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COMMITTEE ON JUDICIARY
January 27, 2005
LB 30, 278, 419, 446, 455, 110

The Committee on Judiciary met at 1:30 p.m. on Thursday, January 27, 2005, in Room 1113 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LB 30, LB 278, LB 419, LB 446, LB 455, and LB 110. Senators present: Patrick Bourne, Chairperson; Dwite Pedersen, Vice Chairperson; Ernie Chambers; Jeanne Combs; Mike Flood; Mike Foley; and Mike Friend. Senators absent: Ray Aguilar.

SENATOR BOURNE: Welcome to the Judiciary Committee. This is the fifth day of our hearings. We have six bills on the agenda this afternoon. I'm Pat Bourne from Omaha. The members of the committee are Senator Flood from Norfolk, Senator Friend from Omaha, Laurie Vollertsen is the committee clerk. Michaela Kubat is the legal counsel and Senator Mike Foley from Lincoln. I'll introduce the other members as they arrive. Please keep in mind that senators have bills and other duties to introduce so they'll come and go during the hearing so please don't take offense at that, don't take it personally. They simply are doing other business. If you plan on testifying on a bill I'd like for you to sign in advance. Those two chairs at the very front are what we call our on-deck chairs. You'll make your way forward and then sign in so that we don't have a delay while we're waiting for people to sign in so, again, we're going to make use of the on-deck chairs. Following the introduction of each bill, I'll ask for a show of hands to see how many people plan to testify on the bill. We'll first have the introduction. We'll have proponent testimony, then opponent testimony and then if there's any neutral testimony we'll take that then. When you come forward to testify, please clearly state and spell your name for the benefit of the transcribers. All of our hearings are taped and transcribed for the permanent record. It will help them. Due to the large number of bills heard here in the Judiciary Committee we're going to use the Kermit Brashear Memorial Lighting System (laughter). Senators, the introducer senator will get five minutes to open and three minutes to close. All other testifiers get three minutes exclusive of any questions the committee members may ask you. The blue light goes on for three minutes. The yellow light will come on as a one-minute warning and then when the red light comes on we ask that you conclude your testimony.

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The rules of the Legislature state that there are no cell phones allowed in committee hearing rooms so if you have a cell phone please disable it. Reading someone else's testimony is not allowed. If you want to submit someone else's testimony on the record we'll accept it but we won't allow you to read it. With that, Senator Schrock to open on LB 30. Welcome to the committee.

LB 30

SENATOR SCHROCK: (Exhibit 1) Senator Bourne, members of the Judiciary Committee, for the record, my name is Ed Schrock. It's spelled S-c-h-r-o-c-k and I serve the 38th Legislative District. Mr. Chairman, this bill represents three years of work by the Natural Resources Committee on the issue of limited liability protection for liquefied petroleum gas seller, supplier, handler, or transporter. Liquefied petroleum gas is commonly referred to as LP gas or farmers call it propane. The bill requires LP gas sellers, supplier, handlers, or transporters to notify its customers that the customers notify the LP gas sellers, supplier, handler, or transporter prior to the customer doing any installation, modification, repairing, or servicing of his or her LP gas system to obtain the LP gas seller's, supplier's, handler's, or transporter's consent. If the customer proceeds to install, modify, repair, or service his or her system without such notification the seller, supplier, handler, or transporter cannot be held liable for damages caused by the customer's activities. We define the LP gas system as an installation with a maximum operating pressure of 125 pounds per square inch or less. It includes the container assembly, pressure regulator, piping system, gas utilization equipment and its components and venting system. The notice is required to contain not only the statutory reference to this section of law but also a description of the law, any additional information with propane education the research council believes is necessary. A notice is required to be mailed or otherwise providing to the customer or leaving at the customer's residence. I would request that the Judiciary Committee either on its own motion or by an adoption of the amendment I have presented to include a provision in the bill to clarify that nothing in this legislation provides protection for damages that arise from the gross negligence or willful

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or wanton acts of the seller, supplier, handler, or transporter. I do have that amendment here with me. What this bill does, it says that if you are an LP gas supplier, you have to notify your customer that they have to notify you if they're going to make any change or modification. And if they don't notify you and something bad happens, the supplier is not responsible. It's not a very difficult bill. The Natural Resource Committee has advanced this bill in the past; I don't think it's changed. But because it is an issue of liability the executive committee referenced it to your committee. I don't have a problem with that. So that's what this is all about. If you have any questions I would try to answer them.

SENATOR BOURNE: Thank you. Are there questions for Senator Schrock? We've been joined by Senator Chambers from Omaha. Senator Chambers. (See also Exhibit 2)

SENATOR CHAMBERS: Senator Schrock, the thrust of the bill is not one that troubles me that much because I think there can be some accommodation but the way it's drafted I do have some difficulty with. But on page 2, starting in line 22, it says no legal action shall be commenced or maintained if certain things were the case. Well, some of these issues could be determined fairly only in court so there's a difference between saying a person cannot even get into court and saying that if an action is brought this that is in the bill would be a defense against liability. I don't favor bills that will not even let a person get in court so I want to let you know where my main concern with the bill is especially in view of the fact that an amendment or some amendments should not be opposed to.

SENATOR SCHROCK: Well, the amendment actually says the limited liability does not apply to gross negligence or willful or intentional misconduct on the part of the supplier.

SENATOR CHAMBERS: But the bill says that you can't even file a legal action if some of these things have been done. The question might be whether, in fact, these steps have been taken and I would not want it to be sufficient to keep a person out of court where the supplier or any of the others who are given the protection or the immunity (inaudible) to say, we did this and here are the papers that

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show it. The courts ought to be open to all citizens. The Constitution guarantees that so the ones that you're working with you can let them know that my major concern because I think we can work on some of the other things in the bill is trying to have a provision that says, you cannot even go to court and that's all that I would have.

SENATOR SCHROCK: But, you know, I just might add that we're dealing with a very pressurized product here and farmers seem to deal with these...it's not that unlike anhydrous ammonia for what it's worth as far as the pressure and how you handle it. But if we want to have a viable industry out there they need to be afforded some protection by the negligence of their customers and...

SENATOR CHAMBERS: Well, if you would make the actions that the supplier took which are in keeping with what the law requires to shield him or her from negligence, you make that a defense if an action is filed. But I'm not in favor of saying that it prevents a person from even getting into court so I don't want you to think I'm saying that the danger is not there, that people who use the product are not careless, or that there should be some degree of protection for the suppliers when they've taken certain steps. But whether or not they complied with the law in the way they took the steps is something that on occasion only a court can determine so that part that says, no action can be commenced is the part that really hangs me up on the bill.

SENATOR SCHROCK: Okay, I appreciate...

SENATOR CHAMBERS: But we can talk because we always do.

SENATOR SCHROCK: Yes, yes.

SENATOR CHAMBERS: Okay.

SENATOR SCHROCK: And you understand the courts and the judicial system better than I do, Senator Chambers.

SENATOR CHAMBERS: Well, I'll accept that (laughter).

SENATOR SCHROCK: Yeah. And no one would question that (laughter).

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SENATOR BOURNE: Thank you. Well, don't get carried away (laughter). Thank you. Senator Foley.

SENATOR FOLEY: Thank you, Senator Bourne, and thank you, Senator Schrock for the bill. I've read the bill and I appreciate where you're trying to go with this. And I agree with where you're trying to go with this. I'm a little concerned about the process of getting notice to the customer. And it says, by mailing or otherwise and it goes on to say something about leaving it at the customer's residence. And I'm thinking of a situation where the customer signs up for service, they get a notice not by mail but it's slipped under the door or something. And then ten years later, who's going to remember that notice? And they make an adjustment to their equipment and it blows up. And I'm just wondering if that's sufficient notice just...this just requires a one-time notice, is that right?

SENATOR SCHROCK: As near as I can tell, yes.

SENATOR FOLEY: Yeah. What if we were to take a different approach and require them to put some sticker or placard on the equipment itself so that before you touch the equipment you can see the sign and or sticker or whatever it is.

SENATOR SCHROCK: You know, the industry is out here. They can probably answer it better than I do but I think most of the equipment already has those warnings on them.

SENATOR FOLEY: It does, okay.

SENATOR SCHROCK: I could be wrong.

SENATOR FOLEY: Is it required or do they just do it as a?

SENATOR SCHROCK: I think if you sell a...

SENATOR FOLEY: Well, maybe we'll hear more from the testifiers.

SENATOR SCHROCK: Yeah, I think I could be mistaken there but I think if any of these appliances that involve either natural gas or propane, I think are pretty well placard with warnings on them.

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SENATOR FOLEY: Thank you.

SENATOR SCHROCK: All right.

SENATOR BOURNE: Thank you. Further questions? Seeing none, thank you.

SENATOR SCHROCK: I'll leave the amendment with you.

SENATOR BOURNE: Could I get a show of hands of those individuals wishing to testify in support? I see two. Opposition? I see one. Neutral testimony? I see none. The first testifier in support would come forward? And, again, we're going to make use of the on-deck area so if there's only one other testifier in support so would the opponents make their way forward? Welcome to the committee.

MICHELLE SWERTZIC: (Exhibit 3) Hello, Chairman Bourne and members of the Judiciary Committee. My name is Michelle Swertzic. That's M-i-c-h-e-l-l-e S-w-e-r-t-z-i-c. I'm executive director of the Nebraska Propane Gas Association and we represent about 250 propane marketers throughout the state, and I am testifying in support of LB 30. And we're also in support of the amendment that Senator Schrock, that you just got passed around. And they're passing around my testimony right now. Basically, there's been an increase with like home improvement centers and a lot of home improvement projects with do-it-yourselfers on equipment and appliance installations and repair. And a leading cause of propane accidents recognized by the industry is when unqualified people make improper installations and changes to their system. Some examples of these are using materials that are not designed for propane use, misusing piping materials, and assembling the systems incorrectly. Propane is a flammable gas that's what makes it a good energy source. However, when wrong installations and repairs happen and occur, these have far-reaching consequences, you know, essentially can cause personal injury, loss of life, and costly property damage. LB 30 does call for joint responsibility on both the suppliers' parts, through notification of the act, and customer to advise the supplier of system changes. And we understand that homeowners are going to continue to work on their systems but one of the best ways to prevent propane incidents is through gas check inspections by a qualified technician. An inspection

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ensures the system is safe for operation or identifies a problem. The state fire marshal does adopt codes specific to propane. According to the code, a leak check is required whenever an interruption of service occurs to a propane system. And a leak check is an operation performed with special equipment to make sure that the system is leakfree. And an interruption to service is basically any time the gas is shut off like when a new appliance is installed or repaired or anything, is modified or changed. But I guess what we're saying is without the knowledge of the customer, the supplier doesn't know when these things are happening and can't do those inspections and can't ensure the system is safe. And I guess NPERC is the Nebraska Propane Education and Research Council and its primary mission is to educate the public and industry. And we have some of the current safety brochures are on my testimony as well as kind of a sample notice of what the dealer could do. So for these reasons, I guess I encourage you to advance LB 30.

SENATOR BOURNE: Thank you. Questions for Ms. Swertzic?
Senator Foley.

SENATOR FOLEY: Did you hear my earlier question?

MICHELLE SWERTZIC: Yes, I did.

SENATOR FOLEY: Do you know what the answer is to that?

MICHELLE SWERTZIC: Well, I guess one thing is some of the...like the safety brochures. The NPER Council sends those out to all the marketers throughout the state on an annual basis and those are then distributed to the customers. And they do...it's called a, what we call a duty to warn they have and they have to do that on an annual basis and warn their customers of the potential dangers of propane. So this would be kind of another, I guess, warning and notice...

SENATOR FOLEY: This would be included in that brochure.

MICHELLE SWERTZIC: Um-hum, in that, uh-huh. And they also do other ways, you know, through the customer newsletters, through websites, through, you know, trade shows, things like that. But they do for sure an annual basis send warning information out to the customers.

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SENATOR FOLEY: What about notification on the equipment itself?

MICHELLE SWERTZIC: There is notification. Like Senator Schrock said, on every piece of both like natural gas and LP gas equipment applying is like water heaters. You know, that does have, you know, warning information stuck on all those appliances.

SENATOR FOLEY: So that's industry standard practice then.

MICHELLE SWERTZIC: Um-hum.

SENATOR FOLEY: Okay.

MICHELLE SWERTZIC: And that's a nationwide standard, yeah.

SENATOR FOLEY: Thank you.

SENATOR BOURNE: Further questions? Senator Flood.

SENATOR FLOOD: Briefly. Would it be to the benefit of your petroleum supplier if they did send a certified letter or had an acknowledgment from the customer so that in the event that you did go to court and it was an affirmative defense, you could provide that as evidence that you did, in fact, notify them of their obligations and the situation and the dangerousness of...

MICHELLE SWERTZIC: Um-hum, um-hum.

SENATOR FLOOD: ...wouldn't that be something you'd consider with your group?

MICHELLE SWERTZIC: Yeah. And I guess, industry practice is that like when you get a new customer that you go through that with them and you have them sign off that they acknowledge and receive that. And then on an ongoing basis every year, they do keep a record of every person that receives that information, what information they've sent, and they do keep record of that. I don't know that it's always done certified mail but I know it's done regular mail.

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SENATOR FLOOD: But you do have a written acknowledgment of the terms and conditions of the...

MICHELLE SWERTZIC: Yeah, when they...

SENATOR FLOOD: ...which would probably satisfy...

MICHELLE SWERTZIC: ...when they become a new customer they, yeah, they mark off that they've acknowledged that.

SENATOR FLOOD: Great, thank you.

SENATOR BOURNE: Thank you. Further questions? Thank you very much. We've been joined by Senator Pedersen from Omaha. Next testifier in support.

DENNY RIEKENBERG: (Exhibit 4) Chairman Bourne and members of the Judiciary Committee, my name is Denny Riekenberg. I'm the energy marketing manager for United Farmers Cooperative in Shelby, Nebraska. We serve over 1,700 propane customers through residential use, irrigation and grain drying. United Farmers Cooperative employs 230 people and operates out of 20 locations in central Nebraska. I am also currently serving as president of the Nebraska Propane Gas Association. I'm testifying in support of LB 30. Safety is a high priority for us and we need to have notification by the customer when changes are made in a propane system so we can do a proper inspection to ensure against unnecessary accidents. An example of this is just last fall when a customer made the choice to perform his own work to upgrade his propane system which needed regulator and line changes because the system was not two-staged and the line entered into the house below ground level. After the work was completed, according to investigators, the underground line began leaking propane and followed the trail into the basement. An explosion occurred, causing two people to lose their lives with another injured, as well as causing extensive property damage. If our company had been notified we would have properly tested the system prior to system start-up and this tragedy could have been avoided. Our company customer safety education program includes safety information handouts, special safety brochure mailings, company newsletter articles on propane safety tips, and website safety information. We have safety inspection and maintenance programs in place in order to

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make sure all heating systems are checked on a regular basis. Our employees are formally trained and certified in the use and handling of propane through educational classes sponsored by the Nebraska Propane Education and Research Council. We are liable for any substandard practices as well as any poor or careless workmanship we would perform. However, systems can be altered, changed or disconnected and improper installation can occur without our knowledge. We need to be made aware of any changes made on the system so we can do proper testing to make sure systems are safe prior to use so tragic accidents can be avoided. We strongly encourage you to advance LB 30. Thank you for your time and consideration.

SENATOR BOURNE: Thank you. Are there questions? Seeing none, thank you. Other testifiers in support? Testifiers in opposition?

