VOLUME I

P U B L I C H E A R I N G

before the

ASSEMBLY COMMERCE, INDUSTRY AND PROFESSIONS COMMITTEE

on

ASSEMBLY, No. 736
(An Act concerning pharmacists.)
ASSEMBLY, No. 1228
(An Act requiring the posting of a list of retail prices for the 100 most frequently used prescription drugs.)
ASSEMBLY, No. 3263
(An Act concerning the practice of optometry.)
ASSEMBLY, No. 3264
(An Act concerning ophthalmic dispensers and technicians.)
ASSEMBLY, No. 3273
(An Act permitting the advertising of retail prices of prescription drugs.)

Held:
Seton Hall University
School of Law
1095 Raymond Boulevard
Newark, New Jersey
May 22, 1975

COMMITTEE MEMBERS PRESENT:

Assemblyman Byron M. Baer (Chairman)
Assemblyman Martin A. Herman (Vice Chairman)
Assemblywoman Mary Keating Croce
Assemblywoman Barbara A. Curran
Assemblyman C. Gus Rys
Assemblyman Morton Salkind

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I N D E X

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ASSEMBLY, No. 736

STATE OF NEW JERSEY

PRE-FILED FOR INTRODUCTION IN THE 1974 SESSION

By Assemblyman BARBOUR

AN ACT concerning the professional conduct and practice of pharmacists and amending R. S. 45:14–12.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. R. S. 45:14–12 is amended to read as follows:

45:14–12. The board may refuse an application for examination or may suspend or revoke the certificate of a registered pharmacist or a registered assistant pharmacist for any of the following causes: When the application or registration is shown to have been obtained by misrepresentation or fraudulent means or when the applicant or registrant is guilty of chronic or persistent inebriety, or has been adjudged guilty of violating any State or Federal law or any law of the District of Columbia or of any territory of the United States relating to the practice of pharmacy, or relating to the dispensing of drugs, or has been convicted of a crime involving moral turpitude, or has impersonated an applicant for registration before the board or has been convicted of knowingly, intentionally or fraudulently adulterating or causing to be adulterated drugs, chemicals or medicinal preparations or has sold or caused to be sold adulterated drugs, chemicals or medicinal preparations knowing, or having reason to know, that same were adulterated, or has procured or attempted to procure registration for another by misrepresentation or fraudulent means, and the board shall refuse an application for examination or suspend or revoke the certificate of a registered pharmacist or a registered assistant pharmacist when the applicant or registrant is shown to be addicted to the use of narcotic drugs, or has been convicted of violating any law of this or any other state or of the United States relating to narcotic drugs or has been adjudicated an incompetent, or is shown

EXPLANATION—Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.

to have any abnormal physical or mental condition which threatens the safety of persons to whom said applicant or registrant might sell or dispense prescriptions, drugs, chemicals, medicinal preparations or devices or for whom he might manufacture, prepare or package, or supervise the manufacturing, preparation or packaging of prescriptions, drugs, chemicals, medicinal preparations or devices. In addition, the board may refuse an application for examination or may suspend or revoke the certificate of a registered pharmacist or a registered assistant pharmacist upon proof satisfactory to the board that such registered pharmacist or such registered assistant pharmacist is guilty of grossly unprofessional conduct and the following acts are hereby declared to constitute grossly unprofessional conduct for the purpose of this act:

a. Paying rebates or entering into an agreement for payment of rebates to any physician, dentist or other person for the recommending of the services of any person.

b. The providing or causing to be provided to a physician, dentist, veterinarian or other persons authorized to prescribe, prescription blanks or forms bearing the pharmacist's or pharmacy's name, address or other means of identification.

c. [The promotion, direct or indirect, by any means, in any form and through any media of the prices for prescription drugs and narcotics or fees or for services relating thereto or any reference to the price of said drugs or prescriptions whether specifically or as a percentile of prevailing prices or by the use of the terms "cut rate," "discount," "bargain" or terms of similar connotation; but this shall not include the term nonprofit if such term is used by a nonprofit entity; and this paragraph shall not be construed or apply to have any effect with respect to sales made by pharmacists or pharmacies directly to physicians, dentists, veterinarians or other persons authorized to prescribe, or to hospitals, nursing homes, governmental agencies, or other institutions licensed under Title 30 of the Revised Statutes, as amended or to the advertising or issuance of trading stamps and similar devices in connection with the sale of said prescription drugs and narcotics.] *The use of the terms "cut rate," "discount," "bargain," or terms of similar connotation in connection with the promotion, direct or indirect, by any means, in any form or through any media, of the prices for prescription drugs and narcotics or fees or for services relating thereto.*

d. The claiming of professional superiority in the compounding or filling of prescriptions or in any manner implying professional

superiority which may reduce public confidence in the ability, character or integrity of other pharmacists.

e. Fostering the interest of one group of patients at the expense of another which compromises the quality or extent of professional services or facilities made available.

f. The distribution of premiums or rebates of any kind whatever in connection with the sale of drugs and medications provided, however, that trading stamps and similar devices shall not be considered to be rebates for the purposes of this chapter and provided further that discounts, premiums and rebates may be provided in connection with the sale of drugs and medications to any person who is 62 years of age or older. Before a certificate shall be refused, suspended or revoked, the accused person shall be furnished with a copy of the complaint and given a hearing before the board. Any person whose certificate is so suspended or revoked shall be deemed an unregistered person during the period of such suspension or revocation, and as such shall be subject to the penalties prescribed in this chapter, but such person may, at the discretion of the board, have his certificate reinstated at any time without an examination, upon application to the board. Any person to whom a certificate shall be denied by the board or whose certificate shall be suspended or revoked by the board shall have the right to review such action by appeal to the Appellate Division of the Superior Court in lieu of prerogative writ.

2. This act shall take effect immediately.

ASSEMBLY, No. 1228

STATE OF NEW JERSEY

INTRODUCED FEBRUARY 15, 1974

By Assemblyman YATES

Referred to Committee on Commerce, Industry and Professions

AN ACT requiring the Board of Pharmacy to compile a schedule of the 100 most frequently used prescription drugs, requiring every pharmacy and drug store to post a list of such prescription drugs together with their current retail price, and supplementing chapter 14 of Title 45 of the Revised Statutes.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. The Board of Pharmacy shall compile a printed schedule of the 100 most frequently used prescription drugs or medicines or combinations or mixtures thereof, and shall distribute such schedule to all registered pharmacists within the State.

2. Every pharmacy, drug store or drug department selling prescription drugs or medicines or combinations or mixtures thereof at retail, shall post a list of the 100 most frequently used prescription drugs or medicines or combinations or mixtures thereof, distributed by the Board of Pharmacy, in a prominent location in a public part of such pharmacy, drug store, or drug department. Included on said list shall be the current retail price charged by

action in any court of competent jurisdiction. Proceedings shall be pursuant to the "Penalty Enforcement Law" (N. J. S. 2A:58-1 et seq.).

4. This act shall take effect 90 days after enactment.

STATEMENT

The purpose of this bill is to require the Board of Pharmacy to compile a printed schedule of the 100 most frequently used

prescription drugs or medicines and distribute such schedule to all registered pharmacists in the State. Every pharmacy and drug store is required to post such list of the 100 most frequently used prescription drugs or medicine together with the current retail prices charged by said pharmacy or drug store in a prominent location in the pharmacy, drug store or drug department.

ASSEMBLY, No. 3263

STATE OF NEW JERSEY

INTRODUCED APRIL 10, 1975

By Assemblymen NEWMAN and DOYLE

Referred to Committee on Commerce, Industry and Professions

AN ACT concerning the practice of optometry and amending R. S. 45:12–11.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. R. S. 45:12–11 is amended to read as follows:

45:12–11. The board shall have the power, and it is hereby made its duty to refuse to grant, to revoke or to suspend for a specified time, to be determined in the discretion of the board, any license to practice optometry in the State of New Jersey for any of the following causes:

a. Loaning, selling, or fraudulently obtaining any optometry diploma, license, record, or certificate, or aiding or abetting therein.

b. Gross incompetence.

c. The obtaining of any fee by fraud or misrepresentation or the practice of deception or fraud upon any patient or patients.

d. Chronic and persistent inebriety, or the habitual use of narcotics.

e. Affliction with a contagious or infectious disease which, in the opinion of the board, renders practice of optometry by the licensee or applicant for license dangerous to the public health.

f. Conviction of a crime involving moral turpitude; or where any licensee or applicant for a license has pleaded non vult contendere or non vult to any indictment, information, allegation or complaint, alleging the commission of a crime involving moral turpitude, or where any licensee or applicant for a license presents to the board any diploma, license or certificate that shall have been obtained, signed, or issued unlawfully or under fraudulent representation. The record of conviction or the entry of such a plea in any court of this State or any other State or in any of the courts of the United

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States or any foreign country, shall be sufficient warrant for the revocation or suspension of a license.

g. Conviction in a court of competent jurisdiction of a high misdemeanor.

h. False, fraudulent or misleading advertising of the practice of optometry or of any art, skill, knowledge, method of treatment or practice pertaining thereto.

[Advertising of the practice of optometry or of any art, skill, knowledge, method of treatment or practice pertaining thereto or ophthalmic materials, fees, prices, the charges for services or ophthalmic materials, the character or durability of services or ophthalmic materials or advertising to perform optometric services or with reference to providing glasses, spectacles, contact lenses, frames, mountings, lenses or prisms free of charge or on credit or installments or anything of similar import to the foregoing, by means of circular, handbills, card, letter, sign, poster, pictures, representations of eyes or eyeglasses, advertising matches, mirrors or other articles or by advertisement in newspapers, books, magazines or other publications or by projection by means of light, electronics, crier, radio broadcasting, television or by use of an advertising solicitor or publicity agent or any other advertising media; provided, however, that any] *Any* person licensed under the provisions of this chapter may issue appointment cards or professional cards to his patients.[, when the information thereon is limited to matter pertaining to the time and place of appointment and that permitted on the professional card, or may display the name of the licensee on the premises where he is engaged in the practice of his profession upon the windows or doors thereof and by door plates, or name or office directory when the information is limited to that of the professional card. For the purposes of this section a professional card shall contain only the name, title, profession, degrees, address, telephone number, office hours of the licensed optometrist, and the words "eyes examined," "eye examinations," or "hours for the examination of eyes." The foregoing is not] *Nothing herein is* to be construed as prohibiting the publication by an optometrist of his professional card in regularly published newspapers [provided his said card and advertisement does not contain any information other than that permitted in the definition of the professional card as is found in this section].

i. Announcing his name in any city, commercial, telephone or other public directory, or directories in public or office buildings using display or boldface type or type that is in any way dissimilar

in size, shape, or color to that used for other practitioners of the healing arts in the same directory.

No optometrist shall cause or permit himself to be listed in a telephone directory under any name other than the name in which he is registered with the board as the holder of a valid, unrevoked, active license to practice optometry in this State.

No optometrist shall cause or permit any listing of any

(1) inactive, retired, removed or deceased optometrist or any other ocular practitioner, except that, for a period of not more than 2 years from the date of succession to the practice of another optometrist, an optometrist may use a telephone listing of such optometrist together with the words "succeeded by," "succeeding" or "successor to."

(2) any trade name or corporate name, or the name of any person, firm, corporation, partnership or association not licensed to practice optometry under the provisions of chapter 12 of Title 45 of the Revised Statutes of New Jersey in which additional listing the address or telephone number is the same as that of the said optometrist.

The listing of an optometrist in a telephone directory shall contain only the name, title, the word "optometrist," degrees, address or addresses, office hours and telephone number or numbers of the licensed optometrist, including, if desired, the words "if no answer, call ....."

Any optometrist listed in the classified section of any directory shall be listed only under the classification entitled "Optometrists," at the address or addresses for which he holds a valid, unrevoked, active license to practice optometry in this State.

[j. Displaying any spectacles, eyeglasses, eyeglass or spectacle frames or mountings, goggles, lenses, prisms, spectacle or eyeglass cases, ophthalmic material of any kind, optometric instruments, or optical tools or machinery, or any merchandise material, or advertising of a commercial nature in office windows or reception rooms or in display cases outside of the offices, where the display of such merchandise, material or advertising would make it visible from the street.] (*Deleted by amendment.*)

k. Displaying his licenses, diplomas, or certificates in such a manner that they may be seen from the outside of the office.

l. Using the title doctor or its abbreviation without further qualifying this title or abbreviation with the word optometrist.

m. Use by an optometrist of the words "clinic," "infirmary," "hospital," "school," "college," "university," or "institute" in

English or any other language in connection with any place where optometry may be practiced or demonstrated; provided, however, that nothing in this section shall prevent an optometric clinic, approved by the board, from being conducted on a nonprofit basis by a school or college of optometry or an association of registered optometrists.

n. The continuance of an optometrist in the employ of, or acting as an assistant to any person, firm or corporation, either directly or indirectly, after he has knowledge that such person, firm or corporation is violating the laws of New Jersey concerning the practice of optometry.

o. Any conduct which is of a character likely to deceive or defraud the public.

p. Soliciting in person or through an agent or agents for the purpose of selling ophthalmic materials or optometric services or employing what are known as "chasers," "steerers," or "solicitors," to obtain business.

[q. The issuance of appointment cards or the display of the name of the licensee on the premises where he is engaged in the practice of his profession when the information goes beyond that permitted by a professional card.] (*Deleted by amendment.*)

r. The display of the name and title of the licensee, or other information in lettering larger than 4 inches in height for street-level offices, or larger than 6 inches in height for office above street-level, and in no event shall there be more than three such displays, and the illumination of said name and title except during office hours; the use of colored or neon lights, eyeglasses or eye signs, whether painted, neon, decalcomania, or any other either in the form of eyes or structures resembling eyes, eyeglass frames, eyeglasses or spectacles, whether lighted or not.

s. Any violation of rule or regulation duly promulgated by the board hereunder or of any provision of this chapter.

t. No optometrist shall cause or permit the use of his name, profession or professional title by or in conjunction with any association, company, corporation, or nonlicensed person, in any advertising of any manner.

[u. Practicing optometry in any retail or commercial store or office not exclusively devoted to the practice of optometry or other health care professions where materials or merchandise are displayed pertaining to a business or commercial undertaking not bearing any relation to the practice of optometry or other health care professions; providing, however, that any optometrist practic-

ing in premises of this type prior to January 1, 1963, shall be permitted to continue in his present location; but when and if any optometrist, who is a lessee or an employee of a lessee, vacates such premises no other optometrist shall be permitted to practice in said vacated premises. Practicing optometry under a false or assumed name, or upon a salary, commission, or any other basis of compensation, while directly or indirectly employed by or associated or connected as an optometrist with any person, association or corporation other than one who possesses a valid unrevoked certificate of registration as an optometrist or a physician licensed in and for the State of New Jersey and who has an actual legal residence within the State.] (*Deleted by amendment.*)

v. Prior to prescribing for or providing eyeglasses or spectacles a complete minimum examination shall be made of the patient to determine the correct lenses necessary for such a patient. The requirements of such minimum examination shall be defined by rule or regulation of the New Jersey State Board of Optometrists.

w. Any person licensed as an optometrist who violates section 45:12–11 (i), (h), (m), [(q),] or (r) of this chapter shall, at the discretion of the board, be subject to a penalty of $50.00 for the first offense and $200.00 for each subsequent offense in lieu of the suspension or revocation of his license.

x. Any person who has been guilty of gross malpractice or gross neglect in the practice of optometry which has endangered the health or life of any person.

Proceedings for the revocation of a certificate or suspension of the right to practice shall be begun by filing with the board a written charge or charges against the accused. These charges may be preferred by any person or the board may on its own motion direct its secretary to prefer the charges.

2. This act shall take effect immediately.

STATEMENT

This bill will allow optometrists to advertise and to practice optometry in a retail or commercial store or office, which practices were previously proscribed by statute. Without in any way limiting the standard of health care and protection for the public, the legislation will have the effect of benefiting the consumer by permitting more informed and less expensive choices with respect to the purchase of eyeglasses and like products.

ASSEMBLY, No. 3264

STATE OF NEW JERSEY

INTRODUCED APRIL 10, 1975

By Assemblymen DOYLE and NEWMAN

Referred to Committee on Commerce, Industry and Professions

AN ACT to amend "An act providing for the regulation of the practice of ophthalmic dispensing; authorizing the issuance of certificates to registered qualified ophthalmic dispensers and ophthalmic technicians; creating an examining board to determine their respective qualifications and conferring powers and duties thereupon; and providing for penalties for violations of the provisions hereof, and supplementing the "Department of Law and Public Safety Act of 1948," approved October 15, 1948 (P. L. 1948, c. 439)," approved June 18, 1952 (P. L. 1952, c. 336).

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. Section 17 of P. L. 1952, c. 336 (C. 52:17B–41.17) is amended to read as follows:

17. It shall be lawful for an ophthalmic dispenser or ophthalmic technician to advertise**[**; provided, that no motion shall be made, either directly or indirectly by any means whatsoever, of a discount, any definite or indefinite price or credit terms on corrective ophthalmic lenses, frames, complete prescription or corrective glasses; and**]** provided**[**, that**]** such **[**ophthalmic dispenser or ophthalmic technician does not advertise in any manner that**]** *advertising* would *not* tend to mislead or deceive the public or **[**that would**]** in any manner discredit others in the eye care field. An ophthalmic dispenser or ophthalmic technician shall have the right with each individual patient to recommend an ophthalmologist or optometrist.

It shall be unlawful to advertise or employ displays in such a manner as to suggest, infer or indicate that persons licensed under

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this act are qualified to give professioanl advice concerning eye care.

It shall be unlawful for any ophthalmic dispenser or ophthalmic technician to use the word "licensed" or any of its synonyms.

It shall be unlawful for any ophthalmic dispenser or ophthalmic technician or employee or agent thereof or any other person on their behalf to offer to pay a rebate or commission in any form whatsoever to any ophthalmologist, refractionist, or optometrist in return for referring patients to anyone licensed under this act.

2. This act shall take effect immediately.

STATEMENT

This bill will allow ophthalmic dispensers and technicians to advertise, which advertising was previously proscribed by statute. It will have the effect of allowing the consumer to shop comparatively for lenses, frames, prescription or corrective glasses and thereby make more informed and less expensive choices with respect to such products.

ASSEMBLY, No. 3273

STATE OF NEW JERSEY

INTRODUCED APRIL 10, 1975

By Assemblyman YATES

Referred to Committee on Commerce, Industry and Professions

AN ACT permitting the advertising of retail prices of prescription drugs and requiring that retail prices be posted for certain commonly dispensed prescription drugs and amending R. S. 45:14–12.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. R. S. 45:14–12 is amended to read as follows:

45:14–12. The board may refuse an application for examination or may suspend or revoke the certificate of a registered pharmacist or a registered assistant pharmacist for any of the following causes: When the application or registration is shown to have been obtained by misrepresentation or fraudulent means or when the applicant or registrant is guilty of chronic or persistent inebriety, or has been adjudged guilty of violating any State or Federal law or any law of the District of Columbia or of any territory of the United States relating to the practice of pharmacy, or relating to the dispensing of drugs, or has been convicted of a crime involving moral turpitude, or has impersonated an applicant for registration before the board or has been convicted of knowingly, intentionally or fraudulently adulterating or causing to be adulterated drugs, chemicals or medicinal preparations or has sold or caused to be sold adulterated drugs, chemicals or medicinal preparations knowing, or having reason to know, that same were adulterated, or has procured or attempted to procure registration for another by misrepresentation or fraudulent means, and the board shall refuse an application for examination or suspend or revoke the certificate of a registered pharmacist or a registered assistant pharmacist when the applicant or registrant is shown to be addicted to the use of narcotic drugs, or has been convicted of violating any law of

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this or any other state or of the United States relating to narcotic drugs or has been adjudicated an incompetent, or is shown to have any abnormal physical or mental condition which threatens the safety of persons to whom said applicant or registrant might sell or dispense prescriptions, drugs, chemicals, medicinal preparations or devices or for whom he might manufacture, prepare or package, or supervise the manufacturing, preparation or packaging of prescriptions, drugs, chemicals, medicinal preparations or devices. In addition, the board may refuse an application for examination or may suspend or revoke the certificate of a registered pharmacist or a registered assistant pharmacist upon proof satisfactory to the board that such registered pharmacist or such registered assistant pharmacist is guilty of grossly unprofessional conduct and the following acts are hereby declared to constitute grossly unprofessional conduct for the purpose of this act.

a. Paying rebates or entering into an agreement for payment of rebates to any physician, dentist or other person for the recommending of the services of any person.

b. The providing or causing to be provided to a physician, dentist, veterinarian or other persons authorized to prescribe, prescription blanks or forms bearing the pharmacist's or pharmacy's name, address or other means of identification.

c. [The promotion, direct or indirect, by any means, in any form and through any media of the prices for prescription drugs and narcotics or fees or for services relating thereto or any reference to the price of said drugs or prescriptions whether specifically or as a percentile of prevailing prices or by the use of the terms "cut rate," "discount," "bargain" or terms of similar connotation, but this shall not include the term nonprofit if such term is used by a nonprofit entity; and this paragraph shall not be construed or apply to have any effect with respect to sales made by pharmacists or pharmacies directly to physicians, dentists, veterinarians or other persons authorized to prescribe, or to hospitals, nursing homes, governmental agencies, or other institutions licensed under Title 30 of the Revised Statutes, as amended or to the advertising or issuance of trading stamps and similar devices in connection with the sale of said prescription drugs and narcotics.] (*Deleted by amendment.*)

d. The claiming of professional superiority in the compounding or filling of prescriptions or in any manner implying professoinal superiority which may reduce public confidence in the ability, character or integrity of other pharmacists.

e. Fostering the interest of one group of patients at the expense of another which compromises the quality or extent of professional services or facilities made available.

f. The distribution of premiums or rebates of any kind whatever in connection with the sale of drugs and medications provided, however, that trading stamps and similar devices shall not be considered to be rebates for the purposes of this chapter and provided further that discounts, premiums and rebates may be provided in connection with the sale of drugs and medications to any person who is 62 years of age or older. Before a certificate shall be refused, suspended or revoked, the accused person shall be furnished with a copy of the complaint and given a hearing before the board. Any person whose certificate is so suspended or revoked shall be deemed an unregistered person during the period of such suspension or revocation, and as such shall be subject to the penalties prescribed in this chapter, but such person may, at the discretion of the board, have his certificate reinstated at any time without an examination, upon application to the board. Any person to whom a certificate shall be denied by the board or whose certificate shall be suspended or revoked by the board shall have the right to review such action by appeal to the Appellate Division of the Superior Court in lieu of prerogative writ.

2. This act shall take effect immediately.

STATEMENT

This bill will permit the advertising of the retail prices of prescription drugs and will require the posting in a particular pharmacy of the prices of certain commonly dispensed prescription drugs. It will have the effect of granting the consumer the opportunity to comparison shop for prescription drugs and thereby make more informed and less expensive decisions with respect to the purchase of such drugs. Such advertising and posting was previously proscribed by statute.

ASSEMBLYMAN BYRON M. BAER (Chairman): The Commerce, Industry and Professions Committee will come to order. This hearing is on Assembly Bills 736, 1228, 3263, 3264 and 3273.

Members of the Committee who are presently here are Assemblyman Rye, Assemblywoman Croce, Assemblyman Herman, Assemblywoman Curran and I am Assemblyman Byron Baer. I will identify other members of the committee as they arrive.

I would like to say that it has come to my attention that there has been an effort planned to stymie the effectiveness of the hearing and of the committee by trying to get a massive number of persons to come here and use up the time of the committee merely by repeating similar statements and by trying to get as many people as possible to come down to essentially articulate the same information to the committee, - to have it articulated from that town, or this town, or the other town. I do not intend to have the effectiveness of the committee stymied by these tactics - by having just a massive effort to repeat the same testimony.

So, if we find that we are getting a great deal of time spent in repetition, we will have to move on to other speakers who may have information for us, because what we are seeking is information. We are not attempting to conduct a referendum.

If you merely wish to be registered on one side or another of a bill, or to associate yourself with arguments that have already been made then just do so in a simple manner.

These bills today are very important. They affect the functioning of two major professions and associated professions and they have a major impact on the consumer.

Before I begin hearing any witnesses, I would like to ask if any member of the committee has an opening statement and then we will begin with the witnesses.

I would like to recognize Assemblywoman Curran and I want to thank Assemblywoman Curran for her efforts in helping to make these facilities available to us since the facilities at 1100 Raymond Boulevard were not available today and there was a consensus in the committee to meet in Newark. Assemblywoman Curran.

ASSEMBLYWOMAN BARBARA A. CURRAN: Thank you, Byron. On behalf of Seton Hall Law School, I want to welcome you here today. We at Seton Hall, as you probably can see, are constructing a new law center right next door to this building which we hope will house similar meetings to this. In the future, the law center is going to conduct seminars for people like yourselves in regard to legislation and also seminars for teachers and reporters and policemen who deal with the law on an every day basis.

So, on behalf of the law school, I would like to welcome you and tell you that our facilities are yours for today. If there is anything I can do personally to be of help to you, I will be happy to do so. Thank you.

ASSEMBLYMAN BAER: Mr. Herman.

ASSEMBLYMAN HERMAN: I would like to ask a question. Are we just going to take one group of bills at a time or are we going to mix the speakers on the bills? Are we going to take one set of speakers at a time?

ASSEMBLYMAN BAER: We are going to have a hearing simultaneously on all bills so that speakers who, in many cases, wish to speak on more than one bill will not have to return to the microphone more than once.

I also wanted to mention that the hearing record will be kept open for at least two weeks, possibly three weeks, so that if you wish to submit a written statement

which you were not able to prepare for today, it can be added to the record. Also, if anybody wishes to add any information rebutting any testimony they hear here, that can also be done. It is also open, if we do run out of time, for written statements to be submitted by any person present, just in case they are not able to be heard today.

I would also like to ask members of the committee, who have the prerogative to ask questions of the witnesses, to try to keep the questions as brief and as simple as possible, limiting them to the essential information that needs to be elicited, in consideration of the time problem we have.

The first witness this morning will be Mr. Richard A. Givens, Regional Director of the Federal Trade Commission.

R I C H A R D A. G I V E N S: Thank you very much, Mr. Chairman. I am extremely pleased to have the opportunity to appear before your committee and I want to thank the committee for going into this extremely important problem.

The Federal Trade Commission, as you know, has been concerned with the problem of improving competition in the marketplace because we believe that the free enterprise system works most effectively for both the consumers and industry where competition is free and full.

I want to mention, however, that what I say is only a staff view and is not attributable to our five commissioners, who only act by official vote.

The bills which are before your committee at the present time would allow advertising, basically, both in the prescription drug area and in the area of eye care. Such advertising would allow the consumer to obtain more information about prices that are available. Therefore, in my opinion, this would benefit the public and the industry.

At the present time, due to the advertising ban, the consumer is ignorant of the prices that are available either for prescription drugs or for eye glasses. As a result, the consumer has to spend a great deal of time going around and talking to individual sellers in order to find out what prices are available. This, of course, is a tremendous hardship and many consumers will not even go through that. As a consequence, when they make a purchase they frequently make this based on ignorance of whether the price that they are being offered is high, low, or medium.

As a consequence of that ignorance there is a tremendous spread in the prices that are available. For example, in the drug field there have been variations of as much as 7 to 1, which have been reported by our Office of Policy Planning. The Director of that office is Mr. Wesley Liebler, who made some surveys of his own in which he found that there have also been numerous other comparisons of drug prices throughout the country which have shown extremely wide variances. As a result of these variances it has been estimated that even if as little as 5% of the consumers shifted to the lower priced drugs as a result of price advertising, the consumer throughout the country could save somewhere between $43 million and $795 million per year.

Now, in the case of the eye glass industry in New Jersey, the latest figures indicate that $39 million, approximately, is spent by New Jersey consumers on eye glasses. The study by Professor Benham has indicated that approximately a 25% saving could be estimated if price advertising were allowed. Of course, these figures are rough and there is no precise scientific proof that any given figure is accurate.

I have indicated in the appendix to my prepared statement how Professor Benham arrived at that figure.

Assuming that that figure is correct, he has projected a 25% saving, which would mean, between the money saved directly and consumers who might buy eye glasses who otherwise would not, there would be a benefit for the consumers in the State of New Jersey of approximately $8.6 million, if advertising of eye glasses were allowed.

Now, if the consumer pays more, this means - as I indicated - less of the product is sold, which means that less jobs are generated from that consumer buying power to the extent that the consumer pays more. It also means they have less money available to buy other things which might generate jobs in the State.

Illustrating the dispersion of prices in the eye glass field, where advertising is present or absent, in Oklahoma certain contact lenses cost $150 where advertising is prohibited and in Texas, where advertising is allowed, a major chain charged $69.50.

Now, I am aware of the argument to the effect that allowing advertising might lead to over-promotion of certain prescription drugs. However, the doctors, of course, form a barrier to that. They would not have to give the prescription.

If it is argued that doctors might be pressured by patients into giving unwise prescriptions, I think the answer to that is that we allow advertising by drug manufacturers to doctors, including promotional advertising and free samples, which, if the doctors were susceptible to this type of blandishment - and I am not saying they are - it would certainly have far more effect than the desires of any individual patient insofar as getting a particular prescription.

Also, of course, there is the argument that advertising would lead to lowering the quality of the products that are made available. I don't think that is

sound because if that were true the rest of the American economy would have been in a bad way for a long time and advertising would be viewed as bad rather than good. The Federal Trade Commission feels that false advertising is bad but certainly not that advertising, in general, is bad.

Along that same line, there is no guarantee that any higher prices which the consumer pays will necessarily be converted into higher quality service. It is entirely possible to give bad service and charge high prices just as well as it is to give good service and charge moderate prices.

I want to submit to the committee copies of testimony of Miss B. Sharon Byrd of the Office of Policy Planning of the Federal Trade Commission, given before the Legislature in Oklahoma, which sets forth in somewhat more detail the basis for some of the statistics that I have given. I am doing that, Mr. Chairman, because of your admonition to save time. I will not read this in full.

At this time I would be happy to answer any questions that you, or members of the committee, might have.

ASSEMBLYMAN BAER: Thank you, Mr. Givens.

Mr. Herman.

ASSEMBLYMAN HERMAN: Mr. Givens, just for the record so we are all identifying with the same definition, how are you defining "lower priced drugs"?

MR. GIVENS: I don't think I defined lower priced drugs.

ASSEMBLYMAN HERMAN: I know, that's why I am asking the question.

MR. GIVENS: I don't think it is possible to give a definition.

What I would say is, there are many differences in the price of the same drug.

ASSEMBLYMAN HERMAN: All right. Now, are we talking about the same drug or are we talking about the same drug vis-a-vis the price that one druggest may charge for Darvon versus the price that another may charge, or are we talking Darvon as it might compare to Smith, Kline & Franch's branded generic for the same thing - using your example of what constitutes a lower priced drug?

MR. GIVENS: What I am talking about is where the precise, same brand name is involved. I am not talking about the question of substitution of generic drugs.

Mr. Wesley Liebler, who is the Director of Policy Planning for the Federal Trade Commission, testified in California on January 9th of this year that the price of the popular brand of Tetracycline in Boston ranged from $2.60 to $8.00 for the same quantity. Now, as I say, that is the same brand name, so we are not talking about cheaper drugs in the sense of something that might be either better or worse, but which is different; we are talking about where the price varies for the precise, same item.

ASSEMBLYMAN HERMAN: I, perhaps, did not follow your comments with regard to the consumer talking the physician into prescribing a cheaper drug. If you are telling me--

MR. GIVENS: I didn't mean to say that. Let me clarify that.

ASSEMBLYMAN HERMAN: I believe that is what the record would disclose.

MR. GIVENS: What I referred to was the argument that if advertising were allowed, some patients might think that certain drugs were wonderful and then get their doctors to prescribe those drugs and, therefore, advertising would tend to promote drug abuse. I was saying that I don't think that argument, which has been raised in the past, is a valid argument because I think the doctors would not do

that and if some doctors did do it, they would be far more likely to do that type of thing as a result of inducements offered by the manufacturers, which are more substantial, than the fee a patient could offer a doctor for doing that. I was not talking about patients inducing doctors to prescribe a cheaper drug.

ASSEMBLYMAN HERMAN: In reference to the advertising of prescription glasses, I just want to get your view because, obviously, all of us have received a great deal of literature concerning the allegation that advertising in no way would control the quality standards of care that the ophthalmologist in New Jersey supposedly renders to his patients. Now, I would like to know, how, in your view, would advertising in the bills that are presented, guarantee that type of quality care? For instance, would the people involved, such as the ordinary ophthalmologist, be required to carry malpractice insurance? What I am trying to do is get your reaction to the arguments that have been raised in response to that position.

MR. GIVENS: In my opinion, the question of quality is something that should be considered entirely separately from the question of advertising because by allowing advertising, it would not take away any of the guarantees of quality that now exists. That would remain exactly as it is and if you need more guarantees of quality, that should be done by means of additional supervision.

By allowing advertising, you simply give the consumer a little more information about one item that might be important to that consumer, namely how much are they going to have to pay for a given item.

It seems to me that poor quality is just as possible without advertising as with advertising because in either case the consumer, not being a professional, will

not immediately know whether the quality is bad. Of course, if they get eye glasses and they get headaches, they should know that something is wrong and they may or may not blame the particular firm; it might be that their eyes have changed.

ASSEMBLYMAN HERMAN: The spread on the savings from $43 million to $795 million -- was that the figure? Why such a large spread?

MR. GIVENS: That's because you really can't tell what percentage of consumers are going to change to the cheaper prices for the same drugs.

As you indicated, and in response to your previous question, I am not talking about switching to a cheaper drug, but about the same drugs.

Now, in Northern California a survey was done of 100 pharmacies, reported in Mr. Kiebler's testimony - which I will submit for the record - indicating that prices for Achromycin ranged between $3.70 and $8.45. Now, if all the people who were paying $8.45 were to switch to $3.70, you would get a very high figure of saving. The low figure of $43 million is based on the assumption that only 5% of the consumers would switch from higher priced establishments to lower priced establishments. However, there has been no scientific study determining what percentage of the consumers will switch. It is obvious that some consumers will switch, otherwise advertising of prices wouldn't pay, either in the automobile industry or in the eye glass industry, and we wouldn't be here, because nobody would follow this option, if it were available.

