Monday, March 9, 2020

Last month, I wrote about the Nevada Supreme Court's holding that a plaintiff must prove more than gross negligence to hold a director liable for breach of fiduciary duty. Chur v. Eighth Jud. Dist. Ct., 136 Nev. Adv. Op. 7 (Feb. 27, 2020). This should not be surprising to the Nevada legislature because it has provided in NRS 78.138(7) that directors and officers of Nevada corporations may not be held liable (with certain specific exceptions) unless the plaintiff proves a breach of fiduciary duty that involved "intentional misconduct, fraud or a knowing violation of law."

This, of course, begs the question of what constitutes a "knowing violation of law." In Chur, the Nevada Commissioner of Insurance argued that allegations of gross negligence sufficed to state a breach of the fiduciary duty of care involving gross negligence. The Supreme Court rejected this argument and instead adopted the Tenth Circuit Court of Appeals' definition in In re ZAGG S'holder Deriv. Action, 826 F. 3d 1222 (10th Cir. 2016). Thus, a plaintiff must establish that the director or officer "had knowledge that the alleged conduct was wrongful" in order to show a "knowing violation of law" or "intentional misconduct" under NRS 78.138(7).

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