itemize}
\end{footnotesize}
Likewise, in *Fox v. Professional Wrecker Operators of Florida, Inc.*, the court found that members of nonprofit corporations should be treated similarly to members of for-profit corporations with respect to derivative actions "because there is nothing about the remedy, which seeks redress for breach of fiduciary duty, that warrants distinctive treatment based upon corporate purpose."  

However, the same is not true when the directors of a public benefit nonprofit corporation breach their fiduciary duties. In this instance, it is not the members of the corporation that are directly affected by a fiduciary breach by directors; rather, it is the donors to the corporation, whose money is being misused, or the employees and volunteers whose workplace has been impacted, who are most directly affected. Unlike the mutual benefit corporation scenario, those who are most affected by the nonprofit corporation's failure to act as intended are not granted the right to challenge the actions of the directors on the corporation's behalf.

Florida's "one size fits all" approach to standing—lumping together both mutual benefit and public benefit organizations—fails to recognize that many public benefit nonprofit corporations do not have members who are empowered to act on behalf of the corporation when directors abuse their position. Charities are unlike country clubs, homeowners associations, or business leagues that are comprised of members who benefit from the nonprofit corporation's activities. Public benefit organizations, by definition, benefit the public or some undefined segment of the public.

In addition, while section 617.0304 of the *Florida Statutes* grants standing to directors to bring suit on behalf of the corporation when the directors breach their fiduciary duties, it is unlikely that directors will authorize

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124. 801 So. 2d 175 (Fla. 5th Dist. Ct. App. 2001).
125. *Id.* at 180.
126. *FLA. STAT.* § 617.0304(2)(a). Because the statute only grants standing to a "member" of the corporation, this effectively leaves public benefit nonprofit corporations without members as immune. *Id.*
128. *See* *FLA. STAT.* § 617.0304(2)(a).
129. *See id.* § 617.0301; *Fox,* 801 So. 2d at 180.
130. *Fishman & Schwarz,* *supra* note 1, at 76.
132. *Fishman & Schwarz,* *supra* note 1, at 76.
133. *FLA. STAT.* § 617.0304.
potentially embarrassing litigation to be brought against them.\textsuperscript{134} Thus, unless the Florida statute is changed, those who wish to challenge the acts of charitable corporations in Florida are at the mercy of the Florida Attorney General when seeking recovery, when directors misuse their positions.

V. **Why Florida Should Change the Standing Provision in the Florida Not for Profit Corporation Act**

A. *Florida Should Provide Equal Access to Derivative Actions to Public Benefit and Mutual Benefit Nonprofit Corporations*

Florida courts have stated—in cases involving mutual benefit corporations—that there is no reason to treat nonprofit corporations differently than for-profit corporations, when it comes to derivative actions.\textsuperscript{135} Since the purpose of derivative actions is to permit redress for “rights of action that belong to corporations that have been injured by the acts of the corporations’ officers and directors,”\textsuperscript{136} the not-for-profit corporation statute must ensure that it is possible for this to happen when both mutual benefit and public benefit nonprofit corporations have been injured. The statute accomplishes this goal for mutual benefit nonprofit corporations by allowing members of the corporation to bring suit when the directors have breached their fiduciary duties.\textsuperscript{137} The members have a vested interest in the purpose of the nonprofit corporation, and it is appropriate that they can act on behalf of the corporation when the directors act contrary to that purpose.

The statute does not, however, provide the same redress when the corporation is a public benefit nonprofit corporation.\textsuperscript{138} Even though there are individuals with a vested interest in the public benefit corporation’s purpose, because there are often no members of the corporation,\textsuperscript{139} there is no one with standing to enforce the rights of the corporation.\textsuperscript{140} The goal of derivative actions, however, is to give those with a legitimate stake in the corpora-

\textsuperscript{134} See Robert W. Hamilton, Business Organizations: Unincorporated Business and Closely Held Corporations § 8.12 (1996). Professor Hamilton makes the same argument about shareholders and actions against for-profit corporations. \textit{Id.}

\textsuperscript{135} See supra text accompanying notes 75–78; see, e.g., Fox v. Prof’l Wrecker Operators of Fla., Inc., 801 So. 2d 175, 180 (Fla. 5th Dist. Ct. App. 2001); Larsen v. Island Developers, Ltd., 769 So. 2d 1071, 1072 (Fla. 3d Dist. Ct. App. 2000).

