MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Seventy-third Session
April 5, 2005

The Senate Committee on Judiciary was called to order by Chair Mark E. Amodei at 8:04 a.m. on Tuesday, April 5, 2005, in Room 2149 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to the Grant Sawyer State Office Building, Room 4401, 555 East Washington Avenue, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file at the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Mark E. Amodei, Chair
Senator Maurice E. Washington, Vice Chair
Senator Mike McGinness
Senator Dennis Nolan
Senator Valerie Wiener
Senator Terry Care
Senator Steven Horsford

STAFF MEMBERS PRESENT:

Nicolas Anthony, Committee Policy Analyst
Kelly Lee, Committee Counsel
Ellie West, Committee Secretary

OTHERS PRESENT:

Ron Coury
David R. Gamble, District Judge, Department 1, Ninth Judicial District
Richard Lisle, Mechanical Contractors Association of Southern Nevada, Incorporated
Steve G. Holloway, Associated General Contractors, Las Vegas Chapter
Richard L. Peel, Sheet Metal and Air Conditioning Contractors National Association, Southern Nevada Chapter; Southern Nevada Chapter, National Electrical Contractors Association; Mechanical Contractors Association of Southern Nevada, Incorporated

Renny Ashleman, Southern Nevada Home Builders Association
Berlyn D. Miller, Nevada Contractors Association
Samuel P. McMullen, Nevada Subcontractor's Association
Sam Facchini
Van V. Heffner
Lucille Lusk, Nevada Concerned Citizens
George A. Ross, Nevada Restaurant Association; Las Vegas Chamber of Commerce
Mary Lau, Grocery Industry Council
Bill Bradley, Nevada Trial Lawyers Association

Chair Amodei opened the hearing on Senate Bill (S.B.) 351.

SENATE BILL 351: Revises provisions governing resort hotels and nonrestricted gaming licenses in certain counties. (BDR 41-1185)

Ron Coury testified from his written testimony (Exhibit C) in support of S.B. 351 with the proposed amendment that had been distributed (Exhibit D). He enumerated several business ventures he had started in Las Vegas and said he currently operated 3 businesses employing around 150 people.

He stated the passage of S.B. 351, with the proposed amendment, would clarify what constituted a resort hotel in the eyes of both the State and Clark County. The question was whether a hotel developed and sold as individually owned condominiums, available for rent by the night, qualified as a resort hotel as that term applied to the gaming statutes under *Nevada Revised Statutes* (NRS) Chapter 463. Some regulators said it should, and others said it should not; he gave reasons why he felt these condominiums should qualify as a resort hotel.

Mr. Coury said the purpose of the hotel requirement was to ensure only those properties that demonstrated a significant investment in Nevada be rewarded with a nonrestricted gaming license. The investment required the construction of a minimum of 200 hotel rooms. Nothing specified the owner of the casino had to own the hotel rooms. In fact, the ownership of the casino and the hotel were separate, he emphasized. Separate ownership in no way detracted from the State's desire that a significant investment had to be made.

Senate Bill 351 would create consistency in the interpretation of what comprised a resort hotel, enabling ordinary working folks the same chance to invest in the resort hotel industry as billion-dollar corporations enjoyed, and offering those who stayed at that property the amenity of nonrestricted gaming, he explained.

He described a project he was involved with that would be helped by the passage of S.B. 351, and referred to Exhibit D, which included a rendering of his building project. He explained the need to expand the gaming area to enhance revenues, and said the property had a grandfathered license that limited the gaming area to the existing structure, preventing expansion into the lobby of the new tower.

Mr. Coury talked about the history of gaming in Nevada and used the 1969 Corporate Gaming Act to demonstrate how the growth of gaming in Nevada benefited. He said as gaming evolved the needs of the industry and the State's laws changed. He stated NRS 463.0129 promoted and mandated the continued growth and success of gaming. He concluded gaming and gaming growth was good for Nevada, and the statutes promoted healthy competition as a means to that end.

Senator Care asked what the significance of the date December 31, 1977 was, and if it pertained to grandfathered licenses. Mr. Coury replied the date was significant because a couple of troubled properties had opened and closed repeatedly, and he thought the inclusion of that date was intended to limit a possible intense level of competition and help troubled properties compete with a new financing tool.