PETE WEGMAN: Mr. Chairperson and committee members, my name is Pete Wegman, W-e-g-m-a-n. I'm a lawyer and a partner in the law firm of Rembolt Ludtke here in Lincoln. I'm a director of the Nebraska Association of Trial Attorneys and am appearing here today on behalf of that organization in strong opposition to this bill. As you know, any time our organization sees bills become before this body with immunity provisions or provisions that play certain special interest groups above the ordinary negligence law to which applies to all the rest of us our antenna goes up. And if I just heard the industry right, they've told us that there is apparently a problem out there. They've given us one example of something in Nebraska. They've admitted a need to notify customers of these risks and I think they're telling you that we will go ahead and do what we probably should do is notify these people if you give us immunity. And that just isn't right. For a number of years until recently, I was one of about 200 members of the Propane Gas Defense Association, one of three members in Nebraska. This national association consists of members from most of the major companies involved in propane production and distribution and lawyers involved in generally defending propane litigation. I had the privilege of representing a multinational company heavily involved in the propane industry in their Nebraska litigation for several years. During the course of that representation, I worked on several residential explosions resulting in deaths and

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horrible burn injuries. I learned from that work that the average Nebraska citizen does not remotely understand the significant risks involved with propane primarily because it's odorless, it's colorless, and, most importantly, and unlike natural gas it is heavier than air and it's incredibly explosive. And I've had cases where people have literally been in their basements standing in a pool of propane and not knowing it and lit a match to light a pilot light. People don't understand that the odor and ethyl mercaptan that is added to propane solely as a warning of its presence doesn't always work. They don't know about scientific concepts known as odor fade, odor fatigue, absorption and adsorption where the odor literally leaves the propane and attaches to other things like dirt walls in an older house's basement. I have today with me the LP gas's handbook. This is a fourth edition from 1995. There may be more current editions. I grabbed this off my bookshelf in my office today. It's almost 500 pages long with ten chapters and ten appendices setting forth the standards for the storage and handling of liquefied petroleum gases. The things about LP gas as I just referenced before is why there's a handbook like this. Chapter 3 which is entitled installation of LP gas systems which I think this bill somewhat addresses runs 140 pages long. This is what the people in the industry are supposed to know. What does the average Nebraskan consumer using this product know about what's in there? Probably nothing or next to nothing. Most of the residential propane heating systems in Nebraska are in older structures in rural areas, primarily occupied probably by elderly citizens and young families. Our trial lawyers' organization is certainly not aware of any significant problem across this state with consumers altering, modifying, repairing their LP gas systems that would justify a new law. We have an existing tort law system in this state which has evolved over the last 120 or 130 years or so which has served our citizens well. We have commonsense men and women sitting on Nebraska juries. If there are lawsuits because a consumer has altered, repaired, or modified an LP gas system then juries are instructed on comparative negligence and assumption of risk defenses.

SENATOR BOURNE: I'm sorry, if you could give us your final thought. The time has expired.

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PETE WEGMAN: There's all kinds of problems with the notices that's being crafted by the industry themselves. We just think this is a bad bill and ought not to go anywhere.

SENATOR BOURNE: Thank you. Questions for Mr. Wegman?
Senator Friend.

SENATOR FRIEND: Thank you, Senator Bourne. Mr. Wegman, I know you probably heard some of the other line of questioning and I was going to follow up on what Senator Chambers had actually brought up earlier. I'm not looking to rewrite the bill or anything else. I've said this before. I'm just thinking out loud and I wanted to get your take on this. In line 22 it says no legal action shall be commenced or maintained against any person engaged in this state in the business of selling and then on and on. If the word commence was removed from this language, it significantly changes the makeup of this bill. Is that a safe assumption?

PETE WEGMAN: I disagree...

SENATOR FRIEND: I mean...okay.

PETE WEGMAN: I disagree totally. You take the word commenced out. That means you can file the lawsuit but the next thing that will happen is they'll be a motion for summary judgment and they'll give proof that they put a notice in maybe a monthly billing somewhere like we all get with our credit card bills and throw away. I mean, I don't think that changes at all. And the other thing I didn't talk about is they're asking to be only liable if they're grossly negligent or commit a willful, wanton act and again. You're going down a slippery slope if you start telling people that that's a negligent standard you only have to adhere to as long as your conduct isn't reckless and you hurt somebody you're going to be innocent and that's just not right. So I don't...with all due respect I don't think taking that word out changes at all. You're still...

SENATOR FRIEND: Yeah. No, I asked the question because it was...I wanted your response to it. I would just say, is there...and I think I know the answer to this. Is there actually anything that can be done from line 22 on or just anything that could be provided to this bill that would

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bring the trial attorneys on-board? Probably not, correct?

PETE WEGMAN: Yeah, delete paragraph three and prepare to have one and two into law which would require this industry to notify the consumers of the dangers. That would be great. They don't get any immunity with it, that's what they should be doing.

SENATOR FRIEND: Thank you.

PETE WEGMAN: Thank you.

SENATOR BOURNE: Thank you. Further questions? Seeing none, thank you.

PETE WEGMAN: Thank you.

SENATOR BOURNE: Next testifier in opposition? Testifier in a neutral capacity? Senator Schrock to close.

SENATOR SCHROCK: I will be brief but I will just tell the committee that we believe the LP gas suppliers are already properly notifying their customers and already giving an annual notice as to the hazards of LP gas and they are great. And it is used a lot in rural Nebraska. On my own farm, we use it to dry grain with and a lot of people use it to power irrigation motors. It's a common fuel for heating homes. So it is dangerous. But what the LP gas supplier is seeking some protection from is from lawsuits that were no part of their doing from do-it-yourself people who think they know what they're doing even though they've been warned, from accidents that can happen. Unfortunately, a gentleman from the co-op here said that two people were killed from (inaudible) that had nothing to do with the supplier. So I think the point is that they're already being properly notified and this says that they have to be notified. But if we're going to be able to continue to use this product, this valuable product in the state of Nebraska, we think there should be some consideration given to the supplier and some protection given to the supplier and that's what this bill is about.

SENATOR BOURNE: Thank you. Questions for Senator Schrock? Senator Friend.

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SENATOR FRIEND: Real fast, thanks, Senator Bourne. Senator Schrock, I remember hearing this last year in Natural Resources. There were, if I remember correctly, two or three folks, you might be able to correct me if I'm wrong, that talked about the gerrymandering and rigging of these systems statewide. Now with all due respect to Mr. Wegman and I probably should have communicated this with him when he was up here but it looked like he was in a hurry to get out of there. Were these people lying? I mean, is there gerrymandering going on? You live out there. If it were up to me, you made a statement. If it were up to me, we wouldn't have any of this stuff statewide but it's not up to me. We don't live in Utopia. My problem is, were those people lying last year or are we hearing that it's not much of an issue now?

SENATOR SCHROCK: I'm not tracking with you.

SENATOR FRIEND: Last year I heard in testimony and you were sitting there as well, that there were all kinds of problems with people duct taping and doing things on their own. What I'm saying was, if it was a problem last year and these people were testifying it to be the case, why is it not a problem now? I'm assuming it is. It's a leading question.

SENATOR SCHROCK: I think, you know, there's a lot of people out there that have a lot of self confidence that don't know what they're doing and they're out there doing things they shouldn't do. I would tell you that I don't have LP gas in my home but I have natural gas and it seems like every fall I have to go down and light the pilot light. And then I call the people to come out and check the furnace (laugh) but it always makes my wife nervous when I go downstairs to light the pilot light (laughter). But the person that doesn't know what they're doing doesn't follow instructions. It's a hazard.

SENATOR FRIEND: Well, with that in mind, and, again, with all due...Mr. Wegman has forgotten more about this than I know but I'm asking this to you and maybe to your legal counsel. If line 22 on down was manipulated or if there was work done with the committee to fix that, would it be something that, I guess, Senator, that you would be open to talking about because I guess that's why I brought it up from the very beginning?

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SENATOR SCHROCK: Well, you have a good chairman, you have good legal counsel, you have good members. If in your wisdom, you think there should be some modifications done, certainly we would consider that.

SENATOR FRIEND: Thanks, Senator.

SENATOR BOURNE: Thank you. Further questions for Senator Schrock? Seeing none, thank you.

SENATOR SCHROCK: Thank you for your time.

SENATOR BOURNE: That will conclude the hearing on LB 30 and Senator Cunningham is here to open on LB 278. Before he starts, could I get a show of hands of those individuals wishing to testify in support? I see one. Those individuals wishing to testify in opposition? I see three. Neutral testifiers? I see none. Senator Cunningham.

LB 278

SENATOR CUNNINGHAM: Thank you, Senator Bourne and members of the committee. I'm Senator 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 278. This bill is the same concept that was contained in LB 240 which was introduced before this committee in 2003 by Senator Jensen. I'm introducing LB 278 on behalf of the Health and Human Services system. LB 278 makes several changes in the medical assistance program. First, it grants Medicaid a lien on proceeds from liable third-party payors with the lien retroactive to the time of injury. Secondly, not later than 14 days after appointment of a personal representative other than a special administrator, the personal representative shall give written notice of his or her appointment to the Department of Health and Human Services finance and support. The notice shall include the descendant's name and Social Security number. I'm concerned about the increasing costs of Medicaid. It's consuming a larger and larger portion of our budget every year. I feel that we must do what we can to control these escalating costs. That's why I agreed to introduce LB 278. The requirement in LB 278 that a personal representative in

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every estate give notice of his appointment to the department ensures that HHS is aware of all possible estates. Medicaid is intended to be the payor of last resort. LB 278 gives HHS the tools to enforce this policy. It provides the Department of Health and Human Services finance and support shall have a first priority lien against any third party for the amount of all medical assistance that was provided to a recipient through the Medicaid program. Under LB 278, when the recipient or his authorized representative, usually an attorney, asserts a claim or brings legal action against a third party such recipient or authorized representative, if he or she knows or should have known about the recipient's receipt of medical assistance, they shall give written notice of the claim or action to the department within 15 days. The recipient or authorized representative is liable for the amount the department is entitled to if they fail to carry out the notification requirement. The fiscal note predicts that the provision providing for a first lien would result in an estimated savings of approximately \$200,000 the first year and \$600,000 the second year as the department would have greater ability to recover costs paid from the Medicaid program when a third party is determined to be liable for those costs. The cost savings cannot be predicted on the provision that requires notification to the department of an estate that is in probate and there is no way to determine how many additional states the department would become aware of. At least 34 other states have taken the approach of a statutory lien from third-party liability cases when Medicaid is involved. I'm sure and I'm aware that hospitals have some concerns with this bill and they're going to testify later. I've recently met with representatives of the hospital association and HHS in an effort to reach a compromise. The director of HHS finance and support will be offering an amendment later which is aimed at resolving their concerns with this bill. I request a favorable vote on the advancement of LB 278 from this committee and I will answer any questions that I am able but I would tell you that Dick Nelson from HHS is behind me and he will answer the technical questions. Thank you.

SENATOR BOURNE: Thank you. Questions for Senator Cunningham? Seeing none, thank you. First testifier in support? If the opponents would make their way to the on-deck area, please, and sign in. Your time is running,

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Mr. Nelson (laugh). I'm just kidding (laugh). Welcome.

DICK NELSON: (Exhibits 5, 6, and 7.) Thank you. Senator Bourne and members of the Judiciary Committee, my name is Dick Nelson, N-e-l-s--o-n. I am the director of the Department of Health and Human Services Finance and Support. I would like to thank Senator Cunningham for introducing this bill on behalf of the Health and Human Services System. I am here today to testify in support of LB 278. We do have, Senators, two amendments that we would offer today. I did not bring sufficient copies of them but I will give this to your clerk so that the committee can have these to take a look at. There is no agreement on these amendments at this point. We have offered them and they are under discussion. The federal Medicaid program is designed so that Medicaid will be the payor of last resort. If a Medicaid recipient receives Medicaid-covered services and a third party is liable, the liable party is responsible for paying for that service or to reimburse Medicaid. Also, Medicaid is required to file a claim in the estate of any deceased Medicaid recipient if that deceased was 55 years or older and resided in a nursing home. And I need to correct that. It's not simply a nursing home, it's any licensed facility, nursing home, hospital, ICFMR. The bottom line is that the responsibility of the state...it is the responsibility of the state to recover as much of the Medicaid costs as possible from available resources. Under Section 2 of LB 278, notification would be given to the department of of the appointment of a personal representative when an estate enters probate. Currently, the department learns of estates by reviewing death or probate notices in newspapers statewide. The notification required in Section 2 would ensure that the department is aware of all possible estates. Section 3 addresses third party liability issues. Under current law, the department can only assert a subrogation right and then only if it becomes aware of a liability claim by a Medicaid recipient against a third party. The first problem is that there are instances when Medicaid does not know about the claim and the judgment or settlement until after the proceeds are disbursed. The second problem is in the low priority position of a subrogation claim when there are insufficient resources to pay all claims. LB 278 would give the department notice of pending claims and a priority lien for Medicaid costs when there is a liable third party. I've given you an example of a typical car accident case,

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Senators, and I have also attached a whole list of providers that do not have medical liens who we are required to pay when they render Medicaid services. We have also, Senators, provided you with a map that shows the 34 states that currently have lien laws for Medicaid agencies such as ours in order to recover, and we have given you just a circle chart showing what happens in liability settlement cases when the claims exceed the amount of the available settlement, and how our subrogation position increases the cost to the Medicaid program. Senators, we would urge you to advance LB 278, and I would be happy to answer any questions.

SENATOR BOURNE: Thank you. Questions for Mr. Nelson?
Senator Chambers.

SENATOR CHAMBERS: Mr. Nelson, you mentioned estate but in...and maybe you were talking only about one part of the bill. But on page 3 where we're in (3), it talks about the recipient failing to notify the department, then that person is liable to the department for the amount the department is entitled to receive under this section. So if there's a person, a recipient without a representative, that recipient is held to the same standard as lawyers and everybody else who might be authorized representatives. Is that true?

DICK NELSON: That is correct, Senator.

SENATOR CHAMBERS: How would the recipient be supposed to know that he or she is required to do this?

DICK NELSON: The situation that we've dealt with there, Senator, is...first of all, Medicaid recipients, you know, are informed of their rights and obligations when they become enrolled, but certainly one of those obligations would be for them to, if they are going to accept payments for medical bills that they have incurred, and those medical bills have already been paid by Medicaid, they know that there's...they've got an obligation to notify. That just follows.

SENATOR CHAMBERS: Well, let me ask you this...

DICK NELSON: Yes.

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SENATOR CHAMBERS: ...because I want to cut through...now I see. You know, you answered that part of it. If the recipient does not receive or seek payment from a third party, payor, then this...none of this bill applies, does it?

DICK NELSON: That's correct.

SENATOR CHAMBERS: Why then don't you ask to give Medicaid the power to go against any third party which would be responsible to pay, if payment is sought by the recipient or the recipient's representative?

DICK NELSON: Senator, I guess the first question is that...or the first answer is that Medicaid pays hundreds of thousands of claims every year.

SENATOR CHAMBERS: Uh-huh.

DICK NELSON: We do not have a basis for knowing whether that claim is as a result of any injury inflicted on a party. I mean, we simply pay claims. What we're saying is--using the word "claims" too many times--we're paying the bills that are submitted to us. What we're saying is if somebody does have a claim against a third party, we don't know about it. We don't have any way of knowing about it.

SENATOR CHAMBERS: Uh-huh.

DICK NELSON: And that's why we're asking the recipient or the authorized person to notify us of that.

SENATOR CHAMBERS: Now if the authorized representative does not notify you, then the authorized representative is responsible for the full amount of the claim, based on this?

DICK NELSON: Yes, and one of the amendments that we submitted, Senator, would say up to the amount of the resources recovered. And if we had a \$100,000 bill and the third party only paid \$50,000, we're not trying to hold the authorized representative for the whole \$100,000.

SENATOR CHAMBERS: How would the authorized representative know this, because the authorized representative is not the recipient and has not been told by Medicaid that if you

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become an authorized representative at any point, then you're going to be...you must meet these requirements or you're responsible for the claim up to the amount that had been paid?

DICK NELSON: Okay, and the authorized representatives that we're talking about, Senator, are either attorneys who have been hired to represent that individual...

SENATOR CHAMBERS: I understand.

DICK NELSON: ...and, though it may be a stretch, they should be presumed to know the law; or they are people who have legal authority conveyed to them such as a personal representative or a custodian or someone like that who has assumed the responsibilities of that recipient. Now we do couch this language in terms of "know or should have known." When...it's not an absolute liability standard. And let me just refer to...

SENATOR CHAMBERS: Well, if you put "or should have known," that broadens it considerably. If it requires actual knowledge, then that could protect a layperson who may be appointed to represent this individual. I don't see anything that says that to be...first of all, a person can be a personal representative, and you don't have to be a lawyer to be that.

DICK NELSON: That's correct.

SENATOR CHAMBERS: Then you have a definition of authorized representative which includes the personal representative...

