

## Nevada's Director Liability Standard Defeats Another Derivative Suit

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NRS 78.138(3) imposes a statutory presumption that other than in cases of a change in control of the corporation, directors and officers, in deciding upon matters of business, act in good faith, on an informed basis and with a view to the interests of the corporation. NRS 78.138(7) provides that director and officers are not individually liable unless this statutory presumption is rebutted *and* it is proven that (i) the director's or officer's act or failure to act constituted a breach of his or her fiduciary duties as a director or officer; and (ii) that breach involved intentional misconduct, fraud or a knowing violation of law. Would be derivative plaintiffs are finding that these provisions make it exceedingly difficult to convince judges that a substantial likelihood of personal liability exists for purposes of establishing demand futility.

In *City of Warren Police & Fire Ret. Sys. v. Tenet Healthcare Corp.*, 2020 Texas App. LEXIS 7792, the plaintiffs had alleged that a bribes-for-referrals scheme continued after Tenet Healthcare, a Nevada corporation, had entered into a Corporate Integrity Agreement with the federal government. The Texas Court of Appeals, however, affirmed the trial court's dismissal of the action, citing NRS 78.138 and finding that the plaintiffs had failed to meet Nevada's pleading requirement.

This is the second recent appellate decision applying NRS 78.138. I discuss the other case in this [post](#) from last week.

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National Law Review, Volume X, Number 300

Source URL: <https://natlawreview.com/article/nevada-s-director-liability-standard-defeats-another-derivative-suit>