MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Seventy-fourth Session
May 1, 2007

The Senate Committee on Judiciary was called to order by Chair Mark E. Amodei at 9:11 a.m. on Tuesday, May 1, 2007, in Room 2149 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to the Grant Sawyer State Office Building, Room 4412, 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 Mark E. Amodei, Chair
Senator Maurice E. Washington, Vice Chair
Senator Mike McGinness
Senator Dennis Nolan
Senator Valerie Wiener
Senator Terry Care
Senator Steven A. Horsford

GUEST LEGISLATORS PRESENT:

Assemblyman Jerry D. Claborn, Assembly District No. 19
Assemblywoman Susan Gerhardt, Assembly District No. 29
Assemblywoman Peggy Pierce, Assembly District No. 3

STAFF MEMBERS PRESENT:

Linda J. Eissmann, Committee Policy Analyst
Brad Wilkinson, Chief Deputy Legislative Counsel
Lora Nay, Committee Secretary

OTHERS PRESENT:

Joshua Martinez, Detective, Las Vegas Metropolitan Police Department
Darin Garness, Sergeant, Las Vegas Metropolitan Police Department
Thomas Delaney, Deputy/Pilot RAVEN Washoe County Sheriff's Office

Russell A. Pedersen, Sergeant, Washoe County Sheriff's Office
Gerald W. Hardcastle, District Judge, Department D, Family Division, Eighth Judicial District
Kimberly Surratt, Nevada Trial Lawyers Association
Mike Capello, Washoe County
David Kersh, Carpenters/Contractors Cooperation Committee, Incorporated
Kevin B. Christensen, Chair, Las Vegas State Apprenticeship Council, Office of Labor Commissioner
Steve Holloway, Association General Contractors Las Vegas Chapter
John D. Madole, Nevada Association of Mechanical Contractors
Trevor Hayes, Molasky Companies; Paradise Development Company
Kathleen E. Delaney, Senior Deputy Attorney General, Bureau of Consumer Protection, Office of the Attorney General
William Bible, President, Nevada Resort Association

CHAIR AMODEI:
We will open the hearing on Assembly Bill (A.B.) 307.

ASSEMBLY BILL 307 (1st Reprint): Prohibits the use of certain lasers and other light sources to interfere with the operation of an aircraft. (BDR 15-1181)

ASSEMBLYMAN JERRY D. CLABORN (Assembly District No. 19):
Assembly Bill 307 prohibits the willful use of laser devices and other light sources with the intent to interfere with the operation of an aircraft. Any violations not resulting in injury or damage would be a misdemeanor. Violations resulting in injury to a person on the aircraft, damage to the aircraft or to equipment used to operate the aircraft would be a Category E felony. I encourage your support of this important safety issue.

JOSHUA MARTINEZ (Detective, Las Vegas Metropolitan Police Department):
We have been working with Assemblyman Claborn in regard to this piece of legislation. It is important not only for law enforcement but general aviation.

DARIN GARNESS (Sergeant, Las Vegas Metropolitan Police Department):
I have been with the Las Vegas Metropolitan Police Department (Metro) for almost 19 years. For the last eight years, I have been assigned with the air support unit, and there has been an alarming increase in the use of lasers and high-intensity lights against the aviation community. We are getting hit with the lasers and lights on an average of at least two times a night. Calls for service

have increased, including calls from McCarran International Airport. Commercial airliners on their final approaches are only about 2,000 feet above the ground and the pilots are getting hit in the eyes. North Las Vegas general aviation community reports being hit on both departures and arrivals. Air ambulance services are also being hit.

These are dangerous situations. Night vision of pilots is immediately impaired which could cause loss of control of the aircraft. With law enforcement and air ambulances flying low on aerial patrols or transport of patients, it would not take long for any loss of control of the aircraft to result in a crash or an emergency landing, causing a hazardous situation to the air crews and to people on the ground.

When we are on calls for service, we get hit with high-intensity lights which light up the cockpit. These lights can be bought at Costco Wholesale for as little as $39 and have 15 million candlelight power which is half the strength we are using with our Nightsun.

The intent of A.B. 307 comes because we do not have anything in city, county or state laws allowing us to deal with this problem. There is a federal law concerning interference with a flight crew, but the intent of that law was to deal with passengers interfering with the stewardesses or the flight crew while on the airplane. They are trying to fit other malicious acts into that bill. We have had difficulty with the federal government in trying to get laws passed or get prosecution under the interference law.

Over a year ago, as we were working the Laughlin River Run and flying with our night vision goggles, someone hit us with a bright light causing us to wash out all of our night vision. We had to remove our goggles, immediately go to instrument flying and temporarily fly away to get our bearings. We returned and caught him. We had to involve the Federal Bureau of Investigation in trying to get charges submitted to the U.S. Attorney. The U.S. Attorney was indecisive on whether they could prosecute this case and ended making it a major felony and putting someone who was drunk and stupid in prison for three to five years.

