MINUTES OF THE
SENATE COMMITTEE ON COMMERCE AND LABOR

Seventy-fourth Session
May 24, 2007

The Senate Committee on Commerce and Labor was called to order by Chair Randolph J. Townsend at 8:07 a.m. on Thursday, May 24, 2007, in Room 2135 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to the Grant Sawyer State Office Building, Room 4412E, 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 in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Randolph J. Townsend, Chair
Senator Warren B. Hardy II, Vice Chair
Senator Joseph J. Heck
Senator Michael A. Schneider
Senator Maggie Carlton

STAFF MEMBERS PRESENT:

Gloria Gaillard-Powell, Committee Secretary
Kelly S. Gregory, Committee Policy Analyst
Wil Keane, Committee Counsel
Scott Young, Committee Policy Analyst
Lori Johnson, Committee Secretary

OTHERS PRESENT:

Alice A. Molasky-Arman, Commissioner of Insurance, Division of Insurance, Department of Business and Industry
Van Mouradian, Chief Insurance Examiner, Division of Insurance, Department of Business and Industry
James Wadhams. American Insurance Association
Charles Rainey, Steel Engineers, Incorporated
Robert Kurth, Kurth Law Offices
Tina Sanchez, Director of Workers' Compensation, MGM Mirage
Kenneth Cooley, State Farm Insurance Company
Robert Ostrovsky, Employers Insurance

CHAIR TOWNSEND:
Madam Commissioner, let us begin with your bill, Assembly Bill (A.B.) 161.

ASSEMBLY BILL 161 (1st Reprint): Revises various provisions governing insurance. (BDR 57-586)

ALICE A. MOLASKY-ARMAN (Commissioner of Insurance, Division of Insurance, Department of Business and Industry):
This bill, A.B. 161, principally represents the lessons learned by the Division of Insurance and my experience as the Commissioner of Insurance in regulating insurance. The bill contains many provisions on a variety of insurance matters.

I am distributing a copy of a PowerPoint presentation (Exhibit C, original is on file in the Research Library) and also a summary of the sections of the bill arranged in chronological order (Exhibit D). The Exhibit C is arranged according to subject matter.

There are also three amendments (Exhibit E, Exhibit F and Exhibit G) that are being proposed by the industry, signed by the proponents and supported by the Commissioner of Insurance.

This bill was heard by both the Assembly Committee on Commerce and Labor and the Assembly Committee on Ways and Means. The bill is marked as having no fiscal impact. As I go through this summary, I will point out those sections that have been observed to have an implied or express monetary amount. You will note that the bill does not contain any varying dates for effectiveness; therefore all of the sections would become effective October 1, 2007. I would have preferred to have seen section 31 effective July 1, to coincide with our budget requests, which is what section 31 is related to.

In section 1, the amendment will enable casualty insurers to report actual, rather than arbitrary loss ratios in certain lines. The arbitrary figures can result in inflated loss ratios and the reliance on actual loss ratios eliminates that problem and is in accordance with the annual statement instructions that are published by the National Association of Insurance Commissioners (NAIC).

The next sections, 1.1 and 1.3, refer to producer licensing and amend *Nevada Revised Statute* (NRS) 683A to enable the Division of Insurance (DOI), Department of Business and Industry, to effectively track and regulate activities

of producers, acting on behalf of business organizations such as a corporation or a limited liability corporation that is licensed as an insurance producer. When we adopted the producer model from the NAIC, some of the terminology was omitted and has caused great difficulty in trying to track agents and brokers and where their offices are located. In section 1.3, subsections 2 and 3, we propose to amend those provisions to require a business entity, licensed as a producer, to notify the Commissioner within 15 days after such entity employs a producer to sell on his behalf. It also requires notice to the Commissioner within 30 days after the producer's authorization is terminated by said entity. The business entity must notify the Commissioner of all persons authorized to act on its behalf, not merely one designated individual. In subsections 2 and 3, we carry out the intent of section 1.3 by deleting the phrase "affiliated with," replacing it with the phrase "authorized to transact business on behalf of." This phrase will fully describe the legal relationship between the business organization and the producer of insurance who is authorized to act on behalf of the business entity. There has been enormous confusion created by using the term "affiliated with" when it is more properly characterized as "authorized."

The producer amendments are carried out in sections 18 and 28 which apply to title and bail agents. They amend NRS 692A.270 and 697.360 respectively and make NRS 683A.331, concerning the appointment and termination of producers and agents, applicable to sure insurers and surety insurers. Currently there are no provisions that are clear in the Insurance Code to require these title surety insurers to notify the Division of appointments, terminations or disciplinary actions against their producers.

MS. MOLASKY-ARMAN:
On page 5, Exhibit C, describing section 1.5, may remind Legislators of 2003 legislation and your expressed intent to ban organizations from charging credentialing fees for health-care providers in order for them to be included on a panel of approved providers. This was accomplished by enacting NRS 679A.200. In our efforts to enforce this statute, we have faced challenges on the applicability of the statute for third-party-administrators (TPA), particularly those contracted with self-insurers. If enacted, section 1.5 will close that loophole by exclusively prohibiting a TPA from charging a credentialing fee. This amendment has been presented with the full support of the Nevada State Medical Association.

Section 1.9 also refers to a TPA but it is intended to ease the financial burden on the TPAs who are smaller companies, because the cost of an audited certified public accountant (CPA) financial statement can be exorbitant for some companies. This amendment will require a reviewed statement from a CPA rather than an audited CPA statement.

