MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Seventy-Eighth Session
March 30, 2015

The Senate Committee on Judiciary was called to order by Chair Greg Brower at 1:34 p.m. on Monday, March 30, 2015, in Room 2134 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to Room 4412 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator 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)

STAFF MEMBERS PRESENT:

Patrick Guinan, Policy Analyst
Nick Anthony, Counsel
Julia Barker, Committee Secretary

OTHERS PRESENT:

Loren Young, President, Las Vegas Defense Lawyers
Martin Kravitz
George Ross, American Tort Reform Association; Institute for Legal Reform; Nevada Manufacturers Association
Tray Abney, The Chamber
Paul Moradkhan, Las Vegas Metro Chamber of Commerce
Lea Tauchen, Retail Association of Nevada

Matt Sharp, Nevada Justice Association
Robert Eglet, Nevada Justice Association
Will Kemp, Nevada Justice Association
Peter C. Neumann
Robert Compan, Farmers Group, Inc.
Stacey Upson
Margo Piscevich, Nevada Rural Hospitals
Dan Musgrove, CSAA Insurance Group; Valley Health System
Josh Griffin, Sierra Medical Services
Jesse Wadhams, American Insurance Association
Mark Sektnan, Property Casualty Insurers Association of America
Tamer B. Botros, Las Vegas Defense Lawyers
Bruce Woodbury, Nevada Justice Association
Mark Wenzel, Nevada Justice Association
Ed Uehling
Nik Walters
Jordan Davis, Las Vegas Metro Chamber of Commerce

Chair Brower:
I open the Senate Committee on Judiciary with the hearing on Senate Bill (S.B.) 296.

SENATE BILL 296: Revises provisions relating to exemplary or punitive damages in certain civil actions. (BDR 3-940)

Senator Michael Roberson (Senatorial District No. 20):
Senate Bill 296 sets new provisions regarding exemplary or punitive damages. This bill provides that no party to a civil action may make a claim for punitive damages until discovery has been conducted. After discovery, such a motion must be made in compliance with the provisions outlined. It lays out circumstances when a manufacturer or seller of a product is not liable for punitive damages. It ensures manufacturers and sellers who follow the law and act in good faith are not held liable for punitive damages when something beyond their control goes wrong.

The use of exemplary damages in private civil litigation as a tool to deter and punish egregious conduct is controversial. A number of states do not allow punitive damages, instead looking to the attorney general (AG) and other enforcement agencies to address conduct warranting punishment. States that

do allow private litigants to pursue punitive damages claim it is misused or misapplied, requiring remediation and posttrial or appellate proceedings.

Nevada allows juries in most civil cases to award punitive damages in exceptional cases involving malicious or despicable conduct. However, in practice, punitive damages claims are not only raised in exceptional cases, they are pleaded in the vast majority of personal injury and product liability cases. When an exceptional remedy is commonly invoked, the system has broken down. This overuse of punitive damages claims damages the integrity of the civil justice system. Simply raising an allegation for punitive damages changes the dynamic of the lawsuit by raising stakes to a higher level. Even if the allegations are without merit, the existence of allegations of egregious conduct in a public filing has the potential to stain a defendant's reputation.

Punitive damages are usually uninsurable. The ongoing financial viability of individuals and small businesses is put into immediate doubt. This often leads to quick settlements on unfavorable terms or pressure on insurers to do the same to ensure an enterprise's continued existence, even when the claims of liability of any sort are defensible. Instead of their recognized purposes, punitive damages are used as threats without regard to the legitimacy of the claims, which is not appropriate. Senate Bill 296 would rein in this abuse of punitive damages claims.

Section 1 precludes the inclusion of punitive damages claims in initial pleadings. Before a claimant can claim punitive damages, he or she must gather evidence and convince a trial court that a prima fascie case can be made. This requires admissible evidence that conduct of the defendant can be demonstrated to the exceptional level of egregiousness necessary under the law. Section 1 puts responsibility on claimants to ensure a real evidentiary basis for imposing upon the defendant costs and burdens of defending a punitive damages claim. This includes the psychological threat of higher damages and the burden of added discovery on topics such as the company's finances. This type of limitation has been successfully employed by other states, including Colorado, Florida and Oregon. This prevents the abusive use of punitive damages claims for their threat value.

The remainder of the bill addresses punitive damages claims asserted in product liability lawsuits. These provisions seek to recognize the reality that many products are required to meet extensive regulations and standards set out by

governmental agencies charged with ensuring fundamental safety. Products such as automobiles, boats, airplanes, medications and medical devices must meet mandates laid out by specialized government regulators. If we take the mission of these government agencies seriously—to establish product safety requirements that protect the public—meeting regulations must count for something. Compliance with regulations or standards created by a government agency demonstrates the product's manufacturer took necessary steps to ensure recognized safety requirements were met.

A jury still might find the product is unreasonably dangerous and the manufacturer should have taken additional steps to ensure safety compliance with safety directives of an expert governmental agency which demonstrates that the manufacturer's conduct could not have been so callous or malicious to be deemed quasi-criminal, warranting punishment. This relates to compensatory damages claims.

This bill contains exceptions preventing product manufacturers from being inappropriately shielded. No protection is allowed if the product is sold after the governmental agency orders it removed or withdrawn from the market, or the manufacturer bribed personnel at the agency to obtain approval or knowingly violated product safety reporting requirements. This bill strikes a middle ground. States including Colorado, Michigan and Texas have established a rebuttable presumption that a product is not defective for purposes of compensatory damages if it complies with applicable regulations. Instead, S.B. 296 focuses only on punitive damages claims, allowing product liability plaintiffs to pursue compensatory damages defects claims. Other states such as Arizona, Tennessee and Utah have taken approaches similar to this bill.

Loren Young (President, Las Vegas Defense Lawyers):
The Las Vegas Defense Lawyers support S.B. 296. This bill does not prevent a person from bringing a punitive damages claim but promotes discovery be conducted first to show a viable claim. From there, it can be amended or parties could stipulate to allow the plaintiff to amend the complaint, bringing in the punitive damages claim. Punitive damages is not a run-of-the-mill claim where you are seeking recovery of damages. It is a specific claim seeking to punish for significant or exemplary actions on behalf of a defendant.

Chair Brower:
You referred to a claim for punitive damages being viable before it can be brought. The language of the bill seems to require that, upon evidence submitted by the plaintiff and all of the parties, the court must find there is a prima fascie case to support a punitive damages claim. Is that your understanding of the bill?

Mr. Young:
Yes. That is under section 1, subsection 4.

Chair Brower:
Would the process be that the court, upon hearing all evidence, would make a prima fascie case that evidence supports a punitive damages claim?

Mr. Young:
Yes, the provisions stipulate that the moving party first conduct discovery to obtain admissible evidence presented to the court pursuant to a motion for leave to amend. The court then makes the determination.

Martin Kravitz:
I represent many of the major hotels and insurance companies in the State. I do defense work on catastrophic injury. I support S.B. 296 with one addition. The burden of proof in section 1, subsection 4, states that upon the presentation of "prima fascie" evidence. The standard in Nevada has always been "clear and convincing" evidence. Having dealt with many district court judges, I worry that they will view this as a weakening of the statutory requirement to present clear and convincing evidence. If there is going to be an amendment, the words "clear and convincing" should be added in place of "prima fascie." That would give the courts the legal responsibility to make a decision instead of punting the decision to a jury, which is what judges like to do, thinking they can rectify the situation at a later time.

Chair Brower:
Clear and convincing evidence is the standard for the jury when deciding whether punitive damages should be awarded. This bill creates a new process where the court is asked first to make a decision as to whether the punitive damages claim should go forward. That is why the prima fascie standard is in there, but we will consider your recommendation.

Senator Ford:
What are we trying to accomplish with this bill? What do the pleadings look like in these instances? In practice, if I get a discovery request as I am representing the defendant and have any way of telling my client he or she does not need to have discovery because it is irrelevant or burdensome, I take that opportunity. Do I understand correctly that the pleading itself cannot ask for punitive damages?

Senator Roberson:
Correct, the initial pleadings cannot.

Senator Ford:
If the pleading cannot allege punitive damages, what do you anticipate the pleadings look like such that a discovery request can bring information about punitive damages? How do you get around the challenges the law will cause when punitive damages are deemed outside the scope of the pleading and inaccessible because there has not been a plea of punitive damages?

Mr. Young:
I would expect it to be similar to other types of litigation. Throughout the case and discovery, the plaintiff will subsequently file a motion for leave to assert a different type of cause of action. Under Rule 26 of the Nevada Rules of Civil Procedure (NRCP), the standard for discovery is anything reasonably calculated to lead to the discovery of admissible evidence. It is fairly broad so the pleadings would look similar to a complaint for negligence. Language can be included that a person believes there should be punitive damages, but it would not include the actual cause of action or claim until the plaintiff has the evidence to prove it. That goes along with the discovery of the financials of the defendant and the company because that is sensitive information. It is prudent to make sure the plaintiff has a viable claim first, before embarking on the secondary discovery for financials.

