MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Seventy-sixth Session
June 2, 2011

The Senate Committee on Judiciary was called to order by Chair Valerie Wiener at 9:11 a.m. on Thursday, June 2, 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 Ruben J. Kihuen
Senator Mike McGinness
Senator Don Gustavson
Senator Michael Roberson

GUEST LEGISLATORS PRESENT:

Assemblyman Jason Frierson, Assembly District No. 8

STAFF MEMBERS PRESENT:

Linda J. Eissmann, Policy Analyst
Bryan Fernley-Gonzalez, Counsel
Kathleen Swain, Committee Secretary

OTHERS PRESENT:

Barbara Buckley, Ex-Assemblywoman; Executive Director, Legal Aid Center of Southern Nevada
John Burnside
Laila Orellana
Barry Gold, AARP Nevada
Ben Graham, Administrative Office of the Courts

Kristin A. Schuler-Hintz
Nicole Cannizzaro, United Trustees Association
Lance Allen, President, Nevada Dispute Resolution Coalition
Greg Ferraro, JP Morgan Chase
Bill Uffelman, President and CEO, Nevada Bankers Association
Jon Sasser, Washoe Legal Services; Washoe County Senior Law Project

CHAIR WIENER:
Senate Bill (S.B.) 150 has returned from the Assembly with an amendment.

SENATE BILL 150 (2nd Reprint): Revises certain provisions governing liens of owners of facilities for storage. (BDR 9-907)

LINDA J. EISSMANN (Policy Analyst):
This was Amendment No. 734, which requires an owner of a self-storage business to give notice of termination to an occupant by verified mail and, if available, electronic mail and to send notice of a lien sale to the occupant's e-mail address, if any, in addition to sending it by verified mail. The amendment deletes the provision that a sale is deemed commercially reasonable if five or more bidders unrelated to the owner attend the sale. It deletes the proposed repeal of the occupant's authority to declare opposition to a lien sale and provides that the owner must not sell the property for 30 days from the date of receiving the declaration. If the occupant files a complaint within 21 days of the owner's receipt of the declaration, the owner must not sell the goods unless the court issues a judgment in favor of the owner. If the occupant does not commence an action within 21 days, the owner may sell the property as provided.

CHAIR WIENER:
I was concerned about protected property stored in the unit. I worked with Senator Don Gustavson on the issue of labeling storage containers with their contents and notifying licensing boards. That has remained in the bill. I was concerned that if stored boxes contain insurance, health, legal or accounting records, the tenant should be responsible or have some level of accountability for those stored documents.

In the amendment, we required tenants to notify storage facilities of any boards the tenants are licensed under. If tenants are in arrears, the storage facilities will notify the licensing boards that the tenants violated the terms of their tenancy

in some way. That puts the licensing boards on notice the tenants breached their fiduciary responsibilities for the people they serve under their licenses. The licensing boards would know records have been abandoned. This would place some level of accountability and responsibility on those who leave records behind.

The sponsor of the bill would like us to concur because the amendment from the Assembly did not harm the intent of the bill and made it a better bill.

> SENATOR BREEDEN MOVED TO CONCUR WITH AMENDMENT NO. 734 TO S.B. 150.
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> SENATOR COPENING SECONDED THE MOTION.
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> THE MOTION CARRIED UNANIMOUSLY.

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CHAIR WIENER:
Senate Bill 200 has returned from the Assembly with an amendment.

SENATE BILL 200 (2nd Reprint): Makes various changes relating to time shares. (BDR 10-217)

BRYAN FERNLEY-GONZALEZ (Counsel):
The Assembly Amendment No. 720 removes two sections of the bill. It removes section 4, which was an authorization to use an alternative form of publication when there is a sale of a time-share to satisfy a lien for unpaid assessments. It removes the authorization to post notice of the sale on the Website, and it removes section 5 to delete the authorization to post notice of a foreclosure sale on a Website.

CHAIR WIENER:
This was important to us. Time-shares are different than properties occupied or with a legal connection to people living in the State. Time-shares are used by people who do not live in the State. We had long discussions about reaching people who would be affected by this, and we believe the Internet would be important. We included notice but allow the Internet to be the vehicle so those

who are not here would see a local publication. The sponsor would like additional discussion to continue on this.

SENATOR BREEDEN MOVED TO NOT CONCUR WITH AMENDMENT NO. 720 TO S.B. 200.

SENATOR COPENING SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

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CHAIR WIENER:
I will open the hearing on Assembly Bill (A.B.) 300.

