1984 S.C. Op. Atty. Gen. 124 (S.C.A.G.), 1984 S.C. Op. Atty. Gen. No. 84-51, 1984 WL 159858

Office of the Attorney General

State of South Carolina
Opinion No. 84-51
May 7, 1984

***1 SUBJECT: Optometrists, Advertising**

Optometrists may freely set and advertise individual prices for eye examinations so long as the advertising does not have a tendency to mislead. No person may advertise expressly or by implication discounts on eye examinations.

To: Dr. Paul Burrell, Jr.
Chairman of the Board of Examiners in Optometry.

The Honorable David O. Hawkins
Member
House of Representatives.

QUESTION:

What restrictions exist under the law on optometrists offering discounts on eye examinations in South Carolina?

STATUTES AND CASES:

15 USC § 45; Sections 39–1–20, 40–37–180, 40–37–190, 40–37–240, CODE OF LAWS OF SOUTH CAROLINA (1976), as amended. State Board of Dental Examiners v. Breeland, 208 S.C. 469, 38 S.E.2d. 644 (1946); Adams v. Clarendon City School Dist. No. 2, 270 S.C. 266, 241 S.E.2d. 897 (1978); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d. 346 (1976); G–H Ins. Agency, Inc. v. Continental Ins. Co., 278 S.C. 241, 294 S.E.2d. 336 (1982); Stone v. Salley, 244 S.C. 531, 137 S.E.2d. 788 (1964); Broome v. Truluck, 270 S.C. 227, 241 S.E.2d. 739 (1978); Friedman v. Rogers, 440 U.S. 1, 99 S.Ct. 887, 59 L.Ed.2d. 100 (1979).

DISCUSSION:

Section 40–37–190, CODE OF LAWS OF SOUTH CAROLINA (1976 as amended) provides that:
It shall be unlawful for any person to offer eye examinations at a discount price or as a premium, the object of which is to induce the sale of ophthalmic services or materials.

The Rules of Practice for Optometry provide that 'Any dissemination of information concerning eye examinations shall include therein . . . a statement of the ophthalmic procedures that are included in the advertised price.' See S. C. Code of Regulations 95–2(B).

In 1982, the entire chapter governing the practice of optometry was rewritten. See 1982 Statutes at Large of South Carolina 2367, Act. No. 395. The above regulation was left unchanged.

In construing the meaning of a statute, our courts will try to follow the legislative intent and will read the statute together with other related statutes so as to maintain consistency in the effect of the various laws.

DISCOUNT

According to Black's Law Dictionary, revised fourth edition, West Publishing Co., St. Paul, Minnesota, (c) 1968, page 551, a discount is 'In a general sense, an allowance or deduction made from a gross sum on any account whatever.' Webster's Third New International Dictionary, G & C Merriam Co., Springfield, Massachusetts (c) 1976, page 646 defines discount as 'an abatement or reduction made from the gross amount or value of anything: as (a)(1): a reduction from a price made to a specific customer or class of customers—see Trade Discount.'

Our courts would probably take judicial notice that the statute envisions definitions such as these. This is further supported by § 40–37–180(a), CODE (as amended) enacted by the same legislation as $40–37–190, CODE (as amended) which reads:
***2** If the offered price is represented as being a reduced price, sale price, or discounted price, the offer shall disclose whether the reduced price, sale price, or discounted price is from the offeror's regular selling price, or shall disclose any other price and its source which serves as the standard from which the offeror represents the offered price as being a deduced price, sale price, or discounted price.

As the above language indicates, a discount can be from the seller's regular price or from some other standard such as the general price prevailing in the marketplace at the time. However, if read literally and taken to the extreme, any variation in the marketplace between the prices charged each purchaser for the same item or service would mean one or more sellers are giving a discount from the others' price.

Such a conclusion would well have the effect of setting one price for all eye examinations in the State. This is, of course, an absurd result, and our courts will not construe a statute in a way that leads to an absurd result. See State Board of Dental Examiners v. Breeland, 208 S.C. 469, 38 S.E.2d. 644 (1946). And the real purpose and intent of the General Assembly will usually prevail over the literal import of the words used. Gunnels v. American Liberty Ins. Co., 251 S.C. 242, 161 S.E.2d. 822 (1968).

Even if one were to assume discount means only discount from the offeror's regular selling price, the statute prohibiting such discounts would have the effect of requiring a practitioner to charge all patients the same set fee for any particular procedure. Such an interpretation could raise several constitutional questions. See G-H Ins. Agency, Inc. v. Continental Ins. Co., 278 S.C. 241, 294 S.E.2d. 336 (1982) (impairing) contractual rights); Stone v. Salley, 244 S.C. 531, 137 S.E.2d. 788 (1964) (the State has no interest in setting the retail price of milk and an attempt to do so violates due process and equal protection clauses of Constitution); Broome v. Truluck, 270 S.C. 227, 241 S.E.2d 739 (1978) (no rational basis for law favoring some professions over others in statute of limitations). The Legislature has only attempted to mandate a set rate to an industry or to individuals in areas where specific ratemaking boards have been established with specific authority to set rates. No such purpose is indicated by those laws governing the practice of optometry.

That the Legislature did not intend to prevent a practitioner from varying his prices for eye examinations is further demonstrated by reference to § 40–37–180(d), CODE (as amended) which was enacted at the same time as § 40–37–190. That section says in pertinent part that:
It shall be unlawful for any person to disseminate price information concerning ophthalmic goods and services without including therein:

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(d) Whether an advertised price for ophthalmic materials includes an eye examination.

If the price of an eye examination can be included in an over-all package price, there is no way that one can determine what is the price for the examination itself, much less to determine if it is a discount from the practitioner's regular price.

***3** It would seem, therefore, that the statute does not intend to prevent a practitioner from setting different prices for different individuals or groups for the same kind of eye examination but rather makes illegal the 'offer' of a discount. The statute does not require that the offer of eye examinations at a discount be solely for the object of inducing the sale of ophthalmic services (i.e. eye examinations) in order to be illegal; it is sufficient that inducing the sale was one object of the offer, even if other altruistic objectives are also involved, such as the desire to give discounts to certain groups or individuals. This interpretation is supported by the fact that our Legislature, in rewriting the entire chapter dealing with optometrics, did not make any exceptions to § 40–37–190, CODE (as amended) even though the former law had contained an exception allowing discounts for persons over 62 under an analogous section which had prohibited giving discounts on spectacles, etc. to induce the sale of spectacles. See 1937 Statutes at Large 394 codified as § 40–37–240 of the 1976 CODE.

OFFER

The Restatement, Contracts (2d) § 24 defines an offer as a 'manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.' Under the common law, an advertisement in a newspaper or circular may or may not constitute an offer as that word is used in the law of contracts. The determination depends upon the particular fact situation. See 17 Am.Jur.2d Contracts '§ 34 To whom offer may be made' at 372. The same conclusion would apply to advertisements made through the broadcast media or by other means.

For a business to advertise a certain price or a certain discount or reduction in price when that business did not intend to offer such price or discount however would be misleading and deceptive. See 16 CFR 39, Federal Trade Commission: Part 238-Guides Against 'Bait Advertising'; also see cases annotated under 15 USCS § 45, footnote 55. Misleading and deceptive, advertising is prohibited by the laws governing the practice of optometry as well as by the general criminal laws of the State. See, § 40–37–180 and § 39–1–20, CODE.

Where a literal interpretation of a particular word in a statute (in this case 'offer') would lead to an inconsistency, our courts will attempt to give the law a reasonable and consistent interpretation, rather than a strictly literal interpretation. See Adams v. Clarendon City School Dist. No. 2, 270 S.C. 266, 241 S.E.2d. 897 (1978).

CONSTITUTIONAL RIGHT OF COMMERCIAL SPEECH

It is well established that the Constitution permits reasonable time, place, and manner restrictions on advertising so long as they do not affect the content of the speech they regulate, and they serve a significant governmental interest, and they have open alternative channels for communication of the information. It is also well established that regulation of the form or requirement of additional information to prevent false, deceptive or misleading advertising is permissible. See SCAG Opinion dated May 15, 1980, on 'Opticians, Advertising' citing Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d. 346 (1976). Since the Virginia Citizens case, the U. S. Supreme Court has upheld a complete ban on certain commercial advertising where there is evidence that such advertising has had a tendency to deceive in the past. See Friedman v. Rogers, 440 U.S. 1, 99 S.Ct. 887, 59 L.Ed.2d. 100 (1979).

***4** There is sufficient evidence that the advertising of discounts has a tendency to deceive the buying public. See 16 CFR Part 233 'FTC-Guides Against Deceptive Pricing' at page 26; also see, CCH Trade Regulation Reporter ¶7835 'Price Comparisons' and the cases cited therein.

A total prohibition against advertising discounts on eye examinations can only be justified as consumer protection legislation designed to prevent misleading advertising. In construing consumer legislation, the South Carolina Court of Appeals held that such laws create 'new substantive rights by making unlawful conduct which was not actionable under the common law.' State ex rel McLeod v. C & L Corp., Inc., —— S.C. App. Ct. ——, 313 S.E.2d. 334 (1984).

There were no attempts to amend the language in § 40–37–190, CODE (as amended) as the Act went through the Legislature. As noted above, however, the Legislature passed § 40–37–180, which requires certain disclosures in advertising prices and discounts for ophthalmic products, at the same time it passed § 40–37–190, which prevents all advertising of discounts for eye examinations. Thus, it can be assumed that the Legislature specifically considered and rejected the less restrictive alternative of allowing the advertising of discounts on eye examinations so long as certain disclosures were given.

CONCLUSION:

In considering the principles of law discussed above and the optometry laws as a whole, (including those changes made by the Legislature in 1982), our courts would probably interpret § 40–37–190 (as amended) as follows: the statute is designed to prevent misleading advertising by forbidding all advertising, whether in the media, by signs, or in promotional materials when such advertising states or implies that a practitioner will give any individual or group a discount or reduction on eye examinations from either his regular price or from some other standard, such as the usual or prevailing price in the community. Thus, a court would probably interpret 'discount' to include advertisements which juxtapose the practitioner's regular price with a lesser offered price, or which offer a certain price for a certain time period only, or for a certain group only; such advertisements all imply that the price is a special price, even if it is not.

Thus, in interpreting this law, our courts would look at the particular facts and circumstances to determine whether an advertisement was in reality offering a discount even if only by implication. The examples given above appear to be obvious examples of what the statute was designed to prohibit under the most liberal of interpretations.

Again, it is not likely that our courts would interpret the statute as in any manner preventing the truthful and straightforward advertising of prices for eye examinations by practitioners. What is instead prohibited is an undue and possibly misleading emphasis upon the fact that a particular price is a special price or in the words of the statute, a discount or premium. Such an interpretation based upon the authorities cited above would appear to be a constitutionally permissive restriction on commercial speech; and it would not prevent the practitioner from contracting to do eye examinations at whatever price is agreed upon.

***5** It is, therefore, the opinion of this Office that § 40–37–190 (as amended) prohibits the advertising expressly or by implication of a discount on eye examinations. A practitioner may otherwise set, advertise, or contract for any price for eye examinations under § 40–37–190 (as amended) so long as his offer does not have a tendency to mislead.

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