In A.B. 161, section 7, subsection 1, we are proposing to amend NRS 686C.240 by restoring the annual administrative assessment by the Nevada Life and Health Guaranty Association (NLHGA) to its members from $150 to $300. In 1997 the Legislators increased the members' annual assessment from $150 to $300. The increase was necessary due to the rising cost of administering life and health insurer insolvencies. In 2001, Legislators inadvertently reduced the assessment. This is one of the three sections of the bill that pertains to a possible fiscal impact but it has been reviewed by the administration and perceived as having no effect on state funding and it is supported by members of the industry and who are also members of NLHGA.

The next subject is workers' compensation. In section 8 of A.B. 161, we propose to amend NRS 678B.350 to ensure that insurers provide 30 days' notice of altered terms of workers' compensation policies. There are two instances where this rule would not apply. The first is when the advisory organization changes a loss cost and the revised loss cost applies to the policy based on approved rules. The second is when there is a correction to an experience of an employer, pursuant to an approved plan of experience ratings. This change will give the insured employer an opportunity to shop for an alternate coverage and promotes a competitive market.

MS. MOLASKY-ARMAN:
We turn now to a completely different subject, funeral and cemetery sellers. The provisions that apply to funeral and cemetery sellers were originally enacted in 1971 and except for some minor changes in 1987, have not been updated since that time. These sections, as noted on page 9 of Exhibit C, refer to the funding of prepaid funeral and cemetery contracts. In today's market, the traditional payment of cash for pre-need contracts, where the seller holds the money in trust, has been replaced by the sale by a small face-value life insurance policy. The proceeds of this life insurance policy are used to fund funeral and cemetery services when the beneficiary of the prepaid contract dies. The proposed amendment reflects modern industry funding practices. In sections 9 and 12, we provide for alternative funding by life insurance policies.

Similarly, sections 10 and 13 allow the Commissioner the flexibility to waive the requirement for funeral and cemetery sellers to have a bond in place if the sellers' only contracts are funded by the proceeds of a life insurance policy. In sections 11 and 14, we proposed to add new subsections to NRS 689.315 and 689.560 whereby funeral and cemetery sellers are not required to establish a trust account if they collect no money for a prepaid contract that is funded by the proceeds of a life insurance policy.

Other than section 1.5, sections 15 and 15.5 are the only provisions that impact health insurance. The frailty of health insurance is evident from a study done by Harvard in 2005 and published by the journal, *Health Affairs,* which we reviewed. The study held that approximately half the people in the United States who filed for bankruptcy cited medical costs as the significant reason leading to their bankruptcy. Of those, 75.7 percent were medical bankruptcy filers actually insured at the onset of illness. Additionally 60.1 percent had private coverage initially; however, one-third of the medical bankruptcy filers did lose their coverage during the course of illness. Unfortunately we are not able to address that issue in our bill, but I thought it was information that you, as Legislators, should have. What we have done in A.B. 161 is to change the language in section 15, defining "health benefit plan" to comply with the federal Health Insurance Portability and Accountability Act (HIPAA) which states these plans are also sold to individuals and large employers. The amendment makes the definition of "health benefit plan" in NRS 689C compatible with the definition of individual health plans contained in the NRS 689A and the large-employer group health chapter 689B of NRS.

MS. MOLASKY-ARMAN:
Section 15.5 also refers to health insurance and it proposes to amend NRS 689C.170 to allow authorized health insurers to offer a suite of health plans to a small employer. The suite of plans will be based, not only on group size, but also by products offered. This will permit an insurer to offer a variety of plans to employers for selection according to the contribution rate of the employer. Once the employer selects the contribution rate, the employee can then select from a variety of plans that will be suitable to that employee. The intent is to provide greater choice to the individual employees.

The next issue is medical malpractice. In section 16 of the bill, NRS 690B.260 is amended. We propose to require medical malpractice insurers to report their closed claims in a batch file 45 days after the close of current calendar quarter.

The current statute provides that these closed claims must be reported immediately after each claim is closed. The proposed amendment will enable our staff to more effectively analyze the data and better monitor and enforce the reporting requirement. We believe it will save time for both the insurers and the DOI.

The next subject is service contracts. In section 17 of A.B. 161 we are proposing to amend the NRS 690C.080. This is needed to clarify that the physical structures of a manufactured home such as walls, roof support, and structural floor base cannot be covered by a service contract. There has been some confusion of the scope of coverage under a service contract. Companies have attempted to cover residential structures with a service contracts. An indemnification policy covering a structure is considered insurance in Nevada, whereas coverage under a service contract is not insurance. Insurance is readily available for manufactured homes through major property insurers as a separate type of policy.

MS. MOLASKY-ARMAN:
Starting on page 13 of Exhibit C, we deal with captive insurance. In A.B. 161, sections 19 through 22 all relate to captive insurance and combine the minimum financial requirements found in NRS 694C.250 and NRS 694C.260 into a single statute. The proposed amended NRS 694C.250 will prescribe that the minimum requirement be a combination of capital and surplus for each type of captive insurers, instead of stating the capital and surplus requirements separately. The amendment does not diminish, nor will it increase, the required amount. The two amounts will be merged into a single dollar amount which will allow the captive insurer to use one instrument, such as a letter of credit, surplus note or bank account, to meet the minimum financial requirement.

