IN THE SUPREME COURT OF THE STATE OF NEVADA

SFR INVESTMENTS POOL 1, LLC, a Nevada limited liability company,

Appellant,

VS.

U.S. BANK, N.A., a national banking association as Trustee for the Certificate Holders of Wells Fargo Asset Securities Corporation, Mortgage Pass-Through Certificates, Series 2006-AR4, a Nevada non-profit corporation,

Respondent.

Case No. 63614

District Court Case No. A-13-678814-C

ERRATA TO APPELLANT'S REPLY BRIEF AND SUPPLEMENTARY STATUTORY ADDENDUM

Appellant SFR Investments Pool 1, LLC, hereby submits the following Errata to Appellant's Reply Brief ("ARB") and Supplementary Statutory Addendum ("SSA"), filed on March 21, 2014. SFR inadvertently omitted pages from its SSA and, therefore, incorrectly cited certain pages in the SSA.

Page 16 of the ARB states : "Commissioner Buckley stated that '[t]he HOA's super priority lien dates from when the HOA starts the foreclosure.' (SSA_557-558.)" Footnote 16 cites to SSA_555-67.

The page of the Legislative history from which the quote came was one of the inadvertently omitted pages from the May 17, 2011 Hearing on S.B. 204

Before the Assembly Comm. on Judiciary, 76th Leg. For this Court's reference, SFR is hereby attaching the entire minutes from that hearing, BATES numbered as SSA_

The correct citation for the quote on p. 16 of the ARB should be Hearing on S.B. 204 Before the Assembly Comm. on Judiciary, 76th Leg. (Nev. May 17, 2011), at p. 9. (SSA_665.) Footnote 16 should also include SSA_657-741.

DATED this 24th day of March, 2014.

HOWARD KIM & ASSOCIATES

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 24th day of March, 2014. Electronic service of the forgoing Errata to Appellant's Reply Brief and Supplemental Statutory Addendum shall be made in accordance with the Master Service List as follows:

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Dated this 24th day of March, 2014

/s/Jacqueline A. Gilbert
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Case No. 63614

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Respondent.

APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable DAVID BARKER, District Judge
District Court Case No. A-13-678814-C

ERRATA TO APPELLANT'S SUPPLEMENTAL STATUTORY ADDENDUM

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MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON JUDICIARY
SUBCOMMITTEE

Seventy-Sixth Session
May 17, 2011

The Committee on Judiciary Subcommittee was called to order by Chairman James Ohrenschall at 4:58 p.m. on Tuesday, May 17, 2011, in Room 3138 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4406 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Copies of the minutes, including the Agenda (Exhibit A), the Attendance Roster (Exhibit B), and other substantive exhibits, are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at www.leg.state.nv.us/76th2011/committees/. In addition, copies of the audio record may be purchased through the Legislative Counsel Bureau's Publications Office (email: publications@lcb.state.nv.us; telephone: 775-684-6835).

COMMITTEE MEMBERS PRESENT:

Assemblyman James Ohrenschall, Chairman
Assemblyman Richard Carrillo
Assemblyman Richard McArthur

COMMITTEE MEMBERS ABSENT:

None

GUEST LEGISLATORS PRESENT:

Assemblyman Tick Segerblom, Clark County District No. 9
Senator Allison Copening, Clark County Senatorial District No. 6

STAFF MEMBERS PRESENT:

Dave Ziegler, Committee Policy Analyst
Nick Anthony, Committee Counsel
Nancy Davis, Committee Secretary
Michael Smith, Committee Assistant

OTHERS PRESENT:

Gary Lein, representing the Commission for Common-Interest Communities and Condominium Hotels
Garrett Gordon, representing Southern Highlands Homeowners Association
Jonathan Friedrich, Private Citizen, Las Vegas, Nevada
Michael Buckley, Chair, Commission for Common-Interest Communities and Condominium Hotels
Michael Randolph, representing Homeowner Association Services Inc., Las Vegas, Nevada
Alisa Nave, representing the Nevada Justice Association
Eleissa Lavelle, Private Citizen, Las Vegas, Nevada
Gail Anderson, Administrator, Real Estate Division, Department of Business and Industry
Michael Joe, representing Legal Aid Center of Southern Nevada

Chairman Ohrenschall:
[Roll taken.] Tonight we will attempt to finish our work session on the two remaining bills. When we adjourned our last meeting, we were working on Senate Bill 204 (1st Reprint). We will begin where we left off.

Senate Bill 204 (1st Reprint): Enacts certain amendments to the Uniform Common-Interest Ownership Act. (BDR 10-298)

Dave Ziegler, Committee Policy Analyst:
When we adjourned our last work session, we were on S.B. 204 (R1), section 45. Perhaps we should forge through to the end and then, if necessary, review a few sections that were discussed earlier.

Section 45 requires a homeowners' association (HOA) to maintain property, liability, and crime insurance subject to reasonable deductibles.

[Continued to read from work session document (Exhibit C).]

Chairman Ohrenschall:
Were there any other amendments?

Dave Ziegler:
No.

Chairman Ohrenschall:
I believe the Committee members received an email from Senator Copening about the crime insurance issue.

Assemblyman Carrillo:
I received a copy also.

Senator Allison Copening, Clark County Senatorial District No. 6:
I did not post the email to Nevada Electronic Legislative Information System (NELIS). It was information that backs up the need for HOAs to carry crime insurance as it is the association's money that needs to be protected. I do not think it stops an independent community association manager (CAM) from carrying whatever insurance he or she would like to carry, but because it is the responsibility of the association to protect its funds, it is a recommendation in the Uniform Common-Interest Ownership Act that crime insurance be carried. I believe there was a supplemental email from Mark Coolman to discuss the fees, which are considered to be very nominal for the type of coverage.

Chairman Ohrenschall:
Do you have any comments on the amendment proposed by Mr. Friedrich?

Senator Copening:
I would need to defer to Michael Buckley on that. I do not have the amendment here. I think it stated the manager should carry the insurance and not the association.

Gary Lein, representing the Commission for Common-Interest Communities and Condominium Hotels:
I feel that insurance is a coverage that should remain at the association level. It is those funds that need to be protected and we need to make sure the insurance is there. We also need to ensure the crime insurance has the appropriate endorsements extending to the employees of the association, its agents, directors, volunteers, and community manager. For coverage up to $5 million of crime insurance with the appropriate endorsements, the cost would be approximately $3,200 per year for an association. That is $6.40 per $10,000. For a very small association with $250,000 of protection, the annual cost would be $582 per year, or $23.28 per $10,000. We feel that is a reasonable price to pay to know that the funds of the association are protected. As it relates to the cap, we had proposed this language so that it would be in sequence with the mortgage guidelines from Fannie Mae and Freddie Mac, in that there is currently no cap in those federal mortgage guidelines.

As a Commission, we had heard a case in Las Vegas this year where a board member got onto the association's executive board and within a few months started embezzling. In that particular case, that person embezzled about $64,000 over several months. This association is out those funds and had no coverage. Had the association had this coverage in place, it would have received that money back from the insurance company.

Another provision in this section is dealing with a no conviction requirement. We know that the Las Vegas Metropolitan Police Department is stretched in resources and in some cases the district attorney's office is as well, so it is important not to have a conviction requirement on the crime policy. I would support no cap, or at minimum a cap at $5 million.

Chairman Ohrenschall:
Mr. Ziegler, the cap Mr. Friedrich proposed was how much?

Dave Ziegler:
$500,000.

Chairman Ohrenschall:
Mr. Lein, you would propose a cap no lower than $5 million, correct?

Gary Lein:
That is correct. You must realize there are some associations that have reserve funds up to $10 million. I do not believe $500,000 is adequate. The cost of $3,200 for $5 million in coverage, when you are dealing with an association with $5 million to $10 million in reserves, is a minimal fee. They have a multimillion dollar budget and to protect those funds, I believe, is absolutely worthwhile.

Chairman Ohrenschall:
Any questions?

Assemblyman McArthur:
Is this where we decided to go with the $500,000 or the three months? There are some very small HOAs, if we kept it at $500,000 or three months' revenue, whichever is less, which would cover the larger HOAs that have a large amount of money coming in and the smaller HOAs would only have to go to $500,000.

Chairman Ohrenschall:
The text of the original bill states, "Such insurance may not contain a conviction requirement, and the minimum amount of the policy must be not less than an

amount equal to 3 months of aggregate assessments on all units plus reserve funds." There is no mention of $5 million.

Assemblyman McArthur:
I am not sure what three months of aggregate assessments is for some of the larger HOAs, but I believe it is a pretty substantial amount.

Garrett Gordon, representing Southern Highlands Homeowners Association:
In the case of Southern Highlands, there is $4 million to $5 million in reserves. Per month assessments for three months is another $2 million to $3 million. That is why our concern is when you start adding up reserve funds and three months of aggregated assessments, the premiums on those amounts would be quite substantial. If it got too high, we would have to increase the assessments of the homeowners. On behalf of Southern Highlands, we would ask that a reasonable amount would be three months of assessments or $500,000, whichever is less. There would be a cap of $500,000 and three months assessments for smaller associations.

Chairman Ohrenschall:
Would that be less than the $5 million that Mr. Lein proposed?

Garrett Gordon:
Yes, it is significantly less. I think Mr. Lein is proposing $5 million; Southern Highlands is proposing $500,000 or three months of assessments, whichever is less.

Assemblyman McArthur:
Approximately what are those three months worth?

Garrett Gordon:
Around $2 million worth of assessments for three months.

Assemblyman McArthur:
So that is still under the $5 million mark?

Garrett Gordon:
Correct. However, with the language I am recommending, "whichever is lower," then it would go to the $500,000 cap.

Assemblyman McArthur:
I am talking about the larger HOAs.

Chairman Ohrenschall:
Would you be comfortable with the three months aggregate assessments or $500,000?

Gary Lein:
I think that is too little for the larger HOAs. I think for an association that has $10 million in reserves and monthly expenses of approximately $700,000 per month, overall, $5 million at a cost of $3,200 per year, with all the proper endorsements is a very small price to pay to have that type of insurance and that type of protection. I think $500,000 for larger HOAs is just too small, especially with the incremental value to obtain the greater coverage. I show that for a policy for $1 million, the annual premium would be $1,160.

Assemblyman McArthur:
Basically we are talking about roughly $1,100 per $1 million?

Gary Lein:
Yes, at $25,000 worth of coverage, the annual premium would be $145. For $250,000 worth of coverage, the cost would be $582; $1 million costs $1,160; and the price for $5 million is $3,200. Again, I think the important thing is to be in line with the guidelines of Fannie Mae and Freddie Mac.

Assemblyman McArthur:
You said for $5 million the annual premium is $3,200?

Gary Lein:
Correct.

Assemblyman McArthur:
Initially I think you said it was around $1,100 for $1 million. So the premium drops as the coverage goes up?

Gary Lein:
Correct. The price per $10,000 of coverage on a $1 million policy is $11.60. The price per $10,000 of coverage on a $5 million policy is $6.40. So, for the smaller HOA that is trying to cover $250,000, it is $23.28 per $10,000.

Chairman Ohrenschall:
Do we want to decide on this section now, or wait until we go through the rest of the sections?

Jonathan Friedrich, Private Citizen, Las Vegas, Nevada:
The way the law is written, this is a two-step process. I have never objected to the three months of the aggregate assessment. I have been told that Sun City Summerlin, which has 7,781 homes, receives monthly dues of approximately $30,000. My concern was that all the reserves be covered under the crime insurance policy. I believe Sun City Summerlin has about $13 million in its reserve fund. Before someone could embezzle that huge amount of money, I would think that flares would be going up, but they could take $10,000 to $50,000. That is why I came up with the $500,000. Most of the HOAs in the state are small and have nowhere near what Sun City Summerlin or Sun City Anthem have. Also, why should the HOA be forced to pay for the crime insurance that the CAM should pay? It is a cost of doing business on behalf of the CAM, just as they pay their own workers' compensation, rent, and office supplies. The HOA should not have to pay for a business expense.

Gary Lein:
I do not want to rebut Mr. Friedrich, but the problem is that not all HOAs are professionally managed. There are a number of self-managed HOAs. The CAM would have to have coverage, but that coverage is not going to cover the executive board, the volunteers, or the directors. The CAM cannot have an endorsement to cover the executive board for fraud or embezzlement. We feel that the coverage has to be at the level of the HOA protecting and insuring the executive board, the employees, the directors, the agents, the management company, and the CAM.

Assemblyman McArthur:
I might offer a compromise here. If we keep the wording as it currently is, three months of aggregate assessments plus reserve funds up to a maximum of $5 million. That way all the smaller HOAs can use the three months aggregate assessments and the larger HOAs will not have to go higher than $5 million.

Gary Lein:
I would not have an objection to that compromise.

Assemblyman McArthur:
As far as covering everyone else, I think most of these policies actually cover everyone including the managers. I do not think that is a problem.

Chairman Ohrenschall:
I have gotten a nod from both Mr. Gordon and Mr. Friedrich on this compromise.

Dave Ziegler:
Section 48 amends provisions relating to common expenses benefitting fewer than all of the units or caused by a unit owner, a tenant, or an invitee.

Chairman Ohrenschall:
There is an exception for when someone has a delivery; if the delivery driver hits a common area, the person receiving the delivery is not liable.

Assemblyman McArthur:
I have no problem with section 48.

Assemblyman Carrillo:
I am good with this one also.

Assemblyman McArthur:
I did not know what the intent of this was. But, it is a benefit, so I agree with it.

Chairman Ohrenschall:
I believe the intent was to exempt the unit owner from liability for willful misconduct or gross negligence of the invitee, the driver.

Dave Ziegler:
Section 49 provides that reasonable attorney's fees and costs and sums due to an HOA under the declaration, *Nevada Revised Statutes* (NRS) Chapter 116, or as a result of an administrative, arbitration, mediation, or judicial decision are enforceable in the same manner as unpaid assessments.

[Continued to read from work session document (Exhibit C).]

Chairman Ohrenschall:
Ms. Schuman's amendment seems reasonable to me.

Jonathan Friedrich:
I have a copy of the amendment, it is five pages long.

Chairman Ohrenschall:
Thank you. We have it up here.

Dave Ziegler:
This amendment is in your packet.

Chairman Ohrenschall:
Page 4, line 20 of the amendment states: "Following the trustee's sale or foreclosure sale of a security interest described in paragraph (b) of subsection 2 of NRS 116.3116, upon payment to the association of the amounts described in subsection 3, any unpaid amounts of the lien accruing before such sale remain the personal obligation of the owner of the unit as of the time the amount became due, but no longer constitute a lien upon the unit." That is quite a change from current law.

Michael Buckley, Chair, Commission for Common-Interest Communities and Condominium Hotels:
I was involved in writing that amendment. The idea we were addressing is at the bottom of page 3. We think this would have a positive effect, and that is the way the law is currently written. The HOA's super priority lien dates from when the HOA starts the foreclosure. There is a statutory reason for an HOA to start the foreclosure. This amendment will measure the super priority lien, not just from the HOA starting the foreclosure, but also from the first mortgagee's foreclosure sale. In that respect there is not an incentive for the HOA to start the foreclosure if it knows it will get its super priority lien when the first lender forecloses. We took that language from the Colorado Uniform Common Interest Ownership Act. The language that you read on page 4 of the amendment was intended to address the idea that when there is a foreclosure sale and the super priority lien is paid off, there is no more lien. It remains of record because liens remain of record, but the HOA no longer has a lien for any unpaid amounts. Once the foreclosure of the first mortgage has occurred, someone cannot try to enforce the HOA lien for the old owner, who is gone. The amount that a homeowner owes when he buys a unit is not only a lien, it is a personal obligation, so the fact that there has been a foreclosure does not wipe out the fact that the money is owed. We have never heard of an HOA suing anyone, but it is like a utility bill; there may be a lien, but there is also a personal obligation. The intent of the law is if there is a foreclosure of the first mortgage, the HOA receives a super priority payment. Once that super priority payment is made, the lien is gone, and the unit is free from any lien from the prior owner.

Chairman Ohrenschall:
Currently, are HOAs going after the prior owners?

Michael Buckley:
We have heard of instances where an HOA files a lien for $5,000 and the super priority lien is $1,000. When the foreclosure of the first mortgage occurs, $1,000 is all that gets paid. There is a $5,000 lien of record. We have heard of situations where a collection agency or an HOA might try and assert a lien

against the new owner for $4,000. This amendment is to ensure that the lien is removed from the property. A lien by definition is an interest against property.

Chairman Ohrenschall:
Do you think this will make HOAs more or less whole in terms of their ability to recover these amounts owed to them?

Michael Buckley:
When a mortgage is foreclosed, it wipes out all junior liens. That is the law. If you are in the title industry, you know that when you foreclose a senior lien it wipes out all the junior liens. Since it does not say that in NRS Chapter 116, you do have a lien of record that says the HOA is owed money, but once the foreclosure occurs, the lien is gone once the super priority lien has been paid. This amendment is not intended to change the law. It is intended to ensure that it is clear that once the super priority lien is paid, the lien the HOA has for the past due assessments against the unit is gone.

