HUMAN SERVICES COMMITTEE MEETING
March 11, 1981

The Human Services Committee convened at 12:30 p.m. in Room 103 of the Capitol on March 11, 1981, with Chairman Budd Gould presiding. All members were present except Representative Bardanouve.

SB 212

BOB ADAMS, attorney for the Department of Health and Sciences, appeared for the sponsor, SENATOR HAGER, who was unable to be at the hearing. He said the bill was a proposal to provide a program of hazardous waste management separate from the nonhazardous solid waste management program in Montana. (See EXHIBIT I) He called to the attention of the committee the last page of the exhibit. He said that, even if the Appropriations Committee cut off all funds for hazardous wastes, it might be possible for DHES to work with the federal agency in dealing with this matter. The DHES would like the law on the books, so that ultimately there will be a program governed by Montanans, he said.

PROPONENTS:

PAT STUART, director of the Montana Coal Council, appeared in favor of the bill and agreed that the program should be governed by Montanans.

ROBERT N. HELDING, attorney and executive director of the Montana Wood Products Association, urged support of the bill and favors Montana administration.

DON ALLEN, director of the Petroleum Association, felt it was inconceivable for the state to allow the "feds" to run the hazardous waste program.

BEN HAVDAHL, Montana Motor Carriers Association, appeared in favor of the bill. His association supports state administration, but felt that regulations of transporting materials should be of an uniform nature, as the materials would be transported from one state to another.

BOB QUINN, Montana Power lobbyist, asked to be placed on the record as favoring the bill.

MARGARET S. WARDEN, former senator, said that she favors the bill and Montana control. She also said that Montana industry favors the bill.

DAWN NORTH, representing the League of Women Voters, appeared in support of the bill.

OPPONENTS:

There were none.

QUESTIONS FROM THE COMMITTEE:

REP. SWITZER asked if a person would have any recourse if they felt they were being discriminated against in disposing of hazardous waste. ADAMS said that the regulations, first of all, are the equivalent of federal regulations. But, if a person felt discriminated against, he could appeal through the district courts. He didn't believe there would be recourse through a federal court for a state program.

REP. BENNETT wondered if the Environmental Protection Agency (EPA) has a precise protocol outlined on this subject. ADAMS said that it did and that the EPA will enact full monitoring of the program.

ADAMS closed the hearing.

SB 411

SENATOR HIMSL opened the hearing on the bill which would delete the requirement that services for medical aid and hospitalization furnished by a county to indigents be approved by the Department of Health and Environmental Sciences (DHES) and private associations. It removes the requirement on the part of the county commissioners of having to go through the DHES for approval of aid the counties give.

PROPONENTS:

There were none.

OPPONENTS:

There were none.

QUESTIONS FROM THE COMMITTEE:

There were none.

SB 426

SENATOR HIMSL opened the hearing on SB 426, which would reestablish the Board of Optometrists and establish rules regarding them and allied practice. He mentioned that part of the bill dealt with advertising, restrictions on opticians, and restrictions regarding employment by corporations.

PROPONENTS:

DR. J.R. CRABTREE, Choteau, president of the Board of Optometry in Montana, said the board was unanimous in its support of the bill as it is written.

DR. M.F. KELLER, an optometrist from Great Falls and a representative of the Montana Optometric Association, presented written testimony in favor of the bill (EXHIBIT II).

DR. PAUL KATHREIN, a practicing optometrist from Great Falls and president of the Montana Optometric Association presented written testimony urging support of the bill (EXHIBIT III).

Former Senator DR. TOM RASMUSSEN said that the fitting of contact lenses requires a great deal of training and feels that opticians should not be allowed to do so. He read a letter from Bozeman Senator Dr. Everett Lensink (EXHIBIT IV) in which the senator agreed with his view.

OPPONENTS:

BILL STERNHAGEN, attorney representing State Optical, said his client has six stores in the State of Montana. He said he was not appearing in regard to contact lenses, but wished to discuss the part of the bill on page 11, lines 11 through 15. He felt that restricting one man to work for another was grossly unfair. In regard to the quality of eyeglass fitting, he read from the December 2, 1980 issue of the Federal Register which commented on the subject (EXHIBIT V). He commented that the bill came out of the sunset review committee with the unfair provisions omitted, but that they had been added since that time by members of the Senate. He advocates deletion of that portion.

PHIL STROPE, attorney representing Dispensing Opticians, said the issue was not health care but money. He suggested leaving the state law as it is, but suggested an amendment on page 9, the deleting of three words, "measure, fit, place." He said there have been thirty complaints against opticians but only two have been for practicing without a license. The reason for the lawsuit in Billings is that the optometrists do not want the opticians fitting contact lenses, because they want a monopoly, according to Strope who said there was no mention of quality of the fitting of lenses. He introduced the next opponent and asked him to explain how an opthamologist uses opticians in the fitting of glasses and contact lenses.

DR. F.H. BURTON, (EXHIBIT VI), appeared saying this bill would not put anyone out of business. He said that whenever an effort has been made to license or certify opticians, that the optometrists have put a stop to it. He said that when you examine and have your own optician fit the glasses, you earn money from both steps. He disagreed with Senator Lensink, an opthamologist (see EXHIBIT IV). He said this law could be compared to having a law that all persons go to a podiatrist to have shoes fit.

VERN KINGSTON, of Big Sky Optical in Butte, read a letter from DR. ROBERT I. NOBLE, a Butte opthamologist, in opposition to the part of the bill dealing with opticians (EXHIBIT VII). KINGSTON felt that opthamologists (under provisions of this bill) would no longer have dispensing opticians, that it would "close them down."

STROPE asked that four opticians be allowed to stand and be introduced to the committee. They were Sill Shive, Jim Shaffer and his son, and Pat Burton (see Visitors Register attached).

KINGSTON said that he had been a dispensing optician for 17 years, is a member of the Contact Lense Society of America, a fellow member of the American Board of Opticianry, a member of the national Contact Lense Registry and is also licensed in Ohio. He felt that continuing education was imperative.

FRITZ DAILY, Butte, asked for the removal of "measure, fit, place" from the bill. He also felt that if the Board of Optometrists is going to regulate opticians, there should be an optician on the board. He felt this bill would put a lot of people out of work in its present form.

CHAIRMAN GOULD felt that the bill should have further study, and he appointed a subcommittee of Representatives KEYSER, PAVLOVICH, and SEIFERT to address the bill. Chairman Gould asked that Dr. Kathrein provide information on complaints against opticians, and Dr. Kathrein said that he would.

QUESTIONS FROM THE COMMITTEE:

REP. NILSON asked if a patient is required to have their glasses fitted by the examining optometrist or is the optometrist required to give the patient his prescription and allow him to have the glasses made wherever he wishes.

DR. KELLER said that a federal rule requires that a copy of the prescription for eyeglasses be given to each patient, but there is no requirement for giving out prescriptions for contact lenses, because the FTC "understands as we do" that contact lenses are different in strength, power, etc.

REP. KEYSER asked if the two opposing groups came up with the language that is in the present bill.

KATHREIN said yes.

REP. KEYSER asked if there were any statistics on complaints against opticians that had been registered since that law had been in effect.

DR. CRABTREE said the real problem is with the contact lense fitting. There has been one suit in Billings that has been in litigation for six years, he said.

REP. KEYSER asked if there had been any other complaints.

DR. CRABTREE said there had, but that the optometrists felt they could handle only one suit at a time.

REP. GOULD asked if there had been any suits charging that permanent damage had occurred as a result of actions of opticians or optometrists.

DR. CRABTREE said no.

REP. KEYSER asked why the law need to be changed.

DR. CRABTREE felt the law needed to be clarified, not necessarily changed. However, he said, the optometrists felt it wasn't right for opticians to fit contact lenses.

REP. WINSLOW asked how the fitting of contact lenses are handled in other states.

DR. CRABTREE said about one-third of the states license opticians. He also said that fitting of contact lenses by opticians is being done throughout the country. He knows of opticians who have fitted contact lenses for 4,000 to 5,000 patients.

REP. BRAND asked what the educational requirements for opticians were.

STROPE said there were none in Montana, as opticians are not licensed. He read a list of states where opticians were allowed to fit contact lenses, and said that many state laws are ambiguous.

REP. BRAND asked how a person can become an optician.

JIM SHAFFER, of Missoula, said he got his training on the job working for his father who worked for four opthamologists. He is a member of the Contact Lense Society of American and the Montana Optical Dispensers Association, which requires 15 credit hours of continuing education (for contact lenses alone) through the Contact Lense Society. He also has had to pass the National Registry test to become a member of the Contact Lense Society. All opticians who are fitting contact lenses in Montana are members of the Contact Lense Society. The people who have set up the National Registry, he said, are teaching members of Baylor University Medical Department.

REP. BRAND asked how much apprentice time was necessary before becoming an optician.

SHAFFER said that you have to fit so many glasses under supervision before you can become a member of the Contact Lense Society. He couldn't remember the specific number. To become a fellow member, he said, you have to take a written and an oral exam, in a state that has a board of opticians.

CHAIRMAN GOULD commented that he had cosponsored bills twice to license opticians, but that the optometrists had defeated the attempts.

REP. MANNING asked how much training was required to become an optometrist.