ASSEMBLY BILL 300 (1st Reprint): Revises provisions governing foreclosures on property. (BDR 9-668)

ASSEMBLYMAN JASON FRIERSON (Assembly District No. 8):
Assembly Bill 300 is an attempt to fine-tune and improve the Foreclosure Mediation Program. For years, Nevada has had the worst home foreclosure rate in the Nation (Exhibit C). With our economy struggling, more Nevadans could lose their homes unless we do something. Recognizing the seriousness of our problem, in 2009 we created the Foreclosure Mediation Program, Exhibit C, page 4. The goal of the Program was to help homeowners stay in their homes. It was to bring the parties together and create an environment where ways to keep homeowners in their homes could be discussed, acting in good faith and moving forward from there. The Program has produced tremendous results. From the time the Program started in September 2009 through June 2010, it had mediated over 6,000 disputes with nearly 90 percent resulting in no foreclosure, Exhibit C, page 6. Although we made great progress, there is still room for improvement.

Last fall, Ex-Assemblywoman Barbara Buckley and I met with lender representatives, mediators and homeowner representatives separately to hear direction from them to discover what was working, what was not and what they thought needed improvement. Assembly Bill 300 is the result of those meetings.

In general, A.B. 300 directs the administrator of the Program to collect statistics and post those on the Website. This improves transparency and gives us a better opportunity to evaluate the Program and continue to make improvements as we go through our crisis in Nevada.

The bill provides clarity with respect to sanctions. Section 7, subsection 5 of the bill creates a rebuttable presumption. The Program requires lenders to bring the proper documents, a person authorized to make a decision in that Program and to participate in good faith. There have been some concerns expressed about the ability to identify what was bad faith and to whom and how sanctions would be imposed. The rebuttable presumption means if the lenders do not bring the documents they are supposed to bring, do not send an authorized representative and take action considered by the court to be in bad faith, there is this presumption they are acting in bad faith. The lenders can rebut that and explain to the court why they did not comply with the requirements of the Program. This provides teeth and clarity to the sanction process.

Since this bill left the first House, I have received concerns this is one-sided and focuses on the bad actions of the banks and not the homeowners. Some are concerned there is no hammer for homeowners. The foreclosure process itself is the hammer on homeowners. If the homeowners delay the process, fail to bring the proper documentation or do not participate in good faith, they lose their homes. A certificate is issued, and the foreclosure goes forward.

The banks do not have a notice of default. They do not lose their homes. A certificate is not issued against them. The sanction for homeowners who do not participate in good faith is that they lose their homes. This process was created because of the imbalance between the homeowners and the bank. Some concerns will be expressed regarding that. Many things would have happened to get to this point. The point is to keep homeowners in their homes if possible. If everyone acts in good faith, brings all the required paperwork and participates in good faith, at the very least, we provide an honorable way for people to leave their homes without coming home one day and finding themselves locked out.

If the parties agree, this bill creates a faster conclusion to the process. Situations have been explained to us where homeowners have agreed they cannot stay in the home. But, because they started in the Program, steps had to be taken so they could leave the home with dignity. This creates a process whereby we can facilitate their leaving the home with dignity.

The bill prohibits the lender from passing its share of the cost for participating in the Program to homeowners. The cost for the Program is $400; $200 paid by the homeowner and $200 by the lender. In some instances, the lenders would pay their $200, and the homeowners would pay their $200. The lenders would then insert their $200 back into the balance, Exhibit C, page 11. They would be passing that cost to the homeowners.

Assembly Bill 300 has gone through several revisions. We have worked with real estate agents to ensure short sales were addressed to provide flexibility down the road as that phenomenon changes. We worked with banks to remove some language with respect to modifications because there was a concern that would be part of litigation. We agreed to remove it as a concession to ensure everyone understands this Program is to bring people together to have an honest discussion and figure out where they can go from there.

CHAIR WIENER:
You mentioned 6,000 disputes have been mediated so far. How many were successful?

ASSEMBLYMAN FRIERSON:
As of June 2010, 90 percent were successful.

CHAIR WIENER:
Please explain why 10 percent are not successful.

ASSEMBLYMAN FRIERSON:
Some participants in the Program have misunderstood success. Some people thought if they participated in the Program, they would get modifications; if their loans were not modified, that would be failure. That is not the goal of the Program. When we say 90 percent resulted in no foreclosure, we mean in 90 percent of those cases, either the homeowners were able to stay in their homes or they left without a foreclosure. They were able to short-sell their homes, sell them or move out with dignity. That is the goal. We are trying to keep them in their homes, but if they cannot stay in their homes, at least deal with the situation with some dignity. Sometimes, they cannot stay in their homes and they agree. It is still a success if we can help them discuss options and then deal with it in a dignified way.

CHAIR WIENER:
Section 8 of the bill deals with the judicial review process. It states, "If a party." So it would be either party. Please explain what you have in mind here.

ASSEMBLYMAN FRIERSON:
Section 8 of the bill deals with the petition for review. If either party is unhappy, that party can petition the court to review the situation. That does not apply only to homeowners. Either side can file the petition for judicial review if dissatisfied. That way, we get the conclusive rulings on these matters if the parties cannot resolve the matters in the regular mediation process.

CHAIR WIENER:
Would this extend the timeline? Do we have this level of conversation?

