MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Seventy-Seventh Session
June 3, 2013

The Senate Committee on Judiciary was called to order by Chair Tick Segerblom at 11:23 a.m. on Monday, June 3, 2013, in Room 2149 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to Room 4412E 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:

Assemblyman Andy Eisen, Assembly District No. 21
Assemblyman Skip Daly, Assembly District No. 31
Assemblyman Ira Hansen, Assembly District No. 32
Assemblyman Andrew Martin, Assembly District No. 9

STAFF MEMBERS PRESENT:

Mindy Martini, Policy Analyst
Nick Anthony, Counsel
Brittany Shipp, Policy Assistant
Lynn Hendricks, Committee Secretary

OTHERS PRESENT:

Bill Uffelman, President and CEO, Nevada Bankers Association
Garrett Gordon, Olympia Companies

Terry Care, Terra West Management Services; Leading Builders of America
Quentin Byrne, Acting Administrator, Offender Management Division, Department of Corrections
Steve Yeager, Clark County Public Defender's Office
Chris Frey, Washoe County Public Defender's Office
Kristin Erickson, Nevada District Attorneys Association
Michael Alonso, Caesars Entertainment; International Game Technology
A. G. Burnett, Chair, State Gaming Control Board
Lesley Pittman, Station Casinos LLC
John Griffin, Nevada Justice Association
Leon F. Mead II, Associated General Contractors; Nevada Contractors Association
Josh Hicks, Coalition for Fairness in Construction
Josh Griffin, Nevada Subcontractors Association
Tray Abney, The Chamber, Reno-Sparks-Northern Nevada
Joanna Jacob, Association of General Contractors, Las Vegas Chapter; Nevada Contractors Association
Craig Madole, Associated General Contractors, Nevada Chapter
Jay Parmer, Builders Association of Northern Nevada
Charles Dee Hopper, Nevada Justice Association

Chair Segerblom:
I will open the hearing on Assembly Bill (A.B.) 273.

ASSEMBLY BILL 273 (2nd Reprint): Revises provisions relating to the Foreclosure Mediation Program. (BDR 9-719)

Assemblyman Andy Eisen (Assembly District No. 21):
Nevada's Foreclosure Mediation Program—which was created by A.B. No. 149 of the 75th Session—operates as an opt-in program in that a homeowner who has received notice of default has to elect to enter the program. Assembly Bill 273 converts this to an opt-out program; the homeowner is automatically enrolled in the Foreclosure Mediation Program upon service of the notice of default. However, it is not a true opt-out program; if the homeowner takes no action within 90 days of service of the notice of default, he or she is unenrolled from the program. The idea was to take the pressure off the homeowner at the time the notice of default is filed, which is clearly an emotional and stressful time. The homeowner can elect to withdraw from the program at any time. In

order to stay in the program, he or she must pay the homeowner portion of the $200 mediation fee within 90 days of service of the notice of default.

Senator Hutchison:
Is this the existing Foreclosure Mediation Program?

Assemblyman Eisen:
Yes.

Senator Ford:
What was the impetus for this change?

Assemblyman Eisen:
The idea was to streamline the process. We also wanted to take that decision about whether to elect to enter the program out of the stressful moment when homeowners receive notices of default while still giving them the ability to opt out of the program. Other provisions in the bill put time limits on the process. For example, if the homeowner opts out of the program, the Foreclosure Mediation Program has 30 days to issue a certificate indicating that no mediation is required.

One of the concerns that has come up with the Foreclosure Mediation Program is that mediation can take a long time. Under the existing court rules, if someone elects to enter the program, there is a limit of 135 days from the service of the notice of default to the completion of mediation. However, there is no limit on how long it takes to get the certificate saying mediation is completed or is not required. The idea is to get to a resolution quickly and efficiently, whatever that resolution may be.

This bill also prohibits a homeowners' association (HOA) from foreclosing a lien by sale on a home enrolled in the mediation program. Under existing law, the lender cannot foreclose lien by sale on a home in the program, and this bill extends that to the HOA. It does not mean the HOA cannot collect fees or charge assessments, and it does not prevent the HOA from moving forward on a foreclosure if that is the intent. The HOA simply cannot complete the process and sell the home if it is in the Foreclosure Mediation Program. The reason is that the homeowner is trying to work things out, so we want to hold HOAs and banks to the same standard.

Senator Ford:
Was the Foreclosure Mediation Program not being used because of the turmoil of the notice of default?

Assemblyman Eisen:
We heard from mediators that homeowners said they did not realize they had this opportunity. The notice about the Foreclosure Mediation Program is sent along with the notice of default, which is a huge stack of paper. This bill requires that the information about the Program is provided both with the notice of default and also under separate cover so it can be noticed. We want people to know what is going on, know what their rights are and understand what they have to do if they want to remain in the Program.

Senator Ford:
If the homeowner does not respond in 90 days, he or she is deemed to have de facto opted out of the Foreclosure Mediation Program, and the lienholder can foreclose. Is that right?

Assemblyman Eisen:
Yes, that is the idea.

Senator Jones:
I like the foreclosure mediation alternatives in this bill. With regard to section 4, subsection 5, I want to make sure we do not overreach. The HOAs would be detrimentally affected by the inability to collect on those costs during the course of foreclosure mediation. It seems like this provision may create an incentive for homeowners to not pay their HOA dues while they are in the foreclosure mediation process.

Assemblyman Eisen:
I want to be clear about how narrow this provision is. What this prohibits on the part of the HOA is the actual sale of the home, the foreclosure lien by sale. It does not prevent the charging of fees, the assessment of fees or even referral to collections. It does not prevent the HOA from claiming those fees if the homeowner stays in the home. It does not affect anything regarding the superpriority lien. In fact, given the time limit on the superpriority lien of 9 months of fees or other assessments, by putting the time limits on this process, the bill could keep homes from staying in this sort of limbo for a year and a half. Potentially, the deficit the HOA sees because those fees are not

coming in would be lessened because this has to get through the process more quickly.

Senator Jones:
I just want to make sure we do not have a gotcha situation with the HOAs. How does the HOA know that a unit owner is in the foreclosure mediation process? When foreclosure mediation has terminated, how do we let the HOA know it can then foreclose if there is a need to do so?

Assemblyman Eisen:
The notice of default is a matter of public record. Nothing in A.B. 273 would prevent the HOA from ensuring, prior to a sale to foreclose, that a notice of default has not been filed. If a notice of default has not been filed, there is nothing to prevent the HOA from moving forward with its process.

Senator Jones:
How does the HOA know when the foreclosure mediation process is terminated?

Assemblyman Eisen:
It is my understanding that the certificate saying mediation is either not required or is completed is also a public record.

Senator Hutchison:
Do you know how long the foreclosure mediation process can potentially take? How long would an HOA be precluded from foreclosing?

Assemblyman Eisen:
The maximum amount of time is roughly 6 1/2 months. If mediation takes place and takes the maximum amount of time permitted under the current court rules, which is 135 days from the notice of default to the completion of mediation, you have 30 days for the certificate to come out. There is another 30 days in which the homeowner can file legal action to argue against the determination. Therefore, 195 days would be the outside end. We have heard from both lenders and HOAs that these homes will often sit empty for a year or more during this process. That is why I felt it was important to set some clear time lines.

Senator Brower:
The term "Mediation Administrator" appears in this part of the NRS. I understand that to mean the person who works for the Nevada Supreme Court administering the program. Are the Nevada Supreme Court and the Mediation Administrator supportive of this concept?