DR. ESPELAND said it is currently a six-year course, and it is required that you pass the test given by the state board. He said that, in order to fit contact lenses, you must know the pathology of the eye, a thorough knowledge of the eye, the lense must be prepared to your prescription, then placed on the eye and evaluated. He said that improper fit can cause eye problems months, or even years, later. He also said that anyone in the room could hang out a shingle saying "Optician" and go into business. Optometrists are required to attend a seminar each year, he said.

REP. CONN asked about the evaluation to decide whether or not a person should wear contact lenses, and whether that had to be made by the person examining the eye.

ESPELAND said that the person who fits the lenses is responsible for them. He said he objects to a lay person fitting contact lenses. He said that he personally sells the lenses for cost and that the only additional cost is for the examination.

DR. BURTON commented that one optometrist charged $400 for contact lenses the patient couldn't wear, fitted him with another pair for $450 and for $900 the man ended up with lenses he still couldn't wear. He also questioned the training of the optometrists.

CHAIRMAN GOULD asked that no further comments be made. Only those answering questions are allowed to speak, he said.

REP. BRAND asked how the opthamologists feel about this matter.

DR. LOREN MCKERROW, Helena, representing the Montana Medical Association and the Academy of Opthamologists, said the Academy is in agreement with the bill as it is written.

REP. SEIFERT asked if there wasn't a provision in the bill, on page 11, regarding corporations.

SENATOR HIMSL recommended that the committee amend the bill so that it does not include corporations other than "professional corporations."

For clarification, CHAIRMAN GOULD asked if SENATOR HIMSL thought it would be fine for a group of doctors to incorporate, but that working for a large chain (such as Sears) would be illegal.

HIMSL agreed.

SENATOR HIMSL closed the hearing.

EXECUTIVE SESSION

HB 427

CHAIRMAN GOULD asked for a report on HB 427 by the subcommittee appointed to study the bill, which concerns the Board of Nursing. He felt the committee should take action on the

bill, as a group of nurses would like to come to Helena Friday to hear it in the House.

REP. WINSLOW said the main controversy concerned the number and ratio of members on the board. He said the subcommittee recommended returning to a 4-3-2 membership. The subcommittee also recommended amending page 16, line 12, adding a subsection regarding special care nursing, excluding hospital administration personnel from being on the board and a clarification on the Statement of Intent.

REP. WINSLOW moved that the board membership be 4-3-2, that is, as the bill came out of the Audit Committee. After some discussion by the committee members, a vote on the amendment was taken. The amendment PASSED by 11 to 5 with the following members voting No: Representatives BRAND, MANNING, DEVLIN, BERGENE and PAVLOVICH.

REP. WINSLOW MOVED that the remainder of the subcommittee's amendments be accepted by the committee. The motion PASSED UNANIMOUSLY.

REP. WINSLOW MOVED the STATEMENT OF INTENT. It was seconded and PASSED UNANIMOUSLY.

REP. CONN MOVED the BILL BE CONCURRED IN AS AMENDED. The motion was seconded and PASSED UNANIMOUSLY.

SB 230

REP. MANNING moved that SB 230 be RECONSIDERED by the committee. The motion PASSED by a vote of 9 Yes and 7 No votes, the No votes being cast by Representatives KEYSER, SEIFERT, BENNETT, SIVERTSEN, DEVLIN, SWITZER and BRAND.

REP. NILSON presented testimony to committee members written by a Helena physical therapist for their information.

REP. MENAHAN moved that SB 230 be CONCURRED IN. The motion was seconded and PASSED by a vote of 10 Yes, 5 No, and 2 absent. The No votes were cast by Representatives KEYSER, SEIFERT, BENNETT, DEVLIN and BRAND.

The meeting adjourned at 3:00 p.m.

CHAIRMAN BUDD GOULD

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VISITORS' REGISTER

HOUSE HUMAN SERVICES COMMITTEE

BILL SB 212 Date March 11, 1981

SPONSOR Sen. Hager

NAME	RESIDENCE	REPRESENTING	SUPPORT	OPPOSE
Bob Adams	Helena	DHES (Legal Division)	✓	
Jim Harris	Helena	US EPA	✓	
A.W. Sokal	Billings	Mt. Department of Ag		✓
Bob Wedum	Missoula	Mont Wood Products Assn	✓	
Pat Stuart	Helena	Mt. Coal Council	✓	
Dawn A Roth	Helena	League of Women Voters	✓	
Duane Robertson	Helena	State Dept of Health	✓	
Margaret S Warden	Q. of Falls			
Bob Quinn	Helena	Mont Power Co.	✓	
Ben Havdahl	Helena	Mont. Motor Carriers	✓	

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR LONGER FORM.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Form CS-33
1-81

Comments of the Department of Health and Environmental Sciences Explaining and in Support of SB 212:

Congress, through enactment of the Resource Conservation and Recovery Act of 1976 (RCRA), has given the states the choice of establishing hazardous waste programs approved by the federal government and operated by the states themselves or of allowing the Environmental Protection Agency (EPA) to operate the program without state involvement. In short, Montanans will have a hazardous waste program; the question is whether that program will be operated from Denver and Washington by EPA or by DHES on behalf of the Montana Legislature. DHES seeks legislative approval of the proposed Montana Hazardous Waste Act in order to obtain a program equivalent to the federal program, yet approved for operation by the State of Montana.

"Hazardous waste" is broadly defined in SB 212 to match the realities of the times: it encompasses those wastes which cause or significantly contribute to increased mortality or serious illness, or which present substantial threats to human health or the environment. The bill meets the need to control the full range of hazardous waste processing in Montana, from the generation of wastes through their transportation to final containment by treatment, storage and disposal.

Hazardous waste regulation is already an accepted idea in Montana. The present code contains the foundation of our hazardous waste program in the "Montana Solid Waste Management Act," 75-10-201, MCA, et seq. Extensive administrative rules have been adopted in ARM Title 16, Chapter 44 which promulgate the hazardous waste statutes existing within the Solid Waste Management Act. The present law and

regulations, in fact, have proved sufficient to bring Montana "interim authorization" to operate its hazardous waste program for approximately two more years in lieu of an EPA-operated program. Interim authorization was received on February 26, 1981.

As the Statement of Legislative Intent shows, SB 212 will accomplish basically two purposes. First, it will separate all authority relating to hazardous waste from 75-10-201, MCA, et seq. and consolidate it into a new act and part of the code. Second, it will sufficiently adjust and clarify DHES' rulemaking authority to allow the Department to bring its program into full equivalency and consistency with EPA's program. When this is accomplished, Montana will move from interim authorization to full and final approval from EPA to run its own program. At that point, Montana will solely administer the permitting, regulating and enforcing. It should be noted that we are close to having the necessary authority at present. SB 212 adds authority to make inspections of and take samples from generators of waste, and includes them as subjects of the enforcement authority. A variance procedure is established, and definitions have been adjusted to coincide with federal law. The bill gives authority to require certain packaging and marking of wastes by generators.

The rules which have already been adopted in ARM Title 16, Chapter 44 are the equivalent to and no more restrictive than the corresponding federal regulations. Some of Montana's regulations adopt EPA rules by reference. As declared in the Statement of Intent, the Department is seeking a program which is equivalent to EPA's and which is no more restrictive. Furthermore, following amendment in the Senate with which the Department concurred, the bill itself now contains language in new Section 12 which prohibits adoption of rules more

restrictive than those adopted by the federal government.

For further details on the intent of and the changes brought about by SB 212, the committee members are referred to the Department's "Fact Sheet" and "Explanation of the Manifest System" which accompany this Comment.

You may also be aware that the Appropriations Committee voted March 10, 1981, not to fund the hazardous waste program for fiscal years 1982 and 1983. General fund monies thus deleted amount to $114,200. Such funding would have been necessary regardless of whether SB 212 passed, since, as noted above, Montana has a partial hazardous waste program enacted already. Your immediate question might then be "why pass this legislation without funds to implement it?". Our reply and belief is that there may yet be a means of obtaining federal funds, three-fourths of the program budget, by agreeing with EPA that certain other State funds already budgeted for the solid waste program may be used as a nominal "matching" amount. There may be other agreements obtainable with EPA that will enable the state to reach its objective of continuing interim authorization and ultimately obtaining final authorization despite the present funding deficiency. Finally, the Department would respectfully submit that it is appropriate to have this legislation in place and ready for funding by the next legislature even if the desire to implement the program during the next two years cannot be assured through the suggested agreements.

In conclusion, DHES supports adoption of SB 212 as the means by which Montana can perfect an approved federal-equivalent program and thereby obtain final authorization, rather than have the entire program revert to federal operation and control at the end of the interim authorization period.

DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES

EXPLANATION OF THE MANIFEST SYSTEM
REQUIRED BY HAZARDOUS WASTE LEGISLATION

The U.S. Department of Transportation (DOT) has required "shipping papers" to accompany hazardous material shipments for a number of years. Several states have also implemented "manifest" systems in recent years for the transportation of hazardous wastes. In implementing the federal hazardous waste program, the U.S. Environmental Protection Agency (EPA) worked with DOT on developing requirements for waste manifests. It was agreed that the "manifest" would legally constitute a "shipping paper," and both EPA and DOT issued regulations in May of 1980 stating the required information to be contained in a manifest and how waste manifests must be used. In keeping with previous DOT rules on shipping papers, a specific manifest form was not specified by DOT and EPA.