Chairman Ohrenschall:
Any questions? [There were none.]

Michael Randolph, representing Homeowner Association Services Inc., Las Vegas, Nevada:
Mr. Buckley was referring to the recording of the priority of liens which is over in NRS Chapter 107. Since NRS 116.311 originally came from NRS Chapter 107, that is where it is. The idea behind removing the leftover amounts due from the property is to give clear title to the succeeding purchaser, whether it be an investor at the auction or a bank who resells it. I have heard of events where the super priority lien portion and collection fees were paid, yet the person attempting to collect was still attempting to collect amounts far greater than leftover amounts due from the prior homeowner, which were not in the super priority lien. They were trying to collect it from the new homeowner, which is a total aberration. When the lien is stripped off the property once the super priority lien portion has been paid, it protects the future homeowners.

Chairman Ohrenschall:
The part of the amendment on page 4, lines 18 through 25, is that in another Senate bill also?

Michael Buckley:
Yes, that is the language that we put in Senate Bill 174. Just to clarify, this is a State Bar Real Property section bill and the language in section 2 of the proposed amendment on page 3 is about Fannie Mae regulations. I would mention that currently the Fannie Mae regulations are referred to for the length

of the super priority lien. When Nevada went from six to nine months, that language was put in because in condominiums, Fannie Mae regulations are limited to six months. This proposal would add not only the time portion of the super priority lien, but the amounts of fees and collection costs would be limited by Fannie Mae guidelines. The other thing I would like to point out is that I have had this debate about what exactly Fannie Mae says about these fees. Some would argue that Fannie Mae prohibits the payment of collection costs and only permits the payment of assessments. I have found language that states that the collection costs can be paid in addition to the assessments. I think that if we adopt this language which now refers back to Fannie Mae regulations for collection costs, we will be injecting much more uncertainty into what must be paid at foreclosure, which I do not think is a good idea. It seems that the idea of a law is to make things more certain than less certain. That is why it was limited in the past to just the time and not the costs.

Chairman Ohrenschall:
So you are seeing that there would be a conflict between the six months that Fannie Mae allows for condominiums and the nine-month super priority lien?

Michael Buckley:
No. The way the law is currently written, there is no conflict because Fannie Mae limits condominiums to six months and our statute says nine months unless Fannie Mae says six months. I think the proposed amendment language would make things uncertain because I am not convinced that Fannie Mae regulations address this. For example, when Fannie Mae approves a project, there are regulations that address whether the project is approved for Fannie Mae financing. The other part of the process that Fannie Mae deals with is when there has actually been a loan that was sold to Fannie Mae because it was an approved project, and now Fannie Mae holds the mortgage. There is a different set of regulations that deal with what Fannie Mae will pay if it is foreclosing. There is also the lender who made the loan and sold the loan to Fannie Mae. There are different regulations that apply there also. I think this language, which would refer to Fannie Mae guidelines on how much collection costs you pay, is creating uncertainty.

Chairman Ohrenschall:
So you have concerns with the first part of the amendment, but you are all right with the section that comes from S.B. 174?

Michael Buckley:
That is correct.

Assemblyman Carrillo:
Assessments are the HOA's lifeblood. If we pass this bill and eliminate all the assessments from the previous owner, are we removing the lifeblood of an HOA? How will this affect the HOAs? If the HOA is dependent on the assessments, it will have to make up the difference by increasing the assessments for the rest of the homeowners.

Michael Buckley:
We are not changing the super priority lien. It will be six to nine months, which is what the law states now. Once an HOA gets paid the super priority lien, it no longer has a lien against the unit. That is existing law. When an investor buys a unit and resells it, it is great for the association who gets new owners because they start paying the dues on the unit that was foreclosed. If there is a problem with title, if the new owner has some question about having to pay the old owner's assessments, that affects the ability of those units to sell. We are not changing the law or the super priority lien. What we are trying to do is to clear up the title once the association has been paid its super priority lien. The association can only get the super priority lien if there is a foreclosure by the first mortgage. If there is no foreclosure by the first mortgage, the HOA could foreclose. Super priority lien deals only with the foreclosure by the first mortgage. When that has been paid, the old lien is gone, and the unit can go on the marketplace with a clean slate.

Assemblyman Carrillo:
You also stated that this will protect investors. Obviously, homeowners are now purchasing homes at the same prices that were paid 15 years ago. If the whole purpose of this bill is to protect investors, then this is missing the point.

Michael Buckley:
I think you make a very good point. Currently homes are very affordable. People can now afford to buy a home, and may want to buy a foreclosed unit from the bank. The association or an unscrupulous collection company could say, "There is a $4,000 lien on your property." The first-time homebuyer does not know whether he has to pay that or not. This is not a question of protecting the investor; it is a question of protecting the new owner.

Chairman Ohrenschall:
Any other questions? [There were none.]

Garrett Gordon:
I would echo Mr. Buckley's testimony. We have no objection to the language from S.B. 174. We do strongly object to the amendment on page 1. This deals with collection costs. There has been a huge debate over the last couple

months about timing of collections, costs of collections, and as this body knows, we have been in discussions about coming up with a reasonable compromise. This language was introduced by the investors in order to make this a collection bill. I would object to putting this language into a State Bar Real Property Section bill. We are trying to go through the uniform changes and not make this a controversial collection bill. Secondly, Senator Copening handed out an amendment to this section which adds three words, "Chapter 116 regulations" (Exhibit D). I just wanted to ensure that is on the record.

Chairman Ohrenschall:
Senator Copening's amendment has been posted on NELIS.

Assemblyman McArthur:
I guess there is a difference between the statutes and regulations in NRS Chapter 116.

Chairman Ohrenschall:
This amendment states, ". . . any other sums due to the association under the declaration, this chapter, Chapter 116 regulations, or as a result of an administrative, arbitration, mediation or judicial decision are enforceable in the same manner as unpaid assessments . . . ." Are we broadening the scope of fines that could be due?

Garrett Gordon:
I believe the intent was not to broaden the scope, but as we all know, NRS is the umbrella. Underneath it are regulations approved by the Commission on Common-Interest Communities and Condominium Hotels (CICCH). The Commission has delegated authority to cap, limit, and create costs and fines. I believe this would tighten this section up for the purpose of regulations that the NRS delegates to the Commission.

Chairman Ohrenschall:
So you do see any broadening of things that people may be liable for in terms of fines?

Garrett Gordon:
This is from Senator Copening, and I do not know whether it broadens it or not. There are regulations that deal with fines, costs, and charges. I think Senator Copening's intent was to encourage those regulations to be called out here in this Chapter and with the declaration. One could interpret this as broadening and one could interpret this as narrowing.

Chairman Ohrenschall:
Any other questions? [There were none.] Mr. Friedrich, would you like to address that amendment?

Jonathan Friedrich:
Only 15 percent of the homes that are sold in foreclosure are sold to investors. Those investors are risking their capital. They are paying cash. They are making the associations viable in that they are restoring the homes, paying the fees to the association, paying taxes, and giving employment to the contractors who are restoring these homes. They are allowing brokers to make a commission on the resale of the property. I see it as a win-win situation.

Regarding the amendment, I was concerned with the wording on section 49, page 47, lines 27 to 33. It would hold a unit owner responsible for all the attorney's fees and costs. "Other fees and charges" is very vague. It puts a unit owner at a disadvantage by making him susceptible to huge attorney fees. You gentlemen have seen some of the documentation that I supplied earlier where the attorney's fees and costs are hurled at homeowners. If you are chasing after the homeowner for anything beyond the nine-month super priority lien, the homeowner would be forced to file bankruptcy. In that case the association gets nothing; the attorney would be the winner. The other issue is on page 49, lines 19 to 28, which talks about a receiver. I have heard some horror stories about how much receivers charge for their services. I would suggest some sort of a percentage of the costs that are involved for the receivers. In essence, there should be a cap on the fees for the receivers' services.

Chairman Ohrenschall:
Your comment about the bankruptcy and the association not getting anything, can you go over that again?

Jonathan Friedrich:
It is section 49, page 47, lines 27 to 33. If someone is walking away from his property and is being foreclosed on, I read this that the individual would then be subject to all of the additional costs. Line 33 states ". . . in the same manner as unpaid assessments . . . ." Mr. Buckley advised me that the amendment by Ms. Schulman would remove that burden on a foreclosed homeowner.

Michael Buckley:
Just to remind you where this all started, which was a Uniform Act proposal. The comment from the Uniform Law Commission on subsection 1 states: "Subsection 1 is amended to add the cost of the association's reasonable attorney's fees and court costs to the total value of the association's existing

super lien. The increased amount of the association's lien has been approved by Fannie Mae and local lenders and has become a significant tool in the successful collection efforts enjoyed by associations in that state." That was referring to Connecticut. I think it goes back to Mr. Carrillo's point that associations need the ability to recover the costs incurred to collect unpaid assessments. If the association cannot recover these costs from the defaulting owner, it will be forced to pass those expenses on to the paying owners. To put it into perspective, our proposal was just to add the language which was adopted by the Uniform Law Commission.

Chairman Ohrenschall:
We definitely have some concerns with this section and the amendments. We will come back to them later. Mr. Ziegler, can we backtrack to Mr. Segerblom's amendment?

Assemblyman Tick Segerblom, Clark County Assembly District No. 9:
When I was here last week, I was seeking to remove a phrase that said "except for . . . ." Mr. Anthony convinced me that I did not need to remove it. In retrospect, I think it would be wise if we could remove that phrase.

Chairman Ohrenschall:
I think we have a mock-up of your proposed amendment.

Dave Ziegler:
That is correct. There is a mock-up prepared by the Legal Division, dated May 9, 2011. It is part of your packet. Section 34 shows what Mr. Segerblom is referring to on lines 32 and 33. What Mr. Segerblom is proposing is also the same that others are proposing. This is one case where all those who seek an amendment in this section are saying the same thing.

Chairman Ohrenschall:
Mr. Segerblom's proposal amends sections 21, 30, and 34 of the bill.

Assemblyman Segerblom:
The Committee agreed to support sections 21 and 30 amendments. Section 34 is the only one left.

Chairman Ohrenschall:
Any feelings from the Committee?

Assemblyman Segerblom:
My amendment to section 34 deals with not allowing the board to amend the declaration, and that it must be done at the vote of the members.

Michael Buckley:
I would just like to note for the record that we have no objection to this amendment.

Assemblyman McArthur:
I am okay with this amendment.

Assemblyman Carrillo:
I am okay with the amendment as written.

Chairman Ohrenschall:
So as a recommendation for the full Committee, we are all in agreement with the proposed amendment by Mr. Segerblom.

Dave Ziegler:
It is my understanding that you will take section 49 under advisement and move on to section 50?

Chairman Ohrenschall:
Correct. I think we need a little more time to reach a comfort level.

Dave Ziegler:
Section 50 provides that a judgment for money against an HOA is a lien on real property of the association. To expand further, this is a lien on property of the association, in addition to the common elements. The idea is that the HOA may have real property that is not part of the common elements.

Chairman Ohrenschall:
As I recall this could be a lien on real property not within the association. Mr. Buckley, is this language from the Uniform Law Commissioners?

Michael Buckley:
Yes, that language is from the Uniform Act. Earlier in the bill there is language that makes it clear that an association could own other real property, such as a parking lot or a golf course. Obviously if the association owes money, the lien is on that property as well.

Chairman Ohrenschall:
So this exempts all common elements within the association, but other real property both within the state or outside the state could be subject to that judgment lien.

Michael Buckley:
That is correct.

Chairman Ohrenschall:
I am all right with this section. I do not recall any testimony against this. Currently, without this change, the judgment lienholder may still be able to go against real property if it is outside the association, correct?

Michael Buckley:
I think that is correct, and this is more of a clarification.

Chairman Ohrenschall:
I agree this is more of a clarification. If someone has a judgment against you, he or she could put a lien on your real property, regardless of where it is.

Assemblyman McArthur:
I do not know whether this is just clarification, but I can go with it and move on.

Chairman Ohrenschall:
I assume this is language from the Uniform Act to just clarify things. Mr. Carrillo are you okay with this? Let the record show that Mr. Carrillo nodded his head that he is okay with section 50.

Dave Ziegler:
Sections 51 and 60 contain provisions that are virtually identical to sections 2 and 3 of Senate Bill 30 (1st Reprint), which this subcommittee approved at the last work session and which the full Assembly Committee on Judiciary approved in the work session yesterday. That point may be moot. We could either amend this out of the bill, or leave it in and ensure it conforms with S.B. 30 (R1). I would make the same comment on the proposed amendment from Yvonne Schuman because I think we covered that in the amendment for S.B. 30 (R1). The only thing that would remain on the table is a proposed amendment from Mr. Friedrich to add a $25 per day penalty if the HOA does not produce books and records within 14 days.

Chairman Ohrenschall:
So we could delete sections 51 and 60 or keep them in because they are identical to sections 2 and 3 of S.B. 30 (R1). The amendment that Yvonne Schuman has proposed seems identical to something we proposed earlier.

Dave Ziegler:
It is identical to the action we took on S.B. 30 (R1).

Chairman Ohrenschall:
Mr. Friedrich's amendment is new, having a penalty to the HOA for not producing books and records after 14 days.

Jonathan Friedrich:
There have been many instances where boards and their management companies refused to turn over the books and records even though it is already in statute. The statute calls for 14 days. This gives that part of the statute some teeth to ensure these books and records, when requested, are turned over to the individual.

Chairman Ohrenschall:
I would like to remind Mr. Friedrich and Mr. Buckley that we are in a work session, and while we appreciate everyone's knowledge and input, please leave it to us to call on you when we need information.

We have other provisions like this currently, correct? If an HOA is not complying, there are different kinds of fines or penalties that can be imposed. This is not something out of the ordinary for the amendment to go forward.

Michael Buckley:
I do not believe there is a specific penalty. I think the process is that if the request is not honored, the requester would go to the Ombudsman who would then request the information. If the HOA failed to comply, the Commission has the authority to impose a penalty or a fine on an HOA, or anyone who violates NRS Chapter 116. It is in the process, but there is no dollar amount. It would have to go through the Real Estate Division in the Department of Business and Industry.

Chairman Ohrenschall:
So, an aggrieved homeowner who did not receive the records that he requested could go through the process with the Ombudsman and potentially get a fine against the HOA right now.

Michael Buckley:
I think that is correct. The Commission focuses more on getting the documents rather than on fining, since if there is a fine, all the owners have to pay.

Jonathan Friedrich:
The process that Mr. Buckley just mentioned can take upwards of one to two years. In the meantime, the homeowner has been deprived of those records. It is a very costly process for the Office of the Ombudsman for Owners in

Common-Interest Communities and Condominium Hotels and for the Commission.

Chairman Ohrenschall:
So you envision this amendment to be swiftly enforced?

Jonathan Friedrich:
That is correct. This gives the existing statute some teeth that are currently missing.

Chairman Ohrenschall:
I see the intent, but I am thinking it may not actually work. The fines may not be imposed for some time, and a determination may need to be made whether there is some type of willful desire to withhold those records.

Garrett Gordon:
I concur with your comments, Mr. Chairman. It would be very difficult to enforce. As Mr. Buckley indicated, if you start assessing arbitrary fines, who pays that? All the other homeowners would have to pay that cost. I would submit to you that there is already a process, as indicated, for a remedy for an aggrieved homeowner.

Chairman Ohrenschall:
Any questions regarding the proposed amendment?

Assemblyman Carrillo:
I am okay with the amendment.

Chairman Ohrenschall:
Mr. McArthur?

Assemblyman McArthur:
I have the same concern; once you start charging these fees, the other homeowners are paying for it.

Chairman Ohrenschall:
Perhaps there is a way to draft this so it can be at the discretion . . .

Assemblyman McArthur:
I think $25 per day is a little steep, also.

Chairman Ohrenschall:
Perhaps it can be at the discretion of the Ombudsman?

Assemblyman McArthur:
I think we already have that process. We need to either put teeth in it with some money or leave it like it is without the amendment.

Chairman Ohrenschall:
Mr. Carrillo, are you okay with the $25 per day for not releasing the documents in 14 days? Is this a problem you see often that HOAs are not releasing the requested documents?

Assemblyman Carrillo:
Personally, in the dealings I have had with HOAs, they seem to be pretty compliant. I am not saying other experiences are not valid, but it may be on a case-by-case basis. Anytime you hit someone in the pocketbook, regardless whether it is an HOA or anyone else, they will respond to it.

Assemblyman McArthur:
I think $25 is a big hit.

Chairman Ohrenschall:
Although the HOA would have had 14 days to comply, but then if it went another 10 days, that would be $250. For a small association, that is a big hit. I recall in another bill we gave homeowners three weeks to remedy a situation.

Assemblyman McArthur:
Would this penalty be enough to sting an association? As a compromise, we could keep the penalty at $25 per day, but give the HOA four weeks to produce the records.

Assemblyman Carrillo:
I am okay with the three weeks.

Chairman Ohrenschall:
That would be consistent with our other bill where we gave the homeowner three weeks to comply.

