MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON JUDICIARY

Seventy-Fourth Session
May 14, 2007

The Committee on Judiciary was called to order by Chairman Bernie Anderson at 9:09 a.m., on Monday, May 14, 2007, in Room 3138 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4401 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Copies of the minutes, including the Agenda (Exhibit A), the Attendance Roster (Exhibit B), and other substantive exhibits are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at www.leg.state.nv.us/74th/committees/. In addition, copies of the audio record may be purchased through the Legislative Counsel Bureau's Publications Office (email: publications@lcb.state.nv.us; telephone: 775-684-6835).

COMMITTEE MEMBERS PRESENT:

Assemblyman Bernie Anderson, Chairman
Assemblyman William Horne, Vice Chairman
Assemblywoman Francis Allen
Assemblyman John C. Carpenter
Assemblyman Ty Cobb
Assemblyman Marcus Conklin
Assemblywoman Susan Gerhardt
Assemblyman Ed Goedhart
Assemblyman Garn Mabey
Assemblyman Mark Manendo
Assemblyman Harry Mortenson
Assemblyman John Oceguera
Assemblyman James Ohrenschall
Assemblyman Tick Segerblom

STAFF MEMBERS PRESENT:

Jennifer M. Chisel, Committee Policy Analyst
Risa Lang, Committee Counsel
Darlene Rubin, Committee Secretary
Matt Mowbray, Committee Assistant

OTHERS PRESENT:

Mark Krause, representing the Nevada Propane Dealers Association
Mike Ericksen, Owner, Wells Propane
Matt Sharp, representing the Nevada Trial Lawyers Association
Bob Crowell, representing the American Council of Engineering Companies
Mark Ferrario, representing the American Council of Engineering Companies
Fred Hillerby, representing the American Institute of Architects
Paul Georgeson, representing the Associated General Contractors of Nevada

Chairman Anderson:
[Roll was called.] We will open the hearing on Senate Bill 133 (1st Reprint).

Senate Bill 133 (1st Reprint): Enacts provisions pertaining to civil actions involving liquefied petroleum gas. (BDR 3-77)

Mark Krause, representing the Nevada Propane Dealers Association:
For most of my 20 years of practice, I have defended propane companies in litigation across the nation. I also do some consulting work for propane dealers and assist state propane dealers' associations like the Nevada Propane Dealers Association in legislative efforts. I am in support of S.B. 133 (R1).

Over the past 20 years, the propane industry has experienced an increase in litigation against propane dealers. During that time, the effect on the Mom-and-Pop businesses—of which the industry is mainly comprised, especially in Nevada—has been significant. Uncertainties created by litigation and difficulties obtaining insurance have had an adverse affect on their businesses.

The major concern more recently is what has become known as the "do it yourself" problem, not only in Nevada but across the nation. This problem occurs when work or modification is done to a propane system by the owner of the system or by someone else—a friend or handyman for instance, trying to fix a gas line or appliance. It happens frequently in rural Nevada where there are many propane users who have that "do it yourself" attitude. This has been further complicated by the proliferation of stores such as Lowe's and Home Depot that encourage people to buy a particular appliance and install it themselves when it should be done by a professional. When it is not left to the professional installer, it becomes an accident waiting to happen. The results can be catastrophic. There have been judgments in Nevada reaching into the millions of dollars.

There is a definite need for this legislation and it is specifically tailored for two sets of circumstances: a change or modification in a propane system that the propane dealer did not know about or have anything to do with, and misuse of the propane equipment or propane appliance. The reason this bill should become the law in Nevada is because the playing field is not level for the propane dealers like Mr. Ericksen and other family-run businesses who make up the majority of the members of the Propane Dealers Association. Under the laws of Nevada, like most states, the burden is on the plaintiff who is bringing the suit to prove that the propane dealer is responsible. However, as a practical matter in defending these cases, the burden is really on the propane dealer to prove his innocence. The liability aspects of the case are often ignored by the jurors. The jurors will instead focus on the horrific burn injuries, fatalities, or property loss from the fire. They overlook the burden that the plaintiff has to prove the propane dealer did something wrong and caused the accident. This affirmative defense would take a conservative approach and help level the playing field in the litigation arena, because currently the burned or deceased victim usually prevails, even though the law says that should not be the case.

Propane dealers are often the targets in situations such as accidents that result from changes or modifications to systems made by property owners or other unlicensed persons. If that change or modification results in an accident, the individual cannot sue himself or the unlicensed person so he targets the propane dealer.

Nevada currently recognizes an affirmative defense based on comparative fault; it is either the fault of the person bringing the suit, or a third party. This bill would make it a specific affirmative defense to this industry. It is an affirmative defense very much needed.

