MINUTES OF THE
SENATE COMMITTEE ON COMMERCE AND LABOR

Seventy-fifth Session
May 11, 2009

The Senate Committee on Commerce and Labor was called to order by Chair Maggie Carlton at 1:40 p.m. on Monday, May 11, 2009, in Room 2135 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to the Grant Sawyer State Office Building, Room 4412E, 555 East Washington Avenue, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Maggie Carlton, Chair
Senator Michael A. Schneider, Vice Chair
Senator David R. Parks
Senator Allison Copening
Senator Dean A. Rhoads
Senator Mark E. Amodei

COMMITTEE MEMBERS ABSENT:

Senator Warren B. Hardy II (Excused)

GUEST LEGISLATORS PRESENT:

Assemblyman Tick Segerblom, Assembly District No. 9

STAFF MEMBERS PRESENT:

Kelly S. Gregory, Committee Policy Analyst
Daniel Peinado, Committee Counsel
Suzanne Efford, Committee Secretary

OTHERS PRESENT:

Catherine Cortez Masto, Attorney General

Ernest Figueroa, Senior Deputy Attorney General, Bureau of Consumer Protection, Office of the Attorney General
Larry Matheis, Executive Director, Nevada State Medical Association
Tray Abney, Reno/Sparks Chamber of Commerce
Rocky Finseth, PhRMA
Megan Dixon, PhRMA
James Wadhams, American Insurance Association
Ann Nelson, Executive Vice President, Employers Holdings Inc.
Samuel Sorich, Property Casualty Insurers Association of America
David Goldwater, Mortgage Advisory Council; Goldwater Capital Nevada
Joseph L. Waltuch, Commissioner, Division of Mortgage Lending
Stacy Harrop, Santoro, Driggs, Walch
Ron Peterson, Nevada Land Title Association
Jay Parmer, Builders Association of Northern Nevada
Sonja Eckert, Nevada Construction Services
Jerry McGrath, President, Washoe Building Supply
Bill Uffelman, Nevada Bankers Association
Paul Bland
Dan Wulz, Legal Aid Center of Southern Nevada, Inc.
Bill Bradley, Nevada Justice Association
Jon Sasser, Washoe County Senior Law Project
Marlene Lockard, Premier Physicians Insurance Co.
Robert Compan, Farmers Insurance
Michael Geeser, AAA Nevada
Samuel P. McMullen, Las Vegas Chamber of Commerce

VICE CHAIR SCHNEIDER:
We will open the hearing with Assembly Bill (A.B.) 95.

ASSEMBLY BILL 95 (1st Reprint): Revises certain provisions concerning the investigation and prosecution of unfair trade practices. (BDR 52-268)

CATHERINE CORTEZ MASTO (Attorney General, Office of the Attorney General):
We support A.B. 95. I would like to give you a little background on this bill. I brought this bill forward, because in the summer of 2007 my office was engaged in the review of a merger between two private insurance carriers due to concerns that a merger of the two companies would have a negative impact on the people of this State.

I was concerned that a merger would cause a monopoly of the Las Vegas market for certain types of health insurance products such as small groups, commercial, Health Maintenance Organization (HMO), Preferred Provider Organization (PPO), Advantage Care, Medicaid and Nevada Check Up. During the course of my review, I received a letter from the merging parties' local legal counsel arguing that my office did not have the authority under chapter 598A of the *Nevada Revised Statutes* (NRS) to review the merger.

Additionally, I was informed by the Division of Insurance that my office lacked jurisdiction under Nevada law to protect its citizens. The Division of Insurance issued an order reserving the Commissioner of Insurance's right to argue that the Attorney General's (AG) Bureau of Consumer Protection lacked jurisdiction over any aspect of the acquisition.

I was prepared to litigate this issue in court in order to protect the health, safety and welfare of Nevadans; however, we were able to negotiate a settlement. There still was a plausible argument to be made that the AG's authority under NRS 598A has limitations.

Assembly Bill 95 puts this legal issue to rest so that, in many similar actions where the protection of our State's citizens is warranted, my office will not be wasting initial resources to overcome a similar legal challenge. With your approval of this bill, we can continue to act in the best interests of our constituency.

ERNEST FIGUEROA (Senior Deputy Attorney General, Bureau of Consumer Protection, Office of the Attorney General):
Section 1.5 of A.B. 95 targets the lessons we have learned in dealing with the United Healthcare-Sierra Health Services merger. The reason for the change is due to the Commissioner of Insurance's administrative order stating that the AG had no authority to review or challenge the merger under State law. The language changes in section 1.5 clarify that the AG does have State authority over insurance mergers.

Furthermore, section 1 provides additional time lines and clarity to the potential involvement or noninvolvement of the AG in insurance mergers. It also provides some certainty to insurance merging parties that does not currently exist in statute.

Section 1 gives insurance merging parties an opportunity to bring the AG's office into the process early and obtain a letter of "no interest" from the AG. In a majority of cases, this will be the extent of the AG's involvement.

We have created a time limit in section 1 within which the AG must commence action. This process does not currently exist and provides a mechanism by which insurance merging parties can be certain the AG is either in or out of the merger review process.

This situation will occur either 30 days after the Commissioner of Insurance enters his final order, or 30 days after the federal government has made its final determination. These conditions allow Nevada the flexibility to continue to monitor the merger, should the Commissioner of Insurance finalize the order, while the federal government is still reviewing and vice versa. In other words, we will review the merger on roughly the same time line as other agencies. This bill will limit the authority of the AG's office, but the process will be clarified so everyone will know the procedures governing it.

Sections 4 and 6 of the bill establish specific confidentiality parameters for documents and other tangible evidence obtained in the course of an antitrust investigation. The rationale for these provisions is the need for additional safeguards in order to assure the targets of our investigations that their confidential documents will not lose their confidential status. It will also give us the ability to share this information with our multistate partners, if we are involved in a joint multi-jurisdictional review of a large national entity.

Sections 2, 3, 5 and 7 of the bill clarify the procedures, powers and remedies available to the State when there is reason to believe a person has engaged, or is engaged, in antitrust practices. The rationale for these provisions is to harmonize the language with federal antitrust laws. In addition, these sections provide clarification of the remedies and damages available to State agencies and political subdivisions. The State's remedies must include the ability to obtain restitution and having a full arsenal of equitable remedies under common law.

SENATOR COPENING:
Mr. Figueroa, does this bill apply only to insurance mergers and no other mergers?

MR. FIGUEROA:
Section 1.5 deals specifically with insurance mergers. We do have the authority right now to review all other mergers under State law. It is just that there was a unique circumstance created by the Commissioner of Insurance in that last order which prompted the need for the statutory change. That is why we targeted the insurance merger context.

VICE CHAIR SCHNEIDER:
In the past few years, some of the casino companies have merged. Have you ever looked at those mergers and how they impact the State as far as monopolies go?

MS. MASTO:
Yes, we work closely with the State Gaming Control Board and the Nevada Gaming Commission. We work hand in hand with them on those issues. To the extent that they have not already reviewed those issues, we would review those as well. We would look at any type of large merger that would have an impact on the constituents of this State.

VICE CHAIR SCHNEIDER:
They did not pose any monopoly nationwide, but there might have been one in Nevada. With those big companies now at risk, that really jeopardizes the stability of Nevada.

CHAIR CARLTON:
Where do you want to get involved in this process, and where should you not be involved in the process?

MS. MASTO:
The AG's office should be involved in any process where we have an antitrust action that has a negative impact on any market in this State and would negatively impact our constituency. There is no "black and white." I can only base it on what has happened in the past and that was the United Healthcare-Sierra Health Services merger. There was a potential for them to take a large market share and create a monopoly which would have had a negative impact on the constituency. That is when we would be involved. That is why section 1.5 is in this bill. In that case, the AG's office should have been involved. I was getting push back from the Division of Insurance and legal counsel representing the merging parties, saying I did not have the authority.

