

IN THE WAR ON PRESCRIPTION DRUG ABUSE, E-PHARMACIES ARE MAKING DOCTOR SHOPPING IRRELEVANT

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I. INTRODUCTION

A few years ago, headlines proclaimed the news that prosecutors were charging a well-known conservative talk-show host with

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“doctor shopping” to obtain unnecessary prescription drugs.¹ During the first few weeks of December 2003, media outlets competed to get out the story and inform the nation about the ins-and-outs of the alleged crime.² This news raised serious questions regarding the war on drugs and exemplified a “disturbing trend in the nation’s battle against drug abuse.”³ The war on drugs is no longer confined to those “illegal” substances such as cocaine, heroin, and ecstasy, but now includes legal prescription medications.⁴

The abuse of prescription drugs is a serious public health issue and the increasing diversion of prescription drugs for illegal use is causing concern among government officials.⁵ Experts claim that the continued non-medical use of these drugs can lead to addiction, which is “characterized by compulsive drug seeking.”⁶ As abuse of prescription drugs increases, more patients desperately try to get their hands on these drugs.⁷ Prescription drug addiction and desperation lead more and more patients to seek their drugs from Internet pharmacies.⁸

Government agencies such as the Drug Enforcement Agency (DEA), the Food and Drug Administration (FDA), and state pharmaceutical boards have long been concerned with the increase in

¹ Associated Press, *Prosecutors: Limbaugh Went ‘Doctor Shopping’*, FOX NEWS, Dec. 5, 2003, available at <http://www.foxnews.com/story/0,2933,104845,00.html> [hereinafter *Limbaugh Went ‘Doctor Shopping’*].

² *Id.*

³ U.S. GEN. ACCT. OFF., *PRESCRIPTION DRUGS: STATE MONITORING PROGRAMS MAY HELP TO REDUCE ILLEGAL DIVERSION* (2004), available at www.gao.gov/cgi-bin/getrpt?GAO-04-524T [hereinafter *GAO PRESCRIPTION DRUGS*].

⁴ StoptheDrugWar.org, *The 2004 Federal Drug Strategy: Drug Czar Makes It Official—It’s War on Pain Patients, Doctors*, <http://stopthedrugwar.org/chronicle/327/budgetpain.shtml> (last visited Dec. 29, 2006).

⁵ Michelle Meadows, *Prescription Drug Use and Abuse*, FDA CONSUMER MAG., Sept. 1, 2001, at 18–24 (stating that in 1999 approximately 9 million Americans used prescription drugs for non-medical purposes); see *GAO PRESCRIPTION DRUGS*, *supra* note 3 (noting that the diversion of prescription drugs is increasing).

⁶ NAT’L INST. ON DRUG ABUSE, U.S. DEP’T OF HEALTH & HUMAN SERVS., *INFOFACTS: PRESCRIPTION PAIN AND OTHER MEDICATIONS* (Feb. 2005), www.drugabuse.gov [hereinafter *PRESCRIPTION PAIN INFOFACTS*].

⁷ See generally *GAO PRESCRIPTION DRUGS*, *supra* note 3; *PRESCRIPTION PAIN INFOFACTS* *supra* note 6; NAT’L DRUG INTELLIGENCE CTR., *DIVERSION-PHARMACEUTICALS DRUG THREAT ASSESSMENT* (Nov. 2004), available at <http://www.usdoj.gov/ndic/pubs11/11449/diversion.htm> [hereinafter *DRUG THREAT ASSESSMENT*].

⁸ See generally *GAO PRESCRIPTION DRUGS*, *supra* note 3; *PRESCRIPTION PAIN INFOFACTS*, *supra* note 6; *DRUG THREAT ASSESSMENT*, *supra* note 7.

the abuse of prescription drug medications.⁹ These agencies are responsible for the enforcement of the Controlled Substances Act, the Food, Drug and Cosmetic Act, and the monitoring of pharmacies.¹⁰ For the most part, regulation laws and enforcement measures have been directed toward brick-and-mortar pharmacies, not Internet pharmacies.¹¹

But consumer purchases over the Internet have increased dramatically over the past ten years.¹² In the fourth quarter of 2004 more than seventeen million Americans visited Internet pharmacy websites, a fourteen percent increase from the previous year.¹³ These websites are visited for a variety of reasons, including ease of access, convenience, and to divert prescription medications.¹⁴ Consumers seem to believe that the advantages of e-pharmacies outweigh the risk of illegally obtaining these medications.¹⁵ Ease of access makes the Internet a prime marketplace for the diversion of prescription drugs.¹⁶ Although e-pharmacies offer many advantages, there must be new regulations to curb this upward trend of prescription drug abuse.¹⁷

Most pharmaceutical regulations were written long before e-pharmacies began forming.¹⁸ For this reason there are serious gaps

⁹ Kent Durning, *No Pain No Gain?! Who Will Make the Greatest Sacrifices in Curbing Opioid Analgesic Diversion and Abuse?*, 93 Ky. L.J. 199, 208–22 (2004–2005).

¹⁰ *Id.* at 208–14.

¹¹ Laura Petrecca, *No Prescription? No Problem* (Jan. 1, 2004), <http://cma6.prevention.com:806/article/0,5778,s1-1-63-63-3591-9,00.html> (claiming many state and medical board laws do not address e-pharmacies because they were written before the conception of the Internet); see generally Patrick J. Egan, *Internet Pharmacy: Gray Area with Big Profit and High Risks*, 29-DEC CHAMPION 32 (2005) (noting that the DEA and FDA are using old statutes to regulate Internet pharmacies).

¹² *Point, Click, Self-Medicat: A Review of Consumer Safeguards on Internet Pharmacy Sites: Hearing Before the H. Comm. on Gov't Reform*, 108th Cong. 1 (2003) (statement of Tom Davis, Chairman) [hereinafter *Gov't Reform Hearings*].

¹³ Press Release, *comScore Networks Releases Analysis of Consumer Perspective on Online Pharmacies*, COMSCORE NETWORKS (April 4, 2005), available at <http://www.comscore.com/press/release.asp?press=571> [hereinafter *comScore Press Release*].

¹⁴ See *id.* (arguing that consumers utilize internet pharmacies because of their convenience and low cost); DRUG THREAT ASSESSMENT, *supra* note 7 (stating that pharmaceutical diversion via the internet is increasing).

¹⁵ See *id.*

¹⁶ *Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Commerce*, 106th Cong. (1999), available at <http://www.fda.gov/ola/drugsonline.html> (statement by Janet Woodcock, M.D., Director, Center for Drug Evaluation and Research, U.S. Food and Drug Admin.) [hereinafter *Commerce Hearings*].

¹⁷ *Id.*

¹⁸ See generally *id.*

in legislation regulating Internet pharmacies and prescription drugs obtained via the Internet.¹⁹ The United States Congress has been slow to address the Internet pharmacy problem and has not yet amended current drug laws to address the diversion of prescription drugs through the Internet.²⁰

This comment addresses the prescription drug abuse problem as it relates to e-pharmacies. Part II discusses the problem of prescription drug abuse and the primary method used by addicts to obtain their drugs. Part III analyzes e-pharmacies and the diversion of prescription medications. Additionally, this part focuses on how e-pharmacies compound the problem of prescription drug abuse. Part IV discusses current and proposed legislation and includes recommendations.

II. PRESCRIPTION DRUG ABUSE

Prescription drug abuse is a serious public health issue that is trending upward and showing no signs of slowing.²¹ It is estimated that forty-eight million Americans (approximately twenty percent) have used prescription drugs for purposes other than those prescribed and that nine million currently abuse prescription drugs.²² The most common types of drugs abused are opiates (typically used to treat pain), central nervous system (CNS) depressants (used for anxiety and sleep disorders), and stimulants (commonly used to treat attention deficit disorder).²³ Many drug abusers either began taking prescription meds for legitimate health reasons and became dependent upon them, or believe that their continued use is required long after their physician has stopped prescribing the drug.²⁴ Still others have obtained pills from friends or associates in an attempt to self-medicate for emotional and physical conditions.²⁵ Ad-

¹⁹ See generally *id.*

²⁰ Egan, *supra* note 11, at 34.

²¹ GAO PRESCRIPTION DRUGS, *supra* note 3; DRUG THREAT ASSESSMENT, *supra* note 7; see NAT'L INST. ON DRUG ABUSE, U.S. DEP'T OF HEALTH & HUMAN SERVS., RESEARCH REPORT SERIES: PRESCRIPTION DRUGS ABUSE AND ADDICTION (Aug. 2005), <http://www.drugabuse.gov/ResearchReports/Prescription/Prescription.html> [hereinafter PRESCRIPTION DRUG ABUSE & ADDICTION].

²² Alexandra Marks, *Steep Rise in Abuse of Legal Drugs*, CHRISTIAN SCI. MONITOR, Oct. 1, 2003 at 1; see PRESCRIPTION DRUG ABUSE & ADDICTION, *supra* note 21.

²³ See PRESCRIPTION PAIN INFOFACTS, *supra* note 6.

²⁴ Amy Harmon, *Young, Assured and Playing Pharmacist to Friends*, N.Y. TIMES, Nov. 16, 2005, at A1. See generally Marks, *supra* note 22.

²⁵ Harmon, *supra* note 24, at A1.

ditionally, there are abusers who obtain the drugs for recreational use, and illegal substance abusers who have switched to prescription meds (“pills”) because of the ease in obtaining them.²⁶ Despite the reason for their abuse, authorities are disturbed by this trend, especially the increasing number of youth who are using pills recreationally.²⁷ The numbers are so staggering that some experts are calling prescription drug abuse a “national epidemic” in which Americans are misusing painkillers, sedatives, and stimulants.²⁸

Continued use of prescription meds can lead to addiction that is characterized by “compulsive drug seeking.”²⁹ Traditionally, addicts obtain their pills through doctor shopping.³⁰ To fully understand what is involved in doctor shopping, it is necessary to define the phenomenon, examine states’ responses, and evaluate individual cases.

A. Doctor Shopping

1. Doctor Shopping Defined

Doctor shopping is a term generated by the addiction and reliance on prescription medications.³¹ It is typically defined as a patient actively seeking doctors who will prescribe certain types of medications, usually opiates, depressants, and stimulants.³² Nearly all legal drugs abused are controlled substances, and as such, re-

²⁶ See Marks, *supra* note 22 (reasoning that theorists contend that the rise in HIV and hepatitis C has prompted illegal drug users to switch to “legal” meds).

²⁷ NAT’L INST. ON DRUG ABUSE, U.S. DEP’T OF HEALTH & HUMAN SERVS., INFOFACTS: HIGH SCHOOL AND YOUTH TRENDS (Mar. 2006), *available at* www.drugabuse.gov [hereinafter YOUTH INFOFACTS] (stating that the annual use of prescription drugs among youth remains at high levels); Marks, *supra* note 22 (noting that three million abusers are youth between the ages of 12 and 17); NAT’L INST. ON DRUG ABUSE, U.S. DEP’T OF HEALTH & HUMAN SERVS., INFOFACTS: NATIONWIDE TRENDS (Sept. 2004), *available at* www.drugabuse.gov [hereinafter NATIONWIDE TRENDS] (claiming prescription opiates appear increasingly in drug indicator data). Authorities are also concerned about the number of deaths that result from the abuse of prescription meds, particularly narcotics. *Id.* (“the number of narcotic analgesic-related death mentions exceeded those for cocaine, heroin/morphine, marijuana, and methamphetamine”).

²⁸ See Marks, *supra* note 22 (additionally, some experts claim that the increase is a dramatic and deadly spike in the abuse of prescription drugs).

²⁹ See PRESCRIPTION PAIN INFOFACTS, *supra* note 6.

³⁰ See Limbaugh Went ‘Doctor Shopping’, *supra* note 1 (reporting that conservative talk show host Rush Limbaugh is charged with doctor shopping for pain pills such as OxyContin).

³¹ Doctor Shopping, WIKIPEDIA, http://en.wikipedia.org/wiki/Doctor_shopping (last visited Mar. 6, 2006).

³² *Id.*

quire a prescription to be dispensed to the general public.³³ Patients who are unable to obtain a prescription from one physician will seek out another physician in an effort to obtain the amount and type of medications they want.³⁴ Doctor shopping ranges anywhere from the very aggressive shopper, who frequents many different doctors, to the casual shopper, who visits different doctors but does so infrequently.³⁵ Once patients receive drugs, they will seek out other physicians to prescribe the same pills, often exaggerating their symptoms or even inventing new ailments.³⁶ The goal in doctor shopping is to obtain the maximum amount of pills without the medical community becoming wise to the scheme.³⁷ In order for the system to work, the addict must frequent different pharmacies because most states require pharmacists to keep records of the controlled substances they dispense.³⁸

The doctor shopping process can take a great deal of time and money.³⁹ Addicts will spend hours in emergency rooms, physicians' offices, and pharmacies seeking prescriptions.⁴⁰ Some patients have spent up to eight hours in a physician's office waiting for a prescription.⁴¹ Generally this type of wait indicates that the doctor has become known for prescribing large amounts of certain types of pills.⁴² Once word gets out that a physician is "pill friendly," every doctor shopper in the vicinity will begin to frequent that doctor.⁴³ Addi-

³³ 21 C.F.R. § 1306.04(a) (2005) (stating that to be effective, a prescription for a controlled substance must be issued for a legitimate purpose); PRESCRIPTION DRUG ABUSE & ADDICTION, *supra* note 21; see *Commerce Hearings*, *supra* note 16.