ASSEMBLYMAN FRIERSON:
There is a process in place, but this clarifies it and gives more direction.

SENATOR ROBERSON:
Please explain what you mean by the rebuttable presumption that lenders are acting in bad faith. I get it if a lender's representative does not show up. As far as failure to bring documents, which documents do you mean?

BARBARA BUCKLEY (Ex-Assemblywoman; Executive Director, Legal Aid Center of Southern Nevada):
Lenders are required to bring the note, deed of trust and assignments. Those three items were included in the legislation last Session to confirm the lender actually owned the note. Concern was expressed about multiple assignments and securitization. It was to ensure the person proceeding with the foreclosure had the right and title to proceed and to make sure all of that was provided before the action proceeded.

SENATOR ROBERSON:
If the lenders fail to provide those three documents, would that result in the rebuttable presumption of bad faith on the part of the lenders?

ASSEMBLYWOMAN BUCKLEY:
Yes. Sometimes, there are multiple assignments.

SENATOR ROBERSON:
If lenders bring those three documents and show up, are they off the hook for the rebuttable presumption? Is there any other reason the mediator can say they acted in bad faith?

ASSEMBLYMAN FRIERSON:
Assembly Bill 300 requires the mediator to check information and provide that to the court. Some of the other requirements are that the lenders send an authorized representative to the mediation rather than someone who will say he or she is not authorized to make a decision. Part of the Program requires lenders to send someone who is authorized to participate in the program. If lenders know the Program requires this, and they do not send an authorized person, it could result in a presumption of bad faith.

SENATOR ROBERSON:
Is that an unreasonable burden on a lender based out of state who may not have authorized people in Nevada?

ASSEMBLYWOMAN BUCKLEY:
That is the law set forth on page 12 of the bill, lines 41 through 44. There are four requirements—attend, have authority, bring documents showing you are the lender and participate in good faith. The court rules promulgated by the Nevada Supreme Court allow a participant to engage in attendance by telephone. Typically, a Nevada lawyer will represent the lender, and the actual persons will be on the phone in their home office. Attendance by the lenders has not presented any hardship to the lenders.

SENATOR ROBERSON:
You mentioned if the mediator believes the lender is acting in bad faith, there is a rebuttable presumption the lender is acting in bad faith. Is that accurate?

ASSEMBLYMAN FRIERSON:
No. The mediator reflects what actually happened. The court answers the question about bad faith. It is not subjective as to whether the lender brought the documents. The mediator puts in the report whether the lender brought those documents.

SENATOR ROBERSON:
If the mediator determines the lender acted in bad faith, what happens next?

ASSEMBLYMAN FRIERSON:
The mediator would not make that determination. The mediator would reflect the information in his report. The court would make the determination about bad faith. It is presumed; the mediator checks off information. The mediator does not write down, "The party is acting in bad faith." The mediator says, "The party did not bring the documents."

SENATOR ROBERSON:
Procedurally, if the borrower believes, based on the mediation, that the lender is acting in bad faith, is that the situation where the borrower would file a petition with the court?

ASSEMBLYMAN FRIERSON:
Either party can file a petition.

SENATOR ROBERSON:
Must the petition be filed by the borrower if the borrower believes there has been bad faith in the mediation?

ASSEMBLYMAN FRIERSON:
If the borrower believes there has been bad faith, the borrower or the lender could file a petition for judicial review. That is not this process. This process is the Program in and of itself and whether lenders have brought the documents they are supposed to bring. The borrowers have had to submit documents to get to this point. They go to the Program. The mediator would reflect the facts that have occurred and provide that to the court. Judges in Clark County and Washoe County review these.

SENATOR ROBERSON:
How do the sanctions work? What could the sanctions be?

ASSEMBLYMAN FRIERSON:
The sanctions could be across the board. I have one example where the court was frustrated at the bad faith of the bank and imposed some sanctions. The court could impose a wide variety of sanctions.

ASSEMBLYWOMAN BUCKLEY:
Section 13, subsection 5 of the bill includes the language enacted last Session. It shows how we thought the Program would work and imposed those

four requirements for a lender. It stated if the lender did not fulfill any of those four requirements, the mediator "shall prepare and submit" a petition and recommendation regarding the imposition of sanctions. The court may then issue an order imposing the sanctions, including requiring a loan modification. The Legislature passed that last Session.

As the Program proceeded to implementation, the hundreds of mediators who were trained and recruited for this effort felt uncomfortable about imposing sanctions. The court felt its role was to hear the evidence and decide whether sanctions should issue. Much of the language in the beginning part of the bill is codifying the existing practice and the court rules as promulgated by the Nevada Supreme Court.