Assemblyman Eisen:
The definition of Mediation Administrator is in existing statute; you can also find it in section 3, subsection 9, paragraph (a) of A.B. 273. The Nevada Supreme Court designates the Mediation Administrator. I have been working with the Nevada Supreme Court on the process of coming up with this plan. One of the reasons we are doing this so late in the Session was we are trying to sort through the fiscal side of this. The policy side of the bill, which is everything except for section 4.5, was passed by the Assembly Committee on Judiciary 2 months ago on a unanimous vote. The Foreclosure Mediation Program is currently supported by a portion of the notice of default fee, which is $200; approximately $45 of that goes to the Nevada Supreme Court to administer the Foreclosure Mediation Program. We were looking at different ways to manage those costs. Ultimately, we realized it is too difficult to predict how much money the Program will generate. The projections of the number of notices of default that will come over the next biennium are in a constant state of flux. Moreover, we cannot predict how many homeowners will want to pay the $200 fee and opt to remain in the program. This innovative model is not a true opt-out or opt-in program; it is somewhere in between.

For that reason, we left the funding mechanism untouched—it is still based on that $45 out of the $200 fee—and removed any other appropriation except for the $100 appropriation from the General Fund because that allows the Nevada Supreme Court to come to the Interim Finance Committee if there is a need for additional allocations to support the Foreclosure Mediation Program.

Senator Brower:
Do you have any evidence that this program is working, however you define "working"? We are talking about changing a program, and I am wondering if it is worth continuing it.

Assemblyman Eisen:
A number of individuals who are actively involved with the Foreclosure Mediation Program, including mediators and those who represent homeowners,

testified at the hearing of A.B. 273 in the Assembly Committee on Judiciary. They said they are making good progress. One of the mediators who lives in my district was proud of what she has accomplished in mediation. Every mediation does not result in the homeowner remaining in the home. The goal here is not a particular outcome; it is getting through the process, and she has been quite successful in that.

Senator Ford:
I think I know the answer to this question, but I want to get it on the record. I had a bill regarding abandoned homes, Senate Bill (S.B.) 278. Is there any connection between A.B. 273 and S.B. 278? Will your bill affect my bill in any way, and is that your intent?

SENATE BILL 278 (Second Reprint): Establishes an expedited process for the foreclosure of abandoned residential property. (BDR 9-134)

Assemblyman Eisen:
It is not my intent. This program and this bill apply to owner-occupied housing.

Bill Uffelman (President and CEO, Nevada Bankers Association):
We support A.B. 273. I am not a great fan of opt-out, but the establishment of deadlines or dates of action has been a stumbling block through the whole mediation process. With regard to the language in section 4, subsection 5 that stops inadvertent dual tracking, it would be bizarre to be in the middle of mediation and have the HOA foreclose. The irony is that with S.B. 321, because of the things we have to do in that bill before we file the notice of default, you still have the potential for inadvertent dual tracking.

SENATE BILL 321 (Third Reprint): Enacts a "Homeowner's Bill of Rights." (BDR 9-748)

In the end, mediation could result in a short sale, a deed in lieu of foreclosure, an actual foreclosure or a homeowner staying in the home.

Garrett Gordon (Olympia Companies):
We are opposed to A.B. 273. The concern is section 4, subsection 5. We have two proposed amendments. First, we respectfully request that during the mediation process, the homeowner be required to pay assessments. We are not requesting that the homeowner catch up; we are just saying that during the

period the homeowner is in good-faith negotiations in the Foreclosure Mediation Program, he or she should be able to afford paying their assessments during that period of time.

Second, when mediation ends, a certificate is recorded saying either that mediation is not required or that mediation was successful. We would ask that the trustee provide a copy not only to the Mediation Administrator but also to the HOA, if any.

Chair Segerblom:
This bill has been in this form since it was passed by the Assembly Committee on Judiciary on April 10, correct?

Mr. Gordon:
The bill came out of the Assembly Committee on Ways and Means with new language on June 1.

Chair Segerblom:
Is it that new language you are addressing?

Mr. Gordon:
Yes.

Chair Segerblom:
And you could not address it in the Assembly Committee on Ways and Means?

Mr. Gordon:
No. I am trying to address it now.

Chair Segerblom:
Why could you not address it in the Assembly Committee on Ways and Means? It is difficult to tack on a new amendment at this point in the process.

Mr. Gordon:
I was made aware of the language after the bill left that Committee and have been working on it ever since.

Senator Hutchison:
I understand your first amendment; HOAs do not want to go for up to 6 1/2 months without being paid assessments. However, I do not follow you on the second amendment.

Mr. Gordon:
Section 4, subsection 5, paragraph (c) of A.B. 273 says the HOA may not foreclose a lien by sale if the trustee has not recorded the certificate required in section 3. Section 3, subsection 2, paragraph (d) says the trustee has caused to be recorded either a certificate stating that no mediation is required or a certificate stating that mediation has been completed. The trustee is required to provide that certificate to the Mediation Administrator. We are asking that the certificate also be provided to the HOA, if one exists. We think that is fair.

Senator Hutchison:
This goes to Senator Jones' question about how HOAs know when the process is completed and they can proceed.

Mr. Gordon:
Yes.

Chair Segerblom:
The HOAs are not part of the mediation process. How are they notified now?

Mr. Gordon:
There is no notification under existing statute because there is no prohibition against moving forward with a nonjudicial foreclosure. The HOA is not aware of mediation; it is only aware of whether assessments are being paid. If assessments are not being paid, the HOA moves through its own foreclosure process.

Terry Care (Terra West Management Services):
We are neutral on A.B. 273. With regard to section 4.5, my understanding is that Assemblyman Eisen's intention is that unit owners would continue to pay fees and costs. I gather Mr. Gordon is codifying that. We are fine with that as well.

Senator Jones:
Assemblyman Eisen, are you amenable to Mr. Gordon's amendments?

Assemblyman Eisen:
I appreciate the concerns on the part of the HOAs, but we have a serious time crunch. This is potentially beneficial policy, and I am concerned about losing the benefit in the swirl of the last hours of the Session. I want to make sure I address Mr. Gordon's concerns very clearly. The provision in section 4, subsection 5 of the bill does not prohibit the HOA from charging assessments, fees, penalties, and even potentially referring to collections or being able to recover those fees. While I understand the concern, we are talking about a matter of time rather than dollars. That is not a small thing to an HOA. But I am not looking to see them left out in the cold.

As to the awareness of the completion of the process, I said a few minutes ago that I believe it is a matter of public record, and that is in fact the case. The certificates we are talking about have to be recorded in that county. It is public information, and the HOA would have access.

Senator Ford:
Even under the current mediation program, an HOA can get notice about whether the mediation process is pending or completed.

Senator Hammond:
I understand the issue, and I applaud you for a majority of it. However, this bill had a hearing in the Assembly Committee on Judiciary in April, and it just sat around until yesterday. We could have heard it yesterday to get us some more time. I think Mr. Gordon's amendments are not terribly burdensome, and I would like to see them included in the bill.

> SENATOR HUTCHISON MOVED TO AMEND AND DO PASS AS AMENDED A.B. 273 WITH THE AMENDMENTS PROPOSED BY MR. GORDON.
>
> SENATOR BROWER SECONDED THE MOTION.
>
> THE MOTION PASSED. (SENATOR FORD VOTED NO.)

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Chair Segerblom:
I will open the hearing on A.B. 325.

ASSEMBLY BILL 325 (1st Reprint): Authorizes a court to commit certain convicted persons to the custody of the Department of Corrections for an evaluation. (BDR 14-742)

Assemblyman Andrew Martin (Assembly District No. 9):
This bill reinstates and reformulates a presentencing evaluation program for first-time felons that was repealed in 1997. The policy goal is to enable prosecutors and judges to make better decisions about who goes to prison and who can be rehabilitated.

Brittany Shipp (Policy Assistant):
I have written testimony (Exhibit C) explaining the need to reinstate the Safe Keeper Evaluation program and giving a quick walk-through of A.B. 325.

Senator Brower:
Is there a fiscal note associated with this bill?

Ms. Shipp:
Yes, but the amount is zero. The Assembly Committee on Ways and Means decided it would be appropriate to pass the bill since the language is permissive. The Department of Corrections (DOC) had some concern that it would not be able to estimate the cost of the program because there is no way to know how many people will be referred. However, the language is permissive, and I believe there are existing resources to help these offenders.

