MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Seventy-Eighth Session
February 26, 2015

The Senate Committee on Judiciary was called to order by Chair Greg Brower at 1:05 p.m. on Thursday, February 26, 2015, in Room 2134 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 Greg Brower, Chair
Senator Becky Harris, Vice Chair
Senator Michael Roberson
Senator Scott Hammond
Senator Ruben J. Kihuen
Senator Aaron D. Ford

COMMITTEE MEMBERS ABSENT:

Senator Tick Segerblom (Excused)

GUEST LEGISLATORS PRESENT:

Assemblywoman Victoria Seaman, Assembly District No. 34

STAFF MEMBERS PRESENT:

Patrick Guinan, Policy Analyst
Nick Anthony, Counsel
Connie Westadt, Committee Secretary

OTHERS PRESENT:

Bob Compan, Farmers Group, Inc.
Stacey Upson, Farmers Insurance Company

Noel Young, Allstate Insurance Company
Dan Musgrove, CSAA Insurance Exchange
Lisa Foster, Allstate Corporation; American Family Insurance Company
Justin Harrison, Las Vegas Metro Chamber of Commerce
Jeanette K. Belz, Property Casualty Insurers Association of America
Mark Wenzel, Nevada Justice Association
Robert Eglet, Nevada Justice Association
Lea Tauchen, Retail Association of Nevada
Tray Abney, The Chamber
Sarah Suter, Las Vegas Defense Lawyers
Loren Young, Las Vegas Defense Lawyers
Ray Bacon, Nevada Manufacturers Association

Chair Brower:
We will open the hearing on Senate Bill (S.B.) 162.

SENATE BILL 162: Revises provisions relating to insurance. (BDR 57-950)

Senator Michael Roberson (Senatorial District No. 20):
I am pleased to introduce S.B. 162, which revises the law in order to facilitate better information-sharing between parties in personal injury claims where passenger vehicles are involved. Senate Bill 162 has only two sections. Existing law requires a claimant or the claimant's attorney to provide to the party against whom they are asserting a claim and the insurer or the party's attorney all medical reports, records and bills concerning the claim at least once every 90 days while the claim is pending.

Senate Bill 162, section 1, subsection 2 adds clarifying language which requires that, in lieu of providing all this information, the claimant or the claimant's attorney can provide the other party with written authorization to receive the information directly from all health care providers involved in the claim. Senate Bill 162 also adds language in section 1, subsection 2 requiring that, along with the written authorization, the claimant must provide to the other party the names and addresses of all health care providers involved in the claim.

Senate Bill 162, section 1, subsection 3 provides that upon receipt of either the required information or the written authorization, the insurer must disclose to the claimant within 30 days all pertinent facts or provisions of the policy relating to any coverage at issue. The change from immediately to 30 days is

intended to mirror provisions already in the law and to provide insurers a reasonable amount of time to analyze the policy and provide sound information to the claimant.

Senate Bill 162, section 1, subsection 4 contains new language which states that if the party or the party's insurer or the party's attorney does not receive all the required medical information, they may petition the court for an order requiring the claimant to provide it. Additionally, a judge may, in place of or in addition to any other sanction, require the claimant to pay reasonable expenses or attorney's fees incurred due to the claimant's failure to comply.

Finally, section 1, subsection 5, paragraph (a) of S.B 162 adds a definition of "all medical reports, records and bills concerning the claim." Section 2 of S.B. 162 provides that the portions of the bill necessary for the adoption of regulations or other administrative matters are effective immediately. For all other purposes, S.B. 162 is effective January 1, 2016. This fair, commonsense bill makes much needed revisions to level the playing field in these cases.

Bob Compan (Farmers Group, Inc.):
Nevada Revised Statute (NRS) 690B.042 was enacted in 1995. It contains reciprocal prelitigation disclosure and discovery requirements. Since the enactment of NRS 690B.042, insurance companies have had issues with the plaintiffs' attorneys not providing the required information. Insurance companies have complied with NRS 690B.042 even though we believe that providing policy limits is fundamentally wrong.

Medical reports, records and bills are critical to the proper evaluation of a claim. In accordance with Nevada law, insurance companies are required to set reserves on claims. Without proper documentation, reserves cannot be properly addressed. It is not uncommon for claims representatives to receive only one piece of documentation during the claims process even though the insurance company has tendered policy limits. We have a duty to protect the interests of our insured and cannot do so without the required information.

I provided the Committee with a redacted sample of the letter (Exhibit C) that we send out every 90 days to the attorney representing a claimant requesting the information required under NRS 690B.042. The language in the letter mirrors the language of the statute. The statute of limitations on bodily injury claims is 2 years. The insurance company will ask for the information required

by NRS 690B.042 and not get it. We may get one emergency room bill. We will have already told the plaintiff's attorney the liability limits. There are attorneys who use this information as a shopping list for building up medical specials. We cannot properly evaluate the claim without medical reports, records and bills. By evaluating this information, we can represent our insured, which we have a duty to do.

In 2013, our legal department decided the language of the statute was not clear and we were not required to provide policy limits. A complaint was filed with the Division of Insurance against Farmers Insurance for not providing policy limits to a claimant's attorney. *Nevada Revised Statute* 690B.042 does not expressly require the provision of policy limits. It simply requires the provision of "all pertinent facts or provisions of the policy relating to any coverage at issue." We provided our response to the Division regarding the complaint (Exhibit D). We also provided the Division's letter to Mr. Dunlap addressing our response (Exhibit E). Our position is what constitutes pertinent facts or provisions of the policy related to the coverage at issue remains undefined in the statute. Our position is supported by caselaw from other jurisdictions as set forth in Exhibit D.

California has enacted privacy laws, and the National Association of Insurance Commissioners has adopted the California position. Policy limits, unless there is question of coverage, are deemed the personal property of the insured and the insurance company. We would like to see NRS 690B.042 repealed. In lieu of that, we have proposed language that gives us the right to go to court for an order requiring the claimant or an attorney representing the claimant to meet the requirements of NRS 690B.042. Right now, the Division can sanction us, but it cannot sanction claimants' attorneys. I have provided written testimony (Exhibit F).

