

IN THE SUPREME COURT OF THE STATE OF NEVADA

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WYNN RESORTS LIMITED,  
  
Petitioners,  
  
vs.  
  
THE EIGHTH JUDICIAL DISTRICT  
COURT OF THE STATE OF  
NEVADA, IN AND FOR THE  
COUNTY OF CLARK; AND THE  
HONORABLE ELIZABETH  
GONZALEZ, DISTRICT JUDGE,  
DEPT. XI,  
  
Respondent,  
  
and  
  
KAZUO OKADA, UNIVERSAL  
ENTERTAINMENT CORP.  
AND ARUZE USA, INC.,  
  
Real Parties in Interest.

Case No. 70050

Electronically Filed  
Jan 24 2017 02:48 p.m.  
Elizabeth A. Brown,  
Clerk of Supreme Court  
**MOTION TO AMEND VOLUME II  
OF APPENDIX IN SUPPORT OF  
WYNN RESORTS' PETITION FOR  
WRIT OF PROHIBITION OR  
MANDAMUS**

On March 29, 2016, Petitioner Wynn Resorts, Limited filed and served its Appendix in Support of Petitioner Wynn Resorts, Limited's Petition for Writ of Prohibition or Alternatively, Mandamus ("Appendix") in the above-captioned matter. In Volume II of the Appendix, Pages PA000434-PA000458 were inadvertently omitted (Minutes of Hearing of the Nev. State Leg. S. Comm. on Judiciary dated May 22, 2001); and Pages PA000459-PA000479 were inadvertently included twice. Wynn Resorts, Limited hereby moves to amend Volume II of its Appendix by supplementing the missing pages, PA 000434-PA000458, attached hereto.

DATED this 24th day of January, 2017.

PISANELLI BICE PLLC

By:           /s/ Todd L. Bice            
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I am an employee of PISANELLI BICE PLLC, and that on this 24th day of January, 2017, I electronically filed and served by electronic mail true and correct copies of the above and foregoing **MOTION TO AMEND VOLUME II OF APPENDIX IN SUPPORT OF WYNN RESORTS' PETITION FOR WRIT OF PROHIBITION OR MANDAMUS** to the following:

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THE EIGHTH JUDICIAL DISTRICT  
COURT OF THE STATE OF  
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KAZUO OKADA, UNIVERSAL  
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Case No. 70050

**AMENDMENT TO APPENDIX IN  
SUPPORT OF WYNN RESORTS'  
PETITION FOR WRIT OF  
PROHIBITION OR MANDAMUS**

**VOLUME II OF VI**

DATED this 24rd day of January, 2017.

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Vargas & Bartlett, Study of Nevada Corporate Law	07/30/1990	I, II	PA000001 – PA000396

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**MINUTES OF THE  
SENATE COMMITTEE ON JUDICIARY**

**Seventy-First Session  
May 22, 2001**

The Senate Committee on Judiciary was called to order by Chairman Mark A. James, at 8:00 a.m., on Tuesday, May 22, 2001, in Room 2149 of the Legislative Building, Carson City, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file at the Research Library of the Legislative Counsel Bureau.

**COMMITTEE MEMBERS PRESENT:**

Senator Mark A. James, Chairman  
Senator Jon C. Porter, Vice Chairman  
Senator Mike McGinness  
Senator Maurice Washington  
Senator Dina Titus  
Senator Valerie Wiener  
Senator Terry Care

**STAFF MEMBERS PRESENT:**

Bradley A. Wilkinson, Committee Counsel  
Allison Combs, Committee Policy Analyst  
Carolyn Allfree, Committee Secretary

**OTHERS PRESENT:**

Michael J. Bonner, Concerned Citizen  
Craig Tompkins, Concerned Citizen  
John P. Fowler, Chairman, Executive Committee, Business Law Section, State Bar of Nevada  
Dean Heller, Secretary of State

Chairman James stated Senate Bill (S.B.) 571 would not be heard, but he would be presenting a proposal for modifications of provisions in Chapter 78 of *Nevada Revised Statutes* (NRS) and other corporate entity-formation and annual license fee statutes. He then turned the chairmanship of the committee over to Senator Jon C. Porter, Vice Chairman.

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**SENATE BILL 571**: Revises provisions governing business tax. (BDR 32-1548)

Vice Chairman Porter opened the hearing on Bill Draft Request (BDR) 7-1547.

**BILL DRAFT REQUEST 7-1547**: Limits common-law and statutory liability of corporate stockholders, directors and officers and increases fees for filing certain documents with secretary of state. (Later introduced as Senate Bill 577.)

Senator Mark A. James, Clark County Senatorial District No. 8, stated BDR 7-1547 is a measure that will take Nevada in a new and positive direction as a state that is business-friendly. He surmised Nevada will be the number one state in the country for a business to incorporate and operate in, or to have as its corporate domicile. He said every year over the past 10 years, the senate judiciary committee has processed a major piece of legislation modifying, amending, and updating the corporate laws of the State of Nevada. The measures have been the work of the Business Law Section of the State Bar of Nevada, chaired by John P. Fowler, he stated. Those changes in Nevada's laws, he asserted, have kept them up to date with Delaware's laws, all the most recent IRS (Internal Revenue Service) revenue rulings, tax court decisions, United States Supreme Court decisions concerning taxation, and other issues important to corporations in deciding where they want to do business and where they want to have their corporate domicile and be registered to do business.