Senator Care asked if this bill became law, whether Mr. Coury envisioned using television advertisements for aggressive marketing or if he would depend on the people who used his hotel as the primary users of the gaming facilities. Mr. Coury replied he planned to market to those renting the 1,000 or 1,100 rooms in his property as well as advertise for external business. He clarified, to attract local business, he planned to have unique entertainment in his lounge, but most of his business would come from occupants of his tower. People played where they stayed due to the compensation they received as a result of the detailed tracking systems in place that gave them something back. Casinos rewarded loyal customers, he said.

Senator Care asked him when he bought the property in question. Mr. Coury responded the developers of the project purchased the adjacent property and approached him, as a casino operator with over 20 years of experience, to assume ownership of the property and operation of the casino by purchasing the casino floor as a large condominium. Senator Care asked how much of the plan was contingent upon S.B. 351 passing or whether his deal had already closed. Mr. Coury stated his purchase was contingent upon completion of the tower; they had not yet finalized the construction loan, and were waiting to see if S.B. 351 passed. He emphasized he was not trying to circumvent the requirement that rooms be available to rent by the night. He explained when someone stayed in a condominium unit, it would be operated as a hotel with room service and maid service.

Chair Amodei reminded Mr. Coury of his testimony about economic impacts of projects like this that included gaming, and asked him to get information regarding his estimate of the economic impact on Clark County in terms of room nights, shopping and other places he expected the money to be spent. Chair Amodei wanted to know what projects like Mr. Coury's would do for the economy of Clark County. Mr. Coury said he would provide the information to the Committee.

Senator Wiener asked how many of the newer properties would otherwise qualify if not for the grandfathered date in S.B. 351. She said she was concerned about the possibility that competition would be hindered because of the grandfathered date. Mr. Coury said he did not know if the numbers were publicly accessible concerning the use of the condominiums as owner-occupied or rental pool. The developers would not know until people bought the units and decided whether they wanted to live in them or rent them. Chair Amodei asked Nicolas Anthony, Committee Policy Analyst, to find out how many projects proposed or under construction were affiliated with unrestricted gaming license holders. He said the Committee needed an idea of the market in the casino core area for time-share or individually owned condominium projects with unrestricted gaming licenses.

Chair Amodei recessed the hearing on S.B. 351 and opened the hearing on S.B. 491.

SENATE BILL 491: Revises provisions governing funding of regional facilities for detention of children. (BDR 5-281)

David R. Gamble, District Judge, Department 1, Ninth Judicial District, stated he supervised China Springs Youth Camp and Aurora Pines Girls Facility. Senate Bill 491 addressed a historical problem of maintaining or predicting funding for the youth camps. The counties were not informed until after a legislative session about their share of the funding for operation of the camps, he said. Since the last Session, a Statewide advisory board was created to develop the budget for the camps with input from all 16 counties, instead of just Douglas County. The Spring Mountain facility was not affected by this bill, but still needed financial help, and would come before the Committee separately, he said. Historically, the counties had paid 63.2 percent of their budgets for the camps, and the State paid the remainder. Last Session changed the budget so the counties paid in excess of 70 percent and suffered a terrible fiscal impact.

Senate Bill 491 took us back to the funding formula used since 1989, Judge Gamble stated, and he referred to a proposed amendment (Exhibit E). Although the bill was originally proposed at a 50-50 rate, he had already been before the money subcommittee and believed the 63.2 percent rate proposed was acceptable to them. The other needed amendment, he said, was to remove the italicized language that said “and capital improvements to,” which was only on Chair Amodei’s copy of Exhibit E. This bill returned us to the status quo before last Session, he said, and permanently created, in law, the funding formula of 63.2-percent county to 36.8-percent State funding ratio in order to achieve predictability for the counties.

Vice Chair Washington asked if the original formula was the one former Assemblyman Joe Dini proposed several sessions ago. Judge Gamble said no, that formula was for the Western Nevada Regional Youth Center for drug and alcohol treatment in Silver Springs that served five counties. Judge Gamble asked Chair Amodei if when the bill went back for amendment, whether the Committee would include the deletion of the capital-improvements portion in the amendment. Chair Amodei answered they would, unless there was opposition testimony.

SENATOR WIENER MOVED TO AMEND AND DO PASS AS AMENDED S.B. 491, CHANGING THE 50 PERCENT TO 63.2 PERCENT AND STRIKING THE LANGUAGE "AND CAPITAL IMPROVEMENTS TO" ON LINE 10.

