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COMMITTEE ON AGRICULTURE  
March 1, 2005  
LB 131, 440

The Committee on Agriculture met at 1:30 p.m. on Tuesday, March 1, 2005, in Room 2102 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LB 131 and LB 440. Senators present: Bob Kremer, Chairperson; Philip Erdman, Vice Chairperson; Carroll Burling; Doug Cunningham; Deb Fischer; and Roger Wehrbein. Senators absent: Ernie Chambers and Don Preister.

SENATOR KREMER: Begin our hearings today, it's a little past 1:30 p.m. Welcome you all and we're going to be a little bit short today, I think. Senator Preister is not going to be here and Senator Wehrbein has to introduce another bill, and I have to introduce another bill in another committee about the same time I might have to here, so I'm not sure whether Rick will do it for me or not. But anyway, I'd like to introduce those that are here. Senator Burling, from Kenesaw, to my far left; Senator Cunningham, from Wausa; Jessica Shelburn is our committee clerk; Senator Erdman, from Bayard, is the Vice Chair of the committee; I'm Bob Kremer, Chairman of the Ag Committee; and Rick Leonard is our Research Analyst. We will introduce others as they come in. I'd ask you to turn off your cell phones, and I'd better do that with mine; sometimes I'm the guilty party. And please, when you come up to testify, fill out a sign-in sheet. If any of the bills, if you would like to just put your name down and say, check whether you're in support or in opposition to the bill, you don't have to testify. We will have it on record then, and I guess... David, I didn't introduce you, our page, and he's a junior, I think, at UNL.

DAVID SOLHEIM: Sophomore.

SENATOR KREMER: Sophomore. Boy, I got you skipped a grade there, anyway.

DAVID SOLHEIM: I wish.

SENATOR KREMER: So if you need anything or handout any material, he's here to do that for us, and we appreciate his good work. I think the sign-in sheets are...testifier sheets are...okay, right there, so please have it filled out before you come up to testify, and drop it in the box. If you do not, why, don't worry about it. You can fill it out

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after you testify, but make sure you put it in there. When you come up to testify, please give us your name and spell your name. It's not for our sake, but the transcribers have to listen to the tapes, and it's a little hard for them to understand sometimes how your name is pronounced, so please spell it for us. Since we're maybe short of some senators, we have Senator "Cap" Dierks in here; maybe he could come in and fill in for us. He used to sit up here in this position.

CAP DIERKS: I'll vote from back here.

SENATOR KREMER: Okay. Okay, welcome, anyway, to our committee hearing. At this time we will open on LB 131, Senator Cunningham is here to open.

LB 131

SENATOR CUNNINGHAM: (Exhibit 1) Well, thank you, Senator Kremer and members of the body. I'm Doug Cunningham, C-u-n-n-i-n-g-h-a-m, representing District 40 in northeast Nebraska. I'm here today to introduce LB 131. LB 131 makes changes in the current exemptions to the definition of food establishment in the Nebraska Pure Food Act. Such items or operations falling under an exemption to the definition of food establishment are thereby exempted from licensure and inspection under the Nebraska Pure Food Act. One exemption pertains to an establishment or vending machine operation that offers only prepackaged soft drinks. LB 131 strikes language that is not needed and includes canned or bottled fruit and vegetable juices in the exemption. LB 131 also adds two new exemptions to the definition of food establishment. The first is a private home where food is prepared for distribution at a function for a charitable purpose. However, a placard stating that the food was prepared in a kitchen that is not subject to regulation and inspection would be required at the serving location. The second exemption is for the sale of commercially packaged foods that are not potentially hazardous at a private home, farmers market, craft show, or other temporary event lasting less than 11 consecutive days. And I would like to offer an amendment to LB 131, and we'll pass that around now, Amendment 0604 would add prepackaged ice, along with canned or bottled fruit and vegetable juices, contained in the

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first exemption to the definition of food establishment. The Department of Agriculture does not have the manpower or the resources, nor is it necessary to inspect every liquor store that sells V8 juice or prepackaged ice. Furthermore, the ice is already inspected at the company that packages it for sale. In the exemption contained in subsection 7 of 81-2,245.01, the amendment specifies that the function is a fund-raising event. It also makes it clear that if a caterer or other food establishment that is providing food for the event is compensated, the exemption does not apply. The amendment replaces subsection 11 with the new language exempting establishments which are not a commercial food establishment if they sell only commercially packaged food that is not potentially hazardous. Commercial food establishment is defined as a permanent sales location having more than 100 cubic feet of area containing food. I became interested in this issue when a constituent contacted me telling their personal story of a charitable event. I won't go into the detail because they are here today to follow me, and they will testify on this bill. I also received a letter from a constituent of Senator Fischer's. She was concerned that in-home businesses, such as Watkins, may have to be licensed. And I might say, I received this correspondence all started taking place before you were elected, Senator Fischer.

SENATOR FISCHER: You sent me a copy; I appreciate it.