Assembly Bill 307 makes it a misdemeanor with no injuries or damage to the aircraft. If something major occurs, the offense would be a felony. We need this bill to address this ongoing problem.

THOMAS DELANEY (Deputy/Pilot RAVEN, Washoe County Sheriff's Office):
I am the chief pilot for the Regional Aviation Enforcement Unit of the Sheriff's Department. We have been hit many times over the years with lasers totally blinding to the aircraft and crew. Like Metro, we have had to discontinue missions and return later. Law enforcement is not the only aircraft being hit. TriState Care Flight has been hit with lasers many times, and we have responded to calls from the tower. Southwest Airlines was hit with a laser near Spanish Springs.

In one instance, we were continually being hit from the same area. We set up a sting and made an arrest. Later on, the federal system decided not to prosecute. We have had the same problems as Metro in not being able to prosecute anyone under federal law as the only current law deals with interference from a laser.

Night vision goggles cost about $10,000. Damage to a pair of these goggles would be a Class E felony. Other laws would come into effect if an aircraft crashed.

RUSSELL A. PEDERSEN (Sergeant, Washoe County Sheriff's Office):
I work with both Search and Rescue and the Regional Aviation Enforcement Unit. The Washoe County Sheriff's Office supports A.B. 307. In an urban setting, we are concerned with pilots, crews and citizens on the ground.

Products can be purchased at local sporting goods stores with 10 million candlelight power for under $30. A small, handheld laser for under $40 can go 900 feet. Lasers can be purchased on the Internet that go up to several thousand yards. This is a safety concern for everyone involved.

SENATOR CARE:
It would be a Class E felony if the vehicle crashed, but are you saying other law comes into effect? Are you certain? An analogy might be the guy you see in the movies who disconnects the rails on a railroad line. Is there something you have in mind under existing law?

MR. PEDERSEN:
Situations depend upon the intent of the individual. If death was involved, homicide charges could be considered. There are other applicable laws for

property damage charges and/or bodily harm and, if appropriate, charges stiffer than a Class E felony could be brought.

SENATOR CARE:
I am assuming the difficulty only occurs between dusk and dawn. Is it conceivable this could ever happen during daylight?

MR. DELANEY:
The high-intensity lights would not have an effect in the daytime, but a strong enough laser could blind the cockpit crew daytime or nighttime especially depending upon the angle of the sun and how it hits the windscreen. A laser in the daytime is definitely still a hazard.

SENATOR CARE:
Would aircraft under the definition in A.B. 307 include vehicles such as hang gliders and ultralights?

MR. DELANEY:
They used aircraft as a broad category to cover everybody.

CHAIR AMODEI:
How does the prosecution come about? If an airline pilot or one of you gets lasered, you know the general area, but do you have to find someone holding the laser?

MR. PEDERSEN:
You are correct. To find the individual, we would use normal investigative work and procedures to make sure we found the alleged, guilty subject.

ASSEMBLYMAN CLABORN:
I would like to reiterate testimony concerning the light systems we are referring to which can be bought almost anywhere. Some have five million to ten million candlelight power and are handheld. We did not want to eliminate their use for search and rescue.

We had a bunch of guys who robbed a 7-Eleven store. When they departed, they held a light on the law enforcement helicopter and were able to drop the light and disburse as the helicopter made evasive actions. These enormous handheld lights are inexpensive.

SENATOR CARE:
Let me ask you about your intent of A.B. 307 the way it is drafted. The crime occurs if someone commits it with the intent to interfere. They do not actually have to interfere. Does interfere also mean to scare? Does it also vary on the size of the light held? I have seen lasers about the size of a pen. Are you referring to those or to larger lights?

ASSEMBLYMAN CLABORN
The bill was originated to address high-intensity lights and to some degree the lasers. It is my understanding it is a federal offense to use a laser.

SENATOR CARE:
It is probably a question for the prosecutor; perhaps the bigger the size of the light, the intent is more obvious.

CHAIR AMODEI:
We will close the hearing on A.B. 307. We will open the hearing on A.B. 353.

ASSEMBLY BILL 353 (1st Reprint): Makes various changes concerning the restoration of parental rights. (BDR 11-851)

ASSEMBLYWOMAN SUSAN GERHARDT (Assembly District No. 29):
I am asking for your consideration of A.B. 353 which would restore the parental rights of a natural parent or parents in certain circumstances as explained in a letter from Ron Titus, Court Administrator and Director of the Administrative Office of the Courts, Office of Court Administrator, Nevada Supreme Court, (Exhibit C). The termination of parental rights in Nevada is a final and conclusive act that once made, the court has no power to change, modify or set aside. Termination of parental rights means the child is declared free of the parents' custody and control. The only way for a natural parent to regain custody is through the adoption process.

