

Nevada's Private Corporation Law: What Is A Knowing Violation?

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Nevada's private corporation law automatically exculpates directors and officers from individual liability from individual liable to the corporation or its stockholders or creditors for any damages as a result of any act or failure to act in his or her capacity as a director or officer unless it is proven that:

- 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
- The breach of those duties involved intentional misconduct, fraud or a knowing violation of law.

NRS 78.138(7). Recently, the Tenth Circuit Court of Appeals tackled the question of what constitutes a "knowing violation of the law". In particular, does Nevada require that a director or officer know that the conduct was wrongful or only that he or she engaged in the conduct? Here is the court's answer:

The purpose of the exculpatory statute is to limit the liability of corporate directors. Under the narrower interpretations of intentional and knowing that do not require knowledge of wrongfulness, a director would not be protected so long as the director knew what his or her actions were—such as signing a document with knowledge of its contents. But that state of mind would be present for virtually any conduct that could lead to the director's liability to the corporation or its stockholders or creditors. The exculpatory statute would be an empty gesture. To give the statute a realistic function, it must protect more than just directors (if any) who did not know what their actions were; it should protect directors who knew what they did but not that it was wrong.

In re Zagg Inc., 2016 U.S. App. LEXIS 11095 (10th Cir. 2016). In comparison, California's exculpatory statute makes an exception for "knowing *and culpable* violation of law" (Cal. Corp. Code § 204(a)(10) (emphasis added)) while Delaware's statute, like Nevada's, excepts a "knowing violation of law" (8 Del. Code § 102(b)(7)).

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