SENATOR CUNNINGHAM: Okay. Well, the Department of Ag has assured me that it's not their intent to inspect private homes. And I've also heard from small, temporary businesses, selling commercially packaged foods, that may set up a booth at the State Fair or maybe in the mall at the...you know, a promotional event at a mall, and they don't want to have to pay licensing and inspection fees for those booths. Legislation was introduced several years ago that broadened the facilities that required inspection and permits. However, there were some unintended consequences, hence the need for this bill. After I introduced the bill, the Department of Ag, Bureau of Dairies and Foods, notified me that there may be other instances that needed to be addressed, so we asked for a late hearing date, which we were granted, and allowed time to work with the department and other interested parties. And as a result of that is the amendment that we passed out. I believe that the

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changes made to the exemptions to the definition of food establishment makes sense. We don't want to hinder local charitable events, likewise the inspections and permits for the sale of commercially packaged foods that are not potentially dangerous is not a wise use of our resources. Additionally, it does not promote small business development. I would urge your support of LB 131. And if you have any...I don't think he's planning on testifying, but if you have any technical questions today, someone from the department will be here to answer those for you.

SENATOR KREMER: Thank you, Senator Cunningham. Any questions for Senator Cunningham? Seeing none, thank you. And I'd like to introduce Senator Fischer, from Valentine, has joined us. So, welcome. First proponent, please. Welcome. Proponent. Welcome.

GEORGE FULLER: I have some copies of the testimony here.

SENATOR KREMER: Okay. We have a new page; he'll take care of it. You can go ahead and start.

GEORGE FULLER: (Exhibit 2) Okay. Senator Kremer and Agricultural Committee members, I am George Fuller, F-u-l-l-e-r, and my wife Lonnie, sitting back there; we're from O'Neill, Nebraska. We are here to express support for the bill LB 131, especially the part about preparing food in a nonregulated kitchen. For the past four years we have rented the O'Neill Armory and served a Thanksgiving dinner for anyone that wanted to come. We started the dinner for people that didn't have anyplace or anyone to share the Thanksgiving Day with. We supply the food and do not charge anyone to come and have dinner with us. Several other people help us with this meal, and some of them bring salads, desserts, et cetera. Much of the food is prepared in the home prior to Thanksgiving Day. We cook the turkey and ham at home, cut it up and freeze it until the day we are to serve it. It is then put in electric roasters and reheated to required serving temperatures. The potatoes and gravy, dressing, and vegetables are prepared at the armory kitchen on Thanksgiving Day. We all wear aprons, hair coverings, and plastic gloves for cleanliness. The first year that we served a dinner, one of our helpers checked with the state food inspector, Bill Gingery, about serving this dinner. He told them that since we did not charge for

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this dinner, that it would be permissible to prepare and serve it this way. The first and second year that we served the dinner, we did not have any provisions for people to donate money. Both of these years we served approximately 125 people. When visiting with people of the community, many expressed that they did not feel comfortable in coming to a dinner that they could not pay for. The third year that we served a dinner, we decided to put out some jars for offerings for those who wished to contribute to a charity. We put out three jars marked for the charities: one for the O'Neill Ministerial Association, the Boy Scouts, and the Girl Scouts. There was over \$700 raised for these three groups, and we served over 200 people. The dinner was still maintained as a free dinner, with people donating to these groups only if they wanted to do so. We do not keep any of the money for our expenses. Last year we run the dinner the same way; over \$900 was raised for these three charities, and we served approximately 250 people. This past year, a few days before Thanksgiving, two food inspectors, Marlon Buzek and Bill Gingery, came to our house. We were informed that it was not legal for us to prepare food in our own kitchen to serve to others. They visited with us about the dinner and explained the food laws. We told them that we had already prepared the turkeys and had advertised the dinner, and that we did not keep any of the money for ourselves. They did permit us to go ahead with the dinner, but told us that we would have to check with them about doing it again. They expressed that we might have to make other arrangements for preparing the food. The armory kitchen is not large enough to prepare this amount of food in one day, nor is there any kitchen in town large enough to do this. We believe that this event is a good thing for the community and that it is a way for us and our helpers to express thanks to God and to other people. Several people in the community looked forward to having Thanksgiving dinner with us. We believe that this bill LB 131, would make it possible for events like this to be held. We believe that this bill will also help other charitable organizations with fund-raising promotions, and we believe the requirement to have a placard on display, stating the food being served was prepared in a nonregulated kitchen, is a reasonable condition to comply with. We thank you for allowing us to give our testimony concerning this matter. Thank you.

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SENATOR KREMER: Okay, thank you, George. Sounds like you're making it so good that more people are wanting to come all the time. Where do you serve your dinner?

GEORGE FULLER: At the O'Neill Armory in O'Neill.

SENATOR KREMER: But you prepared it in your kitchen.

GEORGE FULLER: Yes.

SENATOR KREMER: Any questions for Mr. Fuller? Seeing none, thank you.

GEORGE FULLER: Thank you.