³⁴ PRESCRIPTION DRUG ABUSE & ADDICTION, *supra* note 21.

³⁵ *Doctor Shopping*, WIKIPEDIA, *supra* note 31.

³⁶ *Id.*

³⁷ *Id.*; PRESCRIPTION DRUG ABUSE & ADDICTION, *supra* note 21. See generally Marks, *supra* note 22.

³⁸ See Durning, *supra* note 9, at 221–22 (discussing state and federal regulations as they relate to dispensing controlled substances).

³⁹ Interview with Susan (name changed for privacy), former prescription drug abuser, in Houston, TX (Feb. 22, 2006) (on file with author) (describing in detail the process of getting prescription drugs including the cost and time involved).

⁴⁰ See generally Todd Dorman, *Dozens of Iowans Practice 'Doctor Shopping'*, QUAD CITY TIMES, Feb. 10, 2006, available at <http://www.qctimes.net/articles/2006/02/10/news/state/doc43ec4722286db714452650.txt>; Interview with Susan, *supra* note 39.

⁴¹ Interview with Susan, *supra* note 39.

⁴² *Id.*; Barry Meier, *OxyContin Prescribers Face Charges in Fatal Overdoses*, N.Y. TIMES, Jan. 19, 2002, at A14.

⁴³ Meier, *supra* note 42, at A14. See generally Ariel Levy, *Pill Culture Pops*, N.Y. MAG. (Jun. 9, 2003), available at http://www.newyorkmetro.com/nymetro/news/features/n_8763/.

tionally, doctor shopping can be expensive.⁴⁴ Because insurance companies keep records of the quantity and frequency of the dispensation of prescription medications, most pill addicts have to pay for their drugs out-of-pocket.⁴⁵ For these reasons, prescription drug abusers are always on the lookout for a more convenient and cheaper alternative to doctor shopping.⁴⁶

2. *State Responses to Prescription Drug Abuse*

Although federal agencies such as the FDA and DEA are somewhat involved in monitoring prescription drugs, traditionally, states have been responsible for regulating the prescribing and dispensing of pharmaceuticals.⁴⁷ States have primarily responded by creating prescription monitoring programs (PMPs) and making it statutorily illegal to engage in the practice of doctor shopping.⁴⁸

A prescription monitoring program collects all data related to the dispensing of prescriptions and stores this data in a central location.⁴⁹ After storage, the data is reviewed and analyzed for “educa-

⁴⁴ *Doctor Shopping*, WIKIPEDIA, *supra* note 31; Dorman, *supra* note 40. See generally Interview with Susan, *supra* note 39.

⁴⁵ *Aging in the Know*, HEALTHINAGING.ORG, http://www.healthinaging.org/agingintheknow/research_content.asp?id=34 (last visited Mar. 5, 2006) (noting that some insurance plans put limits on prescription drug coverage); *Prescription Drugs*, LOS ALAMOS NAT'L LAB., <http://www.lanl.gov/worklife/benefits/health/prescription.shtml> (last visited Mar. 5, 2006) (saying an employer health plan has a prescription drug limitation); INFORMATION FOR CONSUMER GROUPS ABOUT THE NAIC'S MODEL ACT ON PRESCRIPTION DRUG BENEFIT MANAGEMENT, NAT'L ASS'N OF INS. COMM'RS, available at <http://www.npcnow.org/resources/PDFs/NAICPharmRegs.pdf> (advocating disclosure requirements and dosage limits for prescription drugs). See generally Mutual of Omaha, <http://www.mutualofomaha.com/module/faq.phtml> (last visited Mar. 5, 2006) (noting that some prescription medications require prior authorization).

⁴⁶ See generally *Commerce Hearings*, *supra* note 16; Marks, *supra* note 22; StoptheDrugWar.org, *supra* note 4.

⁴⁷ See *Commerce Hearings*, *supra* note 16 (testifying that the FDA has legal authority to take action against the sale/distribution of misbranded and unapproved drugs, the illegal promotion of drugs, the dispensing of drugs without a valid prescription, and counterfeit drugs). The FDA does not regulate the practice of pharmacy or medicine. *Id.*

⁴⁸ DRUG THREAT ASSESSMENT, *supra* note 7; see GAO PRESCRIPTION DRUGS, *supra* note 3, at 5.

⁴⁹ *Prescription Drug Abuse and Diversion: The Role of Prescription Drug Monitoring Programs: Hearing Before the S. Comm. on Health, Education, Labor & Pensions*, 108th Cong. (2004) (statement of Sherry Green, Executive Director, Nat'l Alliance for Model State Drug Laws), available at http://help.senate.gov/Hearings/2004_09_23/green.pdf [hereinafter *Health Committee Hearing*]; THE GOALS OF PRESCRIPTION MONITORING, ALLIANCE OF STATES WITH PRESCRIPTION MONITORING PROGRAMS, 4 NAT'L ASS'N OF STATE CONTROLLED SUBSTANCES AUTH. (Oct. 1999), <http://www.nascsa.org/Alliance/PDF/Goals.PDF> [hereinafter GOALS OF PRESCRIPTION MONITORING].

tional, public health and investigative purposes.”⁵⁰ Information received generally includes the name and address of the person receiving the medication and the dosage amount.⁵¹ The programs, typically run by state agencies, perform three primary functions: data collection, issuing reports to state officials, and spotting trends which help identify diversion and addiction issues.⁵² Prescription monitoring programs (“PMPs”) have proven to be an effective system in identifying and preventing the diversion and abuse of prescription drugs at both the pharmacy and patient levels.⁵³

Two organizations, The Alliance of States with Prescription Monitoring Programs (Alliance) and the National Association of State Controlled Substance Authorities (NASCA), first adopted the Prescription Monitoring Program Model Act as an attempt to integrate the most effective actions taken by states to monitor prescriptions.⁵⁴ The organizations touted PMPs as an efficient way to collect and dispense data obtained through diversion investigations.⁵⁵ Following the suggestions of the NASCA and the Alliance, many states implemented PMPs in an effort to reduce the diversion and abuse of prescription drugs.⁵⁶ In 2005, “the Department of Justice (DOJ) announced awards of more than \$6.2 million to 22 states to support prescription drug monitoring programs.”⁵⁷ The DOJ made the announcement as an inducement to states to establish and enhance PMPs.⁵⁸ Regina B. Schofield, the Assistant Attorney General for the Office of Justice Programs, reiterated the claim that drug diversion

⁵⁰ GOALS OF PRESCRIPTION MONITORING, *supra* note 49; see also *Health Committee Hearing, supra* note 49.

⁵¹ *Health Committee Hearing, supra* note 49.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ ALLIANCE OF STATES WITH PRESCRIPTION MONITORING PROGRAMS & NAT'L ASS'N OF STATE CONTROLLED SUBSTANCES AUTH., BACKGROUND INFORMATION ON THE PRESCRIPTION MONITORING PROGRAM MODEL ACT (Oct. 2002), <http://www.nasca.org/PDF/PMPmodelact02bg.pdf> (stating that the organizations adopted the Act in October 2002 and recommended that states use the Act to establish and update PMPs).

⁵⁵ News Staff, *DOJ Awards \$6 Million for Prescription Drug Monitoring Programs*, GOV'T TECH., Oct. 6, 2005, available at <http://www.govtech.net/news/story.print.php?id=96872>.

⁵⁶ Issue Brief: *Prescription Monitoring Programs*, NAT'L ASS'N OF CHAIN DRUG STORES (Sept. 2004), <http://www.nacds.org>.

⁵⁷ News Staff, *supra* note 55 (reporting that the grants are administered by the Office of Justice Programs' Bureau of Justice Assistance and provided by the Harold Rogers Prescription Drug Monitoring Program that assists states in establishing and enhancing the programs).

⁵⁸ *Id.*

can remain undetected and unreported unless states have PMPs.⁵⁹ Additionally, these programs aid in reducing doctor shopping, which the DOJ claims is a primary way abusers obtain prescriptions illegally.⁶⁰ The government hopes the awards will help states in their efforts to share collected information with neighboring states.⁶¹ By sharing information, states will be able to recognize substance abuse patterns more efficiently and reduce prescription drug traffic among states.⁶²

States have adopted different ways of administering prescription monitoring programs.⁶³ Some states, such as Illinois, have engaged in a system in which data is sent to a central location each time a Schedule II drug is dispensed.⁶⁴ Other PMPs require that pharmacies (and physicians holding a permit to sell controlled substances) report dispensing information for Schedule II prescription drugs twice a month.⁶⁵ The reporting of drug information is not necessarily confined to Schedule II drugs, as some states have included Schedules III, IV, and V.⁶⁶ States also vary in the length of time that

⁵⁹ *Id.*

⁶⁰ See generally *id.*

⁶¹ *Id.* (additionally, a pilot program has been added which allows states to take advantage of information sharing by providing a system that enables states to exchange information between contrasting information systems).

⁶² *Id.* (information sharing with neighboring states enhances PMPs that lower prescriptions and abuse trends).

⁶³ See NAT'L ASS'N OF CHAIN DRUG STORES, *supra* note 56.

⁶⁴ The Controlled Substances Act categorizes drugs and substances into one of five schedules based on their medical use, abuse and addiction potential, and harmfulness. Schedule I includes drugs that have no accepted medical use in the U.S. These are typically "illegal" drugs. Schedule II includes opiates, stimulants, and depressants which are the more commonly abused prescription drugs. Schedule III includes steroids and drugs which contain small quantities of controlled substances such as codeine in combination with noncontrolled ingredients, such as aspirin. Schedule IV includes drugs such as Xanax, Valium, Ativan, and Phentermine. Schedule V is made up of certain cough medicines containing limited amounts of codeine. 21 U.S.C. §§ 801-904 (2005); ILL. ADMIN. CODE tit. 77, § 2080.30 (2002) ("Each time a Schedule II drug is dispensed, the dispenser must transmit specific information to a central repository designated by the department").

⁶⁵ See VA. DEP'T OF HEALTH PROFESSIONS, VIRGINIA PRESCRIPTION MONITORING PROGRAM, http://www.dhp.state.va.us/dhp_programs/pmp/pmp_desc.asp (last visited Mar. 7, 2006) (discussing the provisions of Virginia's prescription monitoring program and expounding on the significant deterrent to doctor shopping provided by the PMP).

⁶⁶ See N.C. GEN. STAT. § 90-113.74 (2005) (requiring reports for Schedules II-V); ME. OFFICE OF SUBSTANCE ABUSE, MAINE'S PRESCRIPTION MONITORING PROGRAM, <http://www.maine.gov/dhhs/bds/osa/data/pmp/> (last visited Mar. 7, 2006) (including Schedules III and IV in the reporting requirement).

collected data may be retained.⁶⁷ Some states, such as Texas, only require that information be kept for one year, whereas states such as Maine and North Carolina maintain prescription records for as long as six years.⁶⁸ Other provisions allow the state to determine retention length on an individual basis.⁶⁹ Despite the differences in states' programs, studies have shown that having some sort of PMP reduces illegitimate prescriptions and helps aid in the fight against doctor shopping and prescription drug abuse.⁷⁰

In addition to prescription monitoring programs, some states have chosen to address doctor shopping by making it criminally actionable.⁷¹ Nearly all fifty states have some sort of statute that prohibits obtaining controlled substances by fraud or deceit.⁷² Authorities have used these statutes as a means to identify prescription drug users who obtain their drugs through deception (or doctor shopping).⁷³ Several states, though, have chosen to address doctor shopping through statutes that specifically refer to the practice.⁷⁴ Two states in particular, Connecticut and Florida, have adopted

⁶⁷ NAT'L ALLIANCE FOR MODEL STATE DRUG LAWS, DATA RETENTION PROVISIONS OF STATE PRESCRIPTION MONITORING PROGRAMS (2006), <http://www.natlalliance.org/pdfs/Data%20Purging%20Requirements%20of%20State%20PMP%20Programs.pdf> (last visited Mar. 7, 2006).

⁶⁸ *Id.*

⁶⁹ *See id.* (stating that in Kentucky, data is preserved for as long as the Cabinet for Health and Family Services deems necessary).

⁷⁰ *See* News Staff, *supra* note 55.

⁷¹ *See generally* TEX. DEP'T OF PUBLIC SAFETY, THE GOALS OF PRESCRIPTION MONITORING PROGRAMS, http://www.txdps.state.tx.us/criminal_law_enforcement/narcotics/pages/goals.htm (last visited Mar. 2005).

⁷² *See id.*; *see also* ALA. CODE § 20-2-72 (2005); CAL. HEALTH & SAFETY CODE § 11173 (West 2006); MICH. COMP. LAWS ANN. § 333.17766 (2006); N.J. STAT. ANN. § 2C:35-13 (2005) (the majority of state laws read, "it is unlawful for any person . . . to acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception or subterfuge").

⁷³ *See* discussion *infra* Part 2.A.3 about doctor shopping cases.

