MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Seventy-sixth Session
May 3, 2011

The Senate Committee on Judiciary was called to order by Chair Valerie Wiener at 8:06 a.m. on Tuesday, May 3, 2011, in Room 2149 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to the Grant Sawyer State Office Building, Room 4412, 555 East Washington Avenue, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Valerie Wiener, Chair
Senator Allison Copening, Vice Chair
Senator Shirley A. Breeden
Senator Mike McGinness
Senator Don Gustavson
Senator Michael Roberson

COMMITTEE MEMBERS ABSENT:

Senator Ruben J. Kihuen (Excused)

GUEST LEGISLATORS PRESENT:

Assemblyman Marcus Conklin, Assembly District No. 37
Assemblyman Jason Frierson, Assembly District No. 8

STAFF MEMBERS PRESENT:

Linda J. Eissmann, Policy Analyst
Bradley A. Wilkinson, Counsel
Lynn Hendricks, Committee Secretary

OTHERS PRESENT:

Joanne Levy, Nevada Association of Realtors
Venicia Considine, Legal Aid Center of Southern Nevada

Ernie Nielsen, Washoe County Senior Law Project
Bill Uffelman, President and CEO, Nevada Bankers Association
Ann C. Pongracz, Senior Deputy Attorney General, Office of the Attorney General
John Kelleher, Chief Deputy Attorney General, Fraud Division, Office of the Attorney General
Tisha Black Chernine
Ron Peterson, President, Nevada Land Title Association
George Ross, Bank of America; Mortgage Electronic Registration Systems, Inc.
Jon L. Sasser, Washoe Legal Services; Legal Aid Center of Southern Nevada
Susan Fisher, Coalition of Housing Providers
Jim Berchtold, Clark County Civil Law Self-Help Center; Legal Aid Center of Southern Nevada
Terry J. Care, Ex-Senator

CHAIR WIENER:
I will open the hearing on Assembly Bill (A.B.) 273.

ASSEMBLY BILL 273 (1st Reprint): Revises provisions governing deficiencies existing after foreclosure sales and sales in lieu of foreclosure sales. (BDR 3-561)

ASSEMBLYMAN MARCUS CONKLIN (Assembly District No. 37):
I have a written statement explaining the purpose of and need for A.B. 273 (Exhibit C).

In essence, what we are trying to do in section 2, subsection 1, and section 5, subsection 2 is tighten up the law in this area so it is clear. If you are a homeowner whose property is foreclosed and you have been paying mortgage premium insurance, the first place the bank needs to go to collect is the mortgage premium insurance. That insurance covers a portion of the deficiency. We do not know that banks are not collecting that money first or double-dipping; however, the law is completely silent in this area. We want to make sure the bank utilizes every instrument at its disposal to collect that money, which in essence shrinks the potential deficiency. We want to be sure banks do not sue homeowners for an amount to which they are not entitled.

From time to time, banks will get a deficiency judgment with no intention of collecting those judgments. Instead, they sell them to collection agencies for

pennies on the dollar. Section 2, subsection 2 and section 5, subsection 1, paragraph (c) state that collection agencies can only go after the amount they actually expended. For example, if a deficiency judgment is $100,000 and the bank sells it to a collection agency for $20,000, the agency can only come after the former homeowner for $20,000 plus interest and fees. It is a chain of profiteering against the original homeowner. The purpose of this bill is clear. If the bank was willing to accept $20,000, it should have negotiated with the homeowner for that amount. We are trying to create an environment in which it is in everyone's best interest to negotiate at the spot where the loan was originally negotiated.

Section 3 applies protections to borrowers of secondary or junior loans under the same conditions as those given to senior loans by A.B. No. 471 of the 75th Session. That bill gave those protections only to the primary lienholder, the bank that made the primary loan. However, because there are many cases in which a second loan was used in the original purchase alone, it is necessary to include secondary loans under those protections. Under A.B. 273, the loan package in the original purchase is included in the protections under our deficiency judgment laws.

I have a proposed amendment to the bill (Exhibit D). Section 6 of the amendment adds back some language inadvertently left out when the bill was reprinted.

The purpose of section 3.3 is clear. If you are a homeowner trying to short sell your house, many primary banks are willing to negotiate with you. However, many loan packages were made such that the second lienholder is actually in the primary lienholder spot because the statute of limitations for secondary loans is significantly longer than for primary loans. Senior lienholders have six months from the commencement of a foreclosure sale to file for a deficiency judgment. They are only going to win a deficiency judgment if the person has the assets to pay out on a deficiency. It is unlikely that the person's financial situation will change enough in six months for him or her to have the assets to pay a deficiency. On the other hand, the junior lienholder has six years to commence this action. There is no benefit for the junior lienholder to help the homeowner get out from under the loan. All the junior lienholder needs to do is wait for the economic situation to get better and file a deficiency judgment at that time. This bill puts the second lienholder in the same position as the

first lienholder. That way, everyone negotiates from the same position and sees the same financial benefit or lack of benefit in a foreclosure versus a short sale.

Many banks have told me, "We'd like to help your constituent on this, but the problem is they have a $10,000 secondary note, and the secondary lienholder isn't willing to deal." Why are those secondary lenders not willing to deal? Because they do not have to. They have a six-year statute of limitations that no one else has. They need to be on the same basis as the primary lender, who stands to lose far more and is willing to deal.

Section 5.5 is a little harder to understand. The standard investor who invests in land requires two people: one who is willing to loan money and one who is willing to risk. For example, an investor might say, "I want to buy $30 million worth of land, and I have $5 million cash." That person goes to a bank and gets a loan secured by the land and the personal guarantee of the investor, who is known to have $5 million. This is not an unsecured loan.

What is happening from time to time is that if there is a foreclosure, instead of going after the land first and then going after the guarantor for the difference, banks are choosing to go after the guarantor for the total amount of the loan. If we allow banks to continue to do that, people will not invest in Nevada. No one is going to take that kind of position to guarantee a loan secured by property. It would be different if it was an unsecured loan. What we are trying to do here is force banks to choose one course of action. They can still choose to sue the guarantor, but they have to take the land first.

