MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON COMMERCE AND LABOR

Seventy-Fifth Session
March 18, 2009

The Committee on Commerce and Labor was called to order by Chairman Marcus Conklin at 1:37 p.m. on Wednesday, March 18, 2009, in Room 4100 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4406 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Copies of the minutes, including the Agenda (Exhibit A), the Attendance Roster (Exhibit B), and other substantive exhibits, are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at www.leg.state.nv.us/75th2009/committees/. In addition, copies of the audio record may be purchased through the Legislative Counsel Bureau's Publications Office (email: publications@lcb.state.nv.us; telephone: 775-684-6835).

COMMITTEE MEMBERS PRESENT:

Assemblyman Marcus Conklin, Chairman
Assemblyman Kelvin Atkinson, Vice Chairman
Assemblyman Bernie Anderson
Assemblyman Morse Arberry Jr.
Assemblywoman Barbara E. Buckley
Assemblyman Chad Christensen
Assemblywoman Heidi S. Gansert
Assemblyman Ed A. Goedhart
Assemblyman William C. Horne
Assemblywoman Marilyn K. Kirkpatrick
Assemblyman Mark A. Manendo
Assemblywoman Kathy McClain
Assemblyman John Oceguera
Assemblyman James A. Settelmeyer

COMMITTEE MEMBERS ABSENT:

None

GUEST LEGISLATORS PRESENT:

None

STAFF MEMBERS PRESENT:

Dave Ziegler, Committee Policy Analyst
Andrew Diss, Committee Manager
Patricia Blackburn, Committee Secretary
Sally Stoner, Committee Assistant

OTHERS PRESENT:

Scott Canepa, representing Nevada Justice Association, Las Vegas, Nevada
Keith Lee, Legislative Counsel, Nevada State Contractors Board, Reno, Nevada
Margi A. Grein, Executive Officer, Nevada State Contractors Board, Henderson, Nevada
Walter Bruce Robb, Counsel, Nevada State Contractors Board, Reno, Nevada
Marlene Lockard, representing Subcontractors' Legislative Coalition, Reno, Nevada
Gary Milliken, representing Associated General Contractors, Las Vegas, Nevada
James Wadhams, representing Southern Nevada Home Builders Association, Las Vegas, Nevada; also representing American Insurance Association, Reno, Nevada
Jeanette Belz, representing Associated General Contractors, Reno, Nevada
George Lyford, Director of Investigations, Nevada State Contractors Board, Las Vegas, Nevada
Matthew Sharp, representing Nevada Justice Association, Reno, Nevada
Scott A. Glogovac, Private Citizen, Reno, Nevada
Robert Compan, representing Farmers Insurance Group, Las Vegas, Nevada
Erin McMullen, representing Las Vegas Chamber of Commerce, Las Vegas, Nevada
Tray Abney, Director, Government Relations, Reno Sparks Chamber of Commerce, Reno, Nevada, also representing North Las Vegas Chamber of Commerce, North Las Vegas, Nevada
David Goldwater, representing a constituent of Assemblyman Christensen, Las Vegas, Nevada

Chairman Conklin:
[The roll was taken and a quorum was present.]

We will open the hearing on Assembly Bill 215.

Assembly Bill 215: Expands the circumstances under which an owner of a residence may recover damages from the Recovery Fund administered by the State Contractors Board. (BDR 54-893)

Assemblyman John Oceguera, Clark County Assembly District No. 16:
This bill expands the circumstances under which an owner of a residence may recover damages from the Residential Recovery Fund administered by the Nevada State Contractors Board. I am aware of some contention regarding this legislation, and I am committed to working with the interested parties to alleviate their concerns. The intent of this legislation is not to bring new contractors into the Fund, and that issue has already been dealt with in the mock-up (Exhibit C) that you have in front of you.

The Residential Recovery Fund was created in 1999 with the purpose of providing limited monetary compensation to single-family homeowners in the event that they have been damaged by a licensed contractor's failure to appropriately execute a contract and have exhausted all other means of recovery. Owners of single-family residences who have entered into a contract with a licensed residential contractor for the performance of construction, remodeling, repair, or improvement, and under certain conditions have been harmed by the failure of the contractor to properly perform the qualified services, may be eligible to apply for help from the Residential Recovery Fund. It is my belief that this is just a matter of fairness. The owner of a townhome or a condominium should be given the same access to the Residential Recovery Fund as the owner of a single-family dwelling. I have spoken with the sponsor of the 1999 legislation, Speaker Barbara Buckley, regarding the inclusion of additional homeowners, and she thought that this discussion seemed reasonable. Because townhomes and condominiums are regularly part of common-interest communities, details are still being discussed regarding their ability to file a claim.

I would like to introduce Mr. Scott Canepa for the Nevada Justice Association who will be able to further speak about the bill and the amendment and answer questions.

Scott Canepa, representing Nevada Justice Association, Las Vegas, Nevada:
I do not need to recite the policy underpinnings of A.B. 215 except to say that it is a matter of fundamental fairness. What gave rise to this particular bill is a situation that has been occurring more often in southern Nevada. I am not too sure about northern Nevada. Common-interest communities, or as they are also referred to, homeowners' associations, approach our law firm faced with situations where they have life, health, and safety defects; improper electrical wiring, improper mechanical installations, and the like. They have come to find out that the legal entities that were formed, typically limited liability companies (LLC), and single-purpose limited liability companies, no longer exist, have no assets, and have no liability insurance. Some of these communities range in size from 50 units up to 300 units. In the course of trying to give these people some advice and some help, we turned at one point to the Residential Recovery Fund only to find out that the Recovery Fund is limited in terms of access and the modest payments that are made to owners of single-family residences. There seems to be no fair fundamental policy upon which to exclude the owners of a condominium or a townhome from access to the Fund in that rare circumstance where they have no other source of recovery and they have exhausted all other legal remedies.

This is a small bill and there is no reason to go through it section by section because, except for section 3, most of it is bill drafting. Section 3 of the bill is where they change the definition of who a claimant can be. The Legislative Counsel Bureau did so simply, by saying that in addition to an owner of a residence, under subsection 2, a claimant can also be a representative of a homeowners' association that is responsible for a residence or an appurtenance and is acting within the scope of his duties pursuant to Chapter 116 or 117 of *Nevada Revised Statutes* (NRS). That language comes, verbatim, from NRS Chapter 40, the construction defect statute, and we must proceed in this fashion because you could not just add a single-family homeowner, a condominium owner, or a townhome owner because in most circumstances the townhome owner or the condominium owner only owns the air space. They have no legal jurisdiction to bring a claim for a leaking roof or something else that might be wrong with their building, because the legal jurisdiction to bring that claim remains with the common-interest community. To be sure there is no doubt concerning the situation of double recovery, please understand that once the homeowners' association has made that claim, the condominium or townhome owner cannot make the same claim for the same defect. In those situations where we have air space condominiums and townhomes, and where the legal responsibility and duty belongs with the homeowners' association under this bill, the homeowners' association will now be given legal jurisdiction to assert a claim against the Fund. From a policy standpoint there is no good reason to exclude them from the Fund.

