MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON JUDICIARY

Seventy-Fourth Session
April 20, 2007

The Committee on Judiciary was called to order by Chairman Bernie Anderson at 8:13 a.m., on Friday, April 20, 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
Assemblyman Ed Goedhart
Assemblyman Garn Mabey
Assemblyman Mark Manendo
Assemblyman Harry Mortenson
Assemblyman John Oceguera
Assemblyman James Ohrenschall
Assemblyman Tick Segerblom

COMMITTEE MEMBERS ABSENT:

Assemblywoman Susan Gerhardt (Excused)

GUEST LEGISLATORS PRESENT:

Senator Terry Care, Clark County Senatorial District No. 7

STAFF MEMBERS PRESENT:

Jennifer M. Chisel, Committee Policy Analyst
Risa Lang, Committee Counsel
Janie Novi, Committee Secretary
Matt Mowbray, Committee Assistant

OTHERS PRESENT:

Barry Hawkins, Commissioner on Uniform State Law, National Conference of Commissioners on Uniform State Laws, Bridgeport, Connecticut
Bill Uffelman, President and CEO, Nevada Bankers Association

Chairman Anderson:
[Roll called.]

Let us open the hearing on Senate Bill 70.

Senate Bill 70: Enacts the Uniform Prudent Management of Institutional Funds Act. (BDR 13-970)

Senator Terry Care, Clark County Senatorial District No. 7:
Senate Bill 70 is the Uniform Prudent Management of Institutional Funds Act (Exhibit BB).

Charitable institutions across this country receive, manage, and invest untold amounts of money. The law has always recognized, in some way, that the people working with these funds have a duty to exercise care and prudence. In 1972, the Conference promulgated the Uniform Management of Institutional Funds Act (UMIFA). That Act was eventually adopted by Nevada and is currently contained in *Nevada Revised Statutes* (NRS) 164.500.

With changing times, we have changes in prudent standards among other things. It was for that reason the National Conference promulgated S.B. 70. This act would update and replace the current statute in Nevada. There have been four states that have already adopted it, and it has been introduced in 14 other jurisdictions. I have here Mr. Barry Hawkins who chaired the drafting committee for the act. He can help lead the Committee through the Act.

Barry Hawkins, Commissioner on Uniform State Law, National Conference of Commissioners on Uniform State Laws, Bridgeport, Connecticut:
Senator Care mentioned that there were untold amounts of dollars involved in this field covered by the Uniform Prudent Management of Institutional Funds Act. Those actual numbers are hard to come by because they are based upon collection of information from the Internal Revenue Service (IRS). The last numbers that are available are from the year 2004.

These funds constituted over seven percent of the national economy and are involved in the collection of nonprofit funds and the distribution of those funds and their investment. The numbers of jobs created and controlled by nonprofit organizations—which depend upon those funds either in the collection of the funds or their management and expenditure—constitutes the largest source of employment or the second or third largest in the majority of states. It is a very large part of the national economy, somewhere around $3 trillion, not counting churches and organizations which collect under $25,000.

Why change the law that was enacted by the National Conference in 1972? UMIFA has been adopted in 47 of the 52 jurisdictions—the 50 states plus Puerto Rico and the Virgin Islands. In 1972, the rules of investing, what was allowed, and what rules pertained to the expenditure of funds were greatly aided and assisted by having a uniform law. The Uniform Act allowed for a modern portfolio investment of funds and helped overcome many of the problems that had been bedeviling educational institutions around the country. That is why that act was so popular. Within three years, over 40 jurisdictions had adopted it. By the late 1990s, it was clear that the Act had become outdated in a number of ways. Many problems were created when the technology stocks cratered and there was a great loss of value. A number of nonprofit institutions and educational institutions found that they were handicapped by a law which would not allow them to spend the money in the way that the donors had intended because they were artificially constrained by a concept called historic dollar valuation (HDV). The HDV feature of UMIFA required that no expenditure could be made from an endowment fund unless it would leave the organization with at least the amount of money that had been contributed to it over its historical value. HDV became an absolute bar, no matter the need or how temporary the problem of devaluation of volatile stock might be. A charity, endowment fund, or institution could not make any expenditure that would bring them below HDV.