In section 31 of the bill, we have proposed amending NRS 232.825 to allow the Commissioner to appoint three deputy commissioners instead of two deputy commissioners. The effect will allow us to reclassify the captive administrator position Grade 42 to the new unclassified position of deputy commissioner. This proposal is already included in our budget request for Account 101-3818 which is the captive budget. There is a cost factor; however, this program is supported by 25 percent of the premium tax paid by captive insurers and is dedicated to services by the DOI. The cost of this reclassification is minimal; approximately $10,000 a year for salary and benefits, but the enhancement to the position and the prestige is very significant. Our two chief competitors, Vermont's and

Hawaii's captive regulations all designate their administrator as a deputy commissioner. The change in the title also indicates that the person holding the title is uniquely competent and holds the highest credentials, experience, knowledge and acumen in matters relating to captives. There is also a strategic reason in asking for this position. The captive administrator is responsible for not only developing but preserving the captive program. This necessitates travel and the accumulation of variable time which must be taken by a classified employee during the same pay period. That frequently poses a conflict with other obligations of the position. This measure will allow the division greater flexibility with respect to the time that must be devoted to this position. The captive regulatory states are very competitive. The various meetings of captive regulatory agencies are used as an opportunity to gain new entrants of captives for Nevada or to convince a captive to change his current state of domicile to Nevada.

In section 23, the last section in the bill that refers to captive insurers, we would require sponsored captive insurers to file annual financial reports. When this new class of sponsored captive insurers was added in 2005, we overlooked this reporting requirement which is applicable to all other captives.

Sections 24 and 25 refer to examinations, and they propose to amend NRS 695D.270 and NRS 695F.310 by extending the frequency of examinations for dental care providers and prepaid limited health service organizations to not less than once every three years. These proposed amendments will reduce the financial burden on these small operations and make their examination schedule consistent with those that already apply to health-maintenance organizations.

MS. MOLASKY-ARMAN:
In section 26, which applies to motor clubs, there may also be a very nominal fiscal impact. The section proposes to amend the NRS 696A.185 authorizing the Commissioner to impose an administrative penalty, similar to all other licensees, against a motor club if it fails to file its annual renewal fee in a timely fashion. The proposed penalty is the same fee that would be filed against a motor club for untimely filing of their annual report. We believe this amendment will be an incentive for the motor club for timely remittance of their required annual fee.

On page 17 of Exhibit C, you will see the summary of section 27 which proposes to amend the NRS 696B.330 language regarding the handling of

claims against an insolvent insurer that is placed in receivership. The language was developed in consultation with expert receivers and one of my deputy receivers who was involved in the insolvency of First Nevada Insurance Company. The language is based on similar laws in other states, which will enable the Commissioner as the receiver of an insolvent insurer to make an initial determination and provide notice of the approval or denial of proofs of claims and the class of the approved claims, instead of the court. This proposed amendment clarifies that unless there is an objection to the receiver's determination, there is no need to schedule a court hearing for each claim. The case of First Nevada Insurance Company's insolvency involved over 1,400 claims. Fortunately, this was the first-ever domestic receivership insolvency in Nevada.

This proposed amendment will provide the receiver flexibility, after his determination and notice, to hold claims of a particular class in the priority of distribution, unless it is clear that sufficient assets exist to make a distribution to that particular class. The proposed amendment also clarifies the time frame for filing and processing claims. There is no specific time period in the current statute. The language being added "or as directed by the court" will provide both the receiver and the court flexibility to set deadlines to file claims.

In subsection 4 of section 27, we have added the words "not required," which will enable the receiver to use discretion in restricting the processing of claims in a class where assets may not exist. The intent is to prevent a reinsurer from using an absolute requirement from processing those claims as a defense to avoid paying into the state reinsurance recoveries that are due to the estate.

MS. MOLASKY-ARMAN:
We believe this section will further judicial economy and increase the efficiency of the administration of insolvent insurers' estates, as well as result in greater assets through reinsurance recovery to pay claims.

The next section of provisions applies to self-insuring workers' compensation. Employers and associations of employers that self-insure will be affected by the proposed change to section 29. The proposal clarifies the definition of tangible net worth as the value of all assets minus the value of all liabilities. This proposed amendment addresses concerns of some self-insured groups that question whether liability should be deducted from assets to yield a tangible net

worth. One of the amendments that will be proposed by the Independent Nevada Gaming Operators also refers to this revision of A.B. 161.

In section 29.5, we proposed amending NRS 616B to enable member employers of a self-insured association to obtain claim information, including claims paid and reserves for claims incurred, on behalf of that member employer in a timely manner. Under this proposal, the self-insured association will be required to provide the member employer that information within 30 days of a written request. This requirement will assist an employer to readily determine whether it wishes to place its workers' compensation coverage with another self-insured organization or a traditional insurer. Notably, private insurers must already comply with similar requirements which appear in NRS 687B.355.

We have proposed amending NRS 616B.386 in section 30 of the bill by increasing from 30 days to 60 days, the time an association of self-insured employers must maintain a member whose membership is terminated or canceled by the association. We do not believe that 30 days is sufficient time for a terminated or cancelled member to effectively search the market for coverage with another carrier.

In section 32, we propose to repeal NRS 689A.735 regarding medical savings accounts which was initially established due to the federal HIPAA laws of 1996. On December 8, 2003, the U.S. Medicare Prescription Drug Improvement, and Modernization Act was enacted. This congressional measure created health savings accounts, thus making medical savings accounts obsolete.