Senator Brower:
Do we have anyone here from the DOC? Do you like the bill or not?

Quentin Byrne (Acting Administrator, Offender Management Division, Department of Corrections):
We do not. These programs have not been effective in the past. It will require us to redirect resources from inmates who are preparing to be released. Ninety days is not enough time to properly assess an inmate or potential inmate.

Senator Brower:
This seems to me a novel concept, to say the least. Without a lot more study and consideration of this, I will not be able to support this bill.

Chair Segerblom:
Do you agree that the language is permissive?

Mr. Byrne:
Yes.

Chair Segerblom:
So the DOC will not be required to take any action. Do you agree that it was a prior program?

Mr. Byrne:
Yes, and it was repealed because it was ineffective.

Assemblyman Martin:
This was an unsolicited fiscal note. Essentially, the DOC cannot estimate the cost because it does not understand the cost components, so I will help out. There may be a reallocation along with some differential cost on additional medical staff and additional staffing and reallocation in the beginning part. However, the expectation in the long term is that there would be a savings due to lack of incarceration.

Ms. Shipp:
When this concept was discussed by the Advisory Commission on the Administration of Justice, there was no opposition. The program was repealed in 1997 due to limited bed space and budgetary concerns. A bill was proposed during that Legislative Session to replace the program, but the bill failed.

Senator Ford:
Why did the DOC not oppose this bill in the Assembly?

Mr. Byrne:
We have opposed it all the way through. When the concept was discussed at the Advisory Commission on the Administration of Justice hearings, the Director of the DOC was in federal court that afternoon, so he did not have an opportunity to voice his opposition before it came out of the Commission.

Steve Yeager (Clark County Public Defender's Office):
We support A.B. 325. In terms of some of the concerns, it is a permissive program. We are talking about a small number of offenders; I would be

surprised if Clark County sent more than a couple dozen a year. These are the really difficult cases with young offenders where the judge is struggling to decide between prison and probation. This program gives judges an opportunity to get it right. The idea is that this 90-day program would save costs by not having to incarcerate where probation would be more appropriate.

Senator Brower:
We are talking about someone convicted of a felony who apparently was not eligible for some diversion program and was sentenced to prison or could be sentenced to prison by the judge, given the nature of the crime. That does not seem like a hard case to decide to me.

Chair Segerblom:
Just for the record, the offender would not have to be sentenced to prison. That is why this program is valuable; the judge is making up his or her mind about what to do with the person.

Mr. Yeager:
That is correct. The individual would be adjudicated guilty of a felony, and the judge would say, "Before I actually impose your sentence, whether it be probation or prison, I am going to send you for this diagnostic 90-day stay at prison." The individual comes back from that program with a report detailing how he or she did, and at that point the judge would decide whether the individual would go back to prison to serve out the sentence or get probation instead.

Senator Ford:
What other states have this type of program, and are they successful?

Ms. Shipp:
Other states do not have the same program, but Missouri has a similar one that seems to help with recidivism rates.

Senator Ford:
Is it still in existence?

Ms. Shipp:
Yes.

Chris Frey (Washoe County Public Defender's Office):
We support A.B. 325 for the same reasons articulated by Mr. Yeager.

Kristin Erickson (Nevada District Attorneys Association):
We support A.B. 325. As one of a handful of prosecutors and defense attorneys who used the original program in the 1990s, I found it to be a useful tool for those offenders who were on the edge of either going down the wrong path or making the right choices in life.

Chair Segerblom:
I will close the hearing on A.B. 325 and open the hearing on A.B. 360.

ASSEMBLY BILL 360 (3rd Reprint): Revises provisions relating to gaming. (BDR 41-24)

Chair Segerblom:
This bill is basically a counterpart to S.B. 416. It requires an interim study on what to do between restricted and nonrestricted gaming licenses.

SENATE BILL 416 (Second Reprint): Revises provisions governing gaming. (BDR 41-1104)

Ms. Shipp:
I have written testimony (Exhibit D) giving a quick walk-through of A.B. 360.

Chair Segerblom:
Mr. Anthony, section 15, subsection 4 of A.B. 360 states, "The committee shall study, without limitation ... ." Does that mean committee members can study anything they want?

Nick Anthony (Counsel):
Yes.

Senator Jones:
It looks like this bill had several amendments and fiscal notes, and they went away. Can you walk through how we got to where we are with this bill?

Ms. Shipp:
In the Assembly Committee on Judiciary, Assemblyman William C. Horne proposed an additional tax on businesses that owned over 500 slot machines in the aggregate. That resulted in a high fiscal note, and it would have been hard for the State to meet that. We also felt there needed to be more research into the effect of the restricted and nonrestricted gaming licenses to figure out how the issue should best be approached, so we amended that portion. In the Assembly Committee on Ways and Means, we added in the study and provisions to make it more streamlined and more consistent with S.B. 416.

Senator Jones:
Was there opposition to this portion of the bill?

Ms. Shipp:
There was no opposition to this portion of the bill.

Senator Ford:
Did I understand that A.B. 360 would allow the Governor to enter into agreements with foreign governments?

Ms. Shipp:
Yes, that is correct.

Senator Ford:
I thought that was reserved for the federal government. Is that something we can actually do?

Michael Alonso (Caesars Entertainment; International Game Technology):
There are a lot of issues on even state-by-state compacts. As you know, A.B. 114 went through very quickly, and everybody was scrambling to look at the issues.

ASSEMBLY BILL 114 (First Reprint): Revises provisions governing interactive gaming. (BDR 41-97)

I believe the State Gaming Control Board and the Nevada Gaming Commission need to take a look at this. The industry is going to look at it too to see if those compacts can occur state by state, with Indian tribes and/or with foreign jurisdictions.

Senator Ford:
I distinctly remember hearing comments about compacts with other states. But I thought there was an express exception or a statement that we would not be looking to go outside of the U.S. for these compacts.

A. G. Burnett (Chair, State Gaming Control Board):
It was my understanding that the word "state" was inserted into the bill in deference to a federal bill anticipated to occur during this Legislative Session. That federal bill has not happened. If this bill were processed with the language reading "states," it would exclude the possibility of compacting with any other jurisdictions, including tribes, states or foreign jurisdictions. I am currently in contact with several foreign jurisdictions that would like to look at the possibility of entering into an agreement to share player liquidity. We have not entered into any of those, but it would be nice to keep that option on the table.

Senator Ford:
I am concerned that we are reaching a bit too far. Do we have any legal opinions indicating that it would be okay for us to engage in compacts with foreign governments? It is already difficult going interstate. Now we are talking about international.

Mr. Burnett:
We are in the process of obtaining those opinions. I have had one of our staff attorneys do extensive research into the possibility of compacting with foreign jurisdictions. We routinely ask the industry that will actually benefit from this to pay for it for us. We are in the process of receiving white papers on that now. We believe there is a good chance there will be no federal issues were we to enter into such an agreement. Of course, prior to doing so, we would be very careful to make sure it is legal from a federal standpoint.

Senator Ford:
In any event, it is permissive, correct? You will research it and make a determination from your perspective as to whether we should do it. Is that a fair assessment?

Mr. Burnett:
That is right.

Senator Ford:
As I look at the makeup of the study committee, it is clearly a competent group, but conspicuously absent is any representation from the public. Is there a reason for that?

Senator Brower:
Are you referring to section 15, subsection 2, paragraph (c)?

Senator Ford:
Yes.

Senator Brower:
It seems to me that all of those listed in paragraph (c) are members of the public in a sense; they just happen to be in the gaming industry.

Mr. Alonso:
I think this is a pretty broad spectrum. It includes manufacturers, entities involved in interactive gaming—which could include operators, service providers, geolocation people, people concerned with problem gambling, the whole spectrum—and restricted gaming, which includes tavern owners, grocery stores and convenience stores. It is pretty broad.

Senator Ford:
Did you say problem gambling?