I asked for section 1.5 just to clarify that authority so I do not have to go through that similar argument in a court of law and waste everybody's time. The AG's office should have that authority in this State.

Section 1 was my attempt to be business friendly; to put parameters in place for businesses that want to come in, that look at mergers and want an indication from my office whether we are going to be involved or not. Quite frankly, that does not need to be in there. That was my attempt to work with the business industry in this State and to have some business-friendly procedures so they could work with my office from the beginning. I will always be involved, no matter to what extent, anytime there is a constituency that is impacted in this State.

CHAIR CARLTON:
As far as not being involved, the bill gives you 30 days after you receive formal written notification of a final decision to take regulatory or legal action. Technically, there could be no issues, but you could still be involved 30 days later. If that is the case, how does that impact the process?

MS. MASTO:
In the health insurance merger, there were no time frames. The business community came to me with concerns that this could potentially have a negative impact on them. There were no time frames for them to know how long we would be involved in the process. I was willing to talk with them and put procedures in place where I could notify them up front if we were interested. Then, after a regulatory body or the federal government came in to review it, we would be reviewing it at the same time, but we would also have a time line within which, if we were going to take legal action, we had to take that legal action. This was my attempt to work with the industries by putting procedures in place with parameters within which we are willing to work. This would benefit both industry and the AG's office by allowing us to try to move through the process together. That is the intent for the 30-day process; to give industry a time frame within which I would take legal action, if I were to take legal action.

CHAIR CARLTON:
You talk about petitioning the court to seek an extension of that 30-day period for good cause. What does good cause mean? Can you give me an example?

MS. MASTO:
Yes, for example, when reviewing these mergers, we hire outside experts. I do not have experts internally. When we hire outside experts to do an analysis on whatever market, sometimes it takes time for them to get the information to us or, we may have to hire multiple exerts to review various markets. That may delay the process. This would be good cause.

If for some reason we are still pursuing our investigation, are working with our experts and they have not been able to get the information to us in a timely manner, then I would go to the court to seek an extension based on the fact that our expert needs more time. That would be for good cause.

LARRY MATHEIS (Executive Director, Nevada State Medical Association):
We support the bill. We dealt with the merger between United Healthcare and Sierra Health Services during the last interim. It was an interesting process. One of the things that we discovered in that process was the arguable limitation on the AG's office from weighing in on antitrust issues in the State.

We have learned over the last six or eight months that at the end of a merger or acquisition process you may end up with a company too big to fail. The time to look at the impact that it may have is not when they start failing, but at the beginning of the process. Often in proposed mergers, the issue is about the potential short-term economic effect on the parties that are proposing the idea.

As we see increased consolidations, as in the health insurance field, there are risks associated to the public that may not get considered when looking at a traditional model of the impact on the investors and on the corporations themselves. Having a process in place to review this fairly, from the point of view of what the law says and also of what the impact is going to be on the community, is very important.

The Division of Insurance has one role. The AG has shown the capacity to have an expanded role as a balancing act. How might the public be affected? We know the positive side, what might be the negative side? We understand how the corporations may be involved. What will it do to real competition in the future? If we cannot get that kind of fair balancing act at the national level on a lot of these, perhaps it can start at the State level.

The AG filed a separate action in a separate federal court on this out of the United States Attorney General's office. It gave much more flexibility in developing a response that really addressed Nevada's needs. This is a good bill. It gives proper authority to the office most of us rely on to take these kinds of measures in this way.

TRAY ABNEY (Reno/Sparks Chamber of Commerce):
When this bill was in the Assembly Committee on Commerce and Labor, I testified against the original iteration of it because I thought it was overly broad and would apply to every type of business. The AG's office worked with me on the concerns I had with this bill. I did sign off on this newest version, but I hope that we can address anybody else's concerns with this bill. There are others that do have concerns, including some of my members. That is why I am neutral.

ROCKY FINSETH (PhRMA):
Last Friday, you processed A.B. 90 which reflected some concerns that the Pharmaceutical Research and Manufacturers of America had relative to deceptive trade and confidentiality of trade secrets. We have similar concerns with A.B. 95. You have an amendment before you that mirrors the language that was brought forward in A.B. 90 (Exhibit C).

ASSEMBLY BILL 90: Revises certain provisions concerning the investigation and prosecution of deceptive trade practices. (BDR 52-269)

MEGAN DIXON (PhRMA):
We are here with a limited request pertaining to the confidentiality provision. We are requesting that the amendment be added to provide for trade secret protections, mirroring the language that has already been approved in A.B. 90.

There are a number of reasons for this. In the February Assembly hearings, the AG's office stated that the purpose of this bill is to increase efficiency and to decrease delay in investigations. The confidentiality provision, as written without a trade secrets protection provision, will have the opposite effect.

This bill as worded would result in needless front-loaded litigation, whereby respondents to the AG office subpoenas will be forced to seek the protection for their trade secret information from a court at the very outset of the proceedings. Whereas, if there is a provision established within the bill and a

process whereby the AG's office can enter into a protective agreement up front, the respondents will have more confidence that their documents and their very valuable trade secret information will be properly protected. The efficiency of the system will actually be increased.

Amending the bill, in this very modest way, will better protect the State, the citizens and the companies which are being investigated by the AG's office, in at least three ways. The first way is that the amendment will save the State precious resources, both time and money, because they will not be responding repeatedly to trade secrets protective-order litigation at the front end of their investigation.

Secondly, the amendment will make the unfair trade statute consistent with the language in the deceptive trade practices bill. We are asking to simply include language which mirrors that in A.B. 90.

Finally, the amendment will better protect Nevada businesses and individuals from potential unfair disclosure of trade secrets information by less vigilant or possibly less scrupulous jurisdictions. Access to this information could be gained through the process described by the AG's office, if that information is provided to other jurisdictions who are conducting similar, simultaneous investigations.

As to the first point, there is a high probability that in antitrust investigations in a large number of these cases there will be trade secreted information at issue. Because of that, it is important to have this protection in order to increase the efficiency of the process.

Secondly, consistency in the statutory scheme is important. Chapter 598 of NRS, the deceptive trade practices act, is the immediate statute preceding chapter 598A of NRS, the chapter being discussed in A.B. 95. It is important not to needlessly complicate the issues or confuse respondents and to promote a feeling of fair play by having consistency in the two statutes.

Finally, there are a couple of reasons why there should be concern on the part of the AG's office as to where this information will end up when it is forwarded on to other jurisdictions which have different methods of treating confidential information. There is concern that this information could be inadvertently produced. We would ask that this amendment be added to reflect the language in A.B. 90.

CHAIR CARLTON:
Has this amendment been shared with the AG or her staff?

MR. FINSETH:
We have been working with Mr. Figueroa on the language. He sent me an e-mail saying they were opposed to the language being placed in A.B. 95, even though they were amenable to it being placed in A.B. 90.

JAMES WADHAMS (American Insurance Association):
My client is opposed to this bill. I have submitted a proposed amendment to A.B. 95 (Exhibit D).

There are two significant problems with this bill. On page 3, line 21, the existing chapter 598A of NRS provides that, "The provisions of this chapter do not apply to: 3) Conduct which is expressly authorized, regulated or approved by: (c) An Administrative agency of this State ..." The issue that was described certainly is an area in which the Division of Insurance has regulatory authority over such mergers. There are other State agencies that have control over mergers of licensed entities within the State such as State chartered banking institutions and the State Gaming Control Board.