The comparison between the cost of the contact lenses in Texas and Oklahoma - which I mentioned - indicates that there is an additional effect and that is that prices themselves will come down because if the pharmacy selling at $8.00, or the eye glass fitter who is selling at a higher price, finds that fewer customers are coming to his door, he would be likely to join those that are charging less.

So, the anticipation should be, in my opinion, that the consumer benefit would exceed the estimates that are given.

ASSEMBLYMAN HERMAN: One last question. Has your commission made an evaluation as to the relative potential savings on drug advertising versus the ability of a pharmacist to generically substitute?

MR. GIVENS: The generic substitution question is a completely different question.

ASSEMBLYMAN HERMAN: I am talking about the relative savings involved. I want to know if your commission--

MR. GIVENS: We have no estimate of the savings from generic substitution.

ASSEMBLYMAN HERMAN: Your commission hasn't been involved in that at all?

MR. GIVENS: I don't have any figures on that. There has been discussion on it.

ASSEMBLYMAN HERMAN: Thank you very much.

ASSEMBLYMAN BAER: Assemblywoman Curran.

ASSEMBLYWOMAN CURRAN: Mr. Givens, I wasn't quite clear to me, when you talked in the beginning about this being a staff report which does not reflect the opinion of the Commissioners.

MR. GIVENS: Yes. The Commission only acts by official vote of its 5 members. However, the Commission authorizes the staff to share with state authorities, such as your committee, whatever expertise we may have in case it is of assistance to you. Therefore, what I say is a staff opinion, and not binding on the 5 Commissioners.

ASSEMBLYWOMAN CURRAN: Do you have any idea of the total spending for drugs in the country today?

MR. GIVENS: I believe that the total for the United States, as a whole, for prescription drugs--

ASSEMBLYMAN HERMAN: In excess of $10 billion?

MR. GIVENS: It is a very high figure. I'll see if I can locate that here.

ASSEMBLYMAN BAER: Could you go on to another question? Maybe that can be provided for this committee later.

ASSEMBLYWOMAN CURRAN: Basically, the reason I asked that is, I find this range - as Marty did - somewhat questionable. I mean it is very powerful for the Policy Planning and Evaluation Director of the F.T.C. to tell us that what we are looking at is potentially a savings of $795 million. I just really find it difficult to accept that without some further documentation.

For instance, the comment you made before about Achromycin selling for $3.00 or $8.00. I would think it would certainly be a fair part of that discussion to talk about how many people actually are charging $8.00 and how many people are buying at $8.00 versus how many people are buying at $3.00.

MR. GIVENS: The first figures in 1972 show the American consumers purchased 1.6 billion new and refilled prescriptions at a cost of $6.4 billion.

Now, the other point that you mentioned -- there is a great deal of documentation on the variety of prices. However, I would be the first not only to admit but to emphasize that any of these projections are extremely rough and we cannot establish to any degree of certainty what the saving would be. That's why I gave a range. It seems to me that the fixing of a dollar figure is something which is really a guess. But I think the clear point I would want to convey to you is that there is a very large savings. Exactly how much it is, we can't say.

Where you have tremendous variations in drug prices and buying, with almost total ignorance by the consumer as to who is charging more, the public is going

to get a whopping, big benefit. These figures are ball park figures; they could be wrong. But if they are wrong there is still an awful big saving for the customer in New Jersey if these bills are passed.

ASSEMBLYWOMAN CURRAN: One last question. Did these statistics take into account the spectrum of drugs offered by any given pharmacy, or are they primarily based on, let's say, the 100 fastest-moving items?

MR. GIVENS: It is an attempt to take into account the entire spectrum. You will see, in the material that I am submitting for the record, more detail on how those figures were arrived at. But, again, as you yourself indicated - and I agree - the figures are not precise and the main focus, I think, of your committee should be on the qualitative question, that there is going to be a saving and it is going to be substantial. We don't claim to be able to prove exactly how much it will be.

ASSEMBLYWOMAN CURRAN: Thank you.

ASSEMBLYMAN BAER: I'd like to ask you a couple of questions, Mr. Givens.

First of all, in terms of the studies that were made, and that you referred to, on the price differential - I have not had a chance to peruse the material you submitted - if those studies are not set forth fully in the material, could you provide us, subsequently, with a copy of those studies?

MR. GIVENS: I will. There is a very large number of such studies. For example, the Commissioner of Consumer Affairs of Suffolk County did one recently. It has become almost a pastime for consumer groups to study drug prices.

The New York Public Interest Research group did one. They uniformly find variances in the very high range, such as five times, etc.

ASSEMBLYMAN BAER: Right. I am aware of this. Do any of these studies reflect the type of information Assemblywoman Curran referred to in terms of actually indicating the degree - or the percentage - of a given drug, the variance, pricewise, at one level and the percentage at another level, or the percentage of the total drug market that is subject to these changes? We would appreciate your submitting that to the committee.

MR. GIVENS: If so, I will do that.

ASSEMBLYMAN BAER: The second question I would like to ask you--

MR. GIVENS: I doubt whether that type of figure exists because if it did I am sure I would have it from the work that was done. But I will check again and if there is such a figure I will supply it to the committee.

ASSEMBLYMAN BAER: Thank you.

The second question I would like to ask you is, has there been experience indicating that where advertising is permitted there is a need for regulation, or legislation, limiting the advertising - regulations relating specifically to these professions - so that advertising does not mislead the consumer insofar as the quality of eye glasses, for example, is concerned - where you might have a price differential between two different ads and one might meet standards and one might not - or where there are certain other elements that might not be indicated in ads or might be assumed by the public to be associated with these products and where there could be misunderstanding, or misconception, or deception?

What I am asking is, is there need, where advertising is permitted, for any codes or standards so that the public knows exactly what those ads mean and so that they are expressed in terms of standardized,comparable things?

MR. GIVENS: I think there is a need for supervision of possible false advertising, actually, in all industries across the board.

For example, our commission has recently issued proposed rules in the field of nutritional advertising where, if certain terms are used such as "natural", etc. they would have to have a specific meaning.

So, my opinion would be that your committee certainly should consider additional dictionaries - if you like - defining what certain terms should mean in advertising, not only in this field but in other fields as well. I don't think you need to hold up allowing the advertising pending developing some type of specific code for this industry.

So, my direct answer to your question would be, no, we don't have any indication that states, like Texas, which allow advertising, have had any special problems as a result of that. What I would recommend is that you consider acting favorably now on the bills that are before you; at the same time, the problem of false advertising is under the general supervision of the Attorney General's office.

I know that Mrs. Virginia Long Annich is here this morning and I am sure her department would be vigilant to attack any indications of abuse in advertising. You have a very strong Consumer Fraud Act in New Jersey with a $25,000 penalty for violations and I think that will, undoubtedly, prevent any serious abuses of the type that you mentioned.

I know that there is a bill before your committee - Assembly, No. 736 - that would prohibit certain terms such as "cut rate", "discount", or "bargain" prices. In my opinion, that may not be necessary but, at the same time, if you wanted to consider that proposal as a compromise

it would allow the main thrust that I am so strongly in favor of, namely that the prices themselves could be advertised. If someone needs a certain drug and you are allowed to say that it only costs "X" dollars, the fact that you can't also use the term "bargain", I think is not important.

ASSEMBLYMAN BAER: My last question is, since there have been questions raised - and I am sure we will hear more information on this later today - as to the opening up of advertising either resulting in a degrading of the professional standards involved, or the opening up of advertising in the pharmaceutical field leading to a focus on high volume operations that make it difficult for the consumer to locate and purchase drugs that are not high volume drugs and do not move as readily -- I would like to ask, on the basis of the examination made by your commission - or studies that you are familiar with - whether that supports these concerns or contradicts these concerns? What can you tell us about that?

MR. GIVENS: Our experience would contradict those concerns because to the degree that people want a given item in the free market, it is in the interest of some segment of the business community to supply that item in order to make money. So, without regard to whether the market for a certain high volume drugs might be concentrated in one type of establishment, there would be a legitimate need for the other items which would generate the sale of those items and make it profitable for somebody to filfill that need.

Now, basically, the local druggist has certain key advantages which he, or she, ought to have and which the public is going to continue to recognize. For example, convenience; the fact that you know that person and have confidence in them and that they offer a wide spectrum of

items, such as you mentioned.

I don't believe there is - and I don't know of any experience to show this - a collapse of "mom and pop" operations just because advertising is allowed. The same type of argument is made in support of fair trade - that if you allowed differences in prices on trade-mark items, suddenly all of the smaller businesses would close down - and there has been no such experience and I am happy to say that New Jersey did not give in to that type of scare tactic and did repeal the Fair Trade Law. I think you have, basically, a similar, imaginary horror being presented to you in this case.

ASSEMBLYMAN BAER: I would appreciate it if you could send to us any back-up material that would relate to this question.

MR. GIVENS: I will.

ASSEMBLYMAN BAER: It would document your answer to this question.

MR. GIVENS: Let me say something about that. Some of the things that you have asked -- I think the burden of proof is really on someone who claims that this will happen. They should prove that. Because when you have a limitation on advertising, you have a special interest situation where the normal free market is not allowed to operate and where consumers are kept in ignorance. There is also a restriction on freedom of speech, freedom of the press and freedom of expression of those who want to tell the truth, to actually tell people "we are selling this for 'x' dollars." The State is saying, no, you cannot tell this, even if it is true and the public is also denied their right to have that information.

It seems to me, before we should continue to have that type of restriction, those who claim that there is going to be some terrible, horrible result from allowing

the truth to be told about prices should prove that this is true.

Now, we will do our best to show that it is not true, but I think if this were true, you would know about it because in states, like Texas, where they allow advertising in the eye glass industry, there has been no such horrible result. If there were, that would be evident. It is like saying, "is there anything now in your right arm, otherwise I want proof that all of the blood corpuscles are functioning normally."

Now you, Mr. Chairman, are not making that argument but you are rightfully putting it to me because some people are making it to you. My answer is, if you don't hear of any horrible crys of horror you should assume that that situation is normal - in your arm or in a place that allows advertising, like Texas.

ASSEMBLYMAN BAER: Mr. Givens, I want to thank you very much.

Excuse me, Assemblyman Rys would like to ask you a question.

ASSEMBLYMAN RYS: Mr. Givens, you keep talking about the State of Texas. What about the other states?

MR. GIVENS: I am not aware of any state in which there has been any evidence submitted that allowing advertising has produced any of the bad effects that have been predicted.

ASSEMBLYMAN RYS: In other words, we don't have a uniform Federal policy, isn't that true?

MR. GIVENS: The policy, at the present time, is fixed by the states for this area. That is why we are submitting our views to you, sir; it is for you and the other members of the committee to make your decision on this.

ASSEMBLYMAN RYS: Let me ask you one more question.

Would you know the official Federal Trade Commission policy regarding these bills?

MR. GIVENS: The Federal Trade Commission has not voted to take an official position on these bills and that is why I am presenting a staff opinion.

I think it is fair to say that the Commission favors free competition, but the carrying out of that down to the details and applying them is something that I am doing as a staff member.

ASSEMBLYMAN BAER: Assemblywoman Crocce.

ASSEMBLYWOMAN CROCE: Mr. Givens, could you tell me about how long it would take for a good eye examination - do you know?

MR. GIVENS: Well, I think it would depend. I think, depending on the problem that you have with your eyes--

ASSEMBLYWOMAN CROCE: Suppose I just went into an optometrist just to have my eyes examined?

MR. GIVENS: Well, I have had that done. It took, in one case, about 25 minutes and in another case about 1 hour and one-half. I don't think you could fix a uniform length of time that it will take.

ASSEMBLYWOMAN CROCE: O.K. Now, if we have advertising, would we say that if you came in for an hour we would charge you so much, you know, for an examination and so much for glasses, etc.? Would we break it all down?

MR. GIVENS: I think somebody who has a higher price and is willing to offer more service should be allowed to advertise that too, just as in the case of any other service. They could say that "we offer a thorough examination, if necessary up to three hours" or whatever they offer for whatever price they offer. I don't think that all optometrists are equal or that price

is the only factor. I only say that price is an important factor which the consumer is entitled to know about and then make his or her decision with as much information as can be made available.

ASSEMBLYWOMAN CROCE: The only fear I would have is, if it were advertised saying an examination would be $20, one, you could go in and get a good examination - perhaps from one optometrist - which might take one hour or an hour and fifteen minutes for the $20, or you might have a "quickie" and go in for fifteen or twenty minutes.

MR. GIVENS: I think that is true but I think that could happen even without advertising. In other words, where you have no price information and you walk in, basically you have to pay what they charge and it may take 20 minutes, or it may take two hours and they may prescribe something that is perfect for you or they may just treat it as a schlock operation. You are not protected against that evil by the fact that advertising is prohibited.

So, that's why even though the problem you mentioned can exist, I don't think that by prohibiting advertising you help at all.

ASSEMBLYWOMAN CROCE: O.K. Thank you.

ASSEMBLYMAN BAER: Mr. Herman.

ASSEMBLYMAN HERMAN: Would you consider it appropriate, for instance, that doctors be permitted to advertise?

MR. GIVENS: I think it should certainly be considered;to allow anybody to advertise where what they are telling you would be meaningful.

Now, if, for example, you have a specific type of service that you can define, such as an eye examination--

ASSEMBLYMAN HERMAN: How about an appendix?

MR. GIVENS: Let me finish. If you have a

specific thing that you can define where a person has an opportunity to choose in advance, then information about the cost would be very important and the consumer should have that.

Where you go to a doctor and you have no specific thing that you want, like a defined drug-- If you go in and you want Tetracycline, that is something that is within a specific parameter. When you go to a doctor you may end up with a prescription or you may end up being told that you are perfectly okay. So, it seems to me that the case for advertising of prices by doctors is much weaker. I would not want to say that under no circumstance should the consumer have any information about the cost of medical services, or legal services.

It seems to me that we should not assume that all these things are "sacred cows" and that because we never had advertising we should never have any at all. But I don't think that you can equate the two and say that because advertising by doctors is not about to be allowed - which is certainly a realistic assessment - therefore the same situation ought to apply for prescription drugs, which are a specifically defined item, or for an eye examination, etc.

ASSEMBLYMAN BAER: Mr. Herman, do you have a further question?

ASSEMBLYMAN HERMAN: I would like to persue the point, if I may, with all due respect to the witness.

If I put on a par an appendix operation versus an appendix operation - and I am not being facetious now - I assume we are talking about one doctor's price varying from another's because we are talking, perhaps, about the quality of care. I assume that what Assemblywoman Croce's question was directed to was, how does one equate the degree of professional competence in the price, because I assume we are not just talking about the eye glasses themselves -

which I assume really, overall, constitutes the minimal part of the charge - how do we equate that one?

MR. GIVENS: I think the problem is this: If somebody has a pain in his stomach, he doesn't know whether he has appendicitis or not. So, if you were going to have advertising for appendectomies you would have to assume that the person knows that it is his appendix and is going to look through the Yellow Pages and find the doctor that offers the cheapest appendix operation. This is not realistic; it is a little bit ridiculous.

ASSEMBLYMAN HERMAN: Would you like more specific examples? Would you care to get into more specifics?

MR. GIVENS: Well, what I am saying to you--

ASSEMBLYMAN HERMAN: I would like, if I may -- I am not interrupting, excuse me, Mr. Chairman.

ASSEMBLYMAN BAER: Well, you are interrupting, Mr. Herman. Let the witness finish his answer and then if you have another question, he will answer it.

MR. GIVENS: What I am trying to say is that there is no equation to be drawn between a situation where the consumer does not really know what they need, whether it is an appendix,or whether it is cancer, or simply that they need some Pepto Bismol. That is not the same situation and furthermore, the consequences,in terms of immediate reactions that can't be cured if you go to the wrong surgeon, are much more serious than if you get the wrong eye glasses and you have some time to realize that you still have a problem and can go to somebody else. You are not going to be killed immediately.

ASSEMBLYMAN HERMAN: You will have to wait 'till later, right?

MR. GIVENS: Yes. You are going to have some indication first that you have a problem. So, I am not going to say whether any advertising should be allowed or

not in terms of the other professions, but I think they are distinguishable and really should not be brought into play, one way or the other, in this case.

ASSEMBLYMAN HERMAN: One more question, Mr. Chairman.

ASSEMBLYMAN BAER: Yes, Mr. Herman.

ASSEMBLYMAN HERMAN: You quoted statistics of $6.8 million, I believe, in the cost of overall prescription drugs. If I am correct, I do not believe those statistics take into consideration the charges that hospitals make for prescription drugs. What would be the position of your staff - or the thinking of your staff - in regard to giving the patient an opportunity, in a hospital setting, to know what the price of prescription drugs is going to be? As I understand it, they are usually much higher than they would be in the open market. How do we solve that problem, which, as I understand it, is another $4 or $5 million problem, almost as great as the overall cost to the consumer of prescription drugs, out of a hospital.

MR. GIVENS: I think there are two layers here. One is the layer of allowing somebody, who wants to tell how much they are going to charge, to give that truthful information to the consumer. Now, to me, that is easy. We ought to allow this.

As far as things like a specific drug or an eye examination, I don't think your example of an appendix operation fits that situation.

Now, the second step is whether we ought to require that certain information be provided. That is a harder question. I believe one of the bills that you have under consideration here relates to posting prescription drug prices - Assembly No. 3273. That type of legislation has been passed in New York and the staff thinking would be in favor of that type of legislation.

Now, whether that same concept could workably be applied in a hospital setting is something that I can't give you an immediate answer to because the person who is sitting, or laying, in a hospital bed does not have the same opportunity to do anything about the information if he or she gets it.

Whether there is some way that this could be taken into account so that the patient would have more information on what they are paying for, if there is an over-charge, is something that I will think about and submit a further statement on, if we come up with any solution. I want to stress, through, that I don't believe that you should wait, in acting upon this immediate problem, until that problem is solved. It is like an appendicitis. I think that is what we have right now, we have an appendicitis because the flow of information has been choked off, by a tourniquet, to the public about what they are paying and I say take out the appendix or remove the tourniquet - whichever analogy you want - and then let's go on and prescribe exercises or vitamins later to improve the general condition of the patient.

ASSEMBLYMAN HERMAN: Before he dies?

MR. GIVENS: Before he dies because the recession is serious and the public needs all the help they can get. You know, people can't afford to pay their bills and some of them are going into serious debt problems as a result. So, whatever relief this committee can give, I think, would be timely right now.

ASSEMBLYMAN BAER: Mr. Givens, first of all, I would appreciate it if you would remain for just one moment.

Mr. Givens, since you have indicated that the staff has taken a position on the bill that mandates certain price information and since we are running on in terms of time, I would appreciate it if you would submit to us further details on your position with regard to this.

MR. GIVENS: I will do that.

ASSEMBLYMAN BAER: I want to thank you very much.

MR. GIVENS: Thank you.

ASSEMBLYMAN HERMAN: Before you leave, just one question. Do you wear glasses?

MR. GIVENS: I did.

ASSEMBLYMAN HERMAN: You did?

MR. GIVENS: I found that I could get along without them.

ASSEMBLYMAN BAER: Thank you very much for your testimony and for your information.

MR. GIVENS: Thank you. (statements on pages 1 X & 52 X)

ASSEMBLYMAN BAER: I would like to point out that Assemblyman Salkind has just joined us.

Our next witness will be Mrs. Annich.

V I R G I N I A L O N G A N N I C H: If it please the committee, I have prepared a lengthy statement with respect to the advertising bills, which I have submitted. Obviously, for a number of reasons, I will not read the statement but will stand on the submission in order to save time.

I tried to avoid duplication in the statement by coordinating with the other proponents of the repeal of the advertising ban. Certainly the arguments in the statement, which are relevant to the repeal of the ban on pharmacy advertising, are equally relevant to optometry. I have not repeated these statements at length, however, again in the interest of time.

I would like to make a few points today which I think are really critical, in terms of our whole approach to the area of advertising. I think that the most important one is, who is to bear the burden of sustaining or attacking this legislation which prohibits advertising, or the traditional flow of information which we accept normally in all of our ventures?

The problem has always been - and these kinds of bills have emerged before and nothing has ever happened with them - the representatives of the public interest and the people themselves have been required to justify, statistically, the need for a repeal of the advertising laws. The burden of proof has been laid at the peoples' feet. But the shoe should really be on the other foot; the burden should be on the party seeking restraints against the passage of information and against the dissemination of needed material to the public, to show why this is necessary. The obligation of the seekers of restraint is, to me, to affirmatively show why these infringements bear a reasonable relationship to the end which is sought to be achieved and how they tie in with the concept of the public health, safety, morals, and welfare.

It is not enough in this respect for the supporters of the advertising ban to sit back and say they are unimpressed with the proponents of the repeal's case, or the proponents statistics, and to essentially deal in platitudes involving the public health endangerment and anti-professionalism. The obligation is on the champions of the advertising ban to come forward with firm facts and statistics - incidentally, they have greater assets than the public - which would support a real need, tied into the public interest, tied into the public health, tied into the public morals, safety and welfare, which would support a real need for this kind of legislation.

As a threshold matter, we have submitted in this statement - and we concur, certainly, with much of what was said by Mr. Givens-- We sent out a task force during the last two weeks in order that we might ascertain here in New Jersey what kinds of differentials, in fact, are taking place with respect to the same prescription drugs. This is not a question, again, of generic as opposed to

specifics. The question was raised the last time they appeared before the committee, and rightly so, whether there was any kind of a statistical base upon which to posit the concept that, indeed the people were paying inordinate prices in some locations, low prices in some locations and average prices in some locations for the exact same drug without any ability to make the ascertainment as to what they were paying and why they were paying for this particular drug.

The essential results of this survey, which took place last week and one day this week -- What we did was, we sent investigators from Consumer Protection, from the Enforcement Bureau of the Professional Board, and from Weights and Measures, with prescriptions for prescription drugs which were supplied by physicians through the Professional Board in order to have them filled. The drugs themselves have been confiscated, I can tell you that - no problem, we have accounted for everything at this point.

Appendix A to my statement indicates the exact results of this statistic, but I would like to just generally give you a little thumbnail sketch of the kinds of things that we found. We surveyed 200 pharmacies across the state. Some of the pharmacies were chain, some were private, some of them - and these, I think, are the most interesting statistics-- We surveyed six - I think it was either six or ten - pharmacies on the same street in Union City, all on Bergenline Avenue, so that we are essentially dealing with people in the same neighborhood. The differential between the kinds of operations, for example, in that statistic ought to be pretty much limited. The results are as follows:

In 21 pharmacies in Newark 30 tabs of Valium ranged from $3.28 to $6.75, with an average price of $4.90. In 16 pharmacies in Essex County, 40 tabs of Pfizerpen G, 200,000 units, ranged from $1.60 to $6.00, with an average

price of $3.70. In 20 pharmacies in Mercer County, 20 tabs of Achromycin V, 250 milligrams, ranged from $1.49 to $3.79, with an average price of $2.75. In 8 pharmacies in Union City - and this is the statistic that I was talking about - all located on Bergenline Avenue, 24 tabs of Polycillin, 250 milligrams ranged from $4.10 to $7.85, or an average price of $6.50, and in 6 cities in Monmouth County - 12 pharmacies were looked at - 100 tabs of Lanoxin, 25 milligrams, ranged in price from $1.25 to $6.29, with an average price of $2.62. In six pharmacies in Plainfield, 100 tabs of Orinase, 50 milligrams, ranged from $7.97 to $14.50, with an average price of $10.67.

Now, these are only examples. There are more specifics included in the table which is attached. The point is clear, however, that there is a wide disparity between the prices of identical band-name prescription drugs in the pharmacies of this state and, indeed, often in the pharmacies on the same street in the same town in this state.

As I have observed before, these wide price differentials can only exist when they are unknown to potential consumers, for, given a choice, a comsumer would refuse to pay four times more for a particular brand-name drug if it were available elsewhere cheaper. It's that simple. It is a simple fact. It isn't something that I have to statistically support. That is just clear logic. Nobody would pay more for a particular brand-name drug if they could pay less. So, we have to look, then, to the reason behind these kinds of differentials. One of the reasons certainly has to be because there is no advertising -- forget the word "advertising", let's use the better term, the more acceptable term, there is no "dissemination of information" as to price of these brand-name drugs.

Advertising restrictions, essentially, make it

impossible and more expensive for consumers to collect comparative price information and they also pose a disincentive for the particular pharmacy to lower prices, because if you are going to lower prices and nobody is going to know anything about it, then all you are going to have is the same volune, lower prices, and less profit.

It comes as no surprise, therefore, that a recently published doctoral thesis - and I am not going to belabor this point - has indicated that there should be a substantial saving through the addition of advertising of prescription drugs in the pharmacy business.

Like Mr. Givens, I am not prepared to say that the savings is going to be $8 million, or it is going to be $3 million. I am prepared to say, however, that just theoretically some savings are going to have to accrue. Again, tying this concept back to the original concept that I propounded, the burden should be on the proponents of the ban as opposed to being on the adherence to the normal scheme of things which would allow advertising. The mere fact that some savings can be concieved ought to be enough for us to scrutinize pretty darn closely the kinds of arguments which are propounded in support of the ban.

So, briefly, I would like to speak to these arguments,as I have been able to reconstruct them, and lead in with an idea: I believe that the ban on advertising, generally, is an exception to the normal competitive process. If it is premised on the need to protect the public's health and safety -- there is no question in my mind but that if there is a tie-in between the health and safety of the people and the advertising ban, it ought to be sustained.

I think it is one thing to prohibit or reduce competition and dictate a price structure on the grounds

of public health and safety and quite another to raise the public health and safety banner to camouflage what is essentially economic sanctions geared to protect the vested financial interests of certain members of an industry or profession. And that is really what we finally get down to.

It is my opinion that the advertising ban on prescription drugs has absolutely no relationship to the public's health, safety, morals or welfare and in order to support this view, I'd like to look - as I indicated I would - generally at the arguments I have been able to reconstruct which support the ban on advertising.

The first - and it was alluded to by Mr. Givens - is that advertising will increase unwarranted drug use by encouraging patients to pressure doctors for unnecessary prescriptions and larger prescriptions to enable the patient to take advantage of quantity discounts. Now, the Supreme Court of Pennsylvania dealt with this argument, specifically, in the case of Pennsylvania State Board of Pharmacy versus Pastor in which it struck down the advertising ban in Pennsylvania.

ASSEMBLYMAN BAER: Do you have a citation for that?

MRS. ANNICH: Yes, it is 441 Pennsylvania 186, 272 A2nd 487 (1971).

Essentially the Supreme Court of Pennsylvania said what I have to say today - of course, I am sure they said it better. Essentially what they said was this argument assumes unethical conduct on the part of the doctor - irresponsible conduct on the part of the doctor and/or the pharmacist - and the court noted that there was close supervision of these areas, both state and federal, prohibiting sales except by prescription and the court indicated that with this highly regulated structure it was not prepared to assume that there was going to be

unethical conduct, or irresponsible conduct, on the part of physicians with respect to their patients. I also refuse to make this kind of an assumption. In the event such unethical practice indeed occurs, there are ways of dealing with it through the Professional Board structure - through the peer review structure - in the medical establishment.

A second argument which was advanced is that advertising will cause a cutting of costs and will reduce the availability of services. As far as we have been able to ascertain, there is absolutely no direct ratio between cost and free services, such as delivery, charge accounts, or evening hours in pharmacies. There is no evidence, whatsoever, to support a link between those concepts.

The New York PIRG study-- I have all of these studies here, I have not reproduced them because they are so lengthy but I will make them available to the committee. The Public Interest Research Group, previously alluded to in this report, found no discernible link between price and the availability of service.

In 1974, the same conclusion was reached in Los Angeles by the National Health Law Program.

Our own investigators, on our own survey, spot-checked services rendered and found, for example, that there is absolutely no relationship between lower prices and the services offered but, conversely, in two pharmacies in Plainfield, offering identical services on the same block, including pick-up and delivery - and these are the kinds of services that people are really interested in - the cost differential for the same five prescription drugs, outlined in Appendix A, was $17.80.

So, people, simply by virtue of the fact that they do not know what prices are in Plainfield, are paying a high cost differential - one person sits home and orders his five

drugs and pays $44.85 and the second person sits home and orders his five drugs and pays $26.65, and both get free service and free delivery. So, there is no evidence, whatsoever, that any loss of services will occur if this bill is enacted.

A third suggestion is that advertising will render the patient profile system useless. I believe that, in truth, the patient profile system, either in New Jersey or anywhere else, can only be effective in some kind of a state mandated pharmacy system requiring that the consumer shop in a single drug store. So long as the present system exists which allows people to shop in more than one pharmacy the benefits of the patient profile system are more imagined than real. Obviously, each pharmacist will have only the record of the prescriptions he has dispensed. As such, allegations that advertising is going to allow drug abusers to go undetected is baseless, essentially, because they go undetected now if the drug abuser, either innocently or cleverly, buys his drugs in more than one location.

I think it would be wrong, therefore, to penalize the public by precluding advertising with its concomitant benefits to the public in order to maintain a system, the advantages of which are more imagined than real. As it stands there is nothing to preclude a customer, now, who wishes to be closely monitored, who wishes to have the pharmacist look closely at the drugs that he is receiving, from dealing with a single pharmacy and there would be no preclusion of this kind of a system if there were advertising.

Again, I think we have to look at the effectiveness of the system and weigh that against the advantages which accrue to the public.

Another argument which I certainly think is entitled to nothing but short shrift is that advertising is demeaning

to professionals. As I have indicated on many occasions, the State of New Jersey should not place its power and prestige behind a legislative scheme which grants status or class to one group of individuals at the expense of everybody else.

Another argument which has been suggested is, price advertising would encourage pharmacists to purchase unusually large quantities of drugs so as to obtain lesser prices and, thus, create the possibility that drugs may stay on the pharmacist's shelf and become out-of-date.

There are plenty of safeguards against this kind of an argument, not the least of which are Federal and State laws against a pharmacist utilizing adulterated drugs and with these stringent provisions a denial of advertising would be a great case of overkill.

The next argument is that advertising will raise the prices of drugs. Now, this is a more difficult nut to crack, there is no question about it, but I think before we ever get to this question we have to understand something: everything costs. My sitting here costs. Your sitting here costs. The committee sitting here costs. The question, then, is not whether there is a cost; the question is whether the cost outweighs or does not outweigh the social value which is thought to be achieved by the legislation which is involved.

I say that in this instance, where people will no longer be a captive audience, where they will no longer be required to support marginal practitioners of pharmacies' overhead simply by virtue of the fact that they don't know where they can get drugs at a better price, the advantage to the public will certainly outweigh any cost differential.

Second, in terms of overall cost, while pharmacists who are now charging the lowest prices may indeed have to

raise their prices a little bit in order to advertise, it is equally clear that the pharmacists now who are charging exorbitant prices had better well lower their prices in order to get into the competitive mainstream if they wish to advertise.

I think that, generally, if we take all of these things into consideration, we are still going to have an overall cost reduction.

The next to the last argument is that advertising will cause unscrupulous practitioners to give improper professional services to the consumer. This, essentially, is the spectre of the unethical practitioner who follows us through all of these kinds of situations. It is posited on the proposition that if people think price then they are going to play into the hands of the members of the profession who are more interested in their gross income than they are in their professional performance.

I can say this, if one looks at the record of the Professional Boards of this State over the years, or at the peer review committees, or at other internal review mechanisms, the number of unscrupulous professionals is apparently very, very small. In any event, if a problem does exist, there is clearly jurisdiction in the Board of Pharmacy to take remedial, disciplinary action with respect to the problem and, if necessary, to remove the practitioner's license. The answer is not to throw out the baby with the bath water, but rather to allow advertising, which is totally irrelevant to the question of schlock practitioners.

The final argument - and this is the gist of this entire case, this is what we are really talking about - is that advertising is going to put the small pharmacist out of business. First of all, I think it is important to note that there are absolutely no studies in any state

that has allowed advertising which would indicate to any extent whatsoever that there have been any small pharmacies failing as a result of the institution of the advertising system. In fact, mere advertising of price reductions, for many people, will not change their buying patterns. They will continue to shop in the same kinds of pharmacies that they traditionally shopped in, in order to have the convenience of the location or whatever convenience is offered and they will be willing to assume a cost for that. I know I would be willing to assume that cost in order to go on dealing with my local pharmacist in my home town and I think there are many people who will do so.

Moreover, there will be pressure exerted; there certainly will be pressure exerted on the marginal practitioner, the most inefficient practitioner, who is doing absolutely nothing in order to render his operation more efficient, and on the excessively profit-oriented pharmacist, under the advertising scheme, which will probably put the marginal practitioner out of business. I am willing to concede this. This, however, will ultimately enure - and this is a hard attitude to have, I realize this-- The marginal practitioner today is disadvantaging not only the consumer, he is disadvantaging the rest of the operators - the rest of the pharmacy operators - in the state. I think that the aggressive local pharmacist, with his finger on the pulse of the times, who utilizes his time and his operation the most efficiently, ought to be able to compete in this market.

However, assume the worst - there are going to be problems as far as the failure of some businesses is concerned. This is a solely economic argument which is totally unrelated, really, to any concept of the health, morals, safety and welfare of the people and the question it presents is whether it is good social policy for the legislative power of this State to give economic advantage - again - to

some businesses - and that is really, in this framework, what we are talking about - to the disadvantage of everybody else.

Now, the emotional issue - the real emotional and the hard issue, and I met with the pharmacy people the other day and I feel that this is the hard issue - is the fact that many pharmacists are required to charge higher prices because they have high overhead and because they are not in a position to deal in a wholesale kind of manner with the drug companies, so they cannot get advantageous prices from the drug companies.

This is not venality. This is not greed. This is just a difficult situation which the small business is placed in because he isn't a large business who can deal in the economies of scale.

The question we have to present then is, who has to bear this burden? Who is to bear the burden of the man who simply does not have good bargaining power, or who has high overhead? I have to say that he must bear it himself. The public should not have to bear the burden of this kind of "inefficiency" - and I do not use the word, again, as a venal term. The public should have the right to determine whose overheld it is going to support when dealing in drugs, and, obviously, in other products also.

Now, there are other countervailing factors which I won't go into in terms of the drug situation, which will be dealt with by the public advocate - the right to know, for example; the first amendment rights of certain people who would like to tell the public, or would like to disseminate to the public the information as to what, indeed, the prices are for the various drugs.

I can say that on balance my conclusion has to be, with respect to drug advertising, there really is no public, health, safety, morals, or welfare relationship

between the ban on advertising and the public's interest. Whatever advantage can accrue to the public from an advertising system has to outweigh the kinds of economic arguments which are propounded in favor of the ban.