Mr. Alonso:
Section 15, subsection 2, paragraph (c), subparagraph (2) refers to "entities engaged in the business of interactive gaming." In order to comply with regulations, interactive gaming operators have to deal with geolocation to make sure the bets are coming from appropriate jurisdiction. They have to deal with minors. They have to deal with problem gambling issues. You are going to have all of those people potentially vetting this issue.

Lesley Pittman (Station Casinos LLC):
We support A.B. 360.

Chair Segerblom:
I will close the hearing on A.B. 360 and open the hearing on A.B. 367.

ASSEMBLY BILL 367 (2nd Reprint): Revises provisions relating to constructional defects. (BDR 3-670)

Assemblyman Skip Daly (Assembly District No. 31):
This bill has to do with construction defects and is pretty straightforward. There are two main sections. Section 1 prohibits indemnification if you are to be held responsible for someone else's work. It prohibits indemnification for hold harmless, duty to defend types of issues.

Chair Segerblom:
Every time we get one of these bills, we hear from 100 people who say, "I put the window in; there was a problem with the roof, and I got sued." "I put the sidewalk in; there was a problem with the gutter, and I got sued." How does this bill address that issue?

Assemblyman Daly:
The indemnification provision attempts to limit lawsuits. People who have a construction defect will still be able to file lawsuits. But as to who is held responsible, the controlling party as defined in this bill would be the developer who hired the various subcontractors. If the underlying problem is not related to your work, you are out of the lawsuit, and you have no duty to defend the developer; you have no indemnification.

Chair Segerblom:
What about the situation where the developer refuses to hire a subcontractor unless he or she signs an indemnification contract?

Assemblyman Daly:
The way the bill is written, you would still sign the contract the same way you have always signed the contract, but the indemnification only goes to the portion of the work and only if there was a lawsuit under NRS 40. If there was some other issue, the indemnification clause would kick in. If the developer is sued under NRS 40, he or she would then have to show the case was connected to the work you performed. There would not be any changes to the language in the indemnification clauses that people sign; it would just be a matter of when it was enforced.

Chair Segerblom:
So Nevada law would say, "You can't enforce that part of the contract."

Assemblyman Daly:
It would say that you cannot enforce that part of the contract if I did not have any underlying connection to the defect the case concerns. It is very specific and only applies if it is a case under NRS 40. If it is a case under general law for something else, the indemnification would act the same way it does today.

Chair Segerblom:
The second section of A.B. 367 appears to deal with redefining code violations. We have often heard someone testify, "I put the electrical socket 2 inches closer to the door, or the studs were 15 inches apart as opposed to 16 inches apart, and I'm being sued because it was a code violation."

Assemblyman Daly:
Under section 2.5 of A.B. 367, a technical code violation would also have to adversely impact the structural integrity or safety of the residence or materially affect the fair market value of the residence in order to be considered a construction defect. If it did not do one of those things, it would not be a construction defect for the purposes of NRS 40.

We understand there will still be lawsuits. If there are 60 contractors on a project and the indemnification portion of the bill eliminates 20 contractors who had nothing to do with the defect, then A.B. 367 did some good. If 25 items were listed as defects in this same construction defect case, this definition would take out 5 or 6 of them at least, the frivolous ones. You will get more to the meat and potatoes.

The bill narrows the definition of a construction defect. Other people will claim it expands the definition, but I do not know how they can say that when it adds qualifiers to the definition. That is a narrowing, not an expansion.

Chair Segerblom:
This seems to me that we are giving them a bite of the apple, and we will let them come back for another bite. It addresses a lot of the concerns I have heard over the years.

Assemblyman Daly:
When we began having discussions about this concept, I made that same statement about the apple. If you try to eat the entire apple in one bite, you will choke on it, so let us just take one bite.

Senator Hutchison:
I want to talk about the indemnification language in section 1, subsection 1 of A.B. 367. How is this going to change matters? It starts by saying a controlling party cannot enter into an indemnification agreement. Then it says:

> A controlling party may enter into an indemnification agreement with a subcontractor, supplier, design [or whoever] ... and may enforce that indemnification agreement to the extent that the underlying injury or damage is attributable to the negligent or otherwise wrongful act or omission ... .

That is my understanding of what happens now. You enter into an indemnification agreement, and you enforce it to the extent that there is a basis upon which to enforce the indemnification, which would be a negligent or wrongful act or damages. Can you help me understand how this is different from the way indemnification agreements exist in construction defects?

Assemblyman Daly:
That is not how it works. Indemnification clauses have a much broader intent and language. I have a copy of one if you are interested.

Senator Hutchison:
There are multiple types of indemnification language, so it depends on which one you are using.

Assemblyman Daly:
The first section of this indemnification clause says, "A subcontractor shall indemnify the indemnified parties forming against any and all claims to the extent such claims in whole or in part arise out of or are related to the subcontractor's work." That is what we are doing with the language in this bill. The next section of this contract says:

> Subcontractor's duty to defend the indemnified party is entirely separate and independent from the subcontractor's duty to indemnify the indemnified parties. The subcontractor's duty to defend the indemnified parties applies whether the issue of the subcontractor's liability, breach of its agreement or other obligation or fault has been determined and whether the indemnified parties

> or any of them have paid any sums or incurred any detriment from the subcontractor's work.

That is the duty to defend. This is what happens. The developer, the controlling party by our definition, gets sued under NRS 40 for construction defects. The controlling party then sends a letter out, as required under NRS 40, to all the subcontractors because they all have a contractual duty to hold him or her harmless and defend him or her against this lawsuit. The subcontractors can inspect the job and tell the controlling party that it is not due to their work, and the controlling party can say, "You still have a duty to defend me. You signed this contract, and you are in the case whether you like it or not; I don't care if you did anything wrong; you're responsible for the actions of everyone else, including me." That is what we are getting at.

Senator Hutchison:
Is the purpose of this language to eviscerate the "duty to defend" obligation under indemnification agreements?

Assemblyman Daly:
It is to make sure you are only held responsible for the work you actually did in the narrow case of an NRS 40 construction defect case.

Senator Hutchison:
I understand what you are saying, though I do not know if this language does what you want it to do.

With regard to section 2.5, subsection 1 of A.B. 367, you are narrowing the definition of a construction defect by saying it could be a code violation, which is the statute, but it also has to either adversely impact the structural integrity or safety of the residence or materially affect the fair market value of the residence. Before, it was just any violation of the code; now it is restricted because you are adding additional conditions that have to be met.

Assemblyman Daly:
Yes.

Senator Hutchison:
When would someone claim that a contractor violated the code but did not materially adversely affect the fair market value of the property? When the work

is not in compliance with the code, it seems like someone could argue that it also adversely affects the value or impacts the structural integrity. How would this language stop any lawsuit being filed?

Assemblyman Daly:
Attorneys are ingenious people who think of lots of different ways to work around the angles. This language narrows the definition by saying a construction defect also has to meet two new conditions. The new threshold is not as broad as it was. For example, if you have paint overspray, it might technically be a code violation, but it will not be a safety hazard or affect the value of the property.

I do not want to disparage all the trial lawyers in the world; there are good attorneys, and there are ones who take every angle possible. Will we solve that problem with any of this language? No, but we might have reasonable people interpret the law reasonably, and we might get to a judge somewhere who will throw frivolous cases out. We will never be able to write words on a piece of paper that will stop all lawyers from bringing cases if they think they can get away with it. We are trying to make a change here that hopefully will have some benefit for reasonable people, and we hope judges will punish the others.

Senator Hutchison:
I do not think you have accomplished your aim with the language here. There were other attempts to more narrowly define a construction defect that really would have had an effect on the number of defects determined to be eligible for lawsuits. But that is a discussion for another day.

Assemblyman Daly:
We do not want a definition that says, "On the third Tuesday of the month when it is a full moon and it is cloudy outside but it is not raining, then you can claim a construction defect." If we have a definition that narrow for construction defect, we will definitely eliminate frivolous lawsuits, but we will also adversely affect homeowners. That is not what we are trying to do.