Think of it this way. If you cosigned a loan for your child and your child could not make the payments, would you think the bank could come after you for the total amount of the loan and leave the house? You would not; that is not what happens when you cosign a loan. The loan was secured by land, and all we are doing is clearing this up so the banks do not get two bites of the apple—a lawsuit and a potential foreclosure—but only one. If the bank chooses to file a suit, that is fine, but the bank must take the value of the property out of what is collected from the guarantor. That is what this provision does.

CHAIR WIENER:
Does Exhibit D, Amendment 6738, cover all your concerns?

ASSEMBLYMAN CONKLIN:
Yes, it does.

SENATOR ROBERSON:
I like a lot of this bill, but I have a concern about the extension of provisions from A.B. No. 471 of the 75th Session to junior loans. When I read the bill, it seemed to me that the junior lienholder would no longer be able to obtain a deficiency judgment. I am okay with the junior lienholder having to sue within six months. However, if you are going to put the same constraints on the secondary lienholder as you put on the primary lienholder last Session, the secondary lienholder is going to be wiped out. Am I reading the bill correctly?

ASSEMBLYMAN CONKLIN:
Yes and no. Let me clarify.

In the case of a purchase money mortgage—that is, a loan used to purchase a home that the borrower lives in—no one can file for a deficiency judgment. Either the loan and the home are equal in value or the loan is worth less, if the value of the home goes up and the loan is paid down. If you do not treat your home as an investment—take out a second loan after you purchase the home to buy a boat or a car—whatever was included in the original loan to purchase the house is protected. In existing law, only the primary loan is so protected. This bill extends that protection to the secondary loan if it is part of the original purchase of the house. If the secondary loan is not part of the purchase of the house, that makes it an investment choice, and thus it is no longer protected under this bill.

SENATOR ROBERSON:
That was my understanding. If there is a foreclosure, the first lienholder will get the house. What does the junior lienholder get?

ASSEMBLYMAN CONKLIN:
I am not sure. However, the junior lienholder would still own a portion of the lien on the house. If the first lienholder forecloses and sells the house, there will have to be some negotiation between the first and the second lienholders because the second lienholder still has a lien against the house.

SENATOR ROBERSON:
It seems to me that the second lienholder will get wiped out. Why would anyone going forward agree to be a junior lienholder in the initial purchase of a house if that provision were enacted? That is my concern.

JOANNE LEVY (Nevada Association of Realtors):
We support A.B. 273. Foreclosures have impacted nearly every family business and government entity in some way. This bill would help homeowners in Nevada and offer great consumer protection provisions. There is an undeniable tie between business survival and consumer health. Consumer recovery from this economic downturn is vital to the survival of business and banks. This bill offers an initial step toward consumer recovery.

VENICIA CONSIDINE (Legal Aid Center of Southern Nevada):
We support this important piece of legislation, which will help our clients in many ways. Assemblyman Conklin explained the positive features of the bill well. I would like to echo that giving the second mortgage the same six months to file for a deficiency judgment as a first mortgage will help a lot of people in Las Vegas. Having that liability for five and a half additional years creates a difficult situation for people who are trying to move on with their lives.

This bill will also give our clients certainty that they are not paying double for a debt, and that it is not being paid by other various groups as well. It also minimizes their liability, and it gives them the opportunity to move ahead faster.

ERNIE NIELSEN (Washoe County Senior Law Project):
This is a good bill that will help our clients. I hope you will pass it.

BILL UFFELMAN (President and CEO, Nevada Bankers Association):
We are about 80 percent in favor of this bill. However, we are concerned about section 5.5 of Exhibit D. If you are developing vacant land, that is one set of risks; if a physician builds a five-story medical building, uses three stories and rents out the other two, that is another set of risks. The guarantor on that is in fact the additional security for that loan. It is difficult to figure out the fair market value before you can proceed against the guarantor. I had a bank some months ago that had a piece of ground appraised and they were told the ground was worth less than zero. How do you find the fair market value in these circumstances? The ability to have and pursue that guarantee is part of the inducement to make a commercial loan. I ask that section 5.5 be deleted from

the bill. It was not in the bill as originally introduced; it was added after the first hearing.

We support Assemblyman Conklin's effort with regard to junior loans. Senator Roberson's question had to do with the 100 percent mortgage in which the homeowner borrows the entire cost of the home, 80 percent in the first mortgage and 20 percent in the second mortgage. We are fine with allowing mortgages like that to be wiped out in this foreclosure. We know that is a future reality.

We are also fine with the notion of requiring second lienholders to have the same statute of limitations as first lienholders. Will it be harder to get a second mortgage to put in a pool or buy a boat? It will, and it will cost more because of the risk involved.

ASSEMBLYMAN CONKLIN:
I want to make it clear that we are not saying you cannot get a deficiency judgment out of those investor loans over half a million dollars. What we are saying is that all you can get from the guarantor is a deficiency judgment. If the value of the land goes to zero, the guarantor now has a deficiency of 100 percent. That is the risk of being an investor, and there is nothing wrong with that. But this is a loan secured by land, and you must take the land first. Otherwise, you have an unsecured loan. That is all we are saying. That is a loophole in the law, and we are trying to close it. Everyone understands that when they make a loan secured by land as the guarantor, they are on the hook for the difference. What is happening now is that lenders are trying to get the entire amount of the loan in cash and ignoring the actual property. That was not the way the loan was structured in the first place.

It was my original intent that that and the six-month rule would be covered on all loans upon passage and approval of the bill. I would like to have a day to work with Senator Roberson to find some common ground and answer his concerns. If we can do that, I will offer an additional amendment on this bill.

CHAIR WIENER:
Please let us know when you have resolved that and have language for us. I will close the hearing on A.B. 273 and open the hearing on A.B. 284.

ASSEMBLY BILL 284 (1st Reprint): Revises provisions relating to real property. (BDR 9-1083)

ASSEMBLYMAN MARCUS CONKLIN (Assembly District No. 37):
I have written testimony introducing A.B. 284 and explaining the problem it responds to (Exhibit E).

This is another bill that has been long coming and that cleans up our statutes. This is about clear chain of title. This is about making sure the person who is foreclosing on your home actually has a legal right to do so. It is about ensuring that, once a loan has been sold and resold multiple times, the person who wants to foreclose can prove he or she actually owns the deed and has the legal right to lien that home. It is about making sure that the third person to buy a loan who then sells it to a fourth person does not then foreclose on the home, as some have tried to do. It is about making sure a trustee may only sell a house once and not twice because the first sale was not recorded.