SENATOR KREMER: Next testifier, please, as a proponent?

KATHY SIEFKEN: Senator Kremer and members of the committee, my name is Kathy Siefken; Kathy with a K, S-i-e-f-k-e-n. And I am the executive director of the Nebraska Grocery Industry Association, and we are here in support of this bill. I serve as one of the members of the Food Advisory Board, Council, whatever we call it, that they are positions held over at the Department of Ag, and the committee members are made up of everyone across the board that is inspected: food facilities, we have bakeries, we have meat department people, we have grocery stores, we have restaurants. And what we really try to do with that advisory council is to make sure that everyone that serves food or deals with food is represented at that table. We actually review the FDA's food code, and I guess we come forward with an update about every, what, two, three years, around in there. And one section of the food code that was passed back in 2003 was the requirement that nonpotentially hazardous prepackaged commercial food should be inspected. And what we were attempting to do was to ensure that the Dollar Generals, the Only Deals, the Dollar Trees, those type of stores that are truly grocery stores but do not handle potentially hazardous foods, we were trying to ensure that they were inspected because, even though they are shelf-stable products, there was a concern that some of those foods could be contaminated. And so we thought that they should come under the inspection rule. And what we tried to do was make sure that if you have a permanent retail location, you would be inspected. And my apologies for not getting that right the

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first time; that's why we're back. We, at no time, ever intended to inspect craft shows or things going on in homes. We were concerned with the permanent retail establishments. The amendments that you have to the original bill have all been worked out as far as my knowledge goes. I think everyone is on board with all of those. This is an important bill, and the reason it's important is because if we don't change current statute, then the Department of Ag is going to be required to continue to go around inspecting craft shows and other temporary places like the county fairs and the State Fair, places where there really isn't a food risk. And so with that I'll end my testimony. If you have any questions, I'd be happy to try and answer them.

SENATOR KREMER: Okay, thank you, Kathy. Any questions? I guess I have one, that the...what Mr. and Mrs. Fuller are doing, if we don't change this, then they would just have to be inspected? They could still go ahead with the program that they're doing if it was inspected by the Department of Ag?

KATHY SIEFKEN: They would have to obtain a permit and be inspected, and they would have to follow practices that retail locations practice. So I'm not sure that they would be able to continue to do what they do...

SENATOR KREMER: Okay.

KATHY SIEFKEN: ...because I'm not...I'm not all that familiar with what they do, but there are guidelines in how you handle food, and if they don't meet all of those requirements, then chances are they wouldn't be allowed to hold the event that they hold at Thanksgiving.

SENATOR KREMER: Okay. Okay.

KATHY SIEFKEN: That's the risk we run if we don't pass this.

SENATOR KREMER: Thank you. Are there any other questions of Kathy? Seeing none, thank you.

KATHY SIEFKEN: Thank you.

SENATOR KREMER: Next proponent, please. Seeing none, do we

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have anyone wishing to testify as an opponent? Anyone neutral? Senator Cunningham? Senator Cunningham waives closing. That will close the hearing on LB 131. And I will turn the proceedings over to Senator Erdman and I will introduce this bill. And I may have to run out to introduce another one soon after that, but we will start. And I've been fighting a cough and everything else so I'll try to make it through this.

SENATOR ERDMAN: Thank you, Mr. Chairman. We will now begin the hearing on LB 440. You're recognized to open.

LB 440

SENATOR KREMER: Thank you, Senator Erdman, members of the committee. This is a project we've been working on for some time. I think about two years ago we had an interim study and during that study we realized that those that deliver livestock to a feedlot and never been paid are pretty vulnerable and especially the livestock marketing people. So last year we introduced a bill just about identical to this bill and there was opposition. We thought we could get things worked out. I don't know if we gained much ground. We came back this year again to introduce this bill. And LB 440 defines a statutory trust created for the benefit of cash sellers of livestock to feedlots. The primary substantive provision of the bill is in Section 4(1) which reads: all livestock purchased by a feedlot operator, whether directly or by its agent or representative, from a cash seller and all receivables and proceeds from the sale of such livestock shall be held by the feedlot operator in trust for the benefit of the unpaid cash sellers until full payment has been received by the unpaid cash seller. The bill is modified after a similar provision under the Packers and Stockyards Act. And I think, I don't know how many years ago it's been, I think it was American Beef was a packer that went bankrupt and cattle that was delivered there that were still not even slaughtered the producers could not even claim them as their property so they were in the mix with everybody else as far as receiving the benefits from that. At that time, Packers and Stockyards did create this statutory trust for the packers that said any livestock or the proceeds from those livestock that were not paid for would be in trust for the producers until they were paid