The problem with the language that is added in lines 37 through 42 on page 3 is that it probably unnecessarily limits the jurisdiction. This does not apply to any of those State agency-controlled mergers except for those entities engaged in the insurance business. Inadvertently, this bill may restrict rather than enhance the jurisdiction of the AG.

The other problem occurs in section 1 which was discussed briefly. It creates an additional process requiring an insurance entity which is merging to go through two processes. While the oversight of the AG, in matters of antitrust conduct, is certainly not objectionable, creating two parallel processes creates a redundancy and a confusion that will interfere with the activities that are being regulated. They will be regulated twice rather than once.

It would be worse to suggest that if you would prefer to have the regulation done by the AG, you simply delete the regulation by any State agency including the Division of Insurance. One standard of review would be preferable.

The difficulty with this language is that it is applicable only to Nevada corporations. In this State, we currently have approximately 2,000 licensed insurance companies that transact business here, out of which there are probably less than 50 that are actually Nevada corporations. Of that 50, approximately a dozen are significant enough in size to be engaged in merger activity. The language has put a significant burden on Nevada-based entities as opposed to all entities. For example, it was recently announced that the auto insurance element of American International Group, Inc. was going to merge with Farmers Insurance. This was a very significant merger. This bill provides no jurisdiction over that transaction whatsoever.

The problem is, because of the complexity of what this bill does and the narrowing of the jurisdiction, it will simply create circumstances where mergers that might affect Nevada will be done in corporations that are domiciled in other states. It presents a disadvantage to being a Nevada domestic corporation, which is actually the asset base, and would discourage business development.

In the proposed amendment, I have recommended the deletion of section 1, the deletion of section 1.5, and as an additional comment, on page 7, line 25, deleting the word "treble." As I have noted in my description of the purpose, if the AG finds conduct that deserves punishment, I recommend that criminal prosecution be used rather than just civil damages, which may result in an increase in pricing rather than a constriction of conduct.

CHAIR CARLTON:
The Commissioner of Insurance has one philosophy on regulation and the AG has another philosophy. I do not see them as conflicting. Am I wrong?

MR. WADHAMS:
No, in fact, that is precisely my point. They are not at all conflicting. The problem is that they are redundant. You have two discreet decision makers involved in precisely the same analysis. It creates two discreet processes so there is no certainty as to where you need to go in order to get the approval to do what you want to do. The problem is dual regulation, not conflicting regulation.

ANN NELSON (Executive Vice President, Employers Holdings Inc.):
We oppose this bill. I second what Mr. Wadhams has already said. Assembly Bill 248 amends NRS 692C.210 which reserves these areas for the

insurance commissioner. It is done that way in most of the other states in which we operate and in which insurance carriers in this country operate. We are extremely concerned about the redundant regulatory processes.

We tried to work with the AG's office but were unable to come to agreement on the time lines for a parallel process. By a parallel process, I mean a process by which the AG would review these issues at the same time that the insurance commissioner is reviewing them. We have been unable to agree to have those issues resolved prior to an order from the insurance commissioner approving a "form 'A' filing." A "form 'A' filing" is most often made when doing a merger or acquisition. Because of that, we would oppose A.B. 95 and support the amendment proposed by Mr. Wadhams.

ASSEMBLY BILL 248: Revises provisions governing holding companies. (BDR 57-997)

SAMUEL SORICH (Property Casualty Insurers Association of America):
I have submitted written testimony in opposition to A.B. 95 which I am not going to read (Exhibit E).

Nevada already has a set of strong standards that the insurance commissioner uses to make decisions on mergers and acquisitions. This Committee did approve A.B. 248 which strengthened the insurance commissioner's authority over mergers and acquisitions.

The standards now in place in Nevada come from the National Association of Insurance Commissioners (NAIC). Those standards are in place in 48 states around the Country. They are based on the idea that it is the insurance commissioner who has the particular expertise to make judgments about the competition in the marketplace, the financial condition of insurance companies and how insurance companies handle their claims. That is why the NAIC has developed a model act on mergers and acquisitions which places the authority to make decisions with the insurance commissioner.

That model act is part of the NAIC's accreditation program. This program recognizes states that have a sound regulatory structure in place. This bill would alter the current NAIC standards that Nevada now has in place. I do not have an opinion about whether or not this change would mean Nevada's accreditation

with the NAIC would no longer exist. But, it does create an extra complication which is unnecessary.

CHAIR CARLTON:
Having no further testimony, we will close the hearing on A.B. 95 and open the hearing on A.B. 513.

ASSEMBLY BILL 513 (1st Reprint): Makes various changes to provisions governing licensing of escrow agencies and mortgage brokers, agents and bankers. (BDR 54-1136)

DAVID GOLDWATER (Mortgage Advisory Council; Goldwater Capital Nevada):
Assembly Bill 513 was brought forth in an effort to increase the professionalism of the mortgage lending business, particularly the hard money lending business. There is a statutory committee that meets with the Division of Mortgage Lending and tries to form industry partnerships between residential mortgage lenders and hard money lenders as well as other professionals in the group.

Section 1 of the bill addresses construction control companies. Once a mortgage lender or a bank makes a loan on a construction project, rather than depositing the money directly with the contractor, they deposit it with a company called construction control. The construction control company vouchers the money as the tasks are performed and things are built. They make sure that the lender's interests are protected throughout the construction project.

Currently in Nevada, construction control companies are only required to post a bond with the State Contractors' Board. They are not regulated. They are not registered. They have no licensing requirement. Section 1 addresses licensing construction control companies.

Section 3 addresses the education requirement for an escrow officer. It allows the commissioner of the Division of Mortgage Lending to discipline the escrow agents or agency licensee if the license has expired. It is an enforcement provision of the licensing of escrow agents.

Section 8 requires that 51 percent of the financial interest in a multi-beneficiary trust deed controls transactions. The Division of Mortgage Lending has given us

guidance to operate as if 51 percent of the people with the financial interest control the transaction. This is codifying what our regulator has guided us to do.

Section 9 permits the commissioner of the Division of Mortgage Lending to discipline the mortgage broker after the license has been suspended.

Section 10 deletes an exemption given to a consumer finance company. This was an exemption from licensing that people use to make small, loan-shark type loans. Section 11 complements the changes in section 10.

Section 12 permits the commissioner to subpoena just documents rather than people. Currently, they subpoena both the person and the documents and then waive the requirement for the person to be there.

Section 13 requires a mortgage broker to disclose his fee to his customers, who pays the fee and the impact it has on the terms of the loan. This is a basic disclosure. It also amends the requirement that all loans include a fee-for-service, thus deleting any conflict with conventional home mortgage applications.

Section 14 will give the commissioner some latitude from having to revoke a mortgage broker's license for an unintentional violation, such as an omission on an application or a renewal. Right now, it is required that the license be revoked.

Section 15 would permit the commissioner to discipline mortgage broker licensees after the license has expired.

Section 16 deletes an exemption for consumer finance companies. Section 17 complies with section 16, that persons seeking that exemption have the lending authority and do so under their own home state's authority.

Section 18 permits the commissioner to subpoena documents without the necessity of requiring the subpoenaed party to be there.

Section 19 was deleted out of the original bill and section 20 mandates the commissioner to adopt regulations for insider loans.

If I were to ask for any change in this bill, and we tried to get it out of the Assembly as clean as possible, you could change section 20 to “may” rather than “shall” to make it more permissive.

SENATOR SCHNEIDER:
I am amazed that escrow agents have not been licensed already because they handle billions of dollars in this State. Should escrow agents be bonded to give us more protection?

