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Office of the Attorney General

State of South Carolina
Opinion No. 78-61
March 28, 1978

***1** 1. Senate bill number 656, which prohibits blind bidding on motion pictures to be exhibited in the state before they are screened, is constitutional.

2. Section number 4 of the bill, which outlines the post-screening bidding process, is unconstitutional.

Senator

QUESTION PRESENTED:

Is Senate Bill 656 constitutionally permissible?

AUTHORITIES:

Constitution of United States, Art. I, Section 8 (Commerce Clause); First and Fourteenth Amendments

Constitution of South Carolina, Art. I, Section 4

United States v. Paramount Pictures, Inc., 334 U.S. 131 (1947)

Gasque v. Nates, 191 S.C. 271, 2 S.E.2d 36 (1939)

Miller v. California, 413 U.S. 15 (1973)

Joseph Burstyn Inc. v. Wilson, 543 U.S. 495

Freedman v. Maryland, 380 U.S. 51

Pike v. Bruce Church, Inc., 397 U.S. 137 (1970)

Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960)

DISCUSSION:

Senate Bill 656 (S.656) has been criticized by its opponents as having doubtful constitutionality. The opponents charge that this proposed legislation is violative of the Commerce Clause and the First and Fourteenth Amendments to the United States Constitution. This discussion will review the questions so raised, as well as the permissibility of the legislation under the South Carolina Constitution.

S.656 consists of six sections. Section 5 provides criminal penalties for violating the bill if enacted; Section 6 deals with time effectiveness if enacted. The substantive provisions are found in Sections 3 and 4.

Section 3 of S.656 would provide:
(a) Blind bidding is prohibited in this State. No bids shall be returnable, no negotiations for the exhibition or licensing of a motion picture shall take place and no license agreement or any of its terms shall be agreed to for the exhibition of any motion picture in this State before the motion picture has been trade screened in the State.

(b) A distributor shall include in each invitation to bid for a motion picture for exhibition in the State, if the motion picture has not already been trade screened in the State, the date, time and place of trade screening of the motion picture in the State.

(c) A distributor shall provide reasonable and uniform notice to exhibitors in the State of all trade screenings in the State of motion pictures he is distributing. The notice may be by mail or by publication in a trade magazine or other publication having general circulation among exhibitors in the State.

Section 4 would provide:
If bids are solicited from exhibitors for the licensing of a motion picture in the State:

(a) The invitation to bid shall specify (1) the number and length of runs for which the bid is being solicited, whether it is a first, second or subsequent run and the geographic area for each run; (2) the names of all exhibitors who are being individually solicited; (3) the date and hour the invitation to bid expires and (4) the location, including the address, where the bids will be opened at the distributor's place of business in the film exchange center.

***2** (b) All bids shall be submitted in writing and shall be opened at the same time and in the presence of exhibitors or their agents.

(c) After being opened, bids shall be subject to examination by exhibitors or their agents. Within seven days, exclusive of Saturday and Sunday, after a bid is accepted, the distributor shall notify in writing each exhibitor who submitted a bid of the terms of the accepted bid and the name of the winning bidder.

(d) Once bids are solicited, the distributor shall license the picture only by bidding and must solicit rebids if he does not accept any of the submitted bids.

The purposes of S.656 are defined thusly in Section 1:
It is the policy of this State to establish fair and open procedures for the bidding and negotiation of contracts for the exhibition of motion pictures within the State in order to prevent unfair and deceptive acts or practices and unreasonable restraints of trade in the business of motion picture distribution within the State; to promote fair and effective competition in that business; and to benefit the movie-going public by holding down admission prices to motion picture theaters, expanding the choice of motion pictures available to the public and preventing exposure of the public to objectionable or unsuitable motion pictures by insuring that exhibitors have the opportunity to view a picture before committing themselves to exhibit it.

Blind bidding is a normal trade practice in the film industry. It is defined in Section 2(i) of S.656 as "the bidding for, negotiation for or offering or agreeing to terms for the licensing or exhibition of a motion picture if the motion picture has not been trade screened within the State before any such event has occurred." Contracts to exhibit some films are negotiated often before final editing and splicing are completed. However, it is our understanding that most major films are exhibited in the nation's larger cities before they are made available to the South Carolina market.

The practice of blind bidding was allowed to continue with some modification in 1947 as part of a comprehensive order addressing many trade practices in the motion picture industry which had been challenged under the federal antitrust laws by the United States Department of Justice. United States v. Paramount Pictures, Inc., 334 U.S. 131, 157 (f.n. 11).

The bidding process set forth in Section 4 of S.656 does with some modification conform to that practice as it currently exists. Although Section 4 would not mandate that the bidding process be followed in letting exhibition contracts in this State, it does lock a distributor into the bidding process once it is begun.

The General Assembly's power to impair freedom of contract is not plenary. South Carolina Constitution Article 1, Section 4 provides in part: "No ... law impairing the obligation of contracts ... shall be passed...." The South Carolina Supreme Court held that the constitutional guarantee of liberty of contract cannot be regarded as absolute in the sense that there can be no state regulation of matters as to which persons might desire to contract, but laws interfering with it must "clearly be demanded for the public safety, health, peace, morals or general welfare." Gasque v. Nates, 191 S.C. 271, 2 S.E.2d 36 (1939).

***3** In this context, it is very difficult to see where Section 4 of S.656, a bill regulating an entertainment industry, is demanded for the public safety, health, peace, morals or general welfare. Section 3 on the other hand does appear to address the morals problem. It would give a South Carolina exhibitor the opportunity to see a motion picture before becoming contractually obligated to display it, so as to prevent exposure of the public to objectionable or unsuitable motion pictures.

The United States Supreme Court in Miller v. California recognized that states have legitimate interest in prohibiting dissemination or exhibition of obscene material, when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles. 413 U.S. 15, 19 (1973). In view of alleged unreliability of the motion picture rating system (General Admission, Parental Guidance, Restricted, and "X"), this danger may well exist.

Motion pictures are nonetheless within the guarantees of the First and Fourteenth Amendments. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495. However, it does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and places. Supra 502.

S.656 does not seek to define or prohibit what is objectionable or unsuitable. This responsibility is left with the exhibitor who could face prosecution under some obscenity law on the books now or in the future. It is noteworthy that the test set forth to determine obscenity not protected by the First and Fourteenth Amendments would apply "contemporary community standards." Miller v. California, supra 24. Fairness would then dictate that the person faced with prosecution for exhibition of an obscene motion picture should have been given the opportunity to see it and apply contemporary community standards to it, before becoming contractually obligated to display it.

Opponents to S.656 have cited Freedman v. Maryland, 380 U.S. 51 for the proposition that the bill violates the First and Fourteenth Amendments. In Freedman, the high court invalidated Maryland's censorship statute. That statute required prior to exhibition of any motion picture in the State that the film be submitted to and approved by the Maryland State Board of Censors. The Supreme Court held that a noncriminal process which requires the prior submission of a film to a censor avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system. Supra 58. The Court found the Maryland statute to be lacking in this regard.

S.656 has been said to merely substitute the State Board of Censors in Freedman with the exhibitors attending a trade showing. This distinction is critical. The rights of a distributor under the First and Fourteenth Amendments are not abridged by private censorship on the part of local exhibitors. The First Amendment prohibits Congress from abridging

the freedom of speech; with the Fourteenth Amendment, the First Amendment has been made applicable to state governments.

***4** Turning to the Commerce Clause, the general rule to be applied is stated in Pike v. Bruce Church, 397 U.S. 137 (1970):
Where the statute regulates evenhandedly to effect a legitimate local public interest, and its effects on the 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. (citation omitted) 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 commerce. (Emphasis added.)

This test was stated somewhat differently in Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 448 (1960):
State regulation, based on the police power, which does not discriminate against interstate commerce or operate to disrupt its required uniformity, may constitutionally stand.

Hence in Pike v. Bruce Church, a state regulartory scheme which discriminated against cantaloupe growers with packing facilities in another state did not stand. But in Huron Portland Cement, a city anti-pollution ordinance which would require mechanical modification to ships licensed by the federal government and in interstate commerce, but operating in Detroit was allowed to stand. Cf. Toomer v. Witsell, 334 U.S. 385 (1948).

Three elements emerge as key to determining whether an undue burden has been placed on interstate commerce—1) the legitimacy of the local interest to be protected; 2) whether interstate commerce is discriminated against; and 3) whether required uniformity is disrupted. The court in Pike v. Bruce Church quite candidly indicated that a balancing of interests would be applied to determine whether the burden is impermissible.

Applying these considerations, it is the opinion of this office that Section 3 of S.656 is constitutionally permissible. As discussed above, its purpose is well within permissible goals of the General Assembly under the police power. It operates evenhandedly. Moreover, blind bidding appears to be neither uniform nor required.

It is noteworthy to point out that while the United States Supreme Court has recognized the legitimacy of protecting the public from obscenity by a state, Miller v. California, supra, it quoted a District Court order on the subject of blind-selling (blind-bidding) as follows:
Blind selling does not appear to be as inherently restrictive of competition as block-booking, although it is capable of some abuse. By this practice a distributor could promise a picture of good quality or a certain type which when produced might prove to be of poor quality or of another type—a competing distributor meanwhile being unable to market its product and in the end losing its outlets for future pictures. U.S. v. Paramount Pictures, supra 157, f.n. 11.

Any balancing of interests would appear to favor Section 3, S.656.

***5** As one final matter, some opponents to S.656 have suggested that enforcement of Congressional antitrust, and Federal Trade Commission legislation attacking blind bidding is tantamount to Congressional pre-emption. In effect opponents seek to imply that federal antitrust and Federal Trade Commission activities are tantamount to Congressional occupation of the field. However, as stated by the United States Supreme Court:
Such intent (to supersede the exercise by the State of its police power) is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State. Huron Portland Cement v. Detroit, supra 443.

CONCLUSION:

In summary it is the opinion of this office that Section 3, S.656 is constitutionally permissible under both the South Carolina and Federal Constitutions. Further, it is the opinion of this office that Section 4, S.656 is constitutionally suspect in that it does not on its face appear to be a valid exercise of the State's police power.

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