The only other germane aspect of this would be with the difficulty in trying to determine what the caps would be. Under the current Recovery Fund a single-family homeowner is limited to $35,000 against a particular contractor. The Fund is also capped at $400,000 in aggregate claims by all homeowners against the same contractor. For example, if there was a large subdivision of 300 homes in it, the most that all 300 home owners could get from the one contractor would be $400,000. The way the mock-up reads, if the claim is brought by a homeowners' association for defects in the common areas over which they have the jurisdiction, their cap is going to be $400,000 as it is under the current statutory scheme. The mock-up goes one step further, however, to avoid a situation where the homeowners' association, in order to increase the amount of money it could collect under the Fund, would bring one claim against the general contractor and another against the dry wall contractor, and another one against the framer, and so forth. If you look at section 8, subsection 9, of the proposed amendment, the drafters have added a lifetime cap for any one homeowners' association of $400,000. The most any one community association, irrespective of how many units it might have, could receive is $400,000, even if there were 35 or 40 contractors involved in creating the defect that they ultimately were unable to get redressed through all other legal means.

The rest of the bill is necessary bill drafting changes.

Chairman Conklin:
Are there any questions from the Committee?

Assemblywoman Kirkpatrick:
Section 3.5 of the proposed amendment talks about the definition of a residential contractor and, in my opinion, says anybody who "enters into an agreement with the owner." What I am concerned about is the fact that hotels are building residential condominiums. Last session we changed the definition of what a homeowners' association was for them. Does that mean that we will have a great number of hotel-condominium project homeowners' associations falling under the Recovery Fund?

Scott Canepa:
I cannot forecast how many claims would come under the fund, but a homeowners' association that is a high-rise could assert a claim against the Fund if they had no other recourse, that is, if they had exhausted all other legal remedies. Typically, in the high-rise scenario we have seen that those are usually fairly well insured and well-heeled. The problem that we see is more in the area of wood frame, low-end construction where the limited purpose LLCs

have no assets and the contractors choose purposely not to buy any insurance as a risk management technique.

Assemblywoman Kirkpatrick:
I think a number of contractors are bonded to their limit right now. Economics have changed, and the scope of how people are getting paid is very different than it was a couple of years ago. I do not believe they have plenty of money to go back in and do repair work. Personally, I have seen and heard the changes that they are making on a daily basis to some of these projects. I have concerns about this.

Are the condominium conversions covered in this bill? I think that is where the issue is. Would you limit it to less than 300 units, for instance? I can see a run on the Recovery Fund, and I would be worried that the constituents in my district would not have those funds available to help their concerns.

Scott Canepa:
I am not sure I understand what your question is, but as it relates to condominium conversions, if you look at the definition in the mock-up, the people who are now qualified to make a claim, by virtue of the changes, would be owners of a residence. That would include the owner of a condominium conversion high-rise; it would not matter what it is. The person who has the authority to assert that claim will be the person who, under state law or the Conditions, Covenants, and Restrictions (CCRs), is obligated to make that legal claim. But, under this definition, we would not exclude anyone from the Fund so long as they have jumped through all of the other hoops that they have to in order to get to the Fund.

Another thing I did not mention that is a feature of this legislation is that once an amount is paid out by the Fund, the Nevada State Contractors Board becomes subrogated or steps into the shoes of the homeowner, to pursue the contractor to the extent there are other assets that the homeowner was unable to find or if there was a bond that was untapped. This bill does not diminish the Board's capacity in any way in terms of its rights as a subrogated party, to pursue that money and get it back.

Assemblywoman Kirkpatrick:
I think the real problem is with the condominium conversions. I do not think we should expand it to include any type of condominium. Could we have a unit cap? We changed the definition last session of the homeowners' association, and I think this issue could be larger than we thought. I am uncomfortable with the way this bill is drafted currently.

Assemblyman Settelmeyer:
You indicated that you had some individuals contact your law firm who had to be turned away from their claims due to their not being included in the definition. How much in damages were represented by those clients you had to turn away? I am wondering if it would eat up too much of the Fund to make such a radical change.

Scott Canepa:
We never quantified the total of what the damages would be, but it was clear that it would be in the tens, twenties, even hundreds of thousands of dollars. Certainly, in maybe one or two instances, the claims could have risen to as much as $400,000. I could not tell you what the value of their claims would have been. There are going to be homeowners' associations who have claims that far exceed $400,000, but will be limited to the $400,000 by virtue of this cap. Likewise, there will be homeowners' associations who do not come anywhere near $400,000 but which will have some modest recovery to address life, health, and safety defects.

Chairman Conklin:
Are there any questions from the Committee?

Assemblyman Horne:
I am without my computer today, but I will find out which bill Assemblywoman Kirkpatrick is speaking about. It was my bill and it moved the hotel condominiums into their own chapter, NRS Chapter 116B. I will try to ascertain exactly how that worked.

There are no new contributors to the Fund, yet we are broadening the scope of those who can have access to it. Is that correct?

Scott Canepa:
That is correct. We are giving equal dignity to other people who have other types of home ownership.

Assemblyman Horne:
I do not know how much is in the Fund or how much is contributed to the Fund annually. Is there some type of assessment? Is there a danger of depleting the Fund?

Scott Canepa:
I do not know. I believe the Contractors Board's representatives are here and ready to testify concerning what is in the Fund. I think it is in excess of $2 million. They have the statistics on how much money has been paid out.

We would not have access to that information. Anytime you increase the pool of qualified claimants there is the threat of depleting the Fund.

We have looked at other recovery funds in other states, and we cannot find one that excludes or limits the recovery fund to single-family homeowners. I am not sure that was the original intent of the Speaker when this bill was created in 1999. I cannot speak to what will happen on a going-forward basis. I do not know how many homeowners' associations will come forward. Ninety five percent of our practice is representing common-interest communities, that is, homeowners' associations, and we have only recently, in the last 12 to 18 months, encountered this situation where people have no legal recourse available to them. There does not appear to be any policy-based reason to be excluded from the Fund, save and except, depletion of the Fund. If it is going to get depleted, we need to figure out a way to put more money into it. The people are being harmed, and we believe they should have access to the Fund.

Assemblyman Horne:
I do not know if it makes sense to put forward a remedy, increasing the potential claimants, without increasing the amount in the Fund.

Scott Canepa:
I understand what you are saying. I do not have all the answers. It seems like a good idea to be inclusive rather than exclusive with respect to this issue.

Chairman Conklin:
I am trying to understand the mock-up and Mr. Horne's questions have brought another question to my mind. If someone owns the home and then sells it, would the new buyer of the home also be covered?

Scott Canepa:
That is a statement of existing law.

Chairman Conklin:
So, this is just clean-up in the early part of section 3? What is changed by this part of section 3?

Scott Canepa:
It adds a new section in section 3, subsection 2, "a representative of a homeowners' association that is responsible. . . ." That is all new language. In other words, existing law limited it to a single-family homeowner, and that has been lined out in subsection 1. So instead of saying a single-family homeowner, the subsection says a natural person who owns a residence. That is a good

point because of the following scenario: it is entirely possible that you could have a condominium owner who has a defect in his condominium for which the homeowners' association has no jurisdiction. In other words, it is something that under state law or their CCRs, the owners have to deal with. If that is the case, they would be given authority under subsection 1 as the owner of the residence to assert a claim against the Fund, assuming again, they have exhausted all other legal remedies. Conversely, if something is wrong with their condominium or townhome which under state law or their CCRs falls under the jurisdiction of the homeowners' association, then it would be incumbent upon the homeowners' association to assert that claim. I think that is taken care of in section 3, subsections 1 and 2.

Chairman Conklin:
You may not be able to answer my next question. I am sure the fees associated with the Fund come from the builder somehow. My question is, when homes that are excluded from this are being built, are fees being attached? If so, then why are homeowners not eligible for the money out of the Fund?

Scott Canepa:
I do not have the answer to that question.

