

# MAINE STATE LEGISLATURE

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*Advertising Drugs*

STATE OF MAINE 22 MRSA § 2204

Inter-Departmental Memorandum Date August 18, 1976

To Richard O. Campbell, Jr., Secretary Dept. Commission of Pharmacy

From Joseph E. Brennan, Attorney General Dept. Attorney General

Subject Advertisement of Drugs Included in the Comprehensive Drug Abuse A  
Prevention and Control Act of 1970

I am in receipt of your letters dated August 7 and August 13, 1976, in which you enclosed complaints from licensed pharmacists relating to the alleged unlawful advertising of prescription drug prices by Welby Drug Stores and ACTION Discount Mail Order Drug Company. The gist of both complaints is that these companies have recently placed advertisements in newspapers of general circulation which ads contain price information concerning drugs included in the Comprehensive Drug Abuse Prevention and Control Act of 1970. Chapter 257 of the Public Laws of 1975 (22 M.R.S.A. § 2204D and E) expressly prohibits the advertising of any drug included in the Drug Control Act of 1970.

You are quite correct in stating that it is the responsibility of this Office to represent the Commission of Pharmacy and to enforce statutes duly enacted by the Legislature of the State of Maine. However, the Legislature cannot enact, nor can the Commission enforce a law which violates either the Constitution of the State of Maine or the Constitution of the United States. On May 24, 1976, the Supreme Court of the United States in Virginia State Board of Pharmacy, et al v. Virginia Citizens Consumer Council, Inc., et al, Doc. No. 74-895, held that a ban on the advertising of prescription drug prices violated the First Amendment rights of consumers to receive price information. As the Court said:

"It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us. Virginia is free to require whatever professional standards it wishes of its pharmacists; it may subsidize them or protect them from competition in other ways. [Citation omitted]. But it may not do so by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering." Virginia State Board of Pharmacy, supra, at 22.

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The Supreme Court was quick to point out that false or deceptive speech may not be protected and, indeed, that other kinds of restrictions might be placed on commercial speech providing they serve a significant governmental interest and leave open ample alternative channels for the public's receipt of the information. Therefore, if you have information which demonstrates that the Welby and ACTION advertisements have a tendency to mislead or deceive the public, we will take immediate steps to stop such advertising. Absent any such proof, this Office cannot and will not enforce either legislative or executive action which is contrary to the commands of the Constitutions of the State of Maine and the United States of America.

I am enclosing a copy of the Supreme Court's Opinion in the Virginia State Board of Pharmacy case and urge you to read the Court's articulate examination and resolution of the issues raised by you in the letters.

Very truly yours,

*Joseph E. Brennan*