

MINUTES
HOUSE HEALTH & WELFARE COMMITTEE

DATE: Thursday, February 26, 2015

TIME: 8:00 A.M.

PLACE: Room EW20

MEMBERS: Chairman Wood, Vice Chairman Packer, Representatives Hixon, Perry, Romrell, Vander Woude, Beyeler, Redman, Troy, Rusche, Chew

**ABSENT/
EXCUSED:** Representative Hixon

GUESTS: Nancy Kerr, IDBOM; Shawn Sorenson and Dr. Randy Andregg, Kris Ellis, and Dr. Jennifer Holman, Idaho Optometric Physicians; Eric Helms, Jeff Buel, and Dr. Carol Alexander, Johnson & Johnson; Chase Everton and Jay Maguiry, 1 800 Contacts; John Watts, Northwest Grocery Assn.; Pam Eaton, Idaho Retailers Assn.; Don Stecher, ALCON; Susie Pouliot, ID Med. Assn.

Chairman Wood called the meeting to order at 8:01 a.m.

H 149: **Rep. Kelley Packer**, District 28, presented **H 149**, a protection against unilateral pricing policies (UPP) recently implemented by all four major contact lens manufacturers. Contact lens prescriptions specify the brand and cannot be legally changed. This legislation protects the consumers by prohibiting contact lens manufacturers fixing of retail prices.

MOTION: **Rep. Redman** made a motion to send **H 149** to the floor with a **DO PASS** recommendation.

Shawn Sorenson, Doctor of Optometry, Eagle, Idaho, President-Elect, Idaho Optometric Physicians, testified **in opposition** to **H 149**, stating contact lenses require a current and valid prescription, which can be released to a patient or chosen retailer for purchase wherever the consumer wishes. Proper fit and care avoids serious illnesses and is a result of the patient/physician relationship, which includes the discussion of the lens cost. Online purchases without a valid prescription and a substituted product cause a variety of issues, including long-term state health costs. Retailers can base product choice on their profit margin, diverting the doctor's intent, as discussed with the patient.

Answering questions, **Dr. Sorenson** said retailers are to dispense prescriptions as written, including the brand. Discrepancies are reported to the American Optometric Association and the state board. With patient health a top priority, prescriptions are not renewed without seeing the issuing physician. The UPP pricing has not impacted his practice.

Eric Helms, Senior Manager, Johnson & Johnson Vision Care, testified **in opposition** to **H 149**, stating UPP has reduced consumer costs and was only implemented on existing, price-established brands. UPP is usually used for new products, so this approach and results have differed from the "norm." Online increased costs result from shipping costs. This legislation violates the Dormant Commerce Clause that says a state law is preempted when it conflicts with a federal law. Idaho cannot regulate commerce outside the state, which is the case with these manufacturers, whose headquarters are in other states. UPP is legal in every other economic segment and is reducing contact lens prices.

Answering questions, **Mr. Helms** explained the UPP is a manufacturer's statement of the minimum price for their product. It has been confirmed as a legal policy since 1919. In their case, it was used, along with rebate removal, to successfully decrease prices. They do not use retailer contracts. Retailers selling below their minimum price would not be given product. This is a competitive marketplace with multiple large and small contact lens manufacturers and thousands of products.

UPP protects brand equity while introducing and supporting new and existing product. In order to impact consumer prices, wholesale prices were lowered, the price minimum was implemented, rebates were removed, and pricing marketing was removed.

The four main manufacturers provide over 90% of the U.S. contact lens volume. Other manufacturer brands offer specialty lenses. All four manufacturers implemented the pricing policy. Less than half the contact lens marketplace is covered by the UPP. Johnson & Johnson was not represented in the settlement conversations.

Dr. Carol Alexander, Optometrist, Director, Medical Affairs, VISTAKON, a Division of Johnson & Johnson Vision Care, Inc., testified **in opposition** to **H 149**. Their decision to pursue UPP has lowered prices and improved doctor/patient practices. To single out one product and suggest the pricing policy is not permissible is contrary to business practices. The Federal Drug Administration (FDA) lists contact lenses as a Class 2 or Class 3 medical device because they carry a moderate medical risk. The sponsors of this legislation want intervention in a business decision to the advantage of their business model, making them the top choice in the marketplace. Answering a question, Dr. Alexander said two Supreme Court decisions, Colgate (1919) and Leegin (2007), supported UPP for U.S. manufacturers.

Dr. Randy Andregg, Retired Optometrist, Idaho Citizen, Executive Director, Optometric Physicians Association, testified **in opposition** to **H 149**. Unlike medical prescriptions, contact lens prescriptions do not have a strong regulatory body, although the Fairness Consumer Act and Rule have helped. Complaints are now surfacing about online retailers switching prescribed products. The intricate fitting process culminates in a prescription that must use the defined brand.

Answering questions, **Dr. Andregg** said their only complaint reporting option is the State Board of Optometry. With a minimal budget and staff, the Board is not equipped to protect the consumer in this area. The prescription detail includes an expiration date, which, when ignored, puts patient eye health at risk. He expressed concern that pricing in **H 149** was being put ahead of the safety issues.

John Watts, Veritas Advisors, Northwest Grocery Association, testified **in support** of **H 149**. He said their retail members offer optical services. The dictated retail prices are artificially high, determine consumer choice, and are harmful.

Jay Maguiry, 1-800-Contacts, Government Relations, testified **in support** of **H 149**. The previous anti-competitive action against the same participants had a settlement that expired in 2007. That settlement language is in **H 149**, which will not expire. The 2003 Fairness to Contact Lens Consumers Act (FCLCA) established what is in a prescription, with no seller alteration allowed. The Federal Trade Commission (FTC) is the enforcement agency, there is an \$11,000 per occurrence violation fine, and a complaint phone number.

Purchasing annual amounts at one time is the healthiest way to assure patients change their lenses. However, the new pricing has significantly increased the cost of this type of purchase. Vision insurance covers a fixed amount, so the increase comes out of the consumer's pocket.

A UPP, although legal in 2007 with the Leegin case, has the stipulation that it must be proven under the rule of reason. Legality triggers would be a concentrated marketplace and contagion with major vendors following suit. Europe and China have banned UPP and this has been the U.S. law of the land for ten years.

Kris Ellis, on behalf of the Idaho Optometric Physicians Association, testified **in opposition** to **H 149**, stating the Board oversees optometrists and has a \$55,000 budget. This legislation would make them the enforcing body and have to pursue the manufacturers outside the state. The members would not be able to support the legal costs.

Brett Delange, Deputy Attorney General, Attorney General's Office, was invited to answer a question. In the 2007 case, Idaho joined other states in a lawsuit against Johnson & Johnson, Bausche & Lomb, and other manufacturers alleging that the agreements and practices they were engaging in were suppressing competition and violating the contact lens anti trust laws. The case ultimately settled. If the Attorney General's office pursues litigation or legal concerns, the agency is not billed.

Brian Kane, Attorney General's Office, was invited to answer a question. He declared a conflict since his father-in-law is an optometrist. Answering the question, **Mr. Kane** stated there is no fee if statute assigns the legal pursuit as a duty of the Attorney General. If any suit is optional, with the board determination to select the Attorney General, then there may be associated fees.

Pam Eaton, President, Idaho Retailers Association, testified **in support** of **H 149**. She said retailers don't like to be told what price to sell something and want the free market on every item. Price fixing usually harms businesses and consumers. This is not a patient safety issue. If something illegal is happening with filling prescriptions, it will continue, whether this bill is passed or not.

For the record, no one else indicated their desire to testify.

Answering a question, **Kris Ellis** said the fact that the Board of Optometry will not have to enforce this legislation is comforting. Their concerns remain strong about patient safety.

Rep. Redman, Rep. Beyeler and **Rep. Perry** commented **in support** of **H 149**, stating a UPP is profit maximizing when the competitive forces are strong, allowing control over pricing by limiting the autonomy of other businesses. With four manufacturers setting the pricing, concerns about monopolization arise. If this legislation passes and the manufacturers then refuse to do business with Idaho retailers, an anti trust case may be appropriate.

VOTE ON MOTION:

Chairman Wood called for a vote on the motion to send **H 149** to the floor with a **DO PASS** recommendation. **Motion carried by voice vote. Rep. Packer** will sponsor the bill on the floor.

H 150:

Rep. John Rusche, District 6, presented **H 150**, legislation to provide comprehensive but expedited medically licensed procedure while preserving the autonomy of the state boards.

Nancy Kerr, Executive Director, Board of Medicine (BOM), further presented **H 150**. A compact is a contract between states and includes an oversight body or commission. The BOM currently participates in 26 compacts. With changing health care that includes telehealth services, the use of physicians across state boundaries requires licensure in more than one state. Through telehealth conferencing, a critical physician in Chicago can help a patient in rural Idaho, improving our statewide healthcare system. Additionally, there is a federal government push to tie federal programs to federal licensure and this compact helps states retain their authority.

Participation is voluntary and does not override state licensure regulations. It affirms healthcare occurs where the patient is located and complies with all state statutes. Disciplinary information is shared between state boards and allows license revocation by any member state.

When applying, the original licensure state would vet the physician, which would shorten the remaining application steps considerably. Fees would go to the commission, who would then send them to the compact states. Each state would then issue a state license. The commission establishes and shares database information. Investigations are pursued in a joint manner, including subpoena issuance. Boards retain licensing authority, while the commission coordinates education and training. Each state will have two votes in the commission. The commission's budget is not envisioned to be substantial, with possible initial funding grants added to user fees. Each state board retains license fee rights.

The compact is voluntary and does not apply to anyone not seeking licensure through the compact. States can repeal the compact at any time, still retaining licenses. The compact defines only eligibility, not what the state has already defined as a physician.

The benefits include telemedicine, locum tenens coverage for small rural hospitals, and specialty coverage, especially for mental health and rural health care. It allows physicians to practice right away, since the original state is vetting them. The initial states participating in the compact will establish the rules and fees.

Answering a question, **Ms. Kerr** said a physician applying for license completes the application and awaits the background check before they can practice. Vetting provides this information to other states, foregoing the additional waiting time that would occur if applying directly to other states.

MOTION: **Vice Chairman Packer** made a motion to send **H 150** to the floor with a **DO PASS** recommendation.

Chairman Wood commented **in support** of **H 150**. Rural hospitals struggle to fill locum tenens needs. This prevents national licensure, fits into the State Healthcare Innovation Plan (SHIP), and works well with telehealthcare.

Susie Pouliot, Chief Executive Officer, Idaho Medical Association, testified **in support** of **H 150**.

For the record, no one else indicated their desire to testify.

VOTE ON MOTION: **Chairman Wood** called for a vote on the motion to send **H 150** to the floor with a **DO PASS** recommendation. **Motion carried by voice vote.** **Rep. Rusche** and **Chairman Wood** will sponsor the bill on the floor.

ADJOURN: There being no further business to come before the committee, the meeting was adjourned at 10:19 a.m.

Representative Wood
Chair

Irene Moore
Secretary