

# Nevada Senate Bill

Over the course of almost three decades, the Nevada Legislature has sought to modernize Nevada's corporations law to make it clearer and more relevant to current business practice. Among other objectives, the Legislature has sought to attract new investment to Nevada by providing some measure of predictability in the conduct of corporate affairs by companies choosing to incorporate in Nevada. Unfortunately, as explained below, that effort has been hampered by court decisions that have applied the decisional law of other jurisdictions – most notably that of Delaware – and failed to give effect to the language of Nevada statutes in circumstances where that language controlled.

## An Important Development for Nevada Corporations and Their Counsel

BY JIM PENROSE, ESQ. AND PAUL YOUNG, ESQ.

In response, the 2017 Legislature adopted Senate Bill (SB) 203, which clarified the intent and language of the law and became effective on October 1, 2017. Chapter 559, Statutes of Nevada 2017, at p. 3997. Attorneys who advise Nevada corporations should thoroughly familiarize themselves with the provisions of the bill. The purpose of this article is briefly to summarize and review the background of those provisions.

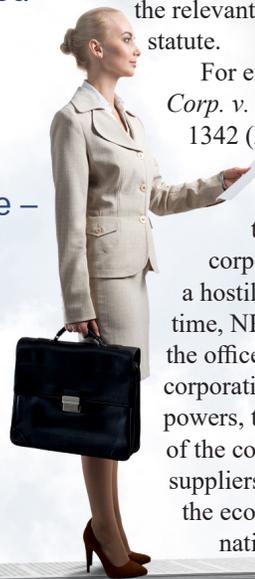
### Nevada Law Applies

It should be self-evident that Nevada corporations and their officers and directors are to be governed by Nevada law. Nevertheless, courts in Nevada have sometimes applied, improperly, the decisional law of other states instead of the relevant provisions of the Nevada statute.

For example, *Hilton Hotels Corp. v. ITT Corp.*, 978 F. Supp. 1342 (D. Nev. 1997), involved the adoption of certain defensive measures by the directors of a Nevada corporation in response to a hostile takeover bid. At the time, NRS 78.138 authorized the officers and directors of a corporation, in exercising their powers, to consider the interests of the corporation's employees, suppliers, creditors and customers; the economy of the state and nation; the interests of the

community and society generally; and the long-term as well as the short-term interests of the corporation and its stockholders, including the possibility that those interests might best be served by the continued independence of the corporation. The same section explicitly authorized the directors to resist a proposed takeover of the corporation on the basis of those factors and the estimated financial impact of the takeover on the corporation or any successor entity.<sup>1</sup> Nevertheless, concluding that these statutory provisions failed to provide "clear guidance" on the propriety of the directors' action, the *Hilton Hotels* court instead applied a line of cases from the Supreme Court of Delaware. 978 F. Supp. at 1345-46. In so doing, the court established for Nevada corporations an extra-statutory distinction between the exercise of the directors' authority as it related to the assets of the corporation and what the court called the "power relationship" between the directors and stockholders of the corporation. (Id., at 1346.) That distinction had no basis in Nevada law; it was created entirely from the decisional law of Delaware.

In *Shoen v. SAC Holding Corp.*, 122 Nev. 621 (2006), the Nevada Supreme Court declared in dicta that the duty of loyalty owed by the directors of a corporation "requires the board and its directors to maintain, in good faith, the corporation's and its shareholders' best interests *over anyone else's interests.*" 122 Nev. at 632 & n.9 (emphasis added). In support of this proposition, the court cited to two decisions of the



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Supreme Court of Delaware, but made no reference to the then-existing provisions of NRS 78.138(4) or (5), which explicitly authorized directors to consider the factors and constituencies discussed above in exercising their authority and specifically relieved directors of any obligation “to consider the effect of a proposed corporate action upon any particular group having an interest in the corporation as a dominant factor.” *Id.*

In response to decisions like these, SB 203 specifically reaffirms the principle that Nevada corporations and their officers and directors are governed by Nevada law, not the law of Delaware or any other jurisdiction. Section 2 of the bill, codified as NRS 78.012, provides in relevant part:

2. The laws of this State govern the incorporation and internal affairs of a domestic corporation and the rights, privileges, powers, duties and liabilities, if any, of its directors, officers and stockholders.
3. The plain meaning of the laws enacted by the Legislature in [title 7 of NRS], including, without limitation, the fiduciary duties and liability of the directors and officers of a domestic corporation set forth in NRS 78.138 and 78.139, must not be supplanted or modified by laws or judicial decisions from any other jurisdiction.