\textsuperscript{136} Timko v. Triarsi, 898 So. 2d 89, 90 (Fla. 5th Dist. Ct. App. 2005) (citing Provence v. Palm Beach Taverns, Inc., 676 So. 2d 1022, 1024 (Fla. 4th Dist. Ct. App. 1996)).


\textsuperscript{138} \textit{Id.} § 617.0304 (2)(a).

\textsuperscript{139} Fishman \& Schwarz, supra note 1, at 76.

\textsuperscript{140} See Fla. Stat. § 617.0304.
Courts have held that members have a legitimate stake in mutual benefit corporations. Who has a legitimate stake when the corporation is a public benefit corporation?

B. Florida Should Protect Charitable Corporations and Charitable Trusts Similarly

Charitable organizations are generally organized as either charitable corporations or charitable trusts. Even though charitable corporations are as similar to charitable trusts as they are to for-profit corporations, the organizational structure determines the law that governs the charity. Florida has chosen to apply the principles of corporate law to charitable corporations. Therefore, the Florida Not for Profit Corporation Act, resembles the Florida Business Corporation Act, and not the Florida Trust Code, when determining who has standing to bring suit, when directors of charitable corporations breach their fiduciary duties.

The law concerning standing may have been drafted differently if Florida had chosen to borrow from trust law, instead of corporate law. In Delaware ex rel. Gebelein v. Florida First National Bank of Jacksonville, the First District Court of Appeal of Florida explained standing for enforcement of charitable trusts as follows:

As a general rule, only the Attorney General may enforce a charitable trust. Unlike a private trust, where there are identifiable beneficiaries who are the equitable owners of the trust property, the beneficiaries of a charitable trust are the public at large. Whereas beneficiaries of a private trust have the power to maintain...
a suit to enforce the trust, the public must act through some public official to maintain such a suit.\textsuperscript{152}

The court continued:

However, it has been recognized that an entity other than the Attorney General can be a proper party to bring suit to enforce a charitable trust. Trustees have been permitted to bring suit against co-trustees, and persons or organizations having a special interest in a trust or a special status under a trust instrument are considered to have standing to enforce the trust.\textsuperscript{153}

Under Florida corporate law, the attorney general and trustees are empowered to bring suit against trustees for breach of fiduciary duties.\textsuperscript{154} Moreover, those with a “special interest” in a trust or a “special status” under a trust instrument can bring suit to enforce a charitable trust.\textsuperscript{155} In Gebelein, the court found that the Attorney General of Delaware, as the lawful representative of the citizens of Delaware, had standing to challenge the actions of the trustees of the DuPont Trust.\textsuperscript{156} According to the trust instrument, “the net income of the trust was to be paid... to the Nemours Foundation ‘for the purpose of maintaining “Nemours” as a charitable institution for the care and treatment of crippled children, . . . first consideration, in each instance, being given to beneficiaries who are residents of Delaware.””\textsuperscript{157} The Florida court found that the citizens of Delaware had a special interest in enforcement of the trust because they had a special status not shared with the public at large.\textsuperscript{158}

Additionally, Florida is one of the nineteen states that has enacted the Uniform Trust Code.\textsuperscript{159} Section 736.0405 of the Florida Statutes recognizes the special interest of settlors in ensuring that the assets of the charitable trusts they create are used to fulfill a charitable purpose.\textsuperscript{160} Because there are those with a special interest or a special status, with respect to a charitable corporation, just as there are those with such an interest or status, with re-

\begin{itemize}
  \item \textsuperscript{152} Id. at 1077.
  \item \textsuperscript{153} Id. (citing RONALD CHESTER ET AL., THE LAW OF TRUSTS AND TRUSTEES §§ 412-14 (2005); EDITH L. FISCH ET AL., CHARITIES AND CHARITABLE FOUNDATIONS §§ 713, 718-19 (1974); 4 AUSTIN WAKEMAN SCOTT, THE LAW OF TRUSTS § 391 (3d ed. 1967)).
  \item \textsuperscript{154} FLA. STAT. § 617.0304.
  \item \textsuperscript{155} Gebelein, 381 So. 2d at 1077.
  \item \textsuperscript{156} Id. at 1078.
  \item \textsuperscript{157} Id. at 1076.
  \item \textsuperscript{158} Id. at 1078.
  \item \textsuperscript{159} UTCproject.org, supra note 10.
  \item \textsuperscript{160} FLA. STAT. § 736.0405 (2006).
\end{itemize}
spect to a charitable trust, those corporate individuals should also have standing to enforce the directors’ duties.161

VI. THE PRIVATE ATTORNEY GENERAL DOCTRINE

In order to fully protect the interests of charitable nonprofit corporations, the Florida Not for Profit Corporation Act should be amended to include a private attorney general provision for public benefit corporations.

A. What Is the Private Attorney General Doctrine?

The private attorney general concept dates back to at least 1943, when the court, in Associated Industries of New York State, Inc. v. Ickes,162 used the term private attorney general to refer “to plaintiffs empowered by Congress to ‘su[e] to prevent action by an officer in violation of his statutory powers . . . even if the sole purpose is to vindicate the public interest.’”163 The term has come to encompass much more than the right to sue a public officer.164 For example, Florida recognizes that the private attorney general theory is used when private attorneys bring suit for violation of civil rights.165 In Wesley Group Home Ministries, Inc. v. City of Hallandale,166 a case involving the Fair Housing Act, the Florida court stated that “[i]n civil rights laws, Congress uses the private attorney general concept as a vehicle for vindicating social policies of the highest priority.”167 The common thread that runs through private attorney general actions is that the lawsuit involves more than just redress for a private injury.168 Rather, the private attorney general theory applies when the injury is to the public, or when the acts of the potential defendant run contrary to some important public policy.169 Such actions also allow for a remedy that protects the public and the public

161. See Blasko et al., supra note 114, at 37 (analyzing standing to sue charitable trusts and corporations for mismanagement, fraud, and corruption).
162. 134 F.2d 694 (2d Cir. 1943).
165. See id.
166. Id. at 1046.
167. Id. at 1050 (citing Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402 (1968)).
168. Morrison, supra note 163, at 590. “At its core, however, the term denotes a plaintiff who sues to vindicate public interests not directly connected to any special stake of her own.” Id.
169. See id. at 598.
policy, rather than just compensating a private individual for injury. The private attorney general theory is not appropriate when there is only an injury to a single person because in that instance, it would be appropriate for the injured party to retain an attorney to seek redress for the injury.

B. Potential Plaintiffs Under the Private Attorney General Doctrine

When directors of public benefit corporations breach their fiduciary duties, it is the corporation that is injured. In addition, the public is injured because public benefit corporations exist to provide a benefit to the public. Because public benefit corporations generally do not have members, there are no private individuals who are entitled to bring suit for enforcement of those duties. A private attorney general provision in the Florida Not for Profit Corporation Act would grant standing to certain private individuals that would enable them to act on behalf of the corporation. The provision would not grant standing generally to members of the public. Rather, the provision would recognize that there are those with a legitimate stake or special interest in the corporation who are entitled to act on behalf of the corporation.

In order to have a legitimate stake or special interest in a public benefit nonprofit corporation that would confer standing, an individual must have an interest or stake in the charity that exceeds any general interest possessed by the public at large. The individual must have a more intimate relationship with the charity, such that it would be appropriate for that individual to serve as a watchdog over the charity. Three categories of individuals—substantial donors, key employees and volunteers, and potential beneficiaries—shall be considered in turn.

170. See id.
172. See FISHMAN & SCHWARZ, supra note 1, at 76.
173. See PHelan & Desiderio, supra note 13, at 2.
174. FISHMAN & SCHWARZ, supra note 1, at 75–76.
175. See Morrison, supra note 163, at 590.
176. See id.
177. See id.
178. See id. at 622–27.
179. See id.
1. Substantial Donors

Section 736.0405 of the new *Florida Trust Code* explicitly grants, for the first time, standing to enforce a charitable trust to the trust’s settlor.\(^{180}\) The statute continues the common law rule that charitable trusts are enforceable by the state attorney general, as well as others with a special interest in a trust, including co-trustees.\(^{181}\) The *Florida Trust Code* defines a settlor as “a person, including a testator, who creates or contributes property to a trust.”\(^{182}\) Thus, in order to protect charitable corporations and charitable trusts similarly, the Florida Not for Profit Corporation Act should also allow those who create or contribute property to a charitable corporation to sue the directors for breach of fiduciary duty. However, in order to ensure that not everyone who makes a contribution to a charity will have standing to sue the charity, a private attorney general provision would only grant standing to “substantial” donors. The provision could define a substantial donor as one who has contributed at least twenty percent of the charity’s revenue in the year or years of the action or actions to be challenged. This requirement would protect directors from having to defend themselves in lawsuits brought by those with virtually no interest in the corporation, while recognizing the significant contribution the substantial donor has made to the charitable corporation.\(^{183}\)

Allowing a substantial donor to have standing to sue directors for breach of fiduciary duties serves several beneficial purposes.\(^{184}\) First, it serves to alleviate the burden on the attorney general’s office of policing the fiduciary duties of all Florida charitable organizations.\(^{185}\) Substantial donors would likely keep a watchful eye on the continuing operations of their chosen charitable organizations. Granting standing to such concerned individuals or entities would perhaps enable the donors to catch a breach early enough to avert a catastrophic result to the charity.

Second, charitable organizations attempting to seek substantial contributions from prospective donors would benefit from a law granting such
The charitable organizations could point to this right in discussions with prospective donors who otherwise might insist on difficult and confining contractual limitations on the use of their donated funds.\footnote{Iris J. Goodwin, Donor Standing To Enforce Charitable Gifts: Civil Society vs. Donor Empowerment, 58 Vand. L. Rev. 1093, 1143 (2005).}

2. Employees and Volunteers

This portion of the attorney general provision of the statute would also provide a status akin to employees’ whistle-blower status and regular volunteers of the charity.\footnote{10-259 Lab. & Emp. Law (MB) § 259.04 (2006), http://lexis.com (follow “Matthew Bender” hyperlink; then follow “By Area of Law” hyperlink; then follow “Labor & Employment Law” hyperlink; search “259.04”; then follow “Part IX General Employment Law” hyperlink). Whistle blower status protects “employees who report, or threaten to report, [or object to employer] wrongdoing” from retaliatory job actions. Id.} Often, employees and volunteers, those who are involved in the day-to-day operations of the charity, have a front row seat to abuses by directors. The statute could grant a special status to these individuals, so long as they were employees or volunteers at the time of the alleged breaches and witnessed, or otherwise had first-hand knowledge of the directors’ breaches of fiduciary duties, giving them standing to sue the directors on behalf of the corporation.\footnote{FLA. STAT. § 112.3187(2) (2006). Florida’s Whistle-blower’s Act is intended: to prevent agencies or independent contractors from taking retaliatory action against an employee who reports to an appropriate agency violations of law on the part of a public employer or independent contractor that create a substantial and specific danger to the public’s health, safety, or welfare. It is further the intent of the Legislature to prevent agencies or independent contractors from taking retaliatory action against any person who discloses information to an appropriate agency alleging improper use of governmental office, gross waste of funds, or any other abuse or gross neglect of duty on the part of an agency, public officer, or employee. Id.}

3. Beneficiaries and Potential Beneficiaries

While it is tempting to advocate that beneficiaries and potential beneficiaries be recognized as having standing to bring suit on behalf of the charities from which they benefit against the directors who are misusing the charities, these individuals may constitute a group that is too amorphous and undefined to be manageable. The beneficiaries of a charitable corporation are by definition unidentifiable, and while it may be possible to identify current beneficiaries of a particular charity, current beneficiaries eventually become former beneficiaries.\footnote{Gary, supra note 101, at 616; Braver et al., supra note 146, at 50.} Students graduate from school, homeless people find homes, hospitals discharge patients, and symphony patrons move to new

\footnote{Gary, supra note 101, at 616; Braver et al., supra note 146, at 50.}
cities. However, it is possible that certain beneficiaries have stakes in the corporation that are legitimate enough that they should be granted standing to sue for breach of fiduciary duties by the directors.\textsuperscript{190} Therefore, the statute should provide that: 1) Current beneficiaries of a charitable corporation at the time of the alleged breach of fiduciary duty have standing to sue on behalf of the corporation; and 2) when the class of potential beneficiaries is sharply defined, any of those potential beneficiaries has standing to sue on behalf of the corporation. For example, students who are members of a class from which a charitable corporation is to select scholarship recipients would have standing to sue if the directors breach their fiduciary duties.

C. \textit{Fundamental Principle Underlying Private Attorney General Doctrine}

Determining who should have standing to enforce the fiduciary duties of charitable corporation directors is difficult and bright line rules are always subject to scrutiny. However, the fundamental, conceptual principle is clear: The plaintiff must be distinguishable from members of the general public so that it is appropriate for the individual to act on behalf of the corporation.\textsuperscript{191} There must be a nexus between the potential plaintiff's interest in the charity and the alleged breach of fiduciary duty.\textsuperscript{192} The potential plaintiff must have an interest in the charity that is related to the alleged breach of duty.\textsuperscript{193} Donors, employees, volunteers, and certain beneficiaries all have interests in the charity that require the directors to act in ways that do not harm the charity.\textsuperscript{194} When directors misuse the charity's assets or opportunities, donors, employees, volunteers, and beneficiaries are affected in ways that are different than any effect that may be felt by general members of the public.\textsuperscript{195}

\textsuperscript{190} See Alco Gravure, Inc. v. Knapp Found., 479 N.E.2d 752, 756 (N.Y. 1985). In this case, the Knapp Foundation, a charitable corporation, established to provide assistance to the employees of specified companies and their families, amended its certificate of incorporation to allow it to distribute principal and income of the Foundation to other charitable organizations. \textit{Id.} at 754. The court, in holding that the employees had standing to challenge the amendment, stated:

\begin{quote}
    The general rule is that one who is merely a possible beneficiary of a charitable trust, or a member of a class of possible beneficiaries, is not entitled to sue for enforcement of the trust... There is an exception to the general rule, however, when a particular group of people has a special interest in funds held for a charitable purpose, as when they are entitled to a preference in the distribution of such funds and the class of potential beneficiaries is sharply defined and limited in number.
\end{quote}

\textit{Id.} at 755.

\textsuperscript{191} See Blasko et al., \textit{supra} note 114, at 55, 70.

\textsuperscript{192} \textit{Id.} at 74.

\textsuperscript{193} \textit{Id.}

\textsuperscript{194} See \textsc{Fishman} \& \textsc{Schwarz}, \textit{supra} note 1, at 75–76.

\textsuperscript{195} See Blasko et al., \textit{supra} note 114, at 70–71.
Donors, whose money has been misspent, employees and volunteers, who can no longer perform their jobs effectively, and beneficiaries, who cannot receive the goods or services they need, suffer and are affected by the breach in a way that is related to, but separate from the injury suffered by the charity. Similarly, the potential plaintiff must have an interest in ensuring that the charity fulfills its charitable mission in a way that can be distinguished from the interest of the general public. While public benefit organizations benefit the public generally by lessening the burdens on government, and improving the quality of life for society as a whole, there are those who are more intimately connected with a charity’s charitable purpose. Donors, who have contributed money to further the charitable purpose, employees and volunteers, who give their time to further the charitable purpose, and beneficiaries, who receive the fruits of the charity’s labor, have a greater interest in the charity’s fulfillment of its charitable purpose than members of the public generally.

D. Remedy Available Under Private Attorney General Doctrine

The purpose of the private attorney general theory is to protect the charity—not to compensate any individual for harms they may have received as a result of a breach of fiduciary duty. Thus, the remedies available under the statute will be those designed to restore the charity to the state it was in before the breach. Directors who have acted in ways inconsistent with the fiduciary duties that they owe to the corporation will be required to return to the charity any assets or opportunities taken from the charity. In addition, the charity may be entitled to equitable relief intended to enjoin the directors from acting in ways that will harm the charity. Further, in appropriate instances, the court may even remove directors from the board or in the most egregious situations, dissolve the corporation. There is the risk that a private attorney general provision in the Florida Not for Profit Corporation statute will make it more difficult for charitable corporations to find individuals

196. Id. at 70–72. 197. See Fishman & Schwarz, supra note 1, at 76. 198. See Morrison, supra note 163, at 590. “The remedies sought in such actions tend to be correspondingly broad: rather than seeking redress for discrete injuries, private attorneys general typically request injunctive or other equitable relief aimed at altering the practices of large institutions.” Id. 199. See Rubenstein, supra note 171, at 2141. 200. Id. 201. Morrison, supra note 163, at 590. 202. See Fla. Stat. § 617.1430 (2006).
willing to serve as directors. However, the private attorney general provision will not alter any protections for directors already built into the Not For Profit Corporation Act.

E. Attorney’s Fees Under the Private Attorney General Doctrine

Private attorney general statutes often provide for attorney’s fees for successful litigation. The doctrine has been described as one that allows for the award of attorney’s fees “to a party who vindicates a right that: (1) benefits a large number of people; (2) requires private enforcement; and (3) is of societal importance.” The private attorney general statute this article proposes would not generally allow for attorney’s fees. Unlike, for example, the Florida Deceptive and Unfair Trade Practices Act, which allows the prevailing party to recover attorney’s fees, the private attorney general provision in the Not for Profit Corporation Act would only do so in very limited circumstances.

The purpose of allowing private individuals to bring suit for directors’ breaches of fiduciary duty is to protect the charity. That is, directors should be required to disgorge any benefit they received at the expense of the charity and return it to the charity. If the prevailing party were entitled to attorney’s fees from the corporation, as is the case with the attorney’s fees when shareholders prevail in derivative actions, it is possible the charity would end up paying more in attorney’s fees than the charity would recover.

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203. See id.
204. See id. § 617.0834(1)(b)(1)-(3). The Florida Statute provides for immunity from civil liability for directors who have not acted criminally, derived an improper personal benefit, or who have not acted recklessly, in bad faith, with a malicious purpose, or in a manner demonstrating wanton and willful disregard of human rights, safety, or property. Id.
206. Id.
208. Id.
209. Id. § 501.2105(5).
210. See Gary, supra note 101, at 596.
211. See id.
212. See, e.g., Fla. Stat. § 607.07401(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.

Id.
from the breaching directors. Instead, the American Rule\textsuperscript{213} regarding attorney’s fees would apply and private attorneys and legal clinics would be encouraged to take up these cases on a pro bono basis. If, however, a director is found to have breached his or her fiduciary duties, and also either: 1) violated the criminal law; 2) received an improper personal benefit; or 3) acted recklessly, in bad faith, with a malicious purpose, or in a manner demonstrating wanton and willful disregard of human rights, safety, or property, that director will be responsible for the prevailing party’s attorney’s fees.\textsuperscript{214} In addition, a nonprofit corporation will not be permitted to indemnify a director in such a case.\textsuperscript{215}

The private attorney general provision in the Florida Not for Profit Corporation Act is intended for use in only the most serious cases—when none of the directors of the charity is willing to bring suit on behalf of the charity and when the attorney general’s office is unwilling to pursue the claim.\textsuperscript{216} By providing for attorney’s fees only when the directors have acted particularly egregiously,\textsuperscript{217} the provision will discourage frivolous and vexatious litigation.

\section*{VII. CONCLUSION}

A private attorney general provision in nonprofit corporation acts that treats public benefit and mutual benefit corporations similarly with regards to standing will ensure that charitable nonprofit corporations provide the public benefits they were created to provide. By providing a mechanism that allows those who are most invested in the corporation to enforce the fiduciary duties the directors owe to the corporation, the private attorney general provision will allow private individuals to assist the attorney general in maintaining a watchful eye over corporations that were granted the privilege of operating in the State of Florida based on the benefits they promised to provide to the public. In addition, the provision will prevent charitable corporations from misusing their corporate charters by encouraging directors to live up to their fiduciary responsibilities. A private attorney general provision that is not a

\textsuperscript{213} Black’s Law Dictionary explains the American Rule as providing “that attorney fees are not awardable to the winning party unless statutorily or contractually authorized.” BLACK’S LAW DICTIONARY 75 (5th ed. 1979).

\textsuperscript{214} This language is borrowed from the provision of Florida’s Not for Profit Corporation Act regarding personal liability of directors of nonprofit corporations. FLA. STAT. § 617.0834(1)(b)(1)-(3).

\textsuperscript{215} This does not change the indemnification provision in the Florida Not for Profit Corporation Act. See id. §§ 617.0831, 607.0850.

\textsuperscript{216} See supra Part VI.D.

\textsuperscript{217} See supra Part VI.E.
“one size fits all” provision will further the state’s interest in protecting its citizens by holding directors of charitable corporations accountable to the corporations they serve.