Imagine a society were only government run businesses are able to survive because the laws have in essence restricted what private business are able to charge for services and goods. The private industries tried to work within the system for a time and eventually tried to work outside of the system, only to have their efforts eventually fail when they were unable to return a sustainable profit margin. That is happening and will happen with the Medicaid Equalization laws, especially with the current changes that will happen with the new health care laws.

Medicaid is composed of federal and state laws. Generally states are allowed to create laws that are meant to protect Medicaid eligible individuals who may seek admittance into a nursing facility.\(^1\) States have enacted different laws to achieve this goal. Some of the most restrictive and damaging are the equalization laws enacted by Minnesota and North Dakota. Medicaid discrimination has been a controversial issue and various measures have been taken to minimize it. Is taking the decision out of the hands of private healthcare providers and forcing them to level the playing field, as seen in Minnesota, a legitimate option or is it a step towards government run healthcare?

In essence the federal laws act as a broad framework for the Medicaid system while the states are largely left to place greater restrictions, or protections, on the system. In relation to the use of nursing home faculties the federal law holds that federally certified nursing facilities cannot discriminate based upon the payment source.\(^2\) This has also been applied to restrict the practice of discrimination in admission. Under federal law financial screening is also illegal. These laws were implemented because private nursing home facilities would rather have private
paying patients.\textsuperscript{3} That is a result of the Medicaid program paying out low reimbursement rates.\textsuperscript{4} Because of this relatively low reimbursement rate something needed to be implemented to discourage, or disallow, certified nursing home facilities from favoring private paying residents. The Federal Regulations have allowed the states to enact laws to protection Medicaid Assistance patients who seek admittance to a nursing home facility.\textsuperscript{5} States have responded in a variety of ways. Some of the most restrictive measures have been those adopted by Minnesota and North Dakota, known as Medicaid Equalization.

Minnesota and North Dakota are the only two states that have a Medicaid Equalization law. Other states, depending on how strict their state Medicaid laws are, are able to somewhat offset the low Medicaid reimbursement rates by making up for it with private paying residents. However, under the equalization laws Minnesota and North Dakota are not left with an offsetting option.

The stated purpose of North Dakota’s rate equalization is, “[t]he rate equalization feature of the North Dakota system ensures that residents within a given nursing facility, with similar health conditions and service needs, are charged the same amount regardless of the source of payment.”\textsuperscript{6} North Dakota’s code states,

\begin{quote}
The right to not be discriminated against by a facility in the admission process or in the provision of appropriate care on the basis of the resident’s source of payment to the facility. Any applicant for admission to a facility who is denied admission must be given the reason for the denial in writing upon request.\textsuperscript{7}
\end{quote}

Put into place in 1990 the rate equalization also contains a case mix based reimbursement program. The reimbursement program determines the amount each facility will receive, it is based on such things as the intensity of the service, age of the building, amount of indebtedness, staffing levels and the prevailing wages, and also the price characteristics for the area.\textsuperscript{8}
The Minnesota equalization law is similar to that of North Dakota, but for the lack of a case mix based reimbursement program. “As a condition of Medicaid certification, a Minnesota nursing facility promises that it will charge private-pay residents a per diem rate not in excess of the Medicaid per diem rate. As a result, certified nursing facilities presumably have no reason to favor private-pay applicants over Medicaid-eligible applicants.”9 The Minnesota Statute states, “in order to receive medical assistance payments a nursing facility cannot charge private paying residents higher rates for similar services except under certain circumstances (1) private room, (2) special services not included in the daily rate.”10 The statute also provides that if a private payer is charged in violation of the law that person has a cause of action for civil damages against that nursing home facility. There is great disincentive for a certified nursing facility to violate the equalization law because the damages include three times the payments that resulted from said violation.11

The two areas of exceptions addressed by the statute were private rooms and special services. A certified nursing facility may charge private paying residents the market rate for a private room because Medicaid usually only covers semi-private rooms.12 To be considered a special service that is not normally part of the daily room rate it

must be offered to all residents of the facility, must be charged at the same rate to all residents, must be charged separately from the daily room rate, may not be services included as part of the daily rate or be a service required by law, and residents must be free to select or decline such special services.13

Minnesota does not have incorporated with their equalization laws a case mix reimbursement rate as North Dakota does. Instead, since 1995 Medicaid reimbursement rates have not been set to the actual and allowable costs.14 The actual, complete, move away from cost base reimbursement began in the 1999 legislative session. The 1999 rate increase legislation ended the cost base system for everything but property.15
There are three main cases that upheld the Minnesota equalization law. The first was brought in 1979, *Minn. Ass’n of Health Care Facilities, Inc. v. Minnesota Department of Public Welfare*. The most important part of that case, quoted in following cases, is about how participation in the program is voluntary for the nursing facilities.