Terminating a person's parental rights is never taken lightly by the courts or the parties involved; however, our life experiences tell us that circumstances can and do change over time. For example, there may have been reconciliation between parent and child or the parent may now be in a better position to care for the child. A parent may have lost parental rights as the result of a drug use but may now be clean of drugs and able to care for the child. In some cases, it may be determined the child is not likely to be adopted and would be better in

the custody and control of his/her natural parent. Under any of these scenarios, it may be beneficial to all parties for parental rights to be restored, and that is the intent of A.B. 353.

Section 2 authorizes a child, the legal custodian of a child or the legal guardian of a child to petition for the restoration of parental rights. In order to petition, the natural parent or parents for whom restoration of rights is sought must consent. The natural parent or parents cannot bring a petition on their own. We are adamant that it is not appropriate for incarcerated parents to flood the courts with petitions.

Section 3 provides certain requirements regarding notice to be provided before a hearing is held. Notice must be given to the natural parent or parents, the legal custodian and legal guardian of the child, the person or governmental entity who filed for termination of parental rights and the attorney of record for the child or the child if there is no attorney of record. Each of those people will be provided an opportunity to present evidence and provide testimony during a hearing on the petition.

Section 4 provides the court to hold a hearing when a valid petition is filed. In order to grant a petition, the court must find the child consents to the restoration of parental rights if the child is 14 years old and the natural parent or parents have been informed of the consequences of the restoration of rights and are willing and able to accept those consequences. The court must also find the child is not likely to be adopted and the restoration of parental rights is in the best interest of the child. When the order is entered, the child becomes the legal child of the natural parent as of that date with all rights and duties of a parent. The continuing needs of a child for proper physical, mental and emotional growth and development are paramount in determining the statutes of parental rights. It is my belief that circumstances change and, in some cases, parental rights that were terminated by a court should be restored if it is in the child's best interest. Nevada law currently does not allow this, but A.B. 353 would.

GERALD W. HARDCASTLE (District Judge, Department D, Family Division, Eighth Judicial District):

Termination of parental rights is essentially a precondition to adoption. In the absence of a possibility or probability of an adoption, there is no reason to terminate parental rights. To legally remove a child's parents when there is no substituted parent is meaningless. In anticipation of an adoption, a termination

of parental rights action is the way we determine whether we can legally allow strangers to adopt a child and take over control from the natural parents.

The impact of this is that termination of parental rights comes with an implied promise. That implied promise is we will find that child new and better parents who will care for the child. Assembly Bill 353 addresses what occurs when there is a termination, but no adoptive parents are found and the child is put back into the position of having his parents' rights restored.

This problem is a result of the Adoption and Safe Family Act of 1997. We have always had children whose rights have been terminated who have not been adopted. In the child welfare arena, we call them legal orphans and their numbers have dramatically increased since 1997. The Adoption and Safe Family Act requires states proceed quickly to move a child through the child welfare system. It shortens the time in which parents have to comply with case plans and reunify with their children. It pushes states to make a greater effort to terminate parental rights after a certain period of time and seek adoptive homes.

The Adoption and Safe Family Act came with a couple myths. The first myth is that children languish in foster care because of the court's repeated efforts to work with families in spite of the fact the parents were hopeless. The other myth was a huge number of childless adults waiting to adopt these children. The reality is that these myths turned out not to be true.

Since the Adoption and Safe Family Act was passed, there have been 117,000 more children whose rights have been terminated than have been adopted. This is consistent with our experience in Nevada. We are terminating parental rights in an ever-expanding rate. There has not been the corresponding increase in adoptions and adoptive homes we hoped would occur when we accelerated a child through the process.

Assembly Bill 353 would allow the court to revisit the issue of the relationship of the child and his/her parents if an adoption is not achieved and it is in the child's best interest to allow the court to set aside the termination of parental rights. People grow up and sometimes things get better. There are too many examples of this. Virtually every week on my calendar, I have a child whose parents had their rights terminated and no adoptive parents were found. This bill gives us the right to do something humane and appropriate.

KIMBERLY SURRATT (Nevada Trial Lawyers Association):
I am a family law practitioner in northern Nevada and represent Nevada Trial Lawyers Association which supports A.B. 353. A family law practitioner's perspective is we often tell clients, especially in stepparent adoption circumstances, that once a termination is granted, inheritance rights, child support, the whole gamut of parental rights disappear. Case law tells us to make sure somebody steps into that role.

A child who has not been adopted and the parents have come full circle back to being upstanding citizens and/or proper parents, and in restoring parental rights, you are also restoring inheritance rights and child support rights. Obviously, inheritance rights go long past majority but child support rights do not.

SENATOR MCGINNESS:
The bill says the court shall order the restoration of parental rights if the court finds by a preponderance of the evidence that a child is not likely to be adopted. How can you adopt a standard on something so subjective?