Senator Hutchison:
On the other hand, we do not necessarily want laws that say, "On any day 365 days a year, you can bring any lawsuit you want to bring." We have to find a happy medium somewhere, and I am not sure A.B. 367 does it.

Assemblyman Daly:
But that is America.

Senator Hutchison:
Well, that discloses the intent of the legislation, then.

Assemblyman Daly:
We are narrowing the definition.

Chair Segerblom:
Do not let the perfect get in the way of the good.

Senator Ford:
Ever since I have been running for office, people have been talking about fixing NRS 40 and construction defects. One suggested change was to change the definition of a defect from a mere code violation to something more substantive, making it more damaging to property values. The language in section 2.5, subsection 1 of A.B. 367 is an effort to address at least one of the concerns I have heard from those who have been navigating NRS 40 for a long time. In the example Chair Segerblom gave about a plug being 6 inches off the ground rather than 7 inches, it would not compromise the safety of the house, and I would not refuse to buy a house because one plug is off by an inch. That section limits what can be a construction defect.

However, I also hear concerns about section 2.5, subsection 3, which refers to work not done in a workmanlike manner in accordance with generally accepted standards and so on. Is it your intent that paint overspray not be caught by subsection 3?

Assemblyman Daly:
I do not believe paint overspray is ever a construction defect. I have heard of a rock under the grass being included in a lawsuit as a construction defect. I have heard of water stains on a wood fence being listed as a construction defect after the homeowner had lived in the house for 6 years. We hope to remove these kinds of things from lawsuits.

This bill tries to tackle the two biggest complaints I hear from subcontractors. The first is when subcontractors are sued when they did not do anything wrong at all. I heard from a man who took aerial photos of a project who got caught

up in a construction defect lawsuit, and all he did was take pictures. Subcontractors blame the trial lawyers, but it is the developer who is roping them in with the indemnification clause. It is a cost shift. The developer says, "I'm eliminating my risk, and I'm going to put it on as many other people as I can." We do not think that is fair.

The other complaint I hear from subcontractors is when they are sued for stupid little ticky-tacky issues that technically qualify as construction defects. We were trying to address those two issues with this bill and make some progress. No bill has been passed on construction defects since 2003.

Senator Ford:
Can you give me an example of something that would be a construction defect under statute, section 2.5, either subsection 1, code violation, or subsection 3, workmanlike, that would not be a construction defect under A.B. 367?

Assemblyman Daly:
Some things I have already given you, such as maintenance issues and tiny things like a rock under the grass.

Senator Ford:
From your perspective, there is no transfer of what was considered a defect under subsection 1 to subsection 3 simply because we are changing the definition of construction defect.

Assemblyman Daly:
You would have to look at the code violations. Several sections in several areas of constructions are not covered by a code. Not every single little step has an associated code. The clause referring to "workmanlike manner" will take care of the hump in the fence. It may or may not be a code violation, and it may not affect the safety, but it would not be done in a workmanlike manner. That is the reason there are two categories.

John Griffin (Nevada Justice Association):
We support A.B. 367 not necessarily because of its provisions but because of the process that went into it. We were asked to participate in extensive negotiations, and this is the product.

With regard to section 1, we have no comment as it does not have an impact on homeowners or my clients. With regard to section 2, any time you add conditions to a definition, it is impossible under the laws of English grammar for the definition to expand. Therefore, this is a contraction of the definition.

Chair Segerblom:
Do you see this as limiting the liability of subcontractors when 60 subcontractors are sued for one roof or whatever?

Mr. Griffin:
Yes. Some states have indemnification language, like California. In 2007 in Nevada, indemnification language was proposed by subcontractors. Many states have indemnification language like this that limits the liability of subcontractors who have nothing to do with the defect. Most of the time, the homeowner only has privity of contract with the home builder; the lawsuit is filed against the home builder, and then the home builder brings in whatever subcontractors. Under Nevada statute, home builders bring in all the subcontractors. This bill would definitely restrict and limit the number of subcontractors the home builder could then bring in.

Senator Hutchison:
Are you aware of any construction defect cases with an allegation against a subcontractor that he or she violated the code but otherwise performed in a good and workmanlike manner? I have been litigating these cases for 20 years, and I have never seen a complaint like that.

Mr. Griffin:
No, as you phrased the question. By definition, every code violation is probably not done in a good and workmanlike manner. But back in 2003 when Governor Kenny Guinn commissioned the Blue Ribbon Task Force to study construction defects, the recommendation was that since the code does not cover everything, "good and workmanlike manner" should be used to cover those things the code did not cover. While every code violation is not done in a good and workmanlike manner, not every violation of the good and workmanlike manner standard is a code violation.

Senator Hutchison:
This may just be feel-good legislation that does not reduce the number of people being sued and does not accomplish anything. Even if the definition under

section 2.5, subsection 1 is constricted, people may still sue under subsection 3, and the bill does not change subsection 3.

Mr. Griffin:
I mostly agree with you. However, it is easier to tell the members of a jury to decide if a defect meets the code than to ask them if it meets the standard of "workmanlike manner."

Senator Ford:
I can see the negotiations back and forth between a homeowner and a builder saying, "I have a code violation I can hang over your head, so come to the table and negotiate a settlement." This bill removes that tool unless the code violation adversely impacts the structural integrity or safety of my residence or drops the fair market value. I see that as a restriction. In some situations, the work was not done in a workmanlike manner but is a code violation, and the reverse situation also occurs. Just because you can run to another section of the law does not mean we have not restricted the definition by saying you have to have something more than just a code violation.

Chair Segerblom:
Over the last four Sessions, I have heard people testify on this topic, "I put the sidewalk in; the roof had a leak, and I got sued," or "They put the plug in the wall 1 inch the wrong direction; that's a code violation, but it didn't do anything to the structure or value of the house, and I got sued." If that is the problem with the law, A.B. 367 does address those problems. I cannot answer whether it cures all the problems with construction defect legislation, but it does address the two issues people constantly complain about.

Mr. Griffin:
Whatever else you say about this bill, it will keep us from having to come to Carson City to hear people talk about paint overspray and 5-inch nail patterns. If this does not eliminate those issues, I do not know what would.

Assemblyman Ira Hansen (Assembly District No. 32):
I support A.B. 367. I am a contractor and worked hard on this issue last Session. I have been in 25 to 30 of these class action lawsuits. While A.B. 367 is not the ideal solution—I would love to have the legal fee issue addressed—it is a good step forward on the indemnification side of it.

I heard some of the lawyers disputing what A.B. 367 does and does not do. What I do know is the laws exist now. You cannot get out of these things; even, as you pointed out, if I did the sidewalks and there is nothing in the lawsuit about sidewalks, I cannot get out of that lawsuit, and I am forced to pay the legal fees for the controlling party. Even after the smoke clears and I have been completely exonerated, I have no way to be compensated for being forced into something I had nothing to do with. That is the idea behind this bill.

From a contractor's perspective, the last time the contractors had any success getting any kind of relief on construction defects was S.B. No. 241 of the 72nd Session in 2003. Ten years have passed since then, and we have not had a single change in the law, even though literally billions of dollars have gone through on these class action lawsuits. Is this bill perfect? No, it is not, but it is definitely a step in the right direction.

Senator Hutchison:
Under section 2.5, where can someone bring a lawsuit against you if you had nothing to do with anything that is wrong on the project? This is supposed to be the section that fixes the problems.

Chair Segerblom:
Section 1 of A.B. 367 says he does not get sued.

Senator Hutchison:
It does not matter if he gets sued or not. If he gets brought in, it is the functional equivalent of being sued. You said the problem is you did not do anything wrong on this project, and this solves your problem. I do not see how.

Assemblyman Hansen:
I did not say it was going to solve my problem. I said I hoped it was a step in the right direction.

Senator Hutchison:
If you want to say it is a step in the right direction, that is great, but do not say if you are a contractor who did not do anything wrong, this solves your problems.

