

MAINE STATE LEGISLATURE

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Pharmacies Advertising Coupons
Drugs & Coupon Advertising
22 M.R.S.A. 2204-D

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DEPARTMENT OF THE ATTORNEY GENERAL
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January 19, 1978

Mr. Richard Campbell
Secretary
Board of Commissions for
the Profession of Pharmacy
1 Northwood Road
Lewiston, ME 04240

Dear Mr. Campbell:

This is in response to your letter to Deputy Attorney General Donald Alexander seeking review by this office of the legality of a "coupon" advertisement, placed by the CVS Pharmacy of Brunswick, Maine. You enclosed a copy of the advertisement together with the original complaint by John G. Desjardins to your board.

You are aware that 22 M.R.S.A. §2204-D, enacted by P.L. 1975, c. 257, permits any licensee of your board to advertise the price that person charges for any drugs, medicines or appliances available only by prescription. The last sentence of §2204-D requires, however, that "(n)o gifts, premiums, trading stamps or bonuses shall be associated with such advertising." Other exceptions, not pertinent here, are found in §2204-E. The State places no other special conditions or proscriptions on advertising of drugs, medicines or appliances available only by prescription. Of course, unfair or deceptive advertising in the conduct of any trade or commerce is unlawful. See, 5 M.R.S.A. Chapter 10.

The advertisement in question informs the reader that he may obtain "\$)1.00 off with this coupon (sic) any one prescription." Arguably, this "coupon" does not meet the generally accepted definitions of gift, premium, trading stamp or bonus and thus does not violate the prohibition of §2204-D. It seems clear, however, that the intent of §2204-D is to permit straight price advertisements and to ban all collateral merchandising techniques generally associated with price competition. The constitutionality of such a ban is resolved by the Supreme Court's recent decision in Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 248, 96 S. Ct. 1817, 48 L. Ed 2d, 346 (1976).

The Virginia statute which gave rise to this decision provided that,

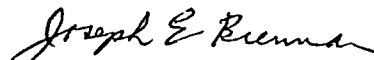
"a pharmacist licensed in Virginia is guilty of unprofessional conduct if he '(3) publishes, advertises or promotes, directly or indirectly, in any manner whatsoever, any amount, price, fee, premium, discount, rebate or credit terms . . . for any drugs which may be dispensed only by prescription.'" 48 L. Ed 2d 351.

The Court held that commercial speech is protected by the First Amendment to the Constitution and affirmed the holding of a three-judge district court declaring the Virginia statute void and of no effect.

The Court expressly rejected Virginia's attempt at justifying their statute's ban on all price advertising, including the use of premiums, discounts and rebates, as necessary to ensure a high degree of professionalism on the part of licensed pharmacists. Mr. Justice Blackmun, writing for a seven-member majority, noted that the First Amendment does not permit the regulation of the profession of pharmacists through the suppression of free speech. In light of this statement, we are compelled to our opinion that the last sentence of §2204-D cannot withstand First Amendment scrutiny.

The legislature has not provided any criminal penalty for violation of §2204-D, its enforcement, as was the case with the Virginia statute, being through license disciplinary action. We advise the Board that a violation of the last sentence of §2204-D should henceforth not be the basis of such disciplinary action.

Sincerely,


JOSEPH E. BRENNAN
Attorney General

JEB/glm