The State of Nevada would recognize that it is important to the propane industry to be able to show that the accident was caused by a change or modification to the propane system which the propane dealer did not know about. It is a defense to the lawsuit. If it can be shown that there was misuse of a particular appliance or piece of equipment; that is also an affirmative defense.

It is important to note that this does not cut off a plaintiff's right to file his lawsuit and have his case considered by a judge or jury. Approximately 17 states have passed bills similar to this, and purportedly, such laws are preventing people from even bringing legal actions. Four other industries have similar affirmative defenses granted to them in the State of Nevada.

For those who are not familiar with the propane industry in Nevada, I want to stress that it is a safety-conscious industry. This group distributes propane safety information to their customers statewide that includes warning messages in an attempt to prevent accidents. The industry is also aggressive in providing training and certification to employees who deliver the product and provide services to the customers. The industry also adopts and enforces regulations for propane safety. This entire effort is aimed at doing everything possible to keep customers who use propane safe and free from injury.

Chairman Anderson:
Oftentimes, propane tank owners live in relatively remote locations. What if they need to have work done on that tank in order to heat the house?

Mark Krause:
I will defer to Mr. Eriksen because he is actually in the business and deals with these types of situations with his customers in Wells, Nevada.

Mike Ericksen, Owner, Wells Propane:
In my situation, when there is a call, we respond. We have a 24-hour answering service and I pride myself on my company being able to respond to every call in a timely manner. I try to give my customers no opportunity to work on their own system by being available for them at any hour of the day or night, holiday or not.

Chairman Anderson:
I understand that you try to do that, however the reality is that a two-hour drive is still a two-hour drive, and that is if you can reach someone at two o'clock in the morning to get out of bed and respond. I presume you have someone at your business 24-hours a day?

Mike Ericksen:
Absolutely; we have an on-call person available 24 hours a day, and every propane company in Nevada operates the same way. They have on-call representatives available for immediate dispatch for service. I cannot say that we can be there immediately. If I get a call from Jackpot, it will take me an hour and a-half to get there, but we will respond and we usually instruct the customer, particularly if there is a dangerous situation like a gas leak, how to shut off the gas supply to the residence and to wait until we get there.

Chairman Anderson:
With this affirmative defense, it means that the person bringing the lawsuit has the responsibility of proving that you are at fault?

Mark Krause:
That is correct.

Assemblyman Horne:
Due to the horrific injuries, you made the statement that you believe the jurors in these cases ignore the facts. You also believe this affirmative defense does not bar potential lawsuits, because the individual could still go before a judge or jury. Those statements lead me to think this bill bars litigation because you do not have confidence in the jury on these cases. We will take it out of their hands and leave it in a judge's hands, because the judge will determine whether or not the plaintiff has met his burden to show that the manufacturer or supplier was at fault. Is that correct?

Mark Krause:
I would disagree with that. Where there is no dispute of material fact as to what caused the accident, and if I was able to convince the judge I had met a summary judgment burden, the jury would not decide the case. But that is the existing law. Under this bill, the judge would instruct the jury that if Mr. Krause has proven to you that this accident was caused by a change or modification to the propane system which the propane dealer did not know about, that jury can find that the dealer is not responsible for the accident. I do not necessarily see it as a situation where people are not going to get their cases decided by a jury. From a defense standpoint, I would really like that particular jury instruction read to them, if warranted. I could not ask for that instruction, and the judge would not give it to the jury in a case where there was no proof the accident was due to the result of a change or modification to the system. If I have that proof, I can convince the judge the jury instruction is warranted.

Assemblyman Horne:
How many cases of this type are there? Is there a need for this legislation? Basically, you are saying that the end result did not match the circumstances of the case.

Mark Krause:
Yes. Mr. Ericksen has some examples of near misses and I will share with you one example. This happened in Elko to a young husband-and-wife team with a family-owned business that they have built up—their last name is Krause, no relation—and I met them at a National Propane Gas Association meeting. They had a customer in the Elko area who was staying in a recreational vehicle (RV) while having a home built. The owner asked this team to supply propane for that RV. The couple went out, set a tank, and ran piping and regulators to the RV for heat. The property owner later had some problems with the furnace in the RV but he did not call the couple who did the installation, nor did he call any

other qualified service technician. He tried to take the furnace apart and put it back together. Unfortunately when he did so, there was a resulting leak, explosion, and fire. The man's daughter died, and he and two other family members received serious burns. At that trial, the plaintiffs argued that there were deficiencies in the outside propane system installed by the husband-wife team that had caused the accident. Even though the explosion and fire was clearly inside the RV, they pointed to some things on the outside. With the loss of a daughter and the serious burns there was tremendous sympathy for the plaintiffs that resulted in a $54 million verdict against the young couple's business that nearly jeopardized its existence.

