

Opinion No. 71-123

December 14, 1971

BY: OPINION OF DAVID L. NORVELL, Attorney General

TO: The Honorable Alex G. Martinez New Mexico State Senator 1949 Hopi Road Santa Fe, New Mexico 87501

QUESTIONS

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1. Do the following violate the provisions of Section 49-1-5, N.M.S.A., 1953 Comp. or the provisions of Attorney General Regulation No. TP-71-02, dated September 15, 1971:

- A. A limitation on the quantity of items of seasonally discontinued or otherwise discontinued merchandise.
- B. A limitation on the quantity of items of merchandise involving product line or model year changes.
- C. A limitation on the quantity of items of merchandise which are used or repossessed.
- D. A limitation on the quantity of damaged items of merchandise or items of merchandise which have otherwise deteriorated in value.

2. Does the above statute or rule operate to require an unlimited supply of an item advertised or offered for sale, or do they merely require a supply sufficient to meet reasonable expected demand?

CONCLUSIONS

- 1. See analysis.
- 2. See analysis.

OPINION

{*189} ANALYSIS

Section 49-1-5, N.M.S.A., 1953 Comp. is set out in full:

"It is unlawful for any merchant to advertise or offer for sale any item of merchandise with a limitation upon the number of such items which any purchaser may purchase at

the advertised price. It is further unlawful for any merchant offering or advertising any such item of merchandise in his place of business at any given price to refuse to sell to any prospective purchaser for cash the whole or any part of his stock of such items at such price."

Attorney General Regulation No. TP-71-02, promulgated September 15, 1971 is set out in relevant part:

"1. **REGULATION OF UNFAIR TRADE PRACTICES:** In order to implement and enforce Section 49-15-2(10), N.M.S.A., 1953 Comp. (1971 Supp.) of the Unfair Trade Practices Act, 49-15-1 through 49-15-14, N.M.S.A., 1953 Comp. (1969 Supp., 1971 Supp.), the Attorney General of the State of New Mexico pursuant to Section 49-15-11, N.M.S.A., 1953 Comp. (1969 Supp., 1971 Supp.), the Attorney General of the State of New Mexico pursuant to Section 49-15-11, N.M.S.A., (1953 Comp. (1969) Supp.) hereby declares that it is an unfair trade practice for:

a. Any merchant to advertise or offer for sale any item of merchandise with a limitation upon the number of such items which any purchaser may purchase at the advertised price, or,

b. Any merchant offering or advertising any such item of merchandise {**190*} at any given price to refuse to sell to any prospective purchaser for cash the whole or any part of his stock of such items at such price."

Thus at the outset it may be seen that the words of Section 49-1-5, **supra**, and of the Attorney General Regulation TP-71-02 are similar. However, it should be noted Attorney General Regulation TP-71-02, **supra**, was promulgated pursuant to Section 49-15-11, N.M.S.A., 1953 Comp. (1971 P.S.) to implement and enforce Section 49-15-2(10), N.M.S.A., 1953 Comp. (1971 P.S.) of the Unfair Trade Practices Act.

A further difference that may be observed is that Section 49-1-5 is modified by Section 49-1-6, N.M.S.A., 1953 Comp. which makes violations of the statute a criminal activity punished by a fine of not more than \$ 500.00 or by imprisonment of not more than 90 days or by both such fine and imprisonment. On the other hand, Attorney General Regulation TP-71-02 carries as a penalty for its violation a civil penalty not to exceed \$ 500.00.

In answering the proposed question concerning limitation of items under varying facts or conditions it would be very speculative on our part to predict what would be allowed and what would be prohibited under the provisions of Section 49-1-5, **supra**. Presently there is one case, **State v. Shop Rite Foods, Inc.**, 74 N.M. 55, 390 P.2d 437 (1964), which stated that the criminal informations which charged that the corporate defendants: (1) advertised for sale a certain beverage with the first two cartons for 29 [cents] and additional cartons for 39 [cents] and then refused a prospective purchaser more than two cartons at 29 [cents], and (2) advertised certain turkeys for 33 [cents] per pound for the first turkey, and 39 [cents] per pound for all additional turkeys and limited the

number of turkeys a person might purchase at 33 [cents] a pound; were insufficient to state an offense pursuant to Section 49-1-5, **supra**. **The court apparently felt that a limitation at a lower price, but willingness to sell the commodity at a higher price thereafter was not the type of limitation prohibited by Section 49-1-5, supra.** The court did not further elaborate on what type of fact situation would be prohibited by the words of Section 49-1-5, **supra**, but merely held that the fact situation of the **Shop Rite** case, **supra**, was not a violation.

The court in **Shop Rite Foods, Inc., supra**, did not concern itself with any of the four factual situations proposed in this request for an Attorney General's opinion. It would be highly presumptuous for us to determine legislative intent and/or prospective Supreme Court rulings on these factual issues, however, in respect to Attorney General Regulation TP-71-02 we are qualified to express what we intended in promulgating such regulation. Our intentions were not to prohibit a limited sale on seasonally discontinued or otherwise discontinued merchandise, or of damaged merchandise or of used merchandise or of merchandise unique in status so long as the advertisements showing the reason for such limitations were made clear to the consuming public. Thus if a merchant had several items of a discontinued line and stated in his advertisement that he had a certain number, he would be limiting the quantity for sale by the fact that he only had available a limited quantity. However, note that if a merchant had a small quantity of a unique commodity he would still not be able to limit the commodity to individual consumers. This "limitation" would be a limitation of his stock. And thus the word "limitation" used in this context would not be a violation of the Attorney General's Regulation TP-71-02.

It is our opinion that pursuant to Section 49-15-2(C) (10), the prohibited sales technique applies to the situation whereby a merchant advertises a commodity at an exorbitantly low price, sometimes below cost, to create a pattern of consumer traffic only to divulge to the prospective buyers that he is sold out of the commodity, when his original scheme was not to supply the commodity to the public but only to bait them into his premises. By requiring a merchant to have a supply reasonably [Illegible Word] to satisfy public demand and prohibiting unrealistically low prices of commodities to be advertised whereby a limit is imposed upon the commodity, low price advertising for specials would become bona fide low prices and bona fide sales.

{*191} Because of our rationale, as expressed, **supra**, if a merchant advertises a commodity as being unique due to discontinuance, damage or for any other reason and this fact is expressly conveyed to prospective buyers it would be our opinion that the regulation would not be violated because the empirical rationale is that of misrepresentation. For the same reasons as enumerated, **supra**, the unique items should not be limited as to individual consumers. The limitation as used in the context of your question refers to the gross limitation on supply.

It is our opinion that pursuant to Section 49-15-2(C) (10), **supra**, nonunique items or commodities must be offered in supplies to satisfy reasonably expected public demand, and of course, the test for determining the expected public demand is subjective and

would depend on variable factors concerning the type of sale and the commodity involved.

Your final question asks if the statute or rule operates to require an unlimited supply of an item advertised or offered for sale or whether they merely require a supply sufficient to meet reasonably expected demand. Since the word "unlimited" supply could mean that the stock must reach an infinite number we must, of course, conclude that the word "unlimited" is an absolute with which compliance is impossible and thus on subjective tests a supply which would meet reasonable expected demand is all that is required.

By: Frank N. Chavez

Assistant Attorney General