Various states on the other hand do require that transporters use a specific, state-authorized manifest form. Because of this, transporters who move hazardous wastes in interstate commerce find that several different manifest forms must be filled out for the same waste shipment to satisfy the requirements of the states through which the waste passes. The transportation industry is understandably dissatisfied with this situation.

Montana has not contributed to this problem. The Department of Health and Environmental Sciences (DHES) hazardous waste rules specify the exact requirements for a waste manifest as are specified by EPA and DOT. In addition, DHES has worked with the Western Governors Policy Office (WESTPO) states and with the Association of State and Territorial Solid Waste Management Officials (ASTSWMO) in evaluations of a uniform national manifest system.

It appears likely that EPA and DOT, after input from the states (through ASTSWMO) and the transportation industry, will soon mandate a uniform waste manifest system nationwide. All transporters will have to use the same manifest form, and all states will have to accept it. For the present time DHES proposes to leave its administrative rules as presently drafted requiring the same information for a manifest as is required by EPA. We do not feel that any amendment to Senate Bill 212 is needed to specify a state manifest compatible with federal requirements.

FACT SHEET

PURPOSE OF HAZARDOUS WASTE BILL

* Establishes hazardous waste authority separate from general solid waste authority.

* Deletes hazardous waste references from the "Montana Solid Waste Management Act".

* Establishes the policy of developing a state program equivalent to the federal program and approvable by EPA.

* Alters definitions to agree with federal definitions.

* Allows DHES to establish a fee system for issuing permits.

* Deletes the transporter licensing requirement, but requires that generators and transporters register with DHES and obtain ID numbers.

* Establishes authority for DHES to issue emergency permits and to grant permits by rule.

* Establishes a variance procedure.

* Specifies a requirement for self-monitoring by facility operators.

* Clarifies and broadens DHES inspection and sampling authority (sampling authority and inspection of generators and transporters were not specified in MSWMA).

* Provides for an inventory of hazardous waste storage and disposal sites - both active and inactive sites.

* Provides for administrative enforcement actions.

* Provides for emergency actions where an imminent hazard is presented.

* Specifies DHES's ability to order cleanup of spills or improperly disposed hazardous wastes.

* Reduces civil penalty limits from $25,000 to $10,000.

* Upgrades criminal penalty provision to $10,000 or 6 months imprisonment. (Necessary to meet minimum requirements placed by EPA on authorized state programs.)

* Designates DHES as the agency responsible for the hazardous waste program and encourages DHES to coordinate its program with those programs operating in other states.

* Establishes venue for legal proceedings.

* Specifies that existing rules, orders, permits and legal actions are not invalidated by this new act.

The attached proposed amendment to SB 212's definitions, at new Section 10(7)(b), would delete subsection (b) entirely. The subsection lists several broad categories of hazardous wastes and mentions the group "radioactive". These categories are for purpose of example only and are not necessary for the defining of hazardous waste, which is accomplished in subsection 7(a) immediately above (b). Because the term "radioactive" is mentioned in (b) and certain radioactive materials are regulated by another state agency, the Occupational Health and Safety Bureau, continued mention of radioactive in the bill could create confusion.

The attached amendment should serve to remove concerns regarding possible duplication of agency regulation. There are no radioactive substances that EPA, under RCRA, presently requires to be regulated by the lead agency for hazardous waste. There might possibly be radioactive items covered by RCRA in the future. If so, the basic definition of hazardous waste in subsection 7(a) will give the agency authority to regulate such items.

The Department believes that each of the remaining example categories in (b) should be deleted since all are covered by the definitional section preceding, and specific mention is not necessary.

Proposed Amendment to the THIRD READING

Copy of Senate Bill 212

Page 10, lines 19 through 22:

Strike: subsection (b) in its entirety
Renumber: subsequent subsection

WITNESS STATEMENT

NAME Dawn A. North BILL No. SB 212

ADDRESS 914 Breckenridge DATE 3/11/81

WHOM DO YOU REPRESENT League of Women Voters

SUPPORT ✓ OPPOSE AMEND

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments: The League of Women Voters has been a stauch supporter of the Resource Conservation and Recovery act of 1976. The League feels that the state should have the major responsibilities for hazardous waste management. For the reasons stated above we hope that you will give SB 212 a due pass vote.

FORM CS-34
1-81

VISITORS' REGISTER

HOUSE HUMAN SERVICES COMMITTEE

BILL SB 411 Date March 11, 1981

SPONSOR Sen. Himsl

NAME	RESIDENCE	REPRESENTING	SUPPORT	OPPOSE
Ken Rutledge	Helena	Montana Hosp. Assoc	✓	

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR LONGER FORM.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Form CS-33
1-81

VISITORS' REGISTER

HOUSE HUMAN SERVICES COMMITTEE

BILL SB 426 Date March 11, 1981

SPONSOR Sen. Himsl

NAME	RESIDENCE	REPRESENTING	SUPPORT	OPPOSE
M.F. Ryllo OD	Great Falls	Montana Optometric Ass	✓	
L.A. LaRock	Butte	Montana Optometric Ass	✓	
D.L. Kathrein OD	GT. Falls	Montana Opt. Assn	✓	
Tom Rasmussen OD	Helena	Mont. Opt. Assoc	✓	
J.R. Cartwright O.D	Choteau	Board of Optometry	✓	
D. Craig Tenney OD	Gt Falls	MOA	✓	
[illegible]	Missoula	Montana Optical Dispensers Ass		✓
Don Langston	Butte	Big Sky Optical		✓
Ruth Leeper	Gt. Falls			
Clay Buttrum	Billings			✓
Patrick H. Burlow	Butte	Opticians		
F.H. Bunting M.D.	Butte	Mont Opticians		✓
James D. Shaffer	Missoula			—
Bill Steinhagen	Helena	State Optical		✓
Loren McLaren MD	Helena	Mont Med Assn.	✓	

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PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Form CS-33
1-81

WITNESS STATEMENT

NAME Patrick H. Burton BILL No. ~~SB~~ 426

ADDRESS 3100 Harrison Ave DATE

WHOM DO YOU REPRESENT Montana Dispensing Opticians

SUPPORT OPPOSE X AMEND

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

Dispensing Opticians want to keep the authority for fitting Contact Lenses under a written perscription by a physician.

Please delete the new language in section 1(c).

FORM CS-34
1-81

WITNESS STATEMENT

NAME L.N. Schiel BILL No. SB426

ADDRESS P.O. Box 1577 - Billings 59103 DATE 3-11-81

WHOM DO YOU REPRESENT Mont. Dispensing Opticians Assn

SUPPORT _____ OPPOSE _____ AMEND ~

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

Amend - Section K - line 21 - page 9 - strike out the 3 new words (manner, kind + place) + return the bill to its original state, so as to permit opticians acting on a prescription to fit Contact Lenses - as they have been doing

If this bill is unamended, it would put me out of business, and there are no grounds to do this, as we have fit contact lenses for over 20 years in Montana.

FORM CS-34
1-81

FEB 11 1981

Mr. Chairman and Members of the Committee:

I am Dr. M.F. Keller, Optometrist practicing in Great Falls and I am also representing the Montana Optometric Association.

I appear in support of SB 426 and its prohibition against employment of Optometrists by business corporations and large out of state conglomerates.

The language on Page 11 of SB 426 is in the present optometry law. When this law was rewritten by the Legislative Audit Committee for some reason it was left out. It was restored by the Senate Public Health Committee upon motion of Senator Himsl who was chairman of the Legislative Audit Committee.

The language reads as follows: "Directly or indirectly accepting employment to practice optometry from a person not having a valid certificate of registration as an optometrist or accepting employment to practice optometry for or from a company or corporation."

For more than fifty years Montana has had laws prohibiting optometrists and dentists from being employed by corporations. Thirty four other states also have this prohibition, and for good reason.

Corporations are institutions primarily designed for making money for corporation heads and stockholders, as they should. A health care professions chosen aim must be to render the best service to patients.

Professional honesty is a virtue that cannot be legislated. There is no place in a health profession for a "let the buyer beware" attitude. Due to the serious and technical nature of any health profession, the patient is at the mercy of the doctor.

Quality vision care takes a back seat to profit in commercial optometric practices. In such a setting the practitioner is often "pressured" by the corporation to compromise his professional judge-

ment to increase the corporation profits.

You might ask why an optometrist would practice in such a setting. The biggest incentive is the instant high starting salary often in excess of $50,000. Can you imagine the volume you would have to generate to pay this salary plus retirement and health benefits and also pay for the excessive overhead of advertising, mall locations, and still produce a needed corporate profit margin. This volume can only be accomplished by reducing the thoroughness of professional care. Obviously the public would not be best served by the health care professional whose primary interest was profit.

The dental law newly rewritten still retains an outright prohibition against a dentist being employed by a regular corporation.

The present optometry law prohibits an optometrist from being employed by any business corporation or company. Present laws allow an optometrist to be employed by another optometrist or by a physician.

