

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee February 21, 2019

**LATHROP:** If you guys want you can come on in and have a seat. Good afternoon, and welcome to the Judiciary Committee. My name is Steve Lathrop. I am the Senator from District 12 representing Ralston and parts of southwest Omaha. I'm the Chair of Judiciary Committee. On the table inside the doors are yellow testifier sheets. If you're planning on testifying today, please fill out one and hand it to the page-- this young lady, when you come up to testify. This helps us keep an accurate record of the hearing. There's also a white sheet on the table if you do not wish to testify but would like to record your position on a bill. Also for future reference if you are not testifying in person on a bill and would like to submit a letter for the official record, all committees have a deadline of 5:00 p.m. the day before. We will begin bill testimony with an introducer's opening statement. Following the opening, we will hear from proponents of the bill, than opponents; and finally, anyone speaking in a neutral capacity. We will finish with a closing statement by the introducer if they wish to give one. If you are going to testify make sure, because this is a somewhat of a difficult room to hear in that you have the mike close enough so that we can pick your voice up well. We ask that you begin your testimony by giving us your first and last name and spell them for the record. We utilize an on-deck chair to the left of the testifier's table. Please keep the on-deck chair filled with the next person to testify to keep the hearing moving along. If you have any handouts, please bring up at least 12 copies and give them to the page. If you do not have enough copies the page will help you make more. We will be using a light system. When you begin your testimony, that's right up here, the light on the table will turn green. It'll stay green for two minutes. The yellow light is your one-minute warning and then the red light comes on and we ask that you wrap up your final thoughts. I always stop at this point from my prepared remarks and say, if you came here with several pages of notes to read you'll, you'll, while you're waiting, want to pare that down to three minutes. As a matter of committee policy I'd like to remind everyone that the use of cell phones and other electronic devices is not allowed during public hearings, though senators may use them to take notes and stay in contact with their staff. At this time, I'd like to ask everyone to look at their cell phones and make sure they're on the silent mode. Also verbal outbursts or applause are not permitted in the hearing room. Such behavior may be cause for you to be asked to leave the hearing room. You may notice committee members coming and going. That has nothing to do with the importance of the bills being heard. But the senators may have other bills to introduce in different

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committees or hearings to attend. And one last thing, we are holding hearings in the Warner Chamber while our regular hearing room is being renovated. Please remember that water bottles, soda cans, and cups are not permitted on the desks to avoid any damage or watermarks. And with that, we'll introduce members of the committee starting to my right.

**SLAMA:** Julie Slama, District 1, covering Otoe, Nemaha, Johnson, Pawnee, and Richardson counties.

**BRANDT:** Tom Brandt, District 32, Fillmore, Thayer, Jefferson, Saline, and southwestern Lancaster.

**DeBOER:** Wendy DeBoer, District 10, I'm Bennington, and the surrounding areas, and northwest Omaha.

**LATHROP:** Committee also includes Senator Wayne from Omaha; as well as Senator Pansing Brooks from Lincoln; Senator Chambers from Omaha; and I expect that we'll see them at some point during the course of our hearings this afternoon. Assisting the committee today are Laurie Vollertsen, our committee clerk, who is seated behind me and to my left. Neal Erickson and Josh Henningsen, are our two legal counsels. And the committee pages, are Alyssa Lund and Dana Mallett, both students from UNL. And with that, we will have the first bill which is LB514. Senator Morfeld who is here. Welcome to your committee and you're good to open on LB514.

**MORFELD:** Thank you, Senator Lathrop, members of Judiciary Committee. My name is Adam Morfeld. For the record, A-d-a-m M-o-r-f-e-l-d, representing the 46th Legislative District, here today to introduce LB514. LB514 is a cleanup bill to existing statute language found in Chapter 26, Section 611 that was brought to me by the State Treasurer and his State Disbursement Unit. The Nebraska State Disbursement Unit processes approximately 2.8 million transactions a year totaling \$300 million. Understandably, the State Disbursement Unit incurs bad debt due to nonsufficient funds, account closed checks, or electronic funds transfers. Since the inception of the State Disbursement Unit in late 2001, the office has worked on strategies to eliminate bad debt, prevent bad debt, and to improve on the processing of child support payments. I believe LB514 will further assist the office by working to completely eliminate bad debt by providing further resources to better deter bad debt and recoup monies errantly disbursed as a result of bad debt. Currently, this isn't possible since bad checks written for child support and alimony cannot be collected upon. This is what the bill addresses. Following me will be Troy Reiners, who is the head of

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the State Disbursement Unit. He is an expert in the field, and I urge you to ask any questions that you may have of him.

**LATHROP:** Very good. Any questions for Senator Morfeld? I see none. We are now joined by Senator Wayne. First proponent.

**TROY REINERS:** Senators, good afternoon. My name is Troy Reiners, spelled T-r-o-y R-e-i-n-e-r-s. I'm the director of the Nebraska Child Support Payment Center, and I'm here on behalf of the State Treasurer's Office supporting LB514. This bill proposes minor changes to statute 28-611 which will call for child support credit and spousal support credit to be viewed as property under issuing or passing a bad check or other order. This makes sense seeing how the failure to pay child support can result in a variety of enforcement measures to include forfeiture of your drivers, professional, hunting, and fishing licenses, liens on personal property, passport denial, credit bureau reporting, and even incarceration. While our offices work diligently on both recouping bad debt and preventing bad debt due to the passing of a bad check or other order, this change will open up a simple process with the Lancaster County Attorney's Office to submit offenders for prosecution. By having this option, we anticipate the lowering of bad items passed to our office and a stronger likelihood of recouping in a timelier fashion. Are there any questions?

**LATHROP:** I have one. What happens now if I write a bad check for child support and you realize that the check bounces? Are you stuck with the credit that you put on the books for my check amount or do you just go back and reverse it?

**TROY REINERS:** Currently, there's federal requirements that require us to receipt in monies and disburse them within 48 hours. We do that actually in 24 hours, so any item we receive is disbursed. We no longer have those funds. We get notice of the item that was not honored at the bank after the fact.

**LATHROP:** After you've already paid--

**TROY REINERS:** After we've already disbursed it out to the parent receiving payments. And so essentially our office, as the State Disbursement Unit, is holding the bag because we no longer have those funds and the feds will not participate in the bad debt either. We do have a collections representative who actively then will pursue the item directly with the issuer of the item. We do like a series of-- you know, letters. We email. We text. We essentially contact the

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parties-- I mean, both parties because it can even happen where it could turn into an overpayment to the parent receiving payments. And so what we do is we do what we can to recoup those funds. However, statute 28-611 as interpreted by Lancaster County Attorney's Office states that child support or spousal support is not a payment for value or property and hence that they will not assist us in prosecuting.

**LATHROP:** OK, so if this passes, are you gonna give these people a chance to come in and make the check good before you turn them into the county?

**TROY REINERS:** Oh, yeah, yeah, yeah. This would be a last resort. I mean, even based upon the volumes we have we would-- I mean, we're trying to look at small numbers. If we have that form filled out that we fill out and then would provide it to them and say, hey, this is our next step is now to submit this. You can make restitution or it's gonna cost them more if we would have to submit it and that is not the route we want to go.

**LATHROP:** OK, I think I understand. Senator Brandt has a question for you.

**BRANDT:** Thank you for testifying today, Mr. Reiners. What is the scope of the problem? I mean, how big of a problem is this in the agency right now?

**TROY REINERS:** For the-- for SDU only? Our, our office, we are sitting on roughly \$349,000 in bad debt. Now it's not just a result of these items because even of these items 40 percent-plus are viable reasons to not honor a payment we received. So if another SDU had a duplicate EFT file come to us-- essentially, we applied payments twice for the same paying parent and disbursed them twice. That is-- ends up being a result of bad debt as well because the other SDU will just reverse the ACH item. And now we're sitting on it. But they had a viable reason to not honor it because they made a mistake and so that happens with employers, that happens with paying parents. I mean, so the, the amount of bad debt we're sitting on is all of that. It's, it's the items from literally insufficient funds or account closed. But in conjunction to that, there's another huge portion attributed to valid reasons. You put a stop payment on a check because you paid your \$500 monthly obligation and then you went to work and you found out your employer took \$250 out of your check. Well, how is the paying parent going to pay their mortgage that month, so they put a stop payment on

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the check. And the parent receiving payments, it's a get well-- I mean, it's a little bit of a blessing because they're getting monies in excess, essentially, of what they're obligated-- or you know, entitled to receive. And so it's a bit of a predicament because bad debt is made up of a lot of different scenarios. This helps with the 60 or less percent that are actually doing insufficient funds and those types of items.

**BRANDT:** I guess what I was looking for is out of 100 percent, is this like 5 percent?

**TROY REINERS:** We're, we're like .00-- I mean,--

**BRANDT:** All right.

**TROY REINERS:** --we process 1.1 million per day.

**BRANDT:** OK.

**TROY REINERS:** So 349,000 in respective to that and this is since our inception in 2001.

**BRANDT:** All right.

**TROY REINERS:** That's, that's what we're looking at.

**BRANDT:** All right, thank you.

**LATHROP:** I see no other questions. Thank you for your testimony. Are there any other proponents to testify in favor of LB514? Anyone here in opposition to this bill? Anyone here in a neutral capacity to testify? Seeing none, Senator Morfeld to close. He waives closing. We do have a letter from Matt Wallen at DHHS in support. With that, we'll close the hearing on LB514 and that will take us to LB5-- pardon me, LB421 and Senator Hilgers. Welcome.

**HILGERS:** Thank you, Chairman Lathrop and members of the Judiciary Committee. My name is Mike Hilgers, M-i-k-e H-i-l-g-e-r-s. I represent District 21, which is northwest Lincoln in Lancaster County and pleased to open today-- this afternoon on LB421, which is a bill that's intended to, in my view, fix sort of a procedural wrinkle for our civil-- in our civil justice system as it relates to asbestos claims that I believe currently leads to or would lead to double-dipping and a lack of transparency. So let me just give a little bit of background about what the bill's intended to fix. And

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this relates to lawsuits for asbestos exposure and so, as I understand it, asbestos-- there, there are, as you probably are aware, asbestos is a-- was a product that is-- was used for decades and has caused all sorts of very fatal diseases including, including mesothelioma. And a lot of the original manufacturers, if not every single one of the initial manufacturers of, of asbestos, were caught up in a wave of litigation for the harm that their product caused. In the late 1990s, early 2000s they-- in light of the way that they had for the litigation they ultimately were declaring bankruptcy. And as part of that bankruptcy-- those bankruptcies a number of trusts were established including 60-- about 60 million or billion-- I'm sorry, 60 trusts with billions of dollars in them were meant to help those who are victims of this asbestos exposure actually get some claims. So the way the-- these trusts work are it's unlike a, a civil litigation manner, if you have, if you, if you have some documentation-- they require some documentation. You go to the claim, go to the trust, you fill out some claim form maybe you provide some employer-- employment history, some background information, maybe some medical information and the like, you submit the claim. Generally, they get processed pretty quickly. There's no limit on necess-- there's-- there is some limit you can't just go to all 60 but I believe the latest statistics I saw as they might go-- an average victim might go to well over a dozen, maybe 20, 22 different trusts in order to get some recovery. In exchange, in exchange the manufacturers are immune from liability. OK, so that system's set up. It, it works. No objection to that system. How that system interrelates with lawsuits against other potential tortfeasors is the issue that I want to talk about today. So if an individual goes to get recovery from the trust, they are welcome to do so. They can get funds and then they can also sue potentially someone else who caused whatever harm that they suffered through a contributory negligence scheme or, or a claim. And there is no problem-- if they were to go to-- if they would go to the trust first and then sue, no problem. But the problem occurs where they sue first and then go to the trust. And I'll explain why. When you go, there is no restriction on how you can recover from the trust either before or after the losses. If you go to loss-- if you go and file your claim and you say, look, I, I, I worked at-- or I, I used this product. I, I got mesothelioma. I had some issue, I'm harmed. The defendant would say, well look, you need to-- you know, who else might of caused your harm? Well if you don't disclose it during discovery and you go to a jury trial-- you go to trial from a jury you can say, well, this, this, this is the defendant that caused all my harm and there's no evidence that would come in that for the actual manufacturer of the

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asbestos. And so what happened-- what has happened is people will file these lawsuits first against maybe some of these periphery players, not the manufacturers, some of the periphery players. There's no evidence of the-- maybe where they had worked, or, or maybe any other interaction with the manufacturer of the asbestos. And then after those lawsuits are as let's say, they settle or there's a judgment and then immediately thereafter they go and they, they file claims with the, with the, with very-- a variety of trusts. And so the issue that that causes is it sort of allows for double-dipping and it allows for unfairness in the process, and the reason is the defendant is at trial saying, well, wait a second. Yeah, they have this problem but I can't point to any other party. I can't point to anyone else who, who might have caused this harm. Well, the reality is if there is no one else who caused this harm that's fine but in many of these cases very shortly after the judgment these plaintiffs are going and saying-- and they have to say it under penalty of perjury when they make these claims that no, no, no, these manufacturers also caused my harm as well. And so what's you're, you're having sort of this by doing the, the lawsuit first. You can go to-- you can go through the discovery process, go through the lawsuit process say no, no, no it was just this entity. There's just-- this, this is the one that caused my harm. Get your judgment and turn around and say, no, actually this per-- this, this manufacturer did, too, and then collect twice. What the bill is intended to do-- and by the way, the problem doesn't exist if you reverse the order because if you reverse the order and you go first to the trust and say, well look, this manufacturer caused my-- caused the, the disease that I have. Then the defendant knows of that and can at least argue to the jury and say, look, we might of cause-- well, we don't think we caused it at all but if we did, maybe there's some apportionment that should, that should result which is a common, which is a common defense that would be available to a defendant and a, and a joint and several liability type lawsuit. But when you reverse the order they don't have the ability to point to other defendants who might have caused their harm. And again we're not talk-- not talking about just randomly picking people out of the air, we're talking about entities that the plaintiff under penalty of perjury later goes and says, no, no, no, this manufacturer caused my harm. So what the bill is intended to do is not to say you, you have to file necessarily before you file your lawsuit but you need to-- you need-- we need to know who-- we needed-- you need to be able to get these trust claims done early. And we need to do it before we go to trial. And the reason is, is so that the defendant has the opportunity to, to actually be able to-- if someone else did cause the harm be

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able to have the opportunity to say, hey, there's contributory negligence here. It's not all on us, and this makes a lot of sense, by the way, when the defendants in the second waves of lawsuits are more on the periphery than the actual manufacturers of asbestos. And it, and it, and it avoids double-dipping because if you go and get a million dollar loss-- if you go to a jury and say, this defendant-- this, this one defendant caused me a million dollars in harm and the jury awards you a million dollars and then after it's done you, you go to the-- you can go to the-- there's nothing to stop you from going to the trust and say, well, I also should get some recovery from this trust. And the trust doesn't go back and say, well, did you file a lawsuit? They don't go into that level of detail it's a pretty quick process. So when I-- so the bill's intended to, to avoid-- not-- the bill is intended to essentially have the trust process happen first so that that information can be disclosed during the litigation. Now when the bill was first brought to me-- well my initial reaction was well, hey, I don't understand why this is a problem, just go to discovery, serve an interrogatory, do a deposition and ask. And the reality is it's very easy as-- and I'm not in any way suggesting malmotives here but it's very easy-- if something happened 30 years ago-- if your, if your memory is not refreshed about some other "malfeasor." It's very easy to say, I don't recall. And, in fact,-- or I don't know or I don't remember and that's a perfectly legitimate thing to be able to say under oath even if later you could have your memory refreshed. And there are-- and there's a case that I will cite to the committee, it's a bankruptcy decision from 2014, the Garlock decision, where the court actually went and looked at these-- looked at these-- on these series of cases and said, hey, you know what there is, there is-- looked at the cases and then the subsequent trust application said, wow, there is a, there is a-- there is exposure evidence that was withheld through the discovery process. So my initial instinct was well let's see discovery-- use discovery, but clearly the discovery process is not working, not working as it is intended. And these-- this information is not being disclosed through the discovery process. The second objection as I thought about it and I sort of socialized it with others is this idea that well maybe you'll delay it because the one of the issues is you can't go to trial and this information has been disclosed. And so the question is well is there a delay? Well, I think a couple of things. One is, other states that have passed this legislation have shown no delay. But secondly, it actually flips the incentive to ensure that you go to get recovery from the trust early on. Because right now the incentive-- there is-- there are incentives to wait because of this double-dipping that I discussed or even if you



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just forget about that and you just say, look, I'm just-- I'm suing this one defendant, I'm gonna focus on this one defendant. There's every-- you don't have any incentive to look at other potential-- if you're the plaintiff you don't have any incentive to look at other potential defendants who may have caused you harm and so the-- but the end result is those trust payments are being delayed until after the litigation ceases which might be eight months it could be a year, it could be a year and a half or two years or longer. So in fact what this would do is incentivize those to get their trust claims in early on in the process and, and get more dollars into the hands of the plaintiff in the first instance. So that's a general overview of what the bill is intended to do. I'm certainly happy to answer any questions. There are a couple individuals behind me who are, are-- will, will-- may be able to answer some of the national experience with this type of legislation. And with that, I would be happy to answer any questions the committee may have.

**LATHROP:** Senator DeBoer.

**DeBOER:** You may have answered this and I didn't hear you. What's-- if you know the approximate time that it takes to go through the process of filing with the trust until an adjudication has been made there?

**HILGERS:** On the trust side-- was that your question was for the trust versus litigation?

**DeBOER:** Right.

**HILGERS:** The information I have-- there's a Law Review article I'll, I'll point out is that the, the trust-- there was a-- it happens pretty quickly. I mean, I don't know if it's days but it might be weeks and I know that at least from this Law Review article that I reviewed from the Fordham Law Review what-- the general counsel for one of the major trusts said, hey, we have no backlog. We can process these pretty quickly. So I don't, I don't know if it's-- I wouldn't say necessarily days but it might be a matter of weeks. Certainly much shorter, I think, than a litigation might take which could be a year or longer.

**DeBOER:** OK, thank you.

**HILGERS:** Um-hum.

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**LATHROP:** I think I'll save my questions for the proponents that come up that are, that are involved in this. But thank you, Senator Hilgers,--

**HILGERS:** Thank you, Senator Lathrop.

**LATHROP:** --we appreciate your introduction and bringing this before the committee. If you're here to testify as a proponent you can come up to the front row and-- or get in the on-deck chair. Good afternoon.

**TOM CONSIDINE:** Hi, how are you? Thank you, Chairman Lathrop, Lathrop and members of the committee. My name is Tom Considine, C-o-n-s-i-d-i-n-e. I'm here today representing the National Council of Insurance Legislators, known as NCOIL for short. I'm the chief executive officer of that group. Before-- I'll just say a few words about myself. Before becoming CEO of NCOIL, I was the president and CEO of a community hospital in New Jersey. Prior to that, I was the COO of Regional Health Plan in the tri-state area back on, on the East Coast. And prior to that, I was the commissioner of banking and insurance for the state of New Jersey and sat on the executive committee of the National Association of Insurance Commissioners. I only have three minutes, but before I, I touch on this legislation, I would just tell you a few things about NCOIL. NCOIL is a bipartisan national legislative organization with the nation's 50 states as members. Typically, the states are represented by legislators who serve on those states' banking and insurance committees or whatever committee has jurisdiction over insurance issues. NCOIL writes model laws in areas over which those committees have jurisdiction as well as related issues including this one. NCOIL holds three national meetings per year as well as interim telephone conferences. NCOIL is bipartisan with the elected officers split between the two parties and the president position alternates every year. Our members look for solutions that are, that are pragmatic which is reflected that by the fact that many of our model laws have been enacted by many states around the country, as many as 49 states. I'm proud to note that this year NCOIL is celebrating its 50th anniversary and again every state is a member. The bill that brings us here today is one that's very similar to the NCOIL Asbestos Bankruptcy Trust Claims Transparency Model Act that was adopted by NCOIL in 2017. Additionally, it's been adopted by 15 states around the country including three that border on Nebraska: South Dakota, Kansas, and Iowa. I note that discussions about a NCOIL model law typically began when a legislator or a group of legislators come to us and say, hey, we see this issue that should

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be addressed nationally. That happens in this instance when some legislators came to the staff with what they called asbestos double-dipping. People collecting in a civil trial, as you just heard, without divulging trust claims. And then after the fact, disclosing the trust claims. This Act-- this model was discussed at NCOIL for three national meetings around the country in 2016 and 2017 as well as interim phone calls. People spoke on both sides of the issue and ultimately it passed both through the Property and Casualty Committee and through the Executive Committee with no votes-- no negative votes. So that's a full-bipartisan national organization represented by member legislators from around the country of both parties and not a single negative vote against it. So I see the light's about to turn red, so I thank you for your time and encourage you to pass this bill as many of your neighboring states have.