Mike Ericksen:
Like many hundreds of propane companies across the United States, we are a family-owned business. Our company was founded in 1956 by my parents and today is operated by myself and two of my brothers. Our company service philosophy has always been one where we try to provide the best service work possible by trained and properly certified propane service technicians. Sometimes our good work can be undermined by customers who inadvertently misuse their propane equipment. Suppose a customer goes to Home Depot or Lowe's to replace a water heater. The customer takes it home, makes the replacement on his own, and does not realize that propane is different than natural gas. Most of the water heaters from those types of merchandisers are manufactured for use with natural gas. Natural gas and propane are entirely different fuels with different properties, and they burn differently. In order to use that water heater with propane, the control and burner must be converted. When that is not done, they risk starting a fire or developing carbon monoxide poisoning because the burning characteristics are so much different than gas.

In another case of customers inadvertently misusing their equipment, they tried to contain their pet in their back yard by tying it to the propane service lines. This occurs many, many times. In Elko, the pets are not toy poodles or Chihuahuas; they are more often St. Bernards or other huge animals that can produce a lot of tension and stress on the line.

I get very frustrated when these untrained and unqualified "do it yourselfers" attempt repairs or misuse their propane equipment, and I still find it hard to believe that someone would risk a fire and explosion, or their own or family members' lives by attempting those repairs, but it happens all too often. If an accident occurs because of inadvertent misuse or an attempted repair to propane appliances or lines or equipment by unqualified persons, my company will likely be named in the lawsuit because I am the propane gas supplier, or equipment supplier, or both. To illustrate, look at the oven safety valve (Exhibit C) circulating among the Committee members. That piece of equipment

was removed from one of my customer's appliances—it is a gas control for a gas oven. I had to look at it quite closely to find out what was wrong with it. There is a bolt installed on the back of the control, and any certified service technician would say that it does not belong there. What should go there is a capillary tube, and when that oven safety valve is installed in the oven properly, the capillary tube would extend into the pilot flame. There is a fluid inside the tube that is heated by the pilot light; the fluid expands, exerts pressure down the tube and onto the back of the oven control where the bolt is located. It exerts pressure on the spring which opens the gas valve which, when the oven is turned on, allows the gas to pass through. The way that control is set up now, it will work fine provided the pilot light never goes out. That is what happened with our customer. He called and said he had a problem with his oven; that it exploded on him when he tried to light it. He lost his eyebrows, eyelashes, and a lot of his hair, but he was not seriously hurt. When my customer changed that equipment, it was an accident waiting to happen.

When we find these improper repairs and inform our customers of the possible consequences, they always say something like, "I was lucky I didn't get hurt;" or, "Boy, was that stupid." Had there been an explosion resulting in property damage or someone being seriously injured or killed, I do not think that customer would be saying he was lucky. He would be saying, "Someone is going to pay; I'm going to sue."

I thank the committee for its consideration and urge passage of S.B. 133 (R1).

Chairman Anderson:
You were not sued in that case?

Mike Ericksen:
Thank goodness, I was not.

Chairman Anderson:
How many states have similar legislation?

Mark Krause:
Fourteen states have enacted legislation. Similar legislation is either pending or being contemplated in eight other states currently.

Chairman Anderson:
Of the 14 states that now have legislation, are there any that have a long enough history since passage to track legal decisions?

Mark Krause:
I am unaware of any reported decisions—cases that are actually on the legal books—where such legislation has been subjected to application. We currently have two cases in states with legislation where a defense has been asserted but we do not know how it will play out. That certainly is an example, in reference to Assemblyman Horne's earlier question, showing that in those cases thus far it is not a situation where the judge has said"...Go away, plaintiff, you can't bring this particular case." My guess is that in those cases and in most cases, what it will result in is a jury instruction and the jury will decide whether that defense has been proven.

Chairman Anderson:
In the states that have legislation in place, did that occur in this century or in the last?

Mark Krause:
Most of those 14 states enacted their legislation in the last seven or eight years. The first state to have such a measure was Alabama and I believe that dated back to the prior century.

I want to stress that the Propane Dealers Association has taken a moderate, conservative approach. This bill was modeled after the Utah law that was passed a couple of years ago and it has actually been whittled down. Originally it contained a "rebuttable" presumption but that was modified in the Senate. Our bill is not like Colorado's that purportedly cuts off a person's ability to even get to the courthouse steps.

Chairman Anderson:
Is there anyone else in support of S.B. 133 (R1)? Is there anyone in opposition to S.B 133 (R1)?

