

SENATE BILL NO. 124—SENATOR TITUS

FEBRUARY 13, 2003

Referred to Committee on Judiciary

SUMMARY—Revises statutory liability of stockholders, directors and officers of corporations. (BDR 7-100)

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 corporations; revising the statutory liability of stockholders, directors and officers of a corporation; and providing other matters properly relating thereto.

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

1 **Section 1.** NRS 78.037 is hereby amended to read as follows:
2 78.037 The articles of incorporation may also contain ~~any~~ ***any*** ~~:~~
3 ***1. A provision eliminating or limiting the personal liability of***
4 ***a director or officer to the corporation or its stockholders for***
5 ***damages for breach of fiduciary duty as a director or officer, but***
6 ***such a provision must not eliminate or limit the liability of a***
7 ***director or officer for:***
8 ***(a) Acts or omissions which involve intentional misconduct,***
9 ***fraud or a knowing violation of law; or***
10 ***(b) The payment of distributions in violation of NRS 78.300.***
11 **2. Any** provision, not contrary to the laws of this state ~~:~~
12 ~~1. For~~ ***for***, for the management of the business and for the
13 conduct of the affairs of the corporation ~~:~~
14 ~~2. Creating,~~ ***and any provision creating,*** defining, limiting or
15 regulating the powers of the corporation or the rights, powers or
16 duties of the directors, the officers or the stockholders, or any class
17 of the stockholders, or the holders of bonds or other obligations of
18 the corporation ~~:~~ ~~:~~



1 ~~3. Governing~~, or governing the distribution or division of the
2 profits of the corporation.

3 **Sec. 2.** NRS 78.138 is hereby amended to read as follows:

4 78.138 1. Directors and officers shall exercise their powers in
5 good faith and with a view to the interests of the corporation.

6 2. In performing their respective duties, directors and officers
7 are entitled to rely on information, opinions, reports, books of
8 account or statements, including financial statements and other
9 financial data, that are prepared or presented by:

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

13 (b) Counsel, public accountants, financial advisers, valuation
14 advisers, investment bankers or other persons as to matters
15 reasonably believed to be within the preparer's or presenter's
16 professional or expert competence; or

17 (c) A committee on which the director or officer relying
18 thereon does not serve, established in accordance with NRS 78.125,
19 as to matters within the committee's designated authority and
20 matters on which the committee is reasonably believed to merit
21 confidence,

22 but a director or officer is not entitled to rely on such information,
23 opinions, reports, books of account or statements if he has
24 knowledge concerning the matter in question that would cause
25 reliance thereon to be unwarranted.

26 3. Directors and officers, in deciding upon matters of business,
27 are presumed to act in good faith, on an informed basis and with a
28 view to the interests of the corporation.

29 4. Directors and officers, in exercising their respective powers
30 with a view to the interests of the corporation, may consider:

31 (a) The interests of the corporation's employees, suppliers,
32 creditors and customers;

33 (b) The economy of the state and nation;

34 (c) The interests of the community and of society; and

35 (d) The long-term as well as short-term interests of the
36 corporation and its stockholders, including the possibility that these
37 interests may be best served by the continued independence of the
38 corporation.

39 5. Directors and officers are not required to consider the effect
40 of a proposed corporate action upon any particular group having an
41 interest in the corporation as a dominant factor.

42 6. The provisions of subsections 4 and 5 do not create or
43 authorize any causes of action against the corporation or its directors
44 or officers.



1 ~~[7. Except as otherwise provided in NRS 35.230, 90.660,~~
 2 ~~91.250, 452.200, 452.270, 668.045 and 694A.030, a director or~~
 3 ~~officer is not individually liable to the corporation or its~~
 4 ~~stockholders for any damages as a result of any act or failure to act~~
 5 ~~in his capacity as a director or officer unless it is proven that:~~
 6 ~~—(a) His act or failure to act constituted a breach of his fiduciary~~
 7 ~~duties as a director or officer; and~~
 8 ~~—(b) His breach of those duties involved intentional misconduct,~~
 9 ~~fraud or a knowing violation of law.]~~

10 **Sec. 3.** NRS 78.300 is hereby amended to read as follows:
 11 78.300 1. The directors of a corporation shall not make
 12 distributions to stockholders except as provided by this chapter.

13 2. Except as otherwise provided in subsection 3, ~~and NRS~~
 14 ~~78.138.]~~ in case of any *willful or grossly negligent* violation of the
 15 provisions of this section, the directors under whose administration
 16 the violation occurred are jointly and severally liable, at any time
 17 within 3 years after each violation, to the corporation, and, in the
 18 event of its dissolution or insolvency, to its creditors at the time of
 19 the violation, or any of them, to the lesser of the full amount of the
 20 distribution made or of any loss sustained by the corporation by
 21 reason of the distribution to stockholders.