MR. GOLDWATER:
That is a great point. It is usually a title company that the escrow agents work for. Usually, the companies are bonded and have some sort of insurance protection.

SENATOR SCHNEIDER:
Some of the escrow companies are independent, free-standing escrow companies and are not affiliated with a title company. Should they be bonded in some way?

MR. GOLDWATER:
There should be some way for someone who has been harmed to have the ability to recover their losses.

SENATOR SCHNEIDER:
Will escrow agents fall under the insurance commissioner?

MR. GOLDWATER:
They will fall under the commissioner of the Division of Mortgage Lending.

SENATOR SCHNEIDER:
Can the Division of Mortgage Lending demand that escrow agents be bonded in some way?

MR. GOLDWATER:
I do not think they can demand that now.

JOSEPH L. WALTUCH (Commissioner, Division of Mortgage Lending):
I support this bill and would like to clarify a couple of points that were raised by Senator Schneider.

Escrow agents and escrow agencies are currently licensed under chapter 645A of NRS, and they are bonded. We are talking about construction control companies rather than escrow agencies, and they too are bonded but not licensed or regulated.

STACY HARROP (Santoro, Driggs, Walch):
We are only opposing section 8 of A.B. 513, and I have submitted written testimony to that effect (Exhibit F). We have proposed an amendment that would take care of our concerns with that section (Exhibit G).

MR. GOLDWATER:
These concerns were not brought up in the Assembly Committee on Commerce and Labor. They were not brought to my attention, but we will gladly try to resolve them.

I hope we can solve the problem because this section needs to get done. The problem is what to do and how to govern these transactions. I would estimate there is about $2.5 billion worth of fractionalized real estate transactions. If not for the holders of 51 percent of the financial interest voting, how would these transactions be governed? Does that mean complete unanimity on everything from what vendor to pick, what sales price, what terms of a deal, etc.?

There are thousands of people, retirees and older people, who have a $10,000 investment here, a $25,000 investment there. They do not want to have to go to the State Supreme Court which is currently where you have to adjudicate this property interest. That is where you have to adjudicate these contracts. Somehow, someway, we have to get all these people to govern a transaction that can be fairly complex.

CHAIR CARLTON:
Mr. Goldwater, we will try to facilitate a conversation between you and Ms. Harrop.

RON PETERSON (Nevada Land Title Association):
Escrow agents licensed under chapter 692A of NRS are regulated by the Commissioner of Insurance. This bill only affects those escrow agencies licensed under chapter 645A of NRS.

JAY PARMER (Builders Association of Northern Nevada):
This bill was brought to our attention by some of the people who are in the construction control business. Those issues were brought up after the bill was heard in the Assembly Committee on Commerce and Labor. I did speak with Assemblyman Conklin about this issue.

This is a needed bill and a good bill, but the one issue they have some concerns about is regarding construction control. We have submitted an amendment to address this issue (Exhibit H). On page 2 of the amendment, section 1, subsection 1, states "A construction control must be licensed under the Department of Business and Industry." There is some concern about confusion that might be created by licensing construction control individuals or businesses as escrow agents or agencies.

SONJA ECKERT (Nevada Construction Services):
What we have proposed is a "friendly" amendment. Our concern with the original bill was that we are defined as an escrow agent or agency. There are some misconceptions on what a construction control company does.

Everyone assumes that a construction control company holds all of the funds as an escrow company would. Ninety percent of our business is through financial institutions. We do not hold the money as an escrow agent or title company would. We are contracted to make sure the work is done, to make progress inspections, pay the subcontractors and suppliers, collect lien releases and make sure subcontracts are in order so that it is a lien-free project at the end.

When we do that process, we send a letter to the bank giving them the appropriate backup and copies of the inspections. The bank will fund the money to us into an account for that particular draw, and we send out the checks. There is a portion of our projects where there are private funds involved, and we do open interest-bearing accounts so we do hold those funds.

It is very important that we are regulated. This is a good bill. I just do not think we should be regulated as an escrow agent or escrow agency. That is not our function. We currently fall under chapter 627 of NRS, which defines what a construction control company does. But, there is no regulation. We have to have a surety bond on file with the State Contractors' Board.

We are proposing that construction control companies be licensed under the Department of Business and Industry and that we continue to follow chapter 627 of NRS.

CHAIR CARLTON:
You do not want to be licensed under the Division of Mortgage Lending, but you would still be operating within that chapter and you would be licensed someplace else. Are the licensing criteria similar?

MS. ECKERT:
Our concern is that we do not see where we fall under the Division of Mortgage Lending. We do not do mortgages. We are basically an accounting and progress inspections company. We do not hold the deeds of trust. The regulation is very important, but we were placed in the wrong category.

CHAIR CARLTON:
Have you had a discussion with the Department of Business and Industry about this?

MR. PARMER:
I did not participate in the meeting. Mr. McGrath can speak to that. Several members of the Builders Association of Northern Nevada, as well as some of the companies that are referenced here, participated in a meeting with Dianne Cornwall, the Director of the Department of Business and Industry. They raised their concerns with her about the time the bill was passing from the first House. They are aware of our concerns. I cannot represent their exact position on this. They understood the concern about where the regulation would fall.

MS. ECKERT:
Assemblyman Conklin is aware of this.

CHAIR CARLTON:
The only concern I have with this is that you are just going to adopt regulations to carry out the provisions. You are not setting out a fee schedule or a renewal schedule. There is a lot that goes into being regulated and licensed in this State. This has been left very open-ended. You may want a little more guidance in this because under the other scheme there was a written structure to follow. With this, it would be left to the Division of Mortgage Lending to set up your licensing and regulation scheme. I am not sure that is really what you want.

MS. ECKERT:
I agree with you. We just did what we had time to do. We understand there needs to be regulations and a fee structure set out. Our biggest concern was that we are not considered an escrow agent or an escrow agency since that is not what we do. That was the main reason for this proposed amendment. I do understand that it is not 100-percent complete. We were just trying to make sure that we were not put in a place that did not serve our industry and our clients in the best way.

CHAIR CARLTON:
Are the people in your industry already licensed as accountants?

MS. ECKERT:
No, they are not.

CHAIR CARLTON:
They are not licensed as accountants. Do you think that they would fit there better? It seems to me that, as a fiscal agent, your function is accounting.

MS. ECKERT:
We are accountants, but we also perform progress inspections, review subcontracts and collect mechanics lien releases.

JERRY MCGRATH (President, Washoe Building Supply):
I am totally in support of this bill, but it should not be under the Division of Mortgage Lending, other than being part of the Department of Business and Industry. I understand that they may adopt regulations and hopefully the people who represent voucher control companies will have some input. As chapter 627 of NRS now stands, there are regulations but there is no enforcement. There are no filing fees or costs for audits.

The problem with chapter 627 of NRS is that the surety bonds are held by the State Contractors' Board. As of this date, there have only been three surety bonds placed since 1978. No one at the State Contractors' Board even knows they have these bonds.

As it exists today, chapter 627 of NRS is fine. I deal with voucher control constantly as a material supplier dealing with subcontractors. Even though it is

required, there is no reporting and there is no oversight or regulation. It needs to be regulated.

The mortgage lending part of this is very unnecessary. The voucher control section should be a separate section. I would like to see an amendment to chapter 627 of NRS where, not only do they have the duties and liabilities outlined, but they also have fees, licensing requirements and audit procedures which they do not have now.

We cannot tell you how many voucher control companies exist in Nevada. We only know of three because there is no licensing requirement. Yet, it is one of the most important functions we deal with.

Recently, we found it necessary for subcontractors and vendors to file dozens and dozens of mechanics liens. Failure on the mortgage lenders part to guarantee first positions for their investors has caused a lot of people, who thought they were in first position and now they are last, to be subject to the filing of mechanics liens. It has created a real "zoo."

