[LB317 LB478 LB571 LB613 LB614 LB639]

The Committee on Banking, Commerce and Insurance met at 1:30 p.m. on Tuesday, February 22, 2011, in Room 1507 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LB571, LB613, LB614, LB639, LB478, and LB317. Senators present: Rich Pahls, Chairperson; Beau McCoy, Vice Chairperson; Mark Christensen; Mike Gloor; Chris Langemeier; Pete Pirsch; and Dennis Utter. Senators absent: Dave Pankonin.

SENATOR PAHLS: I think we'll start with some of the introductory statements. Hopefully by then some of the senators will be here. We have a couple of them absent and some of them are probably still attending meetings. Thanks for your...some of the lunches that you provide. I want to welcome you to the Banking, Commerce and Insurance Committee. My name is Rich, Richard Pahls. I represent District 31, the Millard of Omaha, and it's my pleasure to serve as the Chair of this committee. We will take up the bills as posted. We will begin eventually with Senator Price and (LB)571, then we will do LB613 with Pirsch, (LB)614 with Pirsch, (LB)639 with Schumacher, (LB)478 with McCoy, and (LB)317 with Conrad. As you can see, it looks...it appears that we have a number of bills today so what I'm going to ask you to do is...thank you, is to take a look at the committee procedures over there. They're very important and I know some of you have already read them because you have moved to the reserved chairs, which I appreciate. That helps me understand how many people are up and ready to provide testimony. We will go in the order of, of course, the senator who introduces the bill, then we have the proponents, opponents, neutral, then we will close. It is important that if you testify, if you need to, because if you testify you do sign in. We do need this. And again, it's also important that you spell your name because if I spell it I promise you it will be incorrect. It's just part of my repertoire. Also, I'm going to ask you to be concise and to the point. And if you...if there's somebody before you that has given some of the same testimony, please keep that in mind. If you do need to hand out, we need at least ten copies if you do have some information to hand out. If you have...you want it to be handed out and you don't have it, raise your hand and I will have one of the pages go over. Seeing no hands, seems like we were prepared today. I think what we'll do is right now at the beginning the process, we'll start over here with a senator and have him introduce himself. Senator.

SENATOR LANGEMEIER: Chris Langemeier from District 23, Schuyler.

SENATOR PIRSCH: I'm Pete Pirsch, District 4, Douglas County, parts of Omaha.

SENATOR GLOOR: Mike Gloor, District 35, Grand Island.

SENATOR CHRISTENSEN: Mark Christensen, District 44, Imperial.

SENATOR PAHLS: And the ones who keep us legally correct is Bill Marienau and also all the way over there, the person who makes sure that whatever we said gets recorded in the right direction, I might say, is Jan Foster. And over here we have one of our pages is Matt McNally. He is from Norfolk. We also have Tom Kelly from Sutherland. I think we are ready to begin, Senator Price.

SENATOR PRICE: Senator Pahls, members of the Banking, Commerce and Insurance Committee, it's a pleasure to appear before you today with bill LB571. My name is Scott Price, S-c-o-t-t P-r-i-c-e. I represent the 3rd Legislative District in Sarpy County. And again, I am here today as the primary introducer of LB571. LB571 would name and would amend, excuse me, the Nebraska Revised Statutes sections 52-2001 and 76-874 which govern the creation and enforcement of statutory assessment liens in favor of homeowners' associations and condominium owners' associations, respectively. Now section 52-2001 was enacted this past year and...while section 76-874 is part of the Nebraska Condominium Act which was enacted in 1983. Section 52-2001 was modeled after section 76-874 which, in turn, was based on the Uniform Common Interest Ownership Act--I'd give you the acronym but it breaks your jaw--a model act drafted by the Uniform Law Commission. Now in 2008, the Uniform Law Commission amended the Uniform Common Interest Ownership Act and LB571 would harmonize Nebraska laws regarding condominium owners' associations and homeowner association liens with many of the 2008 amendments to section 3-116 of the Uniform Common Interest Ownership Act. These amendments generally provide protections to condominium owners and homeowners facing foreclosure of assessment liens. Those protections include: (1) prohibiting the association from foreclosing the assessment lien until after the homeowner is at least three months behind in their assessments; (2) requiring the association to offer the homeowner a payment plan before the association could foreclose the assessment lien; (3) requiring the association to apply payments on delinquent accounts to unpaid assessment before being applied to late charges, attorney fees, and collection costs, and other unpaid fees, charges, fines and/or penalties; (4) limiting foreclosure actions merely involving fines and related sums to situations where the association has a judgment for those fines and seeks to foreclose the judgment lien; and (5) requiring that every aspect of the foreclosure be commercially reasonable. The protections included in LB571 are taken virtually verbatim from section 3-116 of the Uniform Common Interest Ownership Act, as amended in 2008. These protections are also consistent with a more comprehensive Uniform Common Interest Owners Bill of Rights Act that was drafted by the Uniform Law Commission in 2008. Other provisions in LB571 that are adapted from the Uniform Common Interest Ownership Act include the option for appointment of a receiver during foreclosure proceedings and limited assessment lien priority in an amount tied to 12 months, 12 months' worth of delinquent assessments, to assure that an association receives payment in foreclosure proceedings where little or no equity exists in the property. According to the Uniform Law Commission, this limited priority strikes an equitable balance between the need to enforce collection of unpaid assessments and the obvious

necessity for protecting the priority of the security interests of lenders. Now comment 2 of section 3-166 of the 2008 amendments is where you can find that. And finally, LB571 includes a provision clarifying its impact on existing liens and applicable law. Section 1 of LB571 would amend section 52-2001 as applicable to noncondominium homeowners' associations to make the language consistent with that used by the Uniform Law Commission and the Uniform Common Interest Ownership Act. Minor technical changes have been made to accommodate the distinctions between homeowners associations and condominium property associations. Now section 2 of LB571 would amend section 76-874 as it applies to condominiums. Both sections incorporate the same provisions of the 2008 amendments to section 3-116 of the Uniform Common Interest Ownership Act extending protections to homeowners in foreclosure proceedings by a homeowners' or condominium owner associations. When an association is required to foreclose its lien, both sections of LB571 would allow the appointment of a receiver in the foreclosure proceedings and would extend a limited priority to the association so it could recover up to 12 months' worth of delinquent assessments before other secured lenders were paid. Because some homeowners' associations already have consensual assessment lien authority that arises from their covenants, both sections of LB571, obviously LB571, include provisions clarifying the impact on existing liens and applicable law. LB571 would therefore make the enforcement of statutory homeowners and condominium association liens more uniform in Nebraska and consistent with public policy objectives identified by the Uniform Law Commission. The recent amendments to the Uniform Common Interest Ownership Act represent important changes that deserve immediate adoption by the Legislature. Now I believe that LB571 would provide meaningful and timely improvements to Nebraska laws governing statutory assessment liens in Nebraska. Now that's a lot to digest, a lot of common law and a lot of references there, but what's happening here, homeowner associations--and I asked when I was asked to carry this bill, what's the deal--they're left holding the bag. You know, they have a lien and if a foreclosure process has started and it goes through, they're the last ones. What happens, they stand in line after the bank. The bank gets everything, they suck it all up, and that homeowner association is left holding the bag. They have to still pay for everything. They have to maintain these things. So what they're asking is that a reasonable amount of 12 months would be afforded to them in a limited manner when it comes time for the collection of these liens. And there are going to be people behind me, some who are constituents, all of whom represent homeowners and other organizations who have a lot more in-depth knowledge about what this bill is trying to do and how it impacts these organizations and our communities. So with that, I would, you know, engender to answer any questions you might have; however, I would recommend asking the people behind me who have much more specific, in-depth knowledge. [LB571]

SENATOR PAHLS: Senator Price, just...for a lot of words, you're saying this is simply, the intent, is this to harmonize the existing Nebraska law regarding condominiums with the uniform? [LB571]

SENATOR PRICE: Yes, sir. [LB571]

SENATOR PAHLS: That's your perception. [LB571]

SENATOR PRICE: Yes, sir. [LB571]

SENATOR PAHLS: Okay. Okay. Thank you. We'll wait for the...are you going to be around for closing? [LB571]

SENATOR PRICE: I'm not sure of that. I have to get back to Transportation. [LB571]

SENATOR PAHLS: Okay. Okay. [LB571]

SENATOR PRICE: Thank you. [LB571]

SENATOR PAHLS: Thank you. We are now ready for proponents. Good afternoon. [LB571]

ROY BRAY: (Exhibit 1) Good afternoon. Good afternoon, Chairman Pahls and members of the committee. I'm going to read a prepared statement. Do you wish a copy of it? [LB571]

SENATOR PAHLS: That would be fine. [LB571]

ROY BRAY: I have enough copies for everyone... [LB571]

SENATOR PAHLS: Okay, that would be good, yes. [LB571]

ROY BRAY: ...if you actually would like one. [LB571]

SENATOR PAHLS: Yes, we do. [LB571]

ROY BRAY: There's actually more than what's required there. My name is Roy Bray and I'm the president of the Walnut Creek Hills Townhome Owners Association in Sarpy County, Nebraska. I'm one of Senator Price's constituents. I support LB571, which protects the economic interests of homeowners' associations while ensuring due process for homeowners and preserving the value of lender collateral in their homes. I oppose LB613 and (LB)614 for the same reasons. Walnut Creek Hills is a neighborhood of single-family homes that looks like many other neighborhoods. Although we are a townhome community, we don't have duplexes or row houses or apartments. We have detached homes with full yards and driveways. What sets us apart from most neighborhoods are the services our association provides to its residents. Our

association maintains the exteriors of the homes and an underground sprinkler system, and it provides lawn care, trash service, and snow removal. This is mandated by our bylaws. To pay for these services, our covenants allow the association to impose an annual assessment which is a continuing lien against the property. We currently charge $110 a month for this. Last week I received a letter in the mail from an attorney in town who was threatening to foreclose a home in our neighborhood. Not surprisingly, that homeowner is delinquent on payment of our association's assessment as well. That letter informed me that the bank's loan was superior to our lien and a judgment lien we already have against the homeowner, and that our liens would be extinguished by the foreclosure. So even though our right to impose an assessment and claim a continuing lien comes from our covenants, which were filed before any banks loaned money to homeowners in our neighborhood, the bank's attorney takes the position that a later filed deed of trust trumps our liens and prevents us from collecting any money from this homeowner. Now what is the fairness in that? It should be first come, first served. Isn't that how liens work? The covenants are filed with the register of deeds and are accessible to the public. Any bank loaning money in our neighborhood knows about the assessment and our lien. On what basis should our association be forced to step to the back of the line when we arrived there first? If the law is going to deprive us of our lien, that almost strikes me as an unconstitutional taking of private property. Homeowners' associations, particularly associations with covenants that create assessment liens, should be entitled to collect those assessments in the event of a foreclosure. While LB571 would continue to give priority to the banks with security interests in the property, it carves out a limited exception to allow associations like mine to collect up to 12 months' worth of assessments first. Then the bank would get the balance. In my neighborhood, that means that a bank could, at most, lose out on $1,320 or less than 1 percent of the assessed valuation of most of these homes in our association. I submit that these dollars mean a great deal more to our association. LB571 would make good sense and seems to me to be sound public policy; LB613 and LB614 do not. Both would force associations like mine to step completely to the back of the line, so that if a homeowner took out a second or third mortgage years after moving in, we could not get paid until after every bank was paid. Again, this is in despite of our covenants putting the world on notice of our assessments and our continuing lien long before that homeowner took out any loans against their property. I'm scratching my head trying to figure out where the sound public policy is there. The services provided by our townhome community attract a number of elderly residents who are on fixed incomes. Our neighborhood's ability to survive and thrive depends on our ability to collect the assessments from our residents so that we can provide the services that our covenants and bylaws require us to provide. LB571 makes important improvements to the law and I ask the committee to advance it to the floor for full consideration by the full Legislature. At the same time, I urge the committee to reject LB613 and LB614 in their current form. Thank you very much. [LB571]

SENATOR PAHLS: Do we have any questions? Seeing no questions, thank you for

your testimony. Next proponent. Good afternoon. [LB571]

CANDICE JAMES: (Exhibit 2) Good afternoon, Senator Pahls and members of the committee. My name is Candice, C-a-n-d-i-c-e, James and I'm a property manager in Omaha and I'm one of Senator John Nelson's constituents. Today I testify in support of LB571, which would make important changes to Nebraska law so that homeowners associations are provided with meaningful recourse in the event an assessment lien must be foreclosed. I oppose LB613 and LB614 because I feel they do just the opposite. I have been a professional property manager for over ten years. In that capacity, I have had the opportunity to work with a number of different types of homeowner associations, including traditional neighborhoods, townhome communities, and condominium properties. My role as a property manager to a residential association typically involves managing the affairs of the association, including collecting assessments from homeowners, paying vendors and contractors, and managing relationships with all these folks. I prepare budgets and financial statements for the associations' boards and am intimately familiar with the state of many associations' finances. My perspective makes me truly appreciate the difference between the many types of neighborhoods and can tell you that townhome and condominium associations depend completely on the collection of assessments so that they can pay for the services that they are obligated to provide to the residents. The obligations exist in the covenants and bylaws, and the associations don't get to decide which residents to serve and which not to serve. Therefore, it is essential that we collect our assessments to sustain the neighborhood and maintain property values. My experience with foreclosures by banks has been an eye-opening experience. There have been a number of properties where a trustee's sale took place with no notice to the association, even when our covenants are on file with the register of deeds. We would only find out months later when we stumbled upon new information from the assessor or the new homeowner voluntarily contacted our office. Apparently, the law does not require notice unless you actually ask for it in writing by filing a document with the register of deeds specifically referencing many details about the underlying loan. Also, I can't recall a time when a bank voluntarily contacted me to pay off an assessment lien after a foreclosure. It just doesn't happen. I am left to assume that the bank didn't sell the property for fair market value. Meanwhile, the association keeps mowing, watering the lawn, painting the exterior, and removing snow from the property and keeping it looking good. This is happening with increasing frequency and is very disturbing. While LB571 would impose a number of restrictions or conditions on a homeowners' association when foreclosing a loan, I don't object to those protections. I think they are reasonable and we generally do this anyway. And if those protections are included in the uniform law on which the statute is based, it makes sense to me to include them in Nebraska law to make things uniform. I think you understand why I oppose LB613. The law, as currently written, already gives banks priority for first mortgages on a property, but that's not good enough. Removing the word "first" means that now the association, which was on the scene before any bank ever loaned money to a homebuyer, must wait until all bank

loans are paid. So if a homeowner takes out a second or third mortgage without any involvement from the association, the association has to take a back seat to those lenders too. That lender...that renders this law completely meaningless to homeowners' associations. I have reviewed LB614, which I understand is modeled after the construction lien law. It would require a notice of assessment to the homeowner and provides that the association's lien would only take priority as of the date of filing a notice of lien liability with the register of deeds. I think this may be different than a construction lien, though. Don't those take priority when a notice of commencement is filed, even before a lien is created? Our associations already give notice to homeowners of the assessment. It is required by the covenants or bylaws. And while we have been filing a notice of assessment lien when an assessment becomes delinquent, I am not aware of anything that requires us to do so. My real problem with LB614 is that it tags the association's lien priority as of the date of the notice of lien liability so that, once again, the association will never be paid if it must stand in line behind the banks, and it makes the assessment lien subordinate to every bank loan secured by the property. Why even bother creating a lien? Another huge problem with LB614 is that it does not allow the association to collect attorney's fees. I don't know any attorneys that will help us foreclose a lien and not charge for it. This means that, again, by the time we tried to exercise our right to foreclose our lien, we would come out behind. LB614 law doesn't make any sense to me. LB571 would provide the associations I work with a real remedy to a real problem. I ask the committee to approve the bill as written. I also urge the committee to reject LB613 and LB614 because they have absolutely no practical value for homeowners' associations. Thank you. [LB571]

SENATOR PAHLS: Any questions? What I'm going to do is, for those of you who are testifying, if you want to be sure that your testimony also is on (LB)613 and (LB)614, since we're sort of merging these things together, which is okay, if you want that to be noted other than in this conversation, you need to fill out a form on those bills, separate. They must...and all you'd have to do is just come up and just say, as my past testimony. Does that makes sense? You don't have to come up and relive that; you just say...and that way it will get on record. I just want to make sure everybody understands that. Okay, seeing no questions, thank you for your testimony, Candy. You may begin. [LB571]

MARK KINSEY: (Exhibits 3 and 4) Chairman Pahls and members of the committee, my name is Mark Kinsey, M-a-r-k K-i-n-s-e-y, and I'm the president of Sunridge Townhome Owners Association in Sarpy County, Nebraska, one of Senator Langemeier's constituents, and Sunridge also abuts Senator McCoy's district at 180th and Harrison in Omaha. I'm here to support LB571, which protects the economic interests of homeowners' associations while ensuring due process for homeowners and preserving the value of lenders' collateral in the homes. Sunridge is a neighborhood of single family homes that from appearances may look like another typical neighborhood; however, a portion of the neighborhood is governed by separate covenants and a separate

townhome owners association that was developed as part of a planned townhome community where exterior maintenance, lawn care, snow removal, and underground sprinkler system maintenance is provided to the homeowners. These services cost money so the covenants give Sunridge Townhome Owners' Association the power to impose assessments against the homeowners to pay for these services. We just raised the rates this year to $120 a month, anticipating higher costs all around in the future and to start protecting what we have by protecting long range in our budget. I was attracted to Sunridge because of these services I've just told you about. In part, it was age, medical and fixed income reasons, but other reasons for a coved (phonetic) community, in my eyes, were that there would be continuing continuity to the community, a preservation of the architectural integrity, and it would maintain the common properties. It further promotes the community concept and protects the community property values. I would also...or always reside in an area that is well-maintained and organized, but I would also know that my neighbors and neighborhood would be of the same mind-set. It just promotes a harmony and unity that isn't found in any uncoved (phonetic) neighborhoods. I've submitted to you also a reprint of an article that ran in the Omaha World-Herald, August 9, 2009, entitled: Foreclosures lurking around the corner. This was an exclusive, front-page story that discussed the quietly building foreclosure problem in Omaha and Nebraska, and it profiled Sunridge in particular. Our association has seen more than its share of bankruptcies and foreclosures over the last several years, and I want to make you aware that every time this happens our association gets hurt. Our covenants don't allow us to pick and choose which lawns get mowed, which homes get painted, nor does it cover the maintenance to lawns that have had utilities shut off during these vacant times of foreclosures, when watering is stopped. Our expenses remain the same and the rest of the homeowners get stuck footing the bill. Last year is a good example of how every assessment dollar counts to our association. Due to the immense amount of snowfall, our snow removal budget was overrun by more than $10,000. These dollars came straight from our homeowners. We don't receive tax dollars nor subsidies. Without the ability to collect our assessments, we run the risk of bankruptcy or insolvency. The survival of our townhome community demands that we be able to collect assessments from delinquent homeowners. The current law, section 52-2001, which was passed last year, does nothing to help my association. In fact, it's just the opposite. It gives the banks with first mortgage the right to get paid first in foreclosure. We've had several foreclosures recently and we never received payment. In fact, the foreclosure...in fact, after the foreclosure we never even get a statement from the bank showing what happened to the money collected. The reality is that there's not much, if any, equity in the homes facing foreclosure and, without us having some priority, section 52-2001 is meaningless to homeowners' associations. LB571 would amend that law to give my association up to 12 months' priority over lenders with a mortgage on the property. This isn't asking much. It encourages associations like ours to move quickly on delinquent assessments and not let the balance spiral out of control. It allows us to continue providing the services that make our neighborhood an attractive community, which I have to think will help preserve property values and protect banks'

collateral. Many of our residents are elderly and on fixed incomes. Long-term, the viability of our neighborhood depends on the association's ability to collect the assessments from our residents so that we can provide the services that our covenants and bylaws require us to provide. LB571 makes meaningful changes to the law and I encourage the committee to advance it to the full Legislature for consideration. And then, in the same token, reject LB613 and (LB)614 in their current form. [LB571]

SENATOR PAHLS: Okay. Any questions? Seeing none, thank you for your testimony. [LB571]

MARK KINSEY: Thank you, sir. [LB571]