This revision envisions that the mediator documents the conduct. If sanctions are to proceed, it will only be done if a petition for judicial review is filed. The judges then hear the evidence and decide what sanctions, if any, are appropriate. District Judge Patrick Flanagan in the Second Judicial District, Washoe County, has heard most of these cases. He has taken a progressive approach to sanctions. If a lender could not locate the documents, he remands it for a second mediation. District Judge Donald M. Mosley in the Eighth Judicial District, Clark County, has often told the lenders' representative the documents should have been produced. He has said the homeowner is there and instructs the representative to go into the hallway with the homeowner and see if they can work something out. Many modifications are resolved as a result of that.

There have been cases where the conduct has been more egregious so the sanctions have risen commensurately. For example, in one case in Washoe County, there was a situation where the homeowner reached out to a lender and requested modification. The lender said it could not help them because the loan was not in default. The homeowner defaulted and reapplied. The lender said it would send a Home Affordable Modification Program (HAMP) application. The homeowner completed the HAMP application and sent it in. The lender informed the homeowner he or she had qualified. The homeowner made the three-month trial payments. The lender then said it did not own the loan. The judge found that the homeowner did everything the lender instructed and ended in a worse position. At the start, the homeowner was 30 days late in spite of following every instruction from the lender. Going to mediation, the homeowner was on the precipice of foreclosure, facing additional charges and

fees. The homeowner participated in a modification program that was wrongfully offered. As a result, the court sanctioned the lender $30,000.

The sanctions being imposed range from paying the homeowner's remediation fee and/or attorney's fees to a more graduated level based on the course of conduct. As the conduct exacerbates, the fines increase. That is how it has worked in practice and is envisioned in new language codifying what is happening now.

SENATOR ROBERSON:
Is there any way a borrower can be found to be acting in bad faith?

ASSEMBLYMAN FRIERSON:
The process includes ways to indentify bad faith by anyone. The hammer on homeowners is the certificate being issued. The law says if the homeowner indicates an election to waive or fails to return the forms to the trustee, a certificate would issue. It also says if the homeowner fails to attend the mediation, a certificate shall issue.

At this point in the process, the homeowner has produced the documentation required to apply for the Program. The lender has all the paperwork and information about who owns the note.

SENATOR ROBERSON:
What is the certificate?

ASSEMBLYMAN FRIERSON:
The certificate issues for the foreclosure to go forward.

SENATOR ROBERSON:
It is a small hammer because people are staying in their homes for 18 to 24 months—in many cases, not paying anything. We hear many problems about people in default on their mortgages, homeowners' association (HOA) dues and property taxes. As a result, the property tax numbers are down in Clark County. Why do we not require people in mediation to at least pay their property taxes and HOA dues while going through this process?

ASSEMBLYMAN FRIERSON:
It is all on the lender when people go 18 to 24 months without paying their mortgages. The lender has the control over the process, submitting the process to start foreclosure proceedings. If it takes that long, it takes that long because often the lender has not moved. People are just waiting for the lender to move so they can move forward. The Program does not deal with HOAs and other things.

SENATOR ROBERSON:
Could that be included as a sign of good faith on behalf of the borrower? If we are going to make a rebuttable presumption of bad faith against the lender, could we require the borrower to do something?

ASSEMBLYMAN FRIERSON:
The borrowers want to stay in their homes. They want to go through this process sooner. When they apply for the Program, they are not just deciding they will get off without having to pay their mortgages for two years. People are laid off, their adjustable mortgages adjust, their principal has gone up. Many unexpected things have happened to which borrowers are trying to adapt. It is a function of the economy that Nevada has the highest rate of foreclosures in the Country. I am open to discussing different measures with people who have concerns. If there is a practical way for the Program to include some of those measures, I would be open to talk about it.

ASSEMBLYWOMAN BUCKLEY:
The statistics regarding lenders' failure to attend, have authority, bring the documents or participate in good faith has not been covered. From the statistics provided by the Program, out of the 6,300 mediations, 62 percent resulted in agreement. This is positive for those 4,000 Nevadans, and it is a credit to the Nevada Supreme Court for implementing this program. Other states are looking at Nevada and emulating this Program. Washington adopted a foreclosure mediation program modeled after ours. I testified before the members of the Washington Legislature and was pleased at their adoption of a program. Hawaii also adopted a foreclosure mediation program modeled after ours.

The statistic needing improvement is that in 25 percent of the cases, lenders fail to attend in person, have authority, bring documents or participate in good faith. We are hoping to improve that through A.B. 300.

The transparency will allow district court judges to see whether noncompliance is an isolated instance or part of a pattern and practice of repeatedly not having authority to modify a loan or not participating in good faith. Less government is better government. Having the ability to see whether participation is happening changes conduct better than hiring regulators. No one wants to be on the bad list. More lenders will participate as a result of this transparency.

JOHN BURNSIDE:
I went through foreclosure mediation with all the documentation the lender asked me to bring. It was frustrating. It took several months to get all these documents together. After over a year of back and forth and repeatedly sending the same documents, I went to a hearing and expected a yes or no answer. I paid for three months on programs that were requested. I heard nothing. I was put on another three-month program, which I paid. I had all the documents and did everything asked of me.