Unfortunately, this is what brought to the surface the realization that there was no regulation. There is chapter 627 of NRS which is not enforced. There are no fees involved. We strongly believe that it should be under the Department of Business and Industry. Hopefully, they can regulate and set fees that are acceptable with input from these voucher controls.

You asked if voucher controls needed to be accountants. There are certain accountants who act as voucher controls. We cannot identify them because there is no licensing requirement now.

CHAIR CARLTON:
If they are already licensed someplace else, then the protections are built-in for that.

MR. MCGRATH:
Banks, which are already regulated by either the State or the federal government, would be exempt from chapter 627 of NRS and A.B. 513. This is just for voucher control companies which are not regulated.

CHAIR CARLTON:
We seem to have encountered a glitch, but it is one that can be worked on.

BILL UFFELMAN (Nevada Bankers Association):
I had originally thought that voucher control companies belonged under the Division of Mortgage Lending because of the number of dollars they were handling, the escrows, clearing the liens and all those things. The Division of Mortgage Lending has auditors. That was why I suggested that is where these companies should be.

CHAIR CARLTON:
How much would it cost to have these people registered or licensed with the Division of Mortgage Lending? I do not know if licensing is really the correct term for what you are trying to do. You are talking more about a registration. Just wanting to know who they are seems to be the major issue.

MR. UFFELMAN:
Just like in the other regulated communities, the State chartered banks and the mortgage companies, fees are set to relate to the costs of regulating that industry. There is an hourly rate for going out and doing audits. Voucher companies is an industry that needs to be audited periodically to make sure that they are not "living large on somebody else's dime." I am not suggesting that anyone would do that, but I know they have. I am sure Mr. Waltuch could set up a budget very quickly that would let you know what it would cost to register, regulate and audit this industry.

CHAIR CARLTON:
My concern is if it is a small community and there is a significant cost, by the time you divide it up amongst that small community, it may be more than we all bargained for. We want to make sure that we are not doing more harm.

MR. UFFELMAN:
If it is a small community, then the reality is that you are not talking about lots of people to regulate in terms of day-to-day. It would involve the periodic visitations to check their books and records.

CHAIR CARLTON:
Mr. Waltuch, would you think about that and give me an idea of costs? We will contact the Department of Business and Industry and ask them what they are

thinking so we can determine what the best path might be for these companies. We do not want to lay a big burden on them. They want to be regulated and held accountable; I just do not want to make it too onerous on them.

MR. WALTUCH:
I will provide you and the Committee members with a copy of our total fee schedule for escrow agencies and escrow agent licensees. It will range from the initial license, to the renewal license, to the hourly rate for examinations, etc.

CHAIR CARLTON:
They are not escrow agents.

MR. WALTUCH:
That is correct. You are assuming they were licensed, if this bill were enacted, as escrow agencies.

CHAIR CARLTON:
That was not my question though. My question is, if we register them with you as a voucher control company, how would you register them with your agency; not necessarily license them, but register them? Could you look into that?

There are education requirements and other things that go along with the licensing of an escrow agent, and I do not want to put anyone out of business. But we want to be able to regulate their particular business.

MR. WALTUCH:
We will look into that, and we will make the Committee a proposal.

CHAIR CARLTON:
That sounds good. That way, at least, we will know what we are working from, and they will be made aware of what their wishes are going to bring them. They may change their mind.

MR. WALTUCH:
That is fine.

CHAIR CARLTON:
We will find someone at the Department of Business and Industry to do the same. I will assign that to Mr. Parmer. Then we will compare the two and talk with Mr. Goldwater about it to determine the best way to approach this.

MR. UFFELMAN:
Mr. Goldwater was concerned that I did not make it clear that I was vaguely opposed to the general, unspecified positioning of this group. It is my opinion that they belong in the Division of Mortgage Lending.

CHAIR CARLTON:
We can compare, contrast and decide where the best place is for them.

We will close the hearing on A.B. 513 and open the hearing on A.B. 381.

ASSEMBLY BILL 381: Revises various provisions relating to arbitration. (BDR 52-931)

ASSEMBLYMAN TICK SEGERBLOM (Assembly District No. 9):
This bill deals with arbitration and the increase in provisions in consumer contracts requiring mandatory arbitration if there is a dispute. The history of mandatory arbitration is that not only is it wrong because it takes away your right to a jury trial and the right to legal process, but it is also unfair in the way the arbitrators are chosen. Some arbitrators are biased before they are chosen. The consumer has no chance.

PAUL BLAND:
One of the things that has happened with mandatory arbitration and the way it is working out in America right now is that there has been a little bit of a race for the bottom.

Major credit card companies, for example, now require all of their customers to go to mandatory arbitration instead of court. There are a handful of arbitration companies that are competing for this business, and it can be very lucrative. It can be millions and millions of dollars. They need to devise systems that by and large favor the credit card companies.

The first significant thing this bill does is to require some basic disclosure of information that would be helpful to a consumer who faces arbitration.

Consumer advocates tend to think of arbitration as a shield against cases that are filed by consumers against companies.

Increasingly, arbitrators are making a lot of their money in debt collection cases started by lenders against consumers, which are brought to arbitration. There is one company in Minnesota, the National Arbitration Forum, which has won the vast majority of the credit card companies' business around the Country in handling these debt collection cases.

In California and just one other state right now, there are laws like the one proposed here that require the arbitration companies to disclose information about the consumer arbitrations they had handled. This information is really useful to consumers. In California, there were 34,000 cases that were disclosed by the National Arbitration Forum. It turns out that they have been pushing over 90 percent of their cases to about 2 dozen people. For example, there is one person who has heard over 1,500 cases between debt collectors and various California consumers. That person rules in favor of the debt collector in 99 percent of the cases. It is overwhelming.

If you were a consumer and you got the name of an arbitrator from the company, it would be extremely useful to you to be able to go on their Website to run a search to discover in how many cases this person has ruled against the consumer. Although a number of different state legislatures are looking at this kind of bill, that information is not available in Nevada or in any other state except California and Washington, D.C.

Through this disclosure, you would be able to find out if the arbitrator has levied significant attorney's fees or significant arbitration fees against the consumer. That is extremely useful information any consumer would want to have.

It is not banning arbitration clauses for credit card users; the State would not be permitted to do that under the jurisprudence that is built up around the Federal Arbitration Act. If the Nevada Legislature banned credit card companies from having arbitration clauses, that would be struck down as preempted.

But, a disclosure rule that at least says the credit card companies, and anyone else who does significant amounts of arbitration, have to disclose information about the outcomes of these arbitrations, how much they cost and so forth is extremely useful information to consumers.

In section 11 on page 5, the bill also has some provisions that deal with conflicts of interest. For example, there was a private arbitration company which owned significant amounts of stock in another company. They had contracts with the company that hired them to come in to do all sorts of training in various ways for their personnel. There were interlocking financial arrangements. The arbitration company is in charge of enforcing the consumer protection laws against the company that it has stock in and gets money from. That is a significant conflict of interest. This legislation provides that that kind of conflict of interest is not acceptable. That is extremely useful.

There are some companies that will pay for the vast majority of the costs of arbitration because they do not want court challenges that the arbitration is too expensive. The one thing they are looking for is to ban class actions. They want the rest of the arbitration system to be pretty fair because they do not face many individual suits.

Then there are other companies that use the arbitration clause to deter lawsuits. You see this in nursing homes and car dealerships. They will sometimes require the consumers to pay very large sums of money up front, in arbitration fees. I have handled several cases for consumers who paid over $10,000 that they would not have had to pay to a judge because the judge is paid by the state. The judge does not bill you by the hour. But when an arbitrator charges $300 to $500 an hour, it can add up to a lot of money.