⁷⁴ *See* LA. REV. STAT. ANN. § 40:971 (2005); MD. CODE ANN., CRIM. LAW § 5-601 (West 2006); MASS. GEN. LAWS ANN. CH. 94, § 33 (West 2006); MO. ANN. STAT. § 195.204 (West 2005) (Missouri, along with Maryland, has included a provision which no longer considers information privileged when it is given to a physician to obtain an unlawful prescription); NEB. REV. STAT. § 28-418 (2005); TEX. HEALTH & SAFETY CODE ANN. § 481.129 (Vernon 2005); WASH. REV. CODE ANN. § 69.50.403 (West 2006). *See also* COLO. REV. STAT. ANN. § 12-22-701 (West 2005) (stating specifically that "(1) the general assembly finds, determines, and declares that: (a) prescription drug abuse occurs in this country to an extent that exceeds or rivals the abuse of illicit drugs; (b) prescription drug abuse occurs at times due to the deception of the authorized prescribers where patients seek controlled substances for treatment and the prescriber is without knowledge of the patient's other medical providers and treatments").

laws that clearly define and prohibit the practice of doctor shopping.⁷⁵

Connecticut includes the provision that most states provide (“no person shall obtain . . . a controlled substance . . . by fraud, deceit, misrepresentation or subterfuge . . .”) but adds the additional restriction of “concealment of a material fact.”⁷⁶ The statute also includes the provision, adopted by Maryland and Missouri,⁷⁷ which refuses to deem, as privileged, any information communicated to a practitioner in an effort to procure a controlled substance unlawfully.⁷⁸ The most significant aspect of Connecticut’s law is part (h), which states:

No person who, in the course of treatment, is supplied with controlled substances or a prescription therefore by one practitioner shall, knowingly, without disclosing such fact, accept during such treatment controlled substances or a prescription therefore from another practitioner with intent to obtain a quantity of controlled substances for abuse of such substances.⁷⁹

State courts interpret this provision as applying to prescription drug abusers who are doctor shopping.⁸⁰

Florida also adopted a statute that specifically implicates doctor shopping.⁸¹ The section provides:

It is unlawful for any person: . . . To withhold information from a practitioner from whom the person seeks to obtain a controlled substance or prescription for a controlled substance that the person making the request has received a controlled substance or a prescription for a controlled substance of like therapeutic use from another practitioner within the previous 30 days.⁸²

This language makes clear that it is a violation of the statute to go doctor shopping.⁸³ By adopting this law, Florida has manifested its intent to combat the serious problem of doctor shopping.⁸⁴

⁷⁵ FLA. STAT. § 893.13 (2005); see CONN. GEN. STAT. § 21a-266 (2004).

⁷⁶ CONN. GEN. STAT. § 21a-266(a)(3).

⁷⁷ See discussion *supra* note 74.

⁷⁸ CONN. GEN. STAT. § 21a-266(b).

⁷⁹ *Id.* § 21a-266(h).

⁸⁰ See *State v. Sonntag*, CR 8-116502, 1996 Conn. Super. LEXIS 2886 (Conn. Super. Ct. Sept. 24, 1996) (concerning a defendant who violated § 21a-266(h) when he went doctor shopping).

⁸¹ FLA. STAT. § 893.13(7)(a)(8) (2005).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ See *Limbaugh v. Florida*, 887 So. 2d 387 (Fla. Dist. Ct. App. 2004), discussed *infra* Part 2.A.3 in doctor shopping cases. See generally FLA. STAT. § 893.13(7)(a)(8) (2005); *Limbaugh Went ‘Doctor Shopping,’ supra* note 1.

States have chosen to prevent prescription drug abuse by adopting prescription monitoring programs and enacting doctor shopping statutes.⁸⁵ Despite these actions, prescription drug abuse remains a serious problem.⁸⁶ For this reason, presumably, states began to pursue enforcement of these laws by bringing doctor shopping charges against alleged violators.⁸⁷

3. Doctor Shopping Cases

In efforts to curb the increase of prescription drug abuse, states have begun to investigate the practice of doctor shopping more stringently.⁸⁸ These investigations led to cases in which the alleged drug abuser claimed a violation of rights.⁸⁹ Two recent cases exemplify the willingness of courts to encroach on these rights in order to aid authorities investigating prescription drug abuse and doctor shopping.⁹⁰

In 2004, the state of Ohio brought charges against Chester Kadas for violating a state statute that made it illegal to obtain a dangerous drug through deception.⁹¹ The Bowling Green Police Department began a general investigation of doctor shopping in November 2001.⁹² During the investigation a detective would go to local pharmacies, look through prescriptions for controlled substances, and write down the names that showed up at more than one pharmacy.⁹³ The detective would then go to the pharmacy and request a patient profile.⁹⁴ From that profile, the department created a spreadsheet to compare the patient's prescriptions, doctors, and

⁸⁵ DRUG THREAT ASSESSMENT, *supra* note 7; see GAO PRESCRIPTION DRUGS, *supra* note 3, at 1–5.

⁸⁶ Meadows, *supra* note 5; see GAO PRESCRIPTION DRUGS, *supra* note 3, at 1.

⁸⁷ See generally *Limbaugh*, 887 So. 2d at 387; *Stidham v. Clark*, 74 S.W.3d 719 (Ky. 2002); *State v. Kadas*, 2004 WL 3017307 (Ohio App. 6 Dist. 2004); *State v. Welch*, 624 A.2d 1105 (Vt. 1992).

⁸⁸ See generally *Limbaugh*, 887 So. 2d at 387; *Stidham*, 74 S.W.3d at 719; *Kadas*, 2004 WL 3017307; *Welch*, 624 A.2d at 1105.

⁸⁹ See generally *Limbaugh*, 887 So. 2d at 387; *Stidham*, 74 S.W.3d at 719; *Kadas*, 2004 WL 3017307; *Welch*, 624 A.2d at 1105.

⁹⁰ See *Limbaugh* 887 So. 2d at 387; *Kadas*, 2004 WL 3017307.

⁹¹ *Kadas*, 2004 WL 3017307, at *3.

⁹² *Id.* at *5.

⁹³ *Id.*

⁹⁴ *Id.*

dates.⁹⁵ Investigators used this information to determine if the patient engaged in doctor shopping.⁹⁶

After being charged with doctor shopping, Kadas filed a motion to suppress any and all pharmacy records obtained during the investigation.⁹⁷ The defendant claimed that seizure of his records violated his Fourth Amendment rights because they were obtained without a warrant.⁹⁸ The trial court denied the defendant's motion to suppress, concluding that the officers "adequately fulfilled the constitutional requirements for an administrative, warrantless search."⁹⁹ The defendant appealed the ruling claiming that the lower court erred in denying his motion to suppress.¹⁰⁰

The court of appeals affirmed the lower court's ruling. In its discussion, the court opined that "a warrantless administrative search of pharmacy prescription records by law enforcement officers is a recognized exception to the warrant requirement when the scope of the search is sufficiently limited."¹⁰¹ Additionally, the court ruled that the state has a substantial interest in regulating prescription drugs and that this type of warrantless search procedure is reasonable.¹⁰² The court viewed the investigation as a scheme to track frequently abused prescription drugs, and as such did not violate the defendant's Fourth Amendment rights.¹⁰³

A more recent case of doctor shopping, which occurred in Florida, further demonstrates a court's willingness to extend police powers in investigating prescription drug abuse.¹⁰⁴ In *Limbaugh*, the state alleged that Rush Limbaugh, the well-known talk show host, violated state law by doctor shopping.¹⁰⁵ Police investigators received statements from two individuals claiming they sold large quantities of controlled substances to Limbaugh.¹⁰⁶ With this information in hand, investigators obtained a list of Limbaugh's pre-

⁹⁵ *Id.*

⁹⁶ *Kadas*, 2004 WL 3017307, at *1.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at *2.

¹⁰⁰ *Id.* at *1.

¹⁰¹ *Kadas*, 2004 WL 3017307, at *2 (relying on *Stone v. Stow*, 593 N.E.2d 294 (Ohio 1992)).

¹⁰² *Id.*

¹⁰³ *Id.* at *13.

¹⁰⁴ *Limbaugh*, 887 So. 2d at 387.

¹⁰⁵ *Id.* at 389.

¹⁰⁶ *Id.*

scriptions from a local pharmacy.¹⁰⁷ Allegedly, these records proved that Limbaugh obtained prescriptions for controlled substances from four different physicians in a five-month period.¹⁰⁸ Using this information, investigators acquired a search warrant to seize his medical records.¹⁰⁹ After learning that the state had received his medical records, Limbaugh objected and asserted his right of privacy.¹¹⁰ Despite the fact that charges had not yet been filed, Limbaugh demanded a hearing before the judge and filed a petition for certiorari asking that the court quash the search warrants.¹¹¹ The circuit court denied all relief and Limbaugh filed an appeal.¹¹²

In his appeal, Limbaugh claimed that the issuance of a search warrant without any prior notice to him resulted in a violation of his constitutional right to privacy.¹¹³ Limbaugh argued that the “court should recognize a general rule that the state may not use search warrants to avoid a constitutional right of privacy in medical records.”¹¹⁴ Limbaugh based his argument on two state laws claiming they gave a right of privacy in medical records.¹¹⁵ In response to these arguments, the court of appeals determined that these statutes only applied to subpoenas and that the omission of any reference to search warrants demonstrated legislative intent that search warrants for medical records are not affected.¹¹⁶ The court held that the seizure of medical records under a valid search warrant, without prior notice or hearing, did not implicate Limbaugh’s constitutional right of privacy in medical records.¹¹⁷

Kadas and *Limbaugh* demonstrate that courts are willing to give the benefit of the doubt to law enforcement officials in their quest to reduce prescription drug abuse and doctor shopping.¹¹⁸ In both cases, courts allowed investigators to encroach on the defendant’s

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Limbaugh*, 887 So. 2d at 390 (indicating that the search warrant called specifically for the medical records, medical questionnaire, cash receipts, sections of appoint book pertaining to Limbaugh, cancelled checks, medical insurance forms, and records of dispersing or issuing prescriptions for controlled substances).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 391.

¹¹³ *Id.*

¹¹⁴ *Limbaugh*, 887 So. 2d at 391.

¹¹⁵ *Id.* at 393.

¹¹⁶ *Id.* at 394.

¹¹⁷ *Id.* at 398.

¹¹⁸ See *Limbaugh* 887 So. 2d 387; *Kadas*, 2004 WL 3017307.

rights, claiming that the state had an interest in regulating prescription drugs and the investigations involved were exceptions to the laws that protected these rights.¹¹⁹ It is apparent from the statistics of prescription drug abuse that it is a serious public health problem, and it is necessary to take aggressive steps in fighting this disturbing trend.¹²⁰ Courts seem willing to take action and stretch the outer bounds of doctor shopping laws.¹²¹ Clearly, this is not enough because the problem continues to worsen.¹²²

B. A Formula for Self-Medicating

1. A Pill to Solve Any Problem

America is a nation dependent upon prescription drugs.¹²³ Over the past ten years Americans' dependence on prescription drugs has risen dramatically.¹²⁴ Experts claim that half of all Americans take at least one prescription drug a day and some take three or more a day.¹²⁵ People are walking into their doctors offices demanding that "magic pill" to solve their latest ailment.¹²⁶ Americans take pills for everything ranging from high blood pressure and diabetes to serious emotional disorders and severe pain.¹²⁷ In fact, baby boomers and subsequent generations have become the most medicated generations ever.¹²⁸ Today there is a pill available to cure virtually any problem that one may have, and drug companies are doing their best to inform consumers about these "magic pills."¹²⁹ Drug companies are making promises that they will cure you from whatever plagues you, including insomnia, anxiety, pain, and lack

¹¹⁹ See *Limbaugh* 887 So. 2d 387; *Kadas*, 2004 WL 3017307.

¹²⁰ See *Limbaugh* 887 So. 2d 387; *Kadas*, 2004 WL 3017307.

¹²¹ See *Limbaugh* 887 So. 2d 387; *Kadas*, 2004 WL 3017307.

¹²² See generally *Durning*, *supra* note 9, at 199.

¹²³ See Michiko Kakutani, *Books of the Times: Tense? Lonely? There's Promise in a Pill*, N.Y. TIMES, Sept. 30, 2005 at E; Harmon, *supra* note 24, at A1.

¹²⁴ See *Gov't Reform Hearings*, *supra* note 12 (statement of Congressman Dan Burton, Chairman, Subcomm. on Human Rights & Wellness).

¹²⁵ Julie Mayeda, *A Look at the New Book, Generation RX: How Prescription Drugs Are Altering American Lives, Minds and Bodies*, (Oct. 11, 2005) (book review), <http://www.newstarget.com/z012342.html> (last visited Mar. 8, 2006).

¹²⁶ See *More Than 40 Percent of Americans on Prescription Drugs*, ST. PETERSBURG TIMES, Dec. 3, 2004, available at http://www.sptimes.com/2004/12/03/Worldandnation/More_than_40_percent_.shtml.

¹²⁷ Kakutani, *supra* note 123.