Title 35, the Profession Corporation Act, clearly allows groups of chiropractors, dentists, medical doctors, podiatrists, veterinarians, optometrists, pharmacists, and nurses to practice as professional corporations. Would we want all these groups to be regular business corporations? Should we want larger multi national conglomerates to practice medicine, optometry, and dentistry.

The basis of the individual and collective concern of our association is that the consumer should receive the highest possible quality vision care.

We urge the passage of SB 426 without amendments as it is now before you.

Thank you.

Testimony

TO: Public Helath Committee, House of Representatives

Mr. Chairman and Members of the Committee:

I am Paul Kathrein, a practicing optometrist from Great Falls and currently President of the Montana Optometric Association, which includes in its membership 90% of the optometrists in Montana.

I am representing the Montana Optometric Association and we are in total agreement with SB 426 concerning re-instatement of the Board of Examiners in Optometry.

We agree with the legislative audit committee that the contact lens section of the Montana Optometry Act needs further clarification to erase any doubt as to who can fit contact lenses to the people of Montana. I want to emphasize that the additions being proposed (page 9, line 21) do not change the intent of the existing law. Only optometrists and ophthalmologists have the legal right to fit contact lenses now, and only they will be fitting contact lenses under the proposed language changes. There have been consumer complaints filed with the Board of Optometry concerning contact lens fitting by unlicensed people, namely opticians who have not been under the direct personal supervision of a licensed professional, an Optometrist or Physician.

Present law allows opticians to work with contact lenses only under the direct personal supervision of an Optometrists or Physician. The change in SB 426 will still allow this to take place, thus there will be no opticians put out of business who are operating within the law.

The Legislative Audit Committee felt that the language change is necessary to provide the Department of Professional and Occupation licensing the clarification necessary to better enforce this portion of state law, which is necessary for the protection of the eye health of the people of Montana.

You may have already heard or you may hear today that filling a contact lense Rx is the same as filling a glasses Rx. This is simply not true. They are not simply filling a contact lense Rx, they are f fitting contact lenses, because to determine a contact lense Rx you must:

1. measure the curvature of the eye to determine the fitting curve of the lense.
2. determine the proper size of the lens for optimal centering.
3. determine the optical zone diameter.
4. determine the correct peripheral curves needed for proper tear exchange underneath the lens.
5. determine proper edge and center thickness for proper flex or no flex.
6. determine the proper refractive power of the lens which is different from the glasses Rx.

The fitting procedure often takes a month or more before completion.

The delicate tissues of the eyes have to be evaluated on a frequent basis. If any adverse change is evident, a change in the lens is often necessary. Only after making all the changes in the lens that maintains healthy ocular tissues and a satisfied patient do we have a contact lens prescription. Most of the time the patient is not immediately aware of necessary changes, so it is impossible to go by patient complaint in determining the need for professional evaluation of the tissues of the eye.

Obviously, a complete knowledge of the physiology and pathology of the eye is necessary to determine that a contact lens is compatible to the patients eye. This can only be obtained with a formal

university education in school of optometry or medicine.

I want to emphasize again:

1. This bill will not put any opticians out of business who are working within the law as it has been the past 50 years or so.

2. We agree with the Legislative Audit Committee's intent to clarify the present law to make it absolutely clear that only optometrists or physicians can fit contact lenses.

3. The fitting of contact lenses must involve professional judjement and training which is received only by optometrists or physicians.

The question is, "Do you want lay people fitting contact lenses who are not under the direct personal supervision of a optometrist or physician?

The Montana Optometric Association feels the answer must be no!

Therefore we urge you to retain SB 426 in its present form.

The Big Sky Country

MONTANA STATE SENATE

EVERETT R. LENSINK
111 SO. WILLSON
BOZEMAN, MONTANA 59715

COMMITTEES:
JUDICIARY, CHAIRMAN
PUBLIC HEALTH

October 17, 1980

Morris L. Brusett
Legislative Auditor
State Capitol
Helena, MT 59601

Dear Mr. Brusett:

Thank you for your recent letter inviting my comments on the Sunset Review of the Board of Optometrists. You specifically mentioned several areas under question:

1. The dispensing and fitting of contact lenses by opticians. Contact lenses are directly applied to the most sensitive and and one of the most specialized tissues in the body, the cornea. Any adverse affect on the cornea caused by a contact lens can temporarily or permanently damage the cornea and, thus, effect vision. Because of this, a high level of expertise in the fitting of contact lenses is necessary to prevent possible damage. Equally important is the matter of knowing when not to consider the application of contact lenses to the eye. There are some disease conditions wherein the wearing of contact lenses would be fraught with danger.

Optometrists are trained to properly apply contact lenses to the eye and to evaluate those situations when they should not be applied.

On the other hand, opticians are not licensed in Montana and there is no prescribed course of training to insure an optician's expertise in the area of contact lenses.

In consideration of the above, it is my opinion that optometrists voice a valid objection in opposing the fitting of contact lenses by opticians. If opticians do work with contact lenses, it is further my opinion, it should only be done under the direct supervision of a professional clearly licensed by state law to fit contact lenses (optometrists or ophthalmologists).

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FEDERAL TRADE COMMISSION

16 CFR Part 456

Eyeglasses II

AGENCY: Federal Trade Commission.

ACTION: Advance notice of proposed rulemaking and request for comments.

SUMMARY: This Notice requests comment on the Commission's investigation of the impact of various state and private restraints on the practice of optometry and opticianry. This investigation, known as "Eyeglasses II," has focused on certain restrictions on forms of commercial ophthalmic practice, limitations on the scope of practice of opticianry, and on the over-the-counter sale of ready-to-wear reading glasses. The Commission staff has prepared a report that suggests that some of the restrictions at issue may raise prices and may have little or no effect on the quality of vision care. The Commission has made no determination on the findings and recommendations of the staff and is seeking public comment before doing so. The Commission is requesting public comment on the issues presented by the investigation and on what action, if any, the Commission should take.

DATES: Comments should be received on or before February 2, 1981.

ADDRESSES: Comments should be submitted to: Secretary, Federal Trade Commission, 6th & Pennsylvania Ave., NW., Washington, D.C. 20580, Attention: Eyeglasses II.

Additional Materials Available for Review: Copies of the materials discussed in this Notice: the Staff Report (entitled "State Restrictions on Vision Care Providers: The Effects on Consumers" and dated July 1980), the Bureau of Economics Report (entitled "Staff Report on Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry" and dated September 1980) and the Bureau of Consumer Protection's study on the duplication of eyeglass lenses without a prescription (entitled "A Comparison of a Random Sample of Eyeglasses") may be obtained from: Public Reference Room (Room 130), Federal Trade Commission, 6th & Pennsylvania Ave., NW., Washington, D.C. 20580, telephone (202) 523–3467.

FOR FURTHER INFORMATION CONTACT: Christine Latsey, Attorney, Bureau of Consumer Protection, Federal Trade Commission, Room 281, 6th & Pennsylvania Ave., NW., Washington, D.C. 20580, telephone (202) 523–3426.

SUPPLEMENTARY INFORMATION:

Part A—Background Information

The Federal Trade Commission began to study the retail ophthalmic industry in 1975 when it directed its staff to examine the adequacy of information available to consumers of vision care. That investigation examined state and private restrictions on advertising of eyeglasses and eye examinations, and the impact of these restraints on the cost, availability, and quality of vision care. Based on the evidence gathered, the Commission found that state bans on truthful advertising by vision care providers and the failure of those providers to release optical prescriptions were unfair acts or practices, violating Section 5 of the Federal Trade Commission Act. It issued a trade regulation rule eliminating total bands on truthful advertising and requiring that consumers be provided with copies of their corrective lens prescriptions after eye examinations. (16 CFR Part 456). On February 6, 1980, the U.S. Court of appeals for the District of Columbia Circuit in *American Optometric Association* v. *FTC*, 627 F. 2d 896 (D.C. Cir. 1980), remanded the advertising portions of the Eyeglasses Rule in light of the Supreme Court decision in *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977), decided after the record in the Eyeglasses Rulemaking was closed. The Court in *Bates* found the right of lawyers to advertise is protected free speech under the First Amendment of the Constitution. The prescription release requirement of the Eyeglasses Rule was upheld by the D.C. Circuit. In response to the remand, the Commission has asked for public comment concerning whether or not changes in state and private regulation of advertising have occurred or are occurring which would eliminate the need for Commission action in this area and whether unwarranted public or private burdens and limitations on advertising continue to exist. (45 FR 72683 (Nov. 3, 1980)).

In the course of that investigation, the Commission staff found that advertising bans were only one part of a larger system of public and private restraints on ophthalmic practice which may be anticompetitive and may harm consumers.

On January 20, 1976, the Commission announced to the public its second investigation of the vision care market, known as "Eyeglasses II." This investigation has focused primarily on two categories of restrictions: limitations on forms of commercial practice by ophthalmic providers and limitations on the scope of practice of opticinary. The Commission staff conducted three studies to generate empirical information concerning the price and quality of care effects of these restrictions. One of these studies, conducted by the FTC's Bureau of Economics, focuses on the effects of commercial practice restrictions ("BE Study"). This study has been completed and publicly released. The second study evaluated the ability of opticians to duplicate a pair of eyeglasses without a prescription. This study has also been completed and publicly released. The third study compared the ability of opticians, optometrists and ophthalmologists to fit contact lenses. This study is not yet complete and only preliminary results are available.