SENATOR CARLTON:
Under section 15, which describes a health benefit plan, the language "arrange for the payment of" concerns me. I sit on the Advisory Board for the Maternal and Child Health Program; we have instituted a referral plan that helps a patient negotiate a fee for service at a cut rate because they have no other insurance. I am afraid that this referral plan will get swept up into this definition.

VAN MOURADIAN (Chief Insurance Examiner, Division of Insurance, Department of Business and Industry):
The health benefit plan in this bill was defined by the federal public law or HIPAA. This law defined what was considered a plan and what was not considered a "health benefit plan," for the carriers.

SENATOR CARLTON:
So my concern is, would the language in this bill turn the referral plan into a health carrier and make them register?

MR. MOURADIAN:
No, it would not affect that particular referral program.

SENATOR CARLTON:
In section 1.5, you are proposing new language to set up a panel of providers. Is it costly to credential, make inquiries and all of the things you need to put a doctor on this panel?

MS. MOLASKY-ARMAN:
The physicians are already credentialed so there is no need for the type of processing you are speaking of. Various organizations have charged illegal or unauthorized fees to physicians merely to be listed on the panel and we feel that precludes the physician from being added to a panel. Some of the fees in the past have been exorbitant and we have been successful in disciplining and enforcing the provisions of NRS 683A in court.

SENATOR CARLTON:
Is it the TPA, who is trying to charge these fees?

CHAIR TOWNSEND:
We passed legislation in 2005 to stop the TPAs from charging fees to physicians just to be on their panel. We determined that it should be prohibited, but apparently some of those entities did not feel that it applied to them and they tried to take advantage of it. The Commissioner exercised her right to discipline those in violation, and now we are clearing that up in the code. Is that a fair statement?

MS. MOLASKY-ARMAN:
Yes, Mr. Chair, it is a loophole that needed to be closed.

CHAIR TOWNSEND:
We have in front of us, three friendly amendments Exhibit E, Exhibit F and Exhibit G, is that correct, Madam Commissioner?

MS. MOLASKY-ARMAN:
Yes, they are supported by the DOI.

JAMES WADHAMS (American Insurance Association):
These amendments to A.B. 161 were sponsored by three discrete clients. In anticipation of your question as to whether these amendments were presented to the Assembly, the answer is no. As an explanation, these amendments should have been presented years ago.

The first amendment, sponsored by Western Insurance, Exhibit E, is an amendment to the detailed chapter of the investment statute. There is a provision at the end of NRS 682A.280 that includes a prohibition of making a loan to any employees, officers or directors. This amendment adds language that conforms to the standards which are applicable to all other financial institutions that operate in this State. That standard being, that a loan may be made to such an employee if that loan has the same terms and conditions as any other borrower and has been approved by a majority of the board of directors and if that person requesting the loan is a director, he must abstain from voting or counting toward the quorum.

The second amendment is proposed by American Equity Investment Life Insurance, Exhibit F. While lengthy, it parallels other existing sections in the existing statute. We propose to create a parallel system for investigations that the Commissioner can conduct at the expense of the person being investigated. This amendment will be similar to the power that she has under the examination statutes which are also referenced in this amendment. Essentially, the Commissioner has tied both the authority and responsibility together regarding confidentiality of investigations and the publication of such actions. What this amendment does is create clear guidelines for the Commissioner's office to use in conducting its investigations and to be able to charge those she investigates, without having to use a general examination statute.

The third amendment is proposed by the Independent Nevada Gaming Operators, Exhibit G. It is directed towards the initial qualification, but it is also a continuation of authority used to be considered a self-insured employer for workers' compensation or as a participant in an association of self-insured employers. In the 1990s, the definition was fairly definitive. What has occurred with the expansion of most gaming properties is their financing for expansion is being added to their balance sheet, showing significant positive cash flow, yet

their tangible net worth for qualification purposes does not match up. In discussion with the Commissioner and her staff, this amendment will provide the DOI with an alternative to simply looking at the balance sheet. The DOI will be able to look at the more dynamic cash flow to make sure there are adequate funds to pay claims. The DOI could do this on an annual, quarterly or even monthly basis. We feel that all of these amendments are friendly and would ask for the Committee's support.

SENATOR CARLTON:
In looking at Exhibit F, I am trying to understand what you are proposing to accomplish by providing a parallel path for investigations.

MR. WADHAMS:
Under the current law, the Commissioner has the authority to examine a licensee, not necessarily to find a bad actor, but to determine the company's financial condition. This proposed amendment is attempting to create a clear path for investigators to use, in addition to the existing examination path.

CHARLES RAINEY (Steel Engineers, Incorporated):
On behalf of Steel Engineers, Incorporated, I am here to present an amendment (Exhibit H) to A.B. 161.The supervising attorney, Mr. Robert Kurth, is also going to testify from Las Vegas. The proposed amendment is seeking to clarify certain language in the Nevada Insurance Guaranty Association Act (NIGA) codified in NRS 687A.

CHAIR TOWNSEND:
If these are not friendly amendments, the Committee may have a problem with adding these at such a late hour. Assembly Bill 161 has been in the Assembly for a long period of time; was this proposed amendment heard in the Assembly?

MR. RAINEY:
No, our office had a conflict on the day that the hearing took place.