That is the problem that we ended up hearing around the country. In many cases, institutions were forced to take the money that had been donated to them and invest it not in growth stocks and not in a modern portfolio that would give them a reasonable return value, but put it in bank accounts and

treasury bonds, taking very low yield interest. They correctly complained that being forced in an artificial way to invest was awkward and constrained and the law was forcing them into a situation where they could not meet the needs of the public that the donor typically wanted to meet. They also found that they were not being able to keep up with inflation, so we had a large number of institutions and their board members who asked us to prepare and promulgate a new statute that would correctly reflect modern portfolio theory. That is what you have before you with S.B. 70, the Uniform Prudent Management of Institutional Funds Act (UPMIFA). It takes away the concept of HDV and instead substitutes a series of prudent standards by which the boards and the staff of these organizations will be judged. In most situations, they are accomplishing and paying attention to the preservation and to the other goals of the fund. Usually, they are doing it in the context of the mission of the university, charity, museum or library. What is its mission? What are the temporary financial problems? What are the prudent things to be done with the funds that they have collected? This act will allow them to do it. The Act substitutes for the artificial barrier of HDV. The listed standards of prudence are contained in the statute and outlined for the guidance of the board members and the staff.

There was another problem we found prevalent in institutions such as small colleges and universities. For example, the class of 1901 had donated money in honor of a student from that class for the eradication of polio. They collected $22,000. They cannot spend that money for anything other than the eradication of polio, which had been eradicated a long time ago. There is no need for some of these small funds because the causes have become outmoded. The colleges and universities asked us to find a way in which they could utilize some of these small outmoded funds. They found that with existing law, it would cost them more than $25,000 to hire a lawyer, go to court, and get a probate judge to change the cause specified for that fund. The money that was locked away for the eradication of polio could be diverted into AIDS research or breast cancer, or a cause that really needs the money. If the donor were still alive, he would be able to tell us what he wanted done with those funds. The presumed intention of the donor was not to have the money locked away uselessly, but to use it for society's good. Section 6D of the Uniform Act, which is different than in the bill, has a section that allows for the nonprofit institutions to take a fund which has become outdated, is smaller than $25,000, more than 20 years old, and notify the Attorney General or the other state charitable regulator that they are proposing to take those funds and move them from, let us say, polio eradication to AIDS awareness. The Attorney General will then notify us if there is a problem, but if there has been no contact within 60 to 90 days, the institution is free to divert those funds to another charitable purpose that is consistent with the general charitable intentions of the

donor. It is a very big help for a number of these small, old funds. Those are the two most important aspects of the bill, as well as the most different aspects between the old UMIFA, and the new UPMIFA. The third most important factor, if it were to be characterized, is the substitution of modern portfolio theory giving guidance and attention to how these funds get managed and invested.

Chairman Anderson:
Would we be moving away from those traditional blue chip stable stock investments that are not considered to be risky? Does this give the opportunity to move into less traditional investments as a practice because of the changing market? If that is the case, these are the standards that large investment groups are currently utilizing to move into that area.

Barry Hawkins:
I think that is partially right. The old UMIFA with its HDV requirement certainly did not act as a constraint on Yale, Harvard, Stanford, Princeton and the very large organizations that had accumulated vast HDV numbers. They were so significantly large that they were able to invest in a combination of stocks, bonds and alternative instruments including hedge funds, real estate, and equity partnership investments. Most of the sophisticated larger institutions, whose portfolios measure in the billions of dollars, have already been able to diversify. It will not change for the large institutions at all. It will more likely change for the newer cutting-edge organizations that have been created within the last 20 years because they have not had that historical excess in dollars. For example, an organization which was funded with high tech stocks in 1997 was given $100 million worth of stock and has a wonderful fund. The day that the fund was created, or within a year of that date, the stock may be worth $70 million. Because of the drop in the value from $100 million to $70 million, that nonprofit organization is out of luck and cannot spend anything because any expenditure that is made from growth would be in violation of the requirement that you not invade the dollar value. In many cases, these newer organizations were out of business the day the dollars came in. Between the date of the death of the donor and the date that the money became available, the stock might have become devalued to the point that they could not use it. They got around it in some cases by taking the value of the money, liquidating the stock, and placing the money into traditional funds and investments in an interest account, not into stock, but into treasury bills and money market accounts so they were spending interest income, and not growth income.

UPMIFA will allow for more diversification of investments if the board of the particular institution finds it to be a prudent way to manage the funds. The boards will be held to the standards that are listed in the statute, so they

become responsible for making sure that what they have selected and what the managers have selected are prudent. Also, they should be prudent in selecting good managers. Basically they invest a prudent portion of their fund in what we call portfolio investment–meaning that the proper allocation between stocks, interest, cash, real estate, exposure to foreign real estate, hedge funds, or any investment in the appropriate percentages. I sit on the board of a college foundation and I sit on the board of another charitable county foundation. One of the things that we do is check if we have properly allocated the funds which have been donated. We want the funds appropriately allocated between the various alternatives that are available and make sure that it is a balanced risk and reward type of analysis. The results will give us a consistent return and will allow for us to make charitable expenditures.