DICK NELSON: Correct.

SENATOR CHAMBERS: ...which means it could be a layperson who knows nothing about the law. So you, by this bill, would be presuming or holding a personal representative who is a layperson to the same standard as a lawyer who is presumed to know the law, and we know a layperson doesn't know the law. So why would this apply to a personal representative or any other legally-authorized person who may not know this?

DICK NELSON: And, Senator, we're not trying to impose an

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impossible burden on these people. What we're trying to do is avoid the situation where somebody doesn't notify us; later on they claim they didn't know they were supposed to, but we can demonstrate they should have known. They have medical bills that come by that show that they've been paid by Medicaid. Now they should have known in those situations.

SENATOR CHAMBERS: Now when we get to the issue of lawyer fees, and when I jump to something else, that means you've answered adequately what I was asking, because I'm trying to move right along. At the bottom of page 2, they start talking about, in line 28, "From the amount collected by the recipient from legal proceedings or as a result of settlement, reasonable attorney's fees and costs shall first be deducted and paid." Whose legal fees and costs?

DICK NELSON: This would be legal fees and costs of the recipient's...the claimant's attorney. In other words,...

SENATOR CHAMBERS: Okay. That's clear. Now, what about, as we proceed, "Unless the department and the recipient agree to a different settlement, the amount previously paid as medical assistance by the department," which we'll say \$100 for ease of dealing with it, "less a pro rata share of attorney's fees and costs..." What does that mean and how is it calculated?

DICK NELSON: We're talking about the common fund theory, Senator. We are agreeing in statute to participate in the common fund theory. The attorney recovers \$200, \$100 of that gets paid to us; we will pay the recipient's attorney's fees, reasonable attorney's fee from the \$100, pro rata, the \$100 we receive. If it's a third, we pay the \$33. The recipient then has the balance of the money. They deal with the attorney, the attorney's fees on their...

SENATOR CHAMBERS: But the full amount, and we can both say claim for easy discussion here,...

DICK NELSON: Okay.

SENATOR CHAMBERS: ...the claim that Medicaid would have would be the amount paid in benefits that the recipient, in turn, recovered from a third party.

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DICK NELSON: Correct.

SENATOR CHAMBERS: Okay. So when you...if the amount recovered by the third party exceeds the amount owed Medicaid, you're saying that even though there is an amount above what is owed Medicaid, from the amount that would be paid to Medicaid, some of the lawyer fees and costs would come from that before Medicaid is paid, rather than the overage that remains after the full claim is paid?

DICK NELSON: That is correct. If the attorney has exercised representation on behalf of their client and it has benefited Medicaid, then we would participate pro rata in the attorney's fee.

SENATOR CHAMBERS: Okay, now that's clear. If we have the authorized representative who is a personal representative and a layperson, and that layperson fails to notify the department, that layperson then becomes liable and not the recipient. Isn't that true?

DICK NELSON: That would be true, Senator. It's...

SENATOR CHAMBERS: Now so that I can get to what I want to ask you, would you be arguing for Medicaid that whatever the recipient knew or should have known, based on the agreement entered into with Medicaid--and you say it was there for them to know if they had read it but they simply didn't read it, so they don't know that they should have known or could have known--would you hold this layperson to the same knowledge or should have known standard as the recipient since their representative is dealing with the recipient? In other words, are you going to say whatever the recipient should have known, or did know, from entering the agreement with Medicaid, the layperson who is the authorized representative is charged with knowing or being in a position of should have known?

DICK NELSON: We are not intending to impute the knowledge of the recipient to the authorized representative. We would look...

SENATOR CHAMBERS: How do we see that in here since we just say "knows or should have known?" And I don't want to be

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argumentative.

DICK NELSON: No. And all we're saying, Senator, and perhaps we can clarify the language is the recipient knew or should have known, based upon the facts and circumstances that directly affected them; authorized representative knew or should have known, based upon the facts and circumstances that directly affected them.

SENATOR CHAMBERS: Now, just two others so I can be clear on what I think I heard. What is the amount that is expected to be recovered under this bill, if it were enacted into law?

DICK NELSON: We would...we are attempting to collect the full amount of the Medicaid payments made on behalf of the recipient from the the third party. And from that, we would share in the attorney's fees on a pro rata basis.

SENATOR CHAMBERS: No, here's what I mean. What is the total amount that Medicaid expects to recover from these individuals who had received third party payments, if this provision...if this proposal became law?

DICK NELSON: Okay. The full amount that Medicaid has paid or...

SENATOR CHAMBERS: I mean, you don't have any idea of how much that will bring in to Medicaid?

DICK NELSON: Oh, I...we have submitted a fiscal note, Senator, that estimated I think around \$200,000 the first year, \$300,000 the second year, and it had to do with when...the effective date of the act. And we are basing that on a percentage of what we currently recover. We believe we would increase our efficiency and likelihood of recovery in these cases, I believe we used the figure of about 25 percent. We would increase our recoveries about 25 percent.

SENATOR CHAMBERS: But there's no guarantee?

DAVID NELSON: No, sir.

SENATOR CHAMBERS: We could, theoretically or

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hypothetically, expend a greater amount of time, which if it was converted to money, which would cost more to put this into law than there would be recovered under this if it were law.

DICK NELSON: Senator, I don't...I really don't think so.

SENATOR CHAMBERS: But you can't...neither of us can say positively that you would or would not, can we?

DICK NELSON: We can say there are many settlements going on now that we don't know about, that we don't find out about until after the monies are disbursed, and we have no way to enforce our lien.

SENATOR CHAMBERS: So how can you...how can you calculate the value of that which you don't know?

DICK NELSON: We cannot other than to estimate that it is significant and then certainly worth the effort to try to increase the efficiency of our collection efforts.

SENATOR CHAMBERS: Not to be argumentative, but remember we're being asked to establish a policy that currently does not exist and put liability on people who currently don't have that liability, and we're imputing knowledge, where that is not the law now. If I had a sack on this table and I reached in, and you can see from the bulges in the sack, that there are several objects, and I take one out and it's an orange. I take another one out, it's an orange. And I ask you, what is the next object I take out going to be? What would you say?

DICK NELSON: I would say, Senator, that I don't know because I don't know what went into the sack.

SENATOR CHAMBERS: But what do you...okay. Now the fact that you have a certain number of settlements to date does not tell you how many...how much money you might derive in the future, does it?

DICK NELSON: No, but it tells us because we know what's in the sack that there are oranges out there to be obtained.

SENATOR CHAMBERS: No, no. You don't know what's in the

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sack. You already said you don't know what's in the sack.

DICK NELSON: I said we didn't know the amount, Senator. We know the fact situations that are existing and that there is money that is not being collected because we're not being notified.

SENATOR CHAMBERS: But you don't know how much money you will actually recover.

DICK NELSON: Senator, we're trying to give you as good of estimates as we possibly can, but...

SENATOR CHAMBERS: I'm not quarrelling with what you're trying to do.

DICK NELSON: And so the answer is no, I do not have an absolute dollar amount that I can tell you.

SENATOR CHAMBERS: Okay, so please answer my questions and we'll get through quicker.

DICK NELSON: Yes.

SENATOR CHAMBERS: I just want it in the record as your answer because I don't have to argue with you. Everything we say is taped. You don't really know how much you're going...Medicaid is going to recover if this bill becomes law.

DICK NELSON: We do not know how much we will recover. We...

SENATOR CHAMBERS: And conceivably, you could recover a lesser amount than that which is expended in printing up this paper, we spending our time, and all the things that go into making this a law. You conceivably could recover less than that amount of money, couldn't you?

DICK NELSON: That is highly improbably. It is conceivable.

SENATOR CHAMBERS: That's why I use...I asked the question. I said conceivable, then you want to throw in something else. That's why law students flunk exams. They give you the question, then the law student says, I know you asked

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this, but if such and such, and then they answer the "but if" which is not a part of the question. And if the "but if" were part of the question, they would have gotten it right. But what is looked for is an answer to what is posed. It might seem like I'm jousting, but I don't want the "but if" in response to my question. I don't know how you all go about frightening somebody who is a layperson to the extent that he or she would seek out this information, because if that person--and this is what the question I want to get to--does actually know..I'm the lay representative of Senator Foley, and I do know that I'm required to report. And I contumaciously fail to report. What would you do, and you know that I deliberately failed to report and I knew I was supposed to? Now that's where I wanted to bring you. What would the department do against me?

DICK NELSON: We would ask you to return to the taxpayers the money that they should have recovered under this law.

SENATOR CHAMBERS: And then, being the smart aleck I am, I'd say, what don't you understand about no? That's why I say contumaciously. It means...

DICK NELSON: Senator, you asked me a question...

SENATOR CHAMBERS: ...I'm not going to do it.

DICK NELSON: ...and I answered your question. You asked me what we would do.

SENATOR CHAMBERS: So...and I say, no, I'm not going to do it. Would it be over then?

DICK NELSON: No.

SENATOR CHAMBERS: So what would you do?

DICK NELSON: We would ask you to return to the taxpayers the money that was rightfully theirs.

SENATOR CHAMBERS: And I say I heard you the first time and the answer is still, no, I'm not going to do it. Now make me.

DICK NELSON: Okay, I'm sorry, I misunderstood your

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question. I thought you were simply repeating the question. I didn't know that we were doing it...

SENATOR CHAMBERS: Yeah, I was repeating it to try to get it answered.

DICK NELSON: I didn't realize you were doing it in dialog. Senator, I...

SENATOR CHAMBERS: I'm not very good at answering...at asking questions.

DICK NELSON: ...I'm not trying to be argumentative. I'm sorry if I misunderstood.

SENATOR CHAMBERS: Okay. I refused to pay this amount that was paid to Senator Foley and he recovered from a third party that amount.

DICK NELSON: Okay.

SENATOR CHAMBERS: And I'm representing him now because for some reason he's not able to look out for his affairs. And you come to me and present all of the documentation and even what the law says. And with full knowledge of all of this, I say, I refuse to be responsible for that; I'm not going to pay it; make me. Now what steps would the department take in a situation like that?

DICK NELSON: We would determine whether it was economically feasible to make you, which would be done through litigation since this would establish a cause of action.

SENATOR CHAMBERS: And if after the litigation you find out that I indeed am judgment-proof, then you've spent money and you get nothing and you're further in the hole than you were before you took legal action to try to compel me to pay. Isn't that true?

DICK NELSON: Except I said we would take that...that we would consider proceeding. One of the questions is, are you judgment-proof?

SENATOR CHAMBERS: But here's what I...

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DICK NELSON: We're not interested in spending money trying to collect funds that aren't there.

SENATOR CHAMBERS: But I listen to you better than you listen to me. You told me that you would make a determination of whether it was feasible to collect this from me, and that would require litigation. You said it would require litigation. So if you're going to engage in litigation to find out if I can pay, then the litigation would determine that I'm judgment-proof and you engaged in litigation that was pointless but may have been expensive. And maybe I had a lawyer.

DICK NELSON: Yeah. Senator, I really am a better manager than that. We don't make the determination through the litigation.

SENATOR CHAMBERS: So then you misspoke.

DICK NELSON: We make the determination before the litigation.

SENATOR CHAMBERS: So you misspoke.

DICK NELSON: No, I didn't. You misunderstood.

SENATOR CHAMBERS: Okay, then I'm going to stop and I'm going to get the transcript and I want it on the record...

DICK NELSON: All right.

SENATOR CHAMBERS: ...because people like to challenge me. I'll bet you \$50 to \$1 that I said what I said you said, and you, if I lose, will give the money to your favorite charity. Are you willing to do that?

DICK NELSON: Senator, I'm not going to bet.

SENATOR CHAMBERS: Okay.

DICK NELSON: We'll let the record stand. If I misunderstood you, I'm sorry. I was not trying to engage in a debate, I was trying to give you information.

SENATOR CHAMBERS: And I want you to remember what you say

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to me.

DICK NELSON: Yes, sir.

SENATOR CHAMBERS: But I'll get the transcript and then we'll both know.

DICK NELSON: Yes, sir.

SENATOR BOURNE: Further questions for Mr. Nelson. Seeing none, thank you. Further testifiers in support. Testifiers in opposition.

BOB MOODIE: Mr. Chairman, members of the committee, my name is Bob Moodie, M-o-o-d-i-e. I am a lawyer here in Lincoln. I'm testifying on behalf of the Nebraska Association of Trial Attorneys in opposition to LB 278. Basically, our opposition is based on the argument that the piece of legislation does not recognize what we call the made whole doctrine. Under this bill, the state as essentially the health insurer in any particular case would be allowed to take back all of its payments on behalf of the injured person from a settlement or judgment that is made against a negligent third party even if that settlement has not made the injured person whole which means that the injured person has not been fully compensated for the injuries suffered at the hands of the negligent third party. The question here is who should bear the risk if full compensation is not available? For example, a Medicaid recipient is injured in a car accident, suffers a serious back injury, left with significant medical bills and permanent impairment. The department, on his behalf, pays medical bills totalling \$30,000. However, the negligent driver in that case has only the minimum required amount of liability coverage in Nebraska which is \$25,000. Under the provisions of LB 278 as it stands now, the state would take the full amount of that settlement, leaving the injured person with nothing to compensate him for the other elements of his injury other than medical bills, those being pain, impairment, wage loss, loss of future earning capacity. The Nebraska Supreme Court recently has affirmed its support of the made whole doctrine, ruling that it applies to similar subrogation claims being made by private health insurance companies after they make payments for people who are injured as a result of negligence of others. It would be our position

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that the bill needs to be amended to allow for full reimbursement of Medicaid only if the injured person is fully compensated by the settlement or judgment or at the very least, provides some type of action available for equitable distribution much in the way that the Workers' Compensation statutes deal with the same issue when Workmen's Comp insurance is paid for the medical bills. Thank you.

SENATOR BOURNE: Thank you. Questions for Mr. Moodie? Thank you very much. Appreciate your testimony. Next testifier in opposition.

ROGER KEETLE: (Exhibit 8) Good afternoon, Chairman Bourne, members of the Judiciary Committee. For the record, my name is Roger, R-o-g-e-r Keetle, K-e-e-t-l-e. I'm a registered lobbyist for the Nebraska Hospital Association. I have in front of me written testimony expressing our opposition to LB 278. Nebraska has had a hospital lien in Nebraska's law since 1927. What that lien is to do is to encourage providers to take people that have emergency cases to deal with them in the emergency room, to provide them the services they need to get them through that trauma, through that emergency care. And the hospital lien bill is extremely important to support the trauma centers in the state. What this bill would do would move the Department of Social Services from being like an insurance company to being the super lien. They would trump our lien, they would be in front of everyone else and have their claim paid first. That's what this bill does on the lien area. There's also a part that deals with the probate area which Senator Chambers has been talking about. What we're very concerned about is several things. One, the language as it's currently drafted would say that they would have a lien if they may pay something and that's point one. You'll see the reference to the bill, it's on page 4, line 7, 20 and 27. We would submit that if HHS files that notice that our lien is basically going to be looked at as something the trial lawyers don't have to honor at all and basically force this into an action where we're not going to have a lien and will end up collecting from Medicaid maybe sometime. So this really takes the provider who's provided the care at the beginning when there's a problem and then says the insurance company or Medicaid is ahead of us. So that's, to me seems a little unfair. This really overrules a case that

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was decided back in 1993. Again, that's cited for you, Perry v. Ehlers. What this really does, Senators, is, in our opinion, would put us in a position where we're foregoing our exercise of the lien right and instead look for Medicaid for payment. That isn't the way Medicaid is supposed to work. Medicaid is the payer of last resort. If we file a claim with Medicaid and there's third party liability involved, they aren't supposed to pay us. So we have to go against the insurance proceeds to try and collect. What this legislation attempts to do then is say that we have to try and collect from the court action, but Medicaid won't pay us. So that's really why I'm here to object. This overrules a Supreme Court case, it puts us in a bad position as to what the law has been since 1927 and it's contrary to them being the payer of last resort. Those are our three concerns at this point. I would say I have tried to work with the department to try and work out, but I think the first part of this dealing with the estates maybe there's some way that can be worked out. On this one, I'd like to figure out some way. I'm not sure if there is because again we're making a drastic change. We're moving an insurance company, the payer of last resort, up ahead of the provider of the service.

