

**MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY**

**Seventy-fifth Session
March 11, 2009**

The Senate Committee on Judiciary was called to order by Chair Terry Care at 8:36 a.m. on Wednesday, March 11, 2009, in Room 2149 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 Terry Care, Chair
Senator Valerie Wiener, Vice Chair
Senator David R. Parks
Senator Allison Copening
Senator Mike McGinness
Senator Maurice E. Washington
Senator Mark E. Amodei

STAFF MEMBERS PRESENT:

Linda J. Eissmann, Committee Policy Analyst
Janet Sherwood, Committee Secretary

OTHERS PRESENT:

Bryan Nix, Coordinator, Victims of Crime Program
Cecilia G. Colling, Chief of Staff, Office of the State Treasurer
Robert P. Krenkowitz, Office of the State Treasurer
Mary McElhone, Deputy of Unclaimed Property, Office of the State Treasurer
Michael Alonso, International Game Technology
Bill Uffelman, President and Chief Executive Officer, Nevada Bankers Association
Ray Bacon, Nevada Manufacturers Association
John W. Griffin, Retail Association of Nevada

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Tray Abney, Director, Government Relations, Reno-Sparks Chamber of Commerce
Keith G. Munro, Assistant Attorney General, Administration, Office of the Attorney General

CHAIR CARE:

We will commence today's hearing for the Senate Committee on Judiciary. Yesterday, we kept the hearing on Assembly Bill (A.B.) 114 open due to questions raised by Senator Wiener and Bryan Nix. Mr. Nix is in Las Vegas to address some of those questions raised about A.B. 114.

ASSEMBLY BILL 114: Makes various changes concerning compensation to victims of crime. (BDR 16-624)

BRYAN NIX (Coordinator, Victims of Crime Program):
I appreciate your willingness to keep the hearing open.

CHAIR CARE:

The e-mail correspondence I have seen would indicate you are aware of the issues that arose yesterday. I received your proposed amendment today ([Exhibit C](#)).

MR. NIX:

Mr. Chair, I apologize for the late submittal of the amendment. This issue involves the same section of the statute, but we do not know if it was independently submitted for a bill draft. It is a bill that came out of the Access to Justice Commission chaired by the Honorable James W. Hardesty, Chief Justice. Nobody located the bill draft so I was asked to include this in this bill since it is the same section of the *Nevada Revised Statutes* (NRS).

CHAIR CARE:

I received an e-mail less than an hour ago from the Fiscal Analysis Division indicating the reversion language you wanted as an amendment is not necessary. Have you seen this e-mail?

MR. NIX:

There was a flurry of e-mail communication late yesterday afternoon and early evening. I do not know if I have seen the particular e-mail you are referring to, but there are concerns with the language in the amendment and in the original

bill. Andrew Clinger raised an issue last night with regard to possible conflicts with Nevada Revised Statute 176.059. This needs to be revisited to take a look at the language on the reversion.

CHAIR CARE:

I appreciate you coming in this morning. I am going to close the hearing on A.B. 114 so you can work this out with Fiscal. Since a number of questions have arisen in the last 24 hours, I do not think we can resolve any of those questions this morning. We will reset this hearing for another week. Senator Wiener may want to talk to you directly.

MR. NIX:

I totally agree. With regard to Senator Wiener, I did forward some information about one of her questions. I would be happy to answer any additional questions she may have.

SENATOR WIENER:

I just received the information this morning but have not had the opportunity to review it. When I do, I will contact you. I am sure I will have additional questions.

CHAIR CARE:

We will close the hearing on A.B. 114 and reset that for sometime next week. We will now open the hearing on Senate Bill (S.B.) 167.

SENATE BILL 167: Makes various changes to provisions governing unclaimed property. (BDR 10-396)

Let me explain why my name is on the bill. I am a Uniform Law Commissioner. Last Session, we revised the Unclaimed Property Uniform Act. Several months ago, in conversation with the Office of the State Treasurer, it was suggested we make additional revisions. I ran those proposed revisions through the Chicago office of the Uniform Law Commission. This office has an interest in this work, hoping to keep uniformity among the states. The review of the Commission concluded the changes were not substantive and it was fine with those changes. The Commission suggested that negative reports, contained in section 1 of this bill, might be an issue but left it to Nevada to resolve. Once Bill Draft Request 10-396 appeared on the list, I was approached by International Game Technology (IGT) wanting an amendment to existing law. I

am willing to help the State Treasurer's Office, and if anybody wants to discuss the bill, that is fine with me. In that vein, I introduce the bill. The representatives from the State Treasurer's Office may come forward and explain their requested changes to S.B. 167.