As far as posting is concerned, I am not terribly enthusiastic about posting. The New York situation with posting has demonstrated that results vary pretty greatly. Most members of the public in New York really never got to see a posted list for one reason or another and did not know what to do with it if they did see one. In fact, the New York experience showed that posting alone really did not do anything to shave prices. Posting without advertising is really practically a meaningless exercise. Advertising is required in order to learn something about competitive prices.

Now, I would like to speak for a moment to the question of advertising by optometrists. Most of the arguments which I made with respect to pharmacists are equally relevant to this area. They don't have to be repeated. We know this much, in a 1972 study by the University of Chicago, gross figures - and I certainly admit that they are gross - indicated that allowing advertising in the optometry area would decrease the price of glasses between 25% and 100%.

This finding is not a bizarre and outrageous conclusion of a demented mind; essentially, this finding--

ASSEMBLYMAN BAER: Excuse me, could you repeat that. If it would decrease the price 100%, that's great.

MRS. ANNICH: I'm sorry, I said it backwards. Prices are between 25% and 100% higher - double - in states which do not allow advertising, as opposed to states that do.

I think this is really important to know. There are really not a heck of a lot of statistics in this area. This is not an area that the people have gone into - the

studies, the educational systems - the same way they have gone into the drug area. These are pretty scanty statistics. Benham's study in 1972 probably is the most expansive study in the area of optometry.

One thing can be said, Benhan's study has been updated. It is going to come out in September under the title "Price Structure and Professional Control of Information." He is bringing his figures up-to-date and they are essentially the same as they originally were. We have copies but we are not allowed to disseminate them until it is published.

So, we know that some savings are certainly going to be effectuated simply by allowing information about the cost of glasses to be disseminated in the marketplace.

Again, as I was about to say before, this conclusion really dovetails or interfaces with normal economic principles which indicate that as information is disseminated prices go down and differentials become more narrow. This is a genuine accepted economic fact. So, we have to look, then, at the fact that there probably is going to be some savings. We don't know what they will be. What are the countervailing factors against allowing advertising in this area? The arguments are very much the same as they were for pharmacies. Advertising is demeaning and unprofessional. Again, status is no business of the legislative scheme.

Advertising will cause unscrupulous practitioners to bilk the public. This, of course, is the business of the State Board of Optometry which has the obligation of policing the profession and ridding it of shoddy and unethical practitioners. It is irrelevant, absolutely irrelevant, to the question of dissemination of price information.

Finally, the last argument - and, of course, this is the critical one because if it is true we should not be advertising in the optometry field - is that advertising will

reduce the overall level of eye care. If that is true, we can just fold up our papers and put them away because there shouldn't be advertising in this area.

The only connection, as far as we have been able to ascertain, however, between price and quality - according to Benham's study, and this is obvious - is the source of care. While the source of care remains the same, the fact is that the price in states, which allow advertising, is lower. There is no evidence to connect lowered price to poor eye care - absolutely none, neither statistically nor logically. There is absolutely no real logic in that kind of concept.

Where it does occur, and it probably will occur sometimes - somebody is going to cut corners and maybe not give the eye examination which is mandated by law - these people have to be disciplined by the State Board.

If it is said that this cannot be done - that is, discipline of the profession in order to see to it that shoddy and unscrupulous practitioners are drummed out - it is a concession that the level of unscrupulousness is such that the profession cannot be adequately policed. Now, I am not prepared to concede this with respect to the profession of Optometry and if I were an optometrist I certainly would not be prepared to concede this fact. So, we, again, reach the visceral issue. It is none of those things that I just mentioned. None of that really has anything to do with the ban on optometric services.

The prohibition against optometric advertising is the same as the prohibition against advertising of drug prices. It is an economic concept, generally to protect the self-interest of the profession. There is nothing wrong with self-interest. We all have self-interest. It is not evil. It is not venal. It is not necessarily greedy. And it is no basis upon which to invalidate the ban on

advertising, even if that's the only basis for it.

However, it is surely far removed from any concept of health, morals, safety, and welfare of the people. I mean, that's really what it finally comes down to. And the question is, since this is extraordinary legislation - these bans cut against the normal grain of things - the persons who champion these bans ought to come forward with something which would tie them into the public interest, and they have not been able to do so.

I want to say one more word and that's about commercial establishments and then I will cease and desist. An optometrist wrote to me the other day wishing me absolutely no success in my quest for advertising - and that is a euphuism for what he wished me. He said, "why, we are only a few years out of the jewelry stores and you are trying to put us back in." You know, I thought about that and, that's really what this is all about in terms of a commercial establishment.

But the truth is, it does not matter where a profession is practiced. There are storefront lawyers. There are mobile-trailer doctors. The important thing is just that the profession is practiced right and the people get a fair price for the service that they are purchasing. There isn't, in fact, the slightest reason why an optometrist shouldn't locate anywhere he darn well pleases. The only conceivable basis for this prohibition is the possible economic advantage which could accrue to an optometrist who ties in with some kind of a commercial establishment. But that's it.

Again, it is a projected economic problem for the private practitioner of optometry and it is totally and utterly irrelevant to any concept of the public health or welfare.

Now, it has been suggested that this location in

a commercial establishment will cause inferior eye care. I'm not even sure how these things follow but I can say this, a recent survey completed by the Enforcement Bureau of the Professional Boards at the behest of the Attorney General found that there is absolutely no difference in the eye care which is rendered now by a dispensing private optometrist or the non-dispensing optometrist who is located near a commercial establishment - which location near a commercial establishment is considered, at this point, to be some kind of an "iffy" proposition. There is no distinction between the eye care which is rendered by these several groups.

The suggestion then that eye care is going to deteriorate by allowing an optometrist to locate in a commercial establishment is kind of baseless. It is argued that the commercial establishment might put a quota system on the optometrist, or fear of some kind of an economic reprisal. For example, if he is a commercial optician and he has a lease, he might cause some lease problems for the optometrist.

While this is certainly possible, the suborning of unethical acts by an optometrist is certainly actionable by the relevant professional boards of this State. I must say that I really believe that the pressure on a non-dispensing optometrist who locates near a commercial establishment to do unethical acts cannot be any more than the pressure on a dispensing optometrist to dispense enough glasses to meet his financial obligations as they become due. That is just a fact of life.

I think we have to assume that the ethical practitioner is going to behave ethically when faced with these kinds of pressures and if he is unethical, or he is marginal, and he doesn't behave ethically, the government is going to take action to see to it that he is not

allowed to ply this trade.

Again, nothing in the proposed arguments with respect to either advertising in the optometry field or the location in a commercial establishment, in any way, dovetails with any concept of the public interest and for this reason, it seems clear to me that bans on advertising ought to be repealed.

ASSEMBLYMAN SALKIND: Mr. Chairman.

ASSEMBLYMAN BAER: Yes, Mr. Salkind.

First, let me thank you for your initial presentation, Mrs. Annich. It was very thorough. I don't know how you managed to get so much information out in such a short period of time.

Mr. Salkind.

ASSEMBLYMAN SALKIND: Mr. Chairman, first let me preface my remarks and questions by saying I think we have the finest, most articulate, as well as nicest looking, Director of Consumer Affairs in this country. She also has the ability to get out an awful lot of data in an quick time and talks even faster than I do. I think the overall attempt by the Director to protect the public interest is most laudable and is, indeed, her assigned and statutory responsibility. There is no question that were her views to be carried forward the instantaneous reaction would definitely be a significant reduction in cost to the consumer.

I think the question that has to come to bear is, what the short and long-range balance would be. I spent this morning, Mr. Chairman, with the President-elect of the New Jersey Medical Society discussing this particular subject, trying to understand their view completely. I think I do and I have been authorized to quote it. Basically, in simplified fashion the view would be supportive of the

posting and negative on the advertising portion. The reason for that was enunciated by the Director in the last part of her testimony on pharmacies.

ASSEMBLYMAN BAER: Mr. Salkind, would you allow me to interrupt you for just a moment?

ASSEMBLYMAN SALKIND: Yes.

ASSEMBLYMAN BAER: You were not present at the beginning of the meeting when I discussed the unique procedural problem that we have here. I would like to ask if you could make any presentation you may have later and just ask the witness questions at this point?

ASSEMBLYMAN SALKIND: That's what I am doing.

ASSEMBLYMAN BAER: Thank you.

ASSEMBLYMAN SALKIND: I want the Director to fully understand the view that I am trying to "question", because this is important and it is essential to the future public health and safety of our State.

There are various kinds of advertising. The kind of advertising that we have today is word of mouth advertising. That is our status at this moment. It is obviously not the most effective.

The second stage of advertising would be what I would call effective posting, where, whether we had 100 items or any other number, things would be posted either inside a store or, indeed, even outside a store.

The next kind of advertising would be the utilization of the media in varying degrees. Posting and media advertising are not distinctive except in the amount of communication they offer. The main thing here is that no advertisement could list 5,000 pharmaceutical items, or any similar number. Of necessity there would be a limit and, in order to be effective, the limit would be a dozen or so. No advertisement in the newspaper and certainly no advertisement in other mass media such as radio or T.V.

could possibly cover many items or it would not be retentive and, therefore, not effective.

The only kind of advertising in mass media advertising which would be effective at all would be price discount advertising and I want to speak to that. The fear that I have, and what my questions are directed to, is what one might call monopolistic tendencies, because, in the long run, that could be - and I know this would not be your intention - more negative to the public good than anything else we might do and we might end up, conceivably, with a worse situation than we have today. I am not speaking from the standpoint of the professional operators in this field but rather from the overall public view.

One more prefacing remark. Our whole history in the United States over the last 50 years - as you know, better than I - has been an anti-monopolistic one, at least theoretically, where we have tried to say that although General Motors can build cars cheaper than anybody else we don't want them to have the whole market because then they could do whatever they wanted and they could raise the prices in any way they wished. There has to be competition and the government has gone, on the federal level, to great lengths to foster that view, both legislatively and administratively.

Now, I'd like to ask this question first: How would the small store owner in Monmouth County, or the medium sized owner in Passaic County, or the large sized owner in Essex County fare if the big food companies, such as - just to illustrate - Pathmark, which has pharmacies, or Shop Rite, or A & P, or Two Guys, were able to advertise a simple ad on T.V., "we will sell you drugs 25% less than anybody else", would you be supportive of that kind of advertising?

MRS. ANNICH: No, generally the support we have

would be for specific advertising of specific drugs for specific prices, which, I think, would tend to even up the difficulty which you are trying to direct yourself to. Obviously, if somebody is going to say "we will undercut everybody" when they take a huge television ad, that is going to be a more difficult situation. If we limit it to the kinds of advertising that we have been talking about we will even this out a bit.

ASSEMBLYMAN SALKIND: I want to make sure we understand this. You are advocating - speaking now for the administration, with your direct responsibility - that advertising in the media be limited to direct single-price item advertising and not to overall classification advertising.

MRS. ANNICH: Yes. That is correct.

Can I step back from that for a second?

ASSEMBLYMAN SALKIND: Yes.

MRS. ANNICH: I am not as fearful of monopoly as you are. As a theoretical matter, I would be inclined to say that this kind of discount ad sort of thing is, from the public's point of view - that would give the people the drugs for the least price - the best idea. I think there are health, morals, and safety aspects though in terms of putting everybody else out of business, which is the kind of thing that this "monopolistic" advertising would do. Therefore, I think a limit would probably be called for simply to even out, from the pharmacies' point of view, their ability to advertise while, at the same time, giving the best advantage to the people.

ASSEMBLYMAN SALKIND: Virginia, my fear is this: I spent 15 years in advertising - in running agencies, etc. - and I know, from an advertising, professional standpoint - and I am using Pathmark as an illustration, it could be anyone else - that Pathmark could run tie-in ads on their

existing advertising in such a way that if they were allowed open-ended advertising and could do whatever they wanted, they could drive every neighborhood pharmacist completely out of business. There is no question of that.

Now, the public good would not be served if that were the end result.

MRS. ANNICH: I agree.

ASSEMBLYMAN SALKIND: I am glad you do agree because it is very important that we protect the public by getting the lowest possible prices, long range as well as short range.

Continuing on the limitation subject in question, would you limit the advertising to just print and prohibit television and radio advertising?

MRS. ANNICH: I must confess to you, I never really considered limitations on advertising.

ASSEMBLYMAN SALKIND: This is basic to the question.

MRS. ANNICH: If I am willing to concede that we would limit it to specific price advertising of specific drugs, I wouldn't see any need to limit television, as opposed to print.

ASSEMBLYMAN SALKIND: I might say - and no one has prepped me for this, this is my own question - the problem with this, as I see it, is that the large, big chain retail merchants - and I use Two Guys as one type of illustration and I use Pathmark as another type of illustration for supermarkets, I could name 20 other names - use T.V. and are in a position that the neighborhood store - even the 10-store chain - could not compete with. They can't go out and buy Channel 4. They can't go out and buy Channel 2. It is too expensive for them to be able to handle.

From a mass media communications standpoint, then, the large firm, such as I have illustrated, of necessity, could drive the small firm out of business. Do you feel

that there isn't enough concern to put in limitations on the types of media to be utilized?

MRS. ANNICH: I think there may be a good reason to consider putting in limitations as far as the advertisign is concerned and I think that can be done by rules and regulations to be promulgated persuant to the statute.

The thing that I really wanted to direct myself to simply is the dissemination of information, somehow, in an efficient manner. It may very well be that what you are saying -- I would be perfectly willing to consider this and give you my views at length in writing at some future time.

ASSEMBLYMAN SALKIND: Please.

MRS. ANNICH: It may be that you are right, that some limitation in advertising ought to be called for in order to balance the health and safety concept. But the real issue is simply the basic dissemination of information and I don't think anything that we are talking about right now speaks to that basic issue.

ASSEMBLYMAN SALKIND: Why do you feel that a posted sign of 100 items, let's say - 100 commonly-used items, such as the one you have illustrated-- And I might say the variations that you show are absolutely impossible to justify in practice. I think when an industry shows that kind of variation, it should be corrected and I would suggest that the industry correct it, voluntarily, today, and I would suggest to the Director that we correct it legislatively tomorrow; both should be done - both, not one or the other, both.

I wonder if you would feel that a posting, let's say, outside of the store - meaning on the front store window - of 100 items, in large sized numbers, would be an advertising vehicle that produced the required effect and if not, why not?

MRS. ANNICH: It would not because it would require a person to attend each and every store, within a reasonable distance for example, in order to determine how he could get the best price. For the elderly, who are really not terribly mobile and, very often, for the poor who are, for a lot of reasons, not terribly mobile this kind of an approach would simply not result in any kind of competitive situation because it would be too costly, either in physical, or emotional, or in a monetary sense for them to make the price survey.

ASSEMBLYMAN SALKIND: Don't you feel - I will use Monmouth County as an example because that is my district and I was interested to see that you did some of this survey in the shore communities-- I wonder if you could tell me, before I go on, in what communities you did this survey in Monmouth County - the six cities in the shore area?

MRS. ANNICH: Avon, Belmar, Manasquan, Brielle--

ASSEMBLYMAN SALKIND: Were Long Branch and Asbury included in that?

MRS. ANNICH: We checked generic drugs in addition, although they were not part of this statistic. I have this information, which I can give you and I also have the specifics of the names of the stores and their locations - the names of the streets.

ASSEMBLYMAN SALKIND: I would like to have all of that. I would specifically like - sharing Mr. Herman's concern - to see all of that information provided to the committee. I think that is important.

MRS. ANNICH: Excuse me. This is an aside. The reason that we did the generics was that the investigator who went out in a couple of different areas didn't relize that it was a particular drug he was dealing with when he did his price survey.

ASSEMBLYMAN HERMAN: You mean he found he was buying an equal drug for less money under a different name, right?

ASSEMBLYMAN SALKIND: Mr. Chairman, I think the reason for going into this at this length with this witness - if I may, because it is important to justify - is because this witness, even more than the public advocate in this particular respect, represents the view of the Administration of the State of New Jersey. That must be understood because I think that we are talking about probably the most far-reaching legislative activity this committee has done so far - despite all we have done before and will do in this session. I think this is the most important area of our activity, really, for the public good.

I want to make sure, in our quest for doing the public good and reducing prices in 1976, that we insure that we don't raise the prices in 1980. That is my concern.

Now, let's go back into Monmouth County. The typical drug store - even what I will call the cut-rate drug store - cannot afford to purchase an advertisement, if it is only one store, in the Asbury Park Press, for example, which covers our County and several others. But the chain drug store, which has 10 stores - a Genovese type drug store - easily can afford to purchase such an advertisement. If you are running print advertising - I am not talking about T.V. and radio now, I am talking about print - doesn't that mean that on an incremental price basis, the smaller merchant has to apply a higher increment of price to the sale than the larger merchant?

MRS. ANNICH: Let me take that in steps. My experience, locally - and this is in Mercer County - has been that although there is a price advertising ban many of the pharmacists in Mercer County - individual practitioners,

and small pharmacists - advertise in a different kind of a way - that is, advertising non-prescription drugs, for example, or putting into the newspapers columns about the health of the people and little health tips, this sort of thing. A good number of them do this. On that basis alone it is not clear to me that you are necessarily correct when you say that the small pharmacist in Monmouth County would not be able to afford print copy. I don't think that that follows. I don't think that is necessarily true. And, certainly, the man who is advertising health care, generally, to get his name in the paper - which is really what we are talking about - ought to be able to translate that advertisement into a price - a pharmacy price advertisement.

ASSEMBLYMAN SALKIND: In my experience, the neighborhood pharmacist does not advertise, generally, the kind of health care that you are talking about in the newspaper, other than, perhaps, if it is a local issue and he is sponsoring the firemen that day for a new fire house or something of that sort. That is not advertising for promotion; that is good will and should not be confused with promotion.

What I am saying is this, in the standard theory of advertising we advertise a product to increase our sales and the theory is that advertising generally results in lower prices by getting a greater number of sales, etc. The problem in this area is that we are not; we are cutting up an existing piece of pie from the total sales item. We are talking about whether the customers of store "A" shift to store "B", or store "C".

MRS. ANNICH: Right.

ASSEMBLYMAN SALKIND: I would be advocating a total price consideration of this kind-- Indeed, one could take it to the enth degree and say "perhaps the Division of Consumer Affairs ought to set" - and I am not advocating this - "what it considers to be fair and equitable, lowest prices, with allowable profit margin for all classifications

of businesses. If we did that, we might end up getting the lowest prices almost instantaneously. I think we probably would.

The problem is we have just, in the Legislature, gone in the opposite direction on a bill that I endorsed and advocated and that was committee passed some months ago which would repeal the Fair Trade Law. In the passage of that Bill we went directly diametrically opposed to that type of regulation, and rightly so. So, now we have a situation here where in our quest to get lower prices we have to be very careful that the end result is lower prices.

MRS. ANNICH: Right.

ASSEMELYMAN SALKIND: I know that is what you want. But I do think, Mr. Chairman, that we have to draw out of the Division, with extended communications back and forth, the full though out process of what the net effect would be of the kind of advertising we are talking about, particularly if it is done without media restrictions because my concern is that the "big guys" will absolutely be able to drive the "small guys" out of business.

Now, I want the lowest prices for the consumer and I think there is no question but that we would save millions of dollars for the consumer by this technique. I think the variation in price-- I see one of the products - the fourth product down on the index - is one I use, I think. Is Zyloprim the anti-gout drug?

RESPONSE FROM AUDIENCE: Yes.

ASSEMBLYMAN SALKIND: I use that. I don't even know what I take, my wife buys it for me.

That particular item seems to have a variation from $7.29 to $11.00 and that is inexcusable. That is too much of a variation. It shouldn't be that way and the industry has the responsibility to see that it is corrected

because, as we see today, if it doesn't, the State will. But, on the other hand, I want to make sure that what we are doing allows the neighborhood man to stay in business and, at the same time, ends up giving it to the consumer for $7.29.

I don't want to have a situation where one big supermarket is able to come out with that product for $6.25 and then five years down the road, because there is nobody competing with it, is able to charge $12.00 for the same product.

So, the whole question is whether or not the end product of what you are saying, with general media use, would be okay. My fear - and I am saying it right now - is best illustrated by T.V., for example. I will tell you this, if we allow an open-ended thing on T.V. giving an advertiser the ability to make a general discount offer by saying, "we will give you your prescriptions for 50% less than anybody else", we are going to initiate monopolies and we are going to end up with a situation that would not be in the public interest. What we want to do is get the lowest prices in 1976 and in 1986.

MRS. ANNICH: That's right and I think that we are more than willing to consider looking into something which I, frankly, didn't consider before and that is, what kinds of limitations there ought to be.

I can say that I would not agree that the good ends that we are attempting to achieve would be achieved by posting because I don't think that is really the dissemination of information within the concept that we are trying to propound which, economically, normally lowers prices.

ASSEMBLYMAN SALKIND: The industry has to do a lot and I would suggest to the industry that while these hearings are going on they work with your Division and

make sure that they don't just wait for the legislation to be enacted in fear, but that they start movement going to lower the prices immediately so that the kind of illustration that the Director has pointed to will never occur again.

ASSEMBLYMAN BAER: Mr. Salkind, was that a question?

ASSEMBLYMAN SALKING: I'll be glad to ask a few more questions, Byron, if you want.

(laughter)

ASSEMBLYMAN HERMAN: Mr. Chairman.

ASSEMBLYMAN BAER: Mr. Herman, I would like to ask if, from here on out, we could try to avoid very lengthy statements and getting into a committee discussion on the part of the committee members as to their views on the legislation. I think we will have ample opportunity to do this after the hearing. Mr. Herman.

ASSEMBLYMAN HERMAN: I accept your preface, Mr. Chairman.

Following what I think to be a very excellent prepared statement, it has an attachment to it, "Ruling on Prescription Drugs" - the federal ruling - I would like to persue general questions along that line just for a moment, keeping that as a background.

Pennsylvania permits advertising, is this correct?

MRS. ANNICH: Yes.

ASSEMBLYMAN HERMAN: New Jersey does not, at the present time. Now, following what Morton has mentioned by way of questions and otherwise, assuming that one would permit radio and T.V. advertising, which obviously disseminates information to more than one state-- For instance, in our area, if Channels 3, 6 and 10 - which are located in Pennsylvania - had an advertisement for a particular drug on T.V., wouldn't that constitute a violation of New Jersey

law if it is disseminated into New Jersey?

MRS. ANNICH: I don't think that it would because the prohibition is against the pharmacies who are registered by the State of New Jersey. There isn't any prohibition against a pharmacy in another state advertising. I don't think that would be a violation of the Pharmacy Law.

ASSEMBLYMAN HERMAN: Let me persue that one step further. Let's take a pharmacy on the other side of the bridge - on the other side of that murky Delaware River - and assume that he solicits business in the State of New Jersey by saying "I can sell it for 'x' amount of dollars cheaper than whatever the price is", isn't he, in essence, practicing pharmacy in the State of New Jersey?

MRS. ANNICH: I think it depends on what you consider a solicitation to be.

ASSEMBLYMAN HERMAN: Well, don't we have a number of cases - very, very significent court cases - on what constitutes doing business?

MRS. ANNICH: Minimum contact and projecting on the radio or on the television, in many instances, does subject a person to this.

ASSEMBLYMAN HERMAN: As lawyer to lawyer, if I advertise from Pennsylvania and solicit business in New Jersey, wouldn't I be practicing pharmacology in New Jersey?

MRS. ANNICH: I just don't know the answer to that. My initial inclination - and I haven't thought of it before - would be to say that in this particular instance the violation would have to be a violation where it occurred.

ASSEMBLYMAN HERMAN: Okay. Let me simplify that: I solicit, on a broad scale, your business in New Jersey from Pennsylvania and I say, "send me your prescription and send me your check and I'll send you the medication," well, isn't this sale, in effect, made in New Jersey?

MRS. ANNICH: I guess it is.

ASSEMBLYMAN HERMAN: The point is, isn't that a violation of New Jersey law at the present time? If we, in essence, extend that to T.V. and radio coverage we might have a similar situation between Pennsylvania and New Jersey.

MRS. ANNICH: Yes.

ASSEMBLYMAN HERMAN: Mort raised a couple of good points which I would like to persue. If it is the position of the Division that advertising should be permitted on a brand-by-brand comparison by pharmacists, would it also be the position of the Administration, or of the Division, that manufacturers should be permitted to engage in comparative drug pricing advertising in order that they might disseminate to the public at large and, perhaps, even to the pharmacy market at large, through advertisement, the same type information? For instance, they could say their drug, which is a branded generic, is equivalent to another drug -- "you can buy our drug in your local pharmacy at 'x' amount of dollars cheaper."

MRS. ANNICH: But you see, that's not really true. That kind of information that you could get from the drug manufacturers isn't necessarily translatable into what the person would actually pay when he went to the store because the individual pharmacy's overhead - whatever you want to call it - and his desire for prifit is going to be added to the cost that the drug manufacturer claims his drug can be purchased for. It is not going to mean anything to the people to know that the "x,y,z" drug company sells a generic at--

ASSEMBLYMAN HERMAN: Are you telling me that when we have advertisements - for instance on t.v., etc. - and they say that the average - even on automobiles - retial price of this car, or this appliance, or this product, or this suit, or this shirt, is "x" amount of dollars, that is not translatable into the pharmacy

market? I just can't believe that and I don't believe it.

MRS. ANNICH: Well, assuming that there is, at this point, an average retail price - no, there is an average price for a generic drug, for example--

ASSEMBLYMAN HERMAN: All right, or an average price for Darvon.

MRS. ANNICH: Is it your experience, from the work that you have done that there is an average price for this kind of a--

ASSEMBLYMAN HERMAN: I think that you could very well establish it if you are aware of how most pharmacies price their prescriptions. I think that one could establish that and perhaps that part of the education process ought to be considered. Because I don't think this is a singular problem. If you are going to attack it, you attack it from both ends.

MRS. ANNICH: I don't think it is a singular problem either and I think the generic approach is the right approach. Unfortunately, there has already been an expression as far as the area is concerned.

ASSEMBLYMAN HERMAN: I am talking about advertising. There has been no expression on advertising. I am saying, in essence, what is good for the goose should be good for the gander and I am asking what the position of your Division would be if we are going to permit pharmacists to advertise. Why shouldn't we permit, on the same hand, manufacturers to advertise? Because to do otherwise, to me, would be anomaly.

MRS. ANNICH: I'll tell you, first of all, I don't see any reason why they couldn't.

ASSEMBLYMAN HERMAN: Okay.

MRS. ANNICH: Second of all, I do have problems as to whether the information would necessarily be translatable. Third of all, I would think that the same people

who are opposing advertising on the retial level would find this even more objectionable - advertising on the manufacturers level - because then any variations from the suggested manufacturers' price would be--

ASSEMBLYMAN HERMAN: Well, we have a whole room full of people who are objecting but what constitutes an objection and what constitutes right or wrong is not necessarily on a parity, right?

MRS. ANNICH: Absolutely. Anyway, the answer is yes. I would not have any objection.

ASSEMBLYMAN HERMAN: If I may, I would like to persue just a few more questions.

Let me stick with this decision. If this decision is not appealed - and this, of course, was a three-judge panel of the District Court which, in lawyer language, has specific significance because it has almost appellate weight - have you discussed the matter with the Attorney General of the State of New Jersey as to what his position is going to be regarding an attorney general's opinion on the present New Jersey law, in light of this opinion?

MRS. ANNICH: In First Amendment terms, for example?

ASSEMBLYMAN HERMAN: No, in terms of the interpretation of this particular decision which appears to be a setting aside of the ban. I am asking what is the position of the Division on this?

MRS. ANNICH: The position of the Division isn't necessarily in terms of that; that is an Attorney General's opinion.

ASSEMBLYMAN HERMAN: I understand.

MRS. ANNICH: No, I have not discussed it with him. I imagine through, certainly, the decision of a three-judge court like this is something which is going to be scrutinized in Trenton.

ASSEMBLYMAN HERMAN: Let me persue this with you, both in your dual roles as an attorney and as the Assistant Director.

ASSEMBLYMAN BAER: Acting Director.

ASSEMBLYMAN HERMAN: Acting Director - yes, Acting Director, right.

In that combined role, is it your position that if this decision is upheld the present New Jersey law is unconstitutional and that we, in essence, need legislation to do what you are seeking to do?

MRS. ANNICH: Well, my position is - disregarding this opinion - that the present law in New Jersey is, in fact, unconstitutional because it is a limit on free speech, which is not related, in any sense, to the public health, safety, morals, or welfare, or to any ligitimate public end and, as such, that limitation on free speech cannot be sustained.

ASSEMBLYMAN HERMAN: All right, let me persue that one step further. In essence, what you are saying is that if we - and I am just trying to establish the parameters here - don't-- I am asking whether, perhaps, you have discussed this matter with the Office of the Public Advocate because I would like to know if we are, in essence, engaging in a fruitless exercise.

If it is the position of your Division and the position of the Public Advocate, or any combination thereof - including the Attorney General - that the present law, using this decision as weighted authority, is unconstitutional - if we proceed in this manner - then why do we need this law that we are discussing here today at all?

MRS. ANNICH: You asked me what my opinion was. My opinion, as a lawyer - my best shot, as a former Deputy Attorney General who spent 7 years defending the statutes of the State of New Jersey - is that this statute is unconstitutional and I would be happy to be the lawyer who

took that stance in court.

This is not to say that the Attorney General's opinion, in terms of his responsibility to uphold the statutes of the State of New Jersey when they come under attack, might not be to support the statute if it did come under attack by a group or another governmental agency. So, I can't say that the agency is going to take action to strike this statute down.

ASSEMBLYMAN HERMAN: Let's be fair, that sounds like sophistry number 128 from college.

MRS. ANNICH: Absolutely.

ASSEMBLYMAN HERMAN: But doesn't the Office of the Attorney General, when cases from the United States Supreme Court and other courts of appropriate weight make decisions affecting similar statutes of our State, render Attorney General's opinions as to whether we should enforce our statute, or not enforce our statute? I am just wondering what position your Division is going to pursue in discussion with the Attorney General in case nothing is done?

MRS. ANNICH: Well, I think we have to understand, again, while this is an extremely prestigious three-judge court in California, it is a court in California. The Attorney General has not, in the past, in cases in which I have been involved, taken a stance as to the unconstitutionality of its statutes where a three-judge court in New Jersey has struck the statute down, for any number of reasons.

So that while the Virginia case - with which you are familiar - as I understand it has been accepted by the United States Supreme Court for assignment this Fall and they might come out with a ruling which would be relevant and which would, indeed, be binding on the Attorney General, that is pretty far down the pipe, number one. Number two, we don't know how it is going to turn out. Number three, we have no kind of a decision from New Jersey on this subject, so I

would think that we would have to proceed - in any concept of the public good - with what we are doing now because of the time lag, which will certainly be involved in any action as far as its constitutionality is concerned.

ASSEMBLYMAN HERMAN: Let me ask you a few more questions, if I may.

ASSEMBLYMAN BAER: Excuse me, how many more questions do you have?

ASSEMBLYMAN HERMAN: I assume we are talking to a rather important witness and I assume, with no disrespect to the others who have appeared here today, that we are interested in making an appropriate public record.

ASSEMBLYMAN BAER: We are, but we do have many witnesses.

ASSEMBLYMAN HERMAN: Getting to the question of competition, if I can persue Mort's thinking for a moment, if we have a situation-- And we are talking now about inventory; every business talks about inventory; it is part of the overall carrying charges and the cost of doing business. Do you foresee a possibility, if we get into the type of competitive advertising which Mort was addressing himself to, that this would require or compel a number of our lesser, well-equipped, economic pharmacies to limit their product lines?

I assume we are talking about thousands of drugs, basically. I am wondering whether - this question came to mind - there would be a decrease in the ability to render an overall service by way of providing a total product selection because of inventory and, perhaps the feeling on the part of the pharmacies of "I'm going to put my dollars here, I'd better put them in a situation where I can buy the type of quantity which would make me competitively active but which might limit my ability to fully stock part of another line." Do you have any comment?

MRS. ANNICH: Yes. We would have to assume that the person engages in advertising. That is the real question. It is the question that Mr. Given brought up. This is not a bill to mandate advertising or dissemination of information, it is a bill to allow for it for those people who wish to disseminate the information.

ASSEMBLYMAN HERMAN: The point very simply is this, I am not talking about - with due respect to you, that is a rather around the corner answer. My question to you addressed itself to the practical, pragmatic results of active, competitive advertising; whether, in effect, you have given this particular subject matter - my last question - any consideration as to what might be the end result. If the answer is no, I will accept that answer. But I think it is a point to be considered.

MRS. ANNICH: Well, we have given it some consideration.

ASSEMBLYMAN HERMAN: And what is your answer?

ASSEMBLYMAN BAER: Please let the witness answer the question.

ASSEMBLYMAN HERMAN: The witness can take care of herself, Byron.

ASSEMBLYMAN BAER: No. I do not want to see a witness interrupted in the middle of an answer.

MRS. ANNICH: We haven't given it the same kind of consideration that we have given to the basic issue. We have discussed it and our view, generally, is this: the professional "pharmacist" is going to maintain, as much as possible, a full line in order to give the service that the people he deals with are going to need.

As part and parcel, yes, there would be a pressure to limit the kind of drug that you deal with - for example, in order that you might maintain the competitive edge of buying in quantity the same way that a large company can.

On the other hand, you have an equal pressure, which is to be able to serve your local, or whatever, customers when you are called upon to do so. If you are going to limit your inventory, the fact is you are not going to be prepared to deal with the people who might ordinarily keep on dealing with you, regardless of the fact that your prices are a little higher than somebody else's, by virtue of normal buying patterns.

I think there are competing factors here and I really don't think that the average pharmacy is going to be pressured into doing that kind of thing.

ASSEMBLYMAN HERMAN: Two or three more questions, if I may.

ASSEMBLYMAN BAER: Yes, Mr. Herman.

ASSEMBLYMAN HERMAN: I noticed that there was some comment about the wholesale price differential, based on quantity. We understand that exists, notwithstanding the drug companies offering special deals here, there and everywhere else.

