

SENATE BILL NO. 203—COMMITTEE ON JUDICIARY

FEBRUARY 22, 2017

Referred to Committee on Judiciary

SUMMARY—Revises provisions relating to domestic corporations. (BDR 7-71)

FISCAL NOTE: Effect on Local Government: No. Effect on the State: No.

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EXPLANATION – Matter in *bolded italics* is new; matter between brackets ~~omitted material~~ is material to be omitted.

AN ACT relating to business associations; expressing the intent of the Legislature concerning the law of domestic corporations; requiring attorneys to verify that they have read certain relevant statutes before filing a complaint for certain causes of action relating to domestic corporations; revising the presumption against negligence for the actions of corporate directors and officers; clarifying the factors that may be considered by corporate directors and officers in the exercise of their respective powers; and providing other matters properly relating thereto.

Legislative Counsel’s Digest:

1 Under existing law, with certain exceptions, a director or officer of a domestic
2 corporation is presumed not to be individually liable to the corporation or its
3 stockholders or creditors for damages unless: (1) an act or failure to act of the
4 director or officer was a breach of his or her fiduciary duties; and (2) such breach
5 involved intentional misconduct, fraud or a knowing violation of law.
6 (NRS 78.138)

7 **Section 4** of this bill provides that evidence of simple negligence is insufficient
8 to rebut this presumption. **Section 4** additionally specifies that a rebuttal of this
9 presumption is insufficient to establish liability on the part of a corporate director or
10 officer, and instead requires a breach of a fiduciary duty accompanied by
11 intentional misconduct, actual fraud or a knowing violation of law. **Sections 4 and**
12 **5** of this bill clarify the factors that a director or officer of a domestic corporation is
13 entitled to consider in exercising his or her respective powers in certain
14 circumstances, including, without limitation, resisting a change or potential change
15 in the control of a corporation.

16 **Section 2** of this bill expresses the intent of the Legislature regarding the law of
17 domestic corporations, including that the laws of other jurisdictions must not
18 supplant or modify Nevada law. **Section 3** of this bill requires a plaintiff to verify



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19 that he or she has read certain statutes (NRS 78.138, 78.139) pertaining to the
20 duties and powers of corporate directors and officers before filing a complaint that
21 alleges a breach of a fiduciary duty or seeks to enforce a right of a shareholder
22 against a domestic corporation.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN
SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

1 **Section 1.** Chapter 78 of NRS is hereby amended by adding
2 thereto the provisions set forth as sections 2 and 3 of this act.

3 **Sec. 2.** *The Legislature hereby finds and declares that:*

4 1. *It is important to the economy of this State, and to domestic*
5 *corporations and their directors, officers, stockholders, employees*
6 *and creditors, for the laws governing domestic corporations to be*
7 *clear and comprehensible without the need for undue or*
8 *inappropriate reliance on judicial decisions.*

9 2. *The laws of this State must govern the incorporation and*
10 *internal affairs of a domestic corporation and the rights,*
11 *privileges, powers, duties and liabilities, if any, of its directors,*
12 *officers and stockholders.*

13 3. *The plain meaning of the laws enacted by the Legislature,*
14 *including, without limitation, the fiduciary duties of the directors*
15 *and officers of a domestic corporation set forth in NRS 78.138 and*
16 *78.139, must not be supplanted or modified, and relying on the*
17 *laws or judicial decisions from any other jurisdiction is contrary to*
18 *the specific intent of the Legislature.*

19 4. *Except in the limited circumstances set forth in NRS*
20 *78.139, an exercise of the respective powers of directors or officers*
21 *of a domestic corporation, including, without limitation, in*
22 *circumstances involving a change or potential change in control*
23 *of a corporation, is not subject to a heightened standard of review.*

24 5. *The standards promulgated by the Supreme Court of*
25 *Delaware in Unocal Corporation v. Mesa Petroleum Co., 493 A.2d*
26 *946 (Del. 1985), and Revlon, Inc. v. MacAndrews & Forbes*
27 *Holdings, Inc.*, 506 A.2d 173 (Del. 1986), and their progeny have
28 *been, and are hereby, rejected by the Legislature.*

29 6. *The directors and officers of a domestic corporation, in*
30 *exercising their duties under NRS 78.138 and 78.139, may be*
31 *informed by the laws and judicial decisions of other jurisdictions*
32 *and the practices observed by business entities in any such*
33 *jurisdiction, but the failure or refusal of a director or officer to*
34 *consider, or to conform the exercise of his or her powers to, the*
35 *laws, judicial decisions or practices of another jurisdiction does*
36 *not constitute or indicate a breach of a fiduciary duty.*