Participation by a nursing home as a provider of health care services to Medicaid recipients is voluntary. If appellants find that the reimbursements rates are insufficient, then they may either make their homes more efficient and economical or terminate their relationship with Medicaid and no longer accept recipients as residents.\(^\text{16}\)

Basically the court decided voluntariness is a key factor in upholding the Equalization law, regardless of implications. Another comment implies that the court realizes in order to survive nursing homes need to receive Medicaid Assistance, but once again voluntariness wins out.\(^\text{17}\)

The next two cases mainly challenged the constitutionality of the equalization law *Minn. Ass’n of Health Care Facilities, Inc. v. Minnesota Dept. of Public Welfare* and *Highland Chateau, Inc. v. Minn. Dept. of Public Welfare*. Highland Chateau differed in the reasoning for the lawsuit. While argued on Constitutional grounds their case was because of an attempt to go around the Equalization law. They tried to establish two separate nursing facilities within one building. One of the facilities, the one with a lesser number of beds, was certified while the other was not. If allowed this would have enabled them to charge any rate to their private paying residents in the non-certified part of the nursing home. They argued the state equalization law was in violation of the Supremacy Clause because the Medicaid Act permits certification of specific parts of a nursing home. The court disagreed and found that the equalization law was not contrary to federal law and did not violate the Supremacy Clause.\(^\text{18}\)

Both cases raised argued that the equalization law violated due process. In *Minn. Ass’n of Health Care Facilities* the nursing facilities argued that limiting the rates they may charge non-
Medicaid residents coupled with the already low rates they receive for Medicaid residents deprives the facilities of substantive due process because it is essentially a taking of property without due process. The court once again looked to the fact that nursing home facilities only fall within the equalization law by voluntary participation. In line with that the court considered that the privilege and benefit involved was when a nursing home chose to participate in the program and received a reimbursement. As a condition the state was then able to require the nursing homes to abide by the statutory requirements.\(^{19}\)

“\[N\]ursing homes that serve medical assistance recipients have no constitutional right to be free from state controls on the rates they charge residents who do not receive medical assistance.”\(^{20}\) With this line of reasoning the court heavily relied on \textit{Nebbia v. New York.} As in \textit{Nebbia} the state was allowed to regulate the price of milk, and in this instance the states may regulate what a certified nursing facility may charge.\(^{21}\)

The court found that the Equalization law did not violate equal protection and met the substantive due process requirements.

The Minnesota legislature could reasonably find that differences in rates for the same nursing home services, depending wholly upon whether or not a resident receives medical assistance, are inimical to the public welfare, and thus it could properly choose to regulate the rates that nursing homes participating in Medicaid charge to residents who do not receive medical assistance. The statute enacted to achieve this purpose has a rational relationship to the end sought and is not arbitrary or impermissibly discriminatory.\(^{22}\)

In \textit{Highland Chateau} the court also found that the equalization law did not violate due process and did not constitute a taking of property without just compensation. Because participation in the Medicaid certification program was voluntary there could not be a violation of due process. This same logic was applied in determining that the law did not violate equal protection.\(^{23}\)
Minn. Ass’n of Health Care Facilities also argued an equal protection violation. They argued it was in violation because it only regulates the rates of nursing homes that participate in Medicaid not the rates and charges of other nursing home and health care providers. The statute was found to

(1) reduces discrimination against Medicaid recipients in gaining entry to nursing homes by eliminating the incentive to discriminate; (2) alleviates the stigma attached to receiving welfare benefits; (3) permits private pay residents to stretch their savings farther and this stay off of welfare; (4) promotes the fundamental notion of fairness that one should pay equal rates for the same services; and (5) cases the resentment of Medicaid recipients by residents who do not receive medical assistance.  

The Court found there was no equal protection violation because the statute was not arbitrary and supported a legitimate state interest.  

Therefore, the courts have twice found that the Minnesota Medicaid Equalization law passes constitutional muster.  

Medicaid Equalization laws are not effective. As stated earlier, Medicaid programs pay a low reimbursement rate. Because of this certified nursing facilities must seek to make up for costs from their Medicaid residents. In other states this is done through private pay residents. Minnesota and North Dakota however, have taken that option away from the nursing facilities. Instead in those two states the nursing facilities are left to find some other way to make up costs, but there are only so many ways costs can be cut. What is to stop the cost saving measures from diminishing the quality of care or less staff? 

The passage of the new health care legislation also raises more concerns about what will happen with Medicaid. It is predicted that the number of people eligible for Medicaid will greatly increase. One estimate is that by 2014 15 million more Americans could be Medicaid eligible. States will be the main ones to bear this burden. Several states have already seen a
decline in revenue and have had to start cutting Medicaid benefits. The already decreasing Medicaid reimbursements would just increase as the demand and eligibility increases. How are nursing facilities under the equalization laws supposed to cope and survive? A decrease in Medicaid reimbursement rates would equivocally mean a decrease in what they are able to charge private paying residents.

With the passage of federal health care legislation it is uncertain what will happen with Medicaid. Does it mean Medicaid will be redone, reformed, expanded? With such uncertainties out there it is difficult to know what direction Minnesota and North Dakota should take. However, it is clear that no other states, or the federal government, should impose anything similar to Medicaid equalization laws. Minnesota and North Dakota need to be on alert of what the changing health care system could mean for the nursing facilities in their states’. Something needs to be done sooner rather than later to preempt what could be a devastating problem.

1 Discrimination In Admission, [2009] MB Long-Term Care Advocacy ¶3.04.
2 Illegality of Discrimination Based on Payment Source, [2009] MB Long-Term Care Advocacy ¶ 2.05.
3 Discrimination In Admission, supra note 1. In 1992 the Health Care Financing Administration’s Region V, Chicago, office found that such practices violated the Nursing Home Reform Law. In 1993 the House Conference Report also essentially deemed it illegal under the current federal law.
4 Illegality of Discrimination Based on Payment Source, supra note 2. Specifically within the Nursing Home Reform Law is the prohibition against discrimination based on the form of reimbursement.
5 Discrimination In Admission, supra note 1. Examples from other states: New York has required that Medicaid certified nursing facilities must admit a reasonable percentage of Medicaid eligible applications. Connecticut has chosen to admit residents on a first come first serve basis. In Ohio a certified nursing facility cannot discriminate based on the applicants eligibility for Medicaid. Id.
6 ND DEPT. OF HEALTH: A GUIDE TO NURSING FACILITY CHARGES (2009).
7 N.D. Cent. Code §50-10.2-02 (2009)
8 ND DEPT. OF HEALTH, supra note 6. “In 1999 each facility had 34 case mix classifications, with corresponding payment rates assigned to each.” The rates were to establish the services and charges for the residents. Id.
9 Discrimination In Admission, supra note 1.
10 Minn. Stat. §256.48(a) (2009).
11 Id. “The damages awarded shall include three times the payments that result from the violation, together with costs and disbursements, including reasonable attorneys’ fees or their equivalent.” Id.
13 *Id.* All residents means private payers and those who receive Medicaid Assistance.

14 *Nursing Home Care in Minnesota: Shortfalls in Medicaid Funding and Economic Impact of Long Term Care, Care Providers of Minnesota* (2009), http://www.careproviders.org/members/2010/Shortfalls_single.pdf.

15 MHHP and MHHA 1999 Legislative Report, Nursing Home Rate Adjustment, c 245 art 3 s. See Minn. Stat. §256B.431.

16 Minn. Ass’n of Health Care Facilities v. Minn. Dept. of Pub. Welfare, 602 F.2d 150, 153-54 (8th Cir. 1979). “This action was originally brought...to challenge the validity of Regulations of the Minnesota Department of Public Welfare for Determining Welfare Per Diem Rates for Nursing Home Providers under the Title XIX Medical Assistance Program and a state statute, *Minn. Stat. Ann. §256B.48(1)(a).*” *Id.* at 151.

17 *Id.* at 154. “That a particular nursing facility cannot survive without Medicaid participation was certainly not Congress’ foremost consideration in its creation of the Medicaid program.” *Id.*


20 *Id.* at 446-7.

21 *Id.* *Id.* *Neibbia v. New York* 291 U.S. 502, 527-28 “The Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases. The right to conduct a business, or to pursue a calling, may be conditioned.” *Id.*

22 *Id.* at 447. The court applied the three part test from *State v. Nat’l Bank of St. Paul.*

23 Highland Chateau, *supra* note 14 at 811.


25 *Id.* at 447 and 448.


27 *Illegality of Discrimination Based on Payment Source,* *supra* note 2.

28 See H.R. 3962.