Matt Sharp, representing the Nevada Trial Lawyers Association:
I was involved in the second lawsuit arising from the Elko case. That second lawsuit involved the insurance company and its failure to settle a claim which on its face involved claim liability. Basically, that case was about the dispute between the plaintiff who alleged that the installation was improper and the defense who alleged that there was tampering to the product. The damages in the case were well into the seven figures just on medical bills alone; it was a horrific injury to a very nice family—both mother and father were injured, a young daughter died, and a young boy had massive burns and was permanently scarred. The point is that the insurance company had a $1 million policy that the plaintiff's lawyer offered to take. The insurance company—whose internal communications I was privy to—used the rationale for not paying the claim that

they did not believe an Elko County jury listening to the facts would ever award more than $1 million. I find it ironic that they are now claiming that this same jury would be refusing to look at the fact or the law if they nullified the law because of this overriding sympathy for the family. No doubt the jury did empathize with the family as any one of us would, but the facts of that case were evaluated by the jury and the facts favored the plaintiff, and the insurance company had an opportunity to settle that case for $1 million and said no. Now, this very same industry wants you to change the law.

I cannot see why this change is necessary. In an instance where someone is damaged due to a propane tank, there typically would be two potential causes of action: one would be negligence, which means that the retailer installed the product incorrectly, did something improperly or acted unreasonably. In that context, I would have to prove that the retailer violated the industry standards, acted unreasonably, and as a result, caused damage to my client. All of these things come into play in the question of damages. The manufacturer is entitled to bring in evidence of misuse or alteration and those things are evaluated by a jury. That is one cause of action.

The second cause of action would be a strict products liability case where the product itself was defective. In order to prove that I would have to show that there was some kind of unreasonable design or creation of the product that led to the injuries.

Again the question of misuse comes into play. Currently, as I understand the law, if the defense can prove that the misuse was not foreseeable, they are entitled to an instruction that says "misuse of product is a defense." Why should someone anticipate a foreseeable misuse? The reason would go back to the premise of why we have products liability, and that is to make products safer for people, for the end users, whether they are heating their homes or driving their cars.

As a society, we think products should be safe and we have an expectation that they are. Manufacturers, as part of their jobs, are trying to see how that product can be safer. Using the example of cars that are crash-worthy—falling asleep in a vehicle and driving off the road is a misuse of that product, but it is foreseeable, and that is why manufacturers spend a lot of time figuring out how to make their vehicles crash-worthy. That is why they sell you a product that is designed to be safe; they tell you that if the car is in an accident you are going to be safe.

This bill is an effort to get a gut reaction to obvious misuse of a product, e.g., the apparatus that was passed around to you. It is emotional; "We have to stop

people from suing who are too stupid to protect themselves." Essentially that is what the proponents of this bill want. But that is not the case before you. That case was never filed. The case that the proponents want to nullify is one in Elko County that a jury sat through, evaluated, and decided. I am confident that juries decide cases based upon the facts, whether you are in Elko County, Clark County, Washoe County, or Carson City. If the facts are in favor of the plaintiff they should award damages; if the facts are in favor of the defense, they should render a defense verdict, but this bill does not help the process. If anything, it will provide the manufacturer with something they are not entitled to now, and will make things more difficult for that family who has been horrifically injured to seek and receive justice.

Assemblyman Horne:
To address Mr. Krause's statement that the bill does not bar access to a court or jury, how would a plaintiff attorney be unable to make a case in a situation where, if this bill were to pass, the jury instruction would be something to the effect that the plaintiff is not at fault, or the plaintiff did not modify or alter the device, then the jury would have to find for the defense? Do you not see that as being a case in which plaintiffs can still adequately bring their case forward?

Matt Sharp:
What Mr. Krause said is that juries nullify the facts; that the jury in Elko County, or wherever juries hear cases involving these catastrophic injuries, nullified the law, nullified the facts, and that their decisions were based upon emotion. My rhetorical question in response then is why would it make a difference if you have another jury instruction? But I think Mr. Krause knows differently. I think he is an experienced lawyer and he understands that the juries do assess cases based upon the facts and the law as instructed by the court. They do pay a lot of attention to the law and they spend a lot of time reviewing those jury instructions. For example, in that Elko County case, which was a three- or four-week case, at the conclusion of four weeks the jurors get to hear the law that they have sworn under oath to follow and to apply the facts to that law. So the juries take very seriously what is contained in the jury instructions. For example, what this jury instruction could include, according to subpart (b), is if "the liquefied petroleum gas system was used by the retail end user in a manner or for a purpose other than for which it was intended ...." I am not sure I understand what that means, but I think that in any kind of situation the retailer could say, "I didn't think you'd use it that way." I am not a specialist in propane, but the example I am thinking of are car manufacturers that do not expect you to fall asleep at the wheel. If the car roof is crushed and you are rendered a quadriplegic, the law now says the manufacturers are responsible because they could have foreseen that misuse and taken it into account when designing the product. I think this provision does change the law. From a

public policy perspective, it switches the onus and says manufacturers have an obligation to make products safe. The manufacturer takes into account misuse when making a safe product.