The bill has a provision requiring that people who are below 300 percent of the poverty line do not have to pay those sorts of fees. If the arbitrator is going to charge those fees, then the company that is choosing arbitration has to pay the fees, not the consumer.

The National Arbitration Forum, the group in Minnesota, has run advertisements in periodicals that are aimed mostly at bankers, which brag that they have a "loser pays rule." Right now, under virtually every consumer protection and civil rights statute in the Country, federal or state, if an individual brings a case under consumer protection law or civil rights law and they lose, they only have to pay the business's attorney's fees if the case was frivolous.

The National Arbitration Forum has written some articles saying that America faces a crisis because Congress has not been bold enough to act to tighten up the consumer protection laws and the civil rights laws. They sort of fill that gap

by having a “loser pays rule” as part of their process. This bill provides that you cannot have that kind of “loser pays rule” which is fairly significant.

In general, state legislatures are very limited in what they can do about abuses of arbitration because of the Federal Arbitration Act. There is an exception to that for insurance companies. There are more than 20 states that have banned arbitration clauses in at least some types of insurance contracts. Nevada has already banned arbitration clauses in certain lines of insurance, particularly, health insurance, but it has not in others, like title and life insurance. There have been a lot of abuses of mandatory arbitration in those areas. The bill would expand Nevada’s ban on arbitration clauses in health insurance to all lines of insurance. There is an enormous amount of precedent for that around the Country. There is no issue that it is not preempted by the Federal Arbitration Act. The case law is overwhelming on that.

This bill would go as far as any state is permitted to go under the Federal Arbitration Act in protecting consumers. The most important part is the disclosure rules that would make information, which is very secretive right now, available to the public.

I have also submitted a written version of my testimony (Exhibit I, original is on file in the Research Library).

CHAIR CARLTON:
Would you go back to the debt collector part of your testimony where they are actually using arbitration companies in the debt collections of credit cards?

MR. BLAND:
Absolutely, the National Arbitration Forum is doing hundreds of thousands of debt collection cases every year. It is growing very rapidly. At first, it was just a couple of credit card companies. It has now spread to a number of different credit card companies. At least five major credit card companies are using arbitration for all of their debt collection. The real problem, from the consumer protection standpoint, is debt buyers.

Most creditors and credit card companies will sell the debt after six months or a year to a debt buyer. There are several tiers of debt buyers. They start paying smaller and smaller sums of money for the debt. For debts that are outside the

statute of limitations and for which there is very little documentation left, they will sell them for one-tenth of a cent on the dollar.

The debt buyers, which tend to be located in Maryland and Buffalo, New York, are increasingly filing tens of thousands of these arbitrations. Frequently, they are way past the statute of limitations. Consumer lawyers call them “zombie” debts. It is a very rapidly growing trend.

There has been a lot of pressure put on the Federal Trade Commission to do something about this, and they are holding hearings. There have been some bills in Congress, but nothing has been done yet.

Debt buyers will pay significantly more money for debt that they buy from a credit card company if it has a National Arbitration Forum clause. They believe that they are much more likely to get larger awards.

CHAIR CARLTON:
That is very interesting to me because I have had to help people here in Nevada who have been contacted by these debt buying corporations. We now have something on the books that makes them register in this State. I have had to respond to them and let them know that they are not registered in this State and are not allowed to do business here.

MR. BLAND:
They tend not to register in states because they take the position that they filed for the arbitration from Buffalo or wherever with the National Arbitration Forum. Consumer lawyers have been trying to use those sorts of registration requirements. So far there is no case in Nevada that I know of, but it has been mixed nationwide where a number of those companies declare that they are exempt from those requirements for arbitration because the arbitrators are not located in the state. Even though the consumer is in the state, they do not consider themselves as operating in the state. They operate in Buffalo where they live and in Minnesota where the arbitrator is. They can decide the rights of the consumers in your state without being subject to its laws. That is something that the legal services people are starting to see in their practices, but nationwide it is a real problem.

CHAIR CARLTON:
Thank you for bringing that to our attention. That is something we need to address also with the Division of Financial Institutions, Department of Business and Industry. Are they going to allow these debt buyers to use arbitration? The debt buyers are still doing their business. They are just doing it in a sideways format rather than straight on by advising the consumer that they need to contact them or they will take the consumer to court.

DAN WULZ (Legal Aid Center of Southern Nevada, Inc.):
I have submitted a one-page, written testimony in support of A.B. 381 (Exhibit J). This bill does not apply to, and has nothing to do with, our court-annexed, mandatory arbitration program in Clark County in cases of less than $50,000. This has nothing whatever to do with that and will have no affect on that system.

It is not just arbitration; it is the fact that in arbitration, as a result of rulings made by the U.S. Supreme Court under the Federal Arbitration Act, there is virtually no review of what an arbitrator does. It would be better if a court had the power to review what an arbitrator did. But courts have ruled, as pointed out in Mr. Bland's written testimony, Exhibit I, that arbitrators can interpret contracts which cannot be reviewed even if they are "wacky." The U.S. Supreme Court has said that arbitrators' factual findings cannot be overturned even if they are "silly."

For that reason, states that are concerned about consumers need to do as much as they can, in terms of arbitration, to see that it is not over utilized and that disclosures are made by the arbitrators as provided for in this bill. This is a very modest bill. It requires that the costs of arbitration be disclosed in any arbitration agreement or clause.

BILL BRADLEY (Nevada Justice Association):
We are not saying that arbitration is not one way to resolve a dispute. If parties in a dispute agree, for whatever reasons, that they want to go through arbitration for costs, for time or for convenience, this bill does nothing to prevent that.

What we do have a problem with, is the decision by one individual that there is going to be arbitration when a dispute arises without that individual realizing how badly the odds are stacked against him. Our point here is people should

have the right to make a decision after a dispute arises, not before, and because of that, arbitration agreements, as stated in this bill, in general, should not be allowed. But if there is a dispute and two parties agree to go to arbitration rather than go to court, this bill does nothing to this system.

I want to reemphasize that in the Assembly Committee on Commerce and Labor there was quite a bit of testimony that this would somehow impact our court-annexed arbitration system. The Nevada Justice Association was one of the prime sponsors of that process and ushered it through the Legislature. We are very proud of that system and would do nothing to affect it.

SENATOR AMODEI:
Is this just in a consumer context? If two business people want to put arbitration provisions in their contracts, this does not have an impact on that.

MR. BRADLEY:
That is correct, as long as it is fully disclosed and well explained.

SENATOR AMODEI:
I understand the consumer context. Does this now make every arbitration clause, even in a business contract, subject to litigation?

MR. BRADLEY:
Two parties can voluntarily go to arbitration, but not unilaterally, if they both have equal bargaining power.

MR. BLAND:
The bill does not make it illegal to have a pre-dispute, binding-arbitration clause. If it did, something like that would definitely be preempted by the Federal Arbitration Act. It just provides that the arbitration clauses involving consumers must have some basic fairness rules. You cannot impose heavy costs nor have a conflict of interest, and you have to disclose basic information about it.

ASSEMBLYMAN SEGERBLOM:
Section 3, subsection 1, defines consumer as something dealing with "... personal, family or household purposes ... ." It would not deal with the commercial transaction you are discussing.

SENATOR AMODEI:
I will take a closer look at it.