Part B—Objectives

The objective of the Commission's investigation is to prevent consumer injury arising from public and private restraints which increase consumer prices but which do not appear necessary to protect the public health and safety. The principal question the Commission is exploring is the impact of the restrictions discussed below on the price, quality and availability of vision care. The Commission's investigation has sought, through the development of statistically valid market research, to determine whether higher prices result from these restrictions and, if so, whether offsetting consumer benefits also result from these restrictions.

Part C—Description of the Investigation

The following section discusses the various restrictions at issue in this investigation and the studies the Commission staff undertook to provide reliable evidence on the issue of whether these restraints maintain or enhance the quality of vision care. A more detailed discussion of the issues and economic studies is found in the report prepared by the FTC staff entitled "State Restrictions on Vision Care Providers: The Effects on Consumers (Eyeglasses II)." To facilitate reference to that report, approopriate sections of the report are provided in parentheses.

1. *Commercial Practice Restraints* (Part 1 of Staff Report). "Commercial practice" in the retail optical market is generally understood to refer to large-scale, high-volume businesses, while "professional" or "non-commercial practice" is more often used to describe small firms or solo practitioners. The Commission staff has examined four major restraints on commercial practice imposed by state law: (1) Restrictions on the employment of optometrists and opticians by lay individuals and non-professional corporations; (2) limitations on the number of branch offices an optometrist or optician may operate; (3) restrictions on the practice of optometry and opticianry in commercial locations or on the premises of mercantile establishments such as department stores; and (4) bans on the use of trade names by optometrists.

In addition to these legal impediments to the practice of optometry and opticianry in commercial settings, the private associations of ophthalmic practitioners may also discourage commercial practice. The Commission has no current information on the extent to which state and national associations may discourage their memberships from commercial practice. The Commission is thus seeking public comment regarding restraints on commercial practice which may be imposed by professional associations either through explicit directives such as codes of ethics or by more indirect means.

Some of the state laws may prevent practitioners from locating in areas such as department stores or shopping centers or adjacent to existing optical dispensaries where the potential for developing higher-volume practices exits. Other state laws create employment restrictions which prevent an optometrist from working for an individual optician, retail optical chain or department store having an optical department. If an optometrist does not wish to be responsible for dispensing eyeglasses, but may not be employed by a store with an optical department or may not locate near an optician, he or she may be at a competitive disadvantage with individual dispensing optometrists who offer "one-stop service" (*i.e.*, examination and dispensing in a single transaction).

Opponents of commercial practice maintain that large firms are primarily profit-motivated, and therefore may be uninterested in maintaining the traditional doctor-patient relationship. Some opponents claim that commercial practitioners are pressured to cut corners and to perform poor-quality "quickie" examinations when decisions concerning pricing, business conduct, and quality of service are in the hands of lay individuals or firms. It is also alleged that commercial firms prescribe unnecessary corrective lenses to increase profits. Finally, some opponents of commercial practice maintain that commercial firms dispense frames and lenses of inferior quality.

To assess the validity of the above contentions, the Commission's Bureau of Economics conducted a study to determine whether the price and quality of goods and services provided by optometrists who advertise or who practice in commercial settings are different from that provided by optometrists in non-commercial or professional settings. Price and quality data were collected from both types of providers for both eye examinations and eyeglasses.

Quality was measured in four ways: (1) The thoroughness of the eye examination in terms of the procedures performed and equipment used; (2) the accuracy of the ophthalmic prescription; (3) the accuracy and workmanship of the eyeglasses prepared from that prescription; and (4) the extent of unnecessary prescribing of eyeglasses.

In this study, healthy but nearsighted survey subjects received a week of training from faculty members at the Pennsylvania College of Optometry (PCO) and the School of Optometry of the State University of New York (SUNY). The survey subjects were trained to identify, recall, and record the major components of a complete optometric eye examination. Three major components of an eye examination were identified as constituting a complete eye examination by the study supervisor, in conjunction with PCO and SUNY. These components are: (1) The case history (a series of questions to determine the patient's history of medical and visual care); (2) the eye health examination (a series of tests and procedures used to detect eye diseases); and (3) the vision test (a series of tests and procedures to determine visual performance and prescriptive needs).

During the week-long training, faculty members from each of the two schools performed complete eye examinations on each subject. These examinations provided the baseline data against which the accuracy of the prescriptions written by the optometrists in the field were evaluated. After the training, the subjects purchased both examinations and prescription eyeglasses from randomly selected optometrists in cities where large commercial firms exited

and in cities where commercial firms were absent.

The study found that (1) prices were significantly lower in cities where commercial practice and advertising are not restricted; (2) commercial optometrists charged lower prices than non-commercial optometrists; and (3) non-commercial providers who operated in markets where commercial practice was permitted charged less than their counterparts in cities where commercial practice was proscribed. Specifically, the results showed that the average price charged for an eye examination plus eyeglasses was $72 in markets where commercial practice was permitted as opposed to a price of $94 in cities where commercial practice was restricted.

The BE study also offers information on quality of care. When comparing the overall quality of care in cities where commercial practice was permitted and cities where commercial practice was restricted, the results show that there is no difference in quality as measured by each of the four standards used in the study. When comparing the quality of care between commercial and non-commercial optometrists, the results show no difference between the two types of providers on three of the four quality measures: commercial optometrists performed as well as non-commercial optometrists with respect to prescription accuracy, accuracy and workmanship of the eyeglasses, and the extent of unnecessary prescribing.

On only one measure of quality—the thoroughness of the eye examination—did the BE results show there to be a difference in quality between commercial providers as compared to non-commercial providers. Non-commercial optometrists performed, on the average, more thorough eye examinations in terms of total number of procedures performed than did commercial optometrists. The Commission is interested in receiving comment on the precise consumer impact of this difference. The Commission notes that the BE study is a process or input study, not a patient outcome study. The Commission would like to know whether there is evidence that less thorough use of the designated procedures may translate into adverse patient outcomes such as failure to detect ocular or systemic diseases.

The staff report notes that the distinction between BE's findings on the comparative quality between cities with and without commercial practice, and the intra-market comparison of commercial providers and non-commercial providers within markets that permit commercial practice, may be important. The average thoroughness of eye examinations was the same in markets that permit commercial practice as in those that prohibit it. Within markets that permit commercial practice, the average thoroughness of eye examinations was lower for commercial providers than for non-commercial optometrists. However, the statistical range of thoroughness in examinations, and the percentage of optometrists falling in each category of thoroughness, was the same in both commercial and non-commercial States, even though only non-commercial practitioners comprise the restrictive market.

2. *Scope of Practice Restraints (Parts II and IV of Staff Report).* The second aspect of the Eyeglasses II investigation concerns state-imposed restrictions on the scope of practice of opticianry; *i.e.*, limitations on the services that opticians may legally provide to the public. The restrictions at issue prevent opticians in some States from fitting contact lenses or from producing a new lens or pair of eyeglasses by duplicating an existing lens or pair of eyeglasses.

(a) *Contact Lens Fitting by Opticians (Part IV of Staff Report).* In order to obtain contact lenses, a consumer must first be examined by an ophthalmologist or optometrist who determines the nature and degree of visual correction required. Additional steps must then be taken if one is to be fitted with contact lenses rather than eyeglasses. For example, the curvature of the consumer's cornea must be measured with a keratometer. The consumer must be taught to insert and remove the contact lenses, and how to clean and care for the lenses. The fit of the lenses must be evaluated through the use of a biomicroscope, both when the lenses are first fitted and on any subsequent follow-up visits to the fitter's office during the period of time the wearer is adapting to the lenses.

Ophthalmologists and optometrists are permitted in all 50 States and the District of Columbia to fit contact lenses. Opticians are prohibited from performing some or all of the contact lens fitting procedures in many States.

Some states expressly prohibit opticians from fitting contact lenses. Other states allow opticians to fit contact lenses but only if they do so under the supervision of an ophthalmologist or optometrist. Several states' laws do not clearly define just what contact lens fitting procedures opticians may or may not perform, and the state courts which have been called upon to interpret such laws have reached inconsistent conclusions.

These state-imposed restrictions on the ability of opticians to fit contact lenses may have significant effects on consumers. If opticians are not permitted to fit contact lenses, consumers' purchase alternatives are limited to opthalmologists and optometrists, and prices may be unecessarily high. The justification offered for restrictions on opticians fitting contact lenses is that opticians may not be adequately trained to perform this function. An improper fit could result in physiological damage to the eye. Many people therefore believe that anyone who fits contact lenses should be formally trained and tested through either certification or licensure. Opticians, however, are licensed in only 20 states, and in many of those states the licensing examination does not assess contact lens fitting proficiency.

There is little empirical data currently available indicating what effects such state restrictions have on contact lens prices and quality of care. In an attempt to generate relevant empirical data about relative prices and fitting skills, the Commission staff has designed a study of recently-fitted contact lens wearers. Representatives of the Contact Lens Association of Ophthalmology, the American Optometric Association, and the Opticians Association of America (through the National Committee of Contact Lens Examiners) helped design and perform the study.