MS. SURRATT:
It will be difficult. It is a gray area of law. The amount of time the child has been in the system, the efforts made by the agencies, why an adoption may have failed—all need to be looked at. Under some circumstances, the behavioral and psychological circumstances of a child may make it difficult for him/her to be adopted depending on what medical assistance was gained and whether they will ever be a good perspective adoptive child. It depends on a case-by-case basis.

CHAIR AMODEI:
Does the wording in section 2 anticipate someone who is still a minor?

MS. SURRATT:
Yes.

CHAIR AMODEI:
If I get to be the age of majority, my parental rights have been terminated and I want to reinstate my inheritance rights, I cannot do so because of the requirement the legal custodian or guardian may petition the court.

MS. SURRATT:
Adult adoptions, a backup procedure, could be utilized.

CHAIR AMODEI:
While I agree with the concept, why would you not allow a child over the age of majority to petition the court?

DISTRICT JUDGE HARDCASTLE:
Adult adoptions are very summary, brief and easy procedures that would be utilized in that case. Since restoration occurs at the time of the granting of the decree, an adult adoption is an easier procedure. The difficulty we are having in the child welfare context is there are numerous burdens. To get placement, you have to qualify as a foster parent, have the child in your home for six months and then go through the process of adoption. Assembly Bill 353 gives us a summary procedure equivalent to an adult adoption.

MIKE CAPELLO (Washoe County):
I am director of Washoe County Social Services. I am here to express our support for A.B. 353. This bill allows alternatives for children who have been in the system for a long time and are looking for permanence. Part of our fundamental beliefs about people is they do have the ability to change. Federal law has set a timetable under which that change has to occur or we have to file a petition to terminate parental rights. In reality, parents sometimes make those changes more slowly than is allowed by federal law. In Nevada statute, we must file a petition if a child has been out of home care for 14 months to 22 months which is a short time frame, respectively, on making that initial decision. This will allow us—when that decision is made at a time when a parent is not ready to change and recognize that change to later on—restore the relationship.

It will be a valuable tool for child welfare agencies and courts in bringing about permanency for these children before they leave the system. So often when they leave the system, they do not have a connection and become homeless, end up in jail and not have the kind of success we want to see them have. Much of that is tied to the fact they are floating aimlessly without a connection to a family or anyone else.

CHAIR AMODEI:
We will close the hearing on A.B. 353.

SENATOR WIENER MOVED TO DO PASS A.B. 353.

SENATOR HORSFORD SECONDED THE MOTION.

THE MOTION CARRIED. (SENATORS CARE AND NOLAN WERE ABSENT FOR THE VOTE.)

* * * * *

CHAIR AMODEI:
We will open the hearing on A.B. 359.

ASSEMBLY BILL 359: Revises provisions governing certain statutory liens. (BDR 9-1011)

ASSEMBLYWOMAN PEGGY PIERCE (Assembly District No. 3):
I am here to present A.B. 359 which deals with mechanics' liens and the judgment from a judge who interpreted *Nevada Revised Statutes* (NRS) in a way not previously interpreted. This bill is presented to clarify the language on mechanics' liens.

DAVID KERSH (Carpenters/Contractors Cooperation Committee, Incorporated):
The Carpenters/Contractors Cooperation Committee is a labor management committee comprised of signatory contractors in the Southwest Regional Council of Carpenters. Assembly Bill 359 is intended to correct what appears to be an unintended consequence in our lien statutes and clarify the definition of laborer in the NRS 108.2214 definition of lien claimant to include an express trust fund acting to collect unpaid fringe benefits that correspond to a participant labor. A district court judge ruled the definition of lien claimant in reference to a laborer did not include the trustees of a trust fund acting in this capacity. This ruling went against a long-standing legal practice and creates an unfair situation. A laborer whose compensation package is all paid in wages is allowed to lien for all his wages but if a laborer's compensation package includes wages, and benefits contributed to a trust fund, the benefits part of his compensation cannot be liened.

Benefits take the form of contributions by an employer for health and welfare, pension and vacation pay trust funds.

Assembly Bill 359 will clarify and affirm the public policy position that it is important to protect the entire compensation of laborers regardless of the form in which compensations are paid. It is about preserving the status quo in a legal mechanism that has worked for many years. It is not about making any dramatic changes or opening up the lien laws.

Because of the district court ruling, we are faced with a potential scenario where the laborer can lose up to 25 percent of his compensation. Examples of these types of situations include an owner/developer who hires out-of-state contractors or subcontractors who do not pay the benefits. Since the trust cannot lien for this, the trust has to make good on the default which is borne by our other members.

It is our understanding there is an amendment to A.B. 359. We do not support this amendment as it seeks to undermine the purpose of this bill and use the bill to address concerns dealing with other sections of NRS and the way contractors resolve conflicts.