CHAIR WIENER:
What was the outcome?

MR. BURNSIDE:
The lender did not bring documentation and said the mediation was still under review. The hearing was on April 27, and the lender said they were still reviewing it. I would produce documents, call the lender, and was told a different person was handling my case. I had 10 or 12 different people handling my case. When new people were assigned, they would not know what had previously gone on in my case. The programs I was put on made me further behind. Then, when I became five payments in arrears, they would not take my money. My credit was ruined. I went from a credit score of 788 to 650. The interest rate on my credit cards has been doubled because my credit score went down. It has been a nightmare. I thought something positive would come from the hearing, but that did not happen.

CHAIR WIENER:
When did the process start for you? Are you still in review?

MR. BURNSIDE:
It started in April 2009. I was still working at that time. I called the bank and said I might get laid off work. In July, I got laid off. I continued making payments for six or eight months. I could no longer do it.

LAILA ORELLANA:
I support this bill. On July 15, 2010, I attended a mediation meeting. An attorney was present representing the Bank of America. I had been approved by Bank of America for a HAMP modification. I had successfully submitted my financial paperwork to the bank for review. I had made my three trial payments as required. I was told at mediation by the representative who was supposed to have authority from the bank that I had been approved for my trial modification to become permanent. I was told the documents were in the mail and I would receive them within two weeks. The mediator was told federal funds would be used for my modification, my interest rate would be reduced and the length of my loan would be extended. The mediation statement recorded it. I left feeling confident I had successfully saved my home.

I made four payments. When I attempted to make my eighth payment on the trial modification, Bank of America notified me they would no longer accept my payments because it was foreclosing on my home. I received a notice in October 2010 that I had been denied and was again facing foreclosure.

This bill helps make banks accountable. Homeowners will have recourse to force banks to comply with agreements they make at mediation. It will also force banks to send people with authority to make negotiations valid. I am going further underwater because fees are still being assessed, late fees and attorney's fees. I have no way to stop it. I cannot make a payment. I am in limbo.

I have been to court twice. I filed a petition for judicial review. Even though I started the process in June 2009, the judge felt Bank of America would benefit from an additional 60 days to again review the paperwork I had been submitting for approximately a year and a half.

I am now in a second trial modification. I have been approved by HAMP to participate in trial payments. I made my first payment yesterday.

I am a contributing member of my community. I purchased my home as a primary residence where my brother and I would raise our children. My nephew passed away November 8, 2006. Three weeks later, our 13-year-old dog died. Two months later, my brother's new wife filed for a divorce. My brother, who had been employed with the same company for 17 years, fell ill and was placed on permanent disability. I had been employed for eight years at my company.

We were a stable family. We did not buy a home we could not afford. Everything changed. I lost my job because my company closed its doors. On November 16, 2008, the one person who helped me through the hard times was diagnosed with cancer and passed away. These circumstances led to my current situation.

In June 2009, I called Bank of America and advised them I might miss a payment and needed to apply for a forbearance so I could get past the winter. I did not file for unemployment. After I lost my job, I became self-employed so I could keep my family afloat. In October 2009, I got behind on my payments. I made partial payments to Bank of America. I continued to contact the bank, asking for assistance. I continued going to "save your home" events. In February, Bank of America advised me it could no longer take my payments. I met with a Bank of America representative at a nonprofit agency. This person told me not to make a payment, and they would have a response for me in ten days. Instead, I received a notice of default notifying me I would lose my home.

I applied for the Foreclosure Mediation Program. I continued to submit paperwork. I successfully completed the mediation program. I thought I would be able to save my home. Again, the bank told me at mediation that my house was worth $200,000 less than I paid for it. I want to save my home. Many people ask me why I want to keep my home, and I tell them I feel safe in my home. I pay my taxes and insurance. I want to continue to be a contributing member in my community. I do not want to devalue my neighbors' properties any further. If the bank gave me a 100-year loan, I would make a payment as long as I could afford the payment. I can afford the trial payment they have given me. However, they continue to prolong the process. The longer the process is continued, the further away my house gets from me because the trial modification payments are partial payments. The bank continues to add late fees. Every time I go to a court hearing to plead my case, the bank pays an attorney, the cost of which they pass on to me. I continue to get further behind.

I would appreciate your support of this bill, particularly as it relates to sanctions. Unless banks have something to lose, they will continue to send untrained people to mediations just to meet the requirement that a body is present. The banks do not participate in good faith to help homeowners.

BARRY GOLD (AARP Nevada):
I provided you with written testimony (Exhibit D). I will summarize it. According to AARP research in 2007, older Americans held approximately 28 percent of all mortgage loans that were delinquent or in foreclosure. Older Americans appear to be particularly vulnerable to house price declines and subprime loans. Homeownership is the largest single asset for most people, and it represents their security and ability to achieve and live the American dream.