Assemblyman Hansen:
Let me back up and tell you what I think it does. It gives me a cause of action to get out of a lawsuit where I can file a claim with a court asking for a summary judgment saying, "I did all the underground utilities, and there are no complaints on underground utilities in this lawsuit, and I would like to have some method of relief." Right now, there is no way to get out of these class action lawsuits.

The reality of it is this. The trial lawyers sue the developers; the developers then turn around and use the indemnification clauses, which we are all pretty much forced to sign, to sue the subcontractors. We either sign these clauses or we do not get the job. Then, when the lawsuits happen, we are pulled in; every single subcontractor is countersued by the developer, and then we spend all the money to get these situations resolved, even though everybody is accused.

Assembly Bill 367 may not clear this up, but it will at least give some method for the little guy to get out of these unfair situations.

Senator Jones:
Is it your understanding that this is prospective, not retrospective? That is, future contracts you sign will be affected, but existing contracts will not.

Assemblyman Hansen:
That would be a good question for the Legal Division. My understanding is that this is going forward only.

Senator Brower:
I know you have done a lot of work on this issue over the years, but you are being sold a bill of goods on this bill. You said you hope it will help; I am not sure hope is good enough for me. You mentioned the attorney's fees provision of the law and said you wished we could address it. There are those out there who think this construction defect litigation is a racket, though I am not describing it that way.

Assemblyman Hansen:
I will do that for you. It is a racket.

Senator Brower:
It is the attorney's fees provision that causes people to call it a racket. Why do you think we cannot address that provision?

Assemblyman Hansen:
I will tell you why: lawyers who do not want to see it changed have influence in this building, and so it does not get changed. That is it. At this point, we are working for a compromise, and that is what this bill is.

Senator Brower:
I appreciate your candor. I do not see A.B. 367 as the kind of compromise that will help contractors like you.

Assemblyman Hansen:
I appreciate that, but after waiting 10 years, this is the first thing I have seen that actually has the possibility of getting to the Governor's desk.

Leon F. Mead II (Associated General Contractors; Nevada Contractors Association):
I am opposed to A.B. 367. I am the construction law partner at Snell and Wilmer Law Offices in Las Vegas. I have written testimony laying out my analysis of the bill (Exhibit E). This bill will do absolutely nothing to stop the kinds of claims you mentioned, such as a wall socket a couple inches one way or the other.

Chair Segerblom:
How about the indemnification part of the bill?

Mr. Mead:
The indemnification provision in this bill will not let subcontractors out of those lawsuits. As Assemblyman Daly read from the contract provision, he noted that there were two different clauses. One dealt with indemnification, and one dealt with defense obligations. Section 1, subsection 1 of A.B. 367 does not deal at all with defense obligations; it only deals with indemnity. Under the contract clause he read to you, those subcontractors would not be able to get out of those lawsuits.

Construction defect cases only rarely go to trial. Most just hang around with extra witnesses testifying that something is a defect and remains a litigious

matter for negotiation. There is not ever a code violation that is not also a failure to perform in a good and workmanlike manner, whether it causes injury or not. So even the definition of defect would not limit lawsuits for such frivolous things. All you need is an expert witness to testify that something is a defect because it does not show a good and workmanlike manner. That will continue to avoid summary judgment as you go forward.

Chair Segerblom:
So I am the subcontractor who put in the sidewalk, and there is a problem with the roof. Cannot the subcontractor on a summary judgment come in and say, "The defect you have identified has nothing to do with the sidewalk, and therefore I should be let out of the lawsuit"?

Mr. Mead:
Yes, if there was no obligation to defend the home builder in that case. Those are the types of situations where a duty of defense steps in.

Chair Segerblom:
Does section 1, subsection 1 of the bill not address the duty to defend?

Mr. Mead:
No. You will notice that nowhere does it say "and to defend." It simply addresses indemnification.

The more difficult situation is in section 1, subsection 2, which actually goes far beyond anything any other state has ever attempted to do. It makes a contract clause that is intended to cause any person to be responsible for the actions of another against public policy void and unenforceable. That would also apply to something like a warranty in a home sale contract because the developer who sold the home would not have been the person who performed the work. But worse than that, to say that an additional insured endorsement that is routinely used in every aspect of construction on every project public and private is void and against public policy would be a major, significant shift for Nevada against any other state in the union. I am not sure if you could limit the public policy issue simply to residential defects as opposed to any other type of construction.

Senator Ford:
In the interest of full disclosure, Mr. Mead is my law partner at Snell and Wilmer.

I would like the proponents of the bill to address what Mr. Mead just said under section 1, subsections 2 and 3. It makes sense to me that we do not make this overbroad.

Regarding, subsection 2, Mr. Mead, subsection 2 includes the phrase, "any indemnification clause or agreement and any provision or clause of an agreement requiring a person to add another person" and so on. What is the name of a clause that requires another person to be added if it is not an indemnity clause? Might this be referring to the duty to defend? We learned in Contract Law 101 that every phrase you use has a specific meaning and should not be redundant. How do you construe the "or" phrase after "indemnification clause"?

Mr. Mead:
The duty to defend would not fall necessarily under section 1, subsection 1. Usually it is included in the indemnification clause, the "to indemnify defendant hold harmless" type of language you find there. Additional insured endorsement requirements are found in the insurance provisions, which would make insurance policies such as commercial general liability insurance policies and those types of things additional insured endorsements. Those types of insurance policies cover construction defects when they are done by third parties and cause damage. This provision could actually be construed to limit the available insurance coverage for homeowners.

Senator Ford:
What about that last "or"? It says, "or is intended to cause any person to be responsible for the actions of another person." I want to make certain I understand the differentiating issues for each of these different "or" clauses.

Mr. Mead:
Let us back up and talk about construction in general. Construction is a pyramid where you have costs at every level to which the upper level adds overhead, profit and things of that nature. In order to avoid additional costs for insurance, what will happen is the higher tier people in the construction pyramid will require the lower tiers to add them as additional insureds under the lower tier insurance policies. That avoids the need for additional insurance over and above, which becomes an additional cost on the construction project. You routinely see these types of clauses for lenders, developers and general contractors. The other place you will see them is when projects take on a wrap

policy or a multiinsured type of policy, like an owner-controlled insurance program or a contractor-controlled insurance program, where you have one insurance policy covering the work of lots of different folks.

This bill is written so broadly that when it says "another person," that could even be the insurance company itself that issues the policy. This is grossly broad. That needs to be vetted much more than we have time to do in the next 12 hours.

Subsection 1 of section 1 attempts to take this too far. Nevada law will allow under certain conditions what we call a Type I indemnity, in which a third party can be held responsible for the acts of someone else. We are going from that to attempting to go to the most lenient side we can possibly get to, which is that someone is only responsible for his or her own acts, even though those acts may have some repercussions and be part of proximate cause.

I understand the statement that nothing has been done and we have to do something. But in my opinion, wanting to get something done is not a reason to pass bad law.

Chair Segerblom:
We do not need your opinion, thank you.

Senator Ford:
I would like to get your opinion on section 2.5, subsection 1. There is a lot of disagreement as to whether this language broadens or narrows the definition of construction defect. For the life of me, I cannot see how putting conditions on subsection 1 can be construed as broadening the definition. Can you take a stab at explaining to me how saying that in addition to a code violation you have to prove either this or that broadens the definition of a construction defect?

Mr. Mead:
You are right; it does not broaden the definition. But it does leave it exactly where it is right now. There is an attempt in that one subsection to apply some additional conditions to a violation of code, but it will do absolutely zero to limit the definition of defect because every violation of code, even if it does not meet the qualifications in paragraphs (a) and (b), is a violation of subsection 3, good and workmanlike manner. You are required as a contractor to build to code, and if you do not, you have not performed in a good and workmanlike manner.

Chair Segerblom:
How would you know that the wall socket that was an inch too high was not done in a good and workmanlike manner if you did not refer to the code?

Mr. Mead:
To establish what a good and workmanlike manner means, you would have an expert witness testify that outlets should be no more than 12 inches above the floor, and this one is 13 inches above the floor; therefore, it is a violation of good and workmanlike manner even if it does not violate the code.