Senator Ford:
It seems that we already have a remedy for that. We have NRCP Rules 7 and 11 which do not allow a person to make frivolous allegations, requiring some level of belief in regard to punitive damages claims. Are you saying I can allege maliciousness, fraud and anything else in this complaint but cannot ask for punitive damages until discovery has taken place?

Mr. Young:
Not exactly. Fraud has a heightened standard which requires specific instances and facts be pleaded into the complaint as well. I am not sure what those include, but the allowed discovery, whether claimed in the complaint, would still allow a plaintiff to serve interrogatories and conduct depositions in areas that they could develop facts into a punitive case. With that, plaintiffs could move for leave of the court to include that claim under NRCP Rule 15.

Senator Ford:
I am not certain how that would work. The bill requires a judge to make a prima fascie finding of evidence supporting leave to amend a complaint to punitive damages. Who makes the determination as to whether there has been sufficient evidence for a finding of something that would give rise to punitive damages? The judge or the jury?

Mr. Young:
A plaintiff can allege punitive damages without any type of prima fascie evidence, but a judge would determine if there was a finding with clear and convincing evidence to support punitive damages at the conclusion of the trial.

Mr. Kravitz:
I have seen punitive damages claims when the only allegations were negligence. The discovery commissioner will allow discovery on potential malice to see if there was negligence, then the defense lawyer reports a punitive damages claim all the way through the conduct of the case, which raises issues from the standpoint of reserves. We then bring motions for summary judgment before the trial to eliminate punitive damages claims. It becomes the burden of the defendant, rather than the plaintiff, to get rid of the punitive damages claim that has been added.

This bill puts the burden back on the plaintiff to provide evidence to a judge who will make the determination as to whether the punitive damages claim should go to a jury. Most judges are afraid of making that decision and this bill puts the burden on the judges to do so. It will also stop blackmail litigation which sometimes results in settlement conferences and putting money up because the judge ruled the claim would be heard by a jury and did not want to deal with the motion for a partial summary judgment. The bill also prevents the financials of a company from being revealed until a jury makes a finding of punitive damages.

George Ross (American Tort Reform Association; Institute for Legal Reform; Nevada Manufacturers Association):
The American Tort Reform Association, Institute for Legal Reform and Nevada Manufacturers Association all support S.B. 296. The first half of this bill restores balance to the process. If there is a punitive damages claim situation, there has to be evidence to show it. Punitive damages claims should be justified. There can be no justice in a situation where a company follows every rule and regulation with regard to how it makes, sells, processes and distributes a product but still be subject to punitive damages. By the definition of punitive damages, the company was doing something bad and malicious. This bill does not deny a plaintiff from recovering damages because he or she still gets compensatory damages. The bill just protects the company from punitive damages when it has done everything right.

Senator Ford:
What does this bill say about situations such as the Ford Motor Company Pinto situation where the company was given a stamp of approval from a federal agency to produce the car but knew the gas tank was positioned poorly and would blow up when hit? Does this bill prevent punitive damages in that regard because Ford Motors had the approval of the National Highway Traffic Safety Administration?

Chair Brower:
We do not have all the facts of that litigation nor do we have all the facts with respect to the government's approval of the product.

Senator Ford:
Let us assume what I have read is accurate. Those at Ford Motors knew what they were doing, had the approval and were blowing people up.

Chair Brower:
We do not have evidence before us that Ford Motors knew about the problem, and we are not sure what the governmental approval process was.

Mr. Young:
Language in the bill covers various instances. One such instance covers compliance with regulations and standards of a government agency. Another instance includes the ability to pursue punitive damages claims based upon evidence a company knew of a defect.

Mr. Ross:
Section 3, subsection 3, paragraph (b), subparagraph (3) states: "A seller of the product, other than the manufacturer, is not liable for exemplary or punitive damages unless the seller: Had actual knowledge of the defective condition of the product at the time the seller sold the product." That would handle the situation Senator Ford is referring to.

Senator Ford:
The Nevada standard provides more protections for our citizenry than federal standards. The notion of letting the federal standard trump Nevada's standard makes little sense to me. Litigations have shown that the Food and Drug Administration (FDA) was wrong in an approval. Litigation uncovered the reasons something was dangerous and punitive damages were required. How do you respond to that?

Chair Brower:
Nevada does not approve products the same way federal agencies do.

Senator Ford:
You are right, but jurisprudence says we have a standard by which products are named defective. The FDA standard is lower than Nevada's standards.

Mr. Kravitz:
You have raised a number of problems, one of which is preemption. If the federal government has regulated the field to the point where the State should not be doing that, you live with the federal standard invalidating the state standard. People forget that with no punitive damages, the law provides massive compensation for somebody who is seriously injured. Take a look at the cigarette manufacturer cases. For years, manufacturers knew the nicotine delivery system would kill people and cause cancer, but they hid that information. When it came out, it was the classic kind of products liability case entitled to punitive damages. The purpose of punitive damages is to punish a manufacturer or party that deliberately and carelessly proceeds with a product for profit, knowing the product will hurt people. Ford Motors did that. A scenario for punitive damages would be when a company intentionally knew of a defect with a product and did nothing about it.

Senator Ford:
Plaintiffs already have that burden of proof. My question is about the Nevada standard relative to something like a FDA standard. I represented companies that have been sued and preemption does not always work. The argument is still that the FDA standard is lower than the Nevada standard and FDA standards cannot be relied upon to govern the amount of duty owed to someone. As a State, we have a right to set that standard because it is how we want to protect our citizenry. This bill would limit our ability to do so when it comes to protecting our citizenry, irrespective of punitive damages. What is your reaction to that and why should we defer to a federal standard?

Mr. Kravitz:
The answer may be whether a state or federal standard governs. If you have adopted the more stringent Nevada standard, that would fit into the statute. Perhaps that is what you need to do to make this issue go away. A plaintiff can still get punitive damages if he or she demonstrates a defendant's conscious disregard in a deliberate intent to injure, even with compliance. A company can still be held liable for punitive and compensatory damages, which could be substantial depending on the size of the class.

Tray Abney (The Chamber):
I agree with what Mr. Ross said. The Chamber supports S.B. 296.

Paul Moradkhan (Las Vegas Metro Chamber of Commerce):
The Las Vegas Metro Chamber of Commerce supports S.B. 296. The U.S. Chamber of Commerce Institute for Legal Reform ranks Nevada thirty-seventh in terms of legal environment. The legal environment does impact business decisions which impact job growth and creation.

Lea Tauchen (Retail Association of Nevada):
The Retail Association of Nevada supports S.B. 296.

Matt Sharp (Nevada Justice Association):
The Nevada Justice Association opposes S.B. 296. In order to get punitive damages, a plaintiff must prove by clear and convincing evidence that there has been fraud, malice or oppression requiring a conscious disregard for the safety of others. We have provided those definitions for the record (Exhibit C). Say an automobile manufacturer makes a car in conscious disregard for the safety of others, knowing the design is defective and people will die, but continues to

market that product. From what I gather, we are all in agreement that that type of conduct should be subject to punitive damages.

The principal problem with this bill is if a government approves a product, even if the manufacturer knows that product is defective, the manufacturer is immune from punitive damages. Section 3, subsection 3, paragraph (a), subparagraph (1) states:

> The product was designed, manufactured, packaged, labeled, sold or represented in relevant and material respects according to the terms of an approval, conditional approval, clearance, license or similar determination of a governmental agency.

That is the Ford Pinto case as well as cases involving many dangerous drugs. These products were packaged in a manner that was approved by the government. The question of governmental approval has been debated in courts and juries repeatedly with the decision that the mere fact of governmental compliance is not a defense against punitive damages.

The Nevada Supreme Court addressed this in *Wyeth v. Rowatt*, 126 Nev. Adv. Op. 44, 2440 P.3d 765 (2010), unanimously deciding that FDA approval does not protect a manufacturer from punitive damages. The court stated, "We reject Wyath's contention that compliance with FDA standards negates its liability for punitive damages, as Wyeth should not be able to benefit from its malicious and deceptive practices." It was demonstrated to a jury that despite FDA approval, Wyeth misled the public as well as the FDA when it knowingly manufactured a dangerous drug. The policy of any state should not allow people who act with malice to have a free pass. That is what this bill does.

The purpose of punitive damages is to punish conduct, not penalize or enforce the laws. That is what the criminal justice system is for. When conduct rises to a level of oppression, regardless of government approval, that conduct should be punished and deterred. It is the duty of the manufacturer, not the governmental agency, to comply with the law. The FDA does not claim approval as a guaranteed safety. It is the pharmaceutical company's responsibility to make sure the product is safe. The company has a duty to monitor that product and when it knows the product is unsafe, it needs to take action. Under S.B. 296, if a company intentionally mislabels a drug, it would be protected from punitive damages, which is not appropriate public policy.