¹²⁸ *Id.*

¹²⁹ *Id.*

of energy.¹³⁰ It is not unusual for Americans to take “pills to sleep, pills to focus, pills to chill and pills to perk up, pills for more sex and pills for less stress.”¹³¹ Americans are accustomed to commercials and advertisements that make these promises and find it unusual when they come across someone who is not taking prescription medication.¹³² One author recently called this the “pharmaceuticalized American life.”¹³³

This needy attitude regarding prescription drugs is encouraged by physicians.¹³⁴ Some experts fear that physicians are over-prescribing drugs for emotional disorders, behavioral problems, insomnia and depression.¹³⁵ Professor Michael Wilkes of U.C. Davis School of Medicine claims that “Americans have grown accustomed to having a drug for every single problem and for things we wouldn’t think of as problems.”¹³⁶ This way of thinking has created an environment in which physicians, under pressure from their harried patients, are over-prescribing.¹³⁷ Gregg Jacobs, assistant professor of psychiatry at Harvard Medical School, claims that “too many prescriptions are being written for people who don’t need a prescription”¹³⁸ Patients walk into their doctors offices and demand that the physician prescribe them a certain medicine.¹³⁹ Physicians who won’t prescribe what the patients want soon find themselves one patient short because the patient will move on to find a doctor willing to prescribe whatever the patient wants.¹⁴⁰ This is where doctor shopping comes into play.¹⁴¹ Americans are so convinced that they need the miracle cures offered by drug companies that they are willing to go from doctor to doctor in search of prescription drugs.¹⁴² Prescription drugs no longer carry the taboo they

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² See Harmon, *supra* note 24, at A1; Levy, *supra* note 43.

¹³³ Kakutani, *supra* note 123, at E.

¹³⁴ See *Healthcheck: Are Doctors Over-Prescribing Medications?* (CBS 13/UPN 31 television broadcast Feb. 9, 2006), available at http://cbs13.com/checkup/local_story_041014828.html (last visited Mar. 9, 2006) [hereinafter *Healthcheck*].

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ Gardiner Harris, *Sleeping Pill Use by Youths Soars, Study Says*, N.Y. TIMES, Oct. 19, 2005, at A14.

¹³⁹ See generally Harmon, *supra* note 24, at A1; Levy, *supra* note 43.

¹⁴⁰ See Harmon, *supra* note 24, at A1.

¹⁴¹ See generally Harmon, *supra* note 24, at A2; *Doctor Shopping*, WIKIPEDIA, *supra* note 31.

¹⁴² See generally Harmon, *supra* note 24, at A1; *Doctor Shopping*, WIKIPEDIA, *supra* note 31.

did in the past, and America is now a nation dependant upon prescription medicine.¹⁴³

This dependence is not just reserved for the adult population.¹⁴⁴ America's children are being placed on drugs to solve all sorts of "disorders."¹⁴⁵ There is major concern that certain drugs (mainly sleeping pills and antidepressants) are being handed out too freely and have limited follow-up, especially to children.¹⁴⁶ A recent study found that the use of sleeping pills among children and very young adults increased eighty-five percent from 2000 to 2004.¹⁴⁷ Many children taking sleeping pills are also given pills to treat attention deficit and hyperactivity disorder (ADD and ADHD).¹⁴⁸ These figures demonstrate that parents and physicians turn increasingly to prescription drugs to solve health and behavioral problems in children.¹⁴⁹ The attitude that a pill can cure virtually any problem is being handed down to America's children.¹⁵⁰

Sociologist Christopher Lasch, in his book *The Culture of Narcissism*, wrote about the tendency to seek medical treatment for life and family problems.¹⁵¹ It is clear by the increased number of Americans who use prescription drugs that this predisposition is more rampant than ever.¹⁵² This inclination results in "people who grow up thinking there's a pill for every ill and who seek quick fixes for life's troubles."¹⁵³

2. *Self-Medication*

In the search for quick fixes, many Americans are deciding that they are capable of diagnosing their own ailments and are self-medicating.¹⁵⁴ People claim to self-medicate for three primary reasons: it

¹⁴³ See generally Harmon, *supra* note 24, at A1; *Doctor Shopping*, WIKIPEDIA, *supra* note 31.

¹⁴⁴ See Harris, *supra* note 138, at A14.

¹⁴⁵ *Id.*

¹⁴⁶ See Denise Grady & Gardiner Harris, *Overprescribing Prompted Warning on Antidepressants*, N.Y. TIMES, Mar. 24, 2004, at A13, A14.

¹⁴⁷ See Harris, *supra* note 138.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ See generally *id.* at A14.

¹⁵¹ Grace Chua, *A Misdiagnosed Generation*, SPIKED LIBERTIES, Nov. 17, 2005, available at <http://www.spiked-online.co.uk/Printable/0000000CAE75.htm> (discussing Lasch's book).

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ See generally Harmon, *supra* note 24, at A1; Levy, *supra* note 43.

is the “norm” to be on pills, they trust themselves more than they trust their physicians, and they enjoy the sense of empowerment.¹⁵⁵

Turn on the television and one will see commercials for the newest prescription medication; open a magazine and one will find a “quiz” to determine if one needs a certain pill; and, apparently, talk to friends and they will know what pills they take.¹⁵⁶ For many, taking prescription medication is now normal.¹⁵⁷ Using prescription drugs to sleep, work, and relax has become a given.¹⁵⁸ Pill-popping has become so prevalent that now people pass their meds out to their friends.¹⁵⁹ A recent New York Times article discussed this new norm.¹⁶⁰ The general consensus by those interviewed seemed to be that everyone takes something, and pills might as well be passed around among friends.¹⁶¹ This attitude, that everyone is on something, derives from a sense of familiarity.¹⁶² People revert to that which they are the most comfortable, and today’s generations find comfort in pills.¹⁶³ Most self-medicators grew up thinking that “there’s a pill for every ill” and will do what they must to get the pills they need.¹⁶⁴ This knowledge, that medications exist which can solve their problems, leads many people to believe they know better than their physicians.¹⁶⁵

Today, people have access to more information than ever before.¹⁶⁶ Anyone can go online and retrieve a wealth of information regarding any topic.¹⁶⁷ This availability of information contributes to self-medicators’ attitudes that they are more capable than their own physician.¹⁶⁸ Pill-poppers have more trust in their ability to go online and do medical research than they do in their physician’s abil-

¹⁵⁵ See generally Levy, *supra* note 43.

¹⁵⁶ *Id.*

¹⁵⁷ See discussion *supra* Part II.B.1. See generally Harmon, *supra* note 24, at A1; Levy, *supra* note 43.

¹⁵⁸ See Levy, *supra* note 43.

¹⁵⁹ Harmon, *supra* note 24.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ Chua, *supra* note 151.

¹⁶⁵ Harmon, *supra* note 24.

¹⁶⁶ See generally World Wide Web Consortium, www.w3.org/PICS/951030/AV/PICSdemo01.html (last visited Mar. 9, 2006).

¹⁶⁷ *Id.*

¹⁶⁸ Harmon, *supra* note 24.

ity to find the cure for what ails them.¹⁶⁹ Many people feel they have the most awareness of their physical and mental condition, and are therefore most able to determine their needs.¹⁷⁰ Some patients dread the predictable cycle of going to a doctor's office and having to try one type of medicine after another as the physician searches for what works.¹⁷¹ These patients claim self-medicating is easier because they know what works and what doesn't.¹⁷² This knowledge has been obtained through years of passing out pills among friends, doing online medical research, and growing up in a world that offers prescription drugs for any "ill."¹⁷³ Patients are confident that they know the latest and greatest prescriptions drugs because they have been exposed to meds through commercials and advertisements.¹⁷⁴ Some pill-poppers are so familiar with these drugs that they casually refer to these drugs using medical terminology.¹⁷⁵ People even get together for "pill parties" to discuss what kind of pills they have and what they need.¹⁷⁶ Prescription drugs have become as common as hair products.¹⁷⁷ Some patients claim that you wouldn't go to a hairstylist everyday to get your hair done, so why should you go to a physician every time you feel a little anxious or tired?¹⁷⁸ Claiming that many doctors do not know what they are talking about, pill-poppers have become more comfortable with self-medicating than with seeing a doctor.¹⁷⁹

Additionally, self-medicators feel a sense of empowerment.¹⁸⁰ Armed with knowledge and a sense of invincibility, self-medicators feel that they are taking control of their own lives.¹⁸¹ This feeling of invincibility comes from the impression that the drugs are "safe."¹⁸² Dr. Wayne K. Goodman, chairman of psychiatry at the University of

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ Harmon, *supra* note 24, at A1.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ Levy, *supra* note 43.

¹⁷⁸ *See generally id.*

¹⁷⁹ Harmon, *supra* note 24, at A1.

¹⁸⁰ *See generally id.*; Levy, *supra* note 43.

¹⁸¹ *See generally* Harmon, *supra* note 24, at A1; Levy, *supra* note 43.

¹⁸² P'SHIP FOR A DRUG-FREE AM., PRESCRIPTION MEDICINE MISUSE AND ABUSE: A GROWING PROBLEM, Dec. 2, 2005, available at www.drugfree.org/Portal/DrugIssue/Features/Prescription_Medicine_Misuse (last visited Mar. 9, 2006).

Florida College of Medicine, claims that “physicians. . . have been lulled into the notion that these drugs are safe.”¹⁸³ This belief has been passed on to consumers.¹⁸⁴ Pill poppers believe that because they are not taking illegal drugs such as cocaine, heroin, or methamphetamine, using pills is okay.¹⁸⁵ This belief, combined with the understanding that these pills will make them feel normal, allow self-medicators to feel empowered.¹⁸⁶ Furthermore, because people now consider using medication “trendy,” many pill-poppers feel that they have a hand in their own status.¹⁸⁷ Self-medicators look for a quick fix, and the ability to pick their cure without the aid of a doctor gives them a sense of empowerment.¹⁸⁸

Americans are addicted to prescription drugs now more than ever.¹⁸⁹ This addiction leads to compulsive drug seeking and self-medication.¹⁹⁰ Traditionally, drug addicts have had to rely on doctor shopping; now they are finding new ways to obtain their pills.¹⁹¹ In their never-ending search for prescription drugs, addicts are moving away from brick and mortar pharmacies and moving online to e-pharmacies.¹⁹²

III. E-PHARMACIES

Pharmacies which conduct business on the Internet (e-pharmacies) have grown exponentially over the past ten years.¹⁹³ In 1999, Americans purchased \$160 million in prescription drugs over the Internet.¹⁹⁴ By 2003, that number had risen to \$3.2 billion.¹⁹⁵ These types of pharmacies provide many advantages to consumers, including convenience and reduced prices, because of increased com-

¹⁸³ Grady et al., *supra* note 146, at A13.

¹⁸⁴ See generally Levy, *supra* note 43.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* (stating that one self-medicator claimed that she takes the pills to keep herself sane and that this allows her to feel as if she can live her life and be content).

¹⁸⁷ Christie Rizk, *Self-Medicating Yuppies*, PRESSETHIC, Nov. 16, 2005, available at <http://journalism.nyu.edu/pubzone/pressethic/node/561>.

¹⁸⁸ *Id.*

¹⁸⁹ See GAO PRESCRIPTION DRUGS, *supra* note 3; Meadows, *supra* note 5.

¹⁹⁰ See PRESCRIPTION PAIN INFOFACTS, *supra* note 6.

¹⁹¹ See Commerce Hearings, *supra* note 16.

¹⁹² *Id.*

¹⁹³ *Id.*; see Linda C. Fentiman, *Internet Pharmacies and the Need for a New Federalism: Protecting Consumers While Increasing Access to Prescription Drugs*, RUTGERS L. REV 119, 123 (2004).

¹⁹⁴ Fentiman, *supra* note 193, at 123.

¹⁹⁵ *Id.*

petition.¹⁹⁶ Despite these benefits, authorities remain concerned with the prevalence of e-pharmacies because the Internet simplifies bypassing pharmaceutical safeguards.¹⁹⁷ E-pharmacies allow prescription drug users to obtain their medications without having to comply with state prescription drug regulations.¹⁹⁸ For this reason, federal legislators started focusing on e-pharmacies and are discussing legislation necessary to regulate these types of pharmacies.¹⁹⁹ To fully understand this legislation, it is important to first consider current pharmaceutical safeguards and the processes used by e-pharmacies to prescribe and dispense prescriptions. Additionally, it is necessary to determine whether e-pharmacies make doctor shopping irrelevant.

A. Pharmaceutical Safeguards & E-Pharmacies

1. *Pharmaceutical Safeguards*

Although state agencies regulate pharmacies, the federal government regulates the sale and distribution of controlled substances through the Controlled Substances Act²⁰⁰ and the Food, Drug, and Cosmetic Act.²⁰¹ Federal law, through the Controlled Substances Act, requires that for a controlled substance prescription to be effective, “it must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of professional practice.”²⁰² For a doctor to be “acting in the usual course of professional practice there must be a doctor/patient relationship.”²⁰³ This relationship is determined, generally, by considering four elements that act as safeguards against the diversion and illegal use of controlled substances.²⁰⁴

¹⁹⁶ See *Commerce Hearings*, *supra* note 16, at 2–3.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ See generally *A Prescription for Safety: The Need for H.R. 3880, The Internet Pharmacy Consumer Protection Act: Hearing Before the H. Comm. on Gov't Reform*, 108th Cong. (2004) [hereinafter *Prescription for Safety*]; *Gov't Reform Hearings*, *supra* note 12, at 1.

²⁰⁰ 21 U.S.C. §§ 801-904 (2005) (the DEA is responsible for regulation of controlled substances).

²⁰¹ See generally 21 U.S.C. §§ 301-399 (2005) (the FDA approves the sale of prescription drugs once they are determined to be safe and effective for medical use and commercial marketing).

²⁰² 21 C.F.R. § 1306.04(a) (2005).

²⁰³ See Notices, Dep't of Justice: Dispensing and Purchasing Controlled Substances Over the Internet, 66 Fed. Reg. 21181, 21182 (Mar. 19, 2001) [hereinafter DOJ Notices].

²⁰⁴ See *id.* at 21,182–83.