Chair Segerblom:
What would the basis for that opinion be if it was not the code?

Mr. Mead:
It would be the person's opinion as to what construction requires, what a good and workmanlike manner means in the industry in the area where the work was performed. You could bring in all the experts you want to deny the statement, but that would not get you summary judgment and get you out of the case. You would have to go to a trier of fact to determine which of those two experts was right.

Senator Jones:
With regard to section 2.5, subsection 1, I cannot wrap my mind around your assertion that this does not limit the definition of construction defect. If you have an allegation of a violation of code, under the new provisions of paragraphs (a) and (b), you would have to have an additional expert come in and either testify as to the structural integrity or hire an appraiser and opine as to the fair market value. Those are additional hurdles to proving a construction defect under section 2.5. Right?

Mr. Mead:
Sure. However, that is not really a problem in a construction defect case; if the homeowner prevails, he or she will get fees and costs, so the attorney just brings in another expert to testify.

Senator Jones:
That is a different issue.

Mr. Mead:
Yes, it is a different issue. I do not want to argue with you, but while there is a shrinking of the number of defects that might be covered by subsection 1, all defects would fall into subsection 3, and the bill would have no effect whatsoever. There is a distinction, but it is a distinction without a difference.

Senator Jones:
It is ironic, because we have been through these hearings before, and members of the Committee asserted a need to change this law precisely because of that section. It is disingenuous to come here on Day 120 and say, "Forget what we said on Day 30 or Day 40; we were just kidding."

Mr. Mead:
I do not think that is what is being said at all. They testified to what was in A.B. 504, which was an attempt to actually bring all these four sections into an understandable definition where damage actually attaches to each one.

ASSEMBLY BILL 504: Revises provisions relating to constructional defects. (BDR 3-1247)

Senator Jones:
I will pull up the materials from the prior hearing where it was asserted to be a big problem.

Senator Brower:
I do not practice in this area, and like Senator Ford, I am affiliated professionally with Mr. Mead. I appreciate his expertise, though I do not always agree with him.

Terry Care (Leading Builders of America):
We oppose A.B. 367. I do not have anything to say as to the indemnification provisions; Mr. Mead covered it all.

With regard to Senator Hutchison's question, it is not difficult for me to imagine an ingenious attorney alleging that a drop in housing prices was caused by an alleged violation of code. You might say that is silly, that a trier of fact would say it was due to market conditions. The problem is it costs a lot of money to go to trial. What normally happens is a settlement just to get rid of litigation.

Senator Jones:
In construction, is it generally accepted that when you do not perform in a good and workmanlike manner, liability should ensue, or do you generally have to show some form of damage as a result of that? I want to understand how section 2.5, subsection 3 would work in real life.

Mr. Mead:
"Good and workmanlike manner" is a standard of performance. "Strict accordance with plans and specifications" is another standard; "good and workmanlike manner" is a step below that.

Chair Segerblom:
We understand that. The question is: what are the damages?

Mr. Mead:
The damages are generally shown as contract damages, which is the value of the work that was not performed in a good and workmanlike manner versus the value of the work done right. This actually takes us a step further and makes it a construction defect, which is fairly unique among construction defect laws.

Josh Hicks (Coalition for Fairness in Construction):
The Coalition for Fairness in Construction has been trying to find something on construction defects. We do not think A.B. 367 goes there for all the reasons you have heard.

An issue that has not come up yet concerns the effective date of the bill. Sections 3 and 4 of A.B. 367 apply to claims for which notices are filed on or after October 1. When you combine that with the statute of repose in these cases, which can be up to 10 years, you have potential impairment of contracts issues.

Chair Segerblom:
Is it your position that this bill does nothing for subcontractors?

Josh Griffin (Nevada Subcontractors Association):
In 2003, S.B. No. 241 of the 72nd Session established the right to repair. In 2007, subcontractors found that the right to repair was not working in the way it was intended, and we tried to come up with some ways to fix that, release from repair and those types of things. There had been, as there often is in large

pieces of legislation, a handshake agreement to stand down for a couple of sessions, to let the bill passed in 2003 have several years to see how it would work. We were told to look for a way to fix these issues without involving NRS 40. As an association, we pursued addressing indemnification and Type III indemnity, not as a cure for NRS 40 but as an alternate objective to find a solution for subcontractors. That put us at odds with our partners: home builders and general contractors. After the 2007 Session, we regrouped and reestablished the Coalition for Fairness in Construction.

Chair Segerblom:
So you oppose this bill because you want to make your partners happy?

Mr. Griffin:
There are certainly subcontractors who think, absent a cure for NRS 40, this language might provide a minimal amount of relief. My clients are members of the Coalition. We set out this session to find some cures for NRS 40. We appreciate Assemblyman Daly's efforts; we worked hard with him. But we do not think this bill provides that relief and those cures for construction defect reform. That is why we oppose it.

Tray Abney (The Chamber, Reno-Sparks-Northern Nevada):
We are opposed to A.B. 367.

Joanna Jacob (Association of General Contractors, Las Vegas Chapter; Nevada Contractors Association):
We took part in the Coalition for Fairness in Construction, and we are opposed to A.B. 367.

Craig Madole (Associated General Contractors, Nevada Chapter):
We are opposed to A.B. 367.

Jay Parmer (Builders Association of Northern Nevada):
We are opposed to A.B. 367.

Senator Jones:
Assemblyman Daly, can you confirm the question I posed to Assemblyman Hansen regarding the prospective nature of this bill?

Assemblyman Daly:
It is prospective only. It would be a violation of the U.S. Constitution to affect a contract ex post facto, going backwards. Any contract in existence today cannot be changed by this law.

Senator Ford:
During the entire campaign cycle, we heard that we need to change construction defect law, and we can do that by changing the definition of code violations. That is done here, and we still have a litany of people opposing it. That is very frustrating. We cannot keep moving the ball. People have said to me point-blank, "Let's change the definition of code violation." We did that, and you are still opposing it. I find that disappointing and intensely frustrating.

Senator Hutchison:
Everyone agrees that there is a problem, but we do not agree that this is the right solution to that problem. I do not think it is disingenuous to disagree with the solution being offered.

Assemblyman Daly:
I do not know how you could say it applies to anything outside of NRS 40.600 to NRS 40.695; that is exactly what it says. It cannot apply to any contract for sale or any of these other things unless the people were sued under an NRS 40 construction defects case. It is very narrow on those limitations.

During the interim, I asked for the legislative history on every single bill on construction defects since 1995, from the first bill that introduced this to the statute of repose measure that went down last Session in the last hour. You can go to one end of the spectrum and say, "Attorney's fees are the whole problem," or you can go to the other end and say, "We want to pierce the corporate veil." People act dishonestly on both sides. Limited liability corporations come in and take all the money, hide the assets, light a match to that corporation, say "I'm out," and shift all the costs over to the subcontractors and anybody else who worked on the project. That is the issue that I see affecting the people I work with—the constituents in my district, the contractors that I know—and A.B. 367 will start to address that problem.

Yes, the language is there. Senator Hutchison said it does not get to the duty to defend, but I think the part in section 1, subsection 2 where it says, "that

causes or is intended to cause any person to be responsible for the actions of another," is going to cover it.

I will just sum up. We have had enough argument back and forth. If you can read, the language covers NRS 40 cases, residential construction, prospective only, and it addresses the two most cited problems: subcontractors being involved in lawsuits they do not belong in and trivial code violations as construction defects. That is what we want to fix; that is what this bill does.

Chair Segerblom:
I have a question about subsections 2 and 3 of section 1. Does this cover the duty to defend and get the subcontractors out or not?

Assemblyman Daly:
I believe so, yes. I write contracts; we negotiate with employers and put provisions in collective bargaining agreements. We work to have precise language to get to the intent we want, and I think this covers it.

Charles Dee Hopper (Nevada Justice Association):
I believe Assemblyman Daly is correct that the duty to defend would be covered by A.B. 367. A recent Nevada Supreme Court case might address that issue.

