MINUTES OF THE MEETING
JUDICIARY COMMITTEE
50TH LEGISLATIVE SESSION
HOUSE OF REPRESENTATIVES

February 18, 1987

The meeting of the Judiciary Committee was called to order by Chairman Earl Lory on February 18, 1987, at 7:00 a.m. in Room 312 D of the State Capitol.

ROLL CALL: All members were present with the exception of Rep. Eudaily who was excused.

EXECUTIVE SESSION:

ACTION ON HOUSE BILL NO. 393:

Rep. Gould moved that HB 393 DO PASS. Rep. Gould moved amendments. Question was called and a voice vote was taken. The motion CARRIED 13-1, with Rep. Hannah dissenting. Rep. Mercer stated that the 180 days should be stricken because the Supreme Court says that Human Rights Commission will have 12 months. Rep. Gould moved the insertion of 12 months. Question was called and a voice vote was taken. The motion CARRIED 12-2 with Reps. Giacometto and Hannah dissenting. (See Amendments Attached). Rep. Gould moved that HB 393 DO PASS as amended. Question was called and a voice vote was taken. The motion CARRIED 13-1 with Rep. Hannah dissenting. HB 393 DO PASS AS AMENDED.

ACTION ON HOUSE BILL NO. 448:

Rep. Darko moved that HB 448 be tabled. Question was called and a voice vote was taken. The motion CARRIED unanimously. HB 448 TABLED.

ACTION ON HOUSE BILL NO. 470:

Rep. Miles moved that HB 470 DO PASS. Rep. Miles stated that there is a drafting error on page 26 of the bill and moved to amend it by inserting "except traffic records". Question was called and a voice vote was taken. The motion CARRIED unanimously. Rep. Rapp-Svrcek moved to amend by returning to the original language of the bill on line 10. Question was called and a voice vote was taken. The motion CARRIED 8-7. (See Amendments Attached). Rep. Addy moved to amend the bill by returning to the original language on lines 3-6, page 13. Question was called and a voice vote was taken. The motion CARRIED 12-4. Rep. Miles moved that HB 470 DO PASS AS AMENDED. Question was called and a voice

vote was taken. The motion CARRIED unanimously. HB 470 DO PASS AS AMENDED.

ACTION ON HOUSE BILL NO. 371:

Rep. Gould moved that HB 371 DO PASS. Rep. Brown moved a substitute motion that HB 371 DO NOT PASS. He stated that this bill is not reasonable. Rep. Addy pointed out that a young man must disclose his social security number at the age of 18. Rep. Giacometto opposed the motion. Question was called and a voice vote was taken. The motion CARRIED 10-6. HB 371 DO NOT PASS.

ACTION ON HOUSE BILL NO. 502:

Rep. Darko moved that HB 502 DO PASS. Rep. Addy opposed the motion. Rep. Mercer stated that this bill is not needed. Rep. Bulger moved a substitute motion to table HB 502. A voice vote was taken and the motion CARRIED 15-1, with Rep. Giacometto dissenting. HB 502 TABLED.

ACTION ON HOUSE BILL NO. 660:

Rep. Strizich moved that HB 660 be tabled. A voice vote was taken and the motion CARRIED unanimously. HB 660 TABLED.

ACTION ON HOUSE BILL NO. 351:

Rep. Hannah moved that HB 351 be tabled. A voice vote was taken and the motion CARRIED 15-1, with Rep. Cobb dissenting. HB 351 TABLED.

ACTION ON HOUSE BILL NOS. 604 AND 605:

Rep. Miles moved that HB 604 and 605 be tabled. A voice vote was taken and the motion CARRIED unanimously. HB 604 and 605 TABLED.

ACTION ON HOUSE BILL NO. 680:

Rep. Hannah opened discussion on the bill. Rep. Mercer stated that this bill deals with negative treatment and he does not have a problem with it. Rep. Bulger stated that he opposes this bill. Rep. Addy pointed out that HB 680 requires a 2/3 vote and if a woman is considering an abortion, then the doctor must tell her everything, with regard to her medical condition.

Rep. Bulger moved that HB 680 be tabled. A voice vote was taken and the motion CARRIED 11-4 with Reps. Hannah, Meyers, Cobb and Keller dissenting. HB 680 TABLED.

Chairman Lory closed Executive Session.

HOUSE BILL NO. 592, Rep. Harp, District No. 7, sponsor, stated that this bill deals with bad faith. Contract decisions now imply a covenant of good faith and fair dealings in every contract. Montana is one of only three states with this new doctrine. The bad faith doctrine is a tort doctrine where parties to a contract used to be subject to contract damages for breach of contract and now they are subject to tort damages, punitive damages awards, and emotional distress awards. The contract means what it says only if the jury agrees with it and he asked why we need bad faith. He acknowledged that bad faith is not needed because as it exists right now it is damaging to Montana's small businesses, financial institutions, farms and ranches. He pointed out that when specific standards are needed the Legislature can write them into law. We do not need juries writing laws on a case by case basis, he said.

PROPONENTS:

JIM ROBISCHON, Montana Liability Coalition, stated that the implied covenant of good faith and fair dealing is a recent creation of the Supreme Court of California. The purpose of which is to provide access to the wonderful world of torts for a party to a commercial transaction. The world of torts includes the opportunity for damages from emotional distress and punitive damages. He pointed out that the purpose of HB 592 is to restrict this access from the commercial transaction to the tort system to only those situations that are covered by specific statutory applications. He submitted a handout titled, Bank Bad Faith Survey. (Exhibit A)

DAVID CALAHAN, First Interstate Bank, President, Missoula, stated that he supports this legislation for two reasons: 1.) The present state of affairs of the bad faith situation prevents myself and my officers from dealing with my existing customer base as well as my new customers because of the amount of time that is necessary to deal with a bad faith issue. 2.) The high cost involved in defense of a bad faith law suit has restricted the lending practices of my bank and we are much more conservative in making loans. He pointed out that when the bank does not do well they become much more restrictive in their lending practices.

BILL PARKER, Chief Executive Officer for the First Interstate Bank of Great Falls, stated that the primary function of a bank is lending money. He urged support for this bill so that banks can continue to make loans for businesses in Montana.

JOHN R. CRONHOLM, District Director for Small Business Administration in Helena, explained that the Government cannot be sued in bad faith, nor can Government employees, acting within the scope of their employment, be held liable for tortious conduct. Nonetheless, our office is under almost continuous subpoena to provide file information and testimony at bad faith hearings and trials. He stated that the possibility of litigative loss is a factor, not the only factor, but definitely a factor in this conservatism. He submitted written testimony. (Exhibit B)

PHILLIP B. JOHNSON, Montana Bankers Association, Director, supplied a definition for the drying up of risk capital that would normally provide additional employment in the state of Montana. Business loans that include financial leverage result in a higher degree of risk taking by both the borrower and the lender. While borrowers may be willing to take the leverage risk the lending institutions are not willing. This is not providing the capital for the building of Montana's economy. He urged support for this bill. Written Testimony was submitted by Mr. Johnson. (Exhibit C).

KAY FOSTER, appearing on behalf of the Governor's Council on Economic Development and the Billings Chamber of Commerce, presented written testimony in support of this legislation. (Exhibit D). She stated that the goal of the Governor's Council was to present administrative and legislative action that would encourage economic growth for all doing business in Montana. The passage of HB 592 is an important step toward that goal through the restoration of some certainty and predictability to employers, lenders and insurers in our state.

LORNA FRANK, Montana Farm Bureau, went on record in support of this bill.

CHIP ERDMANN, Montana League of Savings Institutions, stated that they support this legislation.

BOB PYFER, Montana Credit Unions League, went on record in support of the bill.

KEITH L. COLBO, Department of Commerce, testified in support of this bill from the standpoint of economic development in the state of Montana and they are very concerned over this issue.

OPPONENTS:

TOM LEWIS, Attorney, Great Falls, and the President of the Montana Trial Lawyers Association, appeared in opposition to the bill on behalf of the Association and many small

businesses. He stated that HB 592 violates the public interest by promoting rather than curbing abusive and unethical business practices. The bill mistakes the law relating to common law causes of action for breach of the implied covenant of good faith and fair dealing in that it suggest that all contract breaches are actionable in tort for bad faith. He further stated that this bill does not promote the legitimate business interests of the State of Montana; it promotes and protects improper and unethical business practices in violation of the interests of all citizens of this state. He submitted written testimony. (Exhibit E).

TERRY MURPHY, Montana Farmers Union and Grange, stated that he opposes taking away "bad faith" as a cause of action and submitted a witness statement. (Exhibit F).

CLIFF EDWARDS, Billings, Attorney and on the Board of Directors for a bank in Denton, stated that he is appearing on behalf of himself and Mr. Ed Swanson, County Commissioner from Glasgow. He stated that this bill sweeps out Montana's small businesses right to have hope to deal with the giant out-of-state corporations on an equal footing. He pointed out that this bill is way too broad and will be detrimental to Montana's businesses.

MARY WESTWOOD, Attorney from Great Falls, opposed the whole bill.

EDWIN V. SWANSON, Glasgow, opposed this bill.

KAY NORENBERG, Women Involved in Farm Economics, went on record in opposition to this bill.

GEORGE ALLEN, Montana Retail Association, opposed this legislation.

PROPONENTS:

ROGER W. YOUNG, President, Great Falls, Chamber of Commerce, sent in testimony in support of HB 592. (Exhibit G).

QUESTIONS (or Discussion) ON HOUSE BILL NO. 592:

Rep. Addy asked Mr. Hoyt why he is opposed to the whole bill. He stated that the banks and lending institutions need some relief but the bill itself is just too broad. He pointed out that the bill needs to be carefully structured so that it accomplishes what the proponents really want to accomplish and not create problems.

Rep. Addy asked Mr. Calahan why the banks should not be required to treat customers in good faith. He stated that they do treat their customers in good faith no matter what the transaction is and we attempt to do so in every event. The threat of damages is what creates the problems.

Rep. Cobb asked Mr. Johnson how much more risk capital will we get in this state by passing this bill. Mr. Johnson said that he really cannot answer that question. In dealing with business and leverage positions, with certain businesses, the price to the borrower increases and interest rates are a reflection of risk.

Rep. Miles stated that the way she reads this bill, there is no cause of action for breach of the covenant of good faith, unless it is expressed in statute. She stated that, since there is no accompanying legislation to define what would constitute bad faith for lending institutions, basically this tells her that this proposal would make them completely immune from any concept of bad faith or unfair dealings and she asked Rep. Harp to comment on this. He stated that that is not his intent. This bill states that in the future the Legislature will set the standards as far as bad faith is concerned.

Rep. Addy stated that under the Uniform Commercial Code it states that every contractor duty within this Code imposes an obligation of good faith in its performance and enforcement. He asked Mr. Lewis what the difference was between this obligation of good faith and what this bill is talking about. Mr. Lewis said that he does not see how this bill helps the banks. If the bill is aimed at remedies, the UCC specifically states that punitive damages are available if they are provided for in some other statute. He explained that punitive damages would still be available with this bill against the bank but they would be decided by a judge because this bill recognizes the duty of good faith and fair dealings under the UCC.

Rep. Harp closed the hearing on HB 592 by stating that we often use the big corporations as the whipping tool and there are small banks in Montana that are suffering because of judgments and uncertainty of the commerce and how the economy will move forward. This bill only asks for predictability in those judgments and to make sure those lending institutions continue to lend to businesses in Montana. He urged support for this bill.

HOUSE BILL NO. 604, Rep. Hannah, District No. 86, sponsor, stated that this bill defines life-sustenance procedure in the Living Will Act to exclude the provision of nutrition or hydration and therapy limiting the types of life-sustenance

procedures that may be withdrawn through operation of a living will. This bill clarifies in one specific area the bill passed last session. He pointed out that he feels it is bad public policy to let people starve to death or let them die from lack of nutrition or water. It is an unnatural way of dying to allow someone to die without food and water.

PROPONENTS:

PENNY JEROME, Homemaker and Nurse, stated that from personal experience with her mother and from work with Hospice patients she strongly supported all things of comfort for dying patients.

VIC ALINEN, Helena Pastor, Founder of Rally for Life, stated that this bill deals with a human rights issue. The great state of Montana would not fall into the characteristics that many other states have fallen into in America where the inservice client patient service that deals with health have been left to die in our hospitals and nursing homes. There are too many benefits in this country that can sustain life today. He urged support for this legislation.

JOHN VANDERACRE, Helena, presented a letter from C. P. BROOKE, M.D., J.D. from Missoula, (Exhibit A). He stated that helpless citizens must receive the ordinary essentials of life and comfort, namely: warmth, water, air and sustenance.

CORR POOL, Pastor from Helena, President of the Ministerial Association, is speaking on behalf of himself in support of this bill.

JOHN ORTWEIN, Montana Catholic Conference, stated that the Conference serves as the liaison between the two Roman Catholic Bishops of the State of Montana in matters of public policy. Because human life has inherent value and dignity regardless of its condition, every patient should be provided with measures which can effectively preserve life without involving too grave a burden. Food and water are necessities of life for all human beings and can generally be provided without the risks and burdens of more aggressive means for sustaining life. The law should establish a strong presumption in favor of their use. He urged passage of this legislation and submitted written testimony. (Exhibit B).

DOUG KELLEY, Attorney, Helena, went on record in support of this legislation.

OPPONENTS:

JAN CRONQUIST, Attorney, Helena, stated that this bill is in conflict with public opinion, with recent case law, with policy statements of professional groups, with patient self-determination and the constitutional right to privacy. She submitted written testimony. (Exhibit C).

JOE UPSHAW, Association of Retired People, Helena, stated that if this bill were to be passed it would change the bill to the extent that it will no longer be the true will and intent of the person who desires to have his life sustained by any means when the point of no return is reached. He urged that the present bill, which is a good bill, be left in place by not giving this bill a favorable consideration. He submitted written testimony. (Exhibit D).

