Talking Points on Recent Minnesota Price Gouging Bill

The bill seeks to outlaw the imposition of "an excessive price increase, whether directly or through a wholesale distributor, pharmacy, or similar intermediary, on the sale of any generic or off-patent drug sold, dispensed, or delivered to any consumer in the state."

- It caps price increases per annum at either 15% of the previous year's price, 40% of the three-year-average price, or $30, whichever is lower.
- But liability for is effectively limited to manufacturers: "It is not a violation of this section for a wholesale distributor or pharmacy to increase the price of a generic or off-patent drug if the price increase is directly attributable to additional costs for the drug imposed on the wholesale distributor or pharmacy by the manufacturer of the drug."
- The bill empowers the Attorney General not only to request an injunction to conform prices to this cap, but also to seek a court order "requiring the manufacturer to provide an accounting to the attorney general of all revenues resulting from a violation of" the excessive-price-increase statute and "imposing a civil penalty of up to $10,000 per day for each violation," with each and "every individual transaction" being "considered a separate violation."
- The bill further prohibits "manufacturer[s] of a generic or off-patent drug … from withdrawing that drug from sale or distribution within this state for the purpose of avoiding the prohibition on excessive price increases," and authorizes the Attorney General to "assess a penalty of $500,000 on any manufacturer of a generic or off-patent drug that it determines has failed to comply with th[at] requirement[ ]."

For this reason, as detailed below, the bill **violates the Dormant Commerce Clause**.

- **The bill regulates sales outside of Minnesota.**
  - By affirmatively attempting to exempt (predominantly in-state) pharmacies and wholesalers from liability for passing on price increases from drug manufacturers, the bill **has the practical effect of directly regulating out-of-state transactions** by penalizing price increases made between manufacturers and wholesalers, wherever they occur, instead of regulating transactions that occur in Minnesota.
  - The Commerce Clause is violated whenever a state law "regulate[s] the price of any out-of-state transaction, either by its express terms or by its inevitable effect." *Pharma. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 669 (2003).
  - Here, the bill constructively regulates the out-of-state prices charged to wholesalers; because wholesalers are exempt from liability, they have no incentive not to pass on price increases they pay to consumers, which then triggers manufacturer liability upstream. In short, the out-of-state transactions between manufacturers and wholesalers is inevitably directly regulated by the new law.
  - And it burdens interstate commerce, by imposing Minnesota price regulation on drugs sold nationwide. See *McBurney v. Young*, 569 U.S. 221, 235 (2013).

- **The bill is directly contrary to the Fourth Circuit's decision in AAM v. Frosh.**
  - The Fourth Circuit struck down similar legislation in *Association for Accessible Medicines v. Frosh*, 887 F.3d 664 (4th Cir. 2018).
  - Indeed, the two laws are virtually identical:
    i. Just like this bill, which prohibits "excessive price increase[s]" for generic and off-patent prescription drugs, Maryland H.B. 631 prohibited "excessive" "increase[s] in the price of" generic and off-patent prescription drugs.
    ii. Just like this bill, which exempts wholesalers and retailers from liability when a price increase was attributable to an increase from a manufacturer, Maryland H.B. 631 exempted wholesalers from liability "if the price increase [was] directly attributable to additional costs … imposed on the wholesale distributor by the manufacturer," and it did not apply to retailers at all.
    iii. Just like this bill, which applies only to drugs "sold, dispensed or delivered to any consumer in the state," Maryland H.B. 631 applied only to drugs that were "available for sale" in the State of Maryland.
    iv. But just like this bill, which reaches and regulates sales outside of Delaware whenever they are upstream of consumer sales in Minnesota, Maryland H.B. 631 reached and regulated out-of-state upstream sales.
  - The "practical effect" of the new law will thus be exactly the same as the unconstitutional practical effect of Maryland's law—namely, "to specify the price at which goods may be sold beyond [the State's] borders." *Frosh*, 887 F.3d at 673.
  - That is a per se violation of the Dormant Commerce Clause.
  - The Supreme Court has held for almost a century that no state may "project its legislation into [another state] by regulating the price to be paid in that state," even when the goods sold in that out-of-state transaction are destined for resale in the state. *Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. 511, 521 (1935).
  - The Eighth Circuit has held the same. See, *e.g., North Dakota v. Heydinger*, 825 F.3d 912, 921-22 (8th Cir. 2016) (invalidating Minnesota laws that "seek to reduce emissions that occur outside Minnesota by prohibiting transactions that originate outside Minnesota," because "their practical effect is to control activities taking place wholly outside Minnesota"); *Cotto Waxo Co. v. Williams*, 46 F.3d 790, 793 (8th Cir. 1995) ("Under the Commerce Clause, a state regulation is per se invalid when it has an 'extraterritorial reach,' that is, when the statute has the practical effect of controlling conduct beyond the boundaries of the state.")
  - The courts have also held that a state cannot regulate the prices charged in out-of-state transactions just because those transactions will have an impact on the prices charged in in-state transactions. See *Baldwin*, 294 U.S. at 521-23.
- **The bill's purported "fix" does not solve anything.**
  - The main difference between this bill and Maryland H.B. 631 is that this bill requires "[a]ny manufacturer that sells, distributes, delivers, or offers for sale any generic or off-patent drug in the state … to maintain a registered agent and office within the state."
  - **That does not solve anything**. Nothing in Frosh turned on whether or to what extent the regulated manufacturers had an in-state presence, and nothing in the Supreme Court's extraterritoriality decisions do either.
  - **The constitutional problem is not the connection to in-state transactions; the problem is the regulation of out-of-state upstream transactions.**
  - The problem with Maryland H.B. 631 was that it necessarily regulated "**the upstream pricing and sale of prescription drugs**" outside of Maryland. *Frosh*, 887 F.3d at 671. "This [the State] cannot do." Id. at 672.
  - The same is true here. Just like the Maryland law, this bill penalizes manufacturers for the prices they charge their distributors in sales that take place out of state whenever the drugs sold in those transactions wind up being resold in the state.
  - **The Minnesota can only regulate prices charged to *Minnesotans***, not prices charged out of state in wholesale transactions that are upstream of in-state sales to individuals. Because this new bill does the latter, it is unconstitutional.