SENATOR WASHINGTON SECONDED THE MOTION.

THE MOTION CARRIED. (SENATOR HORSFORD WAS ABSENT FOR THE VOTE.)

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Chair Amodei closed the hearing on S.B. 491 and opened the hearing on S.B. 343.

SENATE BILL 343: Makes various changes to provisions related to mechanics' and materialmen's liens. (BDR 9-787)

Richard Lisle, Mechanical Contractors Association of Southern Nevada, Incorporated, introduced Steve G. Holloway, Associated General Contractors, Las Vegas Chapter, who testified they brought an amendment to S.B. 343 which represented the consensus of the industry (Exhibit F, original is on file at the Research Library). The amendment proposed some changes to NRS 108, which referred to the mechanics' lien law.

Mr. Holloway gave three examples of what the contractors associations hoped to accomplish with their amendment to S.B. 343. The first item was to make sure the courts recognized change work was able to have a lien. The second change regarded notice of nonresponsibility and disinterested owners. He wanted to provide lessees with an alternative to surety bonds by setting up construction control accounts. Thirdly, he wanted to further address the surety markets.

Mr. Holloway said he had met with the Surety Association of Nevada which endorsed and approved the changes the amendment to S.B. 343 brought forth today. The amendment addressed two problems regarding the surety markets. The first difficulty was a lien the claimant had to file within six months after the improvement was completed. The second involved a surety bond filed at

1.5 times the amount of the liens; the courts had allowed additional claimants to come forward, as long as 6 years after the surety bond was posted, to file a claim against that surety bond. The courts also had not restricted the claims to any specific dollar amount, so the principal insurer had to increase the face value of the bond, he explained. Senate Bill 343 required a person to file his claim against a surety bond within 9 months after it was posted, and it also limited the surety penalty. Those were the main changes the amendment proposed to S.B. 343, he summarized. The Associated General Contractors and its affiliates in Nevada, as well as the Surety Association of Nevada, supported Senate Bill 343, he concluded.

Richard L. Peel, Sheet Metal and Air Conditioning Contractors National Association, Southern Nevada Chapter; Southern Nevada Chapter, National Electrical Contractors Association; Mechanical Contractors Association of Southern Nevada, Incorporated, testified S.B. 343 would help solve other problems in addition to the three difficulties Mr. Holloway identified. The groups Mr. Peel represented wanted to first confirm a lien claimant's lien rights pertaining to labor, materials and equipment furnished also pertained to those to be furnished. They wanted to ensure that a lien claimant had a lien for additions, changes and extras with a priced lump sum, unit price, or tracked on a time-and-material basis. Mr. Peel's group also wished to confirm the 15-day notice of intent to lien only applied to residential projects; residential projects would be defined to include apartment houses, but would exclude commercial projects. He said they expected to verify a lien foreclosure action would not be stayed pending an appeal. Also, they sought to require property owners to serve lien claimants with a notice of nonresponsibility that the owner may have caused to be recorded upon receipt of a lien claimant's notice of right to lien.

Mr. Peel said his organizations wanted to make certain lessees obtained the removal of liens recorded against tenant improvements by either prospectively recording a mechanics' lien release bond, which was a surety bond, or setting up a construction disbursement account with an authorized construction control company in this State. They needed to modify the definition of interest, so it was certain what interest had to be paid to a prevailing lien claimant. Lien claimants would be allowed to join an ongoing lien foreclosure action by filing a

statement of facts: one, a reasonable time after the publication of a notice of foreclosure, or two, a reasonable time after the lien claimant received a notice of foreclosure, he said.

The groups Mr. Peel represented were going to confirm a surety's liability on a surety bond was limited to the penal sum of the bond, he stated. Mr. Peel said this was a big problem because most tenants were unable to obtain a mechanics' lien release bond. They planned to allow a principal to record a surety bond before a project started in an amount equal to 1.5 times the amount of the prime contract, he stated. They intended to confirm a provision in the contract was against public policy, void and unenforceable if the provision required a contractor or subcontractor to waive or release damages, delays or impacts under certain circumstances, he said. They also intended to confirm joint-check payments were two-party checks and limited to those payees in the same chain of privity. They planned to slightly modify the waivers and releases that gave up rights and claims regarding a work of improvement. They wanted to define what the consequential damages were, as provided in the mechanics' lien statute, NRS 108.