Through the use of two national market research firms, the Commission staff identified approximately 500 recently-fitted contact lens wearers in nineteen metropolitan areas who were willing to be interviewed and examined by the Commission's staff and consultants. Each wearer was examined by an optometrist, ophthalmologist, and an optician who did not know the identity of or the type of provider who originally fitted the lenses for that wearer. In addition, members of the Commission's staff interviewed each wearer to ascertain the source of the initial contact lens fitting and any replacement lenses obtained, the price of the lenses and fitting services, the lens care and wearing habits of the wearer and other significant information which may bear on the quality issue.

The field examinations have been completed, and the data must now be analyzed by the staff. The results of the study will provide, for the first time, significant empirical data about contact lens fitting. The prices charged and quality of care provided by opthalmologists, optometrists, and opticians (both in states which license opticians and in states which do not)

can be directly compared. The effects on consumers of state laws on contact lens fitting can be evaluated by comparing price and quality data from states which restrict opticians who wish to fit contact lenses and those states which do not. In addition, this study will supplement Commission research into the effects of state laws which restrict commercial practice by eye care providers by permitting a comparison of contact lens fitting practices of commercial versus non-commercial optometrists.

(b) *Duplication of Lenses Without a Prescription (Part II of Staff Report).* The other scope of practice restraint at issue in Eyeglasses II concerns the duplication of eyeglass lenses by opticians. Consumers may seek to have their eyeglasses duplicated in order to replace a scratched lens, to have a pair of prescription sunglasses prepared, to change frame styles, or simply to obtain a spare pair of eyeglasses.

Duplication of lenses without a prescription is accomplished with the use of an optical focimeter, a device which measures the optical characteristics of lenses. In some states opticians are expressly prohibited from duplicating lenses by performing this procedure. In others, duplication without a valid prescription is deemed to be the practice of optometry (and accordingly makes it illegal for an optician to duplicate lenses). In still other states, the statutes do not clearly define whether duplication of lenses by opticians is legal.

The justifications advanced in support of duplication restrictions are that opticians may not be able to duplicate eyeglasses accurately without reference to the prescription, and that duplication may be used by consumers to bypass the eye examination process.

Restrictions on duplication of lenses may increase costs for consumers who wish to purchase a duplicate pair of eyeglasses. The staff report sets forth three alternatives available to a consumer who cannot have a broken lens replaced or cannot have a duplicate pair of eyeglasses prepared from an existing pair. One is to return to the provider from whom the original eyeglasses were obtained and who is likely to have a copy of the prescription on file. If forced to return to the original dispenser, the consumer cannot shop for a better bargain. In addition, it may be inconvenient or even impossible for the consumer to return to the original dispenser (for example, where a consumer has moved to another city). The second alternative for the consumer is to undergo another eye examination. This will cost, on the average, $25 in addition to the cost of the new eyeglasses and may be an unnecessary expense if the consumer has recently undergone an eye examination. The third alternative is to go to a new provider and have new eyeglasses prepared from the original lens prescription if the consumer has a copy of his or her current prescription. Under this option consumers are able to select a new provider if they still have their prescriptions or can obtain them from the original examiners or dispensers.

Although the Commission's Eyeglasses Rule requires optometrists and ophthalmologists to offer prescriptions to their patients upon completion of eye examinations, the Rule does not require that dispensers of eyeglasses return the prescriptions they fill to consumers or that they release prescriptions upon their patients' request to new providers. There is some evidence that even when consumers ask for their prescriptions to be returned to them following the purchase of eyeglasses, some providers refuse to do so, or only return a document which is a laboratory work order or an unsigned copy of the prescription. In some states such documents may not be legally filled by a subsequent provider.

The Commission staff has conducted a shopper survey of opticians to obtain price and quality data about the duplication process. The survey was conducted in two states: New York, which licenses opticians, and Pennsylvania, which does not. Both states permit opticians to duplicate eyeglass lenses without a prescription. Completed pairs of eyeglasses were purchased and one lens in each pair of eyeglasses was scratched to provide the reason for having the lens duplicated. Survey subjects, posing as consumers, then visited randomly-selected opticians and had the scratched lenses duplicated. Three categories of lens prescriptions were used to represent varying degrees of difficulty in the lens duplication process (the hypothesis being that the more sever the prescribed correction, the more difficult it would be to duplicate the lens correctly).

The duplication study results indicate that the cost for lens duplication services is much lower than the cost of obtaining new eye examination and new eyeglasses based on the prescription written following that eye examination.

The results show no statistically significant difference between New York and Pennsylvania in terms of the accuracy with which the lenses were duplicated. The results of the study, however, present some concern regarding the accuracy of the duplication process itself. The study results indicate that the more severe the prescription involved (*i.e.*, the higher the dioptric power of the sphere and cylinder or whether a prism was present in the lens), the more difficult it was to duplicate the lens correctly. In those cases where a prism was present in the lens being duplicated, over 90 percent of the lenses failed to meet the ANSI standard. The standards that were used to determine whether the lenses were properly duplicated are the 1979 American National Standards Institute (ANSI) Z80.1 Standard for Ophthalmic Lenses, the only uniform national lens tolerances available for use in the study.

In assessing the results of this study in terms of the desirability of obtaining duplicate or replacement lenses through the process of duplication of one's existing eyeglasses, the Commission staff believes that two points must be kept in mind. The first is that if a consumer wishes to obtain a duplicate or replacement pair of eyeglasses which reproduces the visual correction present in his or her existing eyeglasses, the process of duplication is more accurate than undergoing a new eye examination. Data from the BE study concerning the prescriptions written by different optometrists for the same patient juxtaposed against the data from the duplication study demonstrate that the mean deviations achieved by opticians in duplicating lenses are significantly less than the mean deviations in the prescriptions written for the same patient. The second point is that the failure to achieve the ANSI tolerances may not necessarily result in an adverse patient response. There appears to be no reliable research in the optical literature assessing the amount of variation from the ANSI tolerances which can be comfortably tolerated by a patient.

3. *Ready-to-Wear Reading Glasses (Part III of Staff Report).* Ready-to-wear or non-prescription reading glasses are magnifying lenses placed in regular eyeglass frames to provide magnification for close vision tasks. They are worn by people who suffer from presbyopia, which is the decreased ability of the normal eye to focus on near objects and printed material.

In most states, ready-to-wear reading glasses are sold in department stores, drug stores and other commercial establishments. They generally retail from $5.00 to $13.00 per pair. Single-vision prescription eyeglasses usually cost two to ten times more.

Most states permit ready-to-wear reading glasses to be sold without an ophthalmic prescription. Five states, however, have statutorily restricted the sale of these eyeglasses, permitting them to be sold only by optometrists and ophthalmologists, or by opticians upon

the prescription of an ophthalmologist or optometrist. The only U.S. manufacturer of these glasses has indicated that there is a growing trend to enact similar restrictions in other states.

Two possible quality justifications for restricting the sale of these glasses have been identified. This first is the quality of ready-to-wear eyeglasses as compared to the quality of prescription lenses. Second, presbyopic consumers whose visual needs are satisfied by ready-to-wear glasses might feel no need to obtain regular eye examinations. As a result, ocular or medical diseases may go undetected.

The staff report indicated that the effect of such a restriction may be an increase in the number of eye examinations and the substitution of prescription eyewear for ready-to-wear glasses. Preliminary evidence indicates that dispensing optometrists, ophthalmologists and opticians tend not to offer ready-to-wear reading glasses for sale if the over-the-counter sale of these glasses in department and drug stores is prohibited.

Part D—Alternatives Under Consideration

The Commission is requesting public comment on what course of action, if any, it should take regarding the above-described investigation. Possible alternatives for Commission action are discussed below in conjunction with each category of restriction at issue.

1. *Commercial Practice Restrictions.* While the staff's report contains evidence that state laws which restrict the ability of optometrists and opticians to practice in commercial settings raise consumer prices but do not result in consumers receiving higher quality care, these findings have not yet been submitted to public scrutiny. Other issues, not fully considered to date, may be raised during a comment period. The Commission, therefore, is interested in receiving public comment on staff's analysis and findings concerning consumer injury before deciding whether to take any action in this area.

There are several possible ways for the Commission to proceed to examine these restrictions. One possible action is for the Commission to commence a rulemaking proceeding aimed at lifting certain restraints on commercial practice. A second approach would be for the Commission to develop a model state statute, or set of principles to guide ate legislatures when considering gislation on the commercial practice of optometry and opticianry. Third, the Commission could put out an industry guide to govern the future conduct of private associations. Finally, the Commission could take no action and close this aspect of the investigation.

a. Proposed Rulemaking. The Commission staff has recommended that the Commission commence a rulemaking proceeding to explore a possible trade regulation rule. This recommendation is based on the results of the BE study (which are corroborated by earlier studies) indicating that prices are significantly lower in cities where commercial practice is permitted, and that the quality justifications raised by opponents of commercial practice may be unsupported. The removal of commercial practice restraints may therefore benefit consumers by reducing the price of vision care and making vision care more accessible without lowering overall quality. The rulemaking proceeding would enable the Commission to test the validity of the staff's evidentiary findings and provide a forum for discussion and debate on the implications of those findings.[1]

If a rulemaking were undertaken by the Commission, the staff has proposed that it address restrictions on commercial practice in four areas: (1) Employment of optometrists and opticians; (2) location of practice; (3) branch offices and (4) use of trade names. The staff's initial proposal would not preempt state laws designed to control specific abusive practices which might attend commercial practice as long as the state does not totally proscribe the ability of optometrists and opticians to practice in commercial settings. For example, to the extent that states are concerned about lay interference in the doctor-patient relationship, state laws that prevent lay employers from interfering in the professional judgments of optometrists and opticians would not be preempted. In addition, even though the staff's proposed action would permit a practitioner to own or operate branch offices, a state could require that a licensed optometrist must be in charge of each branch office and on the premises if eye examinations are being offered there.

The staff's proposal raises several serious questions about the extent of the Commission's authority to remedy any consumer injury found to be caused by commercial practice restrictions. The Commission is therefore requesting comment on the following legal and policy issues.

(1) The Commission is requesting comment on the staff's proposal regarding limitations on the use of trade names by optometrists. In 1979, the Supreme Court held that a Texas optometric trade name ban did not violate free speech rights protected by the First Amendment. (*Friedman* v. *Rogers*, 440 U.S. 1 (1979)). The Court found on the record before it that the trade name ban in question protected consumers from possible deception, and held that this possibility of deception was a sufficient state interest to outweigh the First Amendment right to convey that information. The Commission is interested in receiving comment on whether there is any evidence of consumer deception in states where the use of optometric trade names is permitted. In addition, the Commission is seeking comment on whether it would be possible for commercial ophthalmic practice to develop if employment, branching and location restrictions, but not trade name bans, were eliminated.

(2) The promulgation of any trade regulation rule would require a finding by the Commission that the restrictions at issue are "unfair acts or practices." (Section 18(a)(1)(B), of the Federal Trade Commission Act, 15 U.S.C. Section 57a(a)(1)(B), contains the Commission's rulemaking authority concerning "unfair acts or practices.") The unfairness test used in the Eyeglasses I proceeding requires a showing that the acts or practices at issue result in substantial consumer injury and, that the challenged conduct offends public policy.

To satisfy the "public policy" component of the unfairness test, the staff in relying on federal policy which advocates access to quality health care at a reasonable cost as a priority of the federal government. The 1977 Amendments to Titles XV and XVI of the Public Health Service Act, for example, call for the strengthening of competitive forces in the health services sector wherever competition and consumer choice can constructively serve to advance the purposes of cost effectiveness and access to health care. (Pub. L. No. 96-79, Section 1502, 93 Stat. 592).

The states have enunciated a separate public policy in enacting commercial practice restraints: To ensure that their citizens receive quality vision care. Can

[1] Although the staff's report contains draft rule language and a section-by-section analysis of the draft rule, the Commission is not requesting comment on the language of the staff's proposed rule. That language is included only for information. The FTC Improvements Act of 1980 requires that an Advance Notice of Proposed Rulemaking (ANPR) be published requesting comment on alternative courses of action which the Commission might pursue, but does not require the preparation or release of draft rule language with the issuance of an ANPR. The Commission's exercise of its discretion to publish the draft rule language and section-by-section analysis included in the staff report should not be viewed as precedent for future Commission proceedings at the ANPR stage.

the Commission find the public policy component of the unfairness test has been satisfied given the articulated state goal?

(3) Even if the Commission finds that the unfairness test can be met, did Congress intend the Commission to issue trade regulation rules which would preempt state law? The Commission staff believes that the legislative history of the Magnuson-Moss amendments, which clarified the Commission's rulemaking authority, indicates Congress' intent that Commission rules under Section 18 preempt inconsistent state law. Although the courts have held that Commission rules do preempt some state laws (see *Katharine Gibbs* v. *FTC*, 612 F.2d 658 (2d Cir. 1979)), the question of whether Commission rules preempt inconsistent state laws which rise to the level of "state action" has not yet been passed upon by the courts.

The doctrine of "state action" as it has been developed by the Supreme Court in *Parker* v. *Brown*, 317 U.S. 341 (1943), and its progeny, provides antitrust immunity to conduct that is part of a clearly expressed state policy and that is actively supervised by the state itself. See *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 100 S. Ct. 937 (1980), for the Court's most recent discussion of the "state action" doctrine.

If the *Parker* "state action" doctrine applies to rulemaking under the FTC Act, then state laws that constitute "state action" couuld not be reached under Section 5 rules even if Magnuson-Moss trade regulation rules are otherwise held to be preemptive of inconsistent state laws. The courts have not yet resolved the question of whether the "state action" doctrine of *Parker* v. *Brown* applies to FTC Act rulemaking. Even if the courts were to hold that *Parker* does not apply to FTC Act rulemaking, or that the laws in question do not rise to the level of state action, would it be in the public interest for the Commission to take action in this area of traditional state concern, if the data demonstrate substantial consumer injury and the laws in question do not further the espoused state interest?

b. Model State Law. Another alternative course of action would be for the Commission to issue a public report along with a model state law or guidelines for voluntary change by the states concerning commercial ophthalmic practice. The Commission is seeking comment on whether a model state statute is the most appropriate approach for the Commission to take.

Set out below are possible ways in which states could modify their laws to permit commercial practice but at the same time ensure that quality of vision care is protected. The Commission would like public comment on these specific proposals as well as suggestions for other provisions which could be included in a model state law if the Commission decides to pursue this option. By including these specific examples within this notice, the Commission is not endorsing them or the need for them, nor is the list intended to be exhaustive.

It has been argued that the employment of optometrists by lay corporations and lay individuals could result in interference in the doctor-patient relationship by the lay employers. A statutory provision designed to guard against this is exemplified by a legislative proposal introduced in the state of Ohio (H.B. 432, 111th Ohio General Assembly, Regular Session (1975–76)). That bill would have specifically permitted commercial ophthalmic practice but would also have prevented employers from interfering in the professional judgment of licensed optometrists:

> "The Board (of Optometry) shall not make any rule prohibiting, limiting, or restricting the location where the practice of optometry may be conducted or affecting the right of an optometrist to seek and obtain employment with any person, organization or association provided that licensed optometrist is the individual who performs the practice of optometry as defined * * * (elsewhere in Code of Optometry). In the event that any person, organization, or association employing a licensed optometrist is found by a court of competent jurisdiction to be intefering with the proper exercise of the professional judgment of a licensed optometrist in the practice of optometry, the Board may forbid any licensed optometrist from seeking and accepting employment with such person, organization, or association for a specified and limited period of time to be determined by the board."

Another issue involving lay employment of optometrists and opticians is the propriety of compensation schemes that reward high-volume practice. The Commission staff has received evidence that some commercial firms have utilized incentives to increase sales, such as offering sales commissions, giving bonuses for selling a second pair of eyeglasses and paying employees on a "per head" basis for examinations performed. It is alleged that such systems of remuneration result in unnecessary sales of eyeglasses and incomplete examinations. Although the results of the BE study indicate that commercial optometrists do not prescribe eyeglasses any more frequently than non-commercial optometrists, the results also indicate that commerical optometrists on the average perform less thorough examinations. The extent that a state is concerned with overprescription and the thoroughness of examinations, it could control the system of remuneration to prohibit compensation schemes which provide economic incentives rewarding high-volume practice. For example, the statutory provision could require that the optometrist or optician be paid on a fixed salary basis. Where a leasing (landlord-tenant) arrangement rather than direct employment is involved, the provision could require that the optometrist not lease or occupy space when the rent paid varies according to gross receipts, net profit and/or numerical volume of the patients examined by such licensed optometrist. Such a provision is found in Rhode Island's Optometry Practice Act (R.I. Gen. Laws Section 5–35–20).

One of the primary justifications for commerical practice restraints is that they maintain or enhance the quality of vision care. The results of the BE study show that overall quality of care is the same in markets where commerical practice is permitted as in markets where commercial practice is proscribed. Of the four quality measures used in the study, in one—the thoroughness of eye examination—commercial optometrists on the average scored lower than non-commercial optometrists. As between the two types of markets, *i.e.*, markets where commerical practice is permitted and markets where commercial practice is prohibited, the percentage of optometrists who give less thorough eye examinations is about the same. A possible way for the states to regulate the quality of services provided both by non-commercial as well as commercial providers is through direct regulation of examination procedures. A model state law could establish minimum standards for both office equipment and examination procedures.

A few states have already adopted this approach. For example, New Jersey requires that "prior to prescribing for or providing eyeglasses or spectacles a complete minimum examination shall be made * * *" The New Jersey State Board of Optometry has enumerated 16 tests which constitute the minimum examination (N.J. Stat. Ann. Section 13:38–8 (West)). In Michigan, the State Board of Optometry has specified certain items of equipment which optometrists are required to "have and use." (Rules and Regulations of the Michigan State Board of Examiners in Optometry, Section 338.262.) Maine has also enacted a statutory provision which

sets standards for minimum eye examinations. These are (1) history of visual problems and care; (2) visual acuity of each eye, uncorrected and with best correction; (3) examination for any abnormal condition or significant characteristics of internal and external ocular tissues; (4) advice for medical referral when indicated; (5) objective and subjective refraction of the eyes; and (6) cover test and/or muscle balance tests.

A model state law provision could also be developed to control quality of care in branch offices. States could enact a provision regulating the services provided at each office by requiring that ophthalmic goods, services, and eye examinations offered at each office only be supplied by a person qualified under state law to do so.

A model statutory provision regarding location of practice could permit an optometrist or optician to locate in a drug store, department store, shopping mail or other mercentile location while banning such location in areas which violate state zoning laws or constitute a public health hazard.

Model provisions regarding the use of trade names could permit the use of trade names but regulate their use to prevent deception. One possibility would be to require that all offices under common ownership operate under the same name to avoid creating a false impression of competition. Another way to ensure professional identification is to require, as Texas and many other states have done, that the optometrist's license to practice be prominently posted at each office at which he or she practices.

C. *Voluntary Guide.* Finally, the Commission could issue a voluntary guide governing restrictions that derive from private action, either after the conclusion of a rulemaking proceeding or instead of initiating a proceeding. The guide could include some or all of the provisions recommended by the Commission staff for a trade regulation rule, and would define the kinds of restrictions on commerical practice that the Commission believed to be in violation of Section 5 of the Federal Trade Commission Act. Enforcement of the restrictions, however, would not lead to the same kinds of sanctions as would violation of a rule promulgated under Section 18 of the FTC Act.

2. *Duplication of Lenses.* The results of the duplication and Bureau of Economics studies suggest several hypotheses. First, when consumers are required to obtain new eye examinations earlier than they otherwise would in order to obtain duplicate pairs of eyeglasses or replacements for broken lenses or frames in states where duplication is proscribed, they may incur a substantial and frequently unnecessary expense. Second, a consumer may be more likely to obtain a duplicate or replacement pair of eyeglasses which more closely reproduces the visual correction present in his or her existing eyeglasses by having the lenses duplicated than by undergoing a new eye examination. And third, the greater the power of the prescriptive requirements of a pair of eyeglasses the greater is the significance of error likely to be introduced via duplication.

The Commission is considering several options in this area. The Commission could take no action and close this part of the investigation. Another alternative would be to commence a rulemaking proceeding to explore a possible trade regulation rule which would permit opticians to duplicate a lens or pair of lenses without a prescription. The Commission is interested in receiving comment on the appropriateness of this course of action in light of the results of the duplication study.

As discussed in Part C of this notice, the duplication study results indicate that the more severe the prescription involved (*i.e.*, the higher the dioptric power of the sphere and cylinder or whether a prism was present in the lens), the more difficult it was to duplicate the lens correctly. The statistical findings and deviations from the ANSI tolerances are found on pp. 117, 120, and 122 of the staff's report. Although the ANSI standards were designed as a guide in the fabrication of lenses and do not necessarily correspond to the amount of deviation a person's eyes can tolerate, as the staff report states, the mean deviation in the prism parameter of the prism lenses was so great (nearly a full diopter as opposed to the ANSI tolerance which is 0.33 diopter) that, in most instances, a person's eyes would not be able to tolerate an imbalance of that magnitude. The Commission is seeking public comment on the significance of these results in terms of using the "duplication process" as a means of obtaining replacement or a second pair of eyeglasses. Because of the results of this study—indicating at least some margin of error in the duplication process—the staff has not recommended that the Commission take any action concerning state laws that prohibit opticians from duplicating lenses without a prescription.

Another possible course of action would be to propose a rulemaking proceeding to consider a possible trade regulation rule to extend the prescription release requirement of the Eyeglasses I Rule (16 CFR 456.7) to require that upon filling a prescription for spectacle lenses, the dispenser, (whether an ophthalmologist, optometrist or optician) return a fillable prescription to the consumer.

This is the proposed course of action recommended by the Commission staff. The failure of dispensers of eyeglasses to return spectacle prescriptions to consumers may constitute a violation of Section 5 of the FTC Act for the same reasons articulated in support of the original prescription release requirement of Section 456.7 of the Eyeglasses I Rule. The prescription release requirement of this Rule was upheld by the United States Court of Appeals for the District of Columbia Circuit in *American Optometric Association* v. *FTC, supra.*

This proposal would not affect state laws that prohibit the duplication of lenses without a prescription, but would enable the consumer to obtain replacement or duplicate pairs of eyeglasses from the original lens specifications. Consumers would thus be able to obtain duplicate or replacement lenses from the dispensers of their choice. Under this recommendation states or individual eye doctors would be free to impose an expiration date on the prescription, thereby preventing consumers from bypassing needed examinations by obtaining duplicate or replacement lenses with an outdated prescription.

The staff's recommendation would require all dispensers of eyeglasses to return to the consumer a fillable prescription at the time eyeglasses are purchased, but would not require dispensers of eyeglasses to release prescriptions over the telephone. If a telephone release requirement is not also imposed, some consumers who may have misplaced or lost their prescriptions may still not be able to obtain duplicate or replacement lenses readily. Imposing such an obligation on practitioners, however, may impose a greater cost of doing business since it requires that records be maintained for a certain period of time. Moreover, if such a requirement were imposed, who should have the right to receive the lens specifications by telephone—the consumer or the new dispenser or both? The Commission is interested in receiving public comment on whether a telephone release requirement should also be imposed if the Commission ultimately adopts the staff's recommendation that dispensers be

rulemaking asking for public comment on the proposed rule and requests to appear at public hearings which will be scheduled following the comment period will be published in the **Federal Register**. There are three different hearing formats that may be used if the Commission decides to initiate a rulemaking proceeding: (1) The standard rulemaking hearing procedure set forth in § 1.13 of the Commission's Rules of Practice (16 CFR 1.13); (2) the bifurcated hearing format (as was used in the Children's Advertising rulemaking proceeding); and (3) a variation of the standard procedure in which no issues are designated (as was used in the Thermal Insulation rulemaking proceeding).

Under the Commission's standard rulemaking procedure a notice of proposed rulemaking is published for public comment. Prior to any hearings, disputed issues of material fact are designated. Informal hearings are held on the proposed rule at which public testimony is heard. Witnesses may be cross-examined and rebuttal testimony presented on disputed issues only.

The bifurcated hearing procedure involves two levels of hearings. First, there would be a legislative hearing in which those persons who wished to present their views orally would so advise the Presiding Officer and furnish him or her with verbatim copies of the statements they wished to read or summarize. No participants would be allowed to cross-examine any other participants at this hearing, but could submit written questions to the Presiding Officer who could ask those or any other questions. If, after the review of the record of that hearing and the written comments received during the comment period, the Commission determined that there were disputed issues of material fact that were necessary to resolve, a second hearing would be held to resolve those issues. At this "disputed issues" hearing, cross-examination and the presentation of rebuttal witnesses would be allowed.

The "no designated issues" procedure follows the standard rulemaking procedure, however, no disputed issues are designated. Cross-examination of witnesses and presentation of rebuttal testimony at public hearings is subject only to time limitations.

The Commisson staff has recommended that the standard procedures be used if a rulemaking proceeding is commenced. The Commission requests public comment on which format should be followed.

Part F—Request for Comments

The Commission has not reached any conclusion concerning what course of action, if any, to take concerning the form of practice and scope of practice restraints at issue in this investigation. Before considering the staff recommendations, the Commission wishes to receive comments on the staff's analysis, the staff report, and the Bureau of Economics and duplication studies. The Commission believes that such public comment could greatly enhance its understanding of the issues to be considered. Interested persons are invited to address any issues of fact, law, policy or procedure, and to suggest any alternative courses of action which they believe should be considered by the Commission

By direction of the Commission.

Carol M. Thomas,

Secretary.

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BILLING CODE 6750-01-M

WITNESS STATEMENT

NAME F.H. Burton, M.D. BILL No. S 426

ADDRESS Butte, Montana DATE 3/11/57

WHOM DO YOU REPRESENT Self

SUPPORT _____ OPPOSE _____ AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

I am an Ophthalmologist practicing in Butte.

I give my Contact Lens prescriptions to Opticians and have for the past 29 years.

I like the existing law. Please remove new language in Section K.

F.H. Burton, M.D.

FORM CS-34
1-81

VII

ROBERT I. NOBLE M. D.
OPHTHALMOLOGIST
800 WEST PLATINUM STREET BUTTE, MONTANA 59701
792-4567

10 March, 1981

Members of the House Public Health Committee,
Helena, Montana 59601:

Gentlemen:

I am unable to attend the meeting in which you are to consider Senate Bill 426, so have asked Vern Kingston to read this letter before your committee.

I have employed the services of opticians for many years, for the fitting of glasses and of contact lenses. These people have always behaved in a professional manner, particularly in the handling of contact lenses. The patient who has been fitted is returned to my supervision after the physical fitting, but I do not have to spend the time in actual fitting of the lenses. This enables the ophthalmologist to utilize his time more productively in seeing patients.

The use of independent technical assistants in Medicine is a long tradition. The physician writes a prescription for potent medications, which is dispensed by a Pharmacist. I believe the Optician to be equally professional, and in the area where I practice, extremely well trained to fill my prescription for glasses and contact lenses.

I hope that you will see fit to recommend that the Opticians will not be restricted in their function by the bill under consideration.

Sincerely,

Robert I. Noble M.D., F.A.C.S.

RIN:en