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North Dakota's Pharmacy Ownership Law: An Analysis of the Strictest Pharmacy Ownership Law in the United States

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NORTH DAKOTA'S PHARMACY OWNERSHIP LAW: AN ANALYSIS OF THE STRICTEST PHARMACY OWNERSHIP LAW IN THE UNITED STATES

*“In selling as in medicine,
prescription before diagnosis is malpractice.”¹*

Tony Alesandra

ABSTRACT

This note illustrates the debate surrounding North Dakota's Pharmacy Ownership Law and offers suggestions on how to make North Dakota's statutory pharmacy ownership requirements more business friendly. Specifically, Part II of this note provides an overview of the North Dakota Pharmacy Law, including its provisions, cases dictating the legal treatment of the statute, an analysis of North Dakota's latest attempt to repeal the North Dakota Pharmacy Ownership Law, and a review of comparable pharmacy ownership laws in other states. Part III explores the primary arguments for and against the repeal of the North Dakota Pharmacy Ownership Law. Part IV discusses how the North Dakota Pharmacy Ownership Law's provisions may be improved by future legislation. This note concludes the North Dakota Pharmacy Ownership Law need not be construed as a wall built with the sole purpose of keeping large-chain retailers out of North Dakota's pharmaceutical market, but as a hurdle safeguarding North Dakotans' affordable and secure access to prescription drugs. Additionally, this note suggests until a diagnosis of exactly what ails the North Dakota Pharmacy Ownership Law is achieved, the North Dakota Legislature should work to improve the current North Dakota Pharmacy Ownership Law, rather than repeal the statute and risk losing its safeguards forever.

1. QUOTELAND, http://www.quoteland.com/author.asp?AUTHOR_ID=2634 (last visited Jan. 26, 2010).

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I. INTRODUCTION

On the morning of February 3, 2009, Representative Jon Nelson stood before a joint hearing of the North Dakota House Human Services Committee and the House Industry, Business, and Labor Committee and introduced House Bill 1440, a repeal bill aimed at erasing the language in the North Dakota Century Code mandating that a licensed pharmacist own a controlling interest in each North Dakota pharmacy.² Touted as “the strictest pharmacy ownership law in the nation[.]”³ House Bill 1440 was introduced out of a growing concern for maintaining affordable access to prescription drugs for North Dakotans.⁴ The House Human Services and the House Industry, Business, and Labor Committees heard impassioned testimony from both sides of the debate.⁵ House Bill 1440 was backed by some of the nation’s largest retailers, including Wal-Mart and Walgreens, who alleged North Dakota’s Pharmacy Ownership Law prevents them from running their own pharmacies and offering four dollar prescriptions for selected generic drugs.⁶ Conversely, opponents of the bill stated that although archaic, North Dakota’s Pharmacy Ownership Law effectively safeguards the best interests of North Dakotans by maintaining access to affordable prescription drugs.⁷ In the end, the House Industry, Business, and Labor Committee voted eight to five to recommend a Do Not Pass on

2. *J. Hearing on H.B. 1440 Before the H. Comm. on Human Servs. and H. Comm. on Industry, Business, and Labor*, 2009 Leg., 61st Sess. 1 (N.D. 2009), available at <http://www.legis.nd.gov/assembly/61-2009/bill-status/house/HB1440.PDF> [hereinafter *House Committee Hearings*]. See N.D. CENT. CODE § 43-15-35 (2009) [hereinafter North Dakota Pharmacy Ownership Law].

3. Dale Wetzel, *ND House Votes to Keep Pharmacy Ownership Law*, KXNET.COM (Feb. 13, 2009, 1:53 PM), <http://www.kxnet.com/custom404.asp?404;http://www.kxnet.com/News/332270.asp>.

4. *House Committee Hearings*, *supra* note 2, at 1-2 (statement of Rep. Jon Nelson).

5. *Id.* at 1-22. Nine-year-old Jakob Olson testified he suffers from asthma, allergies, and has had seven surgeries, all of which were followed with prescriptions from doctors. *Id.*, Attachment 3, at 46. “I think if you change this law, it would make it easy for kids and moms in the hospital . . . I know one of my medicines is already less expensive at Walmart[.]” testified Jakob. *Id.* Conversely, rural pharmacist Shane Wendel testified that “[p]redatory pricing and the perception of low prices that is b[r]ought th[r]ough advertising, kills rural North Dakota pharmacies.” *Id.*, Attachment 16, at 94. Wendel testified that if his small business failed, a thirty-mile radius of pharmacy access would be forever lost. *Id.*

6. *Executive Tells Employees to fight Pharmacy Bill or Else*, BISMARCK TRIBUNE (Feb. 9, 2009, 6:00 PM), http://www.bismarcktribune.com/news/local/article_e37ae46c-681e-5527-a9b5-3ceddaadf0650.html.

7. *House Committee Hearings*, *supra* note 2, at 9 (statement of John Olson, Pharmacy Services Corporation).

House Bill 1440.⁸ After a spirited debate on the floor, the North Dakota House of Representatives voted fifty-seven to thirty-five to keep the North Dakota Pharmacy Ownership Law in place.⁹

The purpose of this note is to illustrate the debate surrounding North Dakota's Pharmacy Ownership Law and the options North Dakota has to make its pharmacy ownership requirements more business friendly. Specifically, Part II of this note provides an overview of the North Dakota Pharmacy Law, including its provisions, court cases dictating the legal treatment of the statute, an analysis of North Dakota's latest attempt to repeal the North Dakota Pharmacy Ownership Law, and a review of comparable pharmacy ownership laws in other states.¹⁰ Part III explores the primary arguments for and against the repeal of the North Dakota Pharmacy Ownership Law.¹¹ Part IV discusses how the North Dakota Pharmacy Ownership Law's provisions may be improved by future legislation.¹² This note suggests the North Dakota Pharmacy Ownership Law need not be construed as a wall built with the sole purpose or ability to keep large-chain retailers out of North Dakota's pharmaceutical market, but rather as a hurdle safeguarding North Dakotans' affordable and secure access to prescription drugs. Finally, this note concludes that until legislators can make a more definite diagnosis of what ails the North Dakota Pharmacy Law, the North Dakota Legislature should work to improve the current North Dakota Pharmacy Ownership Law, rather than repeal the statute and risk losing its safeguards forever.

II. THE LEGAL STATUS OF THE NORTH DAKOTA PHARMACY OWNERSHIP LAW

Currently, the practice of pharmacy in the United States is regulated and controlled by the states and is subject to state police powers.¹³ Therefore, "[a] state may regulate the practice of pharmacy in the interest of the public health, safety, and welfare."¹⁴ This section provides a brief overview of North Dakota's Pharmacy Ownership Law, discusses case law dictating

8. *Hearing on H.B. 1440 Before the H. Comm. on Industry, Business, and Labor*, 2009 Leg., 61st Sess. 15 (N.D. 2009).

9. *H. Journal*, 2009 Leg., 61st Sess., at 513 (N.D. 2009), available at <http://www.legis.nd.gov/assembly/61-2009/journals/hr29.pdf#Page513>.

10. See discussion *infra* Part II (reviewing the legal status of the North Dakota Pharmacy Ownership Law, recent legislation aimed at repealing the law, and other states' pharmacy ownership laws).

11. See discussion *infra* Part III (discussing the debate for and against passing H.B. 1440).

12. See discussion *infra* Part IV (discussing two suggestions to broaden protections for minority shareholders of North Dakota pharmacies).

13. 25 AM. JUR. 2D *Drugs and Controlled Substances* § 81 (2009).

14. *Id.*

the legal treatment of the North Dakota Pharmacy Ownership Law, and presents a summary of similar pharmacy ownership laws in other states.

A. AN OVERVIEW OF THE NORTH DAKOTA PHARMACY OWNERSHIP LAW

The North Dakota Pharmacy Ownership Law was enacted in 1963 and provides that in order to obtain a permit to operate a pharmacy in the state of North Dakota:

The applicant for such permit [must be] qualified to conduct the pharmacy, and [be] a licensed pharmacist in good standing or [be in] a partnership, each active member of which is a licensed pharmacist in good standing; a corporation or an association, the majority stock in which is owned by licensed pharmacists in good standing; or a limited liability company, the majority membership interests in which is owned by licensed pharmacists in good standing, actively and regularly employed in and responsible for the management, supervision, and operation of such pharmacy.¹⁵

In short, the North Dakota Pharmacy Ownership Law requires fifty-one percent of the ownership interest of every pharmacy in North Dakota be owned by a pharmacist licensed by the State of North Dakota.¹⁶ By requiring licensed pharmacists to own the majority stock in North Dakota pharmacies, supporters argue the North Dakota Pharmacy Ownership Law safeguards the welfare and safety of North Dakota citizens by “ensuring that pharmacists control and have a stake in the health care services they provide to North Dakotan communities.”¹⁷ Furthermore, the majority ownership requirement both ensures and mandates the decisions pertaining to the pharmaceutical care of people in North Dakota be made by a registered pharmacist.¹⁸

The North Dakota Pharmacy Ownership Law includes four exceptions.¹⁹ The first exception is a “grandfather clause,” which applies to individuals who were granted a permit to operate a pharmacy in North Dakota on or before July 1, 1963.²⁰ If an individual was granted a permit to operate a pharmacy in North Dakota on or before July 1, 1963, the individual may

15. N.D. CENT. CODE § 43-15-35(1)(e) (2009).

16. *Id.*

17. JUSTIN DAHLHEIMER & STACY MITCHELL, THE BENEFITS OF NORTH DAKOTA’S PHARMACY OWNERSHIP LAW 2 (Jan. 2009), available at <http://www.newrules.org/sites/newrules.org/files/ndpolbrief.pdf>.

18. § 43-15-35(2)(c).

19. § 43-15-35(2)(a)-(d).

20. § 43-15-35(2)(a).

continue to operate the pharmacy so long as the permit holder continues operations and renews the permit on time.²¹ For example, the law exempts CVS Caremark Corporation, whose predecessor company was doing business before the North Dakota Legislature approved the North Dakota Pharmacy Ownership Law.²²

The second exception to the North Dakota Pharmacy Ownership Law allows the North Dakota Board of Pharmacy to grant a pharmacy permit to hospitals furnishing pharmaceutical services only to patients in that hospital.²³ The third exception allows a hospital to seek a permit to operate a retail pharmacy if that pharmacy “is the sole provider of pharmacy services in the community and is a retail pharmacy that was in existence before the hospital took over operations.”²⁴ A hospital meeting the criteria listed in the North Dakota Century Code may operate a pharmacy at any location in its community.²⁵

The fourth and final exception to the North Dakota Pharmacy Ownership Law allows an “owner of a postgraduate medical residency training program” to apply for a permit to operate a pharmacy if that “pharmacy is collocated with and is run in direct conjunction with the postgraduate medical residency training program.”²⁶ In order to meet the requirements under the fourth exception, “the postgraduate medical residency training program must be accredited by the accreditation council on graduate medical education or other national accrediting organization.”²⁷

The North Dakota Legislature has granted the North Dakota Board of Pharmacy the authority to promulgate reasonable rules and regulations in conformity with provisions of any statute administered by the North Dakota Board of Pharmacy.²⁸ The North Dakota Legislature also granted the North Dakota Board of Pharmacy the authority to prescribe methods and procedures required in connection with promulgating any reasonable rules and regulations the Board may create.²⁹ The Board of Pharmacy, however, may not promulgate a rule on any substantive matter not included in the statute under which it receives its authority because any such new matter would

21. *Id.*

22. Jacqueline Dotzenrod, *Supporters of Ownership Law Battle Ethics Charges, Flip-Flopping*, NORTH DAKOTA POLICY COUNCIL (Feb. 2, 2009), http://www.policynd.org/index.php?/site/article/board_protects_its_own_ethics_called_into_question/.

23. § 43-15-35(2)(b).

24. § 43-15-35(2)(c).

25. *Id.*

26. § 43-15-35(2)(d).

27. *Id.*

28. § 43-15-10.

29. *Id.*

constitute creating legislation.³⁰ Therefore, any licensing issues related to the North Dakota Pharmacy Law are regulated by the North Dakota Board of Pharmacy.³¹

1. *Case Law Regarding the North Dakota Pharmacy Ownership Law*

From its inception, the North Dakota Pharmacy Ownership Law survived two major legal challenges: *Snyder's Drug Stores Inc. v. North Dakota State Board of Pharmacy*³² and *Medcenter One v. North Dakota State Board of Pharmacy*.³³ In both cases, the North Dakota Pharmacy Ownership Law was upheld by the North Dakota Supreme Court and the United States Supreme Court.³⁴ This section provides an overview of both cases.³⁵

a. *Snyder's Drug Stores Inc. v. North Dakota State Board of Pharmacy*

The North Dakota Pharmacy Ownership Law was first challenged in 1971, when Snyder's Drug applied for a permit to open a pharmacy in a store building operated by the Red Owl Family Center in Bismarck, North Dakota.³⁶ The North Dakota State Board of Pharmacy denied the permit because "the existing facilities of the applicant did not meet the standards required by the Pharmacy Board and [because] the applicant failed to comply with the [North Dakota Pharmacy Ownership Law]."³⁷ In the case of a corporate applicant, such as Snyder's Drug, the North Dakota Pharmacy Ownership Law requires the majority of the corporate "stock be owned by registered pharmacists in good standing, who are actively and regularly employed in and responsible for the management, supervision, and operation of the pharmacy."³⁸ Snyder Drug appealed the North Dakota Board of Pharmacy's order denying the application to open a pharmacy to the Burleigh County District Court, where Judge M.C. Fredricks rendered a judgment that required the Board to issue the pharmacy permit.³⁹ The

30. *Med. Props., Inc., v. N.D. Bd. of Pharmacy*, 80 N.W.2d 87, 89 (N.D. 1956).

31. § 43-15-10.

32. 202 N.W.2d 140 (N.D. 1972).

33. 1997 ND 54, 561 N.W.2d 634.

34. *See* discussion *infra* Part II.A.1-2.

35. *Id.*

36. *Snyder's Drug Stores Inc. v. N.D. State Bd. of Pharmacy*, 202 N.W.2d 140, 141 (N.D. 1972).

37. *Id.*

38. *Id.*

39. *Id.* at 141-42.

Burleigh County District Court granted summary judgment in favor of Snyder Drug on the ground the North Dakota Pharmacy Ownership Law violates the Equal Protection and Due Process Clauses of Section 1 of the Fourteenth Amendment to the United States Constitution, and sections 11 and 20 of the North Dakota Constitution.⁴⁰ The Burleigh County District Court also concluded Snyder's Drug satisfactorily complied with all reasonable regulations of the North Dakota State Board of Pharmacy, which entitled Snyder's Drug to a permit to operate a pharmacy.⁴¹

The North Dakota State Board of Pharmacy appealed the decision of the Burleigh County District Court to the North Dakota Supreme Court.⁴² In *Snyder's Drug*, the North Dakota Supreme Court sustained the Burleigh County District Court's conclusion that the North Dakota Pharmacy Ownership Law violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution.⁴³ The North Dakota Supreme Court reached its decision in *Snyder's Drug* by relying upon a 1928 United States Supreme Court case, *Liggett Co. v. Baldridge*.⁴⁴

In *Liggett*, the United States Supreme Court held a Pennsylvania law that required a pharmacy to be one hundred percent owned by pharmacists was unconstitutional.⁴⁵ The North Dakota Supreme Court stated the court lacked a sufficient basis for distinguishing *Liggett* from *Snyder's Drug*.⁴⁶ Furthermore, because the court was bound by the decision of the United States Supreme Court in *Liggett*, the North Dakota Supreme Court sustained the Burleigh County District Court's decision holding the North Dakota Pharmacy Ownership Law violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution.⁴⁷

The North Dakota State Board of Pharmacy appealed the decision of the North Dakota Supreme Court to the United States Supreme Court.⁴⁸ In *North Dakota Board of Pharmacy v. Snyder's Drug Stores, Inc.*, the United States Supreme Court overruled the *Liggett* decision and reversed the judg-

40. *Id.* at 142.

41. *Id.*

42. *Id.* at 141.

43. *Id.* at 145.

44. *Id.* at 144.

45. *Liggett Co. v. Baldridge*, 278 U.S. 105, 114 (1928). In its decision, the United States Supreme Court stated the Pennsylvania pharmacy law dealt only in ownership terms and plainly forbade the exercise of an ordinary property right. *Id.* at 111. "[O]n its face, [the pharmacy law] denies what the Constitution guarantees. A state cannot, 'under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them.'" *Id.*

46. *Snyder's Drug Stores, Inc.*, 202 N.W.2d at 144.

47. *Id.*

48. *N.D. State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 158 (1973).

ment of the North Dakota Supreme Court.⁴⁹ The United States Supreme Court then remanded the decision to the North Dakota Supreme Court to render a ruling free from what the North Dakota Supreme Court thought to be the “mandate of *Liggett*.”⁵⁰

On remand, Snyder’s Drug Stores renewed its claims that the North Dakota Pharmacy Law violated sections 11, 13, and 20 of the North Dakota Constitution, as well as the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and Section 8 of the Commerce Clause of Article I of the United States Constitution.⁵¹ The North Dakota Supreme Court upheld the constitutionality of the North Dakota Pharmacy Law.⁵² The North Dakota Supreme Court considered the crux of *Snyder’s Drug* to be “a clash between the desire of Snyder’s to do business and the right of the public to be protected from abuse that could result from the improper dispensation of drugs”⁵³ Snyder’s Drug Stores argued the North Dakota Pharmacy Law was unnecessary because of many sections of the North Dakota Century Code and provisions of the Food, Drug, and Cosmetic Act, which protect the public health, safety, and welfare of North Dakota citizens.⁵⁴ Contrary to the argument advanced by Snyder’s Drug Stores, the North Dakota Board of Pharmacy argued the ownership requirement of the North Dakota Pharmacy Law had a substantial relation to the public interest, health, and welfare of North Dakota citizens and provided seven possible reasons to support the reasonableness of the pharmacy law.⁵⁵ Among the North Dakota Board of Pharmacy’s reasons given in support of the North Dakota Pharmacy Ownership Law were:

1. The professional and ethical standards of pharmacy demand the pharmacist’s concern for the quantity and quality of stock and equipment. A drug which has deteriorated because of improper storage facilities can be a detriment to public health. A drug not in stock poses a threat to the individual who needs it now. Decisions made in conjunction with the quantity and quality of stock and equipment by nonregistered-pharmacist owners could be detrimental to the public health and welfare.

49. *Id.* at 167.

50. *Id.*

51. *Snyder’s Drug Stores, Inc., v. N.D. State Bd. of Pharmacy*, 219 N.W.2d 140, 144-45 (N.D. 1974).

52. *Id.* at 152-53.

53. *Id.* at 147.

54. *Id.* at 150.

55. *Id.* at 151.

2. Supervision of hired pharmacists by registered-pharmacist owners would be in the best interests of public health and safety.
3. Responsibility for improper action could be more readily pinpointed when supervision is in registered-pharmacist owners.
4. The dignity of a profession and the morale and proficiency of those licensed to engage therein is enhanced by prohibiting the practitioner from subordinating himself to the direction of untrained supervisors.
5. If control and management is vested in laymen unacquainted with pharmaceutical service, who are untrained and unlicensed, the risk is that social accountability will be subordinated to the profit motive.
6. The term “pharmacy” was intended to identify a particular type of establishment within which a health profession is practiced, and thus was intended to be more than a mere means of making a profit. He who holds the purse strings controls the policy.
7. Doctor-owned pharmacies with built-in conflict-of-interest problems could be restricted.⁵⁶

The North Dakota Supreme Court stated, “Without attempting to weigh these alleged justifications for the ownership requirements of [the North Dakota Pharmacy Ownership Law], we note that the Legislature may have conceived of some of these reasons, and that is a sufficient basis for sustaining those requirements.”⁵⁷ For the North Dakota Supreme Court, the list of seven reasons delivered by the North Dakota State Board of Pharmacy was enough to prove the ownership requirements of the North Dakota Pharmacy Ownership Law bore a reasonable relation to significant aspects of public interest.⁵⁸ The North Dakota Supreme Court had no difficulty concluding “no compelling reason exists in this case for curtailing the authority of the Legislature in favor of the merchant, beyond that protection which the Supreme Court of the United States has said is due.”⁵⁹ Ultimately, the North Dakota Supreme Court held the ownership requirement of the North Dakota Pharmacy Ownership Law had a substantial rela-

56. *Id.*

57. *Id.*

58. *Id.* at 152.

59. *Id.* at 147.

tion to the public interest, health, and welfare of North Dakota's citizens.⁶⁰ In doing so, the court held the North Dakota Pharmacy Law did not violate sections 11, 13, or 20 of the North Dakota Constitution, the Due Process or Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, or the Commerce Clause of Section 8 of Article I of the United States Constitution.⁶¹

b. *Medcenter One v. North Dakota State Board of Pharmacy*

The North Dakota Pharmacy Ownership Law was challenged more recently in the mid-1990s when Medcenter One decided to expand the pharmacy at its hospital to make pharmacy sales to the general public.⁶² The North Dakota State Board of Pharmacy's legal counsel informed Medcenter One the "exemption for community/retail pharmacies set forth in N.D.C.C. 43-15-35 would [not] be available to Medcenter One Hospital Pharmacy."⁶³ The North Dakota State Board of Pharmacy's legal counsel opined:

Before July 1, 1963, there were two type[s] of pharmacy permits for two types of pharmacy practice, one for hospitals servicing only patients in that hospital and one for community/retail pharmacies. When N.D.C.C. 43-15-35 was amended effective July 1, 1963, the legislature recognized that distinction in permits and pharmacy practice and codified that distinction by providing that N.D.C.C. 43-15-35 does not apply to hospital pharmacies furnishing service only to patients in such hospital or to community/retail pharmacies holding a permit on July 1, 1963.⁶⁴

The opinion of the Pharmacy Board's legal counsel stated the Bismarck Hospital Pharmacy acquired beneficiary status of the hospital exemption because that was the type of pharmacy practice it was engaged in on July 1, 1963.⁶⁵ However, the legal counsel's ultimate opinion was that "Medcenter One Pharmacy is not now (32 years later) entitled to an additional exemption for community/retail pharmacies, because it was not engaged in that type of practice on July 1, 1963."⁶⁶

Medcenter One sought and received a declaratory judgment from the Burleigh County District Court, which concluded the unambiguous lan-

60. *Id.* at 152-53.

61. *Id.*

62. *Medcenter One v. N.D. State Bd. of Pharmacy*, 1997 ND 54, ¶ 3, 561 N.W.2d 634, 636.

63. *Id.* ¶ 4.

64. *Id.*

65. *Id.*

66. *Id.*

guage of the North Dakota Pharmacy Law did not differentiate between hospital and retail pharmacy permits.⁶⁷ The Burleigh County District Court held “Medcenter, as the continuous holder of a permit since before 1963, was exempt from the pharmacist-ownership requirements.”⁶⁸

The North Dakota Supreme Court stated the North Dakota Pharmacy Law “clearly and unambiguously describe[d] two exemptions to the pharmacist-ownership requirements.”⁶⁹ The first exemption the court noted was for pharmacies that held permits on July 1, 1963, and had not discontinued operations or failed to renew their permit.⁷⁰ The court held the first exemption applied to all pharmacy permit holders on July 1, 1963, not just retail or nonhospital pharmacies.⁷¹ The second exemption the court listed applied to all hospital pharmacies furnishing services only to patients at the hospital.⁷² The court affirmed the holding of the Burleigh County District Court and concluded if the North Dakota Legislative Assembly had intended the first exemption to only apply to retail or nonhospital pharmacies, the legislature would have included appropriate language limiting exemption in the statute.⁷³

2. *The Rise and Fall of House Bill 1440*

Representative Jon Nelson introduced House Bill 1440 to a joint hearing of the House Human Services Committee and the House Industry, Business, and Labor Committee on February 3, 2009.⁷⁴ Senator Nelson testified his interest in the bill stemmed from a desire to increase rural access to affordable prescription drugs and his belief that repealing the law would “allow the free market to work in pharmacy as it has in so many other industries in our state.”⁷⁵ As introduced, House Bill 1440 would have effectively repealed the North Dakota Pharmacy Ownership Law.⁷⁶

House Bill 1440 sought to amend the North Dakota Pharmacy Ownership Law by striking the controlling interest language located in the North Dakota Century Code and expanding pharmacy ownership to any applicant presenting proof to the North Dakota Pharmacy Board the applicant is

67. *Id.* ¶¶ 5-6.

68. *Id.* ¶ 6.

69. *Id.* ¶ 14.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* ¶¶ 14, 29.

74. *House Committee Hearings*, *supra* note 2, at 1 (testimony of Rep. Jon Nelson).

75. *Id.* at 2.

76. *Id.* at 1.

“qualified to conduct the pharmacy.”⁷⁷ With this language, House Bill 1440 would have opened the door for any qualified applicant to apply for a permit to operate a pharmacy.⁷⁸

While considering House Bill 1440, the committees heard impassioned testimony related to the repeal bill.⁷⁹ The supporters, spearheaded by retail giants Wal-Mart and Walgreens, argued their four dollar discounted prices for commonly prescribed generic drugs would better the lives of North Dakotans.⁸⁰ Meanwhile, opponents to House Bill 1440, primarily North Dakota pharmacists and small business proponents, stressed the mantra of patient safety.⁸¹ After extensive deliberation, the House Industry, Business, and Labor Committee voted eight to five to recommend a Do Not Pass on House Bill 1440.⁸² The full House of Representatives followed the House Industry, Business, and Labor Committee’s lead and defeated House Bill 1440 with a vote of fifty-seven to thirty-five.⁸³ By doing so, the North Dakota Legislature opted to maintain the status quo, leaving the North Dakota Pharmacy Ownership Law in place.⁸⁴

B. OTHER STATES’ PHARMACY OWNERSHIP LAWS VIS-À-VIS THE NORTH DAKOTA PHARMACY OWNERSHIP LAW

As already discussed, North Dakota has a stringent ownership requirement all prospective pharmacy owners must fulfill prior to the issuance of a permit by the North Dakota State Board of Pharmacy.⁸⁵ However, North Dakota is not the only state with a law that mandates pharmacies be

77. H.B. 1440, 2009 Leg., 61st Sess. (N.D. 2009). In addition to striking the ownership language, House Bill 1440 also struck the exceptions to the North Dakota pharmacy ownership requirements located in North Dakota Century Code section 43-15-35(2). *Id.*

78. *Id.*

79. *House Committee Hearings*, *supra* note 2, at 1-22.

80. *Id.* at 5-6 (statement of Ron Weinert, Pharmacist and Director of Government Relations for Walgreens).

81. *Id.* at 19-20.

82. *Hearing on H.B.*, *supra* note 8, at 15.

83. H. JOURNAL, 61st Sess., at 513 (N.D. 2009). However, supporters of H.B. 1440 did not give up at the legislature. Brian Duggan, *Effort Begins to Put Pharmacy Measure on Ballot*, BISMARCK TRIBUNE, Oct. 9, 2009, http://www.bismarcktribune.com/news/local/article_97ce023a-b45a-11de-9415-001cc4c03286.html. North Dakota’s Constitution allows voters to bypass the Legislature and put proposed laws and constitutional amendments directly on the ballot if the required number of petition signatures are gathered. *Id.* A proposed ballot measure aimed at repealing the pharmacy ownership law was submitted to North Dakota Secretary of State Al Jaeger in October 2009. *Id.* Backers of the proposal need at least 12,844 petition signatures from North Dakota voters to place the issue on the statewide ballot in 2010. *Id.*

84. H. JOURNAL, *supra* note 83, at 513.

85. N.D. CENT. CODE § 43-15-35 (2009).

partially owned by a registered pharmacist.⁸⁶ Michigan has a similar law, which states:

A pharmacy, drugstore, or apothecary shop shall be owned by a pharmacist and a partnership or corporation shall not own a drugstore, pharmacy, or apothecary shop unless at least 25% of the interest in the partnership or the stock of the corporation is held by pharmacists. A corporation, organized and existing under the laws of this state, or another state, authorized to do business in this state and empowered by its charter to own and conduct a pharmacy, drugstore, or apothecary shop and which, at the time of the passage of this act, owns and conducts a drugstore, pharmacy, or apothecary shop in this state may continue to own and conduct the drugstore, pharmacy, or apothecary shop and may establish and own additional pharmacies, drugstores, or apothecary shops pursuant to this act.⁸⁷

Although the United States Supreme Court upheld the North Dakota Pharmacy Ownership Law, there is some disagreement as to whether the Michigan law protects the public health, and whether it is constitutional.⁸⁸ Unlike North Dakota's Pharmacy Ownership Law, the Michigan statute only requires a pharmacist own twenty-five percent of the stock in a pharmacy.⁸⁹ There is no corresponding requirement of managerial control by the pharmacist and, in turn, no assurance the pharmacist owner will have any effective control in the operation of the pharmacy.⁹⁰ The North Dakota Pharmacy Ownership Law requires not only that the pharmacist own a controlling interest in the pharmacy, but also that the pharmacist owner be "actively and regularly employed in and responsible for the management, supervision, and operation of the pharmacy."⁹¹ "While it is true that a stockholder may indirectly exercise some influence upon corporate operations, this result is not assured unless he owns over 50% of the stock."⁹² There is no rational relationship between mandating a licensed pharmacist to own twenty-five percent of the stock of a corporation and to have actual control over the operation of a pharmacy business.⁹³ However, "there is a

86. Richard Arden Veon, II, *Physician Owned Pharmacies: Lawful Business Ventures or Illegal Business Interest?*, 4 J. PHARMACY & L. 1, 14 (1995).

87. MICH. COMP. LAWS § 338.481 (1980).

88. Pharmacists Ownership Requirements in Pharmacy Corporations, 14 Op. Mich. Att'y Gen. 6676, 1 (1991).

89. *Id.*

90. *Id.* at 3.

91. *Id.*

92. *Id.*

93. *Id.* at 2-3.

public interest in controlling and regulating the operation of retail drug businesses.”⁹⁴ That result, while not secured by the Michigan Pharmacy Ownership Law, is accomplished by the North Dakota Pharmacy Ownership Law because the latter mandates a controlling ownership interest be in the hands of pharmacists.⁹⁵

A recent trend among states in the 1990s was to pass legislation banning pharmacy ownership by physicians.⁹⁶ In 1991, the California Business and Professions Code restricted the issuance of pharmacy permits for any person authorized to prescribe or write a prescription.⁹⁷ Pharmacy ownership, therefore, was prohibited in California when a corporation was controlled by a medical prescriber or when ten percent or more of the stock was owned by a medical prescriber.⁹⁸ California repealed this law in 1996.⁹⁹

Rhode Island passed a similar ban granting the Rhode Island Board of Pharmacy the ability to refuse a pharmacy license to “any person who is a practitioner authorized to prescribe medications or to any partnership, corporation or other entity in which practitioners authorized to prescribe medications maintain a financial interest which . . . exceeds ten percent of the total ownership of said entity or of the subject pharmacy or drug store.”¹⁰⁰ Similarly, the Board was allowed to refuse licensure if more than forty percent of the prescriptions filled by the subject drug store within any three-month period were written by practitioners with such an ownership interest.¹⁰¹ This law was repealed in 2002.¹⁰²

The State of New Hampshire also allows its State Board to revoke a license of a pharmacy owned or controlled by a prescriber.¹⁰³ Similarly, Maryland “empower[s] its State Board of Pharmacy to revoke or suspend pharmacy permits and pharmacist licenses issued to physicians” when “the physician has a financial interest in a pharmacy, if the practitioner directs patients to a single pharmacy, or if the doctor receives remuneration for referring patients to his pharmacy . . . [or if a physician] ‘make[s] any agreement that denies a patient a free choice of pharmacies.’”¹⁰⁴ Finally,

94. *Id.* at 3.

95. *Id.*

96. *See* Veon, *supra* note 86, at 13.

97. CAL. BUS. & PROF. CODE § 4080.5(a)(1) (1991) (repealed 1996).

98. *Id.* § 4080.5(a)(3).

99. *Id.*

100. R.I. GEN. LAWS § 5-19-25(b)(i) (1993) (repealed 2002).

101. *Id.* § 5-19-25(6)(ii)(B).

102. *Id.*

103. N.H. REV. STAT. ANN. § 318:29(V)(i)(1994).

104. Veon, *supra* note 86, at 13-14 (citing MD. HEALTH OCC. CODE ANN. §§ 12-313(b)(12)(14)(19), 12-403(b)(8)).

“[i]n Pennsylvania, a pharmacist license may be revoked or a pharmacy permit suspended if a pharmacist shares or receives compensation from any medical practitioner and that practitioner has a proprietary or beneficial interest significant to permit them to actively supervise the control of the pharmacy.”¹⁰⁵

III. THE DEBATE SURROUNDING THE NORTH DAKOTA PHARMACY LAW

To best understand the controversy surrounding the North Dakota Pharmacy Ownership Law, it is important to take a closer look at the debate surrounding the North Dakota Pharmacy Ownership Law and House Bill 1440. The debate regarding the North Dakota Pharmacy Ownership Law centers around three main issues: rural access, price and service quality, and economic impact.¹⁰⁶ This section reviews the primary arguments for and against the repeal of the North Dakota Pharmacy Ownership Law.

A. RURAL ACCESS

Representative Jon Nelson testified he introduced House Bill 1440 because he believed repealing the North Dakota Pharmacy Ownership Law would increase rural access.¹⁰⁷ One of the greatest challenges facing the pharmacy business is the delivery of pharmacy services to rural areas.¹⁰⁸ National pharmacist shortages have made it particularly difficult to locate pharmacists able to cover routine hours, evenings, nights, weekends, vacations, sick time, and professional meetings, especially in rural North Dakota.¹⁰⁹

One project developed to increase rural access to prescription drugs is the North Dakota Telepharmacy Project.¹¹⁰ The North Dakota Telepharmacy Project is a collaboration of the North Dakota State University (NDSU) College of Pharmacy, the North Dakota Board of Pharmacy, and the North Dakota Pharmacists Association.¹¹¹ The North Dakota Telepharmacy Project was established with the goal of restoring, retaining, and establishing pharmacy services in medically underserved communities

105. *Id.* at 14 (citing 63 PA. CONS. STAT. ANN. § 390-5(a)(9)(v)).

106. *House Committee Hearings*, *supra* note 2.

107. *Id.* at 2.

108. Petra S. Berger, *Rural Hospitals and Telepharmacy*, THE RISK MANAGEMENT AND PATIENT SAFETY INSTITUTE (Feb. 23, 2006), http://www.raconline.org/pdf/rural_hospitals_and_telepharmacy.pdf.

109. *Id.*

110. *Id.*

111. *Id.*

throughout North Dakota by using telepharmacies.¹¹² Through the efforts of the North Dakota Telepharmacy Project, North Dakota became the first state to pass administrative rules allowing the practice of telepharmacy.¹¹³

The North Dakota Telepharmacy Project works by establishing a pharmacist-staffed central order entry site that provides supervisory pharmacist oversight to a pharmacy technician located at the remote telepharmacy site; the pharmacy technician then processes medication orders for patients.¹¹⁴ A patient filling a prescription at the telepharmacy will deliver his or her medication order to the pharmacy technician who enters the medication order into a computer and prepares the product for dispensing by the pharmacist.¹¹⁵ The pharmacist will then perform a final check of the product and release the medication for dispensing.¹¹⁶ If needed, the pharmacist will provide consultation to the patient, nurse, or physician.¹¹⁷

Real-time pharmacy oversight and wireless telepharmacy carts make safe access to prescription medications available twenty-four hours a day, seven days per week, to any community housing a telepharmacy site.¹¹⁸ The North Dakota Telepharmacy Project began with ten volunteer sites in 2002 and grew to sixty-seven locations in 2008.¹¹⁹ The idea of telepharmacies quickly spread across the country, and as of 2008, ten other states followed North Dakota's lead and amended their laws to allow for telepharmacies.¹²⁰ The emergence of online pharmacies has also increased rural communities' ability to access pharmaceutical services.¹²¹ Not only does an online pharmacy allow patients to have prescriptions delivered to their doorsteps, but an online pharmacy allows patients to obtain "comprehensive profiles of their prescription and over-the-counter drug records."¹²²

According to testimony delivered to the North Dakota House Industry, Business and Labor Committee by the North Dakota State Board of Pharmacy, North Dakota currently has 236 pharmacies, equating almost 26

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. Dave Kolpack, *ND Telepharmacy Project Expands Across Country*, USA TODAY, Sept. 9, 2008, http://www.usatoday.com/money/topstories/2008-09-12-3847041636_x.htm.

120. *Id.* Other states changing their laws to allow for telepharmacies include: Alaska, Idaho, Illinois, Montana, South Dakota, Texas, Utah, Vermont, and Wyoming, along with the District of Columbia. *Id.*

121. Sara E. Zeman, *Regulation of Online Pharmacies: A Case for Cooperative Federalism*, 10 ANNALS OF HEALTH LAW 105, 108 (2001).

122. *Id.*

retail pharmacies per 100,000 people in North Dakota.¹²³ The New Rules Project, a program of the Institute for Local Self-Reliance, stated North Dakotans can catch a glimpse of what life without the North Dakota Pharmacy Ownership Law would look like by looking across state lines to South Dakota.¹²⁴

South Dakota does not require pharmacies to be owned by state licensed pharmacists, and, consequentially, “[r]ural access to pharmacies is notably less robust”¹²⁵ The New Rules Project stated, geographically, not only are there more local pharmacies in North Dakota, but they are spread more evenly throughout the state.¹²⁶ In South Dakota, pharmacies are primarily found in areas with high populations, while pharmacies in North Dakota are seen in large cities and rural areas.¹²⁷

The data compiled by the New Rules Project shows a higher proportion of North Dakota’s rural population census tracts are served by at least one pharmacy.¹²⁸ According to the New Rules Project’s findings, “Census tracts with 2,001 – 3,000 people are 31% more likely to have a pharmacy in North Dakota than those in South Dakota. And, while only one-quarter of census tracts with 1,001 – 2,000 people in South Dakota have a pharmacy, nearly half of those in North Dakota do.”¹²⁹ The New Rules Project findings also indicate that compared with South Dakota, “North Dakota . . . has more pharmacies in communities that do not have another pharmacy within another 10 miles.”¹³⁰ “Over half of North Dakota’s rural independent pharmacies (46) are located in communities where not a single other pharmacy is available for over 10 miles[,]” claims the New Rules Project.¹³¹ One-third of South Dakota’s rural independent pharmacies, thirty-three total, are located in similar communities.¹³²

The New Rules Project proposes another way to measure access to pharmaceutical services by “examin[ing] whether the population served by pharmacies is the population that often uses them.”¹³³ According to the New Rules Project, the “uniform spread of North Dakota’s independent

123. *House Committee Hearings, supra* note 2, Attachment 12, at 83-85 (testimony of Howard C. Anderson, Executive Director of the North Dakota State Board of Pharmacy).

124. DAHLHEIMER & MITCHELL, *supra* note 17, at 3.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 4.

131. *Id.*

132. *Id.*

133. *Id.*

local pharmacies ensures that people in areas more apt to need a pharmacy's services won't have to travel far."¹³⁴ The New Rules Project alleges that all of the preceding data signifies the North Dakota Pharmacy Ownership Law is accomplishing its intended impact: ensuring greater access to pharmacies in all areas, regardless of population density.¹³⁵ However, with the emergence of telepharmacies and online pharmacies, no one can predict with any degree of certainty the effect repealing the North Dakota Pharmacy Ownership Law will have on rural access.¹³⁶

B. PRICES AND SERVICE QUALITY

Arguably, the crux of the debate surrounding the repeal of the North Dakota Pharmacy Ownership Law is related to price and service quality. Price levels and inflation are a constant concern not only in the current United States economy, but around much of the world.¹³⁷ According to Dr. David T. Flynn, Professor of Economics at the University of North Dakota, "price changes alter the available budget resources for consumers, and when unanticipated fluctuations in prices occur consumer spending plans may need to change drastically, particularly when changes are in areas viewed as having few if any substitutions such as health care."¹³⁸

Both opponents and supporters of House Bill 1440 testified before the North Dakota House Industry, Business and Labor Committee and advocated their position that the repeal bill would keep drug prices low and ensure better customer service.¹³⁹ Dr. Flynn undertook an economic analysis of likely changes to North Dakota's economy, should the North Dakota Legislature decide to repeal the North Dakota Pharmacy Ownership Law.¹⁴⁰ Dr. Flynn reported prescription drug prices in North Dakota would decrease if the North Dakota Pharmacy Ownership Law were repealed.¹⁴¹ The estimated savings for consumers was confirmed by a pricing survey of regional chain Thrifty White Drug Stores, which have twenty-eight locations in North Dakota.¹⁴² According to Dr. Flynn, the survey of commonly

134. *Id.*

135. *Id.*

136. *House Committee Hearings, supra* note 2, Attachment 8, at 58-75 (testimony of Dr. David T. Flynn, Professor of Economics and Director of the Bureau of Business and Economic Research, University of North Dakota).

137. DAVID T. FLYNN, REMOVAL OF PHARMACY OWNERSHIP RESTRICTIONS IN NORTH DAKOTA 4 (North Dakotans for Affordable Healthcare, 2009); *House Committee Hearings, supra* note 2, Attachment 8, at 58-75 (testimony of Dr. David T. Flynn).

138. FLYNN, *supra* note 136.

139. *House Committee Hearings, supra* note 2.

140. *Id.*, Attachment 8, at 58-75 (testimony of Dr. David T. Flynn).

141. *Id.*

142. *Id.*

prescribed generic and brand name drugs by Thrifty White Drug Stores indicates that, on average, North Dakotans are paying \$7.88 more to fill a prescription in Thrifty White Drug Stores in North Dakota than what Thrifty White Drug Stores are charging for the same prescription in Minnesota.¹⁴³ Dr. Flynn also reported North Dakota Thrifty White Drug prices are \$16.92 higher than Wal-Mart's cash price.¹⁴⁴ Dr. Flynn's ultimate conclusion was prescription drug prices would be reduced upon the repeal of the North Dakota Pharmacy Ownership Law because the introduction of new competitors into the pharmaceutical drug market would drive prices down.¹⁴⁵

On the other hand, the New Rules Project claimed "North Dakota, largely as a result of its unique Pharmacy Ownership Law, outperforms other states in every key measure of pharmacy services."¹⁴⁶ In a policy brief, the New Rules Project claimed average prescription drug prices in North Dakota were among the lowest in the country and "[c]ompared to neighboring states, North Dakota [had] more pharmacies per capita and more pharmacies dispersed across rural areas, ensuring that residents have access to vital health care services."¹⁴⁷ Advocates for the repeal of the North Dakota Pharmacy Ownership Law argued the law has led to higher drug prices for North Dakota residents.¹⁴⁸ However, the New Rules Project asserted its data contradicted that argument.¹⁴⁹ According to the New Rules Project, the national average price per drugstore prescription was \$72.61 in 2005, compared to the \$62.05 that North Dakotans paid for the same prescriptions.¹⁵⁰ National average prescription drug prices sunk to \$69.90 in 2007, but North Dakota still came in under the national average in the same year, at \$65.28 per prescription.¹⁵¹ *Consumer Reports* conducted a survey that found prices for four common drugs at major drug store chains were more expensive than the same drugs available from independent drug stores.¹⁵² Supporters of the North Dakota Pharmacy Ownership Law argued if North Dakota were to lose its independent rural pharmacies, not only would the state's citizens be forced to pay chain pharmacies' higher prescription drug prices, but citizens would also incur more transportation-

143. *Id.*

144. *Id.*

145. *Id.*

146. DAHLHEIMER & MITCHELL, *supra* note 17, at 7.

147. *Id.* at 2.

148. *Id.*

149. *Id.*

150. *Id.* at 4.

151. *Id.*

152. *Id.*

related expenses from traveling to obtain those higher-priced medications.¹⁵³

The New Rules Project claimed, in addition to contributing to North Dakota's low prescription drug prices, the abundance of independent local pharmacies located throughout the state have helped cement the state's pharmaceutical customer service as among the best in the nation.¹⁵⁴ "*Consumer Reports* has repeatedly ranked independent pharmacies #1 overall since it began conducting drugstore 'consumer satisfaction' surveys in 1998," reported the New Rules Project.¹⁵⁵ *Consumer Reports* found "chain drugstores 'typically made readers wait longer, were slower to fill orders, and provided less personal attention[,]'" while "independent drugstores' pharmacists [were found] to be more accessible, approachable and knowledgeable" ¹⁵⁶ *Consumer Reports* also determined independent pharmacies were more likely to offer health services and medical supplies beyond pharmaceutical sales, such as "disease-management education, in-store health screenings for cholesterol, services such as compounding (customizing medications for patients with special needs), . . . home delivery, . . . canes, walkers, [and] wheelchairs."¹⁵⁷ The New Rules Project asserted in many rural areas, independent pharmacies were the only provider of these healthcare services.¹⁵⁸

C. ECONOMIC IMPACT

The third primary argument addressed by supporters and opponents of the North Dakota Pharmacy Ownership Law pertained to the economic impact repealing the law could have on North Dakota's economy. Economist Dr. David Flynn claimed the significant savings North Dakotans could reap by repealing the North Dakota Pharmacy Ownership Law represented an opportunity for North Dakota's economy to experience "a further buffer against recessionary forces prevalent in other parts of the country."¹⁵⁹ Dr. Flynn conducted an economic impact analysis of the potential economic effects of repealing the North Dakota Pharmacy Ownership Law on North Dakota's economy.¹⁶⁰ In doing so, Dr. Flynn considered two scenarios for the impact analysis incorporating consumers,

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. FLYNN, *supra* note 136, at 4.

160. *See id.*

insurers, and pharmacies.¹⁶¹ Both scenarios in Dr. Flynn's economic impact analysis displayed positive overall benefits for North Dakota's economy if the North Dakota Pharmacy Ownership Law were repealed.¹⁶² Common to both scenarios were positive output, employment, and tax changes.¹⁶³

The first economic impact analysis scenario introduced by Dr. Flynn was meant to provide an estimation of the maximum impact from a change in pharmacy ownership laws.¹⁶⁴ The first scenario assumed the estimated impact of repealing North Dakota's Pharmacy Ownership Law would reduce all pharmaceutical drug prices in North Dakota to the level of Wal-Mart prices, which were provided to Dr. Flynn by Blue Cross/Blue Shield.¹⁶⁵ The first scenario in Dr. Flynn's economic impact analysis also assumed all out-of-state prescription drug customers would return to North Dakota to purchase their medications.¹⁶⁶ Under the first scenario, Dr. Flynn reported the resulting potential savings for North Dakota consumers, by assuming Wal-Mart's average prices, was \$14,017,029.65, while the share of savings to Blue Cross/Blue Shield was \$21,025,544.47.¹⁶⁷ Dr. Flynn further reported the amount of funds returning to North Dakota would be \$28,238,701.31 and, coupled with estimated output impacts, the total economic impact would be in excess of \$46 million.¹⁶⁸ Finally, Dr. Flynn's economic input analysis under the first scenario estimated the loss to existing pharmacies to be equal to the retail markup on the combined consumer and Blue Cross/Blue Shield amounts, or \$35,042,547.12.¹⁶⁹ In his economic input analysis, Dr. Flynn reported, "Insurance and medical services are among the sectors benefitting the most from [repealing the North Dakota Pharmacy Ownership Law], though financial services and food service also benefit."¹⁷⁰ Dr. Flynn stated benefits to insurance and medical services would then spread throughout "restaurants, discount retailers,

161. *Id.*

162. *See id.* at 11.

163. *Id.* at 2.

164. *Id.* at 6.

165. *Id.* The Blue Cross Blue Shield Association is a federation of thirty-nine separate health insurance organizations and companies in the United States. Combined, these organizations and companies provide health insurance to over ninety-eight million Americans, whether directly or indirectly. *About the Blue Cross and Blue Shield Association*, BCBS.COM, <http://www.bcbs.com/about/> (last visited Jan. 18, 2011).

166. FLYNN, *supra* note 136, at 6.

167. *Id.* at 9.

168. *Id.*

169. *Id.*

170. *Id.*

grocery stores and others sharing in the more than 300 jobs created under this scenario.”¹⁷¹

The second scenario introduced by Dr. Flynn in his economic impact analysis focused on a more conservative, and perhaps realistic, outcome of a change in the pharmacy ownership law.¹⁷² The second scenario assumed discount pharmaceutical retailers would gain a fifteen percent market share in North Dakota and that eighty percent of the current out-of-state prescription consumers would return to pharmacies in North Dakota upon repeal of the North Dakota Pharmacy Ownership Law.¹⁷³ Under these assumptions, Dr. Flynn reported the total savings to the consumer sector would be \$2,102,554.45, and the total loss for the current independent pharmacy sector would be \$5,256,386.12, which would be offset by the return of \$6,678,337.46 from out-of-state refills returning to North Dakota pharmacies.¹⁷⁴ “Despite the more limited assumptions in scenario 2 than those found in scenario 1 there is still a positive impact” on North Dakota’s economy, stated Dr. Flynn.¹⁷⁵ In his economic impact analysis, Dr. Flynn reported, “[T]he output impact is just over \$8 million, employment gains more than 60 jobs, and tax collections increase by almost \$350,000[.]”¹⁷⁶

Contrary to Dr. Flynn’s assertions, opponents of repealing the North Dakota Pharmacy Ownership Law claimed the “entry of chain pharmacies into North Dakota would have a negative impact on independent drugstores and the state’s economy.”¹⁷⁷ According to the New Rules Project, if North Dakota’s Pharmacy Ownership Law were repealed, chain stores such as Wal-Mart, Target, and Sam’s Club would likely open pharmacies in their present operations, subsequently taking a bite out of the state’s independent pharmacies’ revenue.¹⁷⁸ The New Rules Project’s policy brief stated that an estimated 70 independent pharmacies employing approximately 600 people would close if national retailers and mail order pharmacies were to attain the same market share in North Dakota as they have elsewhere.¹⁷⁹ The shift in market share, from independent pharmacies to chains and mail order companies, would likely result in the decline of independent pharmacies to levels found in South Dakota and other rural states.¹⁸⁰ The New Rules

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* at 8.

176. *Id.*

177. DAHLHEIMER & MITCHELL, *supra* note 17, at 5.

178. *Id.*

179. *Id.* at 3.

180. *Id.*

Project claimed if national retailers and mail order pharmacies were to attain the same market share in North Dakota as they have elsewhere, the result would be a net loss of anywhere from thirteen to twenty-three million dollars in direct economic benefits—wages and business income—to the state annually.¹⁸¹ The New Rules Project’s policy brief asserted a net loss of twenty-three million dollars in direct economic benefits would also result in a reduction of state and local tax revenue.¹⁸² Independent businesses tend to spend a larger share of their revenue within the states they operate than national chains do, often using local businesses for goods and services such as banking, accounting, and printing.¹⁸³ The New Rules Project argued, “Chains carry out most of these functions at corporate headquarters and have little need for the services of local professionals and other businesses near their stores.”¹⁸⁴ The New Rules Project further stated, “Independent businesses also keep profits local and spend a larger share of their revenue on local payroll, because, unlike chains, all of their management is on site.”¹⁸⁵

However, the debate surrounding North Dakota’s Pharmacy Ownership Law is extremely difficult to navigate. In sum, the debate pins the advantages of small business operations against the benefits of large corporations. Both supporters and opponents agree their ultimate goal with regard to North Dakota’s Pharmacy Ownership Law is to increase rural access to prescription drugs without having a detrimental impact on North Dakota’s economy.¹⁸⁶ Neither side, however, has been able to fully articulate with any amount of certainty why their position on the North Dakota Pharmacy Ownership Law is the one that will increase rural access and sustain or bolster North Dakota’s economy.¹⁸⁷

IV. A PRESCRIPTION FOR A HEALTHIER PHARMACY OWNERSHIP LAW

The North Dakota Legislature opted against repealing the North Dakota Pharmacy Ownership Law, in part because neither side of the debate could testify with any amount of certainty that repealing the law would increase rural access to affordable prescription drugs without sacrificing

181. *Id.* at 6.

182. *Id.* at 3.

183. *Id.* at 6.

184. *Id.*

185. *Id.*

186. See discussion *supra* Part III.A-C (addressing the debate surrounding the North Dakota Pharmacy Ownership Law).

187. See discussion *supra* Part III.A-C.

customer service or forcing current independent pharmacies out of business.¹⁸⁸ The legislature need not wait, however, for pharmaceutical drug prices to skyrocket before taking action.¹⁸⁹ The law does not exist solely as a reactionary policy, but as a proactive force that can work to fix problems before they occur or become widespread.¹⁹⁰ Nonetheless, forward-reaching legislation must be “developed slowly and deliberately and will require extensive public input, not only by politicians and special interest groups, but by regular citizens, the ones most likely to be affected in the long run.”¹⁹¹ To that end, this section provides suggestions regarding the preservation of North Dakota’s Pharmacy Ownership Law by making the law more business friendly.

Seemingly unspoken throughout North Dakota’s Sixty-first Legislative Session was the fact there is no law entirely prohibiting corporate retailers like Wal-Mart and Target from entering the pharmaceutical business in North Dakota; they must merely enter the pharmacy market by entering into a partnership with a North Dakota pharmacist, where the corporate retailer can only own up to forty-nine percent of the pharmaceutical business.¹⁹² In other words, Wal-Mart and other chain stores could enter into a partnership where they are statutorily required to be the minority shareholder.¹⁹³

Large-scale retailers such as Walgreens and Wal-Mart are not strangers to partnership or joint venture agreements.¹⁹⁴ Vanderbilt University Medical Center entered into a joint venture agreement with drug store giant Walgreens in August 2009 to provide home infusion and respiratory services for patients.¹⁹⁵ Walgreens has entered into similar joint venture agreements with organizations to provide healthcare services in Idaho, Ohio, and Oregon.¹⁹⁶ Furthermore, despite Michigan’s comparable pharmacy ownership

188. See discussion *supra* Part III.A-C.

189. See generally Julia Solo, *Urban Decay and the Role of Superfund: Legal Barriers to Redevelopment and Prospects for Change*, 43 BUFF. L. REV. 285, 327 (1995) (“The problem with reactive legislation . . . is that it attempts to solve one problem while creating a host of others. A move toward proactive legislation is essential if we hope to avoid the unintended effects of hastily passed legislation in the future.”).

190. *Id.*

191. *Id.*

192. N.D. CENT. CODE § 43-15-32 (2009).

193. *Id.*

194. Nandini Lakshman, *Why Wal-Mart’s First India Store Isn’t a Wal-Mart*, TIME, May 15, 2009, <http://www.time.com/time/world/article/0,8599,1898823,00.html>; News Release, John Howser, Vanderbilt University, VUMC Announces Joint Venture with Walgreens (Aug. 4, 2009), <http://sitemason.vanderbilt.edu/myvu/news/2009/08/04/vumc-announces-joint-venture-with-walgreens.85908>.

195. News Release, *supra* note 193.

196. *Id.*

law, there are 200 Walgreens pharmacies in the state of Michigan.¹⁹⁷ Wal-Mart currently has 182 pharmacies licensed in Michigan.¹⁹⁸ Although Wal-Mart and Walgreens have entered into partnership agreements, the author has yet to find a situation where the two retail giants have entered into a partnership as the minority shareholder.

Depending on the state in which they make an investment, investors are afforded varying statutory legal protections.¹⁹⁹ The decision to invest in a business requires a careful assessment of the risks involved, and state statutory protections may influence where an investor decides to invest.²⁰⁰ Implementing broader minority shareholder protections, such as amending the penalties statute and reconstructing the North Dakota Pharmacy Ownership Law to reduce the pharmacist ownership mandate to fifty percent, may increase confidence in North Dakota and stimulate investment in North Dakota pharmacies.

A. CURE THE PENALTIES STATUTE

If encouraging partnerships and joint ventures between North Dakota pharmacists and chain pharmacies is of interest to members of future legislatures, then one area of the law should be of primary concern: the penalty sections of the pharmacy ownership statute, sections 43-15-42 and 43-15-44 of the North Dakota Century Code. According to section 43-15-42, “Any person who violates any rule legally adopted by the [North Dakota Pharmacy Board] pursuant to this chapter is guilty of an infraction.”²⁰¹ Section 43-15-44 states, “Any person who willfully violates any of the provisions of this chapter for which another penalty is not specifically provided is guilty of a class B misdemeanor.”²⁰² Currently, if any pharmacy were to enter into a partnership or joint venture to operate a pharmacy in the State of North Dakota, the pharmacy would automatically be in violation of the statute if the contracting pharmacist died or even simply opted out of the contract.²⁰³ Such a penalty is too drastic, especially if the violation is innocently committed. One possible solution, in a situation where the

197. Michigan Department of Community Health License Registration Website, MICHIGAN.GOV, http://www.dleg.state.mi.us/free/pireresults.asp?rb_facility=on&facility_name=Walgreens&dba_name=&profession=53&license_number=&offset=0 (last visited Dec. 7, 2010).

198. *Id.*

199. Carol L. Kline, *Protecting Minority Shareholders in Close Corporations: Modeling Czech Investor Protections on German and United States Law*, 23 B.C. INT’L & COMP. L. REV. 229, 229 (2000).

200. *Id.*

201. N.D. Cent. Code § 43-15-42 (2009).

202. § 43-15-44.

203. *Id.*

pharmacist should die or rescind his or her part of the bargain, would be to incorporate into the statute a grace period of two or three years during which the corporation could make an effort to conform with the ownership requirements of the North Dakota Pharmacy Ownership Law.

B. EXPERIMENT WITH 50/50 OWNERSHIP AMENDMENT

Another suggestion that may entice chain retail pharmacies to enter into partnership agreements with North Dakota pharmacists would be to amend the North Dakota Pharmacy Ownership Law to require fifty percent ownership by a licensed pharmacist. The amendment would protect the pharmaceutical retailer seeking ownership interests in a North Dakota pharmacy because it would eliminate the fear of having to conform to the will of the majority shareholder. An equal partnership would also be more likely to maintain the legality of the law should it be challenged in the court system, because, unlike the twenty-five percent pharmacist ownership law in Michigan, the pharmacist-owner would maintain a reasonable amount of control in order to safeguard the health, safety, welfare, and morality of North Dakota's citizens.²⁰⁴

V. CONCLUSION

North Dakota is the only state that requires pharmacists to own a controlling interest in pharmacies.²⁰⁵ Forged with the desire to protect the health, safety, and welfare of North Dakota citizens, North Dakota's controversial pharmacy ownership law has sparked a heated debate that today echoes throughout the halls of the North Dakota State Legislature. On one hand, chain drugstores and hospitals are wooing North Dakota lawmakers to alter the rules for pharmacy ownership with promises of four dollar prescriptions. On the other hand, supporters of the pharmacy ownership law warn opening the floodgates to the four dollar prescription market will thwart North Dakotans' longstanding rural access to affordable prescription medications and will crush independent, rural pharmacies.²⁰⁶ However, it is important to note there is no ban on chain stores holding ownership rights in North Dakota pharmacies; chain stores simply must do so as a minority

204. Pharmacists Ownership Requirements in Pharmacy Corporations, 14 Op. Mich. Att'y Gen. 6676, 1 (1991).

205. Anthony Vecchione, *North Dakota's Pharmacy Ownership Law Faces Challenges from Chain Drug Stores and Hospitals*, DRUG TOPICS (Oct. 13, 2008), <http://drugtopics.modernmedicine.com/drugtopics/HSE+Business+Management/North-Dakotas-pharmacy-ownership-law-faces-challen/ArticleStandard/Article/detail/557615>.

206. *Id.*

shareholder.²⁰⁷ Implementing broader minority shareholder protections, such as amending the penalties statute and reconstructing the North Dakota Pharmacy Ownership Law to reduce the pharmacist ownership mandate to fifty percent, may increase investor confidence in North Dakota and stimulate investment in North Dakotan pharmacies.

In conclusion, the North Dakota Pharmacy Ownership Law need not be construed as a wall built with the sole purpose of keeping large-chain retailers out of North Dakota's pharmaceutical market, but merely as a hurdle safeguarding North Dakotans' affordable and secure access to prescription drugs. The North Dakota Legislature has been unable to diagnose what ails the North Dakota Pharmacy Law and what would be an effective cure. Until the North Dakota Legislature is able to develop a pharmacy ownership law more certain to safeguard the pharmaceutical interests of North Dakotans, the North Dakota Legislature should work to improve the current North Dakota Pharmacy Ownership Law, rather than repeal the statute and risk losing its safeguards.

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207. § 43-15-35.

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