Aside from that, what is the position - or what does the Division see as a corrective measure for getting the manufacturers to sell like quantities of the same drug to retail pharmacists, perhaps, as they would sell to the State of New Jersey. Now, I am not going to go through the entire document that, as you are aware, the Department of Institutions and Agencies puts out, but I will tell you that I had that document surveyed and I will tell you that that document has nothing to do - in many instances - with the question of quantity. There are many, many drugs which the State buys - the same drug - at a substantially lesser price than they are being sold for now to the retail pharmacist.

Now, my question is, if we are going to really pass on the savings fairly, and make prices competitive, what would be the view of the Division about making the

manufacturers sell to different people at like prices? We do have that -- anti-trust involving automobile manufacturers.

MRS. ANNICH: Right. I will tell you something, I would certainly support some kind of a system which would require at least some relationship, in terms of discount-- I agree. Taking it back two steps, I certainly don't have any specific desire to see all of the burden borne by the retail pharmacy.

It is clear to me that this is not necessarily the way that we should be going. I think it is a right step and a first step, especially with the defeat of the Generic Bill, which I would have supported.

ASSEMBLYMAN HERMAN: Very good.

MRS. ANNICH: No, that is true. I wasn't here long enough at that point to really take a position.

ASSEMBLYMAN HERMAN: Why weren't you here earlier.

MRS. ANNICH: I think what we are talking about today is the right step. This is not to say that there should not be controls. I would favor some kind of control which wouldn't necessarily, maybe, allow the same discount at every stage of the proceeding, because I am not sure that would be something that had any realistic chance of being a real possibility. But, certainly, they would have to scale down the discounts for different numbers so that there would be a relative relationship between their dealings with the small dealer and their dealings with the large dealer.

ASSEMBLYMAN HERMAN: Before I ask you my last question I would like you to consider for future presentation - I don't think you would, obviously, be in a position to answer this today but I feel this is important - what the Division would recommend, either by way of administrative

regulation or by way of substantive legislation, by way of penalty or otherwise - or enforcement - to guarantee, whether the manufacturer sells it to the chain or whether he sells it to the State of New Jersey, that where a price is set for a given quantity to the State or to the large chain, the same price is given to everybody.

I have this fear and I would like to register it because I think - and I am not going to make a speech - it is important insofar as the overall context is concerned. We have had a lot of problems in many, many industries regarding special treatment. For instance, the automobile manufacturers and whether you are a franchised dealer or a non-franchised dealer - I could go on and on - where there is a price differential with the same vehicle, or the same product, and how much a given retailer should pay for it in order to give that retailer an additional competitive edge. Now, I think that's a very important consideration and should be viewed in the same context as the subject matter we are discussing here today.

My last question to you is, you have in your report that the average profit was, I believe, 40¢ on the $1.00 and I would like you to tell us, if you can, where that information came from and, in essence, what is the profit, broken down? Is it pharmacy fees? Is it a question of the percentage of a product? Just exactly, overall, how did you arrive that that figure?

MRS. ANNICH: The higher figure is 48¢, which came from the Lilly Digest, that much I can tell you.

The 40¢ on the $1.00, I will have to confess to you, comes from one of these operations that I have right next to me.

I will break this down for you. I am not in a position to tell you what the actual break-down is. I know that it is from a statistical document.

ASSEMBLYMAN BAER: You will provide us with that information then?

MRS. ANNICH: Absolutely.

ASSEMBLYMAN HERMAN: What book is that you are reading from?

(question addressed to member of audience)

MR. GOLDMAN: A book you are familiar with.

ASSEMBLYMAN HERMAN: Very great book, "Pills, Profits and Politics."

MR. GOLDMAN: He quotes the Lilly Digest and others at 47¢ and quotes 100% mark-up.

MRS. ANNICH: This is Paul Goldman, an attorney from the Division of Consumer Affairs.

ASSEMBLYMAN BAER: Thank you.

MR. GOLDMAN: The 40¢, to my recollection, is either from the Department of Justice or the H.E.W. task force. But there are other figures which are higher.

MRS. ANNICH: I will break it down for you.

ASSEMBLYMAN BAER: Thank you very much. We would appreciate it.

Mrs. Annich, I have two questions. One, you made reference earlier to the possibility of regulations relating to some limitation of advertising and I would appreciate it if you would provide us, between now and the next two or three weeks - when the record is closed - with more detailed thoughts as to what you think would be desirable in terms of the scope of those rules and regulations that would limit advertising.

I also would like to ask you - you made reference, in your initial statement, to evidence that had been put together in a doctoral thesis - if you could give us more information on that, or perhaps if you think the thesis is too lengthy, maybe you can excerpt portions and we will include in the record those portions that you think are most relevant to that matter.

Assemblywoman Curran, do have any further questions you would like to ask the witness?

ASSEMBLYWOMAN CURRAN: I realize that it is getting late but I have two areas that I would like to explore with you a little bit. The first is one that has been mentioned by Mort and also by Marty and it is the question of the volume of drugs versus the inventory. You did an excellent job of outlining the arguments that were presented to each of us, basically, from the representatives of the pharmaceutical industry - basically, the pharmacists. But I would just like to explore the whole question of the big operations - the fast moving operations - versus the community pharmacy.

It is my understanding - and I wonder if you have come across the same kind of statistic - that, basically, according to their figures, the fast moving operations - the supermarket operations - primarily are going to stock 40% of the drugs that are commonly used today - I don't mean the 100 top, I mean across the board - because those apparently account for 65% of the volume of the business and they are looking toward the volume of the business. Although I can appreciate your comments that anybody who wants to stay in business will obviously - the community pharmacy - still try to maintain a complete inventory but I just wonder about the practicality of that.

When we look at the average community pharmacy -- We just took off the Fair Trade laws so now they have to compete with the supermarkets in regard to selling tooth paste and combs, etc. Now we get to the point of these drugs and let's just say there are 1,000 drugs that the average pharmacy would stock - and I don't know if that's really accurate - if 65% of the volume of the business is going to really be 40% of those drugs - the fast moving items - how are they honestly going to afford - and I

don't want this to be marginal or irresponsible - to keep themselves in business with a market primarily for less than 50% of the actual need?

MRS. ANNICH: Your assumptions, I think, are based upon the proposition that everyone will go for the 65% that are being handled by the Shop Rite, or whatever you are talking about, and all that will be left to the local pharmacy is going to be the other 40% of the drugs which are not going to be on this "special" which the big companies will have the ability to sell it at.

I just don't think that statistically there is any indication that that is so and I think that you are going to have to consider who the customers of a particular pharmacy are going to be and it seems to me that in dealing with the customers, as I said before to Assemblyman Herman, the pharmacy is really not going to stock the most popular drug because then he is going to lose a portion of his customers. I think most of the customers - and I am thinking of myself, particularly - are going to keep shopping in their local pharmacies for all of their drugs, regardless of the fact that there may be additional cost.

The point of all of this is that the people,who can't afford that luxury, should know where they can get it cheaper so they can at least get it.

ASSEMBLYWOMAN CURRAN: I think that is a good point. But to go back to your original statement, I agree with you. Our pharmacy in town is terrific and I am not going to go down to the highway to get my drugs. But in your initial statement, which talks very powerfully and, really, very interestingly about these prices, you said, point blank,people are not going to pay more money if they can get the drugs cheaper elsewhere. Now, I think this is really the question here. People have chosen one way or another of shopping and I think what they are going to do,

primarily, is what they do with a tomato or with a toaster, they are going to go to the big stores for things they can get maybe at half price and they are going to look for the specialty items in their local stores. My concern here is, the specialty items in a pharmacy are not the same kinds of things as toasters, etc. These are things which really have a life and death impact and I don't know how those local pharmacies are going to sustain themselves by primarily dealing with specialty items.

MRS. ANNICH: The point that you made is right but I think it is limited in this sense: Nobody is going to pay $14.50 for a drug - nobody - including the richest person in the world if he knows he is going to pay $14.50 for a drug when he could go down to the highway, if you want to call it that, and get it for $7.97 - I am just using these figures from my chart. That's clear. But there is a whole segment of the population that is going to be willing to pay $9.00 - or whatever you want to say - in order to get the convenience, the normal shopping pattern that it has engaged in presently.

The only point behind the theory that nobody is going to buy drugs two times as much in price if they can buy them cheaper is directed toward the people who aren't going to be able to get them at all, very honestly. But there is a huge segment, I believe, of the population that is going to be willing, certainly, to pay an additional cost if that is what it takes to deal with a local pharmacy with higher overhead rather than make the "trek" - if you want to call it that - to one of these large supermarket chain operations. I think that is really going to cover in a lot of the problem that we are conceiving.

ASSEMBLYWOMAN CURRAN: One last question, if I may. Again, I think you have been very helpful - because we have had such strong informational efforts on behalf of the

industry - by going over all of the arguments that were suggested to all of us.

One thing that I would have to question is the whole question of every single profession, which, right now, is prohibited from advertising. One of the arguments that the opticians and the pharmacists have both made to me, very strongly, is that they feel they are being singled out. I don't think that is your intention and I don't think it is our intent to do that kind of thing. Just as a matter of information, how many professions - or whatever - are now prohibited from advertising in this State? Doctors, lawyers, pharmacists, opticians, are obviously prohibited from advertising, but who else is?

MRS. ANNICH: Certified Public Accountants, engineers - there are 19 professions. Now there is certainly advertising in beauty shops and barber shops and that sort of thing. But, averaging it out, I think that more, as opposed to less, are not allowed to advertise. I would say that more of the 19 professions, governed by professional boards, are not allowed to advertise than those that are allowed to.

ASSEMBLYMAN BAER: Could you give us, also, a list of those where there is either prohibition or considerable limitation on advertising?

ASSEMBLYWOMAN CURRAN: Virginia, I guess my last question then is, you made such a strong point with regard to the public health, safety, and welfare that on very, very borad constitutional issues the whole first amendment question - if we are to apply it here - it seems to me, applies to every other one of those professions now covered. Do you have plans to study the whole question of advertising for every one of those professions, including lawyers and doctors?

MRS. ANNICH: Yes, absolutely.

ASSEMBLYWOMAN CURRAN: So, your Division - on the record now - is moving towards studying advertising for all professions, including doctors and lawyers?

MRS. ANNICH: We are going to study bans on advertising across the board.

ASSEMBLYWOMAN CURRAN: Would it not be best then to consider all of these at the same time?

MRS. ANNICH: No, I don't think it would and the reason is this: As you are well aware, I am sure, legislation very often operates in a one-step-at-a-time manner. The reason this step has been taken with respect to these particular professions is that they have one distinction which sets them apart from all the others and that is, they have a "hard" good - a product. That makes them totally -- not totally different because many of the considerations are relevant. I am a lawyer. I am a little nervous about advertising and I am sure that the medical association man that Assemblyman Salkind spoke to this morning wasn't just thinking about posting as a wonderful concept but as a possibility to avoid advertising in the medical field. Let's be practical.

But we have started here because these professions are a little different from the others. But we are going to look on into the rest of the professions and if it is called for, we are going to do it.

ASSEMBLYWOMAN CURRAN: Thank you very much.

ASSEMBLYMAN SALKIND: I want to say one quick thing. First of all, I want you to think about two things as you are developing this information. The fact is that in recent development of shopping centers throughout New Jersey, typically the typical new drug store that is built is adjacent to a supermarket. It is adjacent to an A & P or a Shop Right, if the Shop Right doesn't have a section that is in-house. The effect will be on that whole area. I think

you have to look at it from a consumer's standpoint and also from an industry-effect standpoint in our State. It is unique to our area but it is very real.

The second point on that same subject is, in the food store advertising history of the last 40 years in the United States, in general, in suburban areas the major chains have driven "mom and pop" stores out of business. That is a fact and one has to remember this when drawing his conclusion of its overall effect on the State.

I would like to ask you, officially, as a member of the Legislature and of this Committee, if you would get an opinion from the Attorney General and deliver a copy of that opinion to this Committee on the First Amendment provisions, as affected by the specific California case - or, I should say the Federal Court case. I think it is essential that we know this.

I think that the questions that Mr. Herman dwelt on concerning this subject were most informative to me because if one carries it to this conclusion and if it requires us to go in this direction, aside from the discussions being moot, the very nature of what I was talking about, as far as T.V., etc., is concerned, become, obviously, on-target just from a First Amendment standpoint. That is probably the most important thing to come out of this discussion today, if we are able to get the Attorney General's opinion.

ASSEMBLYMAN BAER: Thank you, Mr. Salkind. Your questions suggest a further question to me and I would like to ask you, Mrs. Annich, to provide us with information on this. As you analyze whether there would be any shift in the form of merchandising, or servicing, associated with both these major profession areas and aside from the question of how far that might go - which is very difficult, indeed, I guess, to project - what differences in services

might there be to the public in terms of the question of lesser services or lessened availability of certain products? Also, if you come to the conclusion, based on analyzing the differences in services presently between forms of merchandising, etc., that there would be a lessening - or danger of lessening - pharmaceutical products, for example, what means of dealing with this should be considered? Is there a means of dealing with it? Is it s problem that should cause us to put the brakes on what we are considering, or are there other means of dealing with it, such as regulations requiring a scope of services - or a scope of products - so that we can consider the extent of this possible problem and the means available to us to deal with it that would be an alternative to just passing this legislation.

MRS. ANNICH: May I just clarify one point with Assemblyman Salkind?

ASSEMBLYMAN BAER: Yes.

MRS. ANNICH: I don't want to leave you with the impression that the First Amendment would prohibit any kind of restriction on advertising. I believe that the First Amendment prohibits the absolute ban on the dissemination of information which is included in our statutes today, but the First Amendment does not proscribe all curtailment on speech only those curtailments on speech which are not related to the public health, safety, morals, and welfare. So, we could disseminate the information but we could tie-in a limitation on the advertising which we could show was, indeed, related to the public health.

ASSEMBLYMAN SALKIND: The smoking ban, for example, would relate to the point you are trying to make.

MRS. ANNICH: Exactly. So, it doesn't necessarily follow that the First Amendment, because I think that it precludes this statute that presently exists, would also preclude any limitation on advertising.

ASSEMBLYMAN SALKIND: It would probably prohibit it if it weren't tied directly to the public health.

MRS. ANNICH: Right. (statement on page 7X)

ASSEMBLYMAN BAER: Are there any further questions?

(no questions)

I want to thank you, Mrs. Annich, for your very full testimony and for coming here today.

We will now recess to go into a meeting dealing with a totally different agenda. We will not discuss, during the recess meeting, any of the matters that are on the agenda today; they are not on the agenda for action and we cannot take any action on them. It would be out of order for us to get into that, outside the hearing, so there is no need for persons who are present here now, and who are not interested in this agenda we are going to be covering during the luncheon recess, to wait through that.

(hearing recessed)

AFTERNOON SESSION

ASSEMBLYMAN BAER: The afternoon session of the Assembly Commerce, Industry and Professions Committee's hearing on A-736, A-1228, A-3263, A-3264, and A-3273 will come to order. First, I would like to apologize for the delay in beginning the session. Yes, Mr. Rys.

ASSEMBLYMAN RYS: I would like to present, for inclusion in the record, the statement of Samuel Mirsky, Executive Director of the New Jersey Pharmaceutical Services Foundation. He had to leave due to a previous engagement. (See page 33 X.)

ASSEMBLYMAN BAER: Fine. All statements left with us will be distributed to all committee members and will appear in the transcript of the proceedings. We have also received written statements from other persons who were unable to personally testify today.

The first witness this afternoon, appearing at the request of Mr. Geser, in his stead, will be Alexander Bell of the New Jersey Pharmaceutical Association.

A L E X A N D E R M. B E L L, R. P.: My name is Alexander Bell. I currently serve as President of the New Jersey Pharmaceutical Association. Beside me is Alvin Geser, our Executive Secretary. The Association was organized in 1870 and has approximately 3000 member pharmacists.

It is the intention of the New Jersey Pharmaceutical Association to explain the problems involved with the proposed mandatory posting and permissive advertising plans. The Association will attempt to encompass three basic questions in this testimony: First, is there a problem? Second, what is the problem? Third, will advertising and/or posting solve the problem and, if not, what are the alternatives?

THE SOURCES OF THE FACTS AND FIGURES WE WILL USE THROUGHOUT THE TESTIMONY WILL BE CITED WHEREVER POSSIBLE. MANY OF THE CONCLUSIONS HAVE BEEN DERIVED FROM CONVERSATIONS WITH CONSUMERS, LEGISLATORS, PHARMACISTS, ET AL, WE WILL BE OBJECTIVE IN OUR ANALYSIS OF THE PRESENT SITUATION, AS WELL AS IN OUR APPRAISAL OF THE VARIOUS ALTERNATIVES. SINCE THE QUESTION OF ADVERTISING AND POSTING IS NOT A NEW ONE, THE NEW JERSEY PHARMACEUTICAL ASSOCIATION HAS HAD AMPLE TIME TO STUDY THE SITUATION, INCLUDING THE NET RESULTS IN OTHER STATES WHERE PRESCRIPTION ADVERTISING IS ALLOWED.

IDEAS PRESENTED IN THIS TESTIMONY GO FAR BEYOND DEFINING OUR HISTORICAL POSITION REGARDING DRUG ADVERTISING. THIS POSITION HAS ALREADY BEEN SET FORTH AND IS WELL KNOWN THROUGHOUT THE STATE. WE ARE ON RECORD AS EARLY AS 1959 WHEN WE FILED OUR INITIAL COMPLAINTS ON THE TYPE OF ADVERTISING USED IN THE PROMOTION OF IRON PRODUCTS. WE HAVE ALSO FILED COMPLAINTS IN 1965 CONCERNING THE DOSAGE OF CHILDREN'S ASPIRIN, IN 1967 CONCERNING THE BAYER ASPIRIN "BEAT THE HEAT" ADS, AND IN 1970 CONCERNING THE HAZARDS OF TV ADS OF CHILDREN'S VITAMINS. AT THE SAME TIME WE INITIATED OUR FIRST REQUEST FOR A COMPLETE BAN ON TV ADVERTISING OF OVER-THE-COUNTER DRUGS DURING CHILDREN VIEWING HOURS. TV PATENT MEDICINE ADVERTISING AIMED AT CHILDREN HAS CONTRIBUTED, WE FEEL, TO THE INCREASE OF THE DRUG SUBCULTURE. WE HAVE CONTINUED TO FILE COMPLAINTS--AMONG THEM COMPLAINTS CONCERNING TV ADVERTISING OF DRISTAN (1971), AND THE LACK OF INFORMATION ON TOOTHPASTE CONTAINING FLUORIDE (1973). IT IS OUR OPINION THAT THE LACK OF COMPLETE INFORMATION IS MORE SERIOUS DUE TO THE SUGGESTION OF COMPLETE PROTECTION. WE WERE INSTRUMENTAL IN GAINING CHANGES IN THE ADVERTISING OF OVER-THE-COUNTER PRODUCTS DURING THE PAST SEVERAL

YEARS. OUR PAST PERFORMANCE GIVES AN INDICATION OF OUR CONCERN FOR THE PATIENT WITHOUT REGARD TO OUR OWN ECONOMIC WELFARE.

THE ENORMOUS AMOUNT OF ATTENTION FOCUSED ON PRESCRIPTION PRICES BY THE MEDIA, POLITICAL FIGURES, AND CONSUMER GROUPS CERTAINLY INDICATES THE EXISTENCE OF A PROBLEM.

DURING THE PAST SEVERAL YEARS NEWSPAPERS, RADIO AND TV HAVE DEVOTED TIME AND SPACE TO THE PRACTICE OF PHARMACY. MOST OFTEN THIS IS DEVOTED TO A DISCUSSION OF PRESCRIPTION PRICES, THE VARIANCE IN PRICES FROM PHARMACY TO PHARMACY, THE HIGH COST OF HEALTH CARE, AND THE APPARENT LACK OF COMPETITION IN THE MARKETPLACE TODAY. THE HEALTH CARE PROFESSIONALS HAVE OFTEN BEEN CONSIDERED A MYSTIQUE IN THE EYES OF THE PUBLIC. THE VERY FACT THAT SO LITTLE IS ACTUALLY KNOWN ABOUT THE PROFESSION OF PHARMACY AND WHAT A PHARMACIST ACTUALLY DOES HAS ADDED TO THE PROBLEM. IT IS SURPRISING THE NUMBER OF PEOPLE WHO ARE UNAWARE OF THE EDUCATIONAL REQUIREMENT INVOLVED IN BECOMING A REGISTERED PHARMACIST. THIS LACK OF KNOWLEDGE, REINFORCED BY CHARGES OF OUTRAGEOUS PRICES BY THE PRESS AND OTHER MEDIA, HAS LEFT THE PUBLIC TO CONSIDER COMMUNITY PHARMACISTS AS SHOPKEEPERS RATHER THAN THE HEALTH PROFESSIONALS THEY ARE.

ACCORDING TO A SPECIAL REPORT BY CBS-TV, NARRATED BY DAN RATHER, PHARMACISTS KNOWLEDGEABLE IN DRUG THERAPY ARE HELPFUL IN MONITORING PRESCRIPTION USAGE. HE PLACED HEAVY EMPHASIS ON ADVERSE DRUG REACTION, AND ACCORDING TO THIS REPORT, "THE AMERICAN CONSUMER IS PAYING $2 BILLION A YEAR MORE THAN THEY SHOULD BECAUSE OF ADVERSE DRUG REACTIONS." IN NEW JERSEY, MEDICATION RECORD CARDS, KEPT BY EVERY PHARMACY IN THIS STATE, ARE DESIGNED TO PREVENT THESE DANGEROUS AND EXPENSIVE INTERACTIONS.

VARIOUS SURVEYS HAVE BEEN TAKEN WHICH ARE DESIGNED TO ILLUSTRATE A DISCREPANCY IN PRICE FROM ONE PHARMACY TO ANOTHER. ONE EXAMPLE IS THE NEW JERSEY PUBLIC INTEREST RESEARCH GROUP SURVEY ON PRESCRIPTION PRICES IN THE NEW BRUNSWICK AREA. THEY STRESS THE HIGHS AND LOWS. YET, EVEN WITH THIS LIMITED SAMPLE AND INCLUDING THE LOWEST AND HIGHEST PRICES CHARGED, THE DIFFERENCE IN AVERAGE PRESCRIPTION PRICE BETWEEN HIGH AND LOW IS ONLY $1.73. IT SHOULD BE STRESSED THAT THE SAMPLE IS VERY LIMITED--ONLY SEVEN PHARMACIES WERE SURVEYED WITH TEN PRESCRIPTIONS EACH. THIS PRICE DIFFERENTIAL WOULD DECREASE THE GREATER THE NUMBER OF PRESCRIPTIONS USED. THIS SURVEY IS TYPICAL OF THE SURVEYS PERFORMED BY THE MEDIA AND OTHER GROUPS AND USED TO PROJECT THE IMAGE OF HIGH PRICES. BECAUSE OF THE SMALL SAMPLE USED, THE DISREGARD OF STATISTICAL VARIANCES AND THE FAILURE TO ADHERE TO STATISTICAL RULES WHEN PLOTTING DATA, THE CREDIBILITY OF THESE SURVEYS IS DOUBTFUL. TO THE BEST OF OUR KNOWLEDGE NO SURVEY HAS BEEN DONE OVER A RANGE OF PRESCRIPTIONS FOR A RANGE OF TIME WHICH PRODUCES BOTH A STATISTICALLY VALID SAMPLE AND A PROFILE OF NORMAL PATIENT PRESCRIPTION USAGE.

ACCORDING TO RAYMOND A. GOSSELIN, PRESIDENT OF THE MASSACHUSETTS COLLEGE OF PHARMACY AND FOUNDER OF A RESEARCH GROUP INVOLVED IN SURVEYING VARIOUS HEALTH FIELDS, THE ONLY DEFENDABLE WAY TO EXAMINE PRESCRIPTION PRICES IN PHARMACIES IS TO DO AN ACROSS-THE-BOARD EXAMINATION OF ALL THE PRESCRIPTIONS ON FILE OR, AT LEAST, A REPRESENTATIVE SAMPLING OF THE VARIOUS TYPES OF PRESCRIPTIONS. WHEN THIS IS DONE, IT CAN BE SHOWN THAT IN THE TYPICAL PHARMACY PRICES AVERAGE OUT TO A FIGURE WHICH IS MUCH LESS VARIABLE THAN THE PRICE FOR ANY ONE INDIVIDUAL ITEM. ALSO, NEWSPAPER STUDIES OF ONE PRESCRIPTION ITEM FAIL TO TAKE INTO ACCOUNT THE PRICING METHOD THAT MAY BE

USED IN THE DIFFERENT PHARMACIES. SOME PHARMACIES USE A FIXED PERCENTAGE MARKUP WHICH ALLOWS THE DOLLAR AMOUNT TO VARY CONSIDERABLY FROM ONE ITEM TO THE OTHER. OTHER PHARMACIES USE A FIXED DOLLAR MARKUP CALLED "A FEE" WHICH ALLOWS THE PERCENTAGE TO VARY CONSIDERABLY FROM ONE ITEM TO THE NEXT. WHEN A STUDY IS DONE, UTILIZING JUST ONE ITEM AND WITHOUT DETERMINING THE METHOD USED FOR PRICING, IT'S A FOREGONE CONCLUSION THAT VARIABILITY WILL BE SHOWN. TOTALLY INVALID CONCLUSIONS ARE THUSLY DRAWN.

STUDIES OF ONE ITEM DO NOT DETERMINE WHETHER THE LOW END OF THE SPECTRUM IN THE RANGE OF PRICES CHARGED ARE, IN FACT, BONA FIDE PRICES FROM THE POINT OF VIEW OF GOOD ECONOMICS. IT SHOULD BE DETERMINED IN THESE STUDIES WHETHER OR NOT SUCH LOW PRICES MIGHT NOT BE SO-CALLED "LOSS LEADER" PRICES TO ATTRACT PEOPLE INTO A PARTICULAR ESTABLISHMENT FOR THE PURPOSE OF EXPOSING THEM TO IMPULSE SALES OF OTHER ITEMS ON DISPLAY. THE CONCENTRATION IN THESE STUDIES IS ALWAYS ON THE HIGH PRICES--SELDOM ON THE RATIONALE FOR THE LOW PRICES. ONE CAN ONLY SPECULATE ON HOW LONG "LOSS LEADER" PRESCRIPTION PRICES COULD BE MAINTAINED ONCE HIGHER PRICE COMPETITION IS WIPED OUT.

THERE'S ALSO THE MATTER OF THE NORMAL CURVE OF DISTRIBUTION WHICH IS A VALID STATISTICAL METHOD FOR EXAMINING THESE DATA. ORDINARILY, WHEN PRICES FOR PRESCRIPTIONS OF A SINGLE ITEM ARE PLOTTED, THEY WILL FOLLOW THE NORMAL CURVE OF DISTRIBUTION AND THE MAJORITY OF THE PRICES TEND TO BE RATHER CLOSE TO ONE ANOTHER AT THE CENTER OF DISTRIBUTION. THE EXTREME ITEMS, BOTH HIGH AND LOW, TEND TO TAIL OFF TO A POINT WHERE THE FREQUENCY OF THE OCCURRENCE IS EXCEEDINGLY LOW. IT IS MORE DRAMATIC, OF COURSE, IN PRESENTATIONS TO SPEAK IN TERMS OF THESE EXTREME ITEMS; IT'S AS IF TO SAY, IF ONE WERE REPORTING ON THE STATURE OF HUMAN BEINGS, THAT PEOPLE VARY FROM A HEIGHT OF FOUR FEET TO EIGHT FEET WITHOUT INDICATING WHAT THE RELATIVE PROPORTION OF PEOPLE IN THOSE CATEGORIES IS. IT IS QUITE OBVIOUS THAT THE VERY LARGE

BULK OF HUMAN BEINGS WOULD TEND TO CENTER AROUND THE FIVE-FOOT-AND-A-HALF MARK RATHER THAN TO BE COUNTED AMONG THE EXTREME ITEMS.

THE PROBLEM OF APPARENT HIGH PRESCRIPTION PRICES HAS BEEN COMPOUNDED BY THE ECONOMIC PROBLEMS WHICH EXIST TODAY. AT THE PRESENT TIME THE TYPICAL AMERICAN FAMILY IS SPENDING A GREATER SHARE OF ITS BUDGET ON MEDICAL CARE THAN A FEW YEARS AGO. THIS ONE ITEM IS TAKING ALMOST 6-1/2% OUT OF THE SPENDING DOLLAR ACCORDING TO THE OFFICIAL CONSUMER PRICE INDEX. THIS IS AN INCREASE OF 9-1/2% SINCE 1963. ALL HEALTH CARE SERVICES, EXCEPT PRESCRIPTIONS, HAVE INCREASED IN COST--SOME AS HIGH AS 72.2%. IN NEW JERSEY, THE AVERAGE PRESCRIPTION PRICE ACCORDING TO A RECENT GOSSELIN SURVEY IS 22¢ BELOW THE NATIONAL AVERAGE, WHILE OPERATIONAL PHARMACY COSTS IN NEW JERSEY ARE 3% ABOVE THE NATIONAL AVERAGE.

IT IS NOT THE ASSOCIATION'S INTENTION TO INTIMATE THAT VARIANCE IN PRICES DOES NOT EXIST. THE VARIANCES THAT OCCUR IN PRESCRIPTION PRICES ARE THE RESULT OF A HEALTHY COMPETITIVE MARKETPLACE. THE PRICE DIFFERENTIALS ARE COMPOUNDED BY A VARIETY OF CIRCUMSTANCES. EXCLUDING THE FACT THAT PRESCRIPTIONS ARE OFTEN USED AS LOSS LEADERS, THERE ARE TWO BASIC REASONS FOR DIFFERENT PRICES. THEY ARE--FIRST, DIFFERENT BUYING HABITS, E.G., DIRECT BUYING VS. WHOLESALE BUYING, AS WELL AS SIGNIFICANT VARIATIONS IN WHOLESALE PRICES OF DRUGS SOLD TO COMMUNITY PHARMACY--AND SECOND, DIFFERENCES IN PHARMACEUTICAL SERVICES RENDERED, E.G., PATIENT CONSULTATION, 24-HOUR EMERGENCY SERVICE, ET AL. CURRENT DRUG COSTS RANGE IN THE THOUSANDS OF PER CENT VARIATIONS USING THE FEDERAL GOVERNMENT CONTRACTS AS THE BASE. STATE GOVERNMENTS ALSO OBTAIN EXCELLENT PRICES, WHILE HOSPITALS FOLLOW. CHAIN STORES GENERALLY RECEIVE A MUCH MORE FAVORABLE PRICE THAN INDEPENDENT PHARMACIES. FOR EXAMPLE, BRISTOL SELLS ITS AMPICILLIN CAPS 250 MG. TO THE STATE OF NEW JERSEY FOR $3.25/100, SLIGHTLY MORE TO HOSPITALS AND LARGE CHAINS, WHILE THE INDEPENDENT PHARMACY PAYS UP TO $16.50/100. THE PRICES

FOR NOCTEC 500 MG. (SQUIBB'S CHLORAL HYDRATE) RANGE FROM $1.60/100 TO $6.50/100. LEDERCILLIN VK 250 MG. RANGES FROM $1.50/100 TO $8.49/100. SIMILAR FIGURES ARE AVAILABLE FOR HUNDREDS OF OTHER DRUGS.

IT IS POSSIBLE AND EVEN PROBABLE THAT MANY PROMOTIONAL CHAIN STORES WILL CHARGE HIGHER FEES THAN A COMMUNITY PHARMACIST AND YET BE IN A POSITION TO HAVE A LOWER RETAIL PRICE. THIS SITUATION IS FURTHER COMPOUNDED BY THE GENERIC QUESTION WHICH PROVIDES EVEN GREATER VARIATION.

WE WOULD LIKE TO POINT OUT THAT IN NEW JERSEY ALONE THERE ARE OVER 1,600 COMMUNITY PHARMACIES EACH COMPETING WITH NEIGHBORING PHARMACIES-- AS WELL AS THE PHARMACIES WITHIN THEIR REGION. THE LILLY DIGEST REPORTS THAT IN 1974 THE AVERAGE PHARMACY HAD A NET PROFIT OF 3.6% BEFORE TAXES. THIS IS THE LOWEST PROFIT SINCE THE ALL TIME LOW RECORD IN 1972. PRICE VARIATIONS OF ANY MAGNITUDE ARE IMPROBABLE WITH SUCH A LOW PROFIT FACTOR. IRONICALLY, PROFIT MARGINS ARE APPARENTLY LOW BECAUSE OF AN INTENSE COMPETITION EVEN THOUGH CRITICS CLAIM THAT COMPETITION DOES NOT EXIST.

THE APPARENT GOALS OF ADVERTISING AND/OR POSTING ARE TWOFOLD: FIRST, TO BE OF INFORMATIONAL VALUE TO THE CONSUMER AND, SECOND, TO CAUSE A DECREASE IN PRESCRIPTION PRICES. NEITHER OF THESE GOALS CAN BE MET IN THE PRESCRIPTION MARKETPLACE WITH ADVERTISING. IN ORDER TO BE EFFECTIVE INFORMATIONALLY, A PERSON MUST BE IN THE MARKET FOR A PRODUCT AT THE TIME OF THE ADVERTISEMENT. SINCE A PATIENT CANNOT CHOOSE WHEN TO BECOME ILL NOR CAN HE CHOOSE THE DRUG, THE QUANTITY, OR ITS RATE OF USE, PRESCRIPTION ADS WOULD HAVE TO BE PLACED ALMOST EVERY DAY TO BE OF ANY VALUE TO THE CONSUMER. ACCORDING TO A RECENT ARTICLE IN HARVARD BUSINESS REVIEW, SOME EXPERTS HAVE EXPLAINED THE USE OF REPETITIVE ADVERTISING AND HAVE NOTED THAT RECALL OF AN AD DROPS WITHOUT CONSTANT REINFORCEMENT. WE, ALSO, HAVE ARGUED AGAINST SINGLE EXPOSURE POTENCY. THE PUBLIC IS NOT ALWAYS IN THE MARKET FOR AN ADVERTISED PRODUCT, BUT WHEN THEY ARE, THE ADVERTISEMENT MUST BE THERE IN ORDER TO BE EFFECTIVE.

