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STATE OF NEBRASKA
OFFICIAL
APR 7 1994
DEPT. OF JUSTICE

DATE: April 6, 1994

SUBJECT: LB 718; Constitutionality of Legislation Which Would Require Equal Benefit Reimbursement for Prescription Drugs Sold by Both Mail-Order Pharmacies and Other Pharmacies

REQUESTED BY: Senator Tim Hall
Nebraska State Legislature

WRITTEN BY: Don Stenberg, Attorney General
Dale A. Comer, Assistant Attorney General

LB 718 deals with the benefits paid under health insurance or medical benefit contracts for prescription drugs sold by mail-order pharmacies and other pharmacies. The portion of the bill pertinent to your inquiry provides:

> A medical benefit contract, including any contract by a health maintenance organization or a preferred provider organization, which provides reimbursement for prescription drugs and other pharmacy services shall not impose upon any person who is a party to or beneficiary of the contract a fee or copayment not equally imposed upon any party or beneficiary utilizing a mail-order pharmacy, and no such contract shall provide differences in coverage or impose any different conditions upon any person who is a party to or a beneficiary of the contract not equally imposed upon any party or beneficiary utilizing a mail-order pharmacy.

You have asked whether "LB 718 discriminates against interstate commerce in violation of the Commerce Clause" of the United States Constitution.

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Neb. Rev. Stat. § 44-513.02 (Cum. Supp. 1992) currently provides that medical benefit contracts which include reimbursement for prescription drugs cannot require a person to obtain prescription drugs from a mail-order pharmacy as a condition to obtaining reimbursement for such drugs. Nonetheless, some health insurance companies and other entities providing health care benefits have apparently created circumstances surrounding their payment for prescription drug benefits which tend to favor mail-order pharmacies. For example, under some benefit plans, persons purchasing prescription drugs from a local pharmacy pay a particular copayment amount, while the same drug purchase from a mail-order pharmacy involves a smaller copayment on the part of the purchaser. Alternatively, purchasers of prescription drugs receive larger percentage discounts on drug purchases under some benefit plans if they purchase those drugs from a mail-order pharmacy. In many cases, these special payment plans are apparently the result of contractual arrangements between the companies providing health care benefits and the mail-order pharmacies. LB 718 would prohibit these special purchase prices, and require that all pharmacies be subject to the same copayment or other reimbursement arrangements. You are concerned that the potential impact of this provision on interstate commerce would violate the Commerce Clause.

Op. Att'y Gen. No. 93029 (April 19, 1993) contains an extensive discussion of the requirements of the Commerce Clause of the United States Constitution, and we will not repeat that discussion here except to note that the United States Supreme Court has defined the Commerce Clause restraints applicable to state regulation using a two-tiered approach: (1) a per se rule of invalidity, and (2) a balancing approach. ***Brown-Forman Distillers Corp. v. New York State Liquor***, 476 U.S. 573 (1986). When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, the Supreme Court has generally struck down the statute without further inquiry. *Id.* In essence, this is a virtual per se rule of invalidity applicable to state laws which involve discriminatory economic protectionism. ***Oregon Waste Systems,Inc. v. Department of Environmental Quality of the State of Oregon***, Nos. 93-70 and 93-108 (U.S. April 4, 1994). On the other hand, when a state statute has only indirect effects on interstate commerce and regulates evenhandedly, the Supreme Court has examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits to the state. ***Brown-Forman Distillers Corp v. New york State Liquor, supra.*** This test involves a lesser degree of scrutiny than the per se test. The Supreme Court has also recognized that there is no clear line separating the per se category of restraints from those involving the balancing regimen. *Id.* In either case, the critical consideration is the overall

effect of the state statute on both local and interstate activity. *Id.*

In the present instance, we do not believe that LB 718 involves direct regulation of or direct discrimination against interstate commerce. This is not a situation, for example, where the state would place direct licensing requirements or direct fee requirements on out-of-state businesses which were inapplicable to in-state businesses. Nor does this situation, on the face of the bill, involve an instance where out-of-state businesses are denied opportunities granted to in-state entities purely on the basis of their location. In fact, the basic distinction drawn by LB 718 is not between interstate versus intrastate commerce. Instead, the distinction is between mail-order pharmacies versus other pharmacies. In that regard, there could be mail order pharmacies which are located in Nebraska which might be adversely impacted by this bill. Conversely, there are certainly local pharmacies in Nebraska operated by large corporations extensively involved in interstate commerce which are not mail-order operations and which might be benefited by this bill. As a result, we also do not believe that the effect of this bill is necessarily to favor in-state economic interests over out-of-state interests.

On this basis, it appears to us that LB 718 is not subject to the per se rule of invalidity discussed above. Rather, it must be tested under the less rigorous balancing approach created by the Supreme Court.

The test for the balancing approach created by the Supreme Court is set out in ***Pike v. Bruce Church***, 397 U.S. 137, (1970):

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. The extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Id. at 142.

There are certainly economic interests underlying LB 718, and the bill is obviously intended, in part, to place local pharmacies in even competition with mail-order pharmacies. However, proponents of the bill have also outlined other public policies underlying the provisions of the bill. ***See Committee Records on***

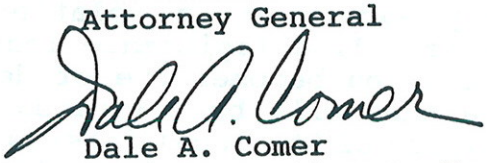
LB 718, 93rd Neb. Leg., 1st Sess. 12-15 (March 16, 1993). For example, local pharmacies can provide important counseling services for consumers of prescription drugs which may not be available to the same degree from mail-order pharmacies. In addition, local pharmacies may be better able to monitor all the prescriptions of a particular individual for improper drug interactions than are mail-order pharmacies which might see only a portion of the individual's drug usage. These public policies support the state's interest in encouraging the use of local pharmacies through legislation which would require local pharmacies and mail-order pharmacies to compete at the same level. These public policies also create at least some legitimate local purpose in the context of the ***Bruce Church*** test.

We also believe that it could be argued that LB 718 would regulate pharmacies evenhandedly in that it would create no pricing advantage for local pharmacies, but simply require that they be treated the same as mail-order pharmacies. Moreover, the effect of the bill on interstate commerce would be incidental since, as noted above, the focus of the bill is really on the local versus mail-order distinction rather than on the intrastate versus interstate aspects of the drug sale. Finally, there does not appear to be any other immediate way to promote the same public policy concerns with legislation which has less impact on interstate commerce.

Since there appears to be some legitimate public purpose for LB 718 apart from simple economic concerns, and since the bill appears to be evenhanded and of only incidental effect on interstate commerce, we do not believe that the bill is clearly unconstitutional under the Commerce Clause to the United States Constitution.

Sincerely yours,

DON STENBERG
Attorney General



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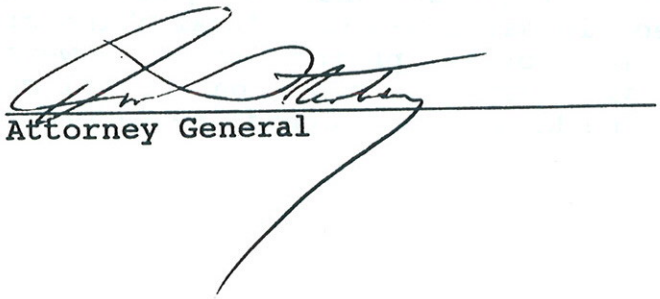

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