22 3. The liability imposed pursuant to subsection 2 does not
 23 apply to a director who caused his dissent to be entered upon the
 24 minutes of the meeting of the directors at the time the action was
 25 taken or who was not present at the meeting and caused his dissent
 26 to be entered on learning of the action.

27 **Sec. 4.** NRS 78.7502 is hereby amended to read as follows:

28 78.7502 1. A corporation may indemnify any person who
 29 was or is a party or is threatened to be made a party to any
 30 threatened, pending or completed action, suit or proceeding, whether
 31 civil, criminal, administrative or investigative, except an action by
 32 or in the right of the corporation, by reason of the fact that he is or
 33 was a director, officer, employee or agent of the corporation, or is or
 34 was serving at the request of the corporation as a director, officer,
 35 employee or agent of another corporation, partnership, joint venture,
 36 trust or other enterprise, against expenses, including attorneys' fees,
 37 judgments, fines and amounts paid in settlement actually and
 38 reasonably incurred by him in connection with the action, suit or
 39 proceeding if he ~~is~~:

40 ~~—(a) Is not liable pursuant to NRS 78.138; or~~
 41 ~~—(b) Acted]~~ *acted* in good faith and in a manner which he
 42 reasonably believed to be in or not opposed to the best interests of
 43 the corporation, and, with respect to any criminal action or
 44 proceeding, had no reasonable cause to believe his conduct was
 45 unlawful. The termination of any action, suit or proceeding by



1 judgment, order, settlement, conviction or upon a plea of nolo
2 contendere or its equivalent, does not, of itself, create a presumption
3 that the person ~~[is liable pursuant to NRS 78.138 or]~~ did not act in
4 good faith and in a manner which he reasonably believed to be in or
5 not opposed to the best interests of the corporation, or that, with
6 respect to any criminal action or proceeding, he had reasonable
7 cause to believe that his conduct was unlawful.

8 2. A corporation may indemnify any person who was or is a
9 party or is threatened to be made a party to any threatened, pending
10 or completed action or suit by or in the right of the corporation to
11 procure a judgment in its favor by reason of the fact that he is or was
12 a director, officer, employee or agent of the corporation, or is or was
13 serving at the request of the corporation as a director, officer,
14 employee or agent of another corporation, partnership, joint venture,
15 trust or other enterprise against expenses, including amounts paid in
16 settlement and attorneys' fees actually and reasonably incurred by
17 him in connection with the defense or settlement of the action or suit
18 if he ~~is~~:

19 ~~—(a) Is not liable pursuant to NRS 78.138; or~~

20 ~~—(b) Acted]~~ *acted* in good faith and in a manner which he
21 reasonably believed to be in or not opposed to the best interests of
22 the corporation. Indemnification may not be made for any claim,
23 issue or matter as to which such a person has been adjudged by a
24 court of competent jurisdiction, after exhaustion of all appeals
25 therefrom, to be liable to the corporation or for amounts paid in
26 settlement to the corporation, unless and only to the extent that the
27 court in which the action or suit was brought or other court of
28 competent jurisdiction determines upon application that in view of
29 all the circumstances of the case, the person is fairly and reasonably
30 entitled to indemnity for such expenses as the court deems proper.

31 3. To the extent that a director, officer, employee or agent of a
32 corporation has been successful on the merits or otherwise in
33 defense of any action, suit or proceeding referred to in subsections 1
34 and 2, or in defense of any claim, issue or matter therein, the
35 corporation shall indemnify him against expenses, including
36 attorneys' fees, actually and reasonably incurred by him in
37 connection with the defense.

38 **Sec. 5.** NRS 78.747 is hereby repealed.



TEXT OF REPEALED SECTION

78.747 Liability of stockholder, director or officer for debt or liability of corporation.

1. Except as otherwise provided by specific statute, no stockholder, director or officer of a corporation is individually liable for a debt or liability of the corporation, unless the stockholder, director or officer acts as the alter ego of the corporation.

2. A stockholder, director or officer acts as the alter ego of a corporation if:

(a) The corporation is influenced and governed by the stockholder, director or officer;

(b) There is such unity of interest and ownership that the corporation and the stockholder, director or officer are inseparable from each other; and

(c) Adherence to the corporate fiction of a separate entity would sanction fraud or promote a manifest injustice.

3. The question of whether a stockholder, director or officer acts as the alter ego of a corporation must be determined by the court as a matter of law.