Clearly, the Nevada Legislature wants Nevada law applied to Nevada corporations.

Given these provisions, counsel for Nevada corporations should resist any effort by opposing counsel, a judge or an arbitrator to apply the law of Delaware or any other jurisdiction in any context described by NRS 78.012. Nevada courts should likewise reject attempts to import and apply the law of other jurisdictions where that law has no proper application. Under NRS 78.012, any such law is simply irrelevant insofar as a Nevada statute speaks to the point at issue.

## Relevant Factors Governing the Exercise Authority

In exercising their powers, the officers and directors of a Nevada corporation may consider all relevant factors and may give such weight to each such factor as they deem appropriate. As explained above and notwithstanding the dicta in *Shoen*, Nevada law has so provided, at least since the adoption of Assembly Bill No. 655 in 1991. Chapter 442, Statutes of Nevada 1991, at p. 1184. The former provisions of NRS 78.139(5) (*cf.* NRS 78.139(4)) made those considerations equally applicable in the context of any change or potential change in control of the corporation.

SB 203 has reaffirmed and clarified the law in this regard. Except as otherwise provided in the corporation’s articles of incorporation or any amendment to the articles, SB 203 has amended NRS 78.138(4) explicitly to authorize directors and officers to “consider all relevant facts, circumstances, contingencies or

constituencies” and “consider or assign weight to the interests of any particular person or group, or to any other relevant facts, circumstances, contingencies or constituencies.” Moreover, the “dominant factor” language of NRS 78.138(5) has been revised to provide that directors and officers “are not required to consider, as a dominant factor, the effect of a proposed corporate action upon any particular group or constituency having an interest in the corporation.” *Shoen*’s suggestion to the contrary has thereby been abrogated.

## Limitations on Individual Liability for Damages

With respect, the Supreme Court’s analysis in *Shoen* is objectionable on yet another ground. The court declared that the directors of a corporation owe both a duty of loyalty and a duty of care, and held that directors could be individually liable for a breach of the latter duty because of “gross negligence.” Here again, the court relied upon a decision by the Supreme Court of Delaware as authority for this proposition. 122 Nev. at 632, 640 & n.59.

Again, this aspect of *Shoen* was simply at odds with the language of NRS 78.138(7), even as it then existed. Under the plain language of the statute, an officer or director was “not individually liable to the corporation or its stockholders for any damages as a result of *any* act or failure to act” unless it was proven that the “act or failure to act constituted a breach of his [or her] fiduciary duties ... *and* [the] breach of those duties involved *intentional* misconduct, fraud or a *knowing* violation of law.” Chapter 601, Statutes of Nevada 2001, at p. 3171 (emphasis added). Thus, not only was there no statutory basis for the court’s distinction between a duty of loyalty and a duty of care in this context, there was likewise no basis for imposing

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individual liability in any case sounding in negligence, whether it be called “gross” or otherwise.

Even before the adoption of SB 203, the former provisions of NRS 78.138(3) codified the business judgment rule, under which the officers and directors of a corporation are ordinarily “presumed to act in good faith, on an informed basis and with a view to the interests of the corporation.” SB 203 amended this provision, in part, by adding: “A director or officer is not individually liable for damages as a result of an act or failure to act in his or her capacity as a director or officer except under circumstances described in subsection 7.” Chapter 559, Statutes of Nevada 2017, at p. 3998. NRS 78.138(7), in turn, has been amended to add – in addition to the requirement that the defendant be shown to have committed a breach of his or her fiduciary duties involving intentional misconduct, fraud or a knowing violation of law – a requirement that any finding of individual

liability must be premised upon a determination by the trier of fact that the presumption set forth in NRS 78.138(3) has been rebutted. *Id.*

## Conclusion

No one disputes that Nevada corporations and their officers and directors should be held to account for acts or omissions that violate standards of conduct expressed in Nevada’s statutory law. However, they are not and should not be responsible for adhering to the law of Delaware or any other jurisdiction, or to judicially created standards that are untethered to, or contrary to, the specific provisions of Nevada statute. This, in brief, is the policy underlying SB 203, and Nevada corporations and their counsel, and the courts of this state, should resist any erosion of that policy. **NL**

1. In 1999, the takeover provision was relocated from NRS 78.138 to a newly-enacted section, NRS 78.139. Chapter 357, Statutes of Nevada 1999, at pp. 1575, 1580. The relevant language now appears in NRS 78.139(4).



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