Another point Mr. Holloway asked Mr. Peel to address dealt with a public body that owned property and wanted to lease it for a private purpose; Mr. Peel said the public bodies should be granted the right to do so because they had created a means for a lessee, leasing public property, to comply with NRS 108.

Senator Wiener said she thought of a lien as a remedy for goods or services rendered, but not paid for. She asked Mr. Peel how a lien could be placed on a project that was not finished. Mr. Peel explained the mechanics' lien statute had always recognized you had a lien for services to be rendered as well as work actually furnished. Senator Wiener asked how you assessed a value for the lien, when the product had not been furnished. He replied they were trying to protect themselves in situations where things were special-ordered and then refused by the buyer. The contractor had to pay a restocking fee or was actually unable to return the item and had to be compensated by the buyer under that circumstance, he said. Mr. Peel explained many contractors spent large sums of money before the project actually was begun in an attempt to fulfill the time requirements for the project. Senator Wiener asked if that was an expense already incurred even though not installed. She said she meant an open-ended

situation where no money had been spent, so there would not be an established value. Mr. Peel replied that in most instances, where work and materials were furnished, it had a value. He identified a mechanism already in place under NRS 108.222, subsection 1, paragraph (b) where the court could litigate the facts to determine the fair market value and to provide a reasonable overhead and profit margin. Mr. Peel addressed her question about prospective liens and stated one of the problems was ridding the project of liens by obtaining a surety bond after the lien had been recorded.

Senator Care cited a situation, such as a shopping center, where a tenant leased space from the owner and decided to put in some new electrical enhancements, but never paid for them and did not get the consent of the owner. He then vacated the property, leaving the owner, referred to legally as a disinterested owner, with a lien for the work. Senator Care asked how S.B. 343 would help the disinterested owner.

Mr. Peel explained when a landlord entered into a lease agreement with a tenant, they had three days, under the current statute, in which to record a notice of nonresponsibility. If they did that, they could, under other circumstances the statute defined, qualify as a disinterested owner. He said there were certain limitations on that qualification, but assuming they qualified as a disinterested owner, the next thing the landlord had to do was to make sure, if they received a notice of right to lien from a prospective lien claimant, they provided that lien claimant with a notice of nonresponsibility.

They had to tell the lien claimant who the lessee was, and that afforded the lien claimant the opportunity to then serve the notice of right to lien upon the lessee. Once the lien claimant did that, the lessee had an obligation to provide all the information regarding the project, in detail, to the lien claimant. They had to tell them whether they obtained a mechanics' lien release bond or a construction disbursement account with a qualified or authorized construction control company. They had to disclose how much money was deposited in the construction control account and provide a copy of the bond, Mr. Peel said. They had to show the lien claimant there was adequate security. If the lessee did not do that within 25 days of the date construction began, the contractor, subcontractor, suppliers or any lien claimants could stop the work. They then waited for compliance before resuming work. If there was no compliance by the

lessee, they had the right to terminate the contract and get the expected profit they would have realized had the project been completed. Their goal, Mr. Peel said, was to protect the owner and, at the same time, provide security for lien claimants.

Senator Care said the proposed amendments deleted the proposed 12-percent cap, but increased the interest rate from 2 percent to 4 percent above the prevailing legal rate. He asked Mr. Peel if that was correct. Mr. Peel said they compromised and agreed to delete all of the additional language in their proposed amendment, and the interest amounted to 4 percent over the prime rate, established by the largest banking institution in the State of Nevada. They tried to make NRS 108.237, subsection 2, paragraph (b), consistent with another bill pending to modify the right-to-stop-work statute, codified in NRS 624. Mr. Peel said they removed any language that had a cap and substituted a straight-fluctuating interest rate.

Senator Care advised the prime rate changed every 6 months, so they had to keep track of that.

Chair Amodei asked Kelly Lee, Committee Counsel, if she had a question about some language in S.B. 343, section 5, subsections 5 and 6. She clarified how this amendment would work: If a construction dispersment account had insufficient funds to pay all claims and liens, then they would bring an action for interpleader. Senate Bill 343, section 5, subsection 6, said if an action for interpleader was brought, then the construction control must "interplead an amount equal to 1.5 times the amount of the lien claims to the extent that there are funds available in the construction disbursement account." She said S.B. 343, section 5, subsection 5, pertained to the construction disbursement account not having sufficient funds to pay all claims of liens.

