MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Seventy-sixth Session
April 5, 2011

The Senate Committee on Judiciary was called to order by Chair Valerie Wiener at 8:09 a.m. on Tuesday, April 5, 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 Shirley A. Breeden
Senator Mike McGinness
Senator Don Gustavson
Senator Michael Roberson

COMMITTEE MEMBERS ABSENT:

Senator Allison Copening, Vice Chair (Excused)
Senator Ruben J. Kihuen (Excused)

STAFF MEMBERS PRESENT:

Linda J. Eissmann, Policy Analyst
Bradley A. Wilkinson, Counsel
Judith Anker-Nissen, Committee Secretary

OTHERS PRESENT:

Karen Dennison, Vice Chair, Real Property Law Section, State Bar of Nevada
Rocky Finseth, Nevada Land Title Association
Sylvia Smith, President, Nevada Land Title Association; President, Western Title Company
Teresa McKee, Nevada Association of Realtors
Garrett Gordon, Southern Highlands Community Association; Olympia Management Corporation

Pamela Scott, Howard Hughes Corporation
Robert C. Kim, Chair, Executive Committee, Business Law Section, State Bar of Nevada
Matthew A. Taylor, Vice President, Nevada Registered Agent Association
Sheila E. Walther, Supervisory Examiner, Mortgage Lending Division, Department of Business and Industry
Scott Anderson, Deputy for Commercial Recordings, Office of the Secretary of State
John Moran, Churchill Mortgage Capital, LLC

CHAIR WIENER:
I will open the hearing on Senate Bill (S.B.) 402.

SENATE BILL 402: Revises provisions relating to real property. (BDR 9-1090)

KAREN DENNISON (Vice Chair, Real Property Law Section, State Bar of Nevada):
Senate Bill 402 was brought forth by the State Bar Real Property Law Section. We have a proposed amendment (Exhibit C).

Senate Bill 402 deals with a variety of topics which relate to loans secured by deeds of trust. Loans secured by real property are the focus of this bill. The first two sections, 1 and 2, are a clarification to the covenants which may be adopted in a deed of trust. These optional covenants are often incorporated by reference in a deed of trust. The section we are focusing on in the covenants is covenant No. 7, which deals with attorney fees. Existing law states attorney fees are equal to blank percent of the amount secured. This is probably not enforceable and certainly not what is customary. Customarily, that blank is filled in with "reasonable attorney fees." This particular amendment gives the alternative to fill in that blank with the phrase, "reasonable counsel fees and costs actually incurred." Those would be the attorney fees and costs payable due to a default.

Section 3 deals with the assumption fees that must be set forth in the deed of trust. If there is a fee charged when a second borrower assumes the loan, that amount must be set forth in the deed of trust. The Real Property Law Committee states there should be a clarification of that phrase "amount of such charge" because it is generally not a fixed fee, although it could be. Generally, it is a percentage of the unpaid balance of the note. You do not know what the unpaid balance of the note will be at the time of the assumption. This

amendment allows you to state the assumption fee as a fixed sum or as a percentage of the amount secured by the deed of trust or any combination of the two.

Section 4 deals with the location of foreclosure sales. In 2007, the law was changed to require all foreclosures be held in one place in a county with a population of 100,000 people or more. The County Commission was charged with designating that place. The Clark County Commission has designated the offices of the *Nevada Legal News* for all foreclosures. Given the volume of the residential foreclosures, the lobby of the *Nevada Legal News* holds approximately 15 people. Consequently, foreclosure sales are being held outside from 9 a.m. to 5 p.m., rain or shine. The Real Property Law Committee states it makes sense for all residential foreclosures to be held in one place because you could have crossbidding. The idea of a public auction is to get the highest price and have many bidders show up for the sale for the benefit of the lender and borrower. What the Committee proposes is commercial sales not be tied to that one place, but rather in a deed of trust which encumbers commercial property. The sale could be held at a place designated by the parties in the deed of trust itself as long as that place is in the same county where the property is located. Prior to 2007, the covenants provided the use of the office of the trustee as an alternate place of sale. The change in the law creates an unintended consequence which now is almost unworkable because of the volume of foreclosures taking place in one particular location.

Section 5 deals with impound accounts which a lender holds for taxes and insurance to be prepaid on a monthly basis. There are two sections in Nevada law that deal with impound accounts. You have to flip back and forth between the two and try to reconcile the two if you are drafting an impound account provision. One of those is found in NRS 100.091, which is being amended. The other impound account provision is found in NRS 106.105 which is being repealed. The provisions were added from NRS 106.105; these two bills are combined in section 5. Section 5, subsections 1 through 7 are current law. Section 5, subsection 8 is the new part. The protections in this law are an annual review of the impound account, dealing with shortages—which at the option of the borrower can be paid over time—and refunding of the excess—which at the option of the borrower can go back to the borrower—applied to the debt or left in the account. These protections are not necessary for a commercial loan; most commercial loans do not require impounds unless the loan is in default. That is a different set of circumstances

on how that impound account should be treated when the loan goes into default. Consequently, subsection 8 states the impound account provisions apply only to a loan secured by a single-family residence, as the term is defined in NRS 107.080, or a unit in a common-interest community that is used exclusively for residential use.