CHAIR TOWNSEND:
There would have been a least two meetings, one before the Assembly Committee on Commerce and Labor and one before the Assembly Committee on Ways and Means.

MR. RAINEY:
This bill has no fiscal impact, so we felt that it was improper to bring up this amendment before the Assembly Committee on Ways and Means. I was not aware of a meeting before the policy committee.

CHAIR TOWNSEND:
Madam Commissioner, is this a friendly amendment?

MS. MOLASKY-ARMAN:
I am not sure how you would characterize a friendly amendment. I have not read this amendment, though I did discuss this with Mr. Rainey. This amendment arises from a lawsuit that is being heard in court. The NIGA is seeking declaratory relief for an interpretation of the law to determine whether the claims under a policy of excess insurance issued by an insolvent insurer were properly before the NIGA.

The DOI had, in fact, issued several opinions that we believed those were covered claims. The members of the board of the NIGA were not so persuaded, so with my approval, they asked to seek an interpretation from the court. It turned out to be a case of summary judgment, and the court declared in favor of NIGA, stating in effect that the law did not apply to the association. It is my understanding that the court was well aware that this matter would be taken up on appeal, regardless of the prevailing party.

MR. RAINEY:
The matter is pending appeal before the Nevada Supreme Court now. The reason we decided to bring this issue before this Committee is that we felt the issue of the ambiguity within the statute is better dealt with by the Legislature. In our analysis, there is no valid policy rationale for any other opinion than the statute is currently vague and needs to be clarified. Self-insured employers in this State represent an enormous number of employed workers. If the law is such that these self-insured companies do not receive any of the protections of the guaranty association, then they are being exposed to significant risks. The lists of entities that are self-insured include virtually any government office in this State, as well as the MGM Mirage.

CHAIR TOWNSEND:
I would not argue that point with you, but we are ten days from the end of session. You are trying to tack something onto an omnibus bill and asking a

new House to consider a major policy issue. When did you determine that you wanted to bring this policy issue before this body?

MR. RAINEY:
About two months ago, but this language was originally proposed in the 73rd Session of the Legislature. The issue was not dealt with at that time.

SENATOR HARDY:
Let me indicate that I did speak with Mr. Kurth in Las Vegas, and he told me that he had talked with Commissioner Molasky-Arman, and she agreed that it was a germane issue to this bill.

MR. RAINEY:
I also spoke to Senator Hardy and Senator Schneider, and I tried to get time with some other Senators but it proved difficult.

CHAIR TOWNSEND:
Please tell us why this is a crisis and necessary to take this up at this time?

MR. RAINEY:
I have brought some written endorsements from several people, including Seth Floyd on behalf of the City of Las Vegas, Charles Nort on behalf of Las Vegas Convention & Visitors Authority and some background information (Exhibit I). We also have a legal memorandum from Professor Jeffrey Stempel (Exhibit J), the foremost insurance law scholar in this State; his curriculum vitae is also attached. He is on the faculty at the William S. Boyd School of Law, and he explains his legal reasoning behind his opinion and endorsement. We did not pay him any money, nor did anyone else, for his legal opinion.

I will provide you with a brief summary of the underlying policy of the amendment. Mr. Kurth will explain the statutory framework. The basic premise is that the current NIGA Act fails to define the term "insurer," which has caused serious problems for self-insured employers. The NIGA has put forth the argument that self-insured employers are insurers under the Act and are therefore barred from receiving the surety protections of the NIGA. This essentially means that every self-insured employer in this state, both public and private, would be exposed to risk if their excess insurer became insolvent or bankrupt. The employer would end up being held responsible for possibly millions of dollars that could accrue under individual claims. I would like to

remind everyone that self-insured employers include major employers, such as the MGM Mirage, the Clark County School District, the Nevada System of Higher Education and almost every major governmental entity.

Our amendment proposes to clarify the NIGA Act and make certain that self-insured employers receive the protections that the Act provides. This should supply an element of stability and certainty for our State's insurance system. I could not find one valid policy reason to deny this coverage to these employers.

CHAIR TOWNSEND:
Do your clients pay into the NIGA fund at this time?

MR. RAINEY:
Yes they do, as do all other excess insurers.

CHAIR TOWNSEND:
Your premise is that currently excess insurers are not defined as "insurers" under the NIGA Act, so if you want to be covered, are you not going to have to pay into the fund?

MR. RAINEY:
Please allow me to clarify my statement, the self-insured employer only has to pay up to what his deductible is, which may be a high deductible. We are not saying that they should ever get that deductible back.

MS. MOLASKY-ARMAN:
As everyone is aware, this issue dates back to 2005, and I am one of the few people who have discussed this issue with members of the insurance industry and the self-insured employers. I have probably been remiss in the last 18 months, because I should have raised this issue and put it on the agenda to the two advisory boards. We have a Property and Casualty Advisory Committee and the other is Self-Insured Workers' Compensation Advisory Committee. I recognize the industry has grown and this issue needs to be discussed and these parties need to be brought together, so I intend to place this topic on the agendas for those advisory committees in the near future.

SENATOR HECK:
I have a question for the Commissioner. Do the self-insured employers and the excess insurance carriers both make contributions to the NIGA fund at the present time?

MS. MOLASKY-ARMAN:
No, that is not exactly correct, all the property and casualty insurers who pay assessments that apply for the NIGA are in proportion to the premium that they have in this State.

