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Nevada: Delaware of the West?

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Corporate law in the United States is federalist in nature. Under this system, each state makes its own laws governing corporations and founders, in turn, select the jurisdiction's laws that will govern the internal affairs of the corporation. In the resulting marketplace for incorporations, founders base their choice of jurisdiction on various legal and economic considerations, including the costs of incorporating and maintaining existence in any given jurisdiction, the scope of liability for directors and officers, the scope of stockholder protections, and the availability of takeover defenses. Founders might also weigh subjective considerations, including familiarity with a jurisdiction's reputation, body of law, or court system.

Delaware has historically been the jurisdiction of choice for incorporation. Although varying arguments have been articulated over the years to explain Delaware's preeminence, commentators generally point to several leading factors: Delaware's well-developed body of case law, and the prestige and expertise of its judiciary. Delaware law, however, has become more complex over the course of recent decades and has trended toward greater director and officer accountability and increased protection of minority stockholders. Moreover, the cost of maintaining a Delaware corporation can be significant, depending on a corporation's capital structure.

Nevada's general corporate law is set forth in Chapter 78 of the Nevada Revised Statutes ("NRS") and the laws governing mergers, exchanges, and conversions of business entities generally, including corporations, are set forth in NRS Chapter 92A. Nevada has modernized its business organizations law substantially over the past several decades in an effort to increase its competiveness as a place to do business and make it an attractive jurisdictional home to corporations, limited liability companies, and other forms of business organizations.

In 1991 and 1995, for example, the Nevada Legislature revamped its mergers and consolidations law through the enactment of provisions derived or adapted from the Model Business Corporation Act ("MBCA"), to incorporate uniform procedures for mergers, equity exchanges, and conversions. Subsequently, the Nevada Legislature has further integrated MBCA provisions governing dissenters' rights. Nevada has also distinguished itself from Delaware by codifying management-friendly standards of care for actions taken

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in response to takeover attempts and maintaining favorable limited liability protection for directors and officers.[1]

Despite the recent economic downturn, Nevada has maintained its business-friendly tax climate, which includes no business income or franchise taxes, no personal income taxes, and the constitutional requirement that all tax increases be approved by a legislative "super-majority." To promote Nevada's business-friendly culture, the Secretary of State has established a website called "whynevada.com" that is designed, as its name indicates, to attract businesses to the state and distinguish the state from other jurisdictions. With an eye toward the leading competitor, the website contains direct comparisons of Nevada and Delaware corporate statutes.

Nevada law presents unique challenges to Nevada corporate counsel, the managers of Nevada corporations, and the courts tasked with applying Nevada corporate law. First, interpretation of Nevada law can be difficult due to a lack of precedent; the Nevada Supreme Court is the only Nevada court that publishes its decisions. The Nevada judiciary lacks an intermediate appellate court (despite efforts within the Nevada legal community to amend the state constitution to rectify this) to provide a forum to alleviate the docket of the high court. Second, the Nevada Legislature only meets biennially in odd-numbered years for a 120-day session. As a result, there are few reported Nevada court opinions construing the provisions of NRS Chapters 78 and 92A, and there are fewer opportunities for statutory change when compared with jurisdictions in which legislatures meet on a more frequent basis. The dispositive sources of Nevada corporate law, therefore, remains limited to the text of the NRS and the small number of published decisions of the Nevada Supreme Court.

Corporations and practitioners faced with an unresolved or ambiguous question of Nevada corporate law will often turn to non-binding sources for guidance. Leading secondary sources include the legislative history of the NRS and the published opinions of the Nevada federal district, appellate, and bankruptcy courts. Principles of Delaware corporate law have also been cited by the Nevada Supreme Court and Nevada federal district court as persuasive authority in deciding open questions of Nevada corporate law.[2] Consequently, Nevada practitioners often refer to Delaware corporate law or the decisions of the Nevada federal district courts for guidance in resolving open questions. The blind application of Delaware corporate law precedent, however, can be perilous as indicated by the reaction of the Nevada Legislature to the 1997 decision of the U.S. District Court in *Hilton Hotels Corp. v. ITT Corp.*[3] In *Hilton Hotels*, a federal district court looked to Delaware law for the appropriate standard to review the defensive measures taken by the board of a target company in response to a hostile takeover. The target board had sought to implement a classified board, among other actions, prior to the annual meeting without obtaining stockholder approval.[4] The federal court applied the *Unocal/Blasius* standard to the actions of the target board after recognizing that Nevada lacked any statutory authority or case law on point and rejecting the arguments of the target company that Nevada law did not follow Delaware case law.[5]

