



STATE OF ARKANSAS
OFFICE OF THE ATTORNEY GENERAL
JUSTICE BUILDING, LITTLE ROCK 72201

(501) 371-2007

STEVE CLARK
ATTORNEY GENERAL

OPINION NO. 85-112

May 28, 1985

Charlotte Schexnayder
State Representative, District 85
P. O. Box C
Dumas, Arkansas 71639

Dear Representative Schexnayder:

This is in response to your request for an opinion regarding the constitutionality of Act 418 of 1985.

Act 418 addresses advertising by ophthalmic dispensing firms, opticians, anyone engaged in such dispensing in Arkansas or anyone on their behalf. The initial issue appears to be the scope of the Act, as to the phrase "or anyone on their behalf". This scope of the Act is addressed in both §2 and §3. The rule of ejusdem generis requires that general language following specific wording be limited by the nature of the latter.

The specific naming of dispensing opticians and ophthalmic dispensers in Arkansas includes those in the ophthalmic dispensing business who create or approve the nature of the ads. Such a construction excludes media personnel from the scope of the Act and comports with Ark. Stat. Ann. §41-2365 which exempts media from responsibility for fraudulent advertising under Act 153 of 1967. Thus the Act appears to provide remedies against those in the ophthalmic dispensing business and does not include media personnel.

Legislation is presumed to be constitutional. Moore v. State, 76 Ark. 197 88 S.W. 881 (1905). But it must pass constitutional review. The speech affected by Act 418 is for economic reasons which subject it to review under the standards for commercial speech.

Sections 2 and 3 must be read together and require a specified disclosure to prevent an ad from being misleading. In Bates v. State Bar of Arizona, 433 U.S. 350 (1977) the court held unconstitutional a prohibition on advertising by attorneys. While a complete prohibition of advertising could not survive review, the Court stated that the State retained the right to correct omissions that have the effect of presenting an

inaccurate picture by requiring more disclosure rather than less. Id at 375. It further stated:

We do not foreclose the possibility that some limited supplementation, by way of warning or disclosure or the like, might be required of even an advertisement of the kind ruled on today as to assure the consumer is not misled.

Id at 384.

In Friedman v. Rogers, 440 U.S. 1 (1979), the Court upheld the State's authority to prohibit the use of trade names by optometrists. The Court found trade names can be used to mislead the public, that restriction on their use only had the most incidental effect upon the commercial speech of optometrists and the State merely required that ads appear in a form necessary to prevent their being deceptive (citing Virginia Pharmacy, 425 U.S. at 772) Id at 16.

Deceptive advertising is not protected by the First Amendment against appropriate restrictions. Potentially misleading advertising cannot be absolutely prohibited, however, if it can be presented in a nondeceptive manner. The remedy for potentially misleading ads can be a requirement of disclaimers or explanation. Re R.M.J., 455 U.S. 191, 202 (1982).

The advertisements addressed in Act 418 have been determined by the legislature to be, without a disclaimer, at least potentially misleading, if not actually deceptive. Rather than prohibit advertising, the Act requires an explanation to prevent the resulting deception. It imposes a minimal effect upon an advertiser's commercial speech and which appears to directly and reasonably further the State's substantial interest in preventing deception. As such the law appears to comply with the four-part analysis for commercial speech cases set forth in Central Hudson Gas v. Public Service Commission, 447 U.S. 557 (1980).

Accordingly, it is our opinion that §3, Act 418 of 1985 does not violate the First Amendment.

This opinion, which I hereby approve, was prepared by Chief Deputy Attorney General Rodney Parham.

Sincerely,


STEVE CLARK
Assistant Attorney General

JSC:RP:jk