CECILIA G. COLLING (Chief of Staff, Office of the State Treasurer):
Sitting to my right is Mary McElhone, Deputy Treasurer for Unclaimed Property for the Office of the State Treasurer. Sitting to my left is Robert Krenkowitz of Affiliated Computer Services (ACS), a clearinghouse related to unclaimed property. Mr. Krenkowitz is a national expert on the topic and will help you with any policy issues you may have.

Senate Bill 167 is designed to clean up things we have noticed since the reforms from the last Session. The most notable of these reforms would be negative reporting. In 2007, we did require negative reporting. Negative reporting assists businesses in being vigilant about reviewing unclaimed property records to make certain they do not have anything to report. Businesses do have to attest they do not have any unclaimed property so it cannot be considered a mistake or an oversight. Negative reporting is a way for the State Treasurer's Office to monitor company reports to see if there are any abnormalities requiring an audit.

CHAIR CARE:

For the benefit of the Committee, explain what we mean by unclaimed property and how it escheats to the State.

MS. COLLING:

I am going to ask Mr. Krenkowitz to explain this for you.

ROBERT P. KRENKOWITZ (Office of the State Treasurer):

Thank you for the opportunity to provide you with background information on the workings of unclaimed property or escheat laws. Starting in 1954, the unclaimed property legislation has principally been fostered by the National Conference of Commissioners on Uniform State Law. Before that, each state had different bills and bifurcated bills addressing various classes of unclaimed property. One of the bases of unclaimed property is the presumption of abandonment. When you talk about abandonment, you should not think this is an actual situation where the owner of the property has knowledge of the property and has made a conscious intent to abandon, to give up all rights to

the property. This is not the situation in the normal definition of abandonment. Unclaimed property rests on a presumption if there is no activity in an account and no communication between a holder of business entity, person or transfer agent and the apparent owner for a certain period of time, the property is presumed to be abandoned.

A property must be a fixed and certain obligation, meaning this is not property subject to question. If there was a dispute about the property or the amount due on a check, that is not a fixed and certain obligation. Therefore, it is not deemed to be property subject to the Act.

You must have a reasonable period of time to look at the property. Ordinarily, a citizen or business would have taken some action regarding a property within a set period of time. This may be one year in the case of a check, or up to 15 years in the case of a traveler's check. All those periods are designed because it is important the State have a report of this property in order to locate the owner. Last year, the Legislature adopted a one-year period for wage checks because the longer you wait, the lower the probability of finding the owner as opposed to having a 15-year period for traveler's checks. Statistically, within that 15-year period, most traveler's checks are negotiated by the individual.

There must be contact or communication based upon the type of property. If the property is a bank account, look for deposits and withdrawals. If it is a check, look for negotiation of the check through the banking circles. If the property is a dividend check, look to see if the check has been cashed, and if the property is a stock certificate, check to see if the certificate has been issued. Look for communication between the corporation and the apparent owner. If there is no activity, there is an absence. The law is designed to step in and protect the interest of the apparent owner. It creates this presumption of abandonment, but it is a rebuttable presumption through communication.

A holder is required to attempt to contact the owner. This can be done by sending a letter for address verification that asks the owner to cash a check or take possession of a stock certificate or outstanding wage check. Communication is key. If the apparent owner responds, even though the period of abandonment has expired, the property is not deemed unclaimed property because there is contact communication between the apparent owner and the holder of the property. Unclaimed property has a foundation—a presumption of abandonment based on inactivity subject to the reestablishment of

communications between the holder and the apparent owner. The purpose, philosophically or jurisprudentially, is unclaimed property seeks to have the State take possession of this property in the best interest of the apparent owner. Some courts have defined this as a class of consumer protection. The State takes possession and has the obligation to do whatever it can to get the information about this property back to the apparent owner and get the property back to the apparent owner. This is a public service the State is providing to its citizens and businesses.

At the same time, it denies the use and benefit of this money to the holder of the property. All too often, this money is taken into income. Remember, these are undisputed obligations. There is no question that the money is owed. Certain businesses have used this as an income stream: take it in, cut off and forfeit the right of the apparent owner. Unclaimed property legislation says a business cannot do this. If you have a recognized, undisputable obligation, you either pay it to the apparent owner or pay it to the State as custodian for the owner with the State then having the perpetual obligation to restore this property to the apparent owner. At the same time, during this period when the property is in custody, the law says it is right and proper for the citizens of the State to have the use and benefit of this money rather inuring it to the private party, which the courts say have naked possession but no legal or moral claim to that property.

CHAIR CARE:

It varies from state to state. In Nevada, we tailored much of the unclaimed property to go to the Millennium Scholarship Trust Fund.

MS. COLLING:

I can walk you through the bill. Section 1 pertains to how the holder of the property will provide written notice and how the filing should occur. If there are more than ten items, the holder of the property should file the report electronically with the Administrator. If the property presumed abandoned is excessive, there is the ability to charge a \$2 deposit on the shares of account to pay for the work being done.