KEVIN B. CHRISTENSEN (Chair, Las Vegas, State Apprenticeship Council, Office of Labor Commissioner):
As an attorney, I have practiced in Las Vegas for about 26 years. My practice has evolved around workers' rights and remedies for workers. I have also served as the State Apprenticeship Council chair for about 23 years, which has been involved in many kinds of labor-remedy issues.

Since 1875, laborers in Nevada have been protected in trying to recover their compensation when the direct employer was unable to pay. It is reflective of a variety of statutes. *Nevada Revised Statute* 608.150, the basis for the proposed amendment, grants a labor priority and makes a general contractor responsible to pay for that labor if it is not paid by a subcontractor.

There is a preference under statute for labor. In interpreting NRS 608.150 and NRS 624, the Nevada Supreme Court has determined that fringe benefit contributions are part of a compensation for labor and can be recovered. I have used NRS 108 on behalf of trust funds and laborers to recover wages and benefits. A list compiled by the Legislature included surveyors, engineers, architects and others who contribute value to a construction project. One of the definitions included laborer as part of the lien claimant definition but did not go on to say wages and benefits.

District Judge Elizabeth Goff Gonzalez, Department 11, Eighth Judicial District, decided in September 2005, who decided that since a trust fund was not specifically listed in statute, it was not the intent of the Legislature to provide a mechanism to recover fringe benefits in addition to wages. This case has been removed to federal court and is currently in front of Judge Robert C. Jones, U.S. District Court for the District of Nevada. His comment in one of our first hearings was trust funds can use lien statute to recover fringe benefits.

Typically, the fringe package is pension contributions, health and welfare contributions to provide workers with health and accident coverage, a vacation contribution or an apprenticeship training contribution. The monies a trust fund would try to recover for the hours of work for a laborer on a construction project are varied. Even in the nonunion, open shop industry in the construction trades, trust funds provide these same benefits.

Assembly Bill 359 is not an organized labor bill, it is a bill to protect the workers and recognize the status quo. The proposed amendment (Exhibit D) is completely incongruous with this purpose. It removes an existing remedy upon which the laborers have depended. Chapter 608.150 of NRS says that a general contractor has to pay for unpaid labor on its project, and there is a three-year statute of limitations. Chapter 108 of NRS provides a laborer has only 90 days to file a lien which can be reduced to 40 days if the owner files a notice of completion. This seldom-used remedy occurs in a situation where the subcontractor or the general contractor goes out of business. The risk goes back to the owner who receives the benefit of improvements or work done, controls the money and always has a retention fund to provide protection from this limited remedy. We request and implore your support to restore what is really the legislative history of the lien statute to protect the workers who have stayed in Nevada, in a construction context, for wages and benefits.

CHAIR AMODEI:
How did it work until the Eighth Judicial District court case? If I am a laborer and do not get paid, is my pay considered net pay? Before this case, I filed a lien and my benefits people filed a lien. How did wages and deductions sort out?

MR. CHRISTENSEN
Pension and welfare benefits do not get deducted from wages; they are contributions over and above. Direct deductions from wages such as a vacation

or holiday funds are usually made 30 days later in the next month which decreases the period of time to file a lien. When the laborer or someone else on the project realizes the contractor is not paying, they advise the interested parties and rush down to file and record a lien against the property for compensation of the fringe benefits. This is done by the laborer, an employee representative or through the trust fund.

CHAIR AMODEI:
Explain to me how that works.

MR. CHRISTENSEN:
Fringe benefits are not a wage and defined under federal law as something other than a wage but still part of the compensation package. The employer gets to deduct the contribution as an expense, but it is not a direct wage that requires roll up like taxes such as Social Security, Medicaid and Medicare.

CHAIR AMODEI:
That contribution is not taxed?

MR. CHRISTENSEN:
Correct, it is not taxed. We are talking about different kinds of benefits that could be liened; a vacation contribution would be a taxed part of a wage but pension, health and welfare would not.

CHAIR AMODEI:
Before this court case, everything is clicking along under whatever rules and if the pension administrators do not get their money, they are liened within three years?

MR. CHRISTENSEN:
No, they only have 90 days.

CHAIR AMODEI:
They are liened within the statutory prescriptions. In the 72nd Legislative Session when we rewrote the lien statute and created a list, this judge said the things left off the list cannot be liened, am I correct?

MR. CHRISTENSEN:
Correct.

CHAIR AMODEI:
Where is that case now?

MR. CHRISTENSEN:
That case was removed from state court to federal court. It is front of U.S. District Judge C. Jones; the case number is CVS05-1107. It has been consolidated with other cases involving the same contractor, Looking Glass, Incorporated, which had gone out of business and was neither providing information nor paying.

CHAIR AMODEI:
Is it still pending in the federal court?

