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JUSTICE BUILDING, LITTLE ROCK 72201

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OPINION NO. 85-68

March 6, 1985

The Honorable Stanley Russ
Senator
P. O. Box 787
Conway, Arkansas 72032

Dear Senator Russ:

This is in response to your request for an opinion regarding HB714.

Your question is whether HB714 will stand constitutional scrutiny. The request assumes that §3 of the Bill will inhibit speech because it will limit or discourage advertising by opticians due to the length and nature of the disclosure and the cost of incorporating same into advertisements.

Advertising, a form of commercial speech, is protected by the First Amendment. Recent relevant decisions include Bates v. State Bar of Arizona, 436 U.S. 447 (1978), Friedman v. Rogers, 440 U.S. 1 (1979), In Re R. M. J., 455 U.S. 191 (1982), and Central Hudson Gas v. Public Service Commission, 447 U.S. 557 (1980). It would appear that such speech could be limited by direct prohibition as well as excessive positive disclosure requirements.

In the Central Hudson decision the Court considered an administrative ban on advertising promoting the use of electricity. A four part analysis was utilized in finding the ban in violation of the First Amendment. The four factors were:

1. Whether the expression is prohibited by the First Amendment;
2. Whether the governmental interest is substantial;
3. Whether the regulation directly addresses the governmental interest asserted; and
4. Whether it is not more extensive than necessary to serve that interest.

Central Hudson, at 566.

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The regulated advertisements appear to be protected and the State appears to be able to show a substantial interest, e.g., seeking to disseminate accurate information to the public. The Court has indicated such disclaimers could be upheld to prevent misleading the consumer. Bates at 384; Central Hudson at 571. While the disclaimer appears to directly address the State's interest, it could be found that the disclaimer is unnecessarily long and therefore more extensive than necessary to serve that interest. Accordingly, HB714 could be constitutionally suspect by so inhibiting commercial speech.

The foregoing opinion, which I hereby approve, was prepared by Assistant Attorney General Thomas S. Gay.

Sincerely,



STEVE CLARK
Attorney General

JSC:TSG:jkb