Assemblyman Horne:
Public policy dictates that manufacturers make things safe, but through the end user's action the product is now unsafe and you are saying the end user's action may have been foreseeable therefore the manufacturer, supplier, or seller, should have some responsibility. However, this bill says that despite that "foreseeability," if the end user's actions or modification of the product was the cause of their injuries, the defendant wins. Does the plaintiff have a way to rebut that?

Matt Sharp:
Not the way I understand the instruction. If it is used for a purpose other than what it was intended for, you lose. That is the way I read it. That is the argument the defense would be making. When a lawsuit is filed there is a process that takes place to get to a jury called "discovery." At the conclusion of the discovery, typically the defense will request a motion for summary judgment which says that this case has no merit; if the facts are interpreted in favor of the plaintiff, he still loses. The underlying intent is to try to use affirmative defenses like this to convince judges to keep people from getting to juries. That is part of what is going on here.

Assemblyman Horne:
It was stated that other industries have been afforded affirmative defense laws in Nevada. Why would that not be appropriate for this industry?

Matt Sharp:
I am not familiar with those other industries, but I wonder about the underlying public policy purpose to single out one entity and provide them specialized protection. I do not hear that there is an overall public policy reason to provide any type of additional protection. They have the same protection as a car manufacturer would have. Why do they need to be singled out—other than the case in Elko County which should have been settled by their insurance company for $1 million?

Assemblyman Cobb:
It seems from your testimony that you are suggesting that all suits, whether valid or not, against all parties within a lawsuit, should go to a jury and not be given the opportunity to be determined by a judge as long as none of the issues is controvertible . Are you against all non-general affirmative defenses?

Matt Sharp:
I am not against all affirmative defenses. Obviously the reason why the rule for summary judgment exists is that the court does have a gate-keeping function, but as a matter of policy that gate-keeping function should be of limited discretion. The court should try to figure out a way to get things to a jury. I have had motions for summary judgments filed against me and I routinely bring them, but my policy is that yes, cases should be tried by juries. Most cases involve questions of fact; a jury is in the best position to assess those facts.

Assemblyman Cobb:
So you have used the summary judgment motion, which I am sure every attorney has, and you have applied specific affirmative defenses, but you do not think it is appropriate for this situation where an end user has changed a system without the knowledge of the person who sold it to them?

Matt Sharp:
I think that if there is a misuse that was not foreseeable and that was incurred by the consumer, that defense already exists. For example, in the Elko County case, what if the installer was not consciously aware of the change to the gas line but just failed to pay attention to that change? What if they came out five or six or seven times and recklessly disregarded that there had been a change made and that change was unsafe such that their product could not be used safely? Under this context, unless you can prove actual knowledge you are going to lose and I do not think that is fair. I do not think it is right to add an additional burden to the plaintiff. That right does not make a level playing field; it gives the playing field to the manufacturer. The goal of sound public policy is to have both sides have a level playing field and let the facts bear out. If the facts cannot support the plaintiff's theory then the court should dismiss it, but if the facts can support that theory the jury should decide.

Chairman Anderson:
Is there anyone else wishing to speak in opposition? [There was no one.] We will close the hearing on S.B. 133 (R1) and open the hearing on Senate Bill 243.

Senate Bill 243: Requires an affidavit and a report in an action against certain design professionals involving nonresidential construction. (BDR 2-695)

Bob Crowell, representing the American Council of Engineering Companies:
I am appearing today with my partner, Mark Ferrario. I will be presenting the bill and Mr. Ferrario will be available to answer any litigation questions. We are representing the American Council of Engineering Companies in support of S.B. 243.

This legislation is often referred to as the certificate of merit legislation. It applies to litigation involving design professionals in their professional capacity and arising out of commercial construction projects. It is essentially the commercial counterpart of legislation previously adopted by the 2001 Legislature relating to actions involving residential projects. Consistent with that earlier legislation, design professionals are identified in this bill as architects and engineers, including landscape architects and land surveyors, who are licensed or certificated by the State of Nevada. In general terms, the bill requires an attorney to file an affidavit with its initial pleading. The affidavit would state that the attorney has consulted with an independent design professional in the appropriate field and upon such consultation and review has concluded that the complaint against the design professional has a reasonable basis in law and fact. The affidavit must also contain a report submitted by the independent design professional setting forth the basis for that professional's opinion that there is a reasonable basis for commencing the action against the design professional.

Why should this legislation be enacted? This legislation does not preclude litigation against the design professional. What it does mean is that those suits that are filed against the design professional have a reasonable basis in law and fact that merit the expenditure of judicial time and effort. The standard of proof for professional negligence requires a finding that the design professional has failed to employ the standard of care and skill exercised by reputable members of the same profession. This law ensures that actions brought against the design professional have a reasonable likelihood of meeting that burden of proof at the time of trial.