All of these things are possible under existing law, and some or all of them have happened. Like other Western states—Idaho, Washington, Oregon, California, Arizona and Utah—we need a statute that protects our consumers from fraud and bad judgment as a result of not having clear title. Let us be a state that protects consumers in this regard and creates a clear chain of title so consumers know, when they are being foreclosed, that the person foreclosing on them has a legal right to do so. This will also ensure that if you purchase a home that has been foreclosed, you know the person selling it to you has legal ownership of the home, and you will be able to buy insurance on the home.

SENATOR ROBERSON:
I too am concerned about protecting the consumer. However, I want to make sure we are passing legislation that does that in the most effective way we can without further damaging the real estate market. In a previous hearing, Mr. Uffelman mentioned that the average period of time a homeowner in default can stay in the home before the bank is finally able to foreclose is 18 to 24 months. The longer we prolong this process of keeping people in their homes who are not paying their mortgages, the longer it will take for us to hit bottom, turn this real estate market around and get home values up.

I am concerned about the issues you raise. I would also like to hear the concerns of those opposed to the bill. I want to work with you to pass

something that makes sense. Was this bill based on laws in other states? I am trying to get a sense of what other states are doing.

I do not have a problem with enacting consumer-friendly provisions that will make our laws better. At the same time, I do not want it to slow down the process of getting our real estate market turned around. I am not sure we really have a problem with this specific type of mortgage fraud in which lenders do not have the promissory note. Can you educate me on that?

ASSEMBLYMAN CONKLIN:
For more than a decade, Nevada has consistently ranked in the top five in the country in mortgage lending fraud. Those are Federal Bureau of Investigation statistics. This is definitely a problem for us.

I wholeheartedly agree with you about the importance of getting home prices up. I said last Session that we will not find the bottom of our current economic woes until our housing market stabilizes. One of the factors in stabilizing this housing market, as painful as it may be, is to get those who can no longer afford their houses into a situation in which they can manage their budgets again. In many cases, that is not in the house in which they now live.

However, we as policy makers need to decide whether finding the bottom of the housing market is so important that we are willing to sell out people who will be defrauded as a result, people who may be foreclosed on by someone who has no legal right to do so. Then, after their home is taken from them by someone who has no legal right to do so, the bank that had the legal right sues the person who holds the note, the original owner of the home.

I understand your concern, and I agree with it. But just because we have that concern, that does not make it right to allow certain types of activity to take place. I for one am willing to take an extra day to make certain those who are about to lose their homes are losing them for the right reasons and not the wrong ones.

Let me give you an example. Assume there are three banks in the line of a mortgage. The second bank in line has two departments. The department that sells the loan does not record the selling of the loan or the new assignment to the loan and is not communicating with the second department, which records the payments made on the loan. When the second department finds out that the

homeowner is no longer making payments, it sends the account to foreclosure. At the same time, the homeowner is making payments to the bank that now owns the loan because that bank sent the homeowner a new payment book and told him or her to start making payments.

Do you see the problem? At some point, we have to clear up that record. We have to put something in place so that people know who owns the loan on their homes, and to ensure, when there is no intended fraud, that these types of accidents do not happen.

I agree with you about the importance of reviving the housing market. That is part of the reason I sponsored A.B. 273, because I believe putting the secondary lienholder on equal footing with the primary lienholder is going to create a better, faster, more efficient short sale market, which is far preferable to the banks owning all the property. The banks do not want it anyway.

ANN C. PONGRACZ (Senior Deputy Attorney General, Office of the Attorney General):
I have a memo from Keith Munro, First Assistant Attorney General, explaining the main points of the bill (Exhibit F). The Office of the Attorney General supports A.B. 284 strongly because it is important to ensure that no Nevadan loses a home or business property in a foreclosure based on fraudulent documents.

You may hear from other witnesses that passage of this bill is not necessary or that it would impose unreasonable burdens on the economy. However, it would be false to say that you must choose between borrowers and economic recovery. The real choice here is among all the participants in the market: borrowers, lenders, servicers, attorneys.

Today, many businesses have been created and are profiting from pushing foreclosures through the system regardless of their merits and regardless of whether homeowners are paying or working with their lenders to modify their loans. Many of these participants are paid based on the volume of foreclosures they process regardless of whether they are fair or fraudulent. That big factor is often not noted as we work our way through these public policy issues. It is one reason why the Office of the Attorney General believes strongly that enactment of this bill is necessary to help Nevada take a significant step to deter

companies from taking our citizens' homes and businesses based upon fabricated documents.

CHAIR WIENER:
I notice that Mr. Munro has addressed the need for enforcement tools in Exhibit F. Would you like to comment?

MS. PONGRACZ:
There are several enforcement tools for the Attorney General included in the bill, and there are also enforcement tools available to private parties. First, A.B. 284 amends *Nevada Revised Statutes* (NRS) 205 to create a new offense, foreclosure fraud, that would supplement existing statutes prohibiting mortgage fraud. This section of the bill also authorizes the Attorney General to recover civil penalties up to $5,000 for each violation, along with fees and costs, and it makes repeated false representations regarding title a felony. We regard these provisions as significant enhancements of our ability to enforce.

JOHN KELLEHER (Chief Deputy Attorney General, Fraud Division, Office of the Attorney General):
In response to the question about whether this type of fraud occurs in Nevada, sadly, it definitely does. We have seen a large volume of complaints come in, and we have several ongoing investigations.

This bill is not so much about protecting homeowners as it is about protecting the integrity of the judicial system in foreclosures and basic legal issues of standing and due process. If a party is able to foreclose without the legal right or the legal evidence to prove that right, that amounts to a fraud on the courts. We have seen far too many of these cases in our office. In many cases, fraud has become the rule rather than the exception. In some of the companies we are investigating, it is their business model. Without a law that allows us to prosecute these cases as fraud in the foreclosure process, we are having to fit a round peg into a square hole and charge them with other crimes. The best remedy would be to create a law that fits the charge to the crime we are seeing.