Senator James said, in some ways Nevada's business laws are better than Delaware's, but they are substantially similar and allow Nevada courts to look to the long history of Delaware jurisprudence to decide disputes that arise under Nevada laws. In recent years, new entities have been created for Nevada businesses, including the limited liability company (LLC), business trusts, and business court, he said. All of these things have been done, he said, and filing fees have not been changed in the past 10 years. He made the following remarks:

We all know that we have . . . an under-funded budget in the state. Our budget is under-funded, by the projected budget, by \$121.5 million . . . If you look at the numbers more carefully . . . the numbers are closer to \$130 million. In the face of this, I have

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been working with . . . Senator O'Donnell [William R. O'Donnell, Clark County Senatorial District No. 5] and Senator Amodei [Mark Amodei, Capital Senatorial District] on coming up with an alternative to simply cutting a budget in a year when it would be extremely deleterious to our education system . . . to do so. So, we bring this measure forward to change the fee structure for the filing of corporations and for the maintenance of corporations in Nevada . . .

Let me tell you how we arrived at this. You cannot constitutionally tax a corporation just because it is domiciled in Nevada and it is resident out-of-state; it is a violation of the commerce clause. You cannot tax or level a fee upon assets or income that are not located within the state; to do so is discriminatory and in violation of the federal constitution. What you have to do is come up with a fee structure that is fair to all corporations who choose to domicile in Nevada and that is based upon some principles that make it fair in terms of the ability of corporations to pay and the benefit they receive from utilizing our corporate form and chartering themselves in Nevada or qualifying to do business in Nevada. [BDR 7-1547], on page 2, creates that structure. For corporations qualifying to do business in Nevada or chartered in Nevada, the minimal fee . . . would be \$150 . . . plus 0.35 percent of its net worth in Nevada in excess of \$40,000.

I have given you a couple of financial breakdowns which will aid you in understanding how this fee will impact business in Nevada and business outside Nevada that utilizes our state (Exhibit C and Exhibit D) . . . An important characteristic of this is about 87 percent of the corporations now registered in Nevada would pay the minimum fee . . . an increase of \$65 . . . When I originally proposed this measure, I proposed there be a \$500 fee across-the-board for all corporations . . . We heard a lot of feedback that if you charge \$500, that is going to be an increase from \$85 . . . and that is too much for a small business to handle . . . People said, "If you do that, we will just go to Wyoming." . . . I never knew Wyoming was such a popular place . . . so I decided to study



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Wyoming and found out that in July of 2000, a new fee structure went into effect in Wyoming. Wyoming places an annual, they call it a license fee, on all corporations, domestic and foreign, having the right to do business . . . in Wyoming; that license fee is at 0.00020 percent, but it is on total assets "sitused" in Wyoming, with a maximum license fee of \$50,000 per year.

What we have presented to the committee is something different, not a license fee based upon total assets, but a license fee based on actual net worth in Nevada, total wealth in Nevada. So, you can see you would not be paying the higher fees if you had a low net worth. So, in that sense, this is based upon the ability to pay. I was very privileged to receive from Carole Vilardo [Lobbyist, Nevada Taxpayers Association] a flyer from her organization on taxation principles, which this fee meets all of.

Senator James said those working on this proposal wanted to know what substantial, additional feature might be offered to make Nevada attractive and ensure corporations will want to come here. He said they received feedback from attorneys in Nevada who said Nevada ought to offer some liability protection to directors of corporations. Section 5, subsection 7, of the bill does that, he said, in providing "a director or officer of a corporation is not individually liable for any damages as a result of any act or failure to act in his capacity as a director or officer unless it is proven by clear and convincing evidence that, (a) his act or failure to act constituted a breach of his fiduciary duties as a director or officer; and (b) his breach of those duties involved intentional misconduct, fraud or a knowing violation of law." Someone cannot sue a director and seek his personal assets as a result of questioning, after the fact, the business judgment involved in his decision, Senator James said, and he emphasized this does not take away a remedy against the corporation.

According to Senator James, an additional provision proposed in BDR 7-1547, in section 2, is the codification of the principle in existing Nevada law that one cannot pierce the corporate veil and seek to get at the personal assets of a person who is an incorporator or a shareholder of a corporation. Recourse is available, he said, only if it is shown the corporate form is being utilized to perpetrate a fraud and there is a commingling and a unity of interest of ownership and control of the corporation between the entity and the stockholder, director, or officer, and that they are inseparable from each other.

Senator James offered an analysis of the business franchise fee that would be paid by various entities under this bill (Exhibit D). The analysis was prepared by Ted A. Zuend, Deputy Fiscal Analyst, Fiscal Analysis Division, Legislative Counsel Bureau, from documents on file of public companies either chartered in Nevada or authorized to do business in Nevada. It is testimony to the bill's inherent fairness, he said, because it is a graduated fee based upon ability to pay and upon the wealth of the company. Senator James described the distribution of the franchise fee burden (Exhibit E). He pointed out the maximum fees are going to be paid not only by companies chartering to do business in Nevada to take advantage of Nevada's favorable tax structure which has no income tax and no corporate income tax, but also by those businesses coming here to take advantage of Nevada's booming economy:

Senator James stated:

Look at the national name brands coming to Nevada to take advantage of our booming economy . . . These companies all either charter here with a subsidiary or with their national company, or they register with the secretary of state to do business here. And, all of these people pay \$85 per year to have the benefit of Nevada's corporate laws . . . Under this proposal, based upon the assets they locate in Nevada, the business they do in Nevada, they will pay a graduated fee . . . It is important to understand, I think, for businesses to take advantage of Nevada's lack of a corporate income tax [and] lack of a personal income tax, the income has to be generated in Nevada. The assets, therefore, need to be located in Nevada. And, under those circumstances . . . a fair net worth-based filing fee would apply.

Senator James read from Carole Vilardo's article in the April 2001 issue of "Tax Topics" (a publication of the Nevada Taxpayers Association) concerning taxation principles: "Long range planning should be an integral part of the state's revenue structure and should include forecasting trends in population growth and the corresponding growth in governmental services. The Legislature should adopt a statement of tax policy which encompasses the following principles: Non-Competitive: Revenue sources should not be competitive

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between the state and local governments." Senator James said some of the proposals made this session would compete with local government over limited revenue sources. They really are not new revenue sources, he said, they are merely a redirection of revenue sources.

Continuing with Ms. Vilardo's article, Senator James read, "Economic: Revenue sources should reflect the existing state economic structure and consider possible future economic needs. The impact on individuals and businesses should be considered. A systematic, periodic review should be conducted to consider current business practices, loopholes and other impacts such as ease of compliance." He said:

We have a state that is generating great wealth, tremendous growth, tremendous growth in wealth and new businesses, and yet we have, after a decade of this unprecedented growth, a state budget that is under-funded, an education system that is under-funded, and a state of affairs at our state level where our employees have not received a raise in so long that many of them defect, not to private [business], but to local government, where they get a one-third increase in the amount of money they make for doing the same, exact job. So I think this . . . would take advantage of the existing economic structure of Nevada, would do no damage, no violence to the existing tax structure of the state or business-friendly climate of the state, but it would bring us back to reality in terms of allowing the great wealth that has been generated in our state to benefit our government and those who benefit from our government, such as our children in school.

Senator James resumed reading from Ms. Vilardo's article: "Simplicity: Taxes should be simple to understand and easily complied with. Results will be improved voluntary compliance and reduced administrative costs." He said the fees provided for in BDR 7-1547 are "extremely simple" to comply with and will utilize the same form that is currently filed with the secretary of state's office, with a couple of lines added for business assets and net worth, pursuant to section 6, subsection 1, paragraph (e) through paragraph (g).

Again, from Ms. Vilardo's article, Senator James read, "Stability: Taxes should be stable and predictable." He said Nevada currently has fluctuating revenue sources that depend upon a number of factors and BDR 7-1547 provides for a

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much more stable and predictable revenue source. Other principles outlined in Ms. Vilardo's article, he stated, are: taxes should be compatible with other government taxes for ease of compliance; they should be broad-based, with as few exemptions as possible and not favor one taxpayer group over another; they should be equitable, taking the impact on economic growth of the state into consideration; and, collections should be fairly and uniformly enforced. Bill Draft Request 7-1547 meets all these criteria, Senator James said.

Senator James said he thinks this tax can be collected as a fee by the secretary of state, and the secretary of state will be asking for an auditor position to keep track of the fees as they come in, and for additional funds to handle the increased responsibilities of the office. He said it is fully appropriate to use some of those revenues to honor that request.

Senator Titus commended Senator James for his work on this bill, and said there is no one who wants more for schools than she does. She pointed out this proposal is a major change in Nevada's tax policy, and noted this Legislature has never undertaken something this major by going around the Governor. She said when something like this is done, both parties, both Houses, and the executive are needed, and "time is running out."

Senator Titus asked Senator James whether he can tell her where the Governor stands on BDR 7-1547, and Senator James said he cannot speak for the Governor, but he is hopeful. "The portent other members of the Legislature or the Governor will not embrace this is not enough to stop me from proposing it," he said. He said the way this developed was that no one was going to do anything. "We were going to cut the budget and we were going to go home," he said. He said he had some support for his original proposal for the \$500 across-the-board fee, but there was much opposition. So, he went to work doing the constitutional research and research on all other 49 states, he said, and combining the results of his research with the Carole Vilardo's "Principles of Tax Policy," he came up with this proposal.

Senator Washington asked whether the protection placed around corporate officers and stockholders will be inducement enough for corporations to come into Nevada, if the filing fees are raised. Senator James answered it is an added incentive. He explained there are two separate issues. One is the protection for a director, he said, so a director is not held liable and his or her personal assets cannot be attached. Directors are the ones who decide where

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to incorporate, he said, and this will be a major incentive. Second is the protection regarding the corporate veil, which is a codification of existing case law defining the criteria for when the corporate veil can be pierced to get at the assets of the person who incorporated.

Senator James continued:

With respect to the fees . . . the places to incorporate . . . are Delaware, Nevada, Texas, and Wyoming. In terms of looking for a domicile, where you are not necessarily going to do business, [where] you are going to charter your company . . . if you go to Delaware, your annual filing fee could be as high as \$150,000 . . . The fee in Wyoming is \$50,000, based upon your assets in Wyoming, so, Wyoming offers nothing that Nevada does not offer.

Senator Washington noted it has been said this fee increase is driven by the need to fund education. However, he said it is his understanding about \$450 million in new money has been appropriated for education. As legislators and policy-makers, they have to be able to answer their constituents, he said. He indicated there are two questions that must be answered: (1) Where is the money going? and, (2) Has everything possible been done to streamline state government and prioritize services the state should render to counties that may not be able to provide those services, while allowing those counties able to provide the services to do so? Senator James answered by describing conditions in the Clark County School District, which is starting \$34 million "in the hole."

Senator James said:

I do not think anybody can make a reasonable case that the education system of this state is over-funded. I do not think anybody can make a reasonable case it is adequately funded. The need is clearly and demonstrably there . . . With respect to state government and whether it is adequately funded, I commend our Governor, because over the last 2 years . . . we went through the first legislative session [and were] very fortunate. We had revenues coming in from existing tax revenues, had surplus in the

budget we could spend on things we wanted to spend it on . . . But, over the last interim, in a time when it looked like [there was] plenty of money, the Governor took the leadership to conduct a fundamental review of state government . . . that was to demonstrate and to find places where government could be cut. This Governor, who is a former CEO [Chief Executive Officer] of major corporations . . . has made government as streamlined as possible, [and] has presented us [with] a very austere budget for this session . . .

We do not have too much money; there is not a lot of fluff in the budget to . . . make up this \$130 million . . . shortfall, based upon the projections of the economic review. So, I think we are at the perfect place to say, "We have presented a very austere state budget . . . We have people that have not had a raise in a number of years, people who are making a lot less than they do in the private sector or in local government, and we have teachers who have not had a salary increase and they are some of the lowest-paid teachers . . . in the country."

Senator Care stated he applauds Senator James's efforts and "you would have to be absolutely blind to not believe there is crisis in funding for public education in Clark County." He asked Senator James whether he has an opinion about the appropriateness of looking at other tax revenues during the interim or in the next legislative session, or whether this fixes everything. Senator James said he is not saying this proposal is a fix for everything, and the Governor has made public statements regarding the need to look at the long-term funding of the state.

Senator James said:

But . . . you have the secretary of state's office, you have people who are paying an \$85-a-year fee . . . a fee that has not been increased in a decade. Most of those companies, if they think about it, probably wonder why they are paying such a low fee. We have a place where we can fairly generate additional revenue, that is all I am saying . . . It does not target any industries . . . Everyone has been saying, "Let's make gaming pay." Well, this makes gaming pay; it makes everybody pay.

Senator Porter said he concurs with what Senator James has said and can appreciate the challenges before education today. Many small business owners are the ones they are trying to help through this legislation by improving education and services to the community. But small businesses think the cards are stacked against them because big businesses are represented by high-paid lobbyists; small business is counting on the legislators to look after their interests, and sometimes when the government thinks it is trying to help them, it really is not.

Senator Porter described the experience of a delicatessen owner whose costs and fees for running her business and providing benefits for her employees are increasing, and who is concerned about the graduated fee schedule proposed in BDR 7-1547, which she read about in the newspaper. Senator Porter said if a business owns a couple of cars and a small building and some inventory, that business may be subject to a fairly high fee. Referring to Exhibit C, he pointed out the \$150 franchise fee for a \$25,000 business is "0.06" percent of the net worth, and to be fair in spreading out the fees, the franchise fee for a business with a net worth of \$51,200,000 should be \$300,000, rather than the \$50,000 indicated. He asked Senator James how he came up with the fees and whether he talked to some of the small businesses to find out who had \$100,000 in assets. Senator James said he looked at other states and at the distribution of estimated net worth of corporations in Nevada to see where the bulk would fall. He said he strongly considered the impact on small business, and 87 percent of the corporations in Nevada will pay the minimum fee. They will not get into the higher fee range unless their net worth goes up; this is a net worth test, not an assets test, he said, and liabilities offset assets.

Senator Porter said he does not think the minimum fee can be categorized as simply an increase of \$65, because it would not be unusual for a small business to have an inventory in vehicles and parts and equipment of \$100,000 or \$200,000, and that would be an increase in the fee from \$85 to \$710, according to the chart (Exhibit C). Senator James acknowledged that would be correct for a net worth of \$200,000, and Senator Porter said he believes the small business is going to be hit the hardest. "When a big corporation goes bankrupt, there is usually a nest egg, but when a small business goes bankrupt, it is just in debt," he said. He said he is very concerned the proposal being presented is going to create a major hardship for those ma-and-pa businesses.

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Senator James said that is something that can be explored, but this is designed to minimize the impact on the small businessperson.

Senator Porter stressed that he thinks something is being missed regarding the small businessperson. Senator James noted he has not heard anybody saying Nevada is not going to do something major to change the tax structure and the tax burden. "It is not a question of if; it is a question of when. What we are talking about now is crisis in the funding of the state budget, a fee that has not been increased in 10 years, and an equitable way in which to increase that fee and distribute the burdens fairly among those people who have the ability to pay," he said. He said he welcomes suggestions, but the endeavor here is to ensure the people who have the ability to pay an increased fee are paying it and the wealthiest are paying the largest fee.

Senator Washington said there are issues concerning projects such as the Henderson State College with \$150 million to be voted on and contended with. "Is that on the table as well now; are we going to take a look at that and say maybe we cannot afford it at this time?" he asked. Senator James said he thinks there is a "mini-fundamental" review taking place in light of the potential for necessary cuts, and the level of funding that can be given to Henderson State College in this budget is a matter still to be considered. He said he would not like to see the project die, but he hopes the level of funding would be considered along with other pressing needs in the state.

Senator Washington pointed out state workers are making the same appeal for a raise as teachers, and legislators need to balance the needs of state workers, teachers, and other considerations. He said he is trying to take a look at the "big picture." Senator James said he did not know what to say, except state workers are slated to receive a long-awaited and well-deserved raise.

Senator James, addressing Senator Porter's concerns, said those people who conduct business as sole proprietors and do not take advantage of the limited liability offered, or other benefits of incorporation, do not experience any fee increase under BDR 7-1547. Sole proprietors who report a substantial net worth on their federal income tax are the only ones who will be impacted by a modest increase in fees, he said.



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Senator James resumed chairmanship of the committee and invited other witnesses to speak.

Michael J. Bonner, Concerned Citizen, Attorney, stated Senator James had asked him to look into a provision to include in BDR 7-1547 to make Nevada a more attractive place in which to domicile a business entity, and he suggested a provision for liability limitation. He said:

When we look to enhance the attractiveness of Nevada as a place in which to incorporate, we have to recognize . . . businesses outside of the state are going to consider and be counseled on a place in which to incorporate. Typically, they are going to be told, "either the state in which you do business, or Delaware." The vast majority of business entities, as they . . . become public, seasoned companies, are going to Delaware. When we look at our Nevada corporate business statutes, we have to recognize that, due to a variety of factors, if it is Delaware versus home state versus Nevada, if it is a tie . . . if the corporate laws of those jurisdictions are equally favorable . . . typically, they are going to select Delaware. That is just the way it is; that is a part of the business practice in which we operate . . .

The reason for that [is] Delaware has a long history of developing corporate law. It has a court that is recognized as the leading court for jurisdiction in this country; it has a seasoned bar . . . The companies that come to us that are being counseled by investment bankers are often just arbitrarily recommended to incorporate in Delaware. So, when you look at Nevada as a choice, frankly, we have to be better than Delaware. We do not want to do things that will encourage less desirable businesses, because that is not in our best interests. But, what we want to do is give boards of directors and corporate officers, and investment bankers and those who counsel them, an opportunity to say, in Nevada there is this element that may not be present in those other jurisdictions.

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Mr. Bonner continued:

In the bill draft before you are a couple of things that have been added with that in mind . . . Boards of directors, in addition to just running the corporation, have to consider a couple of items in selecting a corporate domicile. Those things include the layers of protection that are available to them, the predictability of legal standards with which they will be faced . . . and they are given a variety of considerations to look at. We know that virtually every state now has a form of director . . . liability protection . . . Most states have indemnification, and we know the marketplace allows directors and corporations to purchase director and officer liability insurance . . .

Directors who come on the boards of publicly-traded companies typically are very successful businesspeople in their own right. They have, typically, large assets; they usually have been extremely successful and are being asked to go on a board of directors because of their expertise, their business acumen, [and] because of the things they can truly bring to a corporation's board to enhance the activity of the board in the best interests of the stockholders. As Senator James said earlier, should they have to do that at the risk of their personal assets being placed on the line.

Mr. Bonner stated, in looking at those issues, a corporation wants predictability, and if Nevada can enhance the liability protection for them and strike the proper balance to not protect those who have participated in a criminal activity or fraud, the State will go a long way to making Nevada an attractive place in which to incorporate. He explained, when he reviewed the bill draft, he looked at a couple of other corporate statutes to see what is out there. As an example, he said Maryland has some attractive features in its corporation statutes. He pointed out the states of Florida, Indiana, Maine, Ohio, and Wisconsin have so-called self-executing statutes, meaning as a matter of statutory law, liability protection is available. Mr. Bonner explained this contrasts with NRS 78.037, which allows a corporation to opt in or place a charter provision in its articles of incorporation with the liability limitation. He noted Ohio has a clear and convincing evidence standard in its statutes.

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Mr. Bonner opined Nevada already has a liability immunity statute "equal to, if not better than, Delaware's." He declared it is better than Delaware's because, not only does it cover the liability of directors, but also of executive officers.

Mr. Bonner proposed a new subsection 7 be included in section 5 of the bill. He said it introduces a clear and convincing evidence standard. He added it makes deletions of certain provisions of NRS 78.037, basically for "housekeeping" reasons, and because the provisions will become moot by this statute. He stated, "It makes it an automatic statute, as opposed to an opt-in statute." Mr. Bonner suggested the proposal actually benefits the small "mom-and-pop" operation and is less advantageous to a large corporation.

Mr. Bonner related, in 1987 the Nevada Legislature adopted NRS 78.037, which allows corporations to place in charter a provision of immunizing directors and officers from personal liability. He stated he has probably seen thousands of corporations since 1987, and he can think of only one instance in which a corporation charter did not have that provision because it was, essentially, a small business that apparently did not have the funds to seek legal counsel. He said they formed it based on some office supply form, and missed the director and officer protection.

Mr. Bonner said:

There is also language that has been added to NRS 78.138 that merely clarifies what we clearly believe is existing law . . . Further, there are essentially mirroring changes suggested to [NRS] 78.300 . . . Presently there is a question as to whether there is a different culpability standard in [NRS] 78.300; this will make the culpability standard the same. [NRS] 78.300 also has a change in the statute of limitations, reducing that to 2 years from 3 [years]. Nevada is presently one of only thirteen states that has a longer than 2-year statute of limitations on the payment of dividends; therefore, we are actually in the minority.

Mr. Bonner noted section 1 of the bill draft request has proposed language which will codify existing Nevada case law on the so-called "alter ego doctrine," or "piercing the corporate veil." He surmised it offered great advantages that can benefit Nevada as a corporate domicile. Essentially, he said, in looking at the doctrine of piercing the corporate veil, traditionally case law is consulted.

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He opined the ability of Nevada to provide objective and predictable standards for corporations to evaluate the risk under the alter ego doctrine makes this provision very attractive to corporations considering a domicile in Nevada. He explained it essentially codifies existing case authority, with modifications, and imposes a clear and convincing evidence standard, which "raises the bar" on the evidence necessary for a fraud finding.

Mr. Bonner concluded:

In short, as a counsel who often is asked by corporations and their boards, "Why Nevada versus Delaware" . . . we think the work this body has done for many years has taken us a great way toward making Nevada a more attractive domicile, [and] we have to make it an objectively determinable more beneficial place in which to incorporate.

Senator Washington asked why the statute of limitations was changed from 3 years to 2 years, and how the new language in section 11 will work. Mr. Bonner replied NRS 78.300 deals with the payment by a corporation of distributions or dividends that violate Nevada statute. If a board of directors authorizes a dividend in violation of that statute, there can be personal liability on the part of the directors, he said. The changes provided for in section 11 would eliminate the confusion that exists regarding the proper standard for liability, he said. Concerning the statute of limitations change, he said it would bring Nevada in line with the majority of jurisdictions.

Senator Care expressed concern the enhanced protection for officers and directors may come at the expense of a third party. He asked Mr. Bonner what other acts an officer or director could currently be liable for in Nevada for which that officer or director would not be held liable if this bill should become law.

Mr. Bonner answered,

Nevada Revised Statutes 78.037, which is the law we have today, essentially has the immunities from personal liability that the new proposal will have. The distinction between the law today and the proposal is that this will be self-executing, meaning a corporation

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will not have to adopt an amendment to its articles of incorporation; and, it imposes a higher evidentiary standard, the clear and convincing evidence standard versus a preponderance of the evidence standard. But, I believe that the actual language in the proposal does not increase the actual immunity of liability. We have essentially taken what was in NRS 78.037, moved it into the new section, [with] two significant changes: (1) the clear and convincing evidence standard, and (2) making it an automatic statutory provision as opposed to a charter opt-in provision . . . If a corporation had that provision in its articles of incorporation, there would not be a difference . . . What would be different is that, if a lawsuit were brought, there would be a higher proof standard that a plaintiff would need to bring to establish liability, and the establishment of that liability would be dependent on proving intentional misconduct or fraud.

Senator Care said his question actually had to do, not with section 4, but with section 2, subsection 1, paragraph (b), which says, "A court of competent jurisdiction finds by clear and convincing evidence . . ." He asked, "By 'court of competent jurisdiction,' does that become a matter of fact or a matter of law? Is this something for a jury to determine, or is there some sort of pretrial procedure through which the court has to determine . . . whether, in fact, these elements can be established?" Mr. Bonner replied the reference to a court of competent jurisdiction means a finding, as in any litigation, as to whether the jurisdiction of a given court is proper. He said, "As to the rest of the language in the statute . . . the intent is to say that once you get past the jurisdictional element, the burden of proof to establish the piercing of the corporate veil would be a clear and convincing evidence standard."

Senator Wiener commented clear and convincing evidence is a high standard, and she asked how many states have that standard. Mr. Bonner said he had not surveyed every single state, but from the information prepared for him, Ohio has the clear and convincing evidence standard. He added, Delaware does not, so Nevada would be one of the few states, "maybe only one of a couple, that would have a clear and convincing evidence standard on this particular issue."

Senator Care asked whether the statute of limitations becomes 2 years for all causes of action on the date the bill becomes effective, even for causes of

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action committed somewhere between the 2- and 3-year period. "Is somebody out of luck?" he asked, and Mr. Bonner replied he did not know the answer. Senator James said they would get an answer.

Senator Washington asked whether clear and convincing evidence is the standard of proof the court must find for liability of a corporation pursuant to section 2, subsection 2, and Mr. Bonner replied it is.

Senator James, responding to Senator Care's earlier question concerning the effective date of the bill with regard to the 2-year statute of limitations, stated the intention is for BDR 7-1547 to be prospective. "You cannot have the standard applicable to pending proceedings . . . We should have the legal department redraft this," he said. Bradley A. Wilkinson, Committee Counsel, pointed out that the question is addressed in section 65, and it is not addressed in the way Senator James said he would like it to be. Senator James said he would like it to be changed so that the bill's provisions apply only to cases filed on or after the effective date.

Craig Tompkins, Concerned Citizen, stated he is CEO and President of Craig Corporation, and Vice Chairman, Citadel Holding Corporation and Reading Entertainment. He said Craig Corporation is a New York Stock Exchange company, but most of its operations are conducted through other companies, some of which are also publicly traded companies, and his companies have recently gone through the process of choosing a new corporate venue.

Mr. Tompkins said a couple of years ago his companies undertook a study to determine whether it made sense to continue to keep all the companies in Delaware. He noted there were concerns regarding staying in Delaware for a couple of reasons, one being it had gotten quite expensive to be a Delaware corporation. He said:

We had "maxed out" on two of the companies, which is \$150,000 apiece, and we were coming close . . . to maxing out in the third. So, we were currently at \$350,000 a year and we were looking at being at \$450,000 a year. The second thing was that it did not seem to us that Delaware had kept up with what was going on in

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other parts of the country and the world in terms of trying to balance the needs of corporate directors trying to make decisions in an uncertain world . . . So, we were also looking for a state which could afford a balancing of those concerns.

Mr. Tompkins related the corporations ultimately selected Nevada. He said the group liked Nevada because of the very low fees required. Although the committee is considering, here today, an increase in those fees, he said, the fees being discussed are still quite modest compared with the Delaware standard. He stated, "We like the fact that under Nevada law, directors are not automatically subject to lawsuits in Nevada . . . "

Mr. Tompkins continued:

We like the provisions of the Nevada code, which afford greater protection in terms of using a willful misconduct standard, and we think it is a good idea to allow that across the board and also to allow the clear and convincing evidence standard. Let me talk briefly as to why that is.

In addition to sitting on the boards of our 3 companies, I am also a director of G & L Realty [Corporation], a . . . real estate investment trust; and I am on the board of directors of Fidelity Federal Bank . . . As a lawyer with Gibson, Dunn & Crutcher . . . I had a lot of experience in advising boards of directors involved in both day-to-day and ordinary transactions. Your average director . . . typically attends a meeting every month or so. The compensation varies from company to company; oftentimes it is around . . . \$25,000 a year for your average company . . . For most of us, it is not like we are involved everyday in the day-to-day operation of the company . . . Unfortunately, over the last several years, we have become, increasingly, targets of plaintiffs' lawsuits. Yes, it is true that it is only infrequently that liability comes home to roost; most of these cases end up being settled . . .

But . . . you get sued; you get named personally in a complaint . . . What this [bill] does is help even the playing field. It means that when a plaintiff's counsel is thinking about whether or not to sue the directors, that plaintiff's counsel needs to take into account

what it is that he is going to have to establish, what it is he is going to have to prove . . . When you use a willful misconduct kind of statute or a fraud kind of standard, then the person really has to plead what it is you did wrong. Right now, in Delaware, they do not plead what you did wrong; they just plead that something might go wrong . . . It costs us money to defend these lawsuits, it can adversely affect your credit, [and] it can affect your perception. Another thing it does is, because the amount of damages alleged are so large, and because directors are only human, when your counsel says, "I can settle this case for \$600,000," of which \$547,000 goes to the lawyers, your attitude is [to settle] . . . It does not relieve the company from liability; it does not interfere with any equitable relief . . . But, should [a director] be liable for \$10 million, \$20 million, \$30 million because of an honest mistake?

Mr. Tompkins said piercing the corporate veil is a very uncertain area. What has been suggested for Nevada is to take the case law, he said, so people looking at Nevada do not have to read a lot of cases to try to ascertain whether the law is current. They will be able to look right at the statute, he asserted. And, he noted, the statute would address much uncertainty. Mr. Tompkins pointed out companies most vulnerable are the small companies. He explained the courts typically looked at case law to determine whether a person followed all the corporate formalities, such as whether the right minutes were kept; whether there was a separate board of directors; and whether there were always separate bank accounts.

Mr. Tompkins stated he has a chief financial officer whose job is to make sure those things get done. He reiterated it is the small business owners who have incorporated specifically to protect their individual assets who are the most vulnerable to having the corporate limitations on liability set aside because they did not follow the proper formalities.

Chairman James interjected, "So, the notion is that a small business owner decides to incorporate and forgets to keep his annual meeting minutes up-to-date, he is not as careful as he should be and there may be some commingling of assets or commingling of the books . . . These kinds of things



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occur, and those are not, alone, under this statute, a predicate for disregarding the corporate veil and the limited liability protection. He has to be, in addition, under this language, utilizing the corporation to perpetrate some kind of fraud."

Chairman James commented he did not suppose piercing the corporate veil comes up very often as an issue for large corporations. Mr. Tompkins responded that with subsidiaries there is a significant amount of uncertainty, but if this statute is passed, there will be a greater level of certainty for corporations.

Senator Care asked Mr. Tompkins to describe the kinds of corporate acts for which an officer or director should not be named as a defendant in a lawsuit. He said he would not want to give his constituents the impression because a business is willing to pay more money to incorporate in Nevada, it will get to "walk, scot-free."

Mr. Tompkins replied:

Most of the problems occur not in terms of the corporation acting as a corporation, because directors typically are not directly liable for the acts of the corporation. For instance, if a corporation sells a defective product, it is the corporation that is sued; it is not the director. If a corporation pollutes a river, it is the corporation that is sued; it is not the director. Where director liability really comes in is in terms of mergers, acquisitions, issuances of stock . . . They are shareholder derivative suits that we are concerned about. So, I do not see that this has much, if any, effect at all in terms of whether a director would be liable to a consumer group or to a member of the public. What I see it doing is making it less likely that, in an extraordinary corporate transaction, the director will be caught up in the litigation, unless the plaintiff's lawyer actually has some evidence or some probable cause to believe that director has actually acted wrongfully.

Senator Care said, "I think the public needed to hear that."

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Chairman James asked John Fowler to expound on the status of the Nevada laws in relation to Delaware laws, and the work done in prior sessions.

John P. Fowler, Chairman, Executive Committee, Business Law Section, State Bar of Nevada, explained the history of the Business Law Section's involvement with corporate statutes:

In 1990, a firm I was then with was hired by Secretary of State Frankie Sue Del Papa to revise Nevada's corporate law. That study of Nevada corporate law, about a 350-page book, contained specific statutory suggestions for changes to Nevada corporate law . . . [in order to] try to become a competitor with Delaware and other states in ease of corporate convenience . . . Following that study, in 1991 a bill was written that was worked on by members of the then business law committee of the state bar, and worked over considerably by the Legislature itself, and it became a bill which started us on the road to improving Nevada's corporate laws for the entire country to use . . . Every session since, since 1993 and forward, the business law section has created a bill to improve Nevada's corporate and limited liability company statutes . . . It is an accomplishment that, I think, has taken us quite far . . . That and . . . the fact that we have retained a situation where there is not corporate or personal income tax, and the fact that the secretary of state's office has worked mightily to keep up and to be a customer-friendly office, as opposed to the archetypal governmental bureaucracy.

We now have a substantial national presence in the corporate law world that brings real benefits to the state [and] It makes it easier for those doing business in the state to use our own state laws. It makes it easier for investment bankers . . . and those companies with assets that they can move to the state, to move them here and use our corporate statutes . . .

In the 1999 Session, Senate Concurrent Resolution (S.C.R.) 19 [of the Seventieth Session] was passed, which created a special subcommittee that studied ways to improve corporate governance . . . and [establish] a business court.

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**SENATE CONCURRENT RESOLUTION NO. 19 OF THE SEVENTIETH SESSION:**

Directs Legislative Commission to conduct interim study of methods to encourage corporations and other business entities to organize and conduct business in this state. (BDR 534)

Mr. Fowler stated the S.C.R. 19 of the Seventieth Session committee work resulted in a number of bills, among them S.B. 51 and actions by the Nevada Supreme Court to create a business court in both Clark County and Washoe County.

**SENATE BILL NO. 51:** Makes various changes pertaining to business associations. (BDR 7-255)

Mr. Fowler continued:

It has been a long history and a long effort, and it has to be continued; it is not something that can stop, because the corporate world does not stop. New processes, new kinds of ways of doing transactions come about and require a change in corporate and limited liability company statutes . . . I believe . . . the bill . . . shows a further movement in this direction, to make Nevada a friendly place for a corporation to put its charter and to do business.

Chairman James noted, in S.C.R. 19, John H. O. La Gatta, Lobbyist, Catamount Quantum LLC, had proposed the creation of a different kind of fee structure, "and that was the only part we did not do, and is what is contained here. It is not exactly his proposal, but it is a permutation of it, and that is how this is a whole package [and] how John envisioned the outcome of it."

Chairman James asked Dean Heller, Secretary of State, to discuss issues related to his office, fee adjustments included in BDR 7-1547, and the role of resident agents. Mr. Heller stated his office has been a significant source of revenue for the state, and the studies and efforts made over the last 10 years have worked. He said the secretary of state's office has grown 10 to 15 percent per year, from approximately 5,000 corporate annual filings 10 years ago to approximately 50,000 today. He noted the average individual on the staff earned about \$100,000 in revenue 10 years ago, and today each individual is earning about \$350,000 in revenue for the state.

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Mr. Heller said among the biggest clients in the secretary of state's office are the resident agents. He stated:

[They] do a tremendous service for the state of Nevada. They work very hard in advertising the corporate services we provide . . . It was to everybody's benefit to bring them into the office . . . We probably had a half dozen or eight resident agents in the office, and they probably represented somewhere between 50,000 and 60,000 corporations here . . . and you asked them to give us an alternative . . . and they did discuss some of the filing fees with the office that had not been raised for 10 years and what we could do to raise some of these fees and still remain competitive . . . So, the filing fees and the changes, most of them came through their recommendations. A couple of them were reduced. It took some effort on our part, and one of the fees we did reduce was the annual fee . . . I anticipate our growth will continue. I think we will see a shift in the quality and the quantity of the kind of business we do . . . but, overall, I think this proposal takes us forward.

Chairman James said one of the things the resident agents pointed out is often people start a company and need an entity within which to create the start-up business, which may have a minimal, or even negative, net worth. That is the reasoning behind the fee schedule proposed in BDR 7-1547, he said. "So, people who are start-up companies or small businesses, or people who just want to get their entity going, are going to pay the minimum filing fee of \$150, which they [the resident agents] represented was something they could aggressively market," he said.

Mr. Heller added,

As you struggle with the policy issue here, of course we struggle with the administrative end of this . . . You have requested, and we are preparing, [information regarding] what the fiscal impact will be on our office . . . I think it will be a minimal increase. You are looking at our office, under this proposal, going from \$22 million a year in revenue to somewhat over \$60 million, or

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\$130 [million] for the biennium. I think we can move forward with a minimal increase of six to eight additional employees in the office in order to handle this increase and the change in structure and the way we process some of this paperwork.

Chairman James said it is closer to \$85 million or \$87 million from the secretary of state's office, because what the Legislative Counsel Bureau (LCB) did in its projections was run just the corporations under Chapter 78 of NRS, which would generate \$52 million. He said that does not include 40,000 other kinds of entities that would be on the same schedule. He stated, "[The] LCB did that to leave it at a conservative projection; then the \$52 [million] plus the \$13 [million] from the additional fees, that is \$65 million. It is a very conservative number . . . It accounts for absolutely no growth."

Senator Washington said he is concerned about start-up businesses of single women and minorities, and asked whether this proposal would become a hindrance or disincentive for them. Mr. Heller said the proposed fees were kept as low as possible, with these people in mind. This is not a new tax or a new fee; it is an increase in the filing fee for the annual list of officers, he said. He said a lot of proposals have been on the table, including a business tax proposal, all of which were rejected so people desiring to establish businesses in Nevada would not be faced with all sorts of fees. Mr. Heller pointed out, generally, liabilities are higher than assets for start-up companies, and this proposal is based on net worth.

Senator Porter echoed Senator Washington's concerns, saying he wanted to make sure Nevada is a place where not only the rich can get incorporated. "A lot of these smaller companies do not have major liabilities," he said, adding, "They really kind of 'pay as you go,' because they cannot afford the debt."

Senator Care asked whether financial records submitted to the secretary of state's office could be kept confidential. Chairman James responded the office can have the information remain confidential.


Senator McGinness asked whether the secretary of state's office has some sort of due process in place for determining net worth pursuant to section 31, subsection 4, of BDR 7-1547. Mr. Heller said his office is currently ministerial and accepts documents filed and signed under penalty of perjury, and would

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have to put the language of the bill into place administratively. Chairman James stated whatever process the secretary of state's office puts into place would certainly comply with applicable procedural requirements, due process, and the rights of taxpayers.

There being no further business, the meeting was adjourned at 11:05 a.m.

RESPECTFULLY SUBMITTED:

  
Carolyn Alfree,  
Committee Secretary

APPROVED BY:

  
\_\_\_\_\_  
Senator Mark A. James, Chairman

DATE: 9-30-01