Section 6 repeals NRS 106.105.

The proposed amendment, Exhibit C, deals with a subject going back to the legislative history of the bill. The subject is what constitutes the indebtedness for the purpose of a deficiency action after a real property foreclosure sale. The definition of indebtedness was adopted in 1969.

The testimony in legislative history deals with the debt owed by the borrower to the lender. This would be after applying the value of the real property being foreclosed or the sale price at foreclosure sale, whichever is higher. It would be the remaining amount we are dealing with. The last sentence of the statute is troubling if you take it out of context, because it reads as follows: “Such amount constituting a lien is limited to the amount of the consideration paid by the lienholder.” Recently, people have taken this out of context and have tried to twist the meaning to say the debt is somehow changed when the loan is transferred from one lender to another. For example, if the loan of $100,000 owed by the borrower was sold to an affiliate of the lender for $50,000, somehow the debt would decrease to $50,000 because that was the consideration paid by the lienholder. Or, if values go up and the next note purchaser bought it for $70,000, the debt would go up. The debt fluctuation would not depend on what the borrower paid on the debt but would depend on what the note sold for. We do not see where this was intended in legislative history. Legislative history defined the elements—the principal obligation, the interest, costs and fees, advances made with respect to the property by the beneficiary, and the last phrase, “and all other amounts secured by the mortgage or other lien on the real property.”

The phrase “all other amounts” of the legislative history of NRS 40.451 —A.B. No. 493 of the 55th Session—was based on the testimony of then-Assemblyman Richard Bryan, who made the motion limiting the amount a lender can recover to the out-of-pocket costs advanced by the lender. Two examples would be: if the taxes are delinquent, the indebtedness does not include those taxes unless the lender paid them; or if the loan is a second deed

of trust and the amount of the first deed of trust is in default, the lender cannot include the delinquent amount of the first deed of trust in its own loan for the purpose of defining indebtedness unless it paid them.

Our amendment clarifies the intent of the motion to adopt this statute on the out-of-pocket expenditures of the lender by the language we put forth, which keys all such other amounts limited to the amounts paid by the lienholder or its predecessor.

CHAIR WIENER:
Up to this point, without this clarification, how do you resolve this? Is it what they expend? How has this been addressed with the statute you refer to by former U.S. Senator Bryan?

MS. DENNISON:
The subject has not come up. This sentence has been taken out of context only recently to limit the amount a lender can recover, not to what the borrower owes but the arbitrary amount that may have been paid for the loan. It can go down, but it can also go up. The amount paid by the lienholder or a note transfer was never discussed in the legislative history when the definition of indebtedness was adopted.

CHAIR WIENER:
In section 5, subsection 1 of S.B. 402, you refer to the impound account and are very specific about the ones already in law—taxes, assessments, rentals and so on—where you refer to the new language, "other obligations related to the encumbered property." Can you give us an example of what other obligations there might be?

MS. DENNISON:
Section 5, subsection 1, paragraphs (a) and (b) are from the repealed section of NRS 106.105, subsection 1, page 8 of the bill. That is not new statutory language, but would be new to this particular section.

CHAIR WIENER:
You moved it.

SENATOR ROBERSON:
I found this interesting because I have experienced it in my own practice in the last couple of years. On more than one occasion, this section does not seem to make sense with the rest of the statute. It has come into dispute, so I appreciate your bringing this to our attention.

SENATOR MCGINNESS:
I am concerned about the location of the sales at the courthouse in counties with less than 100,000 people. Why would it not be held in the courthouse in other counties? Is it just a matter of size, or ...

MS. DENNISON:
Washoe County has designated the courthouse as the place in that County. I was at a committee hearing where the change to the County Commission designating the place was discussed. I heard testimony that the county courthouse steps were totally inadequate in Clark County for foreclosure sales. The problem rests primarily in Clark County, but other county commissions could designate the county courthouse as the place of sale for foreclosure sales if they so choose.

SENATOR MCGINNESS:
Once commissioners pick a location, is it always there? People should not have to look for the designated sale place.

MS. DENNISON:
The law now provides that the county commission in a county with a population of 100,000 or more can designate a certain location where all foreclosure sales must be held.

CHAIR WIENER:
What is the practice for those counties that are smaller?

MS. DENNISON:
Section 4, subsection 2, paragraph (a), subparagraph (1) provides it to be at the county courthouse where the property is located if the county has a population of less than 100,000.

CHAIR WIENER:
I will close the hearing on S.B. 402. I will open the hearing on S.B. 403.

