

# MAINE STATE LEGISLATURE

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# STATE OF MAINE

Inter-Departmental Memorandum Date March 11, 1976

To Richard O. Campbell, Secretary

Dept. Commission of Pharmacy

From Phillip M. Kilmister, Assistant

Dept. Attorney General

Subject Osco Drug Advertisement in re Discounts on Prescription Drugs

Your inquiry under date of March 3, 1976, relating to the advertising of prescription drugs by the vehicle of offering discounts on said drugs, through the redemption of coupons by purchasers thereof, poses an interesting question.

Our prescription drug advertising act (P.L. 1975, c. 257), Title 22 M.R.S.A. § 2204-D, reads as follows:

"It shall be lawful for any pharmacy, pharmacist or other licensee of the Board of Commissioners of the Profession of Pharmacy to advertise to the public the current retail price he or she charges for any drugs, medicines or appliances as defined in 21 U.S.C. 3211(g)(1) which bears the legend 'Caution; Federal law prohibits dispensing without prescription.' Such advertising may be according to either the brand name or the generic name of drugs, or both. No gifts, premiums, trading stamps or bonuses shall be associated with such advertising." (emphasis supplied)

Where neither the name nor the price of a prescription drug advertised for sale is specified, there appears to be no prohibition as to the offering of discounts or premiums relating to said advertising. It is therefore my opinion that the "Osco advertisement" under analysis, does not constitute illegal advertising under our current statutory law.

In closing, I deem it important to point out also that it seems clear that in order to prohibit all advertising of prescription drugs at discount prices, that Legislative edict is necessary to effectuate such a result, and the Board of Commissioners of Pharmacy, as an administrative agency, does not appear to possess the authority to promulgate a rule or regulation which would prohibit all advertising of prescription drugs at discount prices. This precise issue was recently decided in the case of Mississippi State Board of Pharmacy v. Steele, 317 So.2d 33 (1975).


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In the above-designated case, two apothecary store licenses were revoked because the managers of separate pharmacies in a corporate drugstore chain placed newspaper advertisements offering blanket 10% discounts on the purchase of all drugs, including prescription drugs. The basis for revocation of licensure was a regulation promulgated by the Mississippi Board of Pharmacy which prohibited all advertising of discount prices in relation to prescription drugs. The Mississippi Court invalidated said prohibitory rule and emphatically denied the Board's authority to promulgate same.

"State Board of Pharmacy did not have statutory authority, either expressly or by implication, to issue rule which provides that advertising of a discount on prescription drugs constitutes false and misleading advertising and which prohibits such advertising."

Perhaps of even greater significance was the Court's decision in Steele, supra, that the argumentation that the prohibition of advertising discounts on prescription drugs can be buttressed upon "the need for public protection" was totally without merit! The Court cited the cases of Maryland Board of Pharmacy v. Sav-A-Lot, Inc., 270 Md. 103, 311 A.2d 242 (1973); Pennsylvania State Board of Pharmacy v. Pastor, 441 Pa. 186, 272 A.2d 487 (1971); and Stadnik v. Shell's City, Inc., 140 So.2d 871 (Fla., 1962), all of which have flatly rejected such a contention.

The above cases are mentioned simply to illustrate the gravity of concern which the various courts have shown in regard to the prohibition of advertising of discount prescription drugs.

  
PHILLIP M. KILMISTER  
Assistant Attorney General

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