As to the design professional who was a defendant in a case, it means that there has been a careful review of that professional's actions and in the opinion of his or her peers there is a reasonable basis to conclude that the design professional has committed an error.

As to the claimant attorney, it is good litigation practice in that it ensures that in professional negligence cases the analysis generally done before the complaint is filed, and accordingly the complaint, can be specific as to the errors alleged. The requirement of an affidavit in actions involving professionally-licensed individuals is not new or unique in the State of Nevada. As stated earlier, such affidavits are already required in affidavits against design professionals in a residential construction setting. Similar types of affidavits are required against other professionals in Nevada such as affidavits used in cases against medical and dental professionals pursuant to NRS 41A.071.

I am told there are 13 other states that have similar affidavit requirements with respect to design professionals and in each of those states there is no limitation between whether the affidavit applies to either residential or commercial construction projects.

If enacted, this law would merely comport the commercial actions to the same as residential actions in the State of Nevada.

Chairman Anderson:
I am a bit concerned over this issue. There are 3,000 to 4,000 homes being constructed in various phases by a large developer, usually offering three or four models. In my early youth I worked for a land surveying company and one of the jobs was to set the pegs where they were going to drill the holes to set the foundation. When you come to a commercial structure, they are usually individually designed and sit in a different format; they are not all "cookie-cutters." How will this work with that kind of situation? There would not be a recurring design flaw in every building and that was one of the things that we were concerned about with home construction. Does this give an unusual protection because of that?

Bob Crowell:
It does not give an unusual protection. It extends the concept of an affidavit from residential to commercial projects, and, in general, with commercial projects there are more sophisticated claimants who are participating in that type project. Frankly, although the number of cases involving commercial projects is not as great as in residential, it does have more significance in those cases because they tend to be more engineering-specific and complex. Under those types of cases, this law would require that in complex cases of engineering standards an expert must look at the situation before filing a lawsuit.

Assemblyman Horne:
Can you walk us through exactly how this might take place and its follow-through procedure? I have concerns about being able to provide such an affidavit and get an expert to do so for these types of projects which are different from single family homes or large casinos.

Mark Ferrario, representing the American Council of Engineering Companies:
I'll use as an example a case that I just arbitrated a few months ago. In that case, I represented an owner of a large condominium project in an arbitration proceeding against the contractor. There were issues that arose in the case as it unfolded involving the plans and conduct of the architect. As those issues matured, and before either side did anything in regard to the architect, we hired

experts. I hired an architectural expert and so did the other side. Our respective experts evaluated the plans and drawings before we brought any of those issues into the case. Essentially what you would do in a commercial case—and I want to echo Mr. Crowell, you are dealing typically with very sophisticated litigants—if a design issue is suspected or if it arises, you first evaluate it by bringing in people in the same field to look at the conduct of the design professional. It is exactly what you would do in a medical malpractice case. It is not a bar to bringing the suit; it accelerates something that is going to happen anyway in the lawsuit. You cannot typically get to the jury or to the end of one of these lawsuits without having an expert opine on the propriety of the conduct of the design professional. Basically, you are rolling that up to the front of the lawsuit, and it is not a bar to entry to the courthouse.

Assemblyman Horne:
There is a statute of limitations on filing lawsuits; what is it in this type of case? Let us say it is 2 years, and your client-engineer comes to you 18 months out after it has been noticed that there is a problem, leaving you 6 months to file. Do you suppose that six months would be sufficient time to get an expert, have them review the plans, and get you the affidavit in order to file a timely complaint?

Mark Ferrario:
Six months would be no problem at all. Where you would be in trouble, which you are anytime you need to get an expert, is if you were right up against the statute of limitations. There is language in this bill that allows the filing of an action without the certificate in those circumstances such that you can toll the statute and then come in later and supplement with an affidavit from an expert. It is not the intent of this bill to preclude legitimate claims against design professionals.

Assemblyman Horne:
Have there been a number of these litigations?

Mark Ferrario:
We are seeing an increase in the number of commercial lawsuits involving construction-related activities. From my perspective, it appears to be a natural extension of what we saw in the residential arena.

Chairman Anderson:
The people involved in this are in a relatively specialized field at the very beginning of the design phase. Do the lawsuits coming forward tend to be in this area, or are they pulled in as a result of other kinds of construction

questions? In other words, is everyone who was working on the project going to be brought into the suit?

Mark Ferrario:
There are a few cases that involve design professionals upfront where you clearly have a design issue. In most instances, the contractor will get sued by an owner, much like the case I just handled, and then as others are brought in they are looking to lay off liability and that is typically where one sees the design professionals come in. But both situations do occur.

Chairman Anderson:
That was the argument for it in the residential area. Had they laid out a good plan and had it been followed, they would have been happy.

Mark Ferrario:
I think it is working well in the residential area. I do not think any legitimate claims are being precluded.