SENATOR COPENING:
Mr. Bradley, you said people should have the right to decide whether they go to court or arbitration when the dispute arises, not beforehand. In home building, when you sign a contract, you are dealing with tens of thousands of homeowners. Within that contract, there is an arbitration clause for those protections. Is there anything in this bill that removes the business's right to required arbitration, or is it just saying we want it to be more transparent and we want the home buyer to understand clearly that they have all of these rights?

MR. BRADLEY:
There are two answers to that question. First, are you implying that the homeowner can either select or reject arbitration?

SENATOR COPENING:
They did not have a choice. If you agreed to the purchase, you were agreeing that, if there were a dispute, you would go into arbitration.

MR. BRADLEY:
That question, absent this bill, is still undecided in Nevada. There have been mandatory arbitration clauses in the context of physicians' offices that have been declared unenforceable.

Home building may be considered a national undertaking which may put it under the Federal Arbitration Act.

MR. BLAND:
It is clear under current law that home building is going to be within the scope of interstate commerce, and Nevada could not ban pre-dispute, arbitration clauses in home building contracts. That would be preempted by federal law.

The only thing in the bill that bans arbitration is in the insurance context. There is already a ban on arbitration clauses in two types of insurance, and the bill would extend it to all lines of insurance.

Right now, the Federal Arbitration Act preempts any state law that would ban arbitration clauses for any area like home building. There is no doubt that home builders can use arbitration clauses now under federal law.

If the U.S. Supreme Court were to reverse the last 20 years of decisions that created federal preemption, or if Congress were to do away with federal preemption, in that case the bill does have a provision that says you could not have arbitration clauses in consumer contracts.

SENATOR AMODEI:
Do you think the bill is drafted as tightly as it could be?

MR. BLAND:
Section 5 of the bill says, "A consumer arbitration agreement is void and unenforceable except to the extent federal law provides for its enforceability." The bill does acknowledge that federal law, where it applies, overrides Nevada law.

SENATOR AMODEI:
The answer to my question is yes; this is worded perfectly and could not be any better in terms of not creating confusion for the courtrooms of Nevada if this is enacted.

MR. BLAND:
I do not see how we would be able to get around that provision. It is pretty clear.

SENATOR AMODEI:
Assemblyman Segerblom, your answer is yes.

ASSEMBLYMAN SEGERBLOM:
Yes.

CHAIR CARLTON:
Mr. Bland, you mentioned there are certain forms of arbitration that are banned in Nevada. One was health insurance. What was the other?

MR. BLAND:
The other was auto insurance.

CHAIR CARLTON:
Is it auto/casualty insurance?

MR. BLAND:
Yes, that is right.

CHAIR CARLTON:
Would this piece of legislation change the auto/casualty insurance?

MR. BLAND:
No, it would not. It would also ban the use of pre-dispute, binding-arbitration clauses for other lines of insurance, such as life insurance and title insurance.

JON SASSER (Washoe County Senior Law Project):
The senior citizen clients that come to the office do present a number of the problems that would be addressed by the bill. People come in with notices of arbitration. They would be helped by the reduction in costs for people with income under 300 percent of the poverty level and by the ability to waive certain fees. Also, the disclosure information would allow them to choose from a list an arbitrator who might treat them more fairly. The Washoe County Senior Law Project supports the bill.

I have also seen a letter to the Chair from Mr. Figueroa, Senior Deputy Attorney General (Exhibit K) which supports the bill. I hope that is part of the record.

CHAIR CARLTON:
We will make sure it is part of the record.

SENATOR AMODEI:
Does this bill have any impact on mediation?

MR. BRADLEY:
There is absolutely no impact on mediation.

SENATOR AMODEI:
Will they start contracting now for mediation?

MR. BRADLEY:
I would love to see contracts for mediation because it takes one person in mediation to agree to resolve a dispute. The mediator does not have a "dog in the hunt." That is a much different environment than arbitration that we are so critical of because of the unfairness.

SENATOR AMODEI:
There is still alternative dispute resolution if that is something someone wants to do.

MR. BRADLEY:
Yes, there is.

MARLENE LOCKARD (Premier Physicians Insurance Co.):
I have submitted an amendment to A.B. 381 (Exhibit L). Our concern is with the provision in this bill which would appear to exempt medical malpractice arbitration from taking place. Medical malpractice arbitration benefits are substantial, especially with respect to patients. They get their money sooner than in the court system with all of its numerous delays, appeals, etc. They benefit from a stable insurance market with stable companies able to pay for medical errors. There are lower health care costs for patients as a result of lower premiums for physicians. They have informed arbitrators who carefully consider their case, the choice of whom is up to the patient as well as the physician. More money is returned to the typical patient than in the jury system because arbitration is generally faster and more economical than jury trials. Arbitration provides virtually all the same damages, discovery and rights to call expert witnesses and cross-examine as the court system.

Arbitration is also a benefit to Nevadans by avoiding a flood of medical malpractice lawsuits in the court system, requiring more courtrooms, judges, personnel and tax dollars in order to properly administer the lawsuits.

Our amendment attempts to clarify section 5 of the bill with the addition of the language "… and in medical malpractice arbitrations and related claims." We are also proposing to delete section 8, subsection 2, and to add new language to section 20, subsection 1, "Not withstanding any other provision of chapter 687B of NRS to the contrary, this policy does not apply to medical malpractice arbitrations and related claims."

There is significant doubt that, in the smaller providers, they would be exempt from the Federal Arbitration Act. If you were to process this bill, we would ask that you consider adding this amendment.

CHAIR CARLTON:
Was this bill intended to impact medical malpractice?

MR. BRADLEY:
It was intended to ban any pre-dispute arbitration agreements.

CHAIR CARLTON:
It would be anything pre-dispute.

MS. LOCKARD:
This arbitration has been practiced widely in California, as well as other states, and has been proved to save substantial sums of money for all parties. Right now, arbitration is an option that some physicians provide to their patients. It is fully explained, and a contract is signed in advance.

CHAIR CARLTON:
This is before an incident happens, not after an incident happens.

MS. LOCKARD:
That is correct.

CHAIR CARLTON:
The physician would give you a form to sign that says if anything goes wrong you have to go to mandatory arbitration; you have no other choice. That is actually what this amendment would propose to do.

MS. LOCKARD:
This amendment would just exempt medical malpractice claims from this bill entirely.

CHAIR CARLTON:
By exempting them from this bill, you would be requiring pre-dispute, mandatory arbitration.

MR. SORICH:
We are not opposed to the consumer protections in this bill. Our opposition is limited to section 20 which would prohibit the use of arbitration in all insurance policies. This bill establishes consumer protections which should apply in the context of insurance. We are opposed to any across-the-board prohibition of arbitration. If these are good, sound, consumer protections, they should apply in the insurance context just as they apply to other consumer transactions.

We do not agree with the representation that the federal law allows a state to prohibit the use of arbitration clauses in insurance contracts. That is an open question. Just because a state can do it, there is no justification to prohibit arbitration. Arbitration has consumer benefits. It eliminates litigation, gets early resolution of disputes and saves costs. Those benefits should be preserved as long as these consumer protections are put into place in insurance contracts.

Our position is to extend the consumer protections to insurance contracts, but to not impose an across-the-board prohibition of arbitration on all insurance contracts.

CHAIR CARLTON:
Mr. Sorich, going back to the same statement, this is aimed at basically agreeing to arbitration before an event actually happens. If you were selling me a policy, I would have to agree that whatever happened while I was your client, I would have to go to arbitration. Is that correct?

MR. SORICH:
That is correct. It should be the same for insurance as it is for every other consumer transaction covered by this bill. We do not see anything unique about insurance. Insurance should not be singled out to prohibit arbitration or the implementation of these protections.