In rejecting the target's arguments, the federal court declared broadly that it would not "eliminate the principles articulated in Unocal, Blasius and Revlon ... without any indication from the Nevada Legislature or the Nevada Supreme Court that this [was] the legislative intent."[6] Although the federal court's holding in *Hilton Hotels* was limited to the facts before the court, an observer of Nevada corporate law may have been tempted to conclude that Delaware case law informed, without qualification, the fiduciary obligations of the directors of a Nevada corporation faced with a hostile takeover attempt. Two years

[1] The evolution of Nevada corporate law continued during the 2011 session of the Nevada Legislature. An omnibus business organizations bill was signed by Governor Sandoval on June 17, 2011 and took effect on October 1, 2011. See Senate Bill 405, Nev. Legis., 76th Sess., § 32 (2011) ("S.B. 405"). S.B. 405 amends various provisions of Nevada's corporate statutes, including provisions governing business combinations, dissenters' rights, the effective date of filings with the Secretary of State, electronic records and notices, and indemnification.

[2] *See, e.g., Cohen v. Mirage Resorts, Inc.*, 62 P.3d 720 (Nev. 2003) (reasoning that Nevada courts will look to the jurisprudence of other states when construing Nevada statutes derived from those state's laws); *Brown v. Kinross Gold U.S.A., Inc.*, 531 F. Supp. 2d 1234, 1245 (D. Nev. 2008) (recognizing that the "Nevada Supreme Court frequently looks to the Delaware Supreme Court and Delaware Courts of Chancery as persuasive authorities on questions of corporation law"); *Hilton Hotels Corp. v. ITT Corp.*, 978 F. Supp. 1342, 1347 (D. Nev. 1997) (finding Delaware authority persuasive in absence of Nevada law on point).

[3] *Hilton Hotels Corp.,* 978 F. Supp. at 1347.

[4] *Id.* at 1344-45.

[5] *Id.* at 1345-47.

[6] *Id.* at 1347.

later, however, the Nevada Legislature expressly rejected a broad reading of *Hilton Hotels* by codifying the court's holding as limited to anti-takeover actions which impede the stockholders' voting rights.[7]

Mergers and Acquisitions

Based substantially upon the MBCA, NRS Chapter 92A sets forth a streamlined set of procedures to effect mergers, conversions, and exchanges. Under NRS 92A, the target's board must first adopt a plan (of merger or exchange) and then recommend the plan to the target's stockholders for approval. The plan must set forth in writing (i) the name and jurisdiction of each constituent entity, (ii) the name, jurisdiction, and kind (*e.g.,* corporation) of the surviving entity, (iii) a basic summary of the terms and conditions of the merger, or exchange and (iv) the manner and basis of converting or exchanging the target stockholders' interests for the applicable consideration (*e.g.,* acquiror's stock, right to purchase acquiror's stock, cash, etc.).

Upon approving the plan, the target's board must recommend stockholder approval prior to (and contemporaneously with) its submission of the plan to the stockholders. As discussed in more detail below, in almost all cases failure to recommend the plan for stockholder approval effectively ends the merger or exchange process. After the board's recommendation for approval and submission of the plan to the stockholders, at least a majority of the voting power of the stockholders must approve the plan. Stockholders may approve the plan through written consent (unless prohibited by the target's articles of incorporation or bylaws) or at a duly called meeting.[8]