Chair Brower:
The scenario is a typical one that insurance companies and plaintiffs' lawyers deal with every day. A personal injury attorney has a new client who has been injured in a car accident. The insurance information for the party at fault is known. The personal injury attorney calls Allstate and says I have a client who was in an accident with one of your insureds. Allstate says send the medical records. The law says that, upon receipt of the medical records, Allstate is obligated to provide "all pertinent facts or provisions of the policy relating to any coverage at issue" to the claimant's lawyer. My understanding from you is

that this bilateral requirement—the duty on the claimant's lawyer to provide the medical records and the commensurate duty on the part of the insurer to provide policy information—is not working well in practice.

Mr. Compan:
That is correct.

Chair Brower:
As you point out, maybe the process would work better if we did not have this statute at all.

Senator Ford:
Do you acknowledge that the Commissioner of Insurance has the authority to interpret this statute, which you contend is ambiguous?

Mr. Compan:
I acknowledge that the Commissioner has authority over insurance companies and can provide sanctions. Yes, he does have the authority.

Senator Ford:
Do you disagree with the Commissioner's interpretation and want the law changed to effectuate a better process?

Mr. Compan:
Correct.

Senator Ford:
I want to be certain that we are clear on how we got here and why we are here. That helps me.

Stacey Upson (Farmers Insurance Company):
I am the managing attorney in the Las Vegas office for Farmers Insurance. *Nevada Revised Statute* 690B.042 has real effects in litigation, especially on the defense side. The attorneys in my office are brought into the prelitigation process simply because the carrier cannot get a claimant's medical records. We send a letter to our insured providing notice of representation by counsel. Prior to receiving a letter from our office, our insured has received a letter from the insurance company advising that because of the accident, the other side has retained an attorney and will be making a claim for damages.

The insured then comes to our offices with a very natural concern about being sued and the financial ramifications of being sued. I have to advise my client that I have no idea because the claimant has provided only one medical bill in order to obtain policy limits. My client, the insured, wants to know if the claimant will seek an amount in excess of the policy limits. I do not know because I do not know what injuries are being claimed. I explain the steps our office has taken to obtain the information required by statute. We have called counsel. We send a letter every 90 days requesting records. We tell the insured that there is no enforcement provision in the statute.

Some members of the plaintiffs' bar rely on NRS 690B.042, subsection 3, which refers to "medical reports, records and bills." They provide one bill, and that is it. We cannot tell our insured the value of the claim or what is being sought. We have no enforcement mechanism to get the information we need in order to evaluate a claim and possibly settle it long before litigation. All we are seeking in S.B. 162 is to level the playing field and have a public policy that works for both sides. Our hands are tied every single time in a prelitigation case when records are not provided despite calling and sending letters. We face this issue on a daily basis.

Chair Brower:
I am struggling with the words "all medical records." It seems hard to know what "all" really is. Does any claimant's attorney really have all the records? Does that pose a practical problem in your opinion?

Ms. Upson:
No. Section 1, subsection 2 of S.B. 162 refers to "all medical reports, records and bills concerning the claim." A claimant's attorney needs to ask whom the claimant has treated with. All that is needed is a list of providers. Counsel sometimes will say that he or she does not have all the records; however, the claimant can sign a HIPAA release so that the claimant's attorney can get the records. Alternatively, the release along with a list of providers can be given to us and we will get the records. Neither happens. Therein lies the problem. We need an enforcement mechanism in the statute.

Chair Brower:
There is an assumption that the claimant has a perfect understanding and recollection of the providers. In some cases, that may be easy. Maybe there are only two providers. In other cases, there may be several and one may be forgotten. The definition of "all" may be problematic in some cases. The claimant's lawyer has every incentive to cooperate with the insurer because the longer it takes to provide what the insurer needs to properly adjust the claim, the longer it takes to receive a payment or resolution of the claim. Therefore, if the goal of the claimant and claimant's lawyer is to be paid, there would be a natural incentive to provide the documents to the insurer, but you say that is not happening.

Ms. Upson:
It does happen in some cases. If a claimant wants payment sooner rather than later and frequently calls the attorney regarding settlement, then the matter will settle because the information will be provided. More often we see a holding back of the records. Then either right before the statute of limitations runs or right at the time the complaint is filed, a policy limits demand is made. Now a $100,000 policy with one $300 medical bill has $78,000 in medical bills and a 10-day policy limits demand. This is a strategy to open the policy under Nevada law. If a carrier does not accept the $100,000 policy limits demand, is that policy now open? If it goes before a jury that comes back with a $400,000 judgment, is that on the insurance company's dime or the insured's?

Nevada Supreme Court case, *Beattie v. Thomas*, 99 Nev. 579, 668 P.2d 268 (1983), says a demand has to be reasonable on both its timing and amount. Despite this ruling, many attorneys do this for strategic advantage even when they have the records, which we have requested multiple times over multiple months.

Senator Hammond:
Your testimony was helpful. Please explain the reason for requesting documents every 90 days?

Ms. Upson:
We are looking for ongoing treatment. For example, you have a $25,000 policy and one medical record for $300. At the 90-day mark, we send a request for records and receive medical records for $20,000. We may have enough information to pay $25,000. During the 90 days, the claimant continued

treatment. When we are left in the dark about ongoing treatment, we are unable to evaluate the claim. We want to evaluate a claim sooner rather than later. We have experts who look at the records to determine if something traumatic occurred. If so, then we resolve the claim—especially if it is for policy limits. If we do not get the information, despite requests and despite a statute allowing us to request that information, we are unable to determine the value of the claim for our client.

Senator Hammond:
Hence, the strategic part of it: namely, holding the ball and hiding it so that you will never be able to evaluate the medical records whatever they might be.

Ms. Upson:
Correct. Then a demand is made with a 10-day or sometimes a 30-day limit demand, which includes all the records but no films. If we had a release or if we were provided films, the case could have been evaluated potentially 9 months to 18 months sooner. Giving records at the last minute forces litigation. A line is drawn in the sand because we cannot evaluate a claim in a vacuum in 10 days without the medical records and films. That happens more often than not.