STEVEN ANDERSEN: (Exhibit 5) Hello, Chairman Pahls. I'm Steve Andersen with the Oak Hills Highlands Condominium Association in Millard. I have served on the Oak Hills Highlands Condominium Board since 2005 and I'm on the tail end of my fifth year serving as president. During the time of my presidency, we, the condominium association, have had to file liens against two different unit owners in order to collect unpaid assessments, reasonable attorney's fees, and costs associated with the collections. In both cases, the association filed foreclosures on the liens to collect. In the instance of the first case, the association won and collected all unpaid assessments, interest, attorney's fees and costs in the amount of $26,803.19. In the second case, it is still ongoing with the assessed amount being $65,959.10. Our association is made up of three regimes and 67 percent of the condo owners are retired, living on fixed incomes. For the last two years, two of our regimes have not been able to complete summer scheduled maintenance and unit repainting because we have blown our budgets on snow removal and attorney's fees, protecting our bylaws and master deed, and collecting unpaid special assessments. The third regime imposed special assessments to continue their scheduled maintenance and repaints. Our association budgets very closely to keep monthly dues down, while covering all of the maintenance costs to keep our neighborhood in beautiful condition. We could not count on the laws to...excuse me. If we could not count on the laws to assist us in collecting duly owed, unpaid assessments and reasonable attorney's fees when the law's help is needed, it would cause a financial hardship on the entire association. Our home values would start declining and I think you would see retired people, living on fixed incomes, having to go back to work just to survive. I think LB571 does a good job of protecting both the homeowner that may be struggling in these tough economic times and the homeowners' association that needs its dues to maintain the neighborhood. It provides guidelines to work out a payment schedule when dues are late and directs the association to wait at least three months before starting legal proceedings to file liens and foreclosure on the property. The bill directs that the payments be applied to the past-due assessment amount first and then the interest, fees, etcetera, thus, protecting the homeowner from becoming trapped, like with credit cards and their high interest rates. I think that this bill is helpful and fair to all parties and ensures that the association's lien has exception to

all other liens when foreclosure is necessary. I am against LB613 and (LB)614 because they would cause financial harm to our association and its residents. It would cause all of our 67 percent retired homeowners living on fixed incomes great financial stress and grief. By giving priority to any secured bank loan during foreclosure, you'll be guaranteeing that our association will not get paid its monies owed us. LB614 removes our ability to collect attorney's fees and interest on an assessment when foreclosing a lien. This will keep us, our association, from ever foreclosing a lien because we cannot afford the $10,000-plus in attorney's fees and costs associated with getting it to the foreclosure process, and then we wouldn't even be able to collect anything if we did foreclose because the banks would get all of the money first. Please approve LB571 and reject LB613 and (LB)614. Thank you for your time and consideration. [LB571]

SENATOR PAHLS: Seeing no questions, thank you for your testimony. Go ahead. [LB571]

CATHERINE LEAVITT: (Exhibit 6) Good afternoon, Senator Pahls and fellow committee members. I want to thank you for allowing me to talk to you today. I will keep my comments brief to allow time for questions. My name is Catherine Leavitt, C-a-t-h-e-r-i-n-e L-e-a-v-i-t-t, and I live in Douglas County, in Omaha, Nebraska. I am here supporting LB571 and opposing LB613 and (LB)614. I am currently an association property manager for P.J. Morgan Real Estate where I have been employed for the last 15 years. Prior to that, I was employed with the Seldin Company for 19 years. Consequently, I have been affiliated with the real estate industry for a total of 34 years. P.J. Morgan Real Estate handles the management of 45 associations. These associations consist of private homes, townhomes, condominiums located in Omaha, Bellevue, Lincoln, Carter Lake, and Council Bluffs. Typically, home associations rely on their annual dues to cover the maintenance and upkeep of their entrances as well as legal expenses for covenant violation and collection of unpaid dues. The condominium and townhome associations rely on their monthly dues to pay the cost of utilities, maintain the exterior of their buildings, including siding repair and/or replacement, painting, roof repair and/or replacement, as well as lawn care and snow removal. The impact of forgoing unpaid dues for the associations would be catastrophic. For some associations this would mean amending their covenants to place the responsibility of the exterior repairs on the individual owners. In most instances, the hardship would fall on the remaining owners within the community. The associations pride themselves on preserving property values, and without these funds the property values on which the mortgages are held would have a significant lower value than when originally written...when the loan was written. As you know, not all mortgage holders or owners are financially responsible. Some live from paycheck to paycheck. They have the money set aside for the utilities, mortgage, car loan, and dues. If the dues payment is removed from the set-aside money, this enables the owner to apply the extra money towards frivolity rather than the needed exterior repairs. Thus, you would have some homeowners who would diligently complete the necessary repairs while other neighbors

may not care. This would cause the property values to decrease, impacting the sales within the community. You would be giving the existing homeowners of the association a reason not to pay their dues. Why should they? Under LB613 and (LB)614, owners of unpaid dues will not be held accountable. If dues are not a necessary part of the association to operate and maintain utilities and exterior repairs, then the association is not a necessary part of the community and the covenants become meaningless, along with the mortgage loan. A problem could occur when a diligent homeowner completes their repairs and then refinances their home, condo, or townhome. A comparison is obtained from at least three recent sales within a community. What would happen if one of these sales would be from a no-care owner, an owner who had not completed their repairs? The assessed value used in this comparison would be substantially less, thus impacting the amount the diligent owner could refinance and lowering the tax base for the city and county governments. For these reasons, it is important for you to protect the integrity of an association community by assuring either the unpaid dues or at least 12 months of the unpaid dues will be disbursed to ensure that the association remain a viable community and all property values are preserved. So I ask you, please approve LB571 and reject LB613 and (LB)614. Thank you for listening. [LB571]

SENATOR PAHLS: Senator Langemeier. [LB571]

SENATOR LANGEMEIER: Chairman Pahls. Catherine, thank you for your testimony. You said you were ready for questions, so I'll ask one. [LB571]

CATHERINE LEAVITT: Okay. (Laugh) [LB571]

SENATOR LANGEMEIER: This all starts when the homeowner quits making their payments. [LB571]

CATHERINE LEAVITT: Correct. [LB571]

SENATOR LANGEMEIER: And in the earlier testimony, in the Omaha World-Herald talks about the foreclosures around the corner and so obviously you have some properties within that you manage that are foreclosed on. Are the banks any better at paying the association dues than the homeowner that's had it previously? [LB571]

CATHERINE LEAVITT: They will pay from the time that they take over. [LB571]

SENATOR LANGEMEIER: Okay. [LB571]

CATHERINE LEAVITT: They will not take into consideration any of the dues that have been in before they assume the loan. [LB571]

SENATOR LANGEMEIER: But they do take them over and they do pay them while they

own them? [LB571]

CATHERINE LEAVITT: Yes. [LB571]

SENATOR LANGEMEIER: You're not having to track them down? [LB571]

CATHERINE LEAVITT: No. And in some cases, for instance in an estate, the bank takes the time in assuming the mortgage and the title for whatever reason, whether it has to do with the estate or whatever, and in the process with the utilities not being paid then the condo floods because it's wintertime. [LB571]

SENATOR LANGEMEIER: All right. Okay. Thank you. [LB571]

CATHERINE LEAVITT: Uh-huh. [LB571]

SENATOR PAHLS: I have just one question. I've heard several people testify, say we need at least 12 months. Is that the magic number, 12 months? I mean would less be more? [LB571]

CATHERINE LEAVITT: Well, the...realistically, by the time...from the time an association starts their foreclosure and then the bank steps in, many, many months goes by. In some cases it can be as many as two years. So in answer to your question, some money is better than no money at all. [LB571]

SENATOR PAHLS: Okay. Okay. But you've come up to say 12 months, in your estimation,... [LB571]

CATHERINE LEAVITT: Uh-huh. [LB571]

SENATOR PAHLS: ...would be fair, if so given. Okay. [LB571]

CATHERINE LEAVITT: Right. [LB571]

SENATOR PAHLS: Thank you. Any more proponents? Appears we have two more proponents, three. Okay. Just let me give...we have, what, four more? I'm just trying to get a...five more? Okay. [LB571]

DENNY BRAY: Good afternoon, Chairman Pahls and members of the committee. My name is Denny Bray, D-e-n-n-y B-r-a-y, and I am the president of a property management company in Omaha. I am one of Senator Jim Smith's constituents. Today I testify in support of LB571. The changes that LB571 would make to Nebraska law are extremely important in providing significant options in the event that an assessment lien must be foreclosed. I oppose LB613 and LB614 because I feel they do not provide

these options. I've owned a property management company for over 14 years. My company's management portfolio consists of homeowner associations that include traditional neighborhoods, townhome communities, and condominiums regimes. The management responsibilities that my company has with these associations calls for my staff to be involved with the collection of homeowner assessments and, in turn, budgeting these funds to be available to contract services provided to homeowners by their covenants and then to pay the vendors and contractors for these services. My staff works closely with the board of directors of the associations in assessing their monthly financial statements to keep them aware of their financial situation. Townhome and condominium associations have to pay very close attention to their expenses, as well as the collection of each member's assessments, because this is their only source of income. The assessments vary by the type of community services required by the covenants and the realization of what is affordable for the homeowner. Within my company's management portfolio, the assessments range from $80 per month to over $150 per month. The assessments are at the predetermined amount that is generally set close to the budget expenditures needed for each home to receive these services, with each homeowner paying for their respective assessment. Several of these services obligated by the covenants can exceed budgeted amounts determined by the length of season and, most importantly, the amount of snowfall which we've seen in the past two years. It's become very detrimental to associations when homes within their neighborhood are foreclosed on by banks. Properties have been sold through trustee sales with no notice to the associations, even with covenants being filed at the register of deeds. After foreclosure, associations are not being contacted for payment for assessment liens, yet without these funds the association is paying for services to continue on the foreclosed properties. The restrictions or conditions that LB571 would impose on homeowner associations when foreclosing a lien are reasonable and are things that are already general practice within our company. If these protections are included in the uniform law on which the statute is based, it seems logical for them to be in the Nebraska law. I oppose LB613. The law was written...the law, the way it is written, gives banks priority for first mortgages on the property. By removing the word "first," the association must wait until all bank loans are paid. The association was in existence prior to and has no involvement with loans to the homeowner, yet the association must wait until all loans are paid to get in position to collect for assessments used to keep the property value of said property to the highest standard. LB614 also puts the association in a latter position by tagging associations' liens' priority as of the date of the notice of lien liability. This makes the process of creating a lien a useless gesture. This law holds no meaning for homeowner associations. LB614 does not allow associations to collect attorney's fees. In exercising the right to foreclose a loan...or a lien, the assistance of a professional attorney is needed. As stated above, the associations run on a tight budget, making assessments affordable for homeowners. By not being able to collect these fees, the association falls even further behind on their budgeted income versus expenses. LB571 would provide associations a remedy in the event that an assessment lien must be foreclosed. I ask the committee to approve this bill as written. I also ask the

committee to reject LB613 and LB614 because they have no practical value to homeowner associations. [LB571]

SENATOR PAHLS: Seeing no questions, thank you for your testimony. Now do you have all...are those all your...you can... [LB571]

DENNY BRAY: Yep. [LB571]

SENATOR PAHLS: Thank you. Yes. [LB571]

WARD HOPPE: My name is Ward F. Hoppe, W-a-r-d H-o-p-p-e. I'm a lawyer in Lincoln, Nebraska. I represent the Nebraska Realtors Association. I also represent several associations, both condominium associations and homeowner associations. I'm here on behalf of the Nebraska Realtors Association, which supports (LB)571 and opposes LB613 and (LB)614, and the reasons therefore I'll echo what has been said previously by the previous people testifying. The problem with, generally, with association dues is they're small. They're not a meaningful amount that is a big sledgehammer to go after. I represent one association that charges $6 a month for dues. Imagine trying to collect judicially $6 a month and let it...and do that efficiently without the ability to get attorney's fees or somehow your costs associated with that collection. It just doesn't work. So in any case, the points that I want to make that distinguish my points--and I do echo the previous ones--from the others is there needs to be an ability to collect costs and fees with the association assessments, and that includes attorney's fees, because generally the numbers are small. Look at the concepts we're dealing with here. What you have in association fees are you have an entire neighborhood going together as a group to pay for different activities that support the individual homes that are in that group. If one part of the chain quits paying then it throws the burden of paying to the rest of the people. And as pointed out previously, the associations have an obligation to treat all of the properties in their realm equally. Okay. So one thing you'll hear later is that...perhaps, I guess, by the opponents, is that the banks need to be able to jump ahead of these assessments. Let me suggest to you that each and every bank that puts out a loan, those loans will have a clause that says the bank can advance funds to protect the security. Consequently, they could advance funds on those loans to protect small amounts of a lien that might be ahead of them to protect their priority position or their position on that property. That's one thing to keep in mind when you're looking at the big picture of these association liens on the property. What you want to ask yourself is, who is best in a position to protect themselves and how are the rightful benefits going to be charged and the payments enforced? And I would suggest that the associations, because of the position they're in, and the fact that there should...that they don't want to have to file a lien or file a lawsuit to collect until they're owed money, which would suggest that they're always going to be behind first mortgages as far as when their obligations become delinquent. Thus, if it's meaningful at all for any benefit for them to go collect and enforce their liens, they have to have an ability to jump ahead of

mortgages and deeds of trust and other liens. Otherwise, the way the system works, it doesn't make sense. You had asked a question, Senator Pahls, you had asked a question, I believe, about a time line. The time line that's in section (sic: LB) 571 provides that you can't even start an action unless you give three months...you have a three-month delinquency. Well, that makes sense. You know, people don't always pay their bills on time. The normal way that bill collectors or associations work to collect their bills is they'll talk to the people, they'll send a letter with the assessment. When they don't get paid, and they usually don't know that for 30 days or 90 days if it is a one-shot assessment, you might find it out fairly quickly if it's a month-by-month assessment, but you'll send out the bill, you'll wait, find out you don't get paid. That's 30 to 45 days. You decide that you have to take some action. Normally, that would take and should take action by a board of directors, which means convening in a bunch of people to make a decision about the collection process. That's probably another 30 to 45 days with the notice provision for calling that meeting and calling that meeting whatsoever. So there you're six months into delinquency before you really have a meaningful activity to decide to collect the debt. What has been happening in my experience, generally assessments go for long, long, long periods of time because they're small and it's so hard to collect them, and your neighbors want to be generous about the collection process. (LB)571, I would suggest, has a very short window of 12 months' protection over the first lenders that...and perhaps that window should be expanded as long as an action has been started within that time frame, but that...there are some minor tune-ups that could...I would suggest. But needless to say, (LB)571 is a better bill than (LB)613 or (LB)614. (LB)613 and (LB)614 don't give any reasonable assistance to homeowners' associations to collect their liens. Last, there is a deficit in (LB)571 and there should be a notice requirement built into that bill, which I don't recall seeing it in there, a notice by filing at the register of deeds so other prospective purchasers or secondary lenders perhaps or title companies if a transaction is coming up can know where they sit, know that there's an action pending or about to be pending on the real estate. So I've talked a little bit about time line. I'd certainly answer any questions. I don't want to repeat the prior testimony, which I think is all valid. And I'd submit myself for questions. [LB571]

SENATOR PAHLS: Senator Langemeier. [LB571]

SENATOR LANGEMEIER: Chairman Pahls. Mr. Hoppe,... [LB571]

WARD HOPPE: Yes, sir. [LB571]

SENATOR LANGEMEIER: ...welcome back. [LB571]

WARD HOPPE: Thank you. [LB571]

SENATOR LANGEMEIER: An association fee is the equivalent of a tax on a property. [LB571]

WARD HOPPE: Pretty much. [LB571]

SENATOR LANGEMEIER: And so the banks are secondary to property taxes so they collect them in the mortgage payments. [LB571]

WARD HOPPE: Yes, sir. [LB571]

SENATOR LANGEMEIER: And I assume they could do that as well to your homeowner's fees, except they don't want to pay them monthly. They like to pay them quarterly or semiannually, as they're paid now. [LB571]

WARD HOPPE: Yes, sir. [LB571]

SENATOR LANGEMEIER: How close do these homeowner associations run their budgets? If a bank was going to collect them as far as an escrow and wanted to pay them semiannually, can homeowners' associations handle that,... [LB571]

WARD HOPPE: Well, you know,... [LB571]

SENATOR LANGEMEIER: ...in general terms? [LB571]

WARD HOPPE: ...if they took the time to assess the transition, they certainly could handle it at some point or another. The majority of the ones, that the more the services provided by the association, the more likely the charging or the billing is monthly. It's on a more regular cycle. The less the services provided, the more likely it is an annual fee. When we have a $6 assessment in...per month assessment in one small subdivision to take care of a retaining pond, we bill that annually. It's hardly worth writing 12 checks at 6 bucks a month. But if you're doing a snow removal, mowing in the summer, snow removal in the winter, usually that's $100 to $150 addition to the monthly fees or that's what I'm looking at, at the ones I represent. So those are normally monthly. That could go on in accrual and the associations generally could absorb...they normally try and budget for three months' expenses anyway and keep that as a reserve, if not six. Moving that to a six or nine-month reserve would not be that bit of a problem, I wouldn't think. [LB571]

SENATOR LANGEMEIER: Okay. Thanks. [LB571]

WARD HOPPE: Does that answer your question? [LB571]

SENATOR LANGEMEIER: Yeah. I guess I could have just said, what's your reserve, and you got to where I needed you to get. So very good. Thank you. [LB571]

WARD HOPPE: Okay. [LB571]

SENATOR PAHLS: See no questions. Thank you for your testimony. [LB571]

WARD HOPPE: Well, you bet. Thank you. [LB571]

DEAN FORNEY: May it please the council...or the Chairman and committee, my name is Dean Forney. I am here on behalf...for LB751 or (LB)571 and against (LB)613 and (LB)614 and would ask you to take legislative notice of my comments so I can be included in all three bills. I live at 190th and Q Street, which is captive in Cattail Creek 1, which is a homeowner association of 102 homes. It was created about 1990. I have been on the board since it...since the board was composed of homeowners instead of the developer. Let's see, I think that was about '02. I am an attorney and have represented a mortgage brokerage firm, in-house counsel, and I am old enough and I was going to say I'm probably the oldest lawyer here but (laugh) I'm not, but I'm old enough to where we actually...I've actually examined abstracts in foreclosed mortgages. Now we all know that we use deed of trusts today. I want to respond to your question about real estate taxes. When a deed of trust...when a home is sold subject to a deed of trust, or in the old days when we foreclosed a mortgage, they are sold subject to real estate taxes. That means that those real estate taxes, special assessments, etcetera, etcetera, still burden the property. They're still owed. When you, in this situation, with a homeowner association past-due assessment, they...if they are junior, like LB613 and (LB)614 would make them, they would extinguish our past-due assessments. So the property would not be sold subject to the past due. It would actually extinguish our rights, where (LB)571 would say we're first. Now I agree with all the comments that have been made. Oh, I also want to answer your question about how close do we cut the...how close are we cutting it. Well, I've been on the board, our board, for nearly ten years. We were at $105 a month when we started. Just last month we raised it to $110 a month and the reason we did it is because our dues were $105 a month, our outgo was $103 a month, and I can tell you that we nickel and dime and beat up on the lawn boy and the management company and everybody else and we have even changed garbage companies because we could save 50 cents a house a month. So it's razor thin and it's done that way on purpose. Nobody wants to have to pay any more dues than they have to, so it's razor thin. If we're going to lose with that sort of a thin gap, if we are going to have to eat a year of past-due assessments on a home even though we have provided that home with the same amenities, the same services as everybody else, we've protected the (inaudible), we've protected the bank's property, we've done all this, it's going to hurt bad. Now you ask whether or not the one year was some sort of a magic number. I agree with the gentleman that testified before me that it should relate back to when the cause of action was started. Now I think the one year comes because the LB571 is a mirror image of the uniform act, as amended in the 2008 amendments, and we took a year. Well, I say let's go ahead and give them some real protection. My point that is different than the other people that testified is just this: The secured lenders

are in the catbird seat when they make the loan. They have underwriting, they have all sorts of good and prudent, sound banking practices that can protect themselves from a foreclosure. If something falls through the crack and their risk, and they accepted that risk after they did their underwriting, if they...they took that risk to make a profit. If something...if the loan goes bad, they're going to have a loss. Why? And as opposed to the homeowner association, we can't pick and choose. We can't underwrite. We can't run a credit check. We can't do anything to protect ourselves. The only thing we can do is take the people that the bank loaned the money to. So here we are, we have absolutely no self-protection, we have to provide all these services, and then the bank that had the opportunity to protect themselves if it goes wrong, and even with the most sound banking principles, even if it goes wrong they assume that risk at risk for a profit. We're doing it just to provide a service. So I submit to you that in fairness and equity it's only right that the guy that is helpless, that is to say the homeowner association, get paid first, then the bank who assumed the risk take the rest of it and try to make lemonade. Thank you. [LB571]

SENATOR PAHLS: See no questions. Thank you for your testimony. I see we have two more proponents. [LB571]

JOHN KEEN: Mr. Chairman. [LB571]

SENATOR PAHLS: Yes. [LB571]