Force the Vote

Unlike Delaware, Nevada law prohibits so-called "force the vote" clauses. Force the vote clauses are contractual provisions that require a target's board to submit a plan to a vote of the stockholders even if the board no longer recommends the plan. Pursuant to NRS 92A.120(3), any "agreement of the board of directors to submit a plan of merger, conversion or exchange to the stockholders notwithstanding an adverse recommendation of the board of directors shall be deemed to be of no force or effect." Moreover, the legislative history of NRS 92A.120(3) makes it clear that the board's affirmative recommendation must exist contemporaneously with the stockholders' vote. That is to say, any change in the board's recommendation prior to the stockholders' vote automatically invalidates such vote. The consequences of any change in the board's recommendation after the affirmative vote of the stockholders, but prior to the effective date of the merger, are unclear.

The single exception to the continuing affirmative recommendation requirement also lies in NRS 92A.120(3). If the board determines that it cannot make a recommendation as a result of a conflict of interest or other "special circumstances," and communicates the basis for its determination to the stockholders, it may still submit the plan for stockholder approval. Importantly, a board's decision to refrain from making a recommendation is distinct from a board's adverse recommendation, with the latter having the immediate effect of canceling any pending stockholder vote. In light of the fact that there is no judicial or statutory guidance as to what constitutes "special circumstances" and mindful of Nevada's clearly stated position on adverse board recommendations, practitioners may want to read this exception narrowly.

Fiduciary Outs

Fiduciary outs are exceptions to the contractual obligations in a merger agreement that would otherwise obligate a target board to continue its affirmative recommendation to the stockholders or prohibit a target board from terminating the merger agreement. The premise of the fiduciary out is to allow the target board to stop a business combination if the exercise of its fiduciary duties would require it to do so. Frequently, buyers push to limit fiduciary outs to defined circumstances (*e.g.,* where the target receives a superior proposal from another party) in order to restrict a target board's ability to terminate the merger.

However, as so limited, such fiduciary outs may not cover all situations impacting a board's fiduciary duties. As an example, consider the so-called "gold in the backyard" scenario where a target discov-

[7] *See* NRS 78.139 (2009). *See also* Minutes of Nev. Senate Judiciary Comm. (Memo from State Bar of Nevada, Business Law Section), Ex. C at p. 7 (Mar. 22, 1999) (discussing the *Hilton Hotels* case).

[8] NRS 92A.120(7) (2009).

ers a vast gold deposit under its headquarters after signing the merger agreement, but before the target stockholders vote. The gold find could result in the acquiror's purchase price significantly undervaluing the target. Yet, if the merger agreement contained a fiduciary out limited to superior proposals, the target board would be contractually prohibited from seeking a better deal for its stockholders (assuming the common situation where the board is prohibited by the merger agreement from soliciting or encouraging a superior proposal), even though the target board might be found to have violated its fiduciary duties for failing to seek a better deal in such a situation.

While Nevada law is silent as to whether boards can contractually limit their fiduciary duties, the application of Delaware law in light of NRS 92A.120(3) suggests the conclusion that such limitations may be prohibited. Under Delaware law, a plan of merger that commits a board to continue its favorable recommendation must include a fiduciary out that extends at least to the consideration of superior proposals.[9] Moreover, though not completely settled, the consensus interpretation of *Omnicare* and its progeny requires that a Delaware board may not contractually limit its ability to change its recommendation to a particular circumstance (*e.g.,* solely in connection with a superior proposal).

Further, unlike a Delaware board which can exercise an unlimited fiduciary out, change its recommendation, and still contractually agree to force the vote, a Nevada board cannot contractually agree to submit a transaction to its stockholders with an adverse recommendation. Thus, given the influence of Delaware law and the statutory language of NRS 92A.120(5), one might argue that limitations on a Nevada board's fiduciary duties are impermissible, although the matter is unsettled.