Concerns about failures within the regulatory system are not unique to trial lawyers. We have provided an article by the *Journal of the American Medical Association* (Exhibit D). The authors conducted a study of FDA approval and reported the FDA has authorized products where there were significant departures from good clinical practices, including falsifying evidence. The FDA concealed that information from peer-reviewed publications. The idea that the FDA protects the safety of the public is something that we and the medical community do not agree with.

Senator Ford:
What happens when a manufacturer knew of a defect, like the Ford Pinto case? I was directed to section 3, subsection 3, paragraph (b), subparagraph (3) which states: "A seller of a the product, other than the manufacturer, is not liable for exemplary or punitive damages unless the seller: Had actual knowledge of the defective condition of the product at the time the seller sold the product." When I first read that, I thought Ford Motors would be liable, but now I see the dealership would be liable, not the auto company. Am I misreading that? It also says under no circumstances will a manufacturer that knew about a defect be liable for punitive damages.

Robert Eglet (Nevada Justice Association):
The section you are talking about is a mirror of the bill on seller product liability, S.B. 161, the innocent seller bill. The language in that section provides immunity for the seller and manufacturer. You are correct that it says the seller can be held responsible if a product has a defect.

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

Senator Ford:
Does this bill have any sections holding manufacturers liable for punitive damages?

Senator Roberson:
That issue needs to be addressed because a manufacturer that knows of the defect should not be off the hook for punitive damages.

Chair Brower:
It begs the question of how a manufacturer gets a product approved by a government agency when the manufacturer knows about a defect. Some would say there are ways.

Mr. Sharp:
We would be happy to work with Senator Roberson to craft language where a manufacturer acting with malice, fraud or oppression should be held responsible for punitive damages. I was surprised by the idea that lawyers are pleading cases with punitive damages when there should not be any. That does not happen in my practice. What section 1, subsections 1 and 2 want to accomplish should be consistent under Rule 56 of the NRCP, the rule for summary judgment. The process is that you plead a complaint with punitive damages, which requires having a good faith basis under NRCP Rule 11. Discovery is then conducted; the defendant moves for summary judgment; and the judge asks the plaintiff if he or she has evidence to establish a prima fascie showing, meaning, can the plaintiff prove to a jury with clear and convincing evidence that the defendant acted with fraud, malice or oppression. The judge evaluates the evidence, deciding if the evidence is clear and convincing, and then the jury decides whether the defendant acted with fraud, malice or oppression.

If S.B. 296 intends to accomplish the same idea as NRCP Rule 56 but through an amended complaint, I am not sure that changes anything. If it intends to switch the burden of proof, I do not understand that argument, but it appears to require two trials, which does not make sense. If the plaintiff presents evidence of a prima fascie showing of fraud to a judge, a jury or judge should decide whether a punitive damages claim prevails.

Chair Brower:
The reality is that many complaints are filed, not only with prayers including a request for punitive damages but punitive damages pleaded as a separate cause of action despite no evidence to support such a claim. Some might say that many answers are filed that include affirmative offenses based on no evidence.

Mr. Sharp:
The Nevada Justice Association has fought against frivolous lawsuits, supporting the loser paying in those lawsuits. None of us want anybody to frivolously allege punitive damages. If that is what the bill aims at and we can find a solution to make that happen, we are willing to work at that. The concern

is what happens when there is no complaint with punitive damages alleged? Does one limit discovery or shift the burden of NRCP Rule 56? Those issues need to be ironed out because we do not want to litigate that down the road. Another concern is: if the idea is that you cannot plead punitive damages until court approval, I am not sure you solve the problem because an unethical lawyer could claim the need for discovery in order to prove fraud, malice or oppression.

Chair Brower:
Routine discovery, absent discovery of a company's financial status, would reveal the prima facie evidence justifying a punitive damages prayer. So it would all come out in the wash.

Mr. Sharp:
I would hope so. In insurance bad faith cases, we have had instances when companies have corporate practices discouraging people to deny claims. Oftentimes an objection to that discovery is it does not have relevance to the underlying bad faith case and is only relevant to fraud, malice or oppression. While I tend to disagree, those issues need to be flushed out so we have a clean rule. Then the goal is accomplished and we do not have frivolous punitive damages claims. We also have the ability to hold responsible those corporations that conduct themselves in a fraudulent manner.

Will Kemp (Nevada Justice Association):
Most of my testimony comes from remarks by District Judge Richard Scotti, Department 2, Eighth Judicial District, to the Nevada Supreme Court during his investiture ceremony. He talked about the origins of punitive damages which put the policy consideration in contrast. In 1763, an English case, *Wilkes v. Wood*, involved a member of parliament who slandered the king. The king ordered his men to break into Mr. Wilkes's house and seize all his materials. Wilkes sued and a jury awarded him 4,000 pounds, which comes out to $1 million by today's standards. The king asked the judge to reduce that, saying the verdict was excessive. The judge refused and the ruling was upheld on appeal. That case established the principle that a civil jury can award damages to punish bad conduct.

After the U.S. Constitution was drafted, the founders wanted to take the same approach. They enacted the Seventh Amendment in 1791 that allowed civil juries to punish bad conduct. When you put restrictions on punitive damages,

you are impairing the rights of citizens to punish wrongful conduct. Do we want citizens to act as restraint on wrongful conduct through the jury system along with government regulators, or do we want to entrust the health and safety of the public exclusively to the bureaucrats? The Founding Fathers answered this question when they adopted the Seventh Amendment. Any changes this Legislature makes to the punitive damages statute should be done carefully because you could potentially undercut the rights of the citizens to punish wrongful conduct, a right that has existed since 1791.

Mr. Eglet:
In September 2006, the Institute of Medicine of the National Academies Committee on the Assessment of the U.S. Drug Safety System released a report on drug safety. The report stated, "The FDA can't ensure the safety of new prescription drugs because of inadequate funds, cultural and structural problems, and unclear and insufficient regulatory authorities," Exhibit D. The funding has exponentially decreased for the FDA since that time, making things worse.

The authors, Exhibit D, say the U.S. Supreme Court weighed in on this issue in *Wyeth v. Levine* regarding insufficient labeling of the drug, Phenergan. This drug had FDA approval but was later found to be corrosive and caused irreversible gangrene when entering a person's arteries. The Court rejected the attempt to deprive injured consumers the right to bring actions against—including punitive damages—drug manufacturers, even if a drug had FDA approval. The Court's reasoning was that the FDA traditionally regarded state law as a complimentary form of drug regulation and:

> has limited resources to monitor the 11,000 drugs on the market. [Further], [s]tate tort suits uncover unknown drug hazards and provide incentives for drug manufacturers to disclose safety risks promptly. They also serve a distinct compensatory function that may motivate injured persons to come forward with information.

The authors state the U.S. Supreme Court realizes that although the FDA approves a drug or its labeling, it does not mean the drug is safe or that the labeling is adequate to reflect a drug's potential harms. This is no different in other government regulations sections. The federal government or state regulatory bodies do not have the resources to take care of this problem. The FDA does not perform the research or studies, relying completely on the

pharmaceutical industry to perform those studies and provide accurate information to the FDA before drug approval. From past experience, we know dozens of drugs have received FDA approval and been on the market before proven dangerous. There is evidence that drug companies knew about dangers and did not turn over studies showing them.

Under S.B. 296, receiving punitive damages against a drug or defective product with government approval would be virtually impossible despite the fact there may be mountains of evidence supporting a claim for punitive damages.

Chair Brower:
Senator Roberson has made it clear he is willing to work on this issue.

Senator Roberson:
If you look at section 3, subsection 4, paragraph (c), a carveout which attempts to address this issue partially, if not fully, states:

> The provisions of subsection 3 do not apply in a product liability action if the plaintiff establishes that, at any time before the activity or event that allegedly caused the harm, any of the following occurred: After the product was sold, a governmental agency found that the manufacturer or seller knowingly violated applicable laws or regulations by failing to report risks of harm to that governmental agency and the information which was not reported was material and relevant to the harm that the plaintiff allegedly suffered.

I am open to working on this language, but at least this is a start. I am willing to work with opponents on this bill to make it better.

Peter C. Neumann:
If S.B. 296 were passed as drafted, section 3, subsection 4 would immunize manufacturers from being held liable for punitive damages. In 1997, an accident occurred 2 miles from here. A family was coming from Wal-Mart in their 1978 General Motors pickup truck with saddlebag gas tanks which held about 70 gallons of fuel. If the truck was hit on the side, the truck would blow up. A young man collided with this pickup truck, the truck burst into flames, and both vehicles burned. I represented the owners of the pickup truck, Mr. and Mrs. Douglas, who burned to death. The young man died from his burns days

later. This pickup truck was approved by National Highway Transportation Safety Administration.

I have submitted *The Wall Street Journal* article for the record (Exhibit E) from February 19, 1988, entitled "GM Analysis of Fiery Car Deaths May Haunt Firm Over Fatalities." It was a cost-benefit memo by a General Motors senior engineer that the company attempted to conceal. The article stated, "The memo is controversial because it puts a dollar value on human life—$200,000—in figuring the annual cost to GM of fuel-fed fire fatalities at $2.40 a car on the road. It figures it would be worth $2.20 a car to prevent such fires." It was shown General Motors could have prevented all of these injuries at $2.20 a vehicle but chose to produce the vehicle because the company decided it would be cheaper to defend the cases than to spend $2.20 a vehicle on over 1.5 million vehicles on the road.

