

1977 S.C. Op. Atty. Gen. 278 (S.C.A.G.), 1977 S.C. Op. Atty. Gen. No. 77-351, 1977 WL 24690

Office of the Attorney General

State of South Carolina

Opinion No. 77-351

November 3, 1977

*1 TO: Honorable Thomas M. Marchant, III
Representative

QUESTION:

1. What effect does Act #211 of 1977 have on the rules of practice regulating advertisements by opticians?
2. Does Act #211 of 1977 repeal § 40–37–240, Code of Laws of South Carolina, 1976, as amended?

AUTHORITIES:

§§ 40–37–10, et. seq., Code of Laws of South Carolina, 1976, as amended;

Act #211 of 1977 Acts and Joint Resolutions;

R95–10, Code of Laws of South Carolina, 1976, as amended;

Virginia State Board of Pharmacy, et al. v. Virginia Citizens Consumer Council, 425 U.S. 478;

Bates v. State Bar of Arizona, — U.S. —, 53 L.Ed.2d —;

Capital, Broadcasting Co. et al. v. Mitchell, 333 F. Supp. 582, aff. 405 U.S. 1000;

Head v. New Mexico Board of Examiners in Optometry, 374 U.S. 424;

Williamson v. Lee Optical of Oklahoma, 348 U.S. 483;

Wagner v. Ezell, 249 S.C. 421, 154 S.E.2d 731;

Lake v. Mercer, 216 S.C. 391, 58 S.E.2d 336;

Terry v. Pratt, 258 S.C. 177, 187 S.E.2d 884;

Cole v. Manning, 240 S.C. 260, 125 S.E.2d 621;

Faile v. S. C. Employment Security Commission, 267 S.C. 536, 230 S.E.2d 219;

Feldman v. S.C. Tax Commission, 203 S.C. 49, 26 S.E.2d 203;

Wade v. Kobb, 204 S.C. 275, 28 S.E.2d 850;

[Home Building & Loan Assoc. v. City of Spartanburg](#), 185 S.C. 353, 194 S.E. 143.

DISCUSSION:

The legislature has recently enacted Act #211 of 1977 (amending § 40–32–250 of the 1976 Code) which reads as follows: It shall be lawful for any licensed optician to advertise the price of eyeglasses. Provided, however, it shall be unlawful to so advertise by the use of any untruthful, impossible, improbable or misleading statement.'

In addition, § 40–37–280, Code of Laws of South Carolina, 1976, defines unprofessional conduct, *inter alia*, to include: ' . . . the advertising of an optometric practice, or optical business, treatment or advice in untruthful, improbable or impossible statement.' The Board of Examiners in Optometry and Opticianry prior to the enactment of Act #211 promulgated several rules and regulations relating to advertisements by opticians. See, R95–10 D, E, F, & G, of the 1976 Code. In light of the legislative assertion that price advertisement of eyeglasses by opticians is now lawful, the validity of said rules is questioned.

The Board of Examiners is expressly authorized to establish rules and regulations for the practice of opticianry. Section 40–37–80 of the 1976 Code. The power to regulate advertisement is within the power to regulate the practice of opticianry. Cf., [Wagner v. Ezell](#), 249 S.C. 421, 154 S.E.2d 731; [Head v. New Mexico Board of Examiners in Optometry](#), 374 U.S. 424; [Williamson v. Lee Optical of Oklahoma](#), 348 U.S. 483. However, the power to promulgate rules and regulations is limited to the extent that the rules cannot contravene statutory or constitutional provisions. [Lake v. Mercer](#), 216 S.C. 391, 58 S.E.2d 336. The Board can promulgate rules which assist in the administration and execution of Act #211, even though such authority may encompass a broad range of discretion, provided that they did not conflict with said Act. [Terry v. Pratt](#), 258 S.C. 177, 187 S.E.2d 884; [Cole v. Manning](#), 240 S.C. 260, 125 S.E.2d 621; [Faile v. S. C. Employment Security Commission](#), 267 S.C. 536, 230 S.E.2d 219. In that Act #211 does opticians, it would be within the province of the Board to regulate opticians, it would be within the province of the Board to regulate the same with purpose of prohibiting untruthful, impossible, or misleading advertisement. A rule or regulation promulgated prior to June 15, 1977, (the effective date of Act #211) which reasonably tends to regulate untruthful, impossible, or misleading advertisements would continue to be valid.

*2 Of the particular rules questioned it appears that the purpose of preventing misleading advertisements could be articulated as basis for the promulgation of each. A lengthy discussion of the justifications of each would serve little purpose, however, brief mention will follow. It appears that Rules 95–10–D, E, F, or G are not in conflict with Act #211 and are reasonable restrictions on the practice of opticianry. The activities proscribed by said rules generally relate to holding oneself out as an optometrist, displaying diplomas, portraying oneself as having superior skills, or using offices for purpose of advertisement. None of the proscribed activities conflicts with permitting advertisement of the price of eyeglasses. Rule 95 10–B restricts optician advertisement by manner and place, including prohibiting the use of electronic media; it does not proscribe price advertising in all media. As such it appears to be a viable restriction of advertising not contrary to Act #211 or constitutional provisions. Cf., [Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council](#), 425 U.S. 748; [Bates v. State Bar of Arizona](#), — U.S. —, 53 L. Ed.2d —; see also, [Capital Broadcasting Co., et al. v. Mitchell](#), 333 F. Supp. 582, aff. 405 U.S. 1000, regarding unique problems of electronic communications, therefore, subjecting same to special regulation.

Additional question has been raised with regard to whether § 40–37–240, Code of Laws of South Carolina, 1976, as amended is repealed in part or in whole by Act #211. Section 40–37–240 reads:

It shall be unlawful for any person to offer or give eyeglasses, spectacles or lenses as a premium with newspapers, books, magazines or merchandise or in any other manner to induce trade or to give or offer to give any sum of money or other thing of value to any other person, the object of which is to induce the examination of the eye or the sale of spectacles, eyeglasses, lenses or any part used in connection therewith.

Act #211 does not explicitly repeal any code provision, however, repeal by implication may occur if the two legislative acts are repugnant to each other and are irreconcilable. Feldman v. S. C. Tax Commission, 203 S.C. 49, 26 S.E.2d 203; Wade v. Kobb, 204 S.C. 275, 28 S.E.2d 850; Home Building and Loan Assoc. v. City of Spartanburg, 185 S.C. 353, 194 S.E. 143. Repeal by implication is not favored and is delegated for use only after all other means of interpretation have been exhausted. Feldman, supra. A reading of § 40–37–240 reveals no repugnancy to Act #211. Act #211 permits the advertising of price, § 40–37–240 prohibits the offering of merchandise (things of value) in order to induce sales of eyeglasses, etc. Both sections apparently can coexist without being repugnant. An optician cannot offer prizes, gifts, or other things of value to induce sales, even though he or she can within limitation advertise the price of eyeglasses. In Wagner v. Ezell, supra, the court interpreted the predecessor to § 40–37–240 as including within a ‘thing of value’ an advertised discount. As such, it would appear that the advertisement of the term ‘discount’ or similar terms such as ‘money back’ are prohibited by said section. Act #211 is not irreconcilable with terms of § 40–37–240 and therefore, is not repealed by implication.

CONCLUSION:

*3 An optician may advertise the price of eyeglasses, however, all advertisements must be in accord with R95–10 D, E, F, G & H of the 1976 Code, and the ad cannot be otherwise misleading, deceptive, untruthful, impossible or improbable.

Section 40–37–240, Code of Laws of South Carolina, 1976, as amended remains in full force and effect, and consequently, offering or advertising free drawings for opthalmic products or discounts for opthalmic products is prohibited.

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