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October 25, 1976

FILE NO. S-1167

CONSTITUTION:
Right of Consumer to
Receive Price Information
Under the First and Four-
teenth Amendments to the
U.S. Constitution

Honorable David DeDoncker
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Rock Island, Illinois 61201

Dear Mr. DeDoncker:

This responds to your letter requesting my opinion as to whether section 1 of "AN ACT to prohibit certain advertising, etc." (Ill. Rev. Stat. 1975, ch. 121 1/2, par. 341) violates the First and Fourteenth Amendments to the United States Constitution, insofar as it prohibits advertising the price of furnishing and fitting eyeglasses and contact lenses. Section 1 provides that:

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"No person, firm or corporation, in relation to the examination of the human eye, or the furnishing, prescribing, or fitting of materials used in prescription eye glasses or contact lenses, may advertise directly or indirectly by any means, any price, cost, or free services or materials."

You base your question on the recent decision of the U.S. Supreme Court in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., ___ U.S. ___, 96 S. Ct. 1817. The issue there was the validity of a Virginia statute providing that a pharmacist who advertised prescription drug prices was guilty of unprofessional conduct. The statute was challenged on the grounds that the First Amendment, as applicable to the States under the Fourteenth Amendment (see, e.g. Bigelow v. Virginia, 421 U.S. 809; Schneider v. State, 308 U.S. 147), guaranteed consumers the right to receive this information. The proponents of the statute's validity argued that ads of the kind prohibited constituted "commercial speech" and therefore were not protected by the First Amendment under the rationale of Valentine v. Chrestensen, 316 U.S. 52.

At pages 1823-1824 of its opinion in the State Board of Pharmacy case, the court begins by noting that

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although support for a "commercial speech" exception to the First Amendment can be found in Valentine v. Chrestensen and cases following it, "the notion of unprotected 'commercial speech' all but passed from the scene" as a result of the decision in Bigelow v. Virginia, supra. In Bigelow, the court rejected the argument that an ad in a Virginia newspaper for a New York abortion clinic was not protected by the First Amendment because of its commercial nature. At page 825 of its decision, the court in Bigelow stated that "the Virginia courts erred in their assumptions that advertising, as such, was entitled to no First Amendment protection".

Because of the subject matter of the ads involved in Bigelow, however, and the fact that it contained factual material of clear public interest, some ambiguity continued to exist with regard to the status of "commercial speech" under the First Amendment. (96 S. Ct. 1817, at 1825.) As the court pointed out in Bigelow at page 825, it was not called upon at that time to decide:

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"* * * [T]he precise extent to which the First Amendment permits regulation of advertising that is related to activities the State may legitimately regulate or even prohibit."

In the State Board of Pharmacy case, on the other hand, the majority of the court felt that the question of whether or not a First Amendment exception for "commercial speech" existed was squarely before it. (96 S. Ct. 1817, at 1825.) At page 1826 of the opinion, Mr. Justice Blackmun, writing for the court, stated:

" * * *
Our question is whether speech which does 'no more than propose a commercial transaction,' Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S., at 385, is so removed from any 'exposition of ideas,' Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942), and from 'truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government.' Roth v. United States, 354 U.S. 476, 484 (1957), that it lacks all protection. Our answer is that it is not.

* * *
(emphasis added.)

The decision that "commercial speech" is protected by the First Amendment does not, as the Court pointed out at page 1830, mean that it can never be regulated in any way, however. The State still has the power to regulate false and

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misleading ads and restrictions as to the time, place and manner of commercial ads may also be valid in some instances.

Applying the rationale and holding of the State Board of Pharmacy decision to the question you pose, it is apparent first that the consumers of eyeglasses and contact lenses have the same right to price information under the First and Fourteenth Amendments as do the consumers of prescription drugs. Furthermore, as was true in the case of the Virginia statute, the statute with which you are concerned is not limited to restricting false and misleading ads or regulating the time, place and manner of advertising. Rather, it bans certain advertising altogether.

It is therefore my opinion, based on the recent decisions of the Supreme Court, that section 1 of "AN ACT to prohibit certain advertising, etc." violates the First and Fourteenth Amendments to the Constitution of the United States.

This conclusion is the same one reached by a three-judge District Court called upon to examine the validity of a comparable California statute in Terminal-Hudson Electronics

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v. Dept. of Consumer Affairs, 407 F. Supp. 1075 (C.D. Cal., 1976). Relying on the Bigelow decision alone, the court held that a California statute prohibiting the advertising of the price of furnishing and fitting prescription eyeglasses violated the First Amendment.

Very truly yours,

A T T O R N E Y G E N E R A L