Chair Amodei asked Mr. Peel to explain. Mr. Peel said he did not interpret the two subsections as ambiguous and said they worked together. He explained if there were insufficient funds to cover all the lien claims recorded against the construction disbursement account, the construction control company would be entitled to interplead whatever funds were left in the construction disbursement account with the court, which would determine whether sufficient funds were available. If there was sufficient funding, that lien claimant had a claim of

1.5 times against whatever monies remained in the construction dispersment account to cover its lien claim, just as it would in the case of a mechanics' lien release bond, Mr. Peel explained. He said he would be happy to work with the Legislative Counsel Bureau staff regarding any language changes they deemed necessary. Chair Amodei said the only issue was in practice, though clear as to Mr. Peel's intent, the language might be ambiguous. He asked Mr. Peel, since he worked with it more frequently than anyone on the Committee, if he was comfortable with that language and whether he thought it was unambiguous. Mr. Peel replied S.B. 343, section 5, subsection 6 was subject to subsection 5, which required sufficient funds. If those funds were not available, they could not pursue the provisions under subsection 6; if the funds were available, subsection 6 provided a remedy for them to interplead 1.5 times the amount of the lien claims due. Mr. Peel concluded he was comfortable with the language, but would be happy to work with Ms. Lee.

Renny Ashleman, Southern Nevada Home Builders Association stated he was willing to help fine-tune S.B. 343 with Ms. Lee and Mr. Peel. He responded to an earlier question by Senator Care, and asked the Committee to look at page 9 of Exhibit F, section 15, subsection 5, which referred to the disinterested owner. He said this change was important because the current law was unworkable, with the difficulty in becoming a disinterested owner, due to the language. He said with the proposed new language, if you put up the construction control account or bond, you were free from having a lien placed on your property. He said it was important to note they did not propose to change the law on the "to be furnished" or the future-damages area of the amendment. The current law allowed the court to assess the equity and the contractual rights between the parties, and they did not propose to alter that language. He referred to S.B. 300, heard by another Committee, with the intent the courts recognized they were entitled to overhead and profit on additional, legitimate damages in some cases.

Vice Chair Washington referred to Senator Wiener's earlier question to Mr. Peel regarding the purchaser of a unit who discovered the owner or the lessee lacked sufficient funds within the controlled account to proceed with the project, and asked if the court allowed the contractor to go above the cost of the unit, including substantial costs for installation, delivery and shipping. Mr. Ashleman replied in the affirmative, and said their proposed amendment carefully

preserved that right. Vice Chair Washington asked him if the courts also required the contractor to check the controlled account for sufficient funds to purchase the unit prior to the ordering and shipment of the unit. Mr. Ashleman explained the contractor, owner and manager of the controlled account were all obligated to ensure sufficient money was in the account. The construction control company was required, and had ultimate responsibility, to prudently assess the monies required, he continued.

Berlyn D. Miller, Nevada Contractors Association, testified he supported S.B. 343 with the proposed amendment.

Samuel P. McMullen, Nevada Subcontractor's Association, testified they had helped draft the proposed amendment to S.B. 343, and they were very much in support of the bill.

Mr. Peel looked at S.B. 343, section 5, subsection 6, paragraph (a), and noted it said "to the extent that there are funds available in the construction disbursement account." Hence, he noted subsections 5 and 6 worked together, and he said he did not think there was ambiguity. Chair Amodei said when S.B. 343 came up in the work session, the Committee would address the bill on a motion to amend and do pass, based on the amendment presented today.

Mr. Ashleman asked for permission and the opportunity to speak with Ms. Lee regarding her concerns. Chair Amodei replied in the affirmative.

Chair Amodei adjourned the hearing on S.B. 343 and opened the hearing on S.B. 313.

SENATE BILL 313: Provides immunity from liability to certain persons and governmental entities for certain claims based on consumption of food. (BDR 3-748)

Senator Dennis Nolan, Clark County Senatorial District No. 9, testified in favor of S.B. 313. He said similar bills had been introduced in 25 states and enacted in at least 15 states over the past 3 years. Senator Nolan drew the Committee's attention to two maps illustrating the specific states where the food-related frivolous lawsuit legislation had been introduced. One map (Exhibit G) showed the states that had enacted the legislation as well as the states where such legislation was still pending and its status. The second map (Exhibit H) was an

overview of frivolous lawsuit legislation. He noted such bills as S.B. 313 had often been referred to as "the personal-responsibility–in–food-consumption bills." Essentially, this bill provided a level of protection for people who earned their livings from manufacturing, packaging, selling and distributing food to the public. The purpose behind this bill was to protect those providers from unwarranted and frivolous lawsuits filed by individuals who claimed their health conditions, as a result of their eating habits, were the direct responsibility of the people who provided the food over a long period of time. The bill outlined the nature of the problem, the health problems related to obesity and those things possibly related to obesity. Senator Nolan emphasized the enormous cost obesity had on our society and said, ultimately, what we ate was the greatest contributor to our health care issues, obesity and morbid obesity. As responsible adults, we made personal choices about what we ate.

The health and safety of the food we consumed was not addressed in S.B. 313; those public protections were left unchanged, he said. There were several lawsuits filed against businesses, he stated. If the cases had merit, where the manufacturer or distributor willfully failed to comply with any of the numerous federal, state and local laws that protected the food and us, legal redress through the legal and tort system would apply. The concern was that once a lawsuit got a favorable verdict, as happened with the tobacco industry, there would be a flood of lawsuits blaming obesity on manufacturers, distributors or restaurants. He said many people were willing to file lawsuits against businesses on the basis of their deep pockets. Since our State was tourist-based, we relied heavily on the ability to provide good and safe food to the public, and the providers of the food deserved protection from frivolous lawsuits.

Senator Wiener asked if the language in S.B. 313 incorporated the best language from each of the 16 other state bills that were now law, or whether he modeled the bill after a particular state or several of the states. Senator Nolan replied the language was similar or identical to that of several of the other states, and was typical of the language introduced throughout the country as model legislation.

Vice Chair Washington asked if Senator Nolan could explain section 8 of S.B. 313 that referred to the dismissal process and how it worked. Senator Nolan said it created, in law, a motion that allowed the courts to show if a dismissal was warranted, based on the frivolous lawsuit. Senator Care said he

did not interpret section 8 that way because it created something he had never seen before—a special motion to dismiss—something offered to a particular defendant and treated as a motion for summary judgment without benefit of discovery. To determine whether a lawsuit was frivolous depended upon whether the lawsuit had merit or not, Senator Care said. In his opinion, S.B. 313 meant if someone filed a lawsuit, based on the theory that the food industry wanted to have recognized as not pleadable in this State, all the judge had to do was determine the plaintiff filed a frivolous lawsuit and dismiss it on that basis, and not on the basis of merit or lack of merit.

Senator Horsford referred to section 7, subsections 1 and 2 of S.B. 313, and asked Senator Nolan for examples of the types of businesses involved. Senator Nolan said from the consumer side, all the channels the food passed through, from the grower on down the food chain applied. Production facilities regulated by the United States Department of Agriculture, the U.S. Food and Drug Administration (FDA), and other federal and state agencies were still protected under subsection 2 of the bill.

Senator Nolan said they wanted to eliminate situations where people who claimed their obesity and health-related problems resulting from their conditions, could be blamed on the businesses providing their food, instead of themselves. Senator Horsford asked if section 5 defined the health problems related to obesity. He also asked if section 7, subsection 1, only related to obesity and not other health-related risks associated with the manufacture, production or distribution of food. Senator Nolan stated it referred to those who were clinically linked to obesity, and that language narrowed the claim to obesity and subsequent health risks associated with the obesity. The primary claim had to be related to obesity and subsequent health problems related to obesity, he explained. Senator Horsford asked if the definition of long-term consumption needed clarification. He said he was aware of the threat involved with the manufacturing, production and distribution of food, but questioned if the definition was intended to be that broad. Senator Nolan said they could work on making the definition more restrictive in S.B. 313. Senator Care said he interpreted section 7's, subsection 1 as much broader than obesity.

Sam Facchini testified from Las Vegas on S.B. 313 in support of the bill. He said 25 percent of all meals were eaten away from home, and choices were made regarding what people ate, how much people ate and when people stopped eating. Restaurateurs were concerned about possible accusations of causing a person's obesity in a lawsuit. He said a lawsuit could not solve any obesity issues. He said since March 31, 17 states had passed legislation similar to S.B. 313. He stated U.S. Senator Harry Reid co wrote a similar bill in the United States Senate.