MR. CHRISTENSEN:
It is.

CHAIR AMODEI:
Is the issue about the types of things lienable under existing law?

MR. CHRISTENSEN:
The other claims are a direct action against Looking Glass, Incorporated which is defunct and out of business. Some of the bond claims have been resolved and some general contractor claims are under investigation and discovery.

CHAIR AMODEI:
Therefore, the reason for bringing A.B. 359 is to proceed with including trusts in statute no matter what happens in the *Looking Glass* case.

MR. CHRISTENSEN:
Yes, even though the lien provision is seldom used because of its short statute of limitations of 90 days reducible to 40 days. The risk to an owner is small.

SENATOR HORSFORD:
For the record, I disclose that Mr. Christensen is the legal counsel for the organization of which I am chief executive officer. Based on Legislative Counsel Bureau input, it is best for me to abstain on this bill, not that the issue before us would in any way affect our organization. Out of full disclosure and the best ethical practices, I prefer to abstain on this measure.

STEVE HOLLOWAY (Association General Contractors Las Vegas Chapter):
I am the executive vice president of the Associated General Contractors in southern Nevada, the largest trade organization in southern Nevada. I am here technically in opposition to A.B. 359 and have introduced the amendment in Exhibit D that would make it palatable to our industry.

We are somewhat sympathetic to the efforts of the labor management trusts to collect the monies not paid to them. We are referring to instances where a union subcontractor may have paid wages to their laborers but may also have not paid into the trust as agreed. Assembly Bill 359 would make the owner responsible for the subcontractor's nonpayment even though the owner had paid the general contractor and the general contractor paid the subcontractor.

A trust can use three or more other possible remedies to recover unpaid monies. They can file a lien, except we did change the law in 2003 during the 72nd Legislative Session; bring a civil action directly against the subcontractor who failed to make the payments using contract law; file charges with the National Labor Relations Board if it is a retirement trust or a pension covered by the Employee Retirement Income Security Act. Chapter 608.150 of NRS, allows a district attorney to bring charges if a complaint is filed against the subcontractor who failed to make the payments but also against the general contractor who paid that subcontractor. They may wait up to three years before they do that because there is a reason why the subcontractor did not pay. He is probably bankrupt, has gone out of business or left the state.

The biggest problem is we cannot get the trusts to tell us there is a default at the time of the default, which would be an advantage to them under lien law because they would have 90 days under their accounting methods to determine if there was a default and file that lien. There is money for them to collect under the lien law called retention. In NRS 624, under the stop work order and Prompt Payment Act, there are specific provisions for money to be withheld for this purpose in addition to NRS 608.150.

The proposed amendment eliminates the ability to bring criminal charges against a general contractor because a subcontractor failed to pay the trust. It also eliminates the ability to come back three years later to bring charges. It makes sure that if NRS 108, the lien law, is used, it will be used under the same terms and circumstances as everybody else. Will you accept this amendment which would eliminate criminal charges that could be brought against someone who is

not responsible for the default and allow them to collect under lien law in a timely manner? This is fair and appropriate under the circumstances.

In 2005 during the 73rd Legislative Session, I promised the Chair I would not bring anymore lien law changes before him. One of the discussions from the 72nd Legislative Session was whether to include trusts as an entity that could file a lien. We opposed it because trusts are far removed from the owner. The owner did not employ those union laborers and had no contractual privity. It was the subcontractor who had contractual privity with the general contractor. They are pretty far removed, but nevertheless, they do have retention and are able to make that payment.

CHAIR AMODEI:
Are you aware of anybody being prosecuted under the criminal provision?

MR. HOLLOWAY:
No, I am not. It is used as a threat. Many general contractors who have been threatened with its use have ended up paying the trust benefits years later that a subcontractor failed to pay.

CHAIR AMODEI:
Is there any release procedure? The owner's objective is to pay for everything once, and the laborer's objective is to get paid once for everything he does.

MR. HOLLOWAY:
Yes.

CHAIR AMODEI:
As a general contractor, can I protect myself when I make payment to the subcontractors whether they are union affiliated or not? Can I get notice that someone is not getting paid as soon as possible?

MR. HOLLOWAY:
No. We are not getting those notices even though we have requested them over and over again. We requested they change their accounting procedures so they can notify us as soon as possible that they have not received those payments. The trusts have not complied with our requests and have not worked with us.

CHAIR AMODEI:
Is there anything in existing statute that requires to be filed within three years?

MR. HOLLOWAY:
No, there is not. Action can be brought against the general contractor because a subcontractor did not pay for as long as three or more years afterwards.

CHAIR AMODEI:
Other than that three-year statute of limitations, is there anything in existing statute requiring communication of a failure to pay?

MR. HOLLOWAY:
No, there is not.

