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PHARMACY OWNERSHIP RESTRICTIONS - SUMMARY OF LITIGATION CHALLENGING THE RESTRICTIONS

In 1963 the Legislative Assembly adopted legislation that provided that an applicant for a permit to operate a pharmacy must be a registered pharmacist or a partnership, each active member of which is a registered pharmacist, or a corporation or association, the majority of stock of which is owned by registered pharmacists actively and regularly employed and responsible for the management, supervision, and operation of the pharmacy. The legislation included an exception for the holder of a permit on July 1, 1963, if otherwise qualified to conduct the pharmacy, for so long as the permitholder continues operations and renews the permit. The legislation also included an exception for hospital pharmacies furnishing service only to patients in the hospital. The legislation, which was codified as North Dakota Century Code (NDCC) Section 43-15-35, faced a constitutional challenge that was ultimately decided by the United States Supreme Court in 1973, and another legal challenge in 1996-97.

In 1971 Snyder's Drug applied for a permit to operate a pharmacy in a portion of a Red Owl store in Bismarck. The State Board of Pharmacy denied the permit because the existing facilities of the applicant did not meet the standards required by the board and because the applicant failed to comply with NDCC Section 43-15-35(5) which required that the majority of the applicant's 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. Snyder's Drug appealed the decision of the board to the district court arguing that Section 43-15-35 was unconstitutional in that it violated the equal protection and the due process clauses of the 14th Amendment to the United States Constitution and Sections 11 and 20 of the Constitution of North Dakota.

The district court granted summary judgment in favor of Snyder's Drug, concluding that NDCC Section 43-15-35 violated the equal protection and the due process clauses of Section 1 of the 14th Amendment to the United States Constitution and Sections 11 and 20 of the Constitution of North Dakota. The State Board of Pharmacy appealed the decision of the district court to the North Dakota Supreme Court.

In *Snyder's Drug Stores, Inc. v. North Dakota State Bd. of Pharmacy*, 202 N.W.2d 140 (N.D. 1972), the North Dakota Supreme Court affirmed the district court decision as it related to the unconstitutionality of NDCC Section 43-15-35 under the due process clause of the 14th Amendment to the United States Constitution. In making its decision, the North Dakota Supreme Court relied upon a 1928 decision of the United States Supreme Court. In that case, the

United States Supreme Court held that a Pennsylvania law that required that a pharmacy be 100 percent owned by pharmacists was unconstitutional. The United States Supreme Court determined that a state may not "under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them" in *Liggett Co. v. Baldridge*, 278 U.S. 105 (1928).

The State Board of Pharmacy appealed the decision of the North Dakota Supreme Court to the United States Supreme Court. In *North Dakota Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156 (1973), the United States Supreme Court overruled the *Liggett* decision and reversed the decision of the North Dakota Supreme Court. The case was then remanded back to the North Dakota Supreme Court.

Upon remand, the North Dakota Supreme Court upheld the constitutionality of the law in *Snyder's Drug Stores, Inc. v. North Dakota State Bd. of Pharmacy*, 219 N.W.2d 140 (N.D. 1974). The North Dakota Supreme Court determined that the reasons given in support of the ownership law were reasonable. Among the reasons given in support of the 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.
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.

The pharmacy ownership law was challenged again in the mid-1990s. In 1996 Medcenter One decided to expand its pharmacy at the hospital to make pharmacy sales to the general public. The State Board of Pharmacy, through its legal counsel, informed Medcenter One that 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." The opinion of the board's legal counsel concluded that "[b]efore July 1, 1963, there were two type[s] of pharmacy permits for two types of pharmacy practice, one for hospitals serving 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." Although the Bismarck Hospital Pharmacy was the beneficiary of the hospital exemption because that was the type of pharmacy practice it was engaged in on July 1, 1963, the opinion

concluded 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."

Medcenter One sought and received a declaratory judgment from the district court which concluded that the unambiguous language of NDCC Section 43-15-35 did not differentiate between hospital and retail pharmacy permits and held that Medcenter One, as the continuous holder of a permit since before 1963, was exempt from the pharmacist-ownership requirements. The North Dakota Supreme Court affirmed the decision in *Medcenter One v. North Dakota State Bd. of Pharmacy*, 561 N.W.2d 634 (N.D. 1997). The North Dakota Supreme Court stated that Section 43-15-35 clearly and unambiguously describes two exemptions to the pharmacist-ownership requirements. The first exemption is for pharmacies that held permits on July 1, 1963, and have not discontinued operations or failed to renew their permit. The court concluded the plain language of that exemption applies to all pharmacy permitholders on that date, not just retail or nonhospital pharmacies. The second exemption applies to hospital pharmacies furnishing service only to patients in the hospital. The court concluded if the Legislative Assembly had intended the first exemption only to apply to retail or nonhospital pharmacies, it would have limited that exemption with appropriate language.