Deal Protections

Generally stated, deal protections take the form of concessions granted by targets to induce potential acquirors to enter into a business combination by increasing the likelihood of the consummation of such business combination. Although deal protections may take many forms, some common types include: limiting a target board's ability to seek or entertain competing offers (no-shops/window shops), requiring the target to pay a fee if it consummates a business combination with another acquiror (termination or break-up fees), voting agreements that obligate significant stockholders to support the business combination (lock-ups), and force the vote provisions (discussed above). Deal protections become problematic when the increase in consummation certainty they provide forecloses the possibility of competing proposals and restricts a target board's exercise of its fiduciary duties.

The prohibition against force the vote agreements and the uncertainty about the validity of limited fiduciary outs (discussed above) suggest a general Nevada policy stance in favor of the unfettered exercise of fiduciary duties. Nevada law, however, has almost no case law in this area. Delaware law, with its more developed body of judicial opinions, may provide useful guidance.

Delaware courts' analysis of deal protections focuses on the cumulative effect of various deal protections in the context of particular transactions. For example, a lock up agreement with a majority stockholder may or may not constitute a permissible deal protection depending on circumstances such as the existence of other deal protections (*e.g.,* force the vote provisions), the number of bidders competing for the target, the additional deal consideration received in exchange for the deal protection, and the existence and nature of any fiduciary out. In its simplest form, the result of a Delaware court's inquiry turns upon whether a set of deal protections assists or inhibits the board in its "'obligation to seek the best value reasonably available for the stockholders."[10]

A Word on Mechanics

Nevada law requires the constituent corporations to any merger or exchange to file form articles of exchange or merger ("Articles") with the Nevada Secretary of State. Articles may be filed on any business day between 8:00 AM and 5:00 PM Nevada time, although practically speaking Articles must be filed by 3:45 PM in order to receive a certified copy of the Articles the same day. Effectiveness of the Articles (and the underlying merger of exchange) occurs upon filing, unless a future effective date and time are

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[9] *Omnicare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914, 936 (Del. 2003).

[10] *Rand v. W. Air Lines, Inc.*, C.A. No. 8632 (Del. Ch. Feb. 25, 1994), slip op. at 14 (quoting *Paramount Commc'ns, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 48 (Del. 1994)), *aff'd*, 659 A.2d 228 (Del. 1995).

specified in the Articles. If the Articles specify a later effective date but do not specify an effective time, the Articles are effective at 12:01 a.m. in the Pacific time zone on such later date. Articles filed with a post-filing effective date may be rescinded at any time before the effective time. For a fee, the Nevada Secretary of State will pre-clear Articles within 90 days of the filing/effective date.

Dissenters' Rights

NRS 92A.300 through NRS 92A.500 sets forth certain rights for stockholders that object to certain business transactions such as mergers and exchanges (a.k.a. "dissenters"). Subject to certain exceptions (*e.g.,* certain publicly traded stock), dissenters who follow the procedure outlined below have certain rights to receive compensation for their stock.

First, for any business transaction subject to dissenters' rights that requires a vote or written consent of the stockholders, the corporation must provide the stockholders of record with a copy of the relevant statutory provisions.[11] Next, any stockholder who wishes to dissent must, before the vote is taken, deliver to the corporation written notice of his or her intent to demand payment if the proposed action is effectuated and must not vote any of his or her shares in favor of the proposed action. If the proposed action requires the written consent of stockholders, any stockholder who wishes to dissent must not consent to the transaction. If the corporation receives the requisite vote or written consent to proceed with the proposed action, the corporation must send a written dissenters' notice to all stockholders entitled to assert dissenters' rights within 10 days of the consummation of that action.[12] The notice must (a) state where demand for payment must be sent and, where and when share certificates, if any, must be deposited; (b) inform the holders of uncertificated shares to what extent transfer will be restricted pending receipt of the payment demand; (c) supply a form for the payment demand that includes (i) date of the first announcement of the terms of the proposed action and (ii) requires the dissenter to certify whether or not the dissenter acquired beneficial ownership of the shares before that date; (d) set a date by which the corporation must receive the payment demand, which may not be less than 30 or more than 60 days after the date the notice is delivered and state that the stockholder will be deemed to have waived the right to demand payment with respect to the shares unless the demand is received by the corporation by the specified date; and (e) be accompanied by a copy of NRS 92A.300 to NRS 92A.500.[13]