Assemblyman Mabey:
Do you think some of these funds will try to use investments that are too risky?

Barry Hawkins:
I do not think so. There is still a constraint in the statute the way it has been drafted in Nevada. We included an alternative in brackets in the statute and Nevada has drafted it in a form which takes the alternative. Any expenditure of more than seven percent of the value of the endowed fund would be presumed to be imprudent unless they overcame that presumption of imprudence. There is a built-in, bright line test that impedes the fund from expending growth stock to a point that would bring it down below where it would exceed seven percent in any given year. With the prudent factors listed, there are real constraints on a board member. I am an attorney, the other members of the boards that I serve on are insurance brokers, businessmen and entrepreneurs, and the one thing that is clear is that they do not want to risk being sued or risk being second–guessed on a poor decision. These prudent standards require the board members who are making the decisions and the managers who are working for them to make prudent decisions that are very specifically outlined, as opposed to the current standard that says as long as you are not expending beyond HDV, you are being prudent. The term "prudent" is not defined.

Arguably, having these standards in your statute under UPMIFA is tightening up the ability of regulators to make sure those board members and their staffs are working in a prudent manner and an appropriate risk-reward basis.

Chairman Anderson:
An institution would want to verify that the people they have selected are knowledgeable enough to use their special skills and traits in managing and investing. That and the other restraints would be helpful.

Barry Hawkins:
If I was an investment advisor and I was asked to serve on a nonprofit board, I would be pretty concerned about the language. If I got onto the board because of my presumed knowledge about investments, I would be acting pretty prudently because I am going to be held responsible and expected to have the knowledge of an investor or an investment advisor, not another occupation.

Assemblywoman Allen:
In some of the endowments that you are involved in, do they exempt or not participate in some funds or investments due to either political purposes or environmental concerns, or are you merely driven by the bottom line?

Barry Hawkins:
We are certainly aware of a number of institutions that have those constraints. The Act itself does not deal with that issue at all. Aside from this act, in dealing with the community fund that I serve on, there are no particular constraints. I do not really know the specific investments that they make. I know that some organizations that receive grants from the Fairfield County Community Foundation have very big constraints. The Salvation Army will not invest in or take funds from the "wages of sin". They made it clear that investments in alcohol producing entities will not be acceptable for their investment purposes. We honor those wishes when we are dealing with donor advised funds, however it is not contained in this bill.

Chairman Anderson:
Ms. Allen's question is well founded, especially given the global marketplace.

Bill Uffleman, President and CEO, Nevada Bankers Association:
I just wanted to add a "me, too" because the items I wanted to cover were already addressed.

Chairman Anderson:
We will close the hearing on S.B. 70.

ASSEMBLYMAN HORNE MOVED TO DO PASS SENATE BILL 70.

ASSEMBLYWOMAN ALLEN SECONDED THE MOTION.

THE MOTION PASSED. (ASSEMBLYWOMAN GERHARDT WAS ABSENT FOR THE VOTE.)

Let us open the hearing on Senate Bill 177.

Senate Bill 177: Enacts the Uniform Foreign-Country Money Judgments Recognition Act. (BDR 2-963)

Senator Terry Care, Senatorial District No. 7:
This is the Foreign-Country Money Judgments Recognition Act (Exhibit C) which does not replace any existing legislation in Nevada. This would be new. It is intended to provide a mechanism for enforcement of a money judgment rendered in a foreign country.

In this age of international trade and commerce, it is entirely conceivable that a party could obtain a judgment in another country and the judgment debtor has assets in Nevada or lives in Nevada. The lawyers would want to execute on that judgment. In other words, a plaintiff got a judgment and needs to get the money from the judgment debtor. Because the assets may be located in Nevada, he may want to get a judgment recognized in Nevada that was rendered by a foreign jurisdiction. This should not be confused with what we already have in Nevada, which is enforcement of a judgment from a so-called sister state.

The *United States Constitution* has the full faith and credit provision, meaning that the judgment, order, or decree from a court in another state will be recognized and given full faith and credit in Nevada. There is a mechanism already in statute under Chapter 17 of NRS. You can take the judgment in another jurisdiction and have it domesticated so that it becomes, in essence, a Nevada judgment and allows you to attempt to execute on that judgment in this State.