Senator Ford:
That is fine, but Mr. Mead talked about a parade of horribles and claimed this language encompasses a lot more than we want it to.

Mr. Hopper:
I do not believe the language in A.B. 367 affects anything other than contracts between developers, builders and subcontractors in residential construction pursuant to construction defect litigation.

Senator Ford:
That is important for legislative history and the legislative record of intent.

Assemblyman Daly:
This bill only applies to controlling parties. If I am a subcontractor and I have several tiers of subcontractors and suppliers below me, I am not the controlling party, and these provisions would not apply to those agreements.

Senator Ford:
Could we add paragraphs (a) and (b) to section 2.5, subsection 3?

Mr. Hopper:
That was not discussed as part of our negotiations. We focused on the two areas we thought were the biggest concerns.

Senator Ford:
I would like to hear your opinion of whether it is appropriate, though. Why could it not work?

Assemblyman Daly:
Many cases of construction defects concern work not done in a workmanlike manner that is appropriate for a lawsuit but which does not adversely impact the structural integrity or safety of the residence or change its fair market value. For example, if the molding in this room had been installed at a 45-degree angle, it would look bizarre and be unacceptable without harming the structural integrity of the building. But a homeowner should not be expected to fix such an issue; it is beyond the skill of most do-it-yourselfers and is harder to do than it looks.

Chair Segerblom:
I will close the hearing on A.B. 367 and open the hearing on A.B. 512.

ASSEMBLY BILL 512: Makes technical corrections to measures passed by the 77th Legislative Session. (BDR S-1249)

Mr. Anthony:
This is a bill from the Legislative Counsel Bureau that comes forward at the end of each session identifying technical corrections and resolving issues created when bills were passed that were in conflict with each other. Nothing added by this bill is substantive in nature.

Senator Hutchison:
Are the issues in this bill related to bills heard by this Committee?

Mr. Anthony:
It includes bills heard by other committees as well as this Committee. For example, section 1 refers to a bill regarding water and the State Engineer.

SENATOR HUTCHISON MOVED TO DO PASS A.B. 512.

SENATOR KIHUEN SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

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Chair Segerblom:
I will open the work session on A.B. 325.

ASSEMBLY BILL 325 (1st Reprint): Authorizes a court to commit certain convicted persons to the custody of the Department of Corrections for an evaluation. (BDR 14-742)

Mindy Martini (Policy Analyst):
This bill, which was sponsored by Assemblyman Martin, authorizes a court, before sentencing a person who has been convicted of a felony and who has never been sentenced to prison as an adult for more than 6 months, to commit the person to the DOC for a complete evaluation. There is also a reporting requirement in this bill.

Chair Segerblom:
As I recall, the language was permissive, and the Nevada District Attorneys Association supported it.

SENATOR JONES MOVED TO DO PASS A.B. 325.

SENATOR KIHUEN SECONDED THE MOTION.

Senator Brower:
As I said earlier, I am not convinced this is necessary and that it has worked or will work. I have seen the Legislature attempt to micromanage the DOC too often. It is our job to set policy, and we should not be shy about that, but when the DOC says it does not want this program and does not think it will work, I defer to that opinion.

Chair Segerblom:
You are on the Advisory Commission on the Administration of Justice that approved the program, is that not right?

Senator Brower:
The Commission considers a lot of things I do not necessarily agree with.

THE MOTION PASSED. (SENATORS BROWER, HAMMOND AND HUTCHISON VOTED NO.)

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Chair Segerblom:
I will open the work session on A.B. 360.

ASSEMBLY BILL 360 (3rd Reprint): Revises provisions relating to gaming. (BDR 41-24)

Ms. Martini:
This is the measure that authorizes the Governor, upon recommendation of the Nevada Gaming Commission, to enter into agreements with other governments allowing persons physically located in those jurisdictions to participate in interactive gaming conducted by one or more licensed operators. This measure also requires an interim study concerning the impact of technology on the regulations of gaming.

Chair Segerblom:
Let me just say for the record that it is my understanding that the study is not limited, so if the study committee members wanted to study betting on federal elections, they could do that too. Is that correct?

Ms. Martini:
Yes.

Senator Brower:
Could you restate that for the record?

Chair Segerblom:
It is my understanding that because the study committee is not limited by what it can study, one of the things it might study, if the members felt it was appropriate, is betting on federal elections.

Senator Brower:
I suppose I would have to agree with you.

SENATOR HUTCHISON MOVED TO DO PASS A.B. 360.

SENATOR FORD SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

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Chair Segerblom:
I will open the work session on A.B. 367.

ASSEMBLY BILL 367 (2nd Reprint): Revises provisions relating to constructional defects. (BDR 3-670)

Ms. Martini:
This bill prohibits a controlling party from seeking indemnification from a design professional, subcontractor, supplier or other service provider for a development project with regard to construction defects claims.

Chair Segerblom:
While the bill is not perfect, it does at least attempt to deal with issues I have been hearing about for 8 years: first, that subcontractors who had nothing to do with a defect are brought into a lawsuit and forced to stay in; second, the fact that a technical code violation that has nothing to do with the structural integrity of the house is automatically a construction defect. It seems to me this bill is better than nothing.

Senator Hutchison:
I spoke about my concerns with section 2.5. With regard to section 1, I am still concerned that it is overbroad. Indemnification law and duty to defend

obligations are the subject of treatises. I think we should take more time and evaluate this.

Senator Jones:
I have appreciated the opportunity to hear a lot more about construction defects this Session than I ever cared to hear. The Committee knows the concerns I have had. I wish A.B. 367 had been sent over sooner so we could have done some things to improve it. This bill is a great opportunity to do something for subcontractors who have suffered in the last several years, and many have gone out of business. This is an opportunity to give them some cover as we go forward. I have friends and colleagues who are subcontractors, and they have told me they were afraid to speak out because of general contractors and others; that is why we did not hear from as many subcontractors today as are truly in support of this bill.

The definitions section does solve one of the big issues raised in prior hearings. We could have more, but this bill is a big step forward in addressing the construction defects issues in Nevada.

Senator Brower:
I echo Senator Hutchison's comments. When the representative of the subcontractors in Nevada tells the Committee he opposes the bill on behalf of his clients, that tells me the subcontractors for the most part do not like this bill and do not think it is an improvement. My concern is that if we pass this bill, it will be held up as a successful effort to fix the construction defect problem, and future efforts to try to introduce legislation will be met with, "Hey, we did that last time; we don't need to do that again." This bill just does not get at the problem. It is a mistake for the Committee to think that a yes vote somehow solves the problem or even moves the ball forward.

Senator Hammond:
The only subcontractor we heard from today was Assemblyman Hansen, who described the whole process as a racket but said A.B. 367 might help a part of the racket. That still makes it a racket, and I will vote no.

Senator Ford:
I still have unanswered questions about the bill. I will vote yes, but I reserve the right to vote no when the bill comes to the Senate Floor. We have more work to do, and I am interested to see if we can get it done.

SENATOR JONES MOVED TO DO PASS A.B. 367.

SENATOR KIHUEN SECONDED THE MOTION.

THE MOTION PASSED. (SENATORS BROWER, HAMMOND AND HUTCHISON VOTED NO.)

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Chair Segerblom:
Is there any public comment? Hearing none, the meeting is adjourned at 1:59 p.m.

RESPECTFULLY SUBMITTED:

_____
Lynn Hendricks,
Committee Secretary

APPROVED BY:

_____
Senator Tick Segerblom, Chair

DATE: _____

EXHIBITS				
Bill	**Exhibit**		**Witness / Agency**	**Description**
	A	2		Agenda
	B	3		Attendance Roster
A.B. 325	C	2	Brittany Shipp	AB 325 Talking Points
A.B. 360	D	3	Brittany Shipp	AB 360 Revised Presentation
A.B. 367	E	6	Leon F. Mead II	Analysis of AB367 as Amended by Proposed Amendment 8983