Upon receiving a dissenters' notice, a stockholder may choose either to move forward with a demand for payment or withdraw. Stockholders that elect to continue must (a) demand payment, (b) certify that they were beneficial owners before the required date specified in the dissenters' notice, and (c) deposit the stock certificates, if any, with the corporation. Stockholders that decline to exercise dissenters' rights may withdraw from the appraisal process by notifying the corporation in writing by the date set forth in the dissenters' notice. Withdrawals after that date are only permitted with the corporation's written consent. For those stockholders that follow the procedures to demand payment, the corporation must provide payment in an amount that the corporation estimates to be the fair value of each dissenter's shares. Payment must be accompanied by (i) the corporation's financial statement, (ii) the corporation's estimate of the fair value of such dissenter's shares, and (iii) a statement setting forth such dissenter's right to contest the corporation's estimate of fair value and the circumstances under which the dissenter will be deemed to have accepted the tendered payment in full satisfaction of the corporation's obligations.[14]

Pursuant to NRS 92A.480, a dissenter that has received payment and objects to the amount of such payment may demand in writing an amount equal to such dissenter's own estimate of the fair value of its shares and the amount of interest due, less any payment already received from the corporation. The dissenter must notify the corporation of its demand within 30 days after receiving the corporation's initial payment. In the event the payment demand remains unsettled, the corporation must initiate judicial

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[11] *Smith v. Kisorin USA, Inc.*, 254 P.3d 636, 640 (Nev. 2011).

[12] Stockholders are not entitled to receipt of the dissenters' notice in the following circumstances: (a) failure to comply with the provisions of NRS 92A.400 regarding the assertion of dissenters' rights by a beneficial owner or by a record holder as to the portion of such holder's shares beneficially owned by a person; (b) if the proposed action is submitted to a vote at a meeting, failure to give timely notice of intent to demand payment, or voting in favor of the proposed action, or (c) if the proposed action is taken by written consent, consenting to the proposed action.

[13] NRS 92A.430(2)(e) (2009).

[14] NRS 92A.460 (2009).

proceedings within 60 days after receiving the dissenter's demand and petition the court to determine the fair value of the shares and accrued interest. In a recently published opinion, the Nevada Supreme Court adopted the Delaware approach to determining fair value.[15] The court held that both a dissenting stockholder and the corporation have the burden of proving their respective valuation conclusions by a preponderance of the evidence. The court, however, has the "final responsibility" to make an independent determination of value.[16] If the corporation does not commence judicial proceedings within the 60-day period, it must pay each dissenter with an unsettled demand the amount demanded by such dissenter.[17]

Fiduciary Duties in Change of Control Transactions (Revlon Duties)

Although a board of directors has no obligation to approve a sale of the corporation, Delaware courts have held that once a board of directors decides to pursue a sale or determines that a change in control is inevitable, the board's primary duty is to maximize stockholder value. The obligations to maximize stockholder value in these situations are commonly known as "Revlon Duties," named for the case, *Revlon Inc. v. MacAndrews & Forbes Holdings*.[18] Revlon Duties are triggered by initiating an active bidding process or by responding to an all cash bid. Revlon Duties, however, do not apply in the context of a sale transaction in which the merger consideration consists in whole or in large part of widely held stock of an acquiror.

Unfortunately, Nevada law lacks any binding statutory or judicial authority on point regarding the applicability or inapplicability of the Revlon Duties to a Nevada corporation. Nevertheless, given the influence of Delaware corporate law in Nevada, a prudent Nevada board should seek to maximize stockholder value under circumstances in which Revlon Duties would apply in Delaware.

Asset Sales

Pursuant to NRS 78.565, a Nevada board may not sell, lease, or exchange all[19] of its assets absent the affirmative vote of at least a majority of the voting power of its stockholders. No stockholder vote is required to mortgage or otherwise pledge all of the assets of the corporation or to abandon an asset sale.

Directors' Duties in Considering/Approving a Business Combination

In Delaware and Nevada, a board of directors always has the duty to exercise its fully-informed business judgment to determine if a proposed business combination is in the interests ("best" interests in Delaware) of the corporation and its stockholders. Directors must act in good faith and must be diligent and vigilant in critically examining the transaction and any alternatives thereto, must act with due care in considering all material information reasonably available (including information necessary to compare the transaction to alternatives), and, in certain contexts, must actively negotiate to obtain the best available transaction for the stockholders. Directors who fulfill these duties should receive the benefit of having courts view their decisions through the protective lens of the Business Judgment Rule.

The duties incumbent upon directors depend upon the circumstances in which their decisions are made. For example, directors' duties become oriented towards maximizing stockholder value when Revlon Duties apply (discussed above) and courts will judge directors' actions against that backdrop. Similarly, in takeover contexts Delaware courts apply the *Unocal* standard to examine defensive actions by target boards such a poison pills.[20] Due to the unique risk present in change of control scenarios that target boards may act in their own self interest as they seek to maintain control, courts applying the *Unocal* standard do not grant Business Judgment Rule deference to their review of defensive actions, instead examining such actions under an "enhanced scrutiny" standard.

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[15] *American Ethanol, Inc. v. Cordillera Fund, L.P.*, 252 P.3d 663, 667 (Nev. 2011).

[16] *Id.*

[17] NRS 92A.490 (2009).

[18] 506 A.2d 173 (Del. 1986).

[19] The more common formulation of this standard is "all substantially all" of the corporation's assets. Nevada law remains unsettled as to whether "all" can be taken literally, or whether it would be interpreted to mean "all or substantially all."

[20] *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985).

The enhanced scrutiny standard effectively works as a proportionality test in which defensive actions are reviewed in light of the threat they were meant to address. Nevada, for its part, has partially rejected and partially embraced the *Unocal* standard. NRS 78.139(1) provides that "directors and officers confronted with a change or potential change in control of the corporation" have the benefit of the Business Judgment Rule presumption. If, however, the defensive actions have the effect of impeding the stockholder franchise, NRS 78.139(2) and the *Unocal* standard applies.[21] Notably, neither NRS 78.139(1) nor NRS 78.139(2) has been addressed by a published decision of the Nevada Supreme Court. As such, the application of the *Unocal* standard under Nevada law remains to be developed.

Business Combinations

Business combinations statutes are designed to encourage potential acquirors of corporations to negotiate with the board of directors before attempting a takeover. In Nevada, NRS 78.411 through 78.444 (the "Business Combination Statute") provides that specified persons who, together with their affiliates and associates, own, or within two years did own, 10% or more of the outstanding voting stock (an "Interested Stockholder") of a Nevada corporation with at least 200 stockholders of record (a "Resident Domestic Corporation") cannot engage in specified business combinations with the Resident Domestic Corporation for a period of two years after the date on which the person became an Interested Stockholder, unless (a) the combination or the transaction by which the person first became an Interested Stockholder was approved by the Resident Domestic Corporation's board of directors before the person first became an Interested Stockholder, or, as provided under a recently-effective statutory amendment, (b) the combination is approved by the board and, at or after that time, the combination is approved at an annual or special meeting of the stockholders by the affirmative vote of 60% or more of voting power of the disinterested stockholders.[22]

In 2011 the Nevada Legislature clarified the meaning of "beneficial owner" for the purpose of determining whether a person is an Interested Stockholder under the Business Combinations Statute. The prior version of the statute generally defined such an owner as a person who "beneficially owns the shares, directly or indirectly…."[23] NRS 78.414(1) has been clarified to state that a "beneficial owner" is one who possesses (a) voting power over the shares, including, without limitation, the power to vote or direct the voting of, the shares, or (b) investment power over the shares, including, without limitation, the power to dispose, or direct the disposition, of the shares.[24]

Corporations that are, or would otherwise be, Resident Domestic Corporations may opt out of the Business Combinations Statute through their articles of incorporation. Resident Domestic corporations that have not opted out of the Business Combinations Statute, however, may not amend their articles to opt out of the Business Combinations Statute with respect to any person who was an Interested Stockholder prior to such amendment.