I have had cases domesticated in the past with a judgment from Japan, and another time with a judgment from Canada. The problem is that the current statute contemplates judgments from other states. You have to obtain what is known as an exemplified copy of the judgment from the rendering court. I was surprised when the court took the judgments from Japan and Canada. It was a lengthy process to get those exemplified copies. Especially when you use the word "exemplified" which does not always equate in another language.

This bill allows a party, having obtained a money judgment in a foreign country, to have the judgment recognized in the United States, more specifically in Nevada.

Section 6 addresses the applicability of this Act. We are only talking about a judgment that grants or denies a recovery of a sum of money and is final and conclusive in a foreign court. This act only kicks in if all appeals processes have run. It does not apply to all money judgments. For example, it does not cover

judgments for taxes, fines, or other penalties, and it does not cover judgments regarding domestic relations. For a variety of reasons, the drafters decided to exclude those in this Act. The first question is whether or not the judgment in a foreign country is for a sum of money, and whether it is final. If it is, then the Act kicks in, but the burden to demonstrate that is on the party who wants the judgment recognized.

Section 7 of the bill goes through the standards for recognition. It says the judgment will be recognized unless there is a mandatory provision and a discretionary provision. The court may not recognize the foreign judgment if the tribunal was not impartial, or there was no due process extended to the defendant or if there was lack of subject matter or personal jurisdiction. If you look at subsection 2 of Section 7, there is a list of scenarios where the court may or may not choose. It is the court's discretionary call to recognize the judgment in the foreign country. For example, if the defendant did not have sufficient notice to defend himself, the judgment was obtained by fraud, the judgment or cause of action is repugnant to public policy, the judgment conflicts with another final judgment, the proceeding itself was contrary to an agreement, there was substantial doubt to the court's integrity, or that the proceeding itself was incompatible with due process. I want to point out that the burden is on the party that is resisting recognition of the foreign money judgment to demonstrate to the court's satisfaction any one of these reasons for the court to not recognize the judgment.

Section 8 says that the foreign country judgment is not going to be refused for lack of personal jurisdiction; however, the list is not exclusive. Section 9 is the procedure for recognition. It says that you actually have to file an action or lawsuit seeking recognition of a foreign judgment. It also says if there is a pending action in Nevada, then you can do it through a counter claim, a cross claim, or even as an affirmative defense. Section 10 is the effect of recognition. If the Act is recognized in Nevada then it is as though the Act were rendered by another state. It is entitled to full faith and credit and can be enforceable in the same manner. That is the purpose of the entire Act itself. Section 11 allows the Nevada court to state a proceeding on recognition of a foreign judgment if the resisting party can demonstrate that the matter is still under appeal and not final in the rendering jurisdiction. Finally, in Section 12 is the statute of limitations provision. If you want to seek recognition of a foreign money judgment, then you have to file by the time the judgment is effective or 15 years after it became effective. It is possible in some jurisdictions a judgment might be effective for 30 years. Here it is going to be 15 years or shorter.

Chairman Anderson:
The net effect of this is that commercial activity or property interest would definitely fall under this Act; however, issues of domestic violence or divorce would not. We are dealing with the civil area and not the criminal area.

Senator Care:
That is correct. In fact, the drafters looked at that. The reason they did not want to get into domestic relations is that from country to country, cultural differences dealing with families are all over the board. We did not feel comfortable dealing with that.

Chairman Anderson:
The historical concept of "innocent until proven guilty" is not always recognized in the rest of the world. How are we going to guarantee our concept of due process? We cannot assume that a foreign country will agree.

Senator Care:
With this Act, the court is not permitted to recognize a judgment rendered in a court where there was lack of due process. It is up to the resisting party to demonstrate to the court the lack of due process in the foreign jurisdiction. That is not a discretionary call. The fundamental notions of due process in this country would probably be used to determine whether or not due process existed in the foreign jurisdiction.

Assemblyman Horne:
Domestic relations would also include child support payments. Under this act, domestic relations are not covered. For example, there are instances with military personnel, but we already have an avenue for them to fulfill their obligations from over seas. What about others who may have child support obligations?

Senator Care:
There are other vehicles for that situation. Next week the Committee will hear an act dealing with family support. This Act would not permit any enforcement of a judgment dealing with domestic matters.

Assemblyman Mabey:
If there is a judgment in Taiwan, and the person involved had assets in Nevada, you could obtain those monies. Is that correct?