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for. The remainder of the bill is primary... adds clarification, definition, and interpretation to the trust based upon case law established in interpreting the packer trust. I'll list about six things that it does. The cash seller is defined as a seller that has not expressly extended credit in writing. Now if you extend credit in writing, that is a different story. It includes commission, intermediaries selling livestock on behalf of cash sellers. Number two, the cash seller preserves their right to claim benefits of the trust if timely notice is given to the buyer and the Department of Agriculture that the seller is unpaid or cash issued for their payment is not honored by the bank. Number three, the cash seller's trust interest may not be waived by inducement or otherwise. Number four, the livestock and proceeds from the sale of livestock purchased from cash sellers remained in trust assets even if commingling with other livestock or funds. In other words, feedlots are not required to segregate livestock and funds and it is not necessary for the cash sellers to have a specific identity accounts or assets of the feedlot that are traceable to cattle obtained from the seller who are not paid. So they can commingle them but still there would be a trust there, the proceeds from those animals. It's expressly affirmed that the trust does not conflict with UCC principles and allow purchasing to transfer title of livestock to subsequent buyers, but the proceeds from the subsequent sales become assets of the trust. I think that pretty well explains the bill. We think that there's the bankers are on both sides on this. We have the banker that's loaned money to the producer of that would like to have this money in trust until they get paid because they do have some interest in that. But the banker who is supplying money to the feedlot is on the other side and believes that this title changes. And if you remember, livestock, the minute they pass the scales at the feedlot, they become...right now they become the property of the feedlot even if they've never been paid for. So this is what we're trying to accomplish through this. So any questions, I'd be glad to answer and I'm sure we will have people on both sides to testify today.

SENATOR ERDMAN: Thank you, Senator Kremer. Any questions from the committee? Seeing none, thank you for your testimony today. There will be an opportunity if you don't feel compelled to actually testify, there will be an

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opportunity for a sign-in sheet to make sure that your attendance is recorded. We'll now move to proponent testifiers on LB 440, those wishing to testify in support of LB 440 please come forward. Put your sign-in sheet in the box there and state and spell your name for us and launch into it and tell us why you're here.

TED BAUM: Good afternoon. Senator Kremer, members of the Ag Committee, my name is Ted Baum, B-a-u-m. My family and I run a livestock market in Elgin, Nebraska. And the reason that I'm a proponent of this bill is basically right now we're out there at an awful lot of risk. The easiest way to explain why is just to give you an example. Senator Kremer, if you can sign 200 head of yearling steers to my market and you give me the trust to sell them cattle and do the best job that I can and that's what I'm hired to do, I'm going to charge you about \$10 a head to sell those cattle. At 200 head, I'm going to charge you 2,000 bucks. Now the buyer comes in, he buys those cattle. I paid Senator Kremer \$140,000, maybe \$160,000, could be \$180,000 for his cattle. Right now the average is about \$800 a head. You guys can do the math. I pay Senator Kremer the day that he brings his cattle to my market, as soon as they're sold. The cattle go to a feedyard, the guy gives me a check, I let the cattle go, they're gone to the feedyard. Once they cross his property line, I have no recourse to go get those cattle if that check is dishonored. So I'm out \$180,00, \$140,000, \$160,000. I'm 46 years old. I can't stand that kind of heat. I don't think if you're 26 or 66 you can stand it and that's why I'm for this bill. Is there any questions?

SENATOR ERDMAN: Thank you, Ted. Any questions for Mr. Baum? Senator Kremer.

SENATOR KREMER: Have you had...been ever faced with the situation where you've had a check given to you that was not honored?

TED BAUM: Yeah. I've lost, back in the late seventies I lost \$30,000 because I couldn't collect it.

SENATOR KREMER: Okay. Not real often, but when it does happen it could be pretty substantial.

TED BAUM: Yeah. And back then cattle were worth 50 cents a

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pound. Today they're worth a dollar something.

SENATOR KREMER: Thank you.

SENATOR ERDMAN: Thank you, Senator Kremer. Any further questions for Mr. Baum? Seeing none, thanks for your testimony.

TED BAUM: Thank you.

SENATOR ERDMAN: Appreciate you being here. Next testifier in support of LB 440.

ERNEST VANHOOSER: Senator Kremer, members of the Agricultural Committee, my name is Ernie VanHooser, spelled V-a-n-H-o-o-s-e-r. I am here today on behalf of the Nebraska Livestock Markets Association to speak in support of LB 440, the Feedlot Statutory Trust Act. The Nebraska Livestock Markets Association is made up of livestock auction markets throughout the state of Nebraska. Their primary function is to provide facilities and services where Nebraska's farmers and ranchers can sell their livestock at fair and competitive prices. Those are the folks that I'm here speaking on behalf of, not all sellers, just the livestock auction markets. Typically livestock sellers, as the previous speaker just noted, they bring their livestock to the auction market, typically it's on the day of the sale. Once in a while, it may be the day before the sale, but typically it's the day of the sale. Within a matter of hours, the livestock are sold. Under Section 409 of the Packers and Stockyards Act, a livestock auction market is required to pay the seller, the consignor, before the close of the next business day. In fact, they almost always pay the day of the sale if the seller is present at the market. If the purchasers of the livestock are packers or dealers or other livestock auction markets, Section 409 of the Packers and Stockyards Act require them to pay the auction market by the close of the next business day. However, when the livestock are purchased by feedyards or farmers and ranchers, there's no such requirement for prompt payment. Feedyards are not covered by the Packers and Stockyards Act. Not only is there no requirement for prompt payment, but there's no requirement that they have a surety bond or any other kind of financial protection device that will help ensure that the seller, the market in this case, actually