JOHN KEEN: My name is John Keen, K-e-e-n, and I'm a constituent of Senator McCoy. I don't represent anybody. I'm the little guy. I stumbled across this bill and I support it. I'm a homeowner. I belong to the Banyan Hills Homeowner Association at 173rd and Pacific area in Omaha. I see in it protections for me. If something were to happen and I fell in a financial crisis, there's some protections in there, you know, that would be codified and put in some parity, uniformity to what's going on now. More than that, you know, when they talk about the burden being placed on the remaining people, I'm that guy. I'm that guy that hangs Christmas lights, me and my boys. I'm the guy that pays for the propane at the cookout because the homeowner association don't have any money. You know, it's good and neighborly and I don't mind doing it, but when there's a chance for fairness then I think it's important to go after it. I understand, you know, banks are, you know, a big part of the economy. It's what keeps the world running, but I'm out there too. And this just seems to be...when I read it I did see it's a problem and it's going to get fixed at some point or another and this just seems to be...LB571 seems to be the one that's the most fair and gives the best protections to someone like me. And that's all I have to say. [LB571]

SENATOR PAHLS: Okay. Thank you for your testimony. Appreciate you coming today. Think this will conclude our proponents. [LB571]

AUDIENCE: (Inaudible) one more. [LB571]

SENATOR PAHLS: Yes. [LB571]

AUDIENCE: One more. [LB571]

SENATOR PAHLS: Yes. If we have any more proponents, come up. I use these front chairs to give me a feel. [LB571]

BEN THOMPSON: (Exhibit 7) Chairman Pahls, members of the committee, my name is Ben Thompson, T-h-o-m-p-s-o-n. I am a constituent of Senator Pahls. I'm also a former candidate for the Legislature in District 31, and I want to let you know that I appreciate the service you provide here and respect everything that you're doing. I'm sitting here in kind of a dual capacity. I actually reside in a condominium community. It's a Scarborough property owners' community in Omaha. It's a 36-unit neighborhood. Our dues are $195 a month. We provide many of the same services that you heard before. We also provide water, a utility, to all the units within our association. That's a little bit different than some of these other neighborhoods and is, again, something you can't live without. You can't live without water and when one person chooses not to pay for it, that's a problem for the other 35 homeowners. I am also...my day job is an attorney and I happen to represent a number of townhome and condominium owners' associations throughout Douglas and Sarpy County in Omaha, and in my practice I've become involved with the foreclosure of assessment liens and I've also become very familiar with the bank foreclosures, both judicial and nonjudicial. And I'm not going to talk much because I can't really add much to what's already been said, except that I will emphasize that LB571 of these three bills that you're considering is the only one that provides any meaningful relief for associations. By the time all is said and done, when an association wants to take that step to actually collect its lien, it's meaningless if it can't collect its interest on that assessment, if it can't collect attorney fees to pay the attorney providing that service, and if it can't have some pot of money to collect those assessments, interest and fees from. I have never come across in my practice a foreclosure case where there is any significant equity left in a home, so that means if the secured lenders are going to be paid first, then it means the association is out of luck. I think a question was asked whether banks, Senator Langemeier, whether banks were paying their assessments after foreclosure. In my experience, I've actually seen the opposite. Maybe they'll pay it eventually. Fannie Mae is a big culprit. They'll sit on a property for nine months or a year without paying assessments and then, when it closes, they'll take care of it. But in the meantime, the association is still providing the same services to that particular piece of property. I'm sure there are some banks, and I've seen local banks are better about that, that will pay the associations as they become due. The neighborhoods...primarily, the neighborhoods we work with are townhome or condominium owners' associations and, as Mr. Hoppe stated, generally they collect on a monthly basis. It is an annual assessment but basically the bylaws or

the covenants state that the board may choose to accept it on a monthly basis. So instead of making the homeowner pay a year up-front, they will allow them to pay it monthly throughout the year. And generally, the covenants have a clause that says if they get behind more than 60 days then the association can exercise the right to accelerate the rest of the annual assessment and collect it all at one time. That doesn't happen very often but it's there. And I'd also like to highlight, from my practice what I've noticed is that every...even in a noncondominium neighborhood where it's just a townhome owners' association where the covenants are very clear about how it's going to be set up with the services that are provided in exchange for an assessment, the lenders know that going into it. Every single deed of trust that I've seen on these properties has a planned unit development rider and, as Mr. Hoppe said, that gives the bank the authority to basically...well, first of all, it gives them a couple options. If the homeowner doesn't pay a neighborhood assessment like this or real estate taxes or other special assessments, it gives the loan...or, I'm sorry, the bank the right to declare a default. They could declare a default on the entire loan just with that action. But it also gives them the authority to have future advances so that the bank could protect its interests, pay those homeowners' assessments, and then tack it on to the balance owed by the homeowner. Now typically I've seen homeowners become delinquent on both their homeowners' assessments and their loan at the same time. I think more often, though, they'll become delinquent on their homeowners' assessment first because it's easy to cut out. It's a lesser payment than their mortgage payment and there's no immediate consequence. As Mr. Hoppe stated, it will take several months before the board of directors for that homeowners' association gets around to actually taking some definitive action because they don't want to have to foreclose their neighbor. That's the choice that they have to make in these situations. I think it's also important to note the distinction between townhome owners' associations and condominiums. I think a lot of people who don't live in one of those neighborhoods probably kind of mix those two terms up. As you probably know, condominiums are a creature of statute. We have a whole list...I mean it's a Condominium (Property) Act here in Nebraska that specifies how a condominium can be created and there's a section dedicated exclusively to liens, how they're created, how they're prioritized, and how they can be foreclosed. That's not the case with townhome owners' associations. They are different neighborhoods and they're entirely a creature of the covenants. The developer decides to have restrictive covenants in place that define how this neighborhood is going to develop, the services that are going to be provided, and the assessment. That's where the authority comes from. So to a certain extent, I view section 52-2001 as an anomaly because it's creating a homeowners' association lien but the homeowners' association never needed the state's help in the first place to actually create the association, create the neighborhood, create the obligations to pay these assessments. It actually has a separate consensual lien, a contractual lien, which under the law is different than what's created in these statutes which is a statutory lien. Be that as it may, it means that the townhome owners' associations that already have covenants with the power to impose assessments and generally an assessment lien in there, they now have two remedies. They have a

statutory lien and they have a consensual lien under the covenants. But I will tell you as a matter of fact that not many people appreciate that distinction so I don't know that you should probably pay a whole lot of attention to that and I wouldn't focus on it too much. But I think the distinction is important because (section) 52-2001 just speaks in terms of homeowners' associations, period, and I think it's very easy to make the assumption that we're just talking about your typical single-family neighborhood where the assessments, in what I've seen, may be $60 a year or it may be $15 a month because all they're paying for is the Christmas lights or they're paying for the sign on the entrance to the neighborhood, you know, the annual picnic, whatever it is, but we're not talking much money. And I think we're all kidding ourselves if we think that one of those neighborhood associations is going to foreclose a lien to collect $60. It's not going to happen, even if they could collect attorney's fees, because that's just ridiculous. So I think as you analyze this, as you consider this, you need to realize that what we're really talking about here are the townhome owners' associations and condominium owners' associations and that's not just your regular neighborhood. This is a planned community and it is essential for these associations to collect all their assessments so that they can carry out that plan. Following up on, Senator Pahls, your question about the 12 month, I think that's probably somewhat of an arbitrary number and, frankly in my practice, I agree with the attorneys who spoke before that it would be more meaningful relief for that 12 months perhaps tied to when it actually starts. Maybe they need to actually initiate the foreclosure action within the 12 months. But I am cognizant of the important role that banks play in all of these neighborhoods. I think probably nine times out of ten the homeowners could not have purchased the properties without a bank's help and so I'm certainly sensitive to that, but I also know that it is, I guess, foolhardy to under appreciate the role that these associations play at the same time in maintaining the community. I think 12 months, though, is the bare minimum. I think anything less than that is of little value to the associations. Mr. Hoppe had also suggested a notice requirement and I agree with that. That would be very helpful to the general public to understand that there's a certain adversarial posture that now exists between the association and the homeowners. So if there were a notice requirement where the association needed to publish that fact, that they are going to enforce their lien by filing something with the register of deeds, I think that is eminently reasonable, but I think it is a huge mistake if, as in LB614, you decide to tie priority to whenever the association finally gets around to publishing that notice, because that is inevitably always going to be after the deed of trust or the HELOC or a third mortgage is filed on that property. And again, then the bill becomes completely meaningless to the association. I guess I'd like to also point out Senator Langemeier raised a very good point about how these homeowners' assessments are handled by banks. It would seem to me, if I were a bank, that the right thing to do would be to require that that money be escrowed along with the money for taxes or special assessments. These services are no less important just because it is a private organization. I think it ranks just as high as the city or the county's ability or the SID's ability to collect their assessments, and I think that moving forward that would be the best practice for these banks to protect themselves. There's nothing to

stop them from doing that right now. I think it would probably be a good business practice for them doing that. It might be possible to statutorily require it, but I think that might get a little difficult in light of the fact that most of these associations where this matters, they do have those monthly obligations and maybe waiting three months is too much. I can't say because it probably would require further study. Finally, I guess I'd like to point out that, I guess as many people have already said, that this is a serious financial issue for these associations, it causes problems. I know a number of my clients over the last year have had to impose special assessments to make ends meet. So in addition to these monthly assessments that they're already paying, they've been hit for another $250 here, $250 there. I personally had to pay $250 extra last year myself. That is a problem and, frankly, a lot of these covenants limit what associations can do. There's a maximum. I know in some of the associations I work with, the covenants itself have a ceiling and it can only exceed that by so many, you know, percentage points each year as they increase their assessments, and generally there's strings attached to a special assessment power as well. But I think the prospect is real that if these associations are forever relegated to the bottom of the pile in a foreclosure that some of these associations may file bankruptcy. I know one that's on the verge right now and we...my office did some research and searched the bankruptcy court records. Just in the last few years, we've had six SIDs in Omaha file for bankruptcy protection. This isn't just hype or overstating the case. This is a real possibility. So again, in order to provide some meaningful relief to the townhome owners' associations and the condominium owner associations that I represent and that I live in, I strongly suggest that you pass LB571 with or without some subtle amendments to improve it. And again, I'll get up and testify against (LB)613 and (LB)614, but obviously I'm against those as well. [LB571]

SENATOR PAHLS: Seeing no questions, thank you. [LB571]

JAMES ARTER: Thank you for your time. I'm Jim Arter, A-r-t-e-r, with the Arter Group here in Lincoln, Nebraska. We manage high-rise and conventional condominium townhome projects. I don't want to repeat what everyone else said. I'm in favor of (LB)571. I think I want to focus on one item, is that when a lender makes a loan to a buyer, that buyer signs a condo rider where they covenant to pay those fees. The lender wants that signed, they want the buyer to pay them because they know it's essential to maintaining the asset that they're loaning against. So if we special assess for a roof or there's an assessment period of saving for a roof, the roof gets put on, the unit gets foreclosed, the lender gets a new roof. They get the benefit without having to pay for any of it. A year is probably adequate if the lenders move in a timely manner. I've filed liens on owners and then notified the lender of the lien, because it's a default under their loan, and then maybe take a year before they start any proceedings and then they're not going to foreclose or call the loan in default until they're not getting paid. So they might be in default technically because they're not paying their homeowners' fees for a year, then the lender doesn't get payments. They've got their basket full of foreclosures; might be another year. So sometimes we lose out of two years of maintenance and

utility expense. A water bill would be a lien on a property, a single-family home, if it's not paid, but if the neighbors pay that through an association then it's not a lien that's enforceable under (LB)613 or (LB)614. So I'm in favor of (LB)571 and opposed to (LB)613 and (LB)614. Thank you. [LB571]

SENATOR PAHLS: Thank you for your testimony. Again, I'm going to point out, since we happened to merge several of these bills together, you do not have to come up and tell us again why you...(LB)613 and (LB)614 you disagree. You just need to fill out the form before you leave. Typically, we separate these bills out but they've sort of merged together today. So again, you do not have to come up if you're a proponent or an opponent of these bills if you've stated that. I think we are now ready for the opponents. And how many opponents do we have? I just...I need to have a figure. I'm going to hold pretty to it. I see three, four. Now I'm going to have you move forward. We have places up here. [LB571]

JERRY STILMOCK: (Exhibits 8 and 9) Good afternoon, Chairman Pahls, members of the committee. My name is Jerry Stilmock, J-e-r-r-y, Stilmock, S-t-i-l-m-o-c-k, appearing on behalf of the Nebraska Bankers Association in opposition to LB571. The biggest piece, of course, of (LB)571 that the bankers and the members that I represent is the 12-month super lien priority that would be granted in LB571. The longstanding rule in Nebraska has been that lien priorities are measured by first in time, first in right, and allowing a lien for unpaid condominium association or homeowner association assessments, including attorney fees, to take priority I think would create havoc among the lending industry. The...it obviously is an attempt to shift the loss of the condominium association and the homeowners' association assessments and attorney fees over to the banks. I was going to wait until LB614, but I think it would be appropriate if I...I'd like to hand out to the members of the committee ten proponents come forward on the measure and I thought to myself, I don't recall this happening. I was not in charge of the bill last year that Senator Pirsch introduced, (LB)736, that became the (section) (sic: 52-2001) 52-1001 that's been referred to, but there has been another distinction. You are all aware of the legislation that came out of this committee. There's been another item that happened and that's the Nebraska Supreme Court in the case that the page is handing out now, Grayhawk v. Birth. That decision came out in June of 2010, so it's current, it's hot in the sense of it followed right after the session, figuratively speaking, after the session ended last year. The Supreme Court went through an analysis, much to which the Supreme Court has done consistently when looking at liens and lien priority. So in the bigger picture, allow me to paint just briefly that Grayhawk decision. Of course, the two are at odds--the bank that provided the financing and the homeowners' associations. They were two associations, two different lenders involved, two different properties, one in Douglas County, one in Sarpy County, and the Supreme Court consolidated them because of the general issues that were being discussed in both cases. Supreme Court looks at it, says, okay, the similarities are the covenant, as it's sometime been referred to this afternoon, the covenant when the homeowner

association says, we may file...we may charge you assessments for dues, for assessments. That was filed. Second in time, a deed of trust was filed on behalf of the lender making the loan to that property owner. Third in time, the homeowner association filed some type of notice of a lien. The court calls it a miscellaneous lien that was...when I say filed, I'm talking about with the register of deeds, of course. First in time, the covenant; second in time, the deed of trust; the deed of trust is prior before the default by the homeowner failing to pay the association assessments and dues. The court looked at that scenario and the court said the only way that Nebraska has been able to go forward is recognizing first in right is first in time, and to deviate from that would be improper. It's not recognized. It would subject...and that's pretty much the nutshell of Grayhawk and so I'll leave it at that. I thought it would be helpful to...and counsel is certainly aware of the decision, but I thought it would be helpful to bring about at this bill rather than at (LB)613 or (LB)614. I think it unnecessarily shifts the burden to lenders in these situations. It would be improper and take up too much of the committee's time, with bills to follow particularly, to go through each of the proponents' items that I jotted down and so forth. There will be a time for that. One of them, though, was, well, gosh, you know, the lenders, they have their ability to go back and do a risk analysis and who can pay and what kind of income is in the house, that will be in the house, and they're the big dog. You know, they ought to be able to watch out for themselves. Well, the bank is looking at repayment of the bricks and mortar. That's what the bank is measuring upon, the ability of the owner of the property to repay. Point number one, they're looking at the ability to repay. Number two is this animal is all over the board: $6 a month to the gentleman that said when one of these homeowner associations entered into a default $60,000. I mean that's a significant amount of money and certainly a bank is not doing their analysis for risk analysis to see whether or not there's an ability to repay or pay the assessments. My last point: I'm going to talk a little bit about uniform acts. But the uniform act, in another bill, the uniform act brought about in this situation that the proponents have rallied around is saying the uniform act--and I can't verify, I'm just repeating their statements--the uniform act that has been referred to by the proponents. The uniform act is a good thing, we should follow it in Nebraska, etcetera, etcetera. The key ingredient if anything is missing in (LB)571 is a notice that a lien...an assessment has not been paid. And the last couple of gentlemen that came forward said, well, there's no lien notice provision in (LB)571, the way it's written now, and if it's tailored after the uniform act I don't know how in God's goodness a uniform act could come out without any lien notation, filing of an assessment lien being filed with the register of deeds. And (LB)571 is void in that respect, Senators. On behalf of my client, I'd ask you to indefinitely postpone LB571. [LB571]

SENATOR PAHLS: Senator. [LB571]

SENATOR UTTER: Thank you, Chairman Pahls. Mr. Stilmock, do you see any impact, should (LB)571 pass and become law, what impact do you think that has on real estate values in terms at least of the ability of financial institutions to make loans to finance the

construction or ownership of these properties? Is there...do you see some impact there? [LB571]

JERRY STILMOCK: Senator, if the wheels are turning slowly now, as we're trying to goose it, I mean we're trying to get things going again, we the citizens of Nebraska, the country, the bankers, I think it's going to slow it down even more so. It has to because we're dealing with an unknown. The unknown is are those assessments being paid or are they not? And the banks have no knowledge about it until their repayment is in default. So I think it would, Senator. I think it would slow down the ability to make loans in Nebraska. [LB571]

SENATOR UTTER: So in that same vein, do you feel like it affects the existing value of people's property that are covered under homeowners' association or other similar type organizations that everyone that owns one now would see some kind of a decline maybe in the potential value of that property... [LB571]

JERRY STILMOCK: Well, if you... [LB571]

SENATOR UTTER: ...as it would have to be sold and refinanced maybe? [LB571]

JERRY STILMOCK: If I am understanding your explanation, Senator, if I was listening closely enough, if those 50-unit owners are, you know, struggling because the 50-unit owners are now down to 45 because of foreclosure and now they're going to have to carry the ball farther on their own, and it's going to be more difficult to replace those 5 that have left because they've been foreclosed, yes, Senator, I believe it would. [LB571]

SENATOR UTTER: Thank you. [LB571]

SENATOR PAHLS: Seeing no other questions, thank you for your... [LB571]

SENATOR CHRISTENSEN: Senator Pahls. [LB571]

SENATOR PAHLS: Senator. [LB571]

SENATOR CHRISTENSEN: Thank you, Chairman. Thank you, Jerry. [LB571]

JERRY STILMOCK: Sir. [LB571]

SENATOR CHRISTENSEN: I guess I look at this as kind of a Catch-22. You're not going to have a delinquency on homeowner fees until after someone has already purchased it and the bank's got the first lien on it. So there's no way they can ever be first in time, first in right and get moved there. Unless you had a bill like this, you could never move there. So they're sitting in second place where they can never ever get their

deal paid as we sit now. And getting out of the first in time, first in right I understand is very contrary to the way we have done things. Explain on the bank's side, how do they do the SIDs and real estate taxes because to me that seems to be the only way to handle a situation that way is if they is handled the same. Are they not both can be figured into...real estate can be figured into the loan and made into the payment so it's made evenly. [LB571]

JERRY STILMOCK: Um-hum. [LB571]

SENATOR CHRISTENSEN: I would think this could be made that way. Is not SIDs got a priority to be paid? [LB571]

JERRY STILMOCK: You know, I haven't done any SID work, Senator, and so I cannot answer the SID portion of it. But I would believe that banks are escrowing because of those...for real estate taxes, because those real estate taxes are first,... [LB571]

SENATOR CHRISTENSEN: Right. [LB571]

JERRY STILMOCK: ...statutorily they're first so they have to protect themselves. The other thing was...I'm sorry, you had another question. Perhaps I'd be more polite if I waited. [LB571]

SENATOR CHRISTENSEN: No, go ahead. [LB571]

JERRY STILMOCK: The other piece of it was somewhat of almost an illusion that banks are going slowly because they're on the gravy train because the work is being done and they're not being paid. And by golly, banks ought to be made to pay. And then somebody brought up the illustration of it's wintertime and the pipes break. The bank is the one that's going to be hurt. The bank is going to be the one that's going to have to dump...we have property in our own...best home in our community, by far the most expensive home in our community. And it's not a homeowner situation, but I'm giving you an illustration. When that property owner flies the coop and the lender doesn't know about it, maybe the homeowners' association would know about it, the banks want to get in there as soon as they can. They don't want busted pipes because you know what happens with busted pipes, I mean, the obvious. But after all the wet and the dampness then there's mold and the decrease in value. It's not the homeowners' association that are going to come in and help pay that, it's the banks. The banks are the ones left holding that bag. [LB571]

SENATOR CHRISTENSEN: So I guess I can see that what Senator Utter said, that we could hurt the damages...or hurt the values of them because banks probably would want to lend less value to them if they're going to have to cover the high side. Are you going to want more security down so that you know you're covered? Same way is if we

stay as we are now and people aren't paying their assessments. If they start deteriorating or you keep jacking it up then people are going to less desire it because living in one I know the upkeep that it takes. I've not had my normal $84 or $80 a month or whatever it is and then that extra yearly assessment. If that's not kept up, that hurts the value. I really don't know how to handle it. I can see both sides of this. I can see it hurts the value both ways, as Senator Utter said. And also if we stay this way and they're not kept up, I guess, I'm not sure what to do. [LB571]