MARY McELHONE (Deputy of Unclaimed Property, Office of the State Treasurer):

Section 1, subsection 6 of S.B. 167 states, "If the apparent owner completes, signs and returns to the holder of the property presumed abandoned" This change came about because we were having problems where there is a requirement if a holder has property valued at \$50 or more, the holder is required to make a last effort to contact the individual with written notice. Claimants told us they had been contacted by written notice, but when they contacted the holder, the holder still turned the property over to our office. We felt it necessary to amend this with language, stating if the owner of the property makes contact with the holder, the property is no longer presumed abandoned and should not be sent to Nevada Unclaimed Property.

Section 1, subsection 7 deals with electronic reporting. If a holder has 15 or more items to report, this must be filed electronically on a CD or diskette. The number of increased holder reports has become a burden to our office. The amendment proposes to have a holder who has ten or more properties file the information electronically on a CD or diskette.

A \$2 fee is discussed in section 1, subsection 8. This was removed in the last Legislative Session. This allowed a holder, who had to send a notification to an apparent owner, to deduct \$2 for the cost of the mailing expense. When removed, we had many phone calls from holders asking if they could still deduct the \$2. We decided it was fair and put this back into the statute, allowing holders to deduct \$2 for mailing the notice to the apparent owner.

Section 1, subsection 12 is a result of a current project. We are trying to work towards a system where we can have true electronic reporting. Right now, electronic reporting consists of putting the information on a CD or diskette. We hope we can move to a system where information can be loaded online through the Internet into our Website. Since the holders' reports must be notarized, we needed this language. When the holder sends the report electronically, the notarized signature would be accepted electronically. We would no longer need hard paper copies.

CHAIR CARE:

Is that something other states are doing?

MS. McELHONE:

Yes. A few states are moving towards this, and it has helped them with their resources.

Section 1, subsection 13 addresses negative holder reporting, which would be good for our office. We do have plans of putting some information into our regulations precluding every business across the United States from reporting a negative holder report to us. During the summer, our office will work on regulations which will outline some exceptions.

Section 2 amends NRS 120A.570 adopted in the Uniform Act of 1995. The proposed deviation from the Uniform Act deals with safe deposit boxes. When we receive the contents of safe deposit boxes, we like to have the report at the same time. The law states that contents of the safe deposit box or safekeeping repository may not be delivered to the Administrator until 60 days after filing the report. This creates a dilemma in our office. In the process of our conciliation, we want the report at the time we receive the contents so we can go through the report to be certain we have received the proper contents. This is one area of unclaimed property where we do have some issues. The banks do not send us the proper number of safe deposit box contents. Sometimes, the owners have come forward to claim those, yet their names are still on the holder report. We wish to receive that information at the same time. This change removes the 60-day delay.

The next change we are making is to NRS 120A.580 in section 3, subsection 1 of S.B. 167. In the last few years, Nevada has taken in a lot of foreign money. The way the statute reads, we are compelled to advertise within our State newspapers for apparent owners even if they live outside our State. The average cost of advertising is \$2.69 per name. The cost of advertising in the *Las Vegas Review-Journal* is \$2.40. Addresses outside Nevada generally go into the *Las Vegas Review-Journal*. Most of this foreign money we have received is from people who have never lived in or stepped foot in our State. We think there is a better way of utilizing that money. Rather than advertise in the newspapers, we want to send the owners a written letter through the mail based upon the last known address or any other address we may obtain. The cost of sending a 1-ounce international letter is between 72 and 94 cents. There would be a savings to the State. This would be a better medium to reach out to these owners of unclaimed property.

CHAIR CARE:

Assuming this bill passes, your office would promulgate some sort of regulation addressing the direct mail.

Ms. McELHONE:

Yes. We have looked into foreign newspapers and other venues to reach out to these foreign claimants, but we have not come up with anything except direct contact through the mail.

The next item is NRS 120A.640 in section 4, subsection 3, of the bill regarding foreign money. It has been a challenge to our small department to translate the many different languages of the paperwork we receive. We have received claims in Russian, Greek, Pakistani, Italian, Spanish and French. We want the cost of translation to fall upon the claimant.

Section 4, subsection 5 deals with foreign claimants. We have had some issues in sending payments to foreign countries. Last year, a check sent to Colombia was taken and altered, never reaching the claimant. Fortunately, the State has a positive pay system. When the check was changed from \$2,000 to \$20,000 and reached our banking services, it was denied for payment. At that point, we decided it would be in our best interest to send checks to foreign countries via registered mail, with expenses for mailing be deducted from the payment due the claimant. Registered mail costs approximately \$13 to \$14. We pay about 15 of those a month. This is a cost savings to the State that would be important to have in our statute.