**LATHROP:** OK. I don't see any questions for you, but thank you for coming here.

**TOM CONSIDINE:** Thank you, bye-bye.

**LATHROP:** Is there anyone else here that's going to testify in favor of this bill?

**MARY MARGARET GAY:** I am.

**LATHROP:** OK, come on up. Good afternoon.

**MARY MARGARET GAY:** Good afternoon. I understand I'm supposed to spell my name. I'm from the south.

**LATHROP:** Yes, recite your name and spell it for us.

**MARY MARGARET GAY:** I'll spell it slower then. My name is Mary Margaret Gay, M-a-r-y M-a-r-g-a-r-e-t, Gay G-a-y. I'm an attorney at Maron Marvel Bradley Anderson & Tardy. I have over 15 years of experience defending some of the 8,000 companies who've been sued in asbestos litigation. Eight thousand companies have been brought into this litigation over the past 30 years. More than a hundred of those companies have filed for and received protection through the asbestos bankruptcy trust system. That system is different. It's different than any other type of bankruptcy that anyone would file. It's not what you have experienced in any of your normal day-to-day bankruptcy or litigation discussions. It's really hard to explain especially in three minutes. But I'm gonna do my best to kind of give you a

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100,000-foot view of how the system works and how it affects me as I defend companies who are second, third, and fourth to your peripheral defendants. Most of them never manufactured insulation products and were directly involved in the distribution of asbestos products. These companies are companies that are-- some are mom-and-pop companies that were brought into the litigation after the solvent defendants-- you may have heard them called the "Big Dusty's" went into bankruptcy. The problem that we're seeing now is the defendants that most the time contributed to the largest exposures for asbestos plaintiffs are the ones that are in the bankruptcy system leaving behind the small peripheral insolvent some not small necessarily but peripheral secondary defendants as the solvent litigants in the litigation. Imagine a highway with a wall down the middle, everybody is going the same way. Everybody wants to get to the same point, but you're not sharing information across the wall. That's the asbestos system. More than \$36 billion exist in asbestos bankruptcy trust to pay out claimants. That money is being paid to claimants in addition to the money that they are recovering in the tort system. A plaintiff can make a claim. I have a copy of a claim form to give you. This may answer the question that came from earlier. A claim is easy to file. Most are computerized. They take a paralegal or administrative person in our office very few minutes to type in information, provide a medical document, and file. The hardest thing to do is to meet with your plaintiff, which is your obligation as a lawyer, to get the information. That should be done before you ever file a case. This is a disclosure bill to disclose information to ensure there is no double-dipping in the system and that a plaintiff receives compensation from the trust system, the compensation from the litigation system, and that information is each disclosed to the other.

**LATHROP:** Thank you. Senator Pansing Brooks.

**PANSING BROOKS:** Thank you. Thank you for coming today, Ms. Gay. I-- some people that talk to me, talk to me about the fact that part of the problem is that there-- it's a procedural matter with trying to be able to protect, protect the interest of the person who basically-- you know, is, is near death in many instances. So can you talk about the fact that there is a feeling that, that some of this effort and these procedures cause the case to be, to be kicked down the road so far that the, the, the, the person who's sick isn't really able to even recover ultimately?

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**MARY MARGARET GAY:** Yes, I actually think it's the opposite. I think the 15 pieces of legislation that have been entered around the country have shown that to be the case. I've had a number of cases in the past three years since legislation has been adopted where a plaintiff's attorney on the day they file their case disclose to me all the information about the plaintiff. There's no delay. I would think-- I'm not a plaintiff's lawyer-- but I would think as a plaintiff's lawyer representing a plaintiff who is near death my obligation would be to get he and his family the most amount of money I could get them to pay for the illness. Obviously, you're never going to make someone whole who has a terminal illness. I recognize that, but I've sat in many depositions with mostly older gentleman with a spouse who want the money that they can get as fast as they can get it to take care of their medical bills and their spouse before they die. And this is money that is available to them. What we're talking about here is disclosure of the information that that person makes to the trust. This is the same injury, the same exposure, and the same work sites. That information a lot of times is available in the trust claims and not disclosed in the litigation. That's the information we need for juries to have to make the decision. I haven't seen any delay. In fact, I've had lawyers tell me they have seen no delay post legislation. If there's any delay it is a calculated decision by the lawyer doing what they may believe is best for their client. But I think any delay would be self-imposed.

**PANSING BROOKS:** Thank you, Ms. Gay.

**LATHROP:** Senator Slama.

**SLAMA:** So you've referenced and we've heard a couple of references to this along the way that 15 other states had passed similar legislation. Are any of those around us?

**MARY MARGARET GAY:** Yes, I think Mr. Considine-- I don't have my map at the table. There's 15 states: Iowa, North Dakota, Utah-- I wish I could tell you I'm a geography whiz and I could tell you what borders Nebraska, but you have, you have 15 states. Many of the Midwest down the middle-- in fact, on my map, there's a hole for Nebraska, the states that touch Nebraska have adopted legislation.

**SLAMA:** OK, so a lot of it is our neighboring states?

**MARY MARGARET GAY:** Yes.

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**SLAMA:** OK, and could you tell me a little bit-- I'm not as familiar with the different levels in terms of litigation here. Could you explain what the main difference is between the companies-- the main companies in that first year you consider with the trusts and then what the differences in terms of exposure or experiences with the litigants between them and the second, third, fourth tier--

**MARY MARGARET GAY:** Sure.

**SLAMA:** --that are getting in?

**MARY MARGARET GAY:** So asbestos has on average a 30-year latency period for asbestos-related disease. You generally develop a disease 20 to 30 years after your initial exposures. The people who were originally sued-- or the companies that were originally sued in asbestos litigation were companies that manufactured insulation. Back years and years and years ago in pipes, most of the time people who served in the military worked at major industrial areas. There's more than 700 approved work sites in Nebraska. That if you were at one of these sites your exposure is presumed and you can be paid from a trust. A number of sites in the Lincoln area that will pay out if you were there. But the asbestos exposure from insulation that covered pipes years ago before asbestos abatement, insulation was all over the place. It covered pipes. It covered pieces of machinery. The people that are being sued now, the second, third, and fourth tier defendants might be someone who manufactured a product that was on a vehicle that added a component part. Let's just say, a brake that had a pad on it that someone may have been changing out in their yard one day. Despite the fact that they worked at a shipyard or were in an industrial area ten hours of the day all day every day, those exposures are not brought up. They bring up the one time they worked with a single product that they may or may not even have been on with or around for a regular period of time, but they are the only defendant left in the case. They're the only defendant that a jury hears about if they don't bring in the information about all the other exposures that the person would have been exposed to throughout their life.

**SLAMA:** OK, and could you just clarify why these other exposures just wouldn't come up in discovery process? Is it like-- I, I guess I'm having issues with the person saying, I just don't remember any part of my life before this one time I got my brakes checked and there was a little bit of asbestos on it. Could you just clarify why that won't come up in discovery?

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**MARY MARGARET GAY:** Most of the time because it's been 30 or 50 years of life experience and work history that the person has had. Generally, the person is ill-- very, very ill. Mesothelioma is not-- you know, not a good disease to have to live through. And the information that you develop in discovery is based on memory and based on what you recall from where you worked on with or around. The bankruptcy trust provide work sites and information that you may recall. I worked in Lincoln Nebraska at this specific place, the bankruptcy trust can tell you whether they had a product at that place that you would have worked on with or around even though all you may remember is I worked in this building.

**SLAMA:** How do these trusts kind of figure out how much money they're gonna pay each person involved in this?

**MARY MARGARET GAY:** So the way the bankruptcy trust is set up is a bankruptcy 524(g) is what it's called, and it is a channeling trust that's set up to funnel asbestos liabilities. And a trust is funded to pay out not only current claims but future claims and that's where it's different from any other bankruptcy you've ever dealt with. If I go file bankruptcy tomorrow, I can't go into the bankruptcy court and say, here's my American Express bill. And, by the way, in five years I plan to run it up really big and I want to put that on this bankruptcy, too. It doesn't work like that for me in the personal bankruptcy system or for any other company filing bankruptcy. But in the asbestos world you are able to include current as well as future liabilities which may develop related to use with your product. A trust is then funded through various sources and a trust advisory committee is set up to oversee or to advise on that trust. Interestingly enough the plaintiffs' lawyers become the creditors in the bankruptcy system. So all of the rules which the trust is run by includes a trustee, a trust advisory committee which is made up of the plaintiffs' lawyers who represent the current and future victims. So in the tort system you're in a situation where you have the person who is against you in the tort system also helps make the rules and oversees the bankruptcy system.

**SLAMA:** OK.

**LATHROP:** I got a few questions for you.

**MARY MARGARET GAY:** Sure.

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**LATHROP:** The purpose of this bill is to avoid double-dipping. Is that true?

**MARY MARGARET GAY:** Yes, it's a disclosure bill. I think the word double-dipping is kind of the ultimate act that happens. The bill is written regarding disclosure of information in the litigation.

**LATHROP:** OK. And so what if, if I contract mesothelioma I find an attorney and now I want to make a claim against a defendant, you would under this bill make me go through the process of filing a claim with every one of the other trusts before I ever got to proceed any further with my mesothelioma case. Is that true?

**MARY MARGARET GAY:** Yes, you would be-- you would file your claim, claim with every person who contributed to your injury for which you are suing the solvent defendant.

**LATHROP:** OK, but you stay the court proceedings pending the applications to these various trusts. Is that true?

**MARY MARGARET GAY:** I don't believe there's any stay in here. I think it is a requirement that you do those things for the case to move forward. I've had a number of lawyers do that before they ever file the case.

**LATHROP:** That may be true and,--

**MARY MARGARET GAY:** Sure.

**LATHROP:** --and-- but my question was it stops the proceeding and I can't go to trial or a plaintiff cannot go to trial against a defendant in a mesothelioma case if this bill were to pass until they've made application with these various trusts.

**MARY MARGARET GAY:** Until they--

**LATHROP:** That's the purpose of the bill. Is that true?

**MARY MARGARET GAY:** The purpose of the bill is to ensure that the claims are made against all the possible sources of compensation--

**LATHROP:** Before going to trial with the defendant? Is that true?

**MARY MARGARET GAY:** Yes, correct.



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**LATHROP:** OK, tell me what the first symptoms are of mesothelioma.

**MARY MARGARET GAY:** Shortness of breath, a pain in your chest. There are a number of different things that could lead to [INAUDIBLE]. Most of the time it starts with a pain and shortness of breath and someone goes and gets checked out.

**LATHROP:** OK, how long after I've been exposed to mesothelioma do I begin to experience the shortness of breath and the pain in my chest which are the first symptoms?

**MARY MARGARET GAY:** Well, the exposure would be to asbestos. The mesothelioma is the disease that develops because of the asbestos in your system.

**LATHROP:** How long between my exposure to asbestos and my developing of the symptoms of mesothelioma?

**MARY MARGARET GAY:** The latency period is as-- I mean, 30 years or more.

**LATHROP:** OK, so it can take a long time before I, before I develop the symptoms of this terminal disease. Is that right?

**MARY MARGARET GAY:** Yes.

**LATHROP:** OK, we don't have people that are surviving mesothelioma do we?

**MARY MARGARET GAY:** There are some now--

**LATHROP:** Very, very, very,--

**MARY MARGARET GAY:** Very few.

**LATHROP:** --very small percentage.

**MARY MARGARET GAY:** Yes, sir.

**LATHROP:** Generally considered a terminal condition.

**MARY MARGARET GAY:** Absolutely.

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**LATHROP:** So what's the average period of time between when I-- or a person begins to experience shortness of breath, pain in the chest before they die from this condition?

**MARY MARGARET GAY:** Usually a few years. It's a very fast progressing disease.

**LATHROP:** Maybe 18 months sound about right?

**MARY MARGARET GAY:** Some, yes, some I've seen lived longer, but, yes.

**LATHROP:** OK. When people begin to experience the shortness of breath and the pain in their chest, do they always go to the doctor right away or do they try to see if it goes away or if they can live with this condition?

**MARY MARGARET GAY:** Sure.

**LATHROP:** OK, so it might take him a little while between the onset of symptoms and the time they actually go to a doctor and get a diagnosis?

**MARY MARGARET GAY:** Absolutely.

**LATHROP:** And if I understand the point of the bill which is you want people to-- your concern is, is that they may come into the litigation and not remember all the people that may have contributed to the exposure?

**MARY MARGARET GAY:** That's part of it, yes.

**LATHROP:** OK, but you want them to go to trusts before they can proceed with their lawsuit?

**MARY MARGARET GAY:** I want them to identify their exposures and determine-- there's nothing in this bill-- in fact, the bill says they can supplement later if they determine additional trusts may become available. But at the time that you are going to file your suit, the investigation you've done as a lawyer to file your suit would reveal most of these lawsuits.

**LATHROP:** And, and when you do this litigation, do you represent the trusts or do you represent the defendants that are involved in the litigation?

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**MARY MARGARET GAY:** The trusts don't participate in the litigation. I represent defendants.

**LATHROP:** OK, so you're, you're representing the people that are actually having suit filed against them as opposed to the trusts?

**MARY MARGARET GAY:** Correct.

**LATHROP:** So you're not worried about the trusts necessarily--

**MARY MARGARET GAY:** I don't--

**LATHROP:** --at identifying other exposures?

**MARY MARGARET GAY:** Correct.

**LATHROP:** OK. And in the discovery process, once you-- your client has had a suit filed against them you can serve interrogatories. Is that true?

**MARY MARGARET GAY:** That is correct. I cannot go get discovery from many of these trusts without going through the plaintiff.

**LATHROP:** OK, so once the suit's filed you can serve interrogatories on the plaintiff and ask him what other exposures you may have had?

**MARY MARGARET GAY:** Correct.

**LATHROP:** Really the same thing you want them to do when you ask them to go apply to all these funds? Is that also true?

**MARY MARGARET GAY:** Well, I think that's a different situation when you go apply to the trust the trust tells you where they were and whether your exposure qualifies for the presumption of exposure for payment from that trust.

**LATHROP:** Are you familiar with all these trusts?

**MARY MARGARET GAY:** Fairly.

**LATHROP:** I would think so if you do that defense work. The interrogatories the plaintiff would answer would also be on-- under oath.

**MARY MARGARET GAY:** Correct.

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**LATHROP:** Right, and then you have an opportunity as a defense lawyer to take their deposition. Is that true?

**MARY MARGARET GAY:** That's true.

**LATHROP:** And that's another opportunity where the plaintiff is literally put under oath before you ask him questions about, among other things, their other exposures.

**MARY MARGARET GAY:** When the plaintiff is still living, yes. Some of these cases are secondary exposure cases.

**LATHROP:** Right, right, and that's part of the problem. Sometimes they die,--

**MARY MARGARET GAY:** Correct.

**LATHROP:** --the plaintiffs do right before you can even get their deposition taken.

**MARY MARGARET GAY:** Sometimes before a lawsuit is ever filed.

**LATHROP:** OK, I think that's all the questions I have for you. Thank you. Senator DeBoer.

**DeBOER:** I don't suppose that we'll probably hear from anyone from one of the trusts. So taking my opportunity where I can, I will ask you. Do you know-- have the trusts been significantly depleted since their inception?

**MARY MARGARET GAY:** Currently-- and I can give you the number, there is approximately \$36.8 billion collectively held in trust to pay, pay claim-- pay claimants and several additional trusts have gone on-line in the past few years.

**DeBOER:** And is that a significantly smaller number than say 10 or 15 years ago?

**MARY MARGARET GAY:** I don't know that I know the answer to that.

**DeBOER:** OK. And I asked this question earlier, but Senator Hilgers maybe didn't know so I'll repeat the question to you. Do you know how long it takes to file one of these claims from the day that you file the claim with one of the trusts until the day that it's adjudicated?

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**MARY MARGARET GAY:** Sure, we work with a lot of plaintiffs throughout the claims process and courts to help get the information and make sure we get it. I think he was correct earlier, several of these trusts say we have no backlog. We can process these as quick as we get them in. I think on average you are probably looking at weeks to get it processed. Part of the problem comes in with people not providing the information on the trust claim that's needed to make the claim. The document that I provided to you, which is a Johns Manville claim form. You'll see that document has first name, last name, what your disease is, the places you've worked. It is not a hard form to fill out. There are 17 trusts that share a central site for submission. You can go on-line and submit all 17 at one time. It does not take long to get those back. You do have the opportunity as a plaintiff's lawyer to choose several different routes to get money. Some people take the slower route or the faster route. There's some expedited ways to get money. Most of the claims that we see are probably a month or two to get their claims back. It's not complicated. It's as complicated as me going on-line to buy my plane ticket to come here today. I went online, I filled out several screens of information. I had to update that information with my travel changes. It's a computer-based system that allows you to go in for most of these trusts and make the claim. And most plaintiffs make a 20-- 18 to 20 claims in addition to their tort claims.

**DeBOER:** That was sort of my next question for you. Imagine that I don't have an attorney, but that I have mesothelioma. And so I've had the diagnosis, I'm freaking out, my family's freaking out, everyone's freaking out. I'm not at the top of my physical game and now I have to think back in-- you know, 30 years ago and figure out all the people that may-- I may have come in contact with asbestos through. It seems to me because of the ubiquitous nature of asbestos 30 years ago that it may be difficult for me to identify all the people considering all the things going on in my life in that moment. So is, is there an issue where folks maybe don't know which trust members they should trust, they should go and file with until far down in the process of, of going forward with litigation against someone else? Is that something that happens?

**MARY MARGARET GAY:** Most-- yes, that could happen. Most of these trusts though are what they call work site based. So there are currently, I think, 70 active trusts. More than half of those are based on the places you were and the places you worked. From Social Security records and other records, that information can become available

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pretty quick when a plaintiff becomes represented by counsel or when they're trying to get information to pull the information to figure out what trust they need to make claims to. Again, this bill allows for you to supplement. If there are-- if information becomes available throughout the discovery process that you did not know about you would simply supplement and make a claim to that trust. Most people make their-- make all of their claims at one time. That is what we see.

**DeBOER:** OK, thank you.

**PANSING BROOKS:** Thank you again. So you made a comment about that most of the defendants with the largest exposure are in bankruptcy and then you-- and you talked about how the mom-and-pop organizations are more vulnerable, not necessarily less liable but--

**MARY MARGARET GAY:** Correct.

**PANSING BROOKS:** --right? So I'm just, I'm just interested in-- be-- because I guess-- could you just talk about that a little bit the landscape?

**MARY MARGARET GAY:** Sure, I think-- and this bill is written to allow juries a full picture of a person's exposure to determine that liability. It is not to change that liability structure in any way. It is simply to allow for a full picture of a person's exposures that the person knows that they had. Many again sign under penalty of perjury when they make a claim that they know they have so that a jury can make a very informed decision on the person's exposures for that liability.

**PANSING BROOKS:** OK, thank you.

**MARY MARGARET GAY:** Um-hum.

**LATHROP:** No other questions, thank you. Appreciate your testimony. Anyone else here in support of LB421? Seeing none, are there folks here to testify in opposition? Good afternoon.

**CHARLES SIEGEL:** Good afternoon, Senator Lathrop, I'm Charles Siegel from the firm of Waters & Kraus in Dallas. We represent asbestos claimants all over the country. We've represented a few even here in Nebraska although we brought their claims elsewhere. And in fact, we have represented a, a person Robert Rawhay [PHONETIC] from, from your legislative district. In, in the three minutes that I have, I just want to try to correct some of the misimpressions that you've been

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given. First of all, there was a reference to what happens after a judgment in this case. When, when how claim-- how trust claims sometimes get filed after a judgment. That's never once happened in the state of Nebraska. Because to my knowledge, there's never been an asbestos case tried to verdict in this state. This is a, this is a solution in search of a problem. There are very few asbestos cases in Nebraska to begin with. That's a good thing demographically and epidemiologically for your state. But as far as the litigation system goes there's never been a trial of an asbestos case here and we would know about it. And I guarantee you Ms. Gay's firm would know about it because her firm, her present and former firm defend these cases all over the country as well. So there is no litigation problem here in Nebraska. I think there may be other motivations for bringing this, this legislation here. So that-- you know, what, what takes place after judgment really isn't the issue here because these cases aren't tried here. However, if there is an ostensible concern about double-dipping in this state the obvious way to handle it and the way it gets handled, and of course Ms. Gay knows this, the way it gets handled is if there is a claim to be filed after a judgment in a lawsuit any future bankruptcy recoveries by that plaintiff are simply assigned to the, to the trial defendant. There was a suggestion that plaintiffs have an unlimited amount of time to file these claims. That's not true. Every trust has its own limit-- built-in limitations period. And of course you have to remember all of these trusts are set up under the supervision of a bankruptcy court and a bankruptcy judge with a right of appeal by any aggrieved party to the district court to the court of appeals and all the way to the Supreme Court. I want to address real briefly the idea that there is such a thing as a peripheral asbestos defendant. Union Carbide, the company that tried to sell its brand of asbestos as the safe asbestos from its King City Mine in California, they're a defendant today. Johnson & Johnson which has known that its talc that mothers were using for-- you know, decades and decades was contaminated with asbestos. They're not really exactly a peripheral mom-and-pop operation. Owens-Illinois Bendix-- Ms. Gay, I think it was referred to perhaps somebody working with a brake on a car that contained asbestos. Bendix has one of the all-time great liability documents in asbestos or any other litigation. Their, their officer said, well, you know if you had, if you had a nice career working with asbestos you might as well die from it because everybody's got to die of something. I see I'm out of my time. I'm happy to answer any questions.