CHAIR AMODEI:
Is there any provision in existing statute for getting a release from payment in the context of these trusts as part of the payment process for owner to general contractor to subcontractor to ultimate payee?

MR. HOLLOWAY:
No, there is not, which is why we want this bill to go through with our proposed amendment requiring them to notify us within 90 days that the trust payments had not been made.

CHAIR AMODEI:
Is the purpose of A.B. 359 to formally put trusts in the statute as a result of the post-2003 legislation of the 73rd Legislative Session and leave the existing framework in place? Is your objective to say you do not mind paying them, but you want framework in terms of time frames other than what the three years is now.

MR. HOLLOWAY:
Mr. Chair, you have hit the nail exactly on the head.

JOHN D. MADOLE (Nevada Association of Mechanical Contractors):
Since I am not an attorney, I will make mine brief. We support the amendment.

TREVOR HAYES (Molasky Companies; Paradise Development Company):
I agree with much of Mr. Holloway's testimony. My clients are owners who hire and pay a general contractor who hires and pays subcontractors. If there is a dispute over the payment of fringe benefits, a lien can be placed. No manner of proof is required in the dispute. My client's title is tied up.

Sometimes, an owner/developer wants to build a project in order to flip it and sell it for a profit. They are the ones who have created the jobs in the first place and are forced to pay a second time in order to clear the title. They are being dragged into a fight that is not theirs; it is between two people far removed from them. They have done their duty and paid their part. There is adequate remedy under existing statute.

MR. CHRISTENSEN:
Many times, the owner does not pay. Many times, the general contractor and the subcontractor go down. The Venetian was one such project where the contractor and many of the subcontractors went out of business.

The statute of limitations for NRS 108 is not three years; it is 90 days in which to file a lien. Chapter 608.150 of NRS has a three-year statute. When a subcontractor submits its pay requests to a general contractor, there is a material release and a labor release. Oftentimes, the trust funds are contracted and asked to sign a release indicating individuals have been paid. The only reservation made when they issue those releases is an audit. If someone lied and did not report wages and benefits, that can be discovered through an audit. Releases are commonly given.

I could not find anything in the minutes of that 2003 hearing of the 72nd Legislative Session indicating trusts were not an intended claimant under this statute. If that were the case, it would be before you today. I have never filed a criminal charge nor do I know of any criminal charges filed. It has to be done through the district attorney. We do not threaten criminal prosecution because that is a crime. We just make the claim for wages and/or benefits.

CHAIR AMODEI:
Ninety days is a short time. Do you have any knowledge of the source of the three-year time frame? Why is three years important as opposed to a shorter period of time?

MR. CHRISTENSEN:
The three-year time comes under NRS 11 which is the general statute of limitations laws for remedies that otherwise do not specify and what the courts have typically interpreted to govern NRS 608.150; NRS 108 has its own statute of limitations language.

CHAIR AMODEI:
What is the longest time frame for action in the lien statutes? Is 90 days the longest or do other provisions give 6 months or a year or something like that?

MR. CHRISTENSEN:
There are three potential cutoff dates: 90 days after the last delivery of materials, for a supplier, 90 days after the last provision of labor for a laborer or 90 days after completion of the project. That last one can potentially extend the time. You could have a laborer who completes in the middle with completion of the project actually later, but he gets the benefit of that additional period to try and figure out if he has been paid his benefits. Usually, the project is done within a month after the labor is finished. There is a statute saying you have six months to file your complaint after you have recorded your lien. Those are the two working parts of the statute of limitations.

CHAIR AMODEI:
We will close the hearing on A.B. 359 and open the hearing on A.B. 560.

ASSEMBLY BILL 560: Establishes requirements concerning agreements between debtors and third parties for assistance in the recovery of certain proceeds of a foreclosure sale. (BDR 3-502)

KATHLEEN E. DELANEY (Senior Deputy Attorney General, Bureau of Consumer Protection, Office of the Attorney General):
I am here today representing both Attorney General Katherine Cortez Masto and Consumer Advocate Eric Witkoski to introduce A.B. 560, a small bill which will have a big effect on protecting homeowners who are vulnerable when their homes are in foreclosure from fraudsters who offer assistance in obtaining what is rightfully theirs in terms of excess proceeds from the foreclosure sale. They do so at an exorbitant price with little or no benefit to the homeowner for an unnecessary service.

Assembly Bill 560 amends NRS 40 provisions dealing with foreclosure sales and the disbursement of excess proceeds. Nevada is second in the nation in number of foreclosure sales per capita and we expect that trend to continue. Many adjusted rate mortgage loans are going to be resetting and people are not able to afford them. They have equity in their homes.