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gets paid. At this point I want to pause for just a second and make sure I'm not misunderstood. I am not here telling you that feedyards are a horrible financial risk. Most feedyards pay, their checks are good, there's not a problem. The problem comes in that if any payment is not paid by a feedyard it is usually a big problem because they buy substantial numbers. They don't buy small numbers. Most feedyards finance a sizable portion of their business. Typically when a feedyard borrows money, the lender takes a security interest not only in specific livestock, but also in all of the feedyard's assets that are then owned or thereafter acquired. It includes everything from livestock to feed to inventory to equipment to machinery to bank accounts, accounts receivable, the whole nine yards, a blanket security interest. Under the Uniform Commercial Code, attachment of an article 9 security interest takes place when three things happen: when there's an agreement that the interest attaches; when the secured party has given value; and when the debtor has rights in the collateral sufficient to permit attachment and that's a key--when they have rights sufficient to permit attachment. Almost always those security agreements provide that the lender's security interest attaches not only to specific livestock but also, as I said before, to all of the collateral: inventory, equipment, feed, livestock, everything. One of the keys is that value does not have to consist of new value. In other words, it doesn't have to be a loan for that specific livestock. Value can be for an antecedent debt. So if the feedlot owes the bank money, that's value already been given. Finally, the Uniform Commercial Code allows a buyer who has not paid for goods to transfer greater title to a good faith purchaser and he or she could actually claim. And a secured creditor, the lender, can be considered to be a good faith purchaser. That's exactly the situation you had in the Maryott case. Thus in a situation where a livestock market delivers livestock to a feedyard and is paid with a dishonored check, the UCC would allow the lender to qualify as a good faith purchaser. And as such, that lender gets a priority under Article 9 over an unpaid seller. The lender with an after required property security interest based on a preexisting debt gets the livestock and the proceeds while the unpaid seller gets no livestock and no proceeds. I think if we're honest with ourselves and you think about this for a minute, there's something inherently unfair in a situation where a lender with a blanket security

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interest that covers everything but the kitchen sink, based on a preexisting debt, gets all the livestock and the proceeds from the sale of the livestock; and the person who actually sold the livestock in question gets nothing. Likewise, I think most of us would find something inherently unfair in a situation where a bankruptcy trustee gets the livestock and the proceeds and the person who actually sold the livestock gets nothing. Historically, the argument has gone something along these lines. Well, the seller could have protected himself, and that argument comes up in the Maryott case. The law was a little different then, even though that was only five years ago when a revised Article 9 was adopted. There is now a specific section that deals with purchase-money security interest and livestock. In the old days you could have taken a...you could have reserved title which basically amounts to a reservation of security interest. And if you were quick enough and got it filed within 10 days or 20 days, depending on the state, you might have a perfected purchase money security interest that would take precedence. That's not the case today. In order to get a perfected purchase-money security interest in livestock today, you must have it perfected before the buyer takes possession, you must notify the secured party, and you have to specifically describe the collateral. Well, if you think about this for a minute, at a livestock auction market, the cattle come in that day. They go through the ring. You don't know...the market doesn't know who is going to buy those until the gavel actually falls. And I would dispute just a little bit some of the words of the prior speaker. It's not just a question of when they actually cross the feedlot's property line. It's when they get on the trucks to go to the feedyard they're in possession of the feedyard at that point. So in order to get a perfected purchase-money security interest that would come in front of what's already there, a livestock auction market would have to fill out the paper after the hammer falls, but before the stuff gets on the truck, get it sent to the Secretary of State's office and filed, notify anybody else that has a competing security interest with a specific description of the cattle that the guy just bought. It's impossible. It does not happen. It cannot happen. The only way it could happen is if the market refused to let the buyer leave the premises with any cattle until they actually had good funds. It doesn't even necessarily mean getting a check because you could have the check that bounces. The lender, would under