Assemblywoman Gansert:
I am looking at section 7 of the mock-up which removes the requirement to obtain a judgment in any court of competent jurisdiction before you go to the Board. It was not in the original bill. The way I am reading this bill, you can go straight to the Board if you have a problem versus first trying to get a judgment in court. Is that the way you read it?

Scott Canepa:
I agree with you. That was never requested, and I do not know why it was done. That needs to stay in. It is my understanding that under current law a claimant can either come to the Board to make a claim against the Fund by virtue of having obtained a judgment in a court of law which they cannot otherwise execute upon, or make a direct claim against the Contractors Board, which is then reviewed by the Board and either determined to be eligible or not. To the extent that it was taken out by drafting, that needs to be put back in.

Assemblywoman Gansert:
Originally, in the first draft, "residential" was taken out as far as defining a contractor, but now "residential contractor" is in. So perhaps it goes back to the question that was being asked before: Who, by definition, will be putting money into the Fund and then who can get it out? If you limit it to residential

contractors putting money into the Fund, then some claims would be paid by contractors who had not contributed to the Fund.

Scott Canepa:
Yes, I believe that has been corrected. When the bill draft first came out, it eliminated "residential" which would have required commercial contractors to contribute to the Residential Recovery Fund, and that did not make any sense. So, drafting has now put it back: that the contributors to the Fund are solely residential contractors. But it still begs an answer to the question the Chairman asked, and I am not in a position to answer that question.

Chairman Conklin:
Are there any questions from the Committee? I see none. Is there anyone else wishing to testify in support of A.B. 215? I see none. Is there any opposition?

Keith Lee, Legislative Counsel, Nevada State Contractors Board, Reno, Nevada:
Present with me today are Margi Grein, the Executive Officer of the Nevada State Contractors Board, and Bruce Robb, the Legal Counsel for the Board. Also present in Las Vegas, and prepared to testify on the procedure for receiving an adjudicated claim, should that be of interest to the Committee, is George Lyford.

As Mr. Oceguera stated in his presentation, the Residential Recovery Fund was established by the 1999 Legislature by Assembly Bill No. 636 of the 70th Session. We began administering claims under that Fund in 2001. From that date until the present we have processed in excess of 800 claims and adjudicated over 650 of those claims and have allocated more than $5.8 million to individuals in the community who have made claims against the Fund. We have reviewed the legislative history of 1999, and we believe it was never the intent that this Fund be applied to anything other than a single-family residence for those who could not or did not want to hire a lawyer. I believe there were some statements with respect to multi-family units, and those were believed to be better taken care of through the constructional defective issues we were working through in that session.

Nonetheless, I would like to make a few points. Our major concern is that if we open up the Residential Recovery Fund to an additional group of individuals it would create the potential for bankrupting the Fund. Assemblywoman Gansert raised the issue of who contributes to this Fund. Right now a residential contractor as defined in statute who essentially builds residential homes contributes to the Fund. That was the definition in 1999. Based upon that definition and based upon the group of individuals this was meant for—those people who owned residential homes—we developed a fee structure by which

they pay. A residential contractor pays an initial application amount, and every biennium on the renewal of his license he pays a certain amount. To answer your question, if we were to expand the number of claimants, we would have to go back and revisit the amount of fees the residential contractors would have to pay. This is not a good time to do that.

If I am a single-family residential owner and I have a claim against a contractor who has left town and has no money, the most I can get for any malfeasance or misfeasance by that contractor on my house at the current time is $35,000. The $400,000 cap is a lifetime cap against a particular contractor. If claims in excess of $400,000 are alleged against a particular contractor, the total amount allowed against that particular contractor would be used up. If another claim came in after that, the homeowner would get nothing. I point that out because I understand the proposed amendment essentially caps the amount that any homeowners' association could make at $400,000. Consider this example: one contractor is involved, a $400,000 claim is made against that contractor, the claim is adjudicated in favor of the homeowners' association, and the homeowners' association receives $400,000. If you or I come in the next day to file a claim against that contractor, we are not entitled to any recovery even though we would have been entitled to $35,000 because the contractor has already reached his $400,000 cap. There is no source of recovery for you or me as the single-family homeowners.

I live in what is defined under NRS Chapter 116 as a planned community. That is a subset of a common-interest community. We have a homeowners' association. I own my home. I do not share ownership with anybody. But, we have certain common areas that are administered by the homeowners' association. For instance, we have a large pond and some landscaping which are appurtenances as I understand the law. As the bill proposes, the homeowners' association can collect for damages to appurtenances. If I have a problem and have a $35,000 claim to make against the Recovery Fund, and my homeowners' association has a judgment against the landscape and pond person in excess of that, there could be two claims made against the Fund. In essence, if I as an individual homeowner in a planned community make a claim of $35,000, and if it happens to be against the same contractor and the homeowners' association claim exceeds $400,000, where are the priorities?

Ms. Grein has prepared a fiscal note (Exhibit D) which has been distributed to the Committee.

Chairman Conklin:
Are there any questions from the Committee?

Assemblyman Horne:
You interpret the $400,000 cap as being a onetime, finite amount for a given contractor. So, if a homeowners' association drains that $400,000, and another homeowners' association has a separate claim two years after the first claim, you interpret this to mean the second association would get no recovery against that contractor. I see the $400,000 as for that common-interest community; it has nothing to do with any harm that this contractor may have done to another common-interest community. Would your suggestion, if we move forward with this, be to make that cap only per incident? If we do have a bad actor, I do not think they should get off the hook just because they have paid out $400,000 once, and they never have to pay it again.

Keith Lee:
I was speaking to the current law. The current law caps the total amount of recovery by any number of single-family homeowners. If each of us had a $35,000 claim against a single contractor, the Fund's liability with respect to that contractor is $400,000. Once the Fund has paid $400,000 in claims, we cannot entertain the additional claims against that single contractor.

Assemblyman Horne:
Why could you not go after that contractor for subsequent defects if that $400,000 was reached?

Keith Lee:
That is my understanding, and I looked at my legal counsel and he agrees with me. The maximum liability the Recovery Fund has to residential homeowners for a single contractor is $400,000.

Chairman Conklin:
Are there any questions from the Committee?

Assemblywoman Buckley:
Typically, who builds condominiums? Are they residential contractors or commercial contractors, or is there a contractor with a certain limit?

Keith Lee:
I do not know the answer. Perhaps Ms. Grein could answer.

Margi A. Grein, Executive Officer, Nevada State Contractors Board, Henderson, Nevada:
It is a combination of both. Normally on large commercial projects it is a commercial contractor who builds the condominiums.

Assemblywoman Buckley:
I think we have to look at that. We do not want contractors who do not build condominiums to have to contribute. On the other hand, if commercial contractors are building them, they should contribute. We need to explore that a bit further.

[Vice Chairman Atkinson assumed the chair.]

Vice Chairman Atkinson:
Are there any questions from the Committee? I see none.

Margi Grein:
[Spoke from prepared testimony (Exhibit E). Also distributed a "Residential Recovery Fund Report" (Exhibit G) and some statistical data (Exhibit F).]

To answer one question concerning how much is paid into the Fund, we currently have 8,795 residential contractors with a limit of less than $1 million who pay $200 every biennium for a projected biennial assessment of $1.759 million. For limits above $1 million but less than unlimited, we have 1,249 residential contractors who pay $500 every two years and that generates $624,500. We have 709 unlimited residential contractors who pay $1,000 every two years for a total of $709,000. The projected biennial amount generated by that group of 10,753 is $3,092,500.

As of December 31, 2008, the Fund balance was a little less than $3.1 million. As of the end of February 2009, we had approximately $2.8 million in the Fund, and that does not include the pending claims.