SENATOR HECK:
So the self-insurers do not pay into the NIGA fund.

MS. MOLASKY-ARMAN:
No, they do not.

ROBERT KURTH (Kurth Law Offices):
Let me try to explain this better. Under NRS 616B.300, a self-insured employer is required to carry excess insurance coverage for all workers' compensation claims above its self-insured retention. In NRS 616A.270, one of the definitions of insured is a self-insured employer. When the workers' compensation statute was changed to allow for self-insured employers, they needed that definition in the statute in order to regulate those self-insured employers. That section is the only place that you will find self-insured employer in the definition of an "insurer."

When you look at NRS 687A.033, subsection 1 defines a "covered claim" as one in which one of the following conditions exists: (b) "The claimant or insured ... maintains it principal place of business in this State at the time of the insured event." Paragraph (c) states "The ... property damage claim arises is permanently located in this State." Paragraphs (b) and (c) would also cover self-insured employers. The problem lies in subsection 2, where it states specifically, " ... does not include: (a) An amount that is directly or indirectly due a reinsurer, ... as recovered by subrogation, indemnity or contribution, or otherwise."

In subsection 2, paragraph (b) "That part of a loss ... self-insured retention specified in the policy," this question of who pays into the fund is a nonissue, because all insurance companies pay into the fund in order to be licensed in the

State. Just because they pay into the fund does not give them the right to make a claim against the NIGA fund. The NIGA fund is for the protection of an individual insured, so if an insurance company goes insolvent and cannot pay claims, the NIGA will step in to guaranty those monies.

MR. KURTH:
We claim that a self-insured employer is an insured and the statute attempts to say that. If you look again at subsection 2, paragraph (b), it states that it does not cover "that part of a loss ... for a deductible or the self-insured retention specified in the policy." For example, if you have a company that carries a self-insured retention of $500,000 per claim, the fund would only kick in if that excess carrier for the self-insured employer goes insolvent. The State requires a self-insured employer to carry excess insurance over the retention amount pursuant to the law. We think the statute was attempting to say that over and above the retention, losses should be protected. This situation is only going to happen on very catastrophic loss, such as a major accident in the City of Las Vegas or at a large school. The fund would kick in to pay damages over the amount of the self-insured retention. This is not a substantive change, it just clarifies the statute.

SENATOR CARLTON:
Is Steel Engineers, Incorporated dealing with workers' compensation claims?

MR. KURTH:
Yes, if the excess insurance company covering the self-insured employer goes insolvent, then the employer may not be able to pay the actual workers' compensation claim.

SENATOR CARLTON:
Has this actually happened to your company?

MR. KURTH:
Currently, Steel Engineers, Incorporated has had a catastrophic loss and they have exceeded their self-insured retention limit. We feel that they should be able to apply to the NIGA fund for that excess. We filed a motion for summary judgment just to get it before the Nevada Supreme Court. I do not know how long it will take to do a brief and actually be heard but, in effect, the Supreme Court will be deciding the legal intent of this NRS 687A, and we think it should be decided here by the Legislature.

TINA SANCHEZ (Director of Workers' Compensation, MGM Mirage):
The MGM Mirage is in support of this amendment.

KEN COOLEY (State Farm Insurance Company):
I was here to speak in support of A.B. 161. I can speak to the policy issue before the Committee. Fundamentally, the guaranty association is set up to be a second line of defense for your customers and provide a means of recovery for an insured of limited means who stands to be badly hurt if an insurance company becomes insolvent. The first line of defense is the core solvency regulation.

When you start to talk about excess insurers who are retained by very financially capable organizations, you start to import a different class of recoverant. Parties who are not really at risk if their excess insurer becomes insolvent, because those companies do have the wherewithal to cover their loss. The current system is designed to cover your mom-and-pop type of small insurance companies, if these larger entities are allowed to submit claims into this same system. In effect, the smaller insurance companies will be subsidizing them, because assessments on carriers are recoupable by charges against customers. It is my opinion that this will cause a financial transfer from the rank and file insurance buyer to large commercial concerns. It seems the best course is for the Commissioner to take up this policy for debate.

SENATOR HARDY:
It seems to me that this is a threshold issue, but there still is some concern about who pays into the fund. The background document, Exhibit J, we got from Kurth Law Office and Steel Engineers is not accurate, because self-insured employers do not pay into the NIGA fund. Excess Insurers do pay into the fund.

MS. MOLASKY-ARMAN:
That is correct.

MR. RAINEY:
Yes, that is correct. I made a mistake on the background document I handed out earlier.

SENATOR HARDY:
To get to the heart of the matter, we are talking about the event of an excess insurance carrier becoming insolvent. You have indicated that would be a rare incident.

MR. RAINEY:
Yes, but it has happened.

MR. KURTH:
Yes, that is correct, and this situation could only occur if the self-insured employer who is required to purchase excess insurance becomes insolvent. Even though the excess carrier pays into the fund, the self-insurer employer would have not access to the guaranty.

The question is whether or not a self-insurer is an insurance company applicable under the NRS 616A.290 definition.

SENATOR HARDY:
As it stands today, without this amendment, do our excess insurance carriers have access to the fund?

MS. MOLASKY-ARMAN:
Until the Nevada Supreme Court action is resolved, I cannot say.

SENATOR HARDY:
There should not be any expectation to have access to the NIGA funds if you do not pay into the fund. That is one question for the Committee; it is a policy issue.