Senator Ford:
You have painted for me a sympathetic picture of what can happen when you have an unscrupulous claimant's lawyer. However, the attorney's fee provision that is being added seems to be one-sided. The insurance company can request attorney's fees if claimant's lawyer does not comply, but no provision allows the claimant's lawyer to request attorney's fees if you do not comply with the statute. Are you amenable to an amendment that would make this a bilateral enforcement opportunity?

Ms. Upson:
Yes, we are amenable. However, the provision for enforcement and fees is not one-sided. The claimant has the Division of Insurance to go to for enforcement. The defense side has no enforcement provision. An attorney who complies every 90 days or gives us a release would never be subject to a court order to pay the attorney's fees or expenses incurred by the other party. I will give you a real-world example. I get a case in prelitigation, but no information is provided at the 90-day mark. I send the claimant's attorney a letter advising that pursuant to statute, we are entitled to this information and there are ramifications for not doing so. The letter states that we will give the claimant

30 days to comply or we will be forced to file with the court. Normally, I wait 30 days and write another letter referring to the previous letter. I call the claimant's attorney on the phone and say we do not want to be forced to file but we will, and we will seek fees and costs. The language in S.B. 162 is discretionary with the court. It is not a mandatory sanction.

Senator Ford:
Mr. Compan, are you amenable to a two-way opportunity for attorney's fees?

Mr. Compan:
Yes.

Noel Young (Allstate Insurance Company):
I am Regional Counsel for the Allstate Insurance Company. I am also the Director of Legislative and Regulatory Affairs over our southwest region, which encompasses Nevada, Utah, New Mexico, Arizona and Oklahoma. Nevada is the only state I oversee that requires an insurance company to turn over policy limits upon the receipt of one single record. No other state in my area allows that. We consider this a privacy issue. The claimant sends the insurer one $300 medical bill and the insurer sends its insured's policy limits for a $100,000/$300,000 policy. The insurer does not get any more records, but months down the road, it will get a demand letter providing a doctor's report that says the claimant needs medical treatment for the next 3 to 4 years that costs $50,000 to $70,000. This is a demand for policy limits and an attempt to open up the policy limits.

Insurance companies have an incentive to get medical records from claimants. There are many reports that show that the longer a claim is open, the more money it costs. I would hope that the lawyers representing claimants have an incentive to get all the medical records to insurance companies in order to put money into the hands of injured parties. Unfortunately, that is not what occurs many times here in Nevada.

Allstate Insurance has proposed an amendment to S.B. 162 (Exhibit G). *Nevada Revised Statute* 690B.042 provides that once the insurer receives medical records, upon request, it shall disclose to the insured or claimant "all pertinent facts or provisions of the policy relating to any coverage at issue." Coverage is liability coverage, uninsured motorist coverage, comprehensive coverage, collision coverage, medical payment coverage, etc. Coverage is not policy limits.

My amendment would require the insurer to disclose all pertinent exclusions that would lead to a denial of the claim. This proposed amendment would remove the necessity of the insurer turning over policy limits. In the other four states that I oversee, we get permission from the insured before we turn over policy limits because it is a privacy issue.

If a defendant who does not have insurance is involved in an accident, neither the injured party nor his or her lawyer is entitled to know the defendant's net worth or assets until there is a judgment rendered against the defendant. Contrast that situation to an insured party who is involved in an accident and has no liability at all, but the other side gets to know the policy limits by providing one medical record. Why should we have to tell the other side the policy limits? We do not believe that it is beneficial for an insurance company to be forced to turn over the policy limits of its insured because it receives one medical record. This leads to increased costs and claims. There is incentive for an insurance company to get all the medical records because it wants to resolve claims.

Chair Brower:
The idea of attempting to open the policy limits has been put forth by Ms. Upson and you. A claimant's lawyer games the timing and process. A policy limit demand is made late and the insurer does not have sufficient information about the claim in the form of medical records, etc. As a result, the policy is opened up. Has that sort of attempt been successful in Nevada?

Mr. Young:
I believe that occurred in the *Fulbrook v. Allstate Insurance Company* case. I have provided a copy of the Order of Affirmance (Exhibit H). What is more common is a last-minute demand. We get $80,000 in medical records sent to us 45 days before the statute of limitations runs. We have to make a decision whether to pay $100,000. We do not have time to investigate, but we do not want to take the chance.

Chair Brower:
It seems to me that it would not be bad faith on the part of the insurance company to deny a policy limit claim because it did not have adequate medical information.

Mr. Young:
Fulbrook dealt with something similar to that. The claimant gave Allstate a last-minute demand and alleged bad faith. The Nevada Supreme Court ultimately decided that Allstate had not acted in bad faith. We are put in a bind when we do not get the medical records and have to make hasty decisions, or we get many medical records 60 days before the statute of limitations runs. Many times an insurance company is going to pay. We do not want to chance it. That is what is occurring.

Senator Harris:
Is 60 days enough time to do an appropriate investigation for a complex injury claim? How much time does it typically take you to do an appropriate medical evaluation and investigation before you pay out a claim?

Mr. Young:
Sixty days may be enough time. What is enough time? I am not sure. It varies. It just depends on the type of case, what information you are given and so forth. I cannot answer your question.

Ms. Upson:
When information and a demand are provided late, a couple of issues come to the forefront. The first point is about preexisting conditions. For example, we have a $100,000 policy and $90,000 in medical bills, but we do not know if there is a preexisting condition. Under Nevada law, our insured is not responsible for a preexisting condition. Our insured is only responsible for exacerbating or making a preexisting condition worse. What decision should we make on behalf of our insured when we get a policy limit demand right before the statute of limitations runs or right at the time of the filing of the complaint? If we demand the insurance company pay policy limits, we are being held up for highway robbery because my client should not be responsible for the insurer paying policy limits if there is a preexisting condition.

Chair Brower:
Why not have the insurer simply deny the claim at that point and say the statute is about to run and if you want to sue, sue and we will sort this out once we get all the medical information during discovery in litigation?