[Continued with prepared testimony.]

Vice Chairman Atkinson:
Are there any questions from the Committee?

Assemblyman Horne:
You said the towers at CityCenter would fall under NRS Chapter 116. Why would they be under that chapter?

Margi Grein:
Because that project includes hotel, hotel condominiums, condominiums, gaming, and retail, it would fall under the condominium definition and come under NRS Chapter 116.

Assemblyman Horne:
I need some clarification on that point.

Margi Grein:
It is because it is multi-use.

Assemblyman Horne:
You made some comments on the bill referring to contractual agreements; I notice the bill language has been changed to an "agreement," which implies it need not be a "contract." It could be an oral agreement. Do you anticipate that type of oral agreement being included in the ability to file claims?

Margi Grein:
I cannot answer for the sponsor of the bill. It might better be directed to him.

Assemblyman Horne:
You are testifying on why you think this bill is bad, and I am asking if that area would be covered.

Margi Grein:
We believe it would open up any type of agreement, whether oral or written.

Assemblyman Atkinson:
We will have our legal staff research that point and get the answer to you.

Assemblywoman Buckley:
Let us assume the language was refined so that it did not include any of the extreme examples you cited and assume the premise is correct that residential condominium owners who have bankrupt contractors should get some help. How would you construct it? Homeowners' associations have responsibilities for ceilings, walls, and common areas. You would not want them to crowd out the individual homeowner, but perhaps they could have a proportionate claim. Perhaps they would have the same rights as homeowners; maybe they could go up to a certain amount that is not claimed by homeowners and then take a proportionate interest. If the Legislature was interested in assisting individuals in that spot, how would we draft it, and then how would we handle the fees? What would concern me the most about the fee structure is no one is building right now, no one is building condominiums, and no one can get financing to build anything right now. But you do not want the burden to fall on the existing contractors, who have managed to keep their doors open while they do not have any business, and we may have some claims that have built up over time. How would you deal with that? How would you estimate how many projects have gone "belly up?" Some contractors may get attorneys, they will receive

judgments, they will be paid, and they will not go bankrupt. That narrows down the pool substantially. How would you approach any of those questions?

Margi Grein:
A thought that has come to mind is to have a separate recovery fund for homeowners' associations, funded by homeowners' association dues.

Assemblywoman Buckley:
Why would you not want it funded by contractors who built projects like that?

Margi Grein:
My concern is the funding that it would take for the additional revenue to pay out assessments. Perhaps Mr. Lee or Mr. Robb has some ideas.

Assemblywoman Buckley:
What is that based on? Is it based on bankruptcy of builders who built condominiums? How did you arrive at your numbers?

Margi Grein:
Our current number of applications and licensed contractors has decreased substantially. In the last two months our applications have decreased approximately 24 percent from 2007 to 2008. Our money-owing complaints, on the other hand, increased by 87 percent. Typically, these are contractors who do not have the financial wherewithal to continue. We see this trend continuing for the next few years. We are trying to manage and deal with a decrease in our application fees and renewal fees. As those numbers go down, so do the assessment fees that we impose on the licensed residential contractors.

Assemblywoman Buckley:
So, your fiscal concern is that you are not getting the revenue in, because contractors went out of business, and at the same time there are a rising number of claims; is that correct?

Margi Grein:
Correct.

Assemblywoman Buckley:
But, that has nothing to do with what you feel is the likelihood of claims from condominiums, does it, or did you do that analysis for your fiscal note?

Margi Grein:
No, the fiscal note analysis was based on additional claims and how much it would take to investigate them. Although we do recover some of those costs from the Recovery Fund, we can recover a maximum, I believe, of 10 percent for costs and advertising from the Fund. If our costs exceed that amount, the Contractors Board would still conduct the investigation, and we would eat those additional costs.

Keith Lee:
May I also attempt to answer Speaker Buckley's question? One of the things we considered was creating a separate fund called the homeowners' association residential fund. We were uncertain what the funding sources would be. If that is the direction in which we may want to go, we should do it the same way we did the Recovery Fund in 1999. You will recall it became effective and we started charging assessments for two years before we actually started processing claims. We had a couple of million dollars built up in the Fund by the time we started processing claims. That made sense to us. My recollection of how we set up the Recovery Fund was that claims were prospective, from and after the date of the act, which was October 1, 1999. Perhaps you might want to have a cutoff date so that we can work with various individuals that might have a better idea than we, as to how many potential claims might be out there from some given date. At least then we could try to perform as good a fiscal analysis as is possible.

Vice Chairman Atkinson:
Are there any questions from the Committee? I see none.

Walter Bruce Robb, Counsel, Nevada State Contractors Board, Reno, Nevada:
The bill and the mock-up that we received today would allow a homeowners' association to recover $400,000 from the Fund. If you had just seven homeowners' associations come to the Contractors Board, the Residential Recovery Fund would be devoid of funds. That would not allow us to make the payments to the homeowners, which have been very successfully made over the past several years. We are very happy to implement the legislative desire to expand claimants against the Residential Recovery Fund, but a candid analysis of A.B. 215 will show you that the Fund will be gone very quickly. Currently we have $2.8 million. If you have seven claims from homeowners' associations of $400,000 each, it is a backbreaker. All of your constituents have appreciated this Fund. We are willing to work with anyone if you want to expand it. We do not think you should treat a homeowners' association differently from another claimant. We limit our claimants to $35,000, and to treat a homeowners' association differently, by letting them recover more than ten times that amount, does not make sense.

Vice Chairman Atkinson:
Are there any questions from the Committee? I see none. If there are others wishing to testify in opposition, please take the witness table at this time.

Keith Lee:
Mr. Vice Chairman, Mr. Lyford is in Las Vegas; he is the Director of Investigations for the Contractors Board. If there is any interest from any member to find out how we adjudicate a claims process against the Recovery Fund, he would be the one to answer.

Marlene Lockard, representing Subcontractors' Legislative Coalition, Reno, Nevada:
The Subcontractors' Legislative Coalition is a group of union and nonunion laborers and contractors. We are here to express the concerns that have been outlined by the State Contractors Board. We are very concerned on behalf of subcontractors of the potential impact of fee increases to a recovery fund during these economic times. Mr. Richard Peel was here to testify on behalf of the Coalition as well, but he had to leave to testify on one of our bills in another committee. I apologize on his behalf.

Vice Chairman Atkinson:
Are there any questions from the Committee? I see none.

Gary Milliken, representing Associated General Contractors, Las Vegas, Nevada:
I want to express our concern about the Fund and about the viability of that Fund. The main question that I had was concerning the mixed-use areas. We have these mixed-use areas where there is residential and commercial blended into one area. How would you handle some of these situations with the common area, and who is responsible for the common area?

Vice Chairman Atkinson:
Are there any questions from the Committee? I see none.

James Wadhams, representing Southern Nevada Home Builders Association, Las Vegas, Nevada:
We are not very numerous in this day and age because we are not pulling any permits, and most of the home builders have disappeared from the map. We were here in 1999 when this program was spearheaded by now Speaker Buckley. We have supported the program, and we are in the program, so technically, I am not opposed. The concern we have is that some of these definitions make it very confusing to me. I am not entirely sure, even after the testimony from the Contractors Board, who is a residential contractor and who is not. I know my vertical contractors are, but I am uncertain about the

horizontal contractors. If they are building a place where people live, are they residential contractors even though they also do other types of commercial construction? I am not sure who is in and who is out. Historically, only vertical contractors have been in.