Senator Care:
Yes, for the kinds of judgments outlined in the bill.

Assemblyman Mabey:
Will this happen very often?

Senator Care:
I do not have a feel for how often this might be utilized in Nevada. Clearly, the NCCUSL study committee determined that there was a need for this Act. I mentioned the judgments that I had in Japan and Canada and this Act would have been helpful. There is no existing law for foreign judgments, so the only vehicle available is the existing law under Chapter 17 of NRS. I do think this Act would be used, however, I do not know to what extent.

Assemblyman Mabey:
What happens if there is a person who is a resident of Taiwan and they sue a person in the United States? Or reverse the situation. What if there was a judgment here and they try to get assets in Taiwan?

Senator Care:
That will be subject to whatever the law is in Taiwan.

Assemblyman Segerblom:
If someone from a foreign country comes to Nevada with a judgment, that judgment would also be enforceable in other states that have adopted this Act.

Senator Care:
You could still have the judgment recognized in other states. If the state in question had adopted this Act, the procedure would be the same. Also, if you got the Act recognized in Nevada, then it could be a case of domesticating a judgment that is recognized in Nevada.

Assemblyman Segerblom:
The foreign country does not have to have a similar act to make their judgment enforceable here.

Senator Care:
That is true. There is a concept in international law called comity. Comity is a jurisdictional courtesy to other lands that have similar concepts of due process.

Assemblyman Segerblom:
If a person from Taiwan comes to Las Vegas and loses a million dollars at Caesar's Palace and we get a judgment for him to pay that money, is that enforceable in Taiwan?

Senator Care:
It would be Taiwanese law. In other words, you get the judgment here because the million dollars is owed here in Nevada. You are basically talking about enforcing a Nevada judgment in Taiwan. I do not know what the law is on that. I would guess that the casino probably does not extend that kind of credit unless comity is recognized in the Taiwanese courts.

Assemblyman Mabey:
I think of the Cook Islands where people put their assets because they know that they would have to go to the Cook Islands to get a judgment. Would this hurt Nevada in anyway with people trying to use Nevada to shield their assets?

Senator Care:
We would have to be talking about a judgment from the Cook Islands. I have heard stories about those islands and do not really know what goes on there. If someone was sheltering assets in the Cook Islands, one thing that could be looked at was whether or not there was impartiality, or whether or not things were done in an underhanded way in the Cook Islands. Under this Act, the court could look at that.

Assemblyman Ohrenschall:
Page 3, line 23, Section 7, subsection 3, says, "a court of this state need not recognize a foreign country judgment if..." Would it trouble the commissioners if the "need not" were changed to "may not?" It seems like that would be stronger language.

Senator Care:
That is a question of style. I might point out that one of the members of the drafting committee was Frank Daykin. The language is intended to make it discretionary for the courts. I will ask Mr. Daykin who is known as the master of style when it comes to the drafting of Uniform Acts.

Assemblyman Horne:
For the Act to operate smoothly, changing that would take away the discretional concept. That language needs to be there for this to operate appropriately.

Senator Care:
Assemblyman Horne is correct. "May not" is to say cannot, but in this case we need the discretion that "need not" allows.

Assemblyman Ohrenschall:
I am troubled by some of the failings under Section 3. A judge might have the discretion to enforce a foreign judgment if there was not proper notice. However, I do not want to second-guess the commissioners.

Chairman Anderson:
Let me close the hearing on S.B. 177.

ASSEMBLYMAN CARPENTER MOVED TO DO PASS SENATE BILL 177.

ASSEMBLYMAN HORNE SECONDED THE MOTION.

THE MOTION PASSED. (ASSEMBLYWOMAN GERHARDT WAS ABSENT FOR THE VOTE.)

The floor assignment for S.B. 70 will go to Assemblyman Cobb, and S.B. 177 will go to Assemblyman Ohrenschall.

Meeting adjourned [at 9:09 a.m.].

RESPECTFULLY SUBMITTED:

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Janie Novi
Committee Secretary

APPROVED BY:

_____
Assemblyman Bernie Anderson, Chairman

DATE: _____

EXHIBITS

Committee Name: Committee on Judiciary

Date: April 20, 2007 **Time of Meeting: 8:00 a.m.**

Bill	Exhibit	Witness / Agency	Description
	A	The Committee on Judiciary	Agenda
SB 70	B	Senator Terry Care	Uniform Prudent Management of Institutional Funds Act
SB 177	C	Senator Terry Care	Uniform Foreign-Country Judgments Recognition Act (2005)