MR. RAINEY:
No one who pays into the fund receives a benefit. The fund is only there for the actual insured that owns a policy and has a claim. At that point, if their insurance company goes bankrupt, then their claim is covered.

SENATOR HARDY:
The question is an equity issue. Does the excess insurance carrier who is representing you pay into the fund on your behalf? Does a self-insured employer have a right to make a claim against the NIGA fund because in essence you are the insured?

MR. RAINEY:
We are talking about a $650,000 excess insurance policy that the self-insured employer is paying for, but the NIGA does not guarantee that amount. The NIGA fund does for insurance policies what the Federal Deposit Insurance Corporation does for banks.

SENATOR HARDY:
Let me give you an example to see if I understand this clearly. I have an insurance policy and pay my premium and then my insurance company takes part of my premium to pay into the NIGA fund so that if I have a claim and my insurance company becomes insolvent, I can still get the claim covered. What Steel Engineers is claiming is they are essentially in the same position as I am with my insurance company, but they do not get the benefit of the NIGA fund.

MS. MOLASKY-ARMAN:
All carriers do pay into the NIGA fund and their assessment is apportioned based on their premiums.

SENATOR HARDY:
Do you agree with Mr. Kurth's contention that the payments made on their behalf going into the NIGA fund by his excess carrier make them the insured?

MS. MOLASKY-ARMAN:
The assessments are not paid based on your book of business, because no insurance company expects to become insolvent the next day. The assessments are based on a particular insolvency, after the fact; however, those assessments are established according to the lines and kinds of insurance that the company sells. When a company includes the excess premiums with the premiums that are used to calculate their assessment, then you can attribute those from that particular kind of policy. It is not a one to one relationship.

There was a huge insolvency of Reliance Insurance Company, a Pennsylvania company, and its subsidiaries. It was an A.M. Best Company-rated "A" company that went bankrupt almost overnight. We are holding a security deposit in the amount of $500,000 that was paid to us in Nevada. We are waiting for the court's determination to tell us who that money should go to.

SENATOR HARDY:
I just think that it is only reasonable if an excess insurance carrier is required to pay into the fund then the people they insure should have access to the fund. It seems reasonable they should be afforded protection. In the excess insurance carriers' case, they do pay into the fund so it is easy to extrapolate that the people they insure would be protected by the NIGA fund. If the decision is that excess insurance should not be involved at all, then we should not require them to pay.

CHAIR TOWNSEND:
How big is the claim in question?

MR. RAINEY:
Steel Engineers and MGM Mirage brought the lawsuit.

MR. KURTH:
There is a claim for damages to Steel Engineers of which the exact figure has yet to be determined, since Reliance went bankrupt. It will exceed $250,000. This was for one individual in a catastrophic accident. The $250,000 is in addition to the self-insured retention which was $250,000. With this accident, Steel Engineers' retention will be raised to $500,000. The MGM Mirage also has a continuing claim of approximately $10,000 a month, forever, and the owners of the companies will ultimately be responsible for paying that.

CHAIR TOWNSEND:
Have those expenses been covered so far?

MR. KURTH:
MGM Mirage has spent $300,000 so far and they are continuing to pay as well. Steel Engineers is also paying their expenses and this will be a lifetime responsibility that could be subject to the personal liability of officers of the companies.

CHAIR TOWNSEND:
This was a workers' compensation claim and the workers have not had to pay for any of this out of their own pocket, have they?

MR. KURTH:
No, so far the companies have been paying everything and will continue to do so, as long as they are solvent

MR. WADHAMS:
First of all, there was a comment made that there is no fiscal impact with this amendment. That is incorrect; these assessments are recouped through abatements of the premium tax over a five-year period so there is an impact to the General Fund. I think it is important to put into context what happened with workers' compensation in the 1980s and the 1990s in lieu of having a state insurer. Rather than having the State Industrial Insurance System be the insurer of record for workers' compensation, we allowed certain employers with enough financial assets to become insurers themselves. So the suggestion of drawing a distinction between a self-insured employer and an insurer is a very fine line, because it was the intent of the legislative body to make them the same

Excess insurers are really reinsurers which have never been part of NIGA fund. If we are going to put all the kinds of insurers into the process of the guaranty fund which was designed for individual claimants for car accidents or whatever, then they all have to pay the assessments into the fund.

CHAIR TOWNSEND:
Senator Hardy's question was, do excess insurance carriers pay into this guaranty fund and if they do, is it just a mistake that they cannot access the fund?

MR. WADHAMS:
Insurers that are directly licensed to sell first-dollar policies will pay an annual nominal administrative assessment into a fund. No other assessments are made until insolvency occurs and a claim account is developed. The assessment then becomes a post-assessment fund. When the determination of the amount of money that is due in claims from an insolvent company is made, then that assessment is apportioned across all premium collectors who are liable for that responsibility.

CHAIR TOWNSEND:
Are excess insurer's carriers liable to be assessed by the fund under the conditions you just described?

MR. WADHAMS:
Yes, some excess carriers are, such as an umbrella policy that you carry over your auto and home policies is technically an excess policy. It is essentially a first-dollar policy. Excess insurance policies that we are discussing are actually reinsurer policies over another insurance company.

CHAIR TOWNSEND:
They are assessable after insolvency. Then they do pay into the fund.