The second area of concern is in section 3 of the bill. There is some changing of the definitions. I understand there is a concern that "single-family residence" may have been construed as an independent, stand-alone entity; yet I think the definition change indicated multi-family residences and the owners of multi-family residences, for instance, apartment houses. I am not sure that was intended by the original legislation. Some of these concerns need to be looked at. We are concerned about expansions and the bill being an increased burden on the smaller contractors. I think that would send the wrong message to the market and the wrong direction to those still in the market.

Vice Chairman Atkinson:
Are there any questions from the Committee? I see none.

Jeanette Belz, representing Associated General Contractors, Reno, Nevada:
We appreciate working with Assemblyman Oceguera. It was one of our members who brought up the issue about all the contractors being involved, and we represent all types of contractors including those who build highways. We appreciate the proposed amendment to this bill. We also have concerns about the mixed-use projects and how this all fits together. We still have issues.

Vice Chairman Atkinson:
Are there any questions from the Committee? I see none.

George Lyford, Director of Investigations, Nevada State Contractors Board, Las Vegas, Nevada:
I am here to answer any questions you might have. I have been administering and assisting in administering this Fund for the last seven years on a day-to-day basis. What have helped me are the clear definitions from prior legislation in weighing these claims. I have seen homeowners submit claims that were excessive and invalid, and I have seen attorneys submit default judgments that were excessive. I have been able to resolve most of these issues by going to the specific warranty and the statute and the legislative history. One of the things that is critical in the day-to-day operations is clear definitions of what is referred to. If we are taking out single-family residences, we need clear definitions of what type of residence is included. We need definitions that specifically include or exclude. It will help in administering the Fund. This bill appears to eliminate the definition of "qualified services." If that happens, we

definitely need a definition of what "services" are so we can administer the Fund properly.

The bottom line is: we need clearly defined definitions and legislative history to implement whatever changes are put into the law. If you would like I can go over the investigative process or answer any questions you have.

Vice Chairman Atkinson:
Are there any questions from the Committee?

Assemblyman Oceguera:
I wonder if you could go through, for the Committee, what it takes to get a claim paid.

George Lyford:
When a claim initially comes in, it is opened and assigned to an investigator. A copy of the claim is sent to the contractor, and a confirming letter is sent to the homeowner. The case file is reviewed with the case investigator to determine if the appropriate documents are provided which support the claim. These would be copies of the original contract, change orders, credits, refunds, or discounts. Oral agreements would be considered, but they are extremely difficult to validate. We require copies of the fronts and backs of all cancelled checks payable to the contractor, subcontractors, and suppliers. We require proof of cash payments and all signed receipts from the contractor, a copy of any liens, and certified copies of all judgments.

The homeowner is contacted and advised about what documents are required. A job site inspection is conducted by the investigator to validate the scope of the work in the original contract, the quality of the work performed, and the need for repairs. If the work has already been repaired, the investigator will review the invoices of the new contractors and insure there are no enhancements from the original contract. The homeowner is requested to provide three bids from licensed contractors to repair all validated work. Repair bids are examined by the investigator to be sure they are for the validated items only and do not include enhancements, improvements, work outside the scope of the original contract, or upgraded services and materials. Bids from unlicensed contractors are rejected.

The investigator prepares a summary report of the claim. These reports are approved for presentation to the Residential Recovery Fund. The contractor is sent a notice of a hearing and given the opportunity to contest the claim. The investigator reviews the case with the homeowner and advises the homeowner of the staff recommendations. The Residential Recovery Fund Committee

meeting is conducted bimonthly, the facts of the cases are provided, and the homeowner and the contractor have the opportunity to present their arguments. There are about 25 or 30 cases in each meeting. The payouts total approximately $200,000 to $250,000 per meeting.

The Residential Recovery Fund makes an award, and issues a decision and order confirming the award. The decision and order is issued within ten days of the date of the hearing. The accounting department is provided a copy of the decision and order and prepares the payment checks. The home owner is contacted by staff and the homeowner receives his check approximately 30 days after the date of the decision and order. The order is then sent to the Controller's Office and forwarded for collections. That is the overall process for each claim.

Assemblyman Oceguera:
Does the Contractors Board require insurance?

George Lyford:
Not to my knowledge. It is not a requirement of licensure.

Assemblyman Oceguera:
Can they require insurance?

George Lyford:
I would have to check with legal counsel.

Walter Bruce Robb:
The Contractors Board does not require insurance; however, it does require its licensees to show financial responsibility. They have to provide us with financial information, and if it is acceptable and creditable it would justify the limit that they have. They also have to post a bond as required by the Contractors Board as a precondition to licensure.

Assemblyman Oceguera:
We are looking at the original bill, and the mock-up has changed it considerably, but people are still talking about the original bill. The original premise here is: why should it be any different if I live in a townhome or a condominium, rather than a single-family dwelling? I should be able to access this Fund. Perhaps there is a different way of looking at it. We might require insurance or something along those lines. I looked at the numbers that you provided, and the numbers that you give in testimony are the "Armageddon" numbers. If everyone received the maximum amount, this would happen. If you look at the number of claims that you have had over the last seven years and then divide it

by the amount paid out, it is only a few thousand dollars per claim. It really is not the "Armageddon" type of situation that is being stated here today. I am willing to work with those opposed to the bill, but I think it is just a matter of fairness.

Vice Chairman Atkinson:
Are there any questions from the Committee? I see none. Is there anyone wishing to testify further? I see none. The Majority Leader will work with interested parties to come to some solution on this bill and bring it back to this Committee when the issues are resolved.

We will close the hearing on A.B. 215.

[Chairman Conklin resumed the chair.]

Chairman Conklin:
We will open the hearing on Assembly Bill 224.

Assembly Bill 224: Revises provisions relating to unfair practices in settling insurance claims. (BDR 57-923)

Matthew Sharp, representing Nevada Justice Association, Reno, Nevada:
I would like to briefly explain this bill. I think this is an important piece of legislation. This bill attempts to establish two points, the first of which is if you have a dispute with your own insurance company over a claim, the insurance should pay the amount that is not in dispute. Let me give you an example: if you lose your home in a fire and your contractor says the home will cost $250,000 to rebuild, but the insurance company says it will cost $150,000. There is no dispute over the $150,000. Consistent with the premium you paid, we are saying that the insurance company should pay the undisputed $150,000. If they do not pay and put you in a position that you have to file suit, not only over the $250,000 but also the $150,000, they should pay your attorney's fees and costs. That is what this bill does.

I would suggest to the Committee, as I outlined briefly, this is not a major change in the law. This is simply a codification of what already exists in the law. When you pay a premium for your own insurance the law says that you enter into a confidential relationship with that insurance company. So, when you file a claim, the insurance company has a duty of good faith and fair dealing to consider your interests the same as their own. Consistent with that obligation is the insurance claims handling process for your own insurance company. It is not supposed to be an adversarial situation. Unfortunately, it does sometimes become an adversarial situation. Over time this Legislature and

the insurance industry, as a whole, have adopted certain standards, and some of those standards are referenced in this bill at *Nevada Revised Statutes* (NRS) 686A.310. This is a legislative pronouncement on certain acts which are unfair. This bill is to recognize that when you have a dispute, the best way to resolve that dispute is to define it. The best way in a non-adversarial situation is for the insurance company to pay what is owed, when they owe it. That is the promise they made. With that in mind, I do not think we are changing the law to any real extent. We are simply codifying that which already exists within the industry.