SENATE BILL 403: Revises provisions relating to the information which must be provided by a unit's owner in a resale transaction. (BDR 10-1126)

ROCKY FINSETH (Nevada Land Title Association):
Sylvia Smith is the president of Nevada Land Title Association, and she will walk you through S.B. 403. We provided the Committee with exhibits she will point to in her testimony.

SYLVIA SMITH (President, Nevada Land Title Association; President, Western Title Company):
I want to thank both Chair Wiener and Senator Copening for assisting the Nevada Land Title Association in bringing this issue forward. It is important to both the title and escrow industry, as well as the processing of real estate transactions.

The bill contains one section that amends the common-interest communities (CIC) statutes. *Nevada Revised Statute* 116.4109 is about resale or the up-front package. When an individual purchases property in a CIC, subsection 1, paragraphs (a) through (f) identify the types of information a buyer in a CIC is to be provided. These include the bylaws, covenants, conditions and restrictions (CC&Rs), rules and regulations, and any documents which pertain to the health of the CIC, along with the disclosure of any pending legal matters or any fees that may be assessed in the future by a CIC for the purchaser of the property.

Nevada Revised Statute 116.4109, subsection 1, paragraph (b) addresses the specific fees associated with the unit for the buyer's review. The association is required to generate a statement which is then provided to the title and escrow company. We use that statement for the final closing transaction.

The statement is ordered at the beginning of the transaction because, according to the statute, the CIC has ten days to issue documents and demands. We order them at the beginning of the transaction so we can provide a timely disclosure to all parties involved.

Our challenge is the way this works and why S.B. 403 is before you today. The information provided in the statement needs to be accurate and valid for longer than the date the statement is issued. In other words, if we order a statement today and provide it to all the parties, generally we are some time from closing.

What this means is the statements (Exhibit D) will say it is only good for the day it is issued. This makes it difficult to use that statement when we are ready to close. Many times we will work up figures, quote them to the buyer—and possibly the seller because in these unfortunate times they are bringing funds to the table as well, have everything approved and then find out the demand is no longer valid. We have to order an update, pay additional fees to obtain the demand and start all over for the buyer to bring in more funds. It creates a lot of frustration at the closing.

The proposed change (Exhibit E) would ensure the statement provided by the CIC or their management company is accurate for ten working days from the date of receipt. It also requires that if the CIC realizes it has made an error when it issued the demand, it has to issue the replacement statement prior to the closing. It also requires the CIC management company to honor the demand as written.

Our goals in S.B. 403 are to timely close the real estate transactions, get the buyers into the property and ensure everyone has a clear picture of what is due at the closing.

CHAIR WIENER:
With the ten-day window, you need to be able to rely on the information. If a replacement statement is not provided, then this gives you permission to rely on what you have as being accurate. Information relevant to the indebtedness could be missing, and you rely on the information because you did not get new information. Where is the CIC held accountable to provide the most current information?

MR. FINSETH:
These are obviously challenging times in the real estate market for the title companies, escrow companies, CICs and management companies. The concept of NRS 116.4109 was to establish due diligence on the part of the unit owner and the CIC management companies to perform certain actions. It was not contemplated that if they did not perform, there would be penalties associated.

CHAIR WIENER:
I see the hold harmless if you do not have reliable information.

MR. FINSETH:
The Committee considered the measure brought by Senator Copening on March 16, S.B. 243. In doing our research for S.B. 403, it was brought to my attention S.B. 243 dealt with collection fees and established a 15-day time period for the demand payoff on page 4, section 1, subsection 6. I want to point out the 15-day time commitment in S.B. 243. Since Senate Bill 403 contemplates a 10-day commitment, Nevada Land Title Association would welcome the 15-day time period if it is the prerogative of the Committee.

SENATE BILL 243: Revises provisions relating to financial obligations in common-interest communities. (BDR 10-295)

TERESA MCKEE (Nevada Association of Realtors):
I am here in support of S.B. 403. We also would support an amendment from the 10-day period to 15 days to be consistent with S.B. 243. That would give adequate time to allow for closing, which would help the real estate transactions close properly.

GARRETT GORDON (Southern Highlands Community Association; Olympia Management Corporation):
We support S.B. 403. We support the transparency, full disclosure and as Ms. Smith testified, a clear picture of closing costs. This only benefits the industry's real estate transactions and is a workable solution my clients are happy to abide by.

PAMELA SCOTT (Howard Hughes Corporation):
I am neutral on the bill but would like to ask for some clarifications. I do not have a problem with changing the 10-day period to a 15-day time period, but am concerned with the phrase, "if the association becomes aware of an error." I am assuming by "error" they are talking about a true error. In the larger associations and management companies that are using lockboxes, human hands do not touch checks anymore. If payments go to a lockbox in California, we do not necessarily know that until such time as we are asked for an update for their demand.

In Summerlin, we track 26,000 units and do hundreds and hundreds of demand letters. We do not charge for them, but we get as many as five requests for updates, and I am comfortable with that. We can reword our demand that if it

does not close within 15 days and passes the first of the month, another month's assessment may become due.

BRADLEY A. WILKINSON (Counsel):
It is not a defined term, so it would have the ordinary meaning. It would mean a mistake, something that is inaccurate.

CHAIR WIENER:
The Webster's version.

MR. WILKINSON:
Exactly.

CHAIR WIENER:
Does that help, Ms. Scott?

MS. SCOTT:
Yes, because it says if the association becomes aware of the error. If we are not aware of it and something changes, the association is held accountable. If we make an error now, we are accountable further down in the statute.

CHAIR WIENER:
I will close the hearing on S.B. 403 and open the hearing on S.B. 405.

SENATE BILL 405: Revises provisions governing business entities. (BDR 7-528)

ROBERT C. KIM (Chair, Executive Committee, Business Law Section, State Bar of Nevada):
The Business Law Section's goal is to constantly review the State's business laws and adapt them as there are changes in the economy, environment and business climate.

I have submitted a Memorandum dated April 5 (Exhibit F) to highlight the key aspects of the bill.

Our approach has been to review our own practice experiences, comments from our clients and other members of the community, trends other states have adopted, and federal acts or legislation that may impact the way we run our businesses. We make a log of the different things we have noticed. During each

even year, we have approximately 20 meetings to help assess, revise and propose changes to Title 7 and other related statutes. In that process, we came up with a bill we submitted to the Executive Committee of the State Bar of Nevada and thankfully, it is supported by this Committee.

I will briefly identify the key things we did change. I will read from my written testimony (Exhibit G).

The first item is to address electronic technology provisions. The Model Business Corporation Act adopted a series of sweeping changes which identify acknowledged uses of both electronic communications and media in terms of governing corporations.

As described in the first paragraph of the Legislative Counsel's Digest, the Executive Committee has taken these changes, although applicable to the corporate context, and has applied them to other entities as well. They will be located in a preliminary chapter as they apply to Title 7 in its whole. The key aspects of this change are the use of terminology from the Uniform Electronic Transactions and federal E-Sign Acts. The goal, as other states adopt and revamp their laws, is consistency in how Nevada views electronic communications and/or delivery of documents.

The second item changes the business combination statutes. These are addressed in the Legislative Counsel's Digest page 2, lines 8 through 25. These antitakeover statutes, of which the business combination statute is one, had an active role in the 1980s and 1990s. However, as corporations have evolved and as corporation takeover strategies have developed, this Act has been restrictive to productive business combinations. The goal has been not to eliminate the antitakeover protections our State affords to corporations, but to reduce the time frames in which certain limitations are applicable, as well as permit the board and the stockholders to ultimately approve what would have been a prohibitive transaction. If it makes business sense for the stockholders to approve it, they can do so and not be unnaturally limited by the provisions of the business combination statute in place.

The third item deals with the dissolution of corporations. A brief summary appears in the Legislative Counsel's Digest on pages 2 and 3, lines 50 through 66. The goal is to take the dissolution statutes, which had not been revisited since the early 1990s, and allow the Nevada corporation to

dissolve in an orderly, predictable and structured process. Before, the statute was written in a way that incentivized people to walk away and not properly dissolve their corporation because there were ambiguities relating to the exposure of a director who tried to properly dissolve a corporation per statute.

One key change we introduced is to afford a director the same protection when dissolving a corporation, which is the business judgment rule, to the extent reasonable care is taken in conducting the way business is done. Directors should not be individually liable for any errors that may occur during the process. A director is subject to any breach of fiduciary duty, claims, fraud, intentional violation of law and misconduct that may exist, but would not alleviate him or her from responsibility. It is to clarify a blind spot in dissolution statute to give people incentive to dissolve corporations in an orderly and statutory basis.

CHAIR WIENER:
What brings this particular change?

MR. KIM:
It is primarily out of practice. Companies would contact me or the members of our Executive Committee and ask, what is the dissolution process? There was a provision in the dissolution section that said directors who act as trustees of the dissolved corporation are personally liable for any errors associated with that dissolution even though the best effort was used to do it properly. That was a big impediment to properly wind down a corporation. Any corporation facing dissolution is in a distressed situation and trying to do the best it can under the circumstances.

We looked at the Model Business Corporation Act, Delaware law and Maryland law. They had adopted similar statutes to allow directors to do it the right way instead of walking away from a business and letting the creditors and other owners fill in the blanks as to what would happen at the end.

CHAIR WIENER:
Although it has not been addressed for more than 20 years, what is happening to businesses is the sign of the times.

MR. KIM:
This is an acknowledgement that the economy is forcing businesses to make the ultimate decision. Part of this law should allow them to do it in an orderly manner to have predictability and finality to each entity.

The fourth item deals with the effective time of filings for different matters recorded with the Secretary of State. You can find a brief summary in the Legislative Counsel's Digest, page 2, lines 26 through 30. The goal is to allow business entities the ability to specify an exact time when their filings are effective. Now, you are allowed to set a future date and many people set a future time as well because the field permits it. The Executive Committee states it is appropriate to allow Nevada corporations and entities to state an effective time in addition to an effective date. When documents are stamped at the Secretary of State's Office, it includes a time stamp. However, the future date or time cannot be more than 90 days after the date in which it is filed. The same limitation exists in terms of how far into the future you can make it. The Executive Committee wants to give people a specific time. Another change is to state if no effective time is stated in a future date, it is presumptively 12:01 a.m.

CHAIR WIENER:
You are saying Pacific time. We had a historical note when we first went to a limited Legislative Session and it had to be done at the end of the 120th day; we were in daylight saving time. Does Pacific time relate to whether you are in standard time or daylight saving time? Mr. Wilkinson, we reprocessed all bills from midnight to 1 a.m. to ensure they were legal, correct?

MR. WILKINSON:
That is correct. I interpret this to mean 12:01 a.m. on whatever the clock time.

MR. KIM:
It was contemplated using Pacific time, whether it is standard or daylight saving time.

The fifth item is the charging order statutes. The summary is located in the Legislative Counsel's Digest, page 3, lines 104 to 107. Nevada statutes provide charging orders are the sole remedy for creditors of individuals, and the charging order process is meant to not disrupt businesses because an owner of the business has gotten into financial trouble and is subject to judgments by

third parties. At the request of Nevada practitioners, we are agreeable to sharpen those statutes to bring clarity in light of recent trends. It is not changing statutes, it is adding further color to what we already provide. It has always included, and will continue to include, an exception for consensual agreements between a person and creditors. If you are in a secured transaction where a borrower pledges the stock of his or her entity as security per an agreement, that would not be subject to the charging order statute but as a separate agreement by the person.

The sixth item includes changes to the Uniform Statutory Trust Entity Act. You will find the summary in the Legislative Counsel's Digest, pages 3 and 4, lines 108 through 113. We were asked to look at the Uniform Statutory Trust Entity Act adopted by the National Conference of Commissioners on Uniform State Laws (NCCUSL). We spoke with ex-Senator Terry Care, the State's representative of NCCUSL. The Uniform Act does not flow with the philosophy of the Act as we first adopted it. In lieu of adopting the Uniform Act, as adopted by the Executive Committee, we revised the Act, which mirrors the Delaware Statutory Trust Act. It is not a recital of all issues that may arise in the trust formation and governance situation, but it allows the users of the Act to adopt proper trust documents that provide the flexibility they may need in whatever transaction they are using. This is a philosophy consistent with what we have done in our other chapters relating to limited liability companies (LLC) and limited partnerships.

Section 99 of S.B. 405 covers changes to our State's domestication statute. I have spoken with interested parties, and we propose to undo certain changes made in the 2009 Legislative Session that we were not aware of for one reason or another. We will speak with members and other interested parties to discuss what we can do to come to a mutual agreement.

In 2001, our Executive Committee introduced, along with conversions statutes, provisions allowing entities to convert from one entity to another or domesticate themselves from non-U.S. jurisdictions to our jurisdiction. Issues raised regarding our reversion of the prior amendments may cause a problem, so we are open to discussion regarding this matter.

CHAIR WIENER:
That is foreign—meaning truly foreign, not just foreign to Nevada, but ...

MR. KIM:
You mean non-U.S.

Conversion statutes, as we had drafted or designed, were intended to apply to foreign as our statute refers to non-Nevada, other state entities. We are open to any party making themselves available to our laws. We want to ensure we cover that and not artificially exclude anyone interested in coming to Nevada by what our laws say.

CHAIR WIENER:
Could you explain the change on page 32, section 42, subsection 2 where it was three years, and now it is 12 months?

MR. KIM:
This is an acknowledgement of the strict penalties associated with business combinations involving interested stockholders. Now, an interested stockholder is defined as a person owning 5 percent to 10 percent of the corporation. If that person does not obtain the prior approval of the board to acquire such shares, that person is prohibited from entering into interested combinations with the company. The purpose is to prevent hostile takeovers, potential greenmail transactions, and other situations where the hostile party is not working with the board or management to take over the company. The purpose of the business combination limitation is to require the party to speak to the board and obtain its consent for increased levels of shares so as not to be precluded from entering into a business combination later.

As many transactions have developed and people have learned to deal with these statutes, other jurisdictions have tweaked and scaled back the harsh penalties associated with these transactions. For example, there could be a situation where this party is hostile, evidencing policies not conducive to the corporation's best interest, stockholders or the community that it operated in, and for that reason the party should be prohibited and required to deal with the board. The person may be given approval to obtain interested stockholder levels so that a business combination in the future is permissible. If that were to happen now, that person is prohibited for three years from entering into any combination. Three years is unnecessarily limiting because times and reasons

can change, and 12 months was sufficient to allow the parties to assess whether a business combination is appropriate in the future.

CHAIR WIENER:
On page 32, section 43, line 15 is another time change from three years to two years.

MR. KIM:
Yes, those are along the same lines—to narrow the time frames down.

CHAIR WIENER:
On page 33, section 44, subsection 3 is again a time change from three years to two years.

MR. KIM:
Yes.

CHAIR WIENER:
Would you explain the new language on page 39, section 53, from lines 20 to 25—and I want the record to reflect I am not a lawyer.

MR. KIM:
A corporation and its board of directors have the right or ability to indemnify a director, officer or any agent who acts on its behalf against any claims, charges or actions the person is subject to when acting on behalf of the corporation. It is optional, but most corporations opt into it and provide such indemnification. The ability to be indemnified is limited by those not acting in good faith or those found not acting in the best interest of the corporation.

The purpose of the changes identified by Madam Chair was to acknowledge management does change and usually when it changes, it does not change voluntarily. Many times, new management seeks to cut off the indemnification rights previously granted to former officers and directors.

Taking leave from other states where they have clarified that previously granted indemnification rights cannot be unilaterally withdrawn or taken away or revoked by future management, lines 20 to 25 are designed to address the right to indemnification does not go away because future management decides to

limit it or eliminate it after the fact. It is meant to preserve the right to indemnification properly granted in the first place.

CHAIR WIENER:
Is the change a right available not just to the person who had it and then new management revoked it? When would the management have the opportunity to indemnify? Is it that someone else may not have that right going forward?

MR. KIM:
It was designed to address the person who had the right and was then told he or she did not have the right after the fact, although the person acted in that reliance.

CHAIR WIENER:
Could you explain limited liability companies on page 51, section 69, subsection 2, paragraphs (a), (b) and (c), lines 6 through 20?

MR. KIM:
These changes relate to the charging order. In subsection 2, paragraph (a), it says the charging order exclusive remedy is still applicable whether the limited liability company has one member or more. The balance of subsection 2, paragraph (a) states no other remedy, including or limiting foreclosure on interest, is available to a judgment creditor.

However, in mirroring what is in other corporate statutes, subsection 2, paragraph (c) states exclusive remedy is not a limitation on a good faith negotiated agreement between the member and a creditor, a secured financial transaction where the party has consciously and voluntarily offered that ownership interest as collateral for an obligation.

CHAIR WIENER:
On page 54, section 75, subsection 1, lines 1 through 39, could you explain the relationship between the two?

MR. KIM:
Nevada Revised Statute 87A was adopted in 2007 as a relatively new chapter. Nevada has two limited partnership paradigms. Although the Uniform Laws Committee had promulgated a Uniform Limited Partnership Act in 2001, which was a stark departure from common-law limited partnership, the Executive

Committee felt it best to preserve Nevada's relatively unique common-law limited partnership structure and offer as an alternative the share creature of statute, the limited partnership structure contained and ultimately codified in NRS 87A. The Executive Committee did not introduce NRS 87A as a bill, but looked at it when asked. One aspect was it had a charging order provision; however, it was not an exclusive remedy. The goal with this change was to conform NRS 87A to the other chapters that already stated the charging order was an exclusive remedy for judgment creditors. In 2007, it was an oversight when first adopted that we did not note to conform the charging order remedy in NRS 87A to what was located in NRS 86 and NRS 88. The reason there are more changes in NRS 87A is a charging order was not the sole remedy, so we are conforming to the other chapters.

CHAIR WIENER:
Would you explain business trusts located on page 61, section 86, subsections 3 and 4.

MR. KIM:
We had a choice to go with the Uniform Statutory Trust Act as adopted by the Uniform Laws Committee or to look at Delaware's trust statutes. We had based our earlier trust statutes on other similar states' trust statutes and wanted to see what they had done in this new act that would be beneficial and useful to Nevada. That is why sections 3 and 4 were adopted. Those rights and obligations were referred to in name. We also were making sure the designation of a business trust as stated in subsection 4 does not create unnecessary presumption or inference.

CHAIR WIENER:
Because you did reference Delaware, does this language mirror it precisely, or is there something Nevada-specific?

MR. KIM:
I do not recall, as another member of the Executive Committee was responsible for these particular revisions. When we looked at Delaware, we did not take the language word for word, as we knew the Legislative Counsel Bureau would change it. It is written differently from a structural basis. Whatever concepts exist, we tailor it the way our statutes are written, as members of our Executive Committee have customs of writing statutes a certain way. Rarely do

we take passages verbatim from Delaware without looking at its structure and its word choice for insertion into our statutes.

CHAIR WIENER:
Could you explain the series trust on page 63, section 89?

MR. KIM:
A trust is a flexible form of vehicle a business can use. Trusts are like mutual funds or entities where they hold a variety of different assets and investments.

A series trust acknowledges within a business trust you can have different series of ownerships; much like series limited liability companies. They are meant to organize and identify different streams of ownership within an entity.

CHAIR WIENER:
Where we discuss foreign entities and domestic partnerships, is this something we still need to resolve?

MR. KIM:
Parties will be addressing their concerns.

There are minor amendments and edits I received from the Executive Committee members because of the way the bill was written. I will be submitting those tomorrow.

MATTHEW A. TAYLOR (Vice President, Nevada Registered Agent Association):
We support a majority of the language contained within S.B. 405 and have worked extensively with the Business Law Section. However, we oppose the bill as written due to the language contained in section 99, subsections 9 and 10. The language stricken from this section was introduced two years ago.

We worked extensively in conjunction with the Secretary of State's Office looking for a clearer process to avail non-Nevada, but also U.S., companies the ability to domesticate their corporations or LLCs in the State. The main concern is working with different companies trying to come to Nevada because they might have problems, such as extensive trade relationships, lines of credit, tax histories or income histories. There is no easy way to say this is the same company or the same business. They wanted to relocate to Nevada and break ties with the state where they were incorporated. This allowed them to bring

their companies to Nevada and keep their histories. It was also a consumer protection issue. By retaining histories and not running away from obligations, they did not create black holes or breaks in time, such as when someone dissolved a corporation in one state, refiled in another and transferred assets over to a new company. While there is some question as to whether they still have that ability under the conversion language, we do not believe it was clear. There are additional provisions contained within the domestication statutes we want to ensure are available to our clients trying to come to Nevada. That is why this language was introduced. This section of the bill does not do much of anything other than undo the changes we worked so hard to get introduced two years ago; as such, we have to oppose the bill as written.

CHAIR WIENER:
You oppose the entire bill because of the deletion in section 99? Can you support the rest of S.B. 405?

MR. TAYLOR:
We can support the rest of it.

CHAIR WIENER:
So you oppose this deletion?

MR. TAYLOR:
We oppose this deletion.

MR. KIM:
The reason we proposed this deletion was our current conversion statutes were contemplated to address entities from other states that wanted to convert into Nevada. Part of its perception is conversion may not seem as attractive as domestication, but we believe there is a process that permits entities to convert from their states to Nevada.

The effects of conversion set forth in NRS 92A, section 250 clearly provide for liabilities or actions carried forward; there is no cutoff of obligations from one entity to the next. However, if we do address the concerns raised, I would prefer they be done in the conversion statutes where the Executive Committee had intended state-to-state conversions be done, rather than in the domestication statutes.

CHAIR WIENER:
Is that a conversation you two could have, and then be part of what comes back to us in the next day or two?

MR. TAYLOR:
Yes, we are committed and will be having meetings. We would have had the meetings sooner, but this is a recently introduced bill and a rather lengthy one. We became aware of that change yesterday and started a dialogue.

CHAIR WIENER:
We encourage the dialogue because resolution is what we aim for in the next day or so, as it is important.

SENATOR ROBERSON:
Mr. Taylor, why do you not believe this issue is adequately addressed in the other chapter as Mr. Kim testified?

MR. TAYLOR:
There is language contained within the domestication statute that is clear. For example, in the bill on page 70, lines 3 through 7:

> The domestication of an undomesticated organization does not constitute the dissolution of the undomesticated organization. The domestication constitutes a continuation of the existence of the undomesticated organization in the form of a domestic entity.

There are several points within the bill that the language clearly says and states the intent. This is not a conversion or a change to the entity, this is a relocation of the entity. While the conversion language may accomplish the same thing, it neither clearly states that intent nor the effect. When we try to educate clients looking to relocate to Nevada how to explain to their board of directors and shareholders, they point to statute and are able to identify they are not changing anything other than the location of the company. With the conversion language not as clear, we can argue it could accomplish the same thing with the conversion statute. In other states, this type of process would occur within the domestication statutes as well. A large portion of the language introduced was based off Wyoming's redomestication process. Some of our members have worked with Wyoming as well to introduce the domestication language which has been in place for a number of years.

CHAIR WIENER:
I look forward to hearing how you resolve this.

SHEILA E. WALTHER (Supervisory Examiner, Mortgage Lending Division, Department of Business and Industry):
The Mortgage Lending Division is neutral on S.B. 405. However, the Division has concerns with the proposed changes in section 56 to NRS 80.015. *Nevada Revised Statute* 80.015, subsection 3, subparagraph (c), which S.B. 405 proposes to change, requires persons who solicit business in Nevada as mortgage brokers or mortgage bankers to be considered doing business in Nevada as subject to licensing with the Division. Senate Bill 405 would change that section to allow out-of-state companies to actively solicit and conduct commercial mortgage business in Nevada without any direct oversight by the Division and possibly without oversight from any regulator.

The Division feels this change would potentially create an unfair competitive situation for current licensees operating in Nevada subject to licensing. Many of these businesses are struggling. These are Nevada businesses employing Nevadans and paying Nevada taxes.

Additionally, the Division is concerned the lack of oversight would extend to out-of-state persons utilizing private investors to fund commercial loans; an area of lending that historically has had many abuses and has harmed many private investors. Lack of licensure might enable some of these bad players who have previously operated in Nevada that the Division has taken action against to resurface and operate from out-of-state locations into Nevada.

The Division respectfully requests the Committee consider removing the addition in section 56 to NRS 80.015, subsection 3, subparagraph (c).

MR. KIM:
These changes have been proposed because when certain changes were made to the mortgage lending statutes, the intent was not to include out-of-state lenders on commercial transactions. I do not have the minutes with me, but as I recall, there were minutes which stated such. But when the language was put together, that was not reflected in the actual statute. At that time, a former Uniform Law Commissioner was amenable to making those changes. Since then, the Executive Committee has not had much traction in making any

clarification, so the Executive Committee decided to address the situation by amendment.

I will point out that the carveout in section 56, subsection 2, paragraph (c) regarding solicitation of business exists in paragraph (d), which deals with commercial property for arranging a mortgage loan secured by real property. We see this in the context of large, secure transactions by banks and institutional lenders that are not necessarily located in Nevada. They ask for an opinion that says there is no licensing requirement for them to do this activity for the borrower. We cannot give that opinion because the way the mortgage banking laws are broadly written, and any attempt to extend anyone a loan is viewed as falling within the jurisdiction. The goal was to mirror what is already being done and was the case beforehand in terms of banks and other institutions that need to get licensed as mortgage brokerages.

CHAIR WIENER:
I remember the history. If you could continue to have a conversation on this because we do not want unintended consequences with any pieces. When people come forward and have a concern, they have a perspective that will lend well to the process. Mr. Kim, if you and Ms. Walther can continue to talk and include that with what you present, it would certainly help us.

MS. WALTHER:
In our law, we do not subject lenders; it is at the point of origination that triggers a licensing requirement. So lenders from out of state can certainly fund the loans that originate by our licensees here, and as Mr. Kim indicated, there are provisions. We call it the "occasional loan" for a company not located in Nevada to do a commercial transaction, as long as it has not solicited that loan. For example, if the lender is doing a loan for a client in California and wants to do a project in Nevada, it is eligible under the law. Our objection is it opens the door for these companies to actively solicit and advertise. These are companies the Mortgage Lending Division would not have any jurisdiction over. Oftentimes, other states will not have any jurisdiction if the activity is occurring in a different state. It disturbs me for consumers or projects to not have any jurisdiction. But I will work with Mr. Kim.

CHAIR WIENER:
That is an important piece for us to consider as well.

SCOTT ANDERSON (Deputy for Commercial Recordings, Office of the Secretary of State):
We are generally supportive of S.B. 405. I have spoken with Mr. Kim. The Secretary of State's Office has similar concerns regarding section 99, domestication language which we did support in the 2009 Session. However, we do understand there is room to reconcile. We do not have a preference whether it is in the domestication language or in the conversion language. We want to ensure Nevada is competitive with Wyoming and other states which are making it easy to relocate or redomesticate a business in another jurisdiction; we want them to come to Nevada. We want those businesses formed and relocated whether here in Nevada or just formed under Nevada law. We want them here to support our State. We will be willing to sit with both parties to help come up with a resolution.

CHAIR WIENER:
Please get together with the other parties as soon as possible because we have a substantial workload, and we would like to do what we can with S.B. 405.

JOHN MORAN (Churchill Mortgage Capital, LLC):
Churchill Mortgage Capital is a commercial real estate mortgage brokerage company headquartered in Los Angeles. I concur with Ms. Walther on section 56 for several reasons. I am opposed to allowing out-of-state commercial mortgage bankers and brokers from operating within the State without licensing. Within the last six months to nine months, I reported two unlicensed individuals who were engaged in fraudulent activity and in violation for not being licensed to Kimberly Stein, Chief of Enforcement, Securities Division, Secretary of State's Office. My complaint assisted the Secretary of State's Office in taking action against these companies.

The out-of-state companies operating in Nevada as mortgage brokers would create a free-for-all atmosphere. Companies such as ours, which spend thousand of dollars here every year, would have no reason to have a Las Vegas office.

We do not need any additional sources of money for commercial transactions. The licensees within the State already access sources of money for commercial properties.

CHAIR WIENER:
I will close the hearing on S.B. 405. The meeting is adjourned at 9:35 a.m.

RESPECTFULLY SUBMITTED:

Judith Anker-Nissen,
Committee Secretary

APPROVED BY:

Senator Valerie Wiener, Chair

DATE:

EXHIBITS

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster
S.B. 402	C	Karen Dennison	Proposed Amendment to S.B. 402
S.B. 403	D	Sylvia Smith	Example of Demand Letter
S.B. 403	E	Sylvia Smith	Proposed Amendment to S.B. 403
S.B. 405	F	Robert C. Kim	Memorandum to Senate Judiciary Committee
S.B. 405	G	Robert C. Kim	Written Testimony