Chairman Ohrenschall:
I would propose for us to report to the full Committee that we will accept sections 51 and 60. They are duplicative of sections 2 and 3 of S.B. 30 (R1). We will accept Yvonne Schuman's amendment and we will accept Mr. Friedrich's amendment. However, we will amend it to 21 days instead of 14 days.

Dave Ziegler:
Section 52 exempts the disposition of a unit restricted to nonresidential purposes from the requirement to provide a public offering statement or certificate of resale. It also deletes a provision applicable to small HOAs that is covered in NRS 116.1203.

[Chairman Ohrenschall left the room. Assemblyman Carrillo assumed the Chair.]

Acting Chairman Carrillo:
Mr. McArthur, do you have any concerns with section 52?

Dave Ziegler:
I think that there can be nonresidential common-interest communities and nonresidential components within residential common-interest communities.

Acting Chairman Carrillo:
This appears to be adding to the disposition of a unit restricted to nonresidential purposes; it struck out planned communities.

Assemblyman McArthur:
I am okay with this section.

Acting Chairman Carrillo:
Mr. Ziegler, we are okay with section 52.

Dave Ziegler:
Section 53 amends the information required to be included in the public offering statement provided to an initial purchaser of a unit, including any restraints or alienation on the common-interest community (CIC) and the HOA's budget information.

Assemblyman McArthur:
Does this exempt the nonresidential use? I am okay with this section.

Acting Chairman Carrillo:
Okay. Mr. Ziegler.

Dave Ziegler:
Section 55 requires an HOA to charge a unit owner not more than 10 cents per page after the first 10 pages for the cost of copying documents furnished in a resale package. It also provides that the purchaser, rather than the seller, is not liable for a delinquent assessment if the HOA fails to furnish documents required in a resale package within the 10 days allowed by this section. There is a

proposed amendment from Yvonne Schuman to provide that if the documents exist in electronic format, they must be provided, upon request, by email and at no charge.

Acting Chairman Carrillo:
Mr. McArthur?

Assemblyman McArthur:
I may have missed something. Were there three points to this section?

Dave Ziegler:
There is the cost per page, the substitution of purchaser for seller, and a proposed amendment from Yvonne Schuman regarding if the documents exist in an electronic format, they must be provided by email upon request at no charge.

Assemblyman McArthur:
I am okay with this.

Acting Chairman Carrillo:
I am okay with the proposed amendment. At that point the homeowner can provide an email address and it can be sent free.

Assemblyman McArthur:
I agree.

[Chairman Ohrenschall reassumed the Chair.]

Assemblyman Carrillo:
We are discussing the proposed amendment from Yvonne Schuman on section 55.

Chairman Ohrenschall:
I am okay with that also.

Dave Ziegler:
Section 56 addresses warranties made to a purchaser of a unit and provides that such warranties are made by a declarant, rather than any seller. There is a proposed amendment from the Nevada Justice Association to retain the language of the existing statute.

Assemblyman McArthur:
Does that mean we are putting seller back in instead of taking it out, and we have to do that by amendment?

Chairman Ohrenschall:
I believe so. I believe Ms. Dennison had no problem with that.

Dave Ziegler:
I do not recall. The proposal from the Nevada Justice Association is to retain the existing statute.

Alisa Nave, representing the Nevada Justice Association:
Regarding section 56, we are asking for a return to the original language, replacing "declarant" with "seller." The declarant is a master plan developer, and typically is responsible for the larger development of the parks, roads, amenities, a country club, and those things that go with a larger community. The builders will then build out the individual units, and sell them to the buyer. The warranties with regard to the specific unit should be placed on the seller and not the declarant. We think that makes more sense within the context of this section.

Chairman Ohrenschall:
Is my recollection correct that Ms. Dennison had no problem with this?

Alisa Nave:
That is correct.

Chairman Ohrenschall:
This is something I am supportive of. Mr. McArthur?

Assemblyman McArthur:
Yes, I am okay with it.

Chairman Ohrenschall:
I think we can proceed.

Dave Ziegler:
Section 58 authorizes an HOA board to create an independent committee of the board to evaluate, enforce, and compromise warranty claims, and provides rules for such a committee. There is a proposed amendment by Mr. Friedrich to delete the word "compromise" at page 60, line 21.

Chairman Ohrenschall:
Mr. Carrillo, while you stepped out of the room, we reviewed section 56 and the proposed amendment. Are you okay with that?

Assemblyman Carrillo:
I am okay with section 56.

Chairman Ohrenschall:
We are now reviewing section 58 and the proposed amendment.

Assemblyman McArthur:
Perhaps as a compromise, we could use the word "address" in place of "compromise."

Chairman Ohrenschall:
I think you and Nick Anthony are legal geniuses. I am surprised that was not caught earlier. I support that. Mr. Carillo?

Assemblyman Carrillo:
I am fine with that.

Chairman Ohrenschall:
Mr. Friedrich, are you okay with changing "compromise" to "address"?

Jonathan Friedrich:
I am ecstatic.

Chairman Ohrenschall:
We are all in agreement and propose to accept the amendment, but instead of deleting "compromise," we will replace it with the word "address."

Dave Ziegler:
I would like to point out that what I am about to say is current law. Section 59 provides that members of an HOA board are not personally liable to victims of crimes occurring on the property, and provides that punitive damages may not be awarded against an HOA or its board or officers under certain circumstances. Those two things are in current law. The new provision is that the CICCH is not prohibited from taking disciplinary action against a member of an HOA board.

Assemblyman McArthur:
I am okay with this section.

Chairman Ohrenschall:
This section is duplicative of everything except for subsection 8 on page 61. Subsection 8 states, "The provisions of this section do not prohibit the

Commission from taking any disciplinary action against a member of an executive board pursuant to NRS 116.745 to 116.795, inclusive."

Assemblyman McArthur:
I do not have a problem with that.

Assemblyman Carrillo:
I am fine with subsection 8 of section 59.

Chairman Ohrenschall:
All three of us are fine with subsection 8 of section 59, and the rest of it is duplicative.

Dave Ziegler:
Section 59.5 deletes the requirement that a community manager must post a bond.

Chairman Ohrenschall:
I am trying to remember what the testimony was in support of removing the requirement for a manager posting a bond.

Michael Buckley:
This is the flip side of requiring the HOA to have crime insurance. This was passed in 2009 with the thought that this was the best way to protect the HOA. When the Commission held hearings on this issue, the Commission heard testimony from the insurance experts that crime insurance was the best way to provide security. It also found that to require a manager—and a manager is the individual, not the company—to post the bond would be mostly cost prohibitive to that individual. An example was given of a young person starting out who did not have a super credit rating. The cost for the bond would be very expensive. The bond would also be very low and would not protect the HOA. The Commission feels that the best way to protect the HOA is through crime insurance, not the bonds for the managers.

Chairman Ohrenschall:
Currently, do the managers have to be bonded?

Michael Buckley:
The statute required the Commission to come up with regulations on what these bonds would look like. Frankly, we were unable to find anyone who could tell us what these bonds were. They are required to have a bond, but there is really no such thing that is available.

Assemblyman McArthur:
Basically I think we are covered by the other part of this bill with the crime insurance.

Assemblyman Carrillo:
I am fine with this.

Chairman Ohrenschall:
We are all in agreement with deleting the requirement of bonding the managers.

Dave Ziegler:
That concludes the printed portion of the bill. There are a few things still on the table. There are three amendments that have been proposed that would be added to the bill. We also have said at the outset that we need to go back and review a couple of sections. The first additional amendment was proposed by Jonathan Friedrich. It would add a new section. It is copied in the work session document. It begins with, "The fee for a mediator or arbitrator selected or appointed pursuant to this section must not exceed $1,000, unless a greater fee is authorized for good cause shown."

Chairman Ohrenschall:
Is this new language being proposed? This is duplicative language that was also in Assembly Bill 448.

Assemblyman McArthur:
It appears as though this would put a cap of $1,000 and each party will split the fees.

Chairman Ohrenschall:
As I recall, this was to be in line with the Nevada Supreme Court Rule 24, which caps arbitrator fees at $1,000 with exceptions for good cause.

Jonathan Friedrich:
The reason for this amendment is that even though A.B. 448 passed through the Assembly 42 to 0, someone added a fiscal note to the bill. It has been sent to die over in the Senate Committee on Finance. If that happens, then this provision, which was approved in A.B. 448, would not be included.

Chairman Ohrenschall:
We are all hopeful that your prognosis is premature; while the patient is on life support, it will pull through and walk out of that hospital, and receive a clean bill of health. I have a "probably okay" from Mr. McArthur. Mr. Carrillo?

Michael Buckley:
For clarification, this is a bill dealing with the Uniform Common-Interest Ownership Act. The next bill on your agenda deals with arbitration and alternative dispute resolution, and that is probably the best place for this amendment.

Chairman Ohrenschall:
I think that is a valid point and perhaps we should consider adding this to Senate Bill 254 (1st Reprint).

Dave Ziegler:
The next proposed additional amendment was from Trudy Lytle. It would amend NRS 116.12065, which is entitled, "Notice of changes to governing documents," to make it applicable to small planned communities also.

Chairman Ohrenschall:
I believe this was covered by Mr. Segerblom's amendment. We have already approved this. It is in Mr. Segerblom's mock-up.

Dave Ziegler:
The next proposed new amendment was submitted by Garrett Gordon. It would amend NRS 116.310305, relating to construction penalties. A copy of this amendment is in your packet.

Garrett Gordon:
This amendment is to clarify NRS 116.310305, which gives the power to the executive board to impose penalties for failure of a unit's owner to adhere to certain schedules relating to design, construction, occupancy, or use of an improvement. The intent behind this section was to mitigate inconvenience to other unit owners, for instance, noise, dust, and construction traffic, giving the board the ability to impose penalties. This amendment will clarify the 2003 legislation regarding where the maximum amount of the penalty should be set forth. In brief, the new language is, "The right to assess and collect a construction penalty is set forth in: (1) The declaration; (2) another document . . . ." Again, where "the maximum allowable penalty" set forth should be made available in a notice and "as part of the resale package that is required under NRS 116.4109 (a)." In summary, this amendment clarifies exactly where the maximum amount of the penalty needs to be, given the declarations that existed prior to 2003. We are adding a provision that this notice of a schedule and notice of what construction penalties may be imposed are, in fact, part of the resale package so all buyers, which includes custom and speculation home builders, are aware of what remedy is available to the HOA.

Again, the intent of this section is to mitigate inconvenience to neighbors regarding noise, dust, construction traffic, et cetera.

Chairman Ohrenschall:
Are there any questions?

Assemblyman McArthur:
For clarification, when you talk about construction penalty, I think about some sort of building, but what we really are talking about is the scheduling. Is this wording clear enough?

Garrett Gordon:
Yes, this does deal with the schedule. You will see the amendment discusses completion and commencement to mitigate any impact on the neighbors. The term construction penalty is used in this section, so I think it is clear that it does deal with a schedule.

Assemblyman McArthur:
In that case, I am fine with this amendment.

Chairman Ohrenschall:
Mr. Gordon can you elaborate on what the confusion was after the passage of the statute in 2003? Has there been litigation with these penalties?

Garrett Gordon:
In 2003, this legislative body added this language regarding that the maximum amount of the penalty must be set forth in the declaration, in a recorded document, or in a contract between the unit owner and the HOA. There has been confusion and questions in the industry regarding declarations existing prior to 2003. It is clear that in order to collect and assess a construction penalty, it must be set forth in the declaration. Regarding the maximum amount of the penalty, from my understanding, in many HOAs, this information is in the rules and regulations, or another document approved by the board, which can be amended very easily by the board. This amendment would say the right to assess and collect a construction penalty must be codified in the declaration. To ensure all buyers are on notice of what this penalty could be, it must be in the resale package.

Chairman Ohrenschall:
So the confusion is within the industry. Has there been litigation?

Garrett Gordon:
To my knowledge there has been no litigation. This has been dealt with through arbitration or mediation. I have heard there is some question regarding declarations prior to 2003. My understanding is the intent was not to affect those declarations, but make this provision prospective in 2003. I hope this clarifies that the declaration must give the right to assess a construction penalty, but that the maximum allowed penalty could be set forth in another document approved by the board.

Chairman Ohrenschall:
Any questions or concerns? [There were none.] I do not remember any testimony in opposition. Was there any, Mr. Ziegler?

Dave Ziegler:
This is a new amendment.

Chairman Ohrenschall:
Right.

Garrett Gordon:
I have spoken with Ms. Dennison and Senator Copening. Neither of them were opposed to this amendment.

Jonathan Friedrich:
In A.B. 448 there was an exclusion for delays and penalties beyond the control of the owner. For example, if bank financing had fallen through and was retracted, or if the contractor went broke, that would be beyond the control of the owner.

Chairman Ohrenschall:
I do recall that. This is not contrary to A.B. 448, if it passes.

Jonathan Friedrich:
If A.B. 448 does not pass, then I would like to see the language from A.B. 448 included in this amendment.

Chairman Ohrenschall:
Mr. Friedrich, there does not seem to be much appetite for that, but thank you for your comments. We will accept this amendment.

Dave Ziegler:
There are a couple of things that we agreed we would revisit. One has to do with section 7. At the last work session, I read from my abstract that the

definitions in NRS Chapter 116 do not apply to the bylaws and declarations of HOAs. After the work session, Ms. Dennison and I discussed that. It was her concern that the intent was exactly the opposite; that the wish was that the definitions in NRS Chapter 116 actually do control. If there are contrary definitions in bylaws and declarations, the definition in NRS Chapter 116 would be the dominant definition. There is a conceptual amendment to satisfy those concerns. Section 7 would be amended to read, "As used in this chapter and in the declarations and bylaws of an association, the words and terms defined in NRS 116.005 to 116.095, inclusive, have the meanings ascribed to them in those sections."

Assemblyman McArthur:
It appears that we are taking one part out and putting another part back in, is that correct?

Dave Ziegler:
One way to describe this is that it takes section 7 and flips it. The way that section 7 is now, it says that NRS Chapter 116 does not control the bylaws and declarations. The intent was that it would control.

Michael Buckley:
The intent of the bill was just as Mr. Ziegler states. The statutory definitions would always trump what the parties provided in the documents.

Chairman Ohrenschall:
I am inclined to support this amendment. It provides uniformity throughout the state. One way to get that uniformity is if the definitions in NRS Chapter 116 are the definitions, and we will not have different definitions with different HOAs.

Assemblyman Carrillo:
This appears to be putting it back to what it was intended to be. I am okay with it.

Chairman Ohrenschall:
We are all in agreement to support this amendment.

Dave Ziegler:
Section 33 has to do with the idea that an HOA board has discretion whether to take enforcement action for a violation of the bylaws, declarations, or rules and provides that a board does not have a duty to take enforcement action in certain circumstances. Yvonne Schuman had suggested an amendment that persons in similar situations must be treated similarly. In other words, there should be a

fairness doctrine attached to this. I do not think we reached closure on that during the last work session.

Michael Buckley:
For clarification, NRS 116.31036, section 3, already requires that the association uniformly enforce the rules and regulations.

Assemblyman McArthur:
Did Mr. Friedrich have an amendment in there? I recall he wanted everything to be fair.

Chairman Ohrenschall:
Mr. Friedrich, did you have an amendment to this section?

Jonathan Friedrich:
I do not see anything.

Michael Buckley:
My previous reference should be NRS 116.31065, subsection 5, which states: the rules ". . . must be uniformly enforced under the same or similar circumstances against all units' owners. Any rule that is not so uniformly enforced may not be enforced against any unit's owner."

Assemblyman McArthur:
There are a couple of other places in statute that address this also.

Chairman Ohrenschall:
Are you all right with this, Mr. Carrillo? All right, we can proceed.

Dave Ziegler:
I do not have anything else on S.B. 204 (R1).

Chairman Ohrenschall:
Is there anyone else who would like to express themselves on this bill?

Jonathan Friedrich:
I believe there are still a couple of sections that have not been resolved.

Chairman Ohrenschall:
Do you know what sections those are?

Jonathan Friedrich:
Section 49. I believe section 45 has been done.

Dave Ziegler:
We have that in our notes. It is the same wording as in the bill, up to a maximum of $5 million.

Garrett Gordon:
I appreciate the compromise, and we are fine with this section. I got a clarification in my amendment regarding the construction penalties. For the record, when I added the language regarding the maximum allowable penalty and schedule as part of the resale package, it should also include the language "or part of the public offering statement." Obviously, we want full notice and disclosure to new buyers and to subsequent buyers. This would provide another layer of transparency.

Chairman Ohrenschall:
So your proposal is to change your amendment to read, "The association has made available a notice of the maximum allowable penalty and schedule as part of the resale package or part of the public offering statement." Is that correct?

Garrett Gordon:
I would suggest that sentence read, "The association has made available a notice of the maximum allowable penalty and schedule as part of the public offering statement or resale package that is required under NRS 116.4109 (a)." I think that is broader and provides more notice to prospective buyers.

Dave Ziegler:
To recap section 49, it provides reasonable attorney's fees and costs and sums due to an HOA under the declaration, or as a result of an administrative, arbitration, mediation, or judicial decision, are enforceable in the same manner as unpaid assessments. This section also authorizes a court to appoint a receiver to collect all rents or other income from a unit owner in an action to collect assessments or foreclose a lien. There are two amendments proposed. One is by Yvonne Schuman, which is attached to the work session document (Exhibit C). Another is proposed by Jonathan Friedrich to delete the language regarding items that are enforceable in the same manner as unpaid assessments. He also suggests that all fees should be capped and that a cap should be placed on the amount a receiver may charge for his or her services.

Chairman Ohrenschall:
There was an amendment having to do with the fines adopted by NRS Chapter 116. That was to which section?

Garrett Gordon:
It was section 49.

Chairman Ohrenschall:
Section 49, subsection 1, on page 47 of the bill, is this duplicative language from another bill?

Michael Buckley:
Yes, I believe it is in S.B. 174, dealing with collections. It came on a parallel track because this is the uniform language.

Chairman Ohrenschall:
One concern I have with that section is that we are working on several of these collection issues, and attempting to come to an agreement prior to the end of session, using one or perhaps both of those bills as a vehicle. I believe the proper venue for this is through those negotiations and attempts to compromise. I do not believe we should process section 49, subsection . . .

Michael Buckley:
Just to point out, I think that you are right. This is all about collections and liens. If you are going to deal with that elsewhere, we do not have any objection to putting that in another bill. We would hope that the language on receivers, which came from the Uniform Act, would go in there as well.

Chairman Ohrenschall:
I agree, I think section 49, subsection 11, should stay in there. There was an example of the Paradise Spa in Las Vegas, correct?

Michael Buckley:
That is correct.

Chairman Ohrenschall:
Mr. Friedrich proposed an amendment regarding charges by receivers. I was thinking perhaps we could pass subsection 11, but mandate that the CICCH promulgate regulations establishing a cap for receivers and what they may charge.

Michael Buckley:
For clarification, the bill proposes to allow receivers to be appointed by the court. I do not think that the CICCH could tell a judge what the receiver would be paid. There may be some confusion about this kind of receiver. The example of Paradise Spa is that there were tenants who were paying their rent to the unit owner. The unit owner was not paying his dues and the association was owed money. There was income to pay the receiver's fee, which is more like a property manager, and would be according to market rates. That needs to be distinguished from appointing a receiver for an association that is being

poorly run, which would be very expensive. I think the Commission does have some authority there because the Real Estate Division is the "person" who would seek the receiver, rather than here where it is the association that is trying to collect and get some money to pay the assessments that the owner is not paying. I do not think the Commission could tell a court what do to.

Chairman Ohrenschall:
So the examples that Mr. Friedrich pointed out about receivers charging egregious fees, you do not think that would happen because the judges would try to ensure the fees are reasonable.

Michael Buckley:
A receiver is an officer of the court. The receiver has to report back to the judge. The judge has to approve the receiver's fees and his accounting. It does not have anything to do with common-interest communities per se. This is just allowing the association to have a remedy that most mortgage lenders have.

Chairman Ohrenschall:
I would propose on section 49 that we do not accept any of the amendments and that we do not process section 49, subsections 1 through 10, and process subsection 11.

Assemblyman Carrillo:
I am not sure I feel comfortable with deleting all of those subsections. Earlier, we were looking at a simple amendment.

Chairman Ohrenschall:
I see your point. However, as Mr. Buckley testified, this section is also in S.B. 174. I do not think it would be wise to have this move forward here, when the issue is part of an overall attempt at a compromise.

Assemblyman McArthur:
We are taking out a lot of language if we delete all of those subsections, correct?

Chairman Ohrenschall:
No. I am not proposing we delete any current language in the NRS. I am just proposing that section 49 would now only have subsection 11. The rest of it would just go away. We would not be deleting any existing language from the NRS, but we would be adding subsection 11.

Assemblyman Carrillo:
If you are going on the assumption that another bill will pass or not, or that both will pass or not, I think we should keep this bill whole.

Chairman Ohrenschall:
Remember the amendment Mr. Friedrich proposed dealing with the construction penalties, and he was concerned that even though it was duplicative of A.B. 448, he wanted it in here because he was afraid A.B. 448 would not get out of the Senate Finance Committee. He wanted a second bite at the apple by having it in this bill. We turned that down for substantially the same reason that I do not think this should be approved. This is not only two bites at the same apple, but more importantly, this is part of the negotiations on the collections issue between both houses.

Assemblyman Carrillo:
This is a bill in itself. This is not taking a second bite at the apple because it is already in the bill. For clarification, how is your example the same as having two bills with the same language? How are we looking at amending it when it is already there? We are not talking about putting section 49 in this bill, because we are not adding to it, that is part of the bill as it is proposed.

Michael Buckley:
I am aware that when S.B. 174 was drafted, we did give them the uniform language. I believe the language in S.B. 174 incorporates the changes that we made. I am not sure about the receiver section, but I know that the language on the attorney's fees and the technical changes are the same as in S.B. 174.

Assemblyman McArthur:
Is there room for compromise in this?

Chairman Ohrenschall:
I think there is room for compromise, and that compromise is going to come out of the negotiations between both houses on S.B. 174 and A.B. 448. Hopefully, we can come out with something that will protect homeowners and protect the HOAs. I do not believe this is a proper place for this issue.

Assemblyman McArthur:
I am not concerned with a compromise having to do with a couple of completely different bills. I am not sure that is helping us with this bill. I am wondering whether maybe we should do what we want to do here and not worry so much about what is being done with two other bills. My question was, can we compromise on this bill? I think we are in agreement on subsection 11.

Chairman Ohrenschall:
We are going to take a brief recess.

[The Committee recessed at 8 p.m. and reconvened at 8:43 p.m.]

Before the break, we were discussing S.B. 204 (R1). We are going to delay any further action on this bill until we reconvene. We will now begin the review of Senate Bill 254 (1st Reprint).

Senate Bill 254 (1st Reprint): Revises provisions relating to common-interest communities. (BDR 10-264)

Dave Ziegler, Committee Policy Analyst:
Senate Bill 254 (R1) is sponsored by Senator Copening and was heard in this Subcommittee on May 6, 2011. It revises the procedures for alternative dispute resolution of civil actions concerning governing documents or the covenants, conditions, or restrictions (CCRs) applicable to residential property. It also revises administrative proceedings concerning a violation of existing law governing common-interest communities and condominium hotels.

[Read from work session document (Exhibit E).]

I would like to point out that Senator Copening's amendment dated May 13, 2011, does include the suggestions of Mr. Stebbins.

Chairman Ohrenschall:
Is the amendment proposed by Mr. Friedrich the arbitration cap that was proposed for Senate Bill 204 (R1)?

Dave Ziegler:
No, the proposed amendment by Mr. Friedrich would replace the bill with new provisions, which are attached to the work session document.

[Read amendment.]

Chairman Ohrenschall:
Regarding the prior amendment that Mr. Friedrich had proposed for S.B. 204 (R1), we will consider that in this bill with the cap on arbitration fees. Are there any concerns with adopting the cap on arbitrator's fees?

Eleissa Lavelle, Private Citizen, Las Vegas, Nevada:
I have been involved as an arbitrator and as an advocate on behalf of both associations and individuals. The concern is to ensure that the arbitrators

hearing these cases are as qualified as possible. We have seen the complexity of *Nevada Revised Statutes* (NRS) Chapter 116 and the way these rules operate. In order for this process to work, you must ensure that you have qualified people who are hearing these matters. While I agree there should be some limitation on these costs, because I do agree with many of the people who have spoken, that there are in many cases an excessive amount of bills that are being promulgated by these arbitrators. I think the method to handle this is partly by what has been proposed by Senator Copening's conceptual amendment. I am also aware that Gail Anderson is in the process of addressing these issues. In addition to limiting the dollar amount, perhaps incorporating something along the lines of budgets and establishing the kinds of things that arbitrators do would limit the total cost of these arbitrations.

Chairman Ohrenschall:
Why would the $1,000 cap work under the Supreme Court rule but not work here?

Eleissa Lavelle:
The $1,000 cap has been implemented in the mandatory arbitration process in the district court. Those kinds of cases under NRS Chapter 38 are very limited in their scope. They deal with matters where under $50,000 is at stake. But the statutes exclude a number of kinds of disputes, notably, matters relating to title to real estate, matters dealing with equitable claims, matters dealing with appeals from courts of limited jurisdiction, and actions for declaratory relief. Basically those types of cases limit the scope and complexity of what arbitrators are hearing. That is not the case with these kinds of arbitrations. Here you have very complex issues, and in many cases, arbitrators are given packets of documents of all the board minutes, all the correspondence, perhaps plans and specifications, and architectural guidelines. It takes a great amount of time for arbitrators to do a decent job of understanding the issues and giving adequate opportunity for these people to be heard. At $1,000, you are going to be requiring people to volunteer their time, and I do not know whether you will find quality arbitrators to do this for $1,000.

Chairman Ohrenschall:
When you talked about the district court cases under arbitration being limited to less than $50,000, does that mean you anticipate that most of these disputes would be more than that?

Eleissa Lavelle:
In many cases with homeowners' associations (HOAs), the dollar amount is not significant with respect to each individual case. More particularly, this is an enforcement issue. It could have a dollar figure, but more often it may deal

with interpretations of declarations or interpretations of other governing documents, where a dollar amount really is not the significant part of it. There may be fines imposed, but the most significant part is not only how that declaration or other governing document is enforced with respect to a single homeowner, but the impact it may have on an entire community. Consistency of enforcement is really what is critical with all of these. We want to ensure that these enforcements are being fairly and evenly applied. Whereas, one person may not consider a fine to be a huge amount of money, the impact across the board to the way that community operates and the value of the homes that this enforcement proceeding might have can be very significant.

Chairman Ohrenschall:
Any questions? [There were none.]

Assemblyman McArthur:
Are we going to review the bill, starting with page 1?

Chairman Ohrenschall:
Regarding the arbitrator's fees, if you do not think the $1,000 cap would work, do you think some other cap would work, and is that something that should be put in statute?

Eleissa Lavelle:
There are provisions in the bill that would provide a fast-track type of arbitration where the Real Estate Division Administrator in the Department of Business and Industry would develop regulations that would limit the scope of what these arbitrations would require. It is provided that is what the Administrator would be doing. I think that it may best be handled by the Administrator with clear direction within the statute. That is the goal. The reason for that is if this statute is to last for as long as we all would like it to last, we want it to be responsive to changing events in the community and changing needs and requirements of the people that are utilizing the statute. The Administrator may be in a better position to find out what is going on and develop in a very quick manner the kinds of regulations that would implement a limitation on these fees.

Chairman Ohrenschall:
What is the reason the bill only provides for capping the fast-track arbitration fees as opposed to all arbitration fees?

Eleissa Lavelle:
I believe the proposal is that all fees would be reviewed and limited. The fast-track is a special form of arbitration that could be utilized where the issues are not complex and would require very limited or no discovery and very short

arbitrations. Some of these arbitrations can go days at a time. Others, where the issues are fairly limited, can be limited by regulation to one or two hours. That alone will limit the cost for everybody. All of those are included within the concept this bill encompasses.

Chairman Ohrenschall:
Where within the bill are the arbitrator fees?

Eleissa Lavelle:
They are on page 21, line 19, which deals with rules for speedy arbitration. I may also have been thinking of the proposal that Senator Copening has made to attempt to lift all fees across the board. Not just for fast-track, but for other types of arbitration.

Chairman Ohrenschall:
That is in her amendment, correct?

Eleissa Lavelle:
Correct.

Chairman Ohrenschall:
If Senator Copening's amendment is approved, how long would it take to adopt those regulations?

Gail Anderson, Administrator, Real Estate Division, Department of Business and Industry:
I actually have a regulation file started. I had a workshop proposing a number of things concerning the arbitrators and mediators under NRS Chapter 38, which is under the Real Estate Division Administrator's jurisdiction. This is very doable. I have spoken with Senator Copening regarding this. I will have to request that I be allowed to proceed with the regulation, but this is an important public policy that I am fairly certain we can get approval for. There would be some changes; I had some good input from the workshop. I do need to review and incorporate the referenced speedy arbitration fast-track process.

Chairman Ohrenschall:
Your caps would apply to all arbitrators under Senator Copening's amendment, correct?

Gail Anderson:
That is correct. My proposed regulation is concerning all arbitrations.

Chairman Ohrenschall:
Any questions? [There were none.] Ms. Lavelle, would you mind walking us through this bill?

Eleissa Lavelle:
Section 1 deals with the mediation portion of this bill and provides that no later than five days after receipt of the written response—the complaint process is initiated through the Division; when a written response is prepared and received, within 5 days after that—the Division is required to provide a copy of the response to the claimant so that everyone knows what the claims are, what the defenses are, and to provide a list of the mediators that is maintained by the Division. The mediators are to be selected, approved, and trained by the Administrator so that it is clear that they have adequate training in mediation process and an adequate understanding of NRS Chapter 116 and general HOA law. That is the purpose of having the panel of mediators maintained by the Administrator.

The mediator is required to provide an informational statement as set forth in subsection 3, within a very short time period. The mediation is supposed to take place within 60 days after the selection and appointment of the mediator. The purpose is to assure that this process does not unduly delay ultimate decision making if the case cannot be settled.

Subsection 5 states that if the parties reach an agreement, that agreement is to be reduced to writing. This is absolutely standard mediation practice and is something that Mr. Friedrich had proposed as well. The idea is that once the parties have agreed to a settlement, it becomes a binding contract between the parties. It will not be sent out to everyone; the agreement is going to be confidential, and it will not be published unless it will be enforced in some way.

There is a provision for the payment of fees of mediation. The plan is that there would be funds available to some extent through the account referenced in subsection 6. The Account for Common-Interest Communities and Condominium Hotels (CICCH) created in NRS 116.630 had funds set aside for the mediation process. The idea was that this money would be available for payment of these mediators. It is true that the statute does not state that it will be free mediation. It is calculated that given the anticipated number of mediations, if the cost per hour was limited, there would be adequate funds from which these mediators would be paid, not requiring any additional funding by the individuals.

Michael Buckley, Chair, Commission for Common-Interest Communities and Condominium Hotels:
We did have, at the Commission, $150,000 for several years that was available to subsidize arbitration that was never used. Finally the amount was taken out of the budget. The fund for CICCH has a surplus in the budget that is not being used. There are funds available through that which could be allocated to provide for the free mediation.

Eleissa Lavelle:
The bill provides that the Commission will have the ability to regulate the fees and charges that would be assessed in section 1, subsection 5. It states, "The Commission shall adopt regulations governing the maximum amount that may be charged for fees and costs of mediation and the manner in which such fees and costs of mediation are paid." We are cognizant of the fact that this should not be a more expensive process, but in fact a tool to perhaps limit the ultimate costs that are going to be incurred in resolving these disputes.

Section 1, subsection 7, provides that if either party fails to participate in the mediation, or if the parties are unable, with the assistance of the mediator, to resolve the issues, then the mediator would, within five days, certify to the Ombudsman that the mediation was unsuccessful and recommend that the claim be referred either to arbitration pursuant to NRS 38.330, if the claim relates to any governing documents, or to the Division for proceedings pursuant to NRS 116.745 through 116.795 if the claim relates to an alleged violation of a provision of NRS Chapter 116.

In order for the mediations to be successful, the communications that take place are required to be confidential. The next provision of that section says the mediator may not provide any other information relating to the mediation to the Division. The Division, the Commission, and a hearing panel may not request from the mediator any other information relating to the mediation. This is a very important part of this statute because it ensures that the people will be able to freely and frankly discuss their positions without fear of having their words come back to them if the case does not settle. That is also included within subsection 8, essentially the same language.

Subsection 9 is a definitional subsection, dealing with where the mediators are going to be taken from and where the mediations will be conducted.

Assemblyman McArthur:
You mentioned a time limit of five days after receipt, is that enough time?

Eleissa Lavelle:
That is a very legitimate concern. We certainly do not want to create any problems in getting this information out. The intent was to ensure the process moved along quickly. I would defer to Gail Anderson as to whether or not that is a sufficient response time.

Assemblyman McArthur:
I am not trying to fix it or change it; I am just wondering whether it is doable.

Gail Anderson:
The five days is the time the Division has once we have received the written response. That is certainly doable; it would be helpful to make it five business days.

Assemblyman McArthur:
The bill states that the Ombudsman must be available within the geographic area. Is that possible in some of the rural areas? We might want to change that to "should be available" instead of "must be available."

Eleissa Lavelle:
That is a very legitimate concern and I think any modification that would make that easier to accommodate is fine. I think within the large metropolitan areas it should be very simple to find someone within the geographical area.

Assemblyman McArthur:
Also, it states in section 1, subsection 2, "Upon appointing a mediator, the Ombudsman shall provide the name of the mediator to the parties." There is not a time frame for that. Do we need one?

Eleissa Lavelle:
I think the time frame for providing the mediators is within five days of the date of the response. We can take a look at that.

Assemblyman McArthur:
I think we need to tighten up who pays and how much they pay. It does not state what funds will be used.

Chairman Ohrenschall:
Any other questions? [There were none.]

Eleissa Lavelle:
Section 4, page 5, is the confidentiality provisions that have already been addressed. Section 5, subsection 5, deals with bad faith filings and states, "If

the Commission finds that an appeal from a final order of a hearing panel is filed in bad faith or without reasonable cause for the purpose of delay or harassment, the Commission may impose any of the sanctions set forth . . . ."

Michael Buckley:
This is a Commission process rather than an arbitration process. This is where there is a hearing panel, which is a subset of the Commissioners that would hear a complaint that the Real Estate Division brought against someone. It is not the typical homeowner dispute.

Chairman Ohrenschall:
Would this be after the mediation has run its course, or independent of any mediation?

Michael Buckley:
This is completely independent. This is after mediation, after it has been directed to the Division, after the Division has filed a complaint, after a hearing panel has held a hearing, then someone can file an appeal to the Commission.

Chairman Ohrenschall:
Is there a sense that many appeals are filed in bad faith, or for the purpose of delay?

Michael Buckley:
Currently we do not have hearing panels. This section will add a little more weight to what the hearing panel can do.

Chairman Ohrenschall:
Any questions on section 5? [There were none.]

Eleissa Lavelle:
I will skip over some of the sections; they are essentially cleanup sections and language modifications. Section 9, subsection 2, allows for the Division to disclose a claim and response filed with the Division and other documents to the mediator and to the arbitrator. This is a procedural process so that the parties will have an idea of what the claims are about and what the defenses are as they are preparing to either conduct a mediation or an arbitration.

Chairman Ohrenschall:
These are claims filed with the Division prior to the mediation process going forward, correct?

Eleissa Lavelle:
Correct.

Assemblyman McArthur:
It states the Division "may" disclose. Is there a reason for "may"?

Michael Buckley:
The reason this is necessary is because all the records of the Division, at the initial start of the claim, are confidential. It was not intended to say they should not disclose. They do need to disclose to the parties what the problem is; so there may need to be some language clarification.

Eleissa Lavelle:
The intent of section 10 is to consolidate all of the claims that a party has to the extent that they are aware of them within one proceeding. When any given claim is made, everything that the individual or HOA knows about that claim needs to be included so that we are not hitting homeowners with multiple claims on multiple occasions and the homeowners do not have to continue to defend themselves claim after claim. Similarly, if a homeowner has a claim against the association, those are consolidated to the best of their knowledge; so the association is not defending claim after claim. This effort is an attempt to limit the cost that homeowners and associations are paying to go through the arbitration process. It does provide that if these claims are not addressed, if known, that they may be limited and there may not be any ability to proceed with the claims. This is very similar to a statute of limitation that you will find in normal adjudicative law in a district court.

Chairman Ohrenschall:
Any questions? [There were none.]

Eleissa Lavelle:
Section 10, subsection 3, provides and details what needs to be included within the claims. This is essentially a due process provision. Due process requires that the person be told what the claim is about and have an adequate opportunity to be heard. This provision sets forth what will be required in the claim: a statement of whether all administrative procedures have been satisfied and a statement of the nature of the claim and the facts supporting it. Section 10, subsection 3, paragraph (e), states that all claims of which the claimant is aware or reasonably should be aware, including any claims that relate to a violation of the governing documents, need to be included within the complaint that is being filed.

Chairman Ohrenschall:
Any questions? [There were none.]

Eleissa Lavelle:
Section 10, subsection 4, says, "Upon the filing of a claim that satisfies the requirements of this section, the Division shall serve a copy of the claim on the respondent by certified mail, return receipt requested, to his or her last known address." Again, this is a due process provision, so that the respondent knows exactly what the claim is and has all of the information available to him to be able to adequately respond.

Subsection 5 requires that a written response be made by the respondent and sets forth the content of what that response is going to be.

Chairman Ohrenschall:
Any questions? [There were none.]

Eleissa Lavelle:
Section 10, subsection 6, provides that the claims may be consolidated. Subsection 7 states that by filing a claim or response, the claim or response is not being filed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of proceedings and that the claims have evidentiary support. The purpose of this is so that people are not filing false or fraudulent claims. There is a substantial amount of support for this in other provisions of the law. Rule 11, under the Nevada Rules of Civil Procedure, requires that if an attorney files a claim on behalf of a party, or if a party signs a pleading, the attorney has to do so with knowledge that there is evidentiary support and that the claim is not filed for improper purposes. There are sanctions applicable if that rule is violated. There are similar provisions within mechanics' lien law and general litigation.

Chairman Ohrenschall:
So will most of the homeowners who are filing these claims be doing it on their own without representation?

Eleissa Lavelle:
An attorney is not required to file these claims. Sometimes attorneys are there, and sometimes they are not. The homeowners who are filing individual claims would be reminded that they must file these claims with a legitimate and good faith purpose for doing so.

Chairman Ohrenschall:
Is there a penalty if they are found not to have met that standard?

Eleissa Lavelle:
There is. In section 18, subsection 9, it says that if a person files a frivolous claim with the Division pursuant to this section or NRS 38.320, the Commission may issue an order directing the person who filed the frivolous claim to pay the costs incurred by the Division as a result of that filing. This cost may be assessed not only against homeowners but also against HOAs. It has equal applicability. Nobody is entitled to file a false, fraudulent, or frivolous claim. There is a penalty involved, but it is a discretionary provision.

Chairman Ohrenschall:
If someone is found to have filed a false or fraudulent claim, can he or she appeal to a court if he or she feels the Commission is wrong?

Eleissa Lavelle:
Under normal administrative law, if a party is aggrieved by an administrative proceeding, there are limited rights of review by a district court. Those rights of review are based on whether the Commission has acted in an arbitrary or capricious manner.

Chairman Ohrenschall:
That provision, allowing an appeal to a district court and ultimately the Supreme Court, comes through the State Administrative Procedures Act as applicable to the Nevada Real Estate Division?

Eleissa Lavelle:
That is correct.

The balance of section 11 deals with false and fraudulent claims and the manner in which these are going to be handled. Subsection 1, page 12, commencing at line 2, states:

> "If, after investigating the alleged violation, the Division determines that the allegations in the claim are not frivolous, false, or fraudulent and that good cause exists to proceed with a hearing on the alleged violation, the Administrator shall:
>
> (a) File a formal complaint with the Commission, with the Division as complainant, and schedule a hearing . . . ."

I believe this is essentially the intervention process that currently exists. We have the analysis period to determine whether or not it is a false or fraudulent filing.

Chairman Ohrenschall:
Any questions? [There were none.]

Eleissa Lavelle:
Section 11, subsection 4, states, "No admission, representation or statement made in the course of the Ombudsman's efforts to assist the parties . . . is admissible as evidence . . . ." There are provisions in NRS Chapter 116 that give the Ombudsman an additional attempt to resolve these disputes. This simply clarifies the confidentiality of those conversations.

Chairman Ohrenschall:
Does this protection currently exist when someone speaks with the Ombudsman, or is this reclarifying?

Eleissa Lavelle:
I have never heard of a situation where an Ombudsman has ever revealed anything inappropriately. I am aware that there is some feeling among people who participate in this process that they want to have this very clear so that when they speak to the Ombudsman, because he is part of the process, that whatever is said is confidential. It is really a clarification.

Chairman Ohrenschall:
Any questions? [There were none.]

Eleissa Lavelle:
The balance of page 13 is clarification. Section 15 basically mirrors earlier parts of this bill. This section provides that not later than five days after receipt of the response, the claimant gets a copy and the parties get a list of the mediators. The changes we have discussed in terms of business days for the five-day time frame would be appropriate here as well.

Chairman Ohrenschall:
Any questions? [There were none.]

Eleissa Lavelle:
Continuing on, page 15 is also a mirror image of what we have discussed with respect to the method by which mediators and arbitrators are selected.

Assemblyman McArthur:
Also, section 15, subsection 6, paragraphs (a) and (b), discuss the payment of fees. This area also needs to be tightened up.

Chairman Ohrenschall:
What line is that on?

Assemblyman McArthur:
Page 15, line 18, "The Division may provide for the payment of the fees . . . ."

Chairman Ohrenschall:
I thought the "may" had to do with the fact that there was enough funding right now and no one will be charged for awhile.

Assemblyman McArthur:
I do not think so; a little lower it says "The Commission approves the payment; and . . . ," so there are a lot of questions about who pays and for how long.

Chairman Ohrenschall:
Maybe we can ask Legal to look at that tomorrow. Do you think there is some conflict in the language?

Assemblyman McArthur:
No, I just think it needs to be tightened up regarding whether or not the Division is going to pay, whether there are funds available, or will we need to get funds somewhere else if those funds get used up?

Chairman Ohrenschall:
Ms. Lavelle, do you think there is a problem in that language?

Eleissa Lavelle:
It is the same issue that was raised earlier; the question is, how do you limit the costs of these arbitrations? How do you set fees? Perhaps put parameters around the kinds of things that arbitrators might be doing that exceed the reasonable costs. I agree there are issues with respect to how much arbitrators are charging and what these costs should be. I think the very same issues and concerns that were expressed in the earlier part of this bill apply equally here.

Chairman Ohrenschall:
Thank you. Please proceed.

Eleissa Lavelle:
Regarding section 16, line 21, the term "assessment" had been included within NRS 38.300 regarding the types of things that need to be defined. Instead of the word "assessment," the word "charges" is used. Essentially, this provides a definitional section for use in the statute. It does not impose any additional charges or fees; it is purely definitional.

Chairman Ohrenschall:
I know that Mr. Friedrich had some concerns with that definition. I have talked it over with our legal counsel, and we do not feel that his concerns are correct. I am okay with this section now.

Eleissa Lavelle:
Subsection 3 is also part of the definitional section. It simply adds and clarifies what kinds of things are going to be included and excluded within the arbitration provisions, and also defines more carefully what "irreparable harm" means. These are more clarifications rather than changing anything substantive.

Subsection 4 defines "Commission" so that we know what we are talking about in the course of this statute.

Subsection 6 is a clarification that links the definition of "governing documents" to the meaning that is already defined in the statute.

Chairman Ohrenschall:
On page 16, lines 38 through 41, is the definition of "irreparable harm." Is that from somewhere else in the revised statutes, or did it come from the Uniform Law Commissioners?

Eleissa Lavelle:
Under normal injunctive relief within the NRS and the Rules of Civil Procedure, whenever you have a potential for an immediate risk of irreparable harm, you have a right for injunctive relief. In drafting this statute, the intent was to preserve that right so that if someone has an immediate issue or concern that there is a huge risk, that has to be addressed immediately, and that if you do not go through the arbitration process or the mediation process, you can go straight to court and get a judge to issue an injunction. The question is what does "irreparable harm" mean? This provision is an attempt to define that more carefully by meaning a harm or injury for which the remedy of damages or monetary compensation is inadequate and does not exist solely because a claim involves real estate. It is really a clarification of this. Under normal real estate law, or injunctive relief law, a change to the way in which real estate is held is normally sufficient grounds for getting into court. This is clarification that I believe comports with other provisions of Nevada law.

Chairman Ohrenschall:
If this passes, will it be harder for someone to get injunctive relief for something involving real estate?

Eleissa Lavelle:
I think this will give the court some guidance as to what kinds of cases they can hear and should be hearing for injunctive relief as opposed to what kinds of cases go through the arbitration process. The idea is not to limit either an HOA or a homeowner's right to get immediate access to injunctive relief. It is simply to define that right as carefully as possible.

Chairman Ohrenschall:
Any questions? [There were none.]

Eleissa Lavelle:
Section 17 is cleanup language. Section 18, page 17, provides that a claim may not be filed if a claimant has previously filed a claim with the Division and at the time the claimant filed the previous claim the claimant was aware or reasonably should have been aware of the facts and circumstances underlying the current claim. This is similar to the earlier provisions that I discussed that talk about a requirement that a claimant cannot keep filing the same claim over and over again, or if he or she has facts that he or she knows justify bringing a claim at a certain point in time, he or she has to consolidate those claims at the same time. This creates a more streamlined and less costly approach to dispute resolution.

Assemblyman McArthur:
For clarification, on page 17, line 36, it says "The claimant previously filed a claim . . . ." Should there be something about the same claim again?

Eleissa Lavelle:
If a claimant files a claim, and at the time he filed the claim, he knew of facts that gave rise to a second claim, that second claim will be barred.

Assemblyman McArthur:
I understand that. I am just not sure about the wording. I do not believe the intent is clear.

Eleissa Lavelle:
Both portions of that statute have to be satisfied. So paragraph (a) and paragraph (b) are both necessary. It is both that the claimant filed previously, and at the time the claimant filed, the claimant was aware or should have been aware of facts and circumstances underlying the current claim.

Chairman Ohrenschall:
So there is no requirement that this latter claim arose out of the same nucleus. It could be something unrelated; there just has to be knowledge of it?

Eleissa Lavelle:
That is the way it is currently drafted. It could be the HOA or the claimant.

Chairman Ohrenschall:
It is not like the civil procedure rule, requiring the same transaction or occurrence. In this situation, knowledge would be enough to bar a second claim?

Eleissa Lavelle:
Actually, there is a provision within the doctrine of *res judicata* that if you file a complaint against someone, and at the time you file that complaint you had actual knowledge of other claims that could be filed, even unrelated, you may be barred.

Chairman Ohrenschall:
Any questions? [There were none.] Thank you, please proceed.

Eleissa Lavelle:
Section 18, subsection 2, paragraph (a) is a due process provision, which says that the claimant must provide the respondent by certified mail, with written notice of the claim which specifies in reasonable detail the nature of the claim. These are provisions that ensure that everybody against whom a claim has been filed has full understanding of what the claim is about. Paragraph (b) provides that "If the claim concerns real estate within a common-interest community subject to the provisions of Chapter 116 of NRS . . . all administrative procedures specified in the governing documents . . ." must be exhausted. It requires that each of these parties, before filing a claim, has exhausted whatever hearing processes exist, and they have to certify that has occurred before they can file a claim with the Division. The rest of this section is procedural. It talks about what the claim forms will include and again, a reasonable detail of the violations. The rest of the section deals with the requirements to be included in the claim so that when these claims come before the Division, it will be clear that the parties have thought through all of their claims and supporting information and the fact that they have tried to resolve this through their administrative processes. If they do not do this, there is no penalty, but it is a requirement in the way the forms are set up.

Chairman Ohrenschall:
Any questions? [There were none.] Please proceed.

Eleissa Lavelle:
Page 19 deals with the consolidation of claims and the way the answers are prepared. Section 18, subsection 8, certifies that the claim is being filed with a

reasonable belief formed after reasonable inquiry that the claim is adequately supported and is not being filed for improper purposes. Subsection 9 provides that if a person files a claim which he or she knows to be false or fraudulent, the Commission or a hearing panel may impose penalties.

Chairman Ohrenschall:
Normally, if someone were to appeal from a hearing panel, he or she goes to the Commission?

Michael Buckley:
That is correct. From a hearing panel you would appeal to the Commission.

Chairman Ohrenschall:
Here either one would have the power to impose a penalty. If it is the Commission that imposes the penalty, the only avenue of appeal would be to district court through the State Administrative Procedure Act?

Michael Buckley:
This is referring to a claim and the fact that if a claim filed with the Real Estate Division turns out to be false or fraudulent, then the Commission and hearing panel can impose a penalty. I believe this is existing law.

Chairman Ohrenschall:
Is that something that has never happened in terms of the Commission or hearing panel imposing a penalty for a false or fraudulent claim in bad faith or without reasonable cause?

Gail Anderson:
There is a provision in law although it is not this exact language, where if the Division believes there is evidence to substantiate a knowing, willful filing of false and fraudulent claims that the state would bring a complaint to the Commission against the person who filed it. The Commission has the ability to impose a penalty. The Division has not done that as yet. We continue to try to work this program on getting things resolved, but we have the ability to do that and we may be doing that. Part of the clarifications in the proposed legislation will help define more clearly what things are appropriate and inappropriate that we could bring forth. We have not brought a claim against someone who has filed something at this point to the Commission. We have closed claims as unsubstantiated, but have not brought forth the case as being willful and fraudulent.

Chairman Ohrenschall:
Any questions? [There were none.]

Eleissa Lavelle:
Section 19 sets forth the procedure with clarification based on what has happened with the mediation. If the mediation is unsuccessful, the mediator refers the matter to arbitration. This provides that the Division will maintain a list of qualified arbitrators, and that not later than ten days from the receipt of the referral to arbitration, an arbitrator will be identified. The parties will be notified who the arbitrator will be. This is a slight clarification of statute that already exists in order to accommodate the mediation process.

Chairman Ohrenschall:
Any questions? [There were none.]

Eleissa Lavelle:
Section 19, subsection 3, provides that arbitrations conducted are nonbinding unless the parties agree in writing to binding arbitration. This is so that if the arbitrator gets it wrong, the parties have a right to go to court and see whether they can get it right. We do not want this to be binding arbitration unless the parties want it that way.

Subsection 5 states unless all the parties to the arbitration otherwise agree, the arbitration will be conducted in accordance with rules of the American Arbitration Association or other comparable rules for speedy arbitration approved by the Commission or the Division. The intent is that speedy, fast-track arbitration rules will be established for cases. The default will be a speedy arbitration unless the parties want to take it out of the speedy arbitration if the issues are more complex.

Chairman Ohrenschall:
So if the issues are more complex, that will take it out of the speedy arbitration?

Eleissa Lavelle:
Correct, the parties can agree to that.

Chairman Ohrenschall:
Any questions? [There were none.] Please proceed.

Eleissa Lavelle:
Section 19, subsection 6, states that once the arbitration decision award has been issued, the Division receives a copy of that award. It will also provide that the arbitration awards will be indexed and maintained by the Division. The intent is that there needs to be some consistency in these rulings. One way of doing that is for these arbitration decisions to be maintained by the Division.

Chairman Ohrenschall:
This does not specify how long they will be maintained.

Eleissa Lavelle:
That would be determined by regulation.

Chairman Ohrenschall:
Any questions? [There were none.]

Eleissa Lavelle:
I jumped ahead to that because the Division is going to be getting copies of these arbitration decisions and it will maintain them. The arbitrator provides a copy of the arbitration award. Except as otherwise provided and subject to regulations adopted by the Commission, the parties are responsible for payment of all fees and costs of arbitration in the manner provided by the arbitrator. This is the way the statute was originally drafted. I understand that we are in the process, through the earlier testimony and proposed amendment by Senator Copening, of tightening this up so that you have clear and more concise and limited fees for these arbitrations.

Chairman Ohrenschall:
Any questions? [There were none.]

Eleissa Lavelle:
Section 20, subsection 2, provides that upon request of a party to a mediation or arbitration, the Division will provide a statement to the party indicating the amount of the fees the selected mediator or arbitrator would charge. This will be revised through either amendment or regulation as discussed earlier.

Chairman Ohrenschall:
Thank you very much for taking the time to walk us through this bill and answer our questions.

Assemblyman McArthur:
If someone has a complaint, does it automatically go to mediation?

Eleissa Lavelle:
The point is to get people talking to each other quickly. As the statutes currently exist, they either go immediately to arbitration or to the Division for investigation or hearing. There are dispute resolution processes that are adversarial. This statute proposes that before any of those disputes go to an adversarial proceeding, the parties are required to sit down and attempt to mediate and resolve the dispute.

Michael Buckley:
Also, the mediation and arbitration ties in to making a formal complaint. If you call the Ombudsman and ask for some help, he does not have to refer you to arbitration. He can give you help without going through the process of mediation.

Assemblyman McArthur:
If you do file, it is required to go to mediation first.

Chairman Ohrenschall:
We will now recess and reconvene tomorrow upon adjournment of the Assembly Committee of the Judiciary hearing, at approximately 10 a.m.

[Meeting recessed at 10:08 p.m. on May 17, 2011, and reconvened at 10:30 a.m. on May 18, 2011.]

Chairman Ohrenschall:
We had a late night last night, but I think we made a lot of progress on these bills. We will come back to Senate Bill 204 (1st Reprint).

Senate Bill 204 (1st Reprint): Enacts certain amendments to the Uniform Common-Interest Ownership Act. (BDR 10-298)

We were held up on section 49. We agreed we did not want to consider any of the amendments that were proposed. We agreed that we supported subsection 11. The impasse was on subsections 1 through 10, that I believe are part of the overall negotiations on the collection and super priority lien issue. We have Senator Copening here to discuss section 49.

Senator Allison Copening, Clark County Senatorial District No. 6:
Regarding section 49, the Chair and I are in discussions about how to strengthen the regulations that are currently in place for collection costs. We are going to remove the new language in section 49, lines 22 through 33, leaving existing language that is currently in law and continue to work on the collection proposal.

Chairman Ohrenschall:
Thank you very much. I would like to clarify with Legal, if we were to not amend that part of *Nevada Revised Statutes* (NRS) 116.3116, we also would not have the subsequent small amendments to subsection 2 through 10. Basically that would leave us with subsection 11, correct?

Nick Anthony, Committee Counsel:
Yes, that is correct.

Assemblyman McArthur:
For clarification, lines 22 through 33, and the new language in subsections 1 through 10, correct?

Chairman Ohrenschall:
Correct, we will not change the existing statute at all. We will keep subsection 11 which deals with receivers.

Assemblyman Carrillo:
I agree with the way section 49 is.

Chairman Ohrenschall:
So we will recommend to the Assembly Committee on the Judiciary that section 49, subsection 11, be kept. All the recommendations we made last night will be included. Mr. Ziegler, is there any point in recapping this bill?

Dave Ziegler:
I think you rehashed it to death last night.

Chairman Ohrenschall:
Then I would be willing to hear a motion that we recommend to the full Committee S.B. 204 (R1) with all the amendments we liked and without all the amendments that we did not like, with section 49, subsection 11, surviving, but subsections 1 through 10 not being recommended.

> ASSEMBLYMAN MCARTHUR RECOMMENDED AMEND AND DO PASS SENATE BILL 204 (1st REPRINT).
>
> ASSEMBLYMAN CARRILLO SECONDED THE RECOMMENDATION.
>
> THE RECOMMENDATION PASSED UNANIMOUSLY.

Chairman Ohrenschall:
We will now review Senate Bill 254 (1st Reprint).

Senate Bill 254 (1st Reprint): Revises provisions relating to common-interest communities. (BDR 10-264)

I have a few questions on this bill. Last night we discussed Supreme Court Rule 24 that established a $1,000 cap for arbitrators. I believe Ms. Lavelle answered

that these arbitrations are much more complicated and are often at a value higher than the $50,000 set in the Supreme Court Rule. Even with the proposed cap, how high do you think arbitrator's fees might go, assuming that is promulgated through regulation. My fear is that arbitrator's fees might be too high.

Eleissa Lavelle, Private Citizen, Las Vegas, Nevada:
The issue has to do with the complexity of some of these issues. I understand that there is a lot of frustration. There is frustration on everybody's part, those of us who have these cases before arbitrators and some of us that are arbitrating, and I understand your concern. The difference has to do with what these cases are about. While sometimes the cases can be very simple, they deal with whether there has been a violation, either it happens or it does not happen, or either it is established or it is not established. Those are easy, and I agree that those fees should be minimal. I absolutely share the concern with this. Every case that comes before a court or an arbitrator does not necessarily have a dollar amount that is the most significant part of it. Sometimes the most significant part may be dealing with an interpretation of one of the governing documents, or how the documents work together. As an example, I had a matter as an arbitrator recently where the community documents were very complicated. They set up various neighborhoods and there were some gaps in those documents with respect to the way certain communities were going to be separately assessed, or certain individuals were going to be separately assessed. In order to reach a decision on that case, it was necessary to take testimony from a number of people and to do a very detailed interrelationship between the declaration and statutory intentions. That being said, the dollar amount is not significant, but the ramifications were huge. It was not necessary to do a site visit, and it was not necessary to take days and days of testimony.

The way that you might consider limiting these is not only a cap on the dollar amount of hourly fees that are charged, but some parameters around the kinds of activities that arbitrators should engage in. That way you can control what might be considered padding of bills, or inappropriate, unnecessary work that is sometimes done. I am not saying that arbitrators are doing that, but sometimes I think there might be a feeling that they are.

Another way would be to have an oversight mechanism, by regulation, so that the Commission for Common-Interest Communities and Condominium Hotels, the Real Estate Division of the Department of Business and Industry, or the Real Estate Administrator would have the ability to review an arbitrator's bill if someone thought it was too high and determine whether it exceeded what were reasonable parameters. There are models for this within the state bar. There is

a fee dispute committee. If an aggrieved client feels an attorney's fees are too high, he or she can go before the committee and claim the fees are inappropriate. There are different ways of controlling these costs. An absolute cap is not going to solve the problem. I know some of these arbitrators charge as little as $115 per hour, but their fees are enormous because of what they are doing.

Chairman Ohrenschall:
So with the Supreme Court Rule, which has a cap of $1,000, is there a loophole where the court may award additional damages, or is it the fact that these disputes are under $50,000? I am still having trouble with the fact that under Supreme Court Rule 24, the $1,000 cap works for all of those arbitrations, yet you feel it is not adequate here.

Eleissa Lavelle:
When you are dealing with the arbitration provisions that are conducted through the court systems, a big component of these issues has to do with discovery and perhaps pretrial motions. There is a court-appointed discovery commissioner where parties can go to have those issues briefed and heard. Those are outside the $1,000 cap. They are heard by someone else and the costs incurred by that are not included within the arbitration. The issues are there, the problems are dealt with, but they are not dealt with within the scope of the arbitration. Those costs can be huge. If you look at what those Supreme Court rules and the mandatory arbitration provisions deal with, they limit the scope of what is considered within those cases. It is not just a dollar amount of a claim that is limited; it is also the character and nature of the disputes that are heard. Complicated disputes dealing with title to real property, declaratory relief actions, et cetera, are excluded from those mandatory arbitrations. The reason for that is it is understood that those matters may be more complicated and cannot be simply divided up based upon a dollar amount. Because there is more involved, you cannot stick them with a $1,000 cap.

Chairman Ohrenschall:
Thank you. Do you feel comfortable that if this passes with Senator Copening's amendment, that these caps that will be in regulation will be adequate to ensure that there are not any outrageous or egregious arbitrator fees?

Eleissa Lavelle:
I think there needs to be a combination of things. I think that the limitation in Senator Copening's amendment is a significant part of this. In addition to that, the testimony that you heard last night from Gail Anderson and the regulations that she would propose for adoption are another significant part. You cannot deal with this issue with one bullet. There needs to be a number of different

approaches taken. Together, a limitation on the dollar amount of fees and other types of structures that are imposed, and other oversights that are imposed, are going to be the control. One other idea, the market, to some extent, controls who gets selected. If someone is outrageous in the fees and is constantly overbilling, and there is a pool of good arbitrators, that arbitrator is not going to be doing much work. That is something that is within the structural control of the Administrator.

Chairman Ohrenschall:
Thank you. Any questions?

Assemblyman McArthur:
I just want to clarify that we are looking at the amendment where there is a maximum of $225 per hour, and not the $1,000 hard cap?

Chairman Ohrenschall:
If we process conceptual amendment one by Senator Copening, there would be a conflict with what we passed in Assembly Bill 448, which was a $1,000 cap on arbitration fees.

Jonathan Friedrich, Private Citizen, Las Vegas, Nevada:
Regarding the $225 per hour, is this per side, which would then be $450? I have seen a lot of arbitrators' resumes and they normally put between $100 and $200 per hour, which is for each side. It is very unclear whether this $225 is in total or split each side? As far as oversight is concerned, I am looking at *Nevada Revised Statutes* (NRS) 38.360, which says "The Division shall administer the provisions of NRS 38.300 to 38.360 . . . ." There is no administration. I have written documentation from Mr. Gordon Milden who says that the Real Estate Division only facilitates the process. So as far as oversight is concerned, currently the Division is supposed to be administering this program and it is not. Regarding the statement that if one arbitrator is charging much more than another, how would a homeowner who has never gone through this process know that? There are still a lot of holes in this bill. I am concerned where it says that the Division "may" pay "if" there are funds available and "if" the Commission approves it. If not, then the homeowner is stuck with these outrageous fees.

Chairman Ohrenschall:
What section are you referring to? I found it, section 15, subsection 6, lines 18 through 23, states:

> The Division may provide for the payment of the fees for a mediator selected or appointed pursuant to this section from the Account for Common-Interest Communities and Condominium Hotels created by NRS 116.630, to the extent that:
>
> (a) The Commission approves the payment; and
> (b) There is money available in the Account for this purpose.

Jonathan Friedrich:
It is also mentioned earlier in the bill.

Chairman Ohrenschall:
Your question about whether both sides would have to pay, is a question I had not thought of.

Assemblyman McArthur:
I think the intent was $225 per hour total.

Eleissa Lavelle:
That is correct. The hourly rate is the maximum rate, normally to be split between the parties. There have been instances where an arbitrator will award fees to one side or another, but the $225 is the total hourly rate that the arbitrator would charge.

Chairman Ohrenschall:
Is that approximately the fair rate that arbitrators are being paid now?

Eleissa Lavelle:
I think the hourly rates range between $150 to $400 per hour. It depends on what the arbitrator is doing. The parties are entitled to not select an arbitrator if they choose to. The rates have been published, and within the resumes that are submitted to the parties, the hourly rates of the arbitrators are provided so they know ahead of time.

Chairman Ohrenschall:
If this bill passes, would both sides have to agree on the mediator, or would the Division pick the mediator.

Eleissa Lavelle:
I would like to make a distinction between mediators and arbitrators with respect to both of these professionals. The parties would be provided a list from which they could jointly select a mediator or an arbitrator. That list is maintained by the Division. If they could not reach a decision, then the Division

would make the appointment. That is consistent with the way that the district courts handle and administer the arbitration program and it is also consistent with the way other organizations, such as the American Arbitration Association, conduct their selection process.

Chairman Ohrenschall:
Thank you. In looking at the conceptual amendment presented by Senator Copening, it says to mandate the Administrator of the Nevada Division of Real Estate to adopt regulations by August 1, 2011, capping the fees that may be charged for arbitration under NRS 38.300 through 38.360, and put in statute that these charges may not exceed $225 per hour. Was this meant to be a cap on mediator's fees or solely to cap arbitrator's fees?

Eleissa Lavelle:
I cannot speak for Senator Copening, but I believe the idea is that there would be a cap on both arbitrator's fees and mediator's fees.

Chairman Ohrenschall:
Senator Copening, can you address that?

Senator Copening:
Only because I do not know the difference between mediation and arbitration, I had a recommendation and I think that one of the amendments that came through from one of the testifiers mentioned just arbitration, and that is why I had proposed that. I certainly would not object to having both in there. Generally, if a mediator charges less than an arbitrator, then perhaps we should make the cap for the mediator less than the cap for the arbitrator.

Chairman Ohrenschall:
So you would be amenable if we were to also propose a reasonable cap on mediator's fees?

Senator Copening:
I certainly would. I would want the people who work in that industry to speak to what the appropriate cap would be.

Michael Buckley, Chair, Commission for Common-Interest Communities and Condominium Hotels:
I think the idea would be that the Real Estate Division would contract with mediators for a flat fee of $500 per mediation. Certainly the idea of a cap on mediation is the intent, and we would not object to putting a cap on it. The Real Estate Division would get resumes and put mediators under contract, and they would agree to mediate these particular problems for a set fee. It would

be much less, and not necessarily on an hourly fee, but it would be a cap per mediation.

Eleissa Lavelle:
I agree with that. I think that is certainly something that can be accomplished for a flat fee. Normally, these mediations are going to go, perhaps, a half a day or a day at the very most. There could be some reasonable way of accommodating a flat number, so that everyone knows what he or she is getting into.

Chairman Ohrenschall:
Would you be averse to our amending Senator Copening's conceptual amendment number one to mandate that the Administrator at the Nevada Division of Real Estate establish a flat fee cap for every mediation?

Eleissa Lavelle:
I do not think that is unreasonable.

Chairman Ohrenschall:
Gail Anderson, would you be okay with that? She is nodding her head yes. Ms. Lavelle, do you do think it would be appropriate to place the cap in statute the way we might with the $225 cap proposed for arbitrators?

Eleissa Lavelle:
I think it is appropriate to do $225 cap for an hourly rate for arbitrators, along with additional regulations governing the structure and the way these arbitrations are going to be conducted, and an oversight by the Division as to fees. You cannot really limit the total number for the arbitration fees because each arbitration is going to be different. The costs will be different based upon the complexity of the issue. With respect to mediations, I believe that a flat fee cap is entirely appropriate.

Assemblyman McArthur:
Are we going to come up with a number for the flat mediation fee?

Chairman Ohrenschall:
That would be up to this subcommittee.

Assemblyman McArthur:
If we set a cap for arbitration, we should set it for mediation also.

Chairman Ohrenschall:
Setting a cap that may not exceed $500 for mediation. Does that seem reasonable?

Eleissa Lavelle:
I think that is a fair number. I also think that is consistent with what the Supreme Court has authorized for its mediation program; so I think there is precedent for that. I also believe that if you do cap it at $500, you will be more likely to be able to accommodate the money that has been set aside for this purpose so that it will not have to come out of the parties' pockets.

Chairman Ohrenschall:
As I read through the bill, there are different provisions for someone who does not show up and participate having to pay all the fees. If both sides participate, then do both sides divide the fee for the mediation, after the available funds have been exhausted?

Eleissa Lavelle:
That is the way it is normally handled, unless through the mediation settlement, occasionally, as a way of settling the case, one side will offer to pay the other side's fees. That can be flexible, but under normal situations, the costs would be split.

Chairman Ohrenschall:
That is in conceptual amendment number three to change section 1, subsection 5, of the bill to state that the parties shall evenly split the costs of mediation should there be a charge. That seems like a good clarification to me.

Assemblyman McArthur:
It looks like we covered number three, so I would be in favor of conceptual amendments one, two, and three.

Chairman Ohrenschall:
You are in favor of conceptual amendments one, two, and three proposed by Senator Copening, including in conceptual amendment one, a direction to the Administrator to promulgate regulations establishing a flat fee for mediation at no more than $500 total? Mr. Carrillo, are you all right with the additional cap on mediation fees?

Assemblyman Carrillo:
Yes, I am good with that.

Chairman Ohrenschall:
I still have some reservations about the $225 versus the $1,000 to cap, although it seems that Ms. Lavelle has expressed the need for this. There was an issue brought up about class action suits and not requiring them to go to mediation. How would this bill affect a potential class action?

Eleissa Lavelle:
Typically, these cases are not heard as a class action, but they can affect a group of people. You may have factions in an association. That is certainly something that happens and is the thorniest of problems to deal with. They are not typically characterized as class actions, and are not certified. I do not see any reason why those types of disputes would not go to mediation. In fact, it seems that those types of disputes are exactly why mediation should be effectuated.

Chairman Ohrenschall:
If they were not happy with the mediation, they could then file a class action, or would they have to go to arbitration under this bill?

Eleissa Lavelle:
If the mediation did not settle, and if they could not reach an accord and resolve their disputes, the mediator would make the recommendation that the case goes to the Division for investigation and go before the Commission. For example, one group of homeowners believes that the board has acted inappropriately and has violated NRS Chapter 116. There may be 50 people in a community who are aggrieved about this. If they cannot reach an agreement, it may go to the Division for investigation and go through that process. That is already in place. If it needs to go to arbitration, the mediator would send it to arbitration instead. The mediator would have the understanding of what the dispute is and be able to direct it in one direction or the other.

Chairman Ohrenschall:
Under S.B. 254 (R1), the mediator determines whether it should go to arbitration or to the Division. There is no opt out for either party, correct?

Eleissa Lavelle:
The mediator makes the recommendation to go either one way or the other. Ultimately, if the parties still do not get satisfaction, if the arbitrator gets it wrong, or they feel the Commission's decision is inappropriate, they can then go to court as an ultimate way of getting another bite at the apple. Presumably, if the mediator sent something to arbitration and the arbitrator felt that it should not be with him, he is not prevented from kicking it back. Similarly, if the Division gets the case, it can also refer it to arbitration.

Chairman Ohrenschall:
If one of the parties in mediation did not want to go to arbitration, would there be anything else he or she could do?

Eleissa Lavelle:
The mediator would recommend where the dispute would be heard because the mediator would have a greater insight as to what these disputes are. Typically, the way the statute exists now, the party files a complaint and the Division makes the decision as to whether it will go to arbitration or to the intervention process. It is somewhat the same. The party can file, but if the Division does not believe it is being conducted where the party wants it to be conducted, the Division can move it to the other process.

Chairman Ohrenschall:
So one of the parties would not have to go the arbitration route if he or she had misgivings about arbitration. We have heard Mr. Friedrich talk about the experiences he has had where the fees are very exorbitant. For clarification, under S.B. 254 (R1), if one of the parties had a fear of arbitration, he or she could choose to go an alternative route. Is that correct?

Eleissa Lavelle:
No, that is not quite accurate. The ultimate objective is to have the dispute decided. The question is who is going to decide it? What this statute does is establish jurisdiction over the dispute, much in the same way as the Nevada statutes establish jurisdiction of justice courts, district courts, and the Supreme Court. This statute establishes jurisdiction between the arbitration process and the intervention process based upon the nature of the dispute. It has to do with how the case is going to be decided, based upon what is being requested to be decided. It is almost a jurisdictional type of allocation.

Gail Anderson, Administrator, Real Estate Division, Department of Business and Industry:
I would like to clarify the jurisdiction. The Real Estate Division investigative compliance arm only has jurisdiction, and the Commission over violations of the law. If someone's dispute does not concern a violation of the law, it is not an option. The Real Estate Division compliance section can look at it and make sure, but if it is a governing documents dispute, the Real Estate Division and the Commission will not be able to deal with it, as there is no jurisdiction there. The only option then is arbitration, if a ruling is required. The other dimension here is if someone wants to sue civilly, he or she has to go through arbitration or mediation under NRS Chapter 38. If the ultimate goal is some kind of civil litigation, he or she will have to go to arbitration or mediation. While there is some discretion, it really is a jurisdictional question of who can deal with what

the substance of the problem is. Sometimes there is a combination with some potential violations of the law that the Real Estate Division can deal with, but cannot touch the governing document side of it. Jurisdiction is the bottom line and the Division would be involved in determining and closing a case.

Chairman Ohrenschall:
Currently, no one is forced into arbitration; it is a choice, correct?

Gail Anderson:
That is correct; no one is forced into it, but the party is told that if there is not a violation of law, the Real Estate Division does not have jurisdiction. The other option is to go through arbitration or mediation.

Chairman Ohrenschall:
Eventually, even after arbitration, someone could get to court if he or she wanted to, but he or she would first have to go through the Division, then mediation and arbitration, or am I misunderstanding.

Gail Anderson:
If someone's ultimate goal is to go to court, he or she will do the filing of affidavit, go through mediation, and if not resolve in mediation, then must file for arbitration, administered by the Real Estate Division to get to court.

Chairman Ohrenschall:
Thank you. Any questions? [There were none.]

Eleissa Lavelle:
I was reminded of another issue regarding setting the cap on mediation fees. While a $500 cap is appropriate in most cases, I want to ensure that parties could opt out of the cap if for some reason the matter were more complex and required more time. For example, if there is a complex mediation, the parties may choose to go forward and continue to mediate beyond what is normally expected.

Chairman Ohrenschall:
Would you want that same opt out opportunity on the arbitration cap?

Eleissa Lavelle:
I think if the parties wanted to select an arbitrator that charged at a higher rate, and that arbitrator was acceptable to the Division, if both parties agree to the rate, they should be allowed to select that arbitrator. I would suggest the parties be given the right to make their own decision if it is a greater amount.

Chairman Ohrenschall:
This would be at their own expense, if they chose to waive the cap, correct?

Eleissa Lavelle:
Correct. Either both parties agree, or if one party agrees to pick up the difference, that party should be given the opportunity to do so.

Chairman Ohrenschall:
Thank you. Any questions?

Assemblyman McArthur:
Do we really need to add that into statute? They can do that on their own and pay it out of their own pocket.

Chairman Ohrenschall:
I think we might if we are directing the Administrator of the Real Estate Division to establish a cap for mediators and arbitrators.

Assemblyman McArthur:
That is a cap that is put on the mediators and arbitrators. After that, it is the decision of the parties.

Chairman Ohrenschall:
We may need to check with Legal about that. One concern that was expressed to me last night in an email was that if someone gets behind in paying these mediation or arbitration fees, it could end up as a lien on his property that could be foreclosed upon. Is that a valid concern?

Eleissa Lavelle:
Normally, the declarations will include a provision for an award of attorney's fees to the prevailing party. Attorney's fees and court costs can be awarded by the arbitrator against one side in an arbitration. That becomes part of the arbitration award. It is not a fine; it is a separate issue and I do not know that there is anything in this statute that makes those attorney's fees lienable, except to the extent that there is a judgment ultimately entered on that award. So attorney's fees and arbitrator's fees alone are not a lienable assessment for which a nonjudicial foreclosure can take place. The point of the arbitration awards is that, for example, someone has not landscaped his or her property. The arbitrator may say the association has the right, if not fixed within 30 days, to make repairs to the landscaping at $1,000. That is reduced to a judgment through the district court or the justice court depending on jurisdiction. Now there is a judgment against the individual that is recorded against the property. If the person does not pay the money and any attorney's fees and costs, yes,

through the normal judgment process, he or she could ultimately execute for that. That is no different than any other judgment in court. This arbitration process does not change that. If the parties went directly to court to get that enforced, the right would be the same.

Michael Buckley:
I agree with Ms. Lavelle. Whether or not the association could foreclose for these fees goes to the section we were discussing before, which is NRS 116.3116. That states that the association can have a lien for fines, construction penalties, and assessments. I think that this is not a fine, it is not a construction penalty, and it is not an annual assessment. I suspect that you could make an argument that the association might be able to make a special assessment against someone based on the language in the covenants, conditions, and restrictions (CCRs), but I do not think it is clear one way or the other. This bill does not address that. It goes back to the collection issue in NRS 116.3116. My own preference is that the way these should be enforced would be through the normal judgment process unless, for example, the arbitration award determines that what the person did violated the CCRs, and therefore fits under the normal basis to make a special assessment. There is a provision that says that if an owner ran into the guard gate, it must be fixed. The owner says I did not do it. If you caused the damage to the association, you should be liable as a special assessment. There is a fine line, but this bill does not address that issue.

Chairman Ohrenschall:
Would either of you be averse to some language in the bill that would clarify that arbitrator's fees and mediator's fees could never be considered assessments for foreclosure purposes?

Eleissa Lavelle:
I do not have a problem with saying they are not lienable in the sense that they would be subject to a nonjudicial foreclosure. To the extent that they would be included in a judgment issued by a court, they would be subject to a judicial foreclosure, which carries with it a right of redemption. The assessments in NRS Chapter 116 are nonjudicial. They happen without any right of redemption. I think there needs to be a mechanism for the association to collect these fees. This is money that everybody in the community will have to pay because one person has done something that has been found to be inappropriate.

Chairman Ohrenschall:
So we need some clarifying language saying that the arbitrator's fees and mediator's fees are not lienable to the extent that it is a nonjudicial foreclosure.

I agree, they should be collectable; I just do not want them to be considered part of the arrears for foreclosure.

Eleissa Lavelle:
I agree with that.

Assemblyman McArthur:
I am not comfortable with that. It is muddying the waters and I am not sure it belongs in this particular bill. We have problems whether it is judicial or nonjudicial.

Chairman Ohrenschall:
I think we are trying to clarify this, not muddy the waters. We are trying to say that these fees for mediators and arbitrators would never be one of those categories under NRS Chapter 116 where the HOA is allowed to pursue foreclosure, which are arrears assessments, and the two exceptions for fines or penalties having to do with construction penalties, and with the health hazard penalty. This would clarify that these fees are definitely not something for which an HOA can foreclose on your home.

Assemblyman McArthur:
Are you saying that the addition of these fees may put them in foreclosure because they cannot pay for them?

Chairman Ohrenschall:
I want to clarify that the addition of these fees would not be part of that nonjudicial foreclosure provided for under NRS Chapter 116. The mediator and arbitrator could still go to court and get a judgment, and potentially put a lien on the property.

Eleissa Lavelle:
Anytime you have a judgment against an individual, regardless of whether it is a breach of contract, hit someone in the face, or whatever, if you get a judgment in court, you can record that judgment and it becomes a lien on all properties. That is standard Nevada law and it has to do with every single kind of judgment you can get. This would fall into that category. If an association or a homeowner were to get a judgment against the adverse party and record it, it becomes a lien against that party's property. Because it is a lien, that judgment can be executed on. There are homestead exemptions that apply to this kind of judgment. So the likelihood of foreclosing a judgment lien based upon a violation of someone's CCRs diminishes because it is a judgment lien. This is a significant protection to homeowners but may still provide a way for an association to be paid. For example, if the home sells, it will be paid through

escrow. It is a middle ground and is a way of providing a mechanism by which the prevailing party can get paid upon the sale of a property, but it does not allow for an immediate nonjudicial foreclosure.

Michael Buckley:
I think these are not really clear issues, and as Ms. Lavelle has pointed out, this is very complex. For example, NRS 116.310312, which deals with an abandoned or vacated unit and the association has the ability to clean up a unit, there could be charges. I do not know whether that would be subject to an arbitration if someone objected, but there was an express finding of that by the Legislature last session that these costs should be enforceable as a lien. In fact, it is given a super priority lien. I think we need to be very careful in how to frame the language. We forget sometimes how complex NRS Chapter 116 is, and if you tweak something one place, it may end up making something else not work.

Assemblyman McArthur:
That is my concern. I am not sure this is necessary because we could cause other problems.

Chairman Ohrenschall:
Mr. Buckley, do you think that adding the language we discussed earlier would cause problems elsewhere in NRS Chapter 116?

Michael Buckley:
I think it can be done if it is carefully worded. The basic idea that you are suggesting is that the attorney's fees and costs, and the arbitrator's fees and costs would not be part of the lien under NRS 116.3116 as long as it was clear that it was unless expressly provided for elsewhere. Also, let us go into this again, because the arbitration deals with the amount of the assessment. If someone is not paying his or her assessment, I do not know whether the association would arbitrate an assessment but certainly if the arbitration involves the collection of an assessment, the association is entitled to collect its fees. As mentioned, the assessments are the lifeblood of the association, and it is clear that the association has the right to collect. There is really no defense to not paying your assessments. If the association incurs costs in collecting assessments, they should be included. In concept, it is the subject matter of the arbitration that makes it complicated. If the subject matter deals with something that gives the association the ability to lien, then it may not work.

Assemblyman McArthur:
My main concern is that it would have to be drafted very carefully. If you are comfortable that this can be drafted, I do not have a real problem.

Chairman Ohrenschall:
I am all right with it. Mr. Carrillo, are you okay with the clarification that fees from mediation and arbitration could never be part of a nonjudicial foreclosure provided for in NRS Chapter 116?

Assemblyman Carrillo:
Yes, I am good with that.

Chairman Ohrenschall:
Thank you. Next we will review Senator Copening's amendment number four, which is to include in section 5 the requirement that penalties be imposed for the responder of the claim filing in bad faith, false, fraudulent, or frivolous response to a claim. I believe that is from Mr. Stebbins' amendment. He was concerned that section 5 of the bill would not work both ways.

Michael Buckley:
On page 11, line 9, you see that the original intent was that if you file a claim or a response, a person is certifying that to the best of the person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances, and it applies to not just the person who files the claim, but the respondent also.

Chairman Ohrenschall:
Thank you. Any questions? [There were none.]

Michael Buckley:
On page 19 is the same issue. Line 28 refers to a claim or response; on line 40 it just refers to the claim. It should also refer to the claim or response.

Assemblyman McArthur:
So for amendment number four we will be adding the word "respondent" or "response."

Chairman Ohrenschall:
Yes, this is just a cleanup. Mr. Carrillo, are you okay with conceptual amendment number four?

Assemblyman Carrillo:
Yes, I am good with that.

Chairman Ohrenschall:
Conceptual amendment number five was proposed by Mr. Segerblom, which we processed yesterday, as a mock-up.

Dave Ziegler:
I checked that mock-up against this bill, and I did not see any overlap between that mock-up and this bill.

Chairman Ohrenschall:
So this is a new amendment?

Dave Ziegler:
No. Amendment number five in Senator Copening's document that states she is in favor of the friendly amendment, number 6818, that applies to Senate Bill 204 (R1). I checked it and I do not see how it overlaps with this bill.

Chairman Ohrenschall:
Okay, and we already accepted that amendment, so we do not need it here.

Conceptual amendment number 6 presented by Senator Copening states, "Add language in Sec. 1 that states that if a party fails to participate in the mediation, that party shall be responsible for any and all costs of that mediation." I believe this will hold parties accountable for resolving their differences.

Michael Buckley:
I would propose that I think this is a good amendment and we need to incorporate the idea of good faith. I think that is in the foreclosure statutes. You would not want someone going through the motions; they need to participate in good faith.

Chairman Ohrenschall:
So we will change that to read "fails to participate in good faith in the mediation . . . ." That is quite a departure from what Mr. Stebbins had proposed.

Michael Buckley:
I do not think so. When people say "participate," we think they will participate in the process, and as lawyers we think how will this work in practice. The practice might be that you could read that literally by saying I will go, but I am not going to get involved. I think the idea of participate, good faith is inherent with what Mr. Stebbins suggested.

Chairman Ohrenschall:
Mr. McArthur and Mr. Carrillo, are you both okay with this amendment, including the addition of the words "good faith" as proposed by Mr. Buckley?

Assemblyman McArthur:
Yes.

Assemblyman Carrillo:
I am good.

Chairman Ohrenschall:
Conceptual amendment number seven reads, "Add language in Sec. 10 that if the person whom a copy of the claim was served refuses or fails to file a written response with the division not later than 30 days after the date of service, the allegations of the claim are deemed substantiated." My only concern is what if there is a bona fide reason that the person could not participate? Should we put in an exception? I would hate for all the allegations to be considered true against him or her if there was a bona fide excuse.

Assemblyman Carrillo:
I think you need to ensure that things are in order if you are going to be away for a period of time. Putting your head in the sand does not resolve anything. If you are going to be away, you need to make sure your business is taken care of before you leave. Obviously, we cannot know whether we will be in the hospital for six months, but a power of attorney would assist getting around this issue. In fact, if you are in the service, you have to give a power of attorney; so that cannot be used as an excuse. You need to ensure your house is in order.

Chairman Ohrenschall:
In an ideal universe that is how it would be. But there could be unforeseen problems.

Assemblyman McArthur:
I agree with Mr. Carrillo. Unless there is a medical emergency that extended the time period, I think in most of the other cases you should be able to take care of your own situation.

Michael Buckley:
I think this could be solved with the word "may" be deemed substantiated. We see this in the Commission, in a complaint where someone did not respond, and you see it in the judicial system. You do take the default, but it is not an automatic that you win. The person would need to prove that the respondent was actually served. I think you would leave that up to the arbitrator. I think that is a customary legal process.

Eleissa Lavelle:
I think something perhaps as a hybrid so that there may be some requirement that the case be proved perhaps by affidavit so there does not have to be a full-blown hearing if the party does not show up, but it could be an abbreviated hearing to keep the costs low.

Chairman Ohrenschall:
That would be in addition to this amendment?

Eleissa Lavelle:
Actually I think the word "may" does it, but I think you may want to say that it is not an absolute that the party still needs to establish by affidavit or some abbreviated mechanism that the arbitrator designates to establish the service has been proper and that the claim is appropriate.

Chairman Ohrenschall:
That gives me a lot more comfort. Mr. McArthur and Mr. Carrillo, would you be all right with amendment number seven if we changed it from "the allegations of the claim are deemed substantiated" to "the allegations of the claim may be deemed substantiated" and include proof of service and perhaps affidavits that prove the allegations?

Assemblyman McArthur:
I would be okay if we can come up with a good conceptual amendment along those lines.

Assemblyman Carrillo:
I am okay.

Chairman Ohrenschall:
Thank you.

Michael Joe, representing Legal Aid Center of Southern Nevada:
I want to comment about what the foreclosure mediation program is doing in terms of people who have a reason for not attending a mediation. The Supreme Court explained to me that they have ruled a lot about the phrase "good cause." Under the mediation program they allow a homeowner or a lender to say they cannot attend for good cause. This has to be a request in writing. The foreclosure mediation program has it addressed specifically by rule. We do see it come up quite often.

Chairman Ohrenschall:
Do you know what the foreclosure mediation program charges to conduct a mediation?

Michael Joe:
They charge a flat fee of $400. In terms of what that works out to per hour, it varies. The program allows for four hours. Some mediations take less and some will go longer. For the $400, the mediator guarantees four hours of mediation plus the mediator does the scheduling work and documentation work up-front. The mediator easily puts in the four hours of work. They have 215 mediators and most of them are happy to do this work. I am okay with a cap on fees, as well.

Chairman Ohrenschall:
Thank you. Regarding the proposed clarifying language that we want to add to ensure that mediator's fees do not become something foreclosable under NRS Chapter 116, do you have an opinion on that?

Michael Joe:
I specialize in doing foreclosures and I deal with people with homeowners' associations (HOAs). We believe that the foreclosure under that statute should only be limited to those situations where it is a violation of paying the association dues and assessments. We do believe that an association plans its budget on those and therefore should be able to collect on it. The most serious remedy we give them of foreclosure should be limited to that and should not be applied to other things. If there is a foreclosure for some other reason, that is okay. It could be a judicial foreclosure, which I have never seen. You cannot foreclose nonjudicially in Nevada; you have to foreclose judicially; so as a practical matter, they just do not bother foreclosing.

Chairman Ohrenschall:
I received an email, and I am not sure this would be an amendment the Subcommittee would consider. What if during the mediation, the fines froze until the mediator made his decision? Is that something that you think would be reasonable?

Michael Joe:
I am sorry, I do not understand.

Chairman Ohrenschall:
After the parties enter the mediation, what if the fines, fees, and any potential foreclosure were frozen until the mediator made the decision?

Michael Joe:
I think there are some real issues of due process for the homeowner. Can you foreclose on someone while he is still appealing something? I think there should be a stay on foreclosure and also maybe on some of the fees. There are different situations where it might be okay, but in general, if you have the mediator's intent to be quick, I think you can resolve an issue, and during that period, through the pendency of that hearing, maybe it should be stayed. In the mediation program, we essentially stay the foreclosure until the mediation is completed.

Chairman Ohrenschall:
So it is possible that this mediation program for problems with HOAs could take a lot of lessons from how the foreclosure mediation program is working under the auspices of the Nevada Supreme Court. It seems that it is working well in terms of how it administers the program.

Michael Joe:
The foreclosure mediation program has had a lot of effort put into it, and therefore, it is a pretty decent program. It gives homeowners one way to appeal and it is appealed pretty quickly and efficiently. If everybody does their jobs, the foreclosure mediation program runs within that 90- to 111-day period that it takes to foreclose. In addition, I know the neighborhood justice center does mediations on a routine basis. I know there are a lot of trained mediators in Clark County and across the state. There is a pool of mediators who are available to do this, and you could craft a program that works pretty well. Currently, there is a $50 fee for the notice of default that goes to fund the program and the administration of it. I am not sure whether that would be available for this program.

Michael Buckley:
There is a difference between assessments and other fees. I am not sure there is anything the association can do if it is in mediation as far as collecting the penalties or fines. It is different as far as assessments go. If someone is not paying his or her assessments, I do not think the assessments should stop or that the association should be stopped from enforcing its liens for the assessments. Those assessments are the lifeblood of the association. They are based on a budget and there are not too many arguments you can make about not paying your assessment. There are lots of arguments as far as fines or interpretation of the documents or construction penalties, et cetera. I would distinguish between those.

Chairman Ohrenschall:
You would be all right with freezing any move toward collections, fines, or potential foreclosure if it dealt with construction penalties as long as it did not deal with arrears assessments. Is that correct?

Michael Buckley:
I think I would be okay with that.

Eleissa Lavelle:
When you see these arbitrations or intervention matters, if someone has violated the governing documents, for example, he or she has not landscaped his or her property, or he or she left his garbage cans out, or there may be some other dispute that has absolutely nothing to do with construction penalties or with the payment of the assessments. I personally think it is inappropriate to penalize the association for enforcing a rule or regulation that has nothing to do with those assessments and then not allowing them to collect the assessments. If there is a homeowner who is absolutely violating rules and regulations on something that has nothing to do with payment of assessments or construction penalties, there is no reason that you stop the payment of assessments because he or she has not taken his or her garbage cans in or left playground equipment out. One has nothing to do with the other.

Chairman Ohrenschall:
Perhaps I am not expressing myself clearly. I was thinking that only fines, collection costs, or interest should be suspended during the pendency of any mediation or arbitration, because that could be part of the arbitrator's award. I was not referring to the assessments.

Eleissa Lavelle:
I wanted to ensure that was the case because I was hearing different things and I wanted to clear it up. If a homeowner is being assessed $10 per month for a violation and the arbitration process goes for 4 months, does that mean that during the time there will be no retroactive assessment of those fines? Do they stop completely, or simply stop the collection process during that time?

Chairman Ohrenschall:
The way I was envisioning this is that any action by a collection agency would be stopped until resolution. I also believe that any interest accrual would stop.

Michael Buckley:
Under NRS there was no interest on fines by statute, but that was changed in 2009. I believe that the fine is not foreclosable, except for the two exceptions you mentioned. I am not aware of collection agencies enforcing fines.

Eleissa Lavelle:
The distinction needs to be if we are talking about the accrual of the fine as opposed to the collection of the fine.

Chairman Ohrenschall:
What would be the adverse impact to having both frozen until the mediator or arbitrator makes his decision?

Eleissa Lavelle:
I have no problem with freezing them both, provided that the arbitrator is entitled to do a retroactive award of those accrued fines if it is determined that the homeowner has violated the governing documents.

Chairman Ohrenschall:
Do you feel that would need to be spelled out in statute?

Eleissa Lavelle:
I think it is happening that way now. I would not want to see the provision be authored in such a way that the association's ability to retroactively collect those accrued fines be diminished if in fact it is determined that the homeowner has violated.

Chairman Ohrenschall:
In those two exceptions on fines where someone could lose his or her home for construction penalties or for a health hazard issue, assuming that got resolved, it might prevent a foreclosure if the mediator or arbitrator is able to reach a successful agreement.

Eleissa Lavelle:
That would be absolutely appropriate.

Assemblyman McArthur:
I am not comfortable with this at all. This new language for this new amendment, we are going to have to add too much technical wording for a conceptual amendment.

Chairman Ohrenschall:
I think our Legal division is pretty topnotch.

Assemblyman McArthur:
I understand that, but we have a lot of topnotch stuff we are adding to this bill already.

Chairman Ohrenschall:
We do want it to be right.

Assemblyman McArthur:
Well, if you want to bring it back to another work session later this week so we can see those conceptual amendments.

Chairman Ohrenschall:
We could always propose the amendment to the full Committee. I could make my recommendation and you can certainly express your opinions against it. Mr. Carrillo, what are your feelings?

Assemblyman Carrillo:
I concur with that, Chairman.

Chairman Ohrenschall:
Mr. Joe, is there anything else here in S.B. 254 (R1) that causes you any concern for your clients?

Michael Joe:
I see arbitration clauses all the time, and for those of us who went to law school, it seemed like they were good things. I have no problem with arbitration as long as it is reined in and accomplishes what it is supposed to. I think arbitration was intended to be an alternative to the judicial process; it is supposed to be cheaper, and to the extent that it does not turn out to be easier, or cheaper, or faster, what is the point? If you are saying that you want to have an arbitration and mediation process that has reasonable costs, I am okay with that. Sometimes arbitration can run amuck, then they ought to be in district court and they should not be barred from doing that. If the reason an arbitrator wants to charge $10,000 to $20,000 is because it is so complicated, then maybe it should be in district court. Having a cap on it will drive those cases that should be in the district court and this will give them an opportunity to get there. I am in favor of a cap for both the arbitration and mediation.

Chairman Ohrenschall:
I suppose as a compromise, we could go ahead with the $500 flat fee for mediation and with the $225-per-hour fee that Senator Copening recommended, maybe have a maximum of $2,500, and give the party the option to go to district court if the fees will be higher than that.

Michael Buckley:
The Real Estate Division has a group of experienced arbitrators who know NRS Chapter 116. As we all know, NRS Chapter 116 is complex, it is

complicated, and, of course, CCRs are usually 80 pages long. Even in A.B. 448, while there is a $1,000 cap, it says "unless for good cause." I am not sure you can legislatively solve this by giving a cap. You will always need to have an out. If we add "for good cause," that will be the next issue to discuss; what is "good cause"? Ms. Lavelle mentioned earlier to allow the Administrator or the Commission to have the ability to review the fees of an arbitration. She mentioned that the State Bar has the fee dispute committee, where they can see whether the fees are reasonable.

Chairman Ohrenschall:
Thank you. You are correct. Assembly Bill 448 does have that safety hatch of a good cause showing allowing higher fees. We could put that good cause in this bill also, or we could go with Senator Copening's proposal of $225 an hour with no absolute cap. These are complex issues that could require a lot of time. I do think Mr. Joe brought up a good point that when it gets over $1,000, should the people go to court?

Eleissa Lavelle:
I would like to go back to the beginning and why arbitration is important. It works. Are there problems? Yes, sometimes there are problems. I think that Senator Copening's suggestion addresses those issues with the additional suggestions we have been talking about today. My concern is that, because these issues are complex, there will be cases not being heard by arbitrators who are qualified to do the work and are spending the time to do the work. This program has been enormously successful. While I recognize that there are many people who are in very serious financial straights, understand that there are communities with all kinds of people, with all kinds of property values, with all kinds of issues. By saying that there will be an absolute dollar cap on these arbitrations, effectively what you are saying is that these arbitrations are not going to be doing what they were initially designed to do. I gave a seminar on NRS Chapter 116 with Mr. Buckley in Reno. It was interesting to hear from the people up there how successful this program has been and how very few of these cases actually get to district court because people are satisfied that they are getting an adequate opportunity to be heard and getting fair and reasonable arbitration awards. They may not always win, but if they feel like they have been heard and understood and there is a good reason for the decision, they are not going to go anywhere else.

Michael Joe:
The question of whether it is working or not is depending on which side you are looking at it from. If you are saying that the purpose is to keep it out of district court, I am not sure that it is working for homeowners and association members. Maybe it is working for the Real Estate Division, maybe it is working

for the district court, maybe it is working for attorneys and collection companies, but I do not think it is working for homeowners. I think that it is not fair to say that it is working if you do not look at all parties involved. The question is who is it that you are representing and who is it that you are trying to protect in this. I think there are plenty of protections for the collection companies and the management companies and the associations, but there are very few protections for the homeowners. This arbitration and mediation process and court litigation is a process to help the homeowner protect himself. I wonder whether it is not slanted to protect the other parties: the management companies, the associations, and the attorneys.

Chairman Ohrenschall:
Thank you, Mr. Joe. We did adopt that $1,000, and it is not an absolute cap. It does have exceptions for good cause. When higher fees are needed, they could be granted. We thought it was good policy six weeks ago in A.B. 448, and I am not really sure we should backtrack from it. It was a unanimous vote when we adopted that $1,000 cap to match the Supreme Court Rule 24, but it also had the exception for circumstances that required it. I would propose that we accept all the amendments with the changes proposed by Senator Copening, with the changes we recommended, which for conceptual amendment number one included instructing the Administrator of the Division of Real Estate to adopt a flat fee cap for mediation fees of $500. However, I think we should stick with the cap we adopted in A.B. 448, which is not an absolute cap. I am sure when there is a complex case involving a lot of money, an exception will be granted for the Administrator to charge an hourly rate going over the cap of $1,000. We all agreed on amendments two and three. Regarding amendments four, five, and six, we were all fine. Actually we decided not to adopt number five because it is in S.B. 204 (R1). Conceptual amendment number seven, we will change the word "are" to "may be" and "proof of service of affidavits proving the claim" should be there to substantiate the other party was served if the other party does not show up. Mr. Joe has a good potential amendment to the conceptual amendment coming from the mediation program that our Supreme Court administers that good cause be required if the person cannot show up for the mediation. Perhaps we could model that on the rule the Supreme Court has adopted for the foreclosure mediation program. We also have Mr. Stebbins' amendment which has been incorporated into Senator Copening's amendments.

Assemblyman McArthur:
If we are going to take a vote, I am not going to go with the recommendation at this point until I see the conceptual amendments.

Chairman Ohrenschall:
Do you mean a mock-up?

Assemblyman McArthur:
Yes, I want to see those mock-ups of conceptual amendments.

Assemblyman Carrillo:
I agree with Mr. McArthur's statement.

Chairman Ohrenschall:
We have gone over Senator Copening's amendments and we agree on most of the language. There is a little debate on conceptual amendment one on whether we should adopt the arbitrator fee cap we had adopted in A.B. 448. Mr. McArthur brought up some cleanup in the original bill he is interested in. I think we should process all the recommendations that we all agree on that will be in the mock-up we present to the full Committee, which basically are conceptual amendments two through seven, without amendment five and with the additions proposed in conceptual amendment number seven. The part we disagree on is in conceptual amendment number one. We can propose to the full Committee on Friday. Does either of you have any appetite for Mr. Friedrich's amendment?

Assemblyman Carrillo:
I do not.

Chairman Ohrenschall:
Mr. McArthur is shaking his head no.

Michael Buckley:
For clarification, I did not hear that the Subcommittee had an issue with the mediation set fee, only the arbitration fees, correct?

Chairman Ohrenschall:
That is correct. We would go ahead with recommending that the Administrator of the Real Estate Division propose a regulation that has a maximum total cost of $500 flat fee for mediation. We are in dispute about whether to keep the arbitrator cap we had adopted in A.B. 448, which is $1,000 with exceptions, or to go ahead with Senator Copening's suggestion. Is there anything else that I am missing? Are we all in favor of that recommendation?

There is another point we do not agree on, which is those fines for construction penalties and the health hazard. These are the fines that are not for assessments that can lead to foreclosure in a common-interest community.

Should they be put on hold during the pendency of the mediation or the arbitration? I feel they should, if they are the issue of the arbitration or mediation. Mr. McArthur has some concerns with that. Maybe we can have an option A and an option B in the mock-up on that issue when we present to the full Committee.

Assemblyman McArthur:
There are some other cleanup things we want to get in there also.

Chairman Ohrenschall:
One is dealing with the geographical area of the Ombudsman.

Assemblyman McArthur:
We have noted it.

Chairman Ohrenschall:
Are we all on board with the recommendation for the full Committee that we agree on most of these recommendations, and there are two points where we are presenting an option A and option B? We are all unanimous on this recommendation and hopefully we will have a mock-up by Friday to present to the full Committee. Could I get a motion?

ASSEMBLYMAN MCARTHUR RECOMMENDED AMEND AND DO PASS SENATE BILL 254 (1st REPRINT).

ASSEMBLYMAN CARRILLO SECONDED THE RECOMMENDATION.

THE RECOMMENDATION PASSED UNANIMOUSLY.

We will forward this recommendation to the full Committee. There will be a few decisions that will need to be made on Friday during the work session. I appreciate everyone being here. Meeting is adjourned [at 12:20 p.m.].

RESPECTFULLY SUBMITTED:

_____
Nancy Davis
Committee Secretary

APPROVED BY:

_____
Assemblyman James Ohrenschall, Chairman

DATE: _____

EXHIBITS

Committee Name: Committee on Judiciary

Date: May 17, 2011 **Time of Meeting: 4:58 p.m.**

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster
S.B. 204 (R1)	C	Dave Ziegler	Work Session Document
S.B. 204 (R1)	D	Senator Copening	Proposed Amendment
S.B. 254 (R1)	E	Dave Ziegler	Work Session Document