HANK HUDSON, Legal Services Developer, Seniors Office, pointed out that this bill is unnecessary. He stated that the Living-Will Act is working. It represents a successful response to changes in medical technology. He urges a do not pass recommendation and submitted written testimony. (Exhibit E).

EILEEN ROBBINS, Montana Nurses Association, presented written testimony. (Exhibit F).

ELMER HAUSKEN American Association of Retired Persons, presented written testimony. (Exhibit G).

ELSIE LATHAM, submitted written testimony in opposition to this legislation. (Exhibit H).

There were no questions.

Rep. Hannah closed the hearing on HB 604 by stating that this bill only asks that people be left to die in peace with the minimum amount of pain and suffering. This act is simply a clarification. He urged support for HB 604.

HOUSE BILL NO. 673, Rep. Whalen, District No. 93, stated that this act is designed to cut down on attorney involvement in workmens' compensation cases. Under the present law, the way the attorney fee statute is written an injured claimant can have his attorney fees paid by the defendant's insurance company if after a hearing on his claim he does better than just prior to the hearing. The problem is that insurance companies make offers to injured workers prior to them going to an attorney and the offers often times are unreasonable offers. The situation most of the time is that injured workers are put in a position where they have to go to an attorney an hour or two before the hearing and the insurance company comes in and makes a reasonable offer. This bill would require that prior to a petition being filed

in a workmens' compensation court, which is the point where an injured worker goes to an attorney, and if a reasonable offer of settlement is not made after the hearing, the defendant will have to pay the claimant's attorney fees. He pointed out that the state fund paid over a half million dollars in defense attorney costs to try and defend against workmens' compensation claims last year. This bill would drastically eliminate litigation in the workmens' compensation system.

PROPONENTS:

TOM L. LEWIS, Montana Trial Lawyers Association, stated that they support this bill because it will reduce attorney involvement in workers' compensation cases which is good for everybody. It triggers an early determination by the insurance company before an attorney is involved as to what the bottom line of their case is. He pointed out that this bill is in the public interest of the state of Montana and he urged passage.

See Visitors' Register for further proponents.

There were no opponents testifying.

QUESTIONS (or Discussion) ON HOUSE BILL NO. 673:

Rep. Cobb asked Mr. Lewis if he had statistics as to how many offers have been made in a year with regard to going to court and the court giving a better settlement. He stated that many cases will be affected by this bill. Almost never does the insurer offer what the case is worth until after an attorney becomes involved or after a petition has been filed, he said.

Rep. Whalen closed the hearing on HB 673.

HOUSE BILL NO. 684, Rep. Whalen, District No. 93, sponsor, stated that this act provides that the Division of Workers' Compensation loses jurisdiction concerning a claim when a petition for determination of a dispute is filed with the workers' compensation judge. He pointed out that once an action has been filed, the District Court has exclusive jurisdiction to determine what is going to happen on a particular claim. When an appeal is made to the Supreme Court, the District Court loses complete jurisdiction to do anything with regard to the case. In the workmens' compensation case, after filing a petition in the workmens' compensation court, having jurisdiction to determine everything having to do with the claim, it goes back to the division for a determination even though jurisdiction has been vested with the workmens' compensation court. The

statute states that prior to the workmens' compensation court obtaining jurisdiction the division can regulate attorney's fees. This bill will eliminate one step in the process. He explained that once jurisdiction is vested with the workmens' compensation court, they should continue to have jurisdiction over all matters in controversy between the claimant, the employer and the insurance company.

PROPONENTS:

TOM L. LEWIS, Montana Trial Lawyers Association, stated that this bill is a good common sense house cleaning bill. HB 673 is intended to see that attorneys fees are paid by the insurer rather than the claimant and this bill will speed up that process. He urged support for this bill.

There were no further proponents, no opponents and no questions.

Rep. Whalen closed the hearing on HB 684.

HOUSE BILL NO. 685, Rep. Whalen, District No. 93, sponsor, stated that he would like this bill tabled because in trying to deal with the problem he created more problems.

Chairman Lory opened EXECUTIVE SESSION.

EXECUTIVE SESSION:

ACTION ON HOUSE BILL NO. 684:

Rep. Addy moved to table HB 685. A voice vote was taken and the motion CARRIED unanimously. HB 685 TABLED.

HOUSE BILL NO. 687, Rep. Simon, District No. 91, sponsor, stated that this bill revises the civil penalty for shoplifting. The civil penalty is set in the amount of $250.00 and this amount is in addition to actual damages.

PROPONENTS:

GEORGE ALLEN, Montana Retail Association, strongly urged support for this legislation because shoplifting has grown to be a major crime in the nation. He said that there is more money lost through shoplifting today then there is through bank robberies or any other major crimes. He presented a decal sign that is displayed in the stores as (Exhibit A). He also submitted as (Exhibit B) a Notice and Demand for Payment of Dishonored Check which stated that a dishonored check could cost $100.00 or more and this is sent to the customer so that they will come in right away and make their check good. These are used as a deterrent and in

order to keep using these methods there must be enough teeth in it to get the attention needed to stop crime. If this bill is passed he proposed that a similar method be used as is currently used for bad check writing to deter shoplifting. The mandatory civil penalty will also be a great help.

REP. DAVE BROWN went on record in support of this bill.

There were no opponents to the bill and no questions.

Rep. Whalen closed the hearing on HB 687 by stating that stealing is stealing, no matter how much the item is worth.

HOUSE BILL NO. 475, Rep. Stang, District No. 52, stated that this act is commonly known as the gas station bill of rights. He explained each section of the bill and submitted amendments. (Exhibit A). He pointed out that under current law there is no right of incorporation, and no right to designate a successor of interest. He also presented handouts as (Exhibit B).

PROPONENTS:

RON LELAND, service station dealer, Helena, stated that he is in full support of this legislation and this bill must be passed now for the survival of the dealers in the service station industry.

JOHN TAGGART, President of the Dealers Association Automotive Trades of Montana, stated that some of the provisions of this bill are already guaranteed in Federal Law in the Petroleum Marketing Practices Act. He pointed out that this Act leaves the regulation of the sale or transfer of a franchise to state law. He submitted a witness statement. (Exhibit C).

See Visitors' Register for further proponents.

OPPONENTS:

WARD A. SHANAHAN, Chevron Corporation, commented that the regulation of relationships between dealers and refiners is adequately covered by the Federal Petroleum Marketing Practices Act (June 19, 1978). This is a protectionist legislation in an industry drastically affected by foreign pricing and supply. Because this Legislature is considering increases in "at the pump" fuel taxes that will increase consumer gasoline and diesel costs, we ask you to reflect on the upward pressure on prices of a bill that expressly limits the refiner's ability to market its product. He presented written testimony. (Exhibit D). He also submitted a statement from CHEVRON CORPORATION as (Exhibit E).

KURT KRUEGER, Montana Petroleum Marketing Association, stated that they agree with the concept of the bill. But they feel the bill is really not needed. He pointed out that there has not been even one law suit brought by a dealer against a refiner or distributor on the concept of bad faith or unfair dealings. He stated that this bill will stop dealer-lease stations in the state of Montana because there are not any safeguards and it is changing the law of the state. All franchises in general should be looked into if this bill is to be considered. He urged that HB 475 be defeated.

There were no further opponents and no questions.

Rep. Stang closed the hearing on HB 475 by stating that there is a law suit pending right now in the state of Montana. He pointed out that this is a good small business bill and it is a chance to help some of the small businessmen in the state. This bill was sent to the Judiciary Committee because the Business and Labor Committee realized that this is a legal problem.

HOUSE BILL NO. 430, Rep. Brandewie, District No. 49, sponsor, explained that this act clarifies penalties that may be imposed for deliberate homicide. The purpose of the bill is to switch the language around because the language is misplaced. He pointed out that the words "life imprisonment" should be changed from line 22 and placed on line 23 so that life imprisonment can be in a sentencing of a criminal.

There were no proponents and no opponents.

QUESTIONS (or Discussion) ON HOUSE BILL NO. 430:

Rep. Rapp-Svrcek stated that he does not understand how moving the language from one line to another can take care of this problem. He asked Rep. Mercer to comment on this. He pointed out that the death penalty provisions are found in 18-301-18-310. If a person is sentenced to death, then that section is used and depending on mitigating circumstances it is decided if the death penalty or life imprisonment will be used, he said. He pointed out that this is a good change in the law. Rep. Rapp-Svrcek stated that his understanding of this issue is, that presently the death penalty must be considered in order to impose life imprisonment and Rep. Mercer stated that that is correct.

Rep. Gould stated that under all circumstances except the death penalty, it is his understanding that a criminal can come under a parole review in 17 1/2 years and he asked Rep. Brandewie how this bill will fix that.

Rep. Brandewie stated that it probably will not fix it but a life term cannot be considered at the present time. The reason they cannot consider it is unless they can consider the death penalty as Rep. Mercer explained.

Rep. Mercer stated that there is one other issue that should be discussed and he explained that with the present law, deliberate homicide does not get the death penalty and it does not get life imprisonment. With the law changed in this bill a straight homicide could bring life imprisonment.

Rep. Rapp-Svrcek asked Rep. Mercer if a judge is presently allowed to sentence someone to a term of years without possibility of parole. Rep. Mercer stated that he was not sure and he asked Mr. MacMaster to comment on that. Mr. MacMaster pointed out that a judge cannot do that but he can designate a person a dangerous offender and he will have to serve a longer part of his sentence before he can be allowed parole. He must serve 50% of his sentence instead of 25%, he said.

Rep. Brandewie closed the hearing on HB 430 by stating that the judges in Flathead County feel this is an important bill.

Chairman Lory open Executive Session.

EXECUTIVE SESSION

ACTION ON HOUSE BILL NO. 430:

Rep. Giacometto moved that HB 430 do pass. Question was called and a voice vote was taken. The motion CARRIED unanimously. HB 430 DO PASS.

Chairman Lory closed Executive Session.

HOUSE BILL NO. 696, Rep. Hannah, District No. 86, stated that this is a reasonable proposal providing for appeal of and trial anew on all final rulings and decisions of the Commission for Human Rights. This bill calls for a de novo review. This bill allows for a direct appeal to District Court and it allows for the appeal to be made within a 30 day time frame. It does not put special weight, therefore, on presumption of the findings of the Human Rights Commission and it will reduce the power of the Commission in its final rule. He further pointed out that this will allow for freedom on the part of the people in the state of Montana to take the case forward into court.

PROPONENTS:

JERRY FASTENAU, Billings Neon Sign Company, stated that they are the victims of a HRC award that will cost them nearly $100,000.00. He does not understand that the HRC has the power and the will to try and break a small concern like his company and why they cannot have the case and the award retried in the District Court where they can get a fair hearing.

BILL NYMAN, President and General Manager for the Billings Neon Sign Company, stated that he is strongly in favor of this bill.

PATTI BROCKEL, Billings, Business Woman, stated that it is her contention that upon entering District Court the HRC's evidence should come from their witnesses and not their files that come from interpretation of their committee members who are not under oath. She acknowledged that she is in strong favor of HB 696 because HRC has far too much power.

DOUG KELLEY, Attorney, Helena, stated that the HRC does have a bias generally to find some form of discrimination and as a consequence they are usually successful in finding bias. The do novo provision would be helpful to have the court look at it. He stated that do novo works and it is presently used from Justice Court to District Court. He urged support for this legislation.

See the Visitors' Register for further proponents.

OPPONENTS:

JOHN SULLIVAN, Attorney, Helena, stated that we do not need this bill.

JEANNE WAGNER, stated that the passage of HB 696 could create many years of unnecessary litigation at a time when our courts are already congested and create a situation of unnecessary financial burden to both plaintiff and defendant, not to mention the taxpayer whose responsibility it is to subsidize the court system. It would also set the clock back years for human rights in the state of Montana. She submitted written testimony. (Exhibit A).

ALLEN JOSCELYN, Attorney, Helena, pointed out that it does not make sense to have two fact finding hearings in the same case. The process would just be too long in getting settled.

JIM REYNOLDS, Attorney, Helena, explained that he opposes this legislation because the present system is fair.

QUESTIONS (or Discussion) ON HOUSE BILL NO. 696:

Rep. Daily asked Mr. Sullivan if the Commission makes a decision that is final does that mean it cannot be appealed to District Court. He stated that it can be appealed. He pointed out that the Commission investigates a complaint and at the end of that investigation they write up a finding. There are two kinds of findings: 1.) No Cause Findings and 2.) Cause Findings. If someone wants to appeal that finding they can request a hearing and that trial will be held in front of an HRC hearing examiner. After that process is completed the hearing examiner renders a decision and the decision is called a proposal. That decision is subject to review by the HRC and the parties are given an opportunity through their attorney to argue to the Commission. The Commission will then make a decision on that record and at that point if the losing party is dissatisfied, the losing party has the right to appeal to District Court and ultimately to the Supreme Court. There are limited grounds in which you can appeal to District Court and you must show that the HRC committed some sort of an illegal error. This bill proposes for a trial de novo in the District Court. He further stated that his concern is that the de novo trials are very expensive.

Rep. Addy asked Mr. Sullivan how we can get at the problem of a lay board making decisions in which the sky is the limit, if we do not adopt this bill. Mr. Sullivan stated that he disagrees with the phrase Rep. Addy used that the sky is the limit. He pointed out that the HRC has the power to make the charging party whole in a situation in which the party was injured. Rep. Addy said that they have full equitable powers, do they not, he asked. Mr. Sullivan stated that they do. Rep. Addy said, that is the sky.

Mr. Sullivan said that it is the sky subject to limitations if it is abused. Rep. Addy stated that that is a very high standard. Mr. Sullivan pointed out that if the concern of the Legislature is that the Commission is not qualified to be doing what it is doing then the way to address that problem is to up the qualifications of its members.