This bill also entails a paradigm shift. When we speak to homeowners and attorneys who have gone through the mediation process, one of the concerns we hear repeatedly is that when a bank is committing fraud, it is difficult for homeowners or their attorneys to prove it. This is partly because everything is

confidential in the mediation process, and thus any documents submitted there cannot be used outside the mediation. Also, if the homeowner is able to afford an attorney to file a petition for judicial review, often the documents produced by the bank are not challenged by the judge. Many judges operate under the old paradigm that if the banks are making a representation that something is so, it must be so. Unfortunately, the paradigm has shifted, and that is not always the case. This bill tells banks that if they are going to say something is so, they must prove it is so. If they can prove it, they have the right to go ahead with the foreclosure.

This bill provides a protection of the judicial process and the integrity of the foreclosure process in the courts, and ultimately ensures due process for everyone concerned.

MS. PONGRACZ:
One reason the office of the Attorney General supports this bill is that we believe it is necessary to drive a paradigm shift in the perspective of the courts. That is why it is important that there be legislative direction on this issue. Prior to this, the courts have appeared not to understand that they have a significant role to play in this, in terms of ensuring that the documents that are relied upon for foreclosures are indeed valid documents. We are coming to the Legislature to ask you to send that clear signal to the courts of Nevada, telling them that this is part of their job, and they need to require the institutions attempting to enforce foreclosures to document them.

CHAIR WIENER:
Mr. Kelleher, do you have a ballpark guess as to how many offenders would be guilty of a single offense and how many would be serial offenders?

MR. KELLEHER:
The vast majority of the complaints we have seen involve companies where this is the business model. It is a definite pattern of fraud; it is not an isolated incident. As prosecutors, if we get a case that has no prior offenses or complaints of this nature, we would not look for a felony prosecution. The felony treatment would be reserved for companies that are set up to perpetuate frauds through volume foreclosures, regardless of whether they have the right or the documents to prove they have that standing. In many incidents we are investigating, if they do not have the documents, they simply create them.

SENATOR ROBERSON:
Can you give us an example of the kind of scheme some of these bad actors are perpetrating? I am trying to get an idea of what is going on.

MR. KELLEHER:
We have seen many instances of robo-signing—that is, the mass production of false and forged execution of legal documents related to mortgage foreclosures by persons without knowledge of the facts being attested to, according to Wikipedia's definition. We have notaries being paid $8 and $10 an hour to sign documents all day as presidents of various lenders. We are investigating companies that hire law firms to do the foreclosures on behalf of the servicers and the trustees, and the attorney fee structure is based on the number of foreclosures they complete. If these firms do not complete the foreclosures within a set period of time, they are penalized by fewer referrals or reduced fees. This forces the attorneys to use the documents received without taking the time to check the veracity of the statements and make sure the representations made by the banks are accurate. When we do further investigation follow-up, many times we discover that they are not.

SENATOR ROBERSON:
Are you saying there are companies in Nevada or from out of state forging documents and then hiring law firms to use these forged documents to foreclose on the houses of innocent homeowners?

MR. KELLEHER:
That is correct.

MS. CONSIDINE:
We support this bill in its original form. We have discussed our concerns with some of the players involved. I have written testimony suggesting some minor revisions to restore the bill's clarity and strength (Exhibit G).

The first amendment is to add "60 days" back to section 1: One of the reasons a foreclosure can take so long is the scramble for all the required documents. In fact, the scrambling has caused the creation of these documents by third parties. If that 60 days can be put back into the bill and assignments of the note are recorded within 60 days, the problem will take care of itself. When foreclosures do happen, the entire chain is already recorded. It takes the need to scramble for documents out of the situation.

Further, having those documents recorded within a shorter time period gives homeowners the added protection of being able to go to the recorder's page and see the entire chain of their property. This will tell them who has that note at any time. We have had clients come in with letters from servicers saying, "We have now taken over your loan. Here are some coupons; start paying." In some cases, those letters are sent by companies that sent people random letters. They do not actually own the deed or the note or even service it. Giving homeowners the ability to check on that in real time is a huge benefit to them.

The next amendment is to section 9, subsection 2, paragraph (c), subparagraph (2), where the word "known" was added. We ask that it be taken back out for clarity in the process. You either know who the beneficiaries are or you do not. Adding the word "known" to this provision adds a loophole that allows banks to claim they do not know who or where the beneficiaries are and thus do not notify them. It leaves a gap in the chain. If we want to have a solid chain that is strong for both the homeowner potentially losing his or her home and the next owner who will own that home, it has to be a full and complete chain.

The last amendment is in section 9, subsection 2, paragraph (c), subparagraph (3), where the phrase "constructive possession" was added. That should be taken out. In the mediation process, it is a sworn statement of actual possession of the note or the deed of trust. Constructive possession leaves another loophole that allows banks to say that they know someone has possession of the note somewhere, in a cave or in a file or in some other state. If we want to make this bill as strong as it was intended to be, we believe someone should be able to swear to actual possession.

We would be happy to work with interested parties to hash out the language.

TISHA BLACK CHERNINE:
I am a real estate attorney in southern Nevada and a native Nevadan. I have written testimony explaining my support for this bill (Exhibit H).

MR. NIELSEN:
We support this bill. I am in agreement with Ms. Considine about the notions that may need to be put back in the bill. This bill should not slow down the process. In fact, it makes the process more clear. It simply makes people do the things they are already supposed to do with respect to recording documents and

instruments. We have seen cases in which there is a dispute about who owns the property, and it is not until you get to the petition for judicial review that you discover the true investor. This provision will go far in cleaning up that difficulty. For that alone, A.B. 284 is worthwhile.

RON PETERSON (President, Nevada Land Title Association):
We support this bill. I want to thank Assemblyman Conklin and Ms. Pongracz for taking the time to work with us on our concerns with the original version of the bill. We are in favor of the bill as it is now written.

MR. UFFELMAN:
We are mostly in favor of the amended form of the bill, since 99.9 percent of our complaints have been dealt with. Changing it back to its original form would increase our level of discomfort and opposition.

We have a question concerning the calculation of damages. I understand the $5,000 statutory damages referred to in section 9, subsection 7, paragraph (a). What are the "actual damages" to the person who initially purchased the property who has defaulted on the mortgage? What is the damage to the individual who has failed to pay the mortgage and been foreclosed? I do not know how we calculate damages there.