Many state agencies, in compliance with federal and state law, have determined that certain elements are indicative of a doctor/patient relationship.²⁰⁵ For this relationship to exist, there must first be a medical complaint by the patient.²⁰⁶ Second, the doctor must take a full medical history of the patient.²⁰⁷ Third, the doctor must physically examine the patient.²⁰⁸ This physical examination requires a face-to-face meeting with the doctor.²⁰⁹ The final element requires that there be some logical connection between the complaint, the physical examination, and the drug prescribed.²¹⁰

The doctor/patient relationship elements were established at a time when a patient could only obtain a prescription drug by going through the process of visiting a physician, satisfying the four necessary elements, and having the drug dispensed by a pharmacy.²¹¹ The fact that a patient had to follow these procedures to obtain a prescription helped reduce the diversion of pharmaceuticals and acted as a safeguard against prescription drug abuse.²¹² Clearly, these safeguards do not prevent doctor shopping, but they do provide some obstacles to the diversion of prescription drugs.²¹³ The advent of online pharmacies has changed the dynamics of the doctor/patient relationship, and the very nature of e-pharmacies allows consumers to bypass the safeguards provided by this relationship.²¹⁴

²⁰⁵ *Id.* at 21,183; *see supra* notes 81–84 and accompanying text for discussion of Florida's doctor shopping law which requires that a doctor/physician relationship exist and that these elements are present within the prior six months of the patient receiving a prescription for a controlled substance.

²⁰⁶ DOJ Notices, *supra* note 203, at 21,182.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 21,183.

²¹⁰ *Id.*

²¹¹ *See generally Commerce Hearings, supra* note 16, at 3 (statement of Janet Woodcock, M.D., Director, Center for Drug Evaluation and Research, Food and Drug Administration); DOJ Notices, *supra* note 203, at 21,183–84; *Gov't Reform Hearings, supra* note 12, at 1–2 (statement of Tom Davis, Chairman); *Prescription for Safety, supra* note 199, at 28–29 (statement of William K. Hubbard, Associate Commissioner for Policy and Planning, Food and Drug Administration).

²¹² *See generally Prescription for Safety, supra* note 199; *Gov't Reform Hearings, supra* note 12, *Commerce Hearings, supra* note 16; DOJ Notices, *supra* note 203, at 21,183–84.

²¹³ *See generally Prescription for Safety, supra* note 199; *Gov't Reform Hearings, supra* note 12, *Commerce Hearings, supra* note 16; DOJ Notices, *supra* note 203, at 21,183–84.

²¹⁴ *See generally Prescription for Safety, supra* note 199; *Gov't Reform Hearings, supra* note 12, *Commerce Hearings, supra* note 16; DOJ Notices, *supra* note 203, at 21,183–84.

2. *E-Pharmacy Process*

The Internet makes it easier for patients to bypass pharmaceutical safeguards because some pharmacies dispense drugs without a prescription or appropriate identity verification.²¹⁵ Although there are tremendous advantages in allowing consumers to obtain prescription drugs via the Internet, the ability of patients to bypass safeguards is a growing concern.²¹⁶ There are e-pharmacies that offer legitimate services and adhere to the safeguards, but there are also “rogue” pharmacies that circumvent them.²¹⁷ The dispensing process used by pharmacies differs according to the type of pharmacy.²¹⁸

There are basically three types of online pharmacies.²¹⁹ The first type is similar to traditional drugstores or mail-order pharmacies; they dispense a drug only after they have received a valid prescription from a physician.²²⁰ These pharmacies abide by the safeguards which are in place and offer many advantages to consumers.²²¹ Because they follow pharmaceutical regulations, these pharmacies are considered safe and are not under strict scrutiny by federal and state authorities.²²² These pharmacies are not seen as contributors to the diversion and abuse of prescription drugs.²²³

A second type of pharmacy, questionnaire pharmacies, provide medication without a physical examination by the doctor.²²⁴ The examination is replaced by a medical questionnaire in which the patient details medical symptoms.²²⁵ These types of pharmacies typically have a physician on staff who evaluates the questionnaires and makes a diagnosis based upon the questionnaire.²²⁶ The doctor

²¹⁵ See *Commerce Hearings*, *supra* note 16; *PRESCRIPTION DRUG ABUSE & ADDICTION*, *supra* note 21.

²¹⁶ See *Prescription for Safety*, *supra* note 199, at 74 (statement by Rebecca J. Patchin); *Commerce Hearings*, *supra* note 16.

²¹⁷ See *Prescription for Safety*, *supra* note 199, at 74 (statement by Rebecca J. Patchin); *Commerce Hearings*, *supra* note 16.

²¹⁸ See U.S. GEN. ACCT. OFF., *REPORT TO CONGRESSIONAL REQUESTERS: INTERNET PHARMACIES, ADDING DISCLOSURE REQUIREMENTS WOULD AID STATE AND FEDERAL OVERSIGHT*, 6–7 (2000) [hereinafter *GAO INTERNET PHARMACIES*].

²¹⁹ *Id.* at 6.

²²⁰ *Id.*

²²¹ *Id.*

²²² See generally *id.* at 5.

²²³ See *PRESCRIPTION DRUG ABUSE & ADDICTION*, *supra* note 21.

²²⁴ *GAO INTERNET PHARMACIES*, *supra* note 218, at 6.

²²⁵ *Id.*

²²⁶ *Id.*

approves the medication and authorizes the pharmacy to mail the drugs to the patient.²²⁷

The third type of pharmacies have been called “rogue” pharmacies because they do not require a prescription or consultation and do not even pretend to require a medical history by using a questionnaire.²²⁸ These pharmacies dispense prescription drugs without any type of physical examination and typically do not employ physicians to review questionnaires.²²⁹ Generally, these types of pharmacies allow consumers to easily obtain prescriptions without verifying identification or the existence of a legitimate medical problem.²³⁰ These sites are frequently used to obtain the types of drugs that are abused most often.²³¹

Questionnaire and rogue pharmacies are able to bypass pharmaceutical safeguards, and as a result, contribute to the increase in prescription drug addiction.²³² There are approximately five-hundred identifiable pharmacy web sites which allow anyone to buy drugs by either filling out an online questionnaire or simply by submitting payment.²³³ These pharmacies circumvent the four elements indicative of a doctor/patient relationship.²³⁴

The first element of a doctor/patient relationship is that the patient has a medical complaint.²³⁵ Questionnaire pharmacies claim that this is provided when the patient completes a detailed form describing his or her medical symptoms.²³⁶ Rogue pharmacies do

²²⁷ *Id.*; Amy Buttell Crane, *Buying Prescriptions Online: A Safe Bet?* (2005), <http://netscape1.bankrate.com/brm/news/pf/20051214a1.asp> (last visited Mar. 10, 2006).

²²⁸ *Id.*; GAO INTERNET PHARMACIES, *supra* note 218, at 24.

²²⁹ *Id.*

²³⁰ See PRESCRIPTION DRUG ABUSE & ADDICTION, *supra* note 21; GAO INTERNET PHARMACIES, *supra* note 218, at 23–24 (noting that rogue pharmacies do verify credit card information).

²³¹ See *id.*; see also Jerry Markon, *Online Drug Ring Bust in Virginia Charges 10 People in 3 States: Federal Probe Alleges 6 Million Doses Dispensed Illegally*, WASH. POST, Dec. 4, 2003, at B5 (“millions of pills now flow from rogue online pharmacies to consumers . . . [these pills range from] painkillers, antidepressants, [and] stimulants”); U.S. GEN. ACCT. OFF., INTERNET PHARMACIES: SOME POSE SAFETY RISKS FOR CONSUMERS AND ARE UNRELIABLE IN THEIR BUSINESS PRACTICES (2004) [hereinafter GAO INTERNET PHARMACIES—SAFETY RISKS].

²³² See Crane, *supra* note 227.

²³³ See *Mother Crusades For Online Pharmacy Regulation: Haight’s Son Found Dead At Age 18* (10News television broadcast Feb. 8, 2005), <http://www.10news.com/print/4178402/detail.html> (last visited Mar. 10, 2006); *Gov’t Reform Hearings*, *supra* note 12, at 116.

²³⁴ See DOJ Notices, *supra* note 203, at 21,182–83.

²³⁵ *Id.*

²³⁶ See Crane, *supra* note 227.

not request personal health information and therefore do not even attempt to determine a patient's medical complaint.²³⁷

The second element, taking a medical history, is provided for by questionnaire pharmacies when patients complete an electronic form with family and medical history.²³⁸ This medical history is not provided for by rogue pharmacies because they simply provide the prescription drug upon payment.²³⁹

Both questionnaire and rogue pharmacies fail to meet the third requirement of a doctor/patient relationship, a physical examination of the patient.²⁴⁰ Questionnaire pharmacies claim that staff physicians substitute physical examinations by evaluating the patient's medical forms.²⁴¹ Although this may be true, many experts argue that "paper" evaluations do not constitute a physical examination for several reasons.²⁴² First, the pharmacy cannot know whether the information provided is accurate because without a face-to-face meeting the patient can more easily provide false information.²⁴³ Secondly, many of the evaluations are cursory, and sometimes the questionnaires are not even reviewed.²⁴⁴ Additionally, many experts are concerned that these types of pharmacies are recruiting doctors who are unemployed, semi-retired, or trying to supplement declining practice incomes.²⁴⁵ These physicians are not motivated to comply with regulations because they have nothing to lose if their licenses are suspended or revoked.²⁴⁶ Most questionnaires are set up to default to answers that allow the patient to get whichever drug they are requesting.²⁴⁷ Even if there is an evaluation of the question-

²³⁷ See CVS.com, *An Approach to Identifying and Regulating the Internet Pharmacy* (Aug. 23, 1999), http://www.businesswire.com/cnn/cvs_white_paper.htm (last visited Mar. 10, 2006).

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ See *id.*; DOJ Notices, *supra* note 203, at 21,182–83.

²⁴¹ See OFF. OF DIVERSION CONTROL, U.S. DEP'T OF JUSTICE, DISPENSING AND PURCHASING CONTROLLED SUBSTANCES OVER THE INTERNET, <http://www.deadiversion.usdoj.gov/faq/internetpurch.htm>. (last visited Mar. 10, 2006) [hereinafter OFFICE OF DIVERSION]; see also CVS.com, *supra* note 237; Markon, *supra* note 231.

²⁴² See CVS.com, *supra* note 237; OFFICE OF DIVERSION, *supra* note 241.

²⁴³ See CVS.com, *supra* note 237; OFFICE OF DIVERSION, *supra* note 241; Petrecca, *supra* note 11 (stating that investigations have shown that applicants are able to lie about everything to get drugs, and that because they never have to see or speak to another person there is no way to know they are lying).

²⁴⁴ See *Gov't Reform Hearings*, *supra* note 12, at 35; CVS.com, *supra* note 237.

²⁴⁵ Berkeley Rice, *The Growing Problem of Online Pharmacies*, MED. ECON., June 4, 2001, at 40.

²⁴⁶ *Id.*

²⁴⁷ See DOJ Notices, *supra* note 203, at 21,183.

naire, the information provided is generally untrue and the evaluation is worthless.²⁴⁸ For these reasons, most authorities do not consider the cursory evaluation by e-pharmacy doctors sufficient to meet the required physical examination of the patient.²⁴⁹

The final element of a doctor/patient relationship is that “[a] logical connection exists between the medical complaint, the medical history, the physical examination, and the drug prescribed.”²⁵⁰ Rogue pharmacies do not require any description of a medical complaint, do not complete a medical history, and have no provision to substitute for a physical examination.²⁵¹ Clearly, rogue pharmacies do not meet the fourth element.²⁵² Although questionnaire pharmacies claim that their forms meet the requirements for a doctor/patient relationship, they do not.²⁵³ A nexus between the prescription given and the patient’s complaint, history, and examination does not exist.²⁵⁴ There is very little effort by these pharmacies to determine whether the patient has a legitimate need for the prescription they are requesting.²⁵⁵ The physician does not see or talk with the patient and generally gives the questionnaire only a cursory examination.²⁵⁶ The pharmacy and the physician do not attempt to verify the accuracy of the information provided by the patient.²⁵⁷ Without these provisions, there cannot be a logical connection between the complaint, history, and examination.²⁵⁸

Of the three types of e-pharmacies, two fail to comply with pharmaceutical safeguards.²⁵⁹ Federal and state laws require that, for a prescription to be effective, there must be a doctor/patient relationship.²⁶⁰ These e-pharmacies clearly do not establish this rela-

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 21,182–83.

²⁵⁰ *Id.* at 21,183.

²⁵¹ See OFFICE OF DIVERSION, *supra* note 241; CVS.com, *supra* note 237; Petrecca, *supra* note 11.

²⁵² See OFFICE OF DIVERSION, *supra* note 241; Petrecca, *supra* note 11.

²⁵³ See DOJ Notices, *supra* note 203, at 21,182–83.

²⁵⁴ *Id.*

²⁵⁵ Kate J. Chase, *Making a Prescription for Disaster: How Online Drug Mills Make It Too Easy*, Associated Content.com, available at http://www.associatedcontent.com/pop_print.dfm?content_type=article&content_type_id=17067 (last visited Mar. 10, 2006).

²⁵⁶ See *Gov't Reform Hearings*, *supra* note 12, at 35; CVS.com, *supra* note 237.

²⁵⁷ See CVS.com, *supra* note 237; Petrecca, *supra* note 11.

²⁵⁸ See DOJ Notices, *supra* note 203, at 21,182–83.

²⁵⁹ See *id.* at 21,182–83; Crane, *supra* note 227.

²⁶⁰ See DOJ Notices, *supra* note 203, at 21,182–83.

tionship because the processes used to dispense controlled substances circumvent the required four elements.²⁶¹

On many e-pharmacy websites, customers are able to choose the type, quantity, and dosage of drug without ever seeing or speaking to a physician and without having their medical or personal information verified.²⁶² “Through these [web]sites, Americans are bypassing the traditional method of seeing a doctor and needing a valid prescription to obtain drugs.”²⁶³ These e-pharmacies present an attractive alternative to those addicted to prescription drugs.²⁶⁴ Prescription drug abusers see internet pharmacies as a convenient alternative to doctor shopping because of the ease with which they can obtain controlled substances.²⁶⁵ E-pharmacies have become so connected to prescription drug abuse that some authorities are claiming that web pharmacies “act more like prescription drug mills”²⁶⁶ because consumers are able to bypass safeguards and order any drug they desire.²⁶⁷ Whereas in the past pill addicts had to follow the routine of seeing a doctor and requesting a prescription, they can now go online for themselves and avoid all of these hassles.²⁶⁸ These “pill mills” are becoming so prevalent that they are making doctor shopping irrelevant.

B. Making Doctor Shopping Irrelevant

The non-medical use of prescription drugs ranks second as a category of illicit drug abuse.²⁶⁹ Although addicts traditionally obtained their drugs through doctor shopping,²⁷⁰ the U.S. has now seen the number of addicts increase as drugs become easier to obtain via the Internet.²⁷¹ E-pharmacies serve as “pipelines” for prescription drugs and sell their products to consumers who have

²⁶¹ See *id.*

²⁶² See *Gov't Reform Hearings*, *supra* note 12, at 1; Markon, *supra* note 231.

²⁶³ Chase, *supra* note 255.

²⁶⁴ See DRUG THREAT ASSESSMENT, *supra* note 7.

²⁶⁵ See generally *Commerce Hearings*, *supra* note 16; Marks, *supra* note 22; StoptheDrugWar.org, *supra* note 4.

²⁶⁶ Chase, *supra* note 255.

²⁶⁷ See *Gov't Reform Hearings*, *supra* note 12, at 52; Chase, *supra* note 255.

²⁶⁸ See *Gov't Reform Hearings*, *supra* note 12, at 52; Chase, *supra* note 255.

²⁶⁹ See *Prescription for Safety*, *supra* note 199, at 75.

²⁷⁰ See discussion *infra* Part II.

²⁷¹ See *Prescription for Safety*, *supra* note 199, at 75.

never seen a doctor.²⁷² Addicts are attracted to e-pharmacies because they circumvent the doctor/patient relationship and allow them to get any type of drug they want.²⁷³ Experts claim that the e-pharmacy market is siphoning off patients who would generally patronize a legal pharmacy by highlighting the convenience and low cost of using the internet to purchase prescription drugs.²⁷⁴ This leads to more Americans becoming addicted to prescription drugs and contributes to the already serious health problem of widespread prescription drug abuse.²⁷⁵ The Internet has encouraged citizens who would not normally seek controlled substances to go outside of the doctor/patient relationship and obtain prescription drugs.²⁷⁶ Most of these “average patients” would not falsify medical complaints in order to obtain a pill, but on the Internet they do not have to.²⁷⁷ E-pharmacies combine the two “menaces” that face authorities in the war on prescription drug abuse: “pill mills” and “doctor shopping.” The addicts who were previously going doctor shopping are now going online to the pill mills.²⁷⁸ Doctor shoppers are moving to the Internet for three primary reasons: availability, easy access, and convenience.²⁷⁹

Before these reasons are explored, it is necessary to briefly re-examine the purpose of doctor shopping. Prescription drug addicts “travel from doctor to doctor to find an easy mark who will readily write prescriptions” or who will believe their false claim of medical needs.²⁸⁰ Doctor shoppers seek drugs that can be easily obtained by providing false, and often illegitimate, medical records.²⁸¹ Patients

²⁷² Gilbert M. Gaul & Mary Pat Flaherty, *U.S. Prescription Drug System Under Attack; Multibillion-Dollar Shadow Market Is Growing Stronger*, WASH. POST, Oct. 19, 2003, at A15.

²⁷³ See *Commerce Hearings*, *supra* note 16, at 3 (noting that the DEA is worried about the absence of the doctor/patient relationship in some internet transactions).

²⁷⁴ Gaul & Flaherty, *supra* note 272.

²⁷⁵ *Id.*

²⁷⁶ Marks, *supra* note 22.

²⁷⁷ *Id.*

²⁷⁸ See also StoptheDrugWar.org, *supra* note 4. See generally *Cheaper Prices, Patient Safety Key to Online Pharmacy Legislation—Collins*, WASH. INTERNET DAILY, June 18, 2004, available on LEXIS (addicts are looking for way to get drugs to which they are not entitled and consumers can readily obtain prescription drugs online without a prescription).

²⁷⁹ See generally *Prescription for Safety*, *supra* note 199, at 75; Marks, *supra* note 22; WASH. INTERNET DAILY, *supra* note 278; StoptheDrugWar.org, *supra* note 4; Gaul & Flaherty, *supra* note 272.

²⁸⁰ *Hearing Before the Subcomm. on Criminal Justice, Drug Policy and Human Resources of the H. Comm. on Gov't Reform*, 108th Cong. (Feb. 9, 2004) (statement of Thomas W. Raffanello, Special Agent in Charge, Miami Division, U.S. Drug Enforcement Administration).

²⁸¹ *Id.*

go from doctor to doctor looking for drugs, and eventually run out of doctors and pharmacies to visit.²⁸² Because pharmacies have reporting requirements that force them to release information about the type, quantity, and frequency of prescription drugs dispensed, doctor shoppers run into supply problems.²⁸³ There comes a point where patients do not have any more doctors or pharmacies to patronize.²⁸⁴ But prescription drug addicts are compulsive drug seekers, so they will turn to the Internet.²⁸⁵ As they begin to do this, addicts will find that e-pharmacies offer greater availability of drugs, easier access, and more convenience, which leads to doctor shopping becoming irrelevant.²⁸⁶

The DEA believes that there is a correlation between the increasing abuse of prescription drugs and the Internet.²⁸⁷ For proof, the agency points to the fact that controlled substances make up only eleven percent of prescriptions that brick and mortar pharmacies fill each day; these same pills constitute ninety-five percent of the prescriptions filled by online pharmacies.²⁸⁸ The DEA claims that this ratio proves the connection between the disturbing number of Americans abusing prescription drugs and Internet pharmacies.²⁸⁹ This ratio also demonstrates the availability of drugs on the Internet, which is a primary reason that pill addicts are now going online for their drugs.²⁹⁰ More and more controlled substances are available online, allowing pill addicts to get any type of pill they want with just a click of the mouse.²⁹¹ In the past, certain drugs, mainly controlled substances, could be obtained only by going through the rigorous steps of visiting a doctor, getting a prescription, and taking the original prescription (sometimes in triplicate) to

²⁸² *Id.*

²⁸³ See generally *Health Committee Hearing*, *supra* note 49; GOALS OF PRESCRIPTION MONITORING, *supra* note 49, at 1.

²⁸⁴ See generally PRESCRIPTION PAIN INFOFACTS, *supra* note 6, at 1.

²⁸⁵ *Id.*

²⁸⁶ See generally *Prescription for Safety*, *supra* note 199, at 75; Marks, *supra* note 22; WASH. INTERNET DAILY, *supra* note 278; StoptheDrugWar.org, *supra* note 4; Gaul & Flaherty, *supra* note 272.

²⁸⁷ Egan, *supra* note 11, at 33 (discussing DEA's Office of Diversion Control's Report to the 2004 National Association of State Controlled Substance Authorities Annual Conference).

²⁸⁸ *Id.*

²⁸⁹ *Id.* at 33.

²⁹⁰ Harmon, *supra* note 24.

²⁹¹ See *Gov't Reform Hearings*, *supra* note 12, at 1.

the pharmacy.²⁹² Schedule II controlled substances, which include oxycodone, codeine, Ritalin, and morphine, could not be refilled, requiring the steps to be repeated each time the patient needed more pills.²⁹³ Now these very drugs that were so hard to come by before e-pharmacies are available with the click of a mouse.²⁹⁴ Consumers can go online, type in the name of the drug they want, and find an e-pharmacy that will dispense it for them.²⁹⁵ All kinds of prescription drugs are available on demand at e-pharmacies, and more drug addicts are flocking to Internet pharmacies for this very reason.²⁹⁶

Pill addicts can go online and get virtually any type of prescription drug because the web sites are extremely easy to access.²⁹⁷ This ease of access is fueling the prescription drug abuse problem and contributing to the increasing number of youth who are able to obtain prescription drugs.²⁹⁸ The Internet does not restrict access to these web sites, and “anyone old enough to operate a keyboard . . . can get the drugs they want.”²⁹⁹ Prescription drug users are quickly learning of this easy access to the drugs they want.³⁰⁰

Another reason pill addicts are flocking to e-pharmacies is convenience.³⁰¹ Traditionally, a patient had to get in the car, drive to the doctor’s office, get a prescription, go to the pharmacy, and then receive the prescription drugs.³⁰² Now, with the advent of e-pharmacies, consumers can sit at their computer, order the drugs, and wait for them to be delivered to their home.³⁰³ Patients never have to see or speak with another person.³⁰⁴ Additionally, they do not even

²⁹² See *id.* (describing the basic requirements for prescribing and dispensing controlled substances).

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ Chase, *supra* note 255; Egan, *supra* note 11, at 33.

²⁹⁷ Amalie L. Tuffin, *Congress Attempts To Crack Down On Internet Pharmacies*, <http://www.d2vlaw.com/articles/LTW.InternetPharmacyCrackdown.pdf> (last visited Mar. 15, 2006).

²⁹⁸ See *id.*; see also, Petrecca, *supra* note 11.

²⁹⁹ KY. ATTY GEN. OFF. STUMBO TARGETS INTERNET DRUG SALES—DETAILS OF DRAFT LEGISLATION (BR 1133) MADE PUBLIC, at <http://ag.ky.gov/news/2005rel/Internet%20Drug%20Sales.htm> (Feb. 4, 2005).

³⁰⁰ *Id.*

³⁰¹ See generally DRUG THREAT ASSESSMENT, *supra* note 7 (stating that Internet pharmacies offer customers prescription drugs without a physician consultation, prescription, or verification); comScore Press Release, *supra* note 13.

³⁰² See generally DOJ Notices, *supra* note 203, at 21,182.

³⁰³ See generally *Mother Crusades For Online Pharmacy Regulations*, *supra* note 233.

³⁰⁴ Petrecca, *supra* note 11.

need a legitimate medical complaint because there is no attempt to verify the information they give to the online pharmacies.³⁰⁵ It is very convenient to obtain any type and dosage of drug because many e-pharmacies allow customers to choose these when they place their order.³⁰⁶ Internet pharmacies allow patients to completely bypass their physicians and home-pharmacies and receive prescriptions without consultation.³⁰⁷ Drug abusers are able to bypass pharmaceutical safeguards leading to an increased number of Americans ordering controlled substances via the Internet.³⁰⁸

Online pharmacies offer an increased availability of drugs, easy access, and convenience.³⁰⁹ Prescription drug users are becoming less inclined to “doctor shop” because of increased regulation and shortened supply of physicians still available to them, and are thereby turning to e-pharmacies.³¹⁰ Internet pharmacies are becoming more prevalent and offer a wide variety of easily accessible drugs.³¹¹ These factors, combined with prescription drug abusers who are compulsive drug seekers, are contributing to making doctor shopping irrelevant.³¹² As pill users are becoming more aware of the convenience, availability, and easy access of e-pharmacies, they are moving away from the traditional doctor-patient relationship and toward Internet pharmacies that will give them any drug at any time for any reason.³¹³ Prescription drug abuse in America is continuing to increase, and as e-pharmacies become more prevalent, the

³⁰⁵ *Id.*

³⁰⁶ Markon, *supra* note 231.

³⁰⁷ NAT'L CONF. OF STATE LEGISLATURES, ISSUE BRIEF: A SUMMARY ON ACTIVITY SURROUNDING ON-LINE PHARMACIES, <http://www.ncsl.org/statedfed/health/olpharm.htm> (last visited Mar. 10, 2006).

³⁰⁸ See DOJ Notices, *supra* note 203, at 21,182–83; Gaul & Flaherty, *supra* note 272.

³⁰⁹ See generally *Prescription for Safety*, *supra* note 199, at 75; Marks, *supra* note 22; WASH. INTERNET DAILY, *supra* note 278, at 75; StoptheDrugWar.org, *supra* note 4; Gaul & Flaherty, *supra* note 272.

³¹⁰ See generally *Health Committee Hearing*, *supra* note 49; GOALS OF PRESCRIPTION MONITORING, *supra* note 49; PRESCRIPTION PAIN INFOFACTS, *supra* note 6.

³¹¹ See *Gov't Reform Hearings*, *supra* note 12, at 116; *Mother Crusades For Online Pharmacy Regulation*, *supra* note 233.

³¹² See generally *Prescription for Safety*, *supra* note 199, at 75; Marks, *supra* note 22; WASH. INTERNET DAILY, *supra* note 278; StoptheDrugWar.org, *supra* note 4; Gaul & Flaherty, *supra* note 272.

³¹³ See generally *Prescription for Safety*, *supra* note 199, at 75; Marks, *supra* note 22; WASH. INTERNET DAILY, *supra* note 278; StoptheDrugWar.org, *supra* note 4; Gaul & Flaherty, *supra* note 272.

number of individuals using e-pharmacies will climb even higher.³¹⁴ Pharmaceutical regulations were written long before the arrival of the Internet and are ineffective in combating the growing trend of prescription drug abuse and e-pharmacies.³¹⁵

IV. E-PHARMACY LEGISLATION

Internet pharmacies are a relatively new phenomenon, and most federal and state laws do not effectively regulate them.³¹⁶ Both federal and state governments are playing catch-up in the regulation of e-pharmacies and are attempting to determine how to prosecute the physicians and pharmacists involved.³¹⁷ Authorities are stuck between applying current legislation, which does not specifically address e-pharmacies, and enacting new legislation geared toward the Internet.³¹⁸ Most authorities have “express[ed] concern[s] that their existing enforcement tools are not adequate to police Internet practices” and that new legislation is needed.³¹⁹ Some states have quickly adopted new laws that appear to address the problem of e-pharmacies, but these laws will most likely prove ineffective.³²⁰ Internet pharmacies have proven to be difficult to regulate and prosecute.³²¹ The increasing availability of online pharmacies is contributing to the increase in the abuse of prescription drugs.³²² It is imperative that federal and state authorities work together to combat the illegal diversion of prescription drugs via the Internet.³²³ Additionally, legislation must be adopted to overcome the gaps in current laws.³²⁴

³¹⁴ See Egan, *supra* note 11, at 33 (DEA claims a connection between Internet pharmacies and prescription drug increase).

³¹⁵ See *Commerce Hearings*, *supra* note 16; Egan, *supra* note 11, at 32–34.

³¹⁶ Kenneth Baker, *Drug Topics: The Risks Involved in Dispensing to On-line Patients* (Feb. 23, 2004), <http://drugtopics.com/drugtopics/article/articleDetail.jsp?id=109768>.

³¹⁷ *Id.*

³¹⁸ See generally *id.*

³¹⁹ See GAO INTERNET PHARMACIES, *supra* note 218, at 3.

³²⁰ Rice, *supra* note 245.

³²¹ See generally Marks, *supra* note 22 (stating that Internet pharmacies have presented officials with a whole new set of challenges, including unethical doctors and pharmacists).

³²² See DOJ Notices, *supra* note 203, at 21,182–83; Gaul & Flaherty, *supra* note 272.

³²³ See generally GAO PRESCRIPTION DRUGS, *supra* note 3, at 2–3; Rice, *supra* note 245; Marks, *supra* note 22.

³²⁴ See generally GAO INTERNET PHARMACIES, *supra* note 218, at 24; *Gov't Reform Hearings*, *supra* note 12, at 105–06.

A. Current Laws

1. State Action

“State law governs the prescribing and dispensing of prescription drugs”³²⁵ Typically, these laws delegate the monitoring of pharmacies to state medical and pharmaceutical boards.³²⁶ These boards establish the standards applicable to prescription drugs and monitor both physicians and pharmacies for compliance.³²⁷ Monitoring enhances states’ power to discipline doctors who prescribe without the existence of a doctor-patient relationship and to discipline pharmacists who dispense drugs without a prescription.³²⁸ Despite these powers, state boards have had a difficult time enforcing prescription drug standards because few e-pharmacies disclose their location or the identity of prescribing physicians.³²⁹ It is also difficult to monitor e-pharmacies because, by their very nature, they are mobile and able to disband their web sites and physical locations quickly before authorities are able to take action.³³⁰ For these reasons, some states have chosen to adopt new laws aimed at regulating and prosecuting e-pharmacies.³³¹

Ohio has adopted a new law that restricts the ability to prescribe within the state only to those doctors licensed within the state.³³² Nevada enacted a law that requires a physician to physically examine the patient within the prior six months and not suspect the prescription will be filled by an illegal Internet pharmacy.³³³ Recently, Texas adopted a law that requires Internet pharmacies to display a link to the state pharmaceutical board on the home page that describes how to file a complaint and gives the board’s contact information.³³⁴

³²⁵ GAO PRESCRIPTION DRUGS, *supra* note 3, at 5.

³²⁶ *Id.*

³²⁷ GAO INTERNET PHARMACIES—SAFETY RISKS, *supra* note 231, at 6.

³²⁸ See DOJ Notices, *supra* note 203, at 21,182–83; Rice, *supra* note 245.

³²⁹ Rice, *supra* note 245.

³³⁰ See generally *Prescription for Safety*, *supra* note 199, at 30; *Gov’t Reform Hearings*, *supra* note 12, at 6–8; Rice, *supra* note 245.

³³¹ Rice, *supra* note 245.

³³² *Id.*

³³³ NEV. REV. STAT. § 453.3643 (2005).

³³⁴ TEX. OCC. CODE ANN. § 562.1045 (Vernon 2005).

Each of the enacted laws attempts to regulate e-pharmacies and the physicians they employ, but these laws are not enough.³³⁵ The mobility and anonymity the Internet offers allows e-pharmacies to establish shop in one state and operate in another.³³⁶ State agencies will have difficulty enforcing these laws against pharmacies located outside the state because they do not have the authority to operate in other states, and they will also have difficulty identifying the pharmacy and physician involved.³³⁷ Additionally, these laws do not address the growing problem of “doctor shopping” as it relates to the Internet, nor do the laws address prescription drug users who now utilize e-pharmacies in their quest to obtain pills.³³⁸

2. Federal Action

While state law regulates the acts of pharmacists and physicians, federal law regulates prescription drugs.³³⁹ Regulation of prescription drugs is provided through two federal laws: The Controlled Substances Act and the Federal Food, Drug and Cosmetic Act.³⁴⁰

The Controlled Substances Act established a system of classifications for controlled substances based upon their potential for abuse.³⁴¹ Under this act, all scheduled drugs, except those in Schedule I which are considered illegal, are available to the public only with a valid prescription.³⁴² These substances may only be prescribed by a physician in the usual course of a physician’s professional practice.³⁴³ The DEA assigns registration numbers to handlers of controlled substances, which are used in all transactions related to these drugs.³⁴⁴ All registrants, including pharmacies, are required to maintain and report dispensing records, but pharmacists are not

³³⁵ NEV. REV. STAT. § 453.3643 ; TEX. OCC. CODE ANN. § 562.1045. See generally Rice, *supra* note 245.

³³⁶ Gov’t Reform Hearings, *supra* note 12, at 6–8; see Rice, *supra* note 245.

³³⁷ Gov’t Reform Hearings, *supra* note 12, at 6–8; see Rice, *supra* note 245.

³³⁸ See generally Prescription for Safety, *supra* note 199, at 75; Marks, *supra* note 22; WASH. INTERNET DAILY, *supra* note 278; StoptheDrugWar.org, *supra* note 4; Gaul & Flaherty, *supra* note 272.

³³⁹ See GAO INTERNET PHARMACIES—SAFETY RISKS, *supra* note 231, at 6.

³⁴⁰ 21 U.S.C. §§ 801–904 (2005); 21 U.S.C. §§ 301–399 (2005); GAO PRESCRIPTION DRUGS, *supra* note 3, at 4; GAO INTERNET PHARMACIES—SAFETY RISKS, *supra* note 231, at 6.

³⁴¹ 21 U.S.C. §§ 801–904 (2005); GAO PRESCRIPTION DRUGS, *supra* note 3, at 4.

³⁴² GAO PRESCRIPTION DRUGS, *supra* note 3, at 4.

³⁴³ See DOJ Notices, *supra* note 203, at 21,181.

³⁴⁴ GAO PRESCRIPTION DRUGS, *supra* note 3, at 4.

required to report information at the patient level.³⁴⁵ According to the Controlled Substances Act, e-pharmacies must register with the DEA and must maintain dispensing records of controlled substances.³⁴⁶ In spite of these requirements, rogue and questionnaire pharmacies are not generally registered with the DEA and are most likely engaged in the illegal sale of controlled substances.³⁴⁷ The DEA has the ability to pursue these types of pharmacies for violating the Controlled Substances Act and have been successful in some instances, but there still exist problems of identification, enforcement and jurisdiction.³⁴⁸

Under the Federal Food, Drug and Cosmetic Act (FD&C Act), the FDA is responsible for ensuring the safety, effectiveness, and quality of domestic drugs.³⁴⁹ The FDA also has the authority to take action against the sale of misbranded drugs, the sale of an unapproved drug, illegal promotion of a drug, dispensing without a valid prescription, and counterfeit drugs.³⁵⁰ Although the FDA has taken action against some e-pharmacies for violating the FD&C Act, the FDA does not typically regulate physicians or pharmacists.³⁵¹ For this reason, the FDA relies primarily on states to bring enforcement actions against pharmacies, but recognizes that cooperation is needed between federal and state agencies to identify and locate violators.³⁵²

³⁴⁵ *Id.*

³⁴⁶ See DOJ Notices, *supra* note 203, at 21,182–83.

³⁴⁷ See *id.* at 21,183.

³⁴⁸ See generally OFF. OF NAT'L DRUG CONTROL POL'Y, U.S. DRUG PREVENTION, TREATMENT, ENFORCEMENT AGENCIES TAKE ON "DOCTOR SHOPPERS," "PILL MILLS," Mar. 1, 2004, <http://www.whitehousedrugpolicy.gov/news/press04/030104.html> (last visited Mar. 16, 2006); News Release, DEA, DEA Disables Major Pharmaceutical Internet Scheme (Sept. 21, 2005), <http://www.dea.gov/pubs/pressrel/pr092105p.html> (last visited Mar. 16, 2006) (DEA has created a task force to target pharmaceutical drug traffickers who are fueling addiction); Lisa M. Power, *DEA Final Rule Sets The Course for E-Prescribing Of Narcotics*, 17 NO. 4 Health Law 32 (Aug. 2005); see also GAO INTERNET PHARMACIES, *supra* note 218, at 17; Marks, *supra* note 22.

³⁴⁹ 21 U.S.C. §§ 301–399 (2005); GAO INTERNET PHARMACIES—SAFETY RISKS, *supra* note 231, at 6.

³⁵⁰ *Commerce Hearings*, *supra* note 16 (A drug is considered misbranded if, among other things, it is dispensed without a valid prescription); GAO INTERNET PHARMACIES—SAFETY RISKS, *supra* note 231, at 6.

³⁵¹ *Commerce Hearings*, *supra* note 16.

³⁵² *Id.*

3. *Gaps Between Federal and State Laws*

Ideally, federal law regulates prescription drugs, while state law regulates the physicians and pharmacists who prescribe and dispense these drugs.³⁵³ Government officials designed this system based upon traditional methods used to obtain prescription drugs, and the system has been effective in the traditional setting.³⁵⁴ However, when applied to e-pharmacies, the traditional system has gaps that hamper the ability to regulate, monitor and prosecute internet pharmacies.³⁵⁵ There are three primary gaps between federal and state legislation: jurisdictional limits, enforcement mechanisms, and identification.³⁵⁶

Jurisdictional gaps occur because states have limited “authority to investigate and act against” e-pharmacies located outside of their state.³⁵⁷ Internet pharmacies take advantage of this gap by physically locating in one state and conducting business in another.³⁵⁸ As a result, the traditional methods states use to investigate pharmaceutical violations are ineffective, and states are unable to compel the pharmacies to disclose information.³⁵⁹ Additionally, states cannot take legal action against these pharmacies because they do not have the authority.³⁶⁰ For instance, if an attorney general in one state obtains an injunction against an e-pharmacy, the injunction only applies to the e-pharmacy in that particular state.³⁶¹ The e-pharmacy can still operate legally in another state.³⁶² This makes it difficult to enforce the injunction against the e-pharmacy because the internet allows mobility and rapid relocation, so an e-pharmacy could effectively still operate in a state where it has been enjoined from doing so.³⁶³ Currently, federal law does not overcome jurisdic-

³⁵³ GAO INTERNET PHARMACIES—SAFETY RISKS, *supra* note 231, at 6.

³⁵⁴ *Commerce Hearings*, *supra* note 16.

³⁵⁵ See generally *Prescription for Safety*, *supra* note 199, at 30; *Gov't Reform Hearings*, *supra* note 12, at 6–8, 104; GAO INTERNET PHARMACIES, *supra* note 218, at 14–15.

³⁵⁶ See generally *Prescription for Safety*, *supra* note 199, at 30; *Gov't Reform Hearings*, *supra* note 12, at 6–8, 104; GAO INTERNET PHARMACIES, *supra* note 218, at 14–15.

³⁵⁷ GAO INTERNET PHARMACIES, *supra* note 218, at 14.

³⁵⁸ *Id.*

³⁵⁹ *Id.* (stating that investigative tools include interviews, electronic surveillance, and serving subpoenas).

³⁶⁰ *Gov't Reform Hearings*, *supra* note 12, at 7–8.

³⁶¹ *Id.*

³⁶² *Id.*

³⁶³ *Id.*

tional gaps and does not allow states to investigate or act against e-pharmacies located outside of the state.³⁶⁴

Enforcement issues arise because the federal government generally yields to what a state defines as a valid prescription.³⁶⁵ Although federal law requires certain prescriptions be dispensed only with a valid prescription, the FDA and DEA have deferred to states to determine when a prescription is valid; thus, they do not generally take action against e-pharmacies for prescription drug violations.³⁶⁶ This leaves an enforcement gap because federal and state agencies are waiting on the other to take action against rogue pharmacies.³⁶⁷ Federal agencies claim that since states monitor physicians and pharmacies, states should bring action against e-pharmacies that violate pharmaceutical laws.³⁶⁸ However, with the jurisdictional gaps mentioned above, states have a difficult time enforcing action against e-pharmacies.³⁶⁹ This creates a cycle in which both federal and state authorities realize there is a problem but neither is taking action.³⁷⁰

The final gap between state and federal law is the failure of any law, state or federal, to require identifying information on e-pharmacy web sites.³⁷¹ E-pharmacies can quickly and easily alter the appearance and location of their website.³⁷² This capability has frustrated regulatory efforts because it is difficult to identify the physical location of the pharmacy, the identity of the physicians, and the license status of both.³⁷³ Most illegal e-pharmacies do not provide identifying information on their web-sites, which compounds the problem of tracking and monitoring these sites.³⁷⁴ State and federal laws lack provisions that require these pharmacies to provide iden-

³⁶⁴ GAO INTERNET PHARMACIES, *supra* note 218, at 14.

³⁶⁵ *Gov't Reform Hearings*, *supra* note 12, at 7.

³⁶⁶ See *Gov't Reform Hearings*, *supra* note 12, at 7; *Commerce Hearings*, *supra* note 16, at 3–4.

³⁶⁷ See *Gov't Reform Hearings*, *supra* note 12, at 7.

³⁶⁸ *Commerce Hearings*, *supra* note 16, at 4–5.

³⁶⁹ See *Prescription for Safety*, *supra* note 199, at 30; *Gov't Reform Hearings*, *supra* note 12, at 6–8; GAO INTERNET PHARMACIES, *supra* note 218, at 14.

³⁷⁰ See generally *Gov't Reform Hearings*, *supra* note 12, at 6–8; GAO INTERNET PHARMACIES, *supra* note 218, at 14.

³⁷¹ See *Prescription for Safety*, *supra* note 199, at 30; *Gov't Reform Hearings*, *supra* note 12, at 6, 104.

³⁷² See *Prescription for Safety*, *supra* note 199, at 30; *Gov't Reform Hearings*, *supra* note 12, at 6, 104.

³⁷³ *Gov't Reform Hearings*, *supra* note 12, at 104.

³⁷⁴ *Id.*

tifying information.³⁷⁵ This gap allows e-pharmacies to remain anonymous and makes it more difficult for authorities to track them.³⁷⁶

Serious gaps exist in the state and federal laws that regulate e-pharmacies.³⁷⁷ These gaps contribute to the illegal diversion of prescription drugs and fail to prevent drug addicts from using the Internet to obtain pills.³⁷⁸ Congress should adopt legislation aimed specifically at e-pharmacies to overcome these gaps and effectively regulate e-pharmacies.³⁷⁹

B. Proposed Legislation

1. *Internet Pharmacy Consumer Protection Act*

The U.S. Congress responded to reports that, fueled by easy access to drugs online, prescription drug abuse is increasing.³⁸⁰ This response included introduction of the Internet Pharmacy Consumer Protection Act (Act).³⁸¹ A version of this Act was first introduced in 2003³⁸² and again in 2004.³⁸³ More recently, this Act has been introduced in the Senate and House where in both chambers it is currently sitting in committee.³⁸⁴ This Act amends the Federal Food, Drug, and Cosmetic Act to include a section entitled “Internet Sales of Prescription Drugs.”³⁸⁵ The Act specifically addresses the problem of Internet pharmacies. The Act intends to address the problem of Americans obtaining medications online without a prescription in three steps.³⁸⁶

³⁷⁵ See *Prescription for Safety*, *supra* note 199, at 30; *Gov't Reform Hearings*, *supra* note 12, at 104.

³⁷⁶ *Gov't Reform Hearings*, *supra* note 12, at 104.

³⁷⁷ See *Prescription for Safety*, *supra* note 199, at 30; *Gov't Reform Hearings*, *supra* note 12, at 6–8, 104; GAO INTERNET PHARMACIES, *supra* note 218, at 14.

³⁷⁸ See *Prescription for Safety*, *supra* note 199, at 30; *Gov't Reform Hearings*, *supra* note 12, at 6–8, 104; GAO INTERNET PHARMACIES, *supra* note 218, at 14.

³⁷⁹ See generally *Prescription for Safety*, *supra* note 199, at 2.

³⁸⁰ See Tuffin, *supra* note 297.

³⁸¹ *Id.*

³⁸² H.R. 2652, 108th Cong. (2003) (showing that this bill never got through Subcommittee referral).

³⁸³ H.R. 3880, 108th Cong. (2004) (showing that this bill was referred to the Subcommittee on Health but never became law).

³⁸⁴ S. 399, 109th Cong. (2005) (read twice and referred to the Committee on Health, Education, Labor, and Pensions); H.R. 840, 109th Cong. (2005) (referred to the Subcommittee on Health).

³⁸⁵ S. 399, 109th Cong. (2005); H.R. 840, 109th Cong. (2005).

³⁸⁶ See *Prescription for Safety*, *supra* note 199, at 2; Tuffin, *supra* note 297.

The first step establishes disclosure standards for e-pharmacies.³⁸⁷ These standards require that the web site display identifying information including the name of the business, and the names of the physician and pharmacist associated with the site.³⁸⁸ Additionally, the information must include each state in which the physician or pharmacist is authorized by law to prescribe and dispense prescription drugs, the address and telephone number of each place of business with which the doctor or pharmacist is associated, and the name of any individual who provides medical consultations for the web site.³⁸⁹ This provision addresses the identifying information gap because it requires that e-pharmacies provide information that would allow authorities to identify the pharmacy, physician, business, and pharmacist involved with the web site.³⁹⁰ This information will aid officials in tracking e-pharmacies and will allow them to bring legal action against pharmacies not displaying the required information.³⁹¹

Secondly, the bill prohibits an e-pharmacy from dispensing a prescription drug based solely upon an online questionnaire.³⁹² For the purposes of this bill, the questionnaire is not considered a medical evaluation and does not meet the reasonable standard of care required to dispense prescription drugs.³⁹³ This section of the bill addresses enforcement gaps because it determines what makes a prescription valid.³⁹⁴ Under this section, state and federal officials are able to take action against e-pharmacies that dispense prescription drugs without a valid prescription.³⁹⁵ This provision will stop the cycle of state and federal agencies waiting on the other to take action.³⁹⁶

Finally, the bill enhances states' enforcement powers over e-pharmacies by allowing them to pursue actions in federal court.³⁹⁷

³⁸⁷ *Prescription for Safety*, *supra* note 199, at 2 (this hearing addressed the second version of the Internet Pharmacy Consumer Protection Act which was similar in all aspects to the current version).

³⁸⁸ *Id.*

³⁸⁹ See S. 399, 109th Cong. § 503B(a)(2)(A)(i-v) (2005).

³⁹⁰ See generally *Prescription for Safety*, *supra* note 199, at 2; *Gov't Reform Hearings*, *supra* note 12, at 7.

³⁹¹ See generally *Prescription for Safety*, *supra* note 199, at 2.

³⁹² *Id.*

³⁹³ *Id.*

³⁹⁴ *Id.*; *Gov't Reform Hearings*, *supra* note 12, at 7-8.

³⁹⁵ *Prescription for Safety*, *supra* note 199, at 2.

³⁹⁶ *Gov't Reform Hearings*, *supra* note 12, at 7.

³⁹⁷ *Prescription for Safety*, *supra* note 199, at 2.

States may request an injunction in federal court that would shut down a web site across the country.³⁹⁸ Through this addition, states can reach across state borders and take action against e-pharmacies that operate outside of state lines.³⁹⁹ This provision allows more efficient sharing of investigative and enforcement resources because it ends the current system of each individual state having to shut down each individual illegal e-pharmacy.⁴⁰⁰ This provision of the bill deals with the gaps in jurisdictional limits because it allows states to take action that would prohibit e-pharmacies even if they operate from a different state.⁴⁰¹ This solves the problem of jurisdictional gaps because the bill increases the authority of states to pursue investigative and legal action against e-pharmacies.⁴⁰²

The Internet Pharmacy Consumer Protection Act is an excellent first step on the part of legislators to solve the growing problem of prescription drug abuse in America.⁴⁰³ However, this legislation does not go far enough to address the serious health threat of the illegal diversion of prescription drugs through e-pharmacies.⁴⁰⁴

2. Recommendations

Three additional steps must be taken to ensure that the Act is effective in fighting the war against prescription drug abuse on the Internet. First, the Act must be amended to address credit card transactions. Second, the conditions that make an e-pharmacy illegal must be better defined. Third, authorities must pursue violators through current doctor shopping laws.

The majority of e-pharmacies rely on credit card transactions processed by U.S. banks and networks.⁴⁰⁵ The Act must be amended to allow states to seek injunctions against financial transactions traceable to online drug sales.⁴⁰⁶ This addition would prove to be an important investigative tool and would allow officials to stop some of the credit card orders.⁴⁰⁷ In turn, this would disable and signifi-

³⁹⁸ *Id.*

³⁹⁹ *Id.*

⁴⁰⁰ See Tuffin, *supra* note 297.

⁴⁰¹ *Prescription for Safety*, *supra* note 199, at 2.

⁴⁰² See *Gov't Reform Hearing*, *supra* note 12, at 7–8; *Prescription for Safety*, *supra* note 199, at 2.

⁴⁰³ See GAO INTERNET PHARMACIES, *supra* note 218, at 23–24; Tuffin, *supra* note 297.

⁴⁰⁴ See generally *Gov't Reform Hearings*, *supra* note 12, at 105–06; GAO INTERNET PHARMACIES, *supra* note 218, at 23–24.

⁴⁰⁵ GAO INTERNET PHARMACIES, *supra* note 218, at 23–24.

⁴⁰⁶ *Id.*

⁴⁰⁷ *Id.*

cantly disrupt illegal e-pharmacies because they rely heavily on credit card transactions.⁴⁰⁸

The Act is aimed at combating illegal e-pharmacies, not those operating online legitimately.⁴⁰⁹ To effectively distinguish between these types of pharmacies, the Act must clearly define what makes an e-pharmacy illegal.⁴¹⁰ The Act does address the issue of whether a prescription that is dispensed based upon a questionnaire is valid, but it does not clearly define that a doctor/patient relationship must exist or that the four elements that define this relationship must be present.⁴¹¹ It is necessary that the Act include clear definitions so that there is not confusion about whether an e-pharmacy is legitimate.⁴¹²

Finally, it is imperative that authorities begin to apply doctor shopping laws to prescription drugs obtained over the Internet. Almost every state has some variation of a law that addresses doctor shopping.⁴¹³ Most of these laws include a provision that makes it unlawful to acquire a controlled substance by misrepresentation.⁴¹⁴ These laws could be applied to consumers who go online and give false information in order to obtain controlled substances. Once consumers realize that what they are doing is criminal, the majority of them will reconsider obtaining these prescriptions through illegal e-pharmacies.⁴¹⁵

Pursuing credit card transactions, defining what makes an e-pharmacy illegal, and applying doctor shopping laws to online prescription drug purchases will drastically improve the effectiveness of the Act. Taking these additional steps will ensure that state and federal officials are better able to combat the illegal diversion of prescription drugs via e-pharmacies.

⁴⁰⁸ *Id.*

⁴⁰⁹ *Prescription for Safety*, *supra* note 199, at 2.

⁴¹⁰ *See Gov't Reform Hearings*, *supra* note 12, at 106.

⁴¹¹ *Id.*

⁴¹² *Id.*

⁴¹³ *See generally* TEX. DEP'T OF PUB. SAFETY, *supra* note 71.

⁴¹⁴ *Id.*

⁴¹⁵ *See Marks*, *supra* note 22 (stating that most people will not go to their doctor and falsify medical complaints but they will do so over the Internet because they do not realize it is illegal).

V. CONCLUSION

There is a disturbing trend in America—the abuse of prescription drugs continues to increase and is being fueled by e-pharmacies.⁴¹⁶ Drug users are attracted to e-pharmacies because they provide greater availability of drugs, easy access, and convenience.⁴¹⁷ Traditionally, addicts relied upon doctor shopping to obtain prescription drugs, but now they can easily obtain controlled substances via the Internet.⁴¹⁸ Current state and federal laws are not designed to address the specifics of e-pharmacies and are ineffective at curbing the problems raised by them.⁴¹⁹ It is essential that Congress draft new laws to combat prescription drug abuse and e-pharmacies.

⁴¹⁶ GAO PRESCRIPTION DRUGS, *supra* note 3, at 1.

⁴¹⁷ See generally *Prescription for Safety*, *supra* note 199, at 75; Marks, *supra* note 22; WASH. INTERNET DAILY, *supra* note 278; StoptheDrugWar.org, *supra* note 4; Gaul & Flaherty, *supra* note 272.

⁴¹⁸ See generally GAO PRESCRIPTION DRUGS, *supra* note 3; DRUG THREAT ASSESSMENT, *supra* note 7; PRESCRIPTION PAIN INFOFACTS, *supra* note 6.

⁴¹⁹ See *Commerce Hearings*, *supra* note 16.