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**LATHROP:** Senator Slama.

**SLAMA:** Thanks for coming up here today to testify for us. So you noted that this was kind of a bill that was a solution in search of a problem. We've never had a case towards us and tried here so I'm just wondering why you came all the way here from Texas to oppose it if there's no problem here?

**CHARLES SIEGEL:** I think I came for the same reason that Ms. Gay came from, from Mississippi. She came-- you know, it ostensibly or somebody in here thought there was a reason to introduce this bill but it's not a problem here and there is no Nebraska defense lawyer to talk about how this concern works in the Nebraska asbestos trials because they never happen here. So the proponents of the bill had to get a person, a person who defends these cases to come from Mississippi. I guess the opponents felt like-- you know, since this is not an issue in court here in Nebraska, I guess the opponents felt like, well, we ought to have someone who understands how this works where they actually try asbestos cases.

**SLAMA:** OK, so I'm wondering then in the other states some of them are our neighboring states that have passed legislation similar to this. What-- what's the impact been there?

**CHARLES SIEGEL:** I don't think there has been much of a-- again I-- you know, we have represented some people in, in lawsuits in South Dakota. Asbestos cases like almost all cases settle. Most, most asbestos cases settle just as most litigation of all kinds settles. I don't think there's ever been a trial in, in South Dakota. There have been a couple or three trials in Iowa and Kansas and, and I'm not really knowledgeable about what the impact there has been. Of course the other irony, I might mention, is-- you know, this is a procedural bill deal-- dealing with court deadlines and so on. It's procedural. Any asbestos litigation that exists such as it is here in Nebraska mostly lives in federal court because there are no Nebraska defendants. The cases get removed on the basis of diversity and so this bill wouldn't even apply in a federal court case in Nebraska. So that's kind of why I feel like it's a solution in search of a problem. I don't-- the, the other reason I feel like it's a solution in search of a problem is it isn't a problem. Ms. Gay said, you know, the plaintiff has to, has to-- ought to be able-- or ought to be made to file a claim against every trust whose product he knows about, whose product he remembers who knows-- he knows of he works with. Yet she also acknowledged that these people don't remember after 30 or 40 years as they're sitting



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there suffocating to death slowly over a period of 9 to 12 months while they're being deposed. These depositions typically go for two or three hours a day because you can't depose one of these unfortunate victims all day. So they're sitting there in their deposition, they're asked a question about what they might have worked with on, on a job site 30 years ago and they can remember or not. But if they remember-- if they testify well, yeah, I was exposed to Owens Corning fiberglass insulation, well then that-- the defendant right there-- Ms. Gay who takes a-- you know, Forman Perry and Maron Marvel don't take slouch depositions. They take extremely thorough depositions. And if I have enough time, I'll quote from her firm's Web site about how they've actually created a whole database derived from these depositions.

**SLAMA:** All right. We're gonna hold up here and refocus on what my question was. So just in short, there has not been much of an impact in the neighboring states that have passed this [INAUDIBLE]?

**CHARLES SIEGEL:** I don't think-- I'm not-- to be honest I'm not knowledgeable about what has happened in those states, but I don't--

**SLAMA:** OK, that's all I needed, thank you.

**CHARLES SIEGEL:** OK.

**LATHROP:** I'd like to ask a few questions.

**CHARLES SIEGEL:** Yeah.

**LATHROP:** So the, the bill would require that some-- if I understand the, the, the stated reason for the bill is that during the discovery process if a plaintiff sues a manufacturer or somebody selling this stuff and they, they have some exposure, they filed the lawsuit and the, the question was whether or not-- or the issue was whether they could remember all of their other exposures. And the solution is to make them file with all the funds about exposure. They--

**CHARLES SIEGEL:** I mean, either, either, either they remember or they don't. If, if they do and they testify at their deposition, yeah, I work with Owens Corning fiberglass. Well, Owens Corning went through this bankruptcy procedure. Then, then-- right then and there, the defense lawyer who is taking the deposition has the evidence he or she needs to assign liability at hypothetical trial to Owens Corning fiberglass and thereby diminish its own liability. If the plaintiff doesn't remember, then the plaintiff isn't gonna file that asbestos

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trust claim anyway because he doesn't remember. Now what the bill does also do is say is give the defendant the opportunity to say, well, we know, even though you don't remember it, we know that you must have been exposed to Owens Corning fiberglass for example because you testified about working at this job site and their job site is on the Owens Corning bankruptcy trust list so make the plaintiff file the-- that claim. That is the delay concern right there. There's no double-dipping concern because again if, if the case were ever actually tried the future recovery would be assigned to them. It's the delay concern. These people do not live for years. The average survival time is something like 12 to 18 months and anything that that delays a person's ability to get to trial is, is, is bad from our standpoint and, and to be avoided at all costs.

**LATHROP:** So talk to me about-- you just made a statement that if a case is taken to trial and a verdict is achieved does the law currently require that they assign to that defendant any claims against the trusts or is that a bankruptcy rule or the law in other jurisdictions?

**CHARLES SIEGEL:** It, it, it is the practice in other jurisdictions. I'm not sure I can cite a statute. But, for example, our firm tries cases frequently in California and that is the standard way this concern is dealt with in California. The judgment says if the plaintiff files any future bankruptcy claims, those recoveries are automatically assigned to the trust. The other thing I should mention is another way to handle it is to say any future claims, whether or not the plaintiff files them, any future claims are here up by assigned to the trial defendant and the defendant can go seek the recovery itself. As can a defendant now by filing a third-party contribution claim against a trust.

**LATHROP:** In these cases when you try them and you, you have defendant A, and defendant A wants to attribute some of the exposure to other people who are, are other entities that actually have one of these trust funds set up. Does the jury in that trial consider the exposure and the liability of the other defendants-- or the other-- the folks who are actually in a trust?

**CHARLES SIEGEL:** Of, of course, of course, it, it-- the-- as, as counsel acknowledged-- you know, the first thing any competent defense lawyer does is send a set of interrogatories. Then at the plaintiff's deposition-- and it's true some people die before their deposition is taken, but, but that works against them as well. You get-- you ask the

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plaintiff about alternative sources of discovery and I really do-- and, and it's not only what the plaintiff himself can remember. The, the-- you know, very, very resourceful capable defense counsel like Ms. Gay do have Web sites and repositories and all kinds of, of, of databanks about products that might have been used at a particular Web site even-- or a job site rather, even though the plaintiff himself doesn't recollect it. So they have all this information that they've built up from defending asbestos cases for 30 years that enables them to assign alternate sources of responsibility in front of the jury.

**LATHROP:** That's currently admissible,--

**CHARLES SIEGEL:** Of course.

**LATHROP:** --that's part of the trial.

**CHARLES SIEGEL:** Of course, yeah.

**LATHROP:** I think I understand. Senator DeBoer.

**DeBOER:** Did I hear you say that the adjudicated defendant-- so if you go through a trial the defendant was found liable for a certain amount that, that if then there is later a trust claim filed by whoever the plaintiff was that they-- the adjudicated defendant could sue the trust for whatever?

**CHARLES SIEGEL:** Well, yes, trial defendants either before or after a judgment can, can pursue third-party contribution claims just like any tort defendant can third party in somebody the plaintiff has chosen not to sue. So, so defendants can do that, but, but what I'm, what I'm specifically referring to is if there's a judgment and the plaintiff says, you know, the minute you walk out of this courtroom after, after this judgment assign, we know you're gonna go file this bankruptcy claim. And that's a, that's a-- additional recovery you're gonna get that you should have done earlier so it could be added to our offset.

**DeBOER:** Right.

**CHARLES SIEGEL:** The way you handle that concern is say-- is to say in the judgment and we recite these in the judgment and I'll be happy to send examples to the committee so it can see them. We, we simply recite in the judgment should the plaintiff file any future recovery-- you know, trust claims of any kind or should the plaintiff receive any future recoveries from trust claims already filed but not yet paid

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those monies are hereby assigned to the defendant-- to the trial defendant.

**DeBOER:** So-- but that would only work in the case where you get to a final adjudication at trial,--

**CHARLES SIEGEL:** That's right.

**DeBOER:** --and not for settlement, right?

**CHARLES SIEGEL:** That's right, but most of these cases are settled and once, once a defendant settles then they don't care about double-dipping anymore.

**DeBOER:** OK, thanks.

**LATHROP:** Senator, Senator Pansing Brooks.

**PANSING BROOKS:** Thank you. Thank you for coming today. I'm, I'm just-- we heard that, that there's-- I guess, \$36.8 billion right now in the trust. Do you have an idea how much the, the average award is?

**CHARLES SIEGEL:** It's very low. That, that, that sounds like a lot of money but, but it is sitting there in anticipation of the unfortunate epidemiological fact that there are gonna continue to be these claims for some time although the number of claims is slowly decreasing. But to give you an example of how--

**PANSING BROOKS:** Do you have a number?

**CHARLES SIEGEL:** Yeah, to give you an example of how low these recoveries really are, Johns Manville which everybody knows is the largest asbestos company in this country-- you know, in, in the 20th century. They typically pay between 15 and 20 thousand dollars for a mesothelioma claim these days. It's, it's truly pennies on the dollar.

**PANSING BROOKS:** That is pennies on the dollar I have to say for a life. So the question is that-- I guess, that-- so, so what happens is that they then like you can't be sure if you got it at one company versus another. Right? Is that correct?

**CHARLES SIEGEL:** That's right the, the jury-- there's no way for a jury or a scientist or a doctor to know which asbestos fiber caused your

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tumor. That is right. And so juries just do the best they can trying to assign--

**PANSING BROOKS:** So in this regard this, this trust filing the proof of claim form that they're recommending, would that-- that would be an apportionment then of the \$15,000 to-- I mean, would they apportion the, the award to the companies?

**CHARLES SIEGEL:** Yeah-- I mean, if, if, if I understand your, your--

**PANSING BROOKS:** Fifteen thousand would be apportioned between company X, company Y.

**CHARLES SIEGEL:** Well, the way it would work is, is, is if-- you know, there was a trial and someone said, well, we know you were exposed to Johns Manville insulation, that's a-- you know, a dusty product that had to, that had to have been a major cause of your disease. We the jury hereby assign Johns Manville 50 percent responsibility. We award you a million dollars for your pain and suffering. We assign Johns Manville 50 percent responsibility. Well, you've just lost 50 percent of your damages-- of your million dollar damages for a \$15,000 bankruptcy claim. The idea that this trust system is-- you know, some kind of wonderful lottery for asbestos plaintiffs. It's, it's not. We--

**PANSING BROOKS:** OK, so when, when the trusts were set up, I presume that, that it was not-- was it intended that somebody be able to go to each trust and, and see if they can get a, a-- win a claim or get an award from each trust if they could because there-- I mean, there is this way that one-- the left hand doesn't know what the right hand's doing. Was that intended?

**CHARLES SIEGEL:** No, I don't think it was but I, but I, but I respectfully disagree that the left and right hands don't know what they're doing. I mean, there is absolute full transparency between-- I mean, if we have a mesothelioma claimant and we get an interrogatory saying, please give us every trust claim you've ever filed. We hand it over. We don't take the position that that's not discoverable or even admissible. What we object to most strenuously about these bills is having the defendant be able to delay our progress to trial while we're dying by saying, we think you ought to file other claims in addition to the claims you remember.

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**PANSING BROOKS:** Is there any kind of-- are there any court cases that say-- that allow-- OK, I was at company X like DuPont for 15 years and then I moved on to whatever you said we all know that I didn't know that company was the number one, but anyway--

**CHARLES SIEGEL:** Johns Manville.

**PANSING BROOKS:** --happy to show my ignorance on this. But anyway-- and, and then you were-- somebody was at that company for 15 years. So is there-- was there ever an intention in your opinion to allow somebody to go to multiple trusts and recover?

**CHARLES SIEGEL:** Yes-- I mean, I think that was contemplated. I, I don't know that it was a matter of intention, but I think certainly when, when the-- when this asbestos trust statute was passed in the 80s, there was-- so even by that time Manville and a few other companies were already in bankruptcy and it was certainly recognized that a plaintiff would file claims against multiple trusts, yes.

**PANSING BROOKS:** And, and, and there must be a termination time for all of this at some point. We aren't going to have any more people living who worked at these companies. When, when--

**CHARLES SIEGEL:** That is true.

**PANSING BROOKS:** --is there an approximate date of this or a year?

**CHARLES SIEGEL:** It-- it's-- you get different epidemiological estimates, but 10 or 15 years maybe. I mean, the, the trust do sort of have to take the-- you know, most conservative view and try to conserve resources way out until 2040 or 2050. But I think the, the recognition is that by those years there will be a very, very small number of claim-- and it's true that the number of claims is going down a little bit each year you know.

**PANSING BROOKS:** Thank you very much.

**CHARLES SIEGEL:** Thank you.

**LATHROP:** Senator DeBoer.

**DeBOER:** Sorry, I have one more question. Fifteen thousand dollars is the average recovery you said from--

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**CHARLES SIEGEL:** No, I, I said that was the, the payment by Johns Manville.

**DeBOER:** So that's the typical payment from the-- from that trust but--

**CHARLES SIEGEL:** Some, some, some are higher, some are much lower. I mean, you know-- HK Porter is a company that made gaskets that contained asbestos or some other equipment that contained asbestos, and I think they pay something like \$736. There are some that pay-- that, that pay more.

**DeBOER:** I mean, I understand that asbestos is accumulative to-- you know, asbestosis and then mesothelioma are a cumulative disease. And so you sort of take from a bunch of pots, but mesothelioma is not a \$15,000 disease.

**CHARLES SIEGEL:** No, it's not.

**DeBOER:** So, so why is the recovery so small? I-- I'm--

**CHARLES SIEGEL:** Because, because the trust has to conserve, conserve resources. Because in the case of Manville so many different people worked with Johns Manville products and Manville is one of the trust that, that-- you know, many, many people will claim against which is not true. Let's say of HK Porter, and since everyone will claim against the Manville trust and since there will be and, and also-- you know, it's a function of how much money Manville had when they, when they went into bankruptcy.

**DeBOER:** Right. OK, thank you.

**LATHROP:** Senator Wayne.

**WAYNE:** Thank you for being here today. Let me pull this a little closer. So the benefit of me having a computer and having internet, I get to look at things. So it seems that since 2011, a lot of states have passed this. And then I happened to notice that Texas is on a list. So I went to Texas and they have a 150-day and a 120-day requirement which seems double what, what this bill proposes. A 120 days before a trial must be served, a 150 days before a trial-- at least the claim must be filed. You're from Texas so how has that affected your practice or how does it affect--

**CHARLES SIEGEL:** It, it slows the cases down. There's, there's no question about it. I mean, I, I can't comment on the other states that

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Senator Slama mentioned but, but in Texas it slows the cases down. And, and we have no incentive to, to not think of claims that we can file. I mean, when somebody comes into our office and-- you know, is dying of mesothelioma and their family is coming up against huge medical expenses, it's not like we-- you know, hold at arm's length potential sources of recovery that we could otherwise get. What, what slows things down is when a defendant says, no, we think you, plaintiff, ought to file against this trust. You know, that, that-- I mean, in Texas fortunately we, we also have an expedited trial provision. You know, that does give dying mesothelioma victims trial priority so in Texas that is ameliorated somewhat by the provision we have that lets us sort of go to the front of the trial line but it-- but still it slows these cases down.

**WAYNE:** So that's where I'm confused. I'm, I'm a trial attorney. I'm practicing-- I think we just filed a case two months ago or three months ago. I'm a year and a half out for a trial date so that's where I'm having a hard time with the slow down argument because at least I only have a Nebraska perspective. That's why I ask you that question just in fairness.

**CHARLES SIEGEL:** Well, it's, it's not, it's-- when I say slow down, you, you have to keep in mind the overarching fact in all these cases and that is the plaintiff will die. And, and from our standpoint and, and really from the victim's standpoint-- no, I mean the, the case will come to trial. But anything that, that keeps-- that moves the trial date out giving it-- making it more likely that our client will die before we get to trial is disastrous for the case. And, and also it's not just a matter of the value of the case going down-- I mean, I think any, any trial lawyer knows that, that a case is worth more when the, the, the victim is there testifying and the jury ought to see that. It's not just a matter of the monetary value of the case it's sort of a intangible emotional value that so many of our clients tell us, you know, I'm just-- I know, I know it's terminal. I know it can't be cured. I know I'm dying. I'm trying to hold on till the day of trial so I can see-- make sure my family is taken care of.

**WAYNE:** So then knowing that why wouldn't you just file with all 60 and let them sort it out?

**CHARLES SIEGEL:** We, we can't. Why wouldn't we?

**WAYNE:** I'm just saying [INAUDIBLE]--



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**CHARLES SIEGEL:** We, we, we would file with every trust that we know of. Again, we don't, we don't have any incentive to, to not. You know, if it's really just as easy as you know typing in some information on some screens it doesn't take days or weeks it takes months to get paid and I assure you many trusts including the more recent trusts. It's not like they just pay, they frequently contest claims. We have a small-- relatively small number of cases and we try to-- most trusts have a provision where you can seek individualized values as opposed to expedited values and we try to do that whenever we can. That takes longer, but, but in general we have no incentive not to file a claim. What we object to is the defendant slowing things down by saying, even though you filed all these claims there are other claims out there that we think you should file.

**WAYNE:** So let's, let's talk a little bit more about the delay. I'm just trying to-- again, this is not my practice although it sounds fascinating. When you say there is delay, give me a time frame-- give me a reference point of what delay means. Because you just said they've been-- in Texas you have a special provision that they move ahead of the line but you're saying that they're delayed.

**CHARLES SIEGEL:** Well, OK, so, so we do have that in Texas. But, but let's hypothesize an asbestos trial-- I mean, you, you say you're two years out from trial in, in your case.

**WAYNE:** A year and a half.

**CHARLES SIEGEL:** A year and a half. There is no provision in--

**WAYNE:** Just a note, we're dealing with that. Senator Lathrop has a bill that increased the number of judges so that might change.  
[LAUGHTER] Go ahead, sir.

**CHARLES SIEGEL:** The good thing is they will not be burdened by asbestos litigation here. But, but if, if, if I had a, if I had a dying mesothelioma victim here in Nebraska, there is no provision that I'm aware of that, that expedites trials for dying plaintiffs like that in Nebraska. Maybe you can file-- you know, I suppose in any court you can file a motion to expedite the trial but I doubt that those are readily granted. And so it's, it's not, it's not the, it's not the, the bare time to trial it's the time to trial while your plaintiff is dying and will-- you know, every, every month that the trial date is moved back, it's more likely that your client dies.

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**WAYNE:** I understand that. So would this be a bill-- would this bill be more palatable if we included a provision to make it move to the front of the line?

**CHARLES SIEGEL:** I-- we would certainly ask. I think that if, if the committee or the Legislature does entertain this bill that that kind of provision be added.

**WAYNE:** And then lastly, you said that this is more of a procedural issue but most of this is in federal court. Do you-- have you ever found any judge's ruling that this matter would be a substantive and they have to file a state law?

**CHARLES SIEGEL:** I'm, I'm not, I'm not aware of any holdings to that effect. But I can tell you that, that for example when we have cases in Texas that get removed to federal court, no, we do not-- we've never even attempted the argument that, Mr. federal judge, we'd like to move to the front of your busy trial docket by virtue of this Texas rule of civil procedure. You know, we--

**WAYNE:** It probably wouldn't go over very well.

**CHARLES SIEGEL:** Right.

**WAYNE:** Thank you, sir.

**CHARLES SIEGEL:** Thank you.

**LATHROP:** I think that's it. Thank you for your testimony.

**CHARLES SIEGEL:** Thank you, Senator.

**LATHROP:** Next opponent.

**MARK RICHARDSON:** Good afternoon, Senators. My name is Mark Richardson, M-a-r-k R-i-c-h-a-r-d-s-o-n, and I am here today on behalf of the Nebraska Association of Trial Attorneys to oppose, to oppose LB421. I think this issue has fairly thoroughly been covered. I won't try to restate a lot of what has just been stated on this. I do think there was a question about, why is this coming to Nebraska? And from a trial attorney's perspective, what I see this bill is, is, is what we call kind of an attempt at momentum. Get this bill passed in states that are either favorable or get it under the radar in some states where the legislation isn't maybe as prevalent. Build the momentum in those states and then you can go try to pass a federal law and say, well

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look, you know 15-- I mean, how many times did we just hear 15 states have already passed this. Well-- you know, it's not to be too long if, if this trend continues that they're gonna be able to say 16, 17, 18, 20, 25 states. And all of a sudden they say, well, now we need something federal to mandate this that's going to cover every mesothelioma case that comes up in the, in the country. I, I think it's been well-versed that we look at this as, as a stall tactic. I heard Miss Gay say that, you know, she's not a plaintiff's trial attorney but it would seem to me like I would want to pursue all these available options. That's 100 percent true. I've never had a case where if we saw an option to-- that made sense for our client to go pursue a possible source of recovery that we wouldn't do it but it has to make sense. And if you're telling a client that they can go submit to one of these trusts and get \$736 and it's gonna take two months minimum to go get that and, and fill out all these forms. The client may well say, it's not worth my time and effort to go try and get \$736. And we are definitely not in the business of wanting the defense counsel to control the actions of our client and the claims that they bring. It's not a direct apples-to-apples comparison but the way I would look at it is when I have a product's liability case that I bring here in the state and I'm pursuing this product liability case against an out-of-state defendant we get up to 60-- 61 days before trial and all of a sudden the opposing counsel is able to come in and say, well, you haven't filed your work comp case yet. And so we need to delay trial until you go file that work comp case so that we're sure that we know what kind of subrogation is there on the aftermath of the work comp so that we know what might have to be paid back to work comp because that's gonna affect our decision in how we do our trial. That's just something that trial attorneys-- plaintiff's trial attorney is always going to be against. It's not in the best interest of the injured person who is suffering a horrific disease here and for that reason the Nebraska Association of Trial Attorneys would oppose this bill.

**LATHROP:** I see no questions for you. Thank you for your testimony.

**MARK RICHARDSON:** Thank you, Senators.

**LATHROP:** Any-- thank you. Anyone else here in opposition? Anyone here in a neutral capacity? Senator Hilgers to close. By the way, we do have some letters of support and I'll-- since there's just a few I'll read them: Bryan Sloan, with the Chamber; Mark Johnston, with the

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National Association of Mutual Insurance Companies; Ann Parr, Nebraska Insurance Information Services.

**HILGERS:** Thank you.

**LATHROP:** No letters in opposition, although we've heard testimony. Senator Hilgers.

**HILGERS:** Yeah, thank you Chairman. Thank you, members of the committee. I'll try to be as brief as I can. I do want to touch on just a couple of points that were raised. But before I do that, I do want to say, if I was listening to this conversation in say in 2009-2010 and the back and forth, Senator Lathrop, that you had with Mr. Siegel and some of the proponents about, hey, you know, there's a discovery process. You're gonna ask the question. You're gonna be a good defense lawyer. I probably would say that seems like a fair thing and that's probably how the system would work. But here in 2019, I had the benefit of some information and some data that has come out publicly on this particular practice and I'm gonna cite two pieces of it for the committee. One is this-- the Garlock case which really as far as I can tell sort of broke the dam open on some of this information. Because as you might imagine when cases are settled, especially when they're settled, after a case is resolved that way there's not a lot-- there's no discovery post settlement typically in a, in a matter and so a lot of this information didn't come to light. But I'm gonna read from the Garlock case just briefly and for the record that's-- so I believe it's a Western District of North Carolina bankruptcy decision, Case Number 10-31607. This is Docket 3296, filed January 10, '14, and I'm gonna read from paragraph-- starting at paragraph 40-- 65, and I'll be brief. But the court did allow in this case the defendant Garlock to actually look at-- actually have discovery in closed cases. And what the court said, was in each and every one, each and every one of those cases the exposure evidence was withheld in the case. So that's 15. The court says, well, this wasn't, this wasn't random, it wasn't representatives, we understand that, but the court goes on to say, but the fact that each and every one of them emphasis in the original contains such demonstrable misrepresentation is surprising and persuasive. More important is the fact that the pattern exposed in those cases appears to have been sufficiently widespread to have a significant impact on Garlock settlement practices and results. Garlock identified 205 additional cases where the plaintiff's discovery responses conflicted with one of the trust claim processing facilities or balloting in bankruptcy cases that

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appear-- that are going on-- it appears certain that more extensive discovery would show more extensive abuse. But that is not necessary because the startling pattern of misrepresentation, misrepresentation that has been shown, shown is sufficiently persuasive. After that, the Fordham-- and I've got a copy I'll circulate to the committee before I close. The Fordham Law Review cited, cited a study from 2015 reviewing nearly 2,000 cases. And in that study looking at publicly available information from using-- I'm just gonna quote it, utilizing publicly available discovery data from Garlock's bankruptcy case. The study found that in cases where Crane Company, one of the defendants, was a codefendant with Garlock, plaintiffs filed an average of 18 trust claims. The study also found 80 percent of those claim forms or related exposures were not disclosed by plaintiffs or their law firms to Crane in the underlying tort proceeding. So sitting here today in 2019 with the benefit of that information is very clear the discovery process is not working as it maybe would be intended and that makes some sense because it's normally intended for different circumstances a very unique procedural context that I can find no analog anywhere or I, I can't think of any analog in another context to which it would apply. So big picture, I think that is, that is the core point. Just to address a few discussion items: one's Chair-- Chairman Lathrop was your question on the stay. And I do think it's important, especially in light of Senator Wayne's discussion, that it is not a stay-- a stay being until you file this, nothing goes forward. Discovery doesn't go forward, nothing gets scheduled. And, and I would agree that if it were a stay that would pose some significant problems because that would say your trial date might not be a year and a half in Senator Wayne's case but until you get it all complete that-- if that takes you six months you've just added six months to the case. So it's not a stay. What it is, is it says, you just have to have this done. And I think it's 60 days before trial. So in Senator Wayne's case a year and three months to get these forms completed. Now what I thought was interesting and was referenced by both opponents is they both-- was this theme, well, we have no, we have no incentive to not look at the claims early on in the case. And I would agree, I would agree with that. But if that's the case, you can't have it both ways. You can't say, well, wait a second, on the one hand we have, we have every incentive to do this, but on the other hand say, well, don't require us to do this because if we have to do it then somehow it won't happen or somehow it will be delayed. I think those-- I don't think those two things comport and I think they're in conflict. So what we're saying is not delay, we're saying, we're gonna give you a reason to investigate early, submit your claims so you get money. So exactly

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what you're saying, Senator Lathrop, these people are sick, they might be dying, they might not make it to trial. We're gonna incentivize. We're gonna make sure that at the beginning of the case they're going and getting these claims submitted and, and, and, and getting money early on. Now a couple other points: one, Senator Pansing Brooks, to your question about the amounts and I think, Senator DeBoer, your, your question as well. The information I have, again, citing the Law Review article, which I think cites Garlock, in turn says, that on average it's around 22 trust claims with on average sort of a total payout of around five to six hundred thousand dollars. Just on the, on the trust claims themselves. Again that's average, some might be maybe fewer but some, some might be more. But that's at least the, the data that I have. On the Nebraska piece-- as far as I know they're correct, there have been no asbestos claims filed at the same time. I'm a believer that it's good the set rules in place before we start having people who might be impacted by those rules and this is a-- this has a long incubation period as we've heard. This could take 20, 30, 40 years to set in. There are, as I understand it, seven to eight hundred work sites in Nebraska that are tied in some form or another to one of these asbestos trusts. The idea that we won't have a claim at some point in the future, I think, is probably unlikely. So I think there is a tie to Nebraska, and I think better to do it now so that everyone knows the rules of the road. Just briefly on a couple of-- a couple other points to-- was taking notes throughout. I won't address every single one for the respect of the committee's time. I'd-- the first I had heard of this-- the assignment of claims post judgement I'm-- I'll, I'll be candid I hadn't heard of that. I don't think it happens in the settlement context. It may happen in the in the verdict context. I think if it-- that doesn't square with the evidence that I've seen but certainly that's something that I would look into. I would say interestingly it was my term that was criticized in terms of a peripheral defendant-- certainly a defendant is a defendant, is a defendant. My point was simply that many of these sort of next wave-- again my term, defendants maybe are not the ones who are the primary tortfeasor and I'll give you-- I'll cite back to the Garlock case, paragraph 67, the court said, in contrast to the cases where exposure evidence was withheld there were actually some cases where that evidence was allowed or there was obtained during the trial. And for those, Garlock was able to use that information at trial and for three of them they got complete defense verdicts and in the fourth they got 2-- they were held 2 percent liable. So sort of the-- to at least address a little bit of the question of, of, of what value the evidence would have and, and the fairness. Ultimately, to conclude, I

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would say-- you know, there are some basic principles I think it's-- that are in play here. One is certainly fairness to a plaintiff. You know, we want to make sure that a plaintiff has a just-- and, and an opportunity to get to trial especially when they are sick and maybe dying. Certainly in my view nothing in this bill slows that up inherently. There is no stay mechanism to the extent that the committee disa-- disagrees and thinks that there's ways to change the bill to make that certain. I am more than happy to make those types of changes. It is not my intent to delay anything. To the contrary, I'd like to give money to the plaintiffs on the front end. At the same time, we have other principles of justice, one is fairness to defendants. And they have every opp-- they should have every right to be able to go at trial and, and be able to assign blame if it's there or least tell the jury. They may lose. They may-- the jury may totally disagree but it is fundamentally unfair in my view to be able-- to have to go to a jury without that evidence which the evidence shows is being withheld in many cases and not be able to have your complete defense. I think that's, I think that's antithetical to my-- at least the notion of justice that I understand-- as I understand it and also the double-dipping. I think that, that also is certainly at play here when, when you can get a full judgement against someone and then go and get claims from somewhere else. So with that, I will-- if there are any last questions-- I will circulate the, the Law Review article before I close. And I again-- I appreciate the, the committee's patience and consideration of this bill. Thank you, Senator Lathrop.

**LATHROP:** OK, thank you. I appreciate it.

**HILGERS:** Thank you.

**LATHROP:** That'll close our hearing on LB421. Thank you for those who came here to testify, and bring us to Senator Dorn and LB474. Welcome, Senator Dorn.

**DORN:** Thank you. Thank you, Chairman Lathrop and Judici-- Judiciary Committee. My name is Senator Myron Dorn, M-y-r-o-n D-o-r-n, representing Legislative District number 30 which is all of Gage County and the southeast fourth of Lancaster County. LB474, I'd like to give you a little background information on why I bring this bill to you today. Back in 1985, a 65-year old woman was raped and murdered in Beatrice. After a few years, six people were accused of the crime, tried, and convicted. Eventually DNA evidence exonerated those six individuals. The six people attempted to negotiate with the county for compensation for the wrongful conviction. No agreement could be

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reached and so their attorneys filed a case in federal court. In July of 2016 at the end of the jury trial, the six people were awarded \$28.2 million plus approximately \$2 million in attorney fees for a federal judgment against Gage County. In addition, Gage County has also incurred about \$2 million in legal fees of their own. Throughout the last several years, and visiting with former Senator Baker and other senators, as well as the Governor, the message was the same. The state would not entertain any financial assistance until a final judgment was entered. A similar bill, LB656, was introduced two years ago by Senator Baker on the county's behalf. It was held in committee until the Eighth Circuit Court entered a ruling on the judgment, and so did not advance. After researching possible payment options by the county it was determined the only source of revenue, of revenue available to counties was additional property taxes. Counties were limited by a 50-cent levy lid in collection of property taxes. Last year, Gage County's budget had a levy of approximately 38 cents. This left about 12 cents of remaining levy available. In Gage County, that would collect approximately \$3.8 million per year resulting in a total of approximately 8 years at this level of property tax to pay off the federal judgment. In the 2018-29 budget-- 2018-2019 budget, Gage County increased its levy to the maximum 50 cents and will be collecting these additional property taxes to start payment on the judgment. LB474 is brought today to ask for help. We are all aware of the crisis regarding property taxes and now the citizens of Gage County have added, have added this additional burden. The bill would allow a political subdivision or claimant to file a claim with the State Claims Board if the claimants are awarded a final federal judgment which prove there was a violation of their constitutional rights and the judgment exceeds the financial available resources of the political subdivision. One of the six individuals in the Beatrice case has passed away and this bill also allows a claimant's cause of action to be assignable and survive the claimant's death. There are others following me that also will speak about the particulars of this bill. At this time, I'm ready for questions or if there are any. Thank you.

**LATHROP:** OK. I do not see any questions for you, Senator. We'll--

**DORN:** Thank you.

**LATHROP:** --consider your proponent testimony. Good afternoon.

**JOE MURRAY:** Good afternoon, Chairman Lathrop, members of Judiciary Committee. My name is Joe Murray, that's J-o-e M-u-r-r-a-y. I'm here



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in support of LB474. The Beatrice Six federal judgment has put Gage County in a precarious financial situation as the county has had to max out its levy as a prelude to paying the judgment. Does not seem fair that in rectifying one injustice that thousands of innocent people in Gage County should alone have to make-- take on a burdensome debt because of what I consider a glitch in state law. There's a flaw in the system when the Gage County Attorney's Office, who made the decision to prosecute the original case, was protected by the state sovereign immunity and was protected in the settlement by the state of Nebraska with the Beatrice Six. In contrast, Gage County and those acting at the direction of the county attorney were not protected. They should have of all, all had the same protection and been part of the state settlement. If so we wouldn't be here today and Gage County wouldn't be on the hook for more than \$30 million. I don't know if we can totally fix this with the legislation as legislation is written but it gives the opportunity for a political subdivision like Gage County to make a claim to the state. I believe the victims can also make a claim. Right now this is a unique problem for Gage County, but it could happen to any county. Gage County is a medium-sized county but is straining at the seams to try and come up with the money. This would still be a big problem in a largely populated county like where I live here in Lancaster County. It would be devastating for some of our lowest populated counties. We need to have a system that covers all government subdivisions under the same umbrella. LB474 goes a long way toward this. I'd hope this committee would consider any other options that would make the-- this uniform so all are covered under the same limits of liability as is the state itself. The state of Nebraska immediately admitted complexity and injustice to the Beatrice Six despite tight budgets absorbing this cost as a small dent in the state budget versus massive one for Gage County or any county. Therefore, I would encourage this committee to move LB474 out of committee with amendments if needed. This is a problem that could affect any government subdivision in the state so an adequate method of compensation and protection is needed. I urge this committee and the Legislature to provide the solution.

**LATHROP:** Thank you, Mr. Murray. I see no questions. Next proponent. Good afternoon.

**ERICH TIEMANN:** Good afternoon, Chairman Lathrop and Judiciary Committee. My name's Erich Tiemann, E-r-i-c-h T-i-e-m-a-n-n. I'm the chairman of the Gage County Board of Supervisors. I appreciate the opportunity to talk in favor of this bill. There's gonna be several

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others that you'll all talk about I'm sure that deal with the same issue. Although there's more direct link with Gage County currently due to a federal judgment, this could happen to any of the counties. It's our jobs as Board of Supervisors and commissioners to look at every potential avenue to pay for county obligations while trying to keep taxes under control. As a rural county, our revenue stream is primarily from ag land. When we have a problem-- we need to raise revenue, it comes from property tax. The problem is it doesn't just affect farmers who are already strapped. They are the backbone of our economies in the rural counties. It also affects the businesses, homeowners, and in essence our future as a small county because economic development is stunted or even stopped. It's already moving slow in the rural counties. Gage County currently has a judgment that with other fees will be over \$30 million. We do not have the funds to pay that. We've maxed out our potential asking. Property taxes will maintain at that level now for the better part of a decade if not longer depending on valuations without some type of relief from the state or some other source. We realize the state has its own budget shortfalls and it's always tough as other organizations come asking for money. We also realize you're not required to pay this but we're coming to you asking for help. Up to this point, we haven't said much. As Senator Dorn said, Senator Baker brought this up in the past. We didn't make comment on it as we were advised by our attorneys as there was ongoing litigation. We have appealed to the Supreme Court but we've been given permission to come and give the Board's support of this, this bill. This legislation could provide property tax relief essentially by assisting in a payment that we can only fund with property taxes. This federal judgment which is a county obligation puts a tremendous strain on the taxpayers of Gage. We're asking for the help of the Legislature, and please keep in mind this could be any county not just ours. We appreciate your consideration of this bill.

**LATHROP:** OK. Senator Slama's got a question for you.

**SLAMA:** Thank you very much for coming out today and for testifying. Could you just put into scope what \$30 million means to Gage County?

**ERICH TIEMANN:** That-- that's something to always keep in mind is the relativity of the, of the amount. If we're looking at the state budget, because we always pass down where it would be to the next level, our, our tax asking is somewhere around \$9 million. So that's all operations. We are basically a service organization as a county. We provide roads, maintenance, snow removal, basic services. So on the

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road side and then-- you know, basic services in the courthouse as well. That's all labor. The only way for us to really cut is cut people which we try to run fairly lean already. We've talked about getting rid of people, cutting additional services. We're trying to maintain the service as provided today without, I guess, cutting the services. There's just not a lot of, not a lot of extra there.

**SLAMA:** So your total annual take in is about \$9 million dollars--

**ERICH TIEMANN:** From tax asking.

**SLAMA:** --for everything?

**ERICH TIEMANN:** There are additional dollars that are encumbered, I guess, STP funds, bridge funds, different things like that but the, the unencumbered that we could apply. It-- \$9 million doesn't seem like a lot on a big budget. For us though, we can, we can operate everything like that.

**SLAMA:** I mean, that \$9 million is expected to cover everything including somehow this extra \$30 million burden you guys now have.

**ERICH TIEMANN:** That's the tough part. You can only squeeze that turnip so tight.

**LATHROP:** Did you sign up for this job after the judgment or before the judgment?

**ERICH TIEMANN:** It's, it's ironic-- we were talking about this. The people that are dealing with this now, I was seven years old when this, when this originally occurred in '85. I was our finance chair last year and I, I had a lot there it seemed like.

**LATHROP:** Lucky you.

**ERICH TIEMANN:** Yeah.

**LATHROP:** We understand-- this committee understands the significance of this problem for Gage County, and, and what we can do about it, I guess, remains to be seen in terms of our budget, too. But we, we very much appreciate, Senator Dorn, bringing the bill and the testimony that you brought here today.

**ERICH TIEMANN:** We do, too,--

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**LATHROP:** Yeah.

**ERICH TIEMANN:** --we do, too. And we appreciate all the, all the help that you can hand our way.

**LATHROP:** OK. We'll give it all the consideration we're able to.

**ERICH TIEMANN:** Thank you.

**LATHROP:** Thank you. Next proponent. Good afternoon.

**ART NIETFELD:** Hi, my name's Art Nietfeld, N-i-e-t-f-e-l-d, and I'd like to thank all of you for considering this Beatrice Six bill. I live and farm, farm in Gage County on the Kansas border. While I believe the Beatrice Six were done a very grave injustice, I also believe the wrong group of people will be paying for this injustice. I read that there are only 13,000-- 1,300 farmers left in Gage County and some of them are hobby farmers so they really don't farm that much. Yet it appears that we will be paying most, most of the bill through property taxes. We already pay for most of the schools and county budgets. And then when we go to town, we, we help the cities through sales taxes, plus we pay income taxes to the state. Yet most rural school districts don't get any of that money back for school funding except for special education. Thus, we have to help the, help the cities pay for their schools and the rest of this town through taxes. I, I wonder where cities would be without farmers. On my farm, I figure almost one-half of my net income for cropland goes to paying property taxes and that does not leave much left to pay the interest let alone the principal on my loans. And if we have a drought or lower prices many farmers simply will not make it. Also on pastureland the taxes are even worse. They take pretty much all of one's net income. I have one small pasture that I rented out last year and the taxes and electric bill, bill to pump water for the cattle were roughly equal to the amount of rent I received. I put that piece of land up for sale and have a contract to sell it. Let's see here. It is almost impossible for a young person to get started farming these days and much of that is due to high property taxes. While I have a fairly large farm, I've been told that I will probably have to pay an extra \$10,000 per year in property taxes until the Beatrice Six are paid off. And I sure didn't having any-- anything to do with it. Most, most county residents if they don't own a very large home or maybe rent won't pay much at all actually. Also, from what I've been told, the state passed a law limiting their liability to \$500,000 and that's why the Beatrice Six sued Gage County. Also that the Gage County sheriffs

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and prosecutors were enforcing state laws using state guidelines and procedures. Also I've been told that part of the damages awarded to the Beatrice Six were due to being beaten and sexually abused in state prison. So I ask that you support LB474, and I thank all of you for considering this bill and allowing me to testify.

**LATHROP:** Well, we're glad to have you here in front of your Judiciary Committee, Mr. Nietfeld.

**ART NIETFELD:** Um-hum.

**LATHROP:** I do not see any questions.

**ART NIETFELD:** OK.

**LATHROP:** Thank you for your testimony.

**LYLE KOENIG:** Good afternoon, Mr. Chairman, members of the committee. My name is Lyle Koenig, L-y-l-e K-o-e-n-i-g. I have been practicing the defense of criminal law for a period of 47 years, everything from speeding to homicide. I'm here today because when Erich Tiemann was seven years old I was defending Ada JoAnn Taylor, one of the defendant-- Beatrice Six.

**LATHROP:** Can you pull that mike a little closer to you?

**LYLE KOENIG:** I can. I think it's appropriate that the state participate in the payment of this judgment for a couple of reasons. The first reason is, that a state statute was directly involved, in my judgment, in the conviction of these people. The, the cases were not particularly strong. But for those of you who are not familiar with what happened in the Beatrice Six criminal litigation there was a state statute staring us in the face namely the capital punishment statute. These people were threatened with that. But for that there would probably have been six trials as opposed to plea agreements. So a state statute, in my judgment, was directly responsible for the fact that innocent people got convicted in this case. I'm here for a second reason and that reason is this: it is abhorrent to us in America that innocent people be convicted of crimes they didn't commit. It is-- it fights with common decency. It fights with our tradition. It is fundamentally unfair. It is unjust. Innocent people ought not to be incarcerated for crimes that they didn't commit. These people were incarcerated for crimes that they didn't commit. The justice system-- the criminal justice-- or excuse me, the civil justice system has

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decided that they're entitled to \$28 million. But if nobody pays it, they're still victims. And as Mr. Tiemann and others who have testified here today have told you, it appears that Gage County is not capable of paying it. So if Gage County can't pay it then there is an, an additional injustice imposed upon these people namely that they suffered this injustice and they don't recover for it. I don't think that's fair either. Now I recognize that this, this committee is probably not inspired to report this out and there's a lot of people that are going to be opposed to the state paying it but I think it's fair and I think it's just. And I see my time is up, so I'll submit it with that.

**LATHROP:** Senator Brandt.

**LYLE KOENIG:** Yes, sir.

**BRANDT:** Thank you, Mr., Mr. Koenig for testifying today. You've been on this a long time.

**LYLE KOENIG:** Yes, sir, I have.

**BRANDT:** You've been on it since the start. And just for my edification, how did the state of Nebraska dodge their responsibility on this in your opinion?

**LYLE KOENIG:** I'm not sure I understand your question, Senator. When you say how do they dodge their responsibility--

**BRANDT:** It appears to me that, that everybody's that testified so far indicates that the state should step up to the plate--

**LYLE KOENIG:** Yeah.

**BRANDT:** --and help with this that just Gage County is the one picking up the bill on this and I guess from your perspective how did that happen?

**LYLE KOENIG:** Well, as a previous witness told you, I suppose that the people that are primar-- primarily responsible for it have escaped judgment because of prosecutorial immunity. A public prosecutor made the decision to bring this case on the basis of evidence that was questionable without a doubt. And then in addition to that, I need to tell you and I've testified twice in federal court and in the state court in this case so I'm familiar with it. And of course I was, I was a part of this. As defense counsel, we were not told for example, that

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there was an FBI profile that implicated the person that was ultimately determined to be the, the perpetrator of this crime. His name was never disclosed to us. A lot of things were not disclosed that should have been disclosed. And if they had been, trials would have happened. I think acquittals would have occurred and none of this would have ensued. So that's part of why-- you know, this, this has evolved. And I think that Nebraska is responsible because part of what's responsible, as I said earlier, is a Nebraska statute. Namely, if we had not had the death penalty statute in effect and if these people had not been threatened with that they wouldn't have pleaded. And that's why I think Nebraska as a state is directly involved and directly responsible.

**BRANDT:** OK, thank you.

**LYLE KOENIG:** You're welcome.

**PANSING BROOKS:** Senator Pansing Brooks

**LYLE KOENIG:** Yes, ma'am.

**PANSING BROOKS:** Thank you for coming today, Mr. Koenig. So we-- I believe-- I'm looking back at my notes from 2017 to see what, what we heard at that point. And at that point there was a lot of discussion about the fact that, that there-- it was a Gage County attorney that was hired by and voted in by Gage County voters. And so there is some responsibility in that fact. So could you just speak to that a little bit if you please?

**LYLE KOENIG:** Well, there is no doubt that the attorney that made the decision to bring this case was an elected official of Gage County, but it is Nebraska law that permitted him to escape any responsibility for this because of the doctrine of prosecutorial immunity. In other words, he is simply immune from, from a judgment or under our law and therefore he's just not responsible. If you're suggesting that Gage County ought to foot the bill simply because the voters of Gage County elected that county attorney, I have to tell you that, that I, I would question whether you want-- would want to extend that doctrine too far. I mean that could apply to a lot of situations.

**PANSING BROOKS:** Well, I'm, I'm not saying what I believe,--

**LYLE KOENIG:** OK.

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**PANSING BROOKS:** --but I'm just saying that is, is a county never responsible for the bad acts of, of the people whom they elect?

**LYLE KOENIG:** Yeah, are they never, no, I think sometimes they could be.

**PANSING BROOKS:** When would you be? I'm trying to figure out-- wrap my head around that.

**LYLE KOENIG:** Well, because-- but, but there is an additional factor here, that in my opinion, negates that and that additional factor is a statewide statute that applies to us all that was applied in this case where every defendant was, was threatened with the death penalty if they didn't plead. And if that phenomenon had not existed this wouldn't-- we wouldn't have this situation.

**PANSING BROOKS:** I appreciate that. Thank you very much.

**LYLE KOENIG:** You're welcome.

**LATHROP:** I see no other questions. Thank you for your testimony, Mr. Koenig.

**LYLE KOENIG:** Thank you, Mr. Chairman.

**ELAINE MENZEL:** Chairman Lathrop and members of the Judiciary Committee, for the record my name's Elaine Menzel, E-l-a-i-n-e M-e-n-z-e-l, here on behalf of the Nebraska Association of County Officials and we, too, support LB474. Certainly appreciate, Senator Dorn, for bringing this legislation to your attention and appreciate your consideration of this issue. I think both, Senator Dorn, and the supervisor-- chairman of Gage County were very humble in their description of their involvement in trying to figure out how to best deal with the options for financial payment of this judgment. As you likely know counties are limited in the terms of how they can best raise revenue and that's by a 50-cent levy limitation. And Senator Dorn somewhat described that for you. I will certainly answer any questions you may have of me and appreciate again your attention and hope you will look favorably upon this legislation.

**LATHROP:** OK. I see no questions, thank you.

**ELAINE MENZEL:** Thank you.



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**LATHROP:** Good afternoon.

**DON SCHULLER:** Good afternoon, Senator Lathrop and committee members. My name is Don Schuller, D-o-n S-c-h-u-l-l-e-r. I'm a landowner and a farm operator from southern Gage County. And I represent the Gage Taxpayers Organization. It has been said that the people of Gage County are responsible for the actions of those they elect to office. The people's only choice is of those who choose to run. This does not ensure quality elected officials. The people of Gage County are just as innocent as the Beatrice Six. Yet, we are expected to pay for the errors of those we have been told to trust. The largest part of the burden of paying the judgment will fall on the farmers. It is true the county attorney and the county sheriff are elected by Gage County voters to enforce state law. We do not have control of who is hired as deputies or how they are supervised. The county board does not either. The county designation is a definition of primary jurisdiction. They are not controlled by the county. Their conduct is set by state law that they enforce it and set out the procedures they are to use. Voters in the legislative district elect a state senator but that doesn't make him or her an employee of the legislative district. The same goes for the county attorney, sheriff, and judge. The people of Gage County were not aware of how the investigation and the murder of Helen Wilson was being conducted. All we knew was what we were told by the county officials via the local newspaper and radio. At the time the county officials were looked upon as heroes. If we are expected to not reelect officials inappropriately doing their job, are we supposed to investigate how they are doing their job? We expect our elected officials to do the job the right way. It is up to the state to oversee and determine if investigations and interrogations are being conducted properly, not the people of the county. Who are the county attorney and the sheriff accountable to? He or she reports information to the taxpayer who voted for them but when it comes to accountability for their actions in conducting their job it is the responsibility of the state. We the voters cannot be expected to know how they are to do their job. This is not a bailout of the county by the state. The state has responsibility for what has happened in Gage County not the voters. The state sets the rules and the methods of interrogation. It was a state death penalty that was used to coerce a confession. The Beatrice Six served time in the state prison which is part of the civil case against Gage County. What could be done to reduce the chances of this happening again? I do have a few thoughts but that's another subject. It could happen in a county in your district. It already did in the case to Mr. and Mrs. Stock near Murdoch in Cass

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County. Measures need to be taken to prevent this from ever occurring again. This state should not turn its back on any county where the state laws and state prison created the situation Gage County is in. Please give LB474 your full consideration and do the right thing to allow the state the opportunity to do the right thing. And let's get the Beatrice Six paid. They need it. They deserve it.

**LATHROP:** Thank you, Mr. Schuller. Appreciate you--

**DON SCHULLER:** Yep, thank you.

**LATHROP:** --coming here today. Next proponent.

**GREGORY LAUBY:** Senator Lathrop, members of the committee, my name is Gregory C. Lauby, G-r-e-g-o-r-y C. as in Christian, L-a-u-b-y. I live in Wymore, Gage County, Nebraska, and I'm here today to support LB474 originally introduced as LB656 by Senator Baker and then reintroduced this year by Senator Dorn. The bill is intended to provide an adequate remedy at law for the innocent. It expands the coverage of the Wrongful Conviction and Imprisonment Act to apply to innocent individuals who are incarcerated for a felony as, as happened in Gage County-- or in Cass County so that it does not require a conviction to be eligible for the remedy that the Act provided. That case in Cass County resulted in lawsuits and settlements amounting to several million dollars. And I understand that Cass County's property tax rate has increased to being one of the highest in the state in part because of, of those settlements. Secondly, it continues the present remedy for those innocent who were wrongfully convicted and imprisoned for a felony but also expands their remedies to include an opportunity to seek state payment of a final federal judgment if they are required to resort to federal court, under 1983 or '85, to get a complete and adequate settlement for the damages. And then, thirdly, it seeks to protect innocent property owners within the political subdivision itself by allowing either the political subdivision or the claimants to file a claim with the State Claims Board and that claim if approved could be referred to the Legislature for an appropriation of funds. This would spare the innocent property owners and recognize that the damages were caused by the state of Nebraska in large part. And in that I have handed out that details some 18 different ways in which the state or their agents were directly involved in the prosecution of the cases known as the Beatrice Six. And it also sets out in some additional detail three times in which the state could have acted differently or in which the conditions specifically those in the state prison contributed to either the conviction of innocent people that

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could have been averted or the damages they suffered in the 75 years that they collectively suffered in Gage-- in prison. And I would know that as far as Gage County goes 75 percent of the taxable assessed value of property in Gage County is rural property. And according to the federal farm service, the most recent report in 2018, there are only 1,303 farm operators left in the county. That is down 211 from 2 years ago; the report that was made by the same agent.

**LATHROP:** OK, appreciate that. I don't see any questions.

**PANSING BROOKS:** I just have one.

**LATHROP:** Oh, I'm sorry, Senator Pansing Brooks.

**PANSING BROOKS:** Thank you, Mr. Lauby, for this list. I think it's pretty extensive and thank you for it.

**GREGORY LAUBY:** Please note it is a partial list. I didn't mention some of the things that the previous testifier illuminated and I think it can grow considerably.

**PANSING BROOKS:** Thank you.

**LATHROP:** Very good. I see no other questions.

**GREGORY LAUBY:** Thank you.

**LATHROP:** You're very welcome. Is there anyone else here to testify as a proponent? And if anyone else is going to testify on this bill you can come up to the front row that helps keep the thing-- the hearings moving along. Good afternoon.

**MATT GREGORY:** Good afternoon, Chair Lathrop and members of the Judiciary Committee. My name is Matt Gregory, M-a-t-t- G-r-e-g-o-r-y. I'm representing Nebraska Farmers Union today. They're a statewide nonprofit advocating for family farmers and ranchers and issues that affect them. And we have members in Gage County who are concerned about the events that led to the introduction of this bill. So we'd like to thank, Senator Dorn, for doing so and we lend our voice of support. I'll try not to repeat a lot of the stuff that we've already heard. But because of our concern on this topic, we've added language to our policy at our annual convention. Nebraska Farmers Union calls for the State Legislature to address the excessive county tax burden created by the federal court judgments against the county for actions of its employees who were found to violate constitutional rights of an

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individual suspected of a crime that may exceed the existing financial resources of a county and threaten the county with bankruptcy. So we support the payment of a final judgment against a political subdivision in this situation to come from the State Treasury when such judgment amount exceeds the existing financial resources of the political subdivision and urge that pending obligations be budgeted by the state. So in short, let's provide relief, let's not let counties go bankrupt so they can continue to provide crucial governmental services. Raising property taxes would only compound that-- the already happening, a property tax crisis that's happening in our state, not to mention cutting government jobs, or education funding, taxing groceries, or ceasing road repairs. All of which could cause residents to flee the area further contributing to the brain, brain drain in the region. So let's not let other counties have to make these tough decisions. We urge the committee to please advance the bill.

**LATHROP:** Very good. Thank you, Mr. Gregory. I don't see any questions. Anyone else here to testify as a proponent? Anyone here to testify in opposition? Anyone here in a neutral capacity? Senator Dorn to close. And while you're walking up here, I have letters of support from Monte Murkle, Joyce Bednar, Richard Goertzen, Elizabeth Shotkoski Jurgens, Don Ferneding, Jane Keefover.

**DORN:** Thank you, Sen-- Chairman Lathrop. Thank you, Committee. And, Senator Slama, I'll just answer a little bit. I know Senator-- or Erich Tiemann tried to answer the question a little bit. In Gage County last year collected in tax asking for property taxes for operations of the county budget approximately \$8.8 or \$9 million. So as you can see this judgment of \$30 million-- if they devoted all of that to paying this off that would still take over three years. Their budget, however, was quite a bit bigger than that because they get a lot of-- well, the state gas tax comes back in. Part of the state gas tax does that they're allocated back in and other sources of income also come back into that. So their whole operational budget if you go on and look on the Internet it's up in the \$20 million range. But there's a lot of other parts that play into the budget just like the state's budget or whatever. So it does put 12 cents out of the 50 cents are now strictly obligated to paying off this judgment of the Beatrice Six. That will be collected this year in property taxes, half in the first part of May. Shortly after that, they will pay that towards the judgment and then the other half in the first half of September. This is a, a situation though that this is not an eight-

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year agreement to do this. This has to come back through the budget process every year and be approved by the county board so that \$3.8 million could fluctuate a little bit. That amount of the payment. There also are two other bills that brought forward this year. One was brought forward two years ago about borrowing for a federal judgment from the state at a half a percent. That one we have brought back this year also. And then there's also one about a county sales tax both of those LB472 and LB473 will be heard in Revenue in the coming weeks. Just wanted to bring that up just as a matter of information more than anything. I also want to make and emphasize this point: the judgment is basically final or is final. We know what that amount has been. The county board which I had been on for the last eight years come to the determination with a lot of legal counsel that in the last several years that we needed to come to the point of how to pay that off. That's why at this current stage that is only allowed by state statute on property taxes. That's why we're looking at some other avenues or the county is looking at some other avenues of maybe possible support, maybe possible help in paying it or some other avenues of now coming about and raising other funds and that's why we went about the sales tax issue also. I thank the committee very, very much for allowing us to come back up here. I know two years ago this created some interesting conversation, as I think Patty read there, and I read the transcript several times on this bill and the other bill. So it has created some good conversation. We appreciate that very much. We also appreciate very much everybody taking the time to listen and to hear out some members of the county and other people. So thank you much.

**LATHROP:** Very good. Thank you, Senator Dorn. I don't see any other questions. Thanks for bringing the bill here today. Thanks for those of you who testified. That will close our hearing on LB474. We are going to take a brief break, probably five to ten minutes before we resume hearings. Thank you.

[BREAK]

**LATHROP:** Looks like three people so can somebody alert Senator Brieser that we'll be on his bill in 15 minutes or so, maybe 20. Senator Cavanaugh, welcome to the Judiciary Committee. You are good to open on LB533.

**CAVANAUGH:** Thank you, Chairman Lathrop and members of the Judiciary Committee. My name is Machaela Cavanaugh, M-a-c-h-a-e-l-a C-a-v-a-n-a-u-g-h, and I represent District 6 in west-central Omaha. I'm going to take a quick sip of water, sorry. I'm very parched. I am

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here to introduce LB533 which will update state statutes to be consistent with federal law by using gender neutral terminology regarding marriage. As we approach the fourth anniversary of the Supreme Court's-- oh, I'm going to say it wrong-- Ober-- Obergefell decision enacting that same gender marriages are a legal reality in all 50 states, Nebraska state statute 42-109 does not reflect federal law. In addition to being unnecessarily hurtful or distressing to Nebraskans during what should be a joyous stage in their lives, this outdated language could put marriage officiants at odds with state law if they do not follow the letter of the law in the case of this state statute. Current statute requires the officiant to instruct the two parties joining in union to declare that they take one another as husband and wife. LB533 does not preclude any ceremony, religion-- religious or otherwise, from using the term "husband and wife" but rather it strikes the requirement and instead changes a declaration to "in marriage." Under current law, an officiant would be in violation of the law if they were to use the commonly used-- used term "man and wife." To reiterate, an officiant may continue to use husband and wife, husband and husband, wife and wife, and any variation that they can think of to be appropriate. I believe last year Senator Chambers suggested "turtle and terrapin." That also would be suitable in this new requirement. In addition to the original bill drafted, an amendment has been crafted after discussions with representatives from civil rights groups, religious organizations, government officials who oversee the marriage process, and the LGBTQ+ community. This amendment clarifies that the couple applying for a marriage license will be referred to as "Applicant 1" or "Applicant 2" rather than bride or groom. Currently, many marriage license application forms identify them using some variation of groom/Applicant 1. I would like to note that Lancaster County's marriage application form, which each of you should have received a copy of, already follows this convention. This change is important so as to ensure that there is no confusion during the application process. In closing, I ask that you vote to approve LB533 and this amendment. I'm glad to answer any questions from the committee.

**LATHROP:** I-- Senator Pansing Brooks.

**PANSING BROOKS:** I just can't help it. Thank you for bringing this, Senator Cavanaugh. I just-- I really appreciate this change. Thank you.

**CAVANAUGH:** I'm happy to do it. Thank you.

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**LATHROP:** Senator Brandt.

**BRANDT:** Thank you, Senator Cavanaugh. Just a real quick question. Looking at this form right here, it has Applicant 1, Applicant 2 but then the next one asks for maiden name. Is that going to be a problem?

**CAVANAUGH:** No, that's just an option if applicable so only if you want to put that down.

**BRANDT:** I'm just--

**CAVANAUGH:** Yeah.

**BRANDT:** That terminology would have-- if we're making corrections--

**CAVANAUGH:** We did talk about changing the terminology but there's not a more widely used term so maybe in a couple of years we'll come back and fix that one.

**BRANDT:** All right. Thank you.

**LATHROP:** Anybody else? Oh, Senator Pansing Brooks.

**PANSING BROOKS:** I know you're so surprised. OK. I just as an FYI, I do like that Senator Brandt found that and we could change that at some point to "birth name" it seems to me.

**CAVANAUGH:** There was-- we discussed it and I can't remember now why 'cause I say birth name. I go by my birth name.

**PANSING BROOKS:** So do I.

**CAVANAUGH:** I use my own birth name so-- but I can't remember, certainly worth revisiting.

**PANSING BROOKS:** Thank you.

**LATHROP:** I see no other questions. Thanks, Senator Cavanaugh. Are you going to stay to close? OK, perfect. First proponent may sit in the testifier seat and be heard. Welcome.

**ABBI SWATSWORTH:** Thank you. Thank you, Senator Lathrop and members of the Judiciary Committee. And thank you very much, Senator Cavanaugh, for introducing this technical bill. My name is Abbi Swatsworth. For the record, that is A-b-b-i S-w-a-t-s-w-o-r-t-h. I'm here representing Out Nebraska as the executive director. We are Nebraska's only

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statewide organization working to empower and celebrate Nebraska's lesbian, gay, bisexual, transgender, and queer questioning community. We stand in full support of LB533. A wedding is undeniably the ultimate expression of love for any couple. But all we know-- we all know that the process of wedding planning can be very stressful. With so many details to make decisions on, choosing who will be the bride and who will be the groom on a marriage license for same sex couples is one detail that needs to be deleted. Same sex marriages and the weddings that bind them are the law of the land. Labels matter. No one should be forced to choose a label that does not apply to them. Same sex couples do not expect that they will be forced to choose a label bride or groom on their marriage license. Discovering that this label will be applied can be embarrassing and hurtful. It can bring up memories of being teased or bullied or recall situations where one of the other-- one or the other of the couple was discriminated against. LB533 is a technical bill that can easily remedy this situation. The removal of gendered language from state statute regarding marriage in no way diminishes a couple's pledge of fidelity, but the continuation of this gendered language diminishes same sex couples across our great state. In 2019 it is time for marriage statutes and marriage licenses to be divorced from gendered language so that all couples can begin their married life freely and happily. Out Nebraska strongly encourages you to move this technical bill to General File, and I'll answer any questions

**LATHROP:** I don't see any questions but thank you for your testimony.

**ABBI SWATSWORTH:** Thank you.

**LATHROP:** Next proponent. We have a sort of an on-deck circle here. If you're going to testify, you are welcome to sit in the front row Good afternoon.

**DAN NOLTE:** Hi. Mr. Chairman and members of the committee, my name is Dan Nolte, D-a-n N-o-l-t-e, and I'm the Lancaster County Clerk. I'm here today in support of LB533, an amendment to change the wording on marriage license from bride and groom to Applicant 1 and Applicant 2. As you may know, in Nebraska county clerks issue marriage licenses. After the 2015 Supreme Court decision legalizing same gender marriages, many couples have expressed their frustration and disappointment to my staff regarding terminology on the document, specifically references to bride and groom. We oftentimes see anguish and embarrassment in women's faces when they're forced to choose which of their names is to be listed in a box labeled groom and the same



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sentiment in reverse for male applicants. Changing the words "bride and groom" to "Applicant 1 and 2" will align with the court decision of four years ago and will continue to foster greater equality and respect for all couples seeking marriage licenses in Nebraska. If you have any questions, be glad to answer.

**LATHROP:** Senator Pansing Brooks.

**PANSING BROOKS:** Thank you for your vision, Mr. Nolte, and your willingness to validate what the Supreme Court has decided and to follow with our-- our current constitutional law pursuant to the Supreme Court and making it more-- more encompassing for all people in Nebraska. Thank you very much.

**DAN NOLTE:** Thank you. I really appreciate that. I'll pass it on to my staff. They've been very helpful on that so.

**PANSING BROOKS:** Thank you.

**LATHROP:** Very good. Hey, can I just ask one clarification question? You're speaking just for yourself or your office and not the county officials.

**DAN NOLTE:** Correct.

**LATHROP:** Got it. Thank you. Next testifier. Good afternoon.

**DANIEL ESCH:** Senator Lathrop, members of the Judiciary Committee, thanks a lot for letting me testify today. My name is Daniel Esch, spelled D-a-n-i-e-l, last name is spelled E-s-c-h, the Douglas County Clerk. And I'm just representing the Douglas County Clerk's Office here today to talk about my support for LB533. I suppose I really don't have-- I did write some remarks, but I really don't have much more to add. It's already been said. The letter that got handed out is just a copy of what I e-mailed you all yesterday. I wasn't sure if I was going to be able to make it down. But I guess I'll take an opportunity to maybe explain why. Senator Cavanaugh mentioned how on Lancaster County's application, if I understood her correctly, they will just put Applicant 1 and Applicant 2 on the application. The Douglas County Clerk's Office started doing that. But on the actual marriage license form that you get from the state, we can't-- we have no control over how that appears. It appears as groom/party A; bride/party B. And so, you know, people are caught off guard regardless. But I guess I wanted to catch them off guard on the

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application instead of thinking that the actual marriage license was going to say Applicant 1, Applicant 2 and then they're surprised when they actually see the actual marriage license so. I know the bill as written out doesn't address that; but if that amendment is chosen by this committee, I would definitely support that.

**LATHROP:** OK. Thank you, Mr. Clerk.

**DANIEL ESCH:** Thank you.

**LATHROP:** Appreciate hearing from you.

**DANIEL ESCH:** All right, thank you.

**LATHROP:** Thanks for being here today. Anyone else here in a-- to testify as a proponent? Anyone here testifying in opposition to LB533? How about in a neutral capacity? Seeing none, Senator Cavanaugh to close. We do have three letters, one in support, Heather Holmes; the Clerk who just testified, Dan Esch; and Amy Miller from the ACLU. Senator Cavanaugh.

**CAVANAUGH:** Thank you.

**LATHROP:** Wish all our bills went as [INAUDIBLE] [LAUGHTER]. Just an observation [INAUDIBLE].

**CAVANAUGH:** You're welcome. I just from a personal standpoint-- and I know that the Chairman knows this-- but Clerk Esch is-- replaced my Uncle Tom after he passed away. June 25, 2015, my daughter Harriet was born. I was in the hospital at Methodist Women's and texting with my Uncle Tom who was in hospice. And he was great about texting and he loved to use emojis. The next day is when the Supreme Court decision came down, and I immediately texted Tom and he told me that he was leaving hospice to go to work to sign the first marriage license. And he sent me a whole bunch of rainbows and then rainbow hearts and a shamrock and smiley face. That-- that text message will always be in my heart. This is-- it's really important. Words do matter. Labels do matter. And making sure that everyone feels loved and included, especially when they're getting married, is really important. So it means a lot to me that there aren't any people testifying in opposition and it means so much to me to have Dan Esch and Dan Nolte here today. So thank you. And if you have any further questions.

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**LATHROP:** No. Your-- your Uncle Tom was a great guy. I don't see any other questions. Thanks, Senator Cavanaugh.

**CAVANAUGH:** Thank you.

**LATHROP:** That will close our hearing on LB533 and bring us to Senator Briese who will introduce LB593. Good afternoon, Senator Briese.

**BRIESE:** Thank you, and good afternoon, Senator Lathrop-- Chairman Lathrop and members of the Judiciary Committee. I am Tom Briese, T-o-m B-r-i-e-s-e, and I represent District 41 in Central Nebraska, and I'm here today to introduce LB593. LB593 would repeal certain provisions of statute that have given rise to some unintended consequences for the Nebraskans affected by them and they have not resulted in significant benefit to the state. The intent of the current statute was to provide the state on behalf of the taxpayers' additional layers of recourse to prevent Medicaid fraud. Without question this is a laudable goal. What could not have been anticipated, however, was the extent to which the process created by the current statutes would affect the ability of Nebraskans to handle their real estate and financial matters. LB593 seeks, seeks to remove some of these impediments. First, the bill removes the certification and waiver process that has hampered the administration of trust assets across the state even when DHHS has no interest in them. Second, the bill removes the provisions of statute that create a lien against assets held by a person potentially eligible for Medicaid. These potential liens have given rise to issues related to title to real estate. In addition to these two key provisions some other minor provisions would be repealed by LB593. Notably, the bill would repeal certain provisions that arguably run afoul of federal law such as a provision that allows a county attorney to act on behalf of DHHS under certain circumstances or a provision that requires commercially reasonable rent to be obtained under certain circumstances. LB593 was brought to me at the joint request of members of the Nebraska State Bar Association and the Nebraska Farm Bureau. Both attorneys and farmers across the state see the need to make the changes proposed by the bill. I know there are attorneys present to testify about the details of the bill and they might be better suited to handle your specific questions about the bill and about the unanticipated issues that have arisen as a result of the, of the statutes. I will note that you have-- I believe you received the letter from DHHS in support of this bill indicating it will, quote, clarify existing law and remove unenforceable and unnecessary provisions, unquote. I thank you for

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your time. I'd be happy to any-- answer any questions that you might have.

**LATHROP:** I don't see any questions. Are you gonna stay to close?

**BRIESE:** Yes, I will be here. Thank you.

**LATHROP:** First proponent may testify or come to the testifier seat.  
Good afternoon.

**FRANK HEINISCH:** Good afternoon. My name is Frank Heinisch, F-r-a-n-k, Heinisch H-e-i-n-i-s-c-h. I'm an attorney in Geneva, Nebraska. I have been active in this arena of dealing with LB72, and testified before the Judiciary Committee way back in 2015 in opposition of it. And that's been growing, lifting a calf every year for years now. I have presented written material, there's a memorandum that is being handed out that we may or may not have time to, to discuss in detail but it does give step by step of specifically what is being changed and some of the arguments. I also have being handed out an e-mail I received from Nate Watson, an attorney with DHHS, that speaks to the issue of what has been the effect of the bill as far as activity. There are 3,105 is what his e-mail says that have been requests for a waiver or certificates resulted in 40 that they have worked on. Of the 40 cases, there's one that's not been complete, and there are 23 that no funds were involved, and 16 in which provided recovered funds and the e-mail says, however, it's my contention that we would have recovered these funds without LB72 and LB268. This-- the comment that's been made earlier has been that this is a solution looking for a problem and that's what was passed in 2015 by LB72. One of the main focuses was to prevent the distribution-- to prevent trusts to be distributed without Health and Human Services having permission to make the distribution. I'm an estate planning attorney. I'm not-- I'm a probate attorney. I'm not a Medicaid attorney, but they got into my world. They said, that I could not distribute assets out of a trust that may have millions of dollars that nobody ever talked about Medicaid. What are they doing in this world of mine? And so that's probably what inspired me more than anything else to say, let's review this. You know what's interesting is, you cannot have a trust like that, revocable grant or trust, or a self-funded trust and be on Medicaid. Simple as that. So you're, you're dealing with a problem that doesn't exist. I've gotten trapped into speaking as the memorandum said on four or five different occasions. I've written material that kept expanding. I gave the first four pages of the material, on the very bottom of the page it shows where you can get it Googling my name, Medicaid LB268, there's over

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200-- there's a 200 page diatribe talking about how attorneys deal with Medicaid planning and LB268. I have also handed out a sheet which has 60 some-- 64, I believe, attorneys names that have sent e-mails to me supporting this, this bill and I have also made one-- I approve-- provided one copy of all of the communications that I've received from the attorneys. The real estate trust and probate section, I asked that-- I see if I could deal with this by appearing on my own here but we also have the Bar Association is in support of this. From there, I can get into any substantive questions that you have. Briefly touched my, my main point of contention is that we need to get rid of this waiver process. We're involving a lot of people and a lot of things that it's a waste of time, a waste of effort for Health and Human Services and lawyers. We need to get rid of this lien, it's not enforceable under the federal laws, and all of a sudden we have a lien for an unknown amount of money, a lien that you do not know when it's going to be applied because you've got to wait for the death of husband and wife or there-- one or the other is the recipient. So we're-- and it's contrary to the federal law because it does not recognize a 60 to-- 60 month look back period. So those are the two and then there was some negotiation with Health and Human Services of other things that have cleaned up. From that, I'd open to questions on anything substantive, I'm-- I've done a lot of the drafting and reviewing of it. Yes, sir.

**LATHROP:** Senator Brandt.

**BRANDT:** Thank you, Mr. Heinisch, for appearing today. So this bill will clean up the problems the legal community has with HHS that was created by the other two bills. Is that correct?

**FRANK HEINISCH:** I don't know if we'll ever get all the problems cleaned up. I've, I've taken this as an approach, it should be a nonrevenue approach and this lien situation is not being enforced, cannot be enforced so there's no revenue coming there. The waiver has just been costing a lot of money. What we've had is that Health and-- that Nate Watson has been just overburdened with calls about title companies and that-- what's going on with the lien? How do I get this waiver? I can't close a real estate deal on that. And we just need to clean that up. I, I don't know I-- there, there are other issues that may or may not come up, but these are the two that are the main one that this bill is taking care of right now.

**BRANDT:** All right, thank you.

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**FRANK HEINISCH:** Yes, sir.

**LATHROP:** Seeing no other questions.

**PANSING BROOKS:** I have a question.

**LATHROP:** Oh, I'm sorry. Senator Pansing Brooks.

**PANSING BROOKS:** Thank you for coming today. I was just-- is this-- was this pursuant to a bill a couple of years ago? Can you tell me, and I may have missed-- Senator Briese may have said something, but I was trying to catch up and get up to speed.

**FRANK HEINISCH:** LB72 was adopted in 2015.

**PANSING BROOKS:** OK.

**FRANK HEINISCH:** And in 2015, it created a system in which we had to contact Health and Human Services and they'd give us a waiver before we could make a distribution out of any revocable grant or trust that became irrevocable by reason of death. What was interesting was that Health and Human Services would not give us an answer as to whether there was any Medicaid due. That was really interesting and LB268 did clean up that problem but for a while we were doing trusts saying we're avoiding probate and then we have to go to the probate court to get permission to gain information as to whether or not there was any Medicaid due. It was a crazy time for a while. A lot of legal effort was done to try to work around that-- get workarounds.

**PANSING BROOKS:** OK, thank you very much.

**FRANK HEINISCH:** You're quite welcome.

**LATHROP:** All right, I see no other questions. I should recognize that our paths crossed early on in my career and I didn't recognize you today. It's been maybe 30 years ago, so in fairness you probably didn't recognize me either. I've changed a little bit as well.

**FRANK HEINISCH:** This year is the fiftieth year I've been at this and still going strong.

**LATHROP:** Yeah, not quite as many for me. Good to see you, and thanks for being here today.

**FRANK HEINISCH:** Thank you, sir.

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**LATHROP:** Next proponent. Good afternoon.

**RAMZI HYNEK:** Good afternoon. My name is Ramzi Hynek, R-a-m-z-i, Hynek H-y-n-e-k. I'm here today to speak on behalf of the Nebraska Bar Association. By way of background, I'm a partner at Rembolt Ludtke Law Firm here in Lincoln and for nearly 12 years I've practiced almost exclusively in the areas of estate and probate work. The Bar Association is supportive of LB593. Nebraska statute 68-990 creates a potential lien which clouds the title of real estate where a life estate has been retained. An overwhelming majority of uses of this type of planning has nothing to do with planning for Medicaid, rather it's simply a cost effective means of transitioning ownership from generation to generation. Put bluntly, this imposition of a potential lien significantly disrupts a family's ability to do it, succession planning. Not only does a potential lien get imposed when a gift of real estate occurs but also when parents create an entity such as an LLC, transferring real estate into this entity and then the children later become owners of that even as in a minority fashion. This is not an issue just affecting ag families, this also hinders planning by all small family owned businesses. A second result of this legislation in Chapter 30, is that whenever any person dies having created a trust that became irrevocable as a result of death, no distribution from that trust can take place without, without first obtaining a waiver from DHHS. As was stated earlier unless fraud has occurred at the time of application for Medicaid, there is absolutely no way a legitimate trust could be in place at the time of death of a Medicaid recipient. The result of these laws is that all Nebraskans suffer this burden placed upon them of significant time delay in being able to make distribution, but also potentially a significant legal fees added on to an already expensive process upon death. With the limited amount of time that I'm granted to speak to you today, please understand I was only able to scratch the surface of the issues that our clients are, are seeing. However, the theme that I want to leave you with today is that while LB593 attempts to relieve the great majority of Nebraskans that will never become recipients of Medicaid, we-- we're attempting to, to rid them of unnecessary delay, significant costs to administer the affairs of their loved ones. It is up to you now as the representatives of our state to weigh those significant burdens that are created amongst the whole with any potential successes or if there are any successes that DHHS is seeing on the financial side of things.

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**LATHROP:** Very good. Any questions? I see none, thanks for your testimony.

**RAMZI HYNEK:** Thank you.

**LATHROP:** Next, next testifier. Good afternoon.

**SCOTT PETERSON:** Good afternoon, Senator Lathrop and members of the Judiciary Committee. My name is Scott Peterson, S-c-o-t-t P-e-t-e-r-s-o-n. I'm here on behalf of Nebraska Farm Bureau and Nebraska Cattlemen. I'm also here on behalf of my several hundred clients in the state in Nebraska. I'm an attorney and rancher in Cherry County Nebraska. My law practice does have practice in South Dakota and Nebraska, so I get to see this in multiple states. We don't oppose Medicaid getting additional assets for recovery which are allowable under federal law. DHHS has indicated that this-- the changes in LB72 and LB268 give them broad authority to recover those assets and we're not looking to diminish that authority. What we are doing, is going through this law in the way that we went through it with DHHS after they were passed. DHHS-- we met with, after LB268 was passed, to go over some of the lien issues that we had-- the commercial reasonableness test and some of those things. And hopefully in their letter they discuss that actually according to federal law the lien that was created as an illegal lien and therefore unenforceable by them and they would refuse to enforce that law. The commercial reasonableness test which is also included in LB593 or the removal of it's included in LB593 is also unenforceable under federal law. And so what you'll see throughout LB593 is basically a cleanup of basically meetings between the Bar Association, Farm Bureau and DHHS regarding (a) what is unenforceable and (b) what is unmanageable. They DHHS and, and the Bar Association both would agree that the trust portion of this and the reporting portions of it have done almost no good as far as collecting additional revenues or in many cases or as Nate would say, no good, but have created an exceptional burden. I would say in my practice the lien portion has created the greatest burden in that every client I have whether a farmer, rancher, or small business owner now has an amorphous lien that attaches to any transfer between a father and son, mother and daughter of any type of business. And I can only testify-- I'm going to testify to that in my personal capacity, in the last two years I bought ranch land from my parents. I have no idea whether this lien is going to be effective 40 years from now or not. There is no limitation on this lien but it attached, even though I bought it for more than assessed value. Because at some point



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in time the way the law was written, I have to prove up that I paid fair-- whatever fair market value is which there's no definition in federal law and no definition in this law. And so the easiest way for us to deal with this is just to get rid of this lien. It's illegal and it shouldn't be. It should not exist.

**LATHROP:** OK. Senator Pansing Brooks.

**SCOTT PETERSON:** Yes.

**PANSING BROOKS:** Thank you for coming, Mr. Peterson. I am-- I'm trying to remind myself and look back at all the old things and so I remember now that, Senator Schumacher, brought this bill and drove everybody crazy by it. So I am wondering, because I know that a good portion of what he was trying to do was to avoid nursing home welfare,--

**SCOTT PETERSON:** Right.

**PANSING BROOKS:** --and having the nursing homes to be able to send your parents to a nursing home and then protect all the property by giving it to the kids, having a life estate of some sort, and just-- and showing that the parents only have this amount of income and so they-- that, that isn't subject to some of the estate proceedings afterwards. So can you speak to that because he convinced a lot of us that this was a really good idea?

**SCOTT PETERSON:** Right. And unfortunately he must not have educated you on what the federal rules and regulations were regarding that because the federal rules are very clear regarding this whole body of law that there is a five-year look back period that anything that, that would happen within that five-year look back period would then if you make a transfer within the five years you're ineligible for Medicaid up to the amount of that value of that transfer. If you make a transfer before the five years, doesn't matter, OK. And so that is a very clear part of federal law. There are very clear rules about how that is effective and our DHS-- DHHS operates under those rules. The liens that he put in place under this, which we probably came in too late to the game, but definitely asked him to include something that limited it to the five-year period, even though we thought it was unenforceable. We're now have gone through the process with the HHS. They say it's unenforceable. Now we have an unenforceable law that still restricts me as an attorney because I don't know whether it's gonna be enforceable 20 years from now or not. So I have to educate all my clients and say we can or cannot do this based upon this

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statutory lien which, yes, is unenforceable, but it's still there. And so I'm probably going in a circle to say, I believe Senator Schumacher misunderstood the federal law and, and its interplay with how this worked. And--

**PANSING BROOKS:** Wow, that's a big statement.

**SCOTT PETERSON:** It is a big statement. But, and I would wish Frank Heinisch was here when you asked him this.

**PANSING BROOKS:** OK. So I, I mean--

**SCOTT PETERSON:** But that is our conversations with DHHS and their attorney, Nate Watson, who also advocated on behalf of this bill.

**PANSING BROOKS:** So you do understand what he was trying to avoid though.

**SCOTT PETERSON:** Yes.

**PANSING BROOKS:** And you could have somebody that, that at 80 moved into a nursing home and lives another 15 years.

**SCOTT PETERSON:** Right.

**PANSING BROOKS:** But for estate planning purposes, they hand everything to the kids so that, that it does avoid some of that estate tax. So what, what do you do about that and how would you--

**SCOTT PETERSON:** What, what you do about that is change the federal law. We don't have the ability-- there's a doctrine called preemption where the federal law preempts state law in this area. And so if we want the look-back period to be longer, we would have to change the federal law.

**PANSING BROOKS:** I'm going to try not to be insulted by that. I do understand the theory of preemption. But anyway, thank you, and I'll continue to look at this.

**SCOTT PETERSON:** And, I don't, I don't-- I apologize if that was at all insulting, but that's, that's just the rules that we have to live under.

**PANSING BROOKS:** Thank you.

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**LATHROP:** Let me take a crack at this. If I am-- a client comes in to me and let's say they own a home in south Omaha and let's say the value of that home is \$100,000 and it's owned free and clear. And they come in, in the year 2000 and they go, I don't know how long Mom's gonna be healthy, Dad's gone, and Mom's still alive, but we want the kids to have the house. So lawyer transfers the house to the kids retaining the life estate for Mom, right? This happens five years before-- let's say it happened six years before Mom then goes into a nursing home, right? Mom now has a life estate in her home, but doesn't own it outright. If she owned it outright it would clearly be an asset for purposes of determining eligibility for Medicaid, true?

**SCOTT PETERSON:** It still can--

**LATHROP:** She owned the house outright.

**SCOTT PETERSON:** The life estate is included--

**LATHROP:** I'll get to the life estate in a second.

**SCOTT PETERSON:** OK, go ahead.

**LATHROP:** If mom owns the house outright at \$100,000 she would have to sell it and go through the \$100,000 before she would be eligible for Medicaid. Isn't that true? If there were no transfer.

**SCOTT PETERSON:** If there were no transfer, that is correct.

**LATHROP:** OK. But if, if Mom goes in to see the lawyer and deeds the house to the kids retaining a life estate and this \$100,000 hypothetical house, house in, in south Omaha, and six, eight years later she now needs to go into the nursing home, her asset is now a life estate in a home in south Omaha.

**SCOTT PETERSON:** That is correct.

**LATHROP:** She can then-- presumably somebody can rent that, right?

**SCOTT PETERSON:** Yep.

**LATHROP:** So they rent the house and let's say it brings a few hundred dollars in a month in rent. Mom can still qualify for Medicaid because her income from her life estate is low enough to allow her to qualify

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for Medicaid. But her \$100,000 house is going to the kids on her death. Isn't that what Senator Schumacher was trying to get at?

**SCOTT PETERSON:** I don't know what he was trying to get at specifically. What I can tell you about that--

**LATHROP:** Well, then-- and tell me, is that an effective way to get Mom qualified for Medicaid and pass the house on to the kids?

**SCOTT PETERSON:** I think that you've skipped a couple steps.

**LATHROP:** OK.

**SCOTT PETERSON:** One,--

**LATHROP:** I'm not a probate lawyer but go ahead and tell me what I missed.

**SCOTT PETERSON:** Once a person makes a transfer, any transfer, they become inel-- ineligible for Medicaid for a five-year period.

**LATHROP:** Understood-- that's why I made this, Mom's going into the nursing home eight years after she--

**SCOTT PETERSON:** Which, which I appreciate. She has also completely transferred a specific right in property, OK. So she doesn't own that right in property anymore. Whether it's a life estate, whether it's any other type of property, if she would have made a complete gift, it would still be transferred more than five years.

**LATHROP:** No question about it.

**SCOTT PETERSON:** Right. And so just because this is a limited portion of property that she owns, we would like to treat it differently, but the federal law doesn't let us do that.

**LATHROP:** OK. I don't, I don't know what the federal law is and I will certainly look at it--

**SCOTT PETERSON:** Right.

**LATHROP:** --as we consider this bill. But I think the hypothetical that I offered is what Senator Schumacher was trying to get at which is people who own something transfer it to their kids but retain a life estate and the income from that property during their life is low enough that they qualify for Medicaid. And basically what we're doing

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is permitting people to give stuff to their kids to avoid paying the cost of end-of-life care. And the Medicaid ends up picking, picking up the bill so that the kids can inherit the house or the farm or whatever it is to this process of deeding while retaining a life estate. That, that would appear to be the purpose, or as I understood it the purpose of, of Schumacher's bill. Now whether it ran afoul of the federal law is a, is a separate question, but that was what he was driving at.

**SCOTT PETERSON:** And I appreciate that.

**LATHROP:** OK. Senator Pansing Brooks.

**PANSING BROOKS:** I just want to get a little bit in the record because I found my notes from 2015 where Senator Schumacher said that people are getting older and that, and that with those numbers they're looking at the state for a safety net and that they're using trust vehicles and by transferring property during the life they-- to the kids that then they can make sure that looking five years ahead before going into a nursing home that they can protect that estate. So that the state ends up paying for them rather than-- and the transfers of property within the five-year time frame are a quick way for the state to pay the bill. And, you know, because you also have to spend down to \$4,000. So I, I don't know about-- I'll check into the federal law, too. But I'm not convinced that this humongous effort that we went through as a body is correct, but is-- it's, it's time to change it. But anyway, I'm happy to look at, at some of this information and try to reconfirm preemption.

**SCOTT PETERSON:** Yeah, and I would greatly encourage you to speak with Nate Watson on this issue. He has been exceptional for DHHS on explaining why this lien is illegal and, and can't be enforced. And so, I mean, he's probably your best reference in the system.

**LATHROP:** Yeah, and you know I do personal injury work as a practicing attorney and I can't-- the first thing I have to do when somebody walks in the door is give up the name and the, the Social Security numbers so that they can alert Medicare in case Medicare is provided a benefit. And Medicare, and I think we're doing it with Medicaid as well, can then say we paid for some of that care and we want to be paid back. So I get that it's not something the probate lawyers are interested in doing, and I certainly understand why, but we're doing it over in the personal injury realm and while it is adding another level to the, to the process of resolving a claim, I get what they're

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driving at, which is-- and I'm gonna tell you, I'm gonna tell you, we were on the floor this morning talking about Medicaid and our Medicaid reimbursement rate right now for nursing homes is \$38 a day less than the cost of care. And I am among those who have a little problem with the type of estate planning that happens which is intended to give assets to children so that Mom can end up on Medicaid for the nursing home. Because when we try to expand Medicaid, in that Legislature we couldn't do it, when we're dealing with nursing homes closing across the state because the Medicaid reimbursement rate is too low. And now as we go to expanding Medicaid and we're looking around for how are we going to pay for it, I know it's gonna land on the providers and at the same time we have people going to ethical lawyers who are doing what their clients ask which is to transfer real estate in this state to kids knowing full well that the purpose of doing that prior to death is to preserve the asset and hand the bill for the nursing home off to Medicaid. And I, I, on the other hand, recognize the doctrine of preemption as well. And we went through a little bit of this yesterday dealing with HUD. This committee will take a close look at any bill which offends federal law and is covered by preemption. But I can just tell you-- I guess, I'm sharing my philosophy on Medicaid paying for nursing homes and I'm sure Senator Briese shares that concern there's got to be nursing homes in his district that are going under because our reimbursement rate is too low and that's because we're trying to stretch our budget to cover all the growing expense of Medicaid, and it's getting worse because our population is that baby boomers are getting to a place where they're gonna fill up the nursing homes. And we want to make sure that people are using their assets to pay for that before we turn that bill over to the Medicaid system and the taxpayer. So I appreciate you being here today. I don't see any other questions. Thanks, Mr. Peterson.

**SCOTT PETERSON:** Thank you.

**CHRISTIN LOVEGROVE:** Good afternoon. Christin Lovegrove, C-h-r-i-s-t-i-n L-o-v-e-g-r-o-v-e. I kind of want to give a really quick summary. There's three points that I think are really getting confused here. First and foremost, if these bills that we're trying to fix, if LB72 and LB268 actually created any type of revenue or reimbursement for Medicaid we would not be here. They don't do it. Talk to DHHS, look at the revenue numbers. These bills don't create any sort of revenue or reimbursement for Medicaid whatsoever. Instead, there's a lot of costs and compliance that are simply passed on to the taxpayers, OK. LB72 was passed in 2015 and I know, Senator Pansing

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Brooks, you referenced that. The important thing to remember about this bill is this bill dealt with trusts only, revocable trust that became irrevocable at someone's life. So what that means is that if I create a trust during my lifetime and it's revocable that means I can change it. If I have a trust that I can change and that I can control, those trust assets are countable for purposes of Medicaid. Those are countable resources. So that being said, that's exactly why this bill isn't generating-- why this bill didn't generate any type of reimbursement for DHHS and Medicaid because people that had funded revocable trust with lots of money are not qualifying for Medicaid. Instead now when they pass away these trusts are irrevocable and they're having to go through five, six, seven steps to try and get a waiver before they can proceed through the process. So that's LB72, that dealt primarily with trusts and trying to create a waiver system with the belief that there were a lot of people for some reason creating trusts and then defrauding Medicaid on their application. LB268 is what deals with the liens that we talk about with the life estate liens in the clouds on title that we're having trouble really finding any enforceable law for, for them. We can't-- these, these liens that are created are not enforceable but yet we have title insurance companies that are saying, well how do, how do we get it released? Well how do you release an unenforceable lien? You really can't. And so that's the issue that we're seeing with LB268 that we're trying to take out as we have this unenforceable lien that simply is like Mr. Peterson referred to as a cloud. We don't know if it's gonna become enforceable. We don't know when it's gonna become enforceable, and that's what's creating a lot of the concern and the unknowns in these families' small businesses transfers that go across the board. I also testified in 2015, and I was here in 2017 for the test-- testifying on LB268, but essentially those two bills tried to kind of do different things. But ultimately if you look at the revenue numbers, they just didn't do what they needed to do. And because of that that's why we're here. We're trying to fix that problem so we're not asking our clients and our constituents to deal with things that are frankly very costly to them that are unnecessary. So I'd open it up if you have any questions.

**LATHROP:** OK. Would you repeat your name again?

**CHRISTIN LOVEGROVE:** Christin Lovegrove.

**LATHROP:** So you're Frank Heinisch's partner?

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**CHRISTIN LOVEGROVE:** Well, don't hold it against me.

**LATHROP:** I promise, I won't. Just wanted to clarify that.

**CHRISTIN LOVEGROVE:** Yep.

**LATHROP:** Senator Pansing Brooks had a, had a concern about that or a question or asked about it, I'll say. But I don't see any questions, so thank you for your testimony today.

**CHRISTIN LOVEGROVE:** Thank you.

**LATHROP:** Anyone else here as a proponent of LB593? Anyone here in opposition to LB593? Anyone in a neutral capacity? Seeing none, Senator Briese. And as you situate yourself at the testifier's table, I'll, I'll note that we have a letter of support from Matt or Matthew Van Patton with DHHS.

**BRIESE:** Thank you, Senator Lathrop. And, and I'm far from an, from an expert on Medicaid recovery like some of the folks that testified in front of me. But, I have done a crash course on it last the few days. But learned a few things about it, and I understand your concerns, you and Senator Pansing Brooks's concerns, about the life estate situation. Section 12 of LB268 provided that the estate of the recipient also includes conveyance of remainder interest, retention of a life estate, and then those provisions aren't taken out by this bill. And so I think that kind of addresses some of your comments there, I believe. So, you know, I've, I've looked everything over and, you know, we kind of -- most testifiers hit upon the main parts of the bill which are the lien and the inability to distribute trust, trust property without the waiver. And there's several other parts to the bill, but, you know, nothing too, too great. But as I look through it, I think it's good legislation, it makes the process more user friendly, and I think it still accommodates the interests of the state in recovering medical payments when necessary. And I think it's very telling that DHHS, to my understanding, sent a letter in support of this, and so I do believe it's good legislation, and I'd ask for your support of it going forward.

**LATHROP:** OK.

**BRIESE:** Thank you.



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**LATHROP:** Very good. I don't see any questions. Thanks, Senator Brieese, and good to have you back here.

**BRIESE:** Good to be here.

**LATHROP:** Next-- that will close our hearing on LB593, and bring us to Senator Kolowski and LB621. And some of you have arrived since I gave my opening remarks. If you're going to testify, particularly as a proponent, if you want to move into the front row that helps us keep the testifier chair warm. Welcome, Senator Kolowski, to the Judiciary Committee.

**KOLOWSKI:** Thank you, Mr. Chairman. It's a pleasure to be here today. Chairman Lathrop and members of the Judiciary Committee, it's a pleasure to have this opportunity to talk to you with some of the background on solar energy that's very important to us. LB261 [SIC] is about the use of solar energy by homeowners. Cities and federal agencies offer incentives and tax benefits for installation of solar energy and other renewable energy systems. We have net metering laws allowing a homeowner to use-- to send unused energy back to the larger electrical system. We have legislative intent language promoting solar and wind energy. Yet, it's common for homeowners associations to ban solar energy systems. Many times these prohibitions are created decades ago. To make changes in the HOA covenants takes 100 percent of the property owners to approve the change. So making changes from within the homeowners association is very difficult. LB621 would prohibit the enforcement of the current solar energy system bans and prevent future bans of solar energy systems in homeowners association covenants and similar legal instruments. LB621 would allow a homeowners association to place reasonable restrictions on solar energy systems without completely prohibiting them. Today's solar energy systems are much different-- excuse me, than the big black solar panels of yesteryear. Today's solar energies collection systems are much advanced, both in design aesthetics and efficiency from the 1970s. Some are still panels, although much, much less bulky and some simply look like shingles and roof tiles. As the price of solar energy systems has come down the use of solar energy systems has increased. The handout I offered is a graphic representation of the amount of overall solar energy production increase, increase exponentially in the U.S. from 2007 to 2017. It also shows the huge increase in the work force numbers working in the solar energy industry. This is definitely a growing industry. A recent highly publicized dispute between a homeowner and a homeowner association over solar energy took

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place in the neighborhood where I live. This dispute is a sign that we need to allow room for the encouragement of solar energy systems. As with any addition to a home there are building codes for setbacks, height restrictions, and other factors. LB621 allows for cities and counties to further develop reasonable guidelines and allowances while allowing homeowners to use solar energy systems to lower their household expenses and use clean solar energy. Solar energy systems are a way that both rural and urban property owners can expand their use of renewable energy. Language in LB621 can be interpreted as rendering the entire HOA contract-- contract void. That is not the intention. Therefore, I offer AM401 to offer language that will allow just the portion constituting the solar energy ban to be rendered unenforceable without voiding the remaining contract. AM401 also removes the provision allowing for a civil cause of action by a property owner against the homeowners association. In conclusion, LB621 is a way to allow a homeowner more choice in their energy use patterns while enhancing the ability of cities and counties to address related zoning. I'd like to say it again that LB621 would allow a homeowners association to place reasonable restrictions on solar energy systems in their association without completely prohibiting the systems. Twenty-four states have laws similar to LB621. I ask your support of LB621 with AM401. I'd be happy to work with the committee on any further concerns and to answer any questions you may have. Thank you very much.

**LATHROP:** I don't see any questions, Senator Kolowski. We'll listen to your proponents.

**KOLOWSKI:** We have them. Thank you, sir.

**LATHROP:** Thank you. First testifier.

**DAVID LEVY:** Good afternoon, Chairman Lathrop, members of the committee. This is my first time before you this year. You have quite a hearing room. David Levy, D-a-v-i-d L-e-v-y, Baird Holm Law Firm, here representing Energy Studio and Omaha by Design in support of LB621 as amended. The federal government provides incentives for residential solar energy. The state of Nebraska provides incentives and encouragement for residential solar energy. Yet, these HOA covenants that are very common and in many cases have been around a very long time can prohibit or prevent somebody from participating in those programs and taking advantage of those incentives. This is very different than your typical covenant that might say, you can't paint your house purple or something like that. That's a preference. But

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participating in the New Energy Economy, participating in sustainability and environmental protection, taking advantage of these federal and state incentives and encouragements, participating in grid modernization and grid security is far different than a preference to what color you paint your house. These are fundamental choices and fundamental things that our federal and state governments have said to people, these are good things we'll even give you tax breaks for them. But yet, these HOA covenants prohibit people from participating in, in those things. And, and to be clear, and Senator Kolowski touched on this, HOA covenants really are fundamentally contracts of adhesion. You don't show up and move into a house and say, hey, I'd, I'd like to negotiate the covenants. You take the covenants as they come. If you don't like the covenants, essentially your choice is to live with them or not live in that neighborhood. And to have to move to be able to participate in the New Energy Economy and to, to have solar energy as part of what you do is, is really a, a pretty significant burden on somebody-- something that is, that is very unfair. I think the, the time has come for this legislation. Senator Kolowski said that well also. And you know one thing I would add in closing, we were talking about this a little bit earlier today, this is probably a bigger deal in some smaller towns than it might be in Omaha and Lincoln. In Omaha and Lincoln, I've got a lot of neighborhoods to choose from. If I'm in a smaller town, I may not have very many neighborhoods to choose from. And if I'm interested in participating in this economy and having solar energy as, as part of the way I get my electricity, I may have so few choices that either I have to move to a whole different town or, or not do that. So, so this is a significant issue and you'll hear from other testifiers as well and I'm happy to answer any questions.

**LATHROP:** I see no questions, but I have a couple.

**DAVID LEVY:** Sure.

**LATHROP:** Just for the benefit of the committee and myself, do covenants typically include some expiration? For example, I live in a neighborhood that had covenants and one of the covenants where you had to have cedar shingles and apparently, apparently that expired because now asphalt shingles are showing up and I'm trying to think back to property class quite a while ago. So do those typ-- typically have an expiration?

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**DAVID LEVY:** In my experience, they do not. They're recorded against the property typically before the first homeowner buys the house and moves in and, and they live on as a deed restriction--

**LATHROP:** Forever.

**DAVID LEVY:** --against that property and they run with the land.

**LATHROP:** OK, and the bill would, would basically say, you can't have-- well, let me ask another question first. Do we-- I realize that we've come a long ways. I've looked on-line and seen these shingles by Tesla and others that actually look like real-- regular shingles that actually are solar collectors,--

**DAVID LEVY:** Um-hum.

**LATHROP:** --but they still have the big black panels that are stuck up on stilts. Do they not?

**DAVID LEVY:** Your typical solar installation on a residential rooftop situation today is not gonna have the stilts. Typically, they'll be--

**LATHROP:** They'll be a box with a [INAUDIBLE].

**DAVID LEVY:** Yeah, it's a-- you know, somebody else can speak to this better than I can, but it's a few inches, but it's parallel with the roof, it's not typically on stilts.

**LATHROP:** OK, so the bill would, as at least as we're looking at it, say, you can't outlaw those or, or we're going to say that they're unenforceable. But that the city can now come along and, after this bill, and regulate what they're gonna look like.

**DAVID LEVY:** The HOA actually can do that. And, and you know one of the things about this bill that I think is a little bit unfortunate just in the drafting is, as many bills do of course, it's amending existing law. And so it, it looks like this bill has something to do with zoning and, and governmental control of land use. And, and it really does not. It just-- the, the law-- the statutes we're amending have-- do that already. And, and what they say is they allow a city to regulate in favor of solar energy if it wants to. They don't require that but they say, hey, city if you're adopting a zoning ordinance as part of-- and as part of that you want to say you have to give people reasonable access to sunlight for solar energy, you can do that. And, and-- but that's already in existing law. What, what this is really

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dealing with is the HOA. But to your question, this would not prevent the HOA for have-- from having regulation on solar panels so long as that regulation didn't go so far as to prohibit them.

**LATHROP:** Well, let's say that-- I know that if we just passed a bill and said you can do anything you want with solar we'd have a lot of people mad at us.

**DAVID LEVY:** Yeah.

**LATHROP:** Right? Because a lot of people moved into neighborhoods because of the covenants not in spite of them. They don't want somebody's RV in the driveway and they don't want a solar panel on the neighbor's door or on the neighbor's roof and they don't want a purple house next door. Right?

**DAVID LEVY:** Potentially--

**LATHROP:** We can agree that that's [INAUDIBLE]--

**DAVID LEVY:** Yeah. I don't know how many people read the covenants in great detail before they move in but there are some no doubt.

**LATHROP:** So are you telling us then that what we would do is wipe the slate clean and then the HOA would have to pass regulations with the same burden you described earlier in order to regulate solar panels?

**DAVID LEVY:** The HOA, if it wanted to regulate them-- so in your example the covenants today prohibit them just outright say you can't have them.

**LATHROP:** Right.

**DAVID LEVY:** And so this bill passes and the HOA says, HOA says, well OK, but we want to have some rules about them. Is, is-- does that--

**LATHROP:** Yeah.

**DAVID LEVY:** So--

**LATHROP:** What-- what's, what's the burden for the [INAUDIBLE]-- the homeowners association to accomplish that?

**DAVID LEVY:** Right. In my experience, typically an HOA will have a set of covenants that are recorded deed restriction that runs with the land and then they'll had-- have a set of rules and regulations that

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are sort of less central than the covenants and they're not recorded. They're just the rules of the organization. If you want to build a new fence you've got to go to the HOA board and, and get permission for your fence. That kind of thing. So I think what would happen likely in your hypothetical is that the HOA-- the board of that homeowners association would then meet and put together some rules and regulations and take that to their next association meeting and there would be a vote like a typical meeting where you would adopt some kind of a, a rule.

**LATHROP:** Are they equally as enforceable as the covenants?

**DAVID LEVY:** They are-- they're enforced by the board. They're, they're not recorded against the property is, is really the difference.

**LATHROP:** But if I live in a homeowners association and we decide that notwithstanding this bill we don't want them in our neighborhood and we take it to a vote. Can the homeowners association enforce that if it's just a rule or a regulation?

**DAVID LEVY:** Not if it conflicts with the statute. If it doesn't conflict with the statute, yes, they can.

**LATHROP:** Well, we're opening these things up. I don't know what, what regulation would become a substitute for the existing covenant. The covenant is enforceable in a lawsuit,--

**DAVID LEVY:** Right.

**LATHROP:** --and the regulations will not be. Is that--

**DAVID LEVY:** No, I think the, the regulations would be as well. I mean, they're, they're adopted by the association as the rules of the association.

**LATHROP:** OK. I-- you know, I've been a fan of renewables: wind energy and solar. Anyway, we'll listen to additional testimony. You started talking about zoning and I wondered why this wasn't an Urban Affairs, is what I was-- my first thought.

**WAYNE:** If it was, we would have kicked it out already. [LAUGHTER] No, and I have-- we only have like 30 bills. You-- we have like 700 here.

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**LATHROP:** OK, I think that's all the comments. [LAUGHTER] Thank you, Mr. Levy.

**DAVID LEVY:** OK, thank you.

**LATHROP:** Oh, wait a minute. No, OK.

**DeBOER:** It's fine.

**LATHROP:** All right, thank you.

**DAVID LEVY:** OK, thank you.

**KEN WINSTON:** Chairman Lathrop and members of the Judiciary Committee, my name is Ken Winston, K-e-n W-i-n-s-t-o-n. I'm appearing on behalf of Nebraska Interfaith Power and Light, and I'm providing written testimony which I will not read because I'm presuming that you're perfectly capable of doing that, but I do want to make a few comments. Well, first of all, just an editorial comment. I wanted to state my appreciation for all the leadership that you've shown, Senator Lathrop, on renewable energy, energy. I mean, there's a lot that's, that's happened is because of your work so, so thank you for that. Well, I guess, I just-- and I'm not nearly as knowledgeable about, about covenants or anything like that as, as David Levy is, so, so please don't ask me questions about that. Mostly our, Nebraska Interfaith Power and Light, our primary concern is climate change. And so we want to encourage renewable energy in whatever way we can. And we believe that this is a beneficial use of the property and that maybe being prevented by the use of these homeowners association covenants. And we think it's, it's appropriate to, to prevent that-- to remove that barrier so that, that renewable-- this renewable energy development can take place. And so-- and we believe that-- and we support renewable energy as a means of addressing climate change. And just want to point out several benefits of renewable energy, it doesn't use-- it doesn't emit harm-- harmful pollutants. It doesn't use water. And, and it's-- and it can provide-- and solar energy in particular can provide energy at, at times of peak use. And just one other point that I'd like to point out is just that solar energy is very popular. The most recent poll that I saw was a 2018 poll done by the Yale Climate Communications Group, and basically across the state there's about 80 percent support for solar energy in the state. So, so it's a very popular subject and we'd encourage the committee to advance this bill.

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**LATHROP:** OK, I don't see any questions. Thanks, Mr. Winston.

**KEN WINSTON:** Thank you, Senator Lathrop.

**LATHROP:** Good to have you here. Next testifier. Good afternoon.

**SCOTT WILLIAMS:** Good afternoon, my name is Dr. Scott Williams, S-c-o-t-t W-i-l-l-i-a-m-s, just like it sounds. I live at 1139 S. 93rd Ave in Omaha. I'd like to clarify, I'm not a medical doctor. Rather, I earned my doctoral degree in engineering from Iowa State University. I join you here today to testify as proponent of LB621 regarding solar energy provisions and regulations. I consider myself an advocate for clean renewable local power in our communities and offer my experience and expertise and I encourage you to support LB621. We live in an era of increasingly impacted by global climate change. The predominant cause is anthropogenic release of greenhouse gases specifically carbon dioxide. Energy production from fossil fuels is one of the largest causes of CO2 pollution. Nebraska will continue to experience increasing impacts of climate change. As a state with an economy largely tied to agriculture, the negative consequences will continue and grow. Fortunately, we also have an opportunity to be part of the solution. Nebraska's blessed with abundant solar and wind resources. To take advantage, we need support and not barriers. Clean renewable local power, such as solar energy, can help to reduce emissions and to light our way on the path of progress. Alongside my twin brother, Eric [PHONETIC], I have installed solar panels in a variety of locations including small off grid installations in an Omaha neighborhood public park and on the shed of the neighborhood community garden as well as the grid connected and net metered solar array on the roof of his house. That array is three kilowatts which averaged over the course of a year has generated about 90 percent of the electric energy needs of their home. Needless to say that has substantially lowered their monthly electric bills. The gables on Eric and Christine's [PHONETIC] roof means that the panels are not at all visible from the street. Many homes throughout Nebraska would have roof designs with the same-- which would display the same visibility or lack thereof. Solar energy systems including panel design and manufacture have shown dramatic improvements in recent years. We aren't talking about the panels that were first available in the 1970s. Panels are low profile as our common roof mounting methods. Safety and reliability have improved significantly. You may have heard about the Tesla subsidiary, SolarCity, which Chairman Lathrop had mentioned, they've developed, demonstrated, and installed solar shingles and solar tiles. These are



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solar panels but they're designed to match the architectural appearance of roof and they are indistinguishable from historical roof met-- roof materials while also generating power to supply for the home. In order to continue to be a part of the solution to the challenges of climate change, it is essential that Nebraska have modernized solar energy provisions and regulations. LB621 seeks to implement these updates. I encourage you to support the bill. I'll be glad to answer any questions or provide other expertise regarding solar energy systems and installations. Thank you, Senator Lathrop and Senators of the committee for your time today.

**LATHROP:** You timed that perfectly. That doesn't happen very much. Senator DeBoer.

**DeBOER:** Thank you, Dr. Williams, for being here today. Could you specifically talk about what a typical solar panel that's available for a residential neighborhood would look like in terms of [INAUDIBLE] and-- you know, you, you mentioned that your brother has some. What-- how big are these? What are the dimensions in terms of width and depth and--

**SCOTT WILLIAMS:** Um-hum.

**DeBOER:** --that sort of thing?

**SCOTT WILLIAMS:** Sure. A typical solar panel that would be used on a residential roof would be about 3 feet by 4 feet although they come a little bit larger. The energy produced by a specific panel is directly proportional to the size of the panel. Smaller panels have less capacity than larger panels to collect solar energy. They're-- I would say something like an inch in height and then roof mounting methods depending on whether a rack system is used or whether it's direct roof mounting would add probably one more inch to the roof so you'd be somewhere in the 2 to 3 inches off of the roof would be the installation of a solar array. As an example, on my brother's house there are 12 panels mounted on a 3 by 4 array. And like I said, 3 kilowatts produces about 90 percent of the electrical demands for the house. That's the array on the top of the roof, and then there are the ancillary equipment pieces that are also required to actually take the electricity into the house and then supply surplus electricity to the grid as well.

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**DeBOER:** Can you sort of mention or describe what those ancillary pieces look like? What does that look like?

**SCOTT WILLIAMS:** Sure. So a solar array produces DC, or direct current, but our electric grids use alternating current. And so there needs to be an inverter which turns the DC direct current into alternating current. This is a box maybe 1 foot by 2 feet and it is mounted in a convenient location typically in a basement and or near a power panel-- a fuse panel. It is nondescript although usually has a display on the front which shows the amount of power that's typically being produced right now. One of the prominent features is that there are safety disconnects for the system to ensure that linemen working on the grid are always safe from the solar energy system. Typically, a home is being powered by the grid. But when solar energy is produced it is possible that in a, in a grid down system that the house could still be trying to push energy out on the lines. And so, for example in Omaha, our Public Power District has regulations that require both a, a DC disconnect from the panels to the inverter as well as an AC disconnect from the inverter to the junction box in the house and both of those can be disconnected to ensure that there's no electricity on the lines as a lineman was working on them. These are little 3-inch by 3-inch boxes that have a little switch on them which just cuts the lines and de-energizes the panels from the grid.

**DeBOER:** And is that all then the sort of stuff you would need to, as far as outside, is that all the, the--

**SCOTT WILLIAMS:** That's it. The panels are on the roof. There would be conduit for the wire running down the side of the house. Although theoretically, if you are particularly interested, you could ask an electrical contractor to install the conduit and wiring within the house under the roof and running inside of the house envelope if you chose. And then the other equipment is all within the house again in the basement near the fuse panel or circuit breaker box. Yeah, so just the panels on the roof and then the-- one of the deep-- one of the connect-- disconnects is required to be on the outside of the house so the small box would have to be mounted somewhere outside. It is required to be visible from the power meter. So it is typically mounted within a foot or two of where the-- well, I do this with my hand, although the meters don't spin anymore, but the, the power meters are located.

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**DeBOER:** And I don't know if you are well-informed about the, the Tesla--

**SCOTT WILLIAMS:** Um-hum.

**DeBOER:** --projects. Is this something that we're going to see coming soon or is this something that's ten years off before there'd be something like that available in, in Nebraska?

**SCOTT WILLIAMS:** Yeah, the Tesla tiles and shingles that Senator Lathrop mentioned, maybe some of the rest of you seen as well, they're already on demonstration houses now. I would-- technically they are essentially market ready right now. It is, it is not a technical consideration why they are not broadly being sold at Home Depot but rather as far as I understand a, a business case. Tesla, Inc. is a fairly large organization with many subsidiaries and they are focused on electric car development. And so they have not been making a business push for the retail availability of these solar shingles and roofs at this point because the Model 3 electric car has been their business focus. But technically they are essentially ready to be put onto roofs now.

**DeBOER:** OK, thank you.

**SCOTT WILLIAMS:** Yes.

**LATHROP:** Senator Pansing Brooks.

**PANSING BROOKS:** Thank you for coming. I appreciate it, Mr. Williams.

**SCOTT WILLIAMS:** Pleasure.

**PANSING BROOKS:** I guess I'm interested-- so I'm thinking about the covenants and are, are these solar panels only on houses? Could they be used in a yard and then-- you know, somebody is trying to keep their neighborhood pristine and-- I mean, I can understand putting it on a house, but if somebody is going to fill up yards in front.

**SCOTT WILLIAMS:** Well, first I'll start with my own opinion and that is that a pristine neighborhood would demonstrate solar energy systems on every roof and in every yard. But it is true that solar arrays do not have to be mounted on roofs only you can have ground-mounted arrays. This is less common in urban or suburban locations. It is certainly more common in rural locations. Farms, for instance, regularly mount ground-based arrays. Although I do know at least one occasion my

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friend, Don Preister, does have a ground-mount array in his backyard. I helped with some of the installation there. It is in the backyard and it is the slope of the ground matches the slope of the, of the panels. So they are about two feet off of the ground, not visible from the front or essentially any other neighbor's property, only visible just from the back of their own porch.

**PANSING BROOKS:** Well, as somebody who brought a climate change plan, I do care about this issue--

**SCOTT WILLIAMS:** Um-hum.

**PANSING BROOKS:** --a lot, but I also feel that neighbors could have an issue about putting it in their front yard. So that would be [INAUDIBLE] the covenants and that's what would be found. And that's what you're trying to make illegal here. Right?

**SCOTT WILLIAMS:** I would, I would have to say that I broadly want to offer technical expertise so with respect to the covenants, I, I think that it is possible that someone would want to try to choose to install a ground-mount solar array in the middle of their front yard. I can say that I have never seen that and I would technically advise against it for a wide variety of reasons. I guess it is theoretically possible that someone would try-- I mean, someone could theoretically try to park cars in their front yard as well. It's exceptionally uncommon. But I guess that it's theoretically possible that someone might--

**PANSING BROOKS:** [INAUDIBLE] regulations again, yeah.

**SCOTT WILLIAMS:** Indeed.

**PANSING BROOKS:** Thank you very much for speaking.

**SCOTT WILLIAMS:** Thanks.

**LATHROP:** How far off are these shingles that look-- that, that are solar panels? How far-- what's-- where are we at on the technology before they become competitive from a price point to the panels?

**SCOTT WILLIAMS:** I guess I could quote what CEO, Elon Musk has said, when comparing to the installation of a roof and a solar array on that roof, a solar roof of solar tiles or solar shingles is supposed to be comparable in price to a roof with a solar array. In fairness, most applications of solar arrays on residential properties do not include

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a complete rebuild of the roof. You only just attach the array. In new construction, if you were to be building the roof or building the solar roof the cost would be much more comparable. But such as the case for technologies that we start from where we are and move forward oftentimes new construction would be more cost effective than the retrofit.

**LATHROP:** Right, right. OK. I-- these panels-- I mean, there are people that just don't want to live by them and they deliberately move into neighborhoods so that they're not going to see them in their neighborhood. The shingles if they're not that far off and they're gonna cost about the same maybe we're-- maybe what we're doing is just if this bill was-- if somebody wants to put solar shingles up, somebody can't stop them because of the covenants I'd probably be OK with it, but I do have some concern about whether we're going to let somebody who's moved into a particular neighborhood because of the covenants among, among those a, a covenant that says no solar panels on the roof. I mean, people don't want to look at them.

**SCOTT WILLIAMS:** I agree with you that solar technology is imminent in a, in a time frame that is advancing at this point across our state. We would have to describe the, the solar energy generation as essentially negligible relative to the total power generation--

**LATHROP:** Sure.

**SCOTT WILLIAMS:** --and consumption in Nebraska.

**LATHROP:** I've seen those panels that you've described that Tesla's--

**SCOTT WILLIAMS:** Um-hum.

**LATHROP:** --working on or put out.

**SCOTT WILLIAMS:** Um-hum.

**LATHROP:** They're-- you can't tell him from a regular, a regular shingle.

**SCOTT WILLIAMS:** That's true, yeah.

**LATHROP:** Senator Pansing Brooks.

**PANSING BROOKS:** So would you feel-- how would you feel about just amending it so that it can go on somebody's house rather than their

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front yard? I mean, those-- I don't know-- I don't think most people would have a problem looking at a shingle that's-- or a Tesla device that looks like a shingle.

**SCOTT WILLIAMS:** I think that my main opposition is that there are-- a homeowners association covenants that explicitly prohibit any access to solar energy generation for the homeowner. And as Mr. Levy had described, the-- this bill seeks to make changes to the covenants in favor of restrictions-- this is your back and forth I've described and I think that if, if there are reasonable opportunities for access to individuals to choose to deploy solar energy to be a part of our climate solution to help lower their own bills, I think that that's-- that would be acceptable to me to think that there is a pathway towards reasonable access to solar energy if that meant disallowing installing ground-based installations in front yards. I, I would probably consider disallowing that specifically to be reasonable.

**PANSING BROOKS:** Well, I appreciate that-- just-- I mean, it's good to think about. And I'd, I'd much rather look at grass than, than the panels,--

**SCOTT WILLIAMS:** Sure.

**PANSING BROOKS:** --but I understand the, the, the joy of saving energy and, and protecting our Earth. But again, it's just balancing these things. Thank you very much.

**SCOTT WILLIAMS:** Thank you.

**LATHROP:** Senator Wayne.

**WAYNE:** Well, in fairness, I think I was involved in drafting this bill and I, and I thought we were-- we thought, we thought it was going to a different committee is why I, I wasn't carrying any. But the answer on Tesla, I just want to put on the record. The issue why some of the Tesla is not available here in Nebraska is because Tesla uses the motto of a store front for their cars and in there is all their energy products and because of the car issue in transportation right now that Senator Vargas is carrying part of the reason why they're not entertaining the market for their solar products in Nebraska. That's the issue.

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**LATHROP:** All right. Well, that gives us an extra interest in the Vargas bill. It all comes together right here in Judiciary Committee. [LAUGHTER] Thank you, Doctor,--

**SCOTT WILLIAMS:** Thank you, Chair.

**LATHROP:** --we appreciate your testimony. Good afternoon.

**CHELSEA JOHNSON:** Hi, my name's Chelsea Johnson, C-h-e-l-s-e-a J-o-h-n-s-o-n, and I'm here representing the Nebraska League of Conservation Voters. We represent more than 10,000 Nebraskans across the state and our mission is to turn conservation values into political priorities. We do that through education, advocacy, and political work. And one of our top priorities is clean energy and specifically wind and solar. And that's because it's good for our environment. It's good for our health. And in Nebraska, in particular, it's good for our economy. Nebraska ranks third in the country in our wind potential and 13th in our solar potential. And the main reason why I'm here and the main point that I want to bring to this bill is that solar energy is incredibly popular across the state particularly individual solar allowing people to generate their own electricity. And I know that because we have knocked on more than 200,000 doors, talked to thousands of Nebraskans. Not just in Lincoln and Omaha, but all over the state, including Norfolk, Kearney, Grand Island, North Platte, McCook, Scottsbluff, all over. Universally, solar energy is something that Nebraskans support and want us to do more to help along in our state. So we are supportive of this bill because we think it's important to remove barriers to individuals being able to install their own solar systems. And we have heard from a lot of folks that we interact with whether they're our members or they're people that we talk to at the door who say that-- you know, they wish that they could put solar on their home, but there's these restrictive covenants that prevent them from doing so. And I think we all have-- you know, been in the situation where we'd like to see something change but we just don't have the time or resources to go through the process to get those-- you know, in this instance to be covenants changed. So the result is that a lot of people aren't getting to install solar energy who would like to. So again just to reiterate the main point of my testimony is to highlight how universally popular solar energy is. And we'd like to see this bill pass out of committee.

**LATHROP:** Very good. Thank you for your testimony,--

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**CHELSEA JOHNSON:** Thanks.

**LATHROP:** --appreciate you being here today. Welcome, once again.

**MATT GREGORY:** Hello, once again, Chair Lathrop and members of the Judiciary Committee. First, I want to commend your temerity and patience being here all day as you do. My name is Matt Gregory, M-a-t-t G-r-e-g-o-r-y. I am the clean energy advocate for a couple of nonprofit organizations, and today I'm representing Nebraska Farmers Union, a statewide nonprofit that has a long history of working on renewable energies especially wind and solar. Our president, John Hansen, is also the chair of the wind and solar conference which is an annual event that brings utilities, industry, and stakeholder groups together to promote solar and wind energy. So I'm here today to support LB621. I'd like to thank Senator Kolowski for introducing it. We believe that Nebraska needs to be doing more to encourage and promote renewable energy specifically solar and wind. Many senators talk about wanting to cut regulations and getting government out of the way. This is not exactly that but we believe that's in the spirit of that sentiment. Homeowners associations shouldn't be a barrier to clean renewable energy and impeding one of the top growing jobs in Nebraska, solar installer. This bill would allow homeowners to be part of the solution to climate change while saving money on their electric bills. The technology, as you've heard, is getting better and newer panels are less and less noticeable. And I think beauty is in the eye of the beholder and I happen to find solar panels beautiful. You know the jobs in solar energy make up more than 45 percent of the total renewable energy jobs throughout the Midwest including in many rural areas. And there were almost 2,000 solar energy jobs in Nebraska last year and we believe this bill could lead to more. So let's allow homeowners to invest in homes and take advantage of available incentives. And-- you know, have a future and, and have homes without fear of retribution from neighbors and homeowners associations. So I respectfully urge the committee to please advance LB621.

**LATHROP:** OK. Oh, I thought you were putting your pencil up because you want to be recognized.

**SLAMA:** No.

**LATHROP:** OK. [LAUGHTER]

**MATT GREGORY:** I think the committee's heard enough of me today.



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**LATHROP:** It's hard to get a question out of this panel after 5:30, so thank you for your testimony. I appreciate it. Anyone else here in support of LB621? Anyone here in opposition to LB621? Anyone here in a neutral capacity? Seeing none, Senator Kozlowski to close. And as you approach, I'll make a note for the record. We do have some letters in support, and because they're just a handful of them I'm gonna read them: Tim Fickenscher, Mary Ruth Stegman, Kristal Stoner, Audubon Nebraska; Carol Windrum, Donna Roller, Amanda Bogner, Richard Miller, and in opposition Denny Van Horn, from the Home Builders Association of Lincoln. Senator Kolowski.

**KOLOWSKI:** Thank you, Senator, appreciate it very much. It's-- I want to thank the entire committee for your patience having us last on your schedule today and a topic that is extremely important to many of us. And I think it's got great potential for the state of Nebraska. We have lots of sunshine and we all know that in capitalizing on that within the realm of our capacities that are growing around us today, I think has got tremendous potential to be impactful on our state in, in many ways. I think-- and I know I, I don't want to get into a conflict with homeowners associations even my own where I live in Omaha because of the, the solar panels and all the rest. And if we have to do something like modify before we move on into a more fuller acceptance of solar varieties that will be out there and there will be like Tesla and what they're doing right now. If we need to start with roof panels only or something of that nature, I'm more than willing to talk about what we might do with a phasing in over time-- over years of where we are and what we could accomplish. This is a time for these roof panels and other varieties that are upon us to, to really have their day on the homes of our country. It makes a huge difference. I, I want to-- I'll give you a one, one sideline, if I may. Within the last six months, I had a chance to go to Germany. I was one of 16 people chosen to few schools and, and all the rest on opportunities that we had there. We had a situation where we were on the coastline of Germany and we had a three-hour bus ride to Berlin. So from the coastline where wind turbines were everywhere, everywhere to the solar panels in fields and other locations for that three-hour bus ride to Berlin we saw 90 minutes of wind turbines everywhere and solar panels in, in fields that were socking it in and using it in that particular way. That's what's happening around the world right now. That's the kind of work that's, that's possible in our own country, and the impact it could have upon jobs and installations and perfection over, over a period of time. So I, I look at that and I, I, I wonder why we're behind the curve quite a bit at this point in time. And we can make

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that up and we can get ahead of that whole aspect of what solar and other option-- options and potentials that are within our reach could be used and greatly impact our society. So thank you very much for your time.

**LATHROP:** Very good. Thank you, Senator Kolowski. We appreciate you introducing LB621. That will close our hearing on LB621 and our hearings for the day. Thank you.

**KOLOWSKI:** Thank you.