ADDITIONALLY, THE PRESCRIPTION MARKET DIFFERS FROM MOST OTHER CONSUMER MARKETS BECAUSE OF ITS LACK OF CONSUMER CONTROL AND ELASTICITY. IN THE PRESCRIPTION MARKET DEMAND IS NOT BASED ON WANT, BUT RATHER ON THE EXTRINSIC FACTOR OF THE PATIENT'S HEALTH NEED. IT IS GENERATED BY THE DESIRE FOR HEALTH AND TREATMENT RATHER THAN THE PRODUCT ITSELF. DEMAND COULD BE INCREASED ONLY TO THE EXTENT THAT THE COMMUNITY AT LARGE AND HEALTH PROFESSIONS ATTEMPT TO GENERATE HIGHER HEALTH STANDARDS AND THE RATIONAL USE OF ALL HEALTH SERVICES INCLUDING PHARMACY.

IN NON-EXPANDABLE MARKETS SUCH AS THIS, AN INCREASE IN ADVERTISING COMPETITION HURTS THE CONSUMER. THE REASON STEMS FROM A BUILT-IN MECHANISM. SINCE COMPETITIVE ADVERTISING EXHIBITS A RECIPROCAL CANCELLATION EFFECT, ADVERTISING EXPENDITURES ESCALATE. BECAUSE ADVERTISING WOULD NOT INCREASE DEMAND, ADVERTISING WOULD BE A DIRECT ADDITIONAL COST TO THE CONSUMER. OVER A PROTRACTED PERIOD OF TIME, PHARMACIES COULD NOT ABSORB THE ADDITIONAL COST OF ADVERTISING WITHOUT RAISING PRICES.

BECAUSE OF GREATER CAPITALIZATION, GREATER DIVERSIFICATION, LACK OF INTEREST IN PUBLIC HEALTH AT THE MANAGERIAL LEVEL, FEW IF ANY SERVICES, AND A GREATER RATIO OF CLERKS TO PROFESSIONALS, THE LARGE DISCOUNTERS, PARTICULARLY SUPERMARKETS AND DISCOUNT DEPARTMENT STORES USING THE PHARMACY DEPARTMENT AS A LOSS LEADER, COULD CONCEIVABLY SPEND THOUSANDS OF DOLLARS ON ADVERTISING INITIALLY WITHOUT AN INCREASE IN PRICE. OF COURSE, IT MUST BE POINTED OUT THAT THEY EVENTUALLY WOULD BE FORCED TO RAISE PRICES TO ABSORB THE INCREASED COST OF ADVERTISING. ON THE OTHER HAND, INDEPENDENT PHARMACIES WOULD BE LIMITED IN THEIR ADVERTISING BUDGET. USING THE FIGURE OF $2,000 ADVERTISING EXPENDITURE PER YEAR PER PHARMACY THERE IS AN INCREASED COST OF $32 MILLION PER YEAR WHICH MUST BE BORNE BY THE NEW JERSEY CONSUMER. THIS IS IN FACT ONLY $40 A WEEK--A MODEST EXPENDITURE FOR ANY TYPE OF ADVERTISING. THESE FIGURES ARE BASED ON 1,600 PHARMACIES IN THE STATE OF NEW JERSEY.

In contrast to the very low net profit margin of 3.6% in the average pharmacy, drug manufacturers have shown consistently high net margins, according to Business Week, 1974 fourth quarter report. For example, Abbott Laboratories, 7.7%; American Homes Products, 9.7%; Bristol-Myers, 8.2%; Eli Lilly, 14.4%; and Merck, 15.2%. The industry's P-E (Profit-Earnings) ratio was higher than any other industry reported. The drug industry average for Return and Common Equity for 12 months ending December 31, 1974 was 19.6% and outranked all other industries.

Studies have shown that prescription advertising, in addition to increasing prices in the long run, would be accompanied by a decrease in services, especially in low income areas. These are the areas which require services most and would be the first to lose them with the advent of unchecked advertising. Services in general could be expected to decrease since community pharmacists would be compelled to advertise on the basis of prices in order to compete with super discount operations. A typical pharmacy which is forced to compete on the basis of price advertising would emulate the discounters. Among the changes they could be expected to make are increasing the ratio of non-professional help to pharmacists on duty, increase the average waiting time for prescriptions, reducing inventory by not stocking slow moving drugs, eliminate the compounding of prescriptions, eliminating charge accounts and adding a charge for other services, including telephone calls to physicians. I would like to point out that compounded prescriptions account for approximately 5-7% of all prescriptions. Telephone calls are performed frequently. They are necessary to check prescriptions and refills, to consult physicians regarding possible drug interactions, duplications, strength, dose and various other problems. Approximately 20% of all prescriptions require such a service. We estimate the cost of such a service, if charged separately as might occur in an advertised price atmosphere, to be about

$1.00 PER CALL OR ABOUT $12 MILLION YEARLY IN NEW JERSEY. THESE INCLUDE SUCH PREPARATIONS AS DERMATOLOGICALS, COUGH SYRUPS, HAND MADE CAPSULES AND OINTMENTS.

AS POINTED OUT EARLIER, RECENT STUDIES HAVE STRESSED THE MAGNITUDE OF THE PROBLEM OF DRUG INTERACTIONS. IN NEW JERSEY, PHARMACISTS HAVE ATTEMPTED TO KEEP THIS PROBLEM IN CHECK BY THE USE OF PATIENT MEDICATION RECORD CARDS. IT SHOULD BE POINTED OUT THAT A NUMBER OF LARGE CHAINS, PARTICULARLY THOSE USING PHARMACY AS A LOSS LEADER, OPPOSED THE INTRODUCTION OF PATIENT PROFILE CARDS. THESE INCLUDED NINE LARGE DISCOUNT PHARMACIES INCLUDING RITE AID AND PATHMARK.

SHOPPING FOR PRESCRIPTION PRICES WOULD RESULT IN AN INCREASE IN THE NUMBER OF DRUG INTERACTIONS SINCE NO SINGLE PHARMACY WOULD HAVE COMPLETE RECORDS. THE RESULTANT ADDED PHYSICIAN AND HOSPITAL EXPENDITURES WOULD OVERSHADOW ANY POSSIBLE SAVINGS BY NEGATING THE USEFULNESS OF PRESCRIPTION PROFILE RECORD CARDS. LESS TIME DEVOTED TO PATIENT CONSULTATION WOULD ALSO CONTRIBUTE TO THIS PROBLEM. OPPONENTS SAY THERE IS SHOPPING NOW. WHILE WE DO AGREE THERE IS SOME SHOPPING, THE MAJORITY OF PEOPLE ARE PROTECTED BY THESE RECORDS SINCE THEY DO NOT SHOP FOR PRESCRIPTIONS. NO OTHER FREQUENTLY VISITED HEALTH PROFESSIONAL OR SERVICE COMMANDS THE PERCENT OF PATIENT LOYALTY WHICH THE PHARMACIST ENJOYS.

THE RESULT OF ADVERTISING IN THE COMMUNITY PRACTICE WOULD NOT RESULT IN AN INCREASE IN COMPETITION. IT WOULD RATHER TEND TO CREATE A MONOPOLISTIC SITUATION FOR THE LARGE OPERATIONS. JOHN HASENJAEGER, ASSOCIATE PROFESSOR AT BOSTON COLLEGE'S SCHOOL OF MANAGEMENT WAS QUOTED BY THE BOSTON EVENING GLOBE (AUG. 14, 1974) AS SAYING THAT WHILE THERE MAY BE SIGNIFICANT FLUCTUATION IN DIFFERENT GEOGRAPHIC LOCATIONS ACROSS A STATE, SUPERMARKET FOOD PRICES WITHIN MARKET AREAS ARE VERY SIMILAR. THIS "PRICE RIGIDITY" IS CAUSED BY THE FACT THAT MANY OF THE AREA MARKETS ARE CONTROLLED BY ONLY A FEW LARGE CHAINS. THIS SAME SITUATION WOULD

BE ACCOMPLISHED BY THE REDUCTION IN THE NUMBER OF INDEPENDENT PHARMACIES DURING THE FIRST YEAR OF ADVERTISING. AFTER THE SUPERS HAVE ASSURED THEIR PLACE IN PHARMACY PRACTICE, PRICES WOULD RISE. IN PENNSYLVANIA, THE LARGEST SINGLE JUMP IN PRESCRIPTION PRICES OCCURRED THE YEAR THE ADVERTISING PROHIBITION WAS REMOVED. THE SAME THING MIGHT BE EXPECTED TO HAPPEN IN NEW JERSEY.

IN ADDITION TO THE PROBABLE DECREASE IN SERVICE, AN INCREASE IN DRUG INTERACTIONS DUE TO AN INCREASE IN PRICE SHOPPING, AND AN INCREASE IN PRICES, THE DRUG ABUSE PROBLEMS MUST THEN BE CONSIDERED. THE PROBLEM OF INCREASED DRUG ABUSE CANNOT BE IGNORED IF PRESCRIPTION DRUGS WERE TO BE ADVERTISED. AS RECENTLY AS APRIL 1975, A LETTER FROM A DEPARTMENT OF HEALTH REPRESENTATIVE INDICATED OPPOSITION TO THE ADVERTISING OF PRESCRIPTION DRUGS ON THE BASIS OF DRUG ABUSE. SHE INDICATED IN HER LETTER THAT THE INCREASED FAMILIARITY WITH BARBITURATES, AMPHETAMINES, PSYCHOTROPICS, AND ANALGESICS WOULD ENLARGE THE NUMBER OF DRUG USERS FROM A SMALL SUBCULTURE TO THE MASS PUBLIC. SHE NOTED AS EXAMPLE THE LIMIT SET ON THE ADVERTISING OF CIGARETTES AND WHISKEY AND URGED THAT THE ADVERTISING PROHIBITION ON PRESCRIPTION DRUGS BE CONTINUED. HER VIEWS ARE CORROBORATED BY THE FEDERAL COMMISSION ON MARIJUANA & DRUG ABUSE AS WELL AS BY JAMES HARVEY YOUNG, AN AUTHOR AND EXPERT IN THIS FIELD.

CHURCH GROUPS AND LOCAL PHARMACISTS HAVE LONG BEEN ACTIVE IN THE AREAS OF DRUG ABUSE CONTROL AND FEEL THAT ADVERTISING WOULD AGGRAVATE THE PRESENTLY DANGEROUS PROBLEM. MR. YOUNG ALSO POINTS OUT IN HIS NEW BOOK, <u>AMERICAN SELF-DOSAGE MEDICINES, AN HISTORICAL PERSPECTIVE</u>, THAT THE PRESS HAS CONSISTENTLY SUPPORTED ADVERTISING OF DRUGS FOR THEIR OWN ECONOMIC GAIN.

THERE ARE SEVEN MAJOR CATEGORIES OF DRUGS WHICH HAVE MAJOR SIDE EFFECTS BY THEMSELVES, AS WELL AS IN COMBINATION WITH ALCOHOL AND FOODS. THEY INCLUDE CENTRAL NERVOUS SYSTEM STIMULANTS, ANALGESICS, TRANQUILIZERS, NARCOTICS AND HALLUCINOGENS. ALL OF THESE CATEGORIES ARE SUBJECT TO MISUSE AND ABUSE AND COULD AND DO AFFECT DRIVING, CAUSING ACCIDENTS WHICH OFTEN RESULT IN DEATH.

IT IS WELL DOCUMENTED THAT PATIENTS NEED ADVICE ON THE PROPER USE OF MEDICATION. FOR EXAMPLE, SEVERAL STUDIES INDICATE THAT EVEN DRUGS AS COMMON AS ASPIRIN REQUIRE EDUCATION. DR. MARTIN I. BLAKE STATED IN THE JOURNAL OF AMERICAN MEDICAL ASSOCIATION THAT "WHILE ASPIRIN IS GENERALLY REGARDED AS ONE OF THE SAFEST OF DRUGS, IT CAN BE RESPONSIBLE FOR GASTROINTESTINAL BLEEDING AND CAN ALSO CAUSE ACUTE AND MASSIVE GASTRIC HEMORRHAGE". THESE OBSERVATIONS REINFORCE THE NEED FOR PHARMACIST CONSULTATION, NOT THE CREATION OF SOMETHING THAT WILL ELIMINATE IT. ROBERT MOSER, M.D., EDITOR OF THE AMERICAN MEDICATION ASSOCIATION JOURNAL (JAMA) SAYS, "IT IS NO EXAGGERATION TO SAY THAT THE GRADUATING PHARMACY STUDENT TODAY MAY KNOW MORE ABOUT DRUG THERAPY THAN A GRADUATING MEDICAL STUDENT."

DIFFERENT PROBLEMS WOULD BE INVOLVED WITH PRICE POSTING. PRICE POSTING WOULD BE INFORMATIONAL ONLY AND DATA HAS SHOWN THAT FEW PEOPLE ARE INFLUENCED BY PRICE POSTING. SEVERAL CONSUMER PATRONAGE STUDIES, SUCH AS THE DICHTER STUDY, SHOW THAT PRICE POSTING IS LOW ON THE LIST OF PATRONAGE MOTIVES. ON TOP OF THE LIST ARE CONVENIENCE AND THE PATIENT'S RELATIONSHIP WITH THE PHARMACIST. SEVERAL PROBLEMS ARE INVOLVED WITH THE POSTING PLANS PROPOSED. PRESCRIPTION PATRONS WILL NOT GENERALLY SHOP FOR LOWER PRESCRIPTION PRICES PROVIDED THEY GET A PERCEIVED VALUE FOR THE HIGHER PRICE. THESE VALUES COME IN THE FORM OF SERVICES RENDERED BY THE COMMUNITY PHARMACIST.

NONE OF THE POSTING PLANS PROVIDE FOR A FULL DISCLOSURE CLAUSE WHICH WOULD MANDATE THE INCLUSION OF A LIST OF SERVICES ON THE POSTING BOARD. ADDITIONAL PROBLEMS INCLUDE THE INABILITY OF A PATIENT TO READ A PRESCRIPTION CORRECTLY, CONFUSION REGARDING THE DRUG ENTITY AND CONFUSION DUE TO DIFFERENCES IN STRENGTH AND QUANTITY. ALL OF THESE THINGS CAN BE DONE ACCURATELY ONLY BY THE PHARMACIST. IT IS ALREADY THE ABSOLUTE RIGHT OF THE CONSUMER TO ASK A PHARMACIST TO PRICE HIS PRESCRIPTION BEFORE IT IS FILLED.

CONFUSION WOULD ALSO ARISE DUE TO THE DIFFERENCES IN PRICING SYSTEMS FROM PHARMACY TO PHARMACY. MOST PHARMACIES USE A FEE, SOME USE A MARK-UP PRICING SYSTEM WHILE OTHERS WILL PRICE POSTED PRESCRIPTIONS AS LOSS LEADERS TO PROJECT A LOW-PRICE IMAGE. PRICE SIGNS, REFLECTING THESE DIFFERENCES WILL TEND TO BE MISLEADING TO THE BUYERS, UNLESS IT SPECIFICALLY STATES THAT QUANTITIES DIFFERING FROM POSTED ONES WILL NOT BE PROPORTIONATELY PRICED.

MORE ACCEPTABLE METHODS OF SOLVING THE PRESENT PROBLEM WOULD BE: 1) THE PASSAGE OF A DRUG PRODUCT SELECTION BILL WHICH WOULD SIGNIFICANTLY REDUCE PRESCRIPTION PRICES; 2) PASSAGE OF AN ACT CALLED THE CROWN ACT -- ENACTED IN CALIFORNIA WHICH WOULD REQUIRE DRUG MANUFACTURERS SELLING WITHIN THE STATE TO MAKE KNOWN TO THE STATE GOVERNMENT THE ACTUAL MANUFACTURER OR FABRICATOR OF THE DRUG. THIS LEADS TO A RATIONAL APPROACH OF PRODUCT INTERCHANGE SINCE IT IS DIFFICULT FOR MANUFACTURERS TO CLAIM UNIQUENESS. AS A MATTER OF FACT MANY PRODUCTS ARE MADE FOR SEVERAL DRUG COMPANIES BY ONE ACTUAL MANUFACTURER. 3) PASSAGE OF AN ACT SIMILAR TO THE PROPOSED CALIFORNIA MEDI-CAL PLAN. THIS PROPOSAL PROVIDES FOR THE STATE'S BUYING OR PURCHASING DRUGS AND RESELLING THE DRUGS TO THE RETAIL PHARMACY THROUGH A DRUG WHOLESALER. 4) A STATE SANCTIONED PEER REVIEW PROGRAM WHICH WOULD

PROTECT THE PUBLIC FROM OCCASIONAL UNCONSCIONABLE PRICES. 5) PASSAGE OF A CATASTROPHIC DRUG COVERAGE BENEFIT FOR THE AGED. SINCE SENIOR CITIZENS ON A LIMITED INCOME UTILIZE MORE MEDICATION PER PERSON THAN THE AVERAGE ADULT, THEY ARE MOST AFFECTED BY THE COST OF PRESCRIPTIONS. 6) PASSAGE OF A "SHOPPER'S RIGHT TO KNOW" PRICE LAW. THIS WOULD REQUIRE EACH PHARMACY TO POST A SIGN STATING THAT THEY WILL PRICE ANY PRESCRIPTION PRIOR TO ITS BEING FILLED UPON REQUEST. THE SPONSOR INTENDS TO INCORPORATE THE CLAUSE INTO ASSEMBLY BILL 1257 -- THE DRUG PRODUCT SELECTION BILL.

WE FEEL STRONGLY THAT THE GENERAL PUBLIC HAS A RIGHT TO KNOW WHAT A PHARMACIST'S CHARGES ARE FOR THE PROFESSIONAL SERVICE HE RENDERS IN BRINGING A PARTICULAR PRESCRIPTION LEGEND DRUG TO A MEMBER OF THE PUBLIC WHEN HE OR SHE REQUIRES IT. WE DO NOT FEEL THAT THIS KNOWLEDGE, HOWEVER, CAN BE CONVEYED ACCURATELY OR EFFICIENTLY TO THE PUBLIC VIA NEWSPAPER OR OTHER ADVERTISEMENTS. THE PUBLIC SHOULD BE ENCOURAGED TO DISCUSS THE SERVICES PROVIDED BY THEIR PHARMACISTS, AND THE PROFESSION OF PHARMACY SHOULD ENCOURAGE PHARMACISTS, SIMILARLY, TO DISCUSS THE SERVICES THEY RENDER AND THE COSTS WITH THEIR PATRONS. THE PROFESSION IS URGING THIS, CURRENTLY, AND THERE IS NO DOUBT IN MY MIND, AS AN OBSERVER OF THE PRACTICE OF PHARMACY IN THE NATION, THAT A MORE OPEN DIALOGUE IS NOW BECOMING PREVALENT BETWEEN PHARMACIST, PATIENT AND PHYSICIAN ON THE MATTER OF THE TYPE OF PHARMACEUTICAL SERVICES THAT ARE RENDERED BY THE PHARMACIST AND THE COSTS OF THEM.

OUR ASSOCIATION HAS LONG FELT THAT PRESCRIPTION PRICE ADVERTISING AND POSTING ARE NOT THE SOLUTIONS TO THE PRESENT DAY PROBLEM. IT IS A QUESTION OF PUBLIC AWARENESS RATHER THAN HIGH PRICES WHICH HAS CAUSED THE

PRESENT SITUATION. IN VIEW OF THE FACTS PRESENTED, WE MUST CONCLUDE THAT THE PRICES THEMSELVES ARE NOT HIGH -- IN FACT THEY HAVE NOT INCREASED AS RAPIDLY AS OTHER CONSUMER PRODUCTS AND SERVICES. IN SPITE OF PRICE INFLATION, PRESCRIPTION PRICES HAVE BEEN STABLE, AND HAVE ACTUALLY SHOWN A DECREASE ON THE CONSUMER PRICE INDEX. BECAUSE OF THIS A MORE RATIONAL APPROACH TO THE PROBLEM WOULD BE TO BYPASS ADVERTISING AND POSTING AND CONSIDER ONE OF THE ALTERNATIVES WE HAVE ILLUSTRATED. THE LOGICAL ALTERNATIVE WOULD BE THE ENACTMENT OF THE DRUG PRODUCT SELECTION BILL WITH THE "SHOPPER'S RIGHT TO KNOW" CLAUSE, SINCE IT IS ALREADY ON THE FLOOR OF THE ASSEMBLY. ALSO, THE CATASTROPHIC DRUG COVERAGE BENEFIT FOR THE AGED BILL SHOULD BE HIGH IN PRIORITY. IT HAS BEEN AUTHORIZED FOR FUNDING BY THE LEGISLATURE'S JOINT APPROPRIATIONS COMMITTEE.

IN CLOSING, WE WOULD LIKE TO INDICATE THE NEED IN OUR ECONOMY TO RETAIN THE SMALL NEIGHBORHOOD SERVICE BUSINESS.

GOVERNOR BYRNE INDICATED THAT HE WOULD NOT REMOVE THE FAIR TRADE RESTRICTIONS ON CIGARETTES AND LIQUOR BECAUSE OF THE NEED TO PRESERVE THE SMALL NEIGHBORHOOD BUSINESS. WE FIND IT DIFFICULT TO BELIEVE THAT LIQUOR AND TOBACCO STORES ARE IMPORTANT WHILE HE EXPRESSES NO SIMILAR CONCERN FOR PHARMACIES.

WITH THE PROBABLE ADVENT OF NATIONAL HEALTH INSURANCE, THE CONCERN OVER PRESCRIPTION PRICES WILL LESSEN WHILE THE NEED TO DELIVER ADDITIONAL HEALTH SERVICES WILL INCREASE. WE BELIEVE A PART OF THIS ADVERTISING MOVEMENT HAS BEEN BROUGHT ABOUT BY THE LARGE CORPORATE PHARMACIES, WHO ARE AFRAID TO COMPETE ON A HEALTH SERVICE AND CONVENIENCE BASIS.

We have met with Donald Altman of the Attorney General's office and with other individuals in the administration in an attempt to work together to develop a new comprehensive pharmacy statute. We hope that these exchanges by virtue of a position paper and meetings with the administration will lead to a new Pharmacy Act which incorporates many areas of professional growth of such vital concerns as brought out in our testimony today. A continuing dialogue with the administration could lead to a viable alternative to these bills under consideration today.

I would like to close with a quote from the California Ralph Nader Citizen Action Committee in their Shopper's Guide to Sacramento area pharmacies: "Warning: You should be cautioned that a stampede by consumers to the chain stores and away from the independent pharmacies may cost you more money in the long-run. Low prescription prices are indeed attractive in these days of rising prices, but driving independent pharmacies out of business may not benefit you either. The independent pharmacy is competition tc the chains, and, without competition, the chains would be free to charge whatever they want for drugs. The most effective way to combat high drug prices is to back legislation aimed at monitoring and controlling the activities of the drug manufacturers. They are at the root of the inequities of drug pricing structures." (Mr. Bell's reference page follows.)

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ASSEMBLYMAN BAER: Thank you very much for your testimony. I assume, Mr. Geser, that you, as well as Mr. Bell, will be willing to answer questions of the committee. Mr. Herman, do you have any questions?

ASSEMBLYMAN HERMAN: Mr. Bell, are pharmacies now required to keep records of the prices they charge for prescriptions? If I were a state inspector and I came into your pharmacy, would I be able to tell how much you charged for a particular prescription?

MR. BELL: On almost every prescription filled, there is the price charged for the prescription.

ASSEMBLYMAN HERMAN: But is it required?

MR. BELL: No, it is not required.

MR. GESER: As a customary practice in the profession - and I have never known of a pharmacist that does not do it - the pharmacist will type the price charged right on the prescription, for his own record. He may also put it on the patient record card. Usually, he does do that e v e n though the law doesn't require it. The current law does give the Board of Pharmacy, and through them, the government, the right to come in and pick up that prescription record. So it would be available in that manner.

ASSEMBLYMAN HERMAN: I assume, then, that you would have no objection if that procedure became mandatory.

MR. BELL: No.

ASSEMBLYMAN HERMAN: I asked that because, in listening to Mrs. Annich today, I think one would have to raise one's eyebrows, if we're going to be candid about it, about the disparity in prices. Based on your testimony, your primary concern is that the survey is not representative, not a universal. Obviously, if that were a mandatory provision, I assume we would be able to easily get a universal.

MR. GESER: On the contrary, Mr. Herman, when this situation arose in a somewhat lower key several years ago, when Mr. Cahill was Governor, the Association suggested that the Board of Pharmacy, within the Division of Consumer Affairs, be given additional authority over unconscionably high prices with the right to actively monitor prices.

ASSEMBLYMAN HERMAN: I think we are skipping around the point. One of your pivotal objections to Mrs. Annich's survey and, I assume, those one or two drug surveys, is that it does not represent a universal, it is not a broad enough spectrum, and it does not cover the overall pricing and profit margin in a particular pharmacy vis-a-vis another pharmacy. Is that correct?

MR. GESER: Yes.

ASSEMBLYMAN HERMAN: What I am saying is this: If prices were mandatory in a given pharmacy and they had to be on the prescriptions, it would then be easy to establish that universal. Is that correct?

MR. BELL: That is correct.

ASSEMBLYMAN HERMAN: I believe you said in your testimony, if I understood you correctly, that chains, if they gave substantial discounts on drug products, would, in essence, recapture it in other areas. In other words, are you saying that the customer would eventually wind up paying for it on another product?

MR. BELL: That's right.

ASSEMBLYMAN HERMAN: Is that the point you're making?

MR. BELL: Yes.

ASSEMBLYMAN HERMAN: Could you relate this concern to any other product line that has been put into retail supermarkets which would justify a like concern in the area of pharmaceuticals?

MR. GESER: If I may, there was someone in the room, Don Wernik, who served on the Board of Pharmacy and as its President for some years. He tells this story: When one of the supermarket chains came to apply for a pharmacy permit, he asked them a question about the prescription department, regarding the way they were going to run it, and they indicated that they had no particular interest, according to the story, in filling prescriptions but that, by making low-priced prescriptions available, it gave them an image whereby they would triple the sale of other health and beauty aids.

MR. BELL: Just the fact that there is a pharmacy does that.

MR. GESER: They would triple their business in these other areas. I believe that may answer your question.

ASSEMBLYMAN HERMAN: I think I get the gist of why you are saying.

Obviously, you back product interchange as evidenced by your support of A-1257. As an extension of that, does your Association object to comparative manufacturer advertising? That is basically the same question that was put to Mrs. Annich. Take this example: Product A versus Product B, being an equivalent product, selling comparatively for a lesser retail price.

MR. GESER: I would take a guess that we would oppose it - to the consumer - because our whole ideology, going back 100 years to the beginning of the American Pharmaceutical Association, has been that this country has been plagued with an inordinate amount of drug advertising and hokum. It is pretty much our opinion - and we have been consistent for over a century - that we have to control this whole advertising spectrum,

because we have produced the horrible situation that exists in America today in drugs, alcohol, tobacco, and various other things. So I would think that, unless there was a really persuasive argument for such advertising directed to the consumer, we should, as professionals, oppose it.

ASSEMBLYMAN HERMAN: I am interested in your opinion.

MR. GESER: I would say that we don't object to advertising of these drugs to professional audiences, that is, to physicians, dentists, pharmacists, and others, because we think we serve as a barrier, and the ads are going to have less influence on us than others. I have to say, even there, that the advertising is pretty persuasive in some instances.

ASSEMBLYMAN HERMAN: I have one last question for either you or Mr. Bell, whoever can answer it. You made a statement that the year after the Pennsylvania law permitting advertising was passed the prices jumped substantially. Would you explain, to the best of your knowledge, why, or was it just the market conditions that caused those prices to increase?

MR. GESER: I would take a guess that it was the condition in the market. The problem with this advertising business is that Mrs. Annich can draw conclusions from her data, and we can probably draw different conclusions from her data and, certainly, different conclusions from our own data. It is an historic fact that the prices went up, but it is very difficult to subjectively analyze that data and absolutely say that advertising was the culprit.

ASSEMBLYMAN HERMAN: You're saying, then, in all fairness to everyone here, that it may have been an historical coincidence r a t h e r t h a n b e c a u s e

of the repeal. It appears in your statement, as I understand it, that you are making the assertion that eliminating the prohibition of advertising directly relates to the increase of drug prices.

MR. GESER: I think it does to this extent: I don't own a pharmacy, but, if I did own a pharmacy, and if this bill were enacted into law, or if I even thought it were going to pass, I think I would start to spend some money on advertising, wherever I could, to position myself against the probable onslaught of the supers and the chains.

ASSEMBLYMAN HERMAN: I think this question just naturally follows: Is there any direct proof that your Association has that the increase in prices was directly related to the elimination of the advertising prohibition, and what was the experience regarding the percentage of increase in the year following the elimination of the advertising prohibition?

MR. GESER: The answer to the first question is that we do not have direct proof that advertising caused it. The answer to the second question is that this was a large one-year jump, but then it started to slow down. In each case, I think the comparison between Pennsylvania and New Jersey is a fair one, and our prices never equaled their prices. So their chart took a jump whereas ours did not. Ours has followed theirs slowly.

ASSEMBLYMAN HERMAN: Thank you very much.

ASSEMBLYMAN BAER: Are there any other questions? Assemblyman Rys.

ASSEMBLYMAN RYS: I have only one question. Do most of your pharmacies buy from a wholesaler or directly from the drug companies?

MR. BELL: I would say that most of them, especially the small ones, buy from a wholesaler.

ASSEMBLYMAN RYS: Do you know the difference in price?

MR. BELL: I would say that there is a difference of about 15 per cent to 20 per cent between the wholesale price and the direct price.

MR. GESER: If I may, the problem is compounded beyond that. As we pointed out in our testimony, there are recurrent trade deals, so the prices are not consistent. We are in the trap of the drug manufacturer, in a sense, and it is the trade deals and other variants, such as wholesaler- retailer, chains, direct buying wholesale, that produce these inordinate cost differentials. If the drug product selection bill were passed, then all pharmacies would be in a better position to take advantage of the trade deals that exist rather than, as at the current time, only those with large purchasing leverage.

ASSEMBLYMAN HERMAN: Are you talking, in essence, then, about limiting your inventory? For instance, would you maybe only carry eight or ten Ampicillins instead of 15.

MR. GESER: Correct. We did cite Polycillin. If the drug product interchange bill were passed, and polycillin were approved by this council and it were on that list, then we could use that to the exclusion of three or four others, and you would be able to concentrate your purchasing to an approved Ampicillin of choice and take advantage of trade deals that come down the line.

ASSEMBLYMAN HERMAN: I would like to ask you one more question, but I don't know if you can give me the answer off the top of your head. Assuming that there were an interchange bill, what - obviously there are many, many duplications of products that one must carry because of the prescribing habits in one's

area - would you anticipate would be the percentage of reduction in the inventory of a normal pharmacy in order for that pharmacy to remain competitive and still give full service?

MR. GESER: Forty per cent of the drugs on the market now are what is called "multiple source drugs." So you are really dealing with a reduction in inventory within that 40 percentile. Within that 40 percentile, I would guess that you might be able to reduce that by half to, let's say, 20 per cent.

ASSEMBLYMAN HERMAN: So, basically, you could reduce your inventory investment by about 20 per cent.

MR. GESER: You could reduce it a little further, because you would be reducing the inventory cost per item per unit by eliminating the higher price. So, while you would reduce it in half, it might represent 60 per cent within the 40 per cent, or about 25 per cent.

ASSEMBLYMAN HERMAN: Thank you very much.

ASSEMBLYMAN BAER: Assemblywoman Curran.

ASSEMBLYWOMAN CURRAN: Have the pharmacists in the State made any effort to go into some kind of cooperative buying program?

MR. BELL: Some counties have done that.

ASSEMBLYWOMAN CURRAN: Has it been successful?

MR. BELL: It has been successful in, I think, Middlesex County, Burlington County, and Essex County where groups of pharmacists have gotten together and received permission from physicians to interchange brands.

ASSEMBLYWOMAN CURRAN: That's not my question.

MR. GESER: On top of that, there has been cooperative buying on those brands interchanged. It's a two-part operation.

ASSEMBLYWOMAN CURRAN: Perhaps this is not practical from your standpoint, but theoretically,

without anybody's permission, and without any effort to limit your inventory in regard to any one area, you could still look into the whole question of cooperative buying across the board, couldn't you?

MR. GESER: Yes, we could.

ASSEMBLYWOMAN CURRAN: What I am really asking is this: Is that feasible? Is it something the State Board of Pharmacy has encouraged or should encourage? We are told that one of the reasons your costs are so high is that you cannot really compete. You are paying three times as much per hundred---

MR. BELL: In cooperative buying, we can only buy in large quantities, and therefore repackaging is not always permissible.

MR. GESER: I think the basic answer to your question is that it probably could be done, but, within the confines of a drug product selection situation, it could be done to a much, much greater degree where it would become economically dynamic.

ASSEMBLYWOMAN CURRAN: Of course. Thank you.

ASSEMBLYMAN BAER: You made reference to "a state sanctioned peer review program which would protect the public from occasional unconscionable prices." As you listened to the earlier testimony and the range of prices, did any of those prices strike you as "unconscionable"?

MR. BELL: I think there may have been one or two prices that sounded wrong or unconscionable, but, by means of a peer review, like we have set up with Medicaid, we can correct this situation with our members.

MR. GESER: Again, you had a couple of these situations where the low end was below cost, and they were used as loss leaders according to the data that we have. On the high side, yes, we do believe that some of those

prices were unconscionable. In a peer review program, they could be eliminated. As a matter of fact, I will say again that two years ago we suggested the possibility, although it wasn't extremely well thought out, of a peer review program to the administration. I regret to say that it did not fall on fertile ears, and it was not developed, perhaps because time didn't exist to do it.

ASSEMBLYMAN BAER: Do you have any knowledge personally of unconscionable prices being charged?

MR. GESER: If we did, we would try to correct it. When they are called to our attention, we do. We have made it known to the public, through press releases and other mechanisms, that we want to hear about, and be sensitive to, their complaints. I will tell you, as a matter of fact, that, when we have had complaints, we have called the pharmacist to find out the justification. When he was wrong, we told him he was wrong and that it should be corrected.

ASSEMBLYMAN BAER: I'm not sure if you are saying that you do know, of your own knowledge, that there have been unconscionable prices charged.

MR. GESER: If I can extract from your question the word "unconscionable," because that becomes a subjective analysis---

ASSEMBLYMAN BAER: That is the term you used in your testimony.

MR. GESER: That's a judgment, though. In some instances, I am saying, based on our experiences, prices seemed to be out of line with reality. In those instances, we have taken corrective action with those pharmacists, including suggesting refunds.

ASSEMBLYMAN BAER: What I am getting at is this: You are suggesting here a measure that will deal with unconscionable prices which most of us, although we

cannot define it exactly, think about in terms of being something absolutely outrageous. I am puzzled by your lack of certainty as to whether anything like this is being charged. If this is so rare, then what you are proposing will not be effective in dealing with the high pricing problems that are wrong, to use your term, that do exist today. Since "unconscionable" is not just a casual word but has been chosen for use here - and, in fact, in other consumer legislation in effect, it has a very specific meaning - I am trying to get a clear picture as to whether or not you feel that the high prices that you are aware of fall within the definition of "unconscionable" and whether or not that will be effective in dealing with them.

MR. GESER: I would say from time to time, yes.

ASSEMBLYMAN BAER: You feel that unconscionable prices are being charged today in some cases?

MR. GESER: In very rare situations, yes, but it is not a common practice. I do have to say to you that our degree of knowledge in this area is limited by people such as Mr. Givens, from the Federal Trade Commission, who have made it very clear to us that, within the anti-trust limitations under which associations operate, we are not permitted to maintain a standing review of prices in our own field. That would become a violation of the anti-trust laws, and we have been told this by the FTC and the Justice Department pretty continuously. That is the reason we went to the state government back in late 1973. We felt that a cooperative effort that would not violate the anti-trust laws would be better and would be legally safe for us.

ASSEMBLYMAN BAER: Are you saying that, from a legal point of view, a peer review program that would be in conflict with the anti-trust act, if undertaken by the industry alone, would become exempt from being in

violation of that federal act just because it had the State's sanction and was enacted and authorized by state law?

MR. GESER: No, I'm not saying that at all. I am saying that, at some point in the game, a joint effort between an industry and a government is legal, whereas, if the same thing were done by the industry alone, it might not be deemed legal by the Justice Department. Now, where that line is has not been drawn by Justice at this moment. We were willing to try to analyze it for both improved service and quality of service for the pharmacists' patients in New Jersey. We had hoped to progress a little further along those lines, but we were unable to at that time. Mrs. Annich mentioned peer review from time to time. I don't know what her definition is, but perhaps, in view of her comments, there might be more fertile ground now than existed before.

ASSEMBLYMAN BAER: You indicated that this peer review is something that you have developed and suggested previously. Is it something that you have developed to the point of having a reasonable outline as to how it would work and what it would do?

MR. GESER: We have some goals, but we never developed a framework, because, as I said, when we met with people in the government at that time, there was not sufficient affirmative encouragement to go ahead beyond that point.

ASSEMBLYMAN BAER: You didn't have an outline then?

MR. GESER: It was new ground. We really weren't sure where it was going. We did not have the framework; we were looking for a framework.

ASSEMBLYMAN BAER: I would like to request that you submit, during the period the record will be open,

whatever further details you have on this including that which was presented to the administration a couple of years ago regarding the goals. I don't want to take the time of the committee and go into that now. I would also like to ask you to amplify on those goals even further than you did previously to the administration, I would like you to indicate what might be in the program, and I would like you to set forth how that would not run afoul of the federal anti-trust act. I would appreciate your submitting that information to us within the next three weeks.

MR. GESER: We'll do our best.

ASSEMBLYMAN BAER: Thank you very much for your testimony.

(Discussion off the record.)

Dr. Papier of the New Jersey Optometric Association will be the next witness.

C H A R L E S S. P A P I E R: Thank you, Mr. Chairman. I am Dr. Papier, President of the New Jersey Optometric Association. I will refrain from reading my prepared statement in the interest of time. However, you have copies of it, and I would like to have it included in the record. My remarks will be confined solely to A-3263. For the record, I would like to say that I think it is basically wrong that you have combined these two areas into one hearing. I think, by combining these, pharmacy and optometry, you are assuming that they have similar problems, and they are as different as apples and oranges. (See statements at 39 X and 92 X.)

The New Jersey Optometric Association is known throughout the country and throughout the world as having a model optometric law. It offers the highest type of eye care. It has a 16 point minimum examination to insure that the patient receives a total and

adequate eye examination. It just passed a couple of months ago a continuing education program that mandates 50 hours of continuing education every two years. It is the only independent doctor-patient health care profession in the State to mandate this, and it is probably the highest number of hours in the country, as far as optometry is concerened. I point these things out to show that optometry in New Jersey is concerned primarily with the welfare and benefit of the patient.

Obviously, New Jersey Optometry is opposed to this bill. If it passes, it will not lower the prices, but it will lower the quality of care. I think, primarily, these are the only two issues we have, in optometry, on A-3263.

The view of the Department of Consumer Affairs has been solely that it will lower the prices insofar as the appliance is concerned. For the last several weeks, we have all read in the newspaper, the Newark Star Ledger, where Mrs. Annich has alluded to studies showing that the cost of eye care will decrease with advertising. We have refuted her all along, and today Mrs. Annich said for the first time, "There truly are not a heck of a lot of statistics that indicate this." I am wondering why we are really here, because this is the only reason that Consumer Affairs has been pushing this bill.

On May 13, less than ten days ago, our office in Trenton, the New Jersey Optometric Association, received a telephone call from the Office of Consumer Affairs asking us if we had any information that we might supply to them. Obviously, the call was from a secretary who was not aware of the situation because, if we did, we might not be inclined to offer it. But it indicates that even ten days ago the

Consumer Affairs Office did not have statistics showing where this would lower the cost of eyewear.

We do know, however, that, if this passes, it certainly will lower the quality of eye care. If this passes concerning eye care, we are talking about inferior materials. Unfortunately, the lay person does not realize that, in your glasses, Mr. Baer and Mrs. Croce, there is a choice of first quality, second quality, etc. This is unfortunate, but this is true. Inferior materials will be part of the average pair of eyeglasses. What will happen to the quality of eye care if advertising comes into being: high volume practices, bait and switch tactics, high pressure sales techniques with bonus incentives, one-price advertising, and less professional time devoted to each patient. I think this is a key, because, if it passes, the optometrist will have to see more patients in a shorter period of time in order to cover the cost of advertising, and he will, then, have to take time away from each patient.

I would like to go back to one statement made by Mr. Givens this morning where he minimized the optometric examination. He said, "The appendix operation is not the same," and I agree with him. In many cases, the vision examination is many times more important than an appendix examination. Little does he realize what constitutes an eye examination, but it can mean the difference between life and death many times, because we are able to detect tumors behind the eye before they appear anywhere else. We examine the eye for pathology, for glaucoma, and for cataracts, etc. If our time is cut because we have to see more patients, we are certainly going to take time away from the extensive retinal examination that detects these problems that can lead to blindness or even death.

I would like to read one thing, if I may, and I think it explains it more eloquently than all of the material that we could write. This was a statement by Governor Richard Hughes when he signed the amendment to statute 4512 which is now being proposed for deletion. He signed it on December 23, 1963.

"I have today signed Senate Bill 77, which operates to prohibit the practice of optometry in mercantile establishments.

"In this day and age, it is beyond dispute that the practice of optometry is no ordinary trade or occupation to be pursued in conformity with the procedures of the market place. Optometry is a learned profession, characterized by our Supreme Court as 'an applied branch of the science of physiological optics, directed to the improvement of visual acuity through the correction of refractive errors.'" The Governor went on to say, "Those privileged to practice this highly skilled calling not only serve the public interest, but also minister to one of the most vital of all physical needs, the care and treatment of the delicate and vulnerable eye which may in a real sense be regarded as a lifeline to life itself.

"Objectors to enactment of Senate Bill 77 have maintained that a commercial setting cannot impair the high professional standards expected and required of the optometric profession. But it is common human experience that like begets like. The relationship between the optometrist and those whom he serves is, or should be, no less personal and dignified than the bond between attorney and client, or that between physician and patient. It has long been considered in the public interest to isolate those professions from the arena of mercantile activity, for obvious and salutary reasons. Is there any less reason to remove a profession which

involves the scientific correction of human vision from that environment?" He went on to say, "No profession is practiced in a vacuum, and it seems unrealistic to suppose that a profession practiced in a commercial milieu would not in time inevitably acquire a commercial flavor. The profession of optometry is too intimately involved in the health and well being of our citizens to risk the perils inherent in such commercialization. No erosion of professional standards has ever occurred overnight. This takes time and exposure to alien elements which, though good in themselves, have no proper place in the formation and maintenance of the criteria by which a learned and distinguished profession must live unless it is to die from a dearth of public confidence. It is never too soon to detect potential weaknesses and to erect appropriate safeguards. It can become too late.

"As Governor of this State, and as a former judge of the Supreme Court, I have always disapproved of the practice of placing unwarranted restrictions upon a lawful occupation by investing that occupation with a professional status which it does not in fact possess." Governor Hughes continued, "But I am convinced that the practice of optometry entails a high professional dignity and sense of responsibility which transcends and repels any overtones of ordinary commercial endeavor. I am not unmindful that some will be inconvenienced by enactment of Senate Bill 77. To those persons I say that this law reflects a measure of their professional stature and prestige. They should be proud, as I am, to be privileged to practice a profession which society has insisted upon elevating to the status of a public service. I am certain that the law which I have signed today must, in the long run,

benefit every member of the optometric profession in the coin of renewed public confidence and esteem."

We cannot believe that circumstances have changed since that statement was made by the Governor of New Jersey. I point this out because it is very interesting that, with all the rhetoric that can be spoken or written on this subject, this morning CBS interviewed three or four of us for a forthcoming program on the pros and cons of this. The interviewer listened to us go through a lot of this rhetoric, but he was interested in one thing: He was interested in the reaction of the consumer.

In the paper last week, I made a statement questioning the motivation of Mrs. Annich. In one of the papers I questioned the motivation of the haste and asked if Mrs. Annich is truly representing consumer interests. Channel 2 television was much more interested in this this morning.

I have here petitions, and I'll read the text. There are close to 10,000 names of consumers on the petition garnered in only the last six days. I will read what the consumers signed:

"Petition to the New Jersey Legislature: As a patient of Dr. (name) of (city) New Jersey, I strenuously object to Assembly Bill 3263 which would force the commercialization of a health care profession without consideration for the quality of service to which I am entitled and have come to expect from the optometric profession. To subject the professional care of my eyes to the commercial control of the market place where economic interests supersede professional judgment is not in the best interests /of me/ or that of other consumers. I urge you . . . to defeat this attempt."

In only six days we have garnered close to 10,000 signatures---

ASSEMBLYMAN HERMAN: Are they all from Byron's district? (Laughter)

DR. PAPIER: To answer your question, they obviously come from all parts of the State.

Since you say that the record will be open for three weeks, we will be glad to secure more names for you. The point that I am trying to make is that the consumers themselves do not want a lowering of the quality of eye care that they have been used to for many years in this State.

Optometry is certainly not alone in its concern over this destructive legislation. Our position is shared by every independent health care profession in New Jersey, as evidenced by the following communications which have been previously sent to the committee:

"The Medical Society of New Jersey is opposed to A-3263 because it will, in contravention of human decency and good taste, permit the huckstering and gross commercialization of health services. Further, there are no circumstantial guarantees that optometry services will be rendered at a lower cost to the public. In fact, the employment of advertising and other commercial practices will inevitably increase the cost to patients."

"The New Jersey Podiatry Society feels A-3263 is a retreat from professionalism and would be detrimental to best interests of the public. There is no evidence that price advertising reduces the cost of health care. Experience has shown that advertising prices and permitting professional practices in retail or commercial stores does lower the quality of health care delivered."

"The New Jersey Association of Osteopathic Physicians and Surgeons are opposed to bill A-3263 on the basis that price advertising would not lower the cost for the consumer nor would it guarantee the consumer

better quality service. Also legislation may be introduced to allow other professions the same advertising prerogative which would lead to care gauged by advertising rather than concern."

"The New Jersey Dental Association believes A-3263 is a retreat from professionalism and would be detrimental to the best interests of the public. There is no evidence that price advertising reduces the cost of health care. Experience has shown that advertising prices and permitting professional practices in retail or commercial stores does lower the quality of health care delivered."

I disagree again with Mrs. Annich in regard to the question that was raised this morning, "Why are you picking on optometry, for example, when you do have in mind a total study of the whole health care profession?" She replied, "Because they have hard goods." I might point out that dentists also have hard goods; they have false teeth and dentures. So do physicians; you need a prescription for diaphragms and neck collars. So I point out to you again that apparently this is a movement to allow advertising in all the health professions without basic reasons and without specifics to show that it will lower the costs. None have been forthcoming except one statistic that Mrs. Annich used. She alluded to a 1972 study by Professor Lee Benham which showed that, in a few States, it did raise it. If you look at statistics - and we all know how to play with statistics - we could take away the one State of Texas, and it would show that instead of reducing it, the cost of eye care went up 44¢. If you took away two of the extreme States, it would go up $3.28. I maintain that these statistics--- This is truly the only thing available in the country, because we have looked, and Mrs. Annich has looked, and there are no valid statistics. So I urge you not to rush

into a situation where you will be dealing with the vision of the people of this State.

ASSEMBLYMAN BAER: Thank you, sir.

Are there any questions? Mr. Rys.

ASSEMBLYMAN RYS: Doctor, would you describe more fully the bate and switch routine?

DR. PAPIER: If I may, I would like to introduce Mr. Dennis Young, the Executive Director. I think he can answer that.

MR. YOUNG: I will try to describe the bate and switch routine as far as commercial practices are concerned. One of the concerns of the Association is the commercialization of optometry by permitting lay corporations or lay interests to own an optometric practice, or employ an optometrist, which is gauged solely on the number of optical appliances that are sold and not really on the professional care of the patient. Bate and switch, as far as optical appliances are concerned, certainly could involve a practitioner writing a prescription for a bifocal, and instead of selling the bifocal, the optician would then sell two pairs of glasses because of the bonus incentive for two pairs of glasses.

There are a number of instances of bate and switch; it's common terminology. When advertising is opened up and a frame is advertised for $4.50, when you go into the optician, that frame will not be available or, if it is available, you wouldn't want to wear it. This is a common tactic whenever advertising is opened up, and I see no reason why it would be any different if optometry were commercialized.

DR. PAPIER: Unfortunately, with any type of advertising, the poor, the aged, and the people who need eye care the most are the ones who are hooked

into the bait and switch and every other advertising gimmick, and their eye care will suffer.

ASSEMBLYMAN BAER: Mr. Herman.

ASSEMBLYMAN HERMAN: You mentioned eliminating the State of Texas from the statistics. Why would you eliminate Texas from the evaluation as not being representative?

DR. PAPIER: Attached to the material are three pages which explain the situation in Texas.

ASSEMBLYMAN HERMAN: Could you summarize it in a couple of sentences? In your own words, does it go to the question of cheaper products?

DR. PAPIER: It goes to everything you could imagine, yes, sir. It goes to bait and switch. It goes to the fact that lay people are now the boss. The professionals are now under the direction of lay persons insofar as hours and, quite often, insofar as salaries. He is at their mercy, and he must do what they say. Their primary concern, when you get into lay people involved in eye care, is the dollar, and professional services do suffer.

ASSEMBLYMAN HERMAN: Are you saying, then, that we would have almost a "para-optometrist"?

DR. PAPIER: No, don't misunderstand me. They are qualified, registered optometrists, but they are now working for a lay corporation.

ASSEMBLYMAN HERMAN: That is not my question.

DR. PAPIER: I am trying to tell you some of the ills of---

ASSEMBLYMAN HERMAN: Do any of these firms, under the control of an optometrist, use lay personnel in making examinations?

DR. PAPIER: No. That's a violation of the law, and they would be thrown in jail if they did.

ASSEMBLYMAN HERMAN: I just wanted to clarify that.

That, however, does not enter into the present situation. The point I want to raise next is this: Let's take an average eye examination for a new pair of glasses. Could you possibly break it down percentagewise, without giving me what the average cost of an eye exam plus glasses would be, as to how much of the overall fee would constitute the glasses and how much of the fee would constitute the eye examination?

DR. PAPIER: Are you talking about Texas now or New Jersey?

ASSEMBLYMAN HERMAN: I am talking about New Jersey.

DR. PAPIER: Percentagewise as far as services rendered versus the materials?

ASSEMBLYMAN HERMAN: Right. In other words, if I came to you for an exam and new pair of glasses, and you gave me a complete eye examination, and I then purchased an average pair of glasses, I would like to know approximately what portion of my bill would be attributable to the examination and what portion to the glasses.

DR. PAPIER: You're---

ASSEMBLYMAN HERMAN: You can use figures if you wish.

DR. PAPIER: You're hitting me with a difficult question, because there are so many variables. The one nonvariable, obviously, is the examination. That is a set fee for whatever the doctor determines it should be. Whether it's $20, $30, or $50, it's the value that he places on his services. When you get into glasses, unfortunately you get into an area where, especially today with fashion, a frame can be $13 or it can be $133, if the lady wants diamonds, etc. So, again, it is very difficult. As far as lenses are concerned,

there is no such thing as an average prescription, because all of our eyes are different. Mrs. Croce's glasses are completely different than Mr. Baer's. We get into bifocals; we get into trifocals; we get into tints. It is very difficult for me, without going to my figures---

ASSEMBLYMAN HERMAN: I'll be very candid with you. I find it very difficult to believe that, over a period of a month or two, with a number of patients coming through your office, there isn't an "overall average charge" per patient. Part of that average charge would have to relate to the examination and part would have to relate to the glasses. I'm not asking you for a specific dollar amount. But statistically what percentage of the charge relates to the glasses and what percentage relates to the physical examination? That would tell me your percentage of profit on the goods and your remuneration for time and service.

DR. PAPIER: I may have to educate you a little.

ASSEMBLYMAN HERMAN: Perhaps you'll have to educate me a lot.

DR. PAPIER: Let me put it this way: An examination in my office is $20.

ASSEMBLYMAN HERMAN: That would be for approximately how long?

DR. PAPIER: If a person requires a half hour or an hour---

ASSEMBLYMAN HERMAN: There's no difference in the charge?

DR. PAPIER: If I have to have them back, yes, of course.

ASSEMBLYMAN HERMAN: I mean between a half hour and an hour.

DR. PAPIER: No. It can vary depending on whether or not it's a new patient, the severity of the case, etc.

ASSEMBLYMAN HERMAN: O.K. Please continue.

DR. PAPIER: If a person requires glasses, normally - and this is in the Texas testimony, and it's true in most of the cases in optometry throughout the country - the man provides the materials at cost and charges what we call a "technical service." This is the way we do it in Medicaid in this State, and this is the way we do it in third party payment systems, etc. So, when you talk about a mark up, it's not all for the glasses, because, if glasses are needed, there is also a professional fee involved.

ASSEMBLYMAN HERMAN: A professional fee of normally what, sir? Excuse me, would you repeat your answer to the last question? There are people in the back of the room who were unable to hear it.

DR. PAPIER: I will repeat a bit of it. I am using myself as an example. My examination fee normally is $20. If there is something over and above the normal, or if I have a patient back for another visit, it obviously is more. Also, if I have to use longer techniques, it obviously is more. But we are trying to talk in terms of the norm, and the normal examination is $20. Let's say that a person picks out an average frame. For example, Mr. Baer is wearing an average frame, and we'll use Medicaid for the example. Medicaid pays the doctor $13 for the technical services involved - this has nothing to do with the materials - in the fitting of the frame and all the things that go into making that pair of glasses fit those eyes. This includes dispensing services, handling, adjustment, etc. This, again, obviously has nothing to do with the examination. Then Medicaid takes care of the material cost which is minimal. So, in answer to your question, in my case there is a $20 examination fee - Medicaid pays $21 now - and a $13 technical service fee for the professional services involved.

ASSEMBLYMAN HERMAN: If it's a non-Medicaid patient like Mr. Baer, average guy with average glasses, what would you charge?

DR. PAPIER: I don't do a lot of that myself. My girl does it.

ASSEMBLYMAN HERMAN: I'm sure she gets it from somewhere.

DR. PAPIER: I'm sure, but it was some time ago. She does it, and I handle the patients. Unfortunately, professional men are the world's worst businessmen, so please bear with me.

ASSEMBLYMAN HERMAN: We'll bear with you.

DR. PAPIER: For the very average situation, maybe between $20 and $25.

ASSEMBLYMAN HERMAN: Would the $20 to $25 cover the cost of materials and the fitting in addition to the $20 for the examination?

DR. PAPIER: Right.

ASSEMBLYMAN HERMAN: So you are basically telling me that, on an average patient not covered by a special program such as Medicaid or other reimbursement, the cost of service is split about 50-50. It's about 50 per cent for the glasses, including the fitting, and 50 per cent for the examination. Is that correct?

DR. PAPIER: It's somewhere around there. Again, you asked me a question that I never consider, or haven't for awhile.

ASSEMBLYMAN HERMAN: You may when you get back to your office.

DR. PAPIER: I may not.

ASSEMBLYMAN HERMAN: I have one more question, and you may not be able to supply me with the answer today, but I would be interested in having the answer, because it might influence my reaction to this legislation. You mentioned earlier in your testimony the things that do not

show up in the price, namely, the thoroughness of the examination, tumor and eye disease detection, question of blindness, etc. During the course of a year, if you see 500 patients--- Obviously, you probably see more; I'm just picking a figure out of the air. Well, let's use 1000 patients. During the course of a year, if you happen to see 1000 patients, how many of those patients would you refer to someone else for additional medical evaluation and consultation based on the problems that are disclosed by your examination?

DR. PAPIER: Off-hand I cannot give you that, but we do have those figures over an extended period of time. We took a survey of our men in the past year and a half, and the survey covered thousands of patients.

ASSEMBLYMAN HERMAN: I would like to receive that information. I certainly would like to see it become a part of the record. I think it's an important piece of information.

DR. PAPIER: We'll send it to you.

ASSEMBLYMAN HERMAN: Thank you.

ASSEMBLYMAN BAER: Are there any other questions?

(No questions.)

Thank you very much for your testimony.

Mr. Katz will be the next witness.

J O S E P H W. K A T Z: Thank you very much, Mr. Chairman. You have copies of my statement, and I have trimmed it considerably, because I realize that the hour is late.

I am Joseph Katz, public affairs counsel and legislative agent for the Association of Optometrists and Opticians of New Jersey. We represent the major corporate optical firms which dispense prescription eyeglasses throughout the State. Our membership is composed of companies which conduct their business through trained and licensed ophthalmic dispensers and technicians.

As perhaps the most vital element in the highly competitive optical industry, which includes "guild" opticians, dispensing optometrists from whom you just heard, and a few - I think there are less than a dozen - dispensing ophthalmologists, medical doctors who also sell eyeglasses, as well as our members, we feel that we have been a particular target of present restrictive legislation and regulations. Indeed, it was only through a lawsuit and a ruling by the New Jersey Supreme Court in December 1970 that we were able to engage in business in New Jersey on any significant scale. The Board of Ophthalmic Dispensers and Technicians had attempted to impose a ban, by regulation, on any optical establishment doing business under corporate ownership. The court held that this was an unreasonable restraint of trade, and the significant growth of our member firms then began.

We strongly support Assembly bills 3263 and 3264. They are primarily designed to enhance competition and lower consumer prices through advertising. We are ready, willing, and able to meet our competition by advertising. We are anxious to announce the cost savings that we can provide the consumer, for example, by advertising discounts to senior citizens, which we are allowed to do now but are unable to tell anybody about, to labor unions, and to other consumer groups.

We have no fear concerning quality maintenance. There are boards that are formed to protect the public with regard to quality, the Optometric Board and the Board of Ophthalmic Dispensers and Technicians. That is their job, and, if they are doing their job, they will monitor the product. From the composition of these boards, which, historically, have been dominated by our competitors, we don't doubt that the closest watch will be paid by them to our product, and we welcome that.

We are most interested in another aspect of A-3263: the part that eliminates the prohibition on the practice of optometry in "any retail or commercial store or office not exclusively devoted to the practice of optometry or other health care professions . . ." This prohibition was enacted, as you heard, in 1963 after some heavy legislative activity, and it was ostensibly designed to protect the public from optometrists who might unnecessarily prescribe eyeglasses. The argument was that, if the optometrist practiced in a department store or other commercial establishment, there would be an economic inducement for him to prescribe glasses; his employer or landlord could twist his arm.

It ignored the fact that the most glaring economic inducement exists in the day-to-day operation of the dispensing optometrists, the people who lobbied this prohibition into law. The dispensing optometrist charges a fee for the examination and then earns a profit on the sale of eyeglasses. He can employ other optometrists and can operate branch offices. If there is a twisting of employees' arms, he is in a good position to do so.

The dispensing optometrists have argued over the years that their "professionalism" was a sure enough safeguard against such a conflict of interest. Isn't an optometrist who works in Bamberger's or in an optical center licensed by the same board? Doesn't he even belong to the same professional association? Isn't he equally as professional? Why shouldn't he be allowed to practice his profession as a tenant or employee in one of our establishments or one of the department stores or any other place he chooses? Indeed, the law right now contains a grandfather clause permitting any optometrist practicing in a commercial

establishment prior to January 1963 to continue in his existing location.

Competition since 1971 has stepped up in New Jersey. Our membership has grown; we have had to compete, the established opticians have had to compete, and the optometrists have had to compete. I think the court decision in 1970 has comparatively lowered the price of eyeglasses in New Jersey, and I think the enactment of A-3263 and A-3264, which, so far, I haven't heard any opposition to, could make us even more competitive, particularly with New York.

I want to say one word which I think differs from what you have heard about A-3263. We do not support price advertising for eye examinations. We think that there is a degree of professionalism there, and we wouldn't want to see a price war. But we do strongly support the renting of space by, or the employment of, optometrists in commercial establishments, and we strongly support the opportunity to advertise the fact that you can have your eyes examined by a licensed professional in one of our centers, in a department store, or in a similar place.

This Legislature, and this committee, has led the way in scoring significant gains for the New Jersey consumer in many areas. The most recent example of your leadership was in the final legislative passage of the fair trade repeal, which first cleared this committee. We think you can accomplish another gain of comparable magnitude by reporting A-3263 and A-3264 favorably and urging an early floor vote.

ASSEMBLYMAN BAER: Thank you, Mr. Katz. Are there any questions? Mr. Rys.

ASSEMBLYMAN RYS: You mentioned in the first part of your testimony giving discounts to senior citizens. What is the percentage?

MR. KATZ: It varies. Not all of our members do that, but some of them do.

ASSEMBLYMAN BAER: One of your statements was not clear to me. You said that you do not advocate the advertising of the price of an examination, but you do support advertising that your eyes can be examined. I am not sure from that what you are advocating insofar as the price of the glasses themselves.

MR. KATZ: We feel strongly that you should be able to advertise the price of glasses, and we feel that there are tremendous safeguards against bait and switch and any other unconscionable tactic. We have a strong consumer fraud act here, and we have strong Federal Trade Commission regulations governing eyeglass quality. We feel that they are ample safeguards, and we would support stronger safeguards against false advertising. The public has to confront advertising in every other area in which it makes purchases, and we feel that the State of New Jersey - and wherever federal restrictions or regulations are available - is well able to serve the public and guard it against abuses in this area.

ASSEMBLYMAN BAER: Could you submit to the committee more detailed information on the safeguards that you feel are adequate? Of course, we are familiar with the Consumer Fraud Statute, but we would appreciate your going into how the safeguards would be effective against specific abuses. You also spoke about other proposed means of dealing with abuses. If there are specifics that you have in mind, we would appreciate hearing those too.

MR. KATZ: I am not an expert on abuses in eyeglass advertising in New Jersey, because we have had no advertising, but I do have Federal Trade Commission regulations, and I will query members about their experiences in other States and provide you with a letter.

ASSEMBLYMAN BAER: One of the things that has come up in this discussion, in addition to whether or not there should be advertising, is the question of whether or not there should be restrictions on the advertising. If you wish to submit testimony relating to restrictions that you feel are either needed or reasonable, the committee would welcome that testimony.

MR. KATZ: The only restriction we would support would be on the price advertising of professional services, such as an eye examination. The only restriction we would support on price advertising of eyeglasses would be fraudulent advertising.

ASSEMBLYMAN BAER: Assemblyman Herman.

ASSEMBLYMAN HERMAN: I believe you stated that there are ways of safeguarding against bait and switch, etc., and that you have recommendations. What we are saying is that, if you have recommendations, we would like to hear them so they can be considered.

MR. KATZ: We would be glad to submit them.

ASSEMBLYMAN BAER: Mrs. Croce.

ASSEMBLYWOMAN CROCE: How can you put a set figure on a pair of frames or lenses? How can you possibly know how much they cost?

MR. KATZ: I think that can be done.

ASSEMBLYWOMAN CROCE: How?

MR. KATZ: By a description of the frames. I can give you examples of that.

ASSEMBLYWOMAN CROCE: Would there be different prices?

MR. KATZ: Sure. When you go to an optician, he shows you a variety of frames. I'll be glad to give you some detailed information including ads in the States that permit it.

ASSEMBLYWOMAN CROCE: But you wouldn't advertise for an eye examination?

MR. KATZ: No, not the price. I think the only advertising that should be permitted is that eye examinations are available by a professional optometrist or ophthalmologist or any licensed practitioner.

ASSEMBLYWOMAN CROCE: What is the membership in your Association?

MR. KATZ: We represent approximately 45 establishments in New Jersey.

ASSEMBLYWOMAN CROCE: How many opticians?

MR. KATZ: I'll guess about 150 opticians.

ASSEMBLYMAN HERMAN: What is that compared to the total number of opticians in the State?

MR. KATZ: I don't have the figures, but I can get them for you.

ASSEMBLYMAN HERMAN (to member of the audience): Do you know how many opticians there are in New Jersey?

MEMBER OF THE AUDIENCE: About 750 actual lisencees plus apprentices.

ASSEMBLYWOMAN CROCE: How many optometrists?

MR. KATZ: We don't represent any optometrists. We cannot. (See page 62 X for material submitted by Mr. Katz.)

ASSEMBLYMAN BAER: Are there any other questions?

(No questions.)

Thank you very much for your testimony, Mr. Katz.

We would like to hear from one more witness today, Jack Voloson of New Jersey Senior Citizens. Is Mr. Voloson here?

(No response.)

In that case, we will now recess the hearing until 10:00 tomorrow morning.

(Recessed until 5/23/75.)

A P P E N D I X

The remarks in this Testimony represent only the views of a member of the Federal Trade Commission Staff. They are not intended to be, and should not be construed as, representative of an official Federal Trade Commission policy.

EXCERPTS OF STATEMENTS BY

RICHARD A. GIVENS

REGIONAL DIRECTOR

FEDERAL TRADE COMMISSION

BEFORE THE

NEW JERSEY ASSEMBLY COMMITTEE

ON

COMMERCE, INDUSTRY AND PROFESSIONS

Newark, New Jersey

May 22, 1975

The economic effects of advertising prohibitions are no secret. They inhibit competition, result in higher prices and increase search costs to consumers.

In order to be competitive, sellers of prescription drugs and eyeglasses must be permitted to give the consumer all the information relevant to the sale of their product. That includes the price of that product.

Prohibitions on price advertising unnecessarily raise prices as shown by several studies, although these studies may differ as to exact methodology and numerical conclusion.

Based on a study, the Director of the Office of Policy Planning and Evaluation of the Federal Trade Commission estimates the consumer benefit from price advertising of prescription drugs for the United States as a whole would range from $43.7 to $795 million annually. This estimate is based on

a potential consumer shift to lower priced drugs and the fact that lower prices will probably bring into the market additional consumers whose prescriptions were formerly left unfilled or for whom prescriptions might not have been previously written because of price.

In terms of the eyeglass industry, it is possible to estimate the loss to New Jersey consumers by using a formula devised by Professor Lee Benham of the University of Chicago who has done a great deal of research in this area.

Based on 1968 figures, it is estimated that the people of New Jersey spent approximately $39,808,400 on eyeglasses. If we assume that prices are 25% higher due to lack of price competition, which is Professor Benham's lowest estimate of price distortion in those states having advertising restrictions, the loss to New Jersey consumers can be pegged at approximately $8,600,000.

In addition, I believe that requiring the posting of prices of certain commonly dispensed prescription drugs and permitting optometrists to practice in retail or commercial stores or offices would promote freer competition and result in substantial benefit to the consumers of New Jersey.

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Appendix

As of 1968 there were 675 active optometrists, 307 active ophthalmologists, and 337 active opticians in the State of New Jersey.*/ Multiplying these numbers of practitioners by their mean annual gross income,**/ we get a total of $67,372,000 spent yearly in New Jersey on eye care. Assuming that 3/4 of optometric sales, ½ of 22% of ophthalmologic sales and all opticianry sales were on eyeglasses,***/ the people of New Jersey spent approximately $39,808,400 on eyeglasses.

If prices were 25% higher (Benham's lowest estimate of price distortion) because of advertising restrictions, we can use the following formula to determine redistributive loss from advertising restrictions:

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*/ Optometrists Employed in Health Services, United States - 1968, U.S. Department of Health, Education and Welfare, (HSM) 73-1803 (1973); Ophthalmology Manpower, A General Profile, United States - 1968, U.S. Department of Health, Education and Welfare (HSM) 73-1800 (1972) and Opticians Employed in Health Services, United States - 1969, U.S. Department of Health, Education and Welfare, (HSM) 72-1052.

**/ For optometrists see, Chipman, F. AOA 1969 Economic Survey, Part IV, Journal of the American Optometric Association, 5.41 #6, June 1970, p. 551; for ophthalmologists see, Owens, A. Solo vs. Partnership: A New Economic Comparison, Med. Econ., March 15, 1971, p. 86. I had no figures for opticians but estimated that their income would bear somewhat the same relationship to optometrists income as optometrists income bears to ophthalmologists income.

***/ Optometrists both fill their own prescriptions and also some of those from ophthalmologists, hence 3/4; 22% of ophthalmologists sell eyeglasses (see, Ophthalmology Manpower: Characteristics of Clinical Practice, United States, 1968, Dept. of Health, Education and Welfare (HSM) 73-1802; and ½ of the sales of the 22% are probably from the sale of eyeglasses.

$39,808,400 = X + .25 X = Total spent on eyeglasses in New Jersey.

-$31,846,720 = X = Amount that would have been spent without advertising restrictions.

7,961,680 = Redistributive loss from advertising restrictions.

The dead-weight loss (loss sustained by those consumers who do not purchase eyeglasses at present prices but would purchase them at the competitive price) to the New Jersey economy from these restrictions is derived from the following formula:

$$W = \tfrac{1}{2} \cdot R \cdot e \cdot (PD)^2$$ */

The elasticity of demand was estimated by Benham in his second article to be -.58. **/ Using our data we get

$$W = \tfrac{1}{2} \cdot (39,808,400) \cdot .58 \cdot (.25)^2$$

$$W = \$721,527$$

Combining the redistributive and dead-weight loss we get $8,683,207 total loss from advertising restrictions in New Jersey.

*/ Where W = dead-weight loss, R = total revenues spent on eyeglasses, e = elasticity of demand for eyeglasses and PD = the price distortion from advertising restrictions.

**/ Lee and Alexandra Benham, Price Structure and Professional Control of Information, March, 1973, working draft.

Statement made by
Virginia Long Annich
Acting Director
New Jersey Division of Consumer Affairs
May 22, 1975

A. PRELIMINARY STATEMENT

In order to save the Committee's time, I have attempted to ascertain the nature of the presentatations of the other proponents of the repeal of advertising bans so as to avoid unnecessary duplication. I wish to make it clear, however, that I rely by references upon their expressions which I have not included herein. I have arranged my remarks to cover 2 subjects: drug advertising and posting; and optometric advertising and the commercial outlet exception. Many of the arguments set out at length in support of my position with respect to drug advertising are equally applicable to optometric advertising but for the sake of brevity have merely been alluded to in the second portion of this presentation. The full arguments are incorporated in the record as if fully set forth.

B. INTRODUCTION

The bills which are under consideration today will lift the restrictions against advertising presently embodied in the statutes governing the professions of pharmacy, optometry and opthalmic dispensing. In my view, these repealers are of great significance to the people of this State. They should be viewed not only in terms of a cost savings, but because they

constitute a legislative expression that our priorities, which were originally fixed in a day when all political power was in the hands of a favored group of professionals, are about to be reordered in accordance with the concept of the public good. In this respect, it should be observed that many persons are here today to speak in favor of the bills. All that they have in common, whether from the Federal Trade Commission, the Public Advocate, the Public Interest Research Group, the Division of Consumer Affairs or local offices of Consumer Affairs, is that they have neither an economic nor a philosophical axe to grind in terms of the regulated professions or the abstract principle of advertising. They have merely weighed all of the competing considerations in the balance and concluded that the interests of New Jersey's citizens are not served by the advertising bans. I commend their statements to you, therefore, with the added notation that they are entitled to great credibility because of the impartial and objective approach of the proponents.

C. WHO BEARS THE BURDEN

One more point is worthy of note at this juncture: there is a basic fallacy in the approach which has traditionally been taken to this area and which has fostered the kind of protective legislation which is sought to be repealed herein. Representatives

of the public interest and indeed the people themselves have been required to justify statistically the need for a repeal of the advertising bans. The burden of proof has been laid at the people's door. But the shoe should be on the other foot, for the burden should be on the party seeking restraints (such as those on advertising) to justify the need therefor. And the obligation which the seekers of restraints must meet is to affirmatively show that such infringements bear a reasonable relationship to the ends sought to be achieved and are related to the public health, safety, morals and welfare. The bans on advertising on their face bear no such relationship to the public interest and the burden should therefore be on the supporters of the ban to come forward with empirical evidence on its behalf. It is not enough for the supporters to sit back and say they are unimpressed with the people's case while asserting vague claims of health endangerment and anti-professionalism. The obligation is not on the people to attack the advertising ban, but on its champions to sustain it with firm facts and statistics, (to which, incidentally, they have greater access than the public). This approach cannot be overemphasized since it places the issue in its proper perspective.

D. DRUG ADVERTISING AND POSTING

The public will benefit in two distinct ways when prescrip-

tion drug price information through advertising is available. First, removing the ban on advertising will have the overall "laudatory" effect of lowering prescription drug prices. Since the retailer takes at least 40 cents of each prescription drug dollar* paid by the consumer, there can be little doubt that there is room for competition and price reduction. Reports and Recommendations of the Task Force on Prescription Drugs, prepared by the U.S. Department of Health, Education and Welfare and published by the Subcomm. on Monopoly of the United States Sen., Select Comm. on Small Business, 90th Congress, 2d Sess. 20 (Comm. Print 1968, hereinafter referred to as HEW Task Force on Prescription Drugs) "By prohibiting the advertising of lower prices, it (the statute prohibiting such advertising) destroys the essence of such competition: i.e., making the public aware of the differences in prices." Comment - Prescription Drug Pricing in California: an Analysis of Statutory Causes and Effects, 49 Calif. L. Rev. 340, 347 (1961.) In fact, one commentator has suggested that the need for such economic information in this day and age may even be more vital to the public welfare that its interest in " ... political or other non-economic expression." Note, Freedom of Expression

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*Some have suggested a higher figure -- for example, the Lilly Digest.

in a Commercial Context, 78 Harv. L. Rev. 1191 (1965.)
The United States Department of Justice has concluded that the "major effect of legislation or regulations prohibiting price advertising of prescription drugs is to reduce retailer incentives to engage in price competition with resulting higher costs to the public." Research Paper and Policy Statement of the United States Department of Justice Regarding State Restrictions on the Advertising of Retail Prescription Drugs, prepared by the U.S. Department of Justice, 1972, p. WV. (Hereinafter referred to as Department of Justice Policy Paper on Advertising of Prescription Drugs.)

Second, the availability of price information will aid the consumer in making an intelligent decision as to where to purchase medication. Of course, factors other than price may influence a consumer's decision regarding which drug store to patronize, but price is certainly a vital consideration. Without information as to price, consumers run the substantial chance of paying more for their prescription drugs than is necessary. "There is an obvious need for patients to be able to determine readily the prices charged by the various pharmacies in their community." HEW Task Force on Prescription Drugs, supra at 20. Noting that an American Medical Association survey in Chicago showed price differentials of up to 1200% for the same amount of an identical drug and that a New York study showed the same drug ranged in price from $1.25 to $11.50,

the Justice Department concluded: "Differentials such as these can only exist when they are unknown to potential consumers, for, given a choice, most consumers would refuse to pay 10 or 12 times the going price for a drug available elsewhere." Department of Justice Policy Statement on Advertising of Prescription Drugs, p. XIV. The facts of price differentials speak for themselves.

I. PRICE DIFFERENTIALS

It is clear that the price of the same brand name prescription drug varies widely in similar locales. For example, a NYPIRG study in Queens in October of 1974 found the price of 40 tabs of Achromycin varied over 300%, 30 tabs of Darvon over 200% and 40 tabs of Terramycin over 300% in the same locale.

The Community Service Society of New York surveyed over 103 pharmacies in New York City in a report published April 10, 1975, and found a 260% spread on 40 tabs of Polycillin; nearly 600% on 40 tabs of Achromycin V.; nearly 500% spread on 100 tabs of Lanoxin. Moreover, comparing prices for 20 stores in the Flatbush section of Brooklyn, the Society found a 140% spread on 40 tabs of Polycillin and a 200% spread on Achromycin V. In central Staten Island, the Society conducted a survey of 10 stores (including 1 chain) and found a 100% spread on Achromycin V and a 300% spread on Lanoxin.

Likewise, the United States District Court, in the case of Virginia Citizens' Consumer Council v. State Board of Pharmacy 373 Fed Supp 683, 684 (E D Va, 1974), in striking down a pharmacy advertising ban, determined that the price of Darvon in Newport News ranged from $1.90 to $4.70.

Closer to home, during the weeks of May 12, 1975 and May 19, 1975, staff of the New Jersey Division of Consumer Affairs surveyed between 180 and 200 pharmacies across the state. The results of that survey are contained in a chart attached hereto as Appendix A. It supports our conclusions and indicates that in 21 pharmacies in Newark, for example, 30 tabs of Valium (5 MG) ranged from $3.28 to $6.75, with an average price of $4.90. In 16 pharmacies in Essex County, 40 tabs of Pfizerpen G, 200,000 units, ranged from $1.60 to $6.00, with an average price of $3.70. In 20 pharmacies in Mercer County, 20 tabs of Achromycin V (250 MG) ranged from $1.49 to $3.79, with an average price of $2.75. In 8 pharmacies in Union City, all located on Bergenline Avenue, 24 tabs of Polycillin (250 MG) ranged from $4.10 to $7.85, or an average price of $6.50, and in 6 cities in Monmouth County (12 pharmacies) 100 tabs of Lanoxin (25 MG) ranged in price from $1.25 to $6.29, with an average price of $2.62. In six pharmacies in Plainfield, 100 tabs of Orinase (50 MG) ranged from $7.97 to $14.50 with an average price of $10.67.

These are only examples. The point is clear, however, that there is a wide disparity between the prices of identical brand name prescription drugs in the pharmacies of the State and indeed often among the several pharmacies on the same block in the same city.

II. PROJECTED SAVINGS

Again, as has previously been observed, wide price differentials can only exist when they are unknown to potential consumers, for, given a choice, most consumers would refuse to pay 2 or 4 times the going price for a drug available elsewhere. Thus, the burden to the public because of the lack of price competition is enormous. The reason for this is that present advertising restrictions act as a disincentive for stores to engage in price competition. Likewise, advertising restrictions make it virtually impossible and more expensive for consumers to collect comparative price information. Thus, rudimentary theory would seem to indicate that repeal of the ban on advertising will make it easier for pharmacies to get the price message into consumer hands to the advantage of both parties -- reduced prices and increased business.

Therefore, it comes as no surprise that a recently pub-

lished doctoral thesis using sophisticated analysis of the fifty states concluded that drug prices will be reduced by three hundred million dollars by an overall repeal of advertising bans. Cady, Drugs on the Market: the Impact of Public Policy on the Retail Market for Prescription Drugs; Lexington Books, 1975. See also 1968 HEW Drug Task Force Report, and May 14, 1975 decision of 3 judge United States District Court in California in the case of Terry v. State Board of Pharmacy, which struck down California's drug advertising ban, noting its effect as an artificial inflator of prices which had the result of actually banning discounts (See Los Angeles Times, May 14, 1975, Appendix B.)

III. ARGUMENTS IN SUPPORT OF THE BAN

Having dealt then with the questions of cost differentials and potential savings through the repeal of the advertising ban, which of course are only a part of the question, it is essential to look to the justification for the prohibition against advertising. The ban, which is an exception to the natural competitive process, ostensibly has been premised on the need to protect the public's health and safety. But it is one thing to prohibit or reduce competition and dictate a particular retail market structure

on the grounds of public health or safety; it is quite another to raise the public health and safety banner to camouflage economic sanctions really geared to protect the vested financial interests of certain members of an industry or profession.

It is my opinion that the advertising ban on prescription drugs has no relationship to the public health and safety. In order to support this view, let us take the public health arguments one by one.

a. That advertising will increase unwarranted drug use by encouraging patients to pressure doctors for unnecessary prescriptions and larger prescriptions to enable the patient to take advantage of quantity discounts. As the Supreme Court of Pennsylvania observed of this argument in invalidating its drug advertising ban in Pennsylvania State Board of Pharmacy v. Pastor 441 Pa 186, 272 A2d 487 (1971) this argument assumes either unethical or illegal conduct by doctors and/or pharmacits, an assumption which the court refused to make. The court noted that the sale of prescription drugs was closely supervised and that other statutes, both state and federal, prohibited sales except by prescription. The court concluded that the highly regulated structure of the pharmaceutical profession, together with the fact that the comsumer cannot choose his purchases, made it "most unlikely that advertising the prices of retail prescription drugs would, or could, have any impact on the demand or consumption of such drugs." I also refuse to make the

assumption of unethical practice by physicians and pharmacists and leave such actuality to the relevant professional boards for action.

b. That advertising will cause a cutting of costs and reduce the availability of services. As far as we have been able to ascertain, there is no direct ratio between cost and services such as free delivery, charge accounts and evening hours in pharmacies. Similarly, the NYPIRG study previously alluded to found "no discernible link" between price and availability of service.

In 1974, the National Health Law Program on behalf of the Los Angeles County Health Rights Organization did a study of price levels and service levels in Los Angeles. The paper studied three services: free delivery, acceptance of major credit cards and evening and/or Sunday hours. They found that drug prices varied substantially on the same drug from store to store. However, of the three services studied, only the availability of free delivery showed any correlation to price level.

Our own investigators in the New Jersey price survey spot checked services rendered and found that in two downtown pharmacies in Plainfield offering identical services, including pick-up and delivery, the cost differential for the same 5 pre-

v. $26.65.) Thus, there is no evidence that a loss of services will occur if this bill is enacted.

c. That advertising will render the patient profile useless. In truth, the profile system can only be effective under a state-mandated pharmacy system requiring that the consumer shop in a single drug store. So long as the present system exists in which people deal with more than one pharmacy, the benefits of the patient profile system are more imagined than real. Obviously, each pharmacist will have only the record of the prescriptions he has dispensed. As such, the allegations that advertising will allow drug abusers to go undetected is baseless since they go undetected now if the abuser either cleverly or innocently has his prescriptions filled in more than one location. Likewise, representations as to the pharmacist detecting physician error and allergic reactions is equally emasculated. It would be wrong, therefore, to penalize the public by precluding advertising with its concomitant savings in the name of a system the benefits of which are indeed illusory. There is nothing to prevent a consumer who wishes to be monitored closely now from shopping in one pharmacy and nothing will prevent such occurrence under an advertising system.

d. That advertising is demeaning to professionals. I don't really know what this means except that perhaps it is not "classy" to advertise. But as I have repeated consistently, the power and prestige of the State of New Jersey should not stand behind a legislative scheme which grants class or status to one group at the expense of everyone else.

e. That price advertising might encourage pharmacists to purchase unusually large quantities of drugs, so as to obtain a

on the pharmacist's shelf for an extended period of time during which they deteriorate. As the Supreme Courts of several of our sister States have observed of this point, the sale of adulterated drugs is prohibited, and can subject a pharmacist to criminal liability as well as the loss of his license. With such stringent provisions, the additional prohibition on price advertising is clearly totally unnecessary.

f. That advertising will raise the prices of drugs. There are a few concepts worthy of examination in this regard. The first is that everything costs money and the question therefore is not whether cost is involved but whether the cost is out weighed by the social aim sought to be achieved. In this instance, I think it clearly is. First, the people will no longer be a captive audience, but rather will be able to shop intelligently and comparatively for drugs as for all commodities. Second, in terms of overall cost, while pharmacists who are now charging the lowest prices for drugs may be required to raise their prices a bit to meet advertising costs- those who are charging exhorbitant costs to the unsuspecting public will be required to lower them to compete in a competitive market, resulting in an all over cost reduction.

g. That advertising will cause unscrupulous practitioners to give improper professional services to the consumer. This essentially is the spectre of the unethical practitioner and is based on the premise that since the public is conditioned to think price, advertising plays into the hands of those professional more interested in their gross income than in the quality of their professional performance. Yet, if one looks at the record of professional boards over the years, or at the peer review committees or other internal

apparently very, very small. In any event, if a problem does exist, it is clearly within the jurisdiction of the Board of Pharmacy, which has the statutory authority. To discipline the unethical practitioner and, if necessary, remove his license.

h. That advertising will put the small pharmacist out of business. First, it is important to observe that there are no studies which have connected pharmacy closings to advertising laws. In fact, mere advertising reduction in price for many people will not outweigh convenience or any other service to which they have become accustomed and for which they will willing to assume a cost. Moreover the pressure which will be put on the inefficient and excessively profit oriented practitioner under the advertising scheme will serve to put the really marginal practitioner out of business. This will ultimately enure not only to the benefit of the consumer out of the efficient pharmacy as well. And the aggressive local pharmacist who has his finger on the pulse of what the people, who thinks in terms of cooperative buying, inventory turnover, and efficiency will surely be able to compete. But even assuming that this fear is legitimate, the question is whether it is a relevant consideration here. For it is a solely economic argument which, in my estimation, unlike the alleged public health arguments, is the true motivation behind continued support of the ban; namely, economic self-interest. Now, economic self-interest is not per se evil or unethical; we all share such interests to varying degrees. The question presented, however, is whether it is good social policy for the legislative power of this State to be used to the special economic advantage of some and the economic detriment to the bulk of New Jersey prescription drug consumers.

In this regard, it is true as the industry indicates that the price differentials on retail drugs is not necessarily due to greed or venality on the part of the individual pharmacist, but to different overhead, including services, and different bargaining positions with the drug companies resulting in different wholesale prices. Thus, there is a real emotional issue in terms of the small businessman's ability to compete with the large who has the economies of scale operating on his behalf. I sympathize with this plight.

But the question is who is going to bear this burden -- should it be the public which should blindly pay for a marginal practitioner's high overhead or should the people have the choice of whose overhead or lack of bargaining power they support? I think the answer is clear: to single out retail pharmacists for special protection at the expense of everyone else strictly to insulate them from the same kinds of economic pressure other businessmen face without a showing of a public health need is neither good policy nor sound legal reasoning.

Thus it seems clear that none of the so called health and welfare considerations are indeed sufficiently related to the people's health and welfare to justify a continuation of the advertising ban.

IV. Other counter vailing factors.

Moreover, there are other compelling considerations which cut against the ban. First, I believe there is a constitutional Right to Know on behalf of the public. I also believe that this right is inextricably bound up with the First Amendment rights of many pharmacy operators to disseminate price information to

today. I will not, therefore, belabor the point. I do urge the committee to consider the legal points raised by the Public Advocate with whose sentiments my own coincide.

Second, on the basis of emperical data, I believe that the poor and the elderly pay more for drugs. The elderly, only 10% of the population, consume 25% of our prescription drug volume. In the Community Service Society of New York survey, the highest average price for each drug surveyed was charged in poor areas and the lowest in middle class districts such as Staten Island. This is not, as will be suggested by the industries, an isolated occurrence. This committee knows that the poor and the elderly often pay more for food and other commodities. Obviously, one clear reason for this is that due to a general lack of information, mobility, and fear of wasting precious dollars on a potentially fruitless price search, the poor and elderly are often the most captive of markets. In my view, advertising will help weed out the retailers who prey on the weaknesses and immobility of the poor and the elderly by making their price search less costly.

Finally, economists use the term dead weight loss to connote consumers who are priced out of the market because of cost. In fact, some prescriptions are not filled because of what the consumers know or fear about available price levels. In my view, the advertised reduction of cost will provide this segment of the population with a chance that would otherwise be unavailable.

V. CONCLUSION

After such a long analysis, one would perhaps expect a tortured and lengthy conclusion. However, I believe that the equities in this case tote up rather neatly.

There is little merit in the belief that advertising will have a negative effect on public health sufficient to justify continued advertising restrictions. When weighed against the excessive dollar cost, when weighed against the lack of a factual basis for most of the claims, it would simply be wrong to invoke the Health, Education and Welfare powers of the State to justify these restrictions.

As to the economic arguments, it is clear that certain segments of the retail drug industry would stand to benefit from continued restrictions; indeed, the restrictions are a source of continued profit to the retailer. However, as a matter of policy, and more importantly, as a matter of law, the use of the State's power to provide special protective economic shields to a particular segment of one retail industry can only be premised on the showing of unique hardship and great social benefit. No such showing has been made.

VI. POSTING

While I support the posting law, I must state that New York experience with posting gives me no reason to regard the scheme as a significant means to bring drug prices in to line.

The NYPIRG survey demonstrates that (1) compliance may drastically fluctuate; (2) a great percentage of the public may never see a posted list and price differentials have not been reduced as a result of posting. The major problem, of course, is that the cost of price/shopping is extremely high in a posting situation because the consumer is required to go to each and every pharmacy in order to learn cost differentials.

Simply stated, my view on posting is this -- in a total advertising scheme, posting cannot hurt. Without advertising is is a meaningless exercise which really does not help.

In an article in the University of Chicago Journal of Law and Economics, Volume XV (2), (October 1972) Lee Benham demonstrated empirically that prices of eye glasses are at least 25% and possibly 100% higher in States which prohibit advertising. Benham has updated this figure and reasserted it in a survey to be published in September under the title "Price Structure and Professional Control of Information." His findings interface with the general economic conclusions outlined above in regard to drug advertising and coincide with the principle that as consumer information increases, average prices decrease and the range of price differentials narrows. Stigler, "The Economics of Information," 69 Journal of Political Econony, 213 (1961). Mr. Givens has testified in this regard that recent studies indicate that the savings to New Jersey's citizens if advertising by optometrists were allowed would be greater than $8,000,000. Whatever the saving, the question which is presented is what possible justification can there be for the prohibition.

II. Arguments in favor of the ban

Like the arguments propounded in favor of a pharmacy advertising ban, supra the optometry arguments are couched in eye care and health terms. But an analysis of the points clearly establishes that they are not directed toward the public interest at all.

a. Advertising is demeaning and unprofessional--again, status is no business of the legislative scheme.

b. Advertising will cause unscrupulous practitioners to bilk the public--This of course is the business of the State Board of Optometry which has the duty of policing the profession and ridding it of shoddy unethical practitioners and is irrelivant to the question of the dissemination of price information.

c. Advertising will reduce the overall level of eye care--The only connection between price and quality according to Benham is the source of care and while the source remains the same, the price is simply lower in states which permit advertising. There is absolutely no evidence to connect lowered price to poor eye care. And in fact, mandated and regulated points of the eye exam should go a long way to preclude its happening. Where it does occur, it is the duty of the State Board to take action to eliminate the practitioner from the profession. If it is said that this cannot be done, it is a concession that the level of unscrupulousness is such that the profession cannot be adequately policed. I am not prepared to concede this and if I were an optometrist, I would certainly not accede to the point. And so we again reach the visceral issue--That the prohibition against optometric advertising is an economic restriction to protect the self interest of the profession. While this alone might not be a basis to invalidate it, it is surely far removed from any public health or eye care issue of such magnitude as to justify

the ban.

III. Commercial Establishments

Finally with respect to the repeal of the ban on location in a commerical establishment--an optometrist wrote to me the other day wishing me absolutely no success in the quest to repeal advertising prohibitions generally--and as a part of his pitch he said--"Why we're only a few years out of the jewelry store and what you're doing is trying to put us back in." The truth is that it really doesn't matter where this profession is practiced (there are storefront lawyers and mobile trailer doctors) so long as the practitioner provides good service at a fair price. And this, of course, is the theory behind the proposed repeal of the prohibition against location in a commerical establishment. There isn't, in fact, the slightest reason why an optometrist shouldn't be allowed to locate wherever he pleases. The only conceivable basis for the prohibition is the possible economic advantage which could accrue to an optometrist who located in conjunction with a commercial optician. Again, this projected economic problem for the private practitioner of optometry is utterly irrelevant to the public welfare and health. While it has been suggested that such location in a commercial establishment will cause inferior eye care, a recent investigation completed by the Enforcement Bureau of the Professional Boards at the behest of the New Jersey Attorney General indicated that there is no significant difference in the eye care presently provided by private dispensing optometrists and those non-dispensing optometrists located near commercial opticians. Nor is there

any indication that eye care will deteriorate through the location of an optometrist in a commercial establishment. It is argued that the commercial business may pressure its tenant, the optometrist, with a quota system of prescriptions under fear of economic reprisal. While this is certainly possible, the suborning of unethical acts is clearly actionable by the optometry or opthalmic dispensing Board. Moreover, the pressure on optometrists located in commercial establishments is certainly no greater than the pressure on dispensing optometrists to prescribe enough glasses to meet their own financial obligations as they become due. It must be assumed that the ethical practitioner will meet each of these pressures squarely and that the marginal or unethical practitioner will either do the same or suffer discipline by the state professional board in accordance with the expressed legislative will. Again nothing in the proposed arguments in support of the ban has even the vaguest relationship to the public interest and as such the ban should be repealed.

CONCLUSION

For the foregoing reasons, it is respectfully urged that the public interest would best be served by the repeal of the prohibition on advertising prescription drugs and opthalmic devices, and accordingly such prohibitions should be repealed. It is also urged that there being no connection between the ban on the location of optometrists in a commerical establishment and the public health and welfare, that such ban should be repealed.

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LONG-TERM MAINTANCE DRUG SURVEY

City or Area	No. of Stores	Name of Drug	Avg. Price	High	Low	High/Low Variance	High/Low Per.
6 Cities in	12	Lanoxin , 0.25 mg, #100	$2.62	$6.29	$1.25	$5.04	400%
Monmouth	12	Hydrodiuril, 50 mg, #100	8.10	9.95	6.49	3.46	50%
Shore Area	12	Orinase, 500 mg, #100	10.00	14.90	7.99	6.91	85%
	12	Zyloprim, 100 mg, #100	9.03	11.00	7.29	3.71	50%
	12	Darvon Compound 65, #50	5.43	6.25	4.55	1.70	38%
Downtown	6	Lanoxin, 0.25 mg, #100	2.67	3.45	1.53	1.92	120%
Plainfield	6	Hydrodiuril, 50 mg, #100	8.81	12.00	5.99	6.01	100%
	6	Orinase, 500 mg, #100	10.67	14.50	7.97	6.53	80%
	6	Zyloprim, 100 mg, #100	9.17	10.95	6.49	4.46	70%
	5	Darvon Compound 65, #50	6.27	7.95	4.59	3.36	73%

31X

OTHER DRUGS

Newark	21	Valium, 5 mg, #30	4.90	6.75	3.28	3.47	105%
Essex County	16	Pfizerpen G; 200,000 Units; #40	3.70	6.00	1.60	4.40	275%
Mercer County	20	Achromycin V, 250 mg, #20	2.75	3.79	1.49	2.30	155%
28 Block Stretch of Bergenline Ave. Union City, West New York	8	Polycillin, 250 mg, #24	6.80	7.95	5.50	2.45	40%
Bergen County Area	17	Valium, 5 mg, #50	6.50	7.85	4.10	3.75	90%

Ruling on Prescription Drugs

Advertising Ban on Prescription Drugs Nullified

BY PHILIP HAGER
Times Staff Writer

SAN FRANCISCO—A three-judge federal court has declared unconstitutional state laws prohibiting prescription-drug price advertising, a ruling opponents of the laws said could save California consumers $43 million annually.

The court held that the laws prohibiting drug-price advertising violated the right of free speech and asserted that in banning the advertising of drug discounts the laws had the practical effect of banning the discounts themselves.

A 23-page opinion filed by the court Monday concluded that the price of drugs ". . . may in some cases even be life-essential, insofar as it may increase availability to low-income persons of medically necessary prescription drugs."

An attorney for one of the plaintiffs said the decision probably would result in lower prescription drug prices.

"By best available estimate, Californians spend $430 million a year on outpatient drugs and we believe that, conservatively, advertising of these drugs will lead to a 10% annual savings," said Philip Neumark, attorney for the California Legislative Council for Older Americans.

Neumark said that a recent study in Los Angeles showed the price of one prescription drug ranged from $2.25 to $7.20 for a 30-tablet quantity.

"Drugstores operate in a relative veil of secrecy," he said. "People don't know there are these kinds of price differentials. Once advertising is interjected into the marketplace, consumers become more price conscious and the price tends to go down."

His prediction was challenged by the president of the California Pharmaceutical Assn., Mary Munson, an Oakland pharmacist.

"Under this ruling a lot of pharmacists will advertise, but the cost of advertising will be passed along. Somebody's going to have to pay for it," said Mrs. Munson.

She also said that the advertising of prescription-drug prices could result in an artificial demand for the drugs.

"Everytime there's an article in the Reader's Digest about drugs, all of a sudden physicians are inundated by people who want to buy those drugs," she said. " . . .I'm sure that anything we put before the public constantly causes them to buy it and the same would be true of drugs."

The class-action suit was brought by Mrs. Shirley Terry of San Jose, a public assistance recipient whose physican had prescribed certain maintenance drugs. She sued the state Board of Pharmacy, seeking to overturn the laws that prohibited the advertisement of prescription-drug prices in newspapers, magazines, radio, television and other media.

A number of organizations, ranging from the California Newspaper Publishers Assn. to the Blind and Disabled Action Committee of California, intervened as plaintiffs in the case.

Attorneys for the board defended the prohibition, saying price advertising would generate artificial demand for prescription drugs, mislead consumers, provide drug information to potential forgers of prescriptions and lower the standards of the pharmacy profession.

But the three-judge panel, convened to determine whether these state laws violated the U.S. Constitution, rejected the board's position.

Said the court:

"Many of the plaintiffs, users of prescription drugs, are old and infirm, unable to travel to and view posted price posters at a number of pharmacies sufficiently large to provide them with an accurate sample of the prices. Evidence in this case indicates that telephone contact is also very time consuming and costly and not a feasible means of making price information available to an individual consumer. This court finds that by prohibiting media advertising, the most effective means of providing price information to consumers, the challenged statutory scheme significantly and impermissibly restricts the distribution of the information plaintiffs seek, thereby establishing a prima facie violation of the First Amendment."

The court noted further that other fears expressed by the board—false advertising and forgery—were already prohibited by other state laws. And, it said, consumer buying was not likely to determine the demand for prescription drugs as it might for over-the-counter drugs. "The consumer performs only one function in the process, that of purchasing the product selected for him by his physician and sold to him by his pharmacist," observed the court.

While the laws in question did not actually prohibit the giving of a discount, they did prevent pharmacists from representing that they were giving a discount.

"Since no one would purchase without knowledge of the discount, the practical effect of banning representation of a discount is the same as banning the discount itself," the court said.

State attorneys who represented the board in the case were not available for comment Tuesday. If a notice of appeal is not filed with the U.S. Supreme Court within 20 days, the panel's decision will go into effect at that time.

The three-member panel included U.S. Circuit Judge James R. Browning, senior U.S. Dist. Judge William G. East of Oregon and U.S. Dist. Judge Robert F. Peckham.

150,000,000 x 10% = 15 million SAVINGS

New Jersey Pharmaceutical Services Foundation

235 Main Street Fort Lee, N. J. 07024 (201) 947-3600

STATEMENT OF SAMUEL MIRSKY, R. P.

EXECUTIVE DIRECTOR, NEW JERSEY PHARMACEUTICAL SERVICES FOUNDATION, INC.

Before The

Commerce, Industry and Professions Committee of the New Jersey Assembly

May 22, 1975

Mr. Chairman and Members of the Committee:

My name is Samuel Mirsky, and I appear here today representing the New Jersey Pharmaceutical Services Foundation, a non-profit corporation of the State of New Jersey, dedicated to the provision of quality pharmaceutical services.

The New Jersey Pharmaceutical Services Foundation strongly opposes the passage of Assembly bills A-736, A-1228 and A-3273.

Our analysis of the proposed legislation brings us to the unalterable conclusion that it is detrimental both to the consumer and to the profession of Pharmacy and that these bills are without any apparent redeeming virtues, save only the benefits that may accrue to the sellers of media space - that might mitigate their harsh effects.

We oppose these bills because they will not accomplish their intended purpose of reducing prescription prices. Even though several States have enacted similar types of legislation, we have not seen any valid evidence that can substantiate the hypothesis that the advertising of prescription prices will result in a sustained and demonstrable monetary saving to the consumer. There is some evidence to show that price posting may in a few cases have a minimal and transient effect, but even this approach provides little, if any, long term benefits to the consumer. The often heard cry that advertising will in some magical and mystical way reduce the costs of medication is at best a self-deception on the part of the proponents, and more often a tragic hoax upon the innocent people who believe in this illusion.

We oppose these bills because they will increase the long term costs to the consumer. As the costs of advertising - which includes the costs of preparation, agency charges and media charges - come on line and are reflected in the operating expense figures of the advertiser, he will have to develop some method of passing on these additional costs. Traditionally this has been done by raising the prices charged to the consumer. The methods used to accomplish this will vary, they may include only several departments, or only selected products or product lines, or perhaps the entire establishment. What will remain constant is the need to recover all additional costs and maintain the necessary profit margins.

It should be noted that the costs of advertising are continually increasing at a rate which is far in excess of the increases in the cost of medication. Therefore, it seems reasonable to theorize that the costs attributable to advertising will become an ever increasing percentage of the prescription price to the consumer. If it is your desire to mandate increased costs on the part of the provider of prescription services, it would seem that prudence would dictate that these increased costs should inure to the benefit of the patient's health, such as a requirement that prescriptions be compounded by a Registered Pharmacist.

We oppose these bills because they will create undue hardships for the consumer.

The purposes of advertising, as we see them, are:

1. To expand the market of the product or service.
2. To create new uses for the product or service.
3. To capture a larger share of the market.
4. To create an "image" for the advertiser or his product.

Inasmuch as it seems highly unlikely that even the most creative and imaginative people from the advertising agencies can convince the public that increased illness is either beneficial or desirable, and since it is the sole responsibility of the Food and Drug Administration to determine the acceptable uses of medicinals, it seems reasonable to pass over the first two of these stated purposes as inapplicable to prescriptions.

We are then left with the remaining two avowed purposes of prescription advertising, which are to gain an increased share of the market and to create an "image" for the advertiser.

Image making is expensive, non-beneficial to the consumer and the image made is often erroneous, contrary to the facts and self-serving. Capturing a larger share of the market may or may not be cost-effective. It does, however, tend to force those who fail to capture increased volume out of business which does result in less competition, fewer jobs, less money in taxes and a greater hardship to the consumer due to the disappearance of convenient locations which offer prescription services.

There have been strong statements from both the Federal Government and agencies of the State of New Jersey which indicate that the availability of pharmacy services are to be considered as important as the quality of such services, and that some New Jersey areas are presently under-serviced. While one may quarrel with the order of priorities, it seems clear that the best of service, when unavailable, becomes unacceptable.

It is clearly in the public interest for there to be quality pharmacy service available in a variety and scope to meet the needs of the vast majority of our patients. These services must not only be fully adequate professionally, but they must be accessible, free of undue "travel friction", undue obstacles and unnecessary red tape.

Our Foundation feels that quality pharmacy service, whether in private or group practice, requires an extensive and viable provider network of pharmacies.

Any legislation that is detrimental to this purpose is contrary to the best interest of the public.

There are not many fields in which this State ranks first, compared to the rest of the Nation. The field of pharmaceutical practice is one, and this is due to the efforts of a strong Board of Pharmacy and the several pharmaceutical organizations. This State has set standards of the highest professional order in the practice of pharmacy with many laws and regulations, setting it apart from the rest of the Country. Many of the other states are enviously emulating this State to attain the same high level that has been reached in New Jersey.

Ladies and Gentlemen of this Committee, let us not destroy what has been done, but help us to do greater things for the health of our citizens. Let us not emasculate the profession of pharmacy by repealing the drug advertising prohibition in the Pharmacy Act.

Thank you for allowing me to speak today.