Van V. Heffner testified he was president and chief executive officer (CEO) of the Nevada Restaurant Association, and President and CEO of the Nevada Hotel and Lodging Association and represented both of those organizations in support of S.B. 313.

They recognized it was critical to keep the tourism industry strong, and frivolous lawsuits held them at risk, especially restaurants. Senator Care asked how many lawsuits were filed in State or federal courts that dealt with obesity and how many demand letters from attorneys his organizations had received. Mr. Heffner stated he was unaware of any lawsuits in Nevada, but cited major tourism sites such as Florida and Hawaii that had experienced tremendous numbers of lawsuits.

Lucille Lusk, Nevada Concerned Citizens, testified they supported S.B. 313 and said people needed to accept the consequences for their own actions and stop looking for scapegoats. We knew exactly what we did when we ate a burger and fries or a pizza, she said. The result was our own fault.

George A. Ross, Nevada Restaurant Association; Las Vegas Chamber of Commerce, testified about personal responsibility and choice, and said our State historically placed a great deal of importance on our freedom of choice, more so than any other state in the Union. We did not need lawsuits to impose regulations upon the food industry, he said. Education had made a major difference in the attitudes of Nevadans toward obesity, thanks to the efforts of Senator Wiener, whom Mr. Ross praised. Senate Bill 313 was intended to prevent the tendency toward the usage of the legal system to obtain regulations and laws not obtainable through the legislative or congressional systems. What we had was the seizing of the legislative prerogative by a combination of the plaintiffs' bar and certain judges. The tort system normally compensated a person for an injury caused by someone else's wrongful behavior or conduct, he

said. Mr. Ross stated people went to court and got a settlement, or got a judge to issue a set of rules that took the place of what normally was done by a Legislature, consciously and carefully implementing the will of the people. Mr. Ross affirmed his groups' intent to prevent lawsuits that sought to punish restaurateurs and corporations for doing things that were absolutely legal and within the social and cultural norms of this country. Penalties were retroactive and often substantial in terms of dollars and changed behavior, he asserted.

Mr. Ross said genes were a major factor in obesity. Restaurants were a major part of the attraction of a city, such as Las Vegas, and as gambling competition across the country increased, the aura of Las Vegas and its allure became more and more important to our State. He said 70 percent of restaurants were not owned by corporate chains, but by small entrepreneurs who operated on about a 4-percent margin. He affirmed it would not take many lawsuits to drive those small businesses out of business, and to drive up the cost of insurance, reducing that small margin of profit. He concluded his groups supported S.B. 313 as a major contribution to the food industries of the State of Nevada.

Senator Care said the debate on this bill was driven by attitudes regarding this issue, but no discussion regarding a specific lawsuit was mentioned. He stated no cases were filed in Nevada; apparently, there were none on the horizon, so Mr. Ross was talking in generalities. He asked Mr. Ross about the legislative process, and wanted to know the public policy served when the Legislature enacted a bill saying "a tavern keeper cannot be sued for serving a drunk, who then goes out and does whatever he does." He stated he was not trying to make an analogy between drinking and overdosing on Big Macs, the point was, when was the Legislature supposed to determine this was just the way it was going to be, with the intent of keeping the courts from determining whether this was a valid cause of action? Mr. Ross replied he thought the analogy was clearly strained. We had all seen the harm caused by drunk driving, including the harm caused to the driver and others. That was a separate issue, he said. The issue today was to protect the food industry in general from being sued for providing food in a legal way, he affirmed. Senator Care reiterated he had not meant to make an analogy between drinking and overeating. His point was the Legislature was asked to say a person could not be sued for certain conduct, even though there had never been any lawsuits filed or the threat of one being filed. Senator Care questioned whether it was appropriate to ask the Legislature to enact a law with no apparent necessity. Mr. Ross replied, the appropriate

time was right now because once one of those lawsuits was filed, liability insurance rates would increase and the likelihood of more lawsuits would follow.

Mary Lau, Grocery Industry Council, testified the Council were in strong support of S.B. 313. She referred to her handout (Exhibit I) and made a correction, stating the cover letter said "this past Wednesday" and it should have said "this past year." The U.S. House of Representatives passed a ban on lawsuits regarding obese customers in 2004. It had not passed the U.S. Senate yet, although 15 to 17 states had passed a law.