The people who prey on homeowners already in a difficult circumstance are well aware of what the value of the home and the amount of excess proceeds is likely to be at the foreclosure sale. They approach homeowners in a vulnerable state who may not even realize their home is close to or pending foreclosure. They offer so-called assistance in obtaining the excess proceeds which is a service not needed because statutory framework is already set forth in NRS 40 to get excess proceeds to the homeowner. Another example brought to our attention is they will offer to make a small loan or do a hard-money lend for a small amount of money in exchange for an assignment of the excess proceeds. They lead the homeowner to believe the value is unknown, but in truth, these people know the value.

In one egregious example brought to our attention, a homeowner was approached and offered a small loan of about $5,000 and signed away the excess proceeds thinking they were making a fair exchange and getting a little money quicker than they otherwise would have gotten. In fact, the excess proceeds exceeded $25,000. That profit should have gone to the homeowner who already lost their home and needs that money to start their lives again.

Assembly Bill 560 was patterned after Arizona statute and would regulate the way to enter agreements for excess proceeds. It requires the agreement to be in writing, signed and notarized by the debtor and not take place or not be entered into until at least 30 days after the foreclosure sale. It gives the opportunity of the trustee who is engaging in the sale to notify the homeowner and find out if they want to undertake the process on their own or need assistance.

We see fraud happening in this arena and do not know of any legitimate operators who are providing this service. In case someone does need help, we do not want to eliminate the service completely; we want to regulate in a fashion to eliminate the harm and temptation for fraud and make services available for homeowners who need them.

SENATOR WIENER:
The $2,500 threshold you said is mirroring an Arizona law, what is magical about that number?

MS. DELANEY:
Arizona felt it was a reasonable amount and important not to have it open-ended but to draw a line in the sand of what could be reasonable up to this point. The Arizona market is similar to ours. Rather than saying any fee could be reasonable, we placed a cap on the fee. We did not do any particular studies to determine the value of the service.

CHAIR AMODEI:
What is the pleasure of the Committee on A.B. 560?

SENATOR WIENER MOVED TO DO PASS A.B. 560.

SENATOR NOLAN SECONDED THE MOTION.

THE MOTION CARRIED. (SENATORS CARE, McGINNESS AND WASHINGTON WERE ABSENT FOR THE VOTE.)

* * * * *

CHAIR AMODEI:
We will open the hearing on A.B. 589.

ASSEMBLY BILL 589: Provides for continued operation of the Nevada Gaming Commission and the State Gaming Control Board during a budgetary or other fiscal crisis. (BDR 41-102)

WILLIAM BIBLE (President, Nevada Resort Association):
The origin of this bill came from a budget dispute out of the state of New Jersey that occurred last year. The legislature and the governor disagreed on how to fund the tax shortfall New Jersey was experiencing. The result was a shutdown of governmental agencies that necessitated a closure of the casinos. The 12 casinos in New Jersey closed and there was a loss of revenue to the state, properties and employees who lost not only their wages and benefits but also their tip income.

I do not know if a similar thing could happen in Nevada. New Jersey has a requirement that a state inspector must be on the premise when licensed gaming is conducted. We do not have a similar requirement, but broad powers in the State Budget Act could potentially allow the Governor to sequester funds for the regulatory agency.

Assembly Bill 589 makes it clear that the regulators and their agents would be deemed essential and not subject to closures in the event of a fiscal emergency so the economy of the state would continue. It is a very simple, straightforward piece of legislation.

SENATOR AMODEI:
I noticed you left the Legislature out of the bill as essential, any reason for that?

MR. BIBLE:
I used to work over here. At that time, I would have felt somewhat differently than when I was the budget director.

SENATOR WIENER:
What other agencies, regulatory bodies or employees of the state are considered essential?

BRAD WILKINSON (Chief Deputy Legislative Counsel):
I am not sure if anything in statute specifically states as such, typically public safety personnel fall into that category.

MR. BIBLE:
I do not believe there are any designations as to essential and nonessential employees in the State Budget Act. Typically, it has been as Mr. Wilkinson indicated, public safety functions where institutional responsibilities would be deemed essential services. In this instance, we would establish the category of a regulatory agency simply to keep the economy going.

CHAIR AMODEI:
Your objective is in the event of a budget meltdown of the regulatory function allowing the operation of gaming licensees to continue normal operations as opposed to without any supervision or administrative involvement of the State Gaming Control Board.

MR. BIBLE:
That is correct.

CHAIR AMODEI:
We will close the hearing on A.B. 589.

SENATOR NOLAN MOVED TO DO PASS A.B. 589.

SENATOR McGINNESS SECONDED THE MOTION.

THE MOTION CARRIED. (SENATORS CARE AND WASHINGTON WERE ABSENT FOR THE VOTE.)

* * * * *

CHAIR AMODEI:
We are adjourned at 10:37 a.m.

RESPECTFULLY SUBMITTED:

_____
Lora Nay,
Committee Secretary

APPROVED BY:

_____
Senator Mark E. Amodei, Chair

DATE:_____