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the present law, would still get the purchase-money security interest, would have the priority, and would get the cattle. LB 440 would provide a simple way to help ensure that the cash seller of livestock would have a legitimate opportunity to get paid for the livestock that he sold to a feedyard. It would not send the industry back to the days of conditional sales contracts. It would not be the death of financing for feedyards. Generally speaking, LB 440, although more narrowly drawn, is similar to the Packers statutory trust set out in Section 206 of the Packers and Stockyards Act. In 1976 when Congress was considering that statutory trust, lenders testified repeatedly that passing that legislation would spell the end of the packer industry because the packers would not be able to get financing. It's 26 years later and they've got financing all the way. The financing did not just disappear. That is the only historical precedence we have in this situation. The claim was financing would disappear for packers. It didn't disappear. And I think if this bill passes we will find the same situation for feedyards. Financing is not going to disappear. It may be reshaped a little bit. They may be more careful about getting purchase-money security interest on specific livestock as opposed to a blanket security interest that covers after acquired property, but the financing will be there. One of the things that happened, I believe it was last October or November, is some representatives of the livestock auction markets met with representatives of the bankers association or different bankers. And there were a number of questions that had to do with the legislation last year that they objected to. And what I'd like to do, if I may, is just take a couple of minutes and address three or four of those issues that have changed from last year's legislation to this year's legislation. One of the objections last year was that the bill did not do a very good job of talking about the specific assets. And the only thing I can say about that is if you look at Section 4 this year and you go down to about line 9, it's talking about what is covered by this statutory trust. It's livestock that are purchased and then it talks about receivables and proceeds from the sale of such livestock--doesn't say all accounts receivable, all proceeds, it says "all receivables and proceeds from the sale of such livestock," okay. So that was an attempt to try to narrow down and address that concern. One of the other concerns was that this would affect title. And in

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fact if you read the bill, there is a specific provision in here that says that this does not affect title, passage of title. What it does then is it attaches to the accounts receivable or to the proceeds as opposed to the livestock themselves. One of the concerns was that there need to be some way to specifically or better identify what was a cash sale. And the suggestion by the lenders at that point was that maybe what we need to do is put a provision in that says that the seller, the livestock auction market, do something within a certain period of time to indicate that they really did mean this to be a cash sale. And one of the suggestions was that the seller make a demand for payment within a certain specific time period. If you look at this legislation under Section 3, subsection (1) as it defines cash seller, there is not only a requirement that there not be a written credit agreement and that the person not have been paid, there is also a requirement that the person has to have made a demand for payment within 15 days after the feedlot operator has received possession of the livestock. So that's an attempt to address that issue. You have a specific requirement that the seller has to jump through in order to be identified as a cash seller. One of the other concerns that was raised at that point, a very valid concern, was our primary concern had to do with this blanket security interest that was out there scarfing up everything that came along in a situation where the bank hadn't really lent or loaned any money. It was an after acquired thing that just kind of sucked everything up. So the question was, well, what if we've actually loaned money for these specific cattle? If you look at Section 4, it starts off and says, "Except for livestock that serve as purchase-money collateral for a perfected purchase-money security interest," all livestock are subject to this trust. In other words, if the lender has loaned money specifically for the cattle in question and has a perfected purchase-money security interest on those cattle, they're excepted from this trust. The banker still has the right to get those cattle first. That the seller would come after that. So that is the attempt to address that issue. Those happen to be, at least according to the information I had at that point, the primary concerns. There were a couple of other concerns. One of the questions essentially got down to, well, couldn't you do something by getting certified checks, cashier's checks, wire transfers, all that kind of stuff. And the simple answer to that is no. It's very difficult to

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get a certified check or a cashier's check when you don't know what the purchase price is going to be until the gavel falls which means then the market has to sit there and hold everything. If you've got a Friday sale or you've got a Saturday sale, the livestock will still be there Monday in that kind of a situation waiting to leave which means somebody has to take care of them. So those kinds of things simply don't work basically is what it amounts to. So what you've got here, LB 440 provides potential help for unpaid cash sellers if they act promptly once they've not been paid by a feedyard. LB 440 does not provide protection for those who sell on credit. It does not return to the days of conditional sales contracts. And it doesn't impair passage of title. What it does is provide a simple, fair and workable means to provide some protection to those folks that sell livestock to feedyards and don't get paid. It doesn't cover every situation, as I said, because it doesn't really address what happens if there's a sale to a farmer or rancher. But typically, those are relatively small compared to sales to a feedyard. What this bill is designed to do is to prevent a catastrophe for the sellers of livestock. I urge you to support LB 440. I'd be happy to answer any questions you might have. Thank you.

SENATOR ERDMAN: Thank you, Ernie. Any questions for Mr. VanHooser? I had a list of about half a dozen, but you went through each one of them so we may have one more. Any questions? I guess I've got a couple here. Would you agree that the feedlot's lender would have a greater interest to see that the cash seller is paid if this bill is passed?

ERNEST VANHOOSER: I would think so. I don't think there's any doubt about that.

SENATOR ERDMAN: I guess...and the other question is what might the feedlot's lender do to make sure any money lent for purchase of livestock are actually used for that purpose?

ERNEST VANHOOSER: Well, I hate to try to dodge this, but it may be better answered by the bankers than I could give you an answer for. I think one of the things to make sure that they have first right to the cattle will be if there is actually a purchase-money security interest for specific cattle because that takes it out from under this trust

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provision and gives them exactly the rights to the cattle at that point. In terms of sort of vetting their borrowers or figuring out who they're loaning money to, I guess my only comment there would be to a large extent from what I've seen, bankers have a continuing relationship with their feedyard owners. So they're in a position to actually go through and qualify the people that borrow from them much better than a livestock market is who may see them come in and buy right then and be gone in an hour. So at least the bankers have a relationship with those folks upfront. It gives them an opportunity to judge their credibility and who it is that they're loaning money to. And I guess to some degree this bill to me really gets down to a matter of fairness. If I'm a banker and I have a longstanding relationship with a client, I think I have some obligation to know what sort of person that is. And this bill the way it is set up with being able to use a purchase-money security interest with specific cattle to keep that priority gives the banker an opportunity not only to know the customer but to make sure with that that the banker comes first. What it does is it gives the livestock auction market that doesn't have that time an opportunity to get the cattle back or to get money in the case where what you simply have is an after acquired property clause that's sucking everything in and to beat the bankruptcy trustee, quite frankly.

SENATOR ERDMAN: Okay. Any further questions for Mr. VanHooser? Seeing none, thank you for your testimony...

ERNEST VANHOOSER: Thank you very much.

SENATOR ERDMAN: ...and your willingness to work through this issue. Next testifier in support of LB 440. I'll also announce that Senator Roger Wehrbein representing District 2 from Plattsmouth has joined us today.

MICHAEL KELSEY: Thank you, Senator Erdman and members of the Agricultural Committee. My name is Michael Kelsey, that's K-e-l-s-e-y. I'm currently the executive vice president of the Nebraska Cattlemen. I'm here on behalf of the cattlemen in support of LB 440. I did have a list of things to say, but quite frankly I think they've been covered very well and I'll not belabor time. Simply in support of the bill. Be happy to answer any questions if

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there are any.

SENATOR ERDMAN: Thank you, Michael. Any questions for Mr. Kelsey? Thank you. Next testifier in support of LB 440. Anyone else? I see none. We will move to opponent testimony. Those wishing to testify in opposition to LB 440 please come forward. And Mr. Hallstrom has promised me we will not get a half hour dissertation on UCC code, has he not?

ROBERT HALLSTROM: (Exhibit 3) I can accommodate that request. Senator Erdman, members of the committee, my name is Robert J. Hallstrom. I appear before you today as registered lobbyist for the Nebraska Bankers Association in opposition to LB 440. I will let my written comments speak for themselves and vary from it and just have a little discourse and dialogue on the issues that have brought us before the committee, not only this year but about the last three or four years on legislation very similar to this. We have been consistent in our opposition. We have been consistent in our pledge to work with committee counsel and with Mr. VanHooser and the elements from the livestock market auction. I think we've probably made some progress. Mr. VanHooser in his testimony eloquently addressed some of the issues that we raised in a meeting that we had back about Thanksgiving time last year, but we still have some concerns and think we probably still have a work in progress. We may, quite frankly, at the end of the day continue to walk away from the table saying that we cite differences of opinion in how this issue ought to be resolved. But essentially a few things that I'd like to bring to the committee's attention. We obviously, to begin with, do have lenders on both sides of these questions so I think we come somewhat pure to the table in terms of not coming with a predetermined or predisposed position on this issue. We do have lenders of producers who have unfortunately had situations where cattle were taken to a feedlot that because of the timing of the delivery of cattle saw the feedlot be rendered insolvent and ended up not being paid for those cattle. We likewise have lenders of feedlots who have gotten burned and who have taken losses in those same types of insolvencies. One of the things that a person has to recall and remember in these livestock feedlot insolvencies is that there's generally plenty of pain to go around for everyone, whether that be for cash sellers of

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livestock or for the lenders of the feedlots themselves. It's not just a simple matter of one side or the other winning or losing as the case may be, but a whole lot of people losing. I think it's interesting to note in terms of looking at the need for the legislation it's one that perhaps at first blush you could say this is an issue that we maybe should look at and address and will continue to do so diligently. But I think it's also interesting to note that the first gentleman that testified indicated that he's had one issue in at least 26 years, he mentioned through the seventies. I would suggest to you that any number of bankers would like to have a record that spotless of only having one significant loss over the last 20-some years, but unfortunately that's not the case. We do appreciate some of the issues that Mr. VanHooser addressed. He took good notes at our meeting in November and he's made a good faith effort I believe to address these issues. Unfortunately, we haven't communicated as to whether or not they were acceptable until today. With regard to the cash seller distinction, draw your attention to page 2, line 19. There is new language in there regarding making a demand for payment within 15 days. Committee counsel, Mr. Leonard, and I had worked on this issue two or three years ago when this legislation was being considered. I don't have the information in front of me, but I think our preference would be that a significantly shorter period of time be made for that demand. I think there's some language of similar import, if I remember correctly, within the federal law that is much shorter in duration or at least was our preference at that time to look at a much shorter time period for making the demand to distinguish between whether or not you're a true cash seller or someone who perhaps went in selling on credit and then had a change of heart when it looks like the feedlot is going south. I think you might be able to logically determine that 15 days normal course of business 15 days you're going to have your check clear the bank if it's issued and demanded in a timely fashion, timely being much quicker than 15 days, in our opinion. By the time the 15-day period comes around I think you'd virtually in every situation have people coming knocking back on the door when there is unfortunately an insolvency and saying, I'm still in time. I'm making my demand now within the 15-day time period so I want the trust to attach. So at a minimum I think that time period is significantly too long to address the concerns that we have in that regard.

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Mr. VanHooser dismissed, and perhaps rightfully so, he knows his business better than I do, some of the issues that we looked at in terms of changing business practices to accommodate what the market is. We talked about wire transfers. When we initially looked at this issue, there was a lot of talk about having to make immediate payment. Well, I think his testimony, to his credit, indicates that the true requirement under the federal law is by the close of the next business day. And so there is an issue there. Again, we'd have to look at the realities of the situation and the process. But if they can wait until the close of the next business day, is it reasonable to assume that they could have a wire transfer from the bank on Saturday for a Friday sale or Monday for a Saturday sale? I'll let the committee make the distinction as to whether or not Mr. VanHooser's description of his business and the inability to do certain things or not to do certain things should carry the day in terms of justifying the need for this legislation. I might also add another concern is although sometimes Nebraska likes to be the leader, we would clearly be the only state to my knowledge that has a law of this type that makes changes in how the process of the system works. The federal law and the Packers Act that Congress passed has, for whatever reason, determined that they are not going to include feedlots in those that have the protections of the trust. I would question whether Nebraska should step out front and be the one that makes that decision when Congress, for whatever reason, has determined that it's not appropriate to do so. Part and parcel of this might also be knowing your customer. Mr. VanHooser suggested that banks are in a better position to know their customer. I'm not sure that's the case. There's been no consideration given to whether or not there should be a registration requirement, some type of prequalification for your order buyers, the people that are buying livestock from the livestock auction house. If it's that significant of a problem, then perhaps they ought to know their buyers better and have some prequalifications as to who they're going to deal with. And I would suggest and submit that perhaps their practice is that they already do that. Perhaps they sell on credit to certain individuals who they deem to be credit worthy and others they demand quicker payment. So they may already have somewhat of that type of system in play. Another issue that we have and, again, I appreciate the fact that Mr. VanHooser made the

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distinction on page 3, line 9 to "all receivables and proceeds from the sale of such livestock" and put provisions in that protect the concept of the immediate transfer of title when the title to transfer or the transfer of livestock takes place to a third party. But again, my understanding of the provisions of Section 4, subsection 2 of the bill on page 4 of LB 440 are that there is no tracing requirement and thus the concept of the trust, as I understand it, and I could be proven wrong on this, but I think it applies to all livestock, not just the livestock that have been sold. So we will have a situation where there may be circumstances where a lender has advanced funds for the cattle that are still on the hoof at the feedlot and yet there's going to be a first hidden lien so to speak that attaches to those livestock even though they had no relationship to the transaction at issue. For those reasons, we would ask the committee to hold the bill. Again, I think we've made some progress. I've raised some additional issues. Mr. Leonard has talked about whether or not there's room to discuss changing the purchase-money security interest or the PMSI status under the Uniform Commercial Code. I'm certainly open to those discussions. I think I'd say publicly that I'm hesitant to make any nonuniform changes in that regard for the impact that they might have on other transactions. And I think in closing another issue and, again, I don't know at the end of the day it changes our stance or position on this bill, but clearly the general people that are before you today that have the major interest, although the cattlemen who opposed the bill last year are now in support, but you have a situation where it's the livestock market people. They've tried to make their case for why their situation is unique. Perhaps they can't take advantage of the purchase-money security interest, but this bill applies to all cash sellers. There are other cash sellers beyond the livestock market people that clearly can take, if they're so inclined, advantage of the purchase-money security interest. So in that respect our concern would be at a minimum that the bill is far too broad again in that respect. So I'd be happy to address any questions that the committee might have.

SENATOR ERDMAN: Thank you, Bob. Any questions for Mr. Hallstrom? I guess I'd just procedurally I guess from the point that the bill was introduced till now, the only conversation that you've had with those that you met with

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prior last fall on this issue has been today. There hasn't been any effort between the time that the bill was introduced until now to present concerns on either side and try to work...

ROBERT HALLSTROM: I will say Mr. Leonard sent me an e-mail last week. I was out of town the better part of the week when they were going to have a meeting so I was probably the one that was not able to attend the meeting. We may or may not have had a productive meeting at that point, and I don't even know whether the meeting was scheduled.

SENATOR ERDMAN: Okay. Any further questions for Mr. Hallstrom? Seeing none, thank you for your testimony.

ROBERT HALLSTROM: Thank you, Senator.

SENATOR ERDMAN: Anyone else wishing to testify in opposition to LB 440? I see none. Anyone wishing to testify in a neutral capacity? It looks like everybody is off the fence on this one. Senator Kremer is not here to close and that will close the hearing on LB 440. (See also Exhibit 4) Thank you for your attendance today. That will close the hearings for the Agriculture Committee for today as well.