GEORGE ROSS (Bank of America; Mortgage Electronic Registration Systems, Inc.):
Let me make it clear that my clients and I fully realize that A.B. 284 is designed to deal with problems that have existed and may still exist in some manner. Assemblyman Conklin made it clear to me in a private conversation that banks are not the target of this bill, that there are other issues the bill is trying to resolve. Having said that, my clients feel it could have unintended negative consequences for Nevada.

Mortgage Electronic Registration Systems (MERS) was created in the mid-1990s because traditional recording at counties could not keep up with the growth of all the secondary markets and the mortgage securities. That is the same reason stock exchanges went to electronic trading: manually, traders could not keep up with the rate and pace of what was being traded. Why is this important to Nevada? Because it is the secondary market that provides the ability to keep the money multiplying, not the amount of money that is loaned. When you make loans and sell them on the market, they become investment vehicles. They

make much more money available for mortgages at a lower rate of interest than otherwise would be the case.

We are concerned that requiring manual recording will slow the process tremendously, though it can be done. We are concerned that the recorders do not realize the burden they will have once the market recovers. That is why MERS was created. There is going to be a tremendous backlog, and that is a major concern. It changes the nature of the beast, and it further insulates Nevada from the national financial system. It slows us down and puts us behind.

From our perspective, the most important thing Nevada's Legislators can do is to promote recovery of the housing market as fast as humanly possible. The market is going down; from the statistics, the majority of your constituents are underwater. How does one solve the underwater problem? Everything the Legislature has done this Session seems to focus on the people who are being foreclosed on. Maybe in some cases the lenders did things that were illegal or unethical, and we have to fix that. But the vast majority of your constituents have not been foreclosed on. They have continued to pay their mortgages on homes that are worth less than they were when they bought and less than they still owe, in many cases.

The question then becomes, how do you help those constituents and the vast majority of those who live in Nevada? By doing those things that promote the recovery of the market and get those prices rising again. And how do we do that? What is keeping the prices down? The foreclosed houses and the overhang of houses that are in the process of being foreclosed on and the overhang of houses that will soon be foreclosed on. Many of those people who are already in default no longer have the revenue sources to continue to make payments. It is one thing to modify the loan of someone whose income is down 10 percent or 20 percent. It is another thing when the income is down 50 percent or 60 percent because one spouse has been laid off. You cannot modify that loan because the household cannot make payments of any size.

Those people, those houses, need to be cleaned out. It is a terrible thing to say, and it sounds cruel. But we have to look at all the people who are still making their payments. For the majority of the people, we need to clean the market out and get it rolling back to normal again as fast as we possibly can. I am not saying not to modify loans. But only ten percent of the people who are eligible

come forward for the mediation process. Most people know there is really not much they can do. They are either going to get foreclosed on or have to walk away from their mortgage.

When you look at these bills that have to do with mortgages and foreclosures, ask yourselves what you can do that cleans out the market as quickly as possible, restores it to normalcy, gets prices rising again and gives Nevadans access to mortgage money at the best rates possible going forward and the best possible process.

This is not to say this bill does not identify a problem because it does. But requiring recording every time the right to receive the mortgage payment gets traded is unnecessary. That is a key part of our financial system today. We hope that does not get placed in jeopardy for Nevadans.

CHAIR WIENER:
Since the recording piece is essential to determine who has the right to participate in this process, what would you offer as an alternative for the clarity and the sanctity that this measure is trying to address?

MR. ROSS:
I will not say that MERS was always perfect, but there have been a number of changes in the last six months to a year in response to complaints. If a bank is using this system, you are able to track it very well.

SENATOR ROBERSON:
When I noticed that most of the Republicans voted against this bill in the Assembly, I had concerns. But it is hard to argue with a lot of the provisions in this bill. The fact that the Attorney General supports it also carries a lot of weight with me. However, I am concerned about the unintended consequences. I am also concerned about getting our housing market turned around. Mr. Uffelman seems largely in support of this bill, but you are not. What is happening in other states? Are other states enacting laws similar to this? How is that affecting how banks operate? How does it affect Bank of America?

MR. ROSS:
I do not know what is going on in all other states. I do know that Nevada is not the only state looking at this type of bill.

SENATOR ROBERSON:
How do you think this bill is going to slow down our housing recovery? What aspects of this bill cause you real concern, and what aspects do you support?

MR. ROSS:
We support the provisions regarding the deed of trust. It is fundamental, and a lot of this bill boils down to making sure you have the proper deed of trust, you know who owns the security and you know who has the right to receive the payment.

SENATOR ROBERSON:
Do you support the provisions regarding the promissory note as well?

MR. ROSS:
Yes. It is critical. I would not deny that because otherwise you have the potential for the problems Assemblyman Conklin mentioned. But when you have the modern technology to track these trades, why go back to the way it used to be done by Bartleby, the scrivener? We need to keep up to date.

SENATOR ROBERSON:
Are you saying you agree with the idea that lenders, before they foreclose, have to provide proof that they have physical possession of the promissory note and are the rightful holder of the deed of trust?

MR. ROSS:
You have to be able to prove you have a right to do this.

SENATOR ROBERSON:
That is a change, because right now there seems to be a problem that a lot of people cannot show documentation.

MR. ROSS:
We would never support foreclosure without a deed of trust.

SENATOR ROBERSON:
Or the promissory note.

MR. ROSS:
But if you can show who owns that promissory note, that should be sufficient.

SENATOR ROBERSON:
The deed of trust is simply a record.

MR. ROSS:
Exactly.

SENATOR ROBERSON:
And the promissory note?

MR. ROSS:
That is what you are trading.

SENATOR ROBERSON:
With regard to MERS, is your primary concern the backlog you anticipate at the recorder's office?

MR. ROSS:
Yes.

SENATOR ROBERSON:
I want to follow up on Chair Wiener's question. What can we do alternatively to make this system better while at the same time promoting a quicker housing recovery?

MR. ROSS:
If you have a recognized computerized tracking system on a national basis that meets certain standards, as has been the practice up until now, that would be sufficient to prove the chain.

SENATOR ROBERSON:
How can this Legislature make that happen this Session?

MR. ROSS:
You could put something in the law saying it would meet those requirements.