Let me address what I understand the insurance industry's concerns to be. First, there is the issue of attorneys' fees which is found in section 2 of the bill. As the law currently stands, if an insurance company did not pay your claim when they should have, you have a right to sue them for a number of things, one of which is a violation of the unfair claims practices. That is in subsection 1 of the bill. Subsection 2 of the bill currently says that if you sue that insurance company they are liable for any damages. Any damages have always included attorney's fees, so with this bill we are simply clarifying that. If you have to file suit against your insurance company to get what you contracted for, it is only fair the insurance company pay your attorney's fees. This is out of fairness. You should understand that there are instances where disputes only involve $3,000 or $4,000. If a consumer does not have a remedy for attorney's fees, they are priced out of the market. For example, if you are in a car accident and the insurance company says it will cost $8,000 to repair your car and you say it will cost $10,000, you come to me over a $2,000 dispute, and you are likely to be priced out of the market. It is not economically feasible to take on that case.

The second point I want to make is that right now the law places the consumer at risk for attorney's fees. Let me explain that. If I represent a client and we file a lawsuit against the insurance company, that client can be at risk, if they lose, for the other party's attorney's fees. This Legislature, over the years, has said if you file a frivolous lawsuit, you will be liable for the attorney's fees of the other side. The consumer is at risk.

There is another procedural issue. For example, there is a dispute between $100,000 you say is owed under your claim and $50,000 the insurance company says is the total. Right now your choice is to either file suit or accept the $50,000. When you file suit, the insurance company will serve you with what is called an "offer of judgment" for that $50,000, which means you are then at risk, if you do not receive a judgment for more than $50,000, for the insurance company's attorney's fees and costs. I want to level this playing field so that everybody is being treated fairly.

There were some questions about the amount of the attorney's fees. That is a legitimate question. This should not be, nor is it intended to be, a gravy train for attorneys. In terms of reasonable attorney's fees, that is something we are willing to consider. We would also consider something like "attorney's fees to be determined by the court." That seems to be a reasonable solution so that both interests are protected.

As a final matter, I would like to make the point that the way the bill was drafted it technically applies to insurance companies, and we want to be clear that we will be offering an amendment to exempt the health insurance companies from that provision. The reasoning for that is the "undisputed issue" does not come up in the health insurance field.

Chairman Conklin:
If I have a $100,000 claim because I had heart surgery, the insurance company does not pay any of it because they denied $50,000 of the total claim, and I file a suit, I pay my own attorney's fees if I lose my suit, for whatever reason. Do I also pay the hospital's attorney'' fees, or is that only in the rare case?

Matthew Sharp:
I assume, in your example, you are suing your insurance company?

Chairman Conklin:
Correct.

Matthew Sharp:
If you lose that case, you might have to pay the other side's attorney's fees. It is not mandatory, but it is considered. In your example, the insurance company says it will settle your case for $50,000. You have the right to accept or reject that offer. If you get $49,000 from a jury, you did not beat the "offer of judgment," and the court could award attorney's fees against you. That is the kind of risk shifting I am talking about.

Assemblyman Settelmeyer:
How often are those attorney's fees awarded?

Matthew Sharp:
I would not agree with the word "rare." It is rare to end up in a trial these days. Usually the case is settled beforehand. It is a tactical determination by the attorney whether they want to submit the fees to the jury. My experience is that courts will instruct the jury that they could award attorney's fees.

Assemblyman Settelmeyer:
I would like to rephrase my question. How many times have you seen it awarded?

Matthew Sharp:
I would have to say three to five times, maybe more. I cannot tell you definitively. When cases settle there is a component that one would consider to be attorney's fees.

Chairman Conklin:
Are there any questions from the Committee? I see none. Is there anyone wishing to testify in support of this bill? I see none. Is there anyone opposed to A.B. 224?

Scott A. Glogovac, Private Citizen, Reno, Nevada:
I have practiced law in Reno since 1979. Since that time a very large percentage of my practice has involved the representation of insurers. I am not here today on behalf of any particular insurance company, but to offer some points about this bill that I think might be instructive to the Committee.

I respectfully disagree with Mr. Sharp's position on this bill, particularly paragraph (q). That does change existing law. The disagreement that I have with Mr. Sharp is at a conceptual, policy level. I agree with him that in the first party context, meaning a context where you have a dispute with your own insurer, the insurer has an obligation to treat you, the insured, fairly and in good faith. But nowhere in the existing law of this state, whether in regulation, a statute, or a case decided by the Nevada Supreme Court, has it been held that an insurer must pay the amount of an offer that was made but that was rejected. In effect, that is really what this bill seeks to do. It seeks to place a burden on the insurer who makes an offer. It seeks a rule of law that imposes upon an insurer an obligation in the first party context to pay the amount of an offer even though that offer has been rejected. I can tell you from my own personal practice, and I have litigated this issue many times, no court has ever held that, to my knowledge.

Chairman Conklin:
We might have a series of questions, so I may interrupt you from time to time. My first question is, I am unclear on which side of this bill you are speaking. The first provision says, "Denying the payment of any amount due pursuant to a provision of the first-party coverage under an insurance policy if that amount is not in dispute." I have a $10,000 claim and $8,000 is good and $2,000 is in dispute. That is simply saying you must pay the $8,000 that is not in dispute.

You cannot hold up the whole $10,000 claim for the $2,000 that is in dispute. You are saying that is not covered?

Scott A. Glogovac:
I am saying the law does not mandate that the rejected offer be paid. I am disagreeing with Mr. Sharp on that.

Chairman Conklin:
Okay, so then we have a policy decision to decide if it is fair that if I have paid for insurance to cover something and something is not in dispute, the insurance company can withhold that from me, even though it is not in dispute, because some other part is in dispute?

Scott A. Glogovac:
It is assuming that the amount that was offered is not in dispute, and that is one of the real problems with this bill. The bill does not define what is and what is not in dispute. A first-party coverage that is very common—and this issue is commonly litigated—is known as uninsured or underinsured motorist coverage. If you were in an automobile accident and you sustained injuries, if the person who caused that accident had only minimal insurance, and it did not compensate you for all your damages, you could make a claim through your own insurer for what is known as underinsured motorist coverage, asking your own insurer to make up the difference. When your insurer evaluates that claim, one part of that evaluation is pain and suffering, and general damages, and the loss of enjoyment of life. If there were 15 lawyers in this room and you gave them all one set of facts regarding a particular injury claim, they would all come up with different ranges of values. There is no precision in the claim handling process in many claims. An offer to settle is made by an insurer because they believe it is a fair offer based on the information they received. An offer is not a concession that it is an undisputed amount.

I think the point I want to make above all else is if this becomes the law, the claims adjustment process in this state will be unfairly tilted. If you look at the various provisions of the Unfair Claims Settlement Practices Act which this bill seeks to amend, they and the bill are designed to do one thing and that is to make claims and settle efficiently, promptly and reasonably. By adding this provision into the bill you actually cut against that purpose and process. Insureds are going to get a guaranteed amount of money up front, and then what incentive do they have to settle? They will take it up front and continue to pursue the process. Claims do not settle that way. On the other hand, you put insurers in the untenable position of knowing that if they make an offer and it is rejected, they will have to pay that. The insurers will begin to look at how they evaluate the case and whether they want to offer the top end of their

range of value. I think this builds in incentives that we probably do not want in the claims adjustment process.

I have been involved in it for 30 years, and by and large the process works pretty well. This has tilting possibilities in it, where it gives one side too much strength in the bargaining position, and in my view it will be a detriment to the settlement of claims. I am not speaking on behalf of any company or any entity. I am speaking on behalf of myself as someone who has seen these disputes for years.

Chairman Conklin:
I assume you represent claimants?

Scott A. Glogovac:
No. I represent insurers.