Ms. Upson:
There are a couple of issues with that approach. I need to do everything I can to protect my client—the insured—from out-of-pocket payments. The carrier can make the decision at that point to pay the claim and under Nevada law and the *Fulbrook* bad-faith case, the policy would not be opened. Unfortunately, that potentially subjects an insured to out-of-pocket damages, which may never have been an issue if information had been supplied in a timely manner according to the statute. The claimant may have accepted a settlement earlier in the treatment process.

If we make an offer to settle, the opposing side must take that offer to the claimant. If we get information in prelitigation and it looks like a claim should be paid, we can make an offer to opposing counsel and the claim may be resolved. If we do not have records and we get the demand, a line is drawn in the sand. The carrier has to make a determination whether the policy is open or not. There is ongoing financial stress on the insured.

Fully evaluating a claim depends on the injured party's preexisting history. An 18-year-old's history can probably be evaluated quickly. A 40- or 50-year-old's history is going to take a little bit of time. It could be done in 40 days. It could be done in 60 days. It depends how forthcoming the opposing side is with the information and whether we get releases to get records in a timely manner.

Dan Musgrove (CSAA Insurance Exchange):
This is about hiding the ball. Why does that make sense for anybody? We all know that fair and timely settlements are good for both parties. Insurers do not look at NRS 690B.042 as a suggestion. Senate Bill 162 simply says that everybody needs to comply.

Lisa Foster (Allstate Corporation; American Family Insurance Company):
American Family Insurance supports S.B. 162 and has reviewed and agrees with the amendment proposed by Allstate.

Justin Harrison (Las Vegas Metro Chamber of Commerce):
We support S.B. 162 and agree with the comments of Ms. Upson, Mr. Compan and Mr. Young. Senate Bill 162 will allow for accurate and timely documentation to be provided to insurers, thus leveling the playing field.

Jeanette K. Belz (Property Casualty Insurers Association of America):
We support S.B. 162 and the amendment proposed by Allstate. We have a letter of support (Exhibit I).

Mark Wenzel (Nevada Justice Association):
The history of NRS 690B.042 is quite simple. Approximately 20 years ago, the insurance industry and the Nevada Trial Lawyers Association, as our group was known then, came to an agreement. If we give the medical documentation in our possession to the insurance company, the insurance company in turn provides us with the policy limit information for the person who is alleged to have been at fault for the accident.

For the 20 years that I have been practicing, both as a defense attorney for the first half of my career and as a plaintiff's attorney for the last half of my career, this process has worked quite well. It fosters cooperation between the insurance companies and the plaintiffs' attorneys to get everything out on the table. How this works in practice is quite simple. When a person comes into our office, we provide the insurance carrier with what is known as a letter of representation and ask for a copy of the policy limit information. We provide the medical documentation that we have in our possession. There is a mutual exchange of information. With very few exceptions, both in my earlier career as a defense attorney and the latter stages of my career as a plaintiffs' attorney, there are very few problems. In fact, many times the insurance company reaches out to me to get that piece of information so that the company can perhaps resolve the claim almost the instant it is made, especially in a low policy limit situation

I have not seen any problems with this process. The horror stories being portrayed here are quite frankly illusions. You hit the proverbial nail on the head. Why would I hold back information which bolsters the value of an injured person's claim? Why would I hold back information which may put more money into my client's pocket? It makes no sense whatsoever. We cooperate with insurance carriers on a daily basis. We provide them with all the medical documentation we have in our possession so they can evaluate it. If the case can be wrapped up sooner rather than later, that benefits everyone. Senate Bill 162 will thwart a working process and throw a monkey wrench into a system that is working quite well.

Senate Bill 162 requires a claimant's attorney or the claimant to provide all medical records, bills and reports to the insurance company prior to the insurance company having to provide policy limit information. The accumulation of medical documentation is not an easy process, especially when you are dealing with a visitor to our State, which happens all the time. Getting medical documentation from other states, other countries or even some medical providers in Nevada is not easy. It is a time-consuming process. If we get a single piece of information in a timely manner that reflects the insurer should tender the policy limits information, that expedites the process exponentially. The accumulation of all medical records and bills before this mutual exchange of information occurs would create a problem where none exists.

Another reason why the changes proposed in S.B. 162 are incompatible with swift administration of justice is that under the *Nevada Rules of Civil Procedure* (NRCP), when a case goes into litigation, the insurance carrier is required to give the plaintiff exactly what NRS 690B.042 says: namely, all insurance agreements and all policy limit information about the potential claims and the damages at issue. If S.B. 162 is enacted, we will have an incongruity between the NRS, which governs prelitigation, and the NRCP, which governs postlitigation. Nevada Rules of Civil Procedure 16.1 requires giving all information, including policy limit information, to the opposing party once a case goes into litigation. If I get the runaround from an insurance company prelitigation, the remedy is quite simple. I file a lawsuit as opposed to now when we try to cooperate through a mutual exchange of documentation to, if possible, wrap the matter up before a lawsuit is filed. An unintended consequence of S.B. 162 would be to place plaintiffs' attorneys in a more favorable posture postlitigation than prelitigation.

The last provision of S.B. 162 that is inconsistent with the swift administration of justice is section 1, subsection 4, the sanctions provision. As Senator Ford pointed out, there is a disparity in the sanctions provision in that it only applies to one party. It only applies if the claimant's attorney does not do what the insurance company wants the attorney to do. What happens if an insurance company—an insurance company like Farmers Insurance Company as so candidly pointed out by Mr. Compan—does not do what is required by the statute? There is no mutual sanction provision; it is one-sided. This is completely inappropriate when the purpose of the statute is the exchange of documentation in order to swiftly resolve these matters if resolution is possible.

In summation, the system works. The horror stories painted for you are outliers. I did not see it as a defense attorney and I certainly do not see it in my practice now. What is commonplace is a claimant's attorney who provides all documentation possible in a timely manner so the claim can be resolved and both the attorney and client can be paid. It makes no sense not to give all information at your disposal to the insurance company to resolve the claim in a timely manner. *Nevada Revised Statute* 690B.042 fosters cooperation between insurance carriers and claimant's attorneys. This cooperation can resolve claims in a timely and efficient manner, often without the necessity of attorneys.

A man was hit by a drunk driver between Fallon and Fernley. He was in the hospital for about 4 days and had surgery on a compound fracture of his leg. He brought me one document—a bill from Renown Regional Medical Center for about $62,000. I told him that I did not know how much insurance coverage was available, but I would certainly do my best to find out. For whatever reason, he had not been able to get that information from either the liability carrier or his own carrier.

With the one document, I found out that the at-fault drunk driver had a minimum policy of $15,000 and that the injured man had a very small underinsured motorist policy of $25,000. I told him he did not need an attorney because the insurance companies, knowing the significance of his injuries, were willing to settle. I wished him well and sent him on his way. One phone call, one piece of information and the matter was resolved. That is how things generally happen in the real world.

Chair Brower:
You echo my thought that claimants' lawyers do not have an incentive to delay the communication of medical information because the longer that process takes, the longer it takes claimants to be paid. What about the scenario mentioned by the proponents of S.B. 162 regarding a claimant's ability to game the system by delay, thereby setting up or attempting to set up an extracontractual, bad-faith or limit-opening claim? Is that a real concern, and if not, can you explain why?

Robert Eglet (Nevada Justice Association):
I have been practicing law in Nevada for 28 years. Roughly the first half was as an insurance defense attorney. I worked for Allstate, Farmers, AAA, GEICO and most of the major auto carriers. I represented their insureds. I also defended

them in bad-faith cases, extensively for Allstate. I do a fair amount of bad-faith cases in my practice now as a plaintiff's attorney.

Chair Brower:
A bad-faith claim is one in which an insurer has refused to settle within policy limits, thereby exposing the insured to a claim that goes beyond the policy limits—theoretically meaning the insured would be on the hook.

Mr. Eglet:
That is correct. That is one form of bad faith. I will respond to the bad-faith issue raised by Ms. Upson and Mr. Young. It is impossible to open a policy up with a 10-day or shorter demand in Nevada. I have provided a copy of an article (Exhibit J) I wrote for *The Trial Lawyer* a couple years ago. I teach seminars to the plaintiffs' bar extensively on this topic. A policy cannot be opened up and an insurance company cannot be set up for bad faith with a time-limit demand of less than 30 days. The only way to open up a policy for bad faith is to give the insurance company a minimum of a 30-day demand and to provide all information—medical, loss of income, the specific nature of the injuries, etc.

The insurance company in every scenario has the ability to request more time because the case is too complicated or more records are needed to find out if there are any preexisting injuries or to have its doctors review the records. If the insurance company requests an extension and the plaintiff's attorney does not give it a reasonable extension, the policy is not opened up. The insurance company can continue to ask for extensions for reasonable reasons as long as it actually needs more time to evaluate the claim.

Time-limit demands do not open up the policy unless the insurance company gets to the point where it is not evaluating the claim but just stalling. It is not having a doctor look at the records, it is not getting more records and it is not putting the claim through its committee. Under those circumstances, the policy could be opened. Those circumstances are extreme. They do not happen very often.

I get probably 80 percent of my cases referred to me from other attorneys. From time to time, I will get a case from an attorney who thinks the policy has been opened up with a short demand. We always explain that the policy has not been opened up. It must be done properly. This risk that the insurance companies are talking about is nonexistent. To my knowledge, there has never

been a bad-faith case in Nevada with a 10-day, time-limit demand, a failure to provide all information and a failure by the insurance company to not respond in time.

Mr. Wenzel:
As a former defense attorney, I represented virtually the same insurance carriers as Mr. Eglet. In 20 years of practice, I have never seen an insurance carrier be set up with ham-handed and ineffectual refusals to give reasonable time, reasonable extensions or multiple extensions if appropriate to evaluate a claim.

Senator Harris:
I have a question about "all" medical records. What happens when the insurance company and the claimant's attorney disagree over what medical records are relevant or whether more medical records are necessary regarding preexisting conditions?

Mr. Wenzel:
I have worked with Ms. Upson for many years and have the upmost respect for her. If Ms. Upson requests additional medical documentation, we will go through the chart. If she says that the claimant had the same injury several years ago and had the same type of procedure done, we will usually come to some type of agreement. *Nevada Revised Statute* 690B.042, subsection 1 says "all medical reports, records and bills concerning the claim." Senate Bill 162 would require all of this information before the insurance company tells us if there is even a claim that an attorney needs to get involved in. That is the burdensome nature of this. This process is going to be completely hamstrung by adoption of S.B. 162.

Senator Ford:
You have a car accident and you a get whiplash, but the medical record the insurance company is asking you for does not deal with whiplash. Is that something that occurs frequently?

Mr. Wenzel:
It does happen. It does not happen when I represent people. It does not happen when Mr. Eglet represents people. It happens before the person who has been hurt is represented by counsel. Many people try to cooperate with the insurance company and are not treated fairly. We represent a 70-year-old woman who was asked by the insurance company for all of the medical doctors that she had

seen since the accident. The insurance company had the audacity to use that authorization to get her gynecological records, for goodness' sake. She was essentially forced into our office because the insurance company was overreaching. We do see abuses in the system, and that oftentimes forces people to our door for help.

Chair Brower:
We will close the hearing on S.B. 162 and open the hearing on S.B. 161.

SENATE BILL 161: Revises provisions governing product liability. (BDR 3-949)

Senator Michael Roberson (Senatorial District No. 20):
I will introduce S.B. 161. Innocent product sellers should not be dragged into Nevada courts to defend themselves in product liability suits where the real dispute is between injured claimants and the manufacturer that designed and constructed the product. Even though product liability claims usually arise from claims of defect in the design or production, claimants all too frequently name as defendants not just manufacturers but also distributors and even retailers.

A case filed in Clark County District Court just last October is a perfect example. A plaintiff claims that he was injured due to a defect in the design or manufacture of his Glock handgun that resulted in a malfunction. He sued Glock, which is a Georgia corporation, on a variety of product liability theories based on the design and manufacture the handgun. He also sued the retail store on Tropicana Boulevard in Las Vegas that sold him the gun in a box based on nothing more than the fact that the store was the point of sale. *Edwards v. Glock, Inc.*, No. A-14-708267-C (Clark Cnty Ct. Nev. Filed Oct. 8, 2014), is this case. A few weeks later, this pattern of adding the retail seller was repeated in *Azouz v. Kick Ass Targets* LLC, No. A705638 (Clark Cnty Ct. Nev. Filed Aug. 16, 2014).

This practice is frequent and ongoing. These indiscriminate lawsuit filings result in substantial, unnecessary legal costs for sellers in addition to distracting their attention away from running their businesses. The Court of Appeals of Utah recently said in *Sanns v. Butterfield Ford,* 94 P.3d 301 (2004), that there remains no reason to require a passive seller to incur the time and expense of defending product liability actions. To make matters worse, costs and inefficiencies resulting from unnecessary product liability claims asserted against retailers are passed on to Nevada consumers in the form of a tort tax on

purchased products or are borne by employees who lose their jobs when those stores go out of business.

At least 17 states have recognized the injustice of requiring innocent sellers to defend against product liability lawsuits and have enacted statutory protections. Nevada should join them. Enacting protections for innocent sellers would not undermine the ability of persons injured by defective products to recover compensation for their injuries. Injured plaintiffs' ability to pursue their true target, the manufacturer, would not be affected. Senate Bill 161 contains exceptions to make sure that injured consumers are able to pursue a recovery against the seller if the manufacturer cannot be sued or if the seller engaged in independent conduct that should result in liability. The result of S.B. 161 is that product liability suits would simply become more efficient, allowing for more streamlined litigation of the dispute and reducing the burden on the Nevada courts. Nevada businesses and commerce would run more smoothly and efficiently.

Assemblywoman Victoria Seaman (Assembly District No. 34):
I support S.B. 161. I am cosponsor of Assembly Bill 185, which is almost identical to S.B. 161. Rather than move forward with my bill, I request that we amend S.B. 161 to add myself, Assemblywomen Michele Fiore, Shelly M. Shelton, Victoria A. Dooling and Robin C. Titus and Assemblymen Brent A. Jones, John C. Ellison, David M. Gardner, John Moore, Philip (P.K.) O'Neil, Lynn D. Stewart and Jim Wheeler to this bill.

Assembly Bill 185: Revises provisions governing product liability. (BDR 3-856)

Chair Brower:
We will consider that request.

Lea Tauchen (Retail Association of Nevada):
We support S.B. 161. Senate Bill 161 will help clarify the rights and responsibilities of the parties involved in product liability actions.

Tray Abney (The Chamber):
We support S.B. 161 for the reasons stated by Ms. Tauchen.

Mr. Harrison:
We support passage of S.B. 161, which will only enhance our State's business climate by protecting innocent sellers while at the same time affording claimants appropriate recourse against manufacturers of defective products.

Sarah Suter (Las Vegas Defense Lawyers):
We support S.B. 161, which is a balanced approach to product liability for sellers in that it protects sellers from being brought into suits when they are innocent and at the same time affords plaintiffs a right to recover against sellers when they cannot recover against the manufacturers.

Loren Young (Las Vegas Defense Lawyers):
We support S.B. 161. I represented The Gun Store, which is the distributor in the *Edwards* case.

Senator Ford:
What if you do not know immediately whether the seller exercised substantial control over "the aspect of the manufacture, construction, design … "? Usually, we find that out in discovery after someone has been sued or during prelitigation discovery. What does S.B. 161 contemplate?

Senator Roberson:
We have been working on this issue with the trial bar. It depends on the case. In the *Edwards* case, the product was sold in a box. It is hard to make a claim with such a product that the seller had any kind of substantial control over the design or the manufacture of the product.

Senator Ford:
We need to think beyond the scenario Senator Roberson mentioned because the question is not just exercising substantial control but also altering and modifying. If something is in a box, it may look like it has not been opened but maybe it was; maybe it was altered and you do not know that. How does this bill deal with lack of knowledge on the front end of the exceptions set forth in S.B. 161, section 1, subsection 2, paragraphs (a) through (i)?

Mr. Young:
Senator Roberson was clear on that point. In our situation, the claimant went to a gun store to buy a gun; the gun was brand-new; it came straight out of the box; and he had to register it. He owned the gun for 4 years before the incident

occurred. You could see the product. You could clearly see whether there had been any kind of modification or change. If you were to go to a Home Depot, it would be the same thing. I have represented Home Depot on ladder injury cases. The ladders were purchased brand-new from Home Depot. It would be self-evident that the product was brand-new without any alteration or change.

Senator Ford:
I think that is probably true on patent defects. However, certain things are latent that you will not catch by looking. You will not know until you operate it. You will not know that someone jiggered with the trigger in the store until you shoot the gun. Not all defects or all alterations are apparent early on. I am glad to hear you are addressing this concern.

Senator Roberson:
Senate Bill 161 contemplates that situation and excludes that in section 1, subsection 1 which says, "Except as otherwise provided in this section, no product liability action may be brought or maintained against a seller other than a manufacturer of the product." Then you go on to the exceptions and look at section 1, subsection 2, paragraphs (a) through (i). Paragraph (a) contemplates the situation that you are describing.

Senator Ford:
I understand. It says except as otherwise provided you cannot sue the seller, but you do not know if the seller altered the product in order to sue in the first place until a latent alteration becomes apparent. I am not certain that the typical way lawsuits occur would allow for timely knowledge of the exceptions. You have been denied the ability to sue at the outset and then the statute of limitations runs and you may not find out until too late.

Senator Roberson:
The list of exceptions is exhaustive: For example, the seller had something to do with the manufacture, construction, design, installation, preparation, assembly, testing, packaging, labeling, etc. There is a difference between having a sound basis for bringing a claim based on a reasonable belief that the seller did take part or did have substantial control versus a fishing expedition. That happens in too many cases. A person who represents gas stations just mentioned to me that gas stations are sued all the time for selling gas. That is why S.B. 161 is appropriate.

Mr. Young:
If an alternation by the seller is discovered later through discovery or litigation, plaintiffs' attorneys have the ability under the local rules and the Nevada Rules of Civil Procedure to do a Doe pleading and bring those parties in at a later date. It will relate back and will satisfy the statute of limitations.

Senator Ford:
That presumes the statute of limitations is tolled under S.B. 161. That is not something I see in S.B. 161. I hope we can work on this.

Chair Brower:
The Doe allegation, not to mention a third-party complaint filed by a manufacturer defendant upon discovering an alteration, would take care of that.

Mr. Eglet:
We have been meeting with Senator Roberson to work out issues related to S.B. 161. Most of my practice is product liability as a plaintiff's attorney. The purpose of product liability law in the United States is to protect consumers. Consumers do not always know who the responsible parties are in the stream of commerce without discovery being conducted. The common law, which developed in products liability over the last 100 years, was designed to protect consumers and allow consumers to sue everyone in the stream of commerce from the manufacturers through the distributors to the sellers. These laws were developed for public policy reasons to protect consumers and to place the burdens of taking care of their injuries on the manufacturers, distributors and sellers of these products and to spread the cost across them because they could absorb these costs through pricing and insurance.

Often, neither the consumer nor the lawyer knows whether the seller or distributor is passive before the lawsuit is filed. We do not know whether the seller or distributor has done anything in handling the product, modifying the product or changing the label that could affect the product. One of the major problems we see in S.B. 161 is no tolling of the statute of limitations. Without a tolling section against sellers, distributors or any intermediaries in the chain of commerce, at least until full discovery is completed, injured consumers' rights could be easily extinguished because the statute of limitations could run during discovery and litigation with the manufacturer.

The other problem with not having the sellers, distributors and intermediaries in the lawsuit is that, unless they are parties, we cannot conduct discovery of them to find out if they did anything to the product or changed anything. It hamstrings the consumers. It is a real issue. We have a 2-year statute of limitations on personal injury cases, which includes product liability cases.

A real-life scenario in Nevada involves the hepatitis C outbreak in 2008. It was the largest medically caused hepatitis C outbreak in U.S. history. I was the lead counsel for the plaintiffs' committee on that case and tried three or four of the cases to verdict. Those cases took years to litigate. We had nearly 200 people infected with hepatitis C because of this catastrophe. We initially sued Teva Parenteral Medicines Inc., the manufacturer of the Propofol, and we also sued the distributors, Baxter Healthcare Corporation and McKesson Corporation, in our original complaints. It took quite some time because of the complexity of the cases. Once we started doing discovery, we learned through the deposition of the detailers—the salespeople for Baxter and McKesson who were visiting the doctors' offices, visiting the hospitals, visiting the clinics—that they were the ones pushing these giant vials of Propofol that were so dangerous in outpatient medical clinics. It was not until we did discovery that we learned they were actively involved in this problem, making this product defective and causing this outbreak in Nevada.

In those cases, Baxter and McKesson had the higher proportionate share of the punitive damages because the jury saw they had more culpability and because their people were pushing these vials of Propofol on the doctors and the clinics. If S.B. 161 had been in effect and we were able to sue only the manufacturers until we discovered the role of the detailers, the statute of limitations would have run and neither Baxter nor McKesson would have been defendants in this case and shared in the liability. That would have been not only unfair to the consumers but also to Teva, the manufacturer.

The other problem we have is with the S.B. 161 exception in section 1, subsection 2, paragraph (h) which says that if the court cannot obtain jurisdiction over the manufacturer, then the seller or distributor may be sued. Who decides that and when? Is it the trial court? If the trial court decides it has jurisdiction over the manufacturer, we are prevented from suing the sellers or the distributors.

The cases concerning drywall from China are an example. Poison in the drywall put into houses in Florida caused all kinds of problems. The manufacturers claimed there was no jurisdiction. The trial court decided that there was jurisdiction, but that decision was the subject of appeal after appeal after appeal. It went all the way to the United States Supreme Court. That took many years. Under S.B. 161, the statute of limitations would have run. If one of those appellate courts or the Supreme Court had ruled that there was no jurisdiction over these Chinese companies, the consumers would have been left without a remedy because it would have been too late for them to sue the distributors or the sellers.

The trial lawyers agree that many times an end seller should not be named as a defendant. The example I use is the boxed barbeque that you buy all wrapped up in cellophane that has just been delivered. It was manufactured in another state or another country. What did Home Depot do? Bought it, put it on the shelf and sold it. However, the public policy behind product liability law is to protect consumers and to spread the risk of injury across the stream of commerce to those entities making profits off the product. If we cannot reach the manufacturer, or we initially reach it and there is an appeal and it is ultimately determined there is no jurisdiction, then the consumer is left without a remedy.

While Home Depot may not have done anything to the product, it did buy it from the manufacturer, possibly a Chinese manufacturer that may not be best manufacturer. Home Depot chooses to sell the barbeque in its store and to make a profit. Having Home Depot be held responsible is certainly better than having a consumer, who now has third-degree burns over 60 percent of his or her body because of a defective barbeque, have no remedy. In our minds, that is a better public policy.

Chair Brower:
You mentioned that one of the problems with not having the retailer in the case is that you cannot do discovery on nonparties. You and I both do discovery on nonparties every day.

Mr. Eglet:
We do limited discovery.

Chair Brower:
What are you not able to do?

Mr. Eglet:
I cannot take their deposition.

Chair Brower:
Sure you can.

Mr. Eglet:
Not necessarily. Not if they are out of state; not if they are out of the country. It is very difficult.

Chair Brower:
You and I have both taken depositions on witnesses out of state and out of the country.

Mr. Eglet:
We can take depositions, but that does not mean we can get all of their documents or their internal memos. Not all the time.

Chair Brower:
That is not a problem with S.B. 161. It seems like I have spent the better part of the last two decades doing discovery out of state. The whole point of Doe defendants is to sue some unknown person or entity on the day you file the complaint without knowing exactly who that is, thus preserving the statute of limitations vis-a-vis that unknown person or entity. Why cannot the plaintiff in a products liability case simply say, "Does 1 through 5 are retailers and/or distributors that may have altered the product in question"?

Mr. Eglet:
The way the federal courts and the Nevada Supreme Court are interpreting the law regarding Doe and Roe defendants is that you have to plead with more specificity than that with respect to what you believe they did. That is my opinion and my reading of the law.

Chair Brower:
We will talk more about that, but I do not see that as an impediment to S.B. 161. Third-party defendants are also an option for the manufacturer

defendant if, in the course of discovery, the manufacturer discovers that, low and behold, the gun store owner did actually alter our product. Can the gun store dealer be brought in at that point by way of a third-party complaint?

Mr. Eglet:
It depends on how old the case is, where the statute of limitations is and whether the distributor or seller has been on notice.

Chair Brower:
When I look through the list of exceptions in paragraphs (a) through (i) in section 1, subsection 2 of S.B. 161, I think we are covered. We all sympathize with the potential plaintiff who has no one to sue, but if you look at section 1, subsection 2, paragraphs (a) through (i), collectively, S.B. 161 points back to the retailer if, in fact, there is no one to sue.

Mr. Eglet:
There is a good-faith attempt to do that in S.B. 161, but I think there are some problems with section 1, subsection 2, paragraphs (a) through (i). For example, look at paragraph (e). Assemblywoman Seaman stated that her bill is almost identical. Her bill is different in that paragraph (e) of S.B. 161 says the seller had actual knowledge of the defect. Assembly Bill 185, section 1, subsection 2, paragraph (a) says the seller "[k]new or had reason to know of the defect in the product." In other words, the seller had actual or constructive knowledge. It is extremely difficult to prove actual knowledge.

I will go back to the example of the hepatitis C case. Baxter, McKesson and all their company representatives claimed repeatedly under oath in depositions that they had no knowledge that these large vials were a problem. Yet there were decades of medical literature. There had been outbreaks all over the world with the same scenario as had occurred in Las Vegas. The outbreaks were not as big, but there had been multiple worldwide outbreaks over the last 20 to 30 years ever since all the Propofol manufacturers started making these large vials.

To limit the exception to just actual knowledge is a standard of proof that in most cases is virtually impossible to overcome even when you have mountains of circumstantial evidence that they at least should have known. We have suggested that S.B. 161 language be changed to "knew or should have known" in section 1, subsection 2, paragraph (e).

Another problem is in section 1, subsection 2, paragraph (i) that reads, "The manufacturer has been adjudicated bankrupt and a judgment may not otherwise be recovered from the assets of the bankruptcy estate of the manufacturer." The problem with that language is that we Americans buy many products manufactured in other countries, many from China, and many of these countries have no bankruptcy laws whatsoever. If they do, their bankruptcy laws are completely different. We suggest removal of the bankruptcy language and add "that a judgment may not otherwise be recovered from the assets of the manufacturer." This broadens the language to remove the specific requirement that the manufacturer be adjudicated bankrupt.

Finally, with respect to the exceptions, section 1, subsection 2, paragraph (a) says that the seller exercised substantial control over the aspect of the manufacture, etc., of the product. We will be litigating what "substantial" means. It would be easier and clearer if consumers were able to sue the distributor if there was evidence that it exercised "any control" versus "substantial control." The only other thing is the causation standard is not the causation standard used in Nevada under product liability law. We do not use the proximate cause standard. We use the substantial factor standard.

Senator Ford:
With respect to the Doe issue, the way that operates is that you can substitute in, and that substitution relates back to the filing of the complaint. Therefore, does it toll the statute of limitations for the Doe defendant?

Mr. Eglet:
There are circumstances where it may not. If the attorney has some knowledge of the specifics, it must be pleaded. Years ago it could be pleaded a little generally. Now it must be pleaded more specifically than just a general statement that the Doe defendants may have done something.

Senator Ford:
We could just say that in view of what S.B. 161 precludes, we recognize the problems with Doe defendants, and under these limited circumstances, specificity is not required.

Senator Harris:
How would this impact online retailers? Amazon has hundreds and hundreds of sellers and products coming from all different kinds of places. You may not be able to track how they went from the manufacturer to the seller and to a new seller. Can you give me some insight on that?

Mr. Eglet:
That is a concern of ours. It is difficult with Internet marketing and the way products are sold now through Amazon and Zappos. These retailers are buying products manufactured all over the world. It is difficult to track the distribution of those products. That is why I believe the common law, which allows the party to sue all of those in the stream of commerce, is much better. The practical effect for good lawyers is that when we realize that the seller has no liability, it is voluntarily dismissed, as is the distributor if it has no liability.

Ray Bacon (Nevada Manufacturers Association):
We are the target of this legislation. We have proposed changes to S.B. 161 in a letter (Exhibit K) dated February 24 and in a proposed amendment (Exhibit L). The situation on the East Coast right now is a perfect example of what we are trying to get to, especially in two areas: food and items handled in bulk. Weather conditions mean the power is out, refrigeration is out and things like that. The manufacturer has absolutely no ability to make sure that the product is being properly maintained. We have proposed a few words to beef up S.B. 161, section 1, subsection 2, paragraph (d).

Subsection 3 of section 1 of S.B. 161 puts all the cost of legal claims on the manufacturer. If it is a handling problem, the manufacturer should not be liable for legal fees for a failure of the retailer to handle the product appropriately. The language is not clear.

Chair Brower:
The hearing is adjourned at 2:59 p.m.

RESPECTFULLY SUBMITTED:

Connie Westadt,
Committee Secretary

APPROVED BY:

Senator Greg Brower, Chair

DATE:

EXHIBIT SUMMARY				
Bill	**Exhibit**		**Witness or Agency**	**Description**
	A	1		Agenda
.	B	5		Attendance Roster
S.B. 162	C	2	Farmers Insurance	Redacted Sample Letter
S.B. 162	D	4	Farmers Insurance	Response to Division of Insurance
S.B. 162	E	2	Farmers Insurance	Insurance Division Response to Farmers Insurance
S.B. 162	F	2	Bob Compan	Letter
S.B. 162	G	2	Allstate Insurance	Proposed Amendment
S.B. 162	H	16	Allstate Insurance	Order of Affirmance
S.B. 162	I	1	Property Casualty Insurers	Letter of Support
S.B. 162	J	2	Robert Eglet	Time Limit Demand Article
S.B. 161	K	1	Ray Bacon	Letter
S.B. 161	L	1	Nevada Manufacturers Association	Proposed Amendment