Practitioners new to Nevada frequently question whether the phrase "of record" at the end of the definition of Resident Domestic Corporation in NRS 78.427(1) should be taken literally or whether the meaning of Resident Domestic Corporation also includes beneficial owners. Based on the legislative history of both the Business Combinations Statute and the Control Share Statute (as well as a 1999 memo from the chair of the Business Law Section of the Nevada State Bar), it seems clear that the phrase "of record" should be read literally and was added to clarify both statutes in the wake of certain court rulings to the contrary.

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[21] Where a target board's actions impede or interfere with the stockholders' vote or right to vote, Nevada law, in a codification of the Unocal standard, requires that the board of directors "must have reasonable grounds to believe that a threat to corporate policy and effectiveness exists; and [t]he action taken which impedes the exercise of the stockholders' [voting] rights is reasonable in relation to that threat." NRS 78.139(2) (2009).

[22] The recently effective amendments to NRS Chapter 78 (S.B. 405, *supra* note 1) reduce the moratorium period from three to two years. No proposed combinations with an Interested Stockholder may occur after expiration of the two-year period unless (a) the combination is approved by the board before the stockholder first became an Interested Stockholder, (b) the transaction by which the stockholder first became an Interested Stockholder was approved by the board before the stockholder first became an Interested Stockholder, (c) the combination is approved by a majority of the Resident Domestic Corporation's disinterested stockholders at an annual or special meeting of the stockholders, or (d) the combination meets certain statutory requirements specifying a premium transaction price.

[23] *See* S.B. 405 § 32.

[24] *Id.*

Acquisition of Control Shares

Nevada law provides stockholders in certain Nevada corporations the right to regulate the voting rights of persons attempting to acquire control of the corporation. Essentially, NRS 78.378-78.3793 (the "Control Share Statute") restricts the ability of individuals and groups acquiring one-fifth or more of the voting shares of a Nevada corporation (that has 200 or more stockholders of record, at least 100 of whom have addresses in Nevada) from exercising voting rights absent required stockholder approval of such transaction. Practically speaking, the Control Share Statute forces a dialog between the prospective acquiring person and the corporation regarding the proposed transaction. Approval of the transaction by the stockholders (or by the directors via an amendment to the bylaws pursuant to NRS 78.378(1)) paves the way for the transaction to proceed. Rejection, on the other hand, usually dooms the transaction leaving the acquiring person without voting rights, unless the corporation has opted out of the Control Share Statute as described below.

The acquisition of a controlling interest must be approved by both (a) the holders of a majority of the voting power of the corporation and (b) if the acquisition would adversely alter or change any preference or any relative or other right given to any other class or series of outstanding shares, the holders of a majority of each class or series affected, excluding those shares as to which any interested stockholder (*i.e.,* an acquiring person, an officer or director of the issuing corporation, or an employee of the issuing corporation) exercises voting rights, and such approval must specifically include the conferral of such voting rights.

The proposed acquiring person seeks appeal by delivering a statement for the controlling shares to the registered office of the corporation, requesting a special meeting and paying all expenses of the meeting. The acquiring person forfeits the right and authority to vote the control shares unless such acquisition of the controlling interest is approved as set forth above and the stockholders restore voting rights by resolution. If so provided in the articles of incorporation or bylaws, the corporation may redeem the control shares at the average price paid by the acquiring person if such person failed to submit an offer statement to the corporation or the majority of disinterested stockholders fail to accord full voting rights to the control shares. If the stockholders accord the control shares full voting rights, a disinterested dissenting stockholder may obtain payment of the fair value of his shares.

A corporation may opt out of the Control Share Statute by expressly electing not to be governed by such provisions in either its articles of incorporation or its bylaws. If a corporation has not opted out in its articles of incorporation or its bylaws, it may opt-out of the Control Share Statute by amending its articles of incorporation or its bylaws prior to the 10th day following the acquisition of a controlling interest by an acquiring person.