That was a punitive damages case. I ask the Committee to consider deleting all of section 3, subsection 4 because it states as long as a product is approved by a governmental authority, the company will not be held responsible for punitive damages. There are circumstances like the Ford Motors cases and the Takata airbags in several manufacturers' cars blowing up. Those were approved by the federal government. Under S.B. 296, as long as manufacturers get their products approved by either federal or state safety committees, they are immune from punitive damages.

The policy question for this Legislature is: Are punitive damages viable? Punitive damages are intended to set an example to others not to engage in similar conduct as well as punish the perpetrator. Legislators have to decide whether they want punitive damages to do those things. If so, do not immunize the manufacturer.

Chair Brower:
I close the hearing on S.B. 296 and open the hearing on S.B. 291.

SENATE BILL 291: Provides for the determination of damage awards in certain civil actions. (BDR 3-951)

Senator Michael Roberson (Senatorial District No. 20):
Senate Bill 291 is a simple tort reform bill dealing with damage awards. It revises Nevada's application of the collateral-source rule by requiring a court to

reduce the amount of damages initially awarded by a jury or other finder of fact by the amount the plaintiff will be paid by an insurer or other entity. This will prohibit double recoveries. This bill does not take away any benefit to which an injured party is rightfully entitled, but it does ensure damage awards will be based in fact and reflect actual costs incurred or good faith estimates of costs incurred in the future. Should a plaintiff receive an award including amounts paid by another party to a health care provider or medical facility, that party can recover the amount from the plaintiff or be subrogated to the plaintiff's rights in regard to those payments.

We have proposed amendments to correct two problematic sections in the bill (Exhibit F). Sections 1 and 2 address concerns raised by medical lien companies. My goal is for clarity and fairness in the law and courtroom. Insofar as it is possible, we should ensure that no party in a lawsuit is allowed to hide or avoid disclosing facts that are clearly relevant and should be considered. The court should be able to make a decision based on a report that is as complete as possible. As amended, this bill takes us in that direction.

Robert Compan (Farmers Group, Inc.):
The premise of this legislation is to protect Nevada consumers from fictitious medical expenses and economic damages that adversely affect the general welfare of Nevada consumers which in turn adversely affect insurance policies. The problem with how collateral-source rules are laid out allows plaintiffs to be compensated twice for the same injury. We call this "phantom damages." The personal injury bar will argue that under the collateral-source rules, people should not be penalized because they have insurance.

We are not asking for true collateral-source reform. If I am in an accident and incur $500,000 worth of medical damages, my insurance, through a contract negotiation with a medical provider, will negotiate that to where insurance will pay $100,000, leaving $400,000 uncovered by insurance. In true collateral-source reform, most people ask that the jury only hears of the actual damages, $100,000 in this case. We are not doing that with this bill. We are allowing the jury to hear the entire amount of damages, $500,000. After jury members hear the testimony, they will award based on the actual damages. The jury will award special damages based upon the $500,000 damages estimate. After a settlement has been reached, this bill provides that the court of jurisdiction will reduce the amount of phantom damages to avoid double payment.

My provided testimony (Exhibit G) lists 27 states that have already worked on collateral-source reforms. Each state has a differentiation; some talk about true collateral-source reform, while others talk about modified collateral-source reform. The American Tort Reform Association realizes a need for tort reform and has taken steps to effect reform. We have been working with those with concerns about uninsured people to make it so that a person who does not have disposable insurance will not be forced to abide by this. Medical lien companies will not be subject under the collateral-source rule.

Chair Brower:
Is it fair to say we are no longer operating with the original language and should approach discussion of the bill with the proposed amendment, Exhibit F?

Stacey Upson:
Yes. The collateral-source rule stems from common law. It was adopted in the U.S. in the 1850s to ensure that people who caused an injury were held responsible for the damages. Back then, there was no prevalent health, personal liability or workers' compensation insurance. Insurance for workers' compensation, personal injury liability, automobile and health caused the change.

From that framework, you can look at what an injured person is lawfully entitled to. The law wants to make a person whole. In some cases, that works if the person does not have ongoing pain complaints, and sometimes that does not work. The best system we have is compensation to make someone whole. A Nevada Supreme Court case in 2009 indicated a person cannot have a double recovery though the injured party is entitled to incurred damages, compensatory pain and suffering, and lost wages. Without this bill, there is a punitive connotation with what happens to phantom damages in addition to the fact that it creates a double recovery for plaintiffs.

If medical bills are $500,000 but insurance only pays $100,000, the jury will hear the medical bills were $500,000. If a jury awards $500,000, it assumes the $500,000 must be paid back because it is instructed not to consider whether insurance is in play. After the trial, when jurors hear two-thirds of the damages awarded are not paid back because insurance already covered that cost, they ask who keeps that money. Under the collateral-source rule, the plaintiff does. This upsets some of the jurors. The purpose of this bill is to let the full damage amount be blackboarded.

Chair Brower:
When you say blackboard, do you mean it allows the plaintiff's attorney to show the jury the full costs incurred as a result of the defendant's alleged negligence?

Ms. Upson:
Yes. The purpose of that is to treat people fairly. If someone does not have insurance, everyone gets to blackboard the same amount. Should plaintiffs recover damages insurance has not paid? That is a double recovery and a punitive effect in caselaw which has a far-reaching effect on society as a whole. About 2.8 million people have brought suits in Nevada. Clark County district court judges carry about 2,000 cases each, not all of which are civil. A very small segment of the population brings lawsuits for pain and suffering injuries, yet the law has far-reaching ramifications in Nevada as a whole because it increases insurance costs. Insurance companies are paying hundreds of millions of dollars over the long haul for damages that do not have to be compensated.

The support of S.B. 291 stems from the fact that a plaintiff can blackboard the amount of damages in trial and still get his or her pain and suffering damages awarded. If this bill is not passed, there will be a windfall. Plaintiff counsel typically works on a contingency fee, meaning the counsel, along with the client, will get extra money. That is not fair and punishes society as a whole because it increases insurance costs across the board. This bill will enable any plaintiff to put forth his or her medical bills, not allowing for double recovery. That serves society as a whole.

Chair Brower:
How would this bill change the process? Let us start with the blackboarding. The plaintiff's lawyer puts up the entire amount of medical bills, lost income and so on; the jury reaches a decision, making an award based upon the expenses, and pain and suffering; then what happens?

Ms. Upson:
Section 1, subsection 1, paragraph (a) of the proposed amended bill, Exhibit F, notes the entire amount can be blackboarded. If a jury awards the medical expenses as well as pain and suffering, under paragraph (b), the fact-finder returns a verdict based upon all of the claimed medical bills. Under paragraph (c), the court or appropriate judicial officer will make a deduction for damages that do not have to be paid back.

Consider the example of $500,000 in medical expenses, $100,000 of which insurance paid: $100,000 would be awarded to pay the insurance, and the defendant would not owe $400,000. The rest of the verdict would stand. If $1 million was awarded for pain and suffering, the plaintiff would be awarded $1 million along with the $100,000 to pay the medical bills. This makes the plaintiff whole, and he or she is not obtaining a double recovery.

Chair Brower:
Is the pain and suffering amount the jury awards based on the total amount of medical bills, not the reduced amount the judge comes up with after the jury verdict?

Ms. Upson:
Yes. The jury would hear the total amount of the claim-billed charges. The jury would never know the actual amount insurance paid. That would be a posttrial verdict mathematically calculated by the judge.

Chair Brower:
Have some states reformed the collateral-source rule to allow the jury to hear everything and make an award based on that?

Ms. Upson:
Yes, and that is considered true collateral-source reform. This Legislature carved out an exception to the collateral-source rule over 10 years ago. The Nevada Supreme Court indicated a jury can hear the workers' compensation actually paid. In a case such as that, the jury sees the total bill so there is no confusion. That is not what we are doing. We are seeking a level playing field so it does not matter whether an injured party has insurance—he or she is still able to blackboard the full charges, and the compensation can be even.

Chair Brower:
I know states that adopted true collateral-source reform are criticized because of the argument that juries can be unfairly prejudiced by learning of evidence that may not be relevant. Does this bill go that far?

Ms. Upson:
It does not. If it did, it would be treating individual plaintiffs differently because if someone did not have insurance, the person could blackboard the full $500,000; but someone who did have insurance could blackboard $100,000,

which would lead to discrepancies in the verdict. We are looking for a level playing field where there is not a double recovery that has far-reaching repercussions to Nevadans.

Senator Ford:
This is the first time I have seen the proposed amendment, Exhibit F.

Chair Brower:
Each new version becomes more simple.

Senator Ford:
In the example you gave of a person with a $500,000 medical bill and insurance paid $100,000, are you using collateral-source reform to stop a $400,000 windfall to the plaintiff?

Ms. Upson:
Yes. The juries are awarding that amount because of the presumption that the money is for medical costs.

Senator Ford:
I understand the windfall argument. If you go back to common law, this was initially presented as a windfall to be awarded to either a negligent defendant or an innocent plaintiff. It was determined that the windfall should go to the plaintiff. Is that right?

Ms. Upson:
I would slightly disagree. Under the common-law principle, it was designed to deter future conduct because there was no insurance. What we have in today's society is not to deter conduct, it is to compensate someone for another's negligence, not an intentional act.

Senator Ford:
I have heard a primary purpose of the collateral-source doctrine is if either a negligent defendant or an innocent plaintiff should get a windfall, it should be the plaintiff. How is this not to the benefit of a negligent defendant? I understand you are saying society benefits, but between a negligent and innocent party, why should the negligent party have the benefit of insurance paying a portion of the medical expenses?

Ms. Upson:
I disagree slightly as to inuring to the benefit of the defendant. The law is set up in a way that if someone injures another party, the law strives to make that person whole. The law is not designed to give someone a windfall.

Senator Ford:
I agree on the windfall notion, but every once in a while, there will be a windfall. We have seen that over the course of time. If anybody gets the benefit of that windfall, it should be the innocent plaintiff. How does S.B. 291 not ultimately inure to the benefit of the negligent defendant?

Ms. Upson:
If you are looking at it through the narrow interpretation of inuring to the benefit, I would agree with you; but the benefit is not being given to the defendant to walk away from responsibility. The defendant is still taking responsibility through a settlement or jury verdict to pay for incurred damages, pain and suffering, and compensatory damages. Nothing in this bill is negating the person who caused an injury or the defendant's responsibility. The only thing this seeks to do is not have a double recovery or windfall. In your hypothetical, there would be a benefit to the defendant; but there is not a benefit in reality because the defendant is paying the full damages.

If this collateral-source rule stays in effect, consider the example of $40,000 in billed medical charges, of which insurance only pays $10,000. For whatever reason, the insurance company offers a $100,000 policy to settle and the plaintiff elects not to take it. The case goes to trial and the jury awards $150,000. That insured person is on the hook for $50,000 he or she may not have the ability to pay. Under insurance, if the insured had backed off the amount, that would have been his or her contractual right; there would have been enough insurance. Under that context, it is a clear punitive damage. That phantom damage going to an individual plaintiff has repercussions for every resident in Nevada, depending on how an accident unfolds.

Mr. Compan:
I remind people that insurance in Nevada is expensive and part of that is because of tort law. The insurance business is competitive by nature. Paying what we owe and nothing more positively affects Nevada consumers.

Margo Piscevich (Nevada Rural Hospitals):
We are overlooking medical bills themselves. Under *Nevada Revised Statute* (NRS) 42.021, the defendant does have some opportunity to put into evidence the amounts actually paid versus the amounts charged. In a situation with a $300,000 medical bill, Medicare paid $35,000, and there is the issue as to who should get that windfall. The amounts charged are not a collateral source. The plaintiff is not responsible for paying those amounts, nor can the doctor or hospital sue the plaintiff to get those amounts. When the collateral-source rule was developed in 1854, we did not have Medicare, Medicaid, collective bargaining agreements or insurance contracts. In the medical malpractice arena under some jurisdictions, we are allowed ... . Half of judges say there is a collateral-source rule and you cannot introduce the amounts actually paid. We are looking at the amounts charged versus the amounts paid. Nobody is responsible for the number. The plaintiff does not have to pay it, and if the plaintiff gets that windfall, he or she never pays the hospital the sum charged and the doctor and hospital cannot sue for that amount because only a certain number of dollars appears under the contract. I would like to see this bill take in the medical malpractice issue of amounts charged versus amounts paid, giving the defense the opportunity, as it does in some cases, to choose to introduce the amounts paid in NRS 42.021, subsection 2.

Dan Musgrove (CSAA Insurance Group; Valley Health System):
The CSAA Insurance Group and Valley Health System support S.B. 291.

Mr. Abney:
The Chamber supports S.B. 291.

Mr. Moradkhan:
The Las Vegas Metro Chamber of Commerce supports S.B. 291.

Josh Griffin (Sierra Medical Services):
Sierra Medical Services supports S.B. 291.

Jesse Wadhams (American Insurance Association):
The American Insurance Association, representing over 300 insurers, supports S.B. 291.

Mark Sektnan (Property Casualty Insurers Association of America):
Property Casualty Insurers Association of America has submitted testimony supporting S.B. 291 (Exhibit H).

Mr. Kravitz:
I agree with Ms. Upson's comments. One of the rationales for the collateral-source rule was the idea that the defendant should not suffer a benefit. However, nobody looked at another major concept in the law, mitigation of damage. The plaintiffs have the obligation to reduce their damage, not increase it. What the collateral-source rule did in operation was create a massive windfall. I have had cases with $1 million of retail value of damages and the plaintiff's insurance only had to pay $200,000. But the plaintiff was awarded $1 million, resulting in a $800,000 windfall. Nobody benefits from that kind of scenario.

An opinion from the California Supreme Court, *Howell v. Hamilton Meats & Provisions, Inc.,* in 2011, started this revolution. This bill is modeled after that case and by how it operates. The jury will hear the retail value and the judge reduces it. We also have the Affordable Care Act, which requires every American to buy health insurance and every juror knows that. Why do we live with the fiction that a plaintiff should be awarded a windfall?

A number of states have decided that, rather than a judge awarding lifetime care of future medical benefits, experts in jury trials testify about the cost of future medical care for the plaintiff as a result of an accident. The jury then has to award future medical damages. What states have done is declare the true cost of future care as the cost of buying medical insurance for the rest of the plaintiff's life. This bill does it differently. The states looking at this issue say the life care concept needs to go away and be replaced with the realistic number of the insurance cost for the rest of the plaintiff's life. I support S.B. 291.

Chair Brower:
Your last point assumes the injured person can buy insurance.

Tamer B. Botros (Las Vegas Defense Lawyers):
I support S.B. 291 because it shows common sense and is long overdue. It addresses a fundamental issue of fairness, the issue of billed versus amount paid. This bill will resolve cases with less time needed for litigation because the

other side will be aware that after a jury returns with a verdict, the amounts billed are to be reduced with respect to the amount paid.

Mr. Young:
Having not seen the proposed amendment, Exhibit F, I reserve further comment until I see it and understand how it changes damages a plaintiff is to recover versus damages incurred. I support the basic concept of the bill.

Bruce Woodbury (Nevada Justice Association):
The Nevada Justice Association opposes S.B. 291. My law firm handles a wide variety of legal issues, representing individuals, businesses and nonprofit organizations. Virtually all persons who have suffered a serious injury can get redress by hiring an attorney on a percentage basis because no one in that situation is able to successfully negotiate with liability insurance carriers. Therefore, anything recovered will be reduced by one-third including court costs. While it is not my only area of practice, I have represented a large number of plaintiffs for personal injury and wrongful death cases. The collateral-source rule allows the recovery of the full reasonable value of medical care received by injured parties hurt by the negligence or wrongful acts of another. In most situations, the law also grants subrogation rights to health insurance companies and workers' compensation insurers to recover payments from the injured person's settlement. Nevada adopted the collateral-source rule based on the simple and well-accepted principles that the injured party is entitled to recover the full and reasonable value of damages suffered, a value set by the medical profession.

Another principle is that the victim, not the liability insurance company for the person whose negligence caused the injury, should benefit from the injured party's health insurance or negotiated discounts. I have not seen the proposed amendment, Exhibit F. I understand this bill allows the recovery of amounts actually paid to the doctor or hospital on behalf of an injured person covered by health insurance, and a full unreduced recovery of amounts incurred for someone who has not had his or her bills paid. Despite federal mandates, a significant number of people, including many employed, have no health insurance and many others have minimal coverage or huge deductibles and copays. Hospitals and doctors have unpaid bills in most injury cases. The collateral-source rule properly allows injured persons to keep the benefits of their insurance coverage, including any negotiated, lowered or reimbursed rates. This bill shifts those benefits away from the one who purchased them, giving

them to the insurance company of the negligent party who caused the injury, potentially allowing minimally or noninsured plaintiffs to recover more for the same injury than a fully insured victim. I have a hard time seeing how that is fair or right for the citizens of Nevada. This should not be about partisan issues or debates about legal technicalities but basic justice.

Mark Wenzel (Nevada Justice Association):
The Nevada Justice Association opposes S.B. 291. Nevada courts have steadfastly and unequivocally precluded the admission of collateral-sources for the payment of an injured party's damages. Both the Nevada Supreme Court and federal district courts have deemed the admission of collateral sources as excessively prejudicial to an injured party's right to a fair trial. In *Proctor v. Castelletti*, 112 Nev. 88, 911 P.2d 853 (1996), the Nevada Supreme Court adopted a per se abolition of any collateral sources being introduced. Three federal court judges have upheld the collateral-source rule in its entirety. The Nevada collateral-source rule does not allow evidence of someone else paying the injured party's medical expenses.

Chair Brower:
Do you mean the defendant is not allowed to introduce that into evidence, letting the jury hear about collateral-source payments?

Mr. Wenzel:
Not entirely. The courts in those cases make it clear you cannot bring in a collateral source for any purpose. The original draft of S.B. 291 allowed this to go to a jury, but it looks like the bill sponsors have changed course in the proposed amendment Exhibit F. Now collateral sources would be looked at by a court in a posttrial evidentiary hearing.

Chair Brower:
The original bill did not allow the jury to hear any collateral source. I want to ensure we focus on the bill with the proposed amendment, Exhibit F. This new bill would not allow a jury to hear evidence of any collateral-source payment.

Mr. Wenzel:
I agree, but it will still allow a judge to hear it.

Chair Brower:
It would require the judge to make an adjustment based thereon.

Mr. Wenzel:
Judge Robert C. Jones, a U.S. district court judge, said after the *Howell v. Hamilton Meats* case:

> The collateral source rule makes the tortfeasor liable for the full extent of the damages caused, no matter how much the victim actually pays. That a medical provider ultimately accepts less than a billed amount, whether from an insurance company or from the victim directly, is not relevant to whether the tortfeasor is liable for the full value of the harm he has caused. … If a victim can remedy his harm at a "bargain" rate, the "windfall" represented by the difference belongs to the victim, not to the tortfeasor.

This case is why defense attorneys continue bringing motions to reduce damages for an injured party down to the amount paid, as opposed to the reasonable value of charges billed. Each time this motion is brought before a jury in Nevada, insurance companies have lost.

Chair Brower:
Is that because no statute says otherwise?

Mr. Wenzel:
Yes.

Chair Brower:
That is the policy dilemma confronting the Committee.

Mr. Wenzel:
The policy dilemma facing the Committee is who should benefit from the difference. The insurance industry believes the tortfeasor who causes injuries should benefit because insurance would pay less. The Association's position is that the injured person, through no fault of his or her own, is the appropriate recipient of any windfall.

Judge Jones said the collateral-source rule, is an equitable rule, and there is no principled reason for deviating from it. That makes sense when every judge in Nevada agrees the collateral-source rule is in place and precludes the admission of collateral-source damages.

Several years ago, I represented a 3-year-old boy who was injured by his caregiver. While his mother was at work, the caregiver dipped the boy's hands in scalding hot water, causing permanent damage. This is called a dipping injury. He had a number of different skin graft procedures. His mother had health insurance. Under S.B. 291, the person who injured the boy could go in front of a judge after the verdict was rendered, saying she should not have to pay for the skin grafts because his mother has insurance. She could claim she should only pay what insurance paid, not for the boy's future surgeries after he fully develops. The bills would be reduced to the amount actually paid. That is the effect of the collateral-source rule.

Chair Brower:
Is not the fact pattern you described a case ripe for punitive damages?

Mr. Wenzel:
Yes.

Chair Brower:
That is intentional, egregious conduct. Any lawyer worth his or her salt would successfully take that to a jury and ask for punitive damages. I am not sure that is the typical case we are talking about.

Mr. Wenzel:
If you do away with the collateral-source rule, nothing in this bill says if it is a punitive case or intentional tort …

Chair Brower:
I understand that, but you are trying to elicit the sympathy of the Committee by offering a sympathetic, unusual case that is not an accident case, because we are talking about intentional, egregious conduct for which any jury would award punitive damages.

Mr. Wenzel:
Potentially. The caregiver claimed it was an accident and the boy put his hands in the bathtub when she was not looking, which was proven otherwise, criminally and civilly.

Chair Brower:
A more typical accident case would be helpful to the Committee.

Mr. Wenzel:
A woman got in her car having forgotten to take her medication. She entered the highway going the wrong direction and hit a family, killing the father and horrifically injuring the mother and the two children. That is a garden-variety negligence case. This woman did not mean to hurt these people. The father, the sole breadwinner of the family, was killed. In that scenario, under S.B. 291, the negligent party could take advantage of the fact that the father had a job and was paying for health insurance which included a disability policy. All of those insurance payments would inure to the negligent woman.

Chair Brower:
The injured party's estate would not have out-of-pocket expenses because between insurance and the jury's award, the family would be made whole to the extent the law can provide. Is it not the case that the plaintiffs, as a result of litigation, would be made whole by the law?

Mr. Wenzel:
I disagree that those people were made whole.

Chair Brower;
How so?

Mr. Wenzel:
The father paid for the premiums. Instead of extra money going into his paycheck, he used the money to pay for health insurance. After his death, the mother needed to procure different health insurance at a higher rate than the father had. The father had a group health insurance plan through his employer to provide health insurance for his family.

Chair Brower:
Are you saying that the family incurred an out-of-pocket cost that was not compensated as a result of the case because of additional future insurance costs?

Mr. Wenzel:
That is part of it. There were copays and deductibles of thousands of dollars for this family who no longer had a breadwinner. They were not made whole.

Chair Brower:
Would the copays and deductibles get paid? It is out of pocket and nothing in S.B. 291 precludes the plaintiff from recovering any out-of-pocket costs for health care.

Mr. Wenzel:
The way I read the bill, it says the amount health insurance pays is the amount that goes to the health insurance company. That is the measure of medical damages. No provision in the bill allows for the repayment of premiums.

Chair Brower:
It is not the intent of this bill that a plaintiff would not be able to recover those out-of-pocket costs. Premiums and future insurance are different, and we should talk about that. I submit that the payment of premiums is happening anyway. I do not get the idea of premium theft. Premiums will be paid no matter what happened with respect to the accident.

Mr. Wenzel:
If you pay health insurance on behalf of your family, you are doing it to benefit yourself and your family, not to lower the cost to a defendant who injures you. That defendant should not pay a lower amount in damages because the appropriate measure of damages is the cost of what the negligent person did. I prepay for my medical expenses so they will be lower and I can manage the medical expenses if something bad happens to my family. I do not pay the expenses up front through my health insurance so a negligent person pays less damages than the actual cost of damages caused.

Chair Brower:
The reason we pay for health insurance is because the federal government requires that we do so. The Affordable Care Act (ACA) throws a huge wrench in this analysis.

Mr. Wenzel:
I do not think the ACA argument has any place in this argument. If I pay health insurance, pre- or post-ACA, I am doing so to take care of my family, not to comply with a federal mandate. Nevada is a national leader in the number of uninsured people. Despite a federal mandate, one in five Nevadans do not have health insurance. The future viability of the ACA is also questionable and before the U.S. Supreme Court. The ACA is a red herring in this whole thing, whether

the issue is health insurance payments paid because of the ACA or because I want to take care of my family. Who should benefit from the dollars I take out of my paycheck to pay for health insurance? Someone who causes an accident, or the person who was prepaying medical expenses to lower them to a manageable amount? Because of the collateral-source rule in Nevada, the person who pays for the benefit should get the benefit, not the negligent party.

Justice demands a level playing field for all. Introducing health insurance payments tilts this playing field in favor of defendants and their liability insurers. It is not just or fair, and it is not the right policy for Nevada.

Mr. Eglet:
The Nevada Justice Association has submitted testimony opposing S.B. 291 entitled, "Eliminating the Collateral Source Rule would Penalize Nevadans who do the Right Thing" (Exhibit I). Practically, this bill cannot work. People are forgetting when plaintiffs present damages in a case, it is not what the doctors and hospitals charge. There has to be expert testimony that the charges were reasonable and customary. On the other side of the case, defense experts say lower amounts would be reasonable and customary. It is not willy-nilly that a hospital bill of $400,000 compared to insurance reimbursement of $35,000 is reasonable and customary. Expert witness testimony shows the amount is, in fact, reasonable and necessary.

Section 1, subsection 2, paragraph (c) talks about estimates of amounts and says that the judge—posttrial, after the jury has determined the future medical expenses—will estimate amounts likely to be incurred. How is the judge supposed to do that? If there is a Republican in the White House in the next administration, there will no longer be the ACA. There are also questionable constitutionality issues with the ACA, so to say everybody is supposed to have insurance and everyone will have it in the future is questionable.

Chair Brower:
That is a red herring and not what this bill is about. It does, however, present a complication to the usual arguments for the collateral-source rule.

Mr. Eglet:
The other problem with the judge estimating possible amounts is that coverages change. One month an insurance company covers a certain type of procedure and two months later it stops covering that procedure. This bill is asking a judge

to figure out whether an insurance company is going to cover certain procedures.

I have tried over 115 civil jury trials to verdict, having had two cases with a life care plan and all future medical expenses awarded to my client, the plaintiff. Typically, it is a compromise and the sum percentage is always cut. In one case, my client needed future medical procedures, surgeries and medications. This client had a 44-year life expectancy, but the verdict was a number. In this bill, how is the judge supposed to determine the total value? What was the jury considering? Did the jury decide the client would only need half of future medical expenses, the client would only live for another 30 years or the client did not need medications? The U.S. government projects the cost of medications to rise at 5 percent a year, whereas the cost of medical procedures will increase at 4.1 percent per year. How is a judge supposed to figure any of this out? We will have to have another trial with expert witnesses, economists and insurance actuary experts. As written, S.B. 291 puts an onus on judges who will not have enough information to estimate future incurred costs.

No competent plaintiff lawyer would go through the acts of the hypothetical given by supporters of the bill. The only time an excess verdict occurs is when an insurance company does not offer the policy limits. I would challenge anybody to cite cases where that hypothetical occurs because where I practice we do not see that.

Mr. Wenzel:
The bill includes a deduction for incurred charges paid or to be paid by insurance. I do not know what that means. Is that health insurance, a disability policy I purchased or life insurance purchased by a deceased party? The wrongdoer could tell the judge the deceased person had life insurance so the wrongdoer does not have to pay as much in damages. That policy is vague.

Chair Brower:
Let us not exaggerate. We are talking about a wrongdoer who has had the worst experience of his or her life because of killing somebody. That person's insurer is the beneficiary of the reduced amount. The idea that the wrongdoer is thinking he or she will get a windfall because of a plaintiff's health insurance is not realistic. It is an arithmetic exercise that an insurance company or liability carrier may potentially benefit from. To suggest a defendant is somehow benefitting from that is not realistic. If you or I were the wrongdoer, would we

be happy with the idea that we get a windfall because the person we killed had a good insurance policy and as a result, our insurer has to pay less? No, we would still be devastated by the fact that we accidentally killed somebody.

I want to make sure we are not exaggerating. This is a complicated policy dilemma the Committee takes seriously and wants to get right. A lot of work has gone into this, language has gone back and forth and amendments are being proffered; but it does not help to exaggerate the reality. We get the dilemma but to suggest a defendant benefits or gets a windfall despite having accidentally hurt or killed somebody is not an accurate description.

Mr. Wenzel:
If I portrayed the situation as a defendant being happy, I apologize. Who should benefit from foresight and planning of injured parties? Should it be the person who injures or the person injured? I know most people who accidentally injure or kill someone would feel devastated, but this is not limited to negligence cases. It applies to all tort cases seeking personal injury recovery. It could be an intentional tort or punitive damages. If I have disability, health or life insurance, who should benefit from that? It is our position that the beneficiaries should be those who procured insurance and had the foresight to pay for insurance before they were injured or killed.

Chair Brower:
The fact you might be punished for having good health insurance and cannot recover as much from the tortfeasor seems illogical. You want to be made whole. If you were the victim of an accident, you do not want that accident to cost you anything and you want compensation for pain and suffering. You will not wish you had not paid the premiums because you cannot double recover.

Mr. Wenzel:
Of course not. No one wants to get in an accident. What is the fairest procedure? Every juror who has looked at this says the fairest way to deal with this issue is: if you pay for health, disability or life insurance, you should be the beneficiary of the windfall because you took money out of your pocket in paying copays and deductibles. The person who injured you should not benefit from insurance available to you. Nevada jurists who looked at this have agreed the collateral-source rule should stay in place and be a per se abolition to the introduction of collateral sources for any purposes either during or posttrial. We

have submitted an article entitled "Nevada Jurists Unanimously Agree that Eliminating the Collateral Source Rule is Bad Policy for Nevadans" (Exhibit J).

Chair Brower:
I do not know if I would go so far to say every judge thinks this should be in place. Judges call it like they see it, and I am confident judges will follow whatever decision we make. This is not an easy decision, but I want to keep the debate on track.

Ed Uehling:
In the end, it is the public who pays for enormous judgments. It protects the public to point out sympathy factors, red herrings and exaggerations of some of the witness testimony.

Nik Walters:
I have represented insurance companies in subrogation cases and handled personal injury cases of all sizes. I am opposed to S.B. 291. *Eichel v. New York Central Railroad Company* was a 1963 U.S. Supreme Court decision adopting the per se rule. I have submitted the 1996 Nevada Supreme Court decision *Proctor v. Castelletti* (Exhibit K), a case on collateral source entrenched in our law since 1996 as a guideline for people. My concern is the subrogation provision of the rule. While I have not seen the most recent change to the bill, it appears that it would ...

I have submitted the 1986 Nevada Supreme Court case *Maxwell v. Allstate Insurance Company*, 102 Nev. 502, 728 P.2d 812 (1986) (Exhibit L), which no one has mentioned. It decided to include subrogation clauses in insurance policies that go after medical payment insurance. When a person is injured in an accident and submits his or her medical bills to the medical payment carrier with $10,000 in coverage, the insurance company would want to subrogate to get the $10,000 from the wrongdoer. The Nevada Supreme Court adopted this rule as a matter of public policy that one cannot subrogate for medical payment insurance because, "in the context of automobile insurance, we have consistently upheld the fundamental principle that an insured is entitled to receive the insurance benefits for which he has paid a premium." Double recovery was discussed in all of those issues and no substantiation was found. The Nevada Supreme Court determined it was a windfall for an insurance company to recover the money from his or her own insurance company. That rule has been in effect for 30 years. It is a well thought-out opinion and talks

about all the public policy reasons to keep subrogation out. If S.B. 291 is adopted, it would overturn this decision.

I had a case where my client had serious injuries and had $10,000 in medical payment insurance. The medical payment insurance paid $10,000 while the other driver had $15,000 in coverage. My client's damages exceeded $30,000, and she did not have uninsured motorist coverage. If the insurance company was allowed reimbursement for medical payment insurance, the first $10,000 of recovery would go to her own insurance company, leaving her with $5,000. It is hard to practice if that rule is not in effect.

Chair Brower:
I am not sure if the modified version of the bill, Exhibit F, provides that result.

Ms. Upson:
The revised version of the bill, Exhibit F, indicates there cannot be a reduction for medical payment insurance.

In relation to Mr. Wenzel's comment that judges have uniformly ruled one way: It is worth noting the Nevada Supreme Court specifically asked for briefing on this issue and how it would affect litigation in matters other than workers' compensation when the court issued the *Tri-County Equipment and Leasing, LLC v. Klinke* 128 Nev. Adv. Op. 33, 286 P3d. 593 (2012) opinion. The Court chose not to rule on it. As Legislators, you have to make a decision about what is right for Nevada and what public policy decision should be made in relation to this issue.

The core issue is whether it is appropriate for someone who buys insurance to have a windfall. When I buy health insurance, for my family or myself, it is so I will have health coverage in case I need it. I do not buy it with the intent that I will have a windfall if a third party injuries me. No one buys health insurance for that reason, they buy it to be protected. Does public policy support a double recovery? That is not the purpose of the law. The purpose of the law is to make a person whole, not give a windfall. No person who causes an accident is given a windfall. The wrongdoer is paying the damages the injured person is entitled to. To go to the example Mr. Wenzel gave: simply because a person pays for insurance, should the person get the benefit of the insurance contractual write-off amount and the other unpaid amount? No. Public policy supports allowing that person to keep extra money. The person bought insurance to have

treatment rendered with no money out of pocket. That is what S.B. 291 does. It allows an injured person to have his or her medical treatment paid for with no out-of-pocket expenses while remaining entitled to pain and suffering.

Mr. Woodbury commented that people are being treated differently when they do not have insurance and can blackboard $500,000 to a jury and keep the money. He stated someone with insurance only gets paid $100,000 and does not get the rest of the money. This is not accurate. When a person signs a lien, the lien requires that person pay back the full $500,000, so there is no disparate treatment between an individual with insurance and another individual without insurance. Public policy should support the mass population in Nevada. An individual should not take a double recovery because everyone will pay for it through insurance premium increases.

Chair Brower:
I will close the hearing on S.B. 291.

Senator Ford:
I open the hearing on S.B. 244.

SENATE BILL 244: Establishes requirements governing a contingent fee contract for legal services provided to the State of Nevada or an officer, agency or employee of the State. (BDR 18-658)

Senator Greg Brower (Senatorial District No. 15):
Senate Bill 244 is intended to resolve a dispute with the Nevada Attorney General's (AG) ability to retain private counsel on a contingent fee contract basis to sue on behalf of the State. It clarifies how contracts and suits should be managed. The former AG repeatedly hired private counsel in violation of NRS 228.110, subsection 1 with no-bid contracts, unlimited fees and virtually no oversight or legislative approval. The practice was challenged several times in the context of those suits, but was never litigated enough to warrant a decision by the Nevada Supreme Court. There was a dispute as to whether that law allows AGs to file such suits without legislative approval.

This bill is intended to create a new framework allowing for the hiring of private counsel—when necessary—to file lawsuits on a contingent fee basis only after gubernatorial and legislative approval, as well as certain restrictions to ensure transparency and accountability.

Sections 2 through 5 are definitions.

Section 6 is the meat of the bill. It states:

> The Attorney General or any other officer, agency or employee in the Executive Department of the State Government shall not enter into a contingent fee contract unless: The Governor, in consultation with the Attorney General, has determined in writing that the Attorney General lacks the resources, skill or expertise to provide representation in the matter that is the subject of the proposed contract; and That representation pursuant to a contingent fee contract is cost-effective and in the public interest; and The proposed contract complies with the requirements of sections 2 to 14, inclusive, of this act. Before entering into a contingent fee contract, the Attorney General or other officer, agency or employee, as applicable, must obtain approval from the Interim Finance Committee to commit money for that purpose.

The bill provides a new scheme whereby the Governor determines hiring contingent fee counsel to sue on behalf of the State is necessary, given a decision made in consultation with the AG's office and approved by the Legislature.

Section 7 provides for a request for proposal process to be pursued in order to award such contracts.

Section 8 sets conditions and requirements for the management of such contracts. Section 8, subsection 1 states:

> The Attorney General must retain final authority over the course and conduct of the matter that is the subject of the contingent fee contract, including, without limitation: The authority to override any decision made by the retained attorney or law firm; and The sole authority to agree to any settlement or voluntary dismissal of the matter.

We want the AG's Office to be intimately involved with the supervision of any such lawsuits.

Section 12 imposes certain limitations on contingent fees earned by private counsel under such contracts with a total fee cap of $10 million per case.

Section 14 details the requirements the AG will have to follow with respect to reporting to the Legislature on the status of all cases being litigated pursuant to such contacts.

Senator Ford:
Section 6, subsection 2 requires the AG to obtain the approval of the Interim Finance Committee. What if the Legislature is in session?

Senator Brower:
That is the stickiest part of this concept. It is important that the Legislature approve such contracts, but how we do that is open for debate. The Legislature is not in session year-round, so Interim Finance Committee (IFC) approval seems to be the most logical. It could be the Legislative Commission. I am open to suggestions of how we can accomplish the goal of legislative approval of contingent fee contracts.

Senator Ford:
Maybe we can talk to the Legislative Counsel Bureau (LCB) about the best way to approach that.

Senator Brower:
We should consult the LCB on this. The goal is to provide for effective, efficient and timely approval by the Legislature. Depending on the time of year, that could mean different things.

Senator Roberson:
Nothing prevents the IFC or Legislative Commission from meeting during the session, and we do so. Can you give context as to what prompted you to bring this bill? What past practices concerned you, prompting the need for this bill?

Senator Brower:
The big picture concern is that AGs in other states have taken on whole industries in terms of civil lawsuits filed. They have prosecuted these suits by hiring private contingent fee attorneys on a no-bid contract basis with unlimited fees and little or no supervision. There is an inherent problem with private lawyers doing government lawyers' work that is quasi-prosecutorial in nature.

When a government attorney believes a case has no merit, the lawyer's duty is to dismiss the case. If the private lawyer, hired on a contingent fee basis, discovers the case does not have enough merit to pursue and dismisses the case, the lawyer does not get paid. Whereas the government lawyer has no disincentive to dismiss a lawsuit lacking in merit, a private lawyer has little incentive to do so because he or she will not be paid as a result.

The microissue is that NRS 228.110, subsection 1 requires the Legislature to approve such contracts. It was the belief of the former AG that legislative approval was not required. She would file lawsuits without approval, arguably violating the law. Last Session, I introduced a bill clearing up that part of the problem and could not get a hearing. During the interim, I had time to think about what needs to be done, so this bill represents a different approach with enhanced reporting, gubernatorial approval at the front end, formal legislative approval, reporting requirements, caps on the fees and so on.

Senator Roberson:
We do not want AGs violating the law.

Senator Brower:
This bill clears up that issue and creates new framework for pursuing what are necessary lawsuits. If the Governor decides the only way to effectively pursue a particular case is hiring private counsel on a contingent fee basis, we as a Legislature will agree and grant the approval. But that approval should be approved in this building and not exclusively be the province of the Executive Branch. This is the model that many states are adopting.

Senator Ford:
I agree with the contingent fee component and the portion stating the AG can hire private attorneys when lacking the resources because that is the reason they go out on contingency fees. *Nevada Revised Statute* 228.110 deals with retention of counsel generally speaking, not just contingency fee cases. In addition to problematic contingency fee cases are pro bono cases wherein the State has retained pro bono counsel without obtaining legislative approval. The statute does not distinguish between pro bono, regular fee cases or contingency cases. Have you amended the statute to address a specific form of retention with this bill?

Senator Brower:
Yes. The State hires private attorneys on an hourly basis to handle a variety of legal matters, assuming requests for proposal processes apply as well as State Board of Examiners approval; that is fine. It is the hiring on a contingent fee basis that is problematic. With that basis, the private attorney gets paid if he or she recovers something. On one hand, that has a lot of appeal to AGs because the State is not out any money unless there is a recovery. The problem creates a strange dynamic that if carefully, closely and limitedly managed can work; but the way it has been working in Nevada has not been carefully managed or limited, so it does not work. This bill brings us all together. It requires the Governor to make the determination in consultation with the AG and the Legislature to approve it. If those things happen with the limitations, transparency and reporting requirements contained in the bill, we can be assured a lawsuit is being pursued because it has to be and is being effectively managed so we know the potential outcome.

Senator Harris:
What would happen if the Governor and the Legislature do not agree?

Senator Brower:
Under this bill, if the Governor decided it was necessary to hire outside counsel and the Legislature did not agree, the contract could not go forward.

Senator Harris:
Would the parties have to work it out in a different way, or the Governor would not be able to pursue that legal matter?

Senator Brower:
The AG pursues it with the Governor's determination of necessity. An hourly arrangement would have to be worked out or the AG would have to do the case himself or herself. Nothing in this bill gives the Legislature authority to tell the Executive Branch which cases to litigate. If the Executive Branch thinks it needs to hire private counsel on a contingent fee basis, then the Legislature steps in to say "yes" or "no."

Senator Harris:
My concern is from section 6, subsection 1 where the AG might lack the skill or expertise and you have a situation where the Executive and Legislative Branches do not agree whether to pursue the matter and determine the fee arrangement.

Senator Brower:
If the AG does not have the expertise to pursue a matter, that case would require hiring outside counsel. It would be an unusual situation where the Legislature agrees the AG's Office does not have the requisite expertise but would not approve a contract. It could happen, and I like to think the Legislature would act logically in such situations. Understanding political disagreements can come up, we have to assume the Legislature will act logically.

Mr. Abney:
The Chamber supports S.B. 244. It is important to provide transparency, and this is a good way to move forward, knowing private lawyers may not always have the best interest of the State and taxpayers at heart. We want to make sure a system is in place to do those double checks.

Mr. Ross:
The American Tort Reform Association and the Institute for Legal Reform support S.B. 244. Both organizations have seen abuses of the contingency fee contract process across the Country and are working hard to correct those abuses. This bill does not prohibit the practice.

Contingency fee contracts are designed for those situations where that expertise may not exist in the AG's Office. At the same time, when a contingency fee attorney is hired, you have to be sure the case is properly and carefully supervised by the AG's Office. That is something that has not always happened. We need to make sure these decisions are made for the good of the state, not a sizeable contingency fee.

Jordan Davis (Las Vegas Metro Chamber of Commerce):
The Las Vegas Metro Chamber of Commerce supports S.B. 244. We support establishing requirements when a contingent fee contract may be utilized by the AG's Office.

Senator Brower:
This bill is an amalgam of the best features of bills from other states. There is a trend around the Country to rein in perceived abusive litigation practices by state AGs. We are keeping up with what many states are doing in this regard.

Senator Harris:
I close the hearing on S.B. 244 and adjourn the Senate Committee on Judiciary at 6:11 p.m.

RESPECTFULLY SUBMITTED:

Julia Barker,
Committee Secretary

APPROVED BY:

Senator Greg Brower, Chair

DATE:

EXHIBIT SUMMARY				
Bill	**Exhibit**		**Witness or Agency**	**Description**
	A	1		Agenda
	B	9		Attendance Roster
S.B. 296	C	4	Nevada Justice Association	Current Law on Punitive Damages
S.B. 296	D	2	Nevada Justice Association	The Food and Drug Administration is Powerless and Dependent Upon Information from Drug Companies
S.B. 296	E	3	Peter C. Neumann	GM Analysis of Fiery Car Deaths May Haunt Firm Over Fatalities
S.B. 291	F	4	Robert Compan	Proposed Amendment
S.B. 291	G	7	Robert Compan	Written Testimony
S.B. 291	H	2	Property Casualty Insurers Association of America	Letter of Support
S.B. 291	I	1	Nevada Justice Association	Eliminating the Collateral Source Rule Would Penalize Nevadans who do the Right Thing!
S.B. 291	J	2	Nevada Justice Association	Nevada Jurists Unanimously Agree that Eliminating the Collateral Source Rule is Bad Policy for Nevadans
S.B. 291	K	2	Nik Walters	*Proctor v. Castelletti*
S.B. 291	L	4	Nik Walters	*Maxwell v. Allstate Insurance*