CHAIR CARLTON:
Then I am missing something. My understanding of this bill was the fact that a consumer should not have to agree to mandatory arbitration when going into a business arrangement with someone. This bill addresses the preexisting mandatory arbitrations within the credit card industry. That is where I started with this.

Why should the right to not choose arbitration be taken away, just to do business with someone? That is my point of confusion.

MR. SORICH:
Perhaps the proponents of the bill are in a better position to answer that. The answer is that arbitration provisions like this are authorized by federal legislation. The attempt of this bill is to impose some consumer protections that do not exist in federal law and to make sure that when these transactions are entered into in this State, there are disclosure requirements and other consumer protections in place.

Our limited position here is that if those consumer protections are to be put into place in this State, extend them to insurance policies, but do not prohibit arbitration in insurance contracts.

CHAIR CARLTON:
I am going to have to re-read this. I have lost where you are going.

MR. WADHAMS:
The Federal Arbitration Act preempts any state law that would ban pre-dispute, arbitration agreements in areas such as home building, but it would also apply to any other transaction that is in interstate commerce.

The problem with the bill is that it might not be well drafted. Section 5 says that arbitration agreements are void except where the Federal Arbitration Act comes into play. That creates a very complicated circumstance for anyone in business to try to determine whether they are in or out of interstate commerce. They literally have to consult a lawyer to find out whether they are, under U.S. Supreme Court law, considered to be in interstate commerce or not.

Another element of this act that is troublesome is in section 6, line 24, which places at risk a person who drafts a contract. That is a much different issue than suggesting there must be certain standards in a contract, which I would also suggest might be preempted by the Federal Arbitration Act. It subjects an individual who simply drafts one to the jurisdiction of this State to be enjoined, as on page 3, line 12, by the attorney general and to be responsible for drafting an agreement. I have several partners in my law firm who routinely draft agreements.

Another area that is somewhat problematic is section 10, line 38. It imposes obligations upon certain organizations that engage in arbitration. While I am very sympathetic to the suggestion that there may be some arbitrators or panels of arbitrators that are less than straightforward and balanced in their approach, this bill goes way beyond trying to deal with fairness in arbitration.

I am not entirely sure that the bill could not be redrafted to have a court opportunity for an affirmation to the arbitral award based upon fraud. It appears from some of the circumstances being described that might very well be appropriate.

The final area I wanted to address is the one the Chair was raising with Mr. Sorich. One of the problems here is the sections dealing with the insurance law. There is case law that clearly describes that the regulation of insurance is the responsibility of the states. However, dispute resolution is not an element of regulation of insurance. Dispute resolution is simply dispute resolution. While there is language in the law today that bans arbitration agreements in auto insurance policies, the Federal Arbitration Act may very well ban any preemption on pre-dispute, arbitration agreements. My suggestion is that may very well apply to the existing law and certainly complicates this. The bill is best left unprocessed.

ROBERT COMPAN (Farmers Insurance):
I just wanted to say “me too” to what Mr. Sorich and Mr. Wadhams said. When the bill was in the Assembly Committee on Commerce and Labor, we too had confusion and misunderstanding that we tried to address with the proponents of the bill. It starts in chapter 597 of NRS and goes all the way into insurance, chapter 687B of NRS. We would like to have assurances from the proponents that the mandated, nonbinding arbitration program will still be afforded to both our clients and their clients. Without some language linking it to the federal preemptions, it is confusing and hard to follow.

CHAIR CARLTON:
Mr. Compan, does your company use these arbitration agreements? If I wanted to purchase insurance from you, in an area where it is allowed, would you have me sign away my rights and go with mandatory arbitration?

MR. COMPAN:
In areas where it is allowed by law, yes we do. We are precluded by federal law from doing this in auto liability insurance.

CHAIR CARLTON:
Part of the confusion is not knowing what issues are under federal jurisdiction and what issues are under state jurisdiction. That is something the Committee is going to have to investigate more in order to be able to understand what we are addressing.

MICHAEL GEESER (AAA Nevada):
I want to echo what my colleagues have said and repeat Mr. Wadhams' point. Sections 1-19 of the bill talk about basic disclosure. The bill then takes a sharp right turn at section 20 and captures a whole industry. If the bill stopped at section 19, we might even support this. I would go even further and say we probably deserve detailed disclosure, not just basic disclosure. It was introduced as a bill about basic disclosure. That is true for sections 1-19. Then it goes on and on about a whole industry and what insurance lines can and cannot do. For that reason we oppose the bill.

CHAIR CARLTON:
Mr. Geeser, does AAA Nevada use these agreements within any lines of your insurance?

MR. GEESER:
It is my understanding that we do not.

MR. ABNEY:
I will just give a "me too" to the previous speakers. We are always worried about any bill that opens up the potential for lawsuits and increased costs to our members. The Reno/Sparks Chamber of Commerce does not use these types of agreements.

SAMUEL P. MCMULLEN (Las Vegas Chamber of Commerce):
I wanted to emphasize some points that have not yet been discussed. There are some aspects of this bill that are very positive and we do not have problems with, such as sections 10 and 11. Disclosures, fairness or ethical guidelines such as not having a financial interest in any party or attorney for a party in the

arbitration are good things. However, there are some things that we absolutely oppose.

This is not just consumer arbitration. It actually adds, under the definition of consumer, employees or people applying for a job. That clearly is not consumer arbitration. That is on page 2, lines 13-14, and page 3, lines 33-35. Those ought to be deleted.

In addition, section 5 is absolutely unnecessary, given the current state of affairs. If the federal law was revoked, then something like this would be worthwhile. As you have heard today, this creates confusion as to whether or not something is outside the interstate commerce clause and its implications. It is either preempted by federal law or it is not. We would like that to be deleted if this bill is processed.

We have gotten a number of phone calls over the past few weeks. A binding arbitration clause in a contract for the purchase of a house or any real property would be illegal under this bill if it ended up becoming actualized under the revocation of the federal law.

CHAIR CARLTON:
Mr. McMullen, if I could stop you, we had that conversation earlier. The explanation given to us was that is within federal jurisdiction, not within this State's, so it would not apply. You were not in the room at the time. Senator Copening had asked that question about arbitration and home building.

MR. MCMULLEN:
Correct, because it is interstate commerce and is covered by the federal act.

CHAIR CARLTON:
It would not be impacted.

MR. MCMULLEN:
Interstate commerce is a function of a lot of businesses. Generally, I think that is clear if you are advertising across state lines. But, it is not always clear. It is a question of fact. It is a question of exactly what are the circumstances and where is the advertising. The law is very inclusive in terms of interstate commerce. The chances of it not being interstate commerce are correct. The point is that it sets up a question of fact that is a function of the facts. There is

no “bright line” test for interstate commerce. They err in favor of interstate commerce because it is easier to find that the facts support that.

CHAIR CARLTON:
Mr. McMullen, were you in the room when the question and answer was given earlier?`

MR. MCMULLEN:
Yes, and I am familiar with that case law.

Section 17, page 6, changes the provisions in chapter 38 of NRS which is the Uniform Arbitration Act. I just want to make sure you understand that you are making changes to a uniform act. The implication of section 17 is whether the arbitration is binding or not. It is taking the arbitration law and saying there would be no consumer arbitration, binding or non-binding. It is not as clear as it is set out to be.

Our opinion is that it needs either some serious deletions or some serious corrections; otherwise, it has real problems for us.

CHAIR CARLTON:
Having no further testimony, we will close the hearing on A.B. 381, and we will adjourn this meeting of the Senate Committee on Commerce and Labor at 4:05 p.m.

RESPECTFULLY SUBMITTED:

Suzanne Efford,
Committee Secretary

APPROVED BY:

Senator Maggie Carlton, Chair

DATE: