IN THE SUPREME COURT OF THE STATE OF NEVADA

HOME WARRANTY ADMINISTRATOR OF NEVADA, INC. dba CHOICE HOME WARRANTY, a Nevada corporation, Appellant, vs. STATE OF NEVADA, DEPARTMENT OF BUSINESS AND INDUSTRY-DIVISION OF INSURANCE, a Nevada administrative agency, Respondent.	**Supreme Court No. 80218** First Judicial District Court Case No. 17 OC 00269 1B

Appeal from First Judicial District Court, State of Nevada, County of Clark
The Honorable James. T. Russell, District Judge

APPELLANT'S APPENDIX
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(AA002195 – AA002383)

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IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

HOME WARRANTY ADMINISTRATOR OF NEVADA, INC., dba CHOICE HOME WARRANTY, a Nevada corporation, Petitioner, vs. NEVADA COMMISSIONER OF INSURANCE BARBARA D. RICHARDSON and THE STATE OF NEVADA, DEPARTMENT OF BUSINESS AND INDUSTRY – DIVISION OF INSURANCE, a Nevada administrative agency, Respondents.	Case No. 17 OC 00269 1B Dept. No. I

RESPONDENTS' RESPONSE TO PETITIONER'S SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES PURSUANT TO NRS 233B.133

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Respondents, Nevada Commissioner of Insurance, Barbara D. Richardson and the State of Nevada, Department of Business and Industry, Division of Insurance ("Division"), through its counsel, Nevada Attorney General, AARON D. FORD, and his Deputy Attorney General, RICHARD P. YIEN and Senior Deputy Attorney General, JOANNA N. GRIGORIEV, hereby file this Supplemental Memorandum of Points and Authorities ("Resp'ts' Supplemental Memorandum") in response to Petitioner's Supplemental Memorandum of Points and Authorities filed on May 28, 2019 ("Pet'r's Supplemental Memorandum"). The Court granted Petitioner's Motion for Leave to File Supplemental Memorandum of Points and Authorities ("Petitioner's Supplement") on June 18, 2019. Petitioner filed a Notice of Entry of Order on July 10, 2019.

FACTS AND PROCEDURAL HISTORY

On December 18, 2017, the Hearing Officer in Cause No. 17.0050 issued her final administrative order. (17.0050 Order). Petitioner filed its petition for judicial review on February 15, 2018. The Opposition and Reply briefs had been submitted by April 10, 2018. On April 18, 2018, Petitioner filed a Motion for Leave to present Additional Evidence ("Motion for Leave") asking the Court to permit it to introduce new exhibits KK, LL, and MM to be considered by the Division.

On September 6, 2018, the Court granted Order for Leave on a limited basis by remanding the determination of materiality of the evidence sought to be added ("proposed exhibits") under NRS 233B.131 (2) to the administrative Hearing Officer.[1] On January 22, 2019, the Hearing Officer issued her Order on Remand, as instructed by the Court. She concluded that "[h]aving received and reviewed exhibits KK, LL, and MM, as mandated in the Court's Remand Order, the Hearing Officer finds exhibits KK, LL, and MM ***not to be material*** and, therefore, do not impact the final decision."[2] (emphasis added).

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[1] The Court acknowledges that, pursuant to NRS 233B.131(2), Petitioner must demonstrate that the Evidence is material to the issues before the agency and that good reasons exist for Petitioner's failure to present the same in the proceeding below. The Court declines both Parties' offer to examine the disputed evidence in camera. Instead, ***the issue of materiality is best left to the Administrative Hearing officer to decide.***

Order for Leave, 2:3-8.

[2] 17.0050 Order on Remand, 8:12-15

ARGUMENT

1. Petitioner's Proposed Exhibits Are Not Material and Should Not Be Considered on Judicial Review of Cause 17.0050

As courts have no inherent appellate jurisdiction over official acts of administrative agencies, the Nevada Administrative Procedures Act ("APA"), chapter 233B of the NRS, was created by the legislature, to provide "a specific procedure for review of administrative agency decisions [and] such procedure is controlling." *Washoe County v. Otto*, 128 Nev. 424, 431, 282 P.3d 719, 724 (2012) (citations omitted). NRS 233B.131 (2) and (3) set forth the procedure for a party seeking to present additional evidence that had not been presented at the administrative level.[3]

NRS 233B.131 (2) and (3) provide:

> . . .
>
> 2. ***If***, before submission to the court, an application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is ***material and*** that there were ***good reasons*** for failure to present it in the proceeding before the agency, the court ***may order*** that the ***additional evidence*** and any ***rebuttal evidence be taken before the agency*** upon such conditions as the court determines.
>
> 3. *After receipt* of any additional evidence, the agency:
> (a) May modify its findings and decision; and
> (b) Shall file the evidence and any modifications, new findings or decisions with the reviewing court.

Id.

Pursuant to the procedure outlined by the above statute, ***if*** the Court finds that the evidence sought to be admitted is (1) ***material,*** and (2) there were ***good reasons*** why the evidence was not presented before the administrative agency, the court *may* then order the *evidence and* any *rebuttal evidence to be taken before the agency*. With the finding (as delegated to the Hearing Officer)[4] that the additional evidence sought to be introduced is not material, no further inquiry is contemplated by the legislature.[5]

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[3] NRS 233B.135 (1)(b) limits the judicial review to the record.

[4] Petitioner had not objected or appealed the Court's decision to leave the determination of materiality to the Hearing Officer.

[5] Had the Court determined the issue of materiality, that would have been the outcome under the statute. The delegation does not change that. If the proposed exhibits would have been found to be material, before the Court could consider these proposed exhibits on review of Cause 17.0050, other procedural steps are contemplated under the statute. The "good reasons" prong would also have to be satisfied, rebuttal evidence would have to be permitted to be presented by the Respondents for the administrative

Petitioner, however, disregards the procedure set by the legislature for introducing additional evidence, and demands a judicial review of the determination of materiality and of the effect of the proposed exhibits on substantive issues on appeal, as if said proposed exhibits had been admitted: "the Court should consider the Evidence when evaluating HWAN's Petition for Judicial Review" (Pet'r's Supplemental Memorandum, 23:17-18). Petitioner is in effect urging this Court to disregard the APA and the Nevada Supreme Court cases holding that "[w]hen the legislature creates a specific procedure for review of administrative agency decisions, such procedure is controlling." *Crane v. Cont'l Tel. Co. of Cal.*, 105 Nev. 399, 401, 775 P.2d 705, 706 (1989). *See also, Otto, K-Kel, Inc. v. Department of Taxation*, 412 P.3d 15, 17 (2018). Pursuant to NRS 233B.131, after a finding that proposed exhibits are ***not material***, no further inquiry is contemplated, and exhibits should not be reviewed as part of the record on appeal.

2. The Hearing Officer's Ruling on Materiality is Supported by Substantial Evidence, and Should not be Disturbed.

Without waiving any of the previous arguments, Respondents will address the arguments asserted by Petitioner in its Supplemental Memorandum.

In compliance with the Court's delegation in Order on Remand, the Hearing Officer addressed the issue of materiality of the exhibits that Petitioner seeks to introduce. To arrive at her decision, she asked the parties to brief the issue of materiality. Her Order on Remand addressed each of the arguments Petitioner made in its brief.[6] In conclusion, the Hearing Officer found that "exhibits KK, LL, and MM [are] not . . . material and, therefore, do not impact the final decision."[7]

As set forth earlier in this brief, the issue of whether proposed exhibits are material, is a determination which the legislature established to be a threshold, or a qualifying test for admission of new evidence that was not previously before the administrative tribunal. The Hearing Officer, as

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Hearing Officer's review, and finally the issue of privilege and admissibility would need to be determined by the Court.

[6] Petitioner's argument that "instead of addressing materiality, the Hearing Officer skips a step and concludes the evidence does not impact her decision" is disingenuous, as the Hearing Officer's analysis follows each and every argument Petitioner asserted in its brief on materiality. It is also nonsensical in view of the definition of materiality. "Material": "of such nature that knowledge of the item would affect a person's decision-making; significant; essential." Black's Law Dictionary (3rd ed. 2006).

[7] 17.0050 Order on Remand, 8:12-15.

delegated by the Court, determined that the exhibits were ***not material*** and that they would not have changed her final order. (Ord'r on Remand 8:13-15). The Hearing Officer's determination was not arbitrary or capricious, and was supported by substantial evidence and should be upheld.[8] The Hearing Officer relied on the following definition of "material": "Of such nature that knowledge of the item would affect a person's decision-making; significant; essential." (Ord'r on Remand, 1:23-24, citing Black's Law Dictionary (3rd ed. 2006)). She proceeded to analyze each of the three proposed exhibits in painstaking detail under the above definition.

CHWG

The Hearing Officer's conclusions included a finding that the proposed exhibits did not show that the Division knew that Choice Home Warranty was CHW Group ("CHWG"), or that the Division approved of CHWG's sale of service contracts in Nevada.[9] Distinguishing relevance from materiality, she concluded that exhibits KK, LL, and MM merely "reflect the Division's awareness that there was an entity that went by the name Choice Home Warranty that was selling unlicensed service contracts that the Division was investigating . . . [t]here was no substantive discussion as to who CHW Group, Inc., dba Choice Home Warranty was, nor any substantive discussion as to who Choice Home Warranty was. Any interpretations about what Division staff meant in the email discussions and note of exhibits KK, LL, and MM would be conjecture." (Ord'r on Remand 4:4-6; 10-13). She determined further that "exhibits KK, LL, and MM ***do not show that the Division knew of and approved of CHW Group's sale of service contracts in Nevada.***"(Ord'r on Remand, 7:8-9) (emphasis added).

Through a careful analysis of the proposed exhibits in the context of the record, as well as, of the potential impact on her findings of violations[10] in the 17.0050 Order, the Hearing Officer concluded that

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[8] Generally, the Court's role on judicial review of an administrative decision, is "to review the evidence presented to the agency in order to determine whether the agency's decision was arbitrary or capricious and was thus an abuse of the agency's discretion," *Brocas v. Mirage Hotel & Casino*, 109 Nev. 579, 582, 854 P.2d 862, 865 (1993).[8] If the administrative decision is based on substantial evidence, the Court may not substitute its judgment for the administrative determination. *Secretary of State v. Tretiak*, 117 Nev. 299, 305, 22 P.3d 1134, 1138 (2001).

[9] Order on Remand, 7:6-9; 22-24;

[10] Petitioner was disciplined for (1) making a false entry of material fact in violation of NRS 686A.070; (2) for failure to make records available to the Commissioner upon request in violation of NRS 690C.325 (1); and for (3) conducting business in an unsuitable manner by allowing unregistered entity to issue and

"[h]aving received and reviewed exhibits KK, LL, and MM, as mandated in the Court's Remand Order, the Hearing Officer finds exhibits KK, LL, and MM not to be material and, therefore, do not impact the final decision." (Ord'r on Remand, 8:13-15).

Petitioner asserts that "a prime issue in this case is whether HWAN's use of CHW Group, Inc. dba Choice Home Warranty ("CHWG") as third party administrator was unlawful." (Pet'r's Supplemental Memorandum, 5:15-16). It asserts further that its proposed exhibits show that the Division "knew or should have known that HWAN believed the Division to have approved and intended HWAN to use CHWG as its third-party administrator." (Pet'r's Supplemental Memorandum, 12:7-9). Setting aside the Hearing Officer's findings to the contrary, this argument is deliberately distorting the issues and misleading the Court. It has no merit.

Petitioner was not disciplined by the administrative Hearing Officer for having a third party as an administrator, nor was it fined for having an unregistered third party administrator. Petitioner was disciplined for allowing an unlicensed entity (administrator or anyone else) to perform the functions-- issuing, selling and offering for sale of service contracts-- for which Nevada law requires a provider certificate of registration.[11].

Petitioner apparently hopes that this will convince the Court that the proposed exhibits are material if they only show some remote possibility that the Division "knew or should have known" that Petitioner was using CHWG as a third-party administrator, which, as stated above, in and of itself, is not even relevant. Petitioner argues that "[t]he law plainly does not necessitate a third-party administrator and sales agent[12] to register as a provider with the Division." (Pet'r's Supplement at 5:16-17). Petitioner's

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offer and sell service contracts in Nevada in violation of NRS 690C.325 and 679B.125. (17.0050 Order, 27:13-21).

[11] *See* 17.0050 Order 27:18-21 stating, "Respondent be fined $50 for each act or violation, for conducting business in an unsuitable manner ***by allowing an unregistered entity to issue and offer service contracts in Nevada***.

[12] The analysis herein applies equally to "sales agents." Moreover, Petitioner should be judicially estopped from asserting an agent/principal relationship. It was Petitioner, who in response to the charge of failing to disclose the disciplinary actions against Choice Home Warranty, asserted in the administrative action that HWAN and Choice Home Warranty are two separate entities. That legal strategy had worked, as the Hearing Officer agreed that due to the separate corporate registrations, HWAN didn't have to disclose regulatory action against Choice Home Warranty. However, upon being fined for allowing an unlicensed entity to issue, sell, and offer for sale service contracts in Nevada, HWAN changed its mind and wants now the Court to believe Choice Home Warranty is an agent of

attempt to mischaracterize this important to the appeal issue is deliberate. In such manner, Petitioner hopes to distract the Court and re-introduce its absurd interpretation that because administrators are not required to be registered, they can issue, sell, and offer for sale service contracts without a certificate of registration or oversight.

The absurdity and danger of Petitioner's offered interpretation quickly becomes apparent when the legal implications of "***issuing***" a service contract without a certificate of registration are contemplated.[13] Petitioner has effectively argued that because NRS 690C.150 only references providers[14], anyone else can "issue, sell, or offer for sale" service contracts without registration. The legislative intent of 690C, as evident from the numerous financial requirements therein, is to ensure that there is an appropriate financial backing for service contracts sold in Nevada. The language of each such requirement is telling.

> 1. A ***provider*** who wishes to ***issue, sell or offer for sale*** service contracts in this state must submit to the Commissioner
>
> . . .
>
> (c) A copy of each type of service contract the ***provider*** proposes ***to issue, sell or offer for sale.***

NRS 690C.160 (1) (c) (emphasis added);

Furthermore,

> 1. To be issued a certificate of registration, ***a provider*** must comply with one of the following to provide for financial security: . . . (c) Maintain,

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HWAN and therefore is operating legally under HWAN's certificate. If Choice Home Warranty is an agent of HWAN, this Court must remand the issue back to the administrative tribunal with the instruction to treat the two entities as one and apply all agency/principal liability principles in considering the complaint filed against HWAN including the failure to disclose out-of-state disciplinary actions against Choice Home Warranty. Judicial estoppel is an equitable doctrine used to protect the judiciary's integrity, and should be invoked if HWAN continues to argue that principal/agency law allows CHWG to legally sell service contracts under HWAN's license. *NOLM, L.L.C. v. Cnty. Of Clark*, 120 Nev. 736, 743, 100 P.3d 658, 663 (2004).

[13] Terms "issue, sell or offer for sale" appear together in NRS 690C.150 and in multiple other provisions of chapter 690C. Petitioner's interpretation, if applied to "sell," would necessarily also have to be applied to "issue."

[14] Other aspects of statutory interpretation and legal implications of Petitioner's interpretation have also been addressed in Respondents' Answering Brief.

> . . . a ***net worth*** . . .under any service contract ***issued or sold by the provider*** . . .
>
> . . .
>
> 4. If the certificate of registration of a provider has not expired and ***the provider*** fails to maintain the financial security required by subsection 1, including, without limitation, if the financial security is cancelled or lapses, ***the provider shall not issue or sell*** a service contract.

NRS 690C.170 (1), (4) (emphasis added).

In this statutory scheme, a "provider" is by definition the obligor on the service contracts (NRS 690C.070), and an "administrator" administers "a service contract that ***is issued, sold or offered for sale by a provider.***" NRS 690C.020 (emphasis added). Only a registered provider (NRS 690C.150) can "issue, sell or offer for sale" service contracts, ***because of the financial backing*** that provisions like NRS 690C.160 and .170 ensure.

Petitioner's interpretation that because NRS 690C.150 registration requirements only references providers, therefore, anyone other than a provider can sell service contracts, would also have to mean that anyone other than a provider can also ***issue*** contracts. This dangerous interpretation would not only bring absurd results in that anyone could issue service contracts without the funding backup or any regulatory oversight, it would also "make the entirety of NRS chapter 690C a nullity," as stated by the Hearing Officer in her final decision. (17.0050 Order, 25:4-5). ***Only registered providers can issue, sell, or offer for sale service contracts in Nevada because by definition they are the ones backing the policies.***

A court "must construe statutory language to avoid absurd or unreasonable results." *Pellegrini v. State*, 117 Nev. 860, 874, 34 P.3d 519, 528 (2001). It must also interpret a statutory scheme in a harmonious fashion. The overreaching goal in statutory interpretation is to effect the legislative intent and public policy underlying a statute. *See A.J. v. Eighth Jud. Dist. Ct.*, 394 P.3d 1209, 1213 (2017). Nothing in Exhibits KK, LL,MM affects the finding that HWAN was using CHWG, an unlicensed entity, to sell service contracts in violation of Nevada law.

EQUITABLE ESTOPPEL

The Hearing Officer's findings in regard to CHWG, as addressed above, apply to the issue of estoppel. More importantly, however, Nevada law does not permit the application of said doctrine under

the circumstances of this case. The essence of the reality of Petitioner's estoppel argument can be summarized as follows: "the proposed exhibits show that even though we tried hard to conceal it, the Division employees knew or should have known that we were violating the law and therefore it is unfair to discipline us." Pursuant to the well-settled law, the doctrine of estoppel is not available to the Petitioner in this case.

The Nevada Supreme Court held that "***estoppel cannot prevent the state from performing its governmental functions.***" *Attorney General Chanos v. Nevada Tax Commission*, 124 Nev. 232, 237, 181 P.3d 675, 679 (2008), (emphasis added), *citing Foley v. Kennedy*, 110 Nev. 1295, 1302, 885 P.2d 583, 587 (1994). The Court in *Chanos* refused to apply estoppel to prevent the Attorney General from pursuing Open Meeting Law violations by the Tax Commission. "The defense of estoppel does not apply against the state in matters affecting governmental or sovereign functions. . . . Nor may the state be estopped by the unauthorized acts of its officers or employees." *Foley, 110 Nev. at 1302, 885 P.2d 587* (internal citations omitted).

Similarly in *Las Vegas Convention and Visitors Authority v Miller*, 124 Nev. 669, 700, 191 P.3d 1138, 1158 (2008), analyzing the *Chanos opinion*, the Court stated "as in *Attorney General*, the Secretary of State is engaged ***in his statutory duty: to enforce Nevada's election laws. Thus, equitable estoppel is not available*** to the proponents in this case." *Miller*, 124 Nev. at 700, 191 P.3d at 1158. (citations omitted) (emphasis added). As in *Miller*, the Division, through the Commissioner, its chief officer, is responsible for the enforcement of the provisions of title 57. NRS 679B.120 (3). Chapter 690C is part of title 57 and the Division has a duty to restrict the issuance, selling, and offering for sale of service contracts in Nevada to only those entities which have a provider certificate of registration, with the appropriate financial resources and security deposits to do so. As a matter of law and public policy, as repeatedly held by the Nevada Supreme Court, the Division cannot be estopped from enforcing NRS 690C and protecting Nevada consumers.

Even if the doctrine of estoppel were available, Petitioner would fail under the *Chanos* four-prong test[15], as set forth in the Order on Remand.[16] The Hearing Officer analyzed each prong in the context of the record and the proposed exhibits, and concluded that "HWAN's arguments piece together a speculation," which has no proof to support it. "Therefore the equitable estoppel test fails." (Order on Remand, 4:18-19). Her findings are supported by substantial evidence and should not be disturbed.

Petitioner would also certainly fail the ***equity and good conscience*** guiding principle of estoppel, if said doctrine were applicable.[17] Petitioner ***actively concealed*** that CHWG was issuing, selling, and offering for sale services contracts by stating in its annual renewal applications that it was "self" administered. This act was part of a pattern of behavior documented by the State of Washington Office of the Insurance Commissioner as early as November 29, 2010:

> On September 1, 2010, the OIC received Victor Mandalawi's August 31, 2010 Application for Registration as a Service Contract Provider in the State of Washington for corporation entity, 'Home Warranty Administrators'... Mr. Mandalawis' biography submitted with this application failed to indicate he had any connection to Choice Home Warranty, though ... And even though the State of California had by then issued at least two separate cease and desist orders against Choice Home Warranty and 'its officers, directors, employees, trustees, agents, affiliates and service representatives'... Mr. Mandalawi's application failed to mention such orders existed... In fact, ***the application failed to mention "Choice Home Warranty" or "CHW Group, Inc." at all in his application.*** On September 15, 2010, Mr. Mandalawi withdrew the application.[18]

The documented act of concealment was replicated in Nevada. Petitioner never disclosed any disciplinary action against its "administrator" in any of their applications, and it never identified Choice Home Warranty as its administrator.[19]

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[15] *Chanos,* 124 Nev. at 237, 181 P3d. at 679.

[16] The Hearing Officer addressed all four prongs of the *Chanos* test in her Order on Remand. " As applied to this case, equitable estoppel requires proof that (1) the Division was apprised of the true facts, (2) the Division intended for HWAN to act upon the Division's conduct, (3) HWAN was ignorant of the true state of facts, and (4) HWAN detrimentally relied on the Division's conduct." (Order on Remand, 3:27-28; 4:1-2).

[17] *Chanos*, 124 Nev. at 238 , 181 P.3d 679 (2008).

[18] Division Exhibit 8 in Cause No. 17.0050.

[19] The Hearing Officer found that Division believed HWAN's representation. After discussing complaints received against Choice Home Warranty with Mandalawi, it was identified that Choice and HWAN were one and the same entity, that Choice was not selling illegally because HWAN was a licensed

Similarly well-supported are the Hearing Officer's other conclusions addressing Petitioner's arguments. Based on her factual determinations that HWAN was "piec[ing] speculation"[20] regarding CHWG and what the Division knew or didn't know, the Hearing Officer addressed other arguments of the Petitioner and found that nothing in the exhibits was material as to impact her 17.0050 Order. Her findings are supported by substantial evidence and should not be disturbed. *Secretary of State v. Tretiak*, 117 Nev. at 305, 22 P.3d at 1138. "The court shall not substitute its judgment for that of the agency as to the weight of evidence on a question of fact." NRS 233B.135 (3).

As the proposed exhibits were determined, based on substantial evidence, not to be material under NRS 233B.131 (2), they should not be considered on judicial review of Cause 17.0050.

CONCLUSION

For the reasons set forth above the Hearing Officer's findings in her Order on Remand should be affirmed.

Dated: August 8, 2019.

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Attorney General

By: Bar No. 12237 Peter K. Keegan
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Deputy Attorney General

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entity in Nevada. (*See* Order on Remand, 6:19-21). "There is no evidence that the Division knew that Choice Home warranty was CHW Group or of the contract between HWAN and CHW Group." *See* also Order on Remand, 7:6-9. Petitioner indicated in all of its renewal applications that it was **itself** administering its service contracts, which was not true.

[20] Order on Remand, 5:2

CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on the 8th day of August, 2019, I served a copy of the foregoing Respondents' Response to Petitioner's Supplemental Memorandum of Points and Authorities Pursuant to NRS 233B.133 by mailing a true and correct copy to the following:

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IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

HOME WARRANTY ADMINISTRATOR OF NEVADA, INC. dba CHOICE HOME WARRANTY, a Nevada corporation,

Petitioner,

v.

STATE OF NEVADA, DEPARTMENT OF BUSINESS AND INDUSTRY-DIVISION OF INSURANCE, a Nevada administrative agency,

Respondent.

Case No. 17 OC 00269 1B
Dept. No. I

PETITIONER'S REPLY IN SUPPORT OF ITS SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES PURSUANT TO NRS 233B.133

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as required by NRAP 26.1(a) and must be disclosed. Petitioner HOME WARRANTY ADMINISTRATOR OF NEVADA, INC d/b/a Choice Home Warranty ("HWAN") is a Nevada domestic corporation. It is not owned by any parent corporation and no publicly held company owns more than 10% of HWAN's stock.

The following attorneys have appeared for the Petitioner:

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These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Dated this 15th day of August, 2019.

for

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Petitioner HOME WARRANTY ADMINISTRATOR OF NEVADA, INC., dba CHOICE HOME WARRANTY ("HWAN"), by and through their attorneys of record, the law firm of Holland & Hart LLP, hereby submits its reply ("Reply") in support of its supplemental memorandum of points and authorities in light of the Order on Remand[1] which was filed on January 22, 2019 (the "Supp. Brief"), in the matter of In re Home Warranty Administrator of Nevada, Inc. dba Choice Home Warranty, Cause No. 17.0050.

DATED this 15th day of August, 2019.

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[1] Capitalized terms not otherwise defined herein have the same meaning as in HWAN's Supp. Brief.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

HWAN moved to present the additional Evidence because the Evidence demonstrates that the Division has known for years that HWAN used CHWG as its third-party administrator and sales agent, and now belatedly attempts to strip HWAN of its registration because of this very arrangement, an arrangement the Division implicitly approved. In HWAN's Supp. Brief, HWAN maintains that the Hearing Officer's finding that the Evidence is not material is clearly erroneous because the Evidence (1) helps to establish HWAN's claim for equitable estoppel, (2) negates the findings of false representations of material fact, (3) shows that the Division's testimony was inaccurate, and (4) establishes that the final order imposed penalties beyond the statute of limitations. Supp. Brief at 10-20. In its Response to the Supp. Brief, ("Response" or "Resp.") the Division does not even attempt to counter the majority of these arguments.[2] Instead, the Division argues against allowing the additional Evidence on the basis that the Evidence is not material, and that the Division is not estopped from penalizing HWAN for its use of CHWG.[3] These arguments are without merit.

A. The Evidence is Material

The Division argues that HWAN is disregarding the Nevada Administrative Procedures Act ("APA") by asking this court to consider the additional Evidence. Resp. at 3. However, the APA is what gives this Court the authority to determine whether the evidence is material. NRS 233B.131(2) provides:

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[2] The Division also improperly alleges that HWAN intentionally attempted to conceal disciplinary actions in other states against CHWG. Resp. at 8-9. In a desperate attempt to discredit HWAN the Division creates what appears to be an HWAN statement: "The essence of the reality of Petitioner's estoppel argument can be summarized as follows: 'the proposed exhibits show that even though we tried hard to conceal it, the Division employees knew or should have known that we were violating the law and therefore it is unfair to discipline us.'" Resp. at 8:1-5. To be clear, HWAN has never made such a statement and as the Hearing Officer found in her order, HWAN did not intentionally conceal disciplinary actions against CHWG in other states. Record Entry No. 47 at 19:23-27 ("HWAN did not violate Nevada law by failing to disclose administrative actions taken in other states. CHW Group is HWAN's administrator, and none of the applications asked whether the administrator or its officers have been the subject of administrative actions in other states.").

[3] Moreover, pursuant to this Court's interpretation of NRS 233B.121(7)(b) the Evidence is properly part of the record as it was "received and considered." *See* Order Denying Petitioner's Objection and Request to Strike in Case No. 19 OC 00015 1B attached hereto as **Exhibit 1**.

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> If, before submission to the court, an application is made to the court for leave to present additional evidence, and ***it is shown to the satisfaction of the court that the additional evidence is material*** and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence and any rebuttal evidence be taken before the agency upon such conditions as the court determines.

Although the Court directed the Hearing Officer "to receive the evidence and determine whether the Evidence is material, and if so, whether it would have had any impact on the final decision,"[4] the Court did not delegate its authority to determine whether the Evidence was material to the Hearing Officer as the Division argues. Resp. at 3. Instead, the Court requested that the Hearing Officer make an initial finding with regard to the materiality of the Evidence. Thus, the Court ultimately has the authority pursuant to NRS 233B.121(2) to determine whether the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency.

Moreover, the Hearing Officer's finding on materiality is affected by error of law[5] given that the Hearing Officer used the wrong standard of materiality. As the Division points out, the Hearing Officer relied on the definition of "material" in the 2006 edition of Black's law Dictionary. Resp. at 4:5-6. This not the correct standard of materiality with regard to evidence, instead the standard of materiality with regard to evidence is "[e]vidence having some logical connection with the facts of the case or the legal issues presented." *See* EVIDENCE, Black's Law Dictionary (11th ed. 2019); *see also Wyman v. State*, 125 Nev. 592, 608, 217 P.3d 572, 583 (2009) (Defining material evidence as that which is "logically connected with the facts of consequence or the issues in the case"). Here, the Hearing Officer's decision is clearly erroneous as her own findings show that the Evidence is logically connected with the facts of consequence within the matters in dispute, because she acknowledges that the Evidence encompasses "conversations that reflect the Division's awareness that there was an entity that went by the name Choice Home Warranty that

[4] Order Granting Pet.'s Mot. for Leave to Present Add'l Evid. at 2.

[5] *See* NRS 233B.135(3) setting forth the standard of review for administrative agency decisions and allowing a final decision to be set aside if the Petitioner's substantial rights are prejudiced by a decision that is affected by error of law or clearly erroneous.

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was selling unlicensed service contracts and that the Division was investigating" [and that] "one employee identified CHW Group, Inc. dba Choice Home Warranty in her comments relating to questions about and investigations of Choice Home Warranty."[6] Thus, the Evidence is relevant and logically connected to the issues of whether the Division knew whether CHWG and HWAN were separate entities and whether CHW Group, Inc. dba Choice Home Warranty was the same Choice Home Warranty used by HWAN as third-party administrator and sales agent. The Division's knowledge on this point, goes directly to HWAN's arguments in its Supp. Brief as to why this evidence should be considered by this court. For example, as further demonstrated below, the Division's knowledge of HWAN's relationship with CHWG goes directly to establishing the first element of estoppel. In addition, the Evidence that the Division know of CHWG and HWAN's relationship negates Hearing Officer's findings of false representations of material fact, shows that the Division's testimony was inaccurate, and helps to establish that the final order-imposed penalties beyond the statute of limitations. Supp. Brief at 10-20. Nevertheless, the Division does not counter HWAN's arguments with respect to these points.

Instead, the Division argues that whether the Division knew that HWAN used CHGW as its administrator is irrelevant because it newly claims that HWAN was not disciplined by the Hearing Officer for having a third party as an administrator, but for allowing an unlicensed entity to operate in this state without being registered.[7] Resp. at 7. This argument is a not only a distraction from the issues regarding whether the Evidence is material for the reasons explained above,[8] it is a red herring because the Evidence is material "[r]egardless of whether the law allows this arrangement, [because the Evidence shows that] the Division has known for years that HWAN used CHWG as its third-party administrator and sales agent, and now belatedly attempts to strip HWAN of its registration because of this very arrangement, an arrangement the Division implicitly

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[6] *See* Ex. 5 to Supp. Brief at 4.

[7] The Division also argues for the first time ever that allowing HWAN to utilize CHWG as its administrator jeopardizes the financial backing of the contracts. This argument should be stricken as it was not argued below is not relevant to the Order on Remand, and is without merit as HWAN's use of CHWG as its service contract administrator does not affect HWAN's obligation as the provider under the service contracts that CHWG sells.

[8] Notably, the Division fails to rebut the majority of the arguments regarding these issues in its Response.

approved." Supp. Brief at 5:19-22. Thus, the Division's argument on this point should be disregarded where it is irrelevant to the Order on Remand.

Furthermore, service contract providers are authorized to use unregistered third-party administrators under NRS Chapter 690C.[9] NRS 690C.020 defines an administrator as a person who is responsible for administering a service contract that is issued, sold or offered for sale by a provider. NRS 690C.260(1)(d)(1), which governs the contents of a service contract issued by a service contract provider authorizes the employment of an administrator by requiring that the name and address of the administrator be included in any service contract. These provisions do not require a service contract provider's administrator to be licensed in any way, restrict or define (short of being a holder) its administrative activities. HWAN's position has always been that CHWG is its administrator. Yet, the Division argues, without any authority whatsoever, that everyone one who acts as an administrator for a service contract provider must be licensed in some way—either as a service contract provider or as a third-party administrator under NRS 683A.085.[10] The Division, however, can point to no applicable Nevada law to support its position.

Therefore, HWAN has demonstrated that additional Evidence is material and the Hearing Officer's finding that it was not material is without substantial evidentiary support, and in accordance with NRS 233B.131(2) this Court should find the additional Evidence material and consider the Evidence in determining the outcome of this petition.

B. The Doctrine of Estoppel is Applicable Here

The Division argues that the doctrine of estoppel does not apply because the Division is a governmental entity *citing Chanos v. Nevada Tax Comm.*, 124 Nev. 232, 237, 121 P.3d, 675, 679 (2008) and *Las Vegas Convention & Visitors Auth. v. Miller*, 124 Nev. 669, 699, 191 P.3d 1138,

[9] For a more detailed discussion on Nevada law regarding service contract providers and administrators see Pet. Op. Br. at 13-20.

[10] *See* Commissioner of Insurance's pronouncement in her January 2, 2019 Finding of Fact, Conclusions of Law, and Order of the Commissioner, Cause No. 18.0095, attached hereto as **Exhibit 2** at 15:19-27 when acting as the Hearing Officer, that administrators for service contract providers must be registered as third party administrators under NRS 683A.085 despite NRS 690C.120(1) (Applicability of other provisions) does not list this section as being applicable in the context of selling service contracts.

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1158 (2008). Resp. at 8. However, these very cases support the application of estoppel in this case.

In *Chanos*, the appellants, the Nevada Tax Commission, argued that the Nevada Attorney General should be estopped from enforcing Nevada's Open Meeting Law because the deputy attorneys general present did not object when the Nevada Tax Commission improperly conducted a closed meeting. 124 Nev. at 678-679, 121 P.3d at 237. The Nevada Supreme Court held that failure to enforce Open Meeting Law could not be a basis for an argument for estoppel. *Id.* at 679, 121 P.3d at 238. In *Las Vegas Convention & Visitors Auth.*, the Nevada Supreme Court clarified the holding in *Chanos* and explained when estoppel can be used against the government and when it cannot by examining the Court's history in applying estoppel against a government entity. 124 Nev. at 699, 191 P.3d at 1158. The Court noted that when a government official makes representations of a factual nature that are specific to a person, the doctrine of estoppel should apply. *Id.* (noting two cases in which the Nevada Supreme Court held that the government was estopped after making factual representations specific to a person in a particular situation).

Unlike in *Chanos* where the government did not enforce the law initially, here the Division knew in 2011 the "true fact" that HWAN was using CHWG as its third-party administrator, that the Division knew HWAN submitted a form service contract listing CHWG as its third-party administrator,[11] that the form service contract prominently displayed the Choice Home Warranty logo, and knew or should have known that HWAN believed the Division to have approved and intended HWAN to use CHWG as its third-party administrator by the Division approving such form service contract. And, unlike in *Chanos* where the appellants acted in clear violation of the law, as HWAN has pointed out throughout this case, the law plainly does not require CHWG to be registered as a service contract provider under NRS Chapter 690C when acting in the role of a third-party administrator. Therefore, in this circumstance the Division made factual representations specific to HWAN by approving HWAN's form service contract and should be equitably estopped from asserting that HWAN improperly utilized CHWG as its third-party

[11] *See* Record Entry No. 35, at CHW073376, Division approved service contract submitted on July 11, 2019 also attached as **Exhibit 3**.

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administrator. Moreover, the additional Evidence further demonstrates that estoppel should apply because it shows the Division knew that "CHW Group, Inc. dba Choice Home Warranty" was lawfully operating as a third-party administrator and sales agent for HWAN.

The Division also argues that even if the doctrine of estoppel were available HWAN does not meet the four-prong test. Resp. at 9. On the contrary, HWAN has demonstrated that it meets the four prong test where the Evidence shows (1) the Division was apprised of the true facts that HWAN utilized CHWG as its third-party administrator, (2) the Division intended HWAN to act upon its approval by allowing HWAN to do business in this state while knowing of this relationship, (3) HWAN was ignorant of the fact that the Division did not approve of its relationship with HWAN and CHWG, and (4) HWAN relied to its detriment on the Division's representations. *Chanos,* 124 Nev. at 679, 121 P.3d at 237; Supp. Brief at 11-15.

The Division then claims that the doctrine of estoppel is inapplicable due to considerations of equity and good conscience alleging that HWAN intentionally concealed disciplinary actions against CHWG in other states. Resp. at 9. This is a blatant misrepresentation of the record and HWAN's conduct where the Hearing Officer expressly dismissed this allegation below. Record Entry No. 47 at 19:23-27 ("HWAN did not violate Nevada law by failing to disclose administrative actions taken in other states. CHW Group is HWAN's administrator, and none of the applications asked whether the administrator or its officers have been the subject of administrative actions in other states.").

II. Conclusion

For the foregoing reasons, HWAN has established that its substantial rights have been prejudiced, and this Court must set aside the Order on Remand in whole or in part. Because the

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Evidence is material, admissible, and should affect the underlying decision, the Court should consider the Evidence when evaluating HWAN's Petition for Judicial Review.

DATED this 15th day of August, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of August, 2019, a true and correct copy of the foregoing **PETITIONER'S REPLY IN SUPPORT OF ITS SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES PURSUANT TO NRS 233B.133** was served by the following method(s):

☑ U.S. Mail: by depositing same in the United States mail, first class postage fully prepaid to the persons and addresses listed below:

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An Employee of Holland & Hart LLP

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INDEX OF EXHIBITS

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EXHIBIT 1

Order Denying Petitioner's Objection and Request to Strike in Case No. 19 OC 00015 1B

EXHIBIT 1

Order Denying Petitioner's Objection and Request to Strike in Case No. 19 OC 00015 1B

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Attorneys for the Division of Insurance

IN THE FIRST JUDICIAL DISTRICT COURT OF
THE STATE OF NEVADA IN AND FOR CARSON CITY

HOME WARRANTY ADMINISTRATOR OF NEVADA, INC., dba CHOICE HOME WARRANTY, a Nevada Corporation Petitioner, vs. STATE OF NEVADA, DEPARTMENT OF BUSINESS AND INDUSTRY- DIVISION OF INSURANCE, a Nevada administrative agency Respondent.	Case No. 19-OC-00015-1B Dept. No. I

ORDER DENYING PETITIONER'S OBJECTION AND REQUEST TO STRIKE

This matter is before the Court as a result of Petitioner's *OBJECTION TO DOCUMENTS INCLUDED IN THE RECORD THAT WERE NOT ADMITTED AND FOR WHICH AN OFFER OF PROOF WAS NOT MADE AND REQUEST TO STRIKE THE SAME* filed on May 14, 2019. Respondent filed a Reply and Petitioner submitted the matter on May 31, 2019.

Upon review and consideration of the papers and pleadings on file, and for good cause appearing, the Court hereby orders:

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WHEREAS, NRS 233B.121(7)(b) provides that the record in the contested case must include evidence received or considered, and;

WHEREAS, upon Petitioner's request that the Division supplement the transmitted administrative record with exhibits not admitted into evidence, Respondent provided all evidence received or considered, including, tabs 107 (State of Washington Insurance Commissioner Order to Cease and Desist against CHW Group, dba Choice Home Warranty), 108 (State of Oklahoma Insurance Commissioner regulatory action records and Emergency Cease and Desist Order against Choice Home Warranty, an "unlicensed service warranty association"), and 109 (State of California Order to Cease and Desist and Notice of Monetary Penalty against Choice Home Warranty) for which offers of proof were made;

IT IS HEREBY ORDERED that Petitioner's *OBJECTION TO DOCUMENTS INCLUDED IN THE RECORD THAT WERE NOT ADMITTED AND FOR WHICH AN OFFER OF PROOF WAS NOT MADE AND REQUEST TO STRIKE THE SAME* filed on May 14, 2019, is **DENIED**. The Court will allow all of the exhibits provided to the Court by Respondent to be part of the record, but will give them the weight it believes they deserve.

Dated: June 6, 2019.

James T. Russell
District Court Judge

Respectfully Submitted by:

AARON FORD
Attorney General

By:
RICHARD PAILI YIEN
Deputy Attorney General
JOANNA N. GRIGORIEV
Senior Deputy Attorney General
Office of the Attorney General

CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on June 4, 2019, I deposited for mailing in the United States Mail, first-class postage prepaid, at Carson City, a true and correct copy of the foregoing **PROPOSED ORDER DENYING PETITONER'S OBJECTION AND REQUEST TIME**, addressed to the following:

Holland & Hart, LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas NV 89134-0532

An employee of the
Office of the Nevada Attorney General

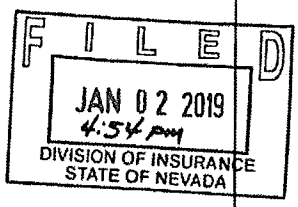
EXHIBIT 2

January 2, 2019 Findings of Fact, Conclusions of Law and Order of the Commissioner, Case No. 18.0095

EXHIBIT 2

January 2, 2019 Findings of Fact, Conclusions of Law and Order of the Commissioner, Case No. 18.0095

STATE OF NEVADA
DEPARTMENT OF BUSINESS AND INDUSTRY
DIVISION OF INSURANCE



IN THE MATTER OF **HOME WARRANTY ADMINISTRATOR OF NEVADA, INC. dba CHOICE HOME WARRANTY** Respondent.	CAUSE NO. **18.0095** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER OF THE COMMISSIONER**

This matter is before the State of Nevada, Department of Business and Industry, Division of Insurance (Division") on an Order Granting Division's Request for a Hearing issued by the Deputy Commissioner of Insurance ("Deputy") on March 12, 2018. The Division's Request was made pursuant to Nevada Revised Statutes ("NRS") 690C.325(1) to effectuate the denial of the service contract provider renewal application of Home Warranty Administrator of Nevada, Inc. dba Choice Home Warranty ("HWAN" or "Respondent"). NRS 690C.325(1) requires a hearing, or a waiver of a hearing, to non-renew, suspend, limit or revoke a provider's certificate of registration as a service contract provider in Nevada. Thus, a due process hearing must commence, unless waived, to implement certain actions against the certificate of a registered service contract provider. The Division alleges that the Respondent violated various provisions of the NRS title 57 ("Insurance Code") to such an extent that the Division requested a due process hearing under NRS 690C.325(1) to allow HWAN to provide evidence supporting HWAN's position that its January 11, 2018 renewal application as a Service Contract Provider should be renewed rather than effectuating a denial.

The Commissioner, as head of the Division, is charged with regulating the business of insurance and service contracts in Nevada. NRS 232.820-825.2; NRS 690C.120(1)(a); NRS 679B.120; Chapter 690C of NRS.

The hearing in this matter was properly noticed and was originally set for May 2, 2018, (continued to May 3, 2018, if necessary) at 9:00 a.m. at the offices of the State of Nevada, Department of Business and Industry, Division of Insurance ("Division"), located at 1818 E.

College Parkway, Suite 103, Carson City, Nevada 89706. Pursuant to Nevada Administrative Code ("NAC") 679B.211(3)(a), and in response to two separate Joint Motions to Continue the hearing, the Joint Requests to Continue were each granted. The first Continuance was granted on April 20, 2018, and the second was granted on June 6, 2018. On August 17, 2018, the Respondent, HWAN, submitted a third Motion to Continue the Hearing which was opposed by the Division. On August 22, 2018, the Hearing Officer set a new Hearing date and Pre-hearing schedule. In response, on August 28, 2018, HWAN submitted a Motion to Reset the Hearing Date to accommodate Religious Observation. On September 10, 2018, the Hearing Officer set a new Hearing date for October 23, 2018, (continued to October 24, 2018, if necessary) which was properly noticed to the parties.

The hearing was held over the two day period of October 23 and 24, 2018, and was held pursuant to chapter 233B of the NRS, Title 57 of NRS, including 679B *et seq.*, chapter 679B of NAC, and all other applicable laws and regulations.

Present for the Division were Deputy Attorney General, Richard Yien, and Senior Deputy Attorney General, Joanna Grigoriev. HWAN was represented by counsel, Kirk B. Lenhard, Esq., Daven P. Cameron, Esq., of the Nevada law firm Brownstein Hyatt Farber Schreck, LLP; Lori Grifa, Esq., of the law firm of Archer & Greiner P.C. of Hackensack, New Jersey; and Brian Tretter, Special Counsel of Bedminster, New Jersey. Barbara D. Richardson, Commissioner of Insurance ("Commissioner"), presided as the Hearing Officer.

SUMMARY OF PROCEEDINGS

On February 1, 2018, renewal applicant HWAN was provided a Notice of Denial to renew its Service Contract Provider Certificate of Registration. HWAN was provided four reasons for the denial of its January 11, 2018 Renewal Application ("Renewal Application").

On February 2, 2018, the Division received a Request for a Hearing from HWAN to reconsider an October 26, 2017 renewal application from HWAN to retain its certificate as a Service Contract Provider in Nevada. (See Cause No. 18.0069). The Division did not process the October 26, 2017 renewal application for a Service Contract Provider for HWAN, as both HWAN and the Division were awaiting the results of a previous administrative action between

the two parties, Cause No. 17.0050. This previous action began on May 9, 2017, when the Division, through the Nevada Attorney General, filed a Complaint and Application to Show Cause, resulting in Cause No. 17.0050. HWAN's request for a Hearing was granted based on the February 2, 2018 Request for a Hearing, and a Notice of Hearing was sent via certified mail on February 9, 2018, opening Cause No. 18.0069. Cause No 18.0069 was eventually closed due to a March 9, 2018 formal Notice of Withdrawal of Request for Hearing by HWAN. On March 12, 2018, the Hearing Officer Provided an Order Granting [HWAN's] Notice to Withdraw Request for Hearing and Cause No. 18.0069 was closed.

The results of the previous administrative action, Cause No. 17.0050, ended with a December 18, 2017 Final Order from the Division by Hearing Officer Alexia Emmermann ("Emmermann Order"). The Emmermann Order determined that, among other items, HWAN's certificate of registration expired as a matter of law. In the Emmermann Order, the Hearing Officer provided a time line for HWAN to submit a renewal application and for the Division to review this renewal application. The January 11, 2018 HWAN Renewal Application and its February 1, 2018 denial are now the subject of this current administrative action. Cause No. 18.0095.

HWAN was provided a notice of the denial of the Renewal Application on February 1, 2018, explaining the four reasons for the denial of the January 11, 2018 Renewal Application. The Division requested a hearing to effectuate this denial on March 12, 2018. On March 13, 2018, the Division's request for a hearing was granted and notice was sent via certified mail to the Respondent. In the March 13, 2018 Notice of Hearing, Barbara Richardson, the Commissioner of Insurance ("Commissioner"), was named as Hearing Officer.

On March 14, 2018, the Commissioner, as Hearing Officer sent out a Pre-Hearing Order to the parties and set the hearing date for May 2, 2018 at 9:00 a.m. (continued to May 3, 2018, if necessary).

On March 28, 2018, HWAN submitted a Request for a Hearing and noted that "HWAN will consent to consolidate and hold this hearing on the date previously set by Commissioner Richardson for Cause No. 18.0095; to wit, May 2, 2018."

On April 3, 2018, the Hearing Officer issued an Order Regarding Stipulated Hearing Date; Order Confirming Terms of [March 14, 2018] Pre-Hearing Order which included the granting of the request for the parties to consolidate the hearing requests into the May 2, 2018 Hearing.

On two following occasions, April 18, 2018 and June 5, 2018, the parties submitted joint requests to Continue Hearing Dates. The Joint Requests were each granted: the first on April 20, 2018, and the second on June 6, 2018, based on the representations of the parties that each party felt they could use more time to negotiate a settlement.

On May 24, 2018, HWAN submitted a Motion for Subpoenas Ad Testificandum and Application for Subpoena Duces Tecum.

On August 17, 2018, HWAN submitted a third Motion to Continue the Hearing. On August 21, 2018, the Division submitted an Opposition to the Request for a Continuance. On August 22, 2018, the Hearing Officer set a new Hearing date and Pre-hearing schedule.

On August 28, 2018, HWAN submitted a Motion to Reset the Hearing Date to Accommodate Religious Observance.

On August 31, 2018, the Division filed an Opposition to Respondent's Motion for Subpoenas.

On September 10, 2018, the Hearing Officer set a new Hearing date for October 23, 2018, (continued to October 24, 2018, if necessary). On October 16, 2018, each party submitted Pre-Hearing statements.

On September 13, 2018, HWAN filed a Motion for a More Definite Statement.

On September 14, 2018, the Division filed a Non-Opposition to Respondent's Motion for a More Definite Statement.

On September 19, 2018, the Hearing Officer filed an Order Granting Motion for More Definite Statement.

On September 25, 2018, Subpoenas for Appearance at Hearing were sent to Rajat Jain, Timothy Ghan, Mary Strong and the State of Nevada Division of Insurance.

On September 26, 2018, HWAN filed a Motion for a Subpoena Duces Tecum.

On September 27, 2018, the Division filed a Limited Opposition to Respondent's Second Motion for Subpoenas.

On September 28, 2018, the Division filed a More Definite Statement.

On September 28, 2018, the Hearing Officer filed an Order on the Motion for Second Subpoena Duces Tecum. On October 3, 2018, the Subpoena Duces Tecum for the second request was filed.

On October 8, 2018, HWAN submitted a Third Motion for Third Subpoena Duces Tecum. In response, on October 10, 2018, the Division submitted an Opposition to Respondent's Third Motion for Subpoenas.

On October 11, 2018, the Hearing Officer filed an Order on the Motion for Third Subpoena Duces Tecum.

On October 16, 2018, both parties met the Pre-Hearing notice deadlines and submitted their Prehearing Statements, their Proposed Hearing Exhibit List, and their List of Hearing Witnesses.

On October 17, 2018, HWAN submitted an additional Prehearing Statement.

On October 19, 2018, the Parties submitted a Joint Request for Prehearing Conference. The Prehearing Conference was held on the morning of the first date of the Hearing, October 23, 2018.

On November 19, 2018, HWAN submitted a Brief Regarding Recusal of Commissioner as Hearing Officer, and the Division submitted its Brief Regarding Recusal of Commissioner as Hearing Officer. These contemporaneous briefs were stipulated to as part of the October 23, 2018 Hearing.

On December 3, 2018, HWAN and the Division submitted timely contemporaneous Closing Briefs.

On December 11, 2018, the Hearing Officer issued her Order Denying Petitioner's Motion for the Recusal of the Commissioner as Hearing Officer.

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WITNESSES

RAJAT JAIN. Rajat Jain, Chief Insurance Examiner of the property casualty unit for the Division ("Jain"), provided testimony under subpoena from HWAN about the Division policies and procedures for reviewing Service Contract Provider initial and renewal applications. Jain also provided testimony regarding the actual review process for the HWAN January 11, 2018 Renewal Application. Additionally, Jain provided testimony regarding Choice Home Warranty's ("CHW") continued sales practices in the service contract market in Nevada, as well as testimony regarding the Division's past enforcement actions against Service Contract Providers.

TIMOTHY GHAN. Timothy Ghan, Assistant Chief Insurance Examiner of the property casualty unit for the Division ("Ghan"), provided testimony under subpoena from HWAN about the Division policies and procedures in reviewing Service Contract Provider initial and renewal applications. Ghan also provided testimony regarding the actual review process for the HWAN January 11, 2018 Renewal Application. Ghan also provided testimony regarding a solicitation he received from CHW to purchase a service contract product at a discount.

FELECIA CASCI. Felecia Casci, Chief Legal Secretary for the Division ("Casci"), provided testimony on behalf of the Division, regarding the use of certified mail for the transmittal of the Notice of Hearing and the Division's Request for a Hearing.

MARY STRONG. Mary Strong, Management Analyst III for the Division ("Strong"), provided testimony under subpoena from HWAN regarding the policies and procedures in reviewing Service Contract Provider initial and renewal applications.

EXHIBITS

The Respondent proposed 70 exhibits (Exhibits A-RRR), and each was marked for identification. Exhibits B, D, J, Q, S, V, W, Y, Z, AA, CC, DD, GG, HH, II, JJ, KK and NN were admitted to and entered into evidence. The Division proposed 17 exhibits (Exhibits 1-17). Exhibits 11, 12 and 13 were withdrawn by the Division at the Hearing. All other Division Exhibits were admitted and entered into evidence.

FINDINGS OF FACT

1. NRS 690C.325(1) states that, [t]he Commissioner may refuse to renew or may suspend, limit or revoke a provider's certificate of registration if the Commissioner finds after a hearing thereon, or upon waiver of hearing by the provider, that the provider has:

> a. Violated or failed to comply with any lawful order of the Commissioner;
> b. Conducted business in an unsuitable manner;
> c. Willfully violated or willfully failed to comply with any lawful regulation of the Commissioner; or
> d. Violated any provision of this chapter.

2. The Emmermann Order, in its Order of the Hearing Officer, noted specifically that if HWAN wishes to continue engaging in the business of service contracts in Nevada, HWAN may apply for a certificate of registration as provided in the Emmermann Order. Division Exhibit 2, pg. 27.

3. The Emmermann Order provided the following instruction to HWAN:

> Therefore , as of the date of this Order [December 18, 2017], [HWAN] is on notice that it must apply for a renewal of its certificate of registration if it wishes to continue in the business of service contracts in Nevada within 30 days of the date of this [the Emmermann] Order. Division Exhibit 2, pg. 27.

4. The Emmermann Order provided the following instruction to the Division in relation to the instructions provided to HWAN:

> The Division must issue its determination on the application no later than 15 business days after the receipt of the complete application. As a result, the Division cannot take action against [HWAN] for issuing, selling, or offering for sale service contracts without a certificate of registration from the date of this Order plus 45 days. Division Exhibit 2, pg. 27.

5. HWAN submitted a Renewal Application for a Service Contract Provider Certificate of Registration ("Renewal Application") which was received by the Division on January 11, 2018.

6. According to the Emmermann Order, HWAN was required to provide a complete renewal application by January 17, 2018.

7. HWAN's Renewal Application was received by the Division within the 30 days after the Emmermann Order, however, it was deemed incomplete by the Division. Division

Exhibit 4, pg.2.

8. Despite the deadline under the Emmermann Order for a complete application to be received within the 30 days, the Division provided some additional time, until January 26, 2018, for HWAN to complete its application. Division Exhibit 4, pg. 2.

9. The Emmermann Order required that the Division make a determination on the renewal application no later than 15 business days after the receipt of the complete application. Division Exhibit 2, pg. 27.

10. Fifteen business days from the date of receipt of the Renewal Application would have been February 2, 2018, if the Renewal Application was received by the Division on January 11, 2018.

11. There was an argument made at the Hearing that the Renewal Application actually arrived at the Division on January 10, 2018. This was supported by Division staff testimony. Hr'g Tr., Day 1 at 182:16- 21 (10/23).

12. In a March 27, 2018 letter from Victor Mandalawi, President of HWAN to Division representative, Mary Strong, HWAN states that, "Unless vacated or modified by the pending appeal before Judge Russell in Nevada's First District Court, the Emmermann Order dated December 18, 2017 remains the law of the case." HWAN Exhibit DD, pg. 2.

13. The March 27, 2018 letter also formally requested that the Division reconsider the February 1, 2018 denial notice. HWAN Exhibit DD, pg 3.

CONCLUSIONS OF LAW

Based upon all pleadings and papers on file in this matter, the testimony of the witnesses, which were all found to be credible, a review of the exhibits admitted at the hearing, and the foregoing Findings of Fact, the Hearing Officer makes the following Conclusions of Law:

A. Jurisdiction

The Commissioner has jurisdiction over this matter pursuant to NRS 690C.120, 679B.120, NRS 679.125, and NRS 690C.300,-.310 and .320. Service Contracts are regulated by the Commissioner under the Insurance Code pursuant to chapter 690C of NRS.

B. Burden of Proof

The Division bears the burden of showing, by a preponderance of the evidence, that HWAN violated provisions of the Insurance Code to support an action under NRS 690C.325(1) which provides that "[t]he Commissioner may refuse to renew ... a provider's certificate of registration if the Commissioner finds after a hearing thereon, ... that the provider has:" violated any one of the elements required under NRS 690C.325(1)(a-d). In hearings before the Division, "the hearing officer shall liberally construe the pleadings and disregard any defects which do not affect the substantial rights of any party." NAC 679B.245.

C. Division Arguments

On February 1, 2018, a notice of denial, hereafter known as a Letter of Determination ("Determination Letter") from the Division was sent to HWAN, as required under the Emmermann Order, listing four reasons to deny HWAN's January 11, 2018 Renewal Application. HWAN Exhibit Z, Division Exhibit 6:

1. Violation of an Order – specifically, the Emmermann Order which called for the payment of fines for various insurance Code violations by HWAN in Nevada.
2. Incomplete Application based on missing financial security statutory requirement.
3. Concerns Regarding Administrator, Choice Home Warranty, ("CHW").
4. Unsuitability of Applicant, HWAN.

The Determination Letter which listed the four reasons for denial was also included in the Division's Request for a Hearing sent to HWAN via Certified Mail on March 12, 2018. These reasons correspond to the statutorily required reasons for an action under NRS 690C.325

> **NRS 690C.325 Administrative fines; suspension, limitation, revocation or refusal to renew certificate of registration.**
> 1. The Commissioner may refuse to renew or may suspend, limit or revoke a provider's certificate of registration if the Commissioner finds after a hearing thereon, or upon waiver of hearing by the provider, that the provider has:
> (a) Violated or failed to comply with any lawful order of the Commissioner;
> (b) Conducted business in an unsuitable manner;
> (c) Willfully violated or willfully failed to comply with any lawful regulation of the Commissioner; or
> (d) Violated any provision of this chapter.
> . . . .

The statutory reasons from NRS 690C.325 for refusal to renew were the basis of the Division's arguments at the Hearing and correspond to the points below.

a. Violation of a lawful Order of the Commissioner, specifically a violation of the Emmermann Order

The first reason in the Division's argument that HWAN's renewal of its certificate of registration as a Service Contract Provider be denied was listed in the Determination Letter as HWAN was in violation of the Emmermann Order, namely that HWAN failed to pay the fines called for in that Order. Division Exhibit 6, HWAN Exhibit Z. The Emmermann Order imposed administrative fines on HWAN totaling $1,224,950 for various violations of the Insurance Code. The fines were due no later than 30 days from the date of the Emmermann Order which would make them due January 17, 2018. Division Exhibit 6, pg. 2. No such payment was received by the Division. Hr'g Tr., Day 1 at 119:4-23 (10/23).

HWAN argues that since HWAN submitted a Motion to Stay of Final Administrative Decision ("Motion") filed with the District Court on January 16, 2018 that this Motion halted any enforcement of the fines due under the Emmermann Order. HWAN Exhibit AA. However, the District Court denied that Motion for a Stay on February 14, 2018. HWAN Exhibit AA.

HWAN and the Division filed a Stipulation and Order for Interpleading of Fines Pending Final Decision ("Interpleading"), which was granted by the District Court on March 15, 2018. HWAN Exhibit CC. HWAN argues that this joint Interpleading should act as a stay to allow them not to pay the required fines under the Emmermann Order; however, the District Court already ruled on the Motion for a Stay when it denied it on February 14, 2018. HWAN Exhibit AA.

The Division argues that NRS 233B.135(2) controls the current action. NRS 233B.135(2) states that "[t]he final decision of the agency shall be deemed reasonable and lawful until reversed or set aside in whole or in part by the court. The burden of proof is on the party attacking or resisting the decision to show that the final decision is invalid pursuant to subsection 3."

HWAN argues that since the District Court **remanded** the Emmermann Order back to the Division on September 6, 2018, ("Remand Order") that the Emmermann Order was **set aside** by the District Court. (emphasis added). Attachment 1. HWAN also argues that the term

remand has the same definition as the term **set aside** such that the District Court's act to remand the Emmermann Order would affect whether the Emmermann Order should be considered as a lawful final decision of the agency under NRS 233B.135(2). However, according to the definition from Black's Law, to **remand** is "to send a case or claim back to the court or tribunal from which it came for some further action." Black's Law Dictionary (10th ed. 2014). Black's defines **set aside** as "to annul or vacate (a judgment, order, etc.)." *Id.*

Under NRS 233B.135(2), to reverse or set aside a final order of an agency is a final action by the court which would certainly affect the status of a final order of an agency decision that had been appealed to that court. A remand does not alter the terms or the final status of the agency's final decision. In this situation, the District Court did provide that the Hearing Officer in the Emmermann case must draft a new Order. The District Court noted that the new Order would be on a limited basis and focused on a determination of whether the three additional proposed Exhibits proffered by HWAN to the District Court for review would affect the agency's final decision. Attachment 1.

In its September 6, 2018 Order Granting Petitioner's Motion for Leave to Present Additional Evidence, the court did not annul, vacate, reverse or set aside the agency's final decision. Given that the District Court had an opportunity to, but chose not to, make any determination to annul, vacate, reverse or set aside the agency's final decision as required under NRS 233B.135(2) to override the Division's lawful order, the Emmermann Order is considered as a lawful final decision of the agency.

b. Division's Argument that by providing an Incomplete Application, HWAN willfully violated or willfully failed to comply with any lawful regulation of the Commissioner

The Division's second reason for a denial of HWAN's renewal of its certificate of registration noted in the Determination Letter was that HWAN did not provide a complete application within a timely manner as required by the Emmermann Order. The annual statutory requirement to provide an update for a financial security deposit for Service Contract Providers was not met by HWAN within the 30-day due date provided in the Emmermann Order. Division Exhibit 6, HWAN Exhibit Z.

The annual financial security deposit for Service Contract Providers is calculated using unearned gross considerations as required under NRS 690C.170(1)(b) which states a Service Contract Provider must "[m]aintain a reserve account in this State and deposit with the Commissioner security as provided in this subsection. The reserve account must contain at all times an amount of money equal to at least 40 percent of the unearned gross consideration received by the provider for any unexpired service contracts. ... The provider shall also deposit with the Commissioner security in an amount that is equal to $25,000 or 10 percent of the unearned gross consideration received by the provider for any unexpired service contracts, whichever is greater."

There was also significant debate by HWAN at the Hearing regarding whether the January 11, 2018 Renewal Application was complete or not as of the January 11, 2018 date. HWAN argued that the Renewal Application should have been considered complete at the January 11, 2018 date, and it further supports this in its March 27, 2018 letter from Victor Mandalawi, President of HWAN, to Division representative, Mary Strong. HWAN Exhibit DD, pg. 1.

HWAN argues that the Division failed to show that HWAN's Renewal Application was incomplete. The Division argued that HWAN was on notice pursuant to NRS 690C.170(1)(b) that its reserve account and deposit with the Division must comply with required security deposit requirements. HWAN did submit a security deposit for the January 11, 2018 Renewal Application on January 16, 2018, in the amount of $345,811, but this amount was based on data from the quarter ending June 30, 2017.

The Division argues that, since HWAN did not submit data documenting its unearned gross considerations for the most recent quarter which would have been December 31, 2017 for a Renewal Application dated January 11, 2018, the Division was unable to determine if HWAN was in compliance with NRS 690C.170(1)(b). The Division argues that HWAN submitted unearned gross considerations for the quarter ending June 30, 2017, and given that this Renewal Application was dated January 11, 2018, HWAN should have known that it needed to submit the required application data from December 31, 2017.

While the Division may be technically correct about the appropriate time period for the data, HWAN was not provided notice that the unearned gross considerations data it provided in its Renewal Application was for an improper quarterly time period until it received the February 1, 2018 Determination Letter. Under NRS 690C.160(3), the Division is not required to allow Service Contract Provider applicants extra time to correct any defects in their initial or renewal Service Contract Provider certificate of registration applications. NRS 690C.160(3) states that "[a] certificate of registration is valid for 1 year after the date the Commissioner issues the certificate to the provider. A provider may renew his or her certificate of registration if, before the certificate expires, the provider submits to the Commissioner ..." As such, if a Service Contract Provider does not submit a complete application under the requirements of NRSC.160(3), then the certificate expires as a matter of law.

However, the Division did provide a January 19, 2018 letter of instruction drafted by Mary Strong to HWAN ("Strong letter"). The Strong letter asked for three additional items from HWAN which could easily have been interpreted to be the only three items that HWAN would have to submit to the Division to fulfill the requirement to have a complete renewal application on file at the Division. Division Exhibit 4, pg. 2. However, the Strong letter did not ask HWAN to provide any information on its unearned gross considerations for the most recent quarter. Division Exhibit 4, pg. 2.

Given that the Division attempted to help correct the incompleteness of HWAN's Renewal Application, it hardly appears reasonable that the Division could hold missing data from that Renewal Application against HWAN when the Division did not ask for it in their attempt to help.

On March 27, 2018, the Division did receive the required data from HWAN for determining the unearned gross considerations as of December 31, 2017, which would be the most recent quarter before its January 11, 2018 renewal application. The data accompanied a payment for a new security deposit based on this new data, in the amount of $393,465. This brought the total amount of the statutory security deposit to $629,230 as would have been required under the January 11, 2018 Renewal Application. HWAN Exhibit DD, pg. 2.

Thus, as of March 27, 2018, HWAN had corrected the defect for the incompleteness of its January 11, 2018 Renewal Application. Despite the January 19, 2018 Strong letter to HWAN noting that the Renewal Application was incomplete, the testimony at the Hearing as well as the Division's own policies and procedures for processing Renewal Applications did not sufficiently support the Division's argument that HWAN was provided adequate notice to provide a completed Renewal Application as required under the Emmermann Order. Division Exhibit 4, HWAN Exhibit Y, HWAN Exhibit Z, pg. 3.

c. Division Argument that HWAN conducted business in an Unsuitable Manner, specifically regarding HWAN's use of CHW

The Division's third reason for the denial of HWAN's renewal of its certificate of registration noted in the Determination Letter states that HWAN did not properly obtain a certificate of registration for its administrator Choice Home Warranty ("CHW"). NRS 690C.150 states that "[a] provider shall not issue, sell or offer for sale service contracts in this state unless the provider has been issued a certificate of registration pursuant to the provisions of this chapter."

HWAN has been on notice of the requirement to have CHW obtain a certificate of registration as of December 18, 2017, under the Emmermann Order. Division Exhibit 2, pg. 24, lines 21-28 and pg. 25, lines 1-19. The Emmermann Order stated that, "Nevada law clearly prohibits the issuance, sale, or offering for sale service contracts unless the provider has been issued a certificate of registration. NRS 690C.150." Division Exhibit 2, pg. 24, lines 24-25.

On January 19, 2018, the Division sent the Strong letter to HWAN giving HWAN a status of its Renewal Application as a Service Contract Provider in Nevada. HWAN Exhibit W, Division Exhibit 4.

On January 26, 2018, HWAN responded to the January 19, 2018, Strong letter and noted as part of its response that the duties of CHW to HWAN were all set forth in the Independent Service Provider Agreement ("ISP") attached to the January 26, 2018 letter. HWAN Exhibit Y, pg. 3, Division Exhibit 5, pg. 3. HWAN also supplied an excel spreadsheet as an attachment to the January 26, 2018 letter which provided a list of contracts sold by CHW in Nevada from

December 18, 2017, through January 19, 2018. HWAN Exhibit Y, pgs. 11-26. The attachment to the January 26, 2018 letter was a document titled *Independent Service Provider Agreement* ("ISP") which laid out the relationship of HWAN to CHW. HWAN Exhibit Y, pg. 3-10.

It is unclear why the ISP is titled as an "Independent Service Provider Agreement" when HWAN argued that CHW is not a Service Contract Provider. HWAN Exhibit Y, pg. 3, Division Exhibit 5, pg. 3. It is also unclear why HWAN would use this document to argue CHW is only administering service contracts when Section B of the ISP, under the Duties of the Parties, states that CHW is responsible for selling and negotiating service contracts to clients. HWAN Exhibit Y, pg. 3, Division Exhibit 5, pg. 3.

HWAN argues that under the internal Division checklist for reviewing Service Contract applications and renewals, the checklist indicates that "[t]hird party administrators are not required to be registered for service contracts." HWAN Exhibit B. HWAN further argues that since CHW is an administrator, it does not have to have a certificate of registration as a Service Contract Provider.

NRS 690C.020 under the Service Contract chapter of the Insurance Code defines an administrator as a person who is responsible for administering a service contract that is issued, sold, or offered for sale by a provider. This definition does not allow for the sale or negotiations of service contracts by an administrator.

Even if HWAN's argument that the notation on the Division's internal checklist stating that third-party administrators do not have to get a Service Contract Provider certificate of registration, it should be noted that third-party administrators are required to hold a certificate of registration under a different section of the Insurance Code, NRS 683A.085. NRS 683A.085 requires that "[n]o person may act as, offer to act as or hold himself or herself out to the public as an administrator, unless the person has obtained a certificate of registration as an administrator from the Commissioner pursuant to NRS 683A.08524." The Division's internal checklist specifically indicated that third-party administrators do not have to get a Service Contract Provider certificate of registration.

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HWAN sent a letter to the Division which was received on March 28, 2018. In that letter from HWAN's President Victor Mandalawi ("Mandalawi letter"), he stated that "CHW Group Inc. will no longer function as HWAN's Nevada Administrator effective April 30, 2018. HWAN Exhibit V, pg. 2, Division Exhibit 7, pg. 2. However, testimony was provided by two members of the Division staff, Jain and Ghan, that supported the fact that CHW continues to solicit and sell service contracts in Nevada through at least October 2, 2018. Hr'g Tr., Day 1 at 241:21-242: 5 (10/23) and Hr'g Tr., Day 2 at 34:14-36:2 and 38:7-11 (10/24). The Division was also able to provide a copy of an email advertisement that had been sent to Ghan from CHW offering a discount on the purchase of a service contract from them. Division Exhibit 9.

HWAN argues that CHW is allowed to sell service contracts as an *agent* of HWAN without being registered as a Service Contract Provider in Nevada. However, this is contrary to the statutes, specifically NRS 690C.150 which prohibits the issuance, sale, or offering for sale service contracts unless the provider has been issued a certificate of registration.

In its closing argument HWAN attempted to argue that, since the Division contends that only "providers" are allowed to sell service contracts, somehow this means that the Division believes that a provider's employees could not sell service contracts. This makes no sense as that the term "person" in the Insurance Code is given the same definition as "person" within the general application of the law.

A line of Supreme Court rulings dating back over 200 years has blurred the distinction between flesh and blood human beings and the businesses they own. The most recent Supreme Court cases embracing this blurred definition are *Citizen's United v. Federal Elections Committee*, 558 U.S. 310 (2010) and *Burwell v. Hobby Lobby,* 134 S. Ct. 2751, 2785 (2014). Unless the plain language of the statute says "natural person" then "person" must be given the meaning determined by years of legal precedent. In *Citizens,* the Court recognized that First Amendment protection of free speech extends to corporations when they determined that bans on corporations and unions are disallowed when those organization make independent expenditures and financing electioneering communications. In *Burwell*, as part of their opinion, the Court opined that closely held corporations could hold religious beliefs that could be

protected under the Relgious Freedom Resoration Act of 1999. ("RFRA") The Court determined that the RFRA permits for-profit corporations are closely held to refuse, on religious grounds, to pay for legally mandated overage of certain contraceptive drugs and devices in their employees' health insurance plans. In so ruling, the Court embraced the view that closely held for-profit corporations are legal "persons" under the RFRA and are therefore capable of exercising religious choices. These cases reinforce the general supposition in law that corporations are considered "persons".

HWAN also argues that since the Division has not, as of yet, non-renewed another registered Service Contract Provider for using a non-registered agents, then the Division is estopped from doing so in this case. This argument falls short as HWAN was unable to provide sufficient evidence that other Service Contract Providers were using non-registered agents in the same manner as HWAN. As each case heard by the Division must be determined on a case by case basis using the facts in front of the agency, HWAN's argument falls short as it provided no substantial evidence. HWAN only provided inferences and unsupported insinuations, but no evidence was provided in this hearing to support HWAN's argument of disparate treatment. HWAN's argument also falls short as it ignores that HWAN has been on notice from the Division since December 18, 2017, through the Emmermann Order that CHW had to be registered.

Based on the evidence presented, HWAN is still in violation of NRS 690C.150 by continuing to allow CHW as its administrator to sell service contracts without a certificate of registration.

d. Division Argument that HWAN is an Unsuitable Renewal Applicant because HWAN has willfully violated or willfully failed to comply with any lawful regulation of the Commissioner

The fourth reason for the Division's argument to deny HWAN's renewal of its certificate of registration as stated in the Determination Letter is that HWAN violated numerous provisions of the Insurance Code, including making false entries of material fact on its renewal applications from 2011 to 2015 in violation of NRS 686A.070; using a service contract form that was not approved by the Division in violation of NRS 686A.070; not producing

information requested by the Division regarding the number of claims incurred and opened contracts held in Nevada in violation of NRS 690C.320(2); and allowing an unregistered entity to issue, sell, or offer for sale service contracts in Nevada in violation of NRS 690C.150. Each of these last four set of statutory violations were originally violations addressed in the Emmermann Order. Division Exhibit 2.

HWAN argues that, since the Emmermann Order addressed each of these violations and determined that fines should be administered rather than revocation or non-renewal of HWAN's certificate of registration, these violations cannot now be used to impose additional punishment for the same acts.

The Division did not provide any additional evidence or testimony that supported that HWAN *continued* to make false entries of material fact on its renewal applications from 2011 to 2015 in violation of NRS 686A.070, or that HWAN *continued* using a service contract form that was not approved by the Division in violation of NRS 686A.070, or that HWAN *continued* to not produce information requested by the Division regarding the number of claims incurred and opened contracts held in Nevada in violation of NRS 690C.320(2) subsequent to the Emmermann Order. Given that there was no evidence provided to support that HWAN had continued to violate these statutes after the Emmermann Order, and that these violations had been addressed in that previous administrative action covered by the Emmermann Order, the Division cannot argue that these violations can be used to support a finding in the current administrative hearing. Unless HWAN had continued to violate the same statutes, the Division cannot use these same violations against HWAN unless the Division provided evidence to support that these statutory violations had continued beyond the administrative action in which they were addressed.

However, the Division was able to provide substantial evidence that HWAN was still violating NRS 690C.150. Hr'g Tr., Day 1 at 241:21-242: 5 (10/23) and Hr'g Tr., Day 2 at 34:14-36:2 and 38:7-11 (10/24). HWAN provided insufficient evidence to refute the Division's contention. Hr'g Tr., Day 1 at 241:21-242: 5 (10/23) and Hr'g Tr., Day 2 at 34:14-36:2 and 38:7-11 (10/24).

The Commissioner is obligated under the Insurance Code to protect Nevadans from entities within her jurisdiction when those entities are causing harm to the Nevada consumers. Nevada consumers are harmed when an entity conducts business in an unsuitable manner. The NAC defines unsuitable manner in NAC 679B.385 as conducting business in a manner which:

1. Results in a violation of any statute or regulation of this State relating to insurance;
2. Results in an intentional violation of any other statute or regulation of this State; or
3. Causes injury to the general public, with such frequency as to indicate a general business practice.

NAC 679B.0385 applies to Service Contract Providers, as well as the general insurance business, as NRS 690C.120 under the Service Contract Provider chapter lays out the applicability of other Insurance Code provisions regarding the marketing, issuance, sale, offering for sale, making, proposing to make and administration of service contracts. These applicable Insurance Code provisions are:

(a) NRS 679B.020 to 679B.152, inclusive;
(b) NRS 679B.159 to 679B.300, inclusive;
(c) NRS 679B.310 to 679B.370, inclusive;
(d) NRS 679B.600 to 679B.690, inclusive;
(e) NRS 685B.090 to 685B.190, inclusive; ...

Given that NAC 679B.0385 is applicable under NRS 679B.125, which is made applicable to Service Contract Providers by NRS 690C.120, conducting business in an unsuitable manner as a Service Contract Provider is a violation of NRS 679B.125 and NRS 690C.150.

HWAN's continued violations of NRS 690C.150 post the Emmermann Order by using an unregistered entity to issue, sell, or offer for sale service contracts in Nevada is conducting business in an unsuitable manner as it is misleading to the Nevada consumers; and HWAN has been on notice of this violation since December 18, 2017.

There was insufficient evidence provided that HWAN had continued to violate NRS 686A.070 and NRS 690C.320(2) as stated in the Determination Letter, but there was substantial evidence provided that HWAN continued to violate NRS 690C.150, and thus, the weight of the Division's argument for this fourth reason to deny HWAN's application to renew its certificate

of registration as a Service Contract Provider is held to establish only that HWAN continued to violate NRS 690C.150.

D. HWAN Arguments

HWAN laid out four arguments to support its request to have its Service Contract Renewal Application for a certificate of registration approved. In its first argument, HWAN claims that the Division's Request for a Hearing should be considered a request for an illegal proceeding. HWAN's second argument is that since the Determination Letter was not sent via certified mail, it must be treated as an unlawful denial under the statutes. HWAN's third argument is that it cannot be held in violation of the Emmermann Order because of its Motion to the District Court to stay the fines determined by the Emmermann Order creates a presumption that HWAN has complied with the Emmermann Order on the specific requirement to pay fines to the Division as per that Order. The final argument HWAN presents in support of its request to have its Service Contract Renewal Application for a certificate of registration approved is a procedural dispute in that HWAN argues that the Division did not comply within its time requirements to make a determination on HWAN's renewal application as required in the Emmermann Order. Each of HWAN's arguments is discussed below.

a. Illegal proceeding

HWAN maintains that the Division's Request for a Hearing, filed on March 12, 2018, states that a hearing is being sought pursuant to NRS 679B.310 and NRS 690C.325(1). HWAN argues that the hearing itself as an illegal, extra-statutory proceeding as it contends that there is no such proceeding to "effectuate a denial" of a renewal application for a Service Contract Provider certificate under NRS 679B.310(2)(b) which provides that, "the Commissioner shall hold a hearing ...[u]pon written application for a hearing by a person aggrieved by any act, threatened act, or failure of the Commissioner to act...."

HWAN argues that since the Division cannot be aggrieved by the actions, or failure to act of the Commissioner or its employees, the Division cannot request a hearing if the purpose of the hearing is to deny a renewal application of a Service Contract Provider certificate of registration. However, this argument fails, as HWAN is relying on the incorrect statutory

reference. The Division relies on NRS 690C.325, which specifically lays out a hearing requirement under the Service Contract Provider Chapter of the Insurance Code. HWAN's statutory reference is a general requirement under the Insurance Code, which, if not specifically contradicted in the Service Contract Provider Chapter within the Insurance Code, would prevail. In this situation, the Service Contract Provider Chapter within the Insurance Code specifically calls for a hearing under NRS 690C.325 if the Division is seeking to non-renew a Service Contract Provider certificate of registration.

The Division cannot refuse to renew a certificate of registration unless it holds a hearing as required under NRS 690C.325 which provides the statutory right and requirement for this hearing to be held in this case:

> **NRS 690C.325 Administrative fines; suspension, limitation, revocation or refusal to renew certificate of registration.**
> 1. The Commissioner may refuse to renew or may suspend, limit or revoke a provider's certificate of registration if the Commissioner finds after a hearing thereon, or upon waiver of hearing by the provider, that the provider has:
> (a) Violated or failed to comply with any lawful order of the Commissioner;
> (b) Conducted business in an unsuitable manner;
> (c) Willfully violated or willfully failed to comply with any lawful regulation of the Commissioner; or
> (d) Violated any provision of this chapter.
> ➥ In lieu of such a suspension or revocation, the Commissioner may levy upon the provider, and the provider shall pay forthwith, an administrative fine of not more than $1,000 for each act or violation.
> 2. The Commissioner shall suspend or revoke a provider's certificate of registration on any of the following grounds if the Commissioner finds after a hearing thereon that the provider:
> (a) Is in unsound condition, is being fraudulently conducted, or is in such a condition or is using such methods and practices in the conduct of its business as to render its further transaction of service contracts in this State currently or prospectively injurious to service contract holders or to the public.
> (b) Refuses to be examined, or its directors, officers, employees or representatives refuse to submit to examination relative to its affairs, or to produce its books, papers, records, contracts, correspondence or other documents for examination by the Commissioner when required, or refuse to perform any legal obligation relative to the examination.
> (c) Has failed to pay any final judgment rendered against it in this State upon any policy, bond, recognizance or undertaking as issued or guaranteed by it, within 30 days after the judgment became final or within 30 days after dismissal of an appeal before final determination, whichever date is the later.
> 3. The Commissioner may, without advance notice or a hearing thereon, immediately suspend the certificate of registration of any provider that has filed for bankruptcy or otherwise been deemed insolvent.

It makes no sense that the Division could not hold a hearing to refuse to renew, suspend,

limit or revoke a provider's certificate of registration because it is not an aggrieved party under NRS 679B.310(2)(b), when NRS 690C.325 statutorily requires the Division to hold a due process hearing.

HWAN argues that the February 1, 2018 Determination Letter must be considered a final act of the Division and that the Determination Letter constitutes a denial under the statutes which would not be allowed unless there was a hearing first as required by NRS 690C.325. However, it was apparent from the evidence provided that HWAN did not consider the Determination Letter a final determination of its ability to continue selling service contracts in Nevada. According to a October 21, 2018 letter from HWAN President Victor Mandalawi to the Division, HWAN stated that it did not stop using CHW Group, Inc. d/b/a/ Choice Home Warranty as administrator. Division Exhibit 5 and Division Exhibit 16.

Given that HWAN has continued and continues to sell service contracts in Nevada, it cannot argue that it has been harmed by the Determination Letter; nor has HWAN been denied its right to due process under the statutes, as there was no evidence that the Division has taken any action to stop the sales of service contracts by HWAN based on the February 1, 2018 Determination Letter except to initiate a hearing under the requirements of NRS 690C.325.

In its argument, HWAN does not consider that both HWAN and the Division were under restrictive timelines for submitting the January 11, 2018 Renewal Application and for the Division to act upon it. According to the terms of the Emmermann Order, the Division had to commit to a determination on the Renewal Application by the 15th day after the receipt of the completed renewal application from HWAN. HWAN is very aware of these restrictive timelines from the Emmermann Order as, in its arguments, it questioned the Division's compliance to meet them.

Under the requirements in NRS 690C.325, the February 1, 2018 determination could not be effectuated until a hearing upon the determination was held and the renewal applicant was provided its due process right to argue its position. As such, HWAN's reliance on NRS 679B.310(2)(b) does not prevail over the Division's required use of the statutory requirement to provide a due process hearing to effectuate a determination of the Division under NRS

690C.325.

b. Unlawful Denial, specifically HWAN argues that the Determination was an unlawful denial of its certificate of registration

HWAN argues that the Division failed to send the Determination Letter via certified mail as required under NRS 233B.127 (3) and, therefore, it was an unlawful denial. NRS 233B.127 requires that an agency must give notice by certified mail of a pending agency proceeding to a [certificate holder] of facts or conduct which warrant the intended action and the [certificate holder] is given an opportunity to show compliance with all lawful requirements for the retention of its [certificate].

> **NRS 233B.127 Licenses: Applicability of provisions governing contested cases to grant, deny or renew; expiration notice and opportunity to show compliance required before adverse action by agency; summary suspension.**
> 1. The provisions of NRS 233B.121 to 233B.150, inclusive, do not apply to the grant, denial or renewal of a license unless notice and opportunity for hearing are required by law to be provided to the applicant before the grant, denial or renewal of the license.
> 2. When a licensee has made timely and sufficient application for the renewal of a license or for a new license with reference to any activity of a continuing nature, the existing license does not expire until the application has been finally determined by the agency and, in case the application is denied or the terms of the new license limited, until the last day for seeking review of the agency order or a later date fixed by order of the reviewing court.
> 3. No revocation, suspension, annulment or withdrawal of any license is lawful unless, before the institution of agency proceedings, the agency gave notice by certified mail to the licensee of facts or conduct which warrant the intended action, and the licensee was given an opportunity to show compliance with all lawful requirements for the retention of the license. If the agency finds that public health, safety or welfare imperatively require emergency action, and incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other action. An agency's order of summary suspension may be issued by the agency or by the Chair of the governing body of the agency. If the order of summary suspension is issued by the Chair of the governing body of the agency, the Chair shall not participate in any further proceedings of the agency relating to that order. Proceedings relating to the order of summary suspension must be instituted and determined within 45 days after the date of the order unless the agency and the licensee mutually agree in writing to a longer period.

The requirements of NRS 233B.127 were met when the Division provided the Division's Request for a Hearing to HWAN via certified mail on March 12, 2018, and attached the February 1, 2018 Determination Letter so that HWAN would have notice of the facts or conduct which warranted the intended action of the Division which is to have the renewal

application denied pursuant to this hearing. Division Exhibit 17.

c. HWAN's Motion to the District Court to Stay the Payment of Fines under the Emmermann Order should stay the Division's ability to take action against HWAN for not paying the ordered fines

The March 12, 2018 Division's Request for a Hearing, which included the February 1, 2018 Determination Letter as an attachment, set out the Division's four reasons used to seek a denial of HWAN's Renewal Application. The first reason was that HWAN failed to pay the fines required under the Emmermann Order in a timely manner, therefore HWAN was in violation of NRS 690C.325(1)(a). Division Exhibit 6, pg. 2.

HWAN provided evidence at the Hearing that it had made a timely application for a stay of the fine in a Motion for Stay of Final Administrative Decision filed with the District Court on January 16, 2018. HWAN Exhibit V.pg. 5.

HWAN argues that since the Motion for the Stay was filed, this prevents the Division from relying on the NRS 233B.135(2) which states:

> **NRS 233B.135 Judicial review: Manner of conducting; burden of proof; standard for review.**
> 1. Judicial review of a final decision of an agency must be:
> (a) Conducted by the court without a jury; and
> (b) Confined to the record.
> ➥ In cases concerning alleged irregularities in procedure before an agency that are not shown in the record, the court may receive evidence concerning the irregularities.
> 2. The final decision of the agency shall be deemed reasonable and lawful until reversed or set aside in whole or in part by the court. The burden of proof is on the party attacking or resisting the decision to show that the final decision is invalid pursuant to subsection 3.

HWAN also maintains that its position relies on case law which states that "where an order of an administrative agency is appealed to a court, that agency may not act further on that matter until all questions raised by the appeal are finally resolved." *Westside Charter Serv., Inc. v. Gray Line Tours of S. Nev.*, 99 Nev. 456.459, 664 P.2d 351, 353 (1983).

The situation in the *Westside* case is unlike the situation in this case. The *Westside* decision was based on an agency taking action contravening to the decision of an earlier district court decision, which was on appeal. This created a conflict between the decision of the appellate court and the agency. *Id.* at 458-460. The court in *Westside* also noted that it would be

clear that a district court's stay of judgement while the case was under appeal would not allow the agency to deal with the subject matter encompassed in that stay of judgment. *Id.* at 460. However, this is not the situation in the current matter. HWAN did file a Motion for Stay of Final Administrative Decision filed with the District Court on January 16, 2018, but the court denied that Motion for Stay on February 14, 2018.

The *Westside* court based its understanding of a generally accepted principle of the interaction of agency final decisions and the treatment of them by parties during and appeals process on the Alaska Supreme Court decision in *Fischback & Moore of Alaska, Inc. v. Lynn,* 407 P.2d 174 (Alaska 1965). The *Fischback* court stated that:

> If a court has appellate jurisdiction over a decision of an administrative body, it would not be consistent with the full exercise of that jurisdiction to permit the administrative body also to exercise jurisdiction which would conflict with that exercised by the court. The court's jurisdiction over the subject matter of an appeal must be complete and not subject to being interfered with or frustrated by concurrent action by the administrative body.
>
> Operation of the rule is limited to situations where the exercise of administrative jurisdiction would conflict with the proper exercise of the court's jurisdiction. If there would be no conflict, then there would be no obstacle to the administrative agency exercising a continuing jurisdiction that may be conferred upon it by law.

Id. at 176. See also, *Westside* at 459.

HWAN also argues that *Baker v. Labor Comm'n* 351 P. 3d 111, 113 (Utah Ct. App,. 2015), as it cited *Westside,* supports its premise noting that, upon petition for judicial review, an agency lacks jurisdiction to alter or modify final agency decisions during such review. The actual language from the *Baker* case is that, "the Commission did not have the jurisdiction to alter its *final orders* once Sunrise instituted proceedings to review the Commission's orders in the district court." (Emphasis added). *Id.* at 113.

Enforcement of a violation of the Emmermann Order does not alter or modify the agency's final Order, and it does not conflict or create an obstacle or interfere with the jurisdiction of the District Court proceeding addressing the December 22, 2017 Petition for Judicial Review of the Emmermann Order by HWAN. As such, the Division's reliance on NRS 233B.135(2) is appropriate and under NRS 233B.135(2) "[t]he final decision of the agency shall be deemed reasonable and lawful until reversed or set aside in whole or in part by the court."

d. HWAN's Argument that the Division did not meet the time requirements under the Emmermann Order to make a determination on HWAN's Renewal Application thus the Division is estopped from bringing a hearing to deny that renewal.

HWAN argues that the Renewal Application was received by the Division on January 10, 2018, and therefore, the Division did not make its 15 business day after receipt deadline requirement under the Emmermann Order. HWAN maintains that the 15th business day trigger would have been January 31, 2018. HWAN contends that since the Division missed the required deadline, the Division should approve HWAN's Renewal Application.

Assuming the January 10, 2018 date of receipt by the Division of the Renewal Application is true, HWAN failed to account for Martin Luther King Day on January 15, 2018 which does not count as a business day. HWAN also failed to account for the actual wording of the Emmermann Order, which states that the Division must issue a decision within 15 business days *after* receipt of the Renewal Application. (Emphasis Added). The 15th business day after the January 10, 2018 receipt of the Renewal Application was February 1, 2018. As such, this procedural argument has no merit.

CONCLUSION

1. The February 1, 2018 Determination Letter from the Division to HWAN is based on four specific concerns that the Division has regarding the renewal applicant HWAN:

a. Violation of an Order – specifically the Emmermann Order which called for the payment of fines for various insurance Code violations by HWAN in Nevada.
b. Incomplete Application based on missing financial security statutory requirement.
c. Concerns Regarding Administrator, Choice Home Warranty, ("CHW")
d. Unsuitability of Applicant, HWAN.

Each of these concerns was addressed through evidence and testimony by the Division in the Hearing. These specific concerns all tie back to specific violations of the statutes under the Insurance Code.

2. The preponderance of evidence shows HWAN continues to be in violation of a lawful Order of the Commissioner for not paying the required fines in the Emmermann Order under 1(a), above. The Emmermann Order is considered as a lawful final decision of the agency

under NRS 233B.135(2), and a violation of an Order is one of the reasons provided in NRS 690C.325 to non-renew a Service Contract Provider certificate of registration, specifically NRS 690C.325(1)(a).

3. The Division did not meet its burden to show that HWAN should be denied its renewal certificate of registration based on an incomplete application, therefore not supporting denial reason 1(b), above.

4. Based on the preponderance of the evidence presented, HWAN is still in violation of NRS 690C.150, therefore supporting denial reason 1(c) above, which is a criteria necessary to take an action not to renew a certificate of registration under NRS 690C.325(1)(a)and (b). HWAN is still in violation of NRS 690C.150 by continuing to allow CHW as HWAN's administrator to sell service contracts without a certificate of registration even after December 18, 2017, when HWAN was provided notice via the Emmermann Order that CHW must apply for its own certificate of registration as a Service Contract Provider if it sells service contracts to Nevada citizens.

5. The preponderance of the evidence shows that HWAN continues to violate NRS 690C.150 by using an unregistered entity to issue, sell, or offer for sale service contracts in Nevada, which is considered to be conducting business in an unsuitable manner as it is misleading to the Nevada consumers, and HWAN has been on notice of the violation since December 18, 2017, therefore supporting denial reason 1(d) above, specifically a criteria necessary to take an action not to renew a certificate of registration under NRS 690C.325(1)(b).

6. Under the arguments presented to support a non-renewal of HWAN's certificate of registration under 1(d) above, the Division did not provide any additional or substantial evidence or testimony that supported its contention that HWAN *continued* to make false entries of material fact on its renewal applications from 2011 to 2015 in violation of NRS 686A.070; or that HWAN *continued* using a service contract form that was not approved by the Division in violation of NRS 686A.070; or that HWAN *continued* to not produce information requested by the Division regarding the number of claims incurred and opened contracts held in Nevada in violation of NRS 690C.320(2). As a result, these three additional reasons proposed by the

Division to support the unsuitability of the applicant HWAN as a criteria to take an action not to renew a certificate of registration under NRS 690C.325(1)(b) do not carry sufficient weight to do so.

7. While the Division's argument did not carry sufficient weight as to violations of NRS 686A.070 and NRS 690C.320(2) as provided in arguments to support 1(d), the Division's argument presented to support a non-renewal of HWAN's certificate of registration under 1(d) above showed by a preponderance of the evidence that HWAN is still continuing to violate NRS 690C.150 by using an unregistered entity to issue, sell, or offer for sale service contracts in Nevada. This violation does support the unsuitability of the applicant HWAN under NRS 690C.325, but it is being considered by this Hearing Officer as a duplication of the concerns regarding the Administrator, CHW, under the arguments presented for non-renewal of a certificate of registration under 1(c) above. As such, it does not receive any additional weight due to the violation falling into two categories under the Determination Letter.

ORDER OF THE HEARING OFFICER

Based on the testimony and exhibits contained in the record, all pleadings and documents filed in this matter, and pursuant to the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer makes the following order:

NOW, THEREFORE, IT IS HEREBY ORDERED that the February 1, 2018 Determination Letter from the Division to HWAN is EFFECTUATED in part and DENIED in part as follows:.

1. The February 1, 2018 Determination Letter from the Division to HWAN is DENIED in part as to the Division's use of HWAN's incomplete application as a reason for denial of the Renewal Application.

2. The February 1, 2018 Determination Letter from the Division to HWAN is DENIED in part as to the Division's use of HWAN's violations of NRS 686A.070 and NRS 690C.320(2) as stated in the Determination Letter under the category of Unsuitability of Applicant as a reason for denial of the Renewal Application as these violations were not shown to be on-going.

3. The February 1, 2018 Determination Letter from the Division to HWAN is UPHELD to effectuate denial of the January 11, 2018 renewal application, since HWAN continues to be in violation of a lawful Order of the Commissioner for not paying the required fines in the Emmermann Order.

4. The February 1, 2018 Determination Letter from the Division to HWAN is UPHELD to effectuate denial of the January 11, 2018 renewal application, since HWAN continues to be in violation of NRS 690C.150 even after receiving notice of this violation on December 18, 2017.

5. Given that each violation of NRS 690C.150 can stand on its own as a criteria to non-renew a Service Contract Provider certificate of registration under NRS 690C.325, HWAN's Renewal application, Certificate No. NV 113194 is DENIED.

IT IS SO ORDERED.

DATED this 2nd day of January, 2019.

BARBARA D. RICHARDSON
Hearing Officer/Commissioner of Insurance

ATTACHMENT 1

KIRK B. LENHARD, ESQ., Nevada Bar No. 1437
klenhard@bhfs.com
TRAVIS F. CHANCE, ESQ., Nevada Bar No. 13800
tchance@bhfs.com
MACKENZIE WARREN, ESQ., Nevada Bar No. 14642
mwarren@bhfs.com
BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
Telephone: 702.382.2101
Facsimile: 702.382.8135

LORI GRIFA, ESQ. (admitted *pro hac vice*)
lgrifa@archerlaw.com
ARCHER & GREINER P.C.
21 Main Street, Suite 353
Hackensack, NJ 97601
Telephone: 201.342.6000

Attorneys for Petitioner Home Warranty Administrator of Nevada, Inc. dba Choice Home Warranty

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR CARSON CITY

HOME WARRANTY ADMINISTRATOR OF NEVADA, INC. dba CHOICE HOME WARRANTY, a Nevada corporation, *Petitioner*, v. STATE OF NEVADA, DEPARTMENT OF BUSINESS AND INDUSTRY -DIVISION OF INSURANCE, a Nevada administrative agency, *Respondent.*	CASE NO.: 17 OC 00269 1B DEPT NO.: I **ORDER GRANTING PETITIONER'S MOTION FOR LEAVE TO PRESENT ADDITIONAL EVIDENCE**

This matter having come on for hearing on August 6, 2018 on Petitioner Home Warranty Administrator of Nevada, Inc. dba Choice Home Warranty's ("Petitioner") Motion for Leave to Present Additional Evidence pursuant to NRS 233B.131(2) (the "Motion"), which was filed herein on April 19, 2018,

The Respondent State of Nevada, Department of Business and Industry – Division of Insurance (the "Division") having filed an Opposition thereto on May 4, 2018 and Petitioner having filed a Reply in Support of the Motion on May 14, 2018,

The Court, having considered the papers on file herein and the arguments of counsel at the

hearing, and being fully advised in the premises, finds as follows:

Petitioner seeks to introduce new evidence to be considered by the Division, namely its Proposed Exhibits KK, LL, and MM (the "Evidence") in the proceeding below. The Court acknowledges that, pursuant to NRS 233B.131(2), Petitioner must demonstrate that the Evidence is material to the issues before the agency and that good reasons exist for Petitioner's failure to present the same in the proceeding below. The Court declines both Parties' offer to examine the disputed evidence *in camera*. Instead, the issue of materiality is best left to the Administrative Hearing officer to decide.

IT IS HEREBY ORDERED that Petitioner's Motion is GRANTED on the limited basis that this matter be REMANDED to the Division of Insurance. The hearing officer is to consider Petitioner's Proposed Exhibits KK, LL, and MM. The hearing officer will receive the Evidence and determine whether the Evidence is material, and if so, whether it would have had any impact on the final decision. If so, the hearing officer will issue a new decision with new findings where applicable. If not, the hearing officer will issue a new decision indicating the Evidence would have had no impact on the original findings.

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BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

Upon issuance of the new decision, the Division shall file an amendment to the Administrative Record on file herein to include a copy of the new decision.

DATED this 6th day of September 2018.

DISTRICT COURT JUDGE

Submitted by:

BROWNSTEIN HYATT FARBER SCHRECK, LLP

By:
KIRK B. LENHARD, ESQ., Bar No. 1437
TRAVIS F. CHANCE, ESQ., Bar No. 13800
MACKENZIE WARREN, ESQ., Bar No. 14642

LORI GRIFA, ESQ., (admitted *pro hac vice*)
ARCHER & GREINER P.C.

Attorneys for Petitioner Home Warranty Administrator of Nevada, Inc. dba Choice Home Warranty

Approved as to form and content by:

ADAM PAUL LAXALT, NEVADA ATTORNEY GENERAL

JOANNA GRIGORIEV, ESQ., Bar No. 5649
RICHARD P. YIEN, ESQ., Bar No. 13035

Attorneys for Respondent

BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

CERTIFICATE OF MAILING

The undersigned, an employee of the First Judicial District Court, hereby certifies that on the 6th day of September, 2018, I served the foregoing Order by placing a copy in the United States Mail, postage prepaid, addressed as follows:

Kirk B. Lenhard, Esq.
Travis F. Chance, Esq.
Mackenzie Warren, Esq.
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614

Lori Grifia, Esq.
21 Main Street, Suite 353
Hackensack, NJ 97601

Richard Paili Yien
Deputy Attorney General
100 N. Carson Street
Carson City, NV 89701

Angela Jeffries
Judicial Assistant, Dept. 1

Exhibit KK

Exhibit KK

Dolores Bennett

From: Dolores Bennett
Sent: Monday, November 07, 2011 9:21 AM
To: David Hall
Cc: Ted Bader; Mada Holl
Subject: Update: CHW Group, Inc. dba Choice Home Warranty

Importance: High

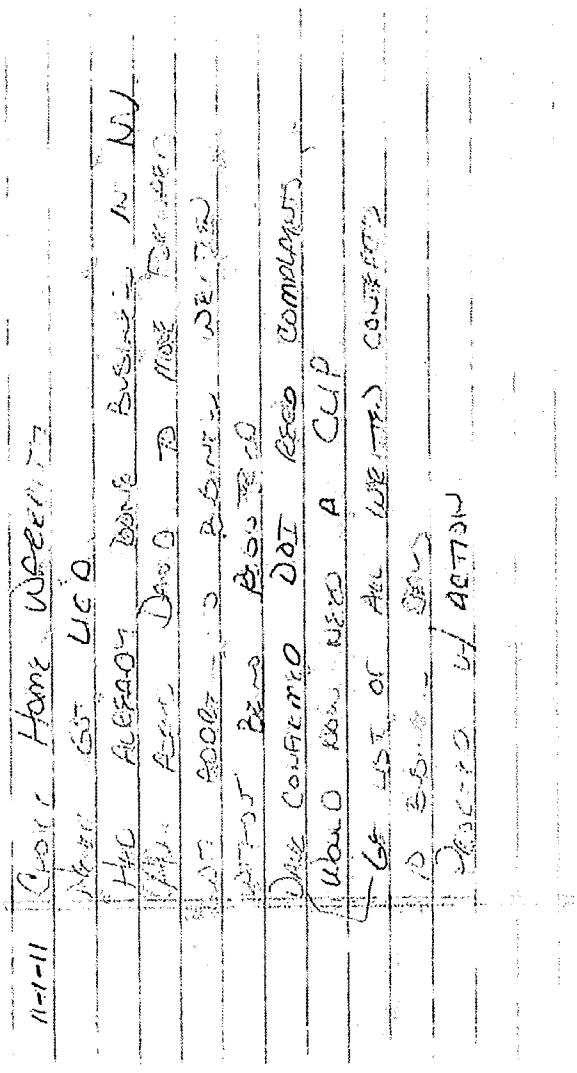
David:
It was just recapping my notes from our meeting last week about CHW Group, Inc. dba Choice Home Warranty and realized that Victor Mandalawi, who was listed as President of CHW Group, Inc., obtained a Certificate of Registration as a service contract provider a year ago with our office on 11/18/10 under a different corporation: Home Warranty Administrator of Nevada, Inc. (Org. ID # 113194).

Note: Home Warranty Administrator of Nevada, Inc. was formed in Nevada on 7/23/10, but the Nevada Secretary of State revoked their corporation on 8/1/11, since they only filed their Articles of Incorporation, and then missed two filings (8/31/10 List of Officers and 7/31/11 Annual List). I just received their service contract provider renewal application for their 11/18/11 renewal with us, so I will have to contact Mr. Mandalawi about their corporate status, since I cannot renew a license for a corporation that does not exist. FYI: They indicated on our renewal that they have had no sales since we licensed them.

Dolores Bennett, ARC, ARM, AIS, AINS
Insurance Examiner
Property & Casualty Section
Nevada Division of Insurance
1818 E. College Parkway, Suite 103
Carson City, NV 89706
direct: (775) 687-0783
main: (775) 687-0700
fax: (775) 687-0787
dbennett@doi.state.nv.us

Visit us online at the Service Contracts Section for service contract provider requirements, filing information, and more.

DIVISION-SDT000399



Dolores Bennett

From:	Dolores Bennett
Sent:	Wednesday, July 27, 2011 2:36 PM
To:	Harland Amborn; David Hall
Cc:	Ted Bader; Gennady Stolyarov
Subject:	RE: Choice Home Warranty

Mr. Hall:

Choice Home Warranty is not registered as a service contract provider in Nevada.

Home Warranty Administrator Of Nevada, Inc. (Org. ID # 113194) is registered as a service contract provider in Nevada, and only has one service contract approved for sale in Nevada at this time: Home Service Agreement # HWAADMIN-8/2/10 (Approved: 11/22/10). That contract is under the "Home Warranty Administrators" name and makes no mention of Choice Home Warranty. However, Home Warranty Administrator of Nevada, Inc. has a pending form filing (Filing # 26290) in SERFF for a new contract called "Choice Home Warranty" (Home Service Agreement # HWA-NV-0711) listing Home Warranty Administrator Of Nevada, Inc. as the Obligor, and listing Choice Home Warranty as the Administrator.

The cover letter contains both Choice Home Warranty and Home Warranty Administrators logos and reads,

- Welcome to Choice Home Warranty! You made a wise decision when you chose to protect your home with a home warranty. We appreciate your business and look forward to providing you with quality service for all your home protection needs. To obtain the most value from your new home warranty, please take a moment to read and understand your coverage. Your coverage is dependant on the plan you have selected. Should you have a problem with any of your covered systems or appliances, please call us toll-free at (888)-531-5403. We are available 24 hours a day, 7 days a week, 365 days a year, or simply log on to our website located at www.ChoiceHomeWarranty.com and file your claim online.

However, the agreement reads,

- Throughout this Agreement the words "We", "Us" and "Our" refer to Home Warranty Administrator of Nevada, Inc. (HWA), 90 Washington Valley Road, Bedminster, NJ 07921, the Obligor of this Agreement and it is backed by the full faith and credit of HWA. This Agreement is administered by Choice Home Warranty (Administrator), 510 Thornall Street, Edison, NJ 08837.

That pending filing is still under review pending the company response to our objections to certain statements, wording and typographical errors in the contract. We will approve the contract after they correct those errors.

Dolores Bennett, ARC, ARM, AIS, AINS
Insurance Examiner
Property & Casualty Section
Nevada Division of Insurance
1818 E. College Parkway, Suite 103
Carson City, NV 89706
direct: (775) 687-0763
main: (775) 687-0700
fax: (775) 687-0787
dbennett@doi.state.nv.us

Visit us online at the Service Contracts Section for service contract provider requirements, filing information, and more.

From: Harland Amborn
Sent: Wednesday, July 27, 2011 1:39 PM
To: David Hall
Cc: Dolores Bennett
Subject: Choice Home Warranty

DIVISION-SDT000402

Enforcement Case ID: 11424

<< File: DOC.PDF >>

Here are two responses that we received from Choice Home Warranty on Consumer Complaints that were filed. I'm not sure that Home Warranty Administrator of Nevada, Inc Company ID << OLE Object: Picture (Metafile) >> << OLE Object: Picture (Metafile) >> 113194 can "back" a warranty from Choice Home Warranty.

Harland F. Amborn
Deputy Commissioner
Nevada Division of Insurance
2501 E. Sahara Ave., Ste. 302
Las Vegas, NV 89104
(702) 486-4378
(702) 486-4007 (fax)

DIVISION-SDT000403

EXHIBIT PAGE NO. 44

AA002266

Exhibit LL

Exhibit LL

admit all of it

Dolores Bennett

From: Lara Pellegrini
Sent: Thursday, July 22, 2010 3:58 PM
To: Dolores Bennett
Subject: RE: Choice Home Warranty

No doubt about that. I talked to the Insurance Division in Washington and it sounds like Choice is a big scam.

From: Dolores Bennett
Sent: Thursday, July 22, 2010 3:51 PM
To: Lara Pellegrini
Subject: RE: Choice Home Warranty

Thanks very much. I've been watching all the emails. So far the company's a lot of talk and no action!

Dolores Bennett, ARC, ARM, AIS
State of Nevada
Division of Insurance
788 Fairview Drive, Suite 300
Carson City, Nevada 89701
(775) 687-4270 x 250
dbennett@doi.state.nv.us

From: Lara Pellegrini
Sent: Thursday, July 22, 2010 3:50 PM
To: Dolores Bennett
Subject: RE: Choice Home Warranty

I am sure David is working on it. I just wanted you to be aware that they have been in violation of Nevada law, if they do apply to be registered.

From: Dolores Bennett
Sent: Thursday, July 22, 2010 3:16 PM
To: Lara Pellegrini
Subject: RE: Choice Home Warranty

Have you talked to David Hall? He seems to be handling it on your end. Who should be taking administrative action? Maybe Ben Gillard has been dealing with David Hall.

Dolores Bennett, ARC, ARM, AIS
State of Nevada
Division of Insurance
788 Fairview Drive, Suite 300
Carson City, Nevada 89701
(775) 687-4270 x 250
dbennett@doi.state.nv.us

From: Lara Pellegrini
Sent: Thursday, July 22, 2010 2:36 PM
To: Dolores Bennett
Subject: RE: Choice Home Warranty

I do not understand why we are even waiting for them to get registered before taking any administrative action. They have already violated Nevada law by selling service contracts to Nevada residents without being registered, and then when the residents have a claim, Choice Home Warranty tries to find any reason they can to deny the claim. Check out this link:

http://www.complaintsboard.com/bycompany/choice-home-warranty-a96136.html

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From: Dolores Bennett
Sent: Thursday, July 15, 2010 7:42 AM
To: Ben Gillard; Dave Erickson; Lara Pellegrini; Kristy Scott; Felecia Tuin
Cc: David Hall
Subject: RE: Choice Home Warranty

RE: CHW GROUP, INC., DBA CHOICE HOME WARRANTY
Ben:
David Hall in our Legal department has been working on that case, so please consult with him. David sent me emails in February mentioning this company and asking how companies get registered. Then on February 17, 2010 David Hall and I received the following message from Art Chartrand (artchartrand@me.com):

The attached is being Fed X'd today to your attention in original: The completed signed registration, the list of officers and copy of certificate of incorporation.
Choice is working earnestly on obtaining a bond and completing the affidavit on the reserves for Nevada business and hopes to have completed soon.
As I advised, the obtaining of a bond for smaller companies can be problematic. We will keep you advised.
We appreciate your willingness to work with Choice as it continues to serve the best interests of its Nevada customers.

I never received the Fed Ex or the application fees or proof of financial responsibility, so they are still not a registered service contract provider in Nevada. I believe it might have been directed to Mr. Hall. Please ask him. Let me know if you would like a copy of the application that he emailed along with the above message. It has their FEIN # 27-0256041 and states that they are incorporated in New Jersey. I don't believe we have received any registration fees for this company.

Dolores Bennett, ARC, ARM, AIS
State of Nevada
Division of Insurance
788 Fairview Drive, Suite 300
Carson City, Nevada 89701
(775) 687-4270 x 250
dbennett@doi.state.nv.us

From: Ben Gillard
Sent: Wednesday, July 14, 2010 4:34 PM
To: Dave Erickson; Lara Pellegrini; Kristy Scott; Dolores Bennett; Felecia Tuin
Subject: FW: Choice Home Warranty

Does anyone have anything on "Choice Home Warranty"?

From: Singer, Alan (OIC) [mailto:AlanS@OIC.WA.GOV]
Sent: Wednesday, July 14, 2010 3:46 PM
To: Ben Gillard
Subject: Choice Home Warranty

Hi Ben,

I learned that Elizabeth Saenz left the agency – sorry to hear that, I enjoyed working with her!

I am writing to ask your help. We received a Choice Home Warranty complaint and I wanted to ask if you would please check and see if your state has taken any action or issued any order or had any complaint about Choice Home Warranty. If there was only a complaint and no regulatory order or other action taken, I want to learn the disposition.

I appreciate your help.

Thanks,

Alan

Alan Michael Singer
Staff Attorney
Legal Affairs
Office of the Insurance Commissioner
PO Box 40255
Olympia, WA 98504-0255
360-725-7046
360-586-0152 Fax

Exhibit MM

Exhibit MM

NO – all

Dolores Bennett

From: Dolores Bennett
Sent: Monday, July 11, 2011 8:08 AM
To: Dolores Bennett
Subject: FW: Sensible Home Warranty, LLC (Org. ID # 113841)

For file.

Dolores Bennett, ARC, ARM, AIS, AINS
Insurance Examiner
Property & Casualty Section
Nevada Division of Insurance
1818 E. College Parkway, Suite 103
Carson City, NV 89706
direct: (775) 687-0785
main: (775) 687-0700
fax: (775) 687-0787
dbennett@doi.state.nv.us

Visit us online at the Service Contracts Section for service contract provider requirements, filing information, and more.

From: Ted Bader
Sent: Monday, July 11, 2011 8:06 AM
To: Dolores Bennett
Cc: David Hall; Ted Bader
Subject: RE: Sensible Home Warranty, LLC (Org. ID # 113841)

Thank you. David and I discussed this before he responded to you and I concur with his appraisal. Should you discover any further nexus between the two entities, please advise us.

Ted L. Bader, CFE, Senior Investigator
Enforcement Unit, Nevada Division of Insurance
1818 East College Parkway
Carson City, NV 89706
tbader@doi.state.nv.us
(775) 687-0711; FAX: (775) 687-0787

If you hold a cat by the tail you learn things you cannot learn any other way.
Mark Twain

From: Dolores Bennett
Sent: Monday, July 11, 2011 7:35 AM
To: Ted Bader
Cc: Dolores Bennett
Subject: FW: Sensible Home Warranty, LLC (Org. ID # 113841)

DIVISION-SDT000407

FYI

Please note our new address and phone number:

Dolores Bennett, ARC, ARM, AIS, AINS
Insurance Examiner
Property & Casualty Section
Nevada Division of Insurance
1818 E. College Parkway, Suite 103
Carson City, NV 89706
direct: (775) 687-0783
main: (775) 687-0700
fax: (775) 687-0787
dbennett@doi.state.nv.us

Visit us online at the Service Contracts Section for service contract provider requirements, filing information, and more.

From: David Hall
Sent: Friday, July 08, 2011 9:16 AM
To: Dolores Bennett
Subject: RE: Sensible Home Warranty, LLC (Org. ID # 113841)

We are in the process of filing a complaint against Choice Home Warranty. The connection with Sensible is difficult to prove, so we are going to hold off on following that up unless it becomes an issue.

David R. Hall
Insurance Counsel
Department of Business and Industry
Division of Insurance
1818 College Pkwy., Suite 103
Carson City, NV 89706
Phone: (775) 687-0706
Fax: (775) 687-0787
Email: dhall@doi.state.nv.us

From: Dolores Bennett
Sent: Friday, July 01, 2011 10:51 AM
To: Ted Bader
Cc: David Hall; Ben Gillard
Subject: Sensible Home Warranty, LLC (Org. ID # 113841)

Re: Sensible Home Warranty, LLC (Org. ID # 113841)
Ted:
Amy Parks wanted me to follow up with you or David Hall to make sure there's no problem with Sensible Home Warranty, LLC in relation to CHW Group Inc., dba Choice Home Warranty. You had a copy of records from New Jersey that established a relation between the two. Have you spoken to David Hall about this situation? Choice Home Warranty is not registered with us.

Please note our new address and phone number:

Dolores Bennett, ARC, AR. , AIS, AINS
Insurance Examiner
Property & Casualty Section
Nevada Division of Insurance
1818 E. College Parkway, Suite 103
Carson City, NV 89706
direct: (775) 687-0783
main: (775) 687-0700
fax: (775) 687-0787
dbennett@doi.state.nv.us

Visit us online at the Service Contracts Section for service contract provider requirements, filing information, and more.

DIVISION-SDT000409

EXHIBIT PAGE NO. 52

AA002274

CERTIFICATE OF SERVICE

I hereby certify that I have this date served the **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER OF THE COMMISSIONER,** in **CAUSE NO. 18.0095,** via electronic mail, and by mailing a true and correct copy thereof via Certified Mail, return receipt requested, properly addressed with postage prepaid, to the following:

Kirk B. Lenhard, Esq.
Brownstein Hyatt Farber Schreck, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106
E-MAIL: klenhard@bhfs.com
CERTIFIED MAIL NO. 7017 3380 0000 0598 4544

Travis F. Chance, Esq.
Brownstein Hyatt Farber Schreck, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106
E-MAIL: tchance@bhfs.com
CERTIFIED MAIL NO. 7017 3380 0000 0598 4551

Lori Grifa, Esq.
Archer & Greiner, P.C.
Court Plaza South, West Wing
21 Main Street, Suite 353
Hackensack, NJ 07601
E-MAIL: lgrifa@archerlaw.com
CERTIFIED MAIL NO. 7017 3380 0000 0598 4568

Attorneys for Respondent Home Warranty Administrator of Nevada, Inc. dba Choice Home Warranty

and a copy of the foregoing was sent via electronic mail and by Inter-departmental mail to the following:

Richard Yien, Deputy Attorney General
Nevada Attorney General's Office
E-MAIL: ryien@ag.nv.gov

Joanna Grigoriev, Senior Deputy Attorney General
Nevada Attorney General's Office
E-MAIL: jgrigoriev@ag.nv.gov

Attorneys for the Division of Insurance

DATED this 2nd day of January, 2019.

Employee of the State of Nevada
Department of Business and Industry
Division of Insurance

EXHIBIT 3

Division approved service contract submitted on July 11, 2019

EXHIBIT 3

Division approved service contract submitted on July 11, 2019

SERFF
25290
Gunnady

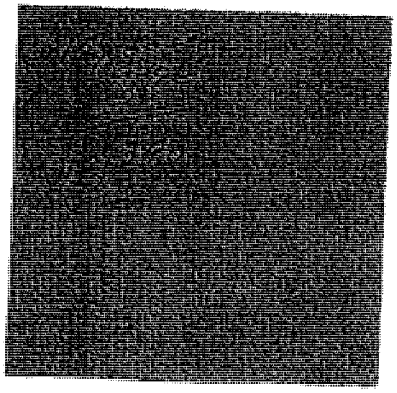
You are here: Filing Search (filingSearch.xhtml)
> Filing Search Results (filingSearchResults.xhtml) > Filing Summary

New Search | Refine Search | Return to Search Results
Health Plan Binder Search

Filing Summary

Filing Information

Product Name:
home service agreement
Type Of Insurance:
33.0 Other Lines of Business
Sub Type Of Insurance:
33.0004 Service Contracts
Filing Type:
Form
SERFF Tracking Number:
BLNK-127328348
Submission Date:
7/19/11
Filing Status:
Closed - Approved



Filing Outcome

SERFF Status:
Closed
Disposition Date:
08/26/2011

CHW073376

EXHIBIT PAGE NO. 55

AA002277

Approved

YOUR HOME SERVICE AGREEMENT

HOME WARRANTY ADMINISTRATORS

CHOICE Home Warranty

CHOICE HOME WARRANTY

America's Choice
In Home Warranty Protection

Obligor: Home Warranty Administrator of Nevada, Inc.

Dear Test Account,

Welcome to Choice Home Warranty! You made a wise decision when you chose to protect your home with a home warranty. We appreciate your business and look forward to providing you with quality service for all your home protection needs.

To obtain the most value from your new home warranty, please take a moment to read and understand your coverage. Your coverage is dependant on the plan you have selected.

Should you have a problem with any of your covered systems or appliances, please call us toll-free at (888)-531-5403. We are available 24 hours a day, 7 days a week, 365 days a year, or simply log on to our website located at www.ChoiceHomeWarranty.com and file your claim online.

THIS CONTRACT EXPLAINS THE COVERAGE, LIMITATIONS, & EXCLUSIONS. PLEASE REVIEW YOUR CONTRACT.

Contract Number: 123456789
Contract Term: 01/01/2011 – 01/01/2012
Covered Property:
123 Main Street
City, State 12345
Property Type: Single Family
Rate: ~~$480.00~~
Service Call Fee: ~~$60.00~~

Coverage Plan: ~~Gold Plan~~
Includes: Air Conditioning System/ Heating System, Electrical System/ Plumbing System/ Plumbing Stoppage/ Water Heater/ Whirlpool Bathtub/ Refrigerator/ Oven/Range/Stove/ Cooktop/ Dishwasher/ Garbage Disposal/ Built-In Microwave/ Clothes Washer/ Clothes Dryer/ Ductwork/ Garage Door Opener/ Ceiling & Exhaust Fans/
Optional Coverage: ~~None~~

CHOICE HOME WARRANTY
510 Thornall Street · Edison, NJ 08837 · Toll Free: (888) 531-5403
[illegible]

CHW073377

YOUR HOME SERVICE AGREEMENT

Throughout this Agreement the words "We", "Us" and "Our" refer to Home Warranty Administrator of Nevada, Inc. (HWA), 80 Washington Valley Road, Bedminster, NJ 07921, the Obligor of this Agreement and it is backed by the full faith and credit of HWA. This Agreement is administered by Choice Home Warranty (Administrator): 510 Thornall Street, Edison, NJ 08837.

A. COVERAGE
During the coverage period, Our sole responsibility will be to arrange for a qualified service contractor ("Service Provider") to repair or replace, at Our expense (up to the limits set forth below), the systems and components mentioned as "included" in accordance with the terms and conditions of this contract so long as such systems and components:
1. Are located inside the confines of the main foundation of the home or attached or detached garage (with the exception of the exterior pool/spa, well pump, septic tank pumping and air conditioner); and
2. Become inoperative due to normal wear and tear; and
3. Are in place and in proper working order on the effective date of this home warranty contract. This contract does not cover any known or unknown pre-existing conditions. It is understood that WE ARE NOT A SERVICE PROVIDER and are not ourselves undertaking to repair or replace any such systems or components. This contract covers single-family homes (including manufactured homes), new construction homes, condominiums, townhomes, and mobile homes under 5,000 square feet, unless an alternative dwelling type (i.e. above 5,000 square foot or multi-unit home) is applied, and appropriate fee is paid. Coverage is for occupied, owned or rented residential property, not commercial property or residences used as businesses, including, but not limited to, day care centers, fraternity/sorority houses; and nursing/care homes. This contract describes the basic coverage and options available. Coverage is subject to limitations and conditions specified in this contract. Please read your contract carefully. NOTE: This is not a contract of insurance, residential service, warranty, extended warranty, or implied warranty.

B. COVERAGE PERIOD
Coverage starts 30 days after acceptance of application by Us and receipt of applicable contract fees and continues for 365 days from that date. Your coverage may begin before 30 days if We receive proof of prior coverage, showing no lapse of coverage, through another carrier within 15 days of the order date.

C. SERVICE CALLS – TO REQUEST SERVICE: 1-888-531-5403
1. You or your agent (including tenant) must notify The Administrator for work to be performed under this contract as soon as the problem is discovered. The Administrator will accept service calls 24 hours a day, 7 days a week, 365 days a year at 1-888-681-3656. Notice of any malfunction must be given to the Administrator prior to expiration of this contract.
2. Upon request for service, the Administrator will contact an authorized Service Provider within two (2) days during normal business hours and four (4) days on weekends and holidays. The authorized Service Provider will contact You to schedule a mutually convenient appointment during normal business hours.
3. We define an emergency as a breakdown of a covered system which renders the dwelling unfit to live in because of defects that endanger the health and safety of the occupants. Upon request for services that fall within the emergency guidelines the Administrator will commence repairs within 24 hours. If repairs cannot be completed within three calendar days, the Administrator will provide you with a status report. If you should request the Administrator to perform non-emergency service outside of normal business hours, you will be responsible for payment of additional fees and/or overtime charges.
4. The Administrator has the sole and absolute right to select the Service Provider to perform the service; and We will not reimburse for services performed without prior approval.
5. You will pay a trade service call fee ("Service Fee") per claim (amount shown on page one) or the actual cost, whichever is less. The Service Fee is for each visit by Our approved Service Provider, except as noted Section C(6), and is payable to the Us approved Service Provider at the time of each visit. The service fee applies to each call dispatched and scheduled, including but not limited to those calls Wherein coverage is included, excluded, or denied. The service fee also applies in the event You fail to be present at a scheduled time, or in the event You cancel a service call at the time a service contractor is in route to your home or at your home.
6. If service work performed under this contract should fail, then We will make the necessary repairs without an additional trade service call fee for a period of 90 days on parts and 30 days on labor.

D. COVERAGE (COVERAGE DEPENDANT ON PLAN)
The Coverage is for no more than one unit, system, or appliance, unless additional fees are paid. If no additional fees are paid, covered unit, system, or appliance is at Our sole discretion; certain limitations of liability apply to Covered systems and appliances.
1. CLOTHES DRYER
INCLUDED: All components and parts, except:
EXCLUDED: Noise - Venting - Lint screens - Knobs and dials – Doors - Door seals – Hinges - Glass – Leveling and balancing - Damage to clothing.
2. CLOTHES WASHER
INCLUDED: All components and parts, except:
EXCLUDED: Noise - Plastic mini-tubs - Soap dispensers - Filter screens - Knobs and dials - Door seals – Hinges - Glass – Leveling and balancing -Damage to clothing.
3. KITCHEN REFRIGERATOR
NOTE: Must be located in the kitchen.
INCLUDED: All components and parts, including integral freezer unit, except:
EXCLUDED: Racks - Shelves - Lighting and handles - Frozen - Ice makers, ice crushers, beverage dispensers and their respective equipment - Water lines and valve to ice maker - Line restrictions – Leaks of any kind - Interior thermal shells - Freezers which are not an integral part of the refrigerator - Wine coolers or mini refrigerators – Food spoilage – Doors - Door seals and gaskets – Hinges – Glass - Audio/Visual equipment and Internet connection components.

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4. AIR CONDITIONING/COOLER
NOTE: Not exceeding 5 (five) ton capacity and designed for residential use.
INCLUDED: Ducted electric central air conditioning ducted electric wall air conditioning. All components and parts, for units below 13 SEER and when We are unable to facilitate repair/replacement of failed covered equipment at the current SEER rating, repair/replacement will be performed with 13 SEER equipment and/or 7.7 HSPF or higher compliant, except:
EXCLUDED: Gas air conditioning systems - Condenser casings - Registers and Grills - Filters - Electronic air cleaners - Window units - Non-ducted wall units - Water towers - Humidifiers - Improperly sized units - Chillers - All exterior condensing, cooling and pump pads – Roof mounts, jacks, stands or supports - Condensate pumps – Commercial grade equipment - Cost for crane rentals - Air conditioning with mismatched condensing unit and evaporative coil per manufacturer specifications – Improper use of metering devices - Thermal expansion valves - Refrigerant conversion - Leak detections – Water leaks - Drain line stoppages – Maintenance - Noise. No more than two systems covered unless purchased separately at time of enrollment. We are not responsible for the costs associated with matching dimensions, brand or color made. We will not pay for any modifications necessitated by the repair of existing equipment or the installation of new equipment.
5. HEATING SYSTEM OR BUILT-IN WALL UNIT
NOTE: Main source of heat to home not to exceed 5 (five) ton capacity and designed for residential use.
INCLUDED: All components and parts necessary for the operation of the heating system. For units below 13 SEER and when We are unable to facilitate repair/replacement of failed covered equipment at the current SEER rating, repair/replacement will be performed with 13 SEER equipment and/or 7.7 HSPF or higher compliant, except:
EXCLUDED: All components and parts relating to geothermal, water source heat pumps including: outside or underground piping, components for geothermal and/or water source heat pumps, redrilling of wells for geothermal and/or water source heat pumps, and well pump and well pump components for geothermal and/or water source heat pumps. Access - Radiators or valves - Baseboard casings - Radiant heating – Dampers – Valves - Fuel storage tanks - Portable units - Solar heating systems - Fireplaces and key valves – Filters – Line dryers and filters - Oil filters, nozzles, or strainers - Registers – Backflow preventers – Evaporator coil pan – Primary or secondary drain pans - Grills - Clocks - Timers – Add-ons for zoned systems - Heat lamps - Humidifiers - Flues and vents – Improperly sized heating systems – Mismatched systems - Chimneys – Pellet stoves - Cable heat (in ceiling) - Wood stoves (even if only source of heating) - Calcium build-up - Maintenance. NOTE: We will pay no more than $1,500 per covered item per contract term for access, diagnosis and repair or replacement of any glycol, hot water, or steam circulating heating systems.
6. WATER HEATER (Gas and/or Electric)
INCLUDED: All components and parts, including circulating pumps, except:
EXCLUDED: Access – Insulation blankets – Pressure reducing valve – Sediment build-up – Rust and corrosion - Main, Holding or storage tanks - Vents and flues - Thermal expansion tanks - Low-boy and/or Squat water heaters - Solar water heaters - Solar components - Fuel, holding or storage tanks - Noise - Energy management systems - Commercial grade equipment and units exceeding 75 gallons - Drain pans and drain lines - Tankless water heaters.
7. ELECTRICAL SYSTEM
INCLUDED: All components and parts, including built-in bathroom exhaust fans, except:
EXCLUDED: Fixtures - Carbon monoxide alarms, smoke detectors, detectors or related systems - Intercoms and door bell systems associated with intercoms - Inadequate wiring capacity - Solar power systems and panels - Solar Components - Energy Management Systems - Direct current (D.C.) wiring or components - Attic exhaust fans - Commercial grade equipment - Ancillary or sub-panels – Broken and/or severed wires - Rerunning of new wiring for broken wires – Wire tracing - Garage door openers – Central vacuum systems - Damages due to power failure or surge – Circuit Overload. We will pay no more than $500 per contract term for access, diagnosis and repair and/or replacement.
8. PLUMBING SYSTEM/STOPPAGE
INCLUDED: Leaks and breaks of water, drain, gas, waste or vent lines, except if caused by freezing or roots - Toilet tanks, bowls and mechanisms (replaced with builder's grade as necessary), toilet wax ring seals - Valves for shower, tub, and divertor angle stops, risers and gate valves - Permanently installed interior sump pumps - Built-in bathtub whirlpool motor and pump assemblies - Stoppages/Clogs in drain and sewer lines up to 100 feet from access point. Multiple stoppages are only covered if there is an accessible ground level clean out, except:
EXCLUDED: Stoppages and clogs in drain and sewer lines that cannot be cleared by cable or due to roots, collapsed, broken, or damaged lines outside the confines of the main foundation (even if within 100 feet of access point) – Access to drain or sewer lines from vent or removal of water closets - Cost to locate, access or install ground level clean out – Slab leaks - Polybutylene or Quest piping – Galvanized drain lines - Hose Bibs - Drum traps - Flange - Collapse of or damage to water, drain, gas, waste or vent lines caused by freezing, settlement and/or roots – Faucets, fixtures, cartridges, shower heads & shower arms - Baskets and strainers - Popup assemblies - Bathtubs and showers – Cracked porcelain - Glass - Shower enclosures and base pans – Roman tubs - Bath tub drain mechanisms - Sinks - Toilet lids and seats - Caulking or grouting - Whirlpool jets - Whirlpool control panel - Septic tanks - Sewage ejector pumps - Water softeners - Pressure regulators - Inadequate or excessive water pressure - Flow restrictions in fresh water lines caused by rust, corrosion or chemical deposits - Holding or storage tanks - Saunas and/or steam rooms. NOTE: We will provide access to plumbing systems through unobstructed walls, ceilings or floors, only, and will return the access opening to rough-finish condition. We will pay no more than $500 per contract term for access, diagnosis and repair and/or replacement. Our authorized Service Provider will close the access opening and return it to rough finish condition, subject to the $500 limit indicated. We shall not be responsible for payment of the cost to remove and replace any built-in appliances, cabinets, floor coverings or other obstructions impeding access to walls, ceilings, and/or floors.
9. BUILT-IN MICROWAVE
INCLUDED: All components and parts, except:
EXCLUDED: Doors – Hinges – Handles – Doors - Door glass – Lights - Interior linings – Trays - Clocks - Shelves - Portable or counter top units - Arcing - Meat probe assemblies - Rotisseries.
10. OVEN/RANGE/STOVE/COOKTOP (Gas or Electric; Built-in, Portable or Free Standing).
INCLUDED: All components and parts, except:

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EXCLUDED: Clocks (unless they affect the cooking function of the unit) - Meat probe assemblies - Rotisseries - Racks - Handles - Knobs - Door seals – Doors – Hinges - Lighting and handles – Glass - Sensi-heat burners will only be replaced with standard burners.
11. DISHWASHER
INCLUDED: All components and parts, except:
EXCLUDED: Racks - Baskets – Rollers – Hinges – Handles – Doors – Door gaskets – Glass - Damage caused by broken glass - Cleaning.
12. GARBAGE DISPOSAL
INCLUDED: All components and parts, including entire unit, except:
EXCLUDED: Problems and/or jams caused by bones, glass, or foreign objects other than food.
13. CEILING AND EXHAUST FANS
INCLUDED: Motors - Switches - Controls - Bearings – Blades, except:
EXCLUDED: Fans - Blades - Belts - Shutters - Filters - Lighting. Note: Builder's standard is used when replacement is necessary.
14. DUCTWORK
INCLUDED: Duct from heating unit to point of attachment at registers or grills, except:
EXCLUDED: Registers and grills - Insulation - Asbestos-insulated ductwork – Vents, flues and breaching – Ductwork exposed to outside elements - Improperly sized ductwork - Separation due to settlement and/or lack of support - Damper motors - Diagnostic testing of, or locating leaks to ductwork, including but not limited to, as required by any federal, state or local law, ordinance or regulation, or when required due to the installation or replacement of system equipment. We will provide access to ductwork through unobstructed walls, ceilings or floors, only, and will return the access opening to rough finish condition. With respect to concrete covered, embedded, encased, or otherwise inaccessible ductwork, We will pay no more than $500 per contract term for access, diagnosis and repair or replacement. Our authorized Service Provider will close the access opening and return to a rough finish condition, subject to the $500 limit indicated. We shall not be responsible for payment of the cost to remove and replace any built-in appliances, cabinets, floor coverings or other obstructions impeding access to walls, ceilings, and/or floors.
15. GARAGE DOOR OPENER
INCLUDED: All components and parts, except:
EXCLUDED: Garage doors - Hinges - Springs - Sensors - Chains – Travelers - Tracks - Rollers - Remote receiving and/or transmitting devices.
16. GREEN
INCLUDED: If a covered system or appliance (limited to Clothes Washer, Clothes Dryer, Refrigerator, Dishwasher, Heating System, and Water Heater) breaks down per Section A above and subject to all other contract inclusions, exclusions and limitations, and it can not be repaired; We will replace the appliance with an ENERGY STAR qualified product (subject to availability, exclusions and limitations), one with similar and like features as existing appliance, except:
EXCLUDED: All other contract limitations of liability and exclusions apply.

E. OPTIONAL COVERAGE (Requires Additional Payment)
NOTE: You may purchase any Optional Coverage for up to 30 days after commencement of Coverage. However, Coverage shall not commence until receipt of payment by Us and such Coverage shall expire upon expiration of Coverage period in Section B.
1. POOL AND/OR SPA EQUIPMENT
INCLUDED: Both pool and built-in spa equipment (exterior hot tub and whirlpool) are covered if they utilize common equipment. If they do not utilize common equipment, then only one or the other is covered unless an additional fee is paid. Coverage applies to above ground, accessible working components and parts of the heating, pumping and filtration system as followed: Heater – Pump - Motor - Filter - Filter timer - Gaskets - Blower - Timer - Valves, limited to back flush, actuator, check, and 2 and 3-way valves - Relays and switches - Pool sweep motor and pump - Above ground plumbing pipes and wiring, except:
EXCLUDED: Portable or above ground pools/spas - Control panels and electronic boards - Lights - Liners – Maintenance - Structural defects - Solar equipment - Jets - Ornamental fountains, waterfalls and their pumping systems – Pool cover and related equipment - Fill line and fill valve - Built-in or detachable cleaning equipment such as, but not limited to, pool sweeps, pop up heads – Turbo valves, skimmers, chlorinators, and ionizers - Fuel storage tanks – Disposable filtration mediums – Cracked or corroded filter casings – Grids - Cartridges - Heat pump – Salt water systems. We will pay no more than $500 per contract term for access, diagnosis and repair and/or replacement.
2. SEPTIC TANK PUMPING
INCLUDED: Main line stoppages/clogs (one time only, and must have existing access or clean out). If a stoppage is due to a septic tank back up, then we will pump the septic tank one time during the term of the plan.
Coverage can only become effective if a septic certification was completed within 90 days prior to close of sale. We reserve the right to request a copy of the certification prior to service dispatch.
EXCLUDED: The cost of gaining or finding access to the septic tank and the cost of sewer hook ups - Disposal of waste - Chemical treatments – Tanks - Leach lines – Cess pools - Mechanical pumps/systems. Limited to a total of $200 maximum.
3. WELL PUMP
INCLUDED: All components and parts of well pump utilized for main dwelling only, except:
EXCLUDED: Holding or storage tanks - Digging – Locating pump – Pump removal - Redrilling of wells - Well casings - Pressure tanks – Pressure switches and gauges – Check valve – Relief valve – Drop pipe - Piping or electrical lines leading to or connecting pressure tank and main dwelling including wiring from control box to the pump - Booster pumps - Well pump and well pump components for geothermal and/or water source heat pumps. We will pay no more than $500 per contract term for access, diagnosis and repair and/or replacement.
4. SUMP PUMP
INCLUDED: Permanently installed sump pump for ground water, within the foundation of the home or attached garage, except:
EXCLUDED: Sewerage ejector pumps - Portable pumps – Backflow preventers – Check valves - Piping modifications for new installs.
5. CENTRAL VACUUM

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INCLUDED: All mechanical system components and parts, except:
EXCLUDED: Ductwork – Hoses - Blockages – Accessories.
6. LIMITED ROOF LEAK (Single Family Homes Only)
INCLUDED: Repair of shake, shingle, and composition roof leaks over the occupied living area.
EXCLUDED: Porches - Patios – Cracked and/or missing material - Foam roofs - Tar and gravel or metal roof - Cornwood shakes - Masonite shingles - Flat or built-up roof - Structural leaks adjacent to or caused by appendages of any kind – Downspouts Flashing – Gutters – Skylights – Decks - Patio covers - Solar equipment - Roof jacks – Antennae - Satellite components – Chimneys – Partial roof replacement - Preventative maintenance.
NOTE: If roof must be partially or completely replaced to effect repair, this coverage does not apply.
7. STAND ALONE FREEZER
INCLUDED: All parts and components that affect the operation of the unit, except:
EXCLUDED: Ice-makers, crushers, dispensers and related equipment - Internal shell – Racks – Shelves - Glass displays – Lights - Knobs and caps – Dials – Doors - Door seals and gaskets - Door hinges - Door handles – Glass - Condensation pans – Clogged drains and clogged lines – Grates - Food spoilage - Freon - Disposal and recapture of Freon.
8. SECOND REFRIGERATOR
INCLUDED: All components and parts, including integral freezer unit, except:
EXCLUDED: Racks - Shelves - Lighting and handles - Freon - Ice makers, ice crushers, beverage dispensers and their respective equipment - Water lines and valve to ice maker - Line restrictions – Leaks of any kind - Interior thermal shells - Freezers which are not an integral part of the refrigerator – Food spoilage – Doors - Door seals and gaskets – Hinges – Glass – Audio/Visual equipment and Internet connection components.
9. SEPTIC SYSTEM
INCLUDED: Sewage ejector pump - Jet pump - Aerobic pump - Septic tank and line from house.
EXCLUDED: Leach lines - Field lines - Lateral lines - Tile fields and leach beds - Insufficient capacity - Clean out - Pumping. We will pay no more than $500 per contract term for access, diagnosis and repair and/or replacement.

F. LIMITATIONS OF LIABILITY
1. The following are not included during the contract term; (i) malfunction or improper operation due to rust or corrosion of all systems and appliances, (ii) collapsed ductwork, (iii) known or unknown pre-existing conditions.
2. We are not responsible for providing access to or closing access from any covered item which is concrete-encased or otherwise obstructed or inaccessible.
3. At times it is necessary to open walls or ceilings to make repairs. The Service Provider obtained by We will close the opening, and return to a rough finish condition. We are not responsible for restoration of any wall coverings, floor coverings, plaster, cabinets, counter tops, tiling, paint, or the like.
4. We are not responsible for the repair of any cosmetic defects or performance of routine maintenance.
5. Electronic or computerized energy management or lighting and appliance management systems, solar systems and equipment are not included.
6. You may be charged an additional fee by the Service Provider to dispose of an old appliance, system or component, including, but not limited to the following items: condensing units, evaporator coils, compressors, capacitors, refrigerators, freezers, water heaters, and any system or appliance which contains dangerous or hazardous materials.
7. We are not liable for service involving hazardous or toxic materials including but not limited to mold, lead paint, or asbestos, nor costs or expenses associated with refrigerant recovery, recycling, reclaiming or disposal. We are not liable for any failure to obtain timely service due to conditions beyond Our control, including, but not limited to, labor difficulties or delays in obtaining parts or equipment.
8. We are not liable for repair of conditions caused by chemical or sedimentary build up, rust or corrosion, mildew, mold, misuse or abuse, failure to clean or maintain as specified by the equipment manufacturer, missing parts, structural changes, fire, freezing, electrical failure or surge, water damage, lightening, mud, earthquake, soil movement, soil settlement, settling of home, storms, accidents, past damage, acts of God, or failure due to excessive or inadequate water pressure.
9. We have the sole right to determine whether a covered system or appliance will be repaired or replaced. We are responsible for installing replacement equipment of similar features, capacity, and efficiency, but not for matching dimensions, brand or color. We are not responsible for upgrades, components, parts, or equipment required due to the incompatibility of the existing equipment with the replacement system or appliance or component or part thereof or with new type of chemical or mineral utilized to run the replacement equipment including, but not limited to, differences in technology, refrigerant requirements, or efficiency as mandated by federal, state, or local governments. If parts are no longer available, We will offer a cash payment in the amount of the average cost between parts and labor of the covered repair. We reserve the right to locate parts at any time. We are not liable for replacement of entire systems or appliances due to obsolete, discontinued or unavailability of one or more integral parts. However, We will provide reimbursement for the costs of those parts determined by reasonable allowance for the [illegible] We reserve the right to rebuild a part or component, or replace with a rebuilt part or component.
10. We are not liable for repairs related to costs of construction, carpentry or other incidental costs associated with alterations or modifications of appliances, components or installation of different equipment and/or systems. Except as required to maintain compatibility with equipment manufactured to be 13 SEER and/or 7.7 HSPF or higher compliant, We are not responsible for providing upgrades, components, parts or equipment required due to the incompatibility of the existing equipment with the replacement system, appliance or component/part, including but not limited to efficiency as mandated by federal, state or local governments.
11. We are not responsible for repairs related to inadequacy, lack of capacity, improper installation, mismatched systems, oversized systems, undersized systems, previous repair of design, manufacturer's defect, and any modification to the system or appliance.
12. We are not liable for normal or routine maintenance. We will not pay for repairs or failures that result from the Contract holder's failure to perform normal or routine maintenance. For example, you are responsible for providing maintenance and cleaning pursuant to

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manufacturers' specifications, such as periodic cleaning of heating and air conditioning systems, evaporator coils and condenser coils, as well as periodic filter replacement.
13. We are not liable for the repair or replacement of commercial grade equipment, systems or appliances. We shall pay no more than $1,000 in aggregate for professional series or like appliances such as, but not limited to, brand names such as Sub Zero, Viking, Wolf, Bosch, Jenn-Air, GE Monogram, Thermador, and etc.
14. We reserve the right to obtain a second opinion at Our expense.
15. We are not responsible for any repair, replacement, installation, or modification of any covered system or appliance arising from a manufacturer's recall or defect of said covered items, nor any covered item while still under an existing manufacturer's, distributor's, or in-home warranty.
16. We reserve the right to offer cash back in lieu of repair or replacement in the amount of Our actual cost (which at times may be less than retail) to repair or replace any covered system, component or appliance.
17. We are not responsible for the repair or replacement of any system or appliance or component or part thereof that has been previously, or is subsequently, determined to be defective by the Consumer Product Safety Commission or the manufacturer and for which either has issued, or issues, a warning or recall, or which is otherwise necessitated due to failure caused by the manufacturer's improper design, use of improper materials, formula, manufacturing process or other manufacturing defect.
18. We will not pay for the repairs or replacement of any covered systems or appliances if they are inoperable as a result of known or unknown pre-existing conditions, deficiencies and/or defects.
19. You agree that We are not liable for the negligence or other conduct of the Service Provider, nor are We an insurer of Service Provider's performance. You also agree that We are not liable for consequential, incidental, indirect, secondary, or punitive damages. You expressly waive the right to all such damages. Your sole remedy under this agreement is recovery of the cost of the required repair or replacement, whichever is less. You agree that, in no event, will Our liability exceed $1500 per contract item for access, diagnosis and repair or replacement.

G. Mediation
In the event of a dispute over claims or coverage you agree to file a written claim with Us and allow Us thirty (30) calendar days to respond to the claim. The parties agree to mediate in good faith before resorting to mandatory arbitration in the State of Nevada. Except where prohibited, if a dispute arises from or relates to this Agreement or its breach, and if the dispute cannot be settled through direct discussions you agree that:
1. Any and all disputes, claims and causes of action arising out of or connected with this Agreement shall be resolved individually, without resort to any form of class action, and exclusively by the American Arbitration Association in the state of Nevada under its Commercial Arbitration Rules. Controversies or claims shall be submitted to arbitration regardless of the theory under which they arise, including without limitation contract, tort, common law, statutory, or regulatory duties or liability.
2. Any and all claims, judgments and awards shall be limited to actual out-of-pocket costs incurred to a maximum of $1500 per claim, but in no event attorneys' fees.
3. Under no circumstances will you be permitted to obtain awards for, and you hereby waive all rights to claim, indirect, punitive, incidental and consequential damages and any other damages, other than for actual out-of-pocket expenses, and any and all rights to have damages multiplied or otherwise increased. All issues and questions concerning the construction, validity, interpretation and enforceability of this Agreement, shall be governed by, and construed in accordance with, the laws of the State of Nevada, U.S.A. without giving effect to any choice of law or conflict of law rules (whether of the State of Nevada or any other jurisdiction), which would cause the application of the laws of any jurisdiction other than the State of Nevada.

H. Severability
If any provision of this Agreement is found to be contrary to law by a court of competent jurisdiction, such provision shall be of no force or effect; but the remainder of this Agreement shall continue in full force and effect.

I. BUILDING AND ZONING CODE REQUIREMENTS OR VIOLATIONS
1. We will not contract for services to meet current building or zoning code requirements or to correct for code violations, nor will it contract for services when permits cannot be obtained. We will not pay for the cost to obtain permits.
2. Except as required to maintain compatibility with equipment manufactured to be 13 SEER and/or 7.7 HSPF or higher compliant, We are not responsible for upgrade or additional costs or expenses that may be required to meet current building or zoning code requirements or correct for code violations. This includes city, county, state, federal and utility regulations and upgrades required by law.

J. MULTIPLE UNITS AND INVESTMENT PROPERTIES
1. If the contract is for duplex, triplex, or fourplex dwelling, then every unit with in such dwelling must be covered by Our contract with applicable optional coverage for coverage to apply to common systems and appliances.
2. If this contract is for a unit within a multiple unit of 5 or more, then only items contained within the confines of each individual unit are covered. Common systems and appliances are excluded.
3. Except as otherwise provided in this section, common systems and appliances are excluded.

K. TRANSFER OF CONTRACT & RENEWALS
1. If your covered property is sold during the term of this contract You must notify Us of the change in ownership and submit the name of the new owner by phoning 1-866-681-3658 in order to transfer coverage to the new owner.
2. You may transfer this contract at any time. There is no fee to transfer contract.
3. This contract may be renewed at Our option and where permitted by state law. In that event You will be notified of the prevailing rate and terms for renewal.

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4. If You select the monthly payment option and We elect to renew your contract, We will notify You of applicable rate and terms of renewal during the tenth month of your contract. You will automatically be renewed for a monthly coverage period unless You notify Us in writing 30 days prior to the expiration of the contract. Your first payment for the next contract term will be construed as authorization for month-to-month charges.

L. CANCELLATION

This is a service contract for repair, replacement, or partial replacement of the products listed that are deemed manufactured or sold by the manufacturer. This is not a contract of insurance, residential service, warranty, extended warranty, or implied warranty. You may cancel within the first 30 days of the order date for a refund of the paid contract fees. You may cancel after the first 30 days and You shall be entitled to a pro rata refund of the paid contract fee for the unexpired term, less a $50 administrative fee, If We do not provide a refund within 45 days of cancellation a ten percent penalty for each 30 day period or portion thereof shall be added to the refund.

This contract shall be non-cancelable by Us except for:

1. Failure by You to pay an amount when due.
2. You are convicted of a crime which results in an increase in the service required under the service contract.
3. Fraud or misrepresentation of facts material by You to the issuance of this contract; or in presenting a claim.
4. An act or omission by You or a violation of any condition of the service contract by You, provided that the act, omission, or violation occurred after the effective date of the service contract and substantially and materially increases the service required under the service contract.
5. A material change in the nature or extent of the required service or repair which occurs after the effective date of the service contract and which causes the required service or repair to be substantially and materially increased beyond that contemplated at the time that the service contract was issued or sold.

If We cancel this agreement for one of the reasons listed above You shall be entitled to a pro rata refund of the paid contract fee for the unexpired term, and will not be charged an administrative fee. We will provide 15 days notice prior to cancellation of this contract.

All cancellation requests must be submitted in writing.

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AA002284

Dolores Bennett

From: Dolores Bennett
Sent: Wednesday, July 27, 2011 2:39 PM
To: Harland Amborn; David Hall
Cc: Ted Bader; Gennady Stolyarov
Subject: RE: Choice Home Warranty

Mr. Hall:

Choice Home Warranty is not registered as a service contract provider in Nevada.

Home Warranty Administrator Of Nevada, Inc. (Org. ID # 113194) is registered as a service contract provider in Nevada, and only has one service contract **approved** for sale in Nevada at this time: Home Service Agreement # HWAADMIN-8/2/10 (Approved: 11/22/10). That contract is under the "Home Warranty Administrators" name and makes no mention of Choice Home Warranty. However, Home Warranty Administrator of Nevada, Inc. has a **pending** form filing (Filing # 25290) in SERFF for a new contract called "Choice Home Warranty" (Home Service Agreement # HWA-NV-0711) listing Home Warranty Administrator Of Nevada, Inc. as the Obligor, and listing Choice Home Warranty as the Administrator.

The cover letter contains both Choice Home Warranty and Home Warranty Administrators logos and reads,

- Welcome to Choice Home Warranty! You made a wise decision when you chose to protect your home with a home warranty. We appreciate your business and look forward to providing you with quality service for all your home protection needs. To obtain the most value from your new home warranty, please take a moment to read and understand your coverage. Your coverage is dependant on the plan you have selected. Should you have a problem with any of your covered systems or appliances, please call us toll-free at (888)-531-5403. We are available 24 hours a day, 7 days a week, 365 days a year, or simply log on to our website located at www.ChoiceHomeWarranty.com and file your claim online.

However, the agreement reads,

- Throughout this Agreement the words "We", "Us" and "Our" refer to Home Warranty Administrator of Nevada, Inc. (HWA), 90 Washington Valley Road, Bedminster, NJ 07921, the Obligor of this Agreement and it is backed by the full faith and credit of HWA. This Agreement is administered by Choice Home Warranty (Administrator), 510 Thornall Street, Edison, NJ 08837.

That pending filing is still under review pending the company response to our objections to certain statements, wording and typographical errors in the contract. We will approve the contract after they correct those errors.

Dolores Bennett, **ARC, ARM, AIS, AINS**
Insurance Examiner
Property & Casualty Section
Nevada Division of Insurance
1818 E. College Parkway, Suite 103
Carson City, NV 89706
direct: (775) 687-0763
main: (775) 687-0700
fax: (775) 687-0787
dbennett@doi.state.nv.us

Visit us online at the Service Contracts Section for service contract provider requirements, filing information, and more.

From: Harland Amborn
Sent: Wednesday, July 27, 2011 1:39 PM
To: David Hall
Cc: Dolores Bennett
Subject: Choice Home Warranty

1

Constance L. Akridge
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Attorneys for Home Warranty Administrator of Nevada, Inc. dba Choice Home Warranty

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

HOME WARRANTY ADMINISTRATOR OF NEVADA, INC. dba CHOICE HOME WARRANTY, a Nevada corporation, Petitioner, v. STATE OF NEVADA, DEPARTMENT OF BUSINESS AND INDUSTRY-DIVISION OF INSURANCE, a Nevada administrative agency, Respondent.	Case No. 17 OC 00269 1B Dept. No. I **REQUEST FOR HEARING ON PETITION FOR JUDICIAL REVIEW PURSUANT TO NRS 233B.133(4)**

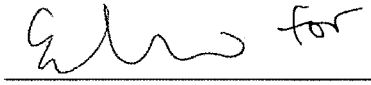
Petitioner Home Warranty Administrator of Nevada, Inc. dba Choice Home Warranty ("Petitioner" or "HWAN"), by and through its counsel of record Constance L. Akridge, Esq., Sydney R. Gambee, Esq., and Brittany L. Walker, Esq., of the law firm Holland & Hart, LLP, hereby requests a hearing pursuant to NRS 233B.133(4) in connection with its Petition for Judicial Review (the "Petition") of the STATE OF NEVADA DEPARTMENT OF BUSINESS AND INDUSTRY – DIVISION OF INSURANCE's (the "Division," or "Respondent") Order filed on December 18, 2017, in the matter of In re Home Warranty Administrator of Nevada, Inc. dba Choice Home Warranty, Cause No. 17.0050.

///

On December 22, 2017, Petitioner filed its Petition on the above entitled matter. On February 16, 2018 Petitioner filed its Opening Brief in support of its Petition. On March 19, 2018, Respondent filed its Answering Brief. On April 11, 2018, Petitioner filed its Reply Brief in support of its Petition. On April 19, 2018, Petitioner filed a Motion for Leave to Submit Additional Evidence. On September 6, 2018, this Court granted Petitioner's Motion for Leave to Submit Additional Evidence and remanded the matter back to the Hearing Officer. On January 22, 2019, the Hearing Officer entered an Administrative Order on Remand. On February 22, 2019, Petitioner filed a Motion for leave to file a Supplemental Memorandum of Points and Authorities and Amend the Record on Appeal. On June 18, 2019, this Court granted Petitioner's Motion for leave to file a Supplemental Memorandum of Points and Authorities and accepted the documents as part of the record on Appeal and ordered the Division to file its response within 30 days. The Division filed its Response to Petitioner's Supplemental Memorandum of Points and Authorities on August 8, 2019. On August 15, 2019, Petitioner filed herewith its Reply in Support of its Supplemental Memorandum of Points and Authorities. This matter having been fully briefed Petitioner hereby requests a hearing on its Petition.

DATED this 15th day of August, 2019.

HOLLAND & HART LLP



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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of August, 2019, a true and correct copy of the foregoing **REQUEST FOR HEARING ON PETITION FOR JUDICIAL REVIEW PURSUANT TO NRS 233B.133(4)** was served by the following method(s):

☑ U.S. Mail: by depositing same in the United States mail, first class postage fully prepaid to the persons and addresses listed below:

Richard Yien
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Attorneys for State of Nevada, Department Of Business and Industry – Division of Insurance

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Attorneys for State of Nevada, Department Of Business and Industry – Division of Insurance

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Attorneys for Home Warranty Administrator of Nevada, Inc. dba Choice Home Warranty

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

HOME WARRANTY ADMINISTRATOR OF NEVADA, INC. dba CHOICE HOME WARRANTY, a Nevada corporation, Petitioner, v. STATE OF NEVADA, DEPARTMENT OF BUSINESS AND INDUSTRY-DIVISION OF INSURANCE, a Nevada administrative agency, Respondent.	Case No. 17 OC 00269 1B Dept. No. I **NOTICE TO SET**

TO: Nevada Commissioner of Insurance Barbara D. Richardson and The State of Nevada Department of Business and Industry, Division of Insurance, and their counsel, Nevada Attorney General Aaron D. Ford, and his Deputy Attorney General Richard P. Yien and Senior Deputy Attorney General Joanna N. Grigoriev.

YOU WILL PLEASE TAKE NOTICE that counsel for the parties will appear telephonically before the Judicial Assistant of the above-entitled court, on August 28, 2019, between 9:00 a.m. and 9:30 a.m., or at a time set by the Judicial Assistant, to set this matter for hearing on Petitioner's Petition for Judicial Review Pursuant to NRS 233B.130 & NRS 233B.133.

///

Constance L. Akridge (702) 222-2543

Richard P. Yien (775) 684-1129

DATED this 15th day of August, 2019.

for

Constance L. Akridge, Esq.
Sydney R. Gambee, Esq.
Brittany L. Walker, Esq.
HOLLAND & HART LLP
9555 Hillwood Drive, Second Floor
Las Vegas, Nevada 89134

Attorneys for Home Warranty Administrator of Nevada, Inc. dba Choice Home Warranty

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of August, 2019, a true and correct copy of the foregoing **NOTICE TO SET** was served by the following method(s):

☑ U.S. Mail: by depositing same in the United States mail, first class postage fully prepaid to the persons and addresses listed below:

Richard Yien
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13402347_v1 104645.0001

In the First Judicial District Court of the State of Nevada
In and For Carson City
* * * *

HEARING DATE MEMO

REC'D & FILED
2019 AUG 28 AM 11:09
AUBREY ROWLATT
CLERK
BY _____ DEPUTY

Case No.: 17 OC 00269 1B

HOME WARRANTY ADMINISTRATOR OF NEVADA, INC., dba CHOICE HOME WARRANTY, a Nevada corporation,

Petitioner,

vs.

STATE OF NEVADA, DEPARTMENT OF BUSINESS AND INDUSTRY – DIVISION OF INSURANCE, a Nevada administrative agency,

Respondent.

_____/

CONSTANCE L. AKRIDGE, Esq.
Attorneys for Petitioner

RICHARD PAILI YIEN, Esq.
Attorney for Respondent

Set In Department: I

HEARING on Oral Argument on Petition for Judicial Review

TO COMMENCE on the 7th day of November, 2019, at 1:30 p.m.

TIME ALLOWED 2 hour(s)/~~day(s)~~ NO. 1 Setting

Telephonic Setting
Petitioners' Counsel

Telephonic Setting
Respondents' Counsel

DATED: August 28, 2019

James T. Russell
JAMES T. RUSSELL
District Judge

CERTIFICATE OF SERVICE

The undersigned, an employee of the Carson City Clerk/District Judge, hereby certifies that on the 28th day of August, 2019, I served the foregoing MEMO by sending a copy thereof via U.S. Mail, postage prepaid, as follows:

Constance L. Akridge, Esq.
9555 Hillwood Drive, Second Floor
Las Vegas, NV 89134

Richard Paili Yien
Deputy Attorney General
100 N. Carson Street
Carson City, NV 89701

SUBSCRIBED and SWORN to before me
this __ day of _____, 2019
AUBREY ROWLATT, Clerk

BY: _____
Deputy

Angela Jeffries
Judicial Assistant, Dept. I

AA002293

JAMES T. RUSSELL
DISTRICT JUDGE
FIRST JUDICIAL DISTRICT COURT
885 East Musser Street • Room 3061
Carson City, Nevada 89701

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Attorneys for Home Warranty Administrator of Nevada, Inc. dba Choice Home Warranty

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

HOME WARRANTY ADMINISTRATOR OF NEVADA, INC. dba CHOICE HOME WARRANTY, a Nevada corporation,

Petitioner,

v.

STATE OF NEVADA, DEPARTMENT OF BUSINESS AND INDUSTRY-DIVISION OF INSURANCE, a Nevada administrative agency,

Respondent.

Case No. 17 OC 00269 1B
Dept. No. I

LEGISLATIVE HISTORY STATEMENT REGARDING NRS 690C.325(1) AND NRS 690C.330

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Petitioner HOME WARRANTY ADMINISTRATOR OF NEVADA, INC., dba CHOICE HOME WARRANTY ("HWAN"), a Nevada corporation, through its counsel, Holland & Hart LLP, hereby submits its statement and analysis as to the legislative history of NRS 690C.325(1) and any relationship to NRS 690C.330 pursuant to this Court's directive via e-mail on November 5, 2019.

NRS 690C.330 was added to the Nevada legislature in 1999 when the Nevada legislature added the entirety of the service contract provider chapter to the Nevada Revised Statutes. Prior to 1999, there was confusion as to how Nevada would treat service contracts, as some were

considered insurance and some were not. "The Division of Insurance would make the determination on a case-by-case basis. Regulatory certainty was necessary because if the industry was regulated as an insurance company, the regulations became too burdensome and denied consumers service contract options enjoyed in other states. Administrators or those involved with third party administrators would like to compete on the same level playing field as others in the industry." Minutes of the Assembly Committee on Commerce and Labor, 70th Session, April 5, 1999, attached hereto as **Exhibit "1"**, at 3. Of particular concern was the onerous nature of regulations placed on insurance companies because "[i]n order to qualify as an insurance company, very high standards had to be met. The standards were so high they acted as a barrier to service contract providers acting in the state." *Id.* at 5.

Relevant here, the definition of an administrator was carefully considered by the Nevada legislature in 1999. "As originally drafted, the term administrator included any person who carried out the terms of a service contract." *Id.* at 4. But "an administrator was not the individual who would carry out the terms of service contracts. The person who did such would be the one who repaired the covered product. The administrator was the one who managed the program behind the scenes. Administrators were not contractually bound to provide the service but made filings with the state, oversaw the accounting of the program to ensure financial standards were met, and ensured the provider met obligations." *Id.* at 4. Here, "for simplicity of regulation they attempted to ensure the provider, as the obligor, was the 'one stop shop.' The administrator's activities were the responsibility of the provider. They were responsible for their administrator's actions and the Division of Insurance needed to go to the provider and inform them they had a complaint, which would allow for clarification of the problem." *Id.* at 4.

In 2011, the Nevada legislature added NRS 690C.325 to the Nevada Revised Statutes. The provision gave "the Division more authority to suspend, limit, or revoke a service contract license." Minutes of the Assembly Committee on Commerce and Labor, 76th Session, February 25, 2011, attached hereto as **Exhibit "2"**, at 15. The same bill also enhanced financial security requirements for providers. *See generally id.* The bill did not revise the statutory scheme for

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registration of providers and did nothing to change the legislative intent from 1999 that administrators "manage the program behind the scenes."

Nor does NRS 690C.325(1) replace NRS 690C.330. The legislative history is silent as to how the fine and civil penalty provisions of these two statutes should be harmonized. There is nothing in the legislative history that indicates that the aggregate cap on similar violations in NRS 690C.330 should not also apply to fines imposed under NRS 690C.325(1). In the absence of a direct conflict, the two statutes may (and can) be read together. While there may be a perceived conflict as to the maximum amount of *fine* or *civil penalty*[1] for one violation ($1,000 fine in NRS 690C.325(1) and $500 civil penalty in NRS 690C.330), there is no such conflict as to a cap on violations of a similar nature in the aggregate. NRS 690C.325(1) is silent as to this aggregate cap, and NRS 690C.330 should not be disregarded in the absence of a conflict with NRS 690C.325(1).

Indeed, a careful reading of the two statutory provisions demonstrates that they dovetail to provide a fulsome regulatory scheme that is subject to the $10,000 cap. Both statutory provisions apply to violations of NRS 690C. See NRS 690C.325(1)(d) ("Violated any provision of this chapter.") and NRS 690C.330 ("A person who violates any provision of this chapter..."). As noted above, NRS 690C.325 was enacted to give the Commissioner more authority to take action with respect to providers who violate NRS 690C, such as an increased fine amount. However, a provider is defined in NRS 690C.070 as "a person who is obligated to a holder..." (emphasis added). Since a provider is defined as a person and any person who violates any provision of NRS 690C can be fined in an amount "not to exceed an aggregate amount of $10,000 for violations of a similar nature" by the terms of NRS 690C.330, the cap must apply to fines assessed under NRS 690C.325. Had the legislature wanted to make the cap inapplicable to fines assessed against providers pursuant to NRS 690C.325, it would have explicitly done so, just as it

[1] While fine is used in NRS 690C.325(1) and civil penalty is used in NRS 690C.330, these terms are synonymous. *See also Hudler v. Anderson*, 125 Nev. 1045, 281 P.3d 1183 (2009) (noting that "[g]enerally, a fine is a 'civil penalty payable to the public treasury.'" quoting *Martinez v. State of Nevada*, 120 Nev. 200, 88 P.3d 825 (2004)).

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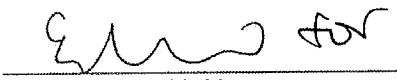
did when it increased the maximum fine that can be assessed against providers (as opposed to persons) from $500 to $1,000.

DATED this 6th day of November, 2019.

HOLLAND & HART LLP



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Attorneys for Home Warranty Administrator of Nevada, Inc.
dba Choice Home Warranty

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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of November, 2019, a true and correct copy of the foregoing **LEGISLATIVE HISTORY STATEMENT REGARDING NRS 690C.325(1) AND NRS 690C.330** was served by the following method(s):

☑ U.S. Mail: by depositing same in the United States mail, first class postage fully prepaid to the persons and addresses listed below:

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Attorneys for State of Nevada, Department Of Business and Industry – Division of Insurance

Joanna Grigoriev
Senior Deputy Attorney General
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Office of Attorney General
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Las Vegas, Nevada 89101
jgrigoriev@ag.nv.gov

Attorneys for State of Nevada, Department Of Business and Industry – Division of Insurance

☑ Email: by electronically delivering a copy via email to the following e-mail address:

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An Employee of Holland & Hart LLP

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INDEX OF EXHIBITS

EXHIBIT 1	Minutes of the Assembly Committee on Commerce and Labor, 70th Session, April 5, 1999	Pages 1 – 34
EXHIBIT 2	Minutes of the Assembly Committee on Commerce and Labor, 76th Session, February 25, 2011	Pages 35 - 58

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EXHIBIT 1

Minutes of the Assembly Committee on Commerce and Labor, 70th Session, April 5, 1999

EXHIBIT 1

Minutes of the Assembly Committee on Commerce and Labor, 70th Session, April 5, 1999

MINUTES OF THE

ASSEMBLY Committee on Commerce and Labor

Seventieth Session

April 5, 1999

The Committee on Commerce and Labor was called to order at 3:45 p.m., on Monday, April 5, 1999. Chairman Barbara Buckley presided in Room 3142 of the Legislative Building, Carson City, Nevada. Exhibit A is the Agenda. Exhibit B is the Guest List. All Exhibits are available and on file at the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Ms. Barbara Buckley, Chairman

Mr. Richard Perkins, Vice Chairman

Mr. Morse Arberry, Jr.

Mr. Bob Beers

Ms. Merle Berman

Mr. Joe Dini, Jr.

Mrs. Jan Evans

Ms. Chris Giunchigliani

Mr. Lynn Hettrick

Mr. David Humke

Mr. Dennis Nolan

Mr. David Parks

Mrs. Gene Segerblom

COMMITTEE MEMBERS ABSENT:

Mr. David Goldwater, Excused

GUEST LEGISLATORS PRESENT:

Assemblyman John Lee, Assembly District 3

STAFF MEMBERS PRESENT:

Vance Hughey, Committee Policy Analyst

Jane Baughman, Committee Secretary

OTHERS PRESENT:

Samuel P. McMullen, representing the Retail Association of Nevada

Mary Lau, Executive Director, Retail Association of Nevada

John Dickson, Attorney, Service Contract Industry Council

Jim Jeppson, Chief Insurance Assistant, Division of Insurance

Jim Wadhams, representing Wadhams & Akridge

Donald L. Drake, President, Baker and Drake Inc.

Lee Duncan, President, Innovative Insurance Solutions

Alice Molasky-Arman, Commissioner of Insurance, Division of Insurance

Doug Carson, Member of the State Contractors' Board

Margi Grein, Executive Officer, State Contractors' Board

George Lyford, Director, Special Investigations State Contractors' Board

John Sande, representing the Nevada Bankers Association

Alan Rabkin, Senior Vice President, SierraWest Bank

Allen Biaggi, Administrator, Nevada Division of Environmental Protection

Doug Zimmerman, representing the Bureau of Corrective Actions

William Frey, Deputy Attorney General, Division of Environmental Protection

Joseph Johnson, representing the Toiyabe Chapter of the Sierra Club

Sharon M. Weaver, Health Insurance Portability and Accountability (HIPPA) Section, Division of Insurance

Bob Crowell, representing Farmers Insurance

Robert Barengo, representing Western Insurance

Dick L. Rottman, Chief Executive Officer, Western Insurance

Matthew Sharp, representing Nevada Trial Lawyers Association

Following roll, Chairman Buckley opened the hearing on A.B. 673.

Assembly Bill 673: Provides for regulation of service contracts. (BDR 57-1673)

Samuel P. McMullen, representing the Retail Association of Nevada introduced Mary Lau, Executive Director, Retail Association of Nevada. He noted the association was the requester and sponsor of A.B. 673. Mr. McMullen then introduced John Dickson, Attorney, Service Contract Industry Council.

Mr. McMullen explained A.B. 673 was an opportunity for the state to study the issue of whether, and under what circumstances, service contracts should be considered and passed. The association tried to work closely with the Division of Insurance because the issue was one the department had to consider in terms of the offering of insurance. In addition, the area was one the association thought could benefit from rules, regulations, standards, and restrictions that would be common across the board.

Mr. Dickson explained the Service Contract Industry Council was a national trade association made up of manufacturers, retailers, insurance companies, and third party administrators. The council covered all facets of the service contract industry. He noted A.B. 673 would require members of the council to come forward and be regulated. Under A.B. 673, members would be required to provide information and comply with regulations with which they previously did not have to comply. The council sought the regulations because of regulatory certainty. Every state had a broad definition of the term insurance. Some states took service contracts and swept them into the realm of insurance. The Division of Insurance had done such with some service contracts. They were told service contracts offered by manufacturers of products or sellers of products would not be considered insurance in the State of Nevada, but all other service contracts probably would. The Division of Insurance would make the determination on a case-by-case basis.

Regulatory certainty was necessary because if the industry was regulated as an insurance company, the regulations became too burdensome and denied consumers service contract options enjoyed in other states. Administrators or those involved with third party administrators would like to compete on the same level playing field as others in the industry.

Another reason the council sought the regulation was to set industry standards. In the past, there were a number of large insolvencies. Some of the insolvencies involved situations where service contracts were sold by manufacturers or retailers. The most notable insolvency involved "Crazy Eddies" in New York where approximately $10 million was absconded by the owner of the business leaving thousands of consumers without service contracts. The result was chilling and affected all bona fide operators in the industry.

A.B. 673 was based on a model adopted by the National Association of Insurance Commissioners (NAIC). Providers had to register with the state. In addition they had to submit information, such as telling the state who they were. As part of the registration, providers had to demonstrate they had the financial responsibility to back their contracts. The bill provided a number of methods for such demonstration, which were a net worth in excess of
$100 million, the purchase of an insurance policy covering 100 percent of obligations, a reserve account, which was maintained, as well as a deposit placed with the department for use in the event the business defaulted with any of the service contract obligations.

Section 19 considered consumer disclosures, which detailed the contents that must appear in a service contract. The disclosures in A.B. 673 closely tracked those developed by the National Association of Insurance Commissioners and were currently in use in a number of states.

There were a number points with which a service contract company had to comply under the act. A copy of the contract and a receipt had to be provided to the consumer. In addition certain records had to be maintained and be open to the Commissioner of Insurance for inspection.

The bill also had an enforcement provision allowing the Division of Insurance to take regulatory action against providers. The enforcement provisions of the act were set forth in sections 24 and 25 and were essentially carried out in the same manner that the Division of Insurance enforced the insurance code against authorized insurance companies. Existing insurance code regulations would be used to enforce the provisions of the act.

Mr. McMullen noted automobile dealers indicated they currently were authorized to act in such a manner under a construct developed through the Division of Insurance and would like to continue to operate under such a construct and not be regulated by A.B. 673. In the proposed amendment (Exhibit C), they were exempted. The Division of Insurance reviewed the amendment and believed it was acceptable.

Mr. Dickson referred to page 1 of Exhibit C amending the definition of administrator. As originally drafted, the term administrator included any person who carried out the terms of a service contract. He noted an administrator was not the individual who would carry out the terms of service contracts. The person who did such would be the one who repaired the covered product. The administrator was the one who managed the program behind the scenes. Administrators were not contractually bound to provide the service but made filings with the state, oversaw the accounting of the program to ensure financial standards were met, and ensured the provider met obligations.

Mr. McMullen said for simplicity of regulation they attempted to ensure the provider, as the obligor, was the "one stop shop." The administrator's activities were the responsibility of the provider. They were responsible for their administrator's actions and the Division of Insurance needed to go to the provider and inform them they had a complaint, which would allow for clarification of the problem.

Mr. Dickson explained the second change in the bill was on page 1, lines 2 through 5 of Exhibit C. The change would delete the definition of the term "issue." Issue, as used in the act, was not a definable term. Limiting the term "issue," in the manner done in the bill, excluded a number of other avenues for delivery of service contracts or for the way providers would do business in the state. They thought there was a common understanding of the term, and the definition in the bill did not do it justice.

The term liability insurance needed to be clarified to reference contractual liability insurance. Liability was guaranteed under service contracts. In addition, the substance of the definition was changed to clarify the two types of contractual liability insurance that were authorized. There could be contractual liability insurance that provided for coverage in the event of a provider's nonperformance. Such meant if a provider did not perform on a claim within
60 days, a claim could be made with the insurance who was bound to provide the service purchased under the service contract. Another type of reimbursement insurance policy provided coverage to the provider whenever the provider contacted the reimbursement insurer for coverage. If a claim was made with a provider, the provider could decide to have the reimbursement insurer pay the claim. If the provider failed to perform, the insurance company was still bound.

In section 10 of Exhibit C on lines 2 through15, the words "a separately stated" were inserted. The change was technical to specify what a service contract was.

Lines 2 through 28 of section 11 in Exhibit C referenced the automobile dealers and said, "a service contract sold or offered for sale by a vehicle dealer on vehicles sold by the dealer if the dealer is licensed pursuant to NRS Title 43, Chapter 482.325." The language tightened the exemption to apply only to service contracts issued by the manufacturer or the actual automobile dealer, which would require third party automobile dealers to register.

The changes in sections 12, 13, and 14 of Exhibit C were technical in nature.

Mr. McMullen noted the above changes in sections 12, 13, and 14 were enacted to bring the language closer to what was proposed in the bill draft request.

Mr. Dickson said the same was for section 16.

In section 19, there were several changes made to disclosures required in the service contract. The first was to insert a new subparagraph requiring a service contract to indicate it was backed by the full faith and credit of the service contract provider if the contract was not insured. Such brought the act into conformity with the NAIC Model Act.

Subparagraph (d) of section 19 was changed in light of privacy concerns. There were a number of situations where consumers would purchase service contracts but not want to provide their name or other personal information. In such a situation, they tracked the service contract by a unique contract number. Such would eliminate the need to obtain the name and address of the consumer.

Subparagraph (e) of section 19 allowed for printing the price of the service contract on the contract at the time of the contract sale. The division wanted an amendment that said, "the purchase price should also be determined pursuant to a schedule of fees established by a provider." The industry did not oppose the amendment.

Mr. McMullen noted Exhibit D listed two additional amendments.

Mr. Dickson explained the remainder of the changes in Exhibit C, section 19, beginning subparagraph (h) and continuing through subparagraph (m) brought the language into conformity as originally agreed with the division.

As the bill came out of the bill drafter's office, it required a copy of the service contract be provided to the consumer within 15 days. Such was changed to state a copy of the service contract be provided to the consumer within a reasonable period of time. Typically the seller sent the service contracts to the administrator once a month. The administrator then processed contracts and mailed them to the consumers. The process could not be accomplished in 15 days in all instances. At the point of sale, the consumer received the product and had a receipt for their purchase. In addition, the consumer typically received a copy of the terms and conditions of the service contract. Most service contracts did not take effect until after the manufactures warranty expired. For the period of time the consumer was without the actual contract, they were still covered under the manufacturer's warranty.

In addition, there was a "free look" provision. Once the consumer received their contract, they still had the ability to cancel the contract and receive a complete refund if they changed their mind about their purchase. The consumer had
20 days to make such a decision upon receipt of the service contract.

Chairman Buckley noted testimony that the bill was based on the NAIC Model Act. She asked if there was information available as to how the bill differed and the rationale for the difference from the act.

Mr. Dickson did not have written information but explained the council went forward in about six different jurisdictions with the bill. Originally they started with the NAIC model in Alabama, and there were concerns raised with the NAIC language. Some of the NAIC language was nonsensical when the model was viewed in its entirety.

Chairman Buckley asked Mr. Dickson to present the above information in writing before the committee voted on the bill. A.B. 675 was a large bill with major policy steps, and the information in writing would provide additional comfort for the committee. She asked why the council wanted to be regulated. Most individuals sought to be released from regulation. Chairman Buckley inquired as to how the regulation benefited the industry.

Mr. Dickson sought regulatory certainty to sell their product in Nevada. Currently Nevada had a broad definition of the term insurance, which was common for most states with NAIC language in their insurance code. There was concern that products sold would be swept into the definition. The Division of Insurance determined a few types of service contracts were actually insurance, as the insurance code was drafted, because there was no service contract regulation in place. Regulations placed on insurance companies were onerous. In order to qualify as an insurance company, very high standards had to be met. The standards were so high they acted as a barrier to service contract providers acting in the state.

Another reason they desired to see the regulation pass was for consumer protection. He again referenced "Crazy Eddies" in New York and noted when they went out of business, the regulators clamped down on the sale of service contracts, and consumers did not want to purchase them. The chill in the industry lasted for a number of years, and the council thought the standards put forward in the bill would keep the "bad actors" out of the industry and allow bona fide providers to operate in the state.

Chairman Buckley asked for an example of the most typically offered service contract in the State of Nevada.

Mr. Dickson said the most typically offered service contract offered by those in his membership was on consumer electronic products. An extended service warranty provided coverage beyond the manufacturer's warranty. Typically the "brown and white" goods were covered. In addition, there were service contracts sold by other industry facets such as automobile dealers and home warranties.

Mr. McMullen referenced Chairman Buckley's question as to the NAIC and noted the issue was specifically discussed with the Division of Insurance, which included the deviations, because it was a model act and the Division of Insurance clearly needed to know exactly why. The provisions, as proposed in the bill draft and as they were in the amendment with the two changes, were compatible with the division.

Ms. Evans asked with how many providers the Division of Insurance would be dealing. She noted the term providers considered all those who would fall under the new statute.

Mr. Dickson said the estimate would be tough to make. They saw the law passed in other states, and the results were anywhere from 28 providers to
186 providers. Some of the states had a larger retail market than Nevada and some of the states had a smaller retail market. He thought Nevada would have between 70 to 150 providers.

Mr. McMullan noted they conducted a survey and attempted to discover the number. There were as few as 6 in some states; 52 was the midrange. There was one state that had 89 and Virginia had 186.

Ms. Evans noted the $25 fee for each type of service contract and asked how that was defined. She noted Mr. Dickson's discussion of the electronics business where there might be dozens of products. She did not think the fee would be for each individual product line.

Mr. Dickson said the $25 fee went along with the required record keeping. A record needed to be maintained for each type of contract sold, and each type was a form. If there was one form used for all products, then only one contract needed to be filed. There were members who were administrators and obligors who offered private label contracts where a warranty company would sell service contracts for an individual shop. Such was a service contract. If the same administrator sold in three different shops, they had three different contracts. A copy of each contract would be kept and filed with the division.

Ms. Evans said such applied only to whatever the retailer was offering because manufacturers had their own warranties over and above what an individual store had.

Mr. Dickson said it was actually the converse of what Ms. Evans suggested. Warranties offered by the manufacturers were limited warranties. There could be a 90-day manufacturer's warranty on an item, and someone could purchase an additional service contract over and above the 90-day period. If the item broke down after the 90-day period, the individual who purchased the warranty would contact the warranty provider to receive service, not the manufacturer. If a manufacturer sold a service contract, under the act in addition to the limited warranty, the manufacturer had to file the contract and comply with the act.

Mr. McMullen said they were attempting to deal with the situation where someone paid additional consideration over and above the purchase of the item and the warranty included therein, but paid separate consideration for a longer period.

Mr. Hettrick asked if the manufacturers wanted to offer their own extended warranty, would they be bound by the same requirements as someone who provided extended coverage as a separate service.

Mr. Dickson noted under A.B. 675 a manufacturer who sold a service contract on one of their products and someone who did not manufacture but wanted to sell a service contract on the same product were regulated in the same manner because of a level playing field. In the past, insurance departments and state regulators focused on the warranties offered by individuals unrelated to the manufacture and sale of the product, because they were the items that most resembled insurance. Insolvencies and consumer abuse occurred within all industry components. The danger was not just from third parties, it was from anyone offering the product.

Mr. Hettrick noted a manufacturer selling an electronic item and sold the consumer an additional 3-year warranty that went beyond the 90-day manufacturer warranty. He did not worry about a large manufacturer, such as SONY, skipping out on the consumer. He understood a retailer who provided the warranty on another's product being regulated. He questioned the manufacturer being bound by the same regulations. The manufacturer's cost to provide was significantly cheaper than someone who had to pay for service outside to maintain a product. He wondered if they were bound by the same requirements.

Mr. Dickson referenced a store such as Sears who sold service contracts. Most individuals were not concerned about a store such as Sears going out of business, but Sears was one of the companies that came forward and pushed for the legislation. It was not the size of the manufacturer that was at issue; it was the product offered to consumers. If a large company offered the product to consumers, such a company should be able to comply with the regulations. They were drafted in such a way as to not create an impediment to the industry in the State of Nevada, but to provide regulatory certainty, minimum necessary consumer protections, and financial stability requirements.

Mr. Hettrick explained he understood, but thought the cost of the product would be raised. The companies would have to jump through many "hoops" when they could do the same for less. He was not sure it was appropriate. Mr. Hettrick pointed out Sears was a retailer, not a manufacturer and would fall into the "Crazy Eddies" category. He noted a difference between a company who made an item, versus one such as Sears who sold the item. He was talking about the manufacturer, not the retailer.

Mr. Hettrick noted he had a retail business for many years and sold a product that came from a manufacturer and they had a warranty that was included in the price. They did not charge separately for the product. He wondered if such would also be included.

Mr. McMullen explained they tried to define warranty as covering such a situation described by Mr. Hettrick and service contract as covering the additional or extended period having separate consideration. If the warranty was included in the purchase price as a regular warranty, such would not be covered and there was no requirement to register under the bill.

Mr. Hettrick noted tire companies who charged a certain amount and put an extended warranty on the tires. Because of the added amount, the tire companies would fall under the statute.

Mr. Dickson said there was a minimum exemption. Warranties sold on products costing under $350 were not regulated by the act. The purchase price of the product had to exceed $350 for the regulation to apply to the service contract covering the product. He noted the tire dealers crafted the exemption.

Chairman Buckley noted $500 seemed high and asked why the fee was such.

Mr. Dickson said the Division of Insurance told them the revenue was needed to cover the cost of regulating the industry. They were open to any fee the legislature thought was appropriate. The fees charged by other states fell below and above the $500 set forth in the bill.

Chairman Buckley said the legislature generally liked to ensure the fee was as low as possible.

Jim Jeppson, Chief Insurance Assistant, Division of Insurance, confirmed the division worked closely with the industry on the development of the A.B. 675. The division had been reviewing service contracts, extended warranties, and warranty service agreements for many years. There were legal opinions from the division dating to 1988. They applied a loose interpretation of a federal act passed in 1972, known as the Magnuson-Moss Warranty Act allowing manufacturers or retailers to warrant or guarantee products they sold. The division looked at service agreements submitted to them to ensure they were issued and backed up by the manufacturer or retailer. If they were, the division generally granted their approval and saw no reason to regulate the product because the division did not consider them as insurance.

Mr. Jeppson noted the division had many third parties wanting to sell service agreements for a wide variety of products. The division saw agreements for many different types of products. The two amendments the division requested considered the fee paid by the consumer. They wanted to ensure the fee charged by the manufacturer or retailer was set pursuant to a schedule rather than based on how much the consumer could afford at the time the product was sold. In addition, the cancellation and nonrenewable provisions within the contract conformed to the cancellation and nonrenewable provisions the division applied to insurance contracts in general.

The main concern of the division was the impact on the agency. They thought they would need to provide service to any consumer who purchased a service agreement. The division would not be able to exclude anyone from service just because their product was under $350. It was not the division's philosophy to deny protection in such an event. Mr. Jeppson thought there would be a fiscal impact on the division, and he drafted and submitted a fiscal note.

Mr. Humke asked why the division worked with NAIC on the particular bill. He asked if there were other uniform bodies promulgating the same type of legislation.

Mr. Jeppson said the division worked with NAIC because NAIC contacted them during the interim saying they were going to propose such legislation and desired to work with the division using the NAIC model as a starting point. The NAIC Model Act was adopted in some form or another in six other states. The division thought if there was legislation coming forward, they wanted their input in it.

Mr. Humke asked if there were other competing model acts by other uniform groups available.

Mr. Jeppson was unaware of others.

Mr. Humke noted the Magnuson-Moss Act covering warranties and asked if it served as a model act.

Mr. Jeppson said the division used it as a guideline to review service agreements. The division allowed manufacturers and retailers to provide the free warranty with a product as well as sell extended warranties and service agreements. Such programs were not under the definition of insurance.

Mr. Humke asked if the programs were exempted pursuant to Mr. Hettrick's question.

Mr. Jeppson affirmed such was the division's position.

Chairman Buckley asked who was currently exempt that would no longer be exempt.

Mr. Jeppson said manufacturers and retailers of products.

Mr. Humke again noted the Magnuson-Moss Warranty Act as an "over-arching" type of model and asked if such would not work in the area in question. He inquired as to whether a supplement was necessary.

Mr. Jeppson was not sure the Magnuson-Moss Warranty Act would not work. He thought it was the desire of the industry group in question to establish guidelines for the sale of all service agreements. The bill would also allow third parties, other than manufacturers, retailers, or insurance companies to meet the standards expressed in the bill and provide service contracts. There were many insurance companies who sold service contracts. The companies filed their products with the division who treated them just like any other insurance contract.

Chairman Buckley asked for clarification as to testimony by the Division of Insurance applying a loose interpretation of the Magnuson-Moss Warranty Act. She asked to whom the loose interpretation was made. Chairman Buckley further asked if the amendment on page 2 of Exhibit C, which said, "The provisions of Title 57" was accepted, who would no longer be regulated who was previously regulated. She noted the existing provisions of Title 57 meant all the existing provisions, including the new chapter did not apply to the group. Chairman Buckley asked Mr. Jeppson to specifically comment on vehicle dealers and whether the division had any jurisdiction and whether by the amendment the division would no longer have such.

Mr. Jeppson explained vehicle dealers offered the standard warranty that came with the vehicle. Ford motor company probably had a 3-year 30 thousand-mile warranty. The vehicle dealer might sell an extended warranty, which was similar to a service contract. The warranty, if Ford motor company offered it, would not be regulated by the division under current guidelines. Mr. Jeppson did not like to use the term loose with the word regulated, and he was not certain the Magnuson-Moss Warranty Act would extend to the sale of the additional service contract or warranty but such was the way the division interpreted it for many years. In addition, some motor vehicle dealers who were not affiliated with manufacturers, such as used car dealers, sold service contracts. If the used car dealers remained directly obligated under the contract, the division applied the standards under the Magnuson-Moss Warranty Act. The division thought such was all right because the dealer was the retailer.

When a retailer, including a car dealer, sold a service agreement to a consumer and the service agreement became the obligation of another entity, such was when the division treated the agreement as insurance. Often the other entity was an insurance company but not always. There were independent third party administrators or independent service contract providers who the division considered insurers when they became obligated under contracts. Mr. Jeppson believed the bill would allow them to come in, and if they complied with the provisions of the act, they could sell agreements without having to meet the standards of being an insurance company.

Chairman Buckley clarified if a used vehicle dealer sold a service contract for someone else, the division currently treated it as insurance, but if the dealer wrote their own service contract, separate and apart from the manufacturers warranty, then the division did not treat it as insurance.

Mr. Jeppson said they did not. In most cases, there was an insurance company backing up the used car dealer. The used car dealer was not in the business of selling service contracts; they were not drafting the service contract. Usually an insurance company approached the dealer who encouraged them to sell service contracts, and the insurance company sold the dealer an insurance policy covering the dealers losses incurred under the contract. Such was basically a contractual liability insurance policy. The division reviewed such policies in the normal course of business and approved or disapproved the contracts based on their merits. The division often received a filing from an insurance company that noted its contractual liability policy and showed the service agreement the dealer would sell.

Chairman Buckley said such would change under the new exemption in A.B. 673 because no longer would it be considered insurance if a car dealer sold the service contract.

Mr. Jeppson explained the amendment under section 11. l (f) would exempt some products the division currently tried to regulate.

Chairman Buckley asked the sponsors of the bill to provide to her an analysis of how the bill differed from the model act with a rationale for each difference. She had concerns as to why they would change existing law with regard to motor vehicle dealers.

Mr. Dickson pointed out the amendment with regard to the motor vehicle exemption was drafted with very short notice after discussion with motor vehicle dealer representatives. Before the hearings, he had a chance to speak with John Sande and they discussed limiting the exemption to only apply to motor vehicle service contracts sold through motor vehicle dealers which obligated either the manufacturer or the dealer. Therefore, the third party contracts the division currently considered as insurance would still be regulated under A.B. 673.

Chairman Buckley noted Mr. Dickson should have further discussions with Mr. Sande and clarify the committee's questions. It was one thing to present a new bill and another to change existing law.

There being no further testimony or additional questions, Chairman Buckley closed the public hearing on A.B. 673 and opened the hearing on A.B. 635.

Assembly Bill 635: Provides for regulation of captive insurers. (BDR 57-1329)

Jim Wadhams, representing Wadhams & Akridge, presented Exhibit E and illustrated a captive insurance company by describing a major business who might buy commercial insurance but leave a self-insured retention, which was often referred to as a deductible. The insurer might go to another state or a foreign country and form a captive insurer; captive in the sense that the company who had the risk owned the company. The company did not sell to the public but was a captive of the employer or business who formed it. They were specialized and limited purpose entities that did not market to the general public but were available only to the enterprises that formed them.

Mr. Wadhams pointed out the insurance companies were formed in the Bahamas or Bermuda, which were the most numerous but not necessarily the most common. A.B. 635 was patterned after a law in the State of Vermont, which was the residence of a number of captive insurance companies.

The reason he asked for the law was there appeared to be an opportunity for the State of Nevada to become an attractive place for such a business to locate. Often the issue of insurance was discussed in the context of consumer issues, and he wanted to reiterate the transaction was closed and not generally open to the public.

There were more forms of captives than what was referenced to as a pure captive that could be formed by an association. The bill would allow employers to form a limited purpose insurance company in the State of Nevada.
Mr. Wadhams noted the worker's compensation self-insured groups and said the concept was similar but could be used for any number of other purposes. A group of small casinos wanting to insure the portion of their fire insurance that was in the deductible might get together and form an insurance company for those purposes.

Mr. Wadhams explained the committee would later see a survey bill covering much of the insurance code. There were about 2,000 pages condensed into
3 or 4 for the purpose of allowing the creation of captive insurance companies. Captive insurance companies would be subject to regulation by the Commissioner of Insurance and they had specific capital and surplus requirements, even for the pure captive formed by the business owner.

The theme of the regulation was parallel to what would apply to a retail insurance company that sold to the public, although the parameters were less restrictive because it was a limited purpose and limited access issue.

Mr. Wadhams noted the first 14 sections of the bill set up definitions that were used throughout the bill.

Section 17 authorized the issuance of the license.

Section 18 described the kinds of insurance that could be offered, which was any insurance a business might purchase. The company could form a captive insurance to cover the portion of insurance that was not commercially insured.

Section 19 set the requirements for the operation of a captive. The captive needed a board of directors, needed to hold meetings, utilize actuaries, accountants, and other professionals the Commissioner of Insurance was satisfied had adequate experience to provide background information.

Section 20 laid out standard information that would go into the application.

Section 22 set the licensing fee and authorized the commissioner to use outside contract individuals to review the applications. Mr. Wadhams understood the Commissioner of Insurance might request an amendment to increase the range of fees for which the commissioner could contract. He noted he had no problem with the amendment. The license extended from year to year and had to be renewed. There were also reports that were required to be filed.

Section 23 required a business plan which would be reviewed by the Commissioner of Insurance and ensured the plan stayed consistent with a limited purpose.

Section 24 considered confusion of names. The commissioner controlled the utilization of the captive's name so as to not be confused with a retail operation.

Sections 25 and 27 set the minimum capital and surplus requirements. The capital and surplus for the purpose of an insurance company was its net worth. Because captives were limited purpose and not selling insurance to the general public, the capital and surplus were more limited.

Section 26 considered the commissioner's authority to adopt regulations dealing with any excess built up money. The commissioner had direct control over distribution of dividends to ensure policyholders were aware of what occurred and yet maintained enough money that the minimum requirements were met.

Section 28 required prior approval for any other dividends beyond those set up by a formula.

Section 29 considered several types of insurance corporations that could be formed. One was a traditional stock corporation called a C Corporation in which stock was issued. That form of corporation would be available for a company that would be formed just by a single employer or single business. Employers coming together to form an association might want to use one of the other forms such as a mutual company, which would be a cooperative type of arrangement or potentially reciprocal. An example of a reciprocal insurance company would be like AAA, Farmers Insurance Company, and USAA.

Section 30 set forth annual reporting requirements.

Section 31 established the examination process and the financial condition review that would be conducted. Such was parallel to regulation that would be applied to a commercial insurance company.

Section 32 was a situation under which the commissioner could suspend or revoke the license of a captive insurer.

Section 33 set forth requirements on investments. The most flexibility belonged to a single business that set up its own insurance company. The business was taking its own risk. Under the federal tax law, the business would receive an advantage, which was why captives were formed under the laws of other countries and other states. The incentive was to bring additional capital into Nevada and allow for additional business development.

Section 34 subjected the operation to the review of the Commissioner of Insurance and indicated a captive insurer had to be in compliance with certain sections of the Nevada Revised Statutes (NRS) that were applicable to insurance companies.

Section 35 stated a captive insurer did not have to join a rating organization. The companies were not selling insurance to the public but were controlled by the individuals who formed them. The rate information was set internally by an actuary that had to be filed with the Commissioner of Insurance.

Section 36 set the operations aside from the insurance guarantee fund. The guarantee fund mechanism covered commercial insurance companies. If one insurance company had difficulties, they participated in a guarantee fund made up of all other insurance companies. The reason captive insurance companies were excluded from the insurance guarantee fund was they were formed by limited businesses and were not available to the general public.

Section 37 set forth a premium tax. Such would be new money. The tax would not be a new tax since there was already a premium tax that applied in the State of Nevada. But in order to attract the business, there was a transaction fee that was applied.

The remaining sections triggered the application of those provisions of the general insurance code in terms of regulation, reorganization, or liquidation.

Section 40 allowed the commissioner to establish whatever regulations were necessary.

Sections 42 and 43 established the effective date of the act.

Mr. Wadhams noted the concept in the bill was new to the State of Nevada.

Chairman Buckley asked if there were any captive insurers currently in the State of Nevada.

Mr. Wadhams noted Nevada did not have any captive insurers. The insurers who were currently licensed were licensed to sell insurance commercially to the general public. Captive insurance was a limited form of insurance in which they would be limited to sell insurance only to themselves. It was a self-insurance mechanism. He was aware that one company might have been formed at one point in time for one of the cab companies to insure their fleet of cabs. The company had a license and they could have sold to the public and might be operating as a defacto captive, but it was not directly organized for such a purpose.

Chairman Buckley asked if someone wanted to currently form a captive insurance company, without the legislation, could they do so under the general provisions of insurance law.

Mr. Wadhams said they could, but the difficulty was the capital and surplus requirements were between five to eight times greater, which would make it commercially unattractive. Financially there would be no incentive for one of the major corporations to go to such an expense when they could go to Vermont and do it for approximately the investment represented in A.B. 635. The bill was set up to compete with Vermont for captive insurers.

Chairman Buckley asked what requirements made it a disadvantage.

Mr. Wadhams explained it would be disadvantageous because of the surplus to policyholders, which was the net worth requirement. The net worth requirement for a general insurance company was $1,500,000 as opposed to the pure captive insurer in the bill, which was about $300,000. The differential was $1,200,000, and it would be cheaper to pay the fees and go through the process in Vermont.

Chairman Buckley asked if there was a downside to having the reserve so low and if there was model legislation on the topic.

Mr. Wadhams did not believe there was any model legislation although most states had begun to pattern their statutes after the Vermont statute, which was patterned after statutes in foreign countries. Vermont had become the model many states were attempting to copy.

Donald L. Drake, President, Baker and Drake Inc., Deluxe and Yellow Cab supported A.B. 635. His company participated in captive insurance programs one of which was established through the International Taxi and Livery Association and had approximately 80 members. They had a very good experience in the program and were in it for about 3 years. He would like to see the program permitted in the State of Nevada.

Chairman Buckley asked what advantages Mr. Drake thought captive insurers would offer his company.

Mr. Drake thought there would be a savings, and he would have a greater comfort level knowing the Division of Insurance had a watchful eye on the program. He also thought the Division of Insurance could help protect any person injured who would present a claim.

Lee Duncan, President, Innovative Insurance Solutions, offered written testimony in support of A.B. 635 (Exhibit F). He noted there were currently over 3,500 captives worldwide with the majority being domiciled in Bermuda and Vermont. The captives provided direct revenue to their domicile through taxes (nearly $10,000,000 to Vermont in 1998) and indirectly through professional jobs and services created by the captive, substantial deposits placed and held by banks within the domicile, and travel, restaurant and entertainment expenditures within the domicile. If A.B. 635 was passed and signed into law, Mr. Duncan would seriously consider moving his captive domicile to Nevada.

Ms. Giunchigliani sought clarification as to whether Mr. Duncan was a captive insurer presently.

Mr. Duncan affirmed her question noting he recently formed an agency rent-a-captive that was located in Bermuda.

Ms. Giunchigliani asked if he was interested in paralleling such action in the State of Nevada so as to be able to function as a captive in the state.

Mr. Duncan again affirmed Ms. Giunchigliani's question.

Ms. Giunchigliani asked Mr. Wadhams if there was anything in the legislation that affected the three-way situation that was coming forward.

Mr. Wadhams explained he illustrated the self-insured groups as being a form of captive insurer that was done several sessions prior. The new legislation would not interfere and might be a complement. The regulation was a different form of regulation and one did not cancel out the other. The excess would be that portion beyond what was required for the minimum satisfaction.

Alice Molasky-Arman, Commissioner of Insurance, Division of Insurance, proposed three amendments to A.B. 635 (Exhibit G). She noted the first proposed amendment was in section 19 on page 4, line 14, where language referred to a "registered" public account as well as a certified public account. The division was not aware of any designation as "registered" and sought the word to be deleted.

The second proposed amendment was in section 21, page 5, lines 5 through 7. She had concerns about the amount allowed for the initial examination of applicants. The bill, as it currently read, stated, "the cost of those services, which must not exceed $2,750 for a pure captive insurer and $5,000 for an association captive insurer, an agency captive insurer, or a rental captive insurer." The division proposed deleting the limits. If the bill was enacted, the division intended to outsource the review of applications. Captive insurers would be a new experience, and she thought those who were reviewing applications needed the sort of expertise demonstrated in other states. Attorneys or accountants could give advice to the commissioner as to whether an applicant should receive the registration or certification. She could not say how much such would cost, and she would not want to limit it. Currently the division was not limited for examinations of applications for a certificate of authority as an insurer. The cost could run from $500 to several thousand dollars. The division did not know the cost until they received the application. She did not believe the division would know with regard to captive insurers as to cost until they saw what sort of applications they received.

The third proposed amendment considered section 25, page 6, where the division would like to insert a phrase stating the letter of credit was "automatically renewable each year unless the issuer gives written notice to the commissioner and the captive insurer at least 90 days before the expiration date." The provision was the same as was in the worker's compensation law for self-insured employers where letters of credit might be acceptable. There were instances where letters of credit had been cancelled or terminated, and it was a great benefit to self-insurers and the division to have notice as to such.

Chairman Buckley noted testimony as to the law regarding captive insurers attracting business to Nevada thus creating an alternative for local businesses who went out of the state or country and perhaps bringing in additional premium tax. She noted such were all positive for the State of Nevada and asked if there was any reason why the enactment of the bill would not be good policy for the state.

Ms. Molasky-Arman said she had an economic development committee who looked at different ways in which the economy could be benefited by the insurance industry. One of the subjects that came up in the forum was the establishment of captive insurers. She was not aware of any downside to captive insurers. It was the sort of industry where experience needed to be developed. Commissioners in other jurisdictions guarded their captive insurer business, and she could not say any of them would be happy if the law was enacted.

Chairman Buckley asked if there were any concerns with the reserve requirements or some of the other statutory provisions that would regulate the industry.

Ms. Molasky-Arman said there were none because of the unique difference between what a captive insurer was and what an ordinary insurer was.

Mr. Humke referenced Exhibit E noting the reference to the 3,665 captive insurers worldwide. He asked what the rate of formation was for such companies.

Ms. Molasky-Arman did not know what the rate of formation was.

Mr. Wadhams explained the number requested by Mr. Humke was a difficult number to estimate with any definitive degree. He would anticipate there would be four or five captive insurers per year that would be attracted to the State of Nevada. He thought the first attraction would be companies who had captives, who brought them back to Nevada.

There being no additional testimony or further questions on A.B. 635, Chairman Buckley closed the public hearing and began the work session with A.B. 193.

Assembly Bill 193: Revises provisions governing use of device for automatic dialing and announcing on telephone. (BDR 52-84)

Vance A. Hughey, Principal Research Analyst, Research Division, Legislative Counsel Bureau, noted there were several amendments proposed and discussed in work session on March 8, 1999. He briefly reviewed the amendments (Exhibit H) and noted the first proposed amendment was to change the time period with which a person could not use an automatic dialing and announcing device.

The second amendment requested by Robert Barengo, representing the Nevada Consumer Finance Association, suggested the definition of a device for automatic dialing and announcing be amended to read as follows, "Incorporates a storage capability of telephone numbers to be called and utilizes a random or sequential number generator producing telephone numbers to be called."

Mr. Barengo also suggested a new provision to the chapter regarding when a person who used a device for automatic dialing and announcing engaged in a deceptive trade practice be made consistent with similar provisions that currently existed in NRS chapter 597.

Barbara Teal Clark, representing the Nevada Parent Teachers Association, submitted the attached memorandum (Exhibit H, Attachment A) in which she proposed adding a provision allowing a school district to use a device for automatic dialing and announcing for purposes other than notification of student attendance.

Mr. Hughey noted during the previous work session on the bill, a question was raised regarding whether the State of Nevada could effectively enforce the provisions of the bill with respect to calls placed to Nevadans from outside the state or calls placed from Nevada to other states. The legal opinion was requested, and Chairman Buckley was in possession of it.

Chairman Buckley explained she was just handed the legal opinion prior to the meeting. The opinion was 16 pages long and stated the widespread use of automatic dialing and unsolicited sales pitches raised concern causing federal and state governments to enact legislation. Nevada was the first state to do so in 1989. Congress followed in 1991 making it unlawful to initiate any telephone call to any residential telephone line unless the call was exempted by rule of the Federal Communications Commission. Undue burden on interstate commerce was considered as well as First Amendment rights, and the conclusion was A.B. 193 would not be any more likely to be held unconstitutional than any other existing statute in the area. Both the federal law and A.B. 193 would get into jeopardy when restrictions appeared to be content based. She read, "the only two other cases where there has been some concern were not limited to commercial purposes unlike" A.B. 193. Chairman Buckley said legal counsel thought the bill would not violate the commerce clause and be held unconstitutional.

Ms. Segerblom said there were about 40 states that had the same type of statute and the language in the California statute was upheld when it was appealed to the Supreme Court.

Mr. Humke said he would be participating, but he might have a conflict due to client activity.

Ms. Giunchigliani noted A.B. 5, regarding the push-pull, was passed during the 69th Session of the Nevada Legislature. She noted there had been no challenge regarding A.B. 5 and A.B. 193 would be segregated and have no impact on A.B. 5.

ASSEMBLYWOMAN GIUNCHIGLIANI MOVED TO AMEND AND DO PASS A.B. 193 REGARDING ITEMS 1 THROUGH 4 ON PAGE 2 AND 3 OF EXHIBIT H.

ASSEMBLYWOMAN EVANS SECONDED THE MOTION.

Chairman Buckley inquired as to whom the bill would cover and if it was limited to commercial activities.

Ms. Segerblom referenced a company who had a contract with a customer and noted if the call was expected the company could automatically call and tell the customer an item was ready.

Chairman Buckley referenced page 2 of A.B. 193, lines 3 and 4, which were to specifically solicit a person called to purchase goods and services. She noted there was an exemption for individuals such as Girl Scouts and said the committee might want to make it clear the issue was commercial only so political activities, First Amendment activities, and other such issues were still protected.

Mr. Parks noted the issue of random or sequential number generators to produce the telephone numbers to be called, and asked if someone had a selected bank of telephone numbers, would such be exempted from the bill.

Chairman Buckley said they would not be incorporated because of the definition.

Mr. Hughey thought the question might call for a legal interpretation, but noted the random or sequential number generator did not seem to include an existing list of telephone numbers that might be called. If there was a standard list of individuals called, he did not think such would be random or sequentially generated but rather an existing list.

THE MOTION CARRIED.

Assembly Bill 476: Provided privilege of confidentiality for certain information obtained during audits of insurers to determine compliance with state and federal law. (BDR 57-1292)

Mr. Hughey noted a letter was received from Roger Bremner, Administrator, Division of Industrial Relations, in which he indicated that on March 31, 1999, Jim Wadhams spoke with John Wiles, Division Counsel, and informed him that A.B. 476 was being withdrawn (Exhibit I).

ASSEMBLYMAN HETTRICK MOVED TO INDEFINITELY POSTPONE A.B. 476.

ASSEMBLYMAN DINI SECONDED THE MOTION.

THE MOTION CARRIED.

Mr. Hughey referenced A.B. 279 on page 3 of Exhibit H.

Assembly Bill 279: Establishes certain rights of lessee of safe-deposit box that is improperly opened. (BDR 55-5).

A.B. 279 was initially heard on March 8, 1999, and there were no amendments proposed.

ASSEMBLYMAN HUMKE MOVED TO DO PASS 279

ASSEMBLYMAN ARBERRY SECONDED THE MOTION.

THE MOTION CARRIED.

Mr. Hettrick voted no.

Assembly Bill 259: Makes various changes concerning State Contractors' Board. (BDR 54-350)

There were several proposed amendments to the bill (Exhibit H, page 2 and 3.) Assemblyman John Lee proposed amending section 5 by changing the word "inspector" to "official."

Irene Porter, Executive Director, Southern Nevada Homebuilders Association, proposed amending section 5 regarding the proposed composition of the State Contractors' Board by adding two additional members who were contractors.

Danny Thompson, representing the Nevada State AFL-CIO, and Jack Jeffrey representing the Southern Nevada Building and Construction Trades Council, proposed the composition of the board remain as it currently existed in statute.

Ms. Porter proposed amending section 5 to allow the chairman of the board to be chosen from among the board's entire membership. Currently in the bill there were some restrictions on who could serve as chairman.

Ms. Porter proposed deleting the new provision in section 10, page 5, lines 9 through 15. The provision required the board provide notices regarding certain disciplinary actions taken by the board to the licensee and each person with whom the board knew the licensee had an uncompleted contract. Ms. Porter indicated such would present a burden to the board.

Chairman Buckley asked Assemblyman John Lee, representing Assembly District 3, to come forward and clarify which of the presented amendments he supported and which he did not support.

Mr. Lee referenced Exhibit J, which were the proposed amendments to A.B. 259. He explained the amendments mirrored many of the complaints of individuals.

Mr. Lee noted section 2 was deleted and jurisdiction for enforcement was left with the district attorney's office.

Section 5 changed the composition of the board to four general contractors, one subcontractor, one architect or engineer, and one representative of the general public. He thought such a composition would better reflect the type of individuals who came before the board. There was some discussion as to the architect or engineer, but he felt strongly about having someone with such a background on the board.

In section 5 on page 2. Mr. Lee wanted lines 36 through 38 deleted to remove the limitation on which member may be chosen as chairman of the board. He was resolved to the fact that anyone the governor put on the board would be a good person and be able to properly chair the board.

Mr. Lee desired the revision of lines 39 through 41, on page 2 to say, "A member shall serve for a term of 4 years or until his successor has been appointed. A member may not serve for more than two consecutive terms of any length."

Mr. Lee noted all of the changes such as "the board shall employ at least one person to receive and facilitate resolutions" shall remain in the bill.

The next change was the deletion of the section of the bill regarding notification of the board's action.

There was also an adjustment to section 11 to provide for staggered terms for the members of the board under the new configuration set forth above so the terms of all members did not expire at the same time.

Mr. Lee said with the changes, the contractors' board was left intact and strong. There was a livable term limit with which those in or out of the industry would be satisfied. Those on the board would be reflective of the individuals who came before it.

Mr. Arberry referenced Exhibit I noting the language stating, "a member shall serve for a term of 4 years or until his successor has been appointed." He further noted the amendment said, "a member may not serve for more than two consecutive terms of any length." Mr. Arberry asked if the board member could serve 4 or 8 years.

Mr. Lee said he had a discussion with Kim Morgan, Chief Deputy, Legislative Counsel Bureau, and noted 8 years was the total length of time. The board members served at the will of the governor. After 8 years a board member had to take a rest; they would not be appointed to another 4 year term. The terms were each 4 years in time.

Chairman Buckley noted the board member would have a term of 4-years and may not serve more than two terms, and the only exception would be if the governor was late with an appointment.

Ms. Giunchigliani said late appointments had been a problem with any governor. At times the governor could not find an appointment, or they had to wait for names to be submitted.

Chairman Buckley said the board was currently made up of seven members, six of whom must be a contractor with an unexpired license, actively engaged for a period of 5 years preceding the appointment, with one member from the general public. She expressed the preceding information was for the purpose of comparing and contrasting the current board with Mr. Lee's most recent amendment.

Mr. Nolan asked Mr. Lee if he had any "buyoff" by the opposition. He then asked if Mr. Lee presented the amendment to the contractors' board or the Office of the Attorney General.

Mr. Lee did not present the information. He worked hard on the issue and thought a little self-praise was better than no praise.

Ms. Giunchigliani noted the attempt at staggering the terms so the individual who had the first term of 2 years could have only one additional 4 year term so the member would be "maxed" at a total of 6.

Mr. Lee said such as described by Ms. Giunchigliani was only until the process got started because at the present time all members quit at the same time, and he did not want to lose all the institutional knowledge.

Ms. Giunchigliani asked if the provision allowed for the staggering of the terms.

Chairman Buckley asked Mr. Lee what his intent was with regard to current board members. She noted one board member who was appointed in 1998, and asked how such an individual would be affected by the bill.

Mr. Lee explained he currently had no problem with anyone on the board. His concern was the length of service time members were on the board. He expected the governor would appoint the best individuals, and if he chose to reappoint the same individuals, he could. Mr. Lee was attempting to provide an opportunity for the governor to choose the best individuals for the board without Mr. Lee telling the governor who to choose.

Chairman Buckley asked Mr. Lee if the bill should be prospective or retroactive in its applicability.

Mr. Lee thought the bill should be retroactive because the governor had not yet made any appointments, and he would be looking at the bill to craft the future.

Chairman Buckley offered an example of the governor choosing not to reappoint an individual asking if someone served only 1 year of their appointment and was not term limited out, would the individual's time start ticking at the present time, all over again, or would it go back for the individual.

Mr. Lee thought the process needed to begin right away. If there was the one odd person, he was sorry.

Chairman Buckley noted Mr. Hughey clarified on the last page of the bill the language said the bill was prospective. Section 11 said, "the term of office for each member beginning July 1, 1999, shall be deemed his first term of office."

Ms. Giunchigliani said the language did not prevent nor cause the governor to appoint the same individuals if they had already been "maxed out." They could have their names resubmitted, but based on the new criteria, the governor could take such into consideration.

Chairman Buckley noted if one of the current board members was not a subcontractor, architect, or an engineer, presumably all would be general contractors or the one representative from the general public.

Ms. Giunchigliani thought such would accomplish some of what Mr. Lee wanted.

Mr. Nolan understood the amendment Mr. Lee brought forward and wondered if it would impact the board in an unanticipated fashion. He noted the presence of Doug Carson, who was a member of the contractors' board and an original opponent to the bill. Mr. Nolan asked if Mr. Carson would come forward and if there was anything in the amendment that helped the board's position.

Chairman Buckley asked Mr. Carson how he felt about the proposed amendments to A.B. 259.

Mr. Carson said there were issues within the amendments that were fairly neutral to the duties of the contractors' board. He thought the composition of the board limited its ability to be effective and noted currently there was a mechanical, electrical, painting, and general contractor on the board, as well as a member of the public. The board drew on the expertise of each individual during certain hearings. Many of the conducted hearings were on what was standard in the industry in so far as workmanship and contracts. He would hate to see the committee dictate the composition of the board; it would be detrimental.

Mr. Perkins referenced the membership of the board and Mr. Lee's suggested composition, which included four general contractors, one subcontractor, one architect or engineer, and one member of the general public. He asked Mr. Carson which members were currently not on the board.

Mr. Carson explained there were two general contractors, a steelwork subcontractor, a mechanical subcontractor, an electrical subcontractor, a painting subcontractor, and one representative from the general public. There was not an architect or engineer. He then noted there were four subcontractors and one general contractor.

Mr. Perkins noted Mr. Carson's comment about drawing from the expertise in different fields and asked how Mr. Lee's amendment would impact the drawing of such expertise if the governor decided not to appoint a contractor in a field such as painting or steel. He noted there were a number of contracting disciplines that were not currently on the board.

Mr. Carson said general contractors had an overall knowledge of the industry, but when the board was presented with issues regarding specific codes in areas such as electrical or mechanical contracting, the expertise of the subcontractors was drawn upon. In the past, the governor's appointments had been structured to fill voids in the expertise on the board. He thought the structure of the board was currently well balanced.

Mr. Perkins asked how many contracting disciplines were not on the board.

Mr. Carson said there were several if he got specific in the trades. The board did not have anyone from ceramic tile and other such craft.

Mr. Perkins noted Mr. Carson's comment about drawing from the expertise of mostly subcontractors, but there were a number of fields not represented on the board, which would cause the board to look elsewhere for information.

Mr. Carson noted individuals who served on the board generally had a long tenure in the industry so there was an overlapping in areas of expertise.

Mr. Humke asked if the board served a quasi-judicial function. Whereby, Mr. Carson affirmed his question. Mr. Humke then noted there were some agencies in state government that when they did not have expertise on the board or commission, they used outside expert witnesses. He asked if the contractors' board ever did such.

Mr. Carson explained in the short period of time he served on the board, he never recalled hiring an outside company to come in and provide expertise.

Mr. Humke noted such might be a funding situation but explained there were so many disciplines in contracting maybe bringing in outside expertise might be something the board had to do. He noted Mr. Carson would not want the legislature to form a board of "39" members.

Mr. Carson said such would be too large and cumbersome.

Ms. Giunchigliani noted general contractors could also have expertise in areas of subcontractors.

Mr. Carson said most did, but not all.

Ms. Giunchigliani said she appreciated the approach being taken. She attempted to do the same in another session and was unsuccessful in changing the makeup of the board, which was overly concentrated with large contractors and not medium or small contractors. She hoped the governor would take into consideration the verity of different sizes of contractors who participated.

Chairman Buckley asked for clarification of Exhibit J section 11. Section 11 in the original bill said anybody who was on the board was off now or off effective June 30, 1999. The amendment suggested staggered terms. There was a competing philosophy of application as to whether it should be applied prospectively or retroactively.

ASSEMBLYMAN PERKINS MOVED TO AMEND AND DO PASS A.B. 259 USING THE AMENDMENTS PRESENTED BY ASSEMBLYMAN LEE IN EXHIBIT J, NOTING HIS PREFERENCE FOR THE BILL LOOKING PROSPECTIVELY AND STILL PROVIDING FOR STAGGERING IF NECESSARY.

ASSEMBLYMAN PARKS SECONDED THE MOTION

Chairman Buckley noted the amendments in Exhibit H and clarified which applied and which did not. She noted amendments 2, 3, and 4 in Exhibit H were supplanted by Exhibit J. Chairman Buckley then noted amendment 1 in Exhibit H was also changed by virtue of Exhibit J.

Chairman Buckley noted she would vote to support the motion noting Mr. Lee's intention was to send a message that a balanced approach needed to be considered. The board needed to look at consumer protection as well as ensuring frivolous claims were disposed of quickly. By applying the law prospectively, the board's new approach was not stopped. She noted the new approach had been much more aggressive and in the best interest of the consumer. There was also concern that while the board was ultimately the "captain of the ship," a lot had to do with those who ran the ship on a day-to- day basis. She thought the public was better served than it had been in the past and desired the good work to continue.

Mr. Hettrick wondered if the proposed amendments were going to clear the fiscal note or if there was still an attached fiscal note.

Chairman Buckley noted there was a $350,000 fiscal note submitted by the Office of the Attorney General that was deleted.

THE MOTION CARRIED.

Mr. Hughey explained A.B. 633.

> **Assembly Bill 633: Makes various changes to provisions concerning contractors. (BDR 54-761).**

Mr. Hughey explained the bill established a program for the issuance of a contractor's license in an expedited manner. The bill also established an inactive status for a contractor's license, increased the amount of fees the board could charge, provided for notification to the board by a surety within
30 days after an action was commenced by or against the surety, provided for service of process and notice of certain actions, and amended certain requirements for a hearing if the board summarily suspended the license of a contractor. He noted there were a number of amendments submitted to the bill by Margi Grein, Executive Officer, State Contractors' Board.

Chairman Buckley asked Ms. Grein to come forward and outline any amendments that were not discussed at the original hearing.

Ms. Grein explained there were a few changes in addition to what was presented in Exhibit H. She pointed out attachment C of Exhibit H was replaced by Exhibit K.

Ms. Grein noted page 3 of Exhibit H, item 1, considered amending A.B. 633 by adding a new subsection to NRS 624.275 to provide for the immediate suspension of a licensee's bond upon payment of a claim by the surety. Her proposed amendment was included as attachment B, and she noted when a claim was paid out on a bond, the board could immediately suspend the license so there was no lapse in protection with the bond amount. If the contractor did not provide another bond, the license would be revoked rather than suspended. If the contractor did comply with the requirements and replenish the bond, the license would be reinstated.

Attachment C of Exhibit H was replaced with Exhibit K and it related to clarification on licensing provisions as far as establishing the monetary license limit and what the determining criteria was.

Ms. Grein noted the board adopted by regulation a provision to address one time raises in license limits, which was the amount a contractor could bid one time on one particular project.

In NRS 624.260, language was included stating "licensee" not just "applicant" to demonstrate experience, knowledge, financial responsibility, and qualifications as needed. Such would allow the board to check a licensee as well as an applicant.

Page 2 of Exhibit K included a proposed amendment to existing provisions in statute concerning experience and knowledge of an applicant or license.

Ms. Grein noted the board asked for a new subsection 5 to NRS 624.260 relating to an applicant's experience and requirements. Currently the law said the applicant had to be a "workman" for 4 years.

The amendment to NRS 624.265 was a language change indicating the requirements were the same for an applicant or a licensed contractor.

Page 3 of Exhibit K noted the board would take into consideration a plea of guilty or no contest where guilt was found. The language did not prohibit anyone from obtaining a license but was part of the criteria used to screen an applicant or licensee. In addition, language stating "misdemeanor" was included. The board also asked consideration be given to a suspended license, which was a technical change.

There were several parts of NRS 624 where the executive officer was referred to as executive director. When the board went through some of their audits, the section was brought forward, and she reworded it to say, "the executive officer, upon receiving such information should take appropriate action." Language stating "as he deems appropriate under the circumstances" was removed, as there should only be one method of handling an action.

Page 4 of Exhibit K allowed for corrective action when the board imposed discipline. The contractor could comply by paying another licensed contractor to do the corrective work. At times, there was "bad blood" between the two parties and the homeowner did not want the contractor on the property.

NRS 624.300, section 1(e) 2, allowed an alternative for corrective action. It might be best for the contractor to reimburse the injured party rather than do the corrective work.

Exhibit K, page 4 requested language be deleted that was included in S.B. 395 in the 1995 Session of the Nevada Legislature. The language prohibited the board from taking disciplinary action regarding a constructional defect during the period in which a claim that arose out of the defect was being settled, mediated, or otherwise resolved. The board did not follow chapter 40 as far as the definition of construction defect. There were times when a contractor would state they could not be disciplined because they were in mediation. The section delayed the board's ability to take action if a violation was found.

Page 5 of Exhibit K, subsection 6 (b) of NRS 624.300 said the board could recover the cost of their investigation if there was a stipulated settlement or agreement.

Subsection 7 of NRS 624.300 was added indicating failure of a licensee to pay a fine within 30 days of the date of assessment was cause for disciplinary action.

Ms. Grein referenced NRS 624.3011 and noted the provision relating to constructional defects was removed because the board did not have such a term in their law.

Subsection 2 of NRS 624.3011 said, "the board shall not require the contractor to obtain that permit more than 90 days after the construction is completed." No one knew why the language was in the law as it made no sense. The board wanted a contractor to have a building permit whether it was 90 days or not.

On page 6 of Exhibit K provisions were added under disciplinary action, which included:

- "Failure to comply with requirements for contracts for construction of residential pools required by Nevada Administrative Code (NAC) 624.695 through 624.697." Ms. Grein noted the board adopted regulations in August of 1997 to address situations with pools, and the board would like to have a provision where they could penalize a contractor for failure to comply with the requirements.
- Language stating "securing a license by fraud, deceit, or misrepresentation of a material fact or omitting to state a material fact" might be repetitive, but it was a little clearer than NRS 624.3014.
- Subversion of licensing exams was to prohibit or regulate those who were falsely taking the exam or taking the exam on behalf of another.
- In 1997, a provision was put into the law stating all contractors must provide homeowners with a notice to owner's statement, which was developed by regulation. The board would like to have a clause for discipline for failure to give a notice required by NRS 624.321.

Chairman Buckley asked what was in the proposed amendments that the committee did not hear at the original hearing.

Ms. Grein said at the original hearing there was general discussion on discipline, qualifications, and background checks. Specifically grounds for discipline for pool contractors or subversion of licensing exams were not

discussed. She said such related to qualifications and background but were not specifically addressed. She asked if the Chairman would like her to amend the bill in the Senate.

Chairman Buckley would not like that; the committee wanted to be presented with the entire bill at the first hearing. She noted it was very confusing to be working off of three documents. The committee preferred to have all of the amendments at least 48 hours in advance to allow research staff the ability to analyze and organize information.

Speaker Dini indicated he would like a mockup bill so as to view all of the information in final bill form.

Ms. Grein asked Chairman Buckley if she wanted her to put A.B. 633 together with A.B. 634 as the issues were similar.

Chairman Buckley wanted to see the entire bill and did not want it to deviate from the original version. She noted people not having an opportunity to present testimony if the mock bill deviated from the original.

Chairman Buckley asked if there was anyone in the audience who would like to comment on the amendments on A.B. 633.

Irene Porter, Executive Director, Southern Nevada Home Builders, noted she just saw the amendments to A.B. 633 so it was difficult to comment on specifics. She would like to take the next 24-hours to review the amendments.

Chairman Buckley said the bill would be on the work session for Wednesday and asked Ms. Grein to provide a mockup draft of the bill to Mr. Hughey no later than noon the next day with no additional amendments than what had been presented.

Chairman Buckley asked Mr. Hughey to present A.B. 634.

Assembly Bill 634: Makes various changes to provisions governing contractors. (BDR 54-762)

Mr. Hughey noted A.B. 634 provided for the establishment of a special investigations unit within the State Contractors' Board and expanded grounds for disciplinary action against a contractor. The bill authorized a special investigator or the executive officer to issue written citations under certain circumstances, authorized the board to impose administrative fines for violations of various provisions, and provided a process for contesting the issuance of a written citation. In addition, the bill amended various provisions concerning construction fraud, required certain persons to submit fingerprints to the board, amended provisions governing advertising, and provided a penalty. Mr. Hughey noted the proposed amendments to the bill (Exhibit H), which were proposed by Assemblyman Hettrick, Assemblyman Perkins, and Margi Grein of the State Contractors' Board. Mr. Hughey said some of the proposals were similar to those previously discussed in A.B. 633.

Chairman Buckley asked Ms. Grein what amendments she proposed for A.B. 634.

Ms. Grein said the board addressed all of the committee concerns. She noted the board changed the fingerprinting language from "shall" to "may," which was what they originally requested.

Ms. Grein said the board had an investigations department, and they were separating criminal investigations from licensee investigations. She explained the board clarified administrative citations versus criminal citations and noted there were two types of issues, which they would be citing; the criminal unlicensed versus licensed contractors. The purpose was to find a better means of achieving resolution for homeowners. By clarifying and separating the two departments, the board would be able to focus on licensed and unlicensed contractors.

George Lyford, Director, Special Investigations, State Contractors Board, noted the board's proposed amendments reflected changes recommended by the committee.

Chairman Buckley referenced Exhibit L and asked if it was shared with anyone. Whereby Mr. Lyford noted it had not been shared.

Chairman Buckley asked if anyone in attendance had any concerns with the amendments presented in A.B. 634.

There were no comments and Chairman Buckley noted the committee could do the same with A.B. 634 as they did with A.B. 633, which was to have the newly amended amendments merged with the others so as to have one final mockup on the bill with which to take action. She pointed out the difficulty of working with so many different documents and asked the board to present a mockup of A.B. 634 with all proposed amendments to Mr. Hughey by noon the next day so he could prepare it for Wednesday's work session.

Chairman Buckley pointed out there were some bills appearing to not have much committee support during the original hearings. She told sponsors she did not plan to set a bill for work session unless they indicated concerns had been worked out or they talked to eight members of the committee and believed there was a consensus. Chairman Buckley noted A.B. 433 was one such bill (Exhibit M).

> **Assembly Bill 433: Clarifies exemption for certain governmental entities from certain provisions.**

Ms. Evans explained she was concerned about quality and standards, but at the same time she was empathetic to circumstances unique to very small jurisdictions. She asked that last minute issues be cleared up and A.B. 433 be put on the next work session document.

Chairman Buckley noted Ms. Evans' suggestion to bring A.B. 433 back on the work session to enable the committee time to consider the issues. Mr. Perkins seconded the suggestion. She asked the committee to review the amendment and the committee would vote on the bill on Wednesday.

> **Assembly Bill 636: Establishes account from which certain owners of single-family residences may recover actual damages suffered as result of inadequate service by licensed contractor. (BDR 54-1404)**

Mr. Hughey explained there were a number of proposed amendments to A.B. 636 (Exhibit H) and noted Chairman Buckley proposed items 1 through
12 as amendments to A.B. 636.

Chairman Buckley noted all of the amendments, with the exception of the amendment considering the funding mechanism, were presented at the original hearing. It was clear to her there were problems with "shoddy" construction in southern Nevada. She noted there were problems with the judicial system, and there were a small number of contractors giving a bad name to good contractors. There were also problems with the contracting system whereby the bond was not sufficient to pay the consumer.

Chairman Buckley noted she had a proposed amendment on the funding mechanism. In the first hearing, she suggested a flat amount of $600. There was confusion about whether the amount would apply to residential contractors or subcontractors. She had two competing proposals for committee consideration. The first was to make both versions applicable to residential contractors, not subcontractors. A residential contractor with a license limit of less than $100,000 would have an assessment of $200. A license limit of less than $500,000 would have an assessment of $400, and a license limit of more than $500,000 would have an assessment of $600. There was a staggered fee scale for implementation.

The second version also applied only to residential contractors and would be funded out of receipts deposited from a 5 cent per square foot surcharge on building permits. The surcharge for the recovery fund would be based on a total square footage of building permits. She thought it made sense not to affect small businesses to the same extent as very large businesses. Chairman Buckley was open to either proposal. It was her contention the recovery system was pathetic and consumers often received nothing. She wanted to prevent individuals from

going to court, as small cases could not afford the costs and consumers were then forced to contend with faulty work.

Mr. Hettrick preferred the second of the two options as far as the funding mechanism was concerned. He considered it to be the fairer of the two. Mr. Hettrick noted a $100,000 bond would cover very few homes and stated few would then pay the $200 fee. Most contractors would pay $400, and the cap was only $600. There was a problem with a contractor who had a license limit of under $500,000 who built two houses per year and then a contractor with a license limit of over $500,000 building 150 houses per year. He thought the mechanism should be on square footage so smaller businesses did not get "burned."

Chairman Buckley thought language should be added stating "in no event could it exceed" and as a further protection place a cap.

Mr. Hettrick addressed the "cap" and noted a contractor who built a greater number of houses would have greater opportunity for problems than a small business. He thought the 5 cents per foot was equal for all.

Mr. Humke asked if the original version of the bill had a recovery fund taxing mechanism, and if so, was it still in the bill pursuant to the amendments.

Chairman Buckley noted the original bill had a $600 dollar assessment, which was discussed being removed and replaced with a staggered mechanism based on the amount of business generated by a company.

Mr. Humke thought he recalled there could be an additional assessment by the contractors' board.

Chairman Buckley said such was out of the bill.

Mr. Hettrick asked if the 5 cents per square foot surcharge was currently collected. He inquired if they were discussing removing a portion of the funding that was going somewhere from the 5 cents and if so where the money went.

Chairman Buckley said she received all of the figures on the building permits from the contractors' board, and asked Ms. Grein to come forward and discuss the board's current actions.

Ms. Grein said the figures were a rough estimate and noted some of the counties did not respond, and to her knowledge there was not a current surcharge.

Chairman Buckley noted the assessment would be a 5 cent surcharge, and instead of using the current bonding system, an assessment mechanism would be used to create a recovery fund for victimized consumers.

Mr. Hettrick noted the amount would be 5 cents per building permit based on the square footage of the permit and would be assessed quarterly. He assumed each contractor's total permits would be quarterly polled, summed up, and multiplied times .05.

Ms. Grein affirmed his comment and said in some of the smaller counties, permits might not be issued so the board would not be able to assess such individuals.

Chairman Buckley said one of the reasons she liked the first version rather than

the second was the first version allowed for stability, planning, and caps. Based on Ms. Grein's knowledge of the numbers, Chairman Buckley asked her to tell the committee what an average new builder would pay with the surcharge and contrast a small, medium and large contractors. She did not what to charge more than necessary to protect the consumer.

Ms. Grein did not have such information.

Chairman Buckley asked Mr. Carson, a member of the contractors' board, to come forward. She asked how the second funding mechanism would affect a small, medium, and large contractor.

Mr. Carson said the average home was about 1,800 square feet. The amount would be $90. He noted they were going to attempt to have building departments collect the fee for the board but was unsure if such would be successful. The assessment was more equitable than any other they could come up with because the assessment was based on square footage.

Chairman Buckley explained if they estimated the amount necessary would be $600 per residential contractor, the mechanism might raise more money than needed.

Mr. Carson agreed. There needed to be a means to fluctuate, and a cap may be necessary. The figure might be reduced. The board did not want to take in any more money than necessary. He noted the bill needed to be fine-tuned.

Chairman Buckley asked if lowering the amount below 5 cents would be better or placing cap on the amount.

Mr. Carson said the board would need additional time to go through the numbers. They were guessing at the average square footage, and some of the counties did not report.

Chairman Buckley asked that A.B. 636 also be held until the next work session to allow time for a better statement of the facts and figures.

Mr. Dini noted some counties did not have building permits and asked how many did not. He noted a contractor could build in such a county for nothing because there was no way of enforcing the requirement.

Chairman Buckley thought such an issue might bring the committee back to the first option. She noted the genesis of the bill was problems in Clark County, but it also did not mean they did not want to look at an effective mechanism statewide.

Chairman Buckley noted the work session was complete and she opened the hearing on A.B. 675.

Assembly Bill 675: Revises provisions relating to hazardous materials.

(BDR 40- 808)

John Sande, representing the Nevada Bankers Association, introduced Alan Rabkin, Senior Vice President, SierraWest Bank, and explained there were two bills pending on the subject matter contained in A.B. 675. There were many parcels held by lenders within the state that were in various forms of contaminated status, and lenders were not willing to foreclose on those parcels of land. Federal and state statutes caused a lender to be fully liable for the cost of property cleanup, even though at the time the lender took the collateral, they did not know the property was contaminated. He also noted the property could have become contaminated after the time the lender took the collateral. Lenders faced a situation where a commercial piece of property was contaminated, and they had to decide whether to proceed with foreclosure thereby incurring liability for cleanup, or not foreclosing on the property and allowing the borrower to proceed with the default and not pay taxes. The property went into a hiatus state, and at such a point, there was no productive value for the property. Another option was to allow the lender to go into district court and declare the property contaminated which would only accomplish an elimination of the collateral held by the lender and allow the lender to proceed on the unsecured note. In order to get over the hurdle, the lender must show the property was substantially contaminated and had a majority of its worth "eaten up" by contamination.

Mr. Rabkin proposed another solution, which was to free up various parcels of property and allow them to be freely traded, sold, and eventually cleaned up. A.B. 675 stated those who caused the contamination would remain responsible under current statutes. His concern was for innocent lenders who lent on property, which they probably ran a phase one examination and got the borrower to certify that the property was free of

contamination, took their collateral, and then something happened. Those types of lenders, whether they were private or bank lenders were the ones he was discussing.

The proposed remedy was allowing the bank or private lender to proceed to foreclose on their property and have a shielded status after a 20-day notice to the state agency charged with the environmental aspects of the property. The lender would not be responsible for cleanup. Mr. Rabkin noted the lender would be able to freely transfer the property in its contaminated state. If the lender transferred the property, other state laws required the lender disclose the contaminated status so they could not transfer the property to another innocent person. The lender would have all their rights, under current statute, to go against the prior owner who caused the contamination to help rectify the problem, proceed to resell the property, or at the foreclosure, allow a bid to be larger than the banks bid. The lender could then sell the property to a third- party who would buffer into their bid the fact there was contamination, but also know they would not be personally liable for the cleanup. The new buyer would probably buy the property with an eye towards cleaning it up and ultimately getting recompense from the prior, potentially responsible parties, who contaminated the property.

A.B. 675 allowed for a freer transferability of the property onto the next level of purchasers who had an interest in working with the prior owners and working with the property to clean it up. Because the maximum amount was buffered into the bid that would be required to repair the contamination on the property, the bidder was already 90 percent home free because the equity was already in the property to start the remediation. Such would serve the state's interest, which was to clean up the property. Lenders were uncomfortable with going to district court to prove contamination because of the expense, and not willing to foreclose and be unlimitedly responsible for cleanup. Another option was needed to move the properties, and through the bill, an option was proposed.

Mr. Rabkin noted a bill in the Committee on Natural Resources that attempted to address the problem but from a different angle. The other bill created a regulatory framework within the Nevada Division of Environmental Protection. Anyone interested in participating in a cleanup would present plans and pay fees in order to seek approval from the agency to go ahead and do the work.

His concern with the other bill was banks did not like to add additional expense onto their liquidation costs and did not like to jump through additional hoops to liquidate collateral they innocently took. In addition, he was not sure it was necessary to involve additional state regulation and cost in the area. Mr. Rabkin was not discussing relieving anyone of responsibility; he was discussing innocent lenders and successors being recognized for being the innocent purchasers. The bill asked that the innocent lenders be allowed to transfer the property without stepping into the liability of prior parties.

Chairman Buckley asked if the bill conflicted with federal law.

Mr. Rabkin stated during the past 5 years, there had been several federal statutes giving banks a similar protection. The law was a secured lender protection. If the lender had a certain innocent status, under federal law, they might be exempt from federal statute. It was not inconsistent, but he could not say A.B. 675 was an identical mirror of the federal law. The federal statutes mainly considered issues such as clean water or clean air. A.B. 675 considered the issue of real estate. They were looking at the issue as a secured lender and not as relieving anyone of contamination to water or air.

Chairman Buckley said the bill went beyond an innocent lender. Someone who would be immune would be someone who could clean the property or if someone purchased the property at a foreclosure, other than the bank, then no one was liable.

Mr. Rabkin agreed and noted the real bottleneck was at the point of the secured lender's decision to foreclose or not, which was what he was attempting to address with the bill. Unless a subsequent transferee was provided immunity, it would be worthless for the bank to have immunity because the bank, by law, could not retain the property; they must move the property as real estate owned (REO). Ultimately the property would end up in the hands of a successor transferee who was assumed to be innocent. Just in case the transferee was not innocent, the bill included relief noting the transferee would lose their immunity should they participate in subsequent or prior contamination.

Chairman Buckley said the situation was difficult because if someone was cited for a environmental violation, they would let the bank take the property back if the cost was astronomically high. At such a point, the bank could then transfer the property without cleaning it up and without liability.

Mr. Rabkin said in the transaction mentioned by Chairman Buckley, the borrower who contaminated the property would not lose any responsibility they had to the state or to the bank in the subsequent transfers. They would be liable. There was no gain in allowing the bank to take property back. Subsequent transferees were going to price the property knowing they might never get recompense from prior responsible parties, and they would bid low at the bank sale knowing there was a prior borrower who might be able to help pay for cleanup. At least the bank could move some of the equity in the property, and have recourse to sue the borrower on the note.

Ms. Evans asked if it was an easy matter to determine who contaminated the property.

Mr. Rabkin said it depended on the facts and on the type of contamination. In a typical contaminated site scenario, it was easy to determine who contaminated the property. Typically the situation involved hydrocarbons, gasoline products, or dry cleaning solvents, and it was easy to identify who operated in and around the property and who caused the concern. Remediation specialists were getting better at identifying the source. They drew maps showing plumes and where the gradient was based upon slope. In other types of contamination, there were certain areas that had a certain mineral content caused by mining operations. In those situations or if a property sat on a huge pool of groundwater, it became difficult to determine source, but it could be done at a great cost. The type of contamination determined if it was easy or hard.

Ms. Evans considered that over a period of years and after a property changed hands a number of times, it might be difficult to identify a responsible party. While she was sympathetic to the "innocent lender," she was concerned about the ultimate mitigation of the contamination. She thought the issue could continue to cycle for awhile thus not dealing with the problem.

Mr. Rabkin thought such was the case under current statutes. Banks were uncomfortable becoming involved in such property, and unless the banks moved on the collateral, nothing happened to it. The property could not be liquidated, no one would buy it, the bank did not foreclose on the property, and the borrower did nothing to the property. Probably the borrower was under some sort of order or investigation by federal or state authorities because of certain mandatory reporting that had to be done by remediation companies. When a bank found out there was a problem, they usually sent their own remediaiton specialist who usually had an obligation to report the problem to the state or Federal Government. At such a point, the property would end up sitting. Mr. Rabkin said they were attempting to find a reasonable solution to put the property into productive use without eliminating the state's rights or anyone's rights against the contaminators.

Mr. Dini referenced mine tailings in the Comstock area. He noted a superfund cleanup of about a dozen lots where the soil had to be cleaned up. Another example was a mine in Yerington, for which ARCO could not get permits until they agreed to cleanup the property. Now the plumes from the water were going out over 2 miles and contaminating wells surrounding the property.
Mr. Dini understood without the legislation the property would probably not get cleaned up unless there was a superfund status, which he thought was defunct with the Federal Government.

Mr. Rabkin did not speak to the issue of the ultimate cost of cleanup. His main concern was private and bank lenders not knowing they were stepping into a problem and then finding themselves in the scenario. The situation was difficult for the lenders, and he was attempting to correct it.

Allen Biaggi, Administrator, Nevada Division of Environmental Protection, introduced Doug Zimmerman, Chief, Bureau of Corrective Actions, and William Frey, Deputy Attorney General, Division of Environmental Protection. Mr. Biaggi offered written testimony in opposition to A.B. 675 (Exhibit N). He noted the division understood the concerns outlined by industry and the difficulty within the situation. However, the division believed A.B. 675 addressed only one component of the concerns at an environmentally contaminated site; that of the liability of a property owner or lender but did not address actual site cleanup. Without addressing the

critical cleanup component, the bill forced the state and Federal Government into a role of funding cleanup efforts at some sites with environmental contamination.

Mr. Hettrick understood there were no easy answers to the problems. He referenced Mr. Biaggi's comment about forcing the state to pay for the cleanup of a site, but the opposite was also true. If the law was not changed, the lender, who had nothing to do with the problem, was forced to pay for the cleanup. It was not fair to either party. He thought the parties needed to get together and make the situation fairer for all.

The bank would only take the property back with immunity, and if the bank did not take the property back with immunity, the property would be in limbo. Property taxes would not be paid and nothing would happen with regard to contamination. Mr. Hettrick thought the situation would be better off by adding immunity if there was some startup for cleanup and agreed with Mr. Rabkin that the buyer was definitely going to buy the property at a reduced price. The buyer was not going to take a risk of paying top dollar for a property and then have to pay for cleanup.

Mr. Biaggi noted page 6, section 18, of S.B. 363 addressed the exact concerns of Mr. Rabkin and Mr. Sande. The senate bill recognized the need for the immunity provisions. He noted a concern with A.B. 675 was immunity could continue on to subsequent purchasers. He was concerned about inducement to ensure cleanup did occur. If everyone continued to get immunity, there would be no incentive for cleanup.

Mr. Beers asked if the bank failed to foreclose, would the property be left in its current state. He inquired as to a means of forcing the bank to take responsibility for cleanup, assuming the owner of the property was unable to do so.

Mr. Frey explained there was no means of forcing a lender to cleanup property. There was no state statute that provided such authority and there was no lender liability even if the lender foreclosed. Lender liability came into existence typically when the lender became involved in the day to day operations of the property owner. Then the actions of the property owner could be imputed back to the lender.

He noted what usually happened was the new purchaser purchased the property at a discount knowing that as an owner they would be obligated to cleanup the property. If the new purchaser had no incentive to cleanup, there would be no discount on the price. The lender would be assured of getting their money back because the price would not be discounted. He explained the new lender would own a piece of property knowing it was contaminated, but such did not matter because they did not have to clean it up. It could be assumed the first owner stopped making payments on the property, and he assumed the state or local government would be "stuck" with the cleanup.

Mr. Beers said the choices were to do nothing with the property and allow the bank to contend with the loan or look into some mechanism to breathe life back into the land hopefully making it economically viable. Hopefully some portion of the economic viability could be used to cleanup the property.

Mr. Frey affirmed Mr. Beers' statement. There was an incentive for the lender to breathe life back into the property and such was expressed in S.B. 363.

Joseph Johnson, representative of the Toiyabe Chapter of the Sierra Club, noted he was a professional geologist and licensed as a registered geologist in the State of California. He said there was a "catch-22" problem and noted a situation where a small family operation had a contaminate. The family might have high net-worth, but the net-worth was in land. The family had no cash to cleanup the contaminate. The family could not go to the bank for a loan, as the bank would not loan on the property because it was contaminated. He noted S.B. 363 addressed some of those issues. By the time the responsible party was faced with a foreclosure, the party may have zeroed out on the property in net worth. The bank took over, and under A.B. 675, the property was released of any responsibility for cleanup, which left the state with the responsibility. Such was the problem with the bill as it was written.

He noted federal statutes partially addressed the issue on liability to lending institutions. S.B. 363 gave some immunity to those who made cleanup efforts so the value residual in the property went at least partially, or maybe even exclusively, to cleanup. S.B. 363 also allowed for a situation where the property did not have to be cleaned up to absolute purity, but could be cleaned up for a future industrial site. There were also recorded restrictions so it would not cost so much to cleanup the property. A.B. 675 was considered a "get out of jail free" bill that would ultimately transfer cost to the state. The problem was real and needed to be addressed but not the way the bill handled it.

There being no further testimony or additional questions, acting Chairman Dini closed the hearing on A.B. 675 and opened the hearing on A.B. 680.

Assembly Bill 680: Makes various changes to provisions relating to insurance. (BDR 57-651)

Alice Molasky-Arman, Commissioner, Division of Insurance, introduced Sharon M. Weaver, Health Insurance Portability and Accountability (HIPPA) Section, Division of Insurance. She noted A.B. 680 was the division's omnibus bill. She referenced Exhibit O, which was a summary of the bill. Exhibit O also contained two amendments proposed by the division to address a drafting problem, a deletion, and a consolidated list of proposals that were going to be introduced by members of the public or the industry. The proposals were not amendments proposed by the division. Ms. Molasky-Arman reviewed the amendments and did not have a problem with them.

A.B. 680 primarily addressed and strengthened third-party administrator laws and addressed changes in HIPPA, which was enacted in 1997. The division needed amendments to the act in order to conform to federal regulations and statutes.

Section 1 indicated when a licensee voluntarily surrendered their license they could not void or terminate the commissioner's authority. There had been situations where disciplinary action was initiated and the licensee attempted to terminate or surrender their license. There was an artificial process where the division refused to allow the licensee to surrender their license as they thought it was important to carryout the disciplinary process. It was important to other states, and under federal law, there was a great effort to review the misconduct of certain licensees under the insurance codes.

Section 2 amended Nevada Revised Statutes (NRS) 679B.190, which was the general provision regarding confidential records within the Division of Insurance. The primary purpose of the proposal was to distinguish investigations and those documents related to investigations from documents related to examinations. The provision was in NRS 679B.230 and followed a nationwide standard. The examinations needed to be removed from NRS 679B.190.

Section 3 amended NRS 679B.440, which was a cost stabilization provision. Cost stabilization allowed for a report to the legislature February 1 of every legislative year. The report indicated the state of the casualty market, which included automobile insurance, medical malpractice insurance, and other professional liability insurance. The provision proposed to add worker's compensation, which was also a casualty line of insurance. The division's report already referred to worker's compensation, but the division wanted it included so it was very clear it was also a study the division would be continuing.

Section 4 was related to sections 27 and 29.

Section 5 was intended to exempt a domestic insurer that did no business in another state from reporting risk-based capital to the division. The language in the bill was incorrect and was corrected in Exhibit O, on page 3. The amendment would address a change affecting the division's intent. Risk-based capital reporting was very expensive and required by all states.

Section 6 began the provisions regarding third-party administrators. The division's awareness that a change was necessary in third party administrator requirements and provisions was heightened because of L and H Administrators, which was the third party administrator for the state health benefit plan. L and H Administrators

was not the first third-party administrator with which the state had problems. The division realized the laws, with respect to reviewing applications, were not sufficiently strong enough, which was why the measures in A.B. 680 were being proposed.

Sections 8 through 11 were definitional.

Section 12 gave the basis for revocation for a third-party administrator license including financial conditions, unfair practices, refusal to be examined, claims delay, or claims refusal. There was also clarification that a $2000 per act or violation fine would be imposed for violation.

Section 13 addressed the application process and required certain financial and internal corporate documents that the division would review prior to registering or licensing a third-party administrator. The section also required a business plan and gave greater insight into who was the manager and who was in control of a third-party administrator. With respect to L and H Administrators, the division had no idea that when the third-party administrator was licensed its principal was already under investigation in the state of Illinois. The division did not have the ability to go beyond the corporate articles of incorporation.

Section 14 consisted of grounds for refusal to license a third-party administrator.

Section 15 addressed renewal of a license every 3 years.

Section 16 required the submission of annual financial statements from a third party administrator.

Section 17 added the provision regarding the administration of an internal service fund under NRS 287.010. The chapter currently required that for a health insurance plan of a political subdivision or public entity the commissioner review the third-party administrator contract for reasonableness of fees. There was nothing currently in the statute that related to internal service funds.

Section 18 was technical and deleted certain requirements because of new requirements.

Section 19 amended NRS 683A.0857 to increase the bond required of a third party administrator from $50,000 to $100,000. Such would provide a larger fund for the benefit of any person, including an employer, employee, insurer, or any other person who was harmed by an administrator.

Section 20 amended NRS 683A.086 regarding the written agreement between an insurer and a third party administrator and required notice to the commissioner for termination of services specified under the agreement.

Sections 21 and 22 were primarily cleanup.

Section 23 amended NRS 683A.0877 regarding financial obligations of a third-party administrator. It clarified their role as a fiduciary with respect to the accounts set up for premiums and claims and emphasized the accounts must be segregated.

Section 24 was also cleanup.

Chairman Buckley asked the committee if they desired the Commissioner of Insurance to explain all 69 sections of the bill or open the meeting to specific questions on the sections. The committee indicated they preferred specific questions, and Chairman Buckley referenced section 46, which indicated no member, agent, or employee of the board may be held liable in a civil action. She asked what the purpose of the section was and why the sovereignty immunity cap was not good enough.

Ms. Molasky-Arman explained the section referred to the HIPPA reinsurance board, which was made up of volunteers. The volunteers were members of the industry and the public. She understood they served for no compensation and had no immunity, which was the purpose of the provision.

Chairman Buckley asked what were the duties of a reinsurance board member.

Ms. Molasky-Arman noted board members managed the reinsurance pool and the program for reinsurance. They received the same monies to which state employees were entitled for reimbursement.

Mr. Hettrick referenced Exhibit O, page 9, which said "second liens upon unencumbered real property located in this or another state." He did not know how there could be a second lien on unencumbered real property. He thought the word unencumbered should be removed.

Ms. Molasky-Arman noted the language was proposed by the industry, and she preferred they addressed the issue themselves.

Chairman Buckley asked Ms. Molasky-Arman if she would submit her comments in writing so as to be included in the legislative record.

Ms. Molasky-Arman noted Exhibit P, which was a summary of A.B. 680.

Chairman Buckley noticed the HIPPA rate was reduced, which would help many consumers.

Ms. Weaver explained for individual eligible persons under the HIPPA program, the division was proposing a rate reduction. Through a recent program memorandum, the Federal Government indicated the industry-contemplated rates of a maximum of 200 percent spread off of their most preferred rate. There were abuses showing up to 500 to 600 percent. The division proposed to drop the rates below the 200 percent threshold to get below the referenced federal limit. The net affect would be 162.5 percent from the most preferred rate. In the individual market, the impact was very small. It affected just eligible persons, not everyone who applied.

Bob Crowell, representing Farmers Insurance, referenced Exhibit O, pages 4 and 5 which said, "This does not prohibit a nonresident licensee from being named to the license of a resident agent or resident broker if the nonresident licensee's primary place of business for transaction insurance is in Nevada and he can verify to the commissioner that his primary residence is within 50 miles of the boundary of the state of Nevada." A Nevada corporation licensed as an agent or broker could not hire a nonresident of Nevada to work for them, which became a problem in areas next to the state line. The new language did not prohibit a nonresident licensee from such if they had the consent of the commissioner and were within 50 miles of the state line. The language was an accommodation for those who lived across the state line.

Chairman Buckley said the committee was hesitant to add nongermane amendments to bills because of close committee deadlines. She asked Mr. Crowell from where the amendment came and why it was not in his own bill.

Mr. Crowell said it was under NRS 683A.140, which was germane. He noted there was no section that considered the issue, but the chapter was there. It was not a major piece of legislation, but he did believe it to be germane.

Robert Barengo, representing Western Insurance, introduced Dick L. Rottman, Chief Executive Officer, Western Insurance. He stated Mr. Rottman would explain the amendments in Exhibit O, starting on page 6.

Mr. Rottman said the amendments considered the investment chapter of the insurance code and amounted to several liberalizations in the section of the code. The chapter had not been amended since 1971, and there were some areas where some investment vehicles and concepts had changed over the years. The amendments were an attempt to allow domestic insurers to earn more on their assets.

Chairman Buckley noted she did not like changing major public policy in the last week of deadlines since no one in the public had a chance to comment on the changes. She asked why the last minute nature of the request.

Mr. Rottman said given the constraints and time, such was the best they could do. He noted the changes were not major nor would they impact the public to any extent. He respectfully requested the committee give the amendments consideration, as it would help their business particularly in the area of declining interest rates.

Mr. Barengo explained the general public would not look at the particular section of the insurance code in question because it considered the regulatory codes for domestic insurance companies. The code only applied to how the company invested its assets and not what a company was doing in so far as selling insurance policies. The amendments would not have an effect on the general public.

Mr. Dini said if the company invested and went broke, the policyholder was stuck. He noted the prudent man rule was used for investing in retirement systems and the State Industrial Insurance System, and asked if the amendments followed such a rule. Mr. Dini then noted the increase from
10 percent to 35 percent.

Mr. Rottman explained the amount looked like a large increase, but the way preferred stock issues were put out, if one was not in a position to take a larger share, one would miss out and could not take advantage. When the section of the insurance code was added in 1971, there was no domestic industry and no one paid any attention to what was put in the chapter, including himself as insurance commissioner at the time. Currently there was some liberalization needed. The changes did follow, in his judgment, the prudent man rule.

Mr. Dini referenced page 8 of Exhibit O and asked why "by the Federal Deposit Insurance Corporation" was deleted.

Mr. Rottman explained the deletion was because there were other insuring mechanisms available.

Mr. Barengo noted the Federal Savings and Loan Insurance Corporation.

Matthew Sharp representing Nevada Trial Lawyers Association explained Exhibit O, page 12. He noted the amendment was concurred with the Division of Insurance and was part of the original bill. There were typographical errors and the first stated "Amend section 57, page 38, line 34" instead of line 41. In addition, they would be amending section "57, page 38, after subsection 1, deleting lines 36 through 42 and inserting the language." What the amendment did was provide the insurance company with the ability, under limited circumstances, to obtain a release. It gave the claimant, who had given the insurance company a medical record release, the ability to obtain the medical records the insurance company received.

Mr. Sharp noted section 57, page 39, lines 6 through 10 would be deleted, which was the provision giving the Commissioner of Insurance the authority to contact the state bar.

Section 66 would be deleted, and the medical malpractice-screening panel would be left as it was. Mr. Sharp noted the membership limitations would also be the same.

Chairman Buckley asked if his amendments were to the original bill rather than amendments to the amendments.

Mr. Sharp answered affirmatively.

As there were no additional questions and no further testimony, Chairman Buckley closed the hearing and adjourned the meeting at 7:50 p.m.

RESPECTFULLY SUBMITTED:

Jane Baughman,

Committee Secretary

APPROVED BY:

Assemblywoman Barbara Buckley, Chairman

DATE:

ASSEMBLY AGENDA

for the

Committee on Commerce and Labor

Day Monday Date April 5, 1999 Time 3:45 PM Room 3142

A.B. 635 Provides for regulation of captive insurers. (BDR 57-1329)

A.B. 673 Provides for regulation of service contracts. (BDR 57-1673)

A.B. 675 Revises provisions relating to hazardous materials. (BDR 40-808)

A.B. 680 Makes various changes to provisions relating to insurance. (BDR 57-651)

Matters continued from a previous meeting.

Committee introductions.

Work session on measures previously considered.

EXHIBIT 2

Minutes of the Assembly Committee on Commerce and Labor, 76th Session, February 25, 2011

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Minutes of the Assembly Committee on Commerce and Labor, 76th Session, February 25, 2011

MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON COMMERCE AND LABOR

Seventy-Sixth Session
February 25, 2011

The Committee on Commerce and Labor was called to order by Chair Kelvin Atkinson at 11:58 a.m. on Friday, February 25, 2011, in Room 4100 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 Kelvin Atkinson, Chair
Assemblyman Marcus Conklin, Vice Chair
Assemblywoman Irene Bustamante Adams
Assemblywoman Maggie Carlton
Assemblyman Richard (Skip) Daly
Assemblyman John Ellison
Assemblyman Ed A. Goedhart
Assemblyman Tom Grady
Assemblyman Cresent Hardy
Assemblyman Pat Hickey
Assemblyman William C. Horne
Assemblywoman Marilyn K. Kirkpatrick
Assemblyman Kelly Kite
Assemblyman John Oceguera
Assemblyman James Ohrenschall
Assemblyman Tick Segerblom

COMMITTEE MEMBERS ABSENT:

None

GUEST LEGISLATORS PRESENT:

None

STAFF MEMBERS PRESENT:

Marji Paslov Thomas, Committee Policy Analyst
Sara Partida, Committee Counsel
Andrew Diss, Committee Manager
Earlene Miller, Committee Secretary
Sally Stoner, Committee Assistant

OTHERS PRESENT:

Brett J. Barratt, Commissioner of Insurance, Division of Insurance, Department of Business and Industry
Karen Z. Schutter, Executive Director, Interstate Insurance Product Regulation Commission, Washington, D.C.
Fred L. Hillerby, representing the American Council of Life Insurers
C. Joseph Guild III, representing State Farm Insurance
John Mangan, Regional Vice President, American Council of Life Insurers, Washington, D.C.
Jack H. Kim, representing United Health Group
Helen Foley, representing National Association of Professional Employer Organizations
Tim Tucker, Vice President, Government Affairs, National Association of Professional Employer Organizations, Alexandria, Virginia
Jeanette K. Belz, representing the Property Casualty Insurers Association of America
Marie D. Holt, Chief Insurance Examiner, Property and Casualty Section, Division of Insurance, Department of Business and Industry
Lisa Foster, representing American Family Insurance, Allstate Insurance, and St. Mary's Health Plans
James L. Wadhams, representing Nevada Independent Insurance Agents, American Insurance Association, Anthem Blue Cross and Blue Shield, Nevada Association of Health Underwriters, Nevada Association of Insurance and Financial Advisors, and Nevada Surplus Lines Association
Matthew Sharp, Board Member, Nevada Justice Association

Chair Atkinson:
[The roll was taken, and a quorum was present.] We have two bill draft requests for introduction today.

BDR 54-1016 — Revises provisions concerning the disbursement of escrow money in real estate transactions. (Later introduced as Assembly Bill 214.)

ASSEMBLYMAN OHRENSCHALL MOVED FOR COMMITTEE INTRODUCTION OF BDR 54-1016.

ASSEMBLYMAN CONKLIN SECONDED THE MOTION.

THE MOTION PASSED. (ASSEMBLYMEN HORNE, KIRKPATRICK, AND OCEGUERA WERE ABSENT FOR THE VOTE.)

BDR 58-593 — Revises provisions governing public utilities. (Later introduced as Assembly Bill 215.)

ASSEMBLYMAN CONKLIN MOVED FOR COMMITTEE INTRODUCTION OF BDR 58-593.

ASSEMBLYWOMAN CARLTON SECONDED THE MOTION.

THE MOTION PASSED. (ASSEMBLYMEN HORNE, KIRKPATRICK, AND OCEGUERA WERE ABSENT FOR THE VOTE.)

We will put those bills on our agenda. I want to remind members that if you voted in favor of introduction of the bill draft request, it does not indicate that you are voting for the bill.

Assembly Bill 23: Enacts the Interstate Insurance Product Regulation Compact. (BDR 57-473)

Brett J. Barratt, Commissioner of Insurance, Division of Insurance, Department of Business and Industry:
Assembly Bill 23 adds a new chapter to Title 57 of the *Nevada Revised Statutes* and enacts the Interstate Insurance Product Regulation Compact. A compact is an agreement between states to cooperate on a multistate or national issue while retaining state control. Compacts are specifically mentioned in the *U.S. Constitution,* and this Compact provides an excellent alternative to federal regulation in the area of insurance. The mission of this Compact is to promote and protect consumers while developing a streamlined review process of specific insurance products under uniform standards that the member states develop. The Compact currently has jurisdiction over four types of insurance. These are asset-type product lines—life insurance, annuities, disability income,

and long-term care insurance. In an increasingly mobile society, these types of products often travel with consumers as they move across state lines and through their lives. These products are not generally as sensitive to local costs and conditions as products such as automobile and health insurance.

The Compact is funded by insurers who pay filing fees and an annual registration fee to the Compact. There is no fiscal impact on state budgets. Insurers continue to pay state filing fees in addition to the Compact fees. The Compact includes one member from each of the member states and is designed to facilitate transparency and accountability. The activities of the Compact are governed by bylaws, rules, and procedures that have been developed through extensive consultations with the member states, state legislators, consumer advocates, and industry representatives. The meetings of the Compact are required to be open to the public except in very limited situations which are detailed in the bylaws.

The process of setting uniform standards is conducted through a collaborative, comprehensive public notice and comment procedure that allows all interested parties the opportunity to provide input. Another important feature of the Compact is its voluntary nature. If product standards created by the Compact are not adequate, states can opt out of the standards. These features promote a consensus-based approach to decision making, which should produce higher product standards to benefit consumers across all states in exchange for an effective single point of contact for filing for insurers.

I am proposing an amendment today that will require Nevada to opt out of any uniform standard that provides a lower level of consumer protection than is currently available under Nevada law. I believe it is important to include the higher level of assurance to Nevada consumers. We are going to continue to protect our consumers if a Compact standard is lower than what Nevada's current law requires. I propose that we opt out of the long-term care uniform standard because I believe it has been mispriced for many years and that we should retain control in Nevada until we see how that product line develops in the next couple of years.

The Compact was created in 2004 and could not become operational until at least 26 states joined or if its members had 40 percent of the national premium. In May 2006 the Compact reached both of those thresholds. As of today, the Compact has been adopted by 38 states or jurisdictions and represents more than two-thirds of the premium volume nationwide. I provided a map (Exhibit C) that shows the states in the Compact, the states not in the Compact, and the three states that are considering Compact legislation. Nevada, New York, and Oregon are considering Compact legislation. I have reviewed the Compact

uniform standards and found them to be detailed, objective, thorough, and generally comparable to Nevada law. In some areas, the uniform standards set a higher bar than Nevada's current laws. This will benefit Nevada because the Division will be better able to leverage our limited resources by focusing our staff's attention on higher-level tasks and on active participation as a member of the Compact's board. With expanded regulatory oversight required by health care reform, any resources we are able to free because of the Compact can be redeployed to health care reform and implementation. Nevada will retain its authority to regulate companies and protect our consumers without encroachment upon our sovereignty or our solvency oversight and market surveillance programs. Nevada will be in control of its participation in the activities of the Compact and can opt out of any new standard by regulation under certain conditions. Nevada can enact legislation to opt out of any standard for any reason and can opt out of the Compact if that is the Legislature's desire.

The Compact benefits the insurance industry by having a single clearinghouse for product filings using uniform standards nationwide. It will permit an insurer to have a product available in each Compact member state with a single filing. This greatly reduces the cost and time insurers have to spend in the current state-by-state approval process. The industry would see a much quicker turnaround and approval of products, which would allow new products to be available faster to consumers.

I do not expect any fiscal impact to the State of Nevada if this bill passes and Nevada joins the Compact. There is no downside for consumers. By reducing costs for the insurers, the marketplace should be more competitive with new products available faster to consumers. Nevada will have to participate in the activities of the Compact, including development of the uniform standards and monitoring the product filings to ensure that we agree with the decisions of the Compact and that the interests of Nevada consumers are well served. There will be a cost to insurers. In addition to the state filing fees that they are now paying, they will also have to pay Compact filing and registration fees. This additional cost is more than offset by the savings in production and time costs resulting from having to file in only one location for each of their products. It is efficient for the marketplace.

Chair Atkinson:
Are there any questions from the Committee?

Assemblyman Hardy:
In Article VII, section 5, it gives us only 10 days to opt out. How do we deal with that if we only have a 120-day legislative session? Is that something the Division does, or how will that affect us?

Brett J. Barratt:
With me today is Ms. Karen Schutter, the Executive Director of the Compact, who will answer technical questions.

Karen Z. Schutter, Executive Director, Interstate Insurance Product Regulation Commission, Washington, D.C.:
Our membership includes 38 states. There are two ways to opt out to preserve the sovereignty of the state. A state's legislature has the ability to opt out at any time and does not have the 10-day requirement. The 10 days language applies to opting out by regulation. The state's department of insurance would have the ability to opt out of a uniform standard. Our rulemaking process is very detailed and transparent, and there are many opportunities to participate. Our members are the ones who drive the Compact. There is a protection before you get to the opt out period. Before a uniform standard can be adopted, it must be approved by at least two-thirds of the Commission members. If the state still feels the uniform standard is below its standard, it can opt out on the rulemaking side. By then it will know that it will be doing it. That is where the 10-day notice occurs. If you opt out by regulation, the department commences its regulation making process under the state's administrative procedure act. There are two forms of opt out, and the legislative opt out is unrestricted.

Chair Atkinson:
Are there any other questions from the Committee?

Brett Barratt:
Section 2 of the bill matches, without any modifications, the language of the Compact. Because this is a Compact and essentially a contract between states, the language needs to stay consistent from state to state to ensure its effectiveness. Articles III through VI are about the duties, powers, and organizational structure that govern the Compact. Article VII provides that member states may have the option to opt out of the uniform standard either by regulation or legislation. The state legislature retains the ultimate authority to enter into or withdraw from the Compact as well as to opt out of standards at any time. I recognize that I am not the policy maker here. I am the person who implements the policies that the Legislature passes. The Compact is your tool as well as mine.

Article VIII addresses public access to the records of the Compact and maintains the state's responsibility for market regulation and enforcement. Article X provides that a product approved by the Compact is automatically approved for sale in the member states. It addresses all public information access to information received by the Compact. Article XII discusses the financing of the Compact. Essentially the Compact is financed by insurers who must pay the Compact's annual registration fee, filing fees, and the state's existing filing fees. There will be no decline in revenue to the State of Nevada. Section 3 of the bill designates the Commissioner of Insurance as Nevada's representative to the Compact. The Compact has eight positions available for state legislators to participate. Generally, the participants are members of the National Conference of State Legislators (NCSL) or the National Conference of Insurance Legislators (NCOIL). Even though Nevada is not a member of NCOIL, I was assured by Ms. Schutter it would not preclude Nevada's participation on the legislative group that sits on the board of the Compact.

I have two amendments to the Compact language (Exhibit D). The first is that Nevada will opt out of the long-term care insurance product standards upon adoption of this act. The Division recently adopted regulation R028-10, which becomes effective on October 1, 2011. This regulation contains many protections that are not afforded to consumers under our current standards. The second change requires Nevada to opt out of the Compact's uniform standard if the standard fails to provide the same level of protection to consumers as current Nevada law. I do not anticipate ever needing to exercise this provision, but I believe it is an important placeholder to ensure that we continue to maintain a high level of protection for consumers and that we can continue to be proactive in protecting our consumers' interests consistent with the law.

I believe that A.B. 23 is good for Nevada. It is good for consumers, the state, and the insurance industry. It is a win-win. Nevada consumers will benefit from having timely access to innovative products while continuing to have their problems addressed quickly and locally at the state level. The Insurance Division will be better able to leverage our regulatory resources and expertise to help create high national standards, including strong consumer protections. By creating a central clearinghouse to receive, review, and approve these asset-based insurance products, the Compact will improve speed to market for insurers by creating a single point of contact for filing new and innovative insurance asset-based products that will ultimately result in reduced expenses for insurers and, I hope, lower premiums.

Chair Atkinson:
Are there any questions from the Committee?

Assemblyman Conklin:
Is it correct that consumers have problems with their products and we need to retain total control to resolve those problems?

Brett Barratt:
That is correct. The consumers call our offices in Nevada, and we resolve their complaints locally, at the state level.

Assemblyman Conklin:
Will current regulations retain their position or take a second seat to any regulation brought forth by the Interstate Compact Commission?

Brett Barratt:
They would take a second seat to the regulations of the Compact unless the Compact standards are lower than current Nevada standards. Then the Nevada standards would prevail.

Assemblyman Conklin:
We would always have the opportunity to tighten our standards through regulation, but not weaken the standards below the Compact's standards. The Compact would create a regulatory floor.

Brett Barratt:
That is correct.

Assemblyman Conklin:
What are the asset-based products besides life insurance and disability insurance?

Brett Barratt:
They are annuities and long-term care insurance. These are products which people have for life or for many years.

Assemblyman Conklin:
The Compact does not regulate auto, health, homeowners, or professional liability insurance.

Brett Barratt:
Only life insurance products are long-term asset-based products. It is possible that the Compact may change in the future. At this point it is focused, and I do not know if there is any desire to extend its lines.

Assemblyman Conklin:
Where does the Compact stand regarding the Nevada regulations on issues such as viatical settlements, where the policy owner sells a life insurance policy before it matures?

Brett Barratt:
Viatical settlements would be outside of the jurisdiction of the Compact.

Assemblyman Conklin:
The settlement law itself is something that the Legislature would exclusively regulate even though it is a life insurance product.

Brett Barratt:
That is correct.

Assemblyman Conklin:
The life insurance industry is trying to address the issue of retained asset accounts. What is the Compact's position on that issue?

Brett Barratt:
I will have the Executive Director of the Compact address that.

Karen Schutter:
The retained assets accounts are also outside of the Compact. The Compact has a very limited jurisdiction in the asset-based arena. Retained asset accounts occur when a beneficiary is involved, so it is outside of the Compact jurisdiction, as are settlement issues. All market regulations regarding how products are sold or underwritten, or how claims are administered, are still under Nevada regulation.

Assemblyman Conklin:
Are there other Compacts for other consumer products that are a model for this Compact?

Karen Schutter:
Our Compact is the first in the insurance area. There are several compacts, including a compact for the collection of sales and use taxes. Our Compact was modeled on the adult and juvenile offender compacts, which have similar provisions. Most states are participating in those compacts. Many of the key provisions are similar.

Chair Atkinson:
Are there any questions from the Committee?

Assemblywoman Bustamante Adams:
What is the fee for the dues to this Compact? Who would be the Nevada representative to the Compact?

Brett Barratt:
The Commissioner of Insurance would represent the State of Nevada as a member of the Compact. The dues would not be paid by the State of Nevada, but are charged to the insurers that utilize the services of the Compact.

Assemblyman Hardy:
Can you interpret Article V, section 2?

Brett Barratt:
Article V, section 2 is the organization of the Compact board, including who serves and in what capacity.

Karen Schutter:
All members are voting members of the Commission. Any action regarding adoption of uniform standards or rules needs Commission action. The Compact also creates a management committee similar to other compacts. Our Compact has a 14-member committee and was developed with consideration of the large and small states and different dynamics to make sure all states have representation. The Management Committee has six automatic members from the six states with the largest premium volume. Four states with 2 percent of premium volume or less are designated by geographical zones, and that would include Nevada. Nevada would be in the western zone and would have an opportunity to participate on the Management Committee. The State of Washington is our current western zone member on the Management Committee. Another safeguard regarding the uniform standards is that an issue cannot be heard by the Commission without a two-thirds vote of the Management Committee.

Assemblywoman Carlton:
Will the Compact recognize that we are a part-time legislature and allow our Legislative Commission to make those decisions and not the whole body?

Karen Schutter:
It is legislative action. In most states the legislature works closely with the department, and the department can also exercise its regulatory opt out if the legislature is not in session. There is another safeguard in the Compact, that once a uniform standard is adopted, it takes about 10 days to publish it, and it is not effective until 90 days after the date of publication. It is called "promulgation" in the statute. So there are at least 100 days between adoption

and becoming effective for the legislature to take action and the department to commence its regulatory making process. There is also an ability for the department to request a stay of effectiveness of the uniform standard while it is pursuing an opt out. To date we have had almost 70 uniform standards adopted, of which no state has opted out by legislation or by regulation. We have two other states that have opted out of long-term care by legislation and another which is pursuing an opt out by regulation. The process is working particularly in the area of long-term care.

Assemblywoman Carlton:
If the Insurance Commissioner can give us a comfort level that it can be done in 120 days, I do not see a problem.

Brett Barratt:
The fastest we usually complete a regulation is 45 days. We try to complete them in 60 days, so I am very comfortable that we will be able to do it in that period of time.

Assemblyman Conklin:
Have you spoken with the Governor or the Governor's staff regarding the executive order creating a moratorium on regulation?

Brett Barratt:
I have not spoken to the Governor and would have to apply to the Governor's Office for an exception to the executive order in the event that we need it during the period that the executive order is in effect.

Assemblywoman Carlton:
Would it be acceptable to the Compact if we gave the Commissioner the authority to adopt these regulations within statute, so he and the state will be protected?

Brett Barratt:
We will ask Ms. Schutter if we could add a regulation to the Compact language to give the Commissioner the ability to opt out in the event there is a statement with which we do not agree.

Karen Schutter:
My initial reaction would be yes, because it puts the obligation on the Commissioner and not on the other members of the Compact. It is similar to the proposed amendment, which puts an obligation on the Commissioner if any uniform standard is adopted that is below Nevada standards. He has the onus to opt out.

Chair Atkinson:
Are there any questions from the Committee? I see none. Is there anyone wishing to testify in favor of A.B. 23?

Fred L. Hillerby, representing the American Council of Life Insurers:
We are in strong support of A.B. 23 and to have Nevada join the Compact. Our companies provide life insurance, annuities, disability income, and long-term care. This bill is very important to us. Most of our members are national companies, and their products are sold in almost every state. We had to go state by state to have products approved. It delays consumers' access to the market and to products. It delays opportunities for our agents and brokers to sell new and innovative products because of their delay to the market.

We would prefer that the Commissioner be in the Compact and test it before deciding to opt out on long-term care. There are national standards for long-term care and we think we would be better served to include it. We support the second amendment, which gives the Commissioner the option to opt out if it is discovered that our citizens are put in jeopardy. He has the option to opt out. We would rather see Nevada get into the Compact and see how it operates before we opt out.

C. Joseph Guild III, representing State Farm Insurance:
We are in support of A.B. 23.

Chair Atkinson:
Is there anyone to speak in support of this bill in Las Vegas?

John Mangan, Regional Vice President, American Council of Life Insurers, Washington, D.C.:
Mr. Hillerby is our representative and has described our strong support of the bill. I want to reiterate our strong support on behalf of our 300 members who do business in Nevada. I would like to compliment the Commissioner on his strong approach to consumer protection. Passing this bill will get products to market faster, which means more sales for agents and brokers in Nevada. Most of our agents and brokers are small businesspeople, and this is good for their business. The more products we sell will create more revenue for the state from premium tax. We would prefer to see the state become a member of the Compact with respect to long-term care products. I think the standards for those products are, in some cases, stronger at the Compact level because of the experience other states have had. We are supportive of the second amendment proposed.

Chair Atkinson:
Are there any questions from the Committee? I see none. Is there anyone else wishing to speak in favor of this bill? Is there anyone to speak in opposition? Is there anyone to speak from a neutral position?

Assemblywoman Carlton:
To make a decision about long-term care, we need to get the regulation from the Commissioner so we can compare it to the Compact.

Chair Atkinson:
If the Commissioner can get that to me, I will distribute it to the Committee members. Are there any other questions or comments on A.B. 23? Seeing none, we will close the hearing on A.B. 23 and open the hearing on Assembly Bill 74.

Assembly Bill 74: Revises various provisions relating to the regulation of the insurance industry. (BDR 57-472)

Brett J. Barratt, Commissioner of Insurance, Division of Insurance, Department of Business and Industry:
Assembly Bill 74 is the Insurance Division's omnibus bill. I have provided an overview of the major areas of the bill (Exhibit E). This bill was developed in April 2010 and was distributed to the industry through meetings of the Commissioner's advisory committees, such as the Life and Health Advisory Committee, the Property and Casualty Advisory Committee, the Licensing Advisory Committee, and the Captive Insurance Advisory Committee. The bill has been heard, and concerns have been expressed.

The first area is the External Review Model Act. When a consumer of health insurance has an issue with a health insurer, the consumer has the right to go through an internal review process with the insurer. Once the consumer exhausts that internal review process, Nevada has a system for external review of the claim. That process takes place under the Governor's Office for Consumer Health Assistance (OCHA). The enactment of the Patient Protection and Affordable Care Act (PPACA) requires the states to do one of two things in regard to external review. We need to adopt either the National Association of Insurance Commissioners (NAIC) model or the Department of Labor model. If we do neither or do not meet the threshold of the NAIC model, the federal government will take over our external review mechanism. Because this bill was written in April, the commissioners have changed. One of the amendments I am presenting (Exhibit F) leaves the external review with OCHA. They have the people, including medical professionals, necessary to do external reviews. The amendments leave the external review there instead of moving it to the

Division of Insurance. These standards also apply to the Public Employees' Benefits Program (PEBP). The Center for Economic Justice has an issue with the federally mandated external review, which says the determination is final for both the consumer and the insurer. Certainly, people can still litigate after that final determination, but I am hesitant to change from the NAIC model and risk not being compliant.

The next topic is the group health rate regulation. The Division of Insurance reviews and has prior approval for all health maintenance organizations (HMO). With preferred provider organizations (PPO) the Division of Insurance has authority only to review individual policies. We do not have authority to oversee their group policies. This change would give us the authority to establish a rate review process for large group PPOs, which is a consumer protection. The State of Nevada applied for federal grants to enhance our rate review process. We received $1 million, and that program is functioning in Nevada. Giving us more authority would not cost the state anything because we can continue to apply for this federal grant for five years. Yesterday, the federal government announced that it had an additional $200 million available for this type of review opportunity for the states.

The next area is long-term care insurance. The amendments allow for the marketing of long-term care products in combination with other life insurance policies. Many insurance products, especially life insurance, continue to be more complex. This will allow insurers to combine product types into one policy. It preserves consumer protections in every way and allows the marketing of these products. The change would be consistent with what is in the Interstate Insurance Product Regulation Compact. This bill contains some consumer protection enhancements for annuities and life insurance. It aligns our laws with the national standards set forth by the Compact. We add consumer protection by providing a 10-day review and return policy for annuities. Current law does not provide for a "free look period" for annuity products. The bill allows a 10-day "free look period" for life insurance products which we have also been applying to annuities. There is a proposal in the bill to provide a 30-day review period for a new annuity contract or life insurance policy when replacing another policy. If the product is not what the consumer wants, he can return the contract and not lose any money or be locked into the policy. It strengthens consumer protection. Annuity policies usually take 10, 15, or 20 years to mature. There are surrender charges to an annuity before it fully matures. With this amendment, we clarify the language and the definitions of those surrender penalties.

The next topic is the credit/extraordinary life events exemption. Because of the high unemployment rate in Nevada, home foreclosures, and the economic

difficulties that we all face, there is a provision in our bill based on a National Conference of Insurance Legislators (NCOIL) model to give our consumers a break regarding the use of credit scoring. If there is a life event over which the consumer has no control, such as death, loss of job, divorce, or serious illness, he can contact the insurance company and explain that one of these extraordinary life events has occurred. The insurer is then precluded from using credit scoring in the insurance rating model to determine its insurance rate. It is a consumer protection based on a NCOIL model. Some insurers in Nevada already have voluntarily implemented these exemptions for extraordinary life circumstances because they recognize our economic situation.

The next area relates to evidence of insurance cards. It allows for proof of insurance of fleet cars without having individual vehicle identification numbers. It makes business more efficient when dealing with fleets.

The next section deals with manufactured home valuation. Nevada law indicates that owners of manufactured homes are offered a policy that is a market value policy. The proposed change is to require insurers to offer replacement value coverage. The insured has the option of accepting the offer or requesting lesser or restricted coverage for a lower premium. We are not taking away any consumer rights, but are giving them options to purchase a more comprehensive policy.

The next section allows insurers to transact insurance-related business electronically with consumers. This does not mean that the insurance company can automatically start doing transactions electronically. Under the Uniform Electronic Transactions Act Code, there has to be an agreement with the consumer to accept electronic processes. It also allows for electronic transactions in the surplus lines area.

The next section allows fingerprints submitted with an application to sell, solicit, or negotiate insurance to be submitted electronically. This is an opportunity to enhance our efficiency.

Service contracts by definition are not insurance, and they do not pay premium tax. The Division of Insurance regulates them. In the last year, we have had four service contract companies go insolvent. They are companies in other states that are doing business in Nevada. Nevada law states that to do business as a service contract provider in this state, you must post a $25,000 deposit or bond. If the company becomes insolvent, we would use that money quickly. The Division of Insurance is not set up to administer and handle claims for service contract entities. These provisions give the Division more authority to suspend, limit, or revoke a service contract license. It also

requires enhanced financial backing to limit the insolvencies. Solvency is enhanced because either the service contract company must have a contractual liability insurance policy or the company, or its parent, must maintain a net worth of $100 million in stockholder equity. This will protect Nevada consumers because the company will be able to pay the benefit the consumer has purchased to cover items such as a vehicle or washer and dryer.

Nevada is a leader in the captive insurers market. Captive insurers are a special kind of insurer created by the federal government. Many other states are getting into the captive insurers market. Two provisions relate to captive insurers. The first clarifies that when calculating dividends based on capital and surplus, captive insurers must use certain statutes in the Insurance Holding Company System Regulatory Act. The second part updates the format used by captive insurers to submit their required reports. It would allow for fining in the amount of $100 per day, of captive insurers who fail to file their financial reports in a timely manner.

I have some cleanups, clarifications, and amendments (Exhibit F) which I will explain. The first clarification updates the definition of a qualified actuary. It clarifies that a qualified actuary can sign an applicable statement of actuarial opinion across all lines. Current law is vague and makes it look as if it is allowed only for life insurance. The producer lines of authority adopt additional portions of the NAIC Uniform Licensing Standards Model Act. This is important because states must have reciprocity and it helps us to be consistent with other states.

The next section concerns adjuster licensing. We had a law in Nevada which said only residents of Nevada can adjust claims. My predecessor, Commissioner Kipper, was sued over that law. The Division and the State of Nevada lost. The U.S. District Court in Las Vegas declared that Nevada's law violated the privileges and immunities clause of the *U.S. Constitution* because it did not allow fair trade. We are updating our adjuster licensing laws to conform to the federal court decision.

The change related to the Nevada Insurance Guaranty Association, which applies to property and casualty insurers, clarifies that a member of that group is an "authorized insurer."

In regard to the viatical settlement, we want to add the word "provider" as it applies to proof of required financial responsibility to the language adopted in 2009 in Senate Bill No. 426 of the 75th Session.

The change for countersignature is the result of another federal court case in which our countersignature requirement was struck down as being in violation of the *U.S. Constitution*. Therefore, we need to amend our countersignature blank for a surety bond template to eliminate "resident."

Under holding companies, this adopts additional changes from the model law. The 2000 NAIC model law read "the greater of" and our statute as approved stated "the lesser of." This will make it consistent with the model law, and the way we calculate dividends to our domestic insurance companies will not be changed in any way. It changes the definition of what are extraordinary and ordinary dividends. Our intent is not to change the way we calculate dividends, but we want to make our law consistent with other laws to help insurers do business across state lines.

Risk retention groups are a type of captive insurer. The Liability Risk Retention Act of 1986 states that to be insured by a risk retention group, you have to be a member of that group. This clarifies Nevada law and is consistent with federal law.

Medical discount plans file their paperwork on their anniversary. This would change the law so they would file their annual renewal paperwork on March 1 of each year, which is consistent with the other companies we regulate. It will help us with our efficiency and tracking.

The employee leasing companies change is consistent with the Nevada Supreme Court decision that Nevada cannot define an Employment Retirement Income Security Act (ERISA) term or a federal term with Nevada law. I know that the National Association of Professional Employer Organizations (NAPEO) has a proposed amendment to this language, and I have no objection to that amendment.

The last section is proposed amendments. The first changes language to clarify that qualified actuaries can sign actuarial opinions for all lines of insurance. The second proposes to return the responsibility for the independent external review process to the Governor's Office for Consumer Health Assistance. The next amendment proposes to amend *Nevada Revised Statutes* (NRS) 683A.261. This is a licensing statute to correctly reference the term "guaranteed asset protection." It is a technical change from "guaranteed auto protection." The next change amends the definition of "casualty" to include "surety," which was omitted in the drafting process. With regards to surplus lines in NRS Chapter 685A, we wanted to make changes to start collecting multistate revenue on surplus lines exposures. Then the Dodd-Frank Wall Street Reform and Consumer Protection Act came out, and based on that the Division of Insurance

wants some changes which will be addressed in a separate bill, but we wanted put the surplus lines language back the way it was.

Chair Atkinson:
Are there any questions from the Committee?

Assemblyman Conklin:
For many sessions, we have had a division's omnibus bill, which covers many issues in one bill. If there is a way to bifurcate the bill so that it deals with minimal or related issues, it helps because you may not lose a whole body of changes because someone did not understand one piece. It also allows people to share the work. Omnibus bills take a lot of time and effort to understand how the whole thing fits together and what all of the changes are. If you could break that apart, you will probably have greater success.

Chair Atkinson:
Is there anyone else wishing to testify in favor of A.B. 74?

Jack H. Kim, representing United Health Group:
I have submitted a proposed amendment (Exhibit G). It is a friendly amendment and the Commissioner has helped me work on it. Under state law, two affiliated insurance companies cannot do certain functions for each other without getting an additional license. We propose to add language to indicate that if you are an affiliated insurance company, you would not be required to be defined as an administrator and would not have to get an additional license. There are no issues of solvency or consumer protection because both entities are regulated by the state.

Chair Atkinson:
Are there any questions from the Committee? I see none.

Helen Foley, representing National Association of Professional Employer Organizations:
We have an amendment (Exhibit H) to section 128 on page 92. We have worked closely with the Insurance Commissioner and his staff, and they are in agreement. We support the concept of section 128 to clarify that employee leasing companies cannot be self-insured. We believe there was an unintended consequence in drafting. Employee leasing companies provide fully insured benefit plans to their employees and are in the large group market. We want to maintain that. The proposed amendment does that.

Tim Tucker, Vice President, Government Affairs, National Association of Professional Employer Organizations, Alexandria, Virginia:
I would like to thank the Commissioner and his staff for working with us on this amendment.

C. Joseph Guild III, representing State Farm Insurance:
I received a proposed amendment today that I did not have the opportunity to forward to the Committee or to discuss with the Commissioner, but I will do so. It refers to sections 16 and 17. The way the bill is written, it imposes a personal liability on adjusters. In section 17, on page 18, line 19 of the bill, it states that an adjuster is "any person who, for compensation as an independent contractor. . . investigates and settles. . .. " State Farm has its own employee adjusters, but occasionally its independent agents might adjust a small claim. Our proposal would be to add an exemption in section 17 for an agent of a company who occasionally adjusts a small claim. I will provide the information.

Chair Atkinson:
Are there any questions from the Committee? I see none.

Jeanette K. Belz, representing the Property Casualty Insurers Association of America:
We submitted a letter of support (Exhibit I). We are in favor of section 30, which is the extraordinary life circumstances as it was adopted by NCOIL. It helps in catastrophic events and also applies to military personnel deployed overseas. We will continue to meet with the Commissioner regarding our concerns about the section on manufactured homes.

Chair Atkinson:
Are there any questions from the Committee?

Assemblyman Ellison:
Most units are now on permanent foundations. How will this affect those?

Marie D. Holt, Chief Insurance Examiner, Property and Casualty Section, Division of Insurance, Department of Business and Industry:
You are correct in your understanding that when a manufactured housing unit is placed on a foundation, it would be real property, and a manufactured home owner's policy can be written for that unit. That is where the replacement cost endorsement would be used.

Lisa Foster, representing American Family Insurance, Allstate Insurance, and St. Mary's Health Plans:
All of the companies I represent are in favor of this bill. American Family Insurance has had concerns about the manufactured housing part of the bill and will be working with the Commissioner.

James L. Wadhams, representing Nevada Independent Insurance Agents, American Insurance Association, Anthem Blue Cross and Blue Shield, Nevada Association of Health Underwriters, Nevada Association of Insurance and Financial Advisors, and Nevada Surplus Lines Association:
We are in support of this bill and would like to review the mock-up as the Committee moves toward the work session with the amendments that are being considered.

Chair Atkinson:
Are there any questions from the Committee? I see none. Is there anyone to speak in opposition to A.B. 74?

Matthew Sharp, Board Member, Nevada Justice Association:
We are in opposition to the changes that have been made regarding the external review process, which is contained in sections 71 through 112. Our opposition is that this bill significantly takes away existing consumer rights. As I understand the requirements from the federal government, there need to be minimum standards that each state is free to provide benefits in addition to the minimum standards, no different than the Uniform Building Code for contractors has minimum standards. There is nothing preventing a contractor from providing greater standards than the Uniform Building Code provides.

The whole process, which is included in NRS Chapter 695G, was something in which former Speaker Barbara Buckley was heavily involved. A series of issues resulted from that. One concern is the application of the term "medical necessity" and the other was the responsibility of both the external review organization and the insurance company. These review processes take place in situations where the insurance companies tell the insured that what their doctor is recommending is not medically necessary. These typically involve life and death situations where people are deprived of transplants or necessary surgeries. If the review is beneficial to the insured, it is binding on the insurance company, and if it is not favorable to the insured, the insurance company has the option to disregard what the review organization says. The reason this exists is that one of the things bought by the premium is a fair investigation from an insurance company. This bill would change the law so if the independent review organization says something is not medically necessary, both the insured and the insurance company are bound. Effectively, you have

taken away a consumer right. If the independent review organization makes a mistake, and it happens, the reviewer has extensive immunity. The insured has no way of holding anybody accountable. I do not think that is the intent of the federal law.

This bill is confusing as to what constitutes medical necessity and what should be reviewed. It is very slanted against the consumer. When you are a consumer asking for a decision for medical necessity, you are working with your treating physician. The physician is not being paid to argue with the insurance company. The insurance company people are paid to do these reviews. They have more time and resources. This bill will put the consumer in a very difficult situation when he is in a dispute over medical necessity. I do not think that is the intent of the federal law. Nobody has demonstrated to me in discussions from the Commissioner's Office that anybody has gone through our existing statutes to compare them to the required minimum standards to see where we are deficient, if at all. I think passing these changes would be very detrimental to the consumer.

Chair Atkinson:
Are there any questions from the Committee? I see none. Is there anyone else in opposition? Is there anyone to testify from a neutral position? I see none. I am going to ask the Division to work with Assemblywoman Carlton, Assemblywoman Bustamante Adams, and Mr. Sharp and bring this back to the Committee. Are there any other questions or comments on A.B. 74? [There were none.] We will close the hearing on A.B. 74. Is there any public comment or anything else to come before the Committee? [There was none.]

The meeting is adjourned [at 1:31 p.m.].

RESPECTFULLY SUBMITTED:

_____
Earlene Miller
Committee Secretary

APPROVED BY:

_____
Assemblyman Kelvin Atkinson, Chair

DATE: _____

EXHIBITS

Committee Name: Committee on Commerce and Labor

Date: February 25, 2011 **Time of Meeting:** 11:58 a.m.

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster
A.B.23	C	Brett Barratt	Map
A.B.23	D	Brett Barratt	Proposed Amendments
A.B.74	E	Brett Barratt	PowerPoint
A.B.74	F	Brett Barratt	Proposed Amendments
A.B.74	G	Jack Kim	Proposed Amendment
A.B.74	H	Helen Foley	Proposed Amendment
A.B.74	I	Jeanette Belz	Letter of Support

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Attorneys for the Division of Insurance

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

HOME WARRANTY ADMINISTRATOR OF NEVADA, INC., dba CHOICE HOME WARRANTY, a Nevada corporation, Petitioner, vs. STATE OF NEVADA, DEPARTMENT OF BUSINESS AND INDUSTRY – DIVISION OF INSURANCE, a Nevada administrative agency Respondent.	Case No. 17 OC 00269 1B Dept. No. 1

RESPONDENT'S STATEMENT OF LEGISLATIVE HISTORY OF NRS 690C.325

Respondent, Department of Business and Industry, Division of Insurance ("Division") through its counsel, Nevada Attorney General AARON D, FORD, Deputy Attorney General RICHARD YIEN, and Senior Deputy Attorney General JOANNA GRIGORIEV, hereby files its statement of legislative history as requested by the Court on November 5, 2019. In 2011, as part of the Division's omnibus bill AB 74, the Division introduced changes to the provisions of chapter 690C to allow the Commissioner more authority over service contract providers and more protection to Nevada consumers.

Section 54 of AB 74 was codified as NRS 690C.325. It provides:

> 1. The Commissioner may refuse to renew or may suspend, limit or revoke a provider's certificate of registration if the Commissioner finds after a hearing thereon, or upon waiver of hearing by the provider, that the provider has:
>
> (a) Violated or failed to comply with any lawful order of the Commissioner;
>
> (b) Conducted business in an unsuitable manner;
>
> (c) Willfully violated or willfully failed to comply with any lawful regulation of the Commissioner; or
>
> (d) Violated any provision of this chapter.
>
> ☐ In lieu of such a suspension or revocation, the Commissioner may levy upon the provider, and the provider shall pay forthwith, an administrative fine of not more than $1,000 for each act or violation

. . . *Id.* (Emphasis added).

In his testimony before the Senate Commerce, Labor & Energy Committee (June 1, 2011) Commissioner Barrett explained that there was a need for ***more authority*** over the service contract industry. "Allowing the Commissioner the authority to suspend or revoke a certificate of registration will better protect from service contract companies that are financially unstable or that conduct business in a deceptive or unfair manner." (Hearing on A.B. 74 Before the Senate Committee on Commerce, Labor and Energy, 2011, 76th Sess. Exhibit F, pp. 9-10 (June 1, 2011), attached hereto as Exhibit 1.

Commissioner Barrett further expressed that the existing laws were inadequate, and that the new provisions are intended to mirror NRS 680A.200:

> ***Currently***, chapter 690C of NRS does not provide authority for the Commissioner to suspend or revoke a certificate of registration unless another state has taken legal action against the company. The Commissioner ***only*** has the authority to fine a contract provider not more than $500 for each violation of statute, regulation or order of the Commissioner up to an aggregate of $10,000 (NRS 690C.330). ***The proposed Section 54 language adds a section to Chapter 690C similar to existing law in NRS 680A.200*** that would allow the

> Commissioner to suspend, limit or revoke a provider's certificate of registration for violations of statute, regulation or order of the Commissioner or for conducting business in an unsuitable manner.

(Hearing on A.B. 74 Before the Senate Committee on Commerce, Labor and Energy, 2011, 76th Sess. Exhibit F, p. 9 (June 1, 2011) (emphasis added). It is clear from the testimony above, that it was the intent of the legislature was to expand the Commissioner's authority over registered service contract providers, including the ability to impose fines, in a manner mirroring NRS 680A.200.[1] NRS 680A.200 has no statutory cap, and, as the legislative intent was for NRS 690C.325 to model it after the insurance industry laws, more specifically NRS 680A.200, the omission of a cap was intentional. As intended, NRS 690C.325 now gives the Commissioner the ability to treat service contract providers similarly to insurers, including on the issue of fines. NRS 690C.330 was purposefully left as a catch-all, to apply to all other "persons" who violate the provisions of the 690C

---

[1] NRS 680A.200 provides:

> 1. Except as otherwise provided in NRS 616B.472, the Commissioner may refuse to continue or may suspend, limit or revoke an insurer's certificate of authority if the Commissioner finds after a hearing thereon, or upon waiver of hearing by the insurer, that the insurer has:
>
> (a) Violated or failed to comply with any lawful order of the Commissioner;
>
> (b) Conducted business in an unsuitable manner;
>
> (c) Willfully violated or willfully failed to comply with any lawful regulation of the Commissioner; or
>
> (d) Violated any provision of this Code other than one for violation of which suspension or revocation is mandatory.
>
> □ *In lieu of such a suspension or revocation, the Commissioner may levy upon the insurer, and the insurer shall pay forthwith, an administrative fine of not more than $2,000 for each act or violation.*

. . . *Id.* (emphasis added).

chapter. NRS 690C.330 is currently used against those persons who do not have a valid certificate of registration ("COR").[2]

As Respondent argued in its Answering Brief, under the rules of statutory construction, NRS 690C.325 and 690.330 should be interpreted "in harmony with one another." *DeStefano v. Berkus,* 121 Nev. 627, 629, 119 P.3d 1238, 1240. (2005). As reflected in the legislative history of AB 74 (2011), section 54 (NRS 690C.325) was intended to mirror NRS 680A.200 to provide the Commissioner with more enforcement authority over service contract providers. The omission of a cap is consistent with the intent and the language of NRS 680A.200 it was designed to mirror.

DATED: November 6, 2019.

AARON D FORD
Attorney General

By: _____ (4805), for
RICHARD YIEN, Bar No. 13035
Deputy Attorney General

[2] NRS 690C.330 enacted in 1999, references "a civil penalty" on any "person" who violates any provision of this chapter, (with a statutory cap). It remains on the books as a mechanism for the imposition of a penalty on a non-licensee. However, if this Court finds that the statutes are in conflict, the statute that is "more recent in time controls over the provisions of an earlier enactment." *Laird v. State Public Emp. Retirement Bd.*, 98 Nev. 42, 45, 639 P.2d 1171, 1173 (1982) (citations omitted). NRS 690C.325 was enacted in 2011, while 697.330 was enacted in 1999. Furthermore, "when a specific statute is in conflict with a general one, the specific statute will take precedence." *Sheriff v. Witzenburg*, 122 Nev.1056, 1062, 145 P.3d 1002, 1005 (2006) (citations omitted). *See also Lader v. Warden*, 121 Nev. 682, 687, 120 P.3d 1164, 1167 (2005). In the present case, NRS 690C.325 unequivocally applies specifically to registered service contract providers.

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the foregoing document does not contain the social security number of any person.

DATED: November 6, 2019.

AARON D FORD
Attorney General

By: (4805), for
RICHARD YIEN, Bar No. 13035
Deputy Attorney General

CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on the 6th day of November, 2019, I served a copy of the foregoing **RESPONDENT'S STATEMENT OF LEGISLATIVE HISTORY OF NRS 690C.325** by mailing a true and correct copy to the following:

Constance Akridge, Esq.
Holland & Hart, LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas NV 89134-0532

Susan Messina

An employee of the
Office of the Nevada Attorney General

EXHIBIT 1

EXHIBIT 1

(Highlighted in Original)

SENATE COMMERCE, LABOR AND ENERGY COMMITTEE

May xx, 2011

PREPARED TESTIMONY OF
THE DEPARTMENT OF BUSINESS & INDUSTRY
DIVISION OF INSURANCE
Presented By
Brett Barratt
Commissioner of Insurance

Good morning Chairman _____ and members of the Committee. I am Brett Barratt, Commissioner of Insurance for the State of Nevada. I am here today to present Assembly Bill 74, the Division of Insurance ("Division") omnibus bill.

External Review

Sections 2, 3, 7-9, 48, 50, 52, 65-67, 69, 70, 79, 80, 88, 91, 92, 94, 101-104, 107, 110, 112-116, 118, 123-127, 129-132

On July 23, the Internal Revenue Service ("IRS'), Department of Labor ("DOL") and the U.S. Department of Health and Human Services ("HHS") published interim final regulations under the Affordable Care Act ("ACA") regarding processes for internal claims and appeals, as well as independent external review processes, for insured and self-insured health plans.

The regulations impose additional standards that must be satisfied by a group health plan's internal claim and appeal processes, including new requirements for notices of adverse benefit determinations. The regulations also provide guidance regarding minimum standards that must be met by a state's independent external review processes.

The interim final regulations generally apply to health plan issuers for plan years beginning on or after September 23, 2010 and January 1, 2011, for calendar year plans. The regulations include a

transition rule allowing states more time to come into compliance. The transition rule states that any applicable state external review process will be deemed to meet the requirements as long as the plan years began before July 1, 2011. Nevada has had a state external review process in place since 2003.

- The majority of the changes to existing law result from changing the name from external review organization to independent review organization.

- AB 74 includes a request to repeal existing external review language in order to comply with the federal law and to incorporate the National Association of Insurance Commissioners' ("NAIC") model language for independent external review.

- There is little change to our current practice to license these types of organizations. The most notable change provides for a two year license/certification. Whereas, the Division currently requires an organization to undergo an annual certification process.

- Some other notable features of the NAIC Model include:

  1. Removal of the $500 out of pocket minimum required of the insured before an independent review can be requested for a final adverse determination.

  2. The external review protections apply to both "pre-service" and "post-service" claims, including situations where the health plan pays an individual less than the total amount of the covered service.

  3. The definition of "adverse benefit determination" is expanded to include rescission of coverage, which applies when coverage is cancelled or discontinued, except when an

individual has failed to pay the required premiums or other contribution toward the cost of coverage.

4. The time period for responding to a claim involving urgent care (expedited external review) is shortened from 72 hours to 24 hours.

5. To ensure that a claimant receives a full and fair review, the health plan must provide additional details on any new or additional evidence considered, relied on or generated by the plan that led to the adverse determination. The rationale must be provided free of charge, as soon as possible and before the appeal process begins.

6. Notices to individual claimants throughout the process must be provided in a culturally and linguistically appropriate manner. The Commissioner may prescribe by regulation the form and content of the notices.

With that in mind, please refer to Exhibit 1, which provides an example of what the independent external review process would look like to the consumer. This example includes the required time periods and responsibilities of each party involved. The Division has proposed amendments concerning the external review process that I will discuss under the Proposed Amendments section at the end of my presentation.

Group Health Rate Regulation

Section 33 of AB 74 originally proposed making group and blanket health insurance products subject to the prior approval rating statutes contained in chapter 686B of NRS. Rates for small group PPO health products currently do not have to be filed with the Division. After AB 74 was originally introduced, HHS amended its rules to require only small employer rates to be filed and approved. HHS will require individual and small group carriers to submit certain rate filings to

HHS in states that do not have an effective rate review process pursuant to HHS regulations. Section 33 will enable the Division to establish an effective rate review process for all small group and all individual products.

Sections 35 and 49 require that all policy forms issued through associations to Nevada residents be filed and approved by the Division. Some health carriers have avoided state requirements, such as mandated health benefits, by issuing policies to Nevada residents through associations situated outside of Nevada. Sections 35 and 49 would make it clear to carriers that forms and rates for these products must be filed with the Division. I will also address a group health amendment under the Proposed Amendments section.

Long-Term Care Insurance

Sections 4, 36 and 37 change the statutory definitions of life insurance and annuity to facilitate the combination of these products with long-term care insurance to better meet the needs of consumers while still maintaining the consumer protections of each individual product.

Annuity & Life Insurance

Sections 38 through 42, inclusive, amend chapter 688A of the NRS and brings Nevada laws in alignment with national standards set by the Interstate Insurance Product Regulation Commission, referred to as the Compact.

Sections 38 and 39 pertain to the "free-look" period during which the owner of a newly purchased annuity contract or life insurance policy may return the contract or policy, generally within 10 days, for any reason and get a full refund of all premiums paid. These two sections clarify that the free look provisions apply to **both** life insurance and annuities and also extend the free look period from 10 days to 30 days for replacement policies and contracts.

Sections 40 through 42, inclusive, clarify and enhance the provisions pertaining to the calculation of minimum nonforfeiture benefits available to owners of annuity contracts or their beneficiaries. Annuities are long-term contracts so insurers usually impose a penalty (surrender charge) if the consumer decides to surrender the contract early. The minimum nonforfeiture laws essentially limit the amount of these surrender charges. The changes included in sections 40 through 42 were made to ensure uniform application of these provisions, clarify the Division's intent, match the standards used by the Compact, put reasonable limits on penalties, and eliminate ambiguity and subjective interpretation.

Credit - Extraordinary Life Events

Sections 30 through 32, inclusive, amend Chapter 686A of the NRS by adding to it a new section to address the use of credit information in insurance underwriting and rating when a consumer's credit is adversely affected by extraordinary life events. This section puts reasonable limits on consumer penalties and eliminates ambiguity and subjective interpretation.

Existing law (NRS 686A.600 – 730) is based upon a credit scoring model act of the National Council of Insurance Legislators, referred to as NCOIL, that was passed by the 2003 Legislature by way of Senate Bill 319. The current law allows insurers to use credit information for the purposes of insurance underwriting, rate classification, tier placement and premium calculation.

Extraordinary life events are events that have the capability of adversely altering a consumer's credit information. More specifically, and unfortunately, Nevada has been experiencing one of the highest unemployment and home foreclosures rate in the nation for the last few years. The adverse impact of these events on consumers' credit can lead to an increase in their insurance premium. In response to this countrywide phenomenon, NCOIL amended its credit scoring model act in 2010 to allow for exceptions in insurance premium calculation when an insured's credit is adversely impacted by extraordinary life events. Section 30 proposes to adopt NCOIL's amendment to provide a measure of relief to Nevada consumers by limiting the impact of deteriorating credit to their insurance premium under certain circumstances.

This amendment proposes requiring insurance companies in Nevada to provide reasonable exceptions from the use of credit information for consumers whose credit information may have been adversely impacted due to certain catastrophic events. These events include: a catastrophic event as declared by the federal or state government; a serious illness or injury to self or a family member; the death of a spouse, child or parent; divorce; identity theft; temporary involuntary unemployment for a period of 3 months or more; military deployment, and; other events as determined by the insurer.

Evidence of Insurance – Fleet

Section 53 amends NRS 690B.023 to allow for the issuance of fleet evidence of insurance cards. Current law requires an insurer to provide the policyholder with evidence of insurance whenever an auto liability policy is issued to satisfy Nevada's financial responsibility law (NRS 485.185).

Further, current law requires that the evidence of insurance include vehicle specific information. This amendment allows vehicle specific information to be replaced with the word "fleet" if the vehicle is covered under a fleet policy written on an "any auto" or "blanket policy" basis. This amendment is consistent with current industry practice throughout the nation.

Manufactured Home Valuation

Sections 56 and 57 amend NRS 691A.020 requires an insurer to offer the option to purchase replacement value property insurance coverage on a manufactured or mobile home in the event of a total loss, including reasonable costs for debris removal and transport and setup of the replacement home. This changes the valuation of the manufactured or mobile home in the event of a total loss from a depreciated "market" value to "replacement" value.

Current law states that an insurer shall offer coverage for "market value of the mobile home" in the event of a total loss. The market value of a mobile home takes into account depreciation, and the market value of a home that is no longer new could be significantly lower than the replacement cost. This could result in the homeowner being unable to replace a home after suffering a total loss. A survey of Division records indicates that many of the manufactured or mobile home policies offered in Nevada contain significant limitations. Although this amendment makes offering replacement cost coverage mandatory for the insurer, an insured would have the option of either accepting the offer or requesting lesser or restricted coverage for a lower premium. Manufactured homes are also addressed in the Proposed Amendment section at the end of this presentation. The amendment reflects the efforts of the Division and industry representatives to refine the wording of this legislation to meet the needs of all parties involved.

Electronic Insurance Transactions

Sections 1, 10, 11, 20, 29, 44-47, 59, 60, 121 and 122

Section 1 and 29 expand the Commissioner's existing authority to adopt regulations concerning electronic transmissions. These amendments bring insurance claims settlement practices and surplus lines transactions into today's electronic environment and encourage a greater degree of efficiency.

In addition, the fingerprint requirements for license applicants have been revised to facilitate the electronic transmission of fingerprints to the Central Repository for submission to the Federal Bureau of Investigation ("FBI").

Service Contracts - Enforcement Provisions

Sections 54 and 55

Sections 54 and 55 amend provisions under the service contract chapter, 690C of NRS. Section 54 strengthens the Commissioner's regulatory authority for enforcement purposes and Section 55 addresses the service contract financial security required to obtain and retain the Certificate of Registration.

Service contracts, although not considered insurance in Nevada, fall under the jurisdiction of the Division of Insurance under Chapter 690C of NRS. A service contract provides for the repair or replacement of items covered by the contract if the item fails because of a defect in the item or normal wear and tear. Examples of service contracts are vehicle extended warranties and home appliance service contracts.

Currently, chapter 690C of NRS does not provide authority for the Commissioner to suspend or revoke a certificate of registration unless another state has taken legal action against the company. The Commissioner only has the authority to fine a service contract provider not more than $500 for each violation of statute, regulation or order of the Commissioner up to an aggregate of $10,000 (NRS 690C.330). The proposed Section 54 language adds a section to Chapter 690C similar to existing law in NRS 680A.200 that would allow the Commissioner to suspend, limit or revoke a provider's certificate of registration for violations of statute, regulation or order of the Commissioner or for conducting business in an unsuitable manner. Section 54 also requires the Commissioner to suspend or revoke the provider's certificate of registration on certain grounds such as conducting business fraudulently, refusing to be examined, or failing to pay a final judgment rendered against it. Suspension or revocation on any of these grounds, both voluntary and mandatory, would require a hearing. However, the Commissioner may immediately suspend the certificate of registration of any provider that has filed for bankruptcy.

The Division has been faced with enforcement challenges in the service contract industry. Allowing the Commissioner the authority to suspend or revoke a certificate of registration will

better protect consumers from service contract companies that are financially unstable or that conduct business in a deceptive or unfair manner.

Section 55 changes proof of financial responsibility requirements for service contract providers. Current law requires a service contract provider applicant to comply with one of three methods of proof of financial responsibility: The company may submit a contractual liability policy insuring the obligations of each service contract sold; the company may maintain a reserve account equal to 40 percent of gross consideration received less claims paid, and deposit with the Commissioner security equal to 5 percent of gross consideration received less claims paid; or the company or its parent must maintain a net worth of $100 million (NRS 690C.170).

The Division proposes to amend the contractual liability policy option to require that the policy be issued by an insurer that is not an affiliate of the provider. Often when a service contract provider becomes insolvent, there is a good possibility its affiliated insurer (often a risk retention group) will also be insolvent.

The Division also proposes to eliminate the reserve account/security deposit option. Service contracts are not covered under the Nevada Guaranty Association and the security deposit does not provide sufficient protection to consumers in the event a provider becomes insolvent. Even if the amount was increased, the Division does not have the staff to administer the claims of an insolvent provider. Additionally, the financial security portion of the service contract law, as written, requires the provider to deposit with the Commissioner a smaller amount of security deposit as claims paid increase.

During this past biennium, four service contract providers filed bankruptcy or went out of business due to bankruptcy of an affiliated entity. Two of these companies had used contractual liability insurance policies as their financial security. As a result, there have been minimal problems ensuring that the companies honored their contracts. However, the remaining two companies posted $25,000 securities with a reserve account affidavit. Because many service contracts are written for five year terms, there is little likelihood the all claims of the remaining two companies will be satisfied.

Captive Insurers

Section 63 of this bill revises NRS 694C.330 to add a statutory reference to clarify the process that captive insurers use to pay dividends from their capital and surplus.

Section 64 of this bill amends NRS 694C.400 to change the format of the Annual Financial Report filed by all insurers in order to enhance the Division's financial supervision of insurers. Additionally, this section adds late report filing penalty language to promote timely financial reporting by insurers.

Third-Party Administration

Section 9.5 adds language to allow an insurer to administer claims on behalf of its Nevada licensed affiliates without requiring the insurer to obtain a separate third-party administrator certificate of registration. This will enable insurers to better utilize their workforce to efficiently process claims.

Clean-up and Clarification

Continuous Care Coverage

Sections 3 and 12 clarify the definition of continuous care coverage and the producer licensing requirements to market continuous care. I will further address continuous care coverage under Proposed Amendments.

Qualified Actuary

Sections 5 and 6 relate to the definition of a qualified actuary and the limitation of liability relating to the opinions of an appointed actuary. This is simply clean-up language to allow uniform application of the provisions pertaining to actuaries across all lines of business.

Producer Lines of Authority

Section 12 revises the existing lines of authority standards to conform to the NAIC Uniform Licensing Standards Model Act to facilitate producer licensing consistency and reciprocity between states.

Adjuster Licensing

Section 13-26 amends the licensing requirement for nonresident adjusters pursuant to Reitz v. Kipper, 674 F. Supp. 2d 1194 (2009).

Insurance Guaranty Association

Section 34 clarifies the definition of an Insurance Guaranty Association member to be an insurer who is authorized to transact insurance in Nevada

Viatical Settlements

Section 43 amends section 4 of NRS 688C.200 by making the evidence of financial responsibility applicable to both brokers and providers of viatical settlement. Providers were inadvertently left out of this statute in the Division's BDR from the 2009 legislative session.

Small Employer Health Insurance

Section 51 defines an employee leasing company and includes employees of the employee leasing company as eligible for small employer health plans.

Title Insurance Countersignature and Financial Adequacy

Section 58 amends the surety bond template provided in NRS 692A.1041 used by title insurers and agents to submit a required deposit with the Commissioner of Insurance. More specifically, section 58 amends the countersignature blank to refer to a "Nevada licensed insurance agent" instead of a "Licensed resident agent." The purpose of this amendment is to conform to NRS 680A.300, which was amended in 2009 to allow nonresident agents as well as resident agents to countersign policies and bonds. This same countersignature language is also being proposed in the Division of Mortgage Lending's bill for the surety bonds that escrow agencies and mortgage brokers are required to deposit with the Commissioner of Mortgage Lending.

Holding Companies

Section 61 of this bill revises NRS 692C.370 (1) to comply with the current NAIC Model Law. This section adds the language "operating results," and "affiliates" to broaden the measures used to evaluate an insurer's financial adequacy.

Risk Retention Groups

Section 68 of this bill revises NRS 695E.110 (1) and (5)(a) by adding language from the NAIC Model Law, which reinforces the restrictions on ownership of Risk Retention Groups. One of the fundamental guidelines of the federal Liability Risk Retention Act is that only insureds can own the company and that only members of the group can be insureds.

Medical Discount Plans

Section 119 of this bill revises NRS 695H.020 (2) by changing the annual renewal dates of Medical Discount Plans from their respective anniversary dates to a standard annual renewal date of March 1. This change expedites the Division's processing of renewals and conforms to other renewal activities of insurers.

Section 120 of this bill revises NRS 695H.180 by removing the cap on aggregated penalties for violations that are "similar in nature."

Employee Leasing

Section 128 changes "industrial" insurance to "self-funded" insurance to clarify an employee leasing company may not offer, sponsor, or maintain any self-funded insurance program for its employees. This change was pursuant to Payroll Solutions Group; Limited Inc., et al. v. Molasky-Arman, 2010 WB 3167071 (D.Nev.); Molasky-Arman v. Payroll Solutions Group; Limited Inc., et al., Nevada Supreme Court, Case No. 50678. Non-published Order or Reversal and Remand issued February 16, 2010. In this case, federal law was determined to preempt NRS 616B.691 to the extent it declared the status of any benefit plans for the purpose of ERISA.

Proposed Amendments to AB 74

1. **External Review**

NRS 683A.373 was repealed in the original version of AB 74 as part of the adoption of the NAIC Uniform External Review Model. This appears to be a drafting oversight. It was inadvertently omitted by Amendment No. 442.

NRS 683A.373 requires the Commissioner to annually submit a list of certified independent review organizations the Office of Consumer Health Assistance ("OCHA"). Additionally, the Commissioner is required to notify the Office of Consumer Health Assistance regarding any change in the list, thereby ensuring that OCHA has the most current information available for use in assigning cases for independent review.

2. **Sec. 12.5 Continuous Care Coverage**

In the 2009 Legislative Session, a license category was added to NRS 683A.367 to allow a producer to sell, solicit or negotiate continuous care coverage which is workers'

compensation coverage that is incidental to a policy of health insurance. This proposed amendment corrects the language to reflect necessary producer licensing requirements to market continuous care. This change is considered housekeeping; the correct wording was not included in the AB 74 reprint. To market continuous care coverage, a producer must hold a license for:

- Accident and Health and receive approval to market continuous care coverage; or,
- Both accident and health and casualty insurance.

3. **Sec. 57 Manufactured Homes**

Pursuant to negotiations with industry representatives, the Division of Insurance submitted a proposed amendment to Section 57 that included replacing the words "without limitation" with the words "reasonable costs" in subsection 1. Amendment No. 442 added the words "reasonable costs" to Section 57, but failed to delete the words "without limitation." This proposed amendment deletes the words "without limitation" as originally submitted and agreed upon with industry representatives. This agreement was reached to allow the insurer to set and adhere to reasonable policy limits and to price the coverage accordingly. If there were no limitations, the coverage could be cost prohibitive to the policy holder.

4. **Sec 33 Credit Accident and Health Insurance**

Amend section 33 in order to:

1) reflect the correct term used in NRS 690A "credit accident and health insurance" rather than "credit health insurance"; and,

2) exempt credit involuntary unemployment insurance from the requirements of 686B.010 to 1799, inclusive because requirements for rates for that type of insurance are detailed in NRS 690A and the corresponding regulations under NAC 690A. These changes will result in consistent treatment of all lines of consumer credit insurance regulated under NRS 690A.

3) correct the Amendment 442 reference to the federal definition of large group employer (100+ employees). Nevada's current definition of large employer is 51+ employees, as a result of the definition of a small employer as an employer with 2-50 employees per NRS 689C.095. We recommend the deletion of subsection 3 in its entirety.

5. **Sec 65 Definition of Large Group Employer**

The federal definition of large group employer (100+ employees) was incorrectly referenced in Amendment No. 442. Nevada's current definition of large employer is 51 or more employees as a result of the definition of a small employer as an employer with 2-50 employees, per NRS 689C.095. We recommend the deletion of the last sentence in subsection 3.

6. **Sec 115 Definition of Adverse Determination**

The term "authorized representative" was amended in the original version of AB 74 to exclude language concerning the external review of a final adverse determination. Amendment No. 442 added that deleted language back in and inadvertently left in the word "final" in describing the type of adverse determination. "Adverse determination" is defined in section 114, NRS 695G.012 and does not include the term final in its definition. The term "final adverse determination" is nonexistent in Nevada statute.

We recommend deleting the word "final" from line 8 that was inadvertently added back in to be consistent with the definition of adverse determination. This deletion would be consistent with LCB's other deletions of the term "final" under NRS 695G.

7. Sec. 118 The term "Managed Care Organization" versus the term "Health Carrier"

The original AB 74 adopted the NAIC Model language in which the term "health carrier" was used in lieu of "managed care organization". In NRS 695G, the term "managed care organization" was not consistently replaced with the term "health carrier". This appears to also be a drafting oversight. We suggest that lines 4, 12, 16, 23, and 33 of section 118 be amended to replace the term "managed care organization" with "health carrier" to be consistent in the use of these terms.

In closing, I urge your support of Assembly Bill 74 and thank you for your time and attention.

CERTIFICATE OF SERVICE

Pursuant to NRAP 25(1)(b) and 25(1)(d), I, the undersigned, hereby certify that I electronically filed the foregoing **APPELLANT'S APPENDIX (VOLUME XII OF XIV)** with the Clerk of Court for the Supreme Court of Nevada by using the Supreme Court of Nevada's E-filing system on May 12, 2020.

I further certify that all participants in this case are registered with the Supreme Court of Nevada's E-filing system, and that service has been accomplished to the following individuals through the Court's E-filing System as indicated below:

Via Electronic Filing System:

Richard P. Yien
Joanna N. Grigoriev

/s/ Joyce Heilich
An Employee of Holland & Hart LLP