SENATOR BOURNE: Thank you. Questions for Mr. Keetle? Are you troubled by the fact that you're on the same side of this issue as the trial attorneys? (laughter)

ROGER KEETLE: Isn't politics wonderful? (laughter) But I guess we can both recognize an inequity.

SENATOR BOURNE: (laugh) Can the Legislature adopt a law that contradicts a Supreme Court decision?

ROGER KEETLE: Well, I guess that's, you know, we might have to ask the court that question. But certainly there's a property right the court has set in the Ehlers case and that is an issue here. And we'd like to say that we...our policies are set up so that we file a claim. If there's some other provider that's paid and should have filed a lien, that's their problem. And if the department pays them that's their problem. They shouldn't have paid. When we submit a bill and there's liability involved, they say don't darken our doors. We're the payer of last resort. You go deal with it. And if you're not going to get any money out

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of it, you can prove it later that there's not, you know, then we can file a claim. But only to the extent Medicaid would have paid so if they're paying somebody and not saying that they should go after that third party that's their mistake.

SENATOR BOURNE: Okay. Thank you. Further questions, thank you.

ROGER KEETLE: Thank you.

SENATOR BOURNE: Next testifier in opposition. Welcome.

BRAD SHER: (Exhibit 9) Senator Bourne and members of the committee, my name is Brad Sher, S-h-e-r. I'm the vice president of Managed Care and Public Policy for Bryan LGH Health System. I'm a registered lobbyist and work on behalf of Bryan LGH. Just a couple of points for the committee on this. Number one is that in the handout that I handed gave you as an example of a recent car accident that we had to deal with that which we filed a lien on. I wanted to show you, this was somebody who basically had like the whole side of their body crushed in a car accident that we took care of. They are a trauma and emergency system. It was an eight-day stay, the DRG, the billed charges in the amount of Medicaid payment. We understand very clearly that Medicaid is the payer of last resort. And believe me, with reimbursement like that, I'd rather find somebody else to pay the bill. That's number one. Number two is we are obligated already by law to seek other payers and other sources. Okay? Number three, if we did get money from Medicaid at some point in time and got paid by somebody else we are once again obligated by law to return that money to Medicaid. Failure to do so causes serious legal ramifications when Medicaid comes and audits and finds out that we didn't return money to them. We're acutely aware of that in the healthcare industry of our obligation as us, physicians, and everybody else is acutely aware of. So right now it's not really a problem about Medicaid paying. And lastly, right now I was in Dick Nelson's office in the beginning of December, asking him about the issue of we now have areas where there are no liens on people. And we have held submitting and asking for payment for Medicaid. And we've asked them, is it two years you want us to wait, three years you want us to wait, four years you want us to wait

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before we send any of that payment to make sure we have waited long enough for the settlement to occur. So we're sitting there waiting. They have not paid and we're just wondering, at what point is enough enough? Us, the physicians, everybody else waiting on this, okay? So I just want to let you all know that and, you know, and listen to the discussion about whether we have...whether how much money it's really going to collect. Is it an expansion of HHS's ability, government, whatever, something we really need to do in this regard. There's a lot of legal recourse right now on providers in collecting which implicates the members because we're going after the people if they get the settlements to pay bills and stuff. Do we really need to do this? And I think they've got enough information to know when these things are going on without having to inform them and alienating people, trying to take care of, you know, people on Medicaid and so forth. So that's my testimony.

SENATOR BOURNE: Thank you. Questions for Mr. Sher? See none, thank you.

BRAD SHER: Thank you.

SENATOR BOURNE: Appreciate your testimony. Further testifiers in opposition? Neutral testifiers? Senator Cunningham to close.

SENATOR CUNNINGHAM: Thank you, Senator Bourne and members. Well, you've heard some conflicting information here today obviously. I do personally believe there's a problem. We need to collect the money if we can. I don't know what is the best way to do it. We have this idea. We've given you a couple of amendments for you to look at. I would appreciate the chance to work with you and if you have any other ideas I am not certain on this lawsuit. That's something we're going to look into if we could have a chance to work on this and try to further this. You all realize the growth of Medicaid in the state of Nebraska and we realize a couple years ago we had large cuts in Medicaid. I mean, if we're ever going to fund the things we really need to fund we need to make sure we stop the waste on the wayside also. So if we can, I would like the chance to work with you.

SENATOR BOURNE: Thank you. Questions for Senator

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Cunningham? Senator Chambers.

SENATOR CHAMBERS: Senator Cunningham, something that I did say when we were talking about those wild pigs, how smart they are. I was going to say what we really have in these pigs are cunning hams (laughter). But I didn't say it, but I didn't do it, did I? I didn't do it. Okay.

SENATOR CUNNINGHAM: But you did end up saying it now, though, Senator (laughter). It slipped.

SENATOR CHAMBERS: But here's the question and this may seem somewhat facetious but to show how I view this approach as being taken. You said that you don't know the best way to collect the money and I don't either. I don't even know that they should be trying to do it but have they tried blackjacks, brass knuckles, or baseball bats to the knees? Here's what I'm getting at. Sometimes we are asked to put in place a complicated system that involves a lot of people making reports and telling on people. I'm glad somebody said it before I did, creating bad relationships to collect an amount of money that might be piddling compared to the total Medicare budget and what a tiny infinitesimally small percentage of that budget this kind of recovery would be. So what I was really trying to get at with those other questions, is what is going to be recovered worth all of the effort we're being asked to put forth to do it? So think that over and talk it over with those you're working with and naturally I'll talk to you but does not say that I would support this bill. But certainly, I wouldn't support it the way it's written.

SENATOR CUNNINGHAM: Appreciate that, Senator.

SENATOR BOURNE: Thank you. Further questions? Senator Pedersen.

SENATOR Dw. PEDERSEN: Yes, thank you, Senator Bourne. Senator Cunningham, Senator Chambers opened up a couple of different issues and the one that I was most concerned about is when he was talking to Mr. Nelson about litigation or when Mr. Nelson was talking to Senator Chambers about litigation. I would just challenge you to look into the cases of litigation that the state has paid for and lost, not just in Health and Human Services. And then how they've

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gone on and cost us more in litigation by appealing them cases and lost them. And then go and do as they damn well please anyway. Excuse me. Thank you.

SENATOR BOURNE: Thank you. Further questions? Seeing none, thank you. That will conclude the hearing on LB 278. Senator Connealy to open on LB 419. As we're waiting for the room to clear out, could I get a show of hands of those individuals wanting to testify in support of LB 419? I see four. And, again, we're going to make use of the on-deck area so if you'd make your way forward. Proponents. Could I get a show of hands from the opponents? I see none. Matt, it's a good day today (laughter). Senator Connealy.

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SENATOR CONNEALY: (Exhibit 10) So I should be brief (laugh).

SENATOR BOURNE: Yeah, exactly.

SENATOR CONNEALY: Senator Bourne and members of the Judiciary Committee, I am Matt Connealy. I have the honor of representing the people of the 16th District and I'm here to open on LB 419. This was brought to me by the Nebraska Bar Association and the Nebraska Legal Aid. It's a version of the bill like this I introduced a couple of years ago. LB 419 helps address a growing problem in a state and an inability to track and retain lawyers who practice public interest law. Part of the problem is that new law school graduates typically carry a debt of around \$60,000 in student loans. This precludes them from being able to practice law for lower salaries that are oftentimes paid for public interest law jobs. I have a handout that is of an article in the World-Herald yesterday that highlights part of this problem is it shows Madison County attorney is under fire for not having a full complement of lawyers in the defense attorneys' office. Attorney Harry Moore states that the \$43,000 salary precludes many from taking the job and he can't fill the positions. This program could help alleviate the financial stress of an attorney with a large amount of student loans that would help them attract and to do this kind of work. Additionally, it is the indigent of the state

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who can't afford an attorney, who suffer from the shortage of these lawyers. It is our best interest for the state to ensure that these people, no matter what their means, have access to this third of our government and access to legal aid. LB 419 puts in statute a loan forgiveness program that's administered by the Nebraska Bar Association. A committee is appointed and made up of representatives of law schools, public interest law groups, and others to determine the eligibility of the program. An advocate must work in the field of public interest law to be considered and this program will be funded by a combination of donations, charitable gifts, and there's no taxpayer money in this version of the bill. One question arose before was, you know, why would you do this? Why wouldn't you just do it privately? And I think as we looked at it before, it's more able to raise money if it's got the stamp of approval of the state on it and the bar would administer it for us.

SENATOR BOURNE: Thank you. Questions for Senator Connealy? Seeing none, thank you. First testifier in support? Welcome.

DOUG GERMAN: (Exhibits 11, 12) Chairman Bourne and members of the committee, Doug German, spelled G-e-r-m-a-n, executive director of Legal Aid of Nebraska. And before I forget it, this bill, I believe, as drawn, has our old name in it, Nebraska Legal Services from page 2 and that should read Legal Aid of Nebraska, I believe. I'm speaking in favor of it and wanted to convey to you that our board of directors is also in favor of it. We provide legal assistance to one-eighth of the population of the state of Nebraska. That's the number of people who qualify for our services. They generate 65,000 issues a year for us. We've got seven offices across the state from Scottsbluff to Omaha and only 27 attorneys. Here is the problem. I cannot hire attorneys and I cannot keep attorneys. Not so long ago, we had a turnover rate of 30 percent and not so long ago, I had two positions that were both open for two years before I could find somebody to fill them. Now why is that the case? I started in Legal Aid in 1972 making \$9,600. I start an attorney out of law school now at \$34,500 and when you put that amount in '72 dollars they're making \$8,600 of purchasing power. We've gone backwards. In addition, when I graduated, very few of us came out with debt. Now these people come out of law school with as much as \$70,000 of

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debt, maybe even more. How can they possibly go to work for the PD's, the county attorneys' offices, and my offices? They can't. And so I am asking you to please pass this bill. It would, I think, help all of those offices greatly. You may ask, why provide this kind of assistance to Legal Aid? And I want to remind you of two good reasons, I believe. One, our democratic society promises access to our justice system and we're not providing that by a wide, wide margin. Secondly, there is a study out of the University of Nebraska-Omaha that says, for every dollar invested by Nebraskans in Legal Aid, there is a \$4 positive economic return. I think those are sound reasons for this state to make an investment in this and I hope, hopefully, some day the Legislature will fund this bill also. Questions?

SENATOR BOURNE: Thank you. Questions for Mr. German?

DOUG GERMAN: Thank you.

SENATOR BOURNE: Senator Foley. Excuse me, Mr. German?

SENATOR FOLEY: The bill is not asking for General Funds to pay for reimbursements to students or...?

DOUG GERMAN: The original bill as submitted two years ago, was structured so that private funds could be put into this same fund and that the Legislature could fund it. And so as I understand it, I'm going to take the cue from Senator Connealy that it's not presently drawn that way but it was originally drawn so they could be funded either way.

SENATOR FOLEY: Right because I was looking at the fiscal note and there's only a \$6,000 fiscal note. I mean, I'm just wondering what good can you do with, that's such a small sum of money.

DOUG GERMAN: Well, I mean, unfunded, we're left with going out and trying to raise money for this. And I realize that you folks are really up against it in terms of the budget but I acknowledge what I think your point is, that we're not going to get very far with this idea unless the state does fund it, quite frankly.

SENATOR FOLEY: How much do you think you could raise in the private sector as a program?

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DOUG GERMAN: Well, there are so many competing forces out there. I spend almost all of my time raising money right now just to fund our budget. I would have to then go out and try and fund this in addition. And, quite frankly, I don't know of any sources sitting out there to fund this.

SENATOR FOLEY: Thank you.

SENATOR BOURNE: Thank you. Further questions? Seeing none, thank you. Next testifier in support. Welcome to the committee.

ANNETTE FARNAN: Thank you. Good afternoon, my name is Annette Farnan, F-a-r-n-a-n and I'm here essentially wearing two hats today. I'm employed with Legal Aid of Nebraska and I have been for ten years but I'm also an attorney with a massive student loan debt. I've been practicing for ten years. When I first started with the Legal Aid I made a whopping \$22,000 a year. I do make more now but I still have approximately \$100,000 in student loans. I've been paying on them but, unfortunately, when they're that large and you make that amount of money you don't have the ability to pay the amount that you have. I pay interest and that's all I can attack. I know there's a concern about how much good is this actually going to do? It's going to do a lot of good for a lot of different reasons and if for nothing else, it will send a message to people like me that the Legislature is concerned about attorneys that try to take on the work that we do. I suppose the next question if I were you is why have I continued to do this for ten years when I could have gone to private practice and maybe made more money? Because what we do is important and helping the people we do help is important and I believe in that. And I believe I want to continue to do that and so I've made choices in my personal life and compromises in my personal life. And I would appreciate the support of this legislation because I think it will go a long way and send a big message out to attorneys and to the public about the support and how you feel about helping those people that are less fortunate than yourselves.

SENATOR BOURNE: Thank you. Questions for Ms. Farnan? Seeing none, thank you.

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ANNETTE FARNAN: Thank you.

SENATOR BOURNE: Next testifier in support?

CARLA DeVELDER: (Exhibits 13, 14) Senator Bourne, members of the committee, my name is Carla DeVelder. I'm assistant dean at the University of Nebraska College of Law. I am here on their behalf. I have also been given authorization by Dean Borchers of Creighton Law School to convey his support of this piece of legislation as well. I'm sorry, I didn't stop and spell my name if you'd like my name. It's Carla, C-a-r-l-a DeVelder, D-e-V-e-l-d-e-r. And as I said, I'm here on behalf of the University of Nebraska College of Law and also here to let you know that Creighton University's Law College supports this legislation as well. What the page is handing out to you is just some real dollars and cents information about the debt that our students have and the money that they make, what the average starting salary is for attorneys in Nebraska and what that comes out to as far as money in your hand at the end of the month after you've paid your student loans depending on where your debt falls. I can tell you that for a class of '04 the average debt load was \$39,826 and that does not include any undergraduate or any other educational debt. That is just their law school debt. Residential tuition right now at the University of Nebraska College of Law is almost \$9,000 a year. For a nonresident it is over \$20,000 a year. This does not include any books, fees, or living expenses. The amount has gone up, it's over twice the amount it was ten years ago. It's up 12 percent over the last two years and tuition does continue to rise despite our best efforts to keep it as low as possible. The days of law students making money over the summer and funding their education that way are over. Eighty-five percent of our students borrow to attend school. At the national level it's 94 percent. This piece of legislation is very important. It will impact students and, more importantly, it will impact people across the state of Nebraska. Law students are very interested in this work. It's meaningful work. The work impacts quite a number of people. It gives them a quality of life that they appreciate. However, they are deterred from this type of work due to their student loan debt and anything that we can do to help them would be appreciated. I would speak quickly to the matter of funding. There are a number of national foundations who we

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would like to approach and, hopefully, if we have this framework in place it will make it more easy for them and more attractive for them to donate to us.

SENATOR BOURNE: Thank you. Questions for Ms. DeVelder? Seeing none, thank you.

CARLA DeVELDER: Thank you.

SENATOR BOURNE: Appreciate your testimony. Further testifiers in support?

MILO MUMGAARD: (Exhibit 15) Good afternoon, Senator Bourne. My name is Milo Mumgaard. I'm a practicing attorney here in Nebraska and the executive director of the Nebraska Appleseed Center for Law in the Public Interest. We're submitting a letter today on behalf of myself, the staff and the board of Nebraska Appleseed in very strong support of LB 419. Nebraska Appleseed, just a little bit of background, was created back in 1996 to help fill some of the gaps in the legal service and legal aid system in Nebraska. And this would be in the context of the ability to take on cases and issues that relate to a lot of people at one time or are legal issues and legal rights that affect the way a system is dealing with low-income populations in the state. Examples would be, for example, the way the welfare system works, the way the child welfare system works and so on. Nebraska Appleseed was created to help fill the gap to address some of those legal issues. We now have five attorneys, all of whom have significant legal education related loan dilemmas. They all, though, are committed to doing public interest and legal service work and, therefore, are willing to accept the lower salaries that we are able to pay at Nebraska Appleseed and within the legal aid system generally. I think it's important for me at this point to sort of wrap up some of the philosophical and practical issues that are incumbent in this kind of legislation. And that is basically the practical points that Doug German points out and the practical issues that the law schools point out and so on that relate to the law students who are wanting to do legal service work and wanting to be able to help low-income people in the state actually have access to justice is built all upon their belief that the only way we can actually have a system of justice that is equal and fair is to actually have a legal aid system that is actually able

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to represent people. And one of the things that Nebraska Applesseed has been very pleased to be part of is the Equal Access to Justice Committee that Senator Connealy and others are involved in as well but also has judges, county attorneys, academics, and so on. And in our written comments here today we cite to some of the work that's been going on in that area over the last several years. But the bottom line, the mission statement of that work was we must make the legal system more relevant and accessible to low-income Nebraska families by providing them representation and advocacy. Well, the reason is simple. As stated in the committee's ultimate recommendations that came out, legal aid is about the proud tradition of justice in America providing access to justice for low-income people is one of the pillars on which with justice for all stands. And in a democracy, if there is not justice for all there is no democracy. Well, clearly then, it's incumbent upon all of us to realize that if we have a legal aid system that is not actually delivering legal services to the degree that we need to to make people feel they have access to the system and can use the system to remedy their problems we have limitation, shall we say, on our present democracy. So LB 419 is a very small step, very small part in that bigger picture question of how do we as a state and how do we as a people make sure that all people feel that they have access to our system and access to a way to resolve their problems? So, with that, we encourage your support for LB 419 and we will work with everyone involved in this to fund it in the future and get it done.

SENATOR BOURNE: Thank you. Questions for Mr. Mumgaard? Seeing none, thank you.

MILO MUMGAARD: Thank you.

SENATOR BOURNE: Appreciate your work. Next testifier in support. Testifiers in opposition. Testifiers neutral. Senator Connealy to close.

SENATOR CONNEALY: Thank you, Senator Bourne, members of the committee. You know, we've made some progress. I think it was about three years ago we had a study that showed that there were 15 percent of the need for legal aid and for indigent defense was being met here in Nebraska. We have backed off across the country but Nebraska has gone ahead

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and stepped up. We increased legal aid a couple of years ago. Last year we put more attorneys in the Attorney General's Office to help with the big cases out in the state. We also added for indigent defense so we've made progress and through the leadership of the Judiciary Committee and the Legislature. I think this is the next step. I'd like to put \$5 million in this to help pay for those from state funds but we don't have them. If we can allow the bar and the law schools and legal aid to raise money for this, I think it's just good public work and it's the next step we need to do.

SENATOR BOURNE: Thank you. Questions for Senator Connealy? Seeing none, thank you.

SENATOR CONNEALY: Thank you.

SENATOR BOURNE: That will close the hearing on LB 419. Senator Jensen to open on LB 446. Could I get a show of hands of those individuals wishing to testify in support of this next measure? I see one, two, three four...I see seven. Those individuals in opposition? I see one? Neutral? I see one neutral. Senator Jensen, welcome.

LB 446

SENATOR JENSEN: Thank you, Senator Bourne, members of the Judiciary Committee. For the record, my name is Jim Jensen, J-e-n-s-e-n, representing District 20 in Omaha. I'm in here today to present LB 446, a very important measure, I feel. I'll go over the basic concepts within the bill and then there will be other testifiers to follow that will explain the bill more in detail. With that, LB 446 is about improving patient safety in Nebraska. The Nebraska Hospital Association, Nebraska Medical Association, Nebraska Pharmacists Association, Nebraska Nurses Association, Nebraska Health Care Association and other healthcare organizations propose the following legislation to improve the safety of health-care delivery in Nebraska. Thousands of deaths occur each year that are attributed to medical errors and Nebraska's health-care providers are committed to developing improvements that will reduce these tragedies. The proposed legislation is designed to encourage a culture of increased safety for patients. Society must mitigate

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away from the culture of shame and blame more towards a culture where health-care stakeholders examine the systems and issues that contribute to a patient's harm and eliminate those issues as much as possible. This culture recognizes that adverse events will occur and when they do they are addressed and analyzed and corrected to reduce their chance of ever occurring again. We need to move to a system of sharing and technology and reporting, a system of education and improvement. It's also important to learn from others who are dealing with similar issues. Each individual incident on its own may seem to be just something out of the ordinary. However, if an individual incident is viewed with a broader context it may indicate that there's a pattern that should be addressed and attempt to either lessen or eliminate similar incidents in the future. Health-care providers must become proactive in improving systems of care by learning from other health-care entities and other industries. Health-care facilities can examine their own practices, determine if their systems are at risk and take steps to improve them before an adverse event affects their patients. This includes, among things, creating a safe environment for studying patients' safety issues, to attain the goal of reducing their occurrence. Facilities need to examine and be able to look at the adverse events so they can accurately identify those factors that contribute to an error. This best can be completed in an environment that encourages them to do so like the aviation industry has done several years ago. The healthcare industry needs to be able to address issues without retribution. The Institute of Medicine in 1999 report "To err is human, building a safer health-care system" called upon Congress to pass legislation to extend peer review protections to data related to patient safety and quality organizations for internal review are shared with others solely for the purposes of improving safety and equality. This legislation attempts to implement for Nebraskans what that Institute of Medicine report recommended for the nation. The ultimate goal is to reduce the incident of adverse events. This legislation is just but one step in the process of achieving that goal. Patient safety is the most important facet of health care. This legislation can make great strides towards improving patient safety through the open communication and implementation of strategies to improve that patient care. As stated previously, there are other testifiers to follow that will explain the bill in much more detail and be prepared to

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answer whatever questions you might have about LB 446.
Thank you, Mr. Chairman.

SENATOR BOURNE: Thank you. Questions for Senator Jensen?
Seeing none, thank you.

SENATOR JENSEN: I'll waive closing and I need to get back
to my committee also.

SENATOR BOURNE: Thank you very much.

SENATOR JENSEN: Thank you.

SENATOR BOURNE: First testifier in support? Again, we're
going to use the on-deck areas and we're signing in before
we testify? Thank you. Welcome to the committee.

ROBERT DRIEWER: (Exhibit 16) Chairman Bourne, members of
the Judiciary Committee, my name is Robert Driewer. I'm the
CEO of Faith Regional Health Services in Norfolk, Nebraska.
And that's spelled D-r-i-e-w-e-r. I'm also serving as the
current past chairman of the board of directors of the
Nebraska Hospital Association and I also have the privilege
of serving as chairman of the Patient Safety Issue Strategy
Group. The Patient Issue Strategy Group held its first
meeting in September of 2001 with representatives of the
Nebraska Medical Association, the Pharmacy Association, the
Nurses Association, the Academy of Physician Assistants, the
Organization of Nurse Executives, the Association of
Professionals in Infection Control, the Nebraska Health Care
Association, the Health and Human Services Regulation and
Licensure, Senator Jensen's office, and also the Nebraska
Hospital Association. The charge for the ISG was to develop
a plan for Nebraska health-care providers that would foster
the sharing of knowledge and information about optimal
patient safety practices and models; convene stakeholders in
an ongoing dialogue in support of patient safety improvement
and encourage individual health-care providers to identify
causes and influence changes in their health-care delivery
systems to prevent medical errors. On behalf of the members
of the ISG, I am asking the committee to advance LB 446.
Healthcare is growing more complex with nearly every new
drug and every piece of technology. Simply increasing the
number of steps or interactions in any process decreases the
probability of performing that procedure perfectly.

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According to the New York Times article by Lawrence Altman that examined medical errors in leading American health-care institutions, it quotes, "These errors have often resulted, not from a failure of cutting edge medicine, but from lapses in basic safety procedures." The complexity of health-care delivery is increasing the probability of errors. There is a culture that exists today that is looking for the bad apple, looking for someone to blame, someone to accept liability. Punish the bad apple and the error will not occur. According to Leonard and Frankel in their book, Achieving Safe and Reliable Healthcare, 95 percent of the errors that cause harm involve conscientious, competent individuals trying hard to achieve a desired outcome." Finding the bad apple only addresses 5 percent of the errors and fails the very people for whom we are caring. LB 446 will allow health-care providers the opportunity to create a statewide patient safety organization that will foster a culture of learning and sharing, that will disseminate information to address the 95 percent through modifying the systems to prevent the same error or near-miss from happening again. LB 446 will promote collaboration and will create a culture where individuals can speak up and improve the systems that deliver care in the state of Nebraska. Thank you for your consideration of this important matter.

SENATOR BOURNE: Thank you. Questions for Mr. Driewer? Seeing none, thank you. Next testifier in support? (See also Exhibits 17, 18)

STEVE SMITH: (Exhibit 19) Senator Bourne, members of the committee, thank you for the opportunity to testify in favor of this bill. I'm Dr. Steve Smith, S-t-e-v-e S-m-i-t-h. I'm the chief medical officer at the Nebraska Medical Center in Omaha and I'm here on behalf of the Nebraska Medical Association. You heard Senator Jensen talk about the Institute of Medicine report that came out in 1999. In that report it indicated that as many as 98,000 individuals each year die in our hospitals as a result of medical errors which would make it the eighth leading cause of death in the United States. And to put that in perspective, that would be the equivalent of a fully-loaded jumbo jet crashing daily 365 days a year. So it is a big issue. At the national level, many things have taken place in Congress, the Agency for Healthcare Research and Quality, the Joint Commission for Accreditation of Hospitals all have developed programs

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aimed at learning from errors and working towards making this a safer environment. One of the identified keys to success for any patient safety program is a reporting mechanism where data can be shared along with the learnings which occur following an in-depth analysis of an adverse event. These trends and aggregate data, along with the sharing of best practices and the learnings from error analysis are invaluable. If we continue to function in silos, hospitals and health-care providers in Nebraska we'll reinvent the wheel by making the same mistakes over and over again simply because of the lack of an opportunity to learn from each other. The practice of medicine is based on research and the reporting and sharing of outcomes data, all designed to advance the science of medicine. Why should we exclude the vital information which comes from the learning after an adverse event? Why must every Nebraska hospital and provider reinvent its own form of insulin or penicillin? That may seem a bit extreme but yet the comparison can be made. The proposed legislation does several things. It encourages a culture of increased safety for patients. We must move away from the culture of shame and blame and study the systems issues which lead to the errors. We must learn from each other when we're dealing with these errors. Viewed in isolation, the incident may seem to be an isolated anomaly but when looked at in the aggregate patterns begin to develop which can be addressed and then the risk can be lessened. We need to become proactive in improving systems of care. By learning from other health-care entities and other industries we can examine our own practices and take proactive steps to prevent errors. And lastly, we need to create a culture for studying patient safety as a safe environment so we can reduce these errors and ultimately reduce the incidence of adverse events. Health-care providers in facilities who submit documents and records to the patient safety organization must be afforded legal protection from discovery and other use of the patient safety work product in any civil action. Such legal protection is necessary so that in-depth analysis of the errors and sharing of the improvement strategies among health-care providers across the state can take place without fear that that analysis will be used against the health-care provider in the civil proceeding. This process will result in safer healthcare for our patients in Nebraska. Thank you.

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SENATOR BOURNE: Thank you. Questions for Dr. Smith?
Senator Chambers.

SENATOR CHAMBERS: Dr. Smith, the last testifier quoted in this testimony from a book by Leonard and Frankel called Achieving Safe and Reliable Healthcare that 95 percent of the errors that cause harm...this is not just deaths but they "cause harm involve conscientious, competent individuals trying hard to achieve a desired outcome." Finding the "bad apple" only addresses 5 percent of the errors and fails the very people for whom we are caring. Would you say that that same percentage holds true with reference to these 98,000 patients who die a year or would there be a different breakdown, do you think?

STEVE SMITH: I think if it's not 95 percent it's pretty close. Research has clearly shown that the overwhelming majority of these are due to systems issues, process issues within hospitals and not an individual provider issue. And that's what that book is referencing.

SENATOR CHAMBERS: But if 95 percent of the errors that cause harm involve conscientious, competent individuals when it comes to deaths there were 93,100 people who died at the hands of conscientious, competent individuals trying hard to achieve a desired result and only 4,900 from the bad apples so if we had more bad apples we'd probably have fewer deaths (laughter) just to show how, if you just go by figures you can arrive at conclusions which are not necessarily reflective of the truth or what we're trying to get at. And here's why I say that. Sometimes figures are stated for a particular purpose and those who are paying close attention will get it. But if you just go strictly by what the figures say, they tell you something that's very troubling and when the last testifier told us those facts which I have no reason to doubt, I'm wondering what is going on with these conscientious, competent people that would result in so many errors? Does it mean that they're tired, they're overworked or what does that mean then?

STEVE SMITH: I think every system is designed to obtain the results that as best the system can. And what we're saying is it's the system problems. It's the processes. It's not an individual bad apple who set out to do poorly but the systems that support that individual aren't there to help

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protect that individual to provide safe healthcare. We all rely on...healthcare is very complex and we rely on a number of different processes to ensure that healthcare is safe and...

SENATOR CHAMBERS: But for our purposes here today,...

STEVE SMITH: ...what we're saying is the systems issues is what we're trying to address with this bill.

SENATOR CHAMBERS: It doesn't really matter why or who is directly as an individual responsible for the situation as it exists. What you're trying to do if I understand it is gather information which would not identify, which would not have facts that would specifically identify individuals and you would only look at what has happened and see if you can find trends or patterns or whatever will help prevent that from happening again?

STEVE SMITH: That's correct. This is focused on the systems issues and not the individual provider.

SENATOR CHAMBERS: How can the individual provider be left out of the equation since everything done is done by a person?

STEVE SMITH: I think the individual provider issues, what we're hoping to accomplish with this is to set up a system where we can learn about the systems issues that occur throughout the healthcare in our state. There is a system in place and each health-care organization has to address individual issues with providers in their workplace through their own systems.

SENATOR CHAMBERS: So then if in one...and I know I'm speaking very imprecisely but if you're looking at a total system and you see certain areas or quadrants or whatever within that system where there is a disproportionate number of whatever error we'd like to correct would be occurring, would you be able to identify that part of the system so that somebody could talk to the people who are operating it?

STEVE SMITH: That would be the goal is to learn from this and then put quality improvement projects to share with all the hospitals so everybody can learn and share in this and

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bring the level of their healthcare up.

SENATOR CHAMBERS: But will specific hospitals and facilities be identifiable so that they will know what they are doing that may be problematic?

STEVE SMITH: They would know their own data. They wouldn't know everybody else's data.

SENATOR CHAMBERS: Right. I don't mean everybody else's...

STEVE SMITH: Yeah. That's correct. They'll know their own data.

SENATOR CHAMBERS: ...but they would know that within their area...

STEVE SMITH: Yes.

SENATOR CHAMBERS: ...this is what's happening.

STEVE SMITH: They'll be able to benchmark themselves against other hospitals to know how they're doing, where they fit in, and what we...sharing of best practices if we analyze a particular area and say that, here's the level of error rate across the state but this particular hospital has one-tenth the error rate that everybody else has in this particular area. Let's study what they do, what do they do different than everybody else and then share that best practice with people so everybody can improve with that.

SENATOR CHAMBERS: And for the record, I'm asking you all these questions so I don't have to ask anybody else and it's for information in the record. That that you just described would show that this is not just going to be an academic or theoretical gathering of information just to have a report. It's going to be used for the purpose of trying to provide better care and services to those who need them.

STEVE SMITH: That's correct. It would not be of value if we didn't take the learnings and apply them practically.

SENATOR CHAMBERS: Thank you. That's all that I have.

SENATOR BOURNE: Thank you. Further questions for

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Dr. Smith? Senator Flood.

SENATOR FLOOD: Thank you for your testimony today. It's my understanding that this bill came about because you want to document the near-misses. Does that phrase make sense to you? And it's my understanding a near-miss would be a pharmacist that catches a provider prescribing a certain drug that's inconsistent maybe with the other drugs that were prescribed earlier and could cause physical repercussion. Is that correct? More often than not, these are near-misses?

STEVE SMITH: You're correct. Now there are two issues here. One is actually after an event occurs and that's what people tend to focus on now and part of that is because the environment to bring things forward is not always as safe as it should be and by making the environment more safe to bring things forward we can study the near-misses and then we can prevent the adverse events. And that's where the real money in this is for us. This is where the improvements will come is by being able to study those near-misses and then proactively plan throughout the state and take the steps to prevent that from happening elsewhere.

SENATOR FLOOD: And my last question would be, with regard to the charting done by providers in hospitals or in medical clinics and the mandatory reporting in hospitals or medical clinics or whatever type of medical service is provided. That remains unchanged. It's not...if there is a bad act or an intentional act or even negligence and it's noted by the next nurse on duty, that will still be in the chart. It's not the intention of this bill to intentionally omit that information in a person's medical record and rather put it in some type of unidentified record. Is that true?

STEVE SMITH: That's correct.

SENATOR FLOOD: Okay. Thank you.

SENATOR BOURNE: Thank you. Further questions? Senator Friend.

SENATOR FRIEND: Thanks, thank you, Senator Bourne. Dr. Smith, is there a model that this legislation somewhere was, you know, it was crafted in the spirit of? And if

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there is, I mean, if there are other states or other organizations going down this track, is there a track record of success, you know, that's bred from something like this?

STEVE SMITH: The answer is yes, there are a number of states that have adopted similar legislation and probably the best model is the Joint Commission for Accreditation of Hospital Organization which started out as mandatory but now it's voluntary reporting. Many hospitals don't report because of fear of discovery of the information but those hospitals that do report then a report is generated by the Joint Commission and sent to all hospitals with alerts about the learnings from other hospitals so we regularly receive alerts from the Joint Commission which we use internally in our organization to address issues that have been identified through the reporting to them, very effective tool.

SENATOR BOURNE: Thank you. Further questions? I have a couple of quick questions. So it's mandatory that providers shall and the providers, it's defined in the statute, in the bill. Is the information, is what's shared with the coalition redacted and that like, say, I was one of these in our laundry list, surgery or procedures performed on the wrong patient or the wrong body part. So, say I had a surgery. It was scheduled to do my right knee and my left was operated upon. Does it say my name and age? It would just say on January 27, white male had wrong knee surgery...?

STEVE SMITH: Personal health information would be removed from this so we would not have any identifiable information tracked back to the single patient.

SENATOR BOURNE: Okay. How many of these items in Section 16 which is the information that's required to be divulged, how many of these providers are already required to give to the state? I guess...

STEVE SMITH: None.

SENATOR BOURNE: None of these. Okay. There are some requirements in current statute of hospital reporting of...isn't there, infections or?

STEVE SMITH: Certain infections they're required to report,

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sexually transmitted diseases, tuberculosis and things like that but none of these sentinel events. And that list of sentinel events comes from the Joint Commission language so it's in keeping with the national efforts and none of the hospitals are required to report that right now.

SENATOR BOURNE: So then, again, this information is given over to the coalition, they take this information and make recommendations statewide, systemwide on how, okay, we're seeing a preponderance of surgeries, they're on the wrong knee. Let's figure out a way to minimize that.

STEVE SMITH: That's correct.

SENATOR BOURNE: Okay. Okay, thank you. Further questions? Seeing none, thank you. Appreciate your testimony. Next testifier in support.

BOB HALLSTROM: (Exhibit 20) Chairman Bourne, members of the Judiciary Committee, my name is Robert J. Hallstrom and I appear before you today as a registered lobbyist for the Nebraska Pharmacists Association in support of LB 446. The NPA has been involved in the Patient Safety group since its inception and fully supports the initiative to formally place patient safety at the forefront of Nebraska healthcare. LB 446 helps reach this objective by creating an environment in which information relating to patient safety can be reported. The NPA strongly believes that improved patient safety requires a collaborative, multidisciplinary approach and that every practitioner in every practice setting or site of care has the ability to influence patient care outcomes. For this to occur effectively and to promote a learning environment, practitioners must be assured that the information they report is used for educational purposes to reduce medical error and improve patient outcomes and not used solely to impose punitive sanctions upon practitioners. Establishment of the Nebraska Coalition for Patient Safety is an important first step in creating an environment to facilitate the reporting of medical information. LB 446 will provide the legal protections healthcare providers and facilities need to analyze systems issues that contribute to error while at the same time preserving individual patient's legal rights. With the development of the Nebraska Coalition for Patient Safety comes the hope that health-care practitioners will

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take a proactive approach to assuring patient safety and from the pharmacist's perspective, reducing medication errors rather than waiting until a medical error and/or patient harm occurs. NPA members were actively involved in developing the medication error reporting system and feel confident that this system will reduce medication errors. We would like to thank Senator Jensen for introducing the legislation and we also applaud the efforts of individuals especially Monica Seeland and Bob Driewer from the Nebraska Hospital Association who have volunteered their time and talents to bring the legislation forward. I do have attached to my testimony a technical amendment on page 9, line 7. We would recommend that the reference to contaminated drugs be changed and replaced with the term "adulterated drugs." And for those reasons, we would respectfully request the advancement of LB 446 to General File.

SENATOR BOURNE: Thank you. Questions for Mr. Hallstrom?
Senator Chambers.

SENATOR CHAMBERS: Mr. Hallstrom, we often are in proceedings where you're sitting there and I'm sitting on this side of the table. Correct?

BOB HALLSTROM: That is correct.

SENATOR CHAMBERS: And sometimes you and I disagree because of the position you hold and the views that I have. Correct?

BOB HALLSTROM: For spar, yes.

SENATOR CHAMBERS: But there are times when we do agree.

BOB HALLSTROM: Yes, sir.

SENATOR CHAMBERS: Which demonstrates that it is indeed true that even a broken clock is right twice a day (laughter). You are right as rain today and I want you to know I appreciate it (laughter).

BOB HALLSTROM: Thank you, Senator.

SENATOR BOURNE: Thank you. Further questions for

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Mr. Hallstrom? Mr. Hallstrom, let me ask you. There's several people that are either going to testify in opposition or in a neutral capacity and I'm assuming that it has something to do with the immunity from prosecution provisions. And the problem with our process is that the proponents will be gone by the time we hear the opposition so assuming that's their objection to the bill and it very well could be a legitimate objection. Do you see any room to do something with that immunity phrase, immunity language so that the bill can go forward? And yet I absolutely understand there has to be some freedom from self incrimination for lack of a better phrase but you see what...

BOB HALLSTROM: Senator, I think there's a couple of things you look at and I want to make it clear for the record that I'm not the drafter of the bill so I don't make the ultimate decisions.

SENATOR BOURNE: Understand. I'm asking you because I know you're an attorney and I just...

BOB HALLSTROM: And I do think that there have been many efforts made in the processing of this legislation from the Nebraska Hospital Association, working with the Press Association, at least communicating with the Trial Lawyers Association. I don't know how intensive the discussions were but I do know that there have been some changes considered and actually made to the draft in the process that if addressed, the openness of the records from the Press Association perspective, I really don't know where they stand on the issues with the trial lawyers but I would suspect with the attitude that the Hospital Association is the primary proponent on this bill, has had to date that they will certainly sit down and talk some more, if necessary, on those issues. But I think you really have to provide the incentives and the protections to make sure that you get the information for the worthy objective at the back end which is to provide for patient safety and education to systems issues that are going to bring about those results. I also think and Senator Flood, I think, started down the path that there are other provisions of Nebraska law that clearly still apply under, I think it's Section 71-168 of the statutes that require the reporting of those so-called bad apples as they've been referred to for disciplinary

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purposes for various actions that may take place. This will not impact those requirements of law as I understand it.

SENATOR BOURNE: Thank you. Further questions? Seeing none, thank you.

BOB HALLSTROM: Thank you.

SENATOR BOURNE: Next testifier in support?

DARWIN BROWN: (Exhibit 21) Senator Bourne and the rest of the Judiciary Committee, good afternoon to you. My name is Darwin Brown. It's D-a-r-w-i-n Brown, B-r-o-w-n. I'm here today as a member of the Patient Safety Issue Strategy Group and a representative of the Nebraska Academy of Physician Assistants. My purpose in testifying is to provide the committee with information in support for this bill and any questions you may have for me today. With the publication that you've heard about from the Institute of Medicine in 1999, "To Err is Human," interested health-care groups in Nebraska took a proactive stance on the issue of patient safety. Within one year of the IOM's publication, a large and diverse group of healthcare and other related groups began working on ways to minimize the effect of errors on patients. LB 446 will provide needed infrastructure to allow the collection, analysis, and distribution of medical error information to all parties involved to encourage improvements in the health systems that may be the root cause of these errors. In a recently published survey, Americans still do not believe that the nation's quality of healthcare has improved. Forty percent of those surveyed believe health-care quality has actually worsened while only 17 percent feel it has improved. The authors believe that the health system needs to be more effective in communicating what is being done to improve patient safety and health-care quality. In another recent study, physicians and nurses reported that more errors would be reported if a blame-free mentoring or collegial environment existed. Fear of litigation, criticism and embarrassment are major reasons for the health-care provider's reluctance to report errors. The intent of LB 446 is to provide a starting point within Nebraska to develop a culture of change in how medical errors are dealt with. Our hope is that by allowing for a more open environment in which to review and evaluate patient errors that occur in our

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health-care institutions, positive steps will be taken to correct areas in need by all entities. This can only be accomplished by the sharing of critical information held by health-care institutions which up to this point is closely guarded. We believe that these positive changes will result in fewer medical mistakes and errors that directly affect our patients and loved ones. The Nebraska Academy of Physician Assistants is in support of this bill. However, we would also like to ask that the committee consider our friendly amendment which you have received to this bill which would allow a member of the academy to be included on the Nebraska Coalition of Patient Safety's board. Thank you very much for your attention and I'll be glad to answer any questions you might have.

SENATOR BOURNE: Thank you. Questions for Mr. Brown?
Senator Chambers.

SENATOR CHAMBERS: Mr. Brown, I didn't want to raise the issue of liability or immunity. That's what brings the bill to this committee...since Senator Bourne mentioned it, if you look on page 11 of the bill because you had mentioned fear of being sued. A person is not going to be liable for civil damages as a result of any of these acts, omissions, or decisions or other such conduct in connection with the duties on behalf of the safety, a patient's safety organization if done pursuant to this act except for acts done with actual malice where, I guess you could say, to keep it simple, an intent to harm somebody. Fraudulent intent, I guess something dishonest for the purpose of obtaining or achieving something of value for yourself where you use deceit to keep from complicating it or bad faith which in the law usually means you know that there's conduct which is inappropriate and prohibited and you perform it anyway. That's done in bad faith. In good faith, you may be doing something that is not bad in and of itself. You're doing it without a malicious intent but you don't exercise the proper care and attentiveness that somebody with your level of training and expertise should utilize so whereas that is something done in good faith it can lead to sanctions because you didn't exercise the care you should. Bad faith is where you knowingly do something that you ought not do. Isn't it kind of a low standard when we're talking about the integrity of the right of a patient to privacy and some of the other factors that need to be protected and

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shielded when we say that the only time a person is going to be called to account for his or her conduct if there is actual malice, fraudulent intent, or bad faith. That would mean that negligence or gross negligence, maybe even recklessness, would not make you liable. But before we go to gross or recklessness, gross negligence, the legal requirement for negligence to be found is that the person did not exercise due care. With the language that exists now to make the person immune we're saying that these medical practitioners, these others who were trained in the profession are being told in advance, you don't have to exercise the care that a person in your profession should exercise to protect the rights and interests of the people concerned. Why do they want to not be held to the same standard of negligence as everybody else, if you know?

DARWIN BROWN: Well, I think...I'll do my best to answer your question and see where we're at. I think you referred to a part in the bill that refers to the members of the safety group that will be formed, that they will not be held liable for the information they possess unless they provide it to somebody in an inappropriate manner. That's my understanding. Again, I'm not the creator of the bill and I think we have others behind me who can maybe answer that question more specifically. If that's the case, a member of the board of the safety committee that's being developed by this bill, if I provide information to a newspaper about the hospital in Hastings and their performance with specific data that would otherwise not be available to the community, that might be considered to be inappropriate use of judgment. And that would, at that point, hold me liable for that information being passed on that should not have been.

SENATOR CHAMBERS: And I wanted at least one person speaking for the bill to give an impression of what the bill means with reference to that immunity. And then when we hear the other side we at least have had something from your side. And I'm glad the chairman raised the issue before we had no more proponents for the bill before us. Thank you.

SENATOR BOURNE: Thank you. Further questions for Mr. Brown? Seeing none, thank you.

DARWIN BROWN: Thank you.

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SENATOR BOURNE: Next testifier in support?

ANDREA NELSON: Senator Bourne and members of the committee, my name is Andrea, A-n-d-r-e-a Nelson, N-e-l-s-o-n. I teach English as a second language through Southeast Community College. I'm here today representing the State Board of Health. I sit as a public member on that board. The board consists of 15 professionals and two public members and all of these individuals are sincerely concerned about the safety of the citizens and the health of the citizens of this state. And I'm here today to express our support for this bill. One of our charges and our major concerns is the safety of the public and the health of the public and we understand that this bill which everybody has defined so I'm not going to redefine it is an effort to improve that safety and the health of the public in which case we are definitely...feel that this is a very important step to take. It would further our goal and our concerns. We discussed this on Monday and we are under the impression that this is a kind of system that NASA and the airline field uses to good effect. And if this could be possibly used to help the citizens of Nebraska we feel that this is an effort that should be made. This system could reduce the number of medical errors by the facilities and increase the totality of successful outcomes and concurrently the safety of the public. And we would urge you to advance this bill. Thank you very much for your time. If you have any questions (laugh).

SENATOR BOURNE: Thank you. Questions for Ms. Nelson. Seeing none, thank you very much.

ANDREA NELSON: Thank you.

SENATOR BOURNE: Next testifier in support.

KATHERINE JONES: (Exhibits 22, 23) Mr. Chairman and committee members, I am Katherine Jones, assistant professor in the Department of Preventive and Societal Medicine at the University of Nebraska Medical Center. And I am testifying on behalf of myself and Dr. Gary Cochran, assistant professor in the College of Pharmacy. Dr. Cochran and I are researchers interested in patient safety in rural hospitals. We are testifying in support of LB 446. We're not here on behalf of the University of Nebraska Medical Center. In

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1999, the Institute of Medicine released its report, "To Err is Human: Building a Safer Health System." This report focused the attention of health-care providers, policymakers, and the public on the fact that people are harmed and killed by the healthcare that is intended to help them. However, the Institute of Medicine also emphasized that the greatest barrier to patient safety is the lack of awareness that errors occur on a daily basis in all health-care settings. And I would just like to have you hold that in your mind as we talk about what healthcare is like in 25-bed critical access hospitals. Legislative Bill 446 establishes a means to report and share information about health-care errors without fear of litigation. It will increase provider awareness of health-care errors and thus be a force for establishing cultures of safety in Nebraska's health-care organizations. In "To Err is Human", the Institute of Medicine recommended mandatory reporting of harmful events and voluntary reporting of potentially harmful events. If feedback is appropriate and timely, error reporting allows providers to identify and prevent system sources of error. For the last three and one-half years, the Nebraska Center for Rural Health Research at the University of Nebraska Medical Center has collaborated with small rural hospitals to develop a program of voluntary medication error reporting, feedback, analysis, and the very important part to follow up with, system change. Of Nebraska's 87 acute care hospitals, 60, nearly three-fourths, have 25 or fewer beds. Fifteen hospitals currently participate in the program and have reported nearly 3,000 potential and actual errors. Through timely analysis of error reports these hospitals have learned that systems must be changed to improve their healthcare. One hospital adopted unit dose dispensing rather than dispensing from bulk stock. Another provided nurses access to drug information software and a third now requires nurse-on-nurse double checks for pediatric dosing when a pharmacist is not available. It's clear that the smallest health-care organizations can learn about threats to patient safety by reporting and analyzing harmful and potentially harmful errors. However, many of these really small hospitals do not have the technical and human resources necessary to learn from error reporting. We would welcome the opportunity to share what we have learned about error reporting with this committee and others who work on LB 446. And I would just like to add that I can provide you with

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resources about the VA system that's been very successful and the national medication error reporting database as well.

SENATOR BOURNE: Thank you. Questions for Ms. Jones? I have a quick question. Is there...as I read this, it never ends, so this obligation to report will go on indefinitely. Is there a point where after three years or five years that it makes sense to discontinue this practice?

KATHERINE JONES: What I would say is that and if you would go to www.medmarx.com, this is the national medication error reporting database. And their recent research has shown that as health-care technology changes the source of error changes so now computer entry has accounted for a significantly increased proportion of the causes of medication errors reported in the country. And what I would urge you to see is that a reporting mechanism is simply your dashboard. It tells you as an administrator, as a physician, as a researcher, it tells you how is my system working? I don't have a temperature gauge to tell me the temperature of my engine but I have a reporting system that tells me, oh, my goodness, why...computerized provider order entry was supposed to solve all our problems. But human beings make mistakes and now the computer is the source of 15 percent of the errors. Why is that? Let's fine out. In our small rural hospitals, just pediatric dosing is not an issue but when the majority, 60 percent of patients in critical access hospitals are elderly so when you have a two-year-old with pneumonia and you need to do proper dosing that's not something those nurses do on a regular basis. Through our project and sharing information, they learned that every time there was a pediatric dose that needed to be treated as a high alert medication and it needed to be double-checked. And one of the critical issues is this splitting between the improvement, quality improvement patient safety reporting. Don't penalize me for telling you what's wrong with your system. If you penalize me for telling, then you won't find out. You'll have no more dashboard. You won't find out so those systems, accountability for the bad apple versus information about quality improvement have...there's a firewall. You can't have...people have to trust that when I tell you what's wrong with the system it's confidential.

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SENATOR BOURNE: Thank you. Further questions for Ms. Jones? Seeing none, thank you. Next testifier in support?

NANCY SHIRLEY: (Exhibit 24) Good afternoon, Senator Bourne, members of the Judiciary Committee. I'm Nancy Shirley, N-a-n-c-y S-h-i-r-l-e-y. I'm president of the Nebraska Nurses Association and I speak in favor of LB 446. For over the last 15 years, concerns relative to the safety of patients and staff in the health-care settings have been a major topic in the national health-care arena. Section 2 of the bill articulates the concerns as previous testimony presented by the Institute of Medicine report, To Err is Human. If we are to address these concerns effectively, it is essential that the health-care system create safe learning environments which health-care providers will report adverse health events and near-misses. Historically, the systems of incident reports develop not only to document such events but also to provide information whereby frameworks and mechanisms could be established to prevent such occurrences in the future. The Nebraska Nurses Association believes that sharing patient safety is a top priority for all health-care providers. Establishing environments and systems that encourage self reporting and mechanisms for monitoring and carrying out safety improvement programs is critical. An additional anticipated outcome of what we are looking mainly at are patient safety. In the long run, we may see reduction in costs associated with malpractice insurance and even reduction in health-care costs. The changes proposed in LB 446 including the creation of a patient safety organization to monitor and improve patient care will encourage a culture of safety and quality. The various health-care professionals represented on the organization along with consumer representation assure collaborative efforts in improving patient care for many aspects. Nursing's responsibility to society includes support for legislation and regulations that protect and serve users of nursing services. As president of our professional organization, I urge you to support this bill and in so doing, protect individuals receiving care and assure quality patient care in our state.

SENATOR BOURNE: Thank you. Questions for Ms. Shirley? Seeing none, thank you. Next testifier in support?

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GREG SCHIEKE: Mr. Chairman, members of the committee, my name is Greg Schieke, G-r-e-g S-c-h-i-e-k-e. I'm the senior vice president for CIMRO of Nebraska. CIMRO of Nebraska is the Medicare quality improvement organization for the state. We contract directly with Medicare to work on behalf of Medicare beneficiaries to improve the quality of care that's received and to encourage measures of patient safety. We do work that involves patient safety. We're part of the national project with the Agency for Healthcare Research and Quality in partnership with the Veterans' Hospital Administration and one hospital in Nebraska to implement some of these changes. So this is of great interest to us. Just to provide some information, not to reiterate what has already been said here. But the HHRQ following the To Err Is Human report conducted 16 medical error reporting pilot projects. And some of the key findings that they found in these projects were that first, no single data source is sufficient to gain a complete understanding of all medical errors. In other words, you can't get it all from claims data. There needs to be a number of sources to gather that information. Another key finding is that nonpunitive systems provide the best opportunity for capturing more information, more useful information. In fact, one of the pilot projects found that for nurses in the state of Texas, reporting could potentially lead to license suspension. The third positive aspect or key finding is creating that positive safety culture. And when we say that we don't mean just at the hospital level; we mean at the community level too. The report found that where information is confidential and nondiscoverable had the most significant incentive to reduce medical errors. Further said that both organizations and individual practitioners continue to report fear of litigation as a major disincentive to reporting medical errors and identifying threats to patient safety. For organizations and providers to commit to addressing patient safety they must be confident that the information that is recorded in the medical records and analyzing that will remain confidential. To follow up a little bit more on the patient confidentiality, as a quality improvement organization we are a peer review organization. Our data is protected by federal statute at a very strict level. It is exempt from Freedom of Information Act, protected from discovery, from disclosure. That has been the basis through which quality improvement organizations are able to work with health-care providers to keep that

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data confidential. I think that's a key aspect of this bill. I think it's extremely important that it remain in there. We have a model for a system of reporting that works. And with that I'll thank you for your time.

SENATOR BOURNE: Thank you. Are there any questions?
Senator Chambers.

SENATOR CHAMBERS: If you know, what is the sanction...you said there's federal regulation that you were discussing.

GREG SCHIEKE: That govern our data use.

SENATOR CHAMBERS: Yes. What is the sanction should that requirement be violated?

GREG SCHIEKE: I wouldn't be able to say specifically other than it's harsh.

SENATOR CHAMBERS: Okay. What I was going to get at was whether or not the only time a person would be found responsible or accountable is if the disclosure was made based on malice, bad faith, or fraudulent intent. I'm sure the federal would have a higher standard than that but you don't know for sure, right?

GREG SCHIEKE: Well, to the best of my knowledge, the inadvertent release or, excuse me, the release of information that is protected by our organization, that crosses the line. I don't believe the regulations that govern our data use talk to the intent of releasing that data.

SENATOR CHAMBERS: But based on your sensing and I'm not holding you to be stating specifically what the regulation would say by way of setting a standard, a person could be held accountable if he or she did not use the care that would be necessary to prevent this information from being disclosed. In other words, the standard here is where in all cases you have to know that you're doing the wrong thing and do it. Then you're accountable. If you're doing it fraudulently then you're accountable. If you do it deliberately to harm somebody you're accountable. But if you just let it out because you're careless you're not accountable. You can be careless, in other words, in

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letting it go and there's no accountability. Is that how loose the standard is that the federal regulations would be, do you think?

GREG SCHIEKE: No.

SENATOR CHAMBERS: Okay.

SENATOR BOURNE: Thank you. Further questions? Seeing none, thank you. Next testifier in support. Testifier in opposition.

BOB MOODIE: Senator Bourne, members of the committee, my name is Bob Moodie, M-o-o-d-i-e. I'm an attorney in Lincoln. I'm testifying on behalf of the Nebraska Association of Trial Attorneys. We applaud the efforts to increase public safety and the safety of patients. But we are concerned about the incredible levels of secrecy and the incredible immunities which are contained in LB 446. In response to what was brought up at one point early on, our organization did receive an e-mail regarding the existence of this bill about two days before it was introduced but that's, I think, the only extent to which we have been involved in the preparation of this legislation. We would be more than happy to sit down with the parties involved. We are concerned about two items, Mr. Chairman, and obviously, immunities is at the top of the list since you're so used to hearing us come. And Senator Chambers, you referred to the main section on immunities which was contained on page 11 at Section 21 and, quite frankly, Senator, I don't know what Section 21 means. I think that the first section of Section 21 is, in fact, attempting to immunize the officials of the patient safety organization for acts that they commit such as the possibility of releasing information that shouldn't be released. I'm not sure but whatever it is that it's trying to do is only allowing a cause of action if there was actual malice, if there was intent. And all of your questions demonstrate that you fully have an understanding of how loose a standard that is. But what really concerns us is the second half of that section and the part that says, any provider. Now a provider is defined earlier in the statute. We're not talking about the members of the...or the organizations of the patient safety improvement organization. We're not talking about the medical care providers. Any provider

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providing patient safety work product to a patient safety organization shall not be liable for civil damages as a result of such acts, omissions, or decisions. Now I don't know if that's an intentional attempt to provide the providers with a blanket immunity as long as they report the occurrences when these bad things happen but it certainly could be interpreted as that. Finally, I think that it becomes very important for us to make sure that we establish, start establishing a legislative history over the fact that the definition of what would be afforded the privilege of the information that's provided. Now Section 8(2) does a good start but it's important to note that records and information that would otherwise be discoverable and admissible using methods and standards which are existing in the current law cannot be rendered inadmissible or unavailable merely because the provider has collected or reported that information to the patient safety organization. And I think a little tweaking...certainly it's a good start but tweaking of the language would be appropriate.

SENATOR BOURNE: Thank you. Questions for Mr. Moodie?
Senator Chambers.

SENATOR CHAMBERS: Mr. Moodie, since you said that you or your organization or whoever would be selected to do so would work with the one sponsoring this bill, are you prepared to find out who those people are and let them know that you all are willing to work with them on some of these issues?

BOB MOODIE: Yes, sir.

SENATOR CHAMBERS: Okay. And that way the committee knows that we...and then you'll let us know what you come up with so that we have an idea of what work is being done on this.

BOB MOODIE: Yes, sir.

SENATOR CHAMBERS: Okay. Thank you.

SENATOR BOURNE: Thank you. Further questions for Mr. Moodie? Seeing none, thank you. Other testifiers in opposition? Testifiers neutral?

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ALAN PETERSON: Chairman Bourne and members of the Judiciary Committee, I'm Alan Peterson. I'm the registered lobbyist and attorney for Media of Nebraska. My family spells it P-e-t-e-r-s-o-n. My first name is A-l-a-n. This organization combines the interests in the First Amendment, access to records, freedom of speech, freedom of press issues. They're important both to the press and to the broadcast media. We're neutral on this bill at this point because the sponsors have indicated a willingness to work on some language problems that we really think are quite serious. I don't have any sign-off on suggested improvements but we've been working with them and certainly plan to keep doing so. I want to explain what the two principal problems are, we think, from the public information free press public record standpoint. Number one, this bill purports to create a firewall for this very good idea of giving the information about bad events to a separate organization which can then create a benchmark and send it back so that all providers can improve. Terrific idea we think. But as drafted, the firewall very likely protects and creates confidentiality on both sides of the firewall. By that I mean under the language now if a provider simply collects the information about adverse events planning perhaps to turn them into this organization, that mere collecting creates confidentiality. My client is interested in public records so we're talking about normally publicly owned hospitals, county hospitals, and so forth. So generally what I'm talking about is that concern. We think that as the patient safety organization works with this information and comes up with recommendations, that should be confidential but not the records as they existed originally. One provision has been drafted to work on that. It's not complete. It needs more work, in my opinion. Second problem is this complete protection for all improvements or corrections. Current evidence law does not provide complete immunity and protection for that stuff if the, say a hospital says, well, correction is not possible; it's not feasible. We didn't really control it. If that's the position taken then all that evidence of corrections is admissible as plaintiff's attorneys would say. And the public may want to know if there's a major problem that there have been corrections made by a county-owned hospital, for example. So that language needs some work in our view. Those are two serious problems so that this good work is not done totally in the dark at least so far as publicly-owned

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providers are concerned. Thank you very much.

SENATOR BOURNE: Thank you. Questions for Mr. Peterson?
Senator Chambers.

SENATOR CHAMBERS: Mr. Peterson, a similar question to what I asked Mr. Moodie, you said that your group is working with the drafters of the bill or supporters on that language.

ALAN PETERSON: Yes.

SENATOR CHAMBERS: Would you keep us apprised of whatever develops one way or the other also?

ALAN PETERSON: Certainly, be honored to do so.

SENATOR BOURNE: Thank you. Further questions? Seeing none, thank you. Senator Jensen has waived closing. That will conclude the hearing...

SENATOR CHAMBERS: I think there might be one more.

SENATOR BOURNE: Oh, I'm sorry, you snuck in on us.

SENATOR CHAMBERS: No, he was so neutral that (laughter)...

BRENDON POLT: Good afternoon, Chairman Bourne and members...

SENATOR BOURNE: Let me just clarify. You're testifying in a neutral capacity.

BRENDON POLT: In the neutral capacity, right.

SENATOR BOURNE: Great. Welcome.

BRENDON POLT: My name is Brendon Polt. I'm assistant executive director of the Nebraska Health Care Association and I'm neutral on LB 446 as is our association. As an association of providers of health-care services, we conceptually support policy aimed at improving patient safety and to that end we applaud the efforts of Senator Jensen and the Nebraska Hospital Association. The Nebraska Health Care Association represents approximately 420 Nebraska nursing homes and assisted living facilities.

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While our association conceptually supports programs aimed at improving patient safety, LB 446 as drafted creates a number of concerns to the membership of our association. First of all, LB 446 adds new costs for participating long-term care facilities which are already underfunded through Medicaid respective payment. The bill would create the Nebraska Coalition for Patient Safety on which the Nebraska Health Care Association would be represented along with the Nebraska Hospital Association, Medical Association, Nurses Association, Pharmacists Association, and a consumer. Section 20 of the act provides that the coalition may assess fees on providers to carry out the purposes of the act. And there is no ability for us to define the potential costs or how financial resources will be allocated with just one vote on that coalition. Additionally, the Patient Safety Improvement Act would provide little, if any, protection to Nebraska nursing homes and assisted living facilities which in Nebraska are funded approximately 54 percent by Medicaid. Pursuant to federal Medicaid law, nursing home and assisted living service providers must be inspected through a process called Survey and Certification once every 15 months, more frequently for facilities with a history of poor performance. If medical errors occur such as those described in the Patient Safety Act in Section 16, the error would be identified as a survey and certification deficiency as a result of the survey process. And pursuant to federal law, these deficiency statements called 2567s are discoverable in civil lawsuits. Thus, the act would have a very limited value from a protection standpoint for the majority of long-term care facilities. So for these reasons, we're neutral thus the (inaudible) of limited value for the majority of our facilities. In reality, we would be adding additional reporting requirements and costs. Furthermore, quality improvements for long-term care facilities are facilitated within Nebraska through the federally mandated quality assurance and improvement process and the federally funded Nebraska quality improvement organization CIMRO of Nebraska. So for these reasons, we're compelled to appear in a neutral capacity on LB 446 as drafted and would ask that the committee allow the option to remove our organization and members from this bill. Thank you for the opportunity to testify.

SENATOR BOURNE: Thank you. Questions for Mr. Polt? Seeing none, thank you. Further testimony in a neutral capacity?

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Senator Jensen has waived closing. That will conclude the hearing on LB 446. The committee will stand at ease for ten minutes.

RECESS

SENATOR BOURNE: Senator Combs to open on LB 455.

LB 455

SENATOR COMBS: Good afternoon, Chairman Bourne, fellow members of our committee. My name is Jeanne, J-e-a-n-n-e C-o-m-b-s and I represent the 32nd district. Today I bring LB 455 for your consideration. The intent of the Commonsense Consumption Act is clear. I am bringing this bill because I want to send a message that a civil claim for damages based on the long-term consumption of food that results in obesity should not be a valid basis for a claim in Nebraska. I want everyone to understand that we in Nebraska realize that obesity is a matter of personal responsibility and that we are not victims. For those of you who do not believe that these types of lawsuits are a threat, I want to point out a story issued by the Associated Press just yesterday. I'll read you the headline and part of the story. "Court revised McDonald's obesity suit. An appeals court in New York Tuesday revived part of a class action lawsuit blaming McDonald's for making people fat, reinstating claims pertaining to deceptive advertising." Again, that was just yesterday on the AP wire so it has come back. That was part of the reason why last year Senator Chambers said he felt it was unnecessary because these were getting thrown out. Well, it's back. I believe as a matter of public policy that we should prohibit similar claims in Nebraska. As you can see, this bill does provide exceptions for the violation of advertising laws but those violations must be knowing and willful. I think it's pretty ridiculous to say that because you used skinny kids in your advertisements then you should be liable for my injuries because I got fat during my long-term consumption of your food. I do want you to know that I believe in the Nebraska courts and I believe in our juries. I believe that it's highly likely that a claim like this would fail in Nebraska. However, we need to raise the bar and move the jam just a little bit higher on the shelf like Senator Loudon would

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say. This bill does just that. It not only prohibits these claims but it prevents fishing for claims by harassing our food industry through methods of discovery unless a court finds that particularized discovery is necessary to preserve evidence and prevent undue prejudice to that party. Shortly after the McDonald's case was filed, I found a presentation where John Banzhaf, the instigator of this litigation addressed a group and stated that although damages based upon obesity are only a small part of the planned legal assault on the food industry, it is a vitally important one because it is this use of the promise of huge damage awards that will cause cases to be filed throughout the country in search of a sympathetic judge and jury. It is troubling to me that someone could stand up in court and say with a straight face that a restaurant has caused their obesity and they should be paid to correct that harm. As I stated last year, I want to say not here, not in Nebraska. We need a stop sign at the border. Mr. Banzhaf went on to say that the insurance industry is currently reexamining the liability rates for food providers in response to this litigation. Both insurance industry rates and the threat of increased legal costs are unnecessary worries for our Nebraska wholesome food production enterprises. We've got more important things to be worrying about. Food providers in one form or another make up the backbone of our state's economy and should not be encumbered by public problems they have not caused. As legislators we can help to prevent the escalating insurance and legal costs by passing LB 455. I have never considered our low cost and abundant supply of food to be a bad thing and I don't want to see Nebraskans paying a greater amount of their paycheck out every month due to lawsuits brought against food providers when we all know this is a matter of personal responsibility. We choose what we eat. We all know that eating too much of the wrong types of foods is what makes us unhealthy and it's a matter of commonsense. With that, I will close and allow others to testify. I do want to note that although I appreciated the work of the committee last year in amending and advancing a similar bill, we wanted to take the opportunity this year to address some additional concerns by means of the model legislation that you have in front of you. I'm certainly willing to work with the committee on this bill if we find it needs additional work or amendments. Thank you. (See also Exhibits 25, 26)

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SENATOR BOURNE: Thank you. Questions for Senator Combs?
Seeing none, thank you.

SENATOR COMBS: Thank you.

SENATOR BOURNE: Next testifier in support?

JIM PARTINGTON: (Exhibit 27) Chairman Bourne, members of the committee, my name is Jim Partington. I'm the executive director of the Nebraska Restaurant Association. I appreciate the opportunity to appear before you to testify in support of the Commonsense Consumption Act. I have a copy of my testimony here for the record. The state of Nebraska has over 4,000 restaurants employing about 61,000 people and generating a revenue of approximately \$1.9 billion. The mission of the Nebraska Restaurant Association is to represent, educate, and promote this growing industry. Most of these restaurants are small businesses with 10 to 40 employees and face the challenges common to all small businesses as well as some that are unique to this industry. One such issue that has surfaced in the last two years is litigation that seeks to hold the industry responsible for certain individuals' health conditions related to overweight and obesity. For many of us, suing a restaurant for serving a product that is healthy, necessary for life, and ordered voluntarily probably seems absurd but suits have been and continue to be filed as outlined in today's Journal Star and in previous testimony by Senator Combs. It's not my intent to minimize the issue of obesity. This is a serious and complex issue for many Americans but restaurants are not the cause and litigation is not the solution. The 4,000 restaurants in Nebraska provide individuals the opportunity to choose from a varied menu of safe, healthy, high quality and enjoyable cuisine. When customers enter a restaurant they are presented with an array of choices designed to accommodate their individual tastes and preferences both in the way the meal is prepared and the food items selected. The restaurant owner wants them to leave as satisfied customers who will return to enjoy the experience many times. Litigation founded on choices made from offering of safe, high quality, nutritious food fails to acknowledge the voluntary nature of the choices the customers make and does not address the fundamental issue of individual responsibility. I believe that it is important to recognize

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that personal responsibility, moderation and physical activity provide the foundation for a healthy lifestyle. All foods can be part of a balanced diet. Healthful eating patterns are not created or destroyed by one meal or one food. It is the overall pattern of food intake and choices over time that is important to a healthy lifestyle. This is especially true when balance and moderation are complemented by physical activity and personal responsibility. It's also very important to remember that 76 percent of meals served in America are not provided by restaurants but are served in the home. We will make more progress against obesity as a nation if we avoid litigation and rely on education about the benefits of a balanced diet, moderation and physical activity in maintaining a healthy lifestyle. Restaurants serve healthy products necessary for life. These products cause health problems only when used to excess in an irresponsible manner over a long period of time. The industry I represent consists mostly of small businesses that are unable to bear the costs of expensive litigation, even if they win in court. The legislation we are asking you to approve would help prevent these misguided lawsuits in the future. And more importantly, the legislation focuses attention on personal responsibility and the voluntary menu choices we all make rather than on costly and unwarranted litigation. Thank you for the opportunity to testify on this issue of great importance to the industry I represent.

SENATOR BOURNE: Thank you. Questions for Mr. Partington? See none, thank you, appreciate your testimony. Next testifier in support?

JIM OTTO: (Exhibit 28) Chairman Bourne, members of the committee, my name is Jim Otto, O-t-t-o. I am president of the Nebraska Retail Federation and I'm here to express our strong support for LB 455. I'll be brief, just want to make a few points. First of all, as Senator Combs said, this issue was advanced out of the Judiciary Committee last year on a seven to one vote and was advanced to the floor. There simply wasn't enough time last year to address it on the floor. And this year it is not...although it is the same issue it is not the exact same language. This year we have the model language from the model bill that is from the Council of State Governments and approved by them and American Legislative Exchange Council. And this language is

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the result of the scrutiny and discussion of several states. And we believe, and I think even if you might have been opposed or might have a tendency to be opposed to the bill, I think that you would find that you are more comfortable with this bill than last year's bill. One of the issues that has come up from...that is kind of out there is that some people say, and I've heard it said, that just the fact that these lawsuits exist has made restaurants and food providers increase their menus and the availability of healthy foods. I would like to submit that many companies have amended their menus for many years and the food offerings. They amended those long before all of this talk of lawsuits. For example, in the mid-1990s Taco Bell introduced a Border Light line and McDonald's introduced and heavily advertised their McLean burger in 1995. But, unfortunately, both of these and other attempts proved to be huge failures. The public simply didn't want them. Unless there is consumer demand for such products they will not be successful. Additionally, science has evolved. In the 1990s it was considered a good dietary practice to replace saturated fats with trans fats. Now science says that we should reduce our consumption of trans fats. In truth, food companies in this country base their product decisions most often on the best science available to them at the time and what the consumer wants. The greatest change recently in food offerings have far more to do with meeting the needs of the Atkins diet than the threat of all these lawsuits. In upcoming testimony, especially testimony in opposition, you may hear that this legislation is unnecessary, that Nebraska law already gives judges the power to categorize a lawsuit as frivolous and impose fines on those bringing it. This bill, I wanted to emphasize that this bill is an opportunity for the Nebraska Legislature to make it clear to judges what this Legislature believes is frivolous. It would still be up to a judge to render an opinion. Could an attorney still file a lawsuit on this issue even if it becomes law? Yes. Would it raise the standard of suits filed and help alleviate the burden on our already overcrowded courts? I believe it would because each attorney would give more thought to each case and make sure of the merit before it was filed. And finally, as Senator Combs said, weight gain is a simple equation. If we eat more than we work off, we gain weight. It's a personal struggle for nearly all of us. Attempting to shift that responsibility to someone other than ourselves is not sensible. If we don't take personal

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responsibility for our own bodies we will each be the losers in the long run. I thank you and urge you to advance the bill and if I can answer any questions.

SENATOR BOURNE: Thank you. Questions for Mr. Otto? Seeing none, thank you. Other testifiers in support?

KATHY SIEFKEN: Good afternoon, Chairman Bourne and members of the Judiciary Committee. My name is Kathy Siefken. That's spelled S-i-e-f-k-e-n and I'm the executive director of the Nebraska Grocery Industry Association. And we'd like to thank Senator Combs for bringing this bill forward. Our members include distributors, manufacturers, and sellers of food products. And the message I'd like to leave with you is simply that there are really no good foods and there are no bad foods but there are good choices and there are bad choices. And consumers are the people that make those choices. Product development is driven by consumer demand and to provide the products that consumers ask us to sell in our grocery stores and then to allow those same consumers to turn around and file lawsuits against us to provide those products seems a little bit on the unfair side. One of the things that has happened is there are actually workshops that are being held to train attorneys on how to use the same tactics that were used in the tobacco settlements against the food industry because we are viewed as a very lucrative area where lawsuits can be filed. That's why we think we need this bill and for those reasons, we would appreciate it if you would forward this bill and send it to the floor for debate. Thank you.

SENATOR BOURNE: Thank you. Questions for Ms. Siefken. Seeing none, thank you.

KATHY SIEFKEN: Thanks.

SENATOR BOURNE: Next testifier in support? Testifier in opposition?

BOB MOODIE: Thank you, Senator Bourne, members of the committee. My name is Bob Moodie, M-o-o-d-i-e. I'm a lawyer in Lincoln. I'm testifying on behalf of the Nebraska Association of Trial Attorneys in opposition to this bill. I am not testifying in favor of obesity lawsuits. What I am testifying is in opposition to blanket immunities which you

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have heard me testify many times so far, even just today. It is inappropriate and it is impossible, I believe, for a legislative body to anticipate all of the possible scenarios in which one party might be held responsible for injuries caused to another party. If the Legislature attempted to legislate all of those instances, we would have statute books that filled libraries. Instead, what we have are some legislative guidelines and a history of common law. We have judges who are very well qualified. We have commonsense members of the juries. I feel a little bit like we've been listening to Chicken Little today with the sky is falling down. And it would seem that a great deal of these lawsuits are now being filed and burdening our society. Before the first bill was offered last year there had been no lawsuits filed in Nebraska. Since that bill was offered last year, there have been no lawsuits filed in Nebraska. And I don't know any lawyer in Nebraska who's given any serious thought to filing such a lawsuit. I think that it would be a ridiculous idea and I think that a court probably impose sanctions for filing a frivolous action. But, nevertheless, anything that is imposing a blanket liability, a blanket immunity, is a bad idea. Could I envision a series of facts in which a food manufacturer might be able to be held responsible for an additive or something that was put in the food that caused a long term obesity and long term diabetes or something like that? Yes, I could. Do I think it's happening? No, I don't. But it could possibly happen. In this case, this bill would stop what could be a possibly meritorious suit. What we have to do is rely on the court system which has been developed over the course of hundreds of years and the competent judges and the level-headed abilities of Nebraskans who serve on juries to deal with the issues of deciding what is a good lawsuit and what isn't a good lawsuit. And we shouldn't try to impose blanket immunities. Truck drivers don't get blanket immunities. Manufacturers of playground equipment don't get blanket immunities. The manufacturers and sellers of food should not either.

SENATOR BOURNE: Thank you. Questions for Mr. Moodie? Seeing none, thank you. Other testifiers in opposition? Neutral testifiers.

RICHARD HEDRICK: I'm Richard Hedrick, H-e-d-r-i-c-k. I couldn't determine if this was to protect the restaurants or

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just in certain cases. I could not determine if you can sue a restaurant for selling all you can eat. Would Grandma have to determine if you had eaten all your vegetables before you could get a second helping? Would that be required of the restaurant? Thank you.

SENATOR BOURNE: Thank you. Questions for Mr. Hedrick? Seeing none, thank you. Further testifiers in a neutral capacity? Senator Combs to close.

SENATOR COMBS: Thank you. I want to thank everyone that testified both sides today and would remind the committee that I believe 17 states so far have passed this legislation. So I do believe it's necessary. I'd like to see it not decided by case law as suggested by Mr. Moodie but I do believe that I'd like a stop sign at the border saying not here, not Nebraska. We have wholesome, low cost food products and if 17 other states have done that and taken the lead in that area in just this short period of time, I believe, in the last two years I believe with Nebraska being so identified with a wholesome, low cost food product that we are known for and take pride in, and is such a driving force in our economy, it should be protected. Thanks.

SENATOR BOURNE: Thank you. Questions for Senator Combs? Seeing none, thank you.

SENATOR COMBS: Thanks.

SENATOR BOURNE: That will conclude the hearing on LB 455.

LB 110

SENATOR Dw. PEDERSEN: Okay. We will now open the hearing on LB 110. Senator Bourne to introduce. Whenever you're ready, Senator.

SENATOR BOURNE: Thank you, Senator Pedersen, members of the Judiciary Committee. My name is Pat Bourne. I represent the 8th Legislative District in Omaha, here today to introduce LB 110. This bill would remove the sunset clause relating to an immunity provided to educational employees that respond to asthma or allergic reactions. As you may

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recall, last year the State Board of Education adopted a rule that requires EpiPens to be available in the classroom in order to respond to life-threatening asthmatic attacks or allergic reactions. The rule was adopted too late in the session to address this issue in a bill and the immunity provision was adopted as an amendment. There was some concern among some senators that this law change did not have a public hearing. Therefore, it was agreed upon that a sunset provision would be included and that a bill would be introduced this year in order to provide for the hearing. There is definitely a need to have EpiPens available in the classroom but teachers are not medical professionals and should have some form of immunity from civil liability. The immunity is limited to school nurses or individuals designated by the school and trained to provide this type of emergency response. In addition, the law does not apply to an injury that is the result of any willful or wanton act or omission. The requirement adopted by the State Board of Education is a good policy. This section of law providing for immunity is also a good policy and I ask that you advance this measure to the floor.

SENATOR Dw. PEDERSEN: Thank you, Senator Bourne. Any questions from the committee? Seeing none, first testifier in support.

MARK McGUIRE: (Exhibit 29) Thank you, Senator Pedersen. My name is Mark McGuire, M-a-r-k M-c-G-u-i-r-e. I'm general counsel for the NSEA and also a registered lobbyist for the NSEA. Senator Bourne, thank you for introducing this bill and you also covered what I might describe as a somewhat different legislative history that already is out there about this bill. As Senator Bourne suggested, this became a part of a bill, 868, basically a floor amendment. He was correct, there was some concern about the fact that it hadn't gone through the hearing process and so forth. But also it was something that was needed and so the agreement was reached that yes, we would go ahead with the immunity bill with the sunset clause. The trade-off or the other side of the coin is that this bill would then be introduced this year as it is in LB 110 which is totally clean and simply focuses on the one issue of the immunity. The NSEA, as you know, is a membership organization of approximately 23,000 teachers across the state. They have a concern about this because they're being called upon to sometimes in

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emergency situations do a procedure they're not comfortable with, frankly. Although the Rule 59 talks about training, it's, again, something where you can be "trained" once a year for 30 minutes or whatever and that is a little hard to have it last to carry over. The department as part of its rule in Chapter 59 has a protocol which I'm handing out to you which I think if you look at and say, this now applies to me because we've just decreed that the Judiciary Committee of the Nebraska Legislature has these responsibilities. You might look at that and say, wow, that's kind of a lot of stuff that I have to have in my head. The issue is simply one of immunity for employees. The language, any person employed by a school district approved or accredited by the state Department of Education or ESU or working in an accredited school, who has been designated and trained as a nonmedical staff shall be immune from civil liability for purposes identified in the bill. Bear in mind it does not say any school district, any educational service unit. It says any employee of. That is what lies behind the bill and a number of situations have arisen and so you know what we're dealing with here in terms of potential harm. There's an emergency situation in Chadron over the last school year. A secretary who had been trained and so forth had to do on an emergency basis EpiPen a student. In the whole process of doing so, she accidentally stabbed herself and wound up being hospitalized for two days. So you're dealing with something here that's potentially serious and have serious consequences. Had that been another student that accidentally had gotten hit, that's the kind of thing we're trying to guard against and so forth and the reason behind the bill. I see my time is up. Thank you and thank you for introducing it. I'd be more than pleased to respond to any questions.

SENATOR BOURNE: Thank you. Questions for Mr. McGuire?
Seeing none, thank you.

MARK MCGUIRE: Thank you.

SENATOR BOURNE: Are there testifiers in support?
Testifiers in opposition? Testifiers neutral? Closing has
been waived. That will conclude the hearing on LB 110 and
the hearings for the afternoon. Thanks.