CHAIR CARE:

This requires a two-thirds vote because of the explanation we just received. There is no tax here, just the fee, which is the reason for the two-thirds vote.

MICHAEL ALONSO (International Game Technology):

I am here on behalf of International Game Technology. I signed in neutral on the bill with a proposed amendment ([Exhibit D](#)). For the record, IGT feels it has been complying with the unclaimed property statutes since its inception in 1981. IGT has been filing the reports. Based on the changes this Committee has made to the Act, there is now an audit examination section. In the last year, IGT has been undergoing an audit under the Act. The proposed amendment by IGT is intended to make the law better by creating some standards to deal with issues that have come up in the audit.

The [Exhibit D](#) amendment to subsection 8 of NRS 120A.113 is trying to create a business-to-business exception to the definition of property. Property would not be unclaimed if the property is between one business and a second business transacting business with the first in a normal course of business. If you see the transaction in the records, it would not even be reportable. For example, if a company had an ongoing relationship with a slot machine company involving deposits and continuous transactions over a period of time in the ordinary course of business, the business would not have to include that in a property report.

The [Exhibit D](#) amendment to NRS 120A.550 intends to clarify that. Because the State is stepping into the shoes of the lost owner, it cannot take property from the holder on a lower burden of proof than it requires the owner to provide to recover the property. In other words, if the owner can provide a written statement showing the holder does not owe them the property, it would not be required to be reported and the property would not be deemed abandoned.

The [Exhibit D](#) amendments to NRS 120A.680 address the period of limitations. Right now there is a ten-year period in the statute. When you combine that with the average dormancy period of 3 years, you are keeping records for 13 years. This record-keeping burden may go against most companies' record retention policies. A statute of limitations would follow the statute of limitations already in code for that type of a transaction. It would provide a three-year statute for a claim by the Administrator if the holder has identified the property on a report and filed a report. Or, it would create the longer one, the six years following the date if the holder had not filed a report or had falsely or fraudulently filed the material with intent to evade delivery of the property. That makes record keeping more workable.

The [Exhibit D](#) amendments to NRS 120A.690 relate to audits. The State is able to contract with an outside auditor on a contingent fee basis. We object to using a contingent fee on an audit; an hourly or fixed fee should be used. It may be difficult for the State to do, but I cannot imagine another scenario where an auditor can audit your books on a contingent fee basis where they have a stake in the outcome. It becomes a fishing expedition with these outside auditors. Dovetailing on that, there is no requirement the outside auditor is licensed in the State of Nevada. If something is amiss, the holder of the property does not have any recourse other than suing the State or the outside auditor. The auditor should be licensed with the State. We require auditors and attorneys who come

into the State to associate or become licensed here. This is not an unreasonable requirement for outside auditors.

Subsection 8 of NRS 120A.690 in [Exhibit D](#) deals with extrapolation. It is up to the holder to accept extrapolation where the records are kept. If records exist, you must go back, look at the records and if there is a claim, determine the amount versus doing a sampling and extrapolating that amount. Extrapolation can be done if records do not exist. You are still putting the burden on the holder to have the records for the statute of limitations period. If the records are in existence, you cannot extrapolate unless the holder agrees to it.

Subsection 1 of NRS 120A.720 in [Exhibit D](#) addresses the examination. An out-of-state audit would occur in conformance with this Act at the business location. This provides confidentiality and makes more sense of the process.

The final [Exhibit D](#) section to NRS 120A.760 is an appeal process. There is no appeal process in the current Act. In this amendment, the appeal would go to the Office of the Attorney General with provisions for judicial review.

SENATOR WIENER:

I have concerns about the language for the business-to-business relationship. The language states in the normal and ordinary course of business, the relationship between two companies or two entities would be exempt. What about the business-to-business relationship when there is no communication for an extended period of time and the relationship has ended, even though there is a holding of money or money due. To me, the dormancy severs the relationship at some point. What are the rights then?

MR. ALONSO:

I do not know if this is the end all, be all to that. We are trying to get something started on the business-to-business exemption. The idea of unclaimed property was to protect individuals and the rightful owners of the property. In a business-to-business context, you have a slightly different issue than an individual. The business is more sophisticated and can take care of itself. It could make the claim and have the additional resources to go after the holder of the property. In the case where three or five years have passed, the holder cannot argue it is an ordinary course of business transaction. Some of these transactions do take longer. If you can show a long-standing business

relationship, dealing with deposits over a period of time is not an unreasonable thing.

SENATOR WIENER:

Here is a hypothetical situation based on some economic challenges we are facing. Let us say a client is in an ongoing relationship, but that client quickly goes out of business. A business closes and that relationship, by the nature of the change in the business itself, has ended. Here is an exemption. How would we deal with that situation?

MR. ALONSO:

If a business shuts its doors, the holder is not going to be able to argue an ordinary course of business. That business is gone or has changed drastically.