Rep. Mercer asked Mr. Joscelyn why we should deny a trial de novo in an instance of a non-elected bureaucracy but yet we do allow a trail de novo in the instance of elected justice of the peace who can put people in jail up to a year and who can fine people up to $500.00. Mr. Joscelyn answered that it just does not make sense to have everyone go through a complete fact finding process in front of the HRC and then throw the whole thing out on request of the losing party. He pointed out that by the time the case is done the expense to the taxpayer and the time involved just would not make sense.

Rep. Hannah closed the hearing on HB 696 by stating that there is a lot of concern with the power of the HRC. He pointed out that this is a good and reasonable bill that will give people in the state of Montana an opportunity to say, "they want their day in court" and this will give them that chance.

HOUSE BILL No. 680, Rep. Hannah, District No. 86, pointed out that this act prohibits causes of action for wrongful life and wrongful birth, and prohibits a defense, award or damages, or penalty based on the failure or refusal to prevent a live birth. Rep. Hannah submitted cities from many cases on this issue. (Exhibit A). He read aloud from one particular cite, The Use and Interpretation of Article 1, Section Eight of the Minnesota Constitution 1861-1984, 10 Wm. Mitchell L. Rev. 667 (1984). He stated that basically he views this bill as a tort reform.

PROPONENTS:

JERRY LOENDORF, Montana Hospital Association, stated that this bill does three things, it says: 1.) The mere fact that I am born is not the basis of a law suit, even though my birth occurs as a result of the negligent conduct of another. 2.) that another person, presumably a parent, may bring a law suit as a reason that a child is born, even though that child is born as a result of the negligent conduct of another. 3.) If that negligent conduct causes any injury, disease, defect or handicap to any person, that they may bring a cause of action and recover damages for their wrong. He pointed out that the bill brings good public policy.

DOUG KELLEY, Attorney, Helena, stated that the birth of a healthy baby should not be cause for a law suit but the cause of rejoicing. He pointed out that this bill is a step in the right direction to curtail needless law suits and to give additional protection to doctors. He urged support for this legislation for the protection of the unborn.

JOHN VANDENACRE, Montana Right to Life Association, stated that this is a good bill and it will protect many people.

CORR POOL, Pastor, commented that he believes in the right to life of the unborn children and he stands in support of HB 680.

JOHN ORTWEIN, Montana Catholic Conference, submitted written testimony. (Exhibit B).

OPPONENTS:

DIANE SANDS, Women's Lobbyist Fund, stated that she opposes HB 680 because they support reproductive choice, affirmed under the 1973 Supreme Court decision known as Roe v. Wade. Denying recovery for wrongful birth and wrongful life undercuts and diminishes the right of reproductive choice. She submitted written testimony. (Exhibit C).

TOM L. LEWIS, Montana Trial Lawyers Association, stated that they do not oppose this bill in total. The problem with the bill is in the situation where the mother goes to the doctor and she asks for a D&C and states that she told the doctor she may be pregnant. After the D&C she found out that she was pregnant. He said that in his opinion a cause of action ought to exist had that child been born long enough to live and require substantial medical care. This bill comes into play where the patient goes to the doctor and requests care and the care is done improperly and the child is born badly deformed. He pointed out that the bill goes too far.

CHRIS VOLINKATY, Developmentally Disabled Association, Lobbyist, stated that doctors should provide people with all the alternatives they need if they feel they cannot provide for a child.

JIM REYNOLDS, Attorney, Helena, stated that he was asked to review this bill at the request of the Montana Pro-Choice Coalition and in doing so he became convinced that the true issue of the bill is not necessarily abortion but consists of the competence of the professional performance. He stated that this bill excuses negligent conduct on the part of doctors. The people of Montana do not need protection from negligent doctors but they do need to take their actions to court.

QUESTIONS (or Discussion) ON HOUSE BILL NO. 680:

Rep. Addy asked Rep. Hannah if this bill requires a 2/3 vote. He answered that he does not know. Rep. Addy stated that in the Abortion Control Act it says that, "thou shall not do anything unless the patient is exercising in form consent" and in this bill we are taking the decision out of the hands of the mother and putting it in the hands of the doctor. He asked Rep. Hannah to comment on that. Rep. Hannah said that he does not feel it is being taken out of the hands of the mother at all and if there is language in the bill that does that then it should be amended.

Rep. Hannah closed the hearing on HB 680 by stating that there are risks all the way around. There are no simple answers.

ADJOURNMENT: There being no further business to come before this committee, the hearing was adjourned at 12:52 P. M.

EARL LORY, Chairman

DAILY ROLL CALL

JUDICIARY COMMITTEE

50th LEGISLATIVE SESSION -- 1987

Date Feb. 18, 1987

NAME	PRESENT	ABSENT	EXCUSED
JOHN MERCER (R)	✓		
LEO GIACOMETTO (R)	✓		
BUDD GOULD (R)	✓		
AL MEYERS (R)	✓		
JOHN COBB (R)	✓		
ED GRADY (R)	✓		
PAUL RAPP-SVRCEK (D)	✓		
VERNON KELLER (R)	✓		
RALPH EUDAILY (R)			✓
TOM BULGER (D)	✓		
JOAN MILES (D)	✓		
FRITZ DAILY (D)	✓		
TOM HANNAH (R)	✓		
BILL STRIZICH (D)	✓		
PAULA DARKO (D)	✓		
KELLY ADDY (D)	✓		
DAVE BROWN (D)	✓		
EARL LORY (R)	✓		

STANDING COMMITTEE REPORT

FEBRUARY 18, 19 87

Mr. Speaker: We, the committee on JUDICIARY

report HOUSE BILL NO. 393

☒ do pass ☐ be concurred in ☒ as amended
☐ do not pass ☐ be not concurred in ☐ statement of intent attached

Chairman

AMENDMENTS AS FOLLOWS

1) Page 1, lines 23 through 25 and page 4, lines 11 through 13.
Strike: "and the" on line 23 of page 1 and line 11 of page 4 through "successful" on line 25 of page 1 and line 13 of page 4 un

2) Page 2, line 3 and page 4, line 16.
Strike: "cooperate"
Insert: "comply with a lawful subpoena issued"

3. Page 2, line 6 and page 4, line 19.
Following: "court;"
Insert: "or"

4) Page 2, line 8 and page 4, line 21. Strike: ";"
Following: "49-2-505" on page 2, line 8 and "49-3-305" on page 4, line 21 → Strike: ";"
Insert: ", unless the commission fails to schedule a hearing to be held within 30 days of service of notice of hearing."

5) Page 2, lines 9 through 13 and page 4, line 22 through line 1 on page 5.
Strike: subsections (d) and (e) in their entirety

FIRST reading copy (WHITE color)

STANDING COMMITTEE REPORT

FEBRUARY 13, 19 87

Mr. Speaker: We, the committee on JUDICIARY

report HOUSE BILL NO. 470

XX ☐ do pass
☐ do not pass

☐ be concurred in
☐ be not concurred in

XX ☐ as amended
☐ statement of intent attached

Chairman

AMENDMENTS AS FOLLOWS

1) Page 13, line 3
Following: "attorney"
Insert: "immediately and effectively"

2) Page 13, lines 5 and 6
Strike: "right against" on line 5 through "counsel" on line 6
Insert: "constitutional rights and his rights under this chapter"

3) Page 13, line 9
Strike: "16"
Insert: "under the age of 12"
Strike: "of"

4) Page 13, line 10
Strike: "age or older"
Following: "parents of"
Insert: "the parents of"

5) Page 13, line 12
Strike: "under"
Insert: "over"
Strike: "16"
Insert: "12"

6) Page 13, line 13
Strike: "a parent or guardian"
Insert: "his parents"

7) Page 13, line 14
Strike: "or"
Insert: "and"

FIRST WHITE
reading copy (color)

8) Page 13, line 15.
Strike: "under"
Insert: "over"
Strike: "16"
Insert: "18"

9) Page 13, line 16.
Strike: "parent or guardian"
Insert: "parents"

10) Page 26, line 12.
Following: "records,"
Insert: ", except traffic records,"

Chairman.

STATE PUB. CO.
Helena, Mont.

STANDING COMMITTEE REPORT

FEBRUARY 18, 19 87

Mr. Speaker: We, the committee on JUDICIARY

report HOUSE BILL NO. 430

☒ do pass
☐ do not pass

☐ be concurred in
☐ be not concurred in

☐ as amended
☐ statement of intent attached

Chairman

FIRST reading copy (WHITE color)

Survey administered to Senior Bank Management Conference, Montana Banke Association, 2/12/87 - 38 Responde

EXHIBIT A
DATE 2-18-87
HB # 592

BANK BAD FAITH SURVEY

A. Are you generally familiar with the area of bad faith claims against banks in Montana?

1. 38 yes

2. 0 no

If your answer to question A was yes, proceed to the following questions.

B. To what degree has your bank's exposure to bad faith claims affected the following lending activities:

1. The making of new commercial and agricultural loans?

a. 13 substantial effect

b. 23 some effect

c. 2 no effect

2. The increase or reduction in the credit line extended to a specific agricultural or commercial loan customer?

a. 10 substantial effect

b. 23 some effect

c. 5 no effect

3. The renewal or non-renewal of existing commercial and agricultural loans on maturity?

a. 13 substantial effect

b. 22 some effect

c. 3 no effect

4. Liquidation of and foreclosure on existing commercial and agricultural loans?

a. 20 substantial effect

b. 14 some effect

c. 4 no effect

EXHIBIT A
DATE 2-18-87
HB # 5921

C. It has been said that the "bad faith" doctrine has produced a virtual obligation on the part of Montana banks to accept a voluntary workout agreement in lieu of foreclosure.

What is your opinion of that statement?

1. 23 agree
2. 6 strongly agree
3. 4 don't know
4. 4 disagree
5. 1 strongly disagree

D. It has been said that the "bad faith" doctrine jeopardizes the quality of a Montana bank's loan portfolio.

What is your opinion of that statement?

1. 18 agree
2. 10 strongly agree
3. 7 don't know
4. 2 disagree
5. 1 strongly disagree

E. Many Montana bankers indicate that the "bad faith" doctrine has increased their costs for legal services, loan documentation and loan administration.

Is this statement true in your case?

1. 36 yes
2. 2 no

F. If your answer to question E was yes, characterize the nature of your cost increases caused by "bad faith."

1. 13 very substantial increase
2. 18 substantial increase
3. 3 moderate increase
4. 2 some increase

DATE 2-18-87
HB HB 591

Hello. My name is John Cronholm. I am the District Director of the Small Business Administration (SBA) in Helena, Montana. Our office guarantees loans submitted to us from banks all across the State of Montana. I am here to offer some observations about the effect of "bad faith" suits on the availability of commercial credit.

We rely heavily on our banking partners to provide basic loan servicing, but find that banks are becoming more and more reluctant to do anything more than accept payments and/or send out notices. When businesses come to the bank for "indepth" help, they are referred to an accountant or attorney as appropriate.

The Government cannot be sued in bad faith, nor can Government employees, acting within the scope of their employment, be held liable for tortious conduct. Nonetheless our office is under almost continuous subpoena to provide file information and testimony at bad faith hearings and trials.

During the month of January alone, my loan officers and I spent dozens of hours at depositions - all of which were attended by someone from my Legal Division - and provided file information for the case. The cost of reproducing the depositions and our file information for just this one lawsuit will exceed $1,000. The cost to the bank will vastly exceed ours.

One last point - during the twelve-month period ending 12/31/86 our office approved 426 loans. Three hundred sixty-three of these were to existing businesses and only sixty-four were to new businesses. Although this is the first year that we have tracked this data, I was surprised at how few loans were made to new businesses. I thought that historically that group comprised about 25% of our total activity. My people also tell me that about 60% of our loan funds are used for refinancing and the remainder for expansion and working capital. All of the above indicates to me that our lending partners - even with the added security of a Government guaranty - are directing their energy and resources to customers with whom they feel relatively secure and are not aggressively seeking new business.

It is my personal opinion that the possibility of litigative loss is a factor, not the only factor, but definitely a factor - in this conservatism.

That concludes my statment. If you have any questions I will try to answer them.

John R Cronholm
2-18-87

February 18, 1987

EXHIBIT C
DATE 2-18-87
HB # 592

Prepared Testimony - Proponent - House Bill 592

Phillip B Johnson, Director, Montana Bankers Assoc

Today, I'm providing you with a definition for the drying up of risk capital that would normally provide additional employment in the State of Montana.

Business loans that include financial leverage result in a higher degree of risk taking by both the borrower and the lender.

While borrowers may be willing to take the leveraged risk, the lending institution is not willing. The institution perceives itself at risk to a bad faith suit for allowing the borrower to willingly enter the contract.

This is not providing the capital for the building of business in Montana.

Please support HB 592.

Thank you.

EXHIBIT D
DATE 2-18-87
HB # 592

Billings Chamber of Commerce

February 18, 1987

TESTIMONY IN SUPPORT OF HB592

Mr. Chairman and Members of the Committee:

I am Kay Foster. I appear in support of HB592 on behalf of the Governor's Council on Economic Development as well as the Billings Area Chamber of Commerce.

In its report published in January of 1987 the Governor's Council made six specific recommendations in the area of tort reform legislation. The first of these was a request that "the Legislature address the issue of bad faith as it pertains to insurance claims, wrongful discharge and the lending policies of financial institutions."

The Council found that in all of these areas the current practice allows Montana juries a great deal of flexibility in making "bad faith" determinations and our codes must be revised to ensure a fair and equitable civil justice system for all Montanans.

The overall goal of the Governor's Council was to present administrative and legislative action that would encourage economic growth for all doing business in Montana. The passage of HB592 is an important step toward that goal through the restoration of some certainty and predictability to employers, lenders and insurers in our state. We urge its approval.

DATE 2-18-87
HB #592

A POSITION PAPER IN OPPOSITION TO
HOUSE BILL #592
by Tom L. Lewis

House Bill #592 violates the public interest by promoting rather than curbing abusive and unethical business practices. The Bill mistates the law relating to common law causes of action for breach of the implied convenant of good faith and fair dealing in that it suggests that all contract breaches are actionable in tort for bad faith. The Montana Supreme Court has specifically declined "to extend the breach of implied convenant to all contract breaches." Nicholas v. United Pacific Insurance Co., 42 St.Rptr. 1822. If the legislature were to enact HB592 the citizens of this state would be badly served by their elected representatives, because the act specifically encourages unethical and unreasonable business conduct.

The Montana Supreme Court has held that the bad faith breach of contract is actionable only when there is a "special relationship" that exists between the parties to a contract or when there is a knowing and unreasonable breach of the contract that exceeds the justifiable expectations of the injured party. The Court has properly reserved the application of tort damages into those cases where the conduct of the breaching party is especially harsh, unjustifiable, capricious and beyond all reasonable expectations of the injured party. The Court has primarily limited the application and availability of this common law cause of action to those cases where there is a special relationship between the parties arising out of an inherently unequal bargaining position at the time of both formation of the contract and enforcement of contract provisions.

The Court has found an implied convenant of good faith in adhesion contracts where one party to the contract is in a vastly inferior bargaining position at the time of formation of the contract. In those cases where powerful financial institutions are in a position to dictate to parties with whom such institutions contract (e.g. contracts between bank/customer, security broker/client, surety/principle, insurer/insured), the inferior party has no real say in the language of the written contract and often does not even see the contract until after the commercial relationship has come into existence. The public interest is therefore well served by a requirement of good faith and fair dealing actionable in tort, when the party in a superior position acts with particular harshness and unreasonableness concerning of the other party's rights arising from the commercial transaction, the insurance policy, or other contractual relationship existing between the parties.

EXHIBIT E
DATE 2-12-87
HB #592

In these kinds of legal relationships, common law actions for bad faith well serve the public, because that is the only way to take the profitability out of intentional and unreasonable contract breaches by parties in a superior financial or bargaining position. For example, if an insurer intentionally, arbitrarily and unreasonably withheld health insurance benefits from its insured and forced that insured into bankruptcy or other form of economic distress due to refusal to pay for extraordinary medical expense, HB592 would prevent the insured from ever being made whole. All the insurance company would be required to pay at the conclusion of a long court fight would be what the insurer should have paid to begin with. What incentive would there by for any insurer to deal fairly and in good faith with the insured, when all the insurer would ever have to pay would be what the insurer should have paid before the insured sought counsel and incurred substantial legal fees. What if the insured lost home, property and life savings, because he or she were unreasonably denied coverage by the carrier? Would the public policy and public interest of the citizens of this state be served by this bill which would allow the insurer to escape any liability for consequential damages resulting to the insured and his or loved ones?

The Montana Supreme Court has correctly ruled that in contracts involving inherently unequal bargaining positions and in cases of special relationship between the parties to a commercial transaction, there is an implied-in-law duty of good faith and fair dealing actionable in our civil courts. Every member of the legislature should read the well reasoned decisions of the Supreme Court, which clearly justify this legal principle. The legal relationships where this duty has been found include: Insurer/insured (First Security Bank v. Goddard, 181 Mont. 407, 593 P.2d 1040 (1979); Gibson v. Western First Ins., 682 P.2d 725, 41 St.Rptr. 1048 (1984); Lipinski v. Title Ins. Co., 655 P.2d 970 (1982). Bank/customer (First National Bank of Libby v. Twombly 689 P.2d 1226 (Mont. 1984); Tribby v. Northwestern Bank of Great Falls, 704 P.2d 409 (Mont. 1985). Attorney/client (Morse v. Espeland, 696 P.2d 428 (Mont. 1985).

House Bill 592 would be a giant and unfortunate step backward by the law makers of this State. The Supreme Court has proceeded cautiously and has only approved or upheld verdicts based upon bad faith when such verdicts or judgments are well founded by the evidence. If justice is to be sacrificed for certainty and predictability, then the

EXHIBIT E
DATE 2-18-87
HB # 592

citizens of this State will suffer. Powerful contracting parties and powerful litigants will therefore be permitted to intentionally violate their contractual obligations regardless of the harshness of the result on the weaker party to the contract. There will be no incentive for the out-of-state holding companies and financial giants to deal fairly with smaller Montana business interests, because the stronger party will only have to pay when it is caught and it will only have to pay what it should have paid according to the limitations the stronger party has written into the contract. The true damages of the victim of bad faith will not even be presented to a court and will go forever uncompensated. There will therefore be a strong and potentially irresistable incentive for powerful institutions to disregard their contractual/commercial obligations, because it will be less expensive and more profitable to violate the terms of the commercial relationship regardless of how disasterous the consequences are for the disadvantaged party.

HB592 does not promote the legitmate business interests of the State of Montana; it promotes and protects improper and unethical business practices in violation of the interests of all citizens of this State.

EXHIBIT F
DATE 2-16-87
HB #592

WITNESS STATEMENT

NAME Leroy Murphy BILL NO. 592

ADDRESS Box 2447 Great Falls, MT 59403 DATE 2-18-87

WHOM DO YOU REPRESENT? MT. Farmers Union + MT. State Bankers

SUPPORT _____ OPPOSE ✓ AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

We oppose taking away "bad faith" as a cause of action.

We do believe in limiting punitive damages, even in bad faith cases, but certainly do not want to lose the right to access in such cases.

EXHIBIT G
DATE 2-18-87
HB # 592

GREAT FALLS AREA CHAMBER OF COMMERCE
P.O. BOX 2127
926 CENTRAL AVENUE
GREAT FALLS, MONTANA 59403
(406) 761-4434

February 18, 1987

TO: House Judiciary Committee
Cascade County Legislative Delegation

FROM: Roger W. Young, President

SUBJECT: BAD FAITH/GOOD FAITH AND FAIR DEALING TORT REFORM

As it has with other tort reform legislation supported by the Montana Liability Coalition, the Great Falls Area Chamber of Commerce favors passage of HB-592 (Harp) which would reform the tort of bad faith and the covenant of good faith and fair dealing. This legislation does much to clarify and limit the bad faith/good faith tort and covenants. It is the position of the Great Falls Area Chamber of Commerce that apart from simply being a tort especially important to the banking community, those of us who have been involved with local economic development activities have developed a new appreciation for it.

For example, the Economic Growth Council of Great Falls, much heralded at its inception for its innovation and aggressiveness in providing risk capital, revolving loan, and technical assistance to new and expanding business, is out of business today. The organization was forced to shut its doors last year largely because a law suit brought against it which alleges bad faith on the part of the Growth Council. A second law suit was filed recently by another client. Both were provided significant levels of assistance by the EGC but when the EGC placed a limit on the level of its support and withdrew its assistance, they apparently became guilty of "bad faith and unfair dealing". The lesson to be learned apparently is that if a local economic development corporation sticks its neck out and offers financial assistance, it better be prepared to go all the way and not turn back for fear of similar reprisals. Obviously this will have a very chilling effect on local efforts to provide much needed risk and venture capital; something which many argue is crucial to economic development in our state.

It is the concept of good faith and fair dealing as well as fear of allegations of bad faith, that has caused every business decision to require endless paper work and documentation in all business, government and institutions. Today the gentleman's agreement and handshake contracts appear to be gone forever.

EXHIBIT 4
DATE 2-18-87
HB # 604

C.P. Brooke, M.D., J.D.
PHYSICIAN & SURGEON
ATTORNEY AT LAW
MISSOULA, MONTANA 59801
307 University Ave.

12 Feb. 1987

Chairman and Committee Members
Judiciary Committee
Re: H.B. 604:: Amendment To Living Will

I have been a Montana Family Doctor for 40 years and a Montana Lawyer for 24 years. As a Practicing Family Physicianwho has served many daying persons and signed many death certificates, I can assure you that dying is usually not happy, easy or painless.

I believe that Doctors, Nurses, and all those serving the dying, including Law-makers are morallybound, common sense bound, and duty bound to insure that these helpless citizens receive the ordinary essentials of life and comfort,namely warmth, water, air , and sustenance.

C P Brooke
C.P. Brooke, M.D.; J.D.

EXHIBIT 11
DATE 2-18-87
HB # 605

Montana Catholic Conference

February 18, 1987

CHAIRMAN LORY AND MEMBERS OF THE HOUSE JUDICIARY COMMITTEE:

I am John Ortwein representing the Montana Catholic Conference. The Montana Catholic Conference serves as the liaison between the two Roman Catholic Bishops of the State of Montana in matters of public policy.

Because human life has inherent value and dignity regardless of its condition, every patient should be provided with measures which can effectively preserve life without involving too grave a burden. Since food and water are necessities of life for all human beings and can generally be provided without the risks and burdens of more aggressive means for sustaining life, the law should establish a strong presumption in favor of their use. This statement is from the United States Catholic Conference Committee on Pro-Life Activities.

The Bishops further state: Negative judgments about the quality of life of unconscious or otherwise disabled patients have led some in our society to propose withholding nourishment precisely in order to end these patients' lives. Society must take special care to protect against such discrimination. Laws dealing with medical treatment may have to take account of exceptional circumstances, when even means for providing nourishment may become too ineffective or burdensome to be obligatory. But such laws must establish clear safeguards against intentionally hastening the deaths of vulnerable patients by starvation or dehydration.

Monsignor Orville Griese of the Pope John XXIII Medical Moral Research and Education Center made the following observation in a letter to the MCC: A report from the Pontifical Academy of Sciences makes a clear distinction between treatments and care. Medical treatments can be withheld or withdrawn in certain circumstances, but supportive care (including nutrition and hydration) cannot be withdrawn or withheld unless there is definite evidence that they are useless, or that the administration of the same adds excessive pain or burden for the patient.

Due to the aforementioned concerns the MCC would like to add the words, "Unless there is substantial evidence that their continued provision would be useless to sustain life."

We would hope you would consider passage of H.B. 604 with the amendment.

Tel. (406) 442-5761 P.O. BOX 1708 530 N. EWING HELENA, MONTANA 59624

(1)

EXHIBIT C
DATE 2-18-97
HB # 604

Chairman, Committee Members,

My name is Jan Cronquist. I'm speaking on behalf of myself as a concerned citizen in opposition to HB 604. I speak from the perspective of having an undergraduate and graduate degree in nutrition; I worked in a hospital with a surgical nutrition team that handled all of the tube feedings for the hospital, and finally I speak as an attorney with a strong interest in health-law issues.

I am opposed to the amendment to the living will submitted by Rep. Hannah because I believe it is in conflicts with public opinion, with recent case law, with policy statements of professional groups, ~~with family-patient relationships,~~ with patient self-determination ~~autonomy~~ and the constitutional right to privacy.

I would like to briefly address each of these concerns, starting with public opinion. Since each of you are here in a representative capacity, it should be of interest to you that a majority of people, in fact 73% of a representative sample of the American public favor "withdrawing life support systems, including food and water, from hopelessly ill or irreversibly comatose patients if they or their family request it." Fifteen percent were opposed, 12% were unsure. Thus I submit to you that what is before you today has the support ~~is~~ of a very small segment of our population.

EXHIBIT C
DATE 2-18-87
HB #604

Secondly, this legislation should be considered in light of the developing body of case law relating to tube feedings and their withdrawal. When courts have been confronted with this issue, the clear majority have recognized a patient's right to have life-supporting procedures, including nutrition and hydration, withdrawn. This legislation would take away those rights that have been recognized elsewhere.

For my third point, I would direct your attention to policy statements issued by the American Medical Association and a chapter of the American College of Physicians. I think these statements are important because they come from people who must deal with the reality of the situation on a day to day basis. It is the general position of both groups that it is appropriate to remove ~~enteral or parenteral~~ nutrition or hydration from irreversibly ill patients according to the same criteria employed to determine the rejection of other life-saving or sustaining treatments such as mechanical respiratory support. In other words, their position is that there is no difference between the withdrawal of nutrition and the termination of ventilator support.

My fourth concern is in regard to the constitutional right of privacy. Court decisions have recognized that a right

EXHIBIT C
DATE 2-18-87
HB 604

(2)

of personal privacy exists and that certain areas of privacy are guaranteed under the Constitution - A recent interpretation of the right of privacy ~~is see~~ resulted in the determination that a person has the right to discontinue treatment and that this right ~~is~~ is not overcome by the State's interest in the preservation of life. Because the proposed legislation would restrict the right of the patient to have nutrition and hydration terminated, I think it is open to a constitutional challenge -

My final concern is with patient self-determination. Before I directly address this issue, I would like to give you a description of Karen Ann Quinlan on her 29th birthday, 7 years after being disconnected from a ventilator. "Quinlan who is 5-foot-4, weighs about 75 pounds and lies curled on a water bed. She is turned every two hours by nurses to prevent bed sores." Unfortunately, they could not prevent all of the bed sores - another article describes them as appearing to extend to the bone.

When I talked with Rep. Hannah yesterday he remarked with obvious approval that tube feedings had given Ms. Quinlan another 7-10 years of life; that without the feedings her life would have been "cut short."

EXHIBIT C
DATE 2-18-87
HB # 604

I choose to disagree. In my opinion Ms. Quinlan's existence was not life at all but rather a very prolonged death.

With the law as presently written there is room for both Rep. Hannah's and my interpretations of life and both of us have the choice to limit or use life-support systems as we see fit. With the proposed amendment to the living will, my choices in regard to my right of self-determination would be severely limited. I highly resent the fact that people who support the proposed legislation would presume to intrude into that aspect of my life.

For all of the above reasons, I urge that you oppose the proposed amendment to the living will. Thank you.

DATE 2-16-87
#604

MR CHAIRMAN, MEMBERS OF THE COMMITTEE,
I AM JOE UPSHAW OF HELENA REPRESENTING THE AARP OF MONTANA. I SPEAK AGAINST THIS BILL. FIRST, LET ME READ THE LIVING WILL THAT I HAVE Executed:
IF I SHOULD HAVE AN INCURABLE OR IRREVERSIBLE CONDITION THAT WILL CAUSE MY DEATH WITHIN A RELATIVELY SHORT TIME, IT IS MY DESIRE THAT MY LIFE NOT BE PROLONGED BY CONTINUED ADMINISTRATION OF LIFE GIVING PROCEDURES OR SUBSTANCES. IF MY CONDITION IS TERMINAL AND I AM UNABLE TO PARTICIPATE IN DECISIONS REGARDING MY MEDICAL TREATMENT, (I DIRECT MY ATTENDING PHYSICIAN TO WITHHOLD AND/OR WITHDRAW ALL PROCEDURES AND SUBSTANCES THAT MERELY PROLONG THE DYING PROCESS AND ARE NOT NECESSARY TO MY COMFORT OR FREEDOM FROM PAIN.) IT IS MY INTENTION THAT THIS DECLARATION SHALL BE VALID UNTIL REVOKED BY ME.

THIS LEGISLATION WAS DEVELOPED BY THE AARP PRIOR TO THE LAST LEGISTATIVE SESSION, AND WE WORKED HARD TO GET IT ENACTED. EVERY LINE OF THE PREVIOUS BILL WAS THORUOGHLY STUDIED AND DISCUSSED BY NUMEROUS PEOPLE AND ORGANIZATIONS AT THAT TIME. BOTH HOUSES OF THE LEGISLATURE ALSO CAREFULLY SCRUTINIZED IT AT THAT TIME, AND EACH HOUSE PASSED IT OVERWHELMINGLY. SINCE ITS PASSAGE, COUNTLESS PERSONS HAVE EXECUTED A LIVING WILL WITHIN THE GUIDELINES OF THIS LEGISLATION. I CAN ASSURE YOU THAT THE FULL INTENT OF WE WHO DRAFTED THE BILL AND ALSO OF THOSE LEGISLATORS WHO PASSED THE BILL INCLUDE FOOD, WATER OR OTHER FORMS OF NUTRITION OR HYDRATION WITHIN THE REALM OF ITEMS THAT COULD BE WITHDRAWN UNDER THE PROVISIONS OF THE LIVING WILL. Piecemeal whittling on this Bill can only Result in Destroying IT.

~~WE FEEL THAT THE LAW AS WRITTEN IS EXCELLENT AND WE VERY STRONGLY OPPOSE ANY CHANGE~~

IF THIS BILL IS PASSED, IT WILL MEAN THAT THE LIVING WILLS THAT HAVE BEEN EXECUTED DURING THE PAST TWO YEARS WILL NEED TO REMADE. IT WILL ALSO CHANGE THE BILL TO THE EXTENT THAT IT WILL NO LONGER BE THE TRUE WILL AND INTENT OF THE PERSON WHO DESIRES TO HAVE HIS LIFE SUSTAINED BY BY ANY MEANS WHEN THE POINT OF NO RETURN IS REACHED.

I URGE YOU TO LEAVE A GOOD LAW IN PLACE BY YOUR NOT GIVING THIS BILL FAVORABLE CONSIDERATION.

if i shoula have an incurable or irreversible condition that will cause my death within a relatively short time, it is my desire

EXHIBIT 9
DATE 2-18-87
HB # 604

Testimony regarding HB 604
Hank Hudson, Legal Services Developer

This statement is written in response to House Bill 604 which would amend the Montana Living Will Act to exclude the provision of food, water, or other forms of nutrition or hydration from the definition of "life-sustaining procedures".

I oppose this change in definition for the following reasons:

First it is unnecessary. Under the current law a physician must certify that a patient is in a terminal condition, an incurable or irreversible condition which will result in death within a relatively short time. Starvation is not irreversible nor is it a condition which would result in death within a relatively short time. For this reason a person under the care of a physician in danger of starvation would not be certified as having a terminal condition. The definition of "life-sustaining procedures" is currently limited to procedures which merely prolong the dying process. If nutrition or hydration would not prolong life perceptibly, so that the patient would die within a short span of time, whether he ate or not, then the only reasonable use of this type of treatment is to provide comfort care. If food and hydration do more than merely prolong the dying process then they would not be considered life sustaining procedures. Under the current law the administration of procedures to alleviate pain is already protected. For these reasons this alteration of the living will law is unnecessary.

A second reason for opposing this bill is the fact that these changes would limit some of the necessary discretion currently allowed physicians and family members in cases of terminal illness. Each individuals medical situation is as unique as that individual. In recognition of this fact the definition of what exactly is a "terminal condition" and "life-sustaining procedure" is flexible enough to allow physicians to exercise their professional judgement. It is not in the best interest of the dying to limit the ability of the physician to prescribe and individualize the treatment to the specific needs of the individual. This concept is well stated in the draft living will materials prepared by the National Conference of Commissioners on Uniform State Laws. They stated, "It is debateable whether physicians or other professionals perceive the providing of nourishment through intravenous feeding apparatus or nasogastric tubes as comfort care <u>in all cases</u>, whether such procedures to provide nourishment should be considered life-sustaining treatment or comfort care appears to depend on the factual circumstances of each case, and therefore, such decisions should be left to the physician, exercising reasonable medical judgement, in consultation with the patient's family. A declarant may, however, specifically provide for continuation of these procedures in the declaration."

EXHIBIT D
DATE 2-18-87
HB # 604

This statement introduces the third objection to this bill. This change would limit the right of a declarant to participate in advance, in the health care decision making process. Currently the law allows a declarant to specify how he wishes to be treated and specifically what procedures under what circumstances he wishes to have administered. If desired, a declarant may insist on nutrition and hydration to continue until death. However, one of the reasons the Living-Will Act has enjoyed its tremendous popularity is that it returns the decision-making right to the individual. House Bill 604 would limit this right.

The Living-Will Act is working. It represents a successful response to changes in medical technology. House Bill 604 is unnecessary, would limit the discretion needed by physicians to prescribe their treatment to meet individual needs and individually expressed desires, and most importantly, it would restrict the right of an individual to participate in decisions regarding his own health care.

B
2-18-87
HB #687

Your Dishonored Check Could Cost You $100.00 or More
NOTICE and DEMAND
for
PAYMENT OF DISHONORED CHECK

ATTENTION:

. . . . . .

. . . . . .

. . . . . .

You are hereby notified that a check dated . . . . . check # . . . . . drawn on the bank of . . . . . .

. . . . . , in the amount of $ . . . . . , bearing the signature of . . . . . .

has been returned unpaid with the notation that payment has been refused because of . . . . . .

Your attention is called to the new Civil Laws of Montan th reference to such checks, a copy of which law appears on the reverse side hereof, and demand is hereby made for payment within 10 days in accordance with the provisions of that law.

Your dishonored check could cost you $100.00 or 3 times the amount of the check, whichever is greater (Chapter 611; Law of 1983; Effective date 4-25-83)

RESPOND TO: . . . . . .

. . . . . .
Company

. . . . . .
Address

. . . . . .
City/Town State Zip

Dated . . . . . .

FORM MRA 110

A
2-18-87
HB# 687

WARNING!!!

IT'S THE LAW

UNDER MONTANA'S NEW CIVIL LAW, FOR WRITING A BAD CHECK, YOU ARE CIVILLY LIABLE (Chapter 611 Law of 1983). Effective Date 4-25-83.

Your Dishonored Check Could Cost You

$100.00

OR 3 TIMES THE AMOUNT OF THE CHECK, WHICHEVER IS GREATER.

MONTANA RETAIL ASSOCIATION

A
2-18-87
475

House Bill No. 475

Amendments

Page 3 Line 22

After the word reseller insert ' SHALL NOT ABSOLUTELY '

Page 5 Line 4

After the word writing insert ' PERSONALLY'

Page 8 Line 13

After the word unless insert ' AND TO THE EXTENT '

Page 8 Line 14

After the word reseller insert ' SATISFIES THE BURDEN OF PROVING '

Page 8 Line 14

Delete the word ' PROVES '

Evelyn Barnes says that she always felt like a gnat who Gulf was trying to brush away, but felt that she'd like to be a mosquito with a sting. Now after a momentus decision by the U.S. Court of ..ppeals, that Gulf violated her PMPA rights when it sold her station to a jobber without offering it to her first . . . Evelyn Barnes is no mere mosquito, she's a bee with a real big sting.

B
2-18-87
475

Evelyn Barnes: The Butterfly Who Became a Bee . . With a Sting

Evelyn Barnes is a pretty red-headed, widowed, ex-school teacher, who used to cry when she had to deal with an irate customer in her service station. However, when jobber Vernon Anderson called her at home where she was doing her laundry one day in May, 1985 and told her, "Lady, you're working for me now" and that he would soon tell her how she should run *his* station, which he had just bought from Gulf . . . she exploded.

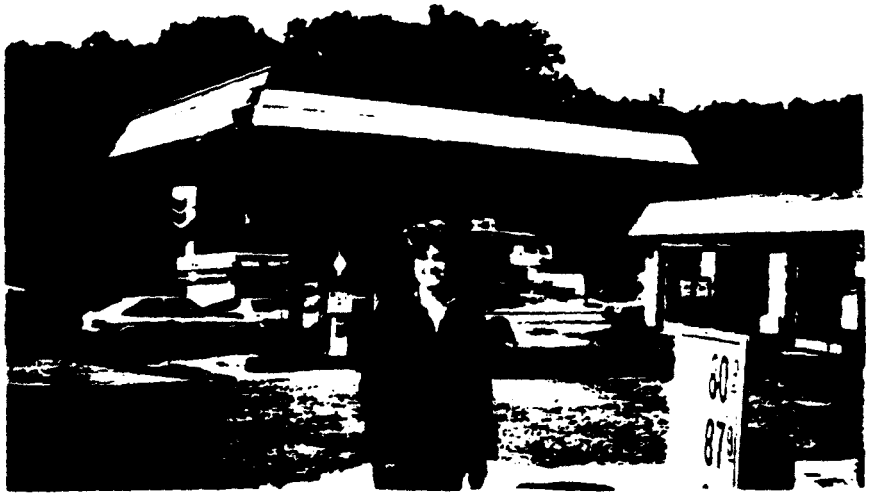
Evelyn says, "I was mad" and called her attorney Richard Bing who represents the Virginia Gasoline and Automotive Repair Association of which she is a member.

Evelyn who is an extrovert but still very much a lady, had every reason to be mad. She felt betrayed by Gulf who had promised her the first option to buy the station which she had run for six years.

Back in 1969, Evelyn and her husband Frank had been transfered to Triangle, Virginia where Frank was manager of a local bank. He decided to lease the station from Gulf in 1972.

Frank was a compulsive worker. He worked a seven-day week morning to night. One Sunday morning in July, 1979, Frank had been persuaded by Evelyn to stay home and take the family on a picnic. It was his first Sunday off in a year. That morning 40-year old Frank Barnes had a heart attack and died.

(Continued on pg. 47)



(Top) Evelyn Barnes enjoys waiting on customers. (Lower) Evelyn at her station.

than the new rent that the jobber had written into his proposed new lease.

After the Fourth Circuit rendered its opinion, Mrs. Barnes' attorney went back to the District Court to seek a preliminary injunction requiring Gulf (Chevron) and Anderson to perform under the same terms of the original franchise. The same judge, who was unanimously reversed by the Fourth Circuit, has refused to issue the injunction, claiming that the hardship to Gulf and the jobber was greater than that to her. Because of this, Mrs. Barnes has gone back to the Fourth Circuit to seek to have this decision reversed.

Case Now Has National Significance

This case has now assumed national proportions and has far outgrown its original dimensions involving one small dealer and a major oil company. Besides being a widely read published opinion, it went into detail to explain its relationship to PMPA and state law.

The decision and its implications have upset Chevron and the other majors so deeply that they now plan to challenge the constitutionality of the Petroleum Marketing Practices Act, and have indicated that they will carry this appeal all the way to the U.S. Supreme Court, if necessary. If PMPA is declared unconstitutional, dealers would lose all of their valuable rights which they earned through their hard legislative work.

In this decision, the court explicitly disagreed with the previous decisions, which allowed oil companies to circumvent dealers' right to purchase their station properties. It also expressly recognized the concept of "constructive termination" under PMPA. This refers to the franchisor practices that will have the effect of **economically evicting** dealers.

Plan Now To Attend SSDA's 1987 Convention in Niagara Falls

Every Dealer Now has a Stake in Barnes v. Gulf

SSDA is now urging financial support from dealers and affiliates, for what may be the most important PMPA case ever, ***Barnes v. Gulf Oil.***

This case has drastic implications for every dealer in the country. It is especially important for those dealers whose leases have been assigned to a jobber and whose stations were then sold to a jobber without the dealer receiving a right of first refusal to purchase the property.

This is precisely the end run around PMPA attempted by Chevron and Cumberland Farms, Shell and a jobber in Memphis, Tenn., Shell in the Pacific Northwest and other majors. Their arguments boil down to a claim that the dealer never had a right of first refusal because his franchise was **not terminated** — it was assigned and an assignment is not a termination.

The Barnes case was argued before the Fourth Circuit for the first time in January, and in July the Fourth Circuit rendered the opinion that shocked the oil companies. The Fourth Circuit held that an assignment of a dealer's lease from a major to a jobber could constitute a constructive termination of the franchise. The court further said, in a footnote, that **overbearing franchisor conduct** could constitute a constructive termination.

This opinion has the potential to inject real life into PMPA. If you would like to join other dealers and contribute to the Barnes case, please fill out coupon and mail with check (any amount).

Associate Members

Allied Aftermarket Division
East Providence, RI

Association Financial Services, Inc.
Baltimore, MD

Creative Logic
Weymouth, MA

Ferranti-Packard Electronics, LTD
Ontario, CAN

Gelco Fleet Mgmt. Services
Eden Prairie, MN

Hamilton Test Systems
Windsor Locks, CT

M&M/MARS
Hackettstown, NJ

NAPA
Atlanta, GA

Patch Rubber Company
Roanoke Rapids, NC

Pepsi-Cola Company
White Plains, NY

Primrose Oil Company, Inc.
Dallas, TX

Reynolds & Reynolds
Dayton, OH

Tradex LTD/Tuc-Tow
Nova Scotia, CAN

U-Haul International
Phoenix, AZ

Wynn Oil Company
Fullerton, CA

(CUT HERE)

I WOULD LIKE TO CONTRIBUTE TO THE EVELYN BARNES DEFENSE FUND

NAME:_____

ADDRESS:_____

Please make checks payable to: SSDA Legal Fund (Barnes)
Send to: SSDA, 304 Pennsylvania Ave., SE, Washington, DC 20003

It could have happened to any dealer. You go to your station one morning and find a local jobber scurrying about the premises. Since you are supplied directly by a major oil company, you wonder what business the jobber has at your station.

When Your Local Jobber Tells You He Has Just Bought Your Station, You Don't Roll Over and Play Dead

Your jobber has just triumphantly announced that he has bought your station and that you now work for him. You wonder, whatever happened to your right of first refusal under PMPA? This jobber is really into company-operated C-stores, how long can I last with him?

Missouri dealer, Jack Felts, found himself in this situation in April of 1985. Rather than roll over and play dead, he decided to fight this transaction and contacted his attorney Jim Wyrsch.

Wyrsch went to Federal Court in Kansas City in an effort to get an injunction under PMPA preventing the assignment of Felts' franchise to the jobber and the sale of Amoco's interests in the leased marketing premises. The suit further sought a declaratory judgement to force Amoco to offer Felts the right to purchase his station.

An interesting twist in this case was provided by the fact that Amoco did not own the property, rather it had a third-party lease. Nevertheless, when a dealer is terminated or non-renewed because of the sale of his station, he is entitled to a right of first refusal to purchase the franchisor's **interest** in the leased marketing premise. Because PMPA requires the franchisor to sell all of its **interests**, it does not matter that the franchisor does not own the property. PMPA simply requires the sale to the dealer of whatever the franchisor owns.

In Felts' situation, Amoco attempted an end run around PMPA which it had successfully tried in the Iowa case of ***Aldrich vs. Amoco***. Amoco argued that its assignment of Felts' franchise to the jobber gave the dealer no cause of action under PMPA.

In its brief, Amoco contended that the assignment and sale represented "a change in Amoco's distribution system with which Felts had no legitimate right to interfere."

Amoco's End-Run Around PMPA . . . No Termination Took Place

Amoco's position was that Felts' franchise had not been terminated, rather it had been assigned. It further stated that Felts had no right of first refusal because the franchise relationship, which PMPA defines as the ongoing business relationship, had not been non-renewed.

This was because a non-renewal of a PMPA franchise relationship by definition, must be preceded by a termination of the specific franchise. Because the franchise had been assigned, not terminated, Amoco argued that there was no non-renewal as a matter of law; therefore, Felts had no right of first refusal. In fact, Amoco contended it was "business as usual" at Felts' station, and he was in fact better off with the jobber beca he had "two parties to look to for performance."

Dealers Had Never Won

Unfortunately, in several other cases including ***McGee vs. Gulf*** (Albama), ***Weatherford vs. Gulf*** (Tennessee) and ***Aldrich vs. Amoco*** (Iowa), the courts bought the "business as usual" argument and dismissed the dealers claim. In fact, dealers had not won a case on the assignment and sale issue when Felts brought his case.

Shortly after going to U.S. District Court, Felts' attorney Jim Wyrsch received an opinion which denied the dealer's motion for a preliminary injuction, but also denied Amoco's motion for a summary judgement due to a factual question as to whether the dealer supply contract was assignment. Nevertheless, the opinion made it clear that the district court had bought the "business as usual" argument, and went so far as to say that if Amoco clearly assigned the dealer supply contract, it would discuss the case. The court did not rule on the declaratory judgement count seeking the right of first refusal.

With his client's livlihood

(Continued on pg. 63)

(Continued from pg. 35)

threatened, Wyrsch appealed the denial of the preliminary injunction in the Eigth Circuit Court of Appeals. He also requested SSDA's assistance in the case, and requested that SSDA file an amicus curare or friend of the court brief.

SSDA Amicus Brief Sought to Educate the Court

The threshold issue facing Wyrsch and SSDA was getting past the business as usual argument and establishing that there had been a constructive termination of Felts' franchise. A further problem was presented by the fact that the courts had been uniformly hostile to the concept of "constuctive termination."

In its amicus brief by staff attorney Jim Daskal, SSDA decided that the court would need educating as to the fundamentals of the gasoline marketing industry. It was critical that the court understood the differences between direct and jobber supply, and why a dealer would prefer to deal directly with a major rather than with a jobber. Many judges did not even know what a jobber was.

It was further necessary to extensively educate the court as to the legislative history of PMPA, particularly as it regarded assignments and sales of stations. SSDA's research into the legislative history brought out two critical points.

First, with regard to assignments, the legislative history indicated that PMPA's provision leaving assignments to state law was included to protect dealers as major oil companies attempted to include provisions in PMPA denying the dealer's right to assignment under state law. It further showed that Congress did not intend to allow assignments that would create loopholes in PMPA.

SSDA contended that this is precisely what would happen if the court allowed the assignment to stand. It would create a loophole which would allow oil companies to destroy the dealers' right to first refusal.

Amoco Opposed SSDA Intervention

Amoco violently opposed SSDA's intervention in the case, and demeaned SSDA arguments in the brief.

In its brief, Amoco stated that, "the courts should not succumb to the SSDA's attempts to lobby the court into amending PMPA without the intervention of Congress." Amoco further stated that, "SSDA's arguments concedes *sub silent* (without actually saying it) that Amoco's position is the one dictated by the express language of PMPA; it asks, in effect, that the court lighten its lobbying burden by amending the statute without the inconvenience or delay in having Congress do so, as the Constitution requires."

Oral argument occurred on January 17, 1986 in St. Louis with SSDA's Daskal and attorney Wyrsch both participating. Only three weeks later, the Court rendered its opinion.

The decision shocked Amoco attorneys who had expressed confidence bordering on cockiness.

The Eighth Circuit expressly held that Amoco's actions could indeed constitute a constructive termination of Felts' franchise and ordered the parties be returned to the status quo that existed prior to the assignment and sale. In other words, Amoco was forced to buy back its interests in the property and resume direct supply of Felts several months after the transaction occurred.

Unfortunately, because the dist court had not ruled on the motion for a declaratory judgement declaring Felts right to purchase the property, the Eighth Circuit could not specifically order it.

Amoco Settled With Felts to Cut Losses

To avoid a total rout, Amoco settled with Felts, allowing him to remain in the station and paying him substantial damages.

Felts vs. Amoco nevertheless remains a landmark decision. First, it represented the first time a federal appeals court had recognized constructive termination under PMPA. Secondly, it was the first dealer victory on the issue of whether an assignment can be used to circumvent the dealer right of first refusal.

The *Felts* precedent will prove very important to dealers across the country, particularly those affected by the **Chevron-Cumberland Farms**, and other other large scale efforts to subvert the dealer right of first refusal.

EX. 10
2-18-87

NAME WARD A. SHANAHAN BILL NO. HB 475

ADDRESS 301 First Bank Bldg, POBox 1715, Helena, Montana DATE 2-18-87

WHOM DO YOU REPRESENT CHEVRON CORPORATION

SUPPORT _____ OPPOSE X X X X AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments: The regulation of relationships between dealers and refiners is adequately covered by the federal Petroleum Marketing Practices Act(June 19, 1978).

Although our company does not yet operate in Montana through a franchise system, this bill increases the chances of more company owned stations, by imposing burdens on the use of franchises. The most significant threat is that of "treble damages" which are in effect a punitive award. This is a strange new remedy proposal at a time when this legislature is eliminating punitive damages in most other cases.

The regulation of franchising in this manner is not only an interference with contracts, but is also strongly anti-competitive. The bill itself recognizes the existence of the many federal and state laws regulating competition.(Federal Trade Commission Act for example). There is also the Robinson -Patman Act, The Sherman and Clayton Acts and the Montana unfair practices Act.

In summary this is protectionist legislation in an industry drastically affect by foreign pricing and supply. Because this legislature is considering increases in "at the pump" fuel taxes that will increase consumer gasoline and diesel costs,we ask you to reflect on the upward pressure on prices of a bill that expressly limits the refiners ability to market its product.

EXHIBIT E
2-18-87
475

STATEMENT OF CHEVRON CORPORATION
IN OPPOSITION TO HB 475
FEBRUARY 20, 1987

Chevron is compelled to submit this statement in opposition to HB 475 which is entitled "THE GASOLINE DEALER BILL OF RIGHTS ACT"

HB 475 is a protectionist bill which is not only ill-timed when this legislature is considering placing additional taxes on fuel "at the pump", but it is also defective regulation. HB 475 would make bad law.

This bill would provide for the assignment of and succession to service station dealerships, and it would regulate supplier-dealer relations in various ways that would restrain competition and injure consumers. None of this appears to be needed for the protection of service station dealers. A more detailed analysis of the principal sections of the bill follows.

Section 2 - The definitions in this section establish that a franchise may be between a dealer and either a "motor fuel refiner-supplier" or a "motor fuel reseller." The latter is any person or firm, other than a refiner-supplier, "who sells motor fuel to a motor fuel retailer for the purpose of sale" (subsection (5)).

Subsction (6) defines "motor fuel retailer" as any person or firm "that sells motor fuel at a retail motor fuel outlet pursuant to a motor fuel franchise entered into with a refiner-supplier or with a motor fuel reseller" (emphasis added).

The proposed Montana definition has two vices. The first is that its used of "sells" instead of "resells" permits the argument that outlets that "sell" a refiner's or jobber's motor fuel include not only independent dealers but stations operated by the refiner or jobber through employees or other agents. The only legitimate purpose of legislation on this subject is to protect independent dealers in their relations with refiners or jobbers from whom they purchase products for resale and from whom they may lease their places of business. Hence, both the Washington statute and The Federal Petroleum Marketing Practices Act (15 U.S.C. § 2801(7)) is limited to the protection of dealers who purchase motor fuel for resale to the public.

The second vice in subsection (6) is its omission of the words "entirely at one or more retail motor fuel outlets." Such language is necessary to assure that jobbers

EXHIBIT E

2-18-87

F #7.5

who in part operate their own stations will not be considered "motor fuel retailers" with all of the rights that such status would give to them under this bill. Here again, the bill's apparent purpose is to protect independent dealers; it should not inadvertently create unnecessary rights in jobbers with consequent unnecessary burdens on refiners.

Section 3 - This section provides that if consent to an assignment of the franchise is prohibited or "unreasonably" withheld, the supplier must compensate the dealer for the "full market value, at the time of expiration of the franchise," of the dealer's inventory and other things purchased from the supplier and for "goodwill."

Wholly apart from section 3's lack of merit, its composition is largely unintelligible. In the first place, the fair market value of certain things for which the dealer must be compensated is to be determined "at the time of expiration of the franchise." This applies to some items but not to others. Moreover, under subpart (a) the dealer must be compensated for inventory and other things "purchased from" the supplier, while under subpart (c) he must be compensated for the same things "not reasonably required in the conduct of the franchise business." And in subpart (b), the dealer is to be compensated for "good will, exclusive of personalized materials that have no value" to the supplier. None of this makes any sense.

It is Chevron's position that such legislation is unsound and jeopardizes the strength of its dealer network. Chevron dealers, like most other service station dealers, are not required to pay the supplier for the dealership. If existing dealers can sell the franchise to others, the operative qualification of the proposed assignee will be his ability to pay for the station rather than his qualifications to operate it. Moreover, if incoming dealers must pay a fee to outgoing dealers, such fees will have to be recovered by the former through higher prices to motorists or by the dealer's suffering reduced profits until the debt is otherwise retired. This will discourage many of the most promising candidates from going into the service station business and will depreciate the quality of Chevron's service station network, all to the detriment of competition and the motoring public.

Section 4 - This would permit dealers to operate dealerships through a corporation. If legislation on this subject is to pass, it should also provide that the supplier may require the corporation to assume in writing all of the motor fuel retailer's obligations to the franchisor, and that it may require the assigning dealer actively to operate the business during the time that the franchise with the corporation continues.

Section 5 - This would make the franchise the dealer's "personal property" which devolves at his death to a successor (if a spouse or adult child or stepchild) designated in writing, and if no designation, to the surviving spouse.

This language may subject the dealership to the administration of the deceased dealer's estate with consequent delays and confusion concerning its future operation. The designated successor or surviving spouse should have to meet the qualifications then being required by the supplier for its dealers. Within a reasonably short time following the dealer's death, say 14 days, the designee or surviving spouse should be required to enter into a new franchise with the supplier on the terms and conditions then generally being extended by the supplier to similarly situated dealers. And until the new dealer begins operations, the supplier should be entitled to possess and operate the station for its own account. This last concept should be substituted for subpart (2) which is both vague and unnecessary.

Section 6 - First, this section is unnecessary because under the PMPA a supplier can decline to renew the franchise and sell the station only if the supplier extends to the dealer a bona fide offer to allow the dealer to purchase the premises, or, if applicable, a 45-day right of first refusal to match an offer made by another. In this respect, Section 6 gives dealers less than is provided by the PMPA (15 U.S.C. § 2802(b)(3)(D)).

Section 7 - Subsection (1) is objectionable. It would forbid requiring the dealer to meet "mandatory minimum sales volume requirements for fuel or other products" unless the supplier "proves that the price to the motor fuel retailer has been sufficiently low to enable the motor fuel retailer reasonably to meet the mandatory minimum."

Parties to contracts of sale must be permitted to agree, as provided by the Uniform Commercial Code, upon the quantity to be sold and the price to be paid. This section subjects to litigation every price under every contract requiring the dealer to purchase a specific volume of product. A large contingent liability could pile up while the parties await a jury's findings, long after the event, as to whether the supplier's price was sufficiently low. It is impossible to predict how a jury would decide that issue.

In Chevron's agreements the supplier may reserve the right from time to time to change its terms. For example, Chevron reserves the right to change the prices it charges the dealer for motor fuels. And although the exercise of

E
2-18-87
475

such a power should not be considered an "alteration" of the agreement, the existance of subsection (2) must necessarily cast some doubt on this.

Section 8 - This section forbids anyone to sell a franchise, which includes any "disposition of a franchise," through the use of untrue statements or any scheme or practice of fraud or deceit. The difficulty is that this section also forbids the failure "to state a material fact" in this connection. The scope and meaning of this obligation are nowhere defined.

We are not aware that there is any practice among oil companies to defraud or to mislead dealers in this disposition of service station dealerships. But even if legislation were needed, the proper approach would be to define those specific facts deemed material to the dealer's consideration of the business opportunity and to require that they and they alone be disclosed. This bill doesn't do that.

Section 9 - This section defines as "an unfair or deceptive act or practice or unfair method of competition and a violation of [this act]" for suppliers to do certain things. Price and discrimination laws are very complex.

If legislation on this subject were needed in Montana, which we doubt, it should be patterned after the federal Robinson-Patman Act. This statute forbids price discrimination between purchasers only when the goods involved are "of like grade and quality" and when the favored and disfavored dealers are in competition so that the discrimination threatens competitive injury. That statute also provides a number of defenses including principally the right of the supplier to justify the lower price by showing that it was made in good faith to meet the equally low price of a competitor. This allows competition to flourish while still avoiding anticompetitive price differences. A statute cast in these terms apprises the supplier of what he must do to avoid a violation. Subpart (b) does not.

Montana already has a law on this subject. A statute enacted in 1935 in Montana forbids any person to sell gasoline or other petroleum products at a higher price in one part of the state than that person is then charging for that product in another part of the state or in the nearest adjoining state. Montana Code Annotated (1985) Section 82-15-201, et seq. Such differences may be justified only in terms of "transportation, quantity of sales, emergencies, cost of doing business, or similar differences under the respective conditions" applicable to the compared transactions. Violators are subjected to very harsh penalties including disqualification from continuing

E
2-18-87
475

to do business in Montana. We do not know whether this anticompetitive statute is being enforced. The annotations to the Code do not contain any reported decisions. Why do we need another law like this, now?

Section 10-14 - We note that the right under section 10 to recover damages and other relief in respect of a franchise sold in violation of the proposed act appears mistakenly to refer to section 7 rather than section 8.

Damages for violations are automatically trebled. No reason appears why actual damages would not be sufficient. If greater damages are to be provided for, there should be a specific multiple with the court having the discretion to increase damages up to that maximum in appropriate cases.

The bill contains no provisions limiting the time within which actions to recover damages may be brought. if legislation on this subject is likely to pass, there should be such a limitation.

PLEASE GIVE THIS BILL A DO NOT PASS RECOMMENDATION.

Respectfully,

Ward A. Shanahan
Chevron Corporation
301 First National Bank Building
P.O. Box 1715
Helena, MT 59624
Tele: (406)442-8560

4231W

A
2-18-87
HB #696

February 15, 1987

Members of the Legislature
Capitol Station
Helena, MT 59601

Dear Members of the Legislature,

I am preparing this statement to express my strong opposition to House Bill #696. The passage of this bill could create many years of unnecessary litigation at a time when our courts are already congested and create a situation of unnecessary financial burden to both plaintiff and defendant, not to mention the taxpayer whose responsibility it is to subsidize the court system. It would also set the clock back years for human rights in the state of Montana.

The possibility of the passage of House Bill #696 would not affect me directly at this point in time. If it had been law in early 1981, when I was pursuing my discrimination suit, it could have unjustly caused me additional emotional and financial distress. As a graphic designer for a large sign company, I had heard rumors that the man whom I was training and who had been recently hired, was being paid more than I. I approached the head of the department and owner of the company about this matter, and was lied to about the disparity between our salaries. Upon obtaining tangible evidence, I confronted my boss; and then was fired for insubordination.

With no other recourse, I began pursuing the matter legally in April of 1981. My case was "clear cut" and therefore fairly easy to prove. I won at every level, while my former employer continued to appeal the matter. Due to the lengthy appeal process, it was January of 1986, nearly five years later, before I received my lost wages and benefits. Now, almost six years later, I am still "battling" to be completely "made whole", as I have still not been reimbursed for my legal fees. I have been told by my attorney, that this could take another two years, before the matter is completely resolved. Had this bill been law in 1981, I could still be looking at another three to five years of legal entanglement to at last have justice prevail.

Other employees in similar situations, under such a law, would find it next to impossible to "wade through" this legal maze. He or she would be faced with the possibility that it could take eight to ten years of appeals and court appearances along with the extremely high stress and mounting legal fees which such a suit entails. Finding the route to justice so obstructed and burdensome, doubtless few could afford to pursue such a wearisome journey in order to have justice prevail. This would invite violations of human rights by large employers and be a step back into the "dark ages" as far as the issue of discrimination.

H
2-18-97
#696

Imagine, if you will, an age discrimination suit filed at the time the plaintiff is 60 years old. By the time the matter is resolved, the company against whom the complaint was filed may no longer be in existance, or worse yet, the plaintiff may have passed away or could no longer be reinstated in his or her former position due to health problems.

One could also look at this bill from the standpoint of the employer or company being sued for discrimination. Let us assume the company is found to be innocent by the Human Rights Commission, after many years of hearings and long legal battles. The plaintiff then decides to try the case over again at the district court level. The company at that point, may be weary of attempting to prove itself innocent, and find matters too financially burdensome to defend itself through the trial and tribulation of this lengthy legal process, and so might settle just to have the matter done with.

In my experience, the Human Rights Commission is composed of very competent individuals who are appointed expressedly for their expertise in matters regarding discrimination law. The Commission's process for determining the outcome of a case is thorough, covering every detail of a particular situation. Although my experience was lengthy and stressful, I can't imagine a more exacting and fair way of examining and resolving discrimination cases.

I strongly urge you to express your opposition to House Bill #696. I wish to thank you for taking the time to hear my view on this important matter.

Sincerely,

Jeanne Close Wagner

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presumes that a statute is constitutional unless it is proven otherwise beyond a reasonable doubt. Minnesota Higher Education Facilities Authority v. Hawk, 305 Minn. 97, 232 N.W.2d 106 (1975). We exercise our power to declare a statute unconstitutional only when absolutely necessary. Minneapolis Gas Co. v. Zimmerman, 253 Minn. 164, 91 N.W.2d 642 (1958). In our opinion, respondents did not meet their burden of proof.

First, we do not believe that the due process and equal protection clauses of the Fourteenth Amendment apply to this case. Prerequisite to a possible violation of the Fourteenth Amendment is state action or involvement. Shelley v. Kraemer, 334 U.S. 1 (1948). How can it be argued that state action is involved in this case? The relationship here is strictly between doctor and patient. The statute does not forbid the doctor to inform the patient of new tests and the risk they entail. It does not directly touch on the expectant mother's right to choose an abortion. Due process does not require that the state adopt regulations prohibiting purely private conduct. Blum v. Yaretsky, 457 U.S. 991 (1982).

Second, even if there were sufficient state action, the United States Supreme Court has clearly held to the rule that, in order to be in violation of Roe v. Wade, the state must directly affect or impose a significant burden on a woman's right to an abortion. See Maher v. Roe, 432 U.S. 464 (1977); Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476 (1983). Thus, in its most recent decision, the court invalidated laws that forced doctors to provide clients with information discouraging abortion and to use medical procedures that could put maternal health at risk for the benefit of a fetus. Thornburgh v. American College of Obstetricians and Gynecologists, 106 S. Ct. 2169 (1986). Other statutes held unconstitutional have given third parties the arbitrary right to veto the woman's choice. See Planned Parenthood v. Danforth, 428 U.S. 52 (1976);

Colautti v. Franklin, 439 U.S. 379 (1979). Unlike these statutes, section 145.424, subdivision 2 does not directly interfere with the woman's right to choose a safe abortion. The two parties, doctor and patient, are still left free to make whatever decision they feel is appropriate.

Furthermore, section 145.424, subdivision 3, allowing a cause of action for wrongful conception suits, does not present an equal protection problem. No suspect or quasi-suspect classification is involved, and the state has a rational basis for distinguishing a situation where a parent decides to be sterilized and the doctor negligently performs the operation from one where the parents decide to assume certain well-known risks in childbearing and then want to sue the physician for the realization of the possible consequences.[5] Most adults are fully aware of the risks of childbearing when the mother is over 30 years old. In our opinion, plaintiffs stretched the United States Supreme Court abortion cases to the breaking point. Parents here were as cognizant of the risks of a late pregnancy as were the doctors. How can it be said that the plaintiffs' right to an abortion, therefore, was in anyway impaired? These parents should not be allowed to take the risk and then sue the doctor for the consequences. What is the doctor's choice? By advising the patient about amniocentesis, appellant contends that there is as high as a 1 to 100 chance that the fetus will be injured if

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[5]Subdivision 3 was obviously intended to preserve the result of our decision in Sherlock v. Stillwater Clinic, 260 N.W.2d 169 (Minn. 1977). Respondents argued that, since subdivision 3 permits a cause of action for wrongful conception, an action for wrongful birth must also be permitted. Respondents, however, miss the point that, at the time this court decided the Sherlock case, section 145.424 did not exist. In Sherlock, the court was operating under the theory that wrongful conception was merely a form of malpractice. In light of the legislative intent embodied in section 145.424, subdivisions 1 and 2, our reasoning in Sherlock may, perhaps, have been erroneous.

the patient elects to have the test; by not advising about the test, there is as high as a 1 in 350 chance that the child will be born with mental or physical defects. With either alternative, the doctor would be subject to a possible suit. How could the court require the state to provide a cause of action against a doctor faced with this Hobson's choice? Doctors can perform what many lay people consider to be miracles today due to advancements in medical technology, but we cannot and should not place the doctor in an impossible situation, interfering with and perhaps thwarting his or her professional judgment.

We are fully aware of the situation that existed a mere quarter of a century ago when physicians' actions were scarcely ever challenged and there was very little or any accountability to anyone for decisions that they made. Those times have changed. The pendulum has now swung to the opposite extreme. Simply put, doctors must be returned some leeway in exercising judgment affecting the treatment of their patients without the fear of legal sanction.

Finally, article I, section 8 of the Minnesota Constitution only assures remedies for rights that vested at common law. The purpose of the section is to protect common law rights and remedies for which the legislature has not provided a reasonable substitute. See Haney v. International Harvester Co., 294 Minn. 375, 201 N.W. 140 (1972); Mickelsen, The Use and Interpretation of Article I, Section Eight of the Minnesota Constitution 1861-1984, 10 Wm. Mitchell L. Rev. 667 (1984).

In summary, we do not believe that the mother's right to abortion is the real issue in this case. The issue is whether the state has a right to decide what action or inaction on the part of one person is actionable by another in the courts of this state. It is illogical to us for the courts to declare that a cause of action

exists in instances where the legislature clearly and unequivocally has said there is none. To the extent that we held in the Sherlock case that a cause of action for wrongful conception existed, it must be borne in mind that that case was written prior to action by the legislature. Moreover, if the plaintiff has the right to invoke equal protection, does it follow that, if a statute has three sections, two of which specifically deny a cause of action and the third merely codifies the existence of an earlier decision of this court made prior to the express will of the legislature, this court must hold the two sections invalid on the basis of section three? We think not. The legislative intent is clear and if any section of the statute is open to question, it would most likely be section three rather than the previous two sections.

Through Minn. Stat. § 145.424, the legislature has spoken concerning the existence of wrongful birth and wrongful life suits in this state. Respondents have not shown beyond a reasonable doubt that the statute violates any provision of the federal or state constitution. Therefore, we uphold the statute and reverse the district court.

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No Cause of Action Allowed

N. CAROLINA Azzolino v. Dingfelder, No. 718PA84, 12/10/85 (See copy of opinion enclosed)

STATES THAT HAVE PASSED LEGISLATION PROHIBITING WRONGFUL BIRTH CAUSES OF ACTION

South Dakota 1982
Minnesota 1982
Utah 1984
Idaho 1985
Missouri 1986

The Minnesota law was challenged as being unconstitutional in violation of a woman's right to abortion as recognized in Roe v. Wade. The Minnesota Supreme Court in Hickman v. Group Health Inc. upheld the constitutionality of that statute on October 24, 1986.

Smith v. Cote, decided July 9, 1986, by the New Hampshire Supreme Court held that a cause of action for wrongful birth, is constitutionally mandated under Roe v. Wade. That case, did not address the fundamental constitutional questions ruled upon by the Minnesota Supreme Court in Hickman and is flawed because of this. However, as a practical matter, it will preclude the state of New Hampshire from passing a law prohibiting wr gful birth causes of action. Apparently, it was not appealed to the U.S. Supreme Court and is, therefore, left as bad precedent.

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CAUSE OF ACTION FOR WRONGFUL LIFE ALLOWED

CALIFORNIA Turpin v. Sortini,

NEW JERSEY Procanik v. Cillo, 478 A.2d 755 (N.J. 1984)

WASHINGTON Harbeson v. Parke-Davis, 656 P.2d 483 (Wash. 1983)

CAUSE OF ACTION FOR WRONGFUL LIFE PROHIBITED BY STATUTE

NORTH DAKOTA N.D.Cent.Code § 32-03-43 (1985 Supp.)

2/87

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CAUSE OF ACTION FOR WRONGFUL BIRTH ALLOWED

FEDERAL:

ALABAMA	Robak v. United States, 658 F.2d 471 (7th Cir. 1981)
PENNSYLVANIA	Gildiner v. Thomas Jefferson Univ. Hosp., 451 F.Supp. 692 (E.D. Pa. 1978)
S.CAROLINA	Phillips v. United States, 575 F.Supp. 1309 (D. S.C. 1983)

STATES:

CALIFORNIA	Turpin v. Sortini, 31 Cal.3d 220, 182 Cal.Rptr. 337, 643 P.2d 954 (1982)
IDAHO	Blake v. Cruz, 698 P.2d 317 (Idaho 1984)
ILLINOIS	Goldberg v. Ruskin, 471 N.E.2d 530 (Ill. App. 1 Dist. 1984) (reversed on appeal to Illinois Supreme Court)
IOWA	Nanke v. Napier, 346 N.W.2d 520 (Iowa 1984) (botched abortion)
MICHIGAN	Eisbrenner v. Stanley, 106 Mich.App. 357, 308 N.W.2d 209 (1981)
NEW HAMPSHIRE	Smith v. Cote, 513 A.2d 341 (N.H. 1986)
NEW JERSEY	Schroeder v. Perkel, 87 N.J. 53, 432 A.2d 834 (1981)
	Berman v. Allan, 404 A.2d 8 (N.J. 1979)
NEW YORK	Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978)
PENNSYLVANIA	Speck v. Finegold, 439 A.2d 110 (Pa. 1981)
TEXAS	Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975);
VIRGINIA	Naccash v. Burger, 223 Va. 406, 290 S.E.2d 825 (1982)
WASHINGTON	Harbeson v. Parke-Davis, 98 Wash.2d 460, 656 P.2d 483 (1983)
W.VIRGINIA	Jennifer S. v. Kirdnual, No.16426, Slip op. at 18-19 (W.Va.Sup.Ct. July 11, 1985)
WISCONSIN	Dumer v. St. Michael's Hospital, 69 Wis.2d 766, 233 N.W.2d 372 (1975)

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Montana Catholic Conference

February 18, 1987

CHAIRMAN LORY AND MEMBERS OF THE HOUSE JUDICIARY COMMITTEE:

I am John Ortwein representing the Montana Catholic Conference.

The Montana Catholic Conference is extremely concerned that "wrongful birth" and "wrongful life" suits will further erode belief in the sanctity of human life.

We feel H.B. 680 is in agreement with some of the deepest Christian beliefs regarding the sanctity of human life, however imperfect that life may be.

We urge your support of H.B. 680.

a program

Tel. (406) 442-5761 P.O. BOX 1708 530 N. EWING HELENA, MONTANA 59624

WOMEN'S LOBBYIST FUND

Box 1099
Helena, MT 59624
449-7917

EXHIBIT C
DATE 2-18-87
HB # 680

2/18/87

Chairman Lory and members of the committee:

My name is Diane Sands and I represent the Women's Lobbyist Fund, We oppose HB680 because we support reproductive choice, affirmed under the 1973 Supreme Court decision known as Roe versus Wade. Denying recovery for wrongful birth and wrongful life undercuts and diminishes the right of reproductive choice.

Wrongful life, wrongful birth, reproductive choice--legal and political phrases, but what do they mean in real peoples lives who have gone through the nightmare situations we are addressing. Let me briefly tell you of the circumstances of a few families that have brought these claims in other states: Between 1972 and 1973, Leon and Jean Harbeson of Spanway, Washington, consulted three doctors about the possible effects from Mrs. Harbeson's use of the drug Dilantin during pregnancy. She had been using the drug to control epilepsy. Each doctor told the couple that if she continued to use the drug throughout the pregnancy, it might cause minor physical impairments to the baby, but none of the doctors conducted a literature search or consulted other sources-steps that would have revealed that there was a substantial risk of serious fetal damage. In April 1974 and again in May 1975, Mrs. Harbeson gave birth to daughters who had a variety of phyiscal and developmental abnormalities. In Texas and Wisconsin pregnant women who had been exposed to rubella were not diagnosed or warned of the implications for their children, resulting in severe physical problems in the children. In a recent North Carolina case, an older woman asked her doctor if she should have amniocentesis because of the higher risk factors and was told it wasn't necessary. The result was a Downs Syndrome child. All of these cases have resulted in successful wrongful birth suits.

The Texas court reasoned that it was impossible " to justify a policy which at once deprives the parents of information by which they could elect to terminate the pregnancy likely to produce a child with a defective body...then denies recovery from the negligent doctor of the costs of treating and caring for the defects of the child." Since 1975, wrongful birth claims have been recognized by every state court that has been asked to consider the issues. Generally, the courts have allowed the parents to recover the costs of medical care and of training and treatment for the handicapped child. In a few cases, the courts have permitted compensation for the parents' emotional suffering.

Laws barring wrongful birth claims not only undercut an important legal trend; they also are contrary to the widely held medical view that patients have a right to complete information--known as informed consent--about the nature and foreseeable risks of any medical treatment, so that they can make informed choices about how to proceed. Such laws as HB 680 would create, in effect, sanction the withholding of information that most prospective parents would consider crucial to have before deciding whether to proceed with a pregnancy. That difficult and moral choice must remain with the parents. HB 680 undermines that right of the parents to reproductive choice.

Finally, there is another factor of public policy impact to be considered. It is easy to see the impact on the individual by the passage of this legislation, but the State will be negatively impacted as well. Families with a child suffering the results of such negligent medical practices often find themselves with enormous financial burdens which they cannot personally meet. Without the opportunity for recovery of damages from those who are responsible the family may be thrown into poverty or onto the state's

EXHIBIT C
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resources for the care of the child, often a life time of intensive and expensive care. As legislators you are making extremely difficult budget decisions this session, balancing the needs for services with our shrinking state pocketbook. Is it fair or reasonable to waive the financial responsibility of a party responsible for negligant conduct and for the State to assume costs for these children, which would result from the passage of HB 860?

We urge you to support reproductive choice for individuals and to support the ability of families to recover damages from the responsible parties by voting against HB 680.

VISITORS' REGISTER

Judiciary COMMITTEE

BILL NO. 696 DATE February 18, 1987

SPONSOR

NAME (please print)	RESIDENCE	SUPPORT	OPPOSE
Patti Brockel	Billings		
Anne MacDonald	Human Rights Commission		X
Bruce W Moerer	Helena - MT School Bds. Assn	X	
[illegible]	Billings	X	
BILL WYMAN	"	X	
Han Soulen	Helena		X
John Sullivan	Helena		X

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

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

CS-33

VISITORS' REGISTER

Judiciary COMMITTEE

BILL NO. 475 DATE February 18, 1987

SPONSOR

NAME (please print)	RESIDENCE	SUPPORT	OPPOSE
Ron Leland	640 Stadium Helena	X	
Ward Shanahan	Chevron - Helena		X
Lorna Frank	Bozeman	✓	
Kurt Krueger	Mt. Pet Marketing Ass		X
Lou Tennant	611 S 14th Bozeman	X	
Betty Taggart	Bozeman	X	

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR WITNESS STATEMENT FORM

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

EXHIBIT C
DATE 2-18-87
HB # 475

WITNESS STATEMENT

NAME John Tracht BILL NO. 475

ADDRESS 611 S 14th Bozeman DATE 2-18

WHOM DO YOU REPRESENT? ATOM.

SUPPORT X OPPOSE _____ AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

VISITORS' REGISTER

Judiciary COMMITTEE

BILL NO. 687 DATE February 18, 1987

SPONSOR _____

NAME (please print)	RESIDENCE	SUPPORT	OPPOSE
George Allen	Mt Retard Area	✓	

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR WITNESS STATEMENT FORM

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

CS-33

VISITORS' REGISTER

Judiciary COMMITTEE

BILL NO. *604* DATE *February 18, 1987*

SPONSOR

NAME (please print)	RESIDENCE	SUPPORT	OPPOSE
Jos Upshaw	AARP - Helena	~~[illegible]~~	✓
Ernest Hansken	AARP Helena	~~[illegible]~~	✓
John W. McMahon Jr.	Mont Medical Assoc	[illegible]	–
John L. Ortwein	Mont. Cath Conf	✓	
Hank Hudson	Seniors Office		–
Penney Jerome	Helena	✓	
Jan Cronquist	Helena		
John Vandenacre	HELENA	✓	
Vic Alsoven	Evangelical Ministers	✓	
~~Doug Kelley~~	Atty Helena	✓	
~~[illegible]~~	Pastor - Helena	✓	
Charles Briggs	Governor's Office		✓
Eileen Robbins	MONTANA Nurses Assn.		✓
James T. [illegible]	MT Med - Assn		✓

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

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

VISITORS' REGISTER

Judiciary COMMITTEE

BILL NO. ~~HB 673~~ 673 DATE February 18, 1987

SPONSOR

NAME (please print)	RESIDENCE	SUPPORT	OPPOSE
Roger McGlenn	Independent Ins Agents Assoc of MT		X
Jacqueline Terrell	Helena American Ins. Assoc.		X
Jerry Gray	NAII; State Farm		X
Tom L Lewis	Great Falls	✓	
Cliff Edwards	Billings	✓	
Bonnie Tippy	AAI - Helena		X

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR WITNESS STATEMENT FORM

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

CS-33

VISITORS' REGISTER

Judiciary COMMITTEE

BILL NO. 684 DATE February 18, 1987

SPONSOR _____

NAME (please print)	RESIDENCE	SUPPORT	OPPOSE
~~Leaf~~ Tom L Lewis	Great Falls	✓	

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

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

EXHIBIT F
DATE 2-18-87
HB # 604

WITNESS STATEMENT

NAME Eileen Robbins BILL NO. HB604

ADDRESS 531 Spruce DATE

WHOM DO YOU REPRESENT? Montana Nurses Assoc

SUPPORT OPPOSE X AMEND

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

The MNA opposes this legislation. Registered nurses, as health care providers ~~are~~ act as advocates to patients & their Rights. One of those rights is "privacy".

In addition, the bill would add costs to patients & their families for "treatment" (life sustaining but not curing). Since DRGs (prospective reimbursement) are the standard in hospital billing systems, many costs associated with prolonging life will not be paid by third party payers.

Please give a DO NOT PASS recommendation

E Robbins RN

EXHIBIT G
DATE 2-16-87
HB # 604

WITNESS STATEMENT

NAME ELMER HAUSKEN BILL NO. HB604

ADDRESS 1400 ~~HIGHLAND~~ ; Helena DATE 18 FEB 87

WHOM DO YOU REPRESENT? AARP American Assn Retired Persons

SUPPORT ~~X~~ OPPOSE X AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments: I represent the AARP and the 80,000 members living in Montana. We ~~oppose~~ support HB604 as amended. I personally have had experience in my family during my Mother's fatal illness with her request she be given no intravenous feeding - only water and pain medication to keep her comfortable. She could have been kept alive several months in extreme pain and still would have succumbed to the terminal cancer she had. Instead, she died peacefully 16 days after her request which was agreed to by the Medical people in attendance.

VISITORS' REGISTER

Judiciary COMMITTEE

BILL NO. 592 DATE February 18, 1987

SPONSOR

NAME (please print)	RESIDENCE	SUPPORT	OPPOSE
John Cadby	MT Bankers Assn	✓	
Tim Robischon	Mont. Liab. Coalition	✓	
Phillip B Johnson	Mt Bankers Assoc	✓	
John R Cronholm	SBA Helena	✓	
Bill Brewer	Mont Bankers	✓	
David Callahan	First Interstate Bank	✓	
Carol Mosher	Mt. Cattle Women	✓	
Mons Teigen	Mt. Stockgrowers	✓	
Lorna Frank	Mt. Farm Bureau	✓	
[illegible] Frank	Bozeman		
[illegible]	WIFE		✓
Tom L Lewis	Great Falls		✓
Elvin V Swenson	[illegible]		✓
CLIFF EDWARDS	BILLINGS		✓
MARY WESTWOOD	MONTANA SULPHUR & CHEMICAL - BILLINGS		✓
Terry Murphy	MT Farmers Union & Grange		✓
Keith L. Colbo	Dept of Commerce	✓	
Kay Foster	Gov. Council on Ec. Dev.	✓	~~✓~~
Chris Erdmann	MT League Sav. Inst	✓	
Bob Pyfer	MT Credit Unions League	✓	

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR WITNESS STATEMENT FORM

George Allen | Mr. Retail [illegible]

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Sue Weingartner MT Assoc of Defense Counsel X Support

CS-33

Rose Skoog MT. HEALTH CARE ASSN X Support

VISITORS' REGISTER

Judiciary COMMITTEE

BILL NO. 680 DATE February 18, 1987

SPONSOR

NAME (please print)	RESIDENCE	SUPPORT	OPPOSE
	Helena	✓	
	Mt Catholic Conf	✓	
	Trust Med Assoc	✓	
	Great Falls		✓
Jim Reynolds			✓
~~Patti Blocker~~	Billings		
Chris Volinkaty	DOR		✓
	Helena, Mt	✓	
Eileen Robbins (self)	Helena, Mt		X
	Women's Lobbyist Fund		X
	Helena MT	✓	
MARY WESTWOOD	BILLINGS		✓

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

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

CS-33