Bill Bradley, Nevada Trial Lawyers Association, testified he opposed S.B. 313. He referred to his handout (Exhibit J) and said his organization would continue to fight bills that created immunity when there was no just cause to create immunity. He was concerned about creating immunity for anyone who might be responsible for causing harm to another individual before fact-finding. Mr. Bradley directed attention to the tobacco industry and the lawsuits justly brought as a remedy for those harmed. He said the manufacturers could have kept all the secrets hidden if there had been protection by law from discovery of the facts. He said Senator Care correctly interpreted section 7 of S.B. 313 and the special motion to dismiss. He stressed this bill ensured manufacturers could create documents that would remain hidden from the American public, and he asserted that was poor public policy. Senator Care said if this bill passed, the message was we did not trust Nevada judges. He advised this was a bad precedent to set.

Mr. Bradley referred to Exhibit J, and said there had been five lawsuits brought across the United States. Of those five lawsuits, all were dismissed by a judge; only one was reinstated with strict guidelines to allow for discovery. He said it was important to look historically at what some lawsuits had done. Mr. Bradley cited *Bantransfat.com, Inc. v Kraft Foods North America* regarding trans-fats in Oreo cookies that resulted in FDA-issued regulations requiring Kraft Foods, Incorporated, to list the total amount of fat on their labels. Kraft and other large companies announced, as a result of the lawsuit, they would eliminate trans-fats from the food chain. Then they did not follow through on their promises, so a public interest company brought a lawsuit against them for misleading the public with their promises, he said. The resultant settlement went to the fundamental issue of educating the public about the risks of obesity. Creating immunity from prosecution would take away any of the incentives for everyone

to do what was right and to educate. Once immunity was created, responsibility would be eliminated.

Senator Nolan asked Mr. Bradley if anything in the bill prevented anyone from filing a lawsuit claiming obesity was the fault of any restaurant or distributor. Mr. Bradley said it did. Senator Nolan interpreted Mr. Bradley's response to mean a person would be prevented from filing a lawsuit because they might be dissuaded, but he explained nothing in S.B. 313 prevented anyone from filing a lawsuit due to obesity or ill health that resulted from eating food over a long period of time at a restaurant. Mr. Bradley said under our legal system, theoretically, someone could file a lawsuit. However, in Nevada, tremendous steps were taken to prevent frivolous lawsuits. A lawyer who filed a frivolous lawsuit was held personally responsible for all expenses, he asserted. He believed the penalty was great enough to prevent a lawyer from filing a frivolous lawsuit.

Senator Nolan said he agreed they both had a great deal of trust in the judges elected and appointed in this system, and therefore the bill provided if a claim was brought forward, a judge could review it. Mr. Bradley declared that was not correct. He said the minute a complaint was filed, Senator Nolan's bill allowed a large fast-food company, that employed buildings full of lawyers, to immediately file, under the provisions of S.B. 313, an immediate motion to dismiss. As a result, the merits of the lawsuit would never be discussed, he emphasized. Senator Nolan asked him if the same judges, who they both agreed were capable and competent, would not evaluate the merits of a case brought before them and a motion brought before them to dismiss, and just willy-nilly dismiss the case. Mr. Bradley said that was what S.B. 313 allowed.

Mr. Bradley referred to section 8, subsection 2 and quoted, "a special motion to dismiss must be filed within 60 days after service of the complaint." He explained the complaint delivered to a fast-food chain headquarters on April 1, for example, and before June 1, would preclude discovery or even an available lawyer from the other side to produce any documents. He said, when you asked for documents from a corporation, it generally took 60 to 90 days, with extensions requested, before the case ever started. He emphasized the special motion to dismiss would immediately defeat the case. Mr. Bradley said his point was if we trusted judges, we would allow them to see what the case was about

before dismissing it. This law prevented that opportunity. Senator Nolan said there was an avenue under S.B. 313, not only for the judge to have some review of the case, but under section 7, subsection 2. The same types of protections were kept intact.

Chair Amodei recessed the hearing on S.B. 313 and adjourned the meeting at 10:58 a.m.

RESPECTFULLY SUBMITTED:

Ellie West,
Committee Secretary

APPROVED BY:

Senator Mark E. Amodei, Chair

DATE: