

NATA ANNUAL MEETING

&

FALL SEMINAR

***NEW NEEDS FOR NEW CLIENTS:
THE CHANGING ROLE OF THE PLAINTIFFS' BAR***

"We are taking the issue to Court because the political process has failed us".

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New Needs for New Clients: The Changing Role of the Plaintiffs' Bar

Practicing Law is a Service

1. The traditional view of law practice is typified by NATA's Annual Seminars, including its seminar scheduled for Friday, October 7, 2005. Quite ordinarily, lawyers are cautioned about:
 - a. tips for handling product liability cases
 - b. depositions
 - c. demonstration arguments
 - d. *voir dire*
 - e. divorce essentials
 - f. cross examination of adverse experts
 - g. speaking to jurors
2. These are truly "nuts and bolts" topics. They provide a laudable level of service.
3. But there is more to it. And modern times call for the best, brightest, and most committed lawyers to respond.

Doing Good, Doing Well

4. 2004 marked *Brown v. Board of Education's*¹ 50th Anniversary. Some noted the occasions by celebrating Thurgood Marshall's life as a heroic public interest lawyer and "the chief litigator for the Civil Rights Movement."² Perhaps the occasion of *Brown's* 50th Anniversary serves as a clarion call for Nebraska's lawyers to examine our state, and our region of the United States, for new areas in which we can do well by doing good. Our state and country's needs have changed, and its time for us to change with them.
5. Certainly, the injustices of ethnicity, gender, and economic disadvantage are not all behind us. Many, many signs of problems in these traditional fronts for plaintiff's lawyers are still clear, present and visible.³

¹ 347 US 483 (1954)

² Moore & Cummings, *Justice Thurgood Marshall and His Legacy: A Living Legend's Unceasing Commitment to Justice and Equality*, 35 How. L. J. 37, 40 (1991), cited in Erichson, *Doing Good, Doing Well*, 57 Vand L. Rev 2087 (2004).

³ A good example of an organization specifically serving to fill these purposes is *Lawyers For One America*, www.lfoa.org. Its mission statement recites:

6. But there are new signs of new and escalated dangers, posing new and exacerbated, but yet neglected needs, for the peculiar energy of plaintiff's lawyers, and the special talents of our nation's strongest advocates. A look at Nebraska's changing face identifies this area.

Nebraska Is Changing

7. Nebraska's complexion has been changing over time, but the change is now radical. The State's 93 counties each provide a "district wherein a crime" may have been committed, and therefore each constitutes a distinct venue, with constitutional responsibility for conducting jury trials and criminal cases, attached to that venue. US Const Amend VI.
8. Before Nebraska's Counties, the pre-Nebraska territories' "courthouse" history may have been limited to observations about "Courthouse Rock" near Bridgeport. The observations from Courthouse Rock were not particularly good:

It is supposed that one-fifth (1/5) are dying here now with cholera and diarrhea. Thus far, one-tenth (1/10) of our company have died.⁴

Once Nebraska became a territory, its assembled legislature heard the Territory's Governor Cuming recommend the laws of Iowa be adopted temporarily because many of Nebraska's residents, having come from Iowa, were already familiar with them. To legislators preoccupied with partisan political squabbles this seemed like a good suggestion. The problem of providing laws for the new territory was thus solved by the simple expedient of adopting in its entirety the civil and criminal code of Iowa.⁵

Our mission is to advocate for and actively promote greater racial and ethnic diversity in the legal profession nationwide, so that our law schools, judicial systems, and lawyers more accurately reflect the communities they serve. To better serve our diverse communities, we also provide civil *pro bono* legal services to underserved communities . . . so that disadvantaged individuals and micro-businesses may gain economic self sufficiency to combat community deterioration.

⁴ William A. Linn, *The Story of the Mormons*, 422-23 (NY:McMillan 1902), quoted in Olson & Naugle, *History of Nebraska* (3rd Ed. 1997).

⁵ *Id.* at 86.

9. Nebraska's population is aging, and in most locations shrinking.^{6,7}
10. The economic and aging census data makes it clear the Midwest is depopulating. See the Census 2000 Nebraska Profile map attached as Appendix 1. This map may be found at:
http://ftp2.census.gov/geo/maps/specialprofile2k/ne_2k_profile.pdf
11. Nothing makes the point about the changing face of Nebraska, and the practice of law in our State, than a simple look at the US Census Bureau's map describing population redistribution between 1990 and 2000. This map is a remarkable study.⁸
12. In every sector of the practice of law, the change in the needs and demands of clients is apparent. This is true for low income consumers of professional services, including those seeking legal aid assistance.⁹

⁶ For a quick survey of the State's counties, see the U.S. Census Bureau's data set at <http://quickfacts.census.gov>.

⁷ The Census Bureau publishes a summary showing population trends from 1900 to the present by county. There are stark figures available for consideration. For example:

County/Year	Population	County/Year	Population
Boone (1920)	14,416	Gage (1920)	29,721
Boone (1940)	12,227	Gage (1940)	29,588
Boone (1960)	9,143	Gage (1960)	26,818
Boone (1980)	7,391	Gage (1980)	24,456
Boone (2000)	6,259	Gage (2000)	22,993
Cedar (1920)	16,225	Otoe(1920)	19,494
Cedar (1940)	15,126	Otoe (1940)	18,994
Cedar(1960)	13,368	Otoe (1960)	16,503
Cedar (1980)	11,375	Otoe (1980)	15,183
Cedar (2000)	9,615	Otoe (2000)	15,396
Douglas (1920)	204,524	Scotts Bluff(1920)	20,710
Douglas (1940)	247,562	Scotts Bluff (1940)	33,917
Douglas (1960)	343,490	Scotts Bluff (1960)	33,809
Douglas (1980)	397,038	Scotts Bluff (1980)	38,344
Douglas (2000)	463,585	Scotts Bluff (2000)	36,951
Holt (1920)	17,151	Seward(1920)	15,867
Holt (1940)	16,552	Seward (1940)	14,167
Holt (1960)	13,722	Seward (1960)	13,581
Holt (1980)	13,552	Seward (1980)	15,789
Holt (2000)	11,551	Seward (2000)	16,496

⁸ www.census.gov/population/cen2000/atlas/censr01-103.pdf

⁹ Lillehaug, *Minnesota Judicial System: 25 Years of Radical Change*, 26 Hamlin L Rev 219 (2003); large corporations, and lawyers attempting to cope with their steady payments, while demanding "Enron Esc" matters. (commencement address, Hon. Lee West, U.S. Senior Dist. Judge, 29 Okla City UL Rev 453 (2003), and even in the approach to legal education, which resorts to more service learning centers. Treuthart, *A Tapestry, Providing Context Through Service Learning*, 38 Gonz L Rev 215 (2003).

13. Nebraska, and the Midwest, finds itself with an aging population, slow or no growth in population in large sectors of the State, and escalating loss of manufacturing businesses, and ever increasing dependence on an economy requiring one Nebraskan to provide service to another, while funds are exchanged without goods being created in the centers where most of the population lives.¹⁰
14. In Nebraska, the plaintiff's bar has historically struggled against the perception "the Nebraska Supreme Court never met an insurance company it did not like."¹¹ Moreover, as is well known, and widely recognized, Nebraska does not permit private litigants to recover punitive damages¹², and its statutes contain virtually no fee-shifting provisions for attorney's fees. All this means Nebraska has, historically, been a defendant-friendly jurisdiction for personal injury, wrongful death, and traditional tort cases involving personal claims.

Structural Changes Require New Claims

15. Nebraska's lawyers are eager to seek recovery for lost earnings and lost earning capacity for individual plaintiffs. A permanent physical impairment is routinely translated into a loss of earnings, and Nebraska has long recognized earning capacity losses are compensable.¹³
16. Yet, Nebraskans, as a whole, suffer a rapidly growing loss in income by comparison with earnings in other states. In 2004, median household income in the United States was \$44,400, but in the United States, median housing income and poverty rates are a serious regional problem, as the Midwest is the only place where median household income has fallen, while the number of persons below the poverty rate has risen in the past 15 years.¹⁴
17. Nebraska plaintiff's bar has not attacked this problem. Earnings are down, poverty is up. Independent business starts are down, box stores are up. Small town main streets have died, and huge corporations that export revenues, reduce overall retail trade, diminish sales taxes, and provide only menial jobs, are on the rise. All this means Nebraskans are losing.
18. But Nebraska's plaintiff's lawyers are not picking up the cause.

¹⁰ Vagts, *Trade Policies for a Better Future: The Leutwiler Report, the Gatt and the Uruguay Round*, 84 Am J Intl Law 334 (1990); Domina, *International Meat Trade Issues*, Salzburg, Austria (2004).

¹¹ White, Ct, former Chief Justice at NCLE approx. 1999.

¹² *Abel v. Conover*, 170 Neb 926, 104 NW2d 684 (1960), cited at *Braesch v. Union Ins Co*, 237 Neb 44, 464 NW2d 769 (1991).

¹³ NJI2d Civ 4.01.

¹⁴ www.census.gov/hhes/www/img/incpov04/fig09.jpg.

THE CAUSE IS IMPORTANT

19. Seldom, if ever before, has America been so consolidated. We have had warnings. Many. President Abraham Lincoln, looking ahead to a difficult time in America said:

I see in the future a crisis approaching that unnerves me and causes me to tremble for the safety of my country. . . . [C]orporations have been enthroned and era of corruption in high places will follow, and the money power of the country will endeavor to prolong its reign by working upon the prejudices of the people until all wealth is aggregated in a few hands and the Republic is destroyed.

20. Frank Knight, widely regarded as the father of the Chicago School of Economics, observed in 1921, “the well being of society depends on maintaining a balance of economic efficiency, economic power, and economic freedom.” We live in a time when economic power is concentrated. The concentration has come about because of a belief that fewer, bigger companies will make for a more efficient economy, providing lower prices at a lower cost. But, as a leading interpreter of economist Frank Knight has noted:
21. On a more practical level, policies which are aimed at increasing efficiency – for example, relaxation of anti-trust law when a large imbalance of economic power exists – will allow those with economic power to further augment their own power. This will drive the imbalance of economic power further away from its optimal position, reducing economic freedom as well.¹⁵
22. Size and power at the market place are widely recognized, and forcefully opposed by big business.¹⁶
23. In Nebraska, a dramatic shift in economic activity has occurred. The State is now home to twenty-two (22) Wal-Mart Super Centers, three (3) discount stores, three (3) Sam’s Clubs, and one (1) distribution center. In Nebraska, these are the relevant statistics:

Super Center -	186,077 sf.; approx. 116,000 sku
Discount	98,079 sf.; approx. 62,500 sku
Sam’s Club	127,776 sf.; approx. 6,000 sku

¹⁵ Stephen John Nash (1998).

¹⁶ ConAgra’s SEC 10-K dated 10/5/4 noted “. . . [private label] customers may also in the future use more of their shelf space, currently used for [ConAgra] products, for their private label products. If the larger size of these customers results in additional negotiating strength or less shelf space for company products, the Company’s profitability could decline.”

24. On July 2005, Wal-Mart reported, on its own website, employing 10,658 Nebraskans, at “average wage for regular full time hourly associates” of \$9.73 per hour.
25. The Company reported it “collected on behalf of the State of Nebraska more than \$72.1 million sales taxes in 2004.”¹⁷
26. By comparison, Nebraska’s State government’s code agencies employed 13,404 persons.¹⁸
27. Non-code agencies employed an additional 1,024 persons.¹⁹ Total State employment was 19,256 persons,²⁰ so Wal-Mart’s employment ranks are half as large as that of the entire State government.

Fighting Size for What it Does to Society

28. Violations of the law, where no private cause of action is present, can be used to prove traditional tort theories. Thus:

It is claimed that [a statute, an ordinance, an administrative rule, a private safety regulation] was violated. If you find that it was, that does not necessarily prove negligence. The violation of [a statute, an ordinance, an administrative rule, a safety regulation] is evidence that you may consider, along with all of the other facts and circumstances in the case, in deciding whether or not there was any negligence.²¹

29. Nebraska’s Supreme Court has held this familiar jury instruction is “not appropriate where there is neither pleading nor proof of such a violation.”²² The instruction is proper in cases regarding navigation,²³ and regulations of the Department of Correctional Services.²⁴

¹⁷ Source: www.walmartfacts.com/community/article.aspx?id=173

¹⁸ www.nlc.state.ne.us/epubs/p2000/b004-2005.pdf, p. 5.

¹⁹ *Id.* at p. 6

²⁰ *Id.* at p. 7

²¹ NJI 2d Civ 3.03.

²² *Klunder v. Mattea*, 214 Neb 327, 331, 334 NW2d 416, 419 (1903).

²³ *McLain v. Ortmeier*, 259 Neb 750, 757, 612 NW2d 217, 223 (2000).

²⁴ *Goodenow v. State*, 259 Neb 375, 380, 610 NW2d 19, 22 (2000).

The Need for Innovation

30. A widely-regarded trade economist has said:

“The major shortcoming in domestic policy as well as bilateral and multi-lateral trade agreements dealing with the agricultural sector is the minimal effort that policymakers and trade negotiators dedicate to understanding how agriculture really works. Consequently, they apply textbook Economics 101 logic to agriculture, resulting in unrealistic expectations such as higher export demand and prices. When their policies are implemented, the result is preventable dumping that ultimately leads to more poverty in developing countries. A clear understanding of the structure of agriculture and everyone’s part would lead to an appreciation of what free markets and free trade can and cannot do. . . .

The overriding problem is that agricultural markets do not self-correct

In the agricultural sector, productivity-enhancing technologies are quickly adopted, increasing supplies and putting downward pressure on prices. The lower prices, in turn, become further incentives to adopt more cost-reducing technologies, and prices continue their slide

Even when individual farmers go bankrupt, total output changes very little. In contrast to other industries, where a plant closure means a reduction in industry size because the land and other assets are sold to a different industry, crop acreage typically remains in production. It is merely tilled by someone else.”²⁵

31. Nebraska’s important agricultural base and economics is inevitably influenced by this basic concept. But Nebraska is not affected in this way only by agriculture. Even healthcare is so impacted.²⁶
32. All these paradigms tend to combine, in economic terms, to have a dramatic influence on Nebraska. As we speak, Nebraska’s McPherson County operates its county government out of a used trailer house while a new, small courthouse not much larger, not as large as many new west Omaha homes, is being built. These

²⁵ Dr. Daniel De La Torre Ugarte, *The Structural Characteristics of Agriculture: Beyond Economics 101*, www.competitivemarkets.com/news_and_events/newsletter/2005/aug6ugarte.htm.

²⁶ See report published by the Robert Wood Johnson Foundation, *In Competitive Markets, Price, Not Quality, Guides Health Plans’ Choices*, RWJ National Program Project Report, Aug. 2003, www.RWJF.org/reports/grr/024328.htm

disparities cannot go unaddressed without long term political, and legal, repercussions.

33. Nebraska's trial lawyers must learn about the tools at their disposal, use them aggressively, and expand them. We must find new ways to remediate conventional injuries, with wise, sharp, clear, and forcefully advocated, interpretations of current, and desired laws.
34. And we must lobby intelligently. This is not happening. For example, does anyone doubt that the Interstate exit onto Grand Island's Locust Street – an exit that has been needed for Grand Island's growth for at least forty (40) years, finally came about because Wal-Mart Stores wanted to build a supercenter at the extreme south edge of Grand Island, on Locust Street, at the point where the new Interstate exit reaches south G.I.?
35. While this expenditure of public funds was occurring, how much futile energy were Nebraska's lawyers and law-related lobbyists devoting to less impactful subjects? Why, for example, wasn't Grand Island's entire business community able to achieve, in an Interstate exit, what an Arkansas company owned by the world's wealthiest people could do without a statute?
36. The playing field is not level. The time to level it has come.²⁷
37. The remainder of this paper will evaluate, and present, Nebraska statutes that are little used, often do not provide for private causes of action, but can certainly serve as vehicles to think through claims, consider alternate theories, present different views of problems suffered by our clients, and, particularly when remediating business problems, perhaps level the playing fields for small business against huge conglomerates.
38. Unless Nebraska lawyers join this cause soon, the unpleasant change in our State's appearance will inevitably continue, and our economic freedom will erode. Unless

²⁷ The National Center for Policy Analysis, United States of America, sponsored the Fraser Institute's 2005 publication, *Economic Freedom of North America 2005 Annual Report*. The publication evaluates economic freedom on the basis of a sophisticated index, and notes changes. In the course of doing so, it defines economic freedom as follows:

Individuals have economic freedom when (a) property they acquire without the use of force, fraud or theft is protected from physical invasions by others and (b) they are free to use, exchange, or give their property as long as their actions do not violate the identical rights of others. Thus, an index of economic freedom should measure the extent to which acquired property is protected and individuals are engaged in voluntary transactions. www.ncpa.org/email/20050620efna.pdf; Report Economic Freedom of North America 2005, Fraser Institute, ISBN0-88975-220-6.

we enjoy economic freedom, there will no place for us at the policy table when political, civic, social or personal freedoms are discussed.

39. Given this setting, then why is it not appropriate and wise to use Nebraska's Unfair Insurance Trade Practices Act²⁸, for example, to establish negligence against insurance companies in the settlement of claims, refusal to pay health insurance benefits, etc. under negligence theories.

40. This statute's broad prohibitions include:

These statutes are applicable to health maintenance organizations. The *Unfair Insurance Trade Practices Act*, and the *Unfair Insurance Claims Settlement Practices Act* both apply to health maintenance organizations. *Neb Rev Stat § 44-32179*. Unfair trade practices for the purposes of the insurance trade include:

Any of the following acts or practices, if committed in violation of section 44-1524, shall be unfair trade practices in the business of insurance:

- (1) Making, issuing, circulating, or causing to be made, issued, or circulated any estimate, illustration, circular, statement, sales presentation, omission, or comparison which:
 - (a) Misrepresents the benefits, advantages, conditions, or terms of any policy;
 - (b) Misrepresents the dividends or share of the surplus to be received on any policy;
 - (c) Makes any false or misleading statements as to the dividends or share of surplus previously paid on any policy;
 - (d) Misleads as to or misrepresents the financial condition of any insurer or the legal reserve system upon which any life insurer operates;
 - (e) Uses any name or title of any policy or class of policies which misrepresents the true nature thereof;
 - (f) Misrepresents for the purpose of inducing or tending to induce the purchase, lapse, forfeiture, exchange, conversion, or surrender of any policy, including intentionally misquoting any premium rate;
 - (g) Misrepresents for the purpose of effecting a pledge or assignment of or effecting a loan against any policy; or
 - (h) Misrepresents any policy as being shares of stock;

²⁸ The Unfair Insurance Claims Settlement Practices Act is found at *Neb Rev Stat § 44-1536, et seq.*

- (2) Making, publishing, disseminating, circulating, or placing before the public, or causing, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in a newspaper, magazine, or other publication, or in the form of a notice, circular, pamphlet, letter, or poster, or over any radio or television station, or in any other way, an advertisement, announcement, or statement containing any assertion, representation, or statement with respect to the business of insurance or with respect to any insurer in the conduct of his or her insurance business which is untrue, deceptive, or misleading;
- (3) Making, publishing, disseminating, or circulating, directly or indirectly, or aiding, abetting, or encouraging the making, publishing, disseminating, or circulating of any oral or written statement or any pamphlet, circular, article, or literature which is false or maliciously critical of or derogatory to the financial condition of any insurer and which is calculated to injure such insurer;
- (4) Entering into any agreement to commit or by any concerted action committing any act of boycott, coercion, or intimidation resulting in or tending to result in unreasonable restraint of or monopoly in the business of insurance;
- (5)
 - (a) Knowingly filing with any supervisory or other public official, or knowingly making, publishing, disseminating, circulating, or delivering to any person, or placing before the public, or knowingly causing, directly or indirectly, to be made, published, disseminated, circulated, delivered to any person, or placed before the public, any false material statement of fact as to the financial condition of an insurer; or
 - (b) Knowingly making any false entry of a material fact in any book, report, or statement of any insurer or knowingly omitting to make a true entry of any material fact pertaining to the business of such insurer in any book, report, or statement of such insurer;
- (6) Issuing or delivering or permitting agents, officers, or employees to issue or deliver agency company stock or other capital stock, or benefit certificates or shares in any common-law corporation, or securities or any special or advisory board contracts or other contracts of any kind promising returns and profits as an inducement to insurance;
- (7)
 - (a) Making or permitting any unfair discrimination between individuals of the same class and equal expectation of life in the rates charged for any life insurance policy or annuity or in the dividends or other benefits payable thereon or in any other of the terms and conditions of such policy or annuity;
 - (b) Making or permitting any unfair discrimination between individuals of the same class involving essentially the same hazards in the amount of premium, policy fees, or rates charged for any sickness and accident insurance policy or in the benefits payable thereunder, in any of the terms or conditions of such policy, or in any other manner, except that this subdivision shall not limit the negotiation of preferred provider policies and contracts under sections 44-4101 to 44-4113;

- (c) Making or permitting any unfair discrimination between individuals or risks of the same class and of essentially the same hazards by refusing to issue, refusing to renew, canceling, or limiting the amount of insurance coverage on a property or casualty risk because of the geographic location of the risk unless:
 - (i) The refusal, cancellation, or limitation is for a business purpose which is not a pretext for unfair discrimination; or
 - (ii) The refusal, cancellation, or limitation is required by law, rule, or regulation;
- (d) Making or permitting any unfair discrimination between individuals or risks of the same class and of essentially the same hazards by refusing to issue, refusing to renew, canceling, or limiting the amount of insurance coverage on a residential property risk, or the personal property contained therein, because of the age of the residential property unless:
 - (i) The refusal, cancellation, or limitation is for a business purpose which is not a pretext for unfair discrimination; or
 - (ii) The refusal, cancellation, or limitation is required by law, rule, or regulation;
- (e) Refusing to insure, refusing to continue to insure, or limiting the amount of coverage available to an individual solely because of the sex or marital status of the individual. This subdivision shall not prohibit an insurer from taking marital status into account for the purpose of defining individuals eligible for dependent benefits; or
- (f) Terminating or modifying coverage or refusing to issue or refusing to renew any property or casualty insurance policy solely because the applicant or insured or any employee of the applicant or insured is mentally or physically impaired unless:
 - (i) The termination, modification, or refusal is for a business purpose which is not a pretext for unfair discrimination; or
 - (ii) The termination, modification, or refusal is required by law, rule, or regulation.

This subdivision (f) shall not apply to any sickness and accident insurance policy sold by a casualty insurer and shall not be interpreted to modify any other provision of law relating to the termination, modification, issuance, or renewal of any policy;
- (8) (a) Except as otherwise expressly provided by law:

- (i) Knowingly permitting or offering to make or making any life insurance policy, annuity, or sickness and accident insurance policy, or agreement as to any such policy or annuity, other than as plainly expressed in the policy or annuity issued thereon, or paying, allowing, or giving, or offering to pay, allow, or give, directly or indirectly, as inducement to such policy or annuity, any rebate of premiums payable on the policy or annuity, or any special favor or advantage in the dividends or other benefits thereon, or any valuable consideration or inducement whatever not specified in the policy or annuity; or
 - (ii) Giving, selling, purchasing, or offering to give, sell, or purchase as inducement to such policy or annuity or in connection therewith any stocks, bonds, or other securities of any insurer or other corporation, association, partnership, or limited liability company, or any dividends or profits accrued thereon, or anything of value not specified in the policy or annuity.
- (b) Nothing in subdivision (7) or (8)(a) of this section shall be construed as including within the definition of discrimination or rebates any of the following acts or practices:
 - (i) In the case of any life insurance policy or annuity, paying bonuses to policyholders or otherwise abating their premiums in whole or in part out of surplus accumulated from nonparticipating insurance if such bonuses or abatement of premiums are fair and equitable to policyholders and for the best interests of the insurer and its policyholders;
 - (ii) In the case of life insurance policies issued on the industrial debit plan, making allowance to policyholders who have continuously for a specified period made premium payments directly to an office of the insurer in an amount which fairly represents the saving in collection expenses; or
 - (iii) Readjustment of the rate of premium for a group insurance policy based on the loss or expense thereunder, at the end of the first or any subsequent policy year of insurance thereunder, which may be made retroactive only for such policy year;
- (9) Failing of any insurer to maintain a complete record of all the complaints received since the date of its last examination conducted pursuant to the Insurers Examination Act. This record shall indicate the total number of complaints, their classification by line of insurance, the nature of each complaint, the disposition of each complaint, and the time it took to process each complaint. For purposes of this subdivision, complaint shall mean any written communication primarily expressing a grievance;

- (10) Making false or fraudulent statements or representations on or relative to an application for a policy for the purpose of obtaining a fee, commission, money, or other benefit from any insurer, agent, broker, or individual person;
- (11) Failing of any insurer, upon receipt of a written inquiry from the department, to respond to such inquiry or request additional reasonable time to respond within fifteen working days;
- (12) Accepting applications for or writing any policy of insurance sold, negotiated, or solicited by an insurance producer or business entity not licensed or appointed as required by the Insurance Producers Licensing Act; and
- (13) Violating any provision of section 44-320, 44-348, 44-360, 44-361, 44-369, 44-393, 44-515 to 44-518, 44-522, 44-523, 44-7,101, 44-2132 to 44-2134, 44-3606, 44-4809, 44-4812, 44-4817, or 44-5266, the Privacy of Insurance Consumer Information Act, or the Unfair Discrimination Against Subjects of Abuse in Insurance Act.

41. Rarely are health insurance policies issued with such clarity of circumstances the buyer understands the limitations on the policy often giving rise to disallowance settings immune from litigation. Of course, the successful litigant can recover attorney's fees²⁹ when litigating against the insured's own insurer. Once a case is concluded, sections of Nebraska's *Unfair Competition Act* and *Trade Practices Act* governing the insurance business do not contemplate private suits, but only suits by the State.³⁰
42. Lenders in Nebraska are prohibited from certain unfair acts and practices too. The statutes provide:
 - (1) No person who lends money or extends credit shall:
 - (a) Require, as a condition precedent to the lending of money or extension of credit or any renewal thereof, that the borrower, mortgagor, or purchaser to whom such money or credit is extended or whose obligation the creditor is to acquire or finance negotiate any policy or renewal thereof through a particular insurer or group of insurers or agent or broker or group of agents or brokers;
 - (b) Solicit insurance for the protection of real property after a borrower, mortgagor, or purchaser indicates interest in securing a first mortgage credit extension until such borrower, mortgagor, or purchaser has received a commitment in writing from the lender as to a loan or credit extension. This requirement for a commitment shall not apply when the premium for the required insurance is to be financed as part of the loan or

²⁹ *Neb Rev Stat* § 44-359.

³⁰ *Allied Financial Services, Inc. v. Foremost Ins Co*, 418 FSupp 157(d) Neb (1976).

extension of credit involving personal property transactions;

- (c) Unreasonably reject a policy furnished by the borrower, mortgagor, or purchaser for the protection of the property securing the credit or lien. A rejection shall not be deemed unreasonable if it is based on reasonable standards, uniformly applied, relating to the extent of coverage required and the financial soundness and the services of an insurer. Such standards shall not discriminate against any particular type of insurer and shall not call for rejection of a policy because it contains coverage in addition to that required in the credit transaction;
 - (d) Require that any borrower, mortgagor, purchaser, insurer, broker, or agent pay a separate charge in connection with the handling of any policy required as security for a loan on real property or pay a separate charge to substitute the policy of one insurer for that of another. This subdivision shall not include the interest which may be charged on premium loans or premium advancements in accordance with the terms of the loan or credit document;
 - (e) Use or disclose, without the prior written consent of the borrower, mortgagor, or purchaser taken at a time other than the making of the loan or extension of credit, information relative to a policy which is required by the credit transaction for the purpose of replacing such insurance; or
 - (f) Require any procedures or conditions of duly licensed agents, brokers, or insurers not customarily required of those agents, brokers, or insurers affiliated or in any way connected with the person who lends money or extends credit.
- (2) The director may examine and investigate those insurance-related activities of any person who the director believes may be in violation of this section. Any affected person may submit to the director a complaint or material pertinent to the enforcement of this section.
 - (3) Nothing in this section shall prevent a person who lends money or extends credit from placing insurance on real or personal property in the event the borrower, mortgagor, or purchaser has failed to provide required insurance in accordance with the terms of the loan or credit document.
 - (4) Nothing in this section shall apply to credit life or credit accident and health insurance.³¹

³¹ *Neb Rev Stat* § 44-1526.

Consumer Protection

43. Nebraska's *Consumer Protection Act* is a little used.³² The Act provides:

Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce shall be unlawful.

44. Actionable conduct under this statute must have an impact on the public interest.³³ Surely, proof of a method of doing business is deceptive can be admitted to prove/establish a deceptive practice. Competent evidence should be admissible to show employers and the attorney general are responsible to supervise or oversee appropriate screening for advertising, product safety, inventory presentation, including stacking of boxes which will fall on customers, etc.

45. Monopolies are forbidden.³⁴ So are conspiracies to restrain trade.³⁵ Price fixing is impermissible.³⁶ In Nebraska, this prohibition is as follows:

It shall be unlawful for any person to lease or sell, or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, or services, whether patented or unpatented, for use, consumption, enjoyment or resale, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods. . . when the effect . . . may be to substantially lessen competition . . .

No Nebraska cases are decided under this statute!

46. Of course, federal law prohibits unfair methods of competition.³⁷ Simply, "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful."³⁸ Only the FTC may bring enforcement actions directly under the Act, and Commission may not "declare unlawful an act or practice on the ground that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to

³² *Neb Rev Stat* § 59-1601. For federal analogous statutes see 15 USC 6 & 7.7.

³³ *Nelson v. Lusterstone Surfacing Co*, 258 Neb 678, 605 NW2d 136 (2000).

³⁴ *Neb Rev Stat* § 59-1603.

³⁵ *Neb Rev Stat* § 59-1604.

³⁶ *Neb Rev Stat* § 59-1605.

³⁷ 15 USC § 45.

³⁸ 15 USC § 45(a)(1), a part of the Federal Trade Commission Act. Only the FTC may bring enforcement actions directly under the Act, and Commission may not "

consumers themselves and not (b) outweighed by countervailing benefits to consumers or to competition.”³⁹

47. Nebraska’s statutes contain an important anti merger provision:

It shall be unlawful for any corporation to acquire, directly, or indirectly, the whole or any part of the stock or assets of another corporation when the effect of such acquisition may be to substantially lessen competition or tend to create a monopoly in any line of commerce.⁴⁰

Only three Nebraska cases cite this statute. Two are unappealed Federal District Court Opinions and one is an unpublished Court of Appeals Decision. Nebraska’s Court of Appeals has noted:

By its statutory terms, a claim for unfair competition would seem to range far and wide across the spectrum of business-related torts. The statute’s language is clearly very broad. Further a review of Nebraska case law on unfair competition does little to narrow or refine the statute’s reach. . . . unfair competition is a commercial tort. Can the tort of unfair competition be defined? The simple and honest answer to this question is no – not in the abstract. It is no easier and no more productive of useful results to define generally the exact limits of unfair competition than it is to define the exact limits of what is a “tort” or a “civil wrong”. On the level of such abstraction, no useful purpose is served by struggling for a sweeping definition. 1. J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 1:8 at 1- 15 (1999).⁴¹

48. Nebraska permits those dealing directly or *indirectly* with the Defendant to pursue a civil action for damages A winner recovers:

the actual damages sustained by him or her, or [can win] an injunction, and the actual damages sustained . . . together with the costs of suit, including a reasonable attorney’s fee, and the Court may, its discretion increase the award of damages to an amount which bears a reasonable relation to the actual damages which have been sustained and which damages are not susceptible of measurement by ordinary pecuniary standards; except that such

³⁹ Id. at (n).

⁴⁰ *Neb Rev Stat* § 59-1606.

⁴¹ This language is from *Catz Inc. v. 4-L Manufacturing, Inc.*, 1999 WL 1063087 (Neb App 1999). The opinion, by Judge Sievers, is not available for citation because it is unreported.

increased award for violation of § 59-1602 shall not exceed \$1,000.⁴²

49. The attorney's fees statute applies to all proceedings under the *Consumer Protection Act*, including those invoking the broadly remedial § 59-1601, above. Of course, under federal law:

Every contract, in combination. in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract, or engage in any combination or conspiracy hereby declared to be illegal, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished . . .⁴³

50. Federal law contains a similar felony sanction, and civil cause of action, for monopolies:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . .⁴⁴

51. It is widely thought co-ops are exempt from the *Consumer Protection Act*,⁴⁵ and from Federal anti-trust laws, but in Nebraska, there are important limitations. Here, the law provides:

Persons engaged in the production of agricultural products as farmers, planters, ranch men, dairy men . . . may act together in associations . . . in collectively processing, preparing for market, handling, and marketing such products in intra state commerce. The association shall be operated for the mutual benefit of the members thereof, as such producers, and conformed to one or both of the following requirements:

⁴² *Neb Rev Stat* § 59-1609.

⁴³ Sherman Anti-trust Act § 1, 15 USC § 1. See also 15 USC § 6 providing for the forfeiture of property "owned under any contract or by any combination, or pursuant to any conspiracy. . . ."

⁴⁴ 15 USC § 2.

⁴⁵ 15 USC § 13(b) provides "nothing in this Act shall prevent a cooperative association from returning to its members, producers, or consumers, the whole, or any part of, the net earnings or surplus resulting from its trading operations, in proportion to their purchases or sales from, to, or through the association."

- (1) That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein; or
- (2) That the association does not pay dividends on stock or membership capital in excess of eight percent per annum.

*Such association shall not deal in the products of non-members to an amount greater in value than such as are handled by it for members.*⁴⁶

52. The disqualification in this statute may make a number of cooperative associations operating in Nebraska vulnerable to suit.

Predatory Practices

53. No one can doubt large box store entrance into Nebraska's retail markets quickly cannibalize many independent businesses in the box store's service areas. The main street of virtually every Nebraska community with a population under 3,000 attests to this fact.
54. Federal law prohibits predatory pricing. Federal law provides:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality. . . where such commodities are sold for use, consumption or resale . . . and where the effect of such discrimination may be substantially to lessen competition, or tend to create a monopoly in any line of commerce or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the different methods or quantities in which such commodities are to such purchasers sold or delivered . . .⁴⁷

55. Where a case is made for price discrimination, the burden of rebutting the *prima facie* case by showing a justification "shall be upon the person charged with the violation of this section. . ."

⁴⁶ *Neb Rev Stat* § 59-1618.

⁴⁷ 15 USC § 13(a), commonly known as the Robinson Patman Act.

56. The law also makes it improper for the retailer to receive or accept “anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to other party to such transaction, or to an agent, representative, or other intermediary therein . . .”⁴⁸
57. Robinson *Patman Act* cases are difficult in many settings. But, where a new box store in a community sells milk, bananas, etc., below cost for other area retailers, an invoice-to-invoice comparison can make a case, and box stores are not immune from suit. It is possible to beat them. The term “predatory pricing” means “pricing below some appropriate measure of cost.”⁴⁹
58. The impact of major box stores requires inventive solutions.⁵⁰

The Federal Robinson Patman Act,⁵¹

59. The *Robinson Patman Act* came about because, by 1936 “Congress believed that large firms could dominate markets through predation and other forms of economic warfare directed against smaller firms, and felt that ‘power buyers,’ such as large retailers could use their market power to extract price concessions from manufacturers and other sellers that was unavailable to their smaller competitors.” As the Commission noted, “[t]he major legislative purpose behind the *Robinson – Patman Act* was to provide some measure of protection to small independent retailers and their independent suppliers from what was thought to be unfair competition from vertically integrated, multi-location chain stores.”⁵²
60. The United States Supreme Court has held the Act is based on one fundamental principle:

⁴⁸ 15 USC § 13(c).

⁴⁹ *Advo, Inc v. Philadelphia Newspapers, Inc*, 51 F3d 1191, 1198 (3rd Cir 1995). Consider *Gaowan Car Care Center v. Murphy Oil USA, Inc*, 230 F3d 1358 (6th Cir 2000); *Wal-Mart Stores, Inc v. Samara Bros, Inc*, 529 US 205, 120 S Ct 1339, 146 LEd 2d 182 (2000). (Alleging infringement of unregistered trade dress.) (Holding for retailer and against Wal-Mart).

⁵⁰ For a fascinating case study involving good lawyering, see *United States v. Eighty-three Rolex Watches*, 992 F2d 508 (5th Cir 1993) a “gray market” goods case in which Sam’s Whole Club and Wal-Mart Stores, Inc. were sued under § 526 of the Tariff Act of 1930, 19 USC § 1526. This Act prohibits the importation of any merchandise bearing a trademark “owned by a citizen of, or by a corporation . . . created or organized within the United States” and registered in the patent and trademark office by a person domiciled in the United States without written consent of the domestic trade mark owner. Wal-Mart imported “gray market” watches. Later, the Company was sued in a class action, settled the case, and paid large sums of money because of its abuse of the market place with “gray market” goods.

⁵¹ **15 USC § 13(a)-(f).**

⁵² Clark, Secretary Federal Trade Commission, speech entitled, *The Robinson – Patman Act: General Principles, Commission Proceedings, and Selected Issues* (San Jose, CA 1995), www.ftc.gov/speeches/other/Patman.htm.

. . . to assure, to the extent reasonably practicable, that business men at the same functional level would stand on equal competitive footing so far as price is concerned.⁵³

61. Nebraska has no analogous statute, and the phrase “predatory pricing” is not found in Nebraska’s appellate *jurisprudence*.
62. By far, one of the most significant recent developments in the law of trade secrets is the issuance of the final draft of the Restatement of the Law Third, Unfair Competition, which was issued by the American Law Institute in January, 1995. Chapter 4, entitled Appropriation of Trade Values devotes an entire topic (Topic 2) to Trade Secrets and the Restatement (3d) contains the following sections:

TRADE SECRETS

39. Definition of Trade Secret
40. Appropriation of Trade Secrets
41. Duty of Confidence
42. Breach of Confidence by Employees
43. Improper Acquisition of Trade Secrets
44. Injunctions in Trade Secret Actions
45. Monetary Relief in Trade Secret Actions

The definition of a trade secret has been simplified:

§ 39. Definition of Trade Secret

A trade secret is any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an actual or potential economic advantage over others.

The Restatement (3d) makes it clear that the "knew or should have known" standard for trade secret misappropriation is a "reasonable person" standard.

"To subject an actor to liability... the [trade secret] owner need not prove that the actor knew that its possession of the trade secret was wrongful, it is sufficient if the actor had reason to know. Thus, if a reasonable person in the position of the actor would have inferred that he or she was in wrongful possession of another's trade secret, the actor is subject to liability for any

⁵³ *FTC v. Sun Oil Co*, 375 US 505, 520 (1963).

subsequent use or disclosure.
Restatement (3d) § 40 Comment d.

The Restatement (3d) establishes a "duty of confidence" to govern the myriad of circumstances in today's marketplace in which trade secrets are disclosed. Liability can be premised upon (1) an "express promise" (whether oral or written) or (2) the circumstances surrounding the disclosure. Restatement (3d) § 41.

The Restatement (3d) establishes a specific section to govern the rights of employees and former employees and expressly limits liability to the use or disclosure of a trade secret owned by the employer and in breach of a duty of confidence. This will now open up a whole new line of "ownership" defenses in trade secret cases. See Restatement (3d) § 42. It also:

Modernizes the definition of "improper means" to include "the unauthorized interception of communications" and a catch-all "improper means" that are "either wrongful in themselves or wrongful under the circumstances of the case." Restatement (3d) § 43.

Sets forth an 8-FACTOR TEST for evaluating the appropriateness and scope of injunctive relief in trade secret misappropriation cases. Restatement (3d) § 44.

Sets forth a 6-FACTOR TEST for evaluating the appropriate method of measuring monetary relief in trade secret misappropriation cases. Restatement (3d) § 45.

63. Nebraska's *Deceptive Trade Practices Act* can be helpful when used as a tool to marshal evidence that actionable wrongdoing has occurred. The *Act* prohibits these acts though it does not provide a private remedy. Each of these acts may, if proven be, may provide proof of a tort or other civil remedy, however:

- (a) A person engages in a deceptive trade practice when, in the course of his or her business, vocation, or occupation, he or she:
 - (1) Passes off goods or services as those of another;
 - (2) Causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services;
 - (3) Causes likelihood of confusion or of misunderstanding as to affiliation, connection, or association with, or certification by, another;

- (4) Uses deceptive representations or designations of geographic origin in connection with goods or services;
 - (5) Represents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he or she does not have;
 - (6) Represents that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used, or secondhand, except that sellers may repair damage to and make adjustments on or replace parts of otherwise new goods in an effort to place such goods in compliance with factory specifications;
 - (7) Represents that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;
 - (8) Disparages the goods, services, or business of another by false or misleading representation of fact;
 - (9) Advertises goods or services with intent not to sell them as advertised;
 - (10) Advertises goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;
 - (11) Makes false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions;
 - (12) Uses or promotes the use of a chain distributor scheme in connection with the solicitation of business or personal investments from members of the public;
 - (13) With respect to a sale or lease to a natural person of goods or services purchased or leased primarily for personal, family, household, or agricultural purposes, uses or employs any referral or chain referral sales technique, plan, arrangement, or agreement; or
 - (14) Knowingly makes a false or misleading statement in a privacy policy, published on the Internet or otherwise distributed or published, regarding the use of personal information submitted by members of the public.
- (b) In order to prevail in an action under the Uniform Deceptive Trade Practices Act, a complainant need not prove competition between the parties.

(c) This section does not affect unfair trade practices otherwise actionable at common law or under other statutes of this state.

64. Nebraska's Attorney General may bring *Deceptive Trade Practices Act* cases,⁵⁴ and the statute does not create a private cause of action on its face. But, proof it has been violated is evidence that may be used to establish more traditional torts.⁵⁵
65. Nebraska's statutes prohibit acts of impropriety by "credit service organizations," including mortgage lenders.⁵⁶ Acts prohibited include:
- a. Charging a buyer before completing performance of all services.
 - b. Charging a buyer for obtaining or attempting to obtain an extension of credit it agreed to obtain for the buyer before the extension was obtained;
 - c. Charging for the full service of referral.
 - d. Making false or misleading representations in the offer or sale of services, or engaging "directly or indirectly, in any fraudulent or deceptive act, practice, or course of business in connection with the offer of the services of a credit service organization."⁵⁷
 - e. Advertising, or caused to be advertised "in any manner whatsoever, the services of a credit services organization without filing a Registration Statement with the Secretary of State under § 45-806 unless otherwise provided by the Credit Services Organization Act."⁵⁸
66. Nebraska's criminal statutes include a prohibition against deceptive or misleading advertising:

Any person . . . shall be deemed guilty of deceptive or misleading advertising that makes, publishes, disseminates, circulates, or places before the public, or causes, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public in this state, in a newspaper or other publication, or in the form of a book, notice, hand bill, poster, bill, circular, pamphlet, or letter, or in any way, and advertisement of any merchandise for sale at retail at less than original actual cost, or less than original replacement cost, whichever is lower, if the merchant does not have a sufficient quantity of merchandise to meet the reasonable expected demand, or the advertisement either (1) fails to state in such advertisement the quantity of merchandise available for sale, or (2) fails to state the advertiser is discontinuing the item.

⁵⁴ *Neb Rev Stat* § 87-303.03

⁵⁵ *NJI 2d Civ* 3.03.

⁵⁶ *Neb Rev Stat* § 45-804.

⁵⁷ *Neb Rev Stat* § 45-804(5).

⁵⁸ *Neb Rev Stat* § 45-804(7).

67. False advertising claims have many sources.⁵⁹ Insurers may not falsely advertise.⁶⁰ Barbers are prohibited from doing so too.⁶¹ So are those who operate membership campgrounds.⁶² Purveyors of food may not falsely advertise it.⁶³

Attorney's Fees

Malpractice Cases

68. Nebraska's Medical Malpractice Act provides for the recovery of attorney's fees and court costs.⁶⁴ The Statute provides:
- (1) In all cases against a healthcare provider for malpractice or professional negligence, upon motion of either party, the Court shall review the attorney's fees incurred by that party and allow such compensation as the Court shall deem reasonable.
 - (2) In all cases against healthcare providers for malpractice or professional negligence, the Court may, upon application by the prevailing party, in its discretion, and in an amount determined in its discretion, tax its costs payable to the prevailing party the reasonable costs of preparation and trial, including reasonable attorney's fees and reasonable loss of earnings by the prevailing party occasioned by the trial if the Court finds that the losing party did not have a reasonable chance of recovery, or a reasonable chance of a successful defense.

Insurance Companies

69. Insured persons are entitled to fees in successful suits against their own insurers:

In all cases when the beneficiary or other person entitled thereto brings an action upon any type of insurance policy, except workers' compensation insurance, or upon any certificate issued by a fraternal benefit society, against any company, person, or association doing business in this state, the court, upon rendering judgment against such company, person, or association, shall allow the plaintiff a reasonable sum as an attorney's fee in addition to the amount of his or her recovery, to be taxed as part of the costs. If such cause is appealed, the appellate court shall likewise allow a reasonable sum as an attorney's fee for the appellate proceedings, except that if the plaintiff fails to obtain judgment for more than may have been offered by such company, person, or association in

⁵⁹ One such source is the Lanham Act, 15 USC § 1051, *et seq.* prohibiting misuse of trademarks, etc. Bait & switch advertising and other unfair forms of "alluring but insincere" offers to sell products are prohibited by the Federal Trade Commission Act, 15 USC § 45, *et seq.*

⁶⁰ *Neb Rev Stat* § 44-1801.

⁶¹ *Neb Rev Stat* § 71-217.

⁶² *Neb Rev Stat* § 76-2108.

⁶³ *Neb Rev Stat* § 81-2, 286.

⁶⁴ *Neb Rev Stat* § 44-2834

accordance with section 25-901, then the plaintiff shall not recover the attorney's fee provided by this section.⁶⁵

Certain Abortion Cases

70. A special statute provides for attorneys fees against one who performs or attempts abortion surgeries in certain settings:

Any person upon whom an abortion has been performed or attempted in violation of section 28-327 or the parent or guardian of a minor upon whom an abortion has been performed or attempted in violation of such section shall have a right to maintain a civil cause of action against the person who performed the abortion or attempted to perform the abortion. A violation of such section shall be prima facie evidence of professional negligence. The written certification prescribed by subdivision (3) of section 28-327 signed by the person upon whom an abortion has been performed or attempted shall constitute and create a rebuttable presumption of full compliance with all provisions of section 28-327 in favor of the physician who performed or attempted to perform the abortion, the referring physician, or the agent of either. The written certification shall be admissible as evidence in the cause of action for professional negligence or in any criminal action. If judgment is rendered in favor of the plaintiff in any such action, the court shall also render judgment for a reasonable attorney's fee in favor of the plaintiff against the defendant.⁶⁶

Certain College Athletics Matters

71. Where a college violates certain college athletics rules and laws, it can be held liable for attorneys' fees:

In addition to costs and a reasonable attorney's fee, a collegiate athletic association that violates the Nebraska Collegiate Athletic Association Procedures Act shall be liable to the aggrieved college or university for an amount equal to one hundred percent of the monetary loss per year or portion of a year suffered during the period that any monetary loss occurs due to a penalty imposed in violation of the act. For purposes of calculating monetary loss, one hundred percent of the yearly loss shall be equal to the gross amount realized by the affected athletic program during the immediately preceding calendar year.⁶⁷

Eminent Domain Fees Provisions

72. A landowner can recover fees in a condemnation case where these conditions are met:

⁶⁵ *Neb Rev Stat Sec 44-359.*

⁶⁶ *Neb Rev Stat Sec 28-327.04*

⁶⁷ *Neb Rev Stat Sec 85-1207*

If an appeal is taken from the award of the appraisers by the condemnee and the amount of the final judgment is greater by fifteen percent than the amount of the award, or if appeal is taken by the condemner and the amount of the final judgment is not less than eighty-five percent of the award, or if appeal is taken by both parties and the final judgment is greater in any amount than the award, the court may in its discretion award to the condemnee a reasonable sum for the fees of his or her **attorney** and for fees necessarily incurred for not more than two expert witnesses. On any appeal by the condemner, the condemner shall pay all court costs on appeal. If appeal is taken by the condemnee only and the final judgment is not equal to or greater than the award of the appraisers, the court may in its discretion award to the condemner the court costs incurred by the condemner, but not **attorney** or expert witness fees.

If an appeal is taken to the district court and the district court finds that the condemner did not negotiate in good faith with the property owner or there was no public purpose for taking the property involved, the court shall award to the condemnee a reasonable sum for the fees of his or her **attorney** and the condemner shall pay all court costs on appeal.⁶⁸

Certain Unfair Competition Cases

73. The *Unfair Competition Act* in Nebraska provides for attorneys fees to be awarded to the successful party:

Whenever the State of Nebraska is injured by reason of a violation of sections 59-1603 to 59-1606, it may sue therefor in the district court to recover the actual damages sustained by it and to recover the costs of the suit including a reasonable attorney's fee.⁶⁹

Other Cases – Examples

74. Other statutes providing for fees include:

Improper Wage Assignments

Any person, firm, corporation, company, partnership, limited liability company, or business institution that violates section 36-213 shall (1) be liable to the party injured through such violation thereof for the amount of the wages withheld by any employer under such void assignment or notice of such void assignment, with all costs and expenses and a reasonable attorney's fee to be recovered in any court of competent jurisdiction in this state, and (2) be guilty of a Class IV misdemeanor.⁷⁰

⁶⁸ *Neb Rev Stat Sec 76-720.*

⁶⁹ *Neb Rev Stat Sec 59-1609.*

⁷⁰ *Neb Rev Stat Sec 67-213.01*

Improper Home Solicitation Sales

Any sale made in violation of sections 69-1601 to 69-1607 shall entitle the buyer to recover any sums paid to the seller pursuant to the transaction along with the actual damages, including any incidental and consequential damages, sustained by the buyer by reason of the violation, together with the costs of the suit, including a reasonable attorney's fee.⁷¹

Certain Residential Landlord Tenant Issues:

If the landlord unlawfully removes or excludes the tenant from the premises or willfully and wrongfully diminishes services to the tenant by interrupting or causing the interruption of electric, gas, water or other essential service to the tenant, the tenant may recover possession or terminate the rental agreement and, in either case, recover an amount equal to three months' periodic rent as liquidated damages, and a reasonable attorney's fee.⁷²

Unperformed Municipal Audits

Should any municipality fail or refuse to cause such annual audit to be made of all of its functions, activities, and transactions for the fiscal year within a period of six months following the close of such fiscal year, then and in such event, any resident taxpayer may make a written demand on the governing body of such municipality to commence such annual audit within thirty days, and if such demand is ignored, a mandamus action may be instituted by any taxpayer or taxpayers residing in such municipality against the then municipal authorities of such municipality requiring the municipality to proceed forthwith to cause such audit to be made, and if such action is decided in favor of the taxpayer or taxpayers instituting the same, the then municipal authorities of such municipality shall be personally, and jointly and severally, liable for the costs of such action, including a reasonable attorney fee to be allowed by the court for the attorney employed by the taxpayer or taxpayers and who prosecuted the action.⁷³

Claims Under \$2,000⁷⁴

Claims Under the APA Where the Citizen Appeals

- (1) Unless otherwise provided by law, the court having jurisdiction over a civil action brought by the state or an action for judicial review brought against the state pursuant to the Administrative Procedure Act shall award fees and other expenses to the prevailing party unless the prevailing party

⁷¹ *Neb Rev Stat* Sec 69-1607

⁷² *Neb Rev Stat* Sec 76-1430

⁷³ *Neb Rev Stat* Sec 19-2907

⁷⁴ *Neb Rev Stat* Sec 25-1801

is the state, except that the court shall not award fees and expenses if it finds that the position of the state was substantially justified.⁷⁵

Nebraska Fair Employment Practices Act

In any action or proceeding under the Nebraska Fair Employment Practice Act wherein an appeal is lodged in the district court, the court, in its discretion, may allow the prevailing party reasonable attorney's fees as part of the costs.⁷⁶

Unpaid Compensation

- (1) Any employer who violates the provisions of section 48-1221 shall be liable to the employee or employees affected in the amount of their unpaid wages, and, in instances of willful violation, in employee suits under subsection (2) of this section up to an additional equal amount as liquidated damages.
- (2) Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. The court in such action shall, in cases of violation in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.⁷⁷

Writs of Mandamus

If judgment be given for the plaintiff, he or she shall recover the damages which he or she shall have sustained, to be ascertained by the court or a jury, or by referees, in a civil action, and a peremptory mandamus shall also be granted to him or her without delay. In addition to damages the court may also award costs and reasonable attorney's fees. The costs and attorney's fees shall be paid by the governmental body represented by the public official or employee.⁷⁸

Frivolous Pleadings⁷⁹

75. In short, it pays to get outside the realm of traditional torts. The payback applies to both proof of claims and recoveries for clients, and to recovery of fees for professional services.

⁷⁵ *Neb Rev Stat* Sec 25-1803

⁷⁶ *Neb Rev Stat* Sec 48-1120

⁷⁷ *Neb Rev Stat* Sec 48-1223

⁷⁸ *Neb Rev Stat* Sec 25-2165

⁷⁹ *Neb Rev Stat* Sec 25-824. See also *Neb Rev Stat* Sec 30-1601 governing frivolous probate appeals.

Conclusion

76. Nebraska faces the loss more and more of its independent business community. Grocers, drugstores, hardware stores, florists, gas stations, and others are all at risk. Nebraska's trial bar owes it to the State, and to trial bar's communities across the State, to search vigilantly, and look aggressively, for solutions.⁸⁰
77. Nebraska's trial lawyers owe it to themselves, their clients and the State to face the population decline, aging phenomenon, and abrupt loss of our State's independent businesses. Inventive litigation, focus on large corporations, and not traditional, well-known torts, will require the plaintiff's bar look for opportunities to be of service, encourage appropriate private enforcement of statutes designed to ensure a fair level playing field, and expand our traditional roles.

- *David A Domina*
DOMINALAW Group pc llo
October 2005.

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⁸⁰ Iowa State University published a nearly 8-year old public proceeding, **Impact of the Wal-Mart Phenomenon on Rural Communities**, in 1997. At that time, the Company was less than one-third its current size and had fewer than one-fourth as many stores in Nebraska as now. It had no "super centers" then. The study examined 34 Iowa towns having Wal-Mart stores for at least 10 years. They ranged in size from 5,000 to 40,000 people. The study shows, after 5 years, overall sales were lower in communities with Wal-Mart stores than before. Thus, a short burst in retail sales is followed by long-term losses, as other businesses are driven out.