Assemblyman Horne:
Part of your argument is that the way this bill is written you will have to pay an offer that has been rejected. That is not a fair definition of this bill. We are talking about undisputed amounts. I understood your underinsured motorists scenario that you painted, but there are different situations. For instance, that same automobile accident, if there are $10,000 in medical expenses that are not covered, let us say the insurance company makes a $15,000 offer to include that pain and suffering. That $10,000, would you agree, is not in dispute? You address a fear of tilting, but under current practice, you can make this offer and you can tilt the field by saying that you will withhold the total amount until it is completely litigated or we settle.

Scott A. Glogovac:
I do not agree that the $10,000 medical bills would necessarily not be in dispute. If someone is in an automobile accident and they end up with a low back, neck strain, classic whiplash injury, but three years prior to this accident they sustained an on-the-job injury to the back and neck, the medical bill might be in dispute. Frequently in these cases you have floating around in them preexisting issues or causal relationship issues. Sometimes insurers in the best interest of moving a claim to resolution will not contest the medical bills, but if the case were to go to trial or before an arbitrator, they would be in a position to contest the medical bills. There have been many cases where lower offers have been rejected and juries have awarded below the medical expenses.

Assemblyman Horne:
But that is a gamble that insurers take as well. When you go into litigation both sides are taking a calculated risk. That is why you give offers of judgment.

Scott A. Glogovac:
Right, and by the way the offer of judgment rule works both ways. Insureds' lawyers in litigation can do the same thing that Mr. Sharp indicated that an insurer can do. The insured's lawyer can serve an offer of judgment on the insurance company for $50,000, and if the case goes to trial and the jury comes back with an award of $65,000, then the trial judge has discretion to award attorney's fees against the insurer as well. That is a risk shifting mechanism that is available in all kinds of cases; medical malpractice, real estate disputes, or any case. That is in the Nevada Rules of Civil Procedure and is not unique to insurers at all.

To restate the issue, in every situation where an insurer makes an offer and that offer is not accepted, the next thing that insurer is going to get is a letter from the insured's lawyer saying, "You offered $15,000, that is undisputed, pay it pursuant to whatever NRS this bill would become." That would eliminate risk on one side because now you have a party that is receiving some money, and that money funds the right to try to get additional funds at trial. That is essentially what this does. When I say we tilt the playing field that is what I have in mind. It promotes a bad policy for insurers who now would understand that any offer they make would be subject to this sort of argument that the offer is an undisputed amount. I think there is that risk.

Assemblyman Goedhart:
I have another example. You have a house that was burned down and the offer was made by the insurance company of $150,000. So according to this proposed language a person could take that check for $150,000 and then take the insurance company to court and say they felt that the $150,000 was agreed upon, but they want $160,000. If they took it to court and it settled for $155,000, and there was $10,000 or $15,000 spent on attorney's fees, because they received $5,000 more than the original offer, then the insurance company is also liable for all of the attorney's fees.

Scott A. Glogovac:
In that example, yes.

Assemblyman Goedhart:
What would happen if they took it to trial and the jury only gave them $140,000? In that case, they already are locked in to your offer, right?

Scott A. Glogovac:
If the jury comes back with an award that is lower than what was paid?

Assemblyman Goedhart:
What was originally offered and paid.

Scott A. Glogovac:
There is nothing in this bill that provides for any remedy to the insurer on that. I know of no legal avenue that would allow the insurer to then go back to that insured and claim the $10,000.

Assemblywoman Buckley:
I have not drafted an offer of judgment in a while, but I thought it said "this offer is not to be used as evidence and is for compromise purposes only?"

Scott A. Glogovac:
Yes.

Assemblywoman Buckley:
So, if that is true, and if we could clarify even further to be sure that the offer could not be used as evidence, I assume that would take away the argument you just made.

Scott A. Glogovac:
No. The offer of judgment is something that is done prior to trial. Either side can serve the formal offer of judgment. The jury never hears about the offer because it is an offer of compromise and does not come into evidence. When the trial is over, a verdict is rendered, and a judgment is entered in favor of whomever. If the party who prevailed at trial did better than the offer of judgment, a motion is made to the court for recovery of attorney's fees. The offer of judgment provision, in my view, is not applicable to our discussion here today.

Assemblywoman Buckley:
I thought what you were saying was that if we use an offer of judgment, which is a fee-shifting tool that should be available to both parties, then that could be used against us with this provision. Perhaps you did not say that.

Scott A. Glogovac:
No. I did not mean to imply that the offer of judgment provision has any impact on what this Committee is considering here today. I was simply addressing Mr. Sharp's comment about the offer of judgment being a device available to insurers. I was merely pointing out that it is available to all parties in any civil damage action.

Assemblywoman Buckley:
Okay. My take on this is that I do see people who are desperate when something happens. In the fire case, for instance, I am a homeowner and my house burns down. I think my damages are $200,000; the insurance company thinks they are $100,000. I am destitute, so I would like to at least get my $100,000 and argue about the other $100,000.

Scott A. Glogovac:
As I view this bill, it is not limited to this proposed amendment. It is not limited to situations like that. It addresses any kind of first-party claim including the uninsured or underinsured motorist claim type that I mentioned as well as property damage claims. There are already significant provisions in the law that strongly encourage insurers to do the right thing in any kind of claims context. If you have an insurer who has undervalued a property damage loss, and that has prevented the claim from being resolved, the insurer runs the risk of being sued for bad faith and then having to pay, in addition to whatever claim amount is due, extra contractual damages for financial distress and other things that the insured endured during the claim adjustment process.

Assemblywoman Buckley:
But, that happens so infrequently, because by the time someone is done litigating the case for five years, and they finally settle, they want to move on. The number of cases where we actually have bad claims is probably infinitesimal.

Scott A. Glogovac:
You mean the number of filed bad faith claims?

Assemblywoman Buckley:
Correct. How many, would you say, do we have in Nevada in a year?

Scott A. Glogovac:
I am probably defending in excess of 50 now. I would say in the last 20 years I have defended in excess of 500 insurance bad faith claims.

Assemblywoman Buckley:
Really?

Scott A. Glogovac:
They are frequently filed. The point that I was going to make is that if an insured has a dispute with his insurance company, when the insurer is sued, it includes not only a claim to recover benefits under the policy, but also the bad faith claim which is almost always added in with it. One thing that you are

correct on is that most of the insurance cases settle. It is fairly rare for an insurance bad faith case to go to trial. They settle, and the settlement takes into account what is owed under the policy and whether there are any extra contractual damages that should be paid because of the claim process. That is often part of the settlement.

Assemblywoman Buckley:
Those 50 or so cases, those are cases where the person is still trying to seek reimbursement and they add a bad faith cause of action? Or, is it after a case has been settled and it is solely for bad faith?

Scott A. Glogovac:
The majority involve an open claim.

Assemblywoman Buckley:
The number I was referring to was cases in which there is no ongoing dispute.

Scott A. Glogovac:
I would agree. Probably one-third of the matters I am handling now involve paid claims.

Chairman Conklin:
Are there any questions from the Committee? I see none.

Scott A. Glogovac:
I did want to make one additional comment. It is on the attorney's fee provision, and what I have been addressing so far is the proposed paragraph (q) to subsection 1.