Assemblyman Cobb:
Construction defects are a very interesting area of tort law. You can have problems with the actual manufacturer of a building versus problems with the actual design. There can be arguments that they blend together, but oftentimes it is quite clear that the construction or manufacturing side of the building process was the problem in the construction defect. I have seen in practice, and rightly so, plaintiff's attorneys try to include as many of the actors as possible in presenting their complaint. But also there is a concern on the other side that people are lumped in where they should not be. What is your experience in terms of trying to extricate oneself from a lawsuit such as this in terms of what the costs are, even if there is no reasonable basis for bringing such a suit?

Mark Ferrario:
It can be difficult to get out of a suit when you are brought in, and I listened with interest to the debate prior as to whether judges should get involved in getting people out of lawsuits before they get to a jury. This bill is just one measure of protection to preclude people from being sucked into a lawsuit and then having to pay a nuisance value to get out. I see no problem with this. I practice in the construction defect arena; I typically represent home builders. Before we can bring in design professionals, we have to get a certificate and it is working well there. I think it would carry over very well in the commercial context. I also represent commercial builders and contractors and, frankly, this would impose a burden on the people that I represent, but I think it is good practice.

Fred Hillerby, representing the American Institute of Architects:
We are in support of this bill. I can add one more thought to the process based on experience I have as a board member of a medical malpractice company. The need to file an expert witness affidavit is part of the process in that arena. When we evaluate claims, if the expert witness presents a good document in support of the case, it helps us decide that we need to settle early. That is one part of this that I want to bring to the Committee's attention.

Chairman Anderson:
Is there anyone to speak in opposition?

Paul Georgeson, representing the Associated General Contractors of Nevada:
I am also a construction attorney involved in construction litigation cases. The American General Contractors (AGC) is in opposition to this bill. I would note that this bill by its exact language was brought last session and did not pass both Houses. It is a bill that we think is not necessary, not fair to the other players in the construction arena, and ultimately not helpful even to the architects and engineers. With respect to not being necessary, there has been some discussion about medical malpractice and residential construction defects. As the Chairman and Committee members know, the legislation giving that special protection arose out of what I would consider a crisis in those areas. You all know what happened with medical malpractice and the insurance crisis there. I think most of you are familiar with the history of the construction defects statutes. Allowing legitimate construction defect cases to move forward also reins in some of the practices in those situations. There simply is no such crisis in the commercial or industrial setting with respect to these types of claims. There is no history of problems resulting in inability to obtain insurance, there is no real strong history of frivolous lawsuits, and therefore our position is there is nothing to be solved by giving the design professionals this special protection under the law.

I would also note that the Rules of Civil Procedure already do address these issues to some extent. Rule 11 already provides that by filing a lawsuit you are basically warranting that the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery. So there are already rules that prevent the filing of frivolous lawsuits and require an attorney in any type of claim to do a reasonable investigation before he files that lawsuit. There is no real necessity for this legislation in this circumstance.

The second problem with this proposed legislation is that it is not fair to the other parties who are involved in these types of lawsuits, namely the contractors. We have a situation where now the design professionals are going

to have special protection and a special hurdle that the plaintiff has to maneuver around before he can move forward with a lawsuit, but that protection does not apply to the contractors. I have experience trying construction defect cases in the commercial setting and the majority of the time there are issues both of construction defect and design defect that get tried in those types of litigation. We have a situation here now where the owner of the project will be able to proceed against the contractor, without having to jump through this extra hoop, but not against the design professional. We do not believe that is fair to the contractor; the standard for that suit should be the same for both the contractor and the design professional.

Further, I would argue that there is some issue with the constitutionality of this statute, which relates back to the history with the statutes of repose that occurred in the mid-80s where statutes were applied to protect both the contractors and the design professionals, but not the owners and suppliers. The Nevada Supreme Court looked at that and said they did not see why one group should be protected as opposed to another group. They found that those statutes were unconstitutional and a violation of due process and struck those statutes down. Aside from fairness, there is an issue of constitutionality.

The contractors with my group believe it should apply to the contractors as well because as long as it applies to everyone it is fair. My concern is a "be careful what you wish for" situation. At the beginning of a lawsuit, neither my clients nor I want an expert witness report identifying allegedly what was done wrong to be on file as part of the complaint and part of the public record. In the standard process, a complaint that includes general allegations is made. There is also discovery during which expert witness reports are exchanged among the parties. These reports identifying what the expert said were the faults and problems are not necessarily made public. My construction clients would not want to be in a situation where at the outset there is an expert witness report that identifies alleged problems. They would not want their insurance companies or their competitors having access to that information, but it would be part of the public record. For those reasons we believe that this legislation is not appropriate and request that it not be passed this session, as it was not passed last session.