SENATOR ROBERSON:
Would you be willing to meet with Assemblyman Conklin on that issue?

MR. ROSS:
I would have to check with my clients, but tentatively yes.

CHAIR WIENER:
I come back to my concern. I appreciate the technology and its efficiency, and MERS is certainly expediting transactions and the flow of money comparable to the New York Stock Exchange. However, when I hear from the Office of the Attorney General that we are one of the highest in mortgage fraud, I feel a disconnect.

MS. PONGRACZ:
I have an answer for Mr. Uffelman's question about the types of damages referred to in section 9. This would include damages resulting from relocation, the need to hire attorneys, storage fees—the types of expenses that a borrower might incur as a result of a fraudulent foreclosure.

ASSEMBLYMAN CONKLIN:
I want to address Senator Roberson's comments. The bill passed in the Assembly 33 to 9, and it was not a partisan measure; 7 of the 16 Republicans in the Assembly supported the measure.

I wanted to address a couple of points Mr. Ross and Mr. Uffelman brought up. First, this bill is not about recovery. This is about justice, plain and simple. If the recovery of the housing market is more important to you than basic human justice associated with the ownership of a house, then by all means vote no on this bill. I can live with that. That is a choice. But to suggest that the market will not recover because of this bill is absolutely false. To suggest that the market will recover much slower is false. Will some actions take a little longer? Yes. But what is it worth to know that what we are doing is right and just? Are we willing to sell out justice for some free market principle so someone can take hold of your property who has no right to it in the first place? These are fundamental questions that we cannot dismiss because we are in a rush to get to a better day tomorrow. A better day tomorrow at the cost of liberty and justice may not be worth having. Please consider that, if that is the direction you choose to go.

Secondly, the comment was made that we would not be able to sell loans on the secondary market if this passes. Is that really true? Is the secondary market interested in buying loans for which they do not know if the bank has the legal

right to sell them in the first place? Think about that. Exactly where are we going if we choose to pursue those types of losses?

This is about knowledge. This is about justice. This is about making certain that those who take action have a legal right to do so. In the free market economy, free market only exists under the rule of law. You can read any philosopher going back to Adam Smith: Laws and the ability to have rights under the law must exist for a free market economy to work. Otherwise, what you have is the rule of the person with the biggest stick. This is a good law. It promotes a free market economy by making sure that those who have legal standing and the legal right to take action in that free market can. At the same time, it protects consumers from fraud who otherwise could not protect themselves.

Finally, Mr. Uffelman suggested that the Bankers Association was in support of 99.9 percent of this bill. When was the last time you passed a bill out of here and got 99.9 percent of the things you wanted in it? They should be happy.

The Attorney General's staff and I have been working with Rocky Finseth and the United Trustees Association on some concerns they have. We were not able to come to a compromise. The changes they want are simply not possible to have in this bill and create clean title. They are operating under similar rules in a variety of other states. The person who wanted to testify in opposition to this bill could not be here, and I would like to submit his written comments for the record (Exhibit I).

SENATOR ROBERSON:
The concern I had was that there seem to be some open issues with the trustees. I would like to have their concerns addressed in some manner. Can you elaborate on their position and why we cannot come to some common ground there?

ASSEMBLYMAN CONKLIN:
We have come to common ground with part of the trustees, and you have heard from those people today. Most of the trustees who came to agreement with us live and work here in Nevada, and many of those who did not agree live and work out of state. They operate in many other states that have these same laws, though they do not like it. But just because somebody does not like a law does not mean it is not right. I do not want to suggest that anyone is at fault, but if we go the way they want to go in this bill, we should tear up the bill

because it will not do what it is intended to do. I am not willing to do that. I would rather place the bill at your feet and say, "Here it is. You are either for it or against it, but this is as far as we can go."

You have heard from supporters of the bill who would like us to put back many of the provisions we have taken out to satisfy those who opposed it. They are not happy about the changes, and I am not happy we gave up those provisions. But we did it in an effort to compromise and make a good piece of legislation. I am not above compromise, and anyone who has worked with me in this building knows that. But there does come a point in time when you have to fish or cut bait. That is where we are with this bill.

CHAIR WIENER:
I will close the hearing on A.B. 284 and open the hearing on A.B. 226.

ASSEMBLY BILL 226 (1st Reprint): Revises various provisions governing landlords and tenants. (BDR 3-669)

ASSEMBLYMAN JASON FRIERSON (Assembly District No. 8):
This bill was originally brought to address some problems with the eviction process. This bill has gone through extensive negotiations with the stakeholders to avoid punishing good actors, while putting more teeth to give landlords some incentive to comply with the eviction statute.

Today's version of A.B. 226 does several things. First, it adds information to the notice that a landlord must provide a tenant when they are going through the process of eviction. The two provisions it adds are that the landlord has to notify the tenant that the court can issue a summary order requiring the tenant be removed within 24 hours. One problem we have seen is tenants who come home from work to find they have been locked out, or who are asked to leave in the middle of dinner. This bill provides notice early on so they know that they may be required to leave within 24 hours. That is in section 1, subsection 3, paragraph (b), subparagraph (2). Subparagraph (3) adds the information that a tenant may seek relief if the landlord unlawfully removes the tenant from the premises or violates the law or the rental agreement. This ensures the tenant is aware of his or her rights. This language came from an amendment offered by representatives of the property management industry who understood the problems tenants were experiencing and wanted to address those problems without overly burdening the good actors.

Section 6 adds a functioning door lock to the list of items or services a landlord must maintain. This was added because some landlords, instead of going through the eviction process, have locked tenants out of their homes. When that became illegal, they have disabled the locks instead. Tenants are not locked out, but they cannot protect themselves or their belongings. I have seen cases in which tenants have come home to find their neighbors have taken all their belongings, believing them to have been evicted or foreclosed and moved out.

Section 7 raises the penalty from $1,000 to $2,500 for landlords who do not follow the eviction process properly, who lock tenants out or remove tenants without going through the proper measures. This came from a suggestion by the property managers.

There was a concern at one point from the constables because of the 24-hour changes. Because of that, and particularly because of the rural sheriffs, who have to do this over an expanded geographical area, we took that section out altogether. This bill no longer impacts how the constables and sheriffs operate in any way whatsoever.

