

The State of South Carolina



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November 3, 1989

The Honorable Warren K. Giese
Senator, District No. 22
4627 Perry Court
Columbia, South Carolina 29206

Dear Senator Giese:

By your letter of October 10, 1989, you enclosed a copy of a letter from the Retired Persons Services, Inc. (AARP Pharmacy Service) and asked for our thoughts as it pertains to S. 378, which deals with mail-order prescription drugs and devices shipped into this State. The referenced letter contains arguments for the defeat of S. 378, citing policy reasons, potential violation of the Commerce Clause of the United States Constitution, and concerns about economic protectionism. Opinions of Attorneys General of other states are cited in support of its position.

Presumption of Constitutionality

In considering the constitutionality of an act of the General Assembly, it is presumed that the act is constitutional in all respects. Moreover, such an act will not be considered void unless its unconstitutionality is clear beyond any reasonable doubt. Thomas v. Macklen, 186 S.C. 290, 195 S.E. 539 (1937); Townsend v. Richland County, 190 S.C. 270, 2 S.E. 2d 777 (1939). All doubts of constitutionality are generally resolved in favor of constitutionality. While this Office may comment upon potential constitutional issues, it is solely within the province of the courts of this State to declare an act unconstitutional. Senate Bill 378 is thus entitled to the presumption of constitutionality if it should be enacted.

S. 378

Senate Bill 378, which is presently in the Senate Medical Affairs Committee for consideration, proposes to regulate a pharmacy located outside the State of South Carolina which ships prescription

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drugs or devices into this State, pursuant to a medical prescription, if such service is the pharmacy's primary business. The pharmacy would be issued a permit upon its reporting to the Board of Pharmaceutical Examiners the names and locations of its corporate officers and pharmacists, that it complies with applicable laws for operation in the state in which it is located, that it maintains its records for drugs dispensed to patients in this State so that such records are readily retrievable, and so forth as outlined in the bill. Additionally, the pharmacy would be required to maintain a toll-free telephone service to patients in this State. The proposed law provides for the denial, suspension, or revocation of such permit under specified circumstances.

Pharmacies and pharmacists are regulated by the State of South Carolina pursuant to Section 40-43-10 et seq. of the South Carolina Code of Laws (1976 & 1988 Cum. Supp.). The State's interest in regulating such activities, as matters involving public health and safety, is beyond argument. A review of Chapter 43 of Title 40 in comparison to S. 378 reveals that certain requirements would be imposed on out-of-state pharmacies which are not imposed on in-state pharmacies, such as maintaining a toll-free telephone service.

In those states in which the same requirements are imposed on both in-state and out-of-state pharmacies serving in-state patients, the Attorney General has indicated that such regulation would not be violative of the Commerce Clause. See, for examples, opinion of the Attorney General of Tennessee No. 86-132 dated July 29, 1986; opinion of the Attorney General of Utah No. 87-13 dated March 16, 1987; and opinion of the Attorney General of Wisconsin No. 33-83 dated August 23, 1983. Where more restrictive requirements have been imposed on out-of-state pharmacies, however, Attorneys General have advised that such are violative of the Commerce Clause. See, for example, opinion of the Attorney General of Nebraska No. 57 dated April 4, 1985 and opinion of the Attorney General of Ohio No. 82-032 dated May 4, 1982.

With this background in mind, the various constitutional arguments advanced by the Retired Persons Services, Inc., will be examined.

Federal Law

Certain federal laws regulate the operation of pharmacies and pharmacists. For example, 21 U.S.C. §823 provides certain registration requirements to be met. Keeping records of inventory and availability of records are required by 21 U.S.C. §827. The federal law evidences an intent that Congress has not chosen to "occupy the field," to the exclusion of state law, except as state law might conflict with federal law. 21 U.S.C. §903. We have been unable to

identify any federal law concerning the regulation of mail-order pharmacies which would restrict or preclude a state's power to legislate thereon.

Registration of manufacturers, distributors, and dispensers of controlled substances (which includes pharmacies and pharmacists) is also regulated by Part 1300 of Title 21 of the Code of Federal Regulations. We have been unable to locate any regulation in 21 C.F.R. §1301.01 et seq. which would restrict or preclude a state from legislating thereon.

Commerce Clause

The letter from the Retired Persons Services, Inc., deals with many of the landmark judicial decisions construing the Commerce Clause, Art. I, sec. 8 of the United States Constitution, which reserves to Congress the power to "regulate commerce...among the several states... ." The discussion contained therein adequately covers the law as to considerations of violations of the Commerce Clause and the same will not be repeated herein.

The general rule enunciated in Pike v. Bruce Church, Inc., 397 U.S. 137, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970), sets forth the criteria for determining the validity of state statutes which affect interstate commerce, as follows:

Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. ...If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. ...

Id., 397 U.S. at 142, 25 L. Ed. 2d at 178.

Summarizing the general rule, the four points to be examined are:

1. Whether a legitimate local public interest is involved.
2. Whether the proposed statute would regulate evenhandedly to effectuate that legitimate local purpose.

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3. Whether the effects on interstate commerce are incidental or are greater.
4. Whether there is an excessive burden imposed on interstate commerce in relation to benefits at the local level.

The Medical Affairs Committee, a subcommittee, or indeed the entire General Assembly could consider the four-pronged test from Pike v. Bruce Church, Inc., supra, if the entity wished to consider how the proposed statute might impact on interstate commerce and whether less burdensome alternatives may exist to achieve the same measure of protection of the health and safety of patients within this State. Whether S. 378 would be unconstitutional as violative of the Commerce Clause could be determined only by a court having the necessary jurisdiction; the foregoing is offered to demonstrate the analysis which the court would employ. As noted, unless and until a court should declare otherwise, S. 378 would be presumed to be constitutional.

Economic Protectionism

Another argument advanced for the defeat of S. 378 is that the bill, if adopted, would shield in-state pharmacies from competition from out-of-state pharmacies, also called economic protectionism. Such argument is another way of saying that the Commerce Clause would be violated by S. 378.

The critical inquiry to be made is whether S. 378 is basically a protectionist measure (by imposing burdens on out-of-state pharmacies which are not imposed on in-state pharmacies and thus impeding competition), or whether S. 378 is a law directed to legitimate local concerns with only an incidental impact on interstate commerce, City of Philadelphia v. State of New Jersey, 437 U.S. 617, 98 S. Ct. 2531, 57 L. Ed. 2d 425 (1978). If S. 378 were found to be a matter of simple economic protectionism, it would most probably be invalidated by a court, which would apply a "per se" rule. It would be helpful to have stated within the bill, perhaps as a preamble, the perceived need for such regulation of out-of-state pharmacies, though such was not persuasive enough in the City of Philadelphia case. The court will concentrate on the practical application of the statute and the state's showing the need to treat out-of-state pharmacies in a manner different from in-state pharmacies. Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 100 S. Ct. 2009, 64 L. Ed. 2d 702 (1980).

Again, only a court could decide with certainty whether S. 378 is a measure promoting economic protectionism. The foregoing is offered to show what a court would consider in making such a determination and for guidance in adopting legislation with a view toward protecting it should a constitutional challenge be raised.

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Policy Issues

The letter of the Retired Persons Services, Inc., raised a number of policy considerations, arguing for the defeat of S. 378. Because the role of the Attorney General is to provide guidance on only the legal issues, we refrain from commenting on the policy considerations. Such is more appropriately within the province of the General Assembly and your committee.

We hope that the foregoing satisfactorily comments upon the various legal issues raised as to S. 378 by the Retired Persons Services, Inc. We note that while their comments naturally promote their point of view, the research contained therein is a thorough discussion of some of the various constitutional issues which could be raised with respect to S. 378. The bill would be entitled to the presumption of constitutionality and could be declared unconstitutional only by a court considering the issue. Please advise if you need clarification or additional assistance on these issues. 1/

With kindest regards, I am

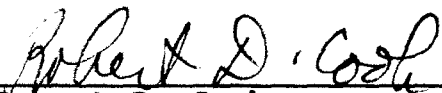
Sincerely,

Patricia D. Petway

Patricia D. Petway
Assistant Attorney General

PDP/nnw
Enclosures

REVIEWED AND APPROVED BY:



Robert D. Cook
Executive Assistant for Opinions

1/ For additional guidance, enclosed please find copies of the opinions of the attorneys general listed above, as well as Pharmaceutical Manufacturers Assn. v. New Mexico Board of Pharmacy, 86 N.M. 571, 525 P. 2d 931 (1974)(regulation of out-of-state pharmacies by New Mexico statute found to be constitutional; regulatory scheme not similar to that proposed by S. 378, however).