Subsection 2 is the attorney's fee provision that is proposed to be added to this bill, and in a way I agree with Mr. Sharp that this provision does not conflict with existing law. What I mean by that is if a case goes to trial arising out of an insurance dispute, at the end of the case if it is being tried before a jury, the judge gives instructions on the law telling them what the law is and giving them the option of what they can find. It is common in insurance cases for the trial court to give an instruction telling the jury that in the event the jury finds the insurance company committed bad faith or violated one of the statutory provisions, they could award damages that would include attorney's fees. It is something that is already instructed to juries anyway. I believe the section is not necessary. It should be left to the discretion of the trial judge as to how to instruct a jury and whether that trial judge believes it is an appropriate case to instruct on attorney's fees. Again, it is done in most cases. In fact, there is a project underway before the Nevada Supreme Court right now to draft jury

instructions in insurance cases, and one of the instructions would already comment on attorney's fees. My point is this should not be a necessary addition to the statute.

Chairman Conklin:
Are there any questions from the Committee? I see none. Several people have signed in opposed to this bill.

Robert Compan, representing Farmers Insurance Group, Las Vegas, Nevada:
I know this Chairman and Committee do not like repetitive testimony, so I am going to defer to Mr. Wadhams and Mr. Guild. [Mr. Guild did not testify.]

Chairman Conklin:
Mr. Compan, I have you on the record in opposition.

James Wadhams, representing American Insurance Association, Reno, Nevada:
I have listened very carefully to the testimony of both Mr. Sharp and Mr. Glogovac, and I am still somewhat confused. This bill is interesting because it amends a chapter that has been on the books for a number of years and that I believe is a consumer-friendly section, that being NRS 686A.310. It lists several deadly sins which, failure to adhere to, constitutes bad faith and is independently actionable under Nevada law. I think to a certain extent both Mr. Sharp and Mr. Glogovac have said that. I draw the Committee's attention, particularly in considering some of the scenarios that have been discussed, to page 2, lines 6 through 10, which makes it already a clear violation of Nevada law to compel insureds to institute litigation to recover amounts by offering substantially less than what insurers should. If I am offering $100,000 on a $200,000 loss, I am already in violation of paragraph (f) of the statute.

The other area which is interesting is paragraph (q). I am concerned about some of the scenarios that have been described. I am not sure that the language in the bill addresses that. It says, "Denying the payment of any amount due to a provision of first-party coverage under an insurance policy if that amount is not in dispute." I think what that means is, if we are not disputing the amount and I do not pay it, then I have violated the proposed addition. I have asked the Committee secretary to distribute a section in the existing law (Exhibit H) that deals with casualty insurance, which is homeowners and automobile insurance. It basically says that if you agree to pay a claim and you do not pay it within 30 days, you owe interest. As some members of this Committee are well aware, in the health insurance area we have dealt with prompt payment. This is really the counterpart to the prompt payment law. I would note, by reference, the interest provision in this statute, NRS 99.040, which is not as aggressive as you would find in the health

insurance prompt pay law, one example of which could be found at NRS 695C.185. In any event, we have existing law, on the books since 1991, that says if you have an amount to pay and you do not pay it, you have to pay interest.

If I am reading paragraph (q) correctly, it simply says: not making a payment that you have agreed to pay. That is already in the law in NRS 690B.012.

Chairman Conklin:
If it is your opinion that it is already in statute, then, why are you in opposition to putting it in this bill?

James Wadhams:
I think redundancy is not necessary. It does not become more against the law if it is repeated. I do not believe it adds anything to what we already have. Consider the other scenarios that were talked about, under lines 29 through 32, which cover the issue of failing to settle things properly, where liability has become reasonably clear under one portion of the policy, in order to influence settlements under other portions of the policy. I think that deals with holding off on one part in order to negotiate with the other. In the example that I heard discussed, I am troubled particularly by the notion that if I have a total loss on my car and the insurance company offers me $10,000 and I think it is worth $15,000, the insurance company would now have to pay me $10,000, and then we will negotiate on the remaining $5,000. The negotiations could go on and on. You would have this sequencing of bites of the apple that tends to do exactly what this Committee is trying to avoid, both today and historically. The goal is, get it settled, and get it paid.

I think Mr. Glogovac, in much more eloquent terms, correctly identified that as the purpose of this section being proposed to be amended by A.B. 224. I would suggest that this bill not be processed. We have the law of bad faith which has been well established in this state for the last 20 years. If an insured needs to sue their insurance company, and that happens rarely, the system seems to address the standards for that currently, both in NRS 686A.310 and in NRS 690B.012.

Chairman Conklin:
Are there any questions from the Committee? I see none. Is there anyone wishing to get on the record in opposition to A.B. 224?

Erin McMullen, representing Las Vegas Chamber of Commerce, Las Vegas, Nevada:
We signed in as opposed to this bill simply because we believe it will give rise to a wave of litigation and increased insurance costs which will increase costs for business.

Chairman Conklin:
Are there any questions from the Committee? I see none.

Tray Abney, Director, Government Relations, Reno Sparks Chamber of Commerce, Reno, Nevada, also representing North Las Vegas Chamber of Commerce, North Las Vegas, Nevada:
In the interest of time, I would say "me to" to what Ms. McMullen testified to. I am here on behalf of the North Las Vegas Chamber of Commerce as well.

Chairman Conklin:
Are there any questions from the Committee? I see none. Is there any one else wishing to get on the record in opposition? I see none. We will move to the neutral.

David Goldwater, representing a constituent of Assemblyman Christensen, Las Vegas, Nevada:
We have a very simple problem. The issue is disclosure. A constituent of Mr. Christensen's went to the hospital, was preadmitted, and under that preadmission received services from that hospital, came out of the hospital, and was presented with a bill because that hospital was not in her network. The suggested language we have proposed (Exhibit I) for A.B. 224 is simply to say that insurers need to disclose to the patient, if they are going to do preadmission, whether or not that hospital is in the patient's network. If insurers do that, the hospital would be covered; if they do not, they cannot sue the patient for the bill.

I am willing to work to perfect the language and appreciate your letting me testify.

Chairman Conklin:
The Committee has a copy of your proposed amendment. Are there any questions from the Committee?

Assemblywoman Gansert:
I was looking for a definition of preadmission. Would that be for a scheduled procedure? What happens if you come through the emergency department?

David Goldwater:
This would not apply to emergency cases.

Assemblywoman Gansert:
It would be limited to cases where you schedule an appointment to have a procedure?

David Goldwater:
Correct.

Chairman Conklin:
Are there additional questions for Mr. Goldwater? I see none. Am I to understand you are still working on this proposed language?

David Goldwater:
Yes. I will communicate with you and your staff to make this perfect.

Chairman Conklin:
That is great. Is there anyone wishing to get on the record? I see no one. We will close the hearing on A.B. 224.

Just to give you an update of what is ahead of us, we have approximately 55 bills in our possession that we have not heard. There are nine meetings left. You do the math. Needless to say, some bills are not going to be heard. Those that are heard will have to be done quickly. We are looking at three or four bills per meeting, not counting work session.

[The meeting was adjourned at 3:41 p.m.]

RESPECTFULLY SUBMITTED:

_____
Patricia Blackburn
Committee Secretary

APPROVED BY:

_____
Assemblyman Marcus Conklin, Chairman

DATE: _____

EXHIBITS

Committee Name: Committee on Commerce and Labor

Date: March 18, 2009 Time of Meeting: 1:37 p.m.

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster
A.B. 215	C	Assemblyman John Oceguera	Proposed amendment
A.B. 215	D	Margi Grein	Fiscal note
A.B. 215	E	Margi Grein	Prepared testimony
A.B. 215	F	Margi Grein	Statistical data
A.B. 215	G	Margi Grein	"Residential Recovery Fund report"
A.B. 224	H	James Wadhams	Reprint of NRS 690B.012
A.B. 224	I	David Goldwater	Proposed amendment