You have heard about the multiple causes for the economic downturn. People are losing their homes. Nevada is first in foreclosures. Anywhere you go, neighborhoods have empty houses that further reduce property values. States need to create a foreclosure deferral process to allow homeowners to work out existing mortgages. Nevada law gives homeowners in their owner-occupied homes the ability to request it. We have heard how this Program has been working and how it has not been working. Some lenders do what they should, and others do not.

Assembly Bill 300 further defines the process and gives needed clarification and protections to homeowners seeking loan modifications. If people want to stay in their homes without walking away, there should be a process. This would help Nevada families and the economy. On behalf of our 310,000 members across Nevada, AARP supports A.B. 300 and urges the Committee to pass it.

BEN GRAHAM (Administrative Office of the Courts):
We were asked to address the economic feasibility of the Mortgage Foreclosure Program and put statistics together that were contemplated in this bill. There were some adjustments in other legislation that moved around some revenue. Even though the foreclosure notices have been down for the last couple of months, it is wishful thinking that will continue. With the adjustments we have seen, we would be able to economically put these statistics together and gather that information. The Foreclosure Mediation Program is doing much more than what people find in other states.

KRISTIN A. SCHULER-HINTZ:
I sent my suggestions for amendments to the Committee (Exhibit E). I am an attorney in Nevada and California and represent mortgage lender servicers and foreclosure trustees. One of our concerns with the language in this bill is that while the requirements in the bill make it seem simple to comply, in actual practice it is not. When I take an original note to a mediation with the

endorsements on it and I am told I did not comply because the endorsement is not dated by the mediator, the mediator checks the box and says I did not bring all required documents. If I bring the note, deed of trust and assignments, the mediator checks the box saying I did not bring all required documents because the mediator believes there should be another assignment when there is not. I am faced with a presumption of bad faith.

You create a problem for us when you say not doing certain things is bad faith. This bill is akin to stacking a roulette wheel with double zeroes. How many double zeroes do you add to the wheel before we stop playing? Everyone in this Program feels the homeowners' pain. The banks' representatives are usually attorneys who live and work here. They too have watched their home values decline.

There have been instances of noncompliance. According to Assemblyman Frierson, we have a 90 percent success rate in this Program. That is a 90 percent success rate regardless of any document deficiencies. The statistics do not consider whether the lender actually did not bring the documents or did the lender not bring what someone thinks the documents should be. When the statistics say someone with authority was not there, it is relying on another's opinion as to whether I have the authority. When I get financial documents the day of the mediation, it is hard to modify a loan because we do not have all the information we need. Loan modification is not an easy process, nor should it be. In mediation, I do not often see 30-year fixed, full-document loans. When I see them in mediation, the loans tend to be those where people have brought the required documents, and they know what they are doing because they know it is hard to get a loan. It should be hard to get a loan modified.

The Program's success rate has been good whether you define it by keeping people in their homes or giving them a graceful exit from the home. The petition for judicial review process is working. We do not need to sanction my clients based on someone else's requirement.

I have a problem with the bill in the way it deals with the mediation. If I am missing an assignment, it is a serious matter, but the homeowner can show up and say he or she is just looking to buy time. We cannot get a certificate without going to court. If you increase foreclosure costs, the costs must be passed on somewhere. I do not want to mortgage my nieces' and nephews'

futures by resolving the crisis now. We must look to the future when this crisis is over and when we are all trying to buy homes.

CHAIR WIENER:
Please state your suggestions for amendments.

MS. SCHULER-HINTZ:
I suggest if we are going to compile statistics, we should compile statistics on what everyone does at the table. That would include homeowners and their representatives. We are missing the fact that many times, a modification or mediation fails because one side of the table is unprepared. If I am unprepared, the bill has sanctions. If the homeowner is unprepared, it is an "oh, well." We should let the homeowners know, when they hire an attorney, the attorney's success rate and whether the attorney is coming to mediation with the required documents enabling the mediation to be productive.

The second change I propose in this bill is that if a certificate is issued, it says the foreclosure must proceed. In some cases, a certificate issues but something changes, making the foreclosure unnecessary. Sometimes, people get employment they did not think they would get; sometimes, they go into a short sale process; sometimes, a program will come along giving them another opportunity to modify. The certificate issuing should not mandate foreclosure when something else is going on.

We need to clarify the specific deadline at which the election to mediate must be received. There is some question whether this is counted as judicial days or calendar days. If you give leeway for interpretation, you will get many interpretations.

The passage of A.B. 284 requires specific documentation as a prerequisite to recording the notice of default. This addresses concerns about whether the proper parties are at the table. If this falls under that provision and the document has been recorded and has no changes, recertifying that document to prove you belong at the table is unnecessary and cumbersome. If we have done it once and said we hold the note and can foreclose, why must we do it again?

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

It is problematic when we go to a mediation which results in a short sale or modification and then the homeowner moves because of a job offer in another state. In one case, an HOA foreclosed because the HOA dues were not paid, the homeowner was evicted and no longer had title to the property. However, in cases such as these we are still on hold in the Foreclosure Mediation Program because of the requirement that we mediate.

ASSEMBLYMAN FRIERSON:
Most of what Ms. Schuler-Hintz has gone over is more appropriately handled through the rules promulgated by the Nevada Supreme Court to administer the Program. The rebuttable presumption is just that. That means you can rebut it. It is presumed and if there are circumstances that need to be explained, you can explain them to the court to avoid a sanction if it is something justifiable.

A concern was expressed regarding section 9 of A.B. 300 and whether a foreclosure needed to proceed. That was added to help homeowners go through the process after everyone had agreed. I would have to look closer at the language in the bill and what Ms. Schuler-Hintz is proposing to ensure this would help the process of leaving the home when everyone agrees. Removing that would make it more difficult for the process to conclude when everyone agrees they want it to conclude.

Regarding the data compiled on all parties, to some extent, it is difficult to track it the way Ms. Schuler-Hintz suggests beyond the bounds of Nevada State Bar complaints about conduct of attorneys because by the time we get to the Program, the homeowner has turned in the paperwork. I disagree that if the homeowners do not bring some paperwork, the response is, "oh, well." The response is foreclosure. There is often a reason to continue the process for either side to allow more time. The banks hold all the cards.

If the banks would collectively support it with some of these amendments, it would be a healthier discussion. However, requiring that homeowners pay their HOA fees does not help the banks or change their position or their situation with respect to the Program. If we are moving toward consensus, I am open to it.

CHAIR WIENER:
Section 7, subsection 5 of the bill says the court will impose sanctions. In the amendment, it says the court "may" impose sanctions, Exhibit E, page 6.

ASSEMBLYMAN FRIERSON:
The first line of section 7, subsection 5 of the bill says, "If the court finds that ... ." The court is still in a position to review it, and it is not required to impose sanctions unless it finds bad faith. If the court found bad faith and there was nothing to do in response to the actual finding of bad faith, it would be futile. It is only when the court reviews the documents and hears from the bank. If the bank explains its conduct in a way that convinces the court there was no bad faith, there is no requirement that sanctions be imposed. This does not describe what sanctions. The sanction could simply be giving the homeowner 30 additional days to continue discussions. It could be the lender did not do what it was supposed to do, so the lender would have to pay the homeowner $200. The beginning of subsection 5 requires that if the court concludes bad faith, it has to impose sanctions.

NICOLE CANNIZZARO (United Trustees Association):
I am speaking on behalf of the United Trustees Association (UTA) in limited opposition to A.B. 300, with a suggested amendment. The UTA and its members, including both foreclosure trustees and loan servicers, have had hundreds of encounters with borrowers in connection with the Nevada Foreclosure Mediation Program and believe this suggestion will help make the Program stronger and better. The UTA members believe the borrowers should be required to pay their HOA dues, property taxes and property insurance. If that is not done, even if an agreement is reached during the foreclosure mediation, it threatens any loan modification or other agreement that could have been reached with the borrowers. In addition, this presents a significant cash flow issue for the local taxing authorities. They are requiring the borrowers to pay their property taxes, insurance and HOA fees. It will address these cash flow issues, and it will also address any issues that could come up after the foreclosure mediation.

The payment of these expenses is philosophically consistent with the borrowers' stated intention of keeping the home. In addition, requiring them to fulfill these obligations will support the community around them and will bring the community together to work toward coming out of this crisis.

LANCE ALLEN (President, Nevada Dispute Resolution Coalition):
This is not an issue of homeowners or banks and to whom this would be an advantage. This is a mediation issue. We submitted a letter (Exhibit F). Mediation is a process where an impartial third party facilitates communication

and negotiation and promotes voluntary decision making by the parties to a dispute. The mediator is the impartial party. Section 7 of the bill requires the mediator to make findings and write a report. Under the definition of mediation, mediators would not do that. A mediator is protected, and mediations are confidential. *Nevada Revised Statute* (NRS) 48.109 protects mediators and mediation the same as pretrial settlement conferences. Mediators cannot be compelled to talk about what took place in mediation or to write reports. They are not subject to service process either.

GREG FERRARO (JP Morgan Chase):
I will point out an issue that may overlay the necessity for this legislation. The Nevada Supreme Court issued an order establishing the 14-member Advisory Committee on the Foreclosure Mediation Program, which will make recommendations to the court in working with the Foreclosure Mediation Program. If we defer the attention to the experts working in the field and let them propose necessary changes, if any, that is a better way to address some of the issues you heard today.

BILL UFFELMAN (President and CEO, Nevada Bankers Association):
Experts in this field have pointed out some of the difficulties with this bill. Two years ago, Colorado started a different program. The sign of good faith for homeowners in the Colorado program is that they continue to pay their taxes, HOA fees and other things as a condition of participating in the state-sanctioned modification program.

Thousands of people did not get to the mediation program and resolution because the lenders and borrowers worked out the problem before the notice of default stage. We also have federal programs, such as the HAMP program, which has changed since it was introduced. Programs such as HAMP are structured programs. We have tried to fit those into the Nevada modification program. This results in opportunities for problems. In addition, the lending industry has gone from a handful of people handling these situations to thousands of people handling them. The industry has changed its management of the program because federal rules have changed to say only one person will be assigned to a case.

We have talked about the bad mortgages people got in 2005 and 2006. Now, we are talking about people with 30-year, fixed-rate mortgages. Who would have thought they would be in this situation? Assembly Bill 284 passed and has

a direct impact on this situation. It directs what must be done, and at the end you have proved that you have title and the proper authority to do these things. This bill emphasizes the good faith. You throw in subjective good faith. Section 7, subsection 2 of the bill says in effect it is the mediator's opinion the parties did not participate in good faith. If they fulfilled steps one, two and three and had a dialogue, is that not the good faith we are supposed to have? The bill says it is a rebuttable presumption, and the court can impose a sanction. There can be differences of opinion over assignments or the completeness of documents. This goes back to A.B. 284, which says you have done these things and here is the certificate to prove you have done those things; the mediator does not make the judgment of whether the steps have been followed. It is the official record coming out of the office.

The issue of the ability to confront the witness bothers me. Even in the military system, the officials make an effort that the witness will be in the courtroom. It is not just a piece of paper. This is almost like an appellate situation where the court of appeals is making a judgment based on the record in front of it. The record in this method is not a trial record, it is a mediator who, after the fact, wrote up the facts as he or she perceived them.

I will speak to the number of mediations in which the beneficiary or deed of trust representative were participants in mediation. Countrywide Home Loans was a huge lender in Nevada, and Bank of America acquired the company. Consequently, Bank of America will show up time and time again in the mediation program. The same is true of Wells Fargo and JP Morgan Chase. I do not know that putting on a Website that Wells Fargo participated in 22,000 mediations, for example, brings anything to the table about life in Nevada. It shows who the lenders and servicers were at the time the borrowers failed in their obligation to the lenders.

There has been discussion about the length of time that passes during this process. When borrowers miss payments, they contact the lenders and request a deferral. That covers a certain period of time. Then, borrowers perhaps miss payments again, and this is done again. From the time homeowners purchase their homes until the time foreclosure is completed, it can take a long time for a variety of reasons. If homeowners are making any payments or paying their obligations to their HOA and their taxes, it is an indication they want to keep their homes. Fannie Mae, Freddie Mac and other government-sponsored enterprises have their own sets of rules about what the servicers or lenders are

allowed to do and in what time frame they can do it. It is a tangled issue that we are trying to stretch out to make a straight line from day zero to the end.

The Nevada Supreme Court has done a good job in starting and administering the Foreclosure Mediation Program. I do not know that this bill brings anything to the table that those court rules cannot handle. I do not want to mess up something with this bill that the court can accommodate with rules. If we are still going through this in 2013, we can have these discussions. I urge you not to process this bill. Let us work out this situation and have some mediations over the next couple of years. This bill needs some refinement, and I am worried about passing it in the waning days of this Session and doing this just to do it rather than doing it because it needs to be done.

SENATOR ROBERSON:
Assemblyman Frierson said lenders are not concerned about borrowers paying their HOA dues. Do you care if HOA fees, insurance and taxes are being paid during this process?

MR. UFFELMAN:
Yes. Servicing agreements up to a point require the servicer to pay those items, even though they are not receiving income.

SENATOR ROBERSON:
To what do you attribute the 18- to 24-month lag in processing foreclosures?

MR. UFFELMAN:
If borrowers miss a payment, they get a letter. Just because a borrower has missed three payments does not mean someone immediately gives the notice of default and election to sell. Lenders try to work with people. You get into a process and get a partial payment. We have the blend of the bad mortgages versus the 30-year fixed mortgages. The circumstances of why borrowers get to that point are different. The efforts by the lenders to work with the borrowers to try to make it work stretches out the time, which is not because the lenders do not want to do it.

JON SASSER (Washoe Legal Services; Washoe County Senior Law Project):
We urge your support of the bill.

CHAIR WIENER:
I will close the hearing on A.B. 300. The hearing is open for public comment. There being nothing further to come before the Committee, we are adjourned at 10:49 a.m.

RESPECTFULLY SUBMITTED:

Kathleen Swain,
Committee Secretary

APPROVED BY:

Senator Valerie Wiener, Chair

DATE:

EXHIBITS			
Bill	**Exhibit**	**Witness / Agency**	**Description**
	A		Agenda
	B		Attendance Roster
A.B. 300	C	Assemblyman Jason Frierson	Printed Presentation
A.B. 300	D	Barry Gold	Written testimony
A.B. 300	E	Kristin A. Schuler-Hintz	Letter and Proposed Amendments
A.B. 300	F	Lance Allen	Letter opposing A.B. 300