JERRY STILMOCK: Well, that very well may be the $60,000 question is, policywise, is this a body willing to shift from the history of Nebraska and shift away from a policy that recognizes first in time, first in right? [LB571]

SENATOR CHRISTENSEN: Thank you. [LB571]

JERRY STILMOCK: Yes, sir. [LB571]

SENATOR PAHLS: Thank you for your testimony. [LB571]

JERRY STILMOCK: Thank you, Senator. [LB571]

JIM BUSER: Good afternoon, Chairman Pahls. [LB571]

SENATOR PAHLS: Good afternoon. [LB571]

JIM BUSER: Senators, committee members, my name is Jim Buser, B-u-s-e-r. I'm an attorney in Omaha, Nebraska in private practice. I don't have any constituents to represent today. I've been practicing law for 22 years. I have a general real estate practice. We represent a lot of developers. I've drafted, I don't know, between 50 and 100 either homeowners' associations sets of covenants, townhomes' covenants, townhomes' association documents. I'm familiar with how the process works in both the conventional homeowners' association, with the townhomes' association. I appreciate the comments the people are really completely different animals in my estimation. Homeowners' association, generally, may have a $50 a month, I'm sorry a $50 a year assessment, regular assessment where when you're dealing with a condo association or you're dealing with a townhomes' association there's a lot more maintenance that goes on and the numbers are greatly skewed. So I appreciate the property managers that are here today and the dilemma that they face in their collection issues. And we're generally talking about, you know, I guess, the people that aren't paying their bills as opposed to those that are regularly paying their bills and who should have priority--the banks or the associations that are providing these additional ancillary services for the people that live there. I'm here today, I guess, to testify against LB571. Senator Pirsch contacted me a year or so ago because of some concerns with the existing legislation that was adopted last year and asked for my commentary because I know him from my

practice and he happens to reside in an SID that I represent. And I provided Senator Pirsch with my sort of overall concerns with the legislation that was adopted last year. And there's three main areas that I thought were issues which eventually led me to drafting what is before you today as (LB)614. I would like to spend a few minutes when we get to that, when we get to (LB)614, to discuss that specifically. I'm going to tie-in some of my comments here. [LB571]

SENATOR PAHLS: Let's try to stick with LB571, though then... [LB571]

JIM BUSER: Okay. [LB571]

SENATOR PAHLS: ...because you're going to go to the other one. [LB571]

JIM BUSER: Yeah. I'll do that. So the three issues that I had with the existing legislation were, one, I think that there's a lot of ambiguities, inconsistencies and inaccuracies that are there specifically with respect to the homeowners' associations. Because, as has been stated before, the condominium act has a great deal of background as to what's required in the declaration of covenants that are filed, has specific provisions that provide some due process and specific limitations on the operation of the condo associations. There's none of that background in the homeowners' association area. There's no statutory scheme that regulations what's required in the declaration of covenants that's reported. There's no provisions specifically relating to how a homeowners' association is supposed to operate, whether it has to be an incorporated association or not. And so there's very little guidance there. And I think that there's a deficiency in the existing statute, which I tried to address in (LB)614. The second issue that I tried to address, I guess, and why I'm opposed to (LB)571 is certainty in lien priority issues. My practice also delves into a lot of mortgage lending work, principally commercial lending but also some residential lending. And it's just critically important that during the title review process and the process of the loan application and review process that there be certainty to the banks as to what liens may or may not be...have priority, what type of encumbrances are against the property. And I do not believe that (LB)571 as presented addresses any of that. I agree with the statement that Nebraska is a first in time, first in right state, that there ought to be...if there's a lien that's going to be filed, there ought to be a notice with the register of deeds that puts all the parties on notice as to the amount and the existence of the lien. And in part to address one of the questions that Senator Christensen was asked and that is, is there any other way that these homeowners' associations or condo associations or townhome associations can get paid? Well, again, in the case where you have a bankrupt person or a person that's unable to pay their debts I don't know that I have an answer to that. But the answer in all other commercial situations where you just may have somebody that's not paying their bills, well, if you have a notice of lien liability that's filed, even if it's after the mortgage and there's a refinance or the person goes to apply for a second mortgage, the bank would at that point require that that lien get paid. Because at that point, because under

my (LB)614 as proposed there would be a notice of lien liability that would be recorded and that would establish that priority with respect to that particular assessment or the amount of that assessment. And that would be mandatory. So that's the second, I guess, what I would call deficiency in the existing legislation and (LB)571. The third issue that I have is homeowners' association abuse type issues. There are provisions in (LB)571 and the existing legislation, specifically that permit fines and additional costs to be included in the body of the lien that is claimed by these homeowners' associations. And unfortunately, there...I see it in my practice not infrequently that people that become involved in homeowners' associations sometimes are the mavericks in the neighborhood, may have personal agendas. And that to give without due process, which if I get fined for violating a parking violation or a moving violation or some typical fine, there is due process, I have some remedy to be able to contest that. And because of the nature of and uncertainty as to what may be contained in a set of covenants you don't know whether there would be any due process. So it would potentially allow a board or an individual member of a board that may have power over the board to be able to levy fines or assess fines against people where there may or may not be due process existing. And so that particular aspect of (LB)571 is troubling to me. I think that whatever is ultimately decided should just relate to the base assessments that we're talking about that allow the associations to operate and that any language relating to fines or additional penalties that might be assessed be taken out of the legislation. I'd be happy to answer any questions. Without specifically going through (LB)571, I would just say that I do not believe, that as to the three concerns I have, that (LB)571 addresses those issues, and in fact, exacerbates the problem with the existing legislation. And so I'd just say that I would be opposed to, in my experience and practice, to adopting LB571. [LB571]

SENATOR PAHLS: Seeing no questions, thank you for your testimony. [LB571]

JIM BUSER: Thank you. [LB571]

JIM LAMPHERE: Good afternoon, Senator Pahls and committee. My name is Jim Lamphere, that's L-a-m-p-h-e-r-e, and I'm here in opposition to LB571 and to support (LB)613 and (LB)614 on behalf of the Nebraska Land Title Association. Our concern is with the integrity of the real estate records. And it's our position that (LB)571 undermines that integrity by not requiring any notice of the line liability to be filed in the register of deeds office where all other liens are required to be filed. Nebraska has long adopted a res notice theory and has a recording act at section 76-238 which sets forth that any lien against any instrument that purports to convey or create a lien against the real estate must be recorded in the register of deeds office to give subsequent purchasers and creditors notice of the existence of that lien prior to their taking any action with respect to the property, either making a loan or purchasing that property. The public policy behind that is intended to give that prospective purchaser notice of instruments which affect title to the land in which said purchaser is interested. (LB)571

attempts to alter that longstanding policy by creating...giving unpaid homeowners' association dues lien rights without the need to file a notice of lien liability with the register of deeds for the county in which the property is located. By placing the priority of the lien in coordination with the date of the filing of the document, the covenants creating the obligation, the date of the lien is then prior to the date the liability even exists. No liability exists until an assessment is actually made against the property. And according to the Grayhawk case, which Mr. Stilmock passed out earlier, that lien is not...notice of that lien is created until the notice of lien liability is filed against the...with the register of deeds. That decision is coordinate or consistent with the recording act as it exists today and that's what our association would prefer to have stay the law. What you're doing...what (LB)571 does is it creates...gives homeowners' dues, which are a private obligation, a statutory lien which is a first, to my knowledge, in the state of Nebraska. We prefer the solutions of (LB)613 and (LB)614 which requires a notice of lien liability. It does give the associations the power to protect their lien rights and to foreclose by filing that notice of lien liability. And that would be consistent with the rights of other creditors in the state of Nebraska and not elevate them above those other creditors. With that, I'll take any questions. [LB571]

SENATOR PAHLS: Seeing no questions, thank you for your testimony, Jim. [LB571]

JIM LAMPHERE: Thank you. [LB571]

SENATOR PAHLS: (Exhibits 10 and 11) Anybody in the neutral? Okay, and Senator Price said he would not be here for closing. So that will close LB571. Oh, just before I do that, I do...I need to...we have a letter from Standing Bear Village Townhome Association, they support (LB)571; also George Cooperider also supports (LB)571. That now closes the hearing on (LB)571. Okay, I'm going to change the direction a little bit. Again, I'm asking, some of you have already testified. You must...just make sure you hand in the sheet to Jan that you are supporting or against (LB)613 or (LB)614. Again, I'm going to say I am going to start using the lights because we have five other bills yet to go today. So we're going to be using the lights. And it will be four minutes on green, one on amber, when you see red that means you should be tying it up. We are now ready for LB613. Again, I'm going to ask you, if you do come up, do not repeat what you've already told us on (LB)571. Thank you. [LB571]

SENATOR PIRSCH: Good afternoon, Chairman Pahls, members of the committee. I am state Senator Pete Pirsch representing Legislative District 4. And it is P-e-t-e P-i-r-s-c-h for the record. I am the sponsor of LB613 and (LB)614. And, Chairman Pahls, just to check with you, would you like to do these combined together? [LB613]

SENATOR PAHLS: No, let's just do LB613 so we will have... [LB613]

SENATOR PIRSCH: Very good then. A little bit of clarification. I do appreciate the

testimony of those who have come before, both proponents and opponents. We are going to be continuing the same general subject. First, with respect to LB613 deals with condominium association and homeowners' association lien priorities as well. Three important points. Fines imposed by a condominium association or homeowners' association that remain unpaid fines would not constitute liens that may be enforced pursuant to foreclosure proceedings. The second point, any mortgage or deed of trust would have priority over the lien for assessments. And last, dealing with that Grayhawk v. Birth decision which had been referenced in the last bill, a lien is only...would only be perfected if the assessment is delinquent and a notice of lien has been duly recorded. So I...again, I appreciate the testimony of those who have gone before. Really, the motivation of bringing forward these bills was I'm interested in bringing forward a due process of fairness to the homeowners and hopefully encapsulate those in this bill. And so with that, I know there will be some to testify after me. [LB613]

SENATOR PAHLS: Okay. Seeing no questions, (inaudible), Senator. [LB613]

SENATOR PIRSCH: Thank you. [LB613]

SENATOR PAHLS: Proponents. [LB613]

JERRY STILMOCK: Chairman Pahls, members of the committee, my name is Jerry Stilmock, J-e-r-r-y Stilmock, S-t-i-l-m-o-c-k, testifying in support of LB613 on behalf of the Nebraska Bankers Association. Senator Pirsch, thank you for bringing (LB)613. The mechanism of taking out fines from the equation is one of the areas of (LB)613, the second is to reference that if not just a first deed of trust or a first mortgage, but any deed of trust or any mortgage that was recorded prior in time to a notice of delinquent assessment is included. And third, codifying the decision that was decided in Grayhawk, in June of 2010. Since the graciousness of Senator Pirsch to introduce this measure, we've actually looked at further LB614. And I'm going to stop there. The association, the client which I represent would elevate (LB)614 to a position that we would prefer, if you will, Senators. And so I'll just reserve any more further comments on (LB)614, gentlemen. [LB613]

SENATOR PAHLS: Okay. [LB613]

JERRY STILMOCK: Thank you. [LB613]

SENATOR PAHLS: (Exhibits 1 and 2) Seeing no questions on LB613, any more opponents? Any other opponents? Do we have opponents? If you've already...because...from your last testimony and you've signed in, that's okay. Yeah because I'm assuming you're going to say the same and I understand that. Any other opponents? Anybody in a neutral? Senator Pirsch. Senator Pirsch waives on...I should...I'm not paying attention here. Standing Bear Village Townhome Association

opposes (LB)613; and also George Cooperider. Now, Senator Pirsch. [LB613]

SENATOR PIRSCH: Thank you. [LB613]

SENATOR PAHLS: That closes. We are ready for (LB)614. [LB613]

SENATOR PIRSCH: Chairman Pahls, members of the committee, again I am state Senator Pete Pirsch, P-e-t-e P-i-r-s-c-h for the record. I represent Legislative District 4. I am the sponsor of LB614. Again continuing the conversation, same subject matter. LB614 would address the issue of condominium association and homeowners' association lien priorities. Three points to bring up. Fines imposed by the condominium association or homeowners' association remaining unpaid would not constitute liens that may be enforced pursuant foreclosure proceedings, again back to the issue that motivates me with the fundamental fairness for homeowners. Secondly, any mortgage or deed of trust, not just a first mortgage or deed of trust, that is recorded prior to a notice of lien being recorded in connection with a delinquent condominium association or homeowners' association assessments would have priority over the lien for assessments. And finally, the Supreme Court again, in Grayhawk v. Birth, would be codified by clarifying provisions of existing law in the manner in which I earlier indicated it would be perfected. In addition, the bill establishes the procedure by which a condominium association or homeowners' association may create and perfect a lien for unpaid assessments and contains provisions by which any person having an interest in restricted real estate may release a condominium association or homeowners' association lien a manner in which a condominium association or homeowners' association liens may be discharged or released and a requirement for a homeowners' association or condominium association upon written request to furnish a person with an interest in restricted real estate with a recordable statement certifying the amount of any unpaid assessments against the restricted real estate. And again, I think more embedded in (LB)614. And I do thank Mr. Buser, who has previously testified here today, for his great impact. And this is the underlying premise of putting in fair procedural safeguards so that homeowners are treated fairly. So with that, I will open it up. [LB614]

SENATOR PAHLS: Senator, so you're saying you think this would be way to help out the question that we're dealing with today? [LB614]

SENATOR PIRSCH: Well, I think in (LB)614, and I think if I understand from Mr. Buser's comments and from what I know of the bill, that there are more procedural safeguards in (LB)614 that will, I think, better protect and more fairly protect homeowners. [LB614]

SENATOR PAHLS: Okay. Thank you. Seeing no questions,... [LB614]

SENATOR PIRSCH: Thank you. [LB614]

SENATOR PAHLS: ...proponents. [LB614]

JIM BUSER: Chairman, senators, again, Jim Buser, B-u-s-e-r, attorney in Omaha. Thank you, Senator Pirsch, for recognizing my contribution. The intent of (LB)614 clearly, in my opinion, was to create certainty, to create...to remove ambiguity and to add clarity to the priority issue to due process type issues, provides a process whereby before a lien can attach to a homeowners' property their certainty is to...certain notices that they are to receive, that they actually receive a written notice of the actual amount of the assessment, that they have an opportunity to pay that after receiving the assessment, and then prior to the lien attaching that the president of the homeowners' association or the townhome association or condo association will provide a certification with the notice of lien liability that they've complied with the act, with the notice provisions of the act and that that provides for the amount of the lien. Again, then when that notice of lien liability is recorded that's the date that that lien establishes priority. So if there was a mortgage that was recorded after that date, as an example, the lien would have priority because it's first in time, first in right. And the...from the title association's standpoint, in title reviews that we do that's very important, is that you have an actual physical written notice with the register of deeds that can tie-in the various priorities. And they can be addressed in the mortgage lending by requiring the payment of those assessments before the loan is made. So I think there's a certain element of fairness to everybody in that bill and the processes that are involved. So I'd be happy to answer any questions regarding the legislation. Thank you. [LB614]

SENATOR PAHLS: Seeing no questions, thank you. Proponent. [LB614]

JERRY STILMOCK: (Exhibit 1) Chairman Pahls, members of the committee, my name is Jerry Stilmock, J-e-r-r-y, Stilmock, S-t-i-l-m-o-c-k, appearing on behalf of the Nebraska Bankers Association in support of LB614. My handwritten testimony...my written testimony, it's not in handwriting, you wouldn't be able to read it, my written testimony goes forward with the procedures and recognizes the different steps that would have to be taken. I would prefer, if I may just for a moment, in the 1970s and 1980s the construction lien law was wreaking havoc with lenders, with builders, the uncertainties that were built into it. And what I understand Mr. Buser did in assisting Senator Pirsch in drafting LB614 was to take those components of the construction lien law that made sense, that have a skeleton, if you will, of backbone of support in terms of the mechanism of how the construction lien law works. And he melded it into the homeowners' association, condominium. I think it makes sense. When the construction lien law was passed in the mid to latter part of 1970s the litigation went away, the constant court battles. And it's for that reason that the Nebraska Bankers Association comes in, in support of LB614 because we believe it's a tried and tested method of providing certainty in the manner in which homeowners' association liens are recognized, recorded and dealt with in going through with the financing part of it.

The...one of the three chords that continues to repeat itself is that as to fines, that fines are excluded in (LB)614, assessments recognized, fines excluded. And as we were...as I was listening and as you were going through testimony, excuse me, floor debate on (LB)736 last year, there was quite a bit of discussion about fines and whether or not a person...and I'm going to be ridiculous because I don't have a real life example. But if the color of my house is not supposed to be red and I painted it red as a part the homeowners' association, I received a fine. The height of my grass doesn't work because most of the grass is being mowed by the association. But there were some examples that you had heard that our membership had heard and said, it sounds like fines are an issue. Fines are an issue because of what Senator Pirsch had described as lack of due process. And for that reason, I haven't said it yet and I want to build into the record (LB)614 excludes fines because of the lack of due process, senators. We believe, on behalf of my client, that LB614 is the mechanism to go forward to solidify and clarify for the three people involved, the three entities involved, the three parties involved--homeowners' association, property owners, homeowners' associations and lenders. Senators, we'd ask you to advance LB614. Thank you. [LB614]

SENATOR PAHLS: Seeing no questions, thank you for your testimony. [LB614]

JERRY STILMOCK: Thank you, Senators. [LB614]

SENATOR PAHLS: Any more proponents? Opponents. You may begin, whoever wants to be. [LB614]

STEVE ANDERSEN: I'm Steve Andersen, S-t-e-v-e A-n-d-e-r-s-e-n, president of the Oak Hills Highlands Condominium Association. I oppose LB614 because it does remove our ability to collect attorneys fees and interest on an assessment when foreclosing a lien. This will keep us, our association from ever foreclosing a lien because we cannot afford the $10,000-plus in attorneys fees and costs associated with getting it to the foreclosure process. And we wouldn't be able to collect anything because the banks would have all of the money first. It sounds, from all of the earlier testimony, like all we need to do to fix all of this is add lien notification to LB571 and we're all set. Thank you, that's it. [LB614]

SENATOR PAHLS: I just have a question. So your biggest issue with this was the attorney fees being omitted? [LB614]

STEVE ANDERSEN: No, my biggest issue is priority, the banks getting the money before the associations. [LB614]

SENATOR PAHLS: Okay, thank you. Thank you. [LB614]

STEVE ANDERSEN: Thank you. [LB614]

JIM ARTER: Thank you, Senator. I'm Jim Arter, A-r-t-e-r, live here in Lincoln. I have a real-life example I think that would help understand. And I heard different situations with neighborhood associations, townhomes, condos. In particular, we manage condominiums or high-rise. You can't get away from each other. They're, you know, they're integral. We had a commercial condo unit and building. Downtown zoning does not allow residential on the ground floor, has to be commercial. The purchaser bought the unit and put in a nightclub. And they started playing music so loud that it rippled the water in the toilet bowls all the way to 14th floor, literally shook the building. And without any way to impose fines, which do have due process because the statute requires a hearing before you have a fine, you have to establish your fine schedules. So there's statutory requirements to meet the fine statutes under the condominium act. Noise ordinances adopted by cities, municipal ordinances do not apply to intrabuilding property lines. So you can call the police, the health department. There was 120 decibels, this zoning allows 65 decibels, and they say, sorry, we can't enforce that because it's a condo. So you're left with the only option the association has is to notify the violator, have a hearing, apply their fines. And if they don't have any teeth to collect those fines, really they have no way to enforce any of their provisions. And you can imagine 85 residents in a 14-story building when they're hearing nightclub music, four or five nights a week, to the 14th floor, if you don't enforce your covenants against your noise in the building they'll sue you, they threaten to sue you. So my main problem with (LB)614 and (LB)613 is the fines. And I'm testifying mainly because I didn't hear anybody else testify on that issue. [LB614]

SENATOR PAHLS: Yes. Right, new information is appreciated. Thank you. [LB614]

JIM ARTER: Okay. [LB614]

JOHN KEEN: I'm John Keen again. I'd just like to stand on my previous comments. I'm opposed to (LB)614. [LB614]

SENATOR PAHLS: Okay, thank you for your testimony. [LB614]

BEN THOMPSON: (Exhibit 2) Chairman Pahls, remaining members of the committee, my name is Ben Thompson again, T-h-o-m-p-s-o-n, and I speak in opposition to LB614. And I just want to make a couple points that I did not make earlier that I think are particularly pertinent to this bill. First, I appreciate Senator Pirsch's concerns about due process, I think they're fairly reflected in the earlier bill you heard today. And I would note that that one also restricts the ability to foreclose liens for fines until you've actually gotten a judgment for that fine, which is a completely separate lien, a different process all together. I guess I'm missing, and I'm looking at this bill with a straight face, I'm missing the point where this is a major due process to the homeowner. If you provide notice of the lien liability, notice of the assessment, I guess that's nice. We already do

that. If we'd like to statutorily mandate it, unlike the Uniform Law Commission, I think that's fair, that's acceptable, but, I guess, in (LB)614 I'm missing where it's all about due process. And I would be opposed to advancing it and selling it on that basis. Second, a major distinction needs to be made about Nebraska law and first in time, first in right. And this is difficult to wrap my brain around and I will do the best I can, but we have first in time, first in right is a common law rule. It arose out of case law from the courts, first in time, first in right. If you have competing liens, it's the person who had the first perfected lien first, they get priority. However, the Legislature can and has in many instances modified the common law by passing statutes that give statutory priority to liens that would otherwise fall second or third in line. You have examples with real estate taxes, unpaid real estate taxes serve as a lien regardless of when they fall due--before or after later liens. The Uniform Commercial Code is a good instance where with personal property you can change that lien priority. There are a number of situations but I think the most important one that you need to appreciate is the Nebraska Trust Deeds Act. The Legislature, in passing the Nebraska Trust Deeds Act in 1965, decided to modify that first in time, first in right rule and decided that a deed of trust is going to take priority when the deed of trust is filed, never mind that the homeowner is not yet in default or would have any reason to give the bank an opportunity to foreclose their loan. The way the law is written it says that the deed of trust takes priority over rights acquired in or liens acquired upon the property after the deed of trust filing. So if you want to take this first in time, first in right to the extreme here, take a look at what happens here. You have a declaration of covenants that's filed, puts the world on notice that this neighborhood has assessments and they're going to serve as a lien on the property. You have a deed of trust that's filed showing the world that this person borrowed money and that that house is going to serve as collateral for the loan. And then one of two things may happen. They may become delinquent on their homeowners' assessment first or they may become delinquent on their home loan first. Depending on what happens, the association may file a notice of assessment lien or a miscellaneous lien, or the bank may file a notice of default putting the world on notice that this person is no longer complying with the terms of the loan. The difference is that because the Legislature decided as a matter of statute to give the deed of trust priority, their priority relates back to the filing of the deed of trust even if that notice of assessment lien by the association is filed prior to the notice of default. That is modifying the first in time, first in right, so now it's second in time, first in right for the banks. The Legislature decided to do that as a matter of public policy. They've done it before, they can do it again. So the question before this body is, do we want to change that rule at all or do we want to leave it the way it is? And the way it is right now is again saying second in time, first in right for the banks. We're simply asking to get 12 months worth of assessment before the second in time lienholder gets paid. That's not unusual, that's not an abrogation of the way the Nebraska Legislature has treated many things like this before and that's what we're asking for. And I'd also like to clarify on the Grayhawk West decision that's exactly what it dealt with. And the situation there was again the miscellaneous liens, I believe was filed before the notice of default, but

because the Legislature decided by statute to change the priorities and no longer follow the true first in time, first in right rule, they reached the outcome that they did. Incidentally, I would note that that is an unpublished decision. The only way that you would get your hands on a copy of it is if you would call down to the clerk of the Supreme Court and requested it by case number and case name because apparently the Supreme Court felt it was of little precedential value. But as you analyze this issue, I think it's very important that you appreciate the role that the Legislature has played and can play in determining these issues. It's really a question of public policy. What should we do with these homeowners' assessments liens? I can't find any compelling reason for why, as a matter of public policy, we should just completely bury them. In fact, LB614 is hypocritical because while the proponents are relying upon first in time, first in right, they're saying that even if the association in filing its notice of lien delinquency, even if they're first, even if they're first before the second and third mortgages, even if they're not in default, if the homeowner is not in default on that second and third mortgage, that doesn't matter, they're going to get paid before the homeowners' association would. So I think you have to take that with a grain of salt. And again, I would ask that you indefinitely postpone LB614. [LB614]

SENATOR PAHLS: Any questions? Thank you for testimony, Mr. Thompson. Any more opponents? [LB614]

CATHERINE LEAVITT: I just have one teeny, tiny comment. [LB614]

SENATOR PAHLS: Your name first, your name. [LB614]

CATHERINE LEAVITT: My name is Catherine Leavitt, C-a-t-h-e-r-i-n-e L-e-a-v-i-t-t. And I just wanted to make one comment in reference to the associations. In my experience when the association files a lien they may, in some instances, elect to start with the lien filing first and having it recorded in hopes that the homeowner will pay the back dues. And then will decide later on that with the dues not being paid then they'll go on to foreclosure. But no matter what they do, they notify the first, second and third mortgage holder that this is in process because we have then collected from a mortgage company because they went back to the homeowner and said, your dues are in default. So I just wanted to bring that up. [LB614]

SENATOR PAHLS: Okay, thank you for your testimony, appreciate that. [LB614]

CATHERINE LEAVITT: Um-hum. [LB614]

SENATOR PAHLS: Anyone in the neutral? Senator. [LB614]

SENATOR PIRSCH: I'll be brief. Thank you. With respect to the three bills, a lot of times we have issues before the Legislature, before the committees and, you know, after the

hearing is done you don't seem to have a tighter grasp actually of kind of flushing out the issues and defining the issues than before, but this is not one of those bills. I think both sides pretty ably argued their points before the...and I think the issue is well framed. That being said, I would be willing to work with the committee on these concepts and bills that are being expressed here in especially LB614. And hopefully, we can pass a product out to the floor that is well accepted. Thank you. [LB614]

SENATOR PAHLS: Just a second. Any questions from anybody? It does seem to me to be...to find out who's on first base, that seems to be a very paramount issue that we need to resolve. Okay. Thank you, Senator. [LB614]

SENATOR PIRSCH: Thank you. [LB614]

SENATOR PAHLS: (Exhibits 3 and 4) I have to read into LB614 opposed, the Standing Bear Village Townhome Association; and also George Cooperider. That will close the hearing on (LB)614. We are now ready for LB639. Senator Schumacher, I think I saw...yes. [LB614]

SENATOR SCHUMACHER: Thank you, Senator Pahls, members of the committee. My name is Paul Schumacher, S-c-h-u-m-a-c-h-e-r, and I represent District 22 in the Legislature. One of my first days down here, a senator who had been down here for many years gave me a piece of advice, and that piece of advice was well, if anybody approaches you on the last day for bill introduction, make sure you look for the leash. And I says, well, what do you mean, look for the leash? Say, well, check it out and make sure it's not a dog. So I did check this particular bill out, because it was coming from the bar association, and it appeared not to be a dog and had some legitimate concerns to be raised to this committee. There's going to be testimony following me that gets into the detailed problems of what's trying to be addressed by this bill, but philosophically, it addresses an issue of how entrepreneur friendly we're going to be in Nebraska. And it deals with limited liability companies which were a creation of the early 1990s and have become, for one reason or another, a favored vehicle for businesspeople getting together and to organizing themselves for business activities. And essentially, what people do is they come together, and they create an operating agreement, and they put money into a venture, and they have limited exposure for losses that that venture might incur in the course of doing whatever they plan to do. And so, if we were to all come together and decide we were going to do a venture, we would pool our money; we would select how we're going to do this amongst ourselves, and we would then engage in business. Well, some of that money that may be put into it may be borrowed money, and one of us, if we weren't as well-heeled as the others, might have to go to a banker, or if we serve in the Legislature we'd all have to go to a banker, and...to borrow some money against this particular investment. And the banker would hold a lien on our share, our membership in the limited liability company. All would be fine and good as long as we weren't going broke. Now, if one of us does get into problems, and the

banker says, hey, I want my money, then what happens? Well, under one version...the version that this bill would like to see incorporated into the law, what would happen is the court would issue an order that would charge the group with any time we would write that person a check, the debtor a check, giving the banker the check instead. That would be the exclusive way that the banker would get his money out, very simple. When the money is peeled off from the profitability of the operation or from the sale of the operation, the banker gets a check. That's the end of the banker's rights. That's where, basically, he knows his position will be, and he lends money or not accordingly to those rights. Well, apparently, the people who drafted the uniform law which was kind of a one-size-fits-all that applied to the states and the states are free to modify, what ends up happening is the banker's role can become much more involved. The banker can go in and knows amongst ourselves as to how we're doing business. The banker can, in essence, become pretty much of a nuisance to the rest of us, and we might be able to, and the banker would hope that we buy him out, pay off the loan. When that's done, according to the terms of the existing law, the guy who's in debt may actually come out with less than what he is entitled to, because the banker is satisfied; the rest of the group gets his share, and he's out on the street simply because he didn't get a chance to wait around long enough for this thing to take on value, or for the project to get to the point where it's paying off. So, what we're basically doing is saying, look, we're going to make it uncomfortable for the group of entrepreneur investors. We're going to increase their risk, so that the banker can get in a position of probably getting paid off quicker. And that's banker friendly entrepreneur unfriendly, because I'm less, as you would be, less inclined to get involved in a business deal like that where we might be put in that position. Then if all we had to worry about is if one of our partners was starting to go belly up, we would just have to make the distributions to the banker instead of them. Most entrepreneurs don't necessarily want to have a banker to be their business partner on a venture that these LLCs are structured to. So, that's what this bill begins to address and it begins to wrestle with those issues. With that, I'll let the technical explanation of exactly what's going on here be conducted by folks who are proponents of this measure, and who probably understand the technical detail, what's trying to be addressed here more. But philosophically, that's it, and I'll wait to close at the end. Thank you. [LB639]

SENATOR PAHLS: Okay. Thank you, Senator. Proponents. How many proponents do we have? One? Opponents? One, two. Okay, I see two. You may begin. [LB639]

HERBERT SAMPSON: Good afternoon, Chairman Pahls and members of the committee. I am Herbert Sampson, S-a-m-p-s-o-n, known to most as Fritz. I am here on behalf of the Nebraska State Bar Association to explain the position we have taken as regards LB639, the 2010 proposed Nebraska Limited Liability Company Act revisions. Last year, the NSBA supported the adoption of the Uniform Limited Liability Company Act. After much effort and study by this committee and many other interested parties, the act was adopted in nearly uniform fashion with very few Nebraska specific sections.

That act became effective for new LLCs on January 1, 2011, and for all Nebraska LLCs on January 1, 2013. After the adoption of the bill last session, lawyers realized that a great public policy change had occurred with regard to the charging order provisions of Nebraska law. The adoption of the uniform act had unintended and injurious consequences to Nebraska businesses as it relates to all of the members of the LLC, and their rights when one member of the LLC has a judgment entered against it. I want to put this in terms...right now, this is not a us versus bank type bill. This is any judgment creditor is what we're talking about, not just banks and their lending to LLC members. LB639 restores only the portion of the law relating to charging orders to its form on August 1, 2010, in other words, before it became effective. I want to be clear here that the concerns of the NSBA are for all of the members of the LLC and the historic protections an LLC member expects from outside parties which will no longer be available and are no longer available for LLCs formed in Nebraska. Number one, the former law was business friendly. The current law is business adverse. The existence of exclusive remedy code language made Nebraska an attractive place to form an LLC. Not so now. Many LLCs were and are the investment entity of choice based on the protections available under the old LLC law. All existing LLCs are now operating without the protections previously available. Number two, the corporate and general business community pressed for the adoption of the changing order as exclusive remedy when it came out of the Judiciary Committee and was passed as LB35 in 2009. And they support the return to that role, because it is the business norm. Charging orders are still noted in the current law as part of the remedy. However, the way that charging orders are enforced is greatly expanded. Under the current "exclusive remedy language" judgment creditors are given four options of this today: the power to make all inquiries the judgment debtor might have made; the right of foreclosure on the lien to force a sale of the transfer of interest; three, transfer the judgment to a member of the LLC; or four, as was the case prior to LB888, the last year's statute, to receive payment for the debt out of the LLC distributions. That is the charging order. Number five, other states seeking business and investment already have or are adopting charging order as exclusive remedy statutes just like the one we used to have. In fact, Nebraska has a charging order as exclusive remedy provisions for its limited partnership act which is our statutory section 67-273, the same as 42 other states. Delaware, Texas, and Wyoming have the same statute Nebraska used to have for LLCs. Florida is amending its statute to ensure charging order as exclusive remedy treatment for all LLCs. The current charging order statutes will have harmful and inequitable results for Nebraska businesses. Some brief examples are: First, under our current section 21-142(b)(1), the business privacy of all of the LLC members, not just the debtor member, may be invaded. LB888 was written with the idea of investor privacy paramount. Operating agreements are private documents under the current law. The proposed changes are consistent with that principle. The current law is actually inconsistent with that general principle. Under (section) 21-142(e), any member can pay another member's debt and succeed to the rights of the judgment creditor, and effectively wipe out the debtor's investment, using once again, (section) 21-142(c) to force a foreclosure sale even if the

fair market value of the investment exceeds the amount of the debt. Similarly, a managing member or group could effectively block distributions from the LLC for legitimate business reasons to a debtor member wishing to use his LLC distributions to pay the judgment, thus, blocking the payment of the judgment. The court would then order foreclosure under (section) 21-142(c), because the charging order was slow pay, and the managing member could then pay the judgment and grab the debtor interest without violation of any fiduciary duties. It is for these reasons that the NSBA reexamined the 2010 legislation...that was LB888, and now ask this committee to restore charging orders as the exclusive remedy for judgment debtors against a member of the LLC. And if you have any questions, I'm happy to answer them. [LB639]

SENATOR PAHLS: Senator Pirsch. [LB639]

SENATOR PIRSCH: When LB888 came around last year, I can't remember, was this ever addressed in any testimony before, this particular issue in committee or on the floor? [LB639]

HERBERT SAMPSON: I do not know. I was not here, so I can't answer the question. [LB639]

SENATOR PIRSCH: Thank you. [LB639]

SENATOR PAHLS: Seeing none, thank you. [LB639]

HERBERT SAMPSON: All right. Thank you, gentlemen. [LB639]

SENATOR PAHLS: Any more proponents? Opponents? I see we have two. [LB639]

JERRY STILMOCK: (Exhibits 1, 2) Pardon me, Senators. Chairman Pahls, members of the committee, my name is Jerry Stilmock, J-e-r-r-y Stilmock, S-t-i-l-m-o-c-k, appearing on behalf of the Nebraska Bankers Association in opposition to LB639. LB639 would adversely impact judgment creditors of members of limited liability companies. The legislation, (LB)639, would eliminate equitable remedies which would be two, particularly, the appointment of receivers, the possibility of appointment of receivers, or a foreclosure action. So you would be just left with, if (LB)639 were adopted, the bare assertion of charging orders, and that would be the exclusive remedy. The backdrop, as the first testifier after Senator Schumacher testified, in 2009 the LLC update to the uniform liability act, 2009, and it has language comparable to what's in (LB)639. 2009, we had language as what's presented in (LB)639, 2009. 2010, it actually, after the adoption, we were contacted by different attorneys that had looked at the concept of what was presented in 2009, and said, there were problems with that, because it did not adopt the uniform act as in relation to these charging orders. So, as I understand the history as presented by my colleague, the Nebraska Bankers Association, along with

Professor Willborn, along with members of the particular section that would be interested in this area of the bar association went together and put together last year's bill, which became a part of (LB)888, and everybody sang happily, I thought (laugh). And lo and behold, now, the law just became effective January 1, 2011, and though, we, the Nebraska Bankers Association, have not been made aware of any problems that would come into play because of action taken in 2010, the proponents want to go back to what was in 2009. Certainly, this committee and the body, which looks upon this committee, can make changes from the uniform law, but the uniform law as I understand it, includes the language that is included in the law as it is written now that it was adopted in 2010. I'm not aware of any circumstances that would show why we should change that provision. Part of the items in the legislation, as I read it, I just refer to page 6, line 7. Just a thought, not to pick it apart, it's just a thought. At line 7, there's a reference to the ULLCA, the Uniform Limited Liability Company Act 503, and then it purports to put in, it does put in new underlined language, new language. I have not seen anything from the Uniform Limited Liability Company Act, section 503, as a reference is made that this is actually a part of the uniform act, though, at least on the green copy it would be represented as such. Second part, please. The first proponent testified that this exclusive remedy for charging orders is as it is found in the Limited Partnership Act. And, here I'm all prepared...Matt, if you would, please, sir. In the partnership act, not the Limited Partnership Act, but just the partnership act, the Uniform Partnership Act, Nebraska, since at least 1997 adopted the same language that appears in the law as it is today, the same categories of law allowing an appointment of receiver; allowing a foreclosure; allowing these remedies to be used. And I think that was worth mentioning. My last point, Senators, on page 7, beginning at lines 10 through 13, I've not seen that language in any writings of the uniform act, beginning...it's subsection (f). I don't know where that came from. It certainly, to my knowledge, is not a part of the uniform act. I don't know what change between the time when the parties came together in 2010 session, and working up to the 2010 session and passing the laws that exist today, to what changed in a mere January plus 22 days. We're in opposition to LB639 for the reasons I've spelled out in front of you, and for the information that's contained in my written testimony, Senators. Thank you. [LB639]

SENATOR PAHLS: Let me ask you a question. In other words, okay, after all the negotiation and everything was done, bill passed. You said it's from January to now. Have you been contacted at all, your organization, about the whys and what fors that needs to be changed? Or is this relatively new to you? [LB639]

JERRY STILMOCK: No contact, relatively new, sir. [LB639]

SENATOR PAHLS: Okay, okay. [LB639]

JERRY STILMOCK: Relatively brand new. [LB639]

SENATOR PAHLS: Okay, okay. Thank you, thank you. [LB639]

JERRY STILMOCK: Thank you, Senators. I appreciate it. [LB639]

SENATOR PAHLS: Thank you. [LB639]

STEVEN WILLBORN: (Exhibit 3) Chairman Pahls, committee members, thank you. My name is Steven Willborn, S-t-e-v-e-n W-i-l-l-b-o-r-n. I'm a faculty member at the University of Nebraska, College of Law, but I'm here today primarily in my role as one of Nebraska's commissioners on the National Conference of Commissioners on Uniform State Laws...Uniform Law Commissioners. The Uniform Law Commission...you may know this, but I'll say it briefly, is in its 118th year, and this state, through you, has been a member of it for almost all that time. It produces laws of the highest technical quality in areas where uniformity across states is desirable. There are more than 200 uniform laws including many that this state has adopted like the Uniform Commercial Code, the Uniform Probate Code, the Uniform Prudent Investor Act, and about 40 others. Nebraska's other current commissioners are the Honorable C. Arlen Beam, Amy Longo, Joanne Pepperl, Harvey Perlman, and Larry Ruth. As has been mentioned, LB639 is a proposed amendment to a uniform law that was enacted during the last session, LB888, the Nebraska Uniform Limited Liability Company Act. That bill was enacted after a very long process of discussion and collaboration with the Nebraska State Bar Association, the Bankers Association, me and other Uniform Law Commissioners, many people and groups. The bar supported that bill last year. This bill proposes to change certain provisions in last year's bill relating to charging orders. Let me say first that I commend the bar for continuing to examine this area and for raising this issue. If the bill is not exactly right for Nebraska in this respect or others, then we should think about it again and change it, if necessary. We want our laws on entity organization to reflect the best national practices and to be right for Nebraska. Let me also say that the general issue that this bill raises, protection of the entity when one of its members is liable to a creditor, is one that has concerned others as well. I have distributed with my testimony two articles that address this specific issue. That the articles exist is testimony to a general concern about the issue. But the articles both conclude that the charging order provisions of the uniform act are appropriate. One of the articles is on the Uniform Partnership Act which has equivalent provisions, and the other is about this act, the act that you enacted last year, the Limited Liability Company Act. I think the analysis in those articles is thorough. I think if you try to read them, you will agree it's thorough, and that it's well taken. Just a few words specifically about LB639. By my reading, the act basically attempts to do three things to change the charging order rules of current Nebraska law. First, the bill would eliminate the power of a court to appoint a receiver to implement a charging order. This is a traditional equitable remedy to assist in enforcement of charging orders, and as has already been mentioned, it's available elsewhere in Nebraska law for noncorporate entities, for example, in Nebraska partnership law. To my knowledge, there's been no concern or controversy about it

there. Removing this authority would merely increase the duties and workloads of our courts in those rare instances when a receivership would otherwise make sense. Second, the bill would eliminate the power of a court to authorize foreclosure of a charging order. This, again, is a traditional remedy in unincorporated entity statutes, and, again, it's present in Nebraska partnership law, and to my knowledge, has not been a problem there. I expect for technical and tax reasons, foreclosure would be very rarely exercised, but think it should be available in those rare instances where a court might find it appropriate. Finally, the bill eliminates the possibility of a creditor of an LLC to ever get governance rights. The articles I've distributed demonstrate in great detail, very great detail, that this possibility is practically nonexistent under the current close to uniform language. Again, I want to thank Senator Schumacher and the bar for bringing this important issue to our attention, so it could be carefully and thoughtfully considered, and I thank you for your consideration of it, but I do urge you to oppose it. [LB639]

SENATOR PAHLS: Any questions? Seeing none, thank you for your testimony. [LB639]

STEVEN WILLBORN: Thank you so much. [LB639]

HERBERT SAMPSON: Can I give some rebuttal? (talking from audience) [LB639]

SENATOR PAHLS: No, nope. To the neutral. Senator. [LB639]

SENATOR SCHUMACHER: Thank you, Senator Pahls and members of the committee. Responding to a little bit of some of the negative testimony here, there is a world of difference between foreclosures in the case of unincorporated entities and receivers to collect judgments from unincorporated entities. A general partnership creates expectations far different from the expectations of a participant in a limited liability company. When you do a general partnership, and very few people do, because they're pretty ugly things to get involved in, if your partner gets into any trouble. You expect to have a great deal of exposure, and most lawyers are going to tell you to head the other direction and not use the things. That's why they're not used very often, and the general partnership laws put into position, basically, to cover these informal kind of sloppy relationships that people get into when they start doing deals amongst themselves without wanting to pay a lawyer. An LLC is a far different animal, and an LLC has a very clear order under a charging order to pay to the creditor anything that is due, that they would otherwise pay to the member, and it's as simple as that. What we have here then is an argument that whoa, let's not deviate from the uniform law. The uniform law is what is theoretically out there, and a lot of smart people sat around the table debating and coming up with language. But this morning, we touched on the issue on the floor of competitive advantage between states, thought it was a pretty good idea for Nebraska to be able to make an offer or our communities be able to do a deal that other states couldn't or do it in a better way by giving some business entities some tax money or other derivatives of our municipal resources. Well, Florida is no dummy for a state and

neither is Delaware when it comes to business. They know how to create business friendly entities. When I read some of the material, I saw Delaware in there, that Delaware does it like this bill proposes to do it, that was a pretty good sign, because Delaware knows how to be catering and business friendly. Back when I was in law school, we were told everybody should have a Delaware corporation, so between the last day of classes and the graduation, I drove over to Dover, Delaware, and incorporated myself, and I've been paying Delaware taxes ever since on it. But, nevertheless, Delaware is sharp. My ears perked up again today when the testimony said, Florida is going to do this, because Florida is sharp also, and that's why there is so much entrepreneurial activity in Florida. It behooves the state to be friendly to the equity organizers of small money and small business. LLCs are such a vehicle, and to the extent we saddle the members of LLCs with discomfort arising out of the financial inability of one of their members, we send people looking elsewhere for vehicles and to place their investment. And those investments are investments that are not made by tapping the local or the state taxpayer on the shoulder to attract them. Those investments are the kind of intangible things that make private capital work. This is a business friendly proposition. It's friendly among the members of the LLC; it makes it comfortable to do business in Nebraska. If you have any questions, I'll be happy to answer them. [LB639]

SENATOR PAHLS: Senator, if it is business friendly, then the Chamber of Commerce should be here backing you, should they not? [LB639]

SENATOR SCHUMACHER: Well, it depends, because it's business friendly; it's equity friendly, but it's not necessarily creditor friendly. And that's the difference, and I would guess that probably there are more bankers on the Chamber of Commerce list of membership than there are entrepreneurs. [LB639]

SENATOR PAHLS: Okay, okay. Seeing no questions, I'm assuming you're not going to let this...you will continue working on this bill. [LB639]

SENATOR SCHUMACHER: Well, I suspect I will if the bar association continues to support the notion, but I think there's a lot of business friendly issues that are laying in this bill. [LB639]

SENATOR PAHLS: Okay. Seeing no questions, thank you for your time. [LB639]

SENATOR SCHUMACHER: Thank you. [LB639]

SENATOR PAHLS: (Exhibit 4) I'm going to read into the record on (LB)639. They do have support from Crosby and Company. What I'm going to do is we're going to have a little bit of a break here before we get...the next bill, about a five-minute break. [LB639]

BREAK []

SENATOR PAHLS: Good afternoon. We are ready to begin LB478. Senator McCoy. [LB639]

SENATOR McCOY: Thank you, Chairman Pahls and members. For the record, I'm Beau McCoy, B-e-a-u M-c-C-o-y, and I represent the 39th District, and I'm here to introduce LB478, which is the Nebraska Insurance Claims Fraud Prevention Act. Motor vehicle insurance fraud is an area in which Nebraska consumers may be vulnerable given evidence of increased unethical and fraudulent activities of medical providers engaging in solicitation of accident victims. Most notable is the utilization of runners and/or cappers accessing accident reports used for overzealous telemarketing and solicitation of victims for potentially unnecessary treatment. The risk of Nebraska consumers arises when victims of accidents are solicited to visit practitioners for free evaluation which is oftentimes followed by a succession of follow-up visits paid for by property and casualty insurance coverage. These services may drain bodily injury benefits as well as other coverage. LB478 would adopt the Nebraska Insurance Claims Fraud Prevention Act and prohibit practitioners from compensating or giving anything of value to a person or organization to recommend or secure his or her employment by client, patient, or customer if such practitioner's intent is to obtain benefits under a contract of insurance, or to assert a claim against an insured or an insurer for providing services to the client, patient, or customer. Furthermore, it would be unlawful for a practitioner, whether directly or through a paid intermediary, to solicit for financial gain a client, patient, or customer within 30 days of a motor vehicle accident with the intent to seek benefits under a contract of insurance or to assert a claim against an insured, a governmental entity, or an insurer on behalf of any person arising out of the accident occurrence. With that, I would close and take any questions, if there are any. And there will be others behind me to testify as well. [LB478]

SENATOR PAHLS: See no questions. Thank you, Senator. Proponents? [LB478]

KORBY GILBERTSON: Chairman Pahls, members of the committee, for the record, my name is Korby Gilbertson. It's spelled K-o-r-b-y G-i-l-b-e-r-t-s-o-n, appearing today as a registered lobbyist on behalf of the Property Casualty Insurers Association of America, in support of LB478. First and foremost, I'd like to thank Senator Pahls and Senator McCoy for looking at this issue. The issue of this type of fraud came to light back in, I think, about November of 2009. PCI has been working with the National Insurance Crime Bureau on looking at issues regarding insurance fraud and looking at what's been going on across the state. Back in 2009, we decided not to pursue legislation in 2010, but rather look at an interim study to try to see what was going on if there was an uptake in fraud here in the state, and so if we would need any legislation based on that. From that, we got LR483 which Senator Pahls introduced, and we had some meetings during the interim with interested parties including the chiropractors, NICB, and PCI, State

Farm, and other insurance companies. Then and during that time, the chiropractor board also came out with some rules and regulations which prohibited contact for 30 days, so no solicitations could be taking place. Those rules, we feel, really take care of the majority of the issues that are raised in LB478, but we wanted to have something introduced and in front of the Legislature should something happen with those rules, and there is at least one court case right now pending on the rules. And so, we wanted to make sure we had something here in the committees that we could further our discussions if we needed to do so. LB478, I will take full blame for drafting of it. This was drafted after we looked at a number of what's going on in other states. I have no pride of authorship. I know that there needs to be some work on it. I've talked to Mr. Marienau about that, and Senator McCoy knows that as well. Literally, we had three different ideas pending about the day before bill introduction deadline, so this is something we put in, and it's based on an NCOIL model act that was done. There are a number of other acts in other states that have penalties that are much more stringent than this that are in place in Minnesota, and a number of other states. We can look at those if we should need to. But with that, I'd be happy to answer any questions. [LB478]

SENATOR PAHLS: So this is your work of art (laughter). [LB478]

KORBY GILBERTSON: I don't know if I'd go that far, but this was one of those quick ones. [LB478]

SENATOR GLOOR: Senator Pahls. [LB478]

SENATOR PAHLS: Yes, Senator Gloor. [LB478]

SENATOR GLOOR: Thank you, Chairman Pahls. Ms. Gilbertson,... [LB478]

KORBY GILBERTSON: Yes. [LB478]

SENATOR GLOOR: How will we know that there's a runner involved? I mean, how will this come to light so that we can be...or hold somebody accountable for doing this? [LB478]

KORBY GILBERTSON: I think that's one of the issues that we need to address. In other states, I don't know if they handle it through the Department of Insurance, or if it's handled through another department on how they track this information. In some states and language that we did not include in this bill, because I felt that it would put us over the edge, but in a number of states that do have laws like this, they require when you go to the police station and ask for a record for an accident report, that you have to sign a document, saying why you want the information. You have to sign your name, say who you work for, so that's how they track it in other states. Obviously, I thought, if we introduce something like that in Nebraska, we'll have every police department and

record-keeping person coming at us, saying, how are we supposed to maintain all these new records, because obviously, this is a huge industry not just for the providers covered in this legislation, but for other areas as well? So that's something I think we would need to address, and that's why I said, I think the solicitation rules are the right way to look at this. We just wanted to have something to be able to continue discussions should we need to. [LB478]

SENATOR GLOOR: Okay. [LB478]

SENATOR PAHLS: Seeing no more questions, thank you. [LB478]

KORBY GILBERTSON: Okay. Thank you. [LB478]

TIM LYNCH: (Exhibit 1) Good afternoon, Mr. Chairman. Thank you, Mr. Chairman, members of the committee. My name is Tim Lynch. I'm director of...T-i-m L-y-n-c-h. I'm Director of Government Affairs for the Chicago-based National Insurance Crime Bureau. In this capacity, I work with our members, law enforcement, legislators, and regulators to improve the antifraud environment at the state and local level. My territory includes Nebraska as well as most of the Midwest and mid-Atlantic. The ICB is a national, not-for-profit organization supported by approximately 1,000 property and casualty insurance companies including many who write business right here in Nebraska. Working with our members and law enforcement, we investigate organized criminal conspiracies dealing with insurance fraud and vehicle theft. NICB has a full-time investigative agent based here in Nebraska, assigned to investigate multiclaim, multicarrier cases involving insurance fraud. She's over there; her name is Linda Baumann, a resident of Omaha. If you have specific questions, come up. She can answer them in terms of any fraud schemes underway here in Nebraska. I agree with what Korby said. I think this is a starting point for the committee. The chiropractic folks should be applauded for their rules. I'll just speak to a couple parts of the bill from a nationwide perspective just to give you some idea of how this works nationwide. But runners and cappers is a big problem here in Nebraska. Putting some criminal statutes on top of this would be a vital and necessary fraud deterrent right here in Nebraska, restricting the solicitation within 30 days would help stem the flow of overzealous solicitation, intrusive phone calls, and unethical tactics arising from unethical medical provider clinics in Nebraska. Runners and cappers, what does that mean? They're terms to use to describe persons who set up staged auto accidents, slip and fall schemes, and make false insurance claims. Oftentimes they're involved in organized criminal conspiracies involving medical facilities and law firms. Runners receive kickbacks arising from these schemes via insurance settlements and lawsuits. NICB information indicates a strong rise in these types of referrals arising here in Nebraska with accident victims being solicited for potentially unnecessary treatment by medical provider clinics. Paid intermediaries are runners who access accident reports from law enforcement agencies within hours of the incident, and the days that follow, and begin

soliciting victims. Oftentimes, these are low-speed fender-bender accidents. These organized fraud rings involve unethical medical providers, chiropractors, lawyers, and paid intermediaries, conning people into obtaining unnecessary or exaggerated medical treatment. Evidence does point to runners and law firms outside Nebraska being involved in these schemes. The temporary hold on the soliciting, as well as criminalizing the acts of runners will be an effective means to fight fraud and help protect insurance consumers from unwanted solicitation. The proposed change would also protect those individuals from telemarketers who mislead and misrepresent to get victims into clinics for treatment. Here are just a few examples of what takes place today: Solicitors will falsely state that they work for, and/or represent insurance companies; (2) Some clinics will intimidate claimants by stating that their in-house lawyers must be used for representation, or the billings for treatment will be sent to a collection agency. Solicitors will tell claimants that they will not have any type of out-of-pocket expenses regardless of treatment type, and if they come in for an examination, an insurance settlement will eventually work itself out. Certain schemes offer free transportation to and from medical clinics. Evidence points to solicitors targeting elderly victims who can be more vulnerable than most to telemarketing of the uses and tactics. Again, our data indicates a significant increase in questionable claim referrals here in Nebraska, an over 30 percent increase over the past three years. As it relates to these types of medical fraud claims arising from collision and exaggerated injury, these referrals have risen by 50 percent over the last three years. NICB wishes, again, to congratulate the efforts of the State Board of Chiropractors last fall to help address these issues within their profession. The State Board of Chiropractors last fall approved a state rule change prohibiting chiropractors and paid intermediaries from calling accident victims within 30 days. This is a strong move, and I agree with what Korby said, and again, I applaud the moves of the chiropractic folks in doing so. This bill gets you off to a good start. You have about 20 to 25 states that have runner and capper laws on the books. You have another 20 that have laws that help stem the flow of solicitation, so I think in terms of your movement in that direction, you would be...(inaudible) you with other states, namely Missouri who is a bordering state as well as Illinois and Minnesota. With that, we just want to state our support for the bill in its form, and happy to answer any questions. I do have a 6:00 flight back to Chicago, so I got to be quick so (laughter). [LB478]

SENATOR PAHLS: Well, I don't know. We'll see (laughter). [LB478]

TIM LYNCH: I'll hang on for a bit. Sure. [LB478]

SENATOR PAHLS: Okay. Senator Pirsch. [LB478]

SENATOR PIRSCH: You're not asking that this bill be pushed forward at this time, though. [LB478]

TIM LYNCH: I agree with what...this came right from an NCOIL model bill, so I think it's important that it help...it's important that it fits the Nebraska problem, and I think it needs some tweaks, and we've talked about that a little bit with some of the chiro folks, so it needs some fine tuning, yes. [LB478]

SENATOR PIRSCH: But there were certain actions by other groups, right, that have been taken recently that may take care of the problem? It's just a matter of monitoring, in your opinion. [LB478]

TIM LYNCH: I think the...the chiro hold is good. Having them...having the 30 day hold from chiropractors to solicit, I think was a...I think that was a solid move. You still have an open policy. There's no runner and capper law on the books here to follow up on your question. I think that's something that probably needs to be looked at. And there's also a very loose...I think there's very loose laws on the books here with regards to direct solicitation. So I think there may be some things you want to do along those lines as well. [LB478]

SENATOR PIRSCH: Does the Attorney General have powers to go after this type of practice in Nebraska, or do you know? [LB478]

TIM LYNCH: I'm not familiar with the... [LB478]

SENATOR PIRSCH: I see. Thank you. [LB478]

TIM LYNCH: Sure. [LB478]

SENATOR PAHLS: Thank you for your testimony. [LB478]

TIM LYNCH: Sure. Thank you. [LB478]

SENATOR PAHLS: Safe trip back. Next proponent. [LB478]

NANCE HARRIS: (Exhibit 2) Good afternoon, Senator Pahls and committee members. My name is Nance Harris. It's spelled N-a-n-c-e H-a-r-r-i-s, and I'm here today representing the nearly 700 members of the Nebraska Trucking Association. Our membership includes commercial trucking companies and affiliated businesses including a number of insurance companies who specialize in writing products for Nebraska's truckers. Great West Casualty Company, which is based in South Sioux City, Nebraska, brought this bill to our attention, so we're here today to speak briefly in support of LB478. We specifically support the provision that makes it unlawful to solicit a client or patient for financial benefit within 30 days of a motor vehicle accident. Our members see this as a situation similar to what they experience with workers' compensation claims. The company reports the workplace injury as required by law.

That's a matter of public record, and within just a few days the person who's been injured gets five to eight letters from people who are offering to assist them in extracting maximum benefits in the workers' comp court. A similar practice happens in other states, and apparently, is now happening in Nebraska with regard to medical treatments following accidents, and that it's just insurance fraud. A 2003 research study conducted by Accenture to measure consumer tolerance of insurance fraud reported that now about one in ten people agree that it's all right to submit claims for personal injuries that did not occur. A 2008 study by the Coalition Against Insurance Fraud reports a decline in the number of Americans who think it's unethical to misrepresent an incident in order to be paid for an uncovered loss. Insurance fraud drives up the cost of doing business for our members; it drives up the cost of doing business for everyone, and ultimately, is expensive to consumers as well. So if some version of LB478, in the future, can help reduce the temptation to play fast and loose with insurance claims as the result of an accident, we stand in support of that notion. [LB478]

SENATOR PAHLS: Senator Pirsch. [LB478]

SENATOR PIRSCH: I'll pose the same question. In the arsenal of existing tools that the Attorney General has at his disposal right now, can he utilize those tools to greater prioritize this type of potential? [LB478]

NANCE HARRIS: I don't know the answer to that. [LB478]

SENATOR PIRSCH: Okay. And do you have an idea or statistics to kind of give us an idea of...in terms of raw numbers or magnitude of the problem that are suspicious claims filed over a recent period? [LB478]

NANCE HARRIS: I don't. I attempted to get that information before this hearing today, and the person I was working with didn't understand that I didn't particularly care if it wasn't broken down just for trucking. And, apparently, the way insurance fraud is tracked, it's a maximum number of all the cases that might involve a motor vehicle accident. And so he was reluctant to give me the number, because he thought I just wanted the number for trucking. I do know that it's an $80 billion problem. [LB478]

SENATOR PIRSCH: Nationwide? [LB478]

NANCE HARRIS: Yes. [LB478]

SENATOR PIRSCH: Is that right? Okay. And that's okay if you don't have any statistics... [LB478]

NANCE HARRIS: Do you want me to get them? [LB478]

SENATOR PIRSCH: Well, it might be helpful in the future for, you know, statistics as far as how Nebraska, in particular, is affected so. [LB478]

NANCE HARRIS: Okay. I'll see if I can persuade him. [LB478]

SENATOR PIRSCH: Wonderful. Thank you. [LB478]

SENATOR PAHLS: I'm assuming Larry Johnson didn't have the nerve to come in front of this committee today, so he sent you to... [LB478]

NANCE HARRIS: That would be correct, Senator Pahls. [LB478]

SENATOR PAHLS: ...to take the...okay. [LB478]

NANCE HARRIS: Actually, he had to testify in the Transportation Committee hearing, so... [LB478]

SENATOR PAHLS: Oh, Transportation over Banking, huh? I see (laughter). [LB478]

NANCE HARRIS: Yeah. You can take that up with Senator Fischer (laugh). [LB478]

SENATOR PAHLS: Okay. Thank you, thank you. Thank you for your testimony. [LB478]

NANCE HARRIS: You're welcome. [LB478]

PATRICK YATES: (Exhibits 3, 4) Good afternoon, Chairman Pahls and committee members. My name is Patrick Yates, Y-a-t-e-s. I am testifying as a proponent to the Nebraska Insurance Claims Fraud Prevention Act, LB478. I work for State Farm Insurance as a claim representative in the Special Investigative Unit. I am responsible for identifying potential insurance fraud cases, insurance fraud schemes in Nebraska and surrounding states. I work in what's called a multiclaim investigation unit, so I investigate claims that involve multiple claims, not just one isolated incident. One area of insurance fraud schemes I investigate on a regular basis involves a suspected medical provider fraud related to the solicitation of parties involved in motor vehicle accidents, the exact thing that this bill is looking to prevent. Insurance fraud costs the public an estimated $80 billion annually, and that is a nationwide figure. Or in another way to put it, just under $1,000 per year per household is spent on increased insurance premiums because of insurance fraud. The insurance industry, through its special investigative units like mine, and other means, are making enough to fight fraud and reduce the incidents of fraud in an effort to keep those insurance premiums at a reasonable level. And I want to thank Senator McCoy for proposing this legislation; also, Senator Pahls for the legislative study that was done last year. I also want to thank the Nebraska chiropractic board for what they have done on the regulatory side. I would

offer one thing in regards to the regulation. The regulatory side of things can only have an impact on the licensee. Some of the medical providers that do business in the state of Nebraska are not owned or operated by a licensee. They're owned or operated by a corporation that may or may not even exist in the state of Nebraska. So, therefore, if there's a violation of a rule or regulation, the only action that can be taken is back against the licensee, not against the corporation, clinic owner, that type thing. The solicitation of action in victims is a concern, not only in the state of Nebraska, but across the country. Many states have introduced and passed similar legislation, and as you have heard, some stronger than what's being proposed here. Solicitation of accident victims is the first step in the development of a fraudulent insurance scheme, and those schemes can be billing for services that are not even provided, on bundling of services, upcoding services, things of that nature. And solicitation brings the key ingredient to the picture here. It brings the insurance fraud money into the mix, and that's why I believe a ban on the solicitation within the first 30 days following the accident is so important. Concerns for the public health and well-being is very important as well. However, I believe that it is the last concern for most of the solicitors, practitioners, and clinic owners who actually engage in the practice of soliciting accident victims. The reality is, most of the solicitors who call accident victims and most of the clinics who hire them, are actually preying on the people that are vulnerable at a time just following an accident. The driving force for most solicitors and clinic owners who solicit is the financial reward that the accident victim represents. A key indicator of their motivation is most of the solicitors focus on the non-at-fault party following an accident. They don't contact the person who caused the accident; they contact the person who's going to eventually have a third-party BI claim, and an insurance settlement from that claim. In most cases, the solicitors are not employees of a local medical clinic; they're employees of an out-of-state telemarketing company who has been hired by the clinic owner. In some cases, the telemarketing company is closely tied to, or in some cases, even owned by the corporation that owns the local clinic. Runners, as Tim talked about, are employed to obtain the local police reports for the purpose of obtaining the personal information that's then needed to do the solicitation. And on any given day, you can go down to the Omaha Police Department, and you'll find runners there with portable scanners scanning through a packet of accident reports that have been prepared for them for the previous day. Then that information is provided on to the solicitors, who then start making contact with the accident victims. And accident victims can get multiple calls the day following an accident, and in some cases, the day of. And actually in Lincoln, it's a little bit easier for the runners, because they can just peruse the accident reports on-line without having to even go down and scan them. Most people involved in motor vehicle accidents are actually facing the situation for the first time, and they're really unfamiliar with what's going to happen after that accident occurs. And the solicitors take advantage of this by making misleading statements or outright misrepresentations regarding who they are to the accident victim. One tactic used is to represent himself or herself as being with a group that resembles a consumer advocate group, and some of the names that they've used is the Wellness Center, National

Accident Resource Association, and Omaha Victims Assistance to try to delay the groundwork and set the person at ease when they're making that solicitation call. In other cases, they actually give the impression or even say outright that they work for or represent the person's insurance company or the insurance company of the other party involved. Currently, there are no laws in the state of Nebraska that effectively address the solicitation problem. Even outright misrepresentations by solicitors are not a violation of the current insurance fraud statute no matter how egregious the misrepresentation is. The current rules and regulations, as I stated, governing the practitioners are ineffective in that they, number one, they do not specifically prohibit telephone solicitation which will change if the new regulations go into effect. But as I stated, even if there is a violation of the rules and regulations, the only action that's taken is against the licensee, not against the clinic owner. And it's typically the clinic owner who is behind the solicitation and the misrepresentations that occur. The passing of this legislation will not take away any practitioner's right to advertise their services or their ability to provide medical care to those Nebraskans who actually seek it, or limit any individual's ability to find and receive healthcare services following an accident. The passing of this legislation will afford Nebraskans the opportunity to evaluate their need for medical care following an accident without having to deal with the unwanted telephone solicitations and without having to deal with the misrepresentations that come with it. Passing this legislation will actually help reduce fraudulent activity and will act as a deterrent to those who would commit fraud. And I encourage you to actually vote in favor of this and move this legislative bill into the General File. I thank you for your time, and I'd be willing to answer any questions you might have. [LB478]

SENATOR PAHLS: Senator Pirsch. [LB478]

SENATOR PIRSCH: You'd like us to pass...advance the bill as written, (inaudible) for the next... [LB478]

PATRICK YATES: Actually, I think that there are a few modifications that would be good in this bill, but I think...my opinion is solely relying on the chiropractic board's regulations doesn't take care of the entire problem, because as I said, it only gets after the licensee. So there are a few modifications that I'd be more than happy to work with the committee to put in place. [LB478]

SENATOR PIRSCH: Well, that's why I'd like to kind of break it down. You've had a chance to look at the bill kind of. What's the parts that you would like to advance now, and which part do you think is not appropriate to advance at this time? [LB478]

PATRICK YATES: There's nothing in the language that I would not want to advance, so I...we're a proponent for all of the language that exists. The one thing that's not in the language is, who would actually enforce this statute? And I would believe that the best place for this statute to fall, would actually be within the insurance fraud act, and thus

the investigation of any violations would fall under the Insurance Fraud Prevention Division. [LB478]

SENATOR PIRSCH: Let me ask. Are you familiar with the powers of the Attorney General in fraudulent practices such as this? [LB478]

PATRICK YATES: The only familiarity I have is that the Attorney General is involved in the process on the regulatory side. [LB478]

SENATOR PIRSCH: Does he have the power to prioritize these type of...this type of an offense, and effectively go after this type of act, I guess we'll call it? [LB478]

PATRICK YATES: Right. My understanding of the process would be that the actual people that get the reports for a violation of a rule and regulation is the Department of Health and Human Services. They then have their investigators investigate the potential violation. That information goes to the chiropractic board, who makes a recommendation, and then that recommendation goes back to the DHHS and the Attorney General, and I don't know who it is has the final say as to whether action is taken on the licensee or what other penalties there could be. [LB478]

SENATOR PIRSCH: So that's a bit of an unclear matter to you at this time. [LB478]

PATRICK YATES: Correct. [LB478]

SENATOR PIRSCH: Okay. And let me ask, with...you're saying advance solicitation within 30 days, is that right? [LB478]

PATRICK YATES: Correct. [LB478]

SENATOR PIRSCH: With respect to the chiropractors, that is in effect now, though, correct, with respect to the...that would be the clinic owners, right? [LB478]

PATRICK YATES: Actually, it's not in effect at this point. It has gone through the Attorney General level, and my understanding is, the next level would be the Governor's Office in order to actually approve the regulatory changes. [LB478]

SENATOR PIRSCH: And with respect to other medical professionals, what are they bound by? [LB478]

PATRICK YATES: To my knowledge, I've never investigated any other medical profession for soliciting accident victims. [LB478]

SENATOR PIRSCH: Is this...well, let me ask you. Do you have any information with

respect to Nebraska's state specific raw numbers of occurrences of this type of activity? [LB478]

PATRICK YATES: Not with me today. From a statistical standpoint, I don't know that there are any specific statistics related to Nebraska. Obviously, most of the statistics are nationwide. [LB478]

SENATOR PIRSCH: Nationwide. [LB478]

PATRICK YATES: I can tell you that there's an increase in what we see as fraudulent billings, potentially fraudulent billings that come out of the solicitation issue. [LB478]

SENATOR PIRSCH: How do you identify that as, you said, suspicious? [LB478]

PATRICK YATES: They're identified, generally, by our line unit claim handlers, so they'll get in a claim; they'll make contact with the patient. If, for instance, the patient tells them that the provider didn't provide them a specific modality or a specific treatment, then they would refer that on to myself, and we would investigate, and, you know, go back, talk to that person again to clarify, to make sure that what was identified originally is actually accurate, that they didn't receive all the treatment provided. Or, I'm sorry, the treatment billed, not provided. [LB478]

SENATOR PIRSCH: I see. So, from the patient himself or herself as the case may be. [LB478]

PATRICK YATES: Yes. We go right to the patient to identify whether or not they were solicited, whether or not they received all the treatment, that type of thing. [LB478]

SENATOR PIRSCH: Would those...well, I appreciate...I'd just make the same statement to you that I made to...I'd be interested in having facts or figures, empirical that you do happen to have. [LB478]

PATRICK YATES: Okay. [LB478]

SENATOR PAHLS: Thank you for your testimony. [LB478]

PATRICK YATES: Thank you. [LB478]

SENATOR PAHLS: Next proponent. [LB478]

BRUCE RIEKER: (Exhibit 5) Senator Pahls, members of the committee, my name is Bruce Rieker. It's B-r-u-c-e R-i-e-k-e-r, vice president of advocacy for the Nebraska Hospital Association and for the record, if Korby is still here, I want it to reflect that the

hospitals and the insurance companies, at least property and casualty, agree on something (laughter). So, we are here in support of LB478. It's imperative that our hospitals are always analyzing things that may reduce the cost of healthcare. You've heard numbers from the previous testifiers as to what this may cost nationally. Overutilization of healthcare, especially in the area of fraud, when it's caused by fraud, is a very real concern of ours. Anecdotally, we recently had one member of our staff at the Hospital Association involved in a small fender-bender, and she received several phone calls within 24 hours after that accident report was posted, that they could help her out with her claim. So, it is real. It does happen. We have one caveat or one concern, and that would have to do with employees of practitioners, or in the instance of the merging...I call it profession of medical coaches or medical homes, if in the case that someone who is responsible for the care of another noticed, for whatever reason, that they were involved in an accident that may necessitate or require at least a medical screening, but that person did not come in. If the case is made that that medical coach contacted that individual...I'm not saying that they scanned a medical record or something like that. Maybe they saw it in the paper or something like that, we would not want to see them penalized for contacting someone to say, do you think you need to come in for a screening, so we can make sure that there aren't more costly things that could happen down the road? So, it's that ounce of prevention worth the pound of cure. We think it would be a very small and isolated incident that those would happen, but, nonetheless, we want to make sure that, if someone contacted a patient that's part of a group such as that, that they wouldn't be penalized for inquiring whether or not they needed to seek medical care. [LB478]

SENATOR PAHLS: Seeing no questions, thank you for your testimony. [LB478]

TAD FRAIZER: Good afternoon, Mr. Chairman, members of the committee, my name is Tad Fraizer, T-a-d F-r-a-i-z-e-r. I'm local counsel for the American Insurance Association, a national trade association of property and casualty firms. I know you've had a long afternoon of hearings, so I'll try to keep this brief. We're generally in support of anything that would tend to reduce insurance fraud. We support the concept of the bill. Kind of anticipating Senator Pirsch's question, I'm afraid I don't have specific statistics to offer as far as what the Attorney General may or may not be empowered to do. I'm afraid I don't have a great knowledge in that area. I guess my one comment would be, it's obviously easier to enforce situation specific or fact specific laws than utilize sometimes broad general grants of authority for unique situations. But I'd be happy to try to answer any questions you might have. [LB478]

SENATOR PAHLS: Seeing no questions, thank you for your testimony. Any more proponents? Seeing none, opponents? How many opponents do we have? One? Okay. Anyone in the neutral? Okay. One, two in the neutral. [LB478]

DON WESELY: (Exhibit 6) Mr. Chairman, members of the Banking Committee, my

name is Don Wesely, W-e-s-e-l-y, registered lobbyist, on behalf of Chiropractic Strategies Group, and here in opposition to LB478. At first off, let me thank Senator McCoy. We had a discussion earlier today, and my understanding is that the bill will be held in committee, and work will be done to make sure there's a necessity for action, and if action is taken, it's in proper drafted form, so I appreciate that from Senator McCoy. Chiropractic Strategies Group is a group that is actually based out of Texas, and has a couple of clinics here in Lincoln and in Omaha. And they do, in fact, call individuals soliciting potential clients for their clinics. So, they are concerned about this banning their opportunity to market. In their view, it's a marketing opportunity for them to call individuals, and I can go through why that is that they have taken this route. One of the things to look at in that line is, if you look at page 3 of the bill at the bottom, it talks about this subsection does not prohibit an attorney or a healthcare provider for making referral and receiving compensation as is permitted under the applicable code of conduct. What my client and other chiropractors, who are young, and just starting off in their profession, tell me is that the established chiropractors, and those are the chiropractors who you'll hear follow in a neutral capacity that represent the Chiropractic Association, and, again, I have great respect for chiropractors in the state--the Chiropractic Physician Association, they're an outstanding group, chiropractic board--everybody's good individuals. But there's a competitive advantage when you're established; you've got relationships with attorneys and you are able to send, perhaps, clients to attorneys and vice versa, attorneys send clients to you. And these long-established relationships make it hard for somebody new to come in and be able to bring in clients. So, there are some young chiropractors up in Omaha and others who I've talked to who have tried out this approach of calling individuals, who have been accident victims, and letting them know that they have the opportunity to come into their clinic, get evaluated, and if necessary, receive treatment. They've found an effective way to market. Commercial speech is protected by our Constitution, and the feeling is, and the reason that you have this bill is it's potentially the case, that this 30-day ban now going through the process, might be challenged in court. I don't know that for a fact, but there is a court case right now dealing with the current ban on personal contact, and in other states this issue has gone to court. And basically, the courts have been mixed on the question of a 30-day ban. Sometimes they say, it's acceptable restriction; in other cases, they say it's an infringement of freedom of speech. In those cases, on commercial speech, it talks other cases, the Hudson case, for instance, talks about whether or not a more extensive than necessary action is taken to serve the interest...identify the public interests identified. And the point I want to make to you is that a broad prohibition from personal contact is overly broad and an infringement of the constitutional right to freedom of speech and commercial free speech. A targeted effort to deal with the problems you heard today, people misleading, people taking advantage of individuals, all of that is something that needs to be addressed. You don't want fraud; you don't want misleading information given out, and so all of that can be addressed through legislation. And that's what we're here to work with you, the committee, and Senator McCoy on over the interim, because there is a way to target the problem and

identify it, and we would work with you on that. If we start talking about...and, again, the reason I mention that is, this question has free speech and constitutional questions that are attached to it. And that's why this bill is here, depending on whether or not the court upholds that regulation or previous regulation. I have passed out for you an amendment, and I just offer this up, because it can be argued if it's not right to contact accident victims. After their accident, they're vulnerable and, you know, they're in a situation where they're uncertain about their choices, their options. The same can be said in some cases where insurance agents get ahold of them and get them to sign releases of their rights in exchange for maybe $500. And I can get you some information around the country where cases have been brought about this taking advantage of individuals and getting them to forego what rights they have to make medical claims. And as I said, frequently the dollar numbers, $500 which doesn't get you very far when you have a serious medical problem. So, if we don't want accident victims contacted, we should also talk about maybe these other situations where they're contacted and not allow that as well. I'm going to stop there. You had a long day. All right, I'm just here to tell you that we'd be happy to work with you on the bill. [LB478]

SENATOR PAHLS: Okay. Thank you for your testimony. [LB478]

DON WESELY: Thanks. [LB478]

SENATOR PAHLS: Thank you. Now, we're ready for neutral? [LB478]

DOUGLAS VANDER BROEK: (Exhibit 7) Mr. Chairman and Senators, appreciate the time to be here today, and we'll just make it brief. My name is Douglas Vander Broek, V-a-n-d-e-r B-r-o-e-k. I've been practicing chiropractic in Lincoln for 28 years. I've been on the Board of Chiropractic of the Nebraska Department of Health and Human Services since December 1, 2009, and currently serve as vice chairman. I'm also a member of two national organizations. One is the Federation of Chiropractic Licensing Boards which is the association of all state chiropractic boards, and also the member of the National Board of Examiners which develops and maintains the testing of the national board exam for chiropractic students, so I'm involved in the state, national, and international levels with licensure and regulation of the chiropractic profession. Although today my neutral testimony is just my personal opinion, it does not represent any opinions or policies of the Nebraska Board of Chiropractic. In fact, I've never discussed LB478 in private or in meetings with any of the other members of the board. My purpose is just to provide information to the committee on the issue of solicitation of personal injury patients by doctors of chiropractic. The main thing I want to assure the committee is that the Board of Chiropractic has been aware of this problem for a period of time and the board has taken a proactive stance on the issue, and that is most evidenced in our bringing forward of the regulation which is a 30-day cooling off period over the period of time during which an individual clinic cannot solicit an individual for potential chiropractic care. Just to give you a brief history of that, over the past couple of years, and this is

because of the uniform licensing law going on with the Department of Health, but there's about 30 different professions which are going through the updating and changing of the regulations that govern their profession. So, we are in the course of that. Now, in the process of doing that, on May 4, 2010, the chiropractic board had a meeting at which we added a 30-day rule to existing regulations, and that was inserted into the proposed regulations under section 172 NAC 29-009.03(e)(3). And I have provided a copy of that for you, so I won't read that this afternoon. A public hearing on the 30-day rule was held on July 22, at which any interested parties were present for comment. Testimony from the hearing was provided to the board members, and then the Board of Chiropractic met again on August 12, 2010, at which time interested parties were again present for input and discussion. And after all the parties were heard, further discussion, the board, again, unanimously reaffirmed their vote on the language that they had adopted on May 4. So, again, although I don't speak for the Board of Chiropractic, the two votes that we had on this issue and this language was unanimous with the three professional and the one public member on the board. Now currently, that regulation, along with the entire proposed regulations for chiropractic are in process within the Department of Health, and after it's through the Department of Health, then it goes to the Board of Health, the Director of Health, Dr. Schafer, to the Attorney General's Office, and then finally, to the Governor's Office. And at each of those steps, it's reviewed and assuming approval, then whichever regulations are approved, then they pass on to the next process. That's really all the information I have, but I'd be happy to answer any questions that the senators may have. [LB478]

SENATOR PAHLS: Senator. [LB478]

SENATOR GLOOR: Thank you, Chairman Pahls. Dr. Vander Broek,... [LB478]

DOUGLAS VANDER BROEK: Yes. [LB478]

SENATOR GLOOR: ...so if this goes through as is being proposed, does this affect the license of the practitioner or the license of the clinic or both? [LB478]

DOUGLAS VANDER BROEK: Currently in Nebraska, clinics are not licensed. [LB478]

SENATOR GLOOR: Okay. [LB478]

DOUGLAS VANDER BROEK: For example, in the massage therapy profession, both the establishment and the provider are licensed, but clinics are not licensed. So this would affect the licensee, either through three methods that we have a discipline, as any other professional boards do, probation, suspension, or revocation of the license. [LB478]

SENATOR GLOOR: Okay. Thank you. [LB478]

DOUGLAS VANDER BROEK: Um-hum. [LB478]

SENATOR PAHLS: Senator Pirsch. [LB478]

SENATOR PIRSCH: Yeah, and the way that this regulation, new one, would be sufficiently broad enough to encompass not just the chiropractor, but also any person designated, contracted, or paid by the chiropractor or his employer to solicit, right? I mean it's... [LB478]

DOUGLAS VANDER BROEK: Correct. That's if the...again, it all comes back to the chiropractor's license. The Board of Chiropractic doesn't have any authority on, you know, you've heard about out-of-state corporations that own and operate clinics within the state, and the Board of Chiropractic doesn't have any legal effect over any of that. And, actually, anything we do is then approved by the Attorney General's Office, but the Board of Chiropractic doesn't have any effect on any out-of-state corporations, only on Nebraska licensed chiropractors. [LB478]

SENATOR PIRSCH: But you're talking...you're referring to it maybe out-of-state telemarketers, for example, you're saying... [LB478]

DOUGLAS VANDER BROEK: Right. We, you know, and again, I can't allude to any details of any cases or investigations that are pending, because that's all confidential. At any time, when that becomes...goes through the Attorney General's Office, and then if an action is taken or affirmed by the AG's Office, then those things become a matter of public record,... [LB478]

SENATOR PIRSCH: Right. [LB478]

DOUGLAS VANDER BROEK: ...and that could probably be done by a search in your office. [LB478]

SENATOR PIRSCH: But ultimately, isn't there a healthcare provider who is in the state who purports to be providing? [LB478]

DOUGLAS VANDER BROEK: Correct. [LB478]

SENATOR PIRSCH: I mean, so it's ultimately one way or the other. It's all going to come back to the license. [LB478]

DOUGLAS VANDER BROEK: It comes back to the licensee. There are some cases where out-of-state corporations can develop kind of a revolving door situation with providers wherein they may hire somebody who's a recent graduate, and that

individual's license may be suspended or whatever action is taken, and there's another one standing in line to be hired. So, that's a problem. [LB478]

SENATOR PIRSCH: Would any effect of these Nebraska regulations in terms of discipline, that's a chiropractor who comes from a different jurisdiction, sets up practice here and is disciplined, would that carry through to, if that chiropractor were to go to a different or that...a healthcare provider to a different jurisdiction then? [LB478]

DOUGLAS VANDER BROEK: The only way that that would have an effect is, there's a thing called the National Practitioners Databank, and every health provider has any disciplinary action that is now available informationwise nationwide, and that really depends on the individual state's laws. And we do have licensees in Nebraska who live in the bordering states and practice in Nebraska or vice versa. They may practice in both South Dakota and Nebraska, for example. But the only way that would come into effect is dependent upon that...for example, if somebody has a license in both Iowa and Nebraska, if Nebraska has some kind of a disciplinary action on their license, Iowa is aware of it, but then that's handled according to their regulations. It would only affect that person's Nebraska license and practice within the state of Nebraska. [LB478]

SENATOR PIRSCH: So there's a compact that does exist between certain states. [LB478]

DOUGLAS VANDER BROEK: Right. There's...the information is available. [LB478]

SENATOR PIRSCH: And do most states belong to that? [LB478]

DOUGLAS VANDER BROEK: Well, that information is available to all states. The way that they handle it is up to them individually. [LB478]

SENATOR PIRSCH: And I guess...you're not...do you know generally how...is there a consensus of the states, how they typically handle it? [LB478]

DOUGLAS VANDER BROEK: I think those things generally today are taken pretty seriously, although handled in a different manner. I don't think they are ignored, because years ago, practitioners of all types used to be able to do something...lose their license in one state, and then they'd go to the next state and the next state and the next state, and that doesn't happen anymore, because other states are... And then also I noted, Senator, that you were interested in numbers, if you could. Currently, there are 560 licensed chiropractors in the state of Nebraska. There are 560 licenses. Thirty of those have outstate addresses. But, again, because we don't license the clinics, some of those people with outstate addresses may be residents in Council Bluffs, but practice in Omaha, for example. And of those, and again, it's just from...this number comes just from kind of observation and number of complaints, things that we hear, actions that we

hear otherwise. As far as prevalence of the...and what I'm talking about is really the misleading telemarketing, and not all telemarketing is misleading. But of the misleading telemarketing, my best guess is that there's probably about 1 percent, maybe less or more of 1 percent of licensees involved in actions which we would call questionable or disciplinary actions are taken. [LB478]

SENATOR PIRSCH: Okay. Thank you for helping me through that perspective. [LB478]

DOUGLAS VANDER BROEK: Thank you. [LB478]

SENATOR PAHLS: Thank you for your testimony. [LB478]

BRADLEY STAUFFER: (Exhibit 8) Chairman Pahls, members of the Banking, Commerce and Insurance Committee, my name is Bradley Stauffer, B-r-a-d-l-e-y S-t-a-u-f-f-e-r. I am a practicing chiropractor in the state of Nebraska. I live and I practice in Gretna, Nebraska, and I'm also the chairperson of the legislative committee of the Nebraska Chiropractic Physicians Association. And I'm appearing before you today in a neutral capacity regarding LB478 on behalf of the NCPA and what we believe to be the vast majority of chiropractors across the state of Nebraska. I was going to talk a little bit about the regulatory changes and exactly what had been proposed, but Dr. Vander Broek has covered that very well, and so I'm not going to take your time doing that. What I do want you to know is that throughout that process, the NCPA has been very supportive of their efforts. In fact, we did testify in favor of those changes when it went through the public hearings. And while we did hear some negative feedback from just a handful of our members, the vast majority of our members give us positive feedback that they like that we did that, and that they were supportive of our efforts. I'd also like to remind the committee that during the interim study, we did participate in a meeting chaired by Senator Pahls this summer, where we met together with the representatives of the insurance industry, the property and casualty insurance industry, and we did share that information with them as well. That's a lot of the time that we talked about the regulatory changes that were moving forward and that we had supported those, and we promised them that we would continue to support those regulatory changes as they did move forward. But we also told them we were not opposed to legislation as long as it was fair and was across-the-board legislation that involved everybody, all medical practices, and was fair across the board to every profession. I would note that during that meeting, they did tell us that they did appreciate our moves. They felt that we had gone above and beyond the call of duty in what our board and our profession had done to try to regulate ourselves, and they did appreciate that. They also were very agreeable that if it was implemented, it should be implemented across the board to all professions. And I would note, along with what Dr. Vander Broek said, you know, while the NCPA does have documented examples of this happening. You know, we really do not think it's a widespread practice. We believe that, you know, and we've sat and talked about it, that we believe that the occurrence

probably happens in less than ten practices in the state of Nebraska. And the vast majority of the practices that you're really talking about, that you heard complaints about today, probably occur in five or less. There are, you know, and while you may hear from those voices as this moves forward, you know, I guess I'm here to speak for the other 500 plus chiropractors that are the silent majority in this state, because we didn't want to parade 200 or 300 of them past you today to, you know, to hear the same thing. But they really do support this. We have 560 licensed chiropractors, as we said in the state of Nebraska; 471 of them are members of our state association, and so I'm representing all those voices today. And we really do believe, as we said, that the five to ten number represents 1 percent to 2 percent of the chiropractors practicing in the state of Nebraska. And we would also note that we're the only profession that's addressed this in our state regulations. I mean, it is something we have tried to go above and beyond and approach, and it is something that's been on our radar for some time which brings me to why I'm testifying neutrally here today instead of as a proponent. Basically, our stand as the NCPA is that for our profession, we feel like this is something we've been looking at for a long time. We have studied it; we've addressed it, and we've moved forward, proposed changes that will take care of it for our profession. And so we don't know that there's a need, at least for our profession, to do this. At the same time, we have said repeatedly, that with a couple of exceptions here that I'll note, and we really don't have a problem with this legislation as long as it continues to be, you know, put across the board uniformly, across all practices, we'd be okay with that. There has been some discussion in the past by some people of narrowing the scope. We would be adamantly opposed to that. We think if one practice lives by these rules, that everybody should, and so we would want it across the board. I did mention a couple of things that we did note as we went through this bill. There's a lot of positives in the bill, but probably my biggest concerns are in subsection 3, paragraphs 1 and 2. I read the statement of intent of (LB)478, kind of, you know, it repeatedly refers to this as a bill that refers to property and casualty insurance, and it refers to motor vehicle crashes. Actually, if you read paragraph 2 as I read it, there is nothing that refers to motor vehicle accidents, and it would apply to, as I read it, to all forms of insurance including health insurance; it would refer to all patients including patients who present with illnesses, injuries, chronic illnesses of any type. Again, I think that's an oversight, but we have significant concern that there is a lot of marketing that goes in across the medical profession, and so we don't want to have a misunderstanding there. You know, even practitioners do this, but even hospital groups provide services to the public with the intent that someday maybe see that patient, and we want to be careful that we don't, you know, impede that. And an example, not to throw any other profession out there, but, you know, hospitals and large orthopedics groups do, in Nebraska, provide sports trainers to individual high schools for no charge, and in return, obviously, the intent is that some of those students may, in turn, be referred back to those providers for services down the road. That's obviously a good practice, and we wouldn't want to do anything that would impede that. Our other concern is that as you read section 1...or excuse me, the first paragraph in section 3, it does not refer back to a...you know, within the definitions, it talks about public media not

being included. I have a little concern that public media is not included there, so if you ran a TV commercial for Methodist Hospital, that is seen by someone who's been in a car accident, technically, it's violated that if there's an intent to file insurance. And we understand there's language tied up in that intent, but we just think that, you know, it's an oversight; it's not what their intent is, and that that language should be cleaned up if it moves forward. As I read the bill, I think it's clear that the intents to address the capping and steering issue, I think it's clear that, you know, attempted to address the motor vehicles. But if it does move forward, we would prefer to see that refined and worked on before it goes out of committee. And we'd be willing to work with the committee; we'd be willing to work with the insurance property and casualty carriers and other practitioners to find ways to address that. We have no problem with that whatsoever. So, in summary, I want to reiterate that I represent the NCPA, a vast majority of Nebraska chiropractors, in support of regulation of the practice of capping and steering if it's done fairly and uniformly. We feel that regulating the practice reflects positively on the state and on the practitioners and does stop a practice that irritates many of our state residents. And we think this also, we kind of welcome the efforts contained in the bill to hold all medical professions to the same high standards that we're trying to hold ourselves to. So, I thank you, again, for the opportunity to speak to you today. If you have any questions, I'd be happy to try to answer them. [LB478]

SENATOR PAHLS: Seeing no questions, we thank you for your testimony. [LB478]

BRADLEY STAUFFER: Okay. Thank you. [LB478]

SENATOR McCOY: Thank you, Chairman Pahls, and we'll just very quickly close. It came to my attention...I'll just mention this to the committee, that the Attorney General, apparently, has just signed off on these proposed rule changes, so perhaps answer some of the questions that were talked about, so with that, I would close. [LB478]

SENATOR PAHLS: Okay. That will close the hearing on (LB)478. We will begin on LB317. Senator Conrad. [LB478]

SENATOR CONRAD: Good afternoon, shall I say, good evening to the Chair and members of the committee. Just as a side note, we're normally in marathon session in Appropriations and we're already out. So this is definitely a long day for you folks over here which I'm going to do my best to be as efficient with your time as possible. My name is Danielle Conrad, D-a-n-i-e-l-l-e, Conrad, C-o-n-r-a-d. I represent the "Fightin'" 46th Legislative District. I'm here today to introduce LB317. LB317 would enact the Nebraska Revised Uniform Unincorporated Nonprofit Association Act based upon the Revised Uniform Unincorporated Nonprofit Association Act as adopted by the National Conference of Commissioners on uniform state laws in 2008 and recommended to the states for enactment. With a few exceptions, there are literally hundreds of thousands of unincorporated nonprofit associations in the United States and thousands of those

organizations in Nebraska who are subject to a hodgepodge of common law principles and statutes governing some of their legal aspects. This act provides a basic comprehensive legal framework governing all unincorporated nonprofit associations formed or operating in the enacting state, i.e., Nebraska. This act deals with the following basic issues: (1) definition of the types of organizations covered; (2) the relation of the act to other existing laws; (3) recognition of an unincorporated nonprofit association as a legal entity and the legal implications flowing from that status; (4) the contract and tort liability of an unincorporated nonprofit association and its members and managers; (5) internal governance, fiduciary duties, and agency authority; and (6) dissolution and merger. This is an area of law that has long needed reform and updating. The existing state laws are largely based upon an aggregate of common law theories, which are no longer suitable for these types organizations. Unincorporated nonprofit associations are the only type of organization where states have not enacted modern comprehensive governing statutes. Senators, this bill was brought to me by the Uniform Law Commissioners from Nebraska who are former dean of the law school, Dean Steve Willborn, Larry Ruth, and the other Uniform Law Commissioners for Nebraska are Joanne Pepperl, Harvey Perlman. I know I'm missing one. I'll be sure to supplement the record with that. And to be clear, this legislation has provoked a great deal of dialogue and debate already. I want to be 100 percent straightforward with the committee as I have been with the folks who I anticipate will be following me here today. I think that this is an important dialogue that should be happening. And that's why the Uniform Law Commission exists, to try and bring this level of dialogue to the states to improve our policy framework. I want to extend a sincere appreciation to the Attorney General's Office, the Secretary of State's Office, the Nebraska Bar Association, the Nebraska Association of Trial Attorneys, and others who have already been working with our office to address legitimate concerns posed by this legislation. And I believe that this legislation is in the best posture to have a full and comprehensive interim study over the next few months. And, hopefully, if we're able to work out some of the questions that have arisen then take a look at this for adoption next session. So that's a little bit about the background. It is highly technical. It's an area that I'm learning more about every day. But I do want you to keep that in mind that we're really at the discussion point right now. And the folks who are coming forward have really been great to work with. [LB317]

SENATOR PAHLS: Let me ask you a question. Now when I hear the word "study"... [LB317]

SENATOR CONRAD: Yes. [LB317]

SENATOR PAHLS: ...that means we're just starting right now. You're thinking about studying. So in other words, we're going to have a study and we'll go into heavy dialogue later on, I'm going to be very honest with you. Does that make sense? [LB317]

SENATOR CONRAD: Yes, yes, it does. And, Senator Pahls, what my position is based on is the experience I have working with the commissioners, the bar, and this committee in the last few years when we adopted the uniform updates to the LLC law. And what we did was we had an introduction, we had an interim study. We were able to bring everybody together. And that was really an effective model for tackling these kinds of comprehensive issues. [LB317]

SENATOR PAHLS: Right. And that's right. I also understand that. And I appreciate that, letting us know... [LB317]

SENATOR CONRAD: Yeah, yeah. [LB317]

SENATOR PAHLS: ...because it seems like we will be doing quite a bit of work. So this is sort of precursor, just... [LB317]

SENATOR CONRAD: This is to start the dialogue. [LB317]

SENATOR PAHLS: Okay. Okay, thank you. [LB317]

SENATOR CONRAD: Yes, thank you. Thank you. Okay. And in the interest of time, I am going to waive my closing. [LB317]

SENATOR PAHLS: Okay. How many proponents will we have? One? Okay, come on up. Opponents? Okay. [LB317]

STEVEN WILLBORN: (Exhibit 1) Thank you. It's been a long day. As it turns out I'm still Steve Willborn, S-t-e-v-e-n... [LB317]

SENATOR PAHLS: Glad to know that. (Laugh) [LB317]

STEVEN WILLBORN: ...W-i-l-l-b-o-r-n, still on the faculty at the university. I'm here again to represent the Uniform Law Commission. I'm not going to go over the Uniform Law Commission again or the members. I expect you're going to hear testimony that comes at this bill from a variety of directions. I think that makes sense, since we're still at a relatively early stage in the process of vetting it. I'm going to be very brief. But I want to tell you some things that I think we all agree on. Then I'll give a very brief summary of the bill. And finally, I'll comment on a few of the issues that have been raised as we've been talking with others about the bill. First, as Senator Conrad mentioned, I think we all agree that there are many thousands of organizations in Nebraska that would fall into the category of unincorporated nonprofit associations that would be governed by this law. Think of your own associations and reflect on how many of them might fall into that category--youth sport leagues, neighborhood associations, small churches some of which may have religious objections to organizationism or

formal business entity, youth groups and so on. We want to look after the welfare of these important associations because they mean so much to the quality of life in Nebraska. Second, I think we all agree that the law in Nebraska relating to the governance of these kinds of organizations is very uncertain. LB317 would provide a set of rules or provide some guidance to everyone involved in those relatively rare instances when legal issues arise. For example, when your local little league is given or bequested a plot of land to be complicated these days, when the organization has only one or a few members left and is trying to decide how to join with another organization or dissolve for which there are few rules these days, when issues arise about the duties and liabilities of managers and members and so forth. The thrust of LB317 is that some good could come from clarification or the basic rules that apply to these types of organizations. Now I want to be clear. I'm not saying that everyone agrees that the rules are perfect as they are in this bill right now. We certainly do not agree...all agree on what the rules should be. But I do think we agree that the current rules applying to these organizations are very murky and that there would be value in clarification. Senator Conrad has given you a good brief overview. Let me just say, I've provided you with a folder that contains the Uniform Law from which the bill was drawn, on the left side, and a summary and other information about the bill on the right side. In essence, the bill recognizes unincorporated associations as legal entities and provides rules that govern their operation, dissolution, merger and liability. The rules are mostly default rules, which means people in the association can change them if they wish, but these would be the operative rules if nothing is done. I focus on the agreement. You may hear more, there are several legitimate issues that would need to be addressed and resolved before you move further on the bill. For example, the Attorney General's Office notified Senator Conrad of its concern about its ability to fulfill its function of monitoring tax exempt nonprofits and nonprofits maintaining charitable trusts. Senator Conrad and I have already had a good dialogue with the Attorney General's Office. We've not completely resolved it, but I'm confident that we will. The Attorney General, I notice, has a representative here and so he may be able to tell you more about that himself. The Secretary of State...the second concern is the Secretary of State and some in the bar have expressed concern that if this bill were enacted into law some who would otherwise incorporate as nonprofit corporations would remain unincorporated and rely on the structure of this law instead. If that were to occur, the Secretary of State may lose some filing fee revenue. This was mentioned in the fiscal note, which you may have noticed. And it may make it more difficult to monitor these types of enterprises. Experts from the Uniform Law Commission have told us that they doubt this would occur. And it seems not to be the experience of other states, but it's a concern we're thinking about if you decide to continue studying the bill. And I think there are steps that could be taken to try to assess it and address it. Senator Conrad informed me before the hearing that there may be also a concern about the liability protection provisions in the act. I want to thank Senator Conrad for introducing the bill to facilitate this discussion. At the end of the day, it may be that the bill is not right for Nebraska or it may be that it is. My hope is that you continue to examine the bill, that you call on us to

help you examine it. We'd be very pleased to be of whatever assistance we can and that a fully informed decision then can be made one way or the other. Thank you so much. [LB317]

SENATOR PAHLS: Thank you. Thank you for your testimony. More proponents? Opponents. I think we have an opponent. I'm asking you to keep in mind it looks...apparently this will be a study. [LB317]

COLLEEN BYELICK: (Exhibit 2) Chairperson Pahls, members of the committee, my name is Colleen Byelick, it's C-o-l-l-e-e-n B-y-e-l-i-c-k. I'm the general counsel for the Secretary of State's Office. And we...I'm not going to belabor the issue. Secretary Gale has set forth an opinion in a letter format for you to look at. I just kind of wanted to briefly explain our concerns and take any questions you may have. Basically, our understanding is that this bill would provide informal, loosely organized unincorporated nonprofit associations with similar benefits that nonprofit corporations currently have under the law. So they would have separate legal entity status. They would have limited liability protections. They would be able to hold and convey property. They would be able to sue in the name of the association, etcetera. But it does not require any sort of public filing; it does not require the filing of their initial formation document; does not require the filing of a registered agent; does not require them to disclose officers or directors; does not require annual meetings, etcetera. So the basic corporate governance structure that nonprofit corporations have and their requirements to file documents with the Secretary of State's Office is not included in the bill, although these associations would have similar benefits that nonprofit corporations would have. So there wouldn't be any oversight over the name; there wouldn't be any ability to track the association; there wouldn't even really be any record of the existence of the association. So those were our main concerns. With regard to the revenue, it seems...it appeared that maybe there would be a disincentive to incorporate, since you can have all these benefits without paying the filing fees and without paying the biennial report fees. And those filing fees and biennial report fees are split, two-thirds with the General Fund and one-third with our office. So it would affect General Fund dollars as well. I don't have anything else. If anybody has any questions, I can try and answer them. [LB317]

SENATOR PAHLS: I see no questions. Thank you. [LB317]

COLLEEN BYELICK: Okay, thank you. [LB317]

SENATOR PAHLS: Neutral. [LB317]

DON WESELY: For the record, I'm Don Wesely, representing the Nebraska Association of Trial Attorneys. We've talked to Senator Conrad about liability concerns, look forward to resolving them during the interim study. Thank you very much. [LB317]

SENATOR PAHLS: Thank you. [LB317]

ALAN WOOD: Alan Wood, A-l-a-n W-o-o-d, appearing on behalf of the Nebraska State Bar Association. We are appearing in a neutral position. There's probably more questions than answers for the bill right now. We have in the past...I, personally, have participated in interim studies with regard to various uniform acts, uniform trust code. Bill Marienau and I worked long and hard on that. So we are offering our help. We want to study and see whether we can answer all the questions that exist. And beyond that, I know Jeff Peetz is here and he may not testify but he's also appearing as my backup. So we'll participate in the interim study and see what we can accomplish. [LB317]

SENATOR PAHLS: Any questions? Thank you for your testimony. We will expect your participation. [LB317]

DAVID COOKSON: Chairman Pahls, members of the committee, my name is David Cookson, D-a-v-i-d C-o-o-k-s-o-n, Chief Deputy Attorney General. Much as we did with LB888, the Uniform Limited Liability Corporation, our concern is very specific and that goes to regulation of nonprofit organizations. This is one of the growth areas in our business practice, if you will. When I was handling charities work, back in '03, I had two cases, a rather large case involving the heirs of the Omaha World-Herald, but only two cases. Now we have 25 to 30 active investigations of illegal activity, not to mention the dozens of dissolutions that we have to review under the Nebraska Nonprofit (Corporation) Act. Basically, nonprofit corporations is a growth area for scam artists, especially in a down economy. In almost every state the Attorney General's Office has some regulatory or oversight over nonprofits, charitable trusts. And it ranges from broad general authority specifically in a number of states that have already adopted this or specific delegation of authority like Nebraska in the Nebraska Nonprofit (Corporation) Act. We're working with Senator Conrad, Dean Willborn. We feel comfortable that we will reach a mutually agreeable solution. We really have no position on the rest of the bill. We simply want to make sure, as required under the current statutes for nonprofits and by the courts, that we stand and choose the public in protecting their interest, particularly when large sums of money can be involved in these organizations. With that, any questions? [LB317]

SENATOR PAHLS: Thank you for your testimony and future work. [LB317]

DAVID COOKSON: Yeah, volunteer. [LB317]

SENATOR PAHLS: Okay, thank you. Any...apparently we are finished. Senator. [LB317]

SENATOR CONRAD: Really briefly, less than a minute. Sorry. I do want to just at least get on the record some of the concerns brought forward by the Secretary of State's

Office. Again, they proactively contacted my office with the same. We really appreciate their input and feedback. But I want the committee to keep in mind that laundry list of the no filings, the no person of record, the concerns that were brought forward by the Secretary of State's Office in that laundry list kind of fashion. Under present law we have the same problems. So what this legislation seeks to do, if we can ultimately work out some of these very legitimate and important questions, is just to provide kind of a default set of rules that are going to apply for these unincorporated associations. And I concur with Dave Cookson that this is an area that, you know, is potentially rife with problems, potential fraud and a variety of issues. And so it really behooves us to work together to ensure that we have a clear framework that protects the public and our policy interests as a state. Thank you. [LB317]

SENATOR PAHLS: Okay, thank you. That closes the hearing on LB317. Could I have everybody Exec just for a... [LB317]