STATEMENT OF DR. CHARLES PAPIER

I am Dr. Charles S. Papier, a practicing optometrist in Pennington and President of the New Jersey Optometric Association. The Association is representative of 80 percent of the active licensed optometrists throughout the State.

The Association's basic reason to be is based on a consumer-oriented code of ethics pledging individual and collective concern for the preservation and delivery of the highest quality professional eye care to the patient. The most recent evidence of our intent, gentlemen, is that in spite of a full year of opposition posed by both New Jersey and New York commercial interests, the Association was successful in sponsoring legislation requiring 50 credits biennually of continuing education in order to be eligible for relicensure. The purpose of this legislative measure (P.L. 24 - 1975) is to guarantee that each licensed optometrist will be continually required to keep abreast of scientific developments within the profession. It is interesting to note that the only opposition to this bill came from New York labor unions who feared the possibility of New York State adopting a similar consumer protection requirement. Even more disconcerting was the covert opposition from the New Jersey commercial vision center chains.

It is because of such consumer interests that we vigorously oppose Assembly Bill 3263 which permits full scale advertising of optometric fees and services; permits optometrists to be employed within retail establishments; and permits optometrists to be employed by non-optometric corporations, individual opticians or any other lay persons.

The New Jersey Optometric Association cannot condone this commercial attempt, cloaked in the guise of consumer interest, to turn back the clock 30 years in New Jersey and permit the lure of promising advertising claims, replace the training, skill, experience and judgment required of an optometric practitioner.

Similar to the medical and dental professions, the optometrist has eight years of college, four of those in an optometric curriculum involving the study of anatomy, physiology, pathology, physics, physiological optics, pharmacology and procedures for examining and caring for the eye. Following this extensive didactic instruction and a clinical internship, still the prospective optometrist must pass comprehensive state board examinations before obtaining licensure. Today's optometrist, in addition to performing eye examinations, is deeply involved in such areas as orthoptics, vision training, contact lenses, subnormal vision aids and the diagnosis of eye pathology.

Professional health care responsibility to the patient diminishes as pressure for speed and volume increases. Ethical standards of the health practitioner will be subordinate to the concern of the owner; that concern is the marketing of a product.

Permitting commercialization of a health care profession takes an even more pronounced profit-oriented shift in marketing techniques when large monopolistic companies become involved. An unsuspecting public is led to believe that the store or chain with the most conspicuous advertisements is

best prepared to provide optometric services and ophthalmic prescriptions. New Jersey's position, as a result of this type of legislation, could become very similar to the situation which currently exists in Texas - a state where commercial practice and price advertising exists. To illustrate this, we have attached (verbatim) a portion of testimony presented by Deputy Attorney General Robert Oliver of Texas before a California state committee considering price advertising of ophthalmic services. This is a documented example of how large corporate entities control the delivery of optometric care in commerical environments.

Deputy Attorney General Oliver states that the profit motives are also apparent when you have a situation where a man can do only so many eye examinations in a day which results in a fixed amount of money you can expect. To offset this, costs are cut; in this instance that means you cut costs on materials. You buy cheap frames and consequently, sell cheap frames with lenses that do not have proper quality control systems. That's one way money is made; percentage of gross receipts. Also evidence was the bonus incentive where if the practitioner prescribed two pairs of glasses, he got a bonus. So, with very little concern for the consumer's actual needs it was the practitioner's (and ultimately the company's) interest to do so!

Another problem, due to commercialization of a profession, is one-price advertising. The believing consumer goes into the office with a complicated prescription. The cost of that lens might far exceed the advertised price;

consequently, he or she is ultimately handed back the prescription with the promise that they will call when the glasses are ready. The consumer never gets those glasses because they cannot furnish an expensive lens at their advertised price.

Another tactic is known as the Bait-and-Switch routine. The believing consumer is lured in with a low advertised price; once through the door, he or she is switched to another frame, a higher-priced one.

It becomes very obvious that the intent of this legislation to benefit the consumer primarily through lower prices as a result of commercialization and price advertising can only result in the deterioration of eye care, inferior materials and a high volume mass produced operation. The Bait-and-Switch sales techniques will go hand-in-hand with media price advertising just as it does today in the traditional retail sales market. High pressure sales techniques are bound to increase with the bonus incentive.

The poor, the uneducated, and the elderly are ready prey for these unethical charlatans who lure them with advertisements and seem to have no compunction in taking advantage of their gullibility to make a quick profit. Advertisements by these purveyors of vision goods are often misleading and serve as "bait" for those who feel they must look for a bargain. Too often it turns out to be a very costly bargain. Unfortunately, it is the poor, the uneducated and the elderly who are most likely to choose someone to help

them with their vision problems on the basis of advertising low prices, or the personality of some salesman.

Eyeglasses are not an isolated commodity. They are the treatment necessary as a result of a practitioner's diagnosis. It is not possible to separate the diagnosis from the treatment in terms of price advertising. It is not reasonable to think it would be in the public interest to put this chain of events in motion, just as it would not be to allow a physician to advertise the price of surgical procedures. In fact it is note-worthy to reflect at this point that less than four years ago many members of this very Legislature passed PL 453 (1971) which amended the statute governing the practice of medicine, podiatry and psychology to prohibit advertising of their professional and technical services. It is even more interesting to note that the wording for that amendment was taken directly from the optometric statute which was enacted in 1948.

While our professional ethics dictate that an eye examination should be performed in a careful and thorough manner, the pressure this legislation would place upon a practitioner who would have to compete with price advertising would be an enormous stimulus to perform an examination in the shortest time possible in order to secure a high patient volume to offset the high costs of marketing. How else could marketing costs be paid for? Is not the consumer's eye health far to valuable to be placed in the care of a practitioner who must now become a commercial specialist? We believe so!

Vision is essential to the highest usefulness of the individual. The human eye is inherently a delicate organ. It

is closely connected with intellectual, nervous and physical functions. Advice as to its care and prescribing for its defects should not be sold through the traditional methods of the market place.

Promotional claims and price competition of eyeglasses and contact lenses by ordinary advertising relegates these devices, which are available to the public only by prescription, to ways of the market place and reduces the quality of eye care to the people.

Optometrists are trained and educated to provide professional vision care and services -- not to sell commodities as in the market place. It so happens that ophthalmic and contact lenses are often needed as treatment and are inseparable from such care and services. If lenses are considered market place commodities, so too are all physical objects utilized by other health care professionals -- artificial limbs, electronic pacemakers, diaphragms, dentures, dental braces and neck collars. All of these items require prescriptions; none can -- or should -- be advertised. Likewise, in optometry. Eyeglasses are not optometry per se; they are incidents of the practice of optometry. The practice of optometry is primarily and basically the exercise of training, skill and professional judgement.

I think you -- or me, for that matter -- cannot ignore the main intent of this legislation: to reduce prices. No competent evidence has ever established that price advertising in this field actually results in lower prices. When you think about it, the opposite may well occur, for an addi-

tional item would now be added to the cost of examination, diagnosis, lenses, frames, fitting and follow-up; that item is the cost of advertising. The only authority cited for the proposition that price advertising of eyeglasses leads to lower prices was an article by Lee Benham appearing in 15 Journal of Law and Economics 337 (1972). The author made several important admissions which must be taken into consideration:

1) North Carolina -- the highest price state -- "had other laws which would tend to raise prices independent of advertising regulations, and the proportion of the total price difference which can be attributed to advertising restrictions cannot be determined at this time."
2) He also stated, "the set of estimates is likely to overstate the impact of advertising restrictions."
3) He acknowledged that he used an "obviously incomplete" model as evidenced by low values for the coefficient of determination. (R^2)
4) When he calculated the median prices "to see if a few expensive cases affected the overall results" we find his differences dropped by 25 percent to 40 percent.
5) He compared the extreme states -- North Carolina on one hand and Texas and the District of Columbia on the other -- to show the upper limit of the difference in the price of eyeglasses. He said the price of eye examinations showed little variation as a

result of advertising.

When we eliminate North Carolina from the sample, the data shows that in actuality consumers paid 44¢ more in advertising states than in non-advertising states. When we eliminate the extreme states from the report, we find that consumers paid $3.16 more in the advertising states than in the others. Benham himself admits (page 344, footnote 3) that his study does not take into account variables.

If the issue is to save consumers money, will this bill before you do that? The Association not only believes it will not, but is deeply concerned about the "price" that would be paid in the process of finding out. That price would be a reduction in the quality of vision care.

Optometrists are not interested in simply making a patient "see better". The concern is to enable the patient to see clearly both near and far without strain; to examine, diagnose and prescribe ophthalmic or contact lenses which will correct, among other things, simple and compound astigmatism and muscular imbalance; to prevent subsequent vision problems and maintain good vision over an extended period of time; to identify and diagnose ocular pathology and other health problems and, when necessary, refer at once such problems for treatment to other health professionals; to prevent permanent damage to the eye which can result from improperly fitted contact lenses; and, to train in proper eye care and exercise. To address these and other optometric concerns requires thorough examinations. To cut down the time of examinations poses real risks which we believe are unnecessary and contrary to the public interest.

We mention these matters for two reasons. First, price advertising will have an impact upon the quality of vision care. The need to cut costs must affect nearly every aspect of optometry, from a shorter less-thorough examination to cheaper lenses to a severe reduction in follow-up and extended care. Second, the bill goes beyond advertising the price of eyeglasses: it allows the advertising of eye examinations, a professional health care service. This has profound implications for us and for all other health care professionals. Is the eye in some way less important than the nose, the ear, the mouth, the skin, the stomach, the foot?

The Association believes that the practical effect of this bill would be to make optometrists businessmen first, optometrists second. From the point of view of the consumer, would this be in the public interest?

Both of the above reasons are interrelated in a number of ways which, because of time constraints, we cannot fully discuss here. For example, in the face of competition bent upon selling as many eyeglasses as possible, it is not at all unreasonable to expect that optometrists will be forced to reduce the amount of professional time spent with each patient in order to increase the per hour dollar volume to cover costly advertising. What will the quality of those examinations be? And is that not putting the consumer in the unenviable position of receiving health care based on economic considerations rather than professional judgement?

Optometry is certainly not alone in its concern over this distructive legislation. Our position is shared by every independent health care profession in New Jersey, as evidenced by the following communications which have been previously sent to the committee:

"The Medical Scoiety of New Jersey is opposed to A-3263 because it will, in contravention of human decency and good taste, permit the huckstering and gross commercialization of health services. Further, there are no circumstantial guarantees that optometry services will be rendered at a lower cost to the public. In fact, the employment of advertising and other commercial practices will inevitably increase the cost to patients."

"The New Jersey Podiatry Society feels A-3263 is a retreat from professionalism and would be detrimental to best interests of the public. There is no evidence that price advertising reduces the cost of health care. Experience has shown that advertising prices and permitting professional practices in retail or commercial stores does lower the quality of health care delivered."

"The New Jersey Association of Osteopathic Physicians and Surgeons are opposed to bill A-3263 on the basis that price advertising would not lower the cost for the consumer nor would it guarantee the consumer better quality service. Also legislation may be introduced to allow other professions the same advertising prerogative which would lead to care gauged by advertising rather than concern."

"The New Jersey Dental Association believes A-3263 is a retreat from professionalism and would be detrimental to the best interests of the public. There is no evidence that price advertising reduces the cost of health care. Experience has shown that advertising prices and permitting professional practices in retail or commercial stores does lower the quality of health care delivered."

For the reasons set forth in this position and others that will be given before this committee and in the interest of the over 7 million residents of this state, we unalterably oppose A-3263.

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A P P E N D I X
to
Dr. Papier's Statement

Testimony (partial) by Deputy Attorney General Robert Oliver
State of Texas

"This is a type of operation that Lee Optical runs in Texas. Up here is the big corporation with many, many subsidiaries. So what do they do? The man that runs this, incidently, is not a licensed optometrist in the State of Texas. He realizes that the offices have to be totally and completely separated so look at all the trouble he goes to get around this. The big corporation up here hires an optometrist that is licensed in Texas. A dispensing optician cannot have control of an optometric practice. The optometrist is given the duties of supervising Lee Optical Dispensing Opticianries -- say 50. Then this optometrist, and we found he is not a wealthy man, then leases space to him on a gross receipt basis, then for a dollar furnishes all the optometric equipment necessary for an optometrist to do his practice -- that's a considerable amount of money. Then three, he furnishes at no cost, all office help. This licensed optometrist then leases to these different dispensaries for gross receipts, gives him all of his equipment for a dollar, and furnishes the office help free. Where do these optometrists practice? Keeping in mind the Legislature says they are supposed to be totally and completely separate, here he is right next door. Big sign out front, Lee Optical over the whole building. Here's the optometrist's

office right here and here is the dispensary right here. This partician could be glass, that's a more sophisticated operation. Lee Vision over the front of a thing like this and here sits this little optometrist in here on his door in tiny letters Joe Bloe Optometrist. Advertising in the newspaper Lee Optical Glasses $19.90 -- the consumer looks at this place from across the street and sees Lee Optical he thinks this whole thing is one front -- common restroom in the back with inter-locking doors. Also a doorway right here which they say is always locked, but I don't understand why they have the door locked when they have common restrooms. Our law prohibits this side from soliciting patients for this side and then when they go over to this side they are sent back to the other side to have their prescriptions filled.

Now you see the operation. What Lee Optical does is patients come in and -- this is prohibited by law -- and the enforcement of it is almost impossible, you can't catch them unless you are hiding back here in the restroom.

If this type of operation exists, then our law is completely and totally worthless."

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FEDERAL TRADE COMMISSION
New York Regional Office

22nd Floor
Federal Building
26 Federal Plaza
New York, New York 10007
Area Code (212) 264-1200

June 4, 1975

Byron Baer, Chairman
New Jersey Assembly Committee on
Commerce, Industry and Professions
State House
Trenton, New Jersey 08625

Dear Mr. Baer:

I wish to thank you again for the opportunity of testifying before your Committee in connection with the pending legislation to permit price advertising of prescription drugs and eyeglasses.

In response to the questions raised during my testimony, I am enclosing a copy of the Staff Report to the Federal Trade Commission made public June 2, 1975. The report provides extensive information concerning prescription drugs and should answer many of your questions on the effects of price advertising in this area. It should be emphasized, however, that the Federal Trade Commission has not adopted any findings or conclusions of the staff.

A question was raised whether the estimate of consumer benefit takes into account the percentage of drugs sold at higher prices. The staff analysis on pages 109-181 indicates that this factor was considered.

As for the effect of price competition on quality, the staff concluded that the enormous consumer benefits are not offset by any problems price disclosures might cause (pages 321-405; 422-431).

The effect of price advertising on small businesses has also been considered. The majority of manufacturers are willing to sell directly to community pharmacies. With the development of various cooperative buying organizations throughout the country, cooperative buying by small independent pharmacies would permit them to take advantage of volume purchasing (pages 406-418).

With respect to Assembly Bill A1228, in-store posters containing retail prices for selected prescription drugs is a helpful device in conjunction with other price disclosure methods. Experience in various states and cities, however, shows that price posting as the only disclosure mode would be inadequate (pages 246-256).

The Federal Trade Commission, by unanimous vote, has proposed two trade regulation rules designed to help consumers use price information when shopping for prescription drugs and to reduce prescription prices by increasing retail competition. The proposed rules would permit pharmacists to give out accurate price information by any means the pharmacists choose, including in-store posters, take home price lists, mailers and newspaper, radio and television ads. A copy of the proposed rules may be found at pages 193-198.

These views are my own as Regional Director and are not as such attributable to the Federal Trade Commission which has not voted thereon.

Respectfully,

Richard A. Givens

Richard A. Givens
Regional Director

Encls.

PREFACE

Attached is the Staff Report to the Federal Trade Commission; it proposes trade regulation rules governing retail price disclosures of prescription drugs. The original Report was submitted to the Commission on January 28, 1975. Certain modifications have since been made in the Report to reflect interim statutory changes and to reduce any possible confusion between staff's initial recommedations and the Commission's final determinations to publish the proposed rules.

The Commission is making available this report with expectations that it will:

1. Improve the utility and sophistication of the written record and informal hearings of the rulemaking proceeding;

2. Provide valuable information to state legislators for use in any current deliberations regarding state statutes bearing upon prescription drug price disclosures;

3. Provide valuable information to state administrative agencies;

4. Provide valuable information to private citizens -- consumers, pharmacists, and others -- for use in their dealings with courts, state agencies, legislatures, or other policy making bodies.

Nevertheless, it should be emphasized that the Commission has not adopted any findings or conclusions of the staff. All findings in the rule proceeding shall be based solely on matters in the rulemaking record.

INDEX

I. INTRODUCTION

Pursuant to the direction of the Commission contained in Memorandum 74-192 dated May 28, 1974, Staff of the Bureau of Consumer Protection submits this Report on whether there is adequate disclosure of retail prices for prescription drugs in the United States and whether the Commission should attempt to remedy any problem which may exist. Staff has completed its investigation 1/ for the purpose of making certain recommendations and has concluded that pharmacies, pharmaceutical associations, and others, by severely limiting or rendering inadequate the disclosure of retail prescription drug prices to consumers, despite the existence of state laws in many states which prohibit adequate disclosure, are engaged in unfair methods of competition and unfair acts or practices in commerce in violation of Section 5. To remedy the situation in the most expeditious manner and eliminate the continuation of the substantial harm to consumers caused by such inadequate disclosure, Staff recommends that the Commission conduct proceedings on the proposed Trade Regulation Rules set forth at pages 193-198 of this Report. The proposed rules would eliminate restraints placed on price disclosures by states and private associations and would mandate certain disclosures of prices.

From the plethora of information received and reviewed by Staff (much of which is presented in the body of this Report), Staff reached the following conclusions:

1. The availability of price information for prescription drugs is totally inadequate to allow consumers to use price in a rational manner as a consideration in making purchase

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1/ During the course of its investigation, Staff sought and received documentation and/or narrative responses from, inter alia, each of the major national pharmaceutical associations, medical associations and consumers groups and from each state pharmaceutical association, state board of pharmacy and state attorney general's office. Further, information was obtained from the academic community, business organizations and pharmacists. While Staff sought voluntary compliance with its requests for information, compulsory process was used where appropriate. A copy of Staff's letter to the pharmaceutical groups is attached hereto as Appendix 1 and the letter to consumer groups is attached as Appendix 2 .

decisions;

2. The unavailability of retail price information for prescription drugs prevents the free market operation of desirable price competition in retail pharmacy;

3. The unavailability of retail price information for prescription drugs causes consumers to spend many millions of dollars more each year for prescription drugs than they would spend if adequate information existed.

The proper functioning of our competitive economic system requires the existence of and easy access to information which is accurate, materially necessary and sufficient to enable consumers to make rational purchase decisions. This essential information permits the achievement of a rational allocation of society's limited resources or what some call "consumer sovereignty". Consumer demand, over time, generates "appropriate" quality, quantity and price levels for marketed products and services. In the absence of adequate information, consumer selection of goods and services will be distorted from what they would have been had adequate information existed for consumers to make rational decisions about ways to spend their money. Sellers will provide and consumers will end up buying goods or services which are different in value (quality and price) and quantity from what they intended or would have preferred had they had more information.

Prescription drugs are rather unique products in our system in that "consumer sovereignty" has been modified in two ways. Since the 1938 Food, Drug and Cosmetics Act, quality and demand factors largely have been excluded from consumers' control by government regulation and by the physician's role as determiner (prescriber) of individual consumers' needs. From the standpoint of public health and welfare, this appears to be a necessary and desirable limitation of consumer sovereignty for numerous reasons, including the extraordinary hazards associated with possible mistakes in need, quantity and quality determinations.

However, perhaps as a result of such concerns, significant restrictions upon disclosure of price information have developed which largely exclude consumers' access to and influence over price. Nevertheless, there appear

to be no valid health or welfare considerations which justify elimination of consumers' access to price information.

Staff expects, based upon competitive and consumer theory, that the lack of readily available price information results in the purchase by a significant number of consumers of prescription drugs at prices higher than they would pay if they had adequate price information. Simply stated, Staff believes that if confronted with identical products or services, the typical consumer would select the one perceived to be lowest in price. If the products or services are in any way perceived to be different in quality, the typical consumer will balance price differences against perceived quality differences and will select the product or service that appears to satisfy his felt needs at the lowest available price.

A consumers' prescription -- or "specification" -- from his doctor describes the particular product that a consumer will purchase and therefore eliminates the need for independent consumer judgment as to product quality or quantity. The consumer will get exactly the same product irrespective of the pharmacy -- or "vendor" -- from which he purchases.2/ However, two aspects of the purchase transaction should remain for the consumer's decision-making purposes: (1) the composition of the "service package" desired with the drug-- i.e., the "professional" services (e.g., analysis of possible drug interactions and drug consultation); the conveniences (e.g., delivery, hours and credit); and the general ambiance (e.g., a waiting room and friendly environment) which individual pharmacies may provide or emphasize; and (2) the price ultimately paid by the consumer. The ancillary services, conveniences and ambiance are for the most part no different in nature from those provided by other distributors of consumer goods or services. The typical consumer, if offered the informed choice, can fairly judge how much money, if any, he is willing to pay

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2/We ignore here the differences in sources of chemically equivalent drugs which may be dispensed upon a generic prescription. Even here the physician is simply telling his patient-consumers that they can be satisfied with any source of the generic which a pharmacist is willing to dispense. Otherwise the physician would not write the prescription as a generic.

for the various services, conveniences or ambiance he wants. 3/ The critical piece of information typically unavailable to the consumer, however, is the price at which identical drug products are dispensed or "sold" at different pharmacies which offer varying combinations of incidental services, 4/ conveniences and the like.

Against the expected benefits to consumers of permitting and encouraging adequate price disclosures, Staff has balanced any alleged consumer harm which could occur with greater disclosure. Staff found no substantial merit to these allegations. The alleged public health, safety, and welfare justifications for the lack of price information could not be substantiated to Staff's satisfaction. Staff concludes that whether or not inadequate disclosure of prices results from the motivation of economic self-interest on the part of pharmacists, it serves no other purpose.

The investigation disclosed that the lack of price information, although varying in intensity among some states, is for the most part ubiquitous throughout the nation. It appears dependent upon various state and local laws and regulations, pharmacy association codes of ethics, and a variety of more or less subtle official and private restraints. Unless the Commission takes action, it appears that consumers will continue to suffer in varying degrees in most, if not all, of the United States.

3/Most of the charges for elements of the "service package" are lumped together into the charge for the drug commodity. Therefore, the consumer must pay for the services even though he may neither want nor utilize them.

4/The use of the words "incidental" or "ancillary" is in no way pejorative. A consumer gets a prescription so that he can purchase and consume a specially prescribed drug in order to alleviate a particular health problem diagnosed by a physician. It is a pharmacist's principal duty to see that a properly prescribed drug is properly dispensed. Because of such responsibilites, pharmacists are subject to strict regulation by the state. While the way the pharmacist goes about his task of dispensing is naturally important to the consumer, these services are in fact incidental to the drug transfer.

In order to remedy the tremendous economic injuries to consumers necessarily caused by the current lack of price disclosure, Staff urges the Commission to adopt the following recommendations designed to assure the adequate availability of retail price information for prescription drugs.

RECOMMENDATIONS:

1. Promulgation of a trade regulation rule which will permit retail pharmacists to disclose price information (within carefully drawn limits) as they see fit, free from official state sanctions and private restraints.

2. Promulgation of a trade regulation rule which will require certain affirmative price disclosures by retail pharmacists.

3. Development of a suitable consumer education program to be implemented upon the effective date of the rules.

4. Development of a liaison program with the states to facilitate changes in pre-empted state laws and encourage state changes prior to federal pre-emption.

Staff believes that the following Report demonstrates the need and appropriateness for the Federal Trade Commission to adopt these recommendations. In the following Report, 5/ Staff analyzes the need for consumer protection as recommended by Staff, the expected benefits which consumers may derive from the recommended action and the legal basis for such action.

5/ "The First Report of the Prescription Drug Task Force: Retailing," May 15, 1974, now has no independent relevance. Those portions of the Task Force Report which Staff determined to be factually or legally correct are incorporated verbatim or are incorporated in expanded new sections treating the same issues. Incorrect or unnecessary portions of the Task Force Report have been omitted. Staff believes that no future reference to the Task Force Report is warranted or desirable.

NOTE: The complete Report is on file with the New Jersey Assembly Commerce, Industry and Professions Committee.

THE JOSEPH W. KATZ COMPANY
Public Affairs Counsel

Capitol House
142 WEST STATE STREET
TRENTON, N.J. 08608
(609) 396-9121

May 29, 1975

Mr. Joseph P. Capalbo
Aide
Assembly Committee on
Commerce, Industry & Professions
Room 224, State House
Trenton, New Jersey 08625

Dear Joe:

You will recall that Chairman Baer and other members of the committee asked me, following my testimony of May 22 in support of A-3263 and A-3264, to amplify my remarks with some additional material.

I had discussed existing governmental safeguards against consumer frauds. Of course, there is the New Jersey Consumer Fraud Act, with which they are familiar. I am enclosing a copy of the Federal Trade Commission's "Trade Practice Rules for the Optical Products Industry" as promulgated June 30, 1962, as well as a more recent regulation governing impact-resistant lenses. As you can see, the FTC takes an active role in this area.

Second, the question was raised as to how eyeglasses could be advertised, with regard to prices as well as styles and quality. I am enclosing some sample ads I obtained in regard thereto.

I think this information further demonstrates the efficacy of A-3263 and A-3264.

I take it that you and the members of the committee have noted that there was no opposition expressed to A-3264, even by those objecting vehemently to A-3263 and A-3273, the pharmaceutical advertising measure.

Kind regards,

JOSEPH W. KATZ
Public Affairs Counsel
Association of Optometrists & Opticians
of New Jersey, Inc.

JWK:m
Enclosures

cc: Hon. Virginia L. Annich

clarify this issue, a proviso has been added to § 3.84(e), that the name and address of a purchaser of nonprescription sunglasses is not required to be kept by the retailer.

A comment was submitted by the Public Interest Research Group, urging the May 15, 1971 language be retained in § 3.84(h) requiring that after December 31, 1971, all eyeglasses and sunglasses must be fitted with impact resistant lenses, except when the physician or optometrist finds that impact resistant lenses will not fulfill the visual requirements of a particular patient. Although the transition process in § 3.84(h) of the Food and Drug Administration's Statement of Policy of May 15, 1971 (36 F.R. 8939), commenced immediately, the Commissioner finds that an adequate supply of impact resistant lenses is not available to permit the May 15, 1971 language to be retained. He therefore finds that the date of manufacture shall control.

The comment of the Public Interest Research Group further recommended that § 3.84(e) also be amended, consistent with § 3.84(f), to permit the Food and Drug Administration to examine copies of invoices, shipping documents, and records of sale and distribution, of all impact resistant lenses (including finished eyeglasses and sunglasses) which are to be kept and maintained for a period of 3 years. The Commissioner finds this comment to be well taken, and has so ordered.

The Commissioner concludes that the proposed amendments will insure the necessary measure of protection to the consumer.

Therefore, pursuant to the provisions of the Federal Food, Drug, and Cosmetic Act (sections 502(j), 701(a), 52 Stat. 1051, 1055; 21 U.S.C. 352(j), 371(a)), and under authority delegated to the Commissioner (21 CFR 2.120), Part 3 is amended by revising § 3.84 to read as follows:

§ 3.84 Use of impact-resistant lenses in eyeglasses and sunglasses.

(a) Examination of data available on the frequency of eye injuries resulting from the shattering of ordinary crown glass lenses indicate that the use of such lenses constitutes an avoidable hazard to the eye of the wearer.

(b) The consensus of the ophthalmic community is that the number of eye injuries would be substantially reduced by the use in eyeglasses and sunglasses of either plastic lenses, heat-treated crown glass lenses, or lenses made impact-resistant by other methods.

(c) To protect the public more adequately from potential eye injury, eyeglasses and sunglasses must be fitted with impact-resistant lenses, except in those cases where the physician or optometrist finds that such lenses will not fulfill the visual requirements of the particular patient, directs in writing the use of other lenses and gives written notification thereof to the patient.

(d) The physician or optometrist shall have the option of ordering heat-treated glass lenses, plastic lenses, laminated glass lenses, or glass lenses made impact resistant by other methods, however, all such lenses must be capable of withstanding an impact test in which a $\frac{5}{8}$-inch steel ball weighing approximately 0.56 ounces is dropped from a height of 50 inches upon the horizontal upper surface of the lens. The ball shall strike within a $\frac{5}{8}$-inch diameter circle located at the geometric center of the lens. The ball may be guided, but not restricted, in its fall by being dropped through a tube extending to within approximately 4 inches of the lens. In order to pass the test, the lens must not fracture (for the purpose of this section, a lens will be considered to have fractured if it cracks through its entire thickness, including a laminar layer, if any, and across a complete diameter into two or more separate pieces or if any lens material visable to the naked eye becomes detached from the ocular surface). The test shall be conducted with the lens supported by a tube (1-inch inside diameter, $1\frac{1}{4}$-inch outside diameter, and approximately 1-inch high) affixed to a rigid iron or steel base plate. The total weight of the base plate and its rigidly attached fixtures shall be not less than 27 pounds. For lenses of small minimum diameter, a support tube having an outside diameter of less than $1\frac{1}{4}$ inches may be used. The support tube shall be made of rigid acrylic plastic, steel or other suitable substance and shall have securely bonded on the top edge a $\frac{1}{8}$- by $\frac{1}{8}$-inch neoprene gasket having a hardness of 40±5, as determined by ASTM Method D 1415; a minimum tensile strength of 1,200 pounds, as determined by ASTM Method D 412; and a minimum ultimate elongation of 400 percent, as determined by ASTM Method D 412. The diameter and/or contour of the lens support may be modified as necessary so that the $\frac{1}{8}$- by $\frac{1}{8}$-inch neoprene gasket supports the lens at is periphery. Each finished impact-resistant glass lens for prescription use shall be subjected to the impact test prescribed by this paragraph. Raised ledge multifocal lenses must be impact-resistant but need not be tested beyond initial design testing. To demonstrate that all other types of impact-resistant lenses (including impact-resistant laminated glass lenses) are capable of withstanding this impact test, the manufacturer of such lenses shall subject to the impact test a statistically significant sampling of lenses from each production batch, and the lenses so tested shall be representative of the finished forms as worn by the wearer (including finished forms that are of minimal lens thickness and have been subjected to any treatment used to impart impact resistance). Plastic prescription and all nonprescription lenses, tested on the basis of statistical significance, may be tested in uncut finished or semifinished form at the point of original manufacture. This statement of policy will be appropriately amended to provide for use of alternate methods of testing the impact resistance of lenses if it can be shown that the alternate method is equal to or superior to the method prescribed in this paragraph.

(e) Copies of invoice(s), shipping document(s), and records of sale or distribution of all impact resistant lenses (including finished eyeglasses and sunglasses) shall be kept and maintained for a period of 3 years; however, the names and addresses of individuals purchasing nonprescription eyeglasses and sunglasses at the retail level need not be kept and maintained by the retailer. The records kept in compliance with this paragraph shall be made available, upon request at all reasonable hours by any officer or employee of the Food and Drug Administration or by any other officer or employee acting on behalf of the Secretary of Health, Education, and Welfare and such officer or employee shall be permitted to inspect and copy such records, to make such inventories of stock as he deems necessary, and otherwise to check the correctness of such inventories.

(f) In addition, those persons conducting impact tests in accordance with paragraph (d) of this section, shall keep and maintain the results thereof for a period of 3 years. Such records and results shall be made available, upon request at all reasonable hours by any officer or employee acting on behalf of the Secretary of Health, Education, and Welfare and shall permit such officer or employee to inspect and copy such records, to make such inventories of stock as he deems necessary, and otherwise to check the correctness of such inventories.

(g) For the purpose of this section, the term "manufacturer" includes an importer for resale. Such importer may have the tests required by paragraph (d) of this section conducted in the country of origin but must make the results thereof available, upon request, to the Food and Drug Administration, as soon as practicable.

(h) The transition to impact-resistant lenses must be completed as promptly as possible; however, to provide for the development of an adequate supply of impact-resistant lenses and to facilitate an orderly changeover to these lenses, all lenses manufactured after January 31, 1972, must be impact-resistant, except when the physician or optometrist finds that impact-resistant lenses will not fulfill the visual requirements of a particular patient.

(i) This statement of policy does not apply to contact lenses.

Effective date. This order shall become effective on its date of publication in the FEDERAL REGISTER (2-2-72).

(Secs. 502(j), 701(a), 52 Stat. 1051, 1055; 21 U.S.C. 352(j), 371(a))

Dated: January 31, 1972.

SAM D. FINE,
Associate Commissioner for Compliance.

[FR Doc.72-1607 Filed 2-1-72;8:51 am]

Federal Trade Commission

TRADE PRACTICE RULES

For The

OPTICAL PRODUCTS INDUSTRY

Promulgated June 30, 1962

65 X

FEDERAL TRADE COMMISSION

Paul Rand Dixon, Chairman
Sigurd Anderson
William C. Kern
Philip Elman
A. Everette MacIntyre

Joseph W. Shea, Secretary

X 99

FEDERAL TRADE COMMISSION
Washington

TRADE PRACTICE RULES

For The

OPTICAL PRODUCTS INDUSTRY

As Promulgated June 30, 1962

STATEMENT BY THE COMMISSION:

Trade practice rules for the Optical Products Industry, hereinafter set forth, are promulgated by the Federal Trade Commission under its trade practice conference procedure. They constitute a revision and extension of the trade practice rules promulgated for the Wholesale Optical Industry on June 30, 1950 and supersede and replace such rules.

The industry members and products, to which the rules now promulgated have application, are defined in paragraphs (a) and (b) which immediately precede such rules.

Proceedings for the establishment of rules for the Optical Products Industry were instituted pursuant to an application from an industry trade association. An industry trade practice conference was held in Chicago, Illinois on January 19, 1962, under auspices of the Commission. Subsequently proposed rules were released by the Commission and a public hearing was held thereon, pursuant to public notice, in the Federal Trad Commission Building, Washington, D. C., on May 14, 1962, at which industry members and other interested and affected parties were afforde opportunity to express their views, objections, and suggestions concerning the coverage and form and content of such proposed rules. Thereafter, and upon full consideration of the entire matter, final action was taken by the Commission whereby it approved rules for the industry in the form hereinafter set forth and directed that same be promulgated.

The rules are interpretive of requirