

**MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY**

**Seventy-Seventh Session
May 9, 2013**

The Senate Committee on Judiciary was called to order by Chair Tick Segerblom at 9:07 a.m. on Thursday, May 9, 2013, in Room 2149 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to Room 4412 of the Grant Sawyer State Office Building, 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 Tick Segerblom, Chair
Senator Ruben J. Kihuen, Vice Chair
Senator Aaron D. Ford
Senator Justin C. Jones
Senator Greg Brower
Senator Scott Hammond
Senator Mark Hutchison

GUEST LEGISLATORS PRESENT:

Senator Michael Roberson, Senatorial District No. 20
Assemblyman Jason Frierson, Assembly District No. 8

STAFF MEMBERS PRESENT:

Mindy Martini, Policy Analyst
Nick Anthony, Counsel
Linda Hiller, Committee Secretary

OTHERS PRESENT:

A.G. Burnett, Chair, State Gaming Control Board
Ann Pongracz, Senior Deputy Attorney General, Office of the Attorney General
Ernest Figueroa, Chief Deputy Attorney General, Consumer Counsel, Bureau of
Consumer Protection, Office of the Attorney General
George Ross, Bank of America

Senate Committee on Judiciary
May 9, 2013
Page 2

Bill Uffelman, President and CEO, Nevada Bankers Association
Lance Earl
Kristen Schuler-Hintz
Rocky Finseth, Nevada Association of Realtors; Nevada Land Title Association
Keith Lynam, Nevada Association of Realtors
Cheryl Blomstrom, United Trustees Association
Philip A. Olsen
Scott Smith

Chair Segerblom:

I will open the hearing with Assembly Bill (A.B.) 10.

ASSEMBLY BILL 10 (1st Reprint): Revises provisions relating to certain crimes involving gaming. (BDR 41-329)

A.G. Burnett (Chair, State Gaming Control Board):

The State Gaming Control Board presented a proposed amendment ([Exhibit C](#)) to the Assembly Committee on Judiciary requesting removal of language from A.B. 10 to clarify the bill. These were agreed upon and have been included in the first reprint of the bill.

Section 1 of A.B. 10 seeks to ensure that the use of a cheating device in interstate online poker would be unlawful just as the use of cheating devices in a brick-and-mortar casino are now unlawful. The amended language deletes the definition of "advantage" from the original bill language since this definition has proven more problematic than helpful. Under the original language, it was unlawful for a participant in a game to use information or knowledge that was made available outside the game. This language has been struck from the revised bill.

My office sent an email notification to this Committee on April 26 that a deletion presented in the proposed amendment had not been picked up in the reprint of this bill. An amendment request from Adriana G. Fralick, Senior Research Specialist with the Gaming Control Board ([Exhibit D](#)), proposes amending section 1, lines 2 and 3 to delete the phrase "either solely or in conjunction with others." This proposed amendment would clarify the bill and reduce redundancies. Assemblyman Jason Frierson has no concerns about the amendment proposed to delete this language.

The Gaming Control Board worked with the public defenders' offices in Clark County and Washoe County to create these amendments. It also worked with the Washoe County District Attorney's office. These organizations are aware of the proposed amendments and support them.

Chair Segerblom:

Please provide an example of the type of activities you intend to prevent with A.B. 10.

Mr. Burnett:

We are trying to prevent cheating in the online space. With the approval of the statutes allowing online gaming, we felt it was necessary to clarify provisions regarding the cheating that may occur in this type of game. This bill creates the same rules for online gaming as we have for brick-and-mortar casinos.

Chair Segerblom:

I know cards can be counted when wagering in a casino. How would cheating occur in online gaming?

Mr. Burnett:

Some attempts at cheating may be similar to those used in casinos; however, we are looking at the use of new technologies when talking about online cheating. One method of online cheating involves the use of bots, which are viral-type programs that can be inserted into gaming programs and then used to enable cheating. We want to prosecute those types of offenses. This bill provides language regarding the illegality of the use of computers, electronic, electrical or mechanical devices, or any type of software or hardware designed to assist in cheating in online gaming. We know people will attempt to cheat at interactive gaming. We would like to be given the power in statute to prosecute those who get caught.

Senator Hutchison:

Implementation of online gaming will require the development of detection technologies. Will those technologies be used to identify cheaters?

Mr. Burnett:

Yes, they will. *Nevada Revised Statute* (NRS) 465.075 will be used as the statutory mechanism for prosecution of these crimes. The Technology Division of the Gaming Control Board will monitor software and online play. The

interactive game operators and their service providers will be contracted to provide age verification, geolocation and other security services. The Technology Division will essentially provide the firewalls and detection capabilities to ensure that cheating, if it does occur, is caught. Once an issue is detected, this statute will be used to prosecute those who have committed crimes.

Chair Segerblom:

The high quality of gaming regulators in Nevada is the reason gaming in this State remains excellent. I will close the hearing on A.B. 10 and open the hearing on A.B. 300.

ASSEMBLY BILL 300 (1st Reprint): Revises provisions governing real property.
(BDR 9-961)

Assemblyman Jason Frierson (Assembly District No. 8):

Assembly Bill 300 would make adjustments to A.B. No. 284 of the 76th Session and take the next step forward in improving Nevada's foreclosure laws. This bill is the product of a working group organized by Attorney General Catherine Cortez Masto consisting of Legislators, representatives from the banking industry, loan service providers, title companies, real estate professionals and others to address issues raised since 2011 regarding implementation of A.B. No. 284 of the 76th Session.

Assembly Bill No. 284 of the 76th Session was enacted to amend NRS 107.080. It addressed the problem of robo-signing and provided legislation to ensure Nevada citizens did not lose their homes to improper foreclosures. It required foreclosing parties to provide documentation in the form of affidavits to demonstrate they possessed a legal right to foreclose on properties.

Assembly Bill 300 would clarify the intentions of A.B. No. 284 of the 76th Session regarding the documentation required to carry out a foreclosure. It would explain more clearly how foreclosing parties comply with the personal knowledge requirements of A.B. No. 284 of the 76th Session. It would also establish a means for foreclosing on property when the note on the property has been lost or stolen. It would require a foreclosing entity to inform a borrower in writing of the amount of money required to either reinstate the note or discharge the debt entirely. It would also require a foreclosing entity to provide a borrower with a single telephone number to call for information regarding the

most current amounts due and other related information. Lastly, it would clarify how a foreclosing entity must inform the borrower about an original local document and subsequent assignments of the loan.

The working group collaborated to ensure any adjustments made to A.B. No. 284 of the 76th Session would allow its intent to be workable and practical. The intent of this collaboration was to adjust the previous bill to improve Nevada's situation in respect to foreclosures.

Several amendments have been proposed to this bill. In section 1, subsection 2, paragraph (c), subparagraph (5) of A.B. 300, a concern was expressed about use of the phrase "any questions." The intention of this section is to allow a borrower to call for information about an affidavit, not to ask legal questions or receive an analysis. This section was designed to allow the borrower to determine the payoff amount at the time of the call.

An amendment has been proposed by Bill Uffelman and George Ross to address this issue ([Exhibit E](#)). We do not totally agree with this amendment. We agree that there must be a toll-free number a borrower can call to receive information referred to in the affidavit. We do not want to make this section overly broad, but we do not want to make it so narrow the banks are not in compliance with the National Mortgage Settlement. This section is not intended to relieve banks of their obligation to comply with the National Mortgage Settlement. We want to clarify the purpose of the toll-free number. I would agree to language allowing someone to read the Settlement to a caller or to mail a copy of the affidavit to the borrower. The central point here is to ensure the borrower has access to the most up-to-date information.

Chair Segerblom:

Under A.B. 300, would a borrower have a right to access the affidavit?

Assemblyman Frierson:

I do not have details on this. I do not know if a borrower would automatically be provided with a copy of the affidavit. Lenders are not necessarily opposed to this idea.

Senator Hutchison:

The language regarding the toll-free number is not finalized. Are you still working on it?

Assemblyman Frierson:

The language in this section is 99.9 percent finalized. There are many years of history regarding concerns about how this has worked. We are near agreement on language for this section.

Senator Michael Roberson (Senatorial District No. 20):

I support A.B. 300. In an effort to remedy foreclosure issues, Assembly Bill No. 284 of the 76th Session passed with substantial bipartisan support. Assembly Bill 300 reexamines these issues and proposes improvements to the legislation approved in the previous Session. A diverse group of stakeholders participated in difficult discussions regarding this bill. Please support A.B. 300.

Ann Pongracz (Senior Deputy Attorney General, Office of the Attorney General):

I am providing testimony in support of A.B. 300 on behalf of Attorney General Catherine Cortez Masto ([Exhibit F](#)). This bill provides technical amendments to A.B. No. 284 of the 76th Session.

Chair Segerblom:

Why is there a need for A.B. 300? What is specifically being fixed and why does it require fixing? It appears the housing market is improving and some of the problems this bill is designed to address no longer exist.

Ms. Pongracz:

The Attorney General's Office does not recognize Assembly Bill No. 284 of the 76th Session as the cause for the fall of the real estate market in Nevada. Situations existed where foreclosures were necessary, and there were problems in the procedures being used by a number of the foreclosing entities. Assembly Bill No. 284 of the 76th Session was not designed to fix the real estate market but rather to address the documentation requirements for foreclosure. It ensured borrowers would understand that those foreclosing on their properties had the legal right to do so. I do not know the links between NRS 107.080 and the overall developments that happened in the real estate market. The Attorney General's Office felt problems existed in the design of Assembly Bill No. 284 of the 76th Session. We have developed an understanding of how to technically improve that bill and make the foreclosure process more efficient while still protecting the rights of borrowers. This is why we support A.B. 300.

In 2011, we were not able to hold open and complete discussions with the wide range of stakeholders who were involved in the development of A.B. 300. Participation in the working group for A.B. 300 was more inclusive, and the process allowed development of greater understanding of the issues. Participants in the working group are listed on pages 4 through 6 of [Exhibit F](#).

In section 1, subsection 2, paragraph (c) of A.B. 300, the definition of personal knowledge is clarified by relying upon other provisions that exist in law but have not been understood to relate to the affidavit requirement. These three types of personal knowledge are further explained on page 2 of [Exhibit F](#). Questions existed about the application of NRS 51.135. For that reason, this paragraph was included in the bill.

Chair Segerblom:

Is it a crime to sign an affidavit if you have not personally verified the information?

Ms. Pongracz:

The criminal penalty provisions of A.B. No. 284 of the 76th Session are not changed by A.B. 300. Assembly Bill No. 284 of the 76th Session allows for an honest error on the part of an individual provided it is corrected within 20 days. A clerical error can also be corrected under the existing regulations.

Chair Segerblom:

Are the business records referred to in A.B. 300 required to be maintained for possible use in a future review process?

Ms. Pongracz:

No. Nevada law does not require a person relying on business records to supply a duplicate set of those records. This was discussed as an option by the working group but not accepted. It was felt this would slow down the process for no appropriate reason. These records are relied upon in the regular course of business, and creating a repository of duplicate documents did not seem to be useful.

Chair Segerblom:

How would the person who signed the affidavit have reviewed them?

Ms. Pongracz:

The person who signs the affidavit must be able to say he or she has reviewed the business records maintained by the beneficiary, the successor in interest of the beneficiary or the servicer. Those records must exist within the business. The affiant must have the opportunity to review those business records. Not just any business record is reviewed as part of this process; it must be those of a business entity involved in the process. The affiant must then swear, under penalty of perjury, that he or she has conducted the review, and the information contained in the affidavit is based on those records.

Provisions were included under A.B. No. 284 of the 76th Session that give a private right of action to a borrower who wishes to challenge whether the proper records were referred to in an affidavit. That private right of action has not been changed by A.B. 300. Section 1, subsection 7, of A.B. 300 states the court must award damages and reasonable attorney fees and costs to the grantor or the person holding the title of record. Different types of documentation are available for documenting prior assignments than for other elements. The affiant may rely upon personal knowledge based upon title guaranty or title insurance issued by the proper authority in these cases.

Chair Segerblom:

If a title insurance company states a title is guaranteed legitimate, can the affiant rely on its guarantee?

Ms. Pongracz:

The guarantee can be relied on only for purposes of documenting prior assignments. The title insurance company would then be responsible if fraud exists. It would be subject to penalties under the set of rules that apply to licensed title companies in this State.

A process exists under NRS 104.3309 for establishing a means for foreclosing upon properties in situations where the note is lost or stolen. It was unclear if this process was available for purpose of the affidavit. This is clarified in section 1, subsection 2, paragraph (c), subparagraph (2) of A.B. 300.

This bill also addresses personal financial information required to be set forth in the affidavit under A.B. No. 284 of the 76th Session. The working group felt it was most useful for this information to be provided directly to the borrower in writing. Section 1, subsection 2, paragraph (c), subparagraphs (4) and (5)

address the information the affiant must provide to the borrower in writing. Discussion has occurred regarding amending subparagraph (5) of this section. Language received by the Attorney General's Office would change subparagraph (5) to read "A toll-free telephone number that the obligor or borrower of the obligation or debt may call to receive the most current amounts due." Section 1, subsection 2, paragraph (c), subparagraph (6) relates to relying upon certain additional records in documenting prior assignments. We support Assemblyman Frierson's efforts to amend A.B. 300.

The Attorney General supports enactment of A.B. 300 because she believes it will continue to protect Nevadans from wrongful foreclosures while also facilitating the issuance of title insurance. It will provide additional means for vendors to provide proper and complete documentation of prior ownership of a property prior to foreclosure.

Senator Jones:

In section 1, subsection 2, paragraph (c), personal knowledge is discussed. Does this imply that someone who does not have direct knowledge needs to inform him or herself about the information if the person having that direct knowledge is not available?

Ms. Pongracz:

I do not know the answer to that question. I am not an attorney.

Senator Hutchison:

Relating to the toll-free number, is there a difference between what the National Mortgage Settlement agreement requires and what would be required by A.B. 300? Does the policy in this bill match the National Mortgage Settlement agreement?

Ernest Figueroa (Chief Deputy Attorney General, Consumer Counsel, Bureau of Consumer Protection, Office of the Attorney General):

Assembly Bill 300 would not conflict with the National Mortgage Settlement. It adds additional requirements to that settlement.

Senator Hutchison:

Assembly Bill 300 and the amendments being considered will not conflict with the National Mortgage Settlement. Is that correct?

Mr. Figueroa:

We initially were concerned there could be conflicts. This bill was written to avoid conflicts while the National Mortgage Settlement is in effect.

Senator Hutchison:

What specific improvements would this bill make to A.B. No. 284 of the 76th Session?

Ms. Pongracz:

First, the definition of personal knowledge would be clarified to include business records. Second, the lost documents exception would be expressly included in the affidavit. Third, the borrower would receive all the financial information listed in section 1, subsection 2, paragraph (c), subparagraph (4) in writing. Finally, assignments could be documented in a way that accommodates the use of title and property records as well as other forms of documentation.

Chair Segerblom:

Was A.B. No. 284 of the 76th Session discussed by the working group as a reason the banks were having a difficult time foreclosing?

Ms. Pongracz:

Discussions were not focused on this topic. Participants were asked to bring to the meetings summaries of problems they were encountering and proposed solutions to those problems. The group had strong disagreements outside of the meeting context about what was happening in the real estate market. We did not attempt to reach agreement on the causes or effects of the causes on the problems the individual group was facing. We asked members to share specific problems and to explain why they were having problems with specific requirements such as documentation of personal knowledge. We did not spend time on why these problems existed for a group member. We looked at the problems as a group and asked participants to share proposed solutions to them. Our efforts focused on reviewing proposed solutions to determine their impacts on different stakeholders. We discussed whether changes would make it more or less difficult for borrowers to have their rights addressed. We did not attempt to have an economic, financial or business discussion about the issues.

Chair Segerblom:

Did you discuss problems such as the impact an oversupply of homes might have on a geographical area?

Ms. Pongracz:

This was not the type of discussion we had. Our discussions consisted of banks' or borrowers' counsels sharing information about actions they could not take for certain reasons. Members of the group then would evaluate the information and discuss ways to address it.

Chair Segerblom:

This bill becomes effective on passage. Do you know why it was written this way?

Ms. Pongracz:

The group felt it important this bill be implemented immediately.

Chair Segerblom:

Under this proposed legislation, is there a way a mortgagee can access an affidavit?

Ms. Pongracz:

The affidavit is recorded, so it is available for review.

George Ross (Bank of America):

This is an important bill for the banking and housing industry in Nevada. There are approximately 43,000 homes currently in default from the three major banks. These homes will eventually be entering the market, and the market needs to economically be cleared. If inventory can be predicted, price can be predicted. Assembly Bill 300 represents compromise on both sides.

Chair Segerblom:

Do you know the number of homes Bank of America or Countrywide have in default?

Mr. Ross

Those companies have 24,000 homes in default.

Chair Segerblom:

Why are you not able to sell the houses? Are the titles unclear?

Mr. Ross:

That is not exactly the case. Homes can be judicially foreclosed in order to be sold. This bill would enable the homes that would be foreclosed upon in the future to be handled in an expeditious and orderly manner. It would not increase the number of foreclosures. Short sales have impacted the market as have cash-for-key sales and renegotiated mortgages. Assembly Bill 300 will eliminate a significant roadblock to orderly foreclosures.

Chair Segerblom:

Can you guarantee there will not be a drop in housing prices?

Mr. Ross:

No, I cannot. We will continue to work on language to amend this bill.

Bill Uffelman (President and CEO, Nevada Bankers Association):

Items 1 through 4 on pages 2 and 3 of [Exhibit F](#) are important in resolving the problems that have occurred in filing notices of default. Once the notices of default have been filed, owners of the 43,000 homes may be more inclined to begin discussions about their properties. Mediation is available, but it does not start until after a notice of default has been filed. Assembly Bill 300 will resolve unknowns about the foreclosure process and the homes now in default. The process of foreclosure can take up to 12 months unless a homeowner chooses a cash-for-keys option or one of the other options available under the National Mortgage Settlement.

Lance Earl:

I am an attorney specializing in real estate, banking and financing. This bill would apply to both residential and commercial lenders. I have submitted a document detailing several proposed amendments to A.B. 300 ([Exhibit G](#)). The first proposed amendment would remove certain language from section 1, subsection 2, paragraph (c), subparagraph (3) and create a new paragraph (d). This would create an additional step, requiring lenders foreclosing on homes to provide specific instructions to trustees to proceed with the foreclosure sale, which is the exercise of the power of sale. This would require the lender and the trustee to undertake a final review to ensure they have properly followed rules and procedures under law.

Chair Segerblom:

Have you discussed these amendments with Assemblyman Frierson or the Attorney General?

Mr. Earl:

I have discussed them with Ms. Pongracz. I have not talked to Assemblyman Frierson about them.

I am concerned about section 1, subsection 2, paragraph (c), subparagraph 4 that relates to beneficiaries or successors in interest. This section indicates the beneficiary's counsel cannot be sent notice. Many times, these are complicated legal issues and counsel is involved. This section has an unintended consequence because the letter cannot be sent by legal counsel or other consultants who may be involved in the process. I have proposed language on page 2 of [Exhibit G](#) that requires only that the affidavit include a representation of the information sent by or on behalf of the beneficiary to the borrower. This would allow the notice to be sent by parties such as representatives, counsel and agents as well as the beneficiary.

The amendment proposed on page 3 of [Exhibit G](#) addresses voiding the exercise of the power of sale. I submit the exercise of the power of sale is never void. This amendment provides alternative wording to clarify section 1, subsection 2, paragraph (c), subparagraph (4), sub-subparagraph (I) of the bill. An explanation of this proposed amendment is provided on page 4 of [Exhibit G](#).

Assembly Bill 300 presumes that all loans are made by financial institutions. However, individual lenders also make loans. It is not practical or fair to have these lenders obtain a toll-free number to foreclose on a property. Many local lenders such as credit unions maintain loans in their offices. It is impractical for them to be talking personally to their borrowers and then, when a foreclosure begins, have to utilize toll-free numbers for communication. I propose amending section 1, subsection 2, paragraph (c), subparagraph (4), sub-subparagraph (VI) and subparagraph (5), to add "a local or toll-free telephone number" to the language relating to the requirement to provide contact information. This proposal is detailed on page 2 of [Exhibit G](#).

Senator Hutchison:

Were you able to discuss these proposed amendments in depth with Ms. Pongracz? It appears your proposals are designed to clarify the bill, not change it.

Mr. Earl:

That is correct. My intent is not to change the intent of A.B. 300. I do not think Ms. Pongracz disagreed with the proposals I have made. She asked that I supply them in writing so they could be made available to the appropriate committees for consideration.

Senator Hutchison:

I found your explanations and proposals helpful. I would like to hear from Ms. Pongracz.

Ms. Pongracz:

I spoke with Mr. Earl. Timing was the issue in implementing the suggestions he has proposed. He presented them to me after the working group had concluded, and I was not able to move ahead with them.

Senator Hutchison:

Would you approve these amendments if Assemblyman Frierson approves them?

Ms. Pongracz:

The Attorney General's Office defers to the sponsor of the bill, so yes, I would approve them.

Kristen Schuler-Hintz:

I am an attorney practicing in Nevada and California. I specifically represent creditors, mortgage lenders, servicers and foreclosure trustees. We support A.B. 300, especially with the proposed amendment from Assemblyman Frierson, which would clarify the information to be provided when calling the toll-free phone number. We had concerns over the original broad language in this section. My clients do not want to be forced to answer legal questions regarding A.B. No. 284 of the 76th Session, the affidavit or the contents of the affidavit. This bill will remedy what now occurs.

Chair Segerblom:

Do you see foreclosures being held up now because of A.B. No. 284 of the 76th Session?

Ms. Schuler-Hintz:

Many things currently hold up foreclosures, not just A.B. No. 284 of the 76th Session. Due to the uncertainty of its language, however, that legislation is making an impact on holding up foreclosures. Assembly Bill 300 would clarify those areas of confusion and clear up the backlog. My clients are aware of the effect of releasing these homes into the market and are making plans to do this in an orderly fashion.

Rocky Finseth (Nevada Association of Realtors; Nevada Land Title Association):

The Nevada Association of Realtors and the Nevada Land Title Association support this bill. It contains important changes for the real estate marketplace. We are disappointed the concept of a bona fide purchaser was not vetted by the working group. Senate Bill 295 was presented to address this concern but was not processed by this Committee.

SENATE BILL 295: Revises provisions relating to title to real property. (BDR 9-1003)

Keith Lynam (Nevada Association of Realtors):

Homeowners reach out to Realtors when experiencing difficulties selling their homes. Realtors are on the front line of this issue. We are caught between the interests of many interested parties.

Chair Segerblom:

We do not want to remove options a homeowner has today to pursue a short sale if doing so might cause a foreclosure for that homeowner in the future. Do you, as a representative of the Association of Realtors, think this is a good bill?

Mr. Lynam:

This legislation affects Realtors. We are affected internally by battles regarding the need for this legislation. Some Realtors feel other Realtors use A.B. No. 284 of the 76th Session as an excuse because it is not financially beneficial for them to proceed with filing notices of default. There are legal barriers to prevent Realtors from filing notices of default. We need to remove these barriers to allow them to proceed with the foreclosure process.

Homeowners and homebuyers are in difficult situations. The inventory of homes in Nevada is one of the worst in the Nation. Approximately 40,000 homes are in peril. A healthy buyer-seller market has an inventory that will last 6 months. In southern Nevada, 3,500 homes to 4,000 homes per month are absorbed by the market. There is now only a month's worth of inventory in this area. This shuts out Nevadans who want to own homes. They cannot purchase homes because of this low inventory. If we put 40,000 homes on the market tomorrow, we could absorb them in short order because of buyer pressure. The market is improving. Prices would come down if this many homes entered the market, but they would not drop drastically.

We have lost the meaning of "home." We need to add security back into the equation. Implementation of the procedures proposed in A.B. 300 will allow a homeowner to know what is to happen to his or her home and family. The homeowner will know the process that occurs if he or she defaults on a loan. This bill will help correct some of the housing issues we are facing today.

Cheryl Blomstrom (United Trustees Association):

The United Trustees Association supports this bill. Clarity is needed to ensure movement of houses from delinquency through the foreclosure process and back on the market. This will create the cycle we have seen in the past and that we need to see again in order to stabilize the housing market in our State. Until we correct our housing problems, the recovery in Nevada will not occur.

Philip A. Olsen:

I am an attorney representing a number of northern Nevada homeowners who are facing foreclosure. I am speaking on my own behalf. I have submitted a letter to the Committee ([Exhibit H](#)) containing a proposed amendment to A.B. 300. I testified before the Assembly Judiciary Committee on this bill and raised the concerns that I have presented in [Exhibit H](#). I also expressed my concerns to Ms. Pongracz at the request of Assemblyman Frierson.

Assembly Bill 300 creates a loophole for a party who wishes to foreclose, does not have possession of the underlying note and cannot establish in court that he or she, despite not having possession of the note, has the right to enforce the obligation. In the majority of cases, the beneficiary is in possession of the note. Under law and as proposed in A.B. 300, the beneficiary must acknowledge this possession under oath. In a small number of cases, however, the note has been lost, stolen or is otherwise unavailable.

A beneficiary with the right to enforce a note who does not physically have the note may go to court under NRS 104.3309 and obtain a determination from the court that said party has the right to enforce the note. Under A.B. 300, a party not in possession of a note who cannot establish that he or she has the right to enforce the note need only provide an affidavit from a person containing the legal conclusion that the party has the right to enforce the note. It is dangerous to allow a clerical employee to make this legal determination or to state, under oath, his or her legal conclusion. *Nevada Revised Statute* 104.3309 provides a remedy to any person who has the right to foreclose but for some reason does not have possession of the note.

The working group that developed A.B. 300 did not include the most important stakeholders in the foreclosure process—the homeowners. The Legal Aid Center of Southern Nevada, which is often regarded as the representative of homeowners, does not represent my clients. I differ with its opinions in many respects.

Chair Segerblom:

Please give the Committee an example of when a beneficiary could not prove ownership of a note or deed and when, if in effect, that beneficiary could have used the affidavit process under A.B. 300.

Mr. Olsen:

I have attended many foreclosure mediations where the party representing a beneficiary was unable to produce either the note, a certified copy of the note, the deed or a certified copy of the deed. The party was not permitted to proceed in these cases. Statistics regarding foreclosure mediation indicate approximately 40 percent of these mediations end with a mediator's determination that the foreclosing party has been unable to provide proof it holds the note, deed of trust and assignments. Under A.B. 300, a party in this position need only state the legal conclusion that the party is nevertheless entitled to enforce the note. If the homeowner does not request mediation, the process will move forward.

Senator Brower:

Have you seen a case where a party purporting to be a beneficiary and trying to foreclose was wrongly doing so and not truly the beneficiary?

Mr. Olsen:

Yes, I have experienced this situation many times. Foreclosure mediation program statistics indicate the highest numbers of participants on the foreclosing side are from Bank of America and Wells Fargo Bank. These parties routinely come to mediation and state they are the beneficiaries. The Attorney General's Office, however, finds that 60 percent of the residential loans in Nevada are owned by Fannie Mae or Freddie Mac. Bank of America and Wells Fargo Bank are the servicers of these loans, but they are able to masquerade as the beneficiaries in foreclosure mediations. This has become a common problem. A client of mine will soon be attending her fifth mediation. At earlier hearings, the purported beneficiary was unable to provide an original or certified copy of the note, deed of trust and assignments. The mediator therefore indicated the purported beneficiary in each of these hearings was unable to proceed with the foreclosure. A new notice of default was filed after each mediation. My client paid \$200 each time to start a new mediation process. Each subsequent mediation ended with the same result.

Senator Brower:

Is the servicer acting on behalf of the beneficiary who has the right to foreclose in cases like this? I started the Mortgage Fraud Task Force in 2008 that prosecuted many types of mortgage fraud. I have not heard about a situation like the one you have described. Did you refer this case to the FBI or does it not constitute fraudulent behavior?

Mr. Olsen:

I have referred one recent case to the Attorney General's Office.

Senator Brower:

You are describing a situation in which one entity is acting on behalf of another rather than one where fraud is actively being committed. Is that correct?

Mr. Olsen:

I am not certain. In many cases, the servicer purports to act on behalf of the beneficiary. I have experienced cases where the servicer is unable to establish that he or she represents the beneficiary. Mediation requires the person attending the mediation bring the documents required to establish his or her credentials and that he or she represents the beneficiary.

In the case I referred to the Attorney General's Office, the beneficiary was Fanny Mae and the servicer was Bank of America. It was falsely stated to the foreclosure mediation program by representatives from Bank of America that the bank was the beneficiary. When pressed on the issue, these representatives later conceded the bank was only the servicer and its authority was limited. We asked who the actual beneficiary was, and bank representatives were not permitted to tell us. Our investigation later discovered the actual beneficiary was Fannie Mae. Bank of America conceded that Fannie Mae was, in fact, the beneficiary but continued representing to the foreclosure mediation program that the bank was the beneficiary.

Senator Brower:

Is your client in default? Does someone have the right to foreclose?

Mr. Olsen:

Yes, my client is in default. The right to foreclose exists after participation in good faith in the foreclosure mediation program. My client has not been able to negotiate a loan modification because the bank is masquerading as the beneficiary when the true beneficiary is Fannie Mae.

Chair Segerblom:

Who can sign an affidavit? Can a clerk sign it?

Ms. Pongracz:

The lost documents exception applied under statute is being imported into the section of A.B. 300 relating to affidavits. Proof that would be sufficient under statute today would be acceptable for both the affidavit and other applications.

Chair Segerblom:

Is the signer of the affidavit required to have expertise in any specific area?

Ms. Pongracz:

The affiant does not need to make any claim of expertise. He or she is required to make a claim of personal knowledge.

Chair Segerblom:

This bill does not eliminate the requirement that documents be produced during mediation. Is that correct?

Mr. Olsen:

That is correct.

Senator Hutchison:

State law has dealt with lost records for many years. Is it true you are merely incorporating these principles into A.B. 300?

Ms. Pongracz:

That is correct.

Mr. Olsen:

A person signing an affidavit under A.B. No. 284 of the 76th Session must state he or she has personal knowledge the beneficiary has possession of the original note, the beneficiary has obtained judgment under NRS 104.3309, or the legal conclusion the beneficiary is entitled to enforce the obligation or debt secured by the deed of trust. My proposed amendment essentially deletes section 1, subsection 2, paragraph (c), subparagraph (3). It revises the language in that section as explained on page 1 of [Exhibit H](#).

Chair Segerblom:

How can an affiant swear to the legal conclusion that a beneficiary has the right to take action?

Ms. Pongracz:

The affiant is allowed to make this statement. The borrower would have the right to challenge the statement and receive an injunction under section 1, subsections 5 through 7 of A.B. 300.

Scott Smith:

I testified against this bill when it was heard by the Assembly Committee on Judiciary. I am concerned about its ramifications. This bill would allow a person signing an affidavit to make legal decisions. This decision-making is normally left to judges. Section 1, subsection 2, paragraph (c) allows an affiant to determine if another person has the right to foreclose. Judges do not make this type of decision if they are personally involved in a business. This bill delegates the authority to make this decision to persons who do not have legal training.

Senator Jones:

The affidavit would be signed under penalty of perjury. Is that correct?

Mr. Smith:

Yes. The language in A.B. No. 284 of the 76th Session would remain in force. Many people, however, would not have the ability to challenge the affidavit. This would cause a person to not know what had been reviewed prior to the signing of the affidavit. The person would have the option of hiring an attorney, but this could be costly.

Existing law has been cited as a reason to support this legislation. A codified exception for admissibility in court to the hearsay rule is NRS 51.135. This exception allows that if records are kept in the normal course of business and the custodian of those records comes forward and agrees the records are those kept, these records will not be deemed hearsay—the records can be excepted from hearsay and brought before the trier of fact. This statute ensures testimony about the records including deposition and cross-examination. It does not allow a clerk to review records and make a determination regarding admissibility.

The process proposed in A.B. 300 requires someone who does not have legal training to review records for the purpose of making a decision about the right to foreclose. This is very problematic. The amendment to this bill proposed by Mr. Olsen would protect Nevada homeowners. As an alternative to that amendment, I propose requiring lenders to produce and provide to homeowners copies of the records reviewed to allow the signing of an affidavit. This would allow homeowners to review these documents for correctness. It would additionally provide homeowners the option to have these materials reviewed by counsel. We are discussing a secured interest. This is not automatically received; all of the rules must be followed explicitly. This bill addresses lenders who have not followed the required steps.

Senator Hutchison:

Did you present these arguments to the Assembly Committee on Finance?

Mr. Smith:

Yes, I did.

Chair Segerblom:

During mediation, is a homeowner allowed to review documents?

Mr. Smith:

Yes, review of a certified copy of the documents is allowed under NRS 107.086. I request that you do not address this section of statute, which is the foreclosure mediation statute. I ask that you instead amend NRS 107.080. Under NRS 107.086, additional documents such as deeds of trust and original assignments must also be proved.

Chair Segerblom:

Do these problems exist when a homeowner is going through the foreclosure mediation process?

Mr. Smith:

No, they do not.

Senate Committee on Judiciary
May 9, 2013
Page 23

Chair Segerblom:

Seeing no further business before the Senate Committee on Judiciary, we are adjourned at 10:52 a.m.

RESPECTFULLY SUBMITTED:

Diana Jones,
Committee Secretary

APPROVED BY:

Senator Tick Segerblom, Chair

DATE: _____

| <u>EXHIBITS</u> | | | | |
|------------------------|----------------|---|----------------------------|---------------------------------------|
| Bill | Exhibit | | Witness / Agency | Description |
| | A | 1 | | Agenda |
| | B | 5 | | Attendance Roster |
| A.B. 10 | C | 2 | A.G. Burnett | Proposed Amendment |
| A.B. 10 | D | 1 | Adriana G. Fralick | Proposed Amendment |
| A.B. 300 | E | 1 | Bill Uffelman, George Ross | Proposed Amendment |
| A.B. 300 | F | 6 | Ann Pongracz | Testimony and Supporting Documents |
| A.B. 300 | G | 5 | Lance Earl | Proposed Amendments |
| A.B. 300 | H | 2 | Philip A. Olsen | Proposed Amendment |