SENATOR HARDY:
We have established that a self-insured employer does not pay into the fund and they are not asking for access to the NIGA fund. Steel Engineers became a policy holder with their excess insurance carrier who does pay into the NIGA fund. If the excess fund goes insolvent, they as a policy holder are not protected.

MR. WADHAMS:
Reinsurers have no access to the NIGA fund either. If Steel Engineers bought an insurance policy from Employers Insurance, as a reinsurer, Employers has no access to a guaranty fund.

MR. RAINEY:
If our company did not self-insure and instead bought workers' compensation from such a company, we would be protected under the NIGA Act. What Mr. Wadhams is talking about is trying to get reinsurance money back which is something totally different.

SENATOR HARDY:
Mr. Ostrovsky, as a representative of a reinsurer, Employers Insurance, could Steel Engineers, having bought their workers' compensation policy from Employers, be covered if Employers went insolvent?

ROBERT OSTROVSKY (Employers Insurance):
Yes, they would be protected, but my company would not be protected. We are totally and absolutely opposed to this amendment. This situation is not a consumer buying a product; it is a business buying another business's product. It is our position, that if they want to access this fund they should have to pay into it.

SENATOR HARDY:
In essence they are.

MR. OSTROVSKY:
You cannot assess a self-insured employer for payments to the NIGA Fund. This is a self-regulating market. That insurance company in this case is already gone because they are bankrupt, so you cannot get any money from them. By self-regulating, the insurance industry makes sure we have a good reinsurance market because we are all on the hook to pay claims for companies that go down. Self-insured companies are not on that hook; they make their premium payment to the reinsurer and walk away. This is an extremely complicated and complex issue. The summary judgment motion before the Nevada Supreme Court was 63 pages long. There are many issues. This Committee decided two years ago not to address those issues and we were going to try to address them at the Commissioner's level. It just has not been done yet.

MR. KURTH:
In 2005, when this amendment was brought forward, no one was there to support it. Today we have a myriad of employers who support this amendment and it is really not that complicated. To be self-insured, you have to, by law, carry excess insurance to cover anything over the amount of your retention or you cannot have insurance. The excess insurer carrier, just like Employers Insurance, pays into the fund but they cannot access the fund. The self-insured employers are the insured.

CHAIR TOWNSEND:
When did these claims occur?

MR. KURTH:
These claims happened before the 73rd Session of the Legislature.

CHAIR TOWNSEND:
Did you know that the law did not include self-insured employers?

MR. KURTH:
We are just asking for an interpretation of NRS 616 in relation to a "covered claim" in the NIGA Act. Even NIGA lawyers are not clear and so have joined us in asking for an interpretation. All of these self-insured employers are not asking to have access to the fund to get back their deductibles or their

self-insured retention. People who are insured pay those deductibles and have a valid policy as an insured. If this is not settled here, then it will be settled by the Nevada Supreme Court. The statute is ambiguous; in one place in the statute they are considered an insured in order to regulate them, as I have said before.

CHAIR TOWNSEND:
I cannot say if you have made your case or not, but the problem is this late hour. I am worried about the process. I am looking at a note counsel gave me, that California limits their guaranty fund to only small businesses. None of the parties you are talking about today are small businesses. What I suggest is, our time is limited, and you have put this Committee in a difficult situation because we need to maintain the Committee's integrity.

SENATOR HARDY:
The Commissioner apologized for not having addressed this issue sooner. How long will it take for you to deal with this issue administratively?

MS. MOLASKY-ARMAN:
I will have my advisory committees take this issue up immediately after Session ends. We need to discuss many things about this issue. In the next Legislative Session, we can go over any revisions or clarifications at that time.

SENATOR HARDY:
But you can issue an opinion prior to that, so we can provide another venue to Mr. Kurth and his client since the Legislature does not have time to deal with this issue.

MS. MOLASKY-ARMAN:
Yes, I would prefer that course of action.

SENATOR CARLTON:
Madam Commissioner, I thought you said you had already issued an opinion and that it did not seem to carry any weight, which is how we ended up in this disagreement.

MS. MOLASKY-ARMAN:
I had issued an opinion to the staff and board of directors of the NIGA. None of those members were absolutely certain whether the law applies and that is the reason they decided to seek declaratory relief. I can issue another opinion but

I do not know how much weight that will carry in light of the Nevada Supreme Court. There are other areas in this relationship that need to be resolved and that is why I recommend coming back with a coordinated plan as to how all of these items can be meshed together.

CHAIR TOWNSEND:
I will close the hearing on A.B. 161 and give you some time to answer some questions to the Committee members individually. I cannot in good conscience give this to the other house at this late time. This bill was first heard in March, amended and passed in the Assembly in April and then it went to the Assembly Committee on Ways and Means in May, so you can understand our reluctance to pursue this amendment.

CHAIR TOWNSEND:
We will take a vote on A.B. 161 with the three friendly amendments included. The amendment brought forth by Steel Engineers will have to wait for another day.

SENATOR HARDY MOVED TO AMEND AND DO PASS AS AMENDED A.B. 161.

SENATOR CARLTON SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

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CHAIR TOWNSEND:
If there is no one else to be heard, I will adjourn this Senate Committee on Commerce and Labor at 10:27 a.m.

RESPECTFULLY SUBMITTED:

Lori Johnson,
Committee Secretary

APPROVED BY:

Senator Randolph J. Townsend, Chair

DATE: