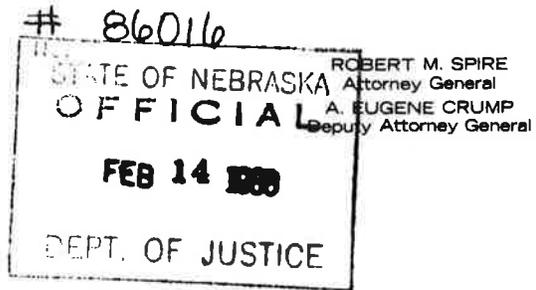


DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

TELEPHONE 402/471-2682 • STATE CAPITOL • LINCOLN, NEBRASKA 68509



DATE: February 13, 1986

SUBJECT: Constitutionality of LB 578 as Amended

REQUESTED BY: Senator Chris Abboud
Nebraska State Legislature

WRITTEN BY: Robert M. Spire, Attorney General
Marilyn B. Hutchinson, Assistant Attorney General

You have asked whether LB 578 as amended on February 10, 1986 by the Lynch Amendment is still constitutionally suspect as we concluded in Attorney General Opinion No. 57 (April 9, 1985).

In that opinion we addressed whether LB 578 as then proposed violated the Commerce Clause of the Federal Constitution. We concluded that it probably did. Requiring all out of state pharmacies dispensing prescription drugs into this state to hold a pharmacy permit issued by the Department of Health in this state and to comply with Nebraska law and rules and regulations governing the practice of pharmacy was more than an incidental burden on interstate commerce. Also, the state's interest in regulating the flow of controlled substances was adequately protected by the pertinent federal statutes. We pointed out that Congress had preempted regulation in this area of interstate commerce by enacting the Drug Abuse Prevention and Control Act, 21 U.S.C. §801 at seq. but that Congress did not intend to preempt state regulation of interstate commerce involving controlled substances so long as any state regulation did not directly conflict with the act itself.

The Lynch Amendment retains the general rule that all out of state pharmacies dispensing prescription drugs into this state must have a permit issued by this state and must comply with Nebraska law and rules and regulations governing the practice of pharmacy. The Lynch Amendment then adds an exemption for such out of state pharmacies which hold a pharmacy permit in the state where they are located if the requirements and qualifications for such permit are substantially equivalent to those contained in specific sections of Nebraska statutes. That exemption is probably not in violation of the Commerce Clause so long as the Nebraska statutes used as the standard are consistent with the federal law which is controlling.

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However, there are problems with the general rule. It would mean that a pharmacy located in another state which does not come within the exemption would have to get a permit from this state before it could dispense prescription drugs here. Neither the constitution of the federal government nor laws passed in pursuance of it have any force in foreign territory unless in respect to our own citizens. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936). Consistent with that, each state's sovereign power ends at the boundaries which separate it from the other sovereign states of the union. Thus Nebraska could not police another state to assure that an applicant for a permit or a permittee there complied with Nebraska law and the rules and regulations governing the practice of pharmacy.

These problems may be avoided by making the exemption in the Lynch Amendment the general rule, that is, by requiring that all out of state pharmacies dispensing prescription drugs into the State of Nebraska hold a pharmacy permit from the state in which the pharmacy is located and that such state have requirements substantially equivalent to those in this state and consistent with the federal law.

In conclusion, the exemption in the Lynch Amendment is probably valid under the Commerce Clause of the United State Constitution so long as the pharmacy laws of this state are consistent with the controlling federal law. However, the general rule in that amendment intrudes on the sovereignty of other states and cannot be enforced.

Sincerely,

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