This bill reflects work by realtors, property managers, the Legal Aid Center and other stakeholders. We are making a significant step forward in protecting tenants and making sure landlords go through the eviction process according to the law.

CHAIR WIENER:
I noticed that in sections 6 and 7, and perhaps elsewhere as well, you have changed the language to refer to essential items as well as essential services. Aside from a functioning door lock, what kinds of items were you thinking of?

JON L. SASSER (Washoe Legal Services; Legal Aid Center of Southern Nevada):
This might include kitchen appliances like a refrigerator, if it was included in the rental agreement.

ASSEMBLYMAN FRIERSON:
The language was added to address a problem we have seen with landlords disabling door locks. However, we did not want to limit it to that one item in the event some bad actors find other ways to get around the law. If they start disabling window locks, for example, this statute will still cover the situation.

CHAIR WIENER:
This might include plumbing items, for example.

MR. SASSER:
We support this bill. I have written testimony explaining the need for the bill and the changes made by the amendment offered in the Assembly (Exhibit J). Several pieces came to this Committee in the last Session dealing with the expansion of the 24 hours to have an execution of eviction after an eviction order. We included that in the original version of A.B. 226.

After extensive discussions with representatives of the industry, they suggested we focus on giving us the tools to deal with the bad actors instead of focusing on changes that affects all landlords, good and bad. That is the essence of the bill now. It does this in four ways:

1. It gives extra information in the five-day eviction notice, alerting tenants that if they do not follow through, they can be locked out within 24 hours. Some people do not wake up to the situation until they are forced to.

2. It notifies the tenant that if the landlord does not follow the eviction process, there are remedies available.

3. It addresses the problem with functioning locks and any other creative methods landlords come up with to evade the eviction law. Such evasions will subject landlords to immediate expedited hearings in front of a court to determine if the tenant was improperly excluded from the place of residence.

4. It increases statutory damages from $1,000 as established in 1985 to $2,500.

SUSAN FISHER (Coalition of Housing Providers):
We are in full support of A.B. 226 in its amended form. This is a consensus document. We are concerned with policing our own industry. There are some bad players out there, and we want to make sure we help police them because they reflect negatively on us. The provision about functioning locks is common sense. It protects the property as well as the tenant. Giving more stringent notice to tenants when they move in and on the first notice of the eviction process lets them know exactly what is going to happen in big bold print. This will help ease some of the surprise factor when the constables show up to lock

them out. We work hard to keep good tenants, especially in these difficult times. We want to keep people in rather than evict them if at all possible. Raising the fine on landlords who do inappropriate actions was our idea; we would like to see bad landlords weeded out entirely, if possible.

SENATOR MCGINNESS:
Was there discussion on what might be included in the phrase "essential items"?

MS. FISHER:
The bill initially listed items such as furniture, dishwashers and other appliances, sinks, toilets, bathtubs and so on. Those are essential items that are part of the apartment. We objected to including furniture in the list because often it is provided by a third party such as a furniture rental business. That is a separate agreement, and we did not feel that is something landlords should be bound to look out for if the tenant is in default. The third party needs to come and take that out.

SENATOR MCGINNESS:
Does the phrase "essential items" cover you well enough?

MS. FISHER:
Yes.

MR. NIELSEN:
We support this bill. We provide representation for seniors in eviction matters. Seniors often come into our office who were locked out that morning, and they are surprised and unprepared to take the next step. For this reason, I would like to comment on the notice that is provided to tenants about to be evicted.

In some jurisdictions, after an eviction order is signed by a judge, the sheriff or constable will come to the residence twice: the first time to tell the tenant that an eviction order has been entered, and the second time to carry out the eviction order. In Washoe County, the practice is that there is only one visit by the sheriff after the judge signs the summary eviction order. That one visit is when the sheriff tells the tenant, "You have to leave." We were concerned about that. We recognize that this bill is a compromise. We wanted to have two visits by the sheriff, but that is too costly for them. What we have in this bill now is at least better than the situation we now have.

This bill adds language to the eviction notice that essentially says, "If you do not file an affidavit and have a hearing, be aware that once the judge signs the order you will have only 24 hours to leave, and the sheriff will be there and make you leave."

MS. LEVY:
We are in total support of A.B. 226.

JIM BERCHTOLD (Clark County Civil Law Self-Help Center; Legal Aid Center of Southern Nevada):
We support this bill. In 2010, the Legal Aid Center assisted approximately 31,000 people, of whom 51 percent were either landlords or tenants. This bill addresses issues we see on a repeated basis.

One of the issues we frequently see is that landlords and tenants are not familiar with the eviction process. Giving them notice in the initial eviction notice will benefit them, notifying them that this eviction can happen quickly. Many of these tenants are from out of state and do not understand that Nevada has one of the shortest eviction time frames in the Country, so they are shocked when they are locked out after 24 hours. Similarly, the provision notifying landlords and tenants that there are ramifications to simply locking someone out of their apartment without going through the eviction process is a huge benefit.

The functioning lock provision is interesting. In summer 2010, we started to see landlords disengaging locks rather than going through the eviction process. The tenants then had the choice of either gathering up their belongings and leaving or never leaving the premises in order to protect their belongings.

With regard to essential items, we have heard from tenants whose landlords have removed the refrigerator, the stove or even the toilet from the premises. This provision is a way of ensuring that creative landlords are dissuaded from doing improper evictions and making sure they understand they have to go through the eviction process. Similarly, the increase in the fine will be a good way to dissuade landlords from getting creative. Often, these bad actors are landlords who rent to low-income individuals who do not speak English, and they simply avoid going through the normal eviction process. This bill will be a good way to encourage them to go through the eviction process properly.

CHAIR WIENER:
I will close the hearing on A.B. 226 and open the hearing on A.B. 244.

ASSEMBLY BILL 244: Enacts the Uniform Partition of Heirs Property Act. (BDR 3-329)

TERRY J. CARE (Ex-Senator):
I am presenting this bill in my role as a Uniform Law Commissioner. I have a handout from the Uniform Law Commission on this issue (Exhibit K).

Let me define some terms for you. A tenancy in common is a situation in which two or more people have an interest in an undivided piece of property. One person might own 70 percent and the other 30 percent, but it is not split into two physical pieces. Either one of the tenants may dispose of his or her interest at any time, and any cotenant may seek to partition the property. If that happens, it can lead to a forced sale of the entire parcel at any time. Tenancy in common can arise by default if the original owner leaves the land to more than one person without giving specific details.