Chairman Anderson:
Did you have an opportunity to testify in opposition to the bill on the Senate side?

Paul Georgeson:
I was not available, however my partner, Tim Rowe, did testify before the Senate. I did testify regarding this bill during the last session.

Assemblyman Horne:
You are saying this may be a constitutional issue, but we have already done this to an extent in noncommercial settings, so I would like some clarification. We are talking about two different types of professions. I do not know how one would even provide this type of standard where we bring in an affidavit about a contractor who runs the project and hires multiple subcontractors. This situation is much different than those involving specialists such as architects or engineers.

Paul Georgeson:
The plaintiff in a construction defect case still has to have an expert that will testify that there was a construction defect. Maybe that defect will be on behalf of the contractor; maybe it will be on behalf of one of the subcontractors, but to prevail in trial you would have to meet the same standard. Often the same issue may apply with the design site: the owner hires the architect and then the architect hires the engineers and sub-specialty designers as well. So it would be the exact same potential on both sides in that situation.

Assemblyman Horne:
You stated that there was no need because existing law providing for this type of affidavit filing was in response to the medical malpractice and construction defect crises. Why would we want to wait until there was a crisis in order to act? Testimony today from Mr. Ferrario is that the number of cases involving this type of litigation is increasing. Could we be making a positive step toward heading off a potential problem?

Paul Georgeson:
Yes, there is an increase in litigation; the state is growing and there is more building. As Chairman Anderson noted at the beginning, one of the problems in the residential side is that thousands of homes are built at a time and as the subdivisions go up the number of potential cases is astronomical. While there may be some increase in litigation in the commercial setting in this state, I do not see that it will ever reach a crisis level. Looking forward, and based on my experience in the past, there are sophisticated owners who hire sophisticated attorneys who determine whether there is a claim to be made or not. There are no "incentives" in the commercial setting as are found in the residential setting with respect to the automatic award of attorney's fees and some of the other things I believe lead to what I consider the crisis in the residential setting. Therefore, I do not think we are moving toward a situation that needs to be headed-off now; I think there is no basis for it. I think the sophisticated owners are going to hire their attorneys and make the determination based on the facts.

There is nothing to be thwarted here; there is neither the history nor the potential for substantial frivolous lawsuits.

Assemblyman Horne:
Regarding the burden, how onerous would it be on the plaintiff to get this affidavit? Particularly in view of this language that says if one is pushed up against the statute of limitations clock it can be filed at a later date. How difficult would it be for one to comply with this legislation if it were to pass?

Paul Georgeson:
I hate to be cynical about it, but I think the honest answer is that you can get an expert to say anything if you find the right expert. I do not think it would be extremely onerous for the owner to obtain the certificate if there was a legitimate design defect. Then we return to the issue of why just the architect is protected by this legislation and not the other side.

Regarding the global picture of these types of projects, what is interesting is that most of these commercial projects rely on or use the American Institute of Architects (AIA) forms. Mr. Hillerby testified on behalf of the AIA. The architect is essentially the judge and jury for all claims that proceed during construction so, for instance, if the contractor finds a problem he sends it to the architect to decide whether the architect was responsible. Even at the outset before litigation is filed, the contractor is a little bit behind the eight ball because the architect has already said, "It's not my problem—I'm the one that gets to decide if it was a design problem and not a construction problem. I'm going to tell the owner that it's a construction problem." We see that, and see those claims move towards the contractor and away from the architect at the outset. This is one more bullet in the architect's arsenal that will make it more difficult for the contractor to get a fair shake when it comes time to file litigation.

Assemblyman Segerblom:
Is there anything about this law that would prevent you from turning around and suing the architect yourself?

Paul Georgeson:
The contractor usually cannot sue the architect directly because there is no privity, so there is no direct claim against the architect.

Assemblyman Segerblom:
A third-party complaint could not be brought against them saying they were responsible?

Paul Georgeson:
Not generally because the contractor does not have the contract with them.

Assemblyman Cobb:
You discussed the necessity of legislation like this and compared it to the 2001 Session. Has any of the 2001 legislation been used to prevent the filing of any legitimate claims against architects on the residential side?

Paul Georgeson:
I do not do a lot of residential work; I cannot answer that.

Chairman Anderson:
Are there any other questions? Is there anyone else to speak in opposition? [There were none.] We will close the hearing on S.B. 243. We are adjourned [at 10:43 a.m.].

RESPECTFULLY SUBMITTED:

_____
Darlene Rubin
Committee Secretary

APPROVED BY:

_____
Assemblyman Bernie Anderson, Chair

DATE: _____

EXHIBITS

Committee Name: Committee on Judiciary

Date: May 14, 2007 **Time of Meeting: 9:09 a.m.**

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster
SB 133 (R1)	C	Mark Krause, Nevada Propane Dealers Association	Photo of oven safety valve