1 **Sec. 3. 1. In an action involving or relating to a domestic**
2 *corporation that is subject to the provisions of NRS 41.520 or*
3 *alleges a breach of a fiduciary duty by a director or officer of a*
4 *domestic corporation, the complaint must be verified by oath and*
5 *must aver that each plaintiff named in the action has read the*
6 *provisions of NRS 78.138 and 78.139 and section 2 of this act in*
7 *their entirety.*

8 2. *A court shall give each plaintiff leave to amend the*
9 *complaint to comply with the requirements of this section, and a*
10 *dismissal for failure to comply with this section must not operate*
11 *as an adjudication upon the merits.*

12 3. *The period in which any defendant must file an answer or*
13 *other responsive pleading with the court commences only upon*
14 *compliance with this section by all plaintiffs named in the action.*

15 **Sec. 4.** NRS 78.138 is hereby amended to read as follows:

16 78.138 1. ~~{Directors}~~ *The fiduciary duties of directors* and
17 officers ~~{shall}~~ *are to* exercise their *respective* powers in good faith
18 and with a view to the interests of the corporation.

19 2. In ~~{performing}~~ *exercising* their respective ~~{duties.}~~ *powers,*
20 directors and officers *may, and* are entitled to , rely on information,
21 opinions, reports, books of account or statements, including
22 financial statements and other financial data, that are prepared or
23 presented by:

24 (a) One or more directors, officers or employees of the
25 corporation reasonably believed to be reliable and competent in the
26 matters prepared or presented;

27 (b) Counsel, public accountants, financial advisers, valuation
28 advisers, investment bankers or other persons as to matters
29 reasonably believed to be within the preparer's or presenter's
30 professional or expert competence; or

31 (c) A committee on which the director or officer relying thereon
32 does not serve, established in accordance with NRS 78.125, as to
33 matters within the committee's designated authority and matters on
34 which the committee is reasonably believed to merit confidence,
35 ➔ but a director or officer is not entitled to rely on such
36 information, opinions, reports, books of account or statements if the
37 director or officer has knowledge concerning the matter in question
38 that would cause reliance thereon to be unwarranted.

39 3. ~~{Directors}~~ *Except as otherwise provided in subsection 1 of*
40 *NRS 78.139, directors* and officers ~~{, in deciding upon matters of~~
41 ~~business.}~~ *are presumed to act in good faith, on an informed basis*
42 *and with a view to the interests of the corporation. **Simple***
43 *negligence, alone, is insufficient to rebut this presumption. As*
44 *provided in subsection 6, rebuttal of this presumption, alone, is*
45 *also insufficient to establish the individual liability of a director or*



1 *officer for damages as a result of an act or failure to act in his or*
2 *her capacity as a director or officer.*

3 4. Directors and officers, in exercising their respective powers
4 with a view to the interests of the corporation, may ~~{consider:}~~, *and*
5 *are entitled, but not required to:*

6 (a) *Consider all relevant facts, circumstances, contingencies or*
7 *constituencies, including, without limitation:*

8 (1) The interests of the corporation's employees, suppliers,
9 creditors ~~{and}~~ *or* customers;

10 ~~{(b)}~~ (2) The economy of the State ~~{and}~~ *or* Nation;

11 ~~{(e)}~~ (3) The interests of the community ~~{and}~~ *or* of society; ~~{and}~~

12 ~~—(d)}~~ (4) The long-term ~~{as well as}~~ *or* short-term interests of the
13 corporation ~~{and its}~~, *including the possibility that these interests*
14 *may be best served by the continued independence of the*
15 *corporation; or*

16 (5) *The long-term or short-term interests of the*
17 *corporation's* stockholders, including the possibility that these
18 interests may be best served by the continued independence of the
19 corporation.

20 ~~{5. Directors and officers are not required to consider the effect~~
21 ~~of a proposed corporate action upon any particular group having an~~
22 ~~interest in the corporation as a dominant factor.~~

23 ~~—6.}~~ (b) *Consider or assign weight to the interests of any*
24 *particular person or group, or to any other relevant facts,*
25 *circumstances, contingencies or constituencies.*

26 5. The provisions of ~~{subsections 4 and 5}~~ *subsection 4* do not
27 create or authorize any ~~{causes}~~ *cause* of action against the
28 corporation or its directors or officers.

29 ~~{7.}~~ 6. Except as otherwise provided in NRS 35.230, 90.660,
30 91.250, 452.200, 452.270, 668.045 and 694A.030, or unless the
31 articles of incorporation or an amendment thereto, in each case filed
32 on or after October 1, 2003, provide for greater individual liability, a
33 director or officer is not individually liable to the corporation or its
34 stockholders or creditors for any damages as a result of any act
35 or failure to act in his or her capacity as a director or officer unless
36 ~~{it}~~ :

37 (a) *The court determines that the presumption established by*
38 *subsection 3 has been rebutted; and*

39 (b) *It is proven that:*

40 ~~{(a)}~~ (1) The director's or officer's act or failure to act
41 constituted a breach of his or her fiduciary duties as a director or
42 officer; and

43 ~~{(b) The}~~

44 (2) *Such* breach ~~{of those duties}~~ involved intentional
45 misconduct, *actual* fraud or a knowing violation of law.



1 **7. This section applies to all cases, circumstances and matters**
2 **unless otherwise provided in the articles of incorporation, or an**
3 **amendment thereto, including, without limitation, any change or**
4 **potential change in control of the corporation.**

5 **Sec. 5.** NRS 78.139 is hereby amended to read as follows:

6 78.139 1. ~~Except as otherwise provided in subsection 2 or~~
7 ~~the articles of incorporation, directors and officers, in connection~~
8 ~~with a change or potential change in control of the corporation,~~
9 ~~have:~~

10 ~~—(a) The duties imposed upon them by subsection 1 of~~
11 ~~NRS 78.138;~~

12 ~~—(b) The benefit of the presumptions established by subsection 3~~
13 ~~of NRS 78.138; and~~

14 ~~—(c) The prerogative to undertake and act upon consideration~~
15 ~~pursuant to subsections 2, 4 and 5 of NRS 78.138.~~

16 ~~2.~~ If directors or officers take action to resist a change or
17 potential change in control of a corporation, which action impedes
18 the exercise of the right of stockholders to vote for or remove
19 directors:

20 (a) The directors must have reasonable grounds to believe that a
21 threat to corporate policy and effectiveness exists; and

22 (b) The action taken which impedes the exercise of the
23 stockholders' rights must be reasonable in relation to that threat.

24 ➤ If those facts are found, the directors and officers have the benefit
25 of the presumption established by subsection 3 of NRS 78.138.

26 ~~3-1~~ 2. The provisions of subsection ~~2~~ 1 do not apply to:

27 (a) Actions that only affect the time of the exercise of
28 stockholders' voting rights; or

29 (b) The adoption or signing of plans, arrangements or
30 instruments that deny rights, privileges, power or authority to a
31 holder of a specified number or fraction of shares or fraction of
32 voting power.

33 ~~4-1~~ 3. The provisions of subsections 1 and 2 ~~and 3~~ do not
34 permit directors or officers to abrogate any right conferred by
35 ~~statute~~ **the laws of this State** or the articles of incorporation.

36 ~~5-1~~ ~~Directors~~

37 4. **Except as otherwise provided in NRS 78.138, a director**
38 **may resist a change or potential change in control of the corporation**
39 **if the board of directors** ~~by a majority vote of a quorum determine~~
40 **determines** that the change or potential change is opposed to or not
41 in the best interest of the corporation ~~;~~

42 ~~—(a) Upon~~ **upon** consideration of ~~the interests of the~~
43 ~~corporation's stockholders or any of the matters set forth in~~ **any**
44 **relevant facts, circumstances, contingencies or constituencies**
45 **pursuant to** subsection 4 of NRS 78.138 ~~;~~ **or**



1 ~~—(b) Because~~ , *including, without limitation*, the amount or
2 nature of the indebtedness and other obligations to which the
3 corporation or any successor to the property of either may become
4 subject, in connection with the change or potential change, provides
5 reasonable grounds to believe that, within a reasonable time:

6 ~~(1)~~ (a) The assets of the corporation or any successor
7 would be or become less than its liabilities;

8 ~~(2)~~ (b) The corporation or any successor would be or
9 become insolvent; or

10 ~~(3)~~ (c) Any voluntary or involuntary proceeding
11 concerning the corporation or any successor would be commenced
12 by any person pursuant to the federal bankruptcy laws.

13 *5. The provisions of subsection 4 do not create or authorize*
14 *any cause of action against the corporation or its directors or*
15 *officers.*

16 **Sec. 6.** NRS 78.752 is hereby amended to read as follows:

17 78.752 1. A corporation may purchase and maintain
18 insurance or make other financial arrangements on behalf of any
19 person who is or was a director, officer, employee or agent of the
20 corporation, or is or was serving at the request of the corporation as
21 a director, officer, employee or agent of another corporation,
22 partnership, joint venture, trust or other enterprise for any liability
23 asserted against the person and liability and expenses incurred by
24 the person in his or her capacity as a director, officer, employee or
25 agent, or arising out of his or her status as such, whether or not the
26 corporation has the authority to indemnify such a person against
27 such liability and expenses.

28 2. The other financial arrangements made by the corporation
29 pursuant to subsection 1 may include the following:

30 (a) The creation of a trust fund.

31 (b) The establishment of a program of self-insurance.

32 (c) The securing of its obligation of indemnification by granting
33 a security interest or other lien on any assets of the corporation.

34 (d) The establishment of a letter of credit, guaranty or surety.

35 ➔ No financial arrangement made pursuant to this subsection may
36 provide protection for a person adjudged by a court of competent
37 jurisdiction, after exhaustion of all appeals therefrom, to be liable
38 for intentional misconduct, *actual* fraud or a knowing violation of
39 law, except with respect to the advancement of expenses or
40 indemnification ordered by a court.

41 3. Any insurance or other financial arrangement made on
42 behalf of a person pursuant to this section may be provided by the
43 corporation or any other person approved by the board of directors,
44 even if all or part of the other person's stock or other securities is
45 owned by the corporation.



1 4. In the absence of fraud:

2 (a) The decision of the board of directors as to the propriety of
3 the terms and conditions of any insurance or other financial
4 arrangement made pursuant to this section and the choice of the
5 person to provide the insurance or other financial arrangement is
6 conclusive; and

7 (b) The insurance or other financial arrangement:

8 (1) Is not void or voidable; and

9 (2) Does not subject any director approving it to personal
10 liability for his or her action,
11 ➔ even if a director approving the insurance or other financial
12 arrangement is a beneficiary of the insurance or other financial
13 arrangement.

14 5. A corporation or its subsidiary which provides self-
15 insurance for itself or for another affiliated corporation pursuant to
16 this section is not subject to the provisions of title 57 of NRS.

17 **Sec. 7.** NRS 41.520 is hereby amended to read as follows:

18 41.520 1. As used in this section "corporation" includes an
19 unincorporated association, and "board of directors" includes the
20 managing body of an unincorporated association.

21 2. In an action brought to enforce a secondary right on the part
22 of one or more shareholders in a corporation or association,
23 incorporated or unincorporated, because the corporation or
24 association refuses to enforce rights which may properly be asserted
25 by it, the complaint must ~~be~~:

26 (a) *Be* verified by oath and must aver that the plaintiff was a
27 shareholder at the time of the transaction of which the plaintiff
28 complains or that the plaintiff's share thereafter devolved on the
29 plaintiff by operation of law ~~†. The complaint must also set~~;

30 (b) *Set* forth with particularity the efforts of the plaintiff to
31 secure from the board of directors or trustees and, if necessary, from
32 the shareholders such action as the plaintiff desires, and the reasons
33 for the plaintiff's failure to obtain such action or the reasons for not
34 making such effort ~~†~~; and

35 (c) *Comply with the provisions of section 3 of this act.*

36 3. In any such action, at any time within 30 days after service
37 of summons upon the corporation or any defendant who is an officer
38 or director of the corporation, or held such office at the time of the
39 acts complained of, the corporation or such defendant may move the
40 court for an order, upon notice and hearing, requiring the plaintiff to
41 furnish security as hereinafter provided. Such motion must be based
42 upon one or more of the following grounds:

43 (a) That there is no reasonable possibility that the prosecution of
44 the cause of action alleged in the complaint against the moving party
45 will benefit the corporation or its security holders.



1 (b) That the moving party, if other than the corporation, did not
2 participate in the transaction complained of in any capacity.

3 ↪ The court on application of the corporation or any defendant
4 may, for good cause shown, extend the 30-day period for an
5 additional period or periods not exceeding 60 days.

6 4. At the hearing upon such motion, the court shall consider
7 such evidence, written or oral, by witnesses or affidavit, as may be
8 material:

9 (a) To the ground or grounds upon which the motion is based; or

10 (b) To a determination of the probable reasonable expenses,
11 including attorney's fees, of the corporation and the moving party
12 which will be incurred in the defense of the action. If the court
13 determines, after hearing the evidence adduced by the parties at the
14 hearing, that the moving party has established a probability in
15 support of any of the grounds upon which the motion is based, the
16 court shall fix the nature and amount of security to be furnished by
17 the plaintiff for reasonable expenses, including attorney's fees,
18 which may be incurred by the moving party and the corporation in
19 connection with such action, including expenses which the
20 corporation may incur by reason of any obligation which it may
21 have to indemnify its officers or directors pursuant to NRS 78.7502
22 or otherwise. A determination by the court that security either must
23 or must not be furnished or must be furnished as to one or more
24 defendants and not as to others shall not be deemed a determination
25 of any one or more issues in the action or of the merits thereof. The
26 corporation and the moving party have recourse to the security in
27 such amount as the court determines upon the termination of the
28 action. The amount of the security may thereafter from time to time
29 be increased or decreased in the discretion of the court upon
30 showing that the security provided has or may become inadequate or
31 is excessive. If the court, upon any such motion, makes a
32 determination that security must be furnished by the plaintiff as to
33 any one or more defendants, the action must be dismissed as to such
34 defendant or defendants, unless the security required by the court is
35 furnished within such reasonable time as may be fixed by the court.

36 5. If any such motion is filed, no pleadings need be filed by the
37 corporation or any other defendants, and the prosecution of the
38 action must be stayed, until 10 days after the motion has been
39 disposed of.