The other term is heirs property, which is defined in section 8 of A.B. 244. Heirs property, for the purposes of this act, is property that is usually ancestral in nature. For example, my family has roots in western Oklahoma. My great-grandfather homesteaded two sections of land when it was the Oklahoma Territory, and it was handed down to the family over the years. The land was not worth much, but the family had a sentimental attachment to it; it became known as the old Care place. We are talking about property that is handed down to family members and has some sort of sentimental value.

Here is the issue. The number of cotenants can grow as the land is passed down through generations. A tenant can at any time convey his or her interest to someone else. It sometimes happens that a cotenant will sell that interest to somebody completely outside the family who has no attachment to the property and only wants to make money from it. That person will sometimes exercise the right of a cotenant and seek partition of the property, then try to buy the entire piece. Any family member who is a cotenant could also do this, of course. The idea behind the bill is to come up with a way to handle heirs property so that real estate speculators cannot take advantage of the situation.

There is a mechanism already in statute that handles the partition of real property, and that is NRS 39. This bill does not disturb any of the provisions of that statute. Section 13, subsection 2 of the bill says that this act will supplement NRS 39, which stays the way it is.

I will go through the bill. Sections 4 through 12 are definitions. Section 8 defines heirs property. A partition action is when one of the cotenants goes to court to seek partition and sale of the property.

CHAIR WIENER:
Section 8, subsection 3 includes the figure 20 percent. How did you arrive at that number?

SENATOR CARE:
It was subjective. It was the result of a discussion of the drafting committee. The idea was to strike a figure to distinguish heirs property from other property. That subsection includes three components to define heirs property. If you meet any of the three criteria, you are likely talking about heirs property. The number was not based on any sort of caseload.

CHAIR WIENER:
Section 12 defines "relative" and includes the phrase, "law of this State." Can you give an example of that?

SENATOR CARE:
I will check up on that and let you know.

If one of the heirs seeks to partition the property, the first thing that happens is one of the other cotenants can go to the court and say, "I believe this property qualifies as heirs property." In section 13, the first test is the court must determine if the property meets the definition of heirs property. If the court determines that it does, the next section that applies is section 16, which stipulates that there has to be a determination of the value of this heirs property. If the parties do not agree, then the court can seek an appraisal.

The court can also hold a hearing to determine the value. The cotenants can take the appraiser's word for the value, or somebody might challenge that, which can lead to an evidentiary hearing.

Section 17 has a provision for a cotenant buyout. Let us say that one of the cotenants wants to partition this property. Section 17 allows the other cotenants, after they have been served the petition, to buy the property themselves if they wish. It may happen that a couple of cotenants will say, "We know that brother Jim wants the old place, but we'd kind of like to keep it ourselves. So why don't we see if we can't buy the property?" This section goes to the heart of the act. The court notifies the other cotenants that they may buy; the other cotenants may then give notice that they are interested in buying all the interests of the cotenant seeking partition.

It may happen that there are so many cotenants that even though they have all received notice of the petition for partition, they may not enter an appearance. They may own 1 percent of the land, or they may not be interested, or they may live in Florida. There is a provision in section 17 that would allow for the buyout of those cotenants who have been served but have not made an appearance. Let me point out that if the court agrees, all cotenants get compensated on a percentage basis for their ownership interest in the land. No cotenants will be left out because they did not enter an appearance in these circumstances.

Section 18 is designed to provide alternatives to partition in some cases. Partition in kind is defined in section 10 of the bill. Section 19 contains the considerations the court must weigh before agreeing to do this. One of those considerations in subsection 1, paragraph (d) is a cotenant's sentimental attachment to the property.

Section 20 goes to the sale of the property, if there is to be a sale. It can be by open market, sealed bids or auction. The sale must be by open market unless the court finds one of the other types of sale would be more economically advantageous.

CHAIR WIENER:
How would the court determine the value of the property before it is put on sale in the open market?

SENATOR CARE:
There first has to be that determination of value. It is not just put up for sale to see what price it will fetch. Section 20, subsection 3 says, "If the broker ... obtains within a reasonable time an offer to purchase the property for at least

the determination of value ... ." In other words, the broker is going to put the property up for sale at that determination of value price. That is the whole point in having that determination of value. The cotenants may not get any offers, or they may get an offer for less than that.

Section 21 refers to the report of the open market sale and the report of any offers the broker might receive for at least the determined value. If no offers are received for that amount, it will be sold at auction or by sealed bid. But the sentimental value of the property is recognized here.

CHAIR WIENER:
If the offers are less than the determined value, it would be at the court's discretion to say, "We know we've got that, but if we go to auction it would be substantially less." Is that the kind of thing they weigh?

SENATOR CARE:
It would be. Ultimately, the court has to sign off on it.

CHAIR WIENER:
So if it is close, that might be a factor in the decision.

SENATOR CARE:
That might be a factor.

I am unaware of any opposition to this bill.

CHAIR WIENER:
I will close the hearing on A.B. 244. Is there any further business to come before the Committee? Hearing none, I am adjourning this meeting at 10:33 a.m.

RESPECTFULLY SUBMITTED:

Lynn Hendricks,
Committee Secretary

APPROVED BY:

Senator Valerie Wiener, Chair

DATE:

EXHIBITS			
Bill	**Exhibit**	**Witness / Agency**	**Description**
	A		Agenda
	B		Attendance Roster
A.B. 273	C	Assemblyman Marcus Conklin	Written testimony
A.B. 273	D	Assemblyman Marcus Conklin	Proposed Amendment 6738 to Assembly Bill No. 273 First Reprint
A.B. 284	E	Assemblyman Marcus Conklin	Written testimony
A.B. 284	F	Ann Pongracz	Memo from Keith Munro
A.B. 284	G	Venicia Considine	Written testimony
A.B. 284	H	Tisha Black Chernine	Written testimony
A.B. 284	I	Michael Brooks	Statement
A.B. 226	J	Jon L. Sasser	Written testimony
A.B. 244	K	Terry J. Care	Legislative Fact Sheet: Partition of Heirs Property Act