SENATOR WIENER:

At that point, do you see there is no longer a business-to-business relationship that would qualify for this exemption?

MR. ALONSO:

Yes, I agree. This would not be an ordinary course of business and would no longer be exempt from the definition.

SENATOR PARKS:

With regard to S.B. 167, you said you were testifying as neutral. Do you have any problems with the bill as presented?

MR. ALONSO:

We do not have any specific concerns with the bill as written.

SENATOR PARKS:

I am having difficulty getting my arms around what we are talking about when referring to business-to-business in [Exhibit D](#) for NRS 120A.550. How large might this issue be? Can you give me an example of what this would entail?

MR. ALONSO:

I do not work with unclaimed property, but I will try to give you an example. Under the statute, you have to report within a period of time, depending on the type of property. For larger companies, the reporting can take a lot of time. You have to keep the records and report them to the State. You are then subject to

an audit. The State can find that in your records and come back to you. You must then explain why this is unclaimed property. We are trying to include a business-to-business exemption from the definition of unclaimed property so that we are not reporting if we believe the property exempt. In other words, we continue to do business with the entity, which must be a business association, commercial vendor, commercial customer to or for the benefit of another business association, commercial vendor and commercial customer, resulting from a transaction occurring in a normal and ordinary course of business. At that point, we can make a judgment call to say we are not going to report. In the possible audit, we could have an argument over whether or not we should have reported it. From our standpoint, we do not have to report those things we believe to be a commercial transaction done in the ordinary course of our business.

BILL UFFELMAN (President and Chief Executive Officer, Nevada Bankers Association):

I was supportive of the bill until I received a call from a banker this morning whose questions changed my mind. The banker wanted to know if the \$2 fee mentioned on page 3, line 22 of the bill reflects the postage or the expense of the preparation and mailing of the document? If the cost is to cover the preparation and mailing of the document, \$5 would be a more reflective fee.

In some situations, we have turned overseas property valued at more than \$50 to the State, and perhaps there are multiple items the claimant cannot prove, thus reducing the amount. As I read lines 12 to 14 on page 6 of the bill, the State Treasurer's Office is saying it costs around \$15 to send the international letter in cases of overseas property. For whatever reason, the claimant can only prove up to \$12 worth of property out of some larger claim. The State eats the postage because it exceeds the value of what is being mailed. I do not think they intended for this to happen. I would suggest double-checking to see if they are always allowed the postage. If it exceeds the value of the claim, the claim is then voided or negated. Our opposition to the bill is not strong; it is just money.

RAY BACON (Nevada Manufacturers Association):

International Game Technology is a member of our association. They are fundamentally proposing good business practice. I come to the table from this standpoint. They are trying to put measures in place for regular due process so

things can be handled in an orderly fashion. Their proposal is an improvement to the existing statutes.

JOHN W. GRIFFIN (Retail Association of Nevada):

On behalf of the Retail Association of Nevada, I am here in support of the IGT amendment. I reiterate Mr. Alonso's comments. There are some business-to-business transactions that stay dormant for multiple years without raising any eyebrows in the business community. Sometimes, you are on a five-year tickler where a supplier will call and say it is time to talk again. We are in favor of the IGT amendment.

CHAIR CARE:

Your focus is proposed subsection 8 on the first page of [Exhibit D](#) under NRS 120A.113, the ongoing relationship between businesses.

MR. GRIFFIN:

That is correct. That would be the primary focus of our support, but we are in support of the other provisions as well.

SENATOR WIENER:

At what point is the relationship not ongoing? You mentioned five years.

MR. GRIFFIN:

I am not sure I can answer that because it is probably fact specific for different industries and businesses. The safeguard for the State is businesses in Nevada are properly doing business, have business licenses and are registered with the Secretary of State. They have appointed resident agents in the State so the years of the relationship may not be as big a concern as a consumer who has one address and moves.

SENATOR WIENER:

I express hesitation of something being declared an ongoing relationship where there is no activity for 5, 10 or 12 years just because they are licensed and do business legally in Nevada. I will have to weigh in on that idea.

TRAY ABNEY (Director, Government Relations, Reno-Sparks Chamber of Commerce:

I signed in as neutral on this bill, but I do support the IGT amendment. I want to urge the Committee to examine and consider this amendment. From a Chamber

perspective, we want to make sure our unclaimed property laws are not overly onerous so we can continue to attract industries to Nevada.

KEITH G. MUNRO (Assistant Attorney General, Administration, Office of the Attorney General):

With respect to the amendment in [Exhibit D](#), the new section 10 under NRS 120A.760 requires new duties of the Office of the Attorney General. We became aware of this amendment today, so we would like to have the opportunity to review those new duties.

CHAIR CARE:

Mr. Krenkowitz, let us walk through the amendment presented by IGT. The first provision of the amendment addresses the transactions between businesses and the ongoing relationship. You heard the testimony of Mr. Alonso and Mr. Bacon from the Nevada Manufacturers Association. I am looking for your reaction. Are you speaking on behalf of the Office of the State Treasurer?

MS. COLLING:

Yes, he is.

MR. KRENKOWITZ:

I would reiterate what the Chair said at the beginning. This is a Uniform Act. This is not legislation developed solely by the State Treasurer's Office or in consultation with certain people. This was developed by the National Conference of Commissioners on Uniform State Laws. There is a vigorous drafting process a bill goes through before adoption by the National Conference of Commissioners. The drafting committee is composed of lawyers, judges and attorneys, not people in the unclaimed property field. The bill is given an independent, nonpartisan look. The bill goes through two examinations when the Conference sits as a committee of the whole. All of these provisions are extensively examined so the bill is usable in all states. The last provision in the bill, in the Nevada Act, states the bill is to be construed and applied to accomplish its purpose to make uniform the laws of all the states that adopted it.

One of the problems in the unclaimed property field is a number of interest groups want to carve out exceptions for their industries. Doing that undercuts the fundamental objective of having uniform legislation which applies to all

states. This kind of business-to-business exemption has been tried in a number of states. I believe it has only been adopted in three states in a modified form.

As proposed here, there are some drafting problems. The terms commercial customer and commercial vendor are not found in the sales act or in the Uniform Commercial Code. Going down that road, you will have to define what these terms mean because they are not accepted definitions in the field.

The more fundamental problem is, as Legislators, you have an obligation to treat all persons similarly situated in the same fashion. Under the *Constitution of the United States of America*, a person includes a natural person and includes artificial entities, business associations and business organizations. The underlying issue of standard is what is in the public interest? If you take that and equal protection, why is it then, if a business issues me, a private citizen, a check and for some reason I do not negotiate the check, the law protects me as an individual? If my neighbor opens a small business and operates as sole proprietor, doing the same thing I do as an individual, why is he not protected? If a check is issued to his business, and the check is chewed up in the mail system, for example, why is he not protected? If my neighbor says he is not going to be a sole proprietor and wants to incorporate because of the tax benefits, why should he not be protected in the same way?

When looking at exemptions, a Legislator should consider if the exemption is providing equal protection to persons similarly situated. If we are going to protect the individual, should we not also protect the sole proprietor, partnerships and small businesses? If there is communication in this ongoing relationship concept, under section 2 of S.B. 167, the property is not unclaimed. You have rebutted the presumption of abandonment. The unclaimed property law is saying if you have this obligation, what are you doing to make sure it is a current obligation? What are you doing if the company is no longer in business?

MR. KRENKOWITZ:

My concern is on the opposite side of the coin. I have been involved in cases in Minnesota where a company deliberately did not communicate with its customers and other businesses that had outstanding money. The company took the money into income. Eventually the United States Attorney for the District of Minnesota found out and prosecuted the company for mail and wire fraud because the company did not provide this information. The unclaimed

property laws say if you have an obligation to pay and it is not discharged, you must tell the apparent owner. If the apparent owner says yes, but I am going to need it, leave it there, you have made contact. It is not part of the law.

The other aspect with business-to-business communications is you should recognize that you are not only talking about a Nevada corporation. Different states can have sovereignty over the disposition of unclaimed property. If it is a Nevada corporation, the Nevada law applies. If the property is due to a citizen or business in Nevada, your law may also apply to property held by a company in another state because you have the power as the Nevada sovereign to determine the succession to property. Who owns property of people in your State? Property might be due to a foreign corporation or a corporation of another state not in Nevada, but the transaction occurs here. You have a connection.

There may be a situation where three states say they have the right to take custody. The United States Supreme Court has said that will not work. The state having the primary right to take custody is the state of the last known address. If there is no last known address, the state of incorporation has the right to take the property. If there is no address and the state of incorporation does not have an unclaimed property law for that property, the state of incorporation can take that property. If there is no last known address and there is no state of incorporation, the state of transaction can claim the property as the tertiary holder. What happens if you adopt this business-to-business provision? Suppose the business is in another state and the rightful owner is a citizen of Nevada. If you adopt this, what have you done? The property goes to the other state because the primary holder, Nevada, cannot claim the property because of this exemption. You have now taken a Nevada citizen's property away from the State Treasurer of Nevada, who can reach that person and get their money to them, and you have given it to the other state. The other state will do what it can, but the other state is not as interested in the Nevada citizen as the State Treasurer. From the business point of view, suppose it is a Nevada corporation, but the last known address is in another state; the Nevada corporation cannot say this is a business-to-business exemption. You have to look at the law of the other state. The sovereignty of Nevada ends at its borders. A Nevada corporation, even with this on its books, has an obligation to pay that person.

There are situations where there is communication and businesses can take care of themselves. National statistics show there are billions of dollars unclaimed by businesses. If businesses can take care of themselves, why is all this property unclaimed? Some holders engage companies in the business of locating this property for them because they cannot do it themselves. In this situation, not having the exemption is providing a public service both to the individual and to the individual as business person as corporation. The State is not in the position of taking any monies where there is this communication. If there is contact between the business and the apparent owner, then the presumption of abandonment is rebutted.

CHAIR CARE:

I want to address your first comment. You seem to know the drafting process of the Uniform Law Commission. It is my intent to submit this to Chicago to get their reaction. The Commission does recognize that states make adjustments of public policy for various reasons. After that has happened over a period of years, the Conference will say we need to look at a revision. It is not that amendments do not exist in Uniform Act, it is the extent of the amendment.

SENATOR WIENER:

Mr. Chair, based on what you shared and the testimony of Mr. Krenkowitz, I noted three states have a more moderate amendment to the Uniform Act regarding a business consideration. If you are going to submit this, would you also give us access or determine the Commission's review of those states?

CHAIR CARE:

What are those three states?

MR. KRENKOWITZ:

I can look up the information and provide it for you. I have done a study, and if the Committee is interested, I can give you a copy of the other so-called exemptions.

CHAIR CARE:

There was a discussion in the amendment about the level of proof, the contingency fee versus the hourly fee, auditors being licensed in Nevada, confidentiality provisions, extrapolation and the appeal process. What is your reaction to those ideas?

MR. KRENKOWITZ:

The work of the Uniform Law Commissioners is not in a vacuum. The codification of the decisions from the courts and from administrative determinations is used as the basis for their drafting. The use of auditors came to the floor in 1984. From 1984 through the time the Uniform Law Commissioners considered what eventually became the 1995 Act, more states began using contract commissioners. These contract auditors were modeled on the Multistate Tax Commission used by most of the states to conduct audits of major multistate corporations. That was the genesis for this model now being used by most of the prevailing audit firms.

When the 1995 Act came up for considerations, the Commissioners recognized this was a reality of the situation. A provision in the law, as with the 1995 Act that Nevada adopted, authorizes the Administrator to contract with a third party to conduct these examinations; it is well known that contingency fees are the way to do it. Speaking about the propriety of contingency fees, in 1927, the United States Supreme Court said it is with truth that the legislature of the state may and often ought to stimulate prosecutions by offering rewards to those who initiate and carry on such prosecutions for thus acting in the interest of the state and the people. This has been the genesis. Since then, there have been a few cases raising the issue about the propriety of contingency fees. The latest cases have all held that they are appropriate.

A decision by the Georgia Supreme Court said contingency fees were not appropriate and were a matter for the Legislature. Two years after that case, the legislature not only enacted a provision that said you could use contract fee auditors but said it had to be on a contingency basis only, thereby overruling the court. All precedents thereafter have been consistent with the provision. With that history, the Commissioners put the provision into the Unclaimed Property Act.

There is a provision about enforcement. If the holder is in another state and a Nevada court cannot get jurisdiction over that holder, the Administrator and the Attorney General of Nevada are authorized to contract with another state or private attorney to enforce Nevada's law with the fees and expenses of the private attorney to be satisfied on a contingency fee basis. This is already in the statute with respect to legal representation. Contingency fees are nothing new to Nevada law. That was not introduced last year. Since 1983, previous editions had a provision allowing a 15-percent reward for information about

unclaimed property. Last year, when you adopted the 1995 Act, you did nothing more than continue the practice already established in 1983.

Many criticisms of contract fee auditors are made by the holder community. The basis of unclaimed property, with respect to the holder, is truthful self-reporting. It is only when the holder has not reported that the state conducts these kinds of examinations. The United States Supreme Court has ruled this is a necessary concomitant to an efficient enforcement of the law. How else can the state make sure laws are enforced unless it is audited? The states need these contract auditors because they do not have the personnel; they need to have this assistance and expertise. A drawback of the proposed legislation is that they want a Nevada-licensed accountant. This is a specialized practice, and not everybody knows it.

CHAIR CARE:

Let me ask you about the confidentiality provision proposed in [Exhibit D](#), subsection 5, paragraph (b) of NRS 120A.690, " ... if the agreement contains confidentiality provisions similar to those required by this Act."

MR. KRENKOWITZ:

This is not an innovation. Other states having the 1995 Act already have this provision. You cannot tell another state what it can or cannot do. The sovereignty of the legislature ends at the border. Laying the sovereignty apart, it is an unnecessary provision because in the ordinary course of business, the Administrators cooperate with one another. Nevada cannot do all of this alone.

There has been a focus on Nevada corporations in the presentations. Remember, Nevada is entitled to an enormous amount of money being held by corporations which are not Nevada corporations. Their books and records are not in Nevada; therefore, Nevada has to join with other states in a unified effort. As the United States Supreme Court has told us, there is strength in numbers in organization. They need the ability to go with other states and conduct these joint examinations through contingency fee auditors who bring the necessary expertise to the examination. Many of the big accounting firms have turned to ACS and others that specialize in this area. The State Treasurer does not unilaterally hire accounting firms. These are publically bid contracts. The big public accounting firms do not bid on these contracts because they make more money advising corporations on how to straighten out unclaimed property.

CHAIR CARE:

Do any other jurisdictions have an appeals process?

MR. KRENKOWITZ:

They do not when you have the Attorney General as the second reviewer. Iowa has an appeals process. There is also a review committee in the Pennsylvania State Treasurer's Office. The holder can go to that committee, have a hearing, and the Treasurer will make the examination. That is typically what happens under the Administrative Procedure Act. I have not reviewed the Nevada Act, so I cannot say. In other states, if there is a controversy in the first instance, they go to the administrative agency and they make the determination. The process then goes to Judiciary. Judiciary is required to defer to the examination and determinations of the Administrator, so long as it is reasonable in concept. Going to the Attorney General does not make sense. It would be new law if you now say the Attorney General must defer to the Administrator so long as it is reasonable. This is not necessary. The statute already provides judicial relief. This is the typical pattern, first to the Administrator and then to Judiciary.

CHAIR CARE:

What about the extrapolation language?

MR. KRENKOWITZ:

Extrapolation is only done when there are insufficient records available. Under the present statute, estimations are done when there are no sufficient records available to make the calculation. When the records are available, the State is required; but the State should not be put in the position of doing the holder's work. This provision would allow a holder to sit back and do nothing, creating a mess of the records, telling the State if it wants the report, the State will have to straighten out the mess. This is unreasonable and puts the burden upon the public when the burden, in the first instance, is upon the holder. It is to the benefit of the holder to do these kinds of estimations so the holder does not have to spend an enormous amount of time gathering and going through the records. If the holder does not want to do the work, the State should not do the work for them. The holder has the obligation.

CHAIR CARE:

Do you have a reaction to Mr. Uffelman's testimony about the \$2 fee?

MS. McELHONE:

In the previous statute, \$2 was reasonable. We have had situations where people have said they were only allowed to charge 43 cents for the cost of the postage. We told them, by statute, they were allowed to charge up to \$2.

CHAIR CARE:

There was a discussion about spending \$15 on registered mail overseas when someone can only prove a claim of \$12. I do not know if any language was suggested.

MS. McELHONE:

Perhaps Mr. Uffelman was suggesting if it costs more to do it, we just do not do it at all. Most money going to foreign claimants is more than \$15. It is usually \$1,000 or more.

MR. KRENKOWITZ:

The *Constitution of the United States of America* addresses a due process issue concerning the \$15 cost when the claim may be less than \$2. Even though they may only have a \$2 claim, that party is entitled to notice whether the cost is \$15 or \$30. You cannot take the \$2 if you have not given them the constitutionally required notice. They have to have that mailing. It is unfortunate, but it is one of those things that happened. If you want the program to go forward, then you have to do the mailing.

CHAIR CARE:

In the interim, talk to Mr. Uffelman about the \$5 fee. It does not look like there is any sense in going forward with discussion because of the constitutional implications with the notice requirement. The Committee heard this morning that nobody is opposed to the bill as proposed, perhaps with exception to the amount of the fee. I will submit the proposed amendment from IGT to the Uniform Law Commission for their opinion. We will find out the three states that have this business-to-business exemption, what language exists in those states and when that language might have been adopted. It will take awhile to get that information so we will not do anything today.

MS. COLLING:

I would like to add a comment for the record. Should this amendment occur, there will be a fiscal impact, although we are not sure of the amount. The State Treasurer takes the position that you are the policy makers. This is why

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she provided you with expertise to help you with policy decision. We will enact whatever you feel is appropriate policy, but we need to inform you there could be financial implications in terms of loss of revenue.

CHAIR CARE:

Please submit the latest data on the amount of revenue the State has received through the existing unclaimed property statutes and any information about fiscal impact as a result of the proposed amendment.

SENATOR WIENER:

Since we have spent so much time on the business component, could you also provide information about the unclaimed property involving businesses?

Ms. COLLING:

I would be happy to provide you with that information.

CHAIR CARE:

If there is nothing further, we will close the hearing on S.B. 167. The meeting is adjourned at 10:01 a.m.

RESPECTFULLY SUBMITTED:

Janet Sherwood,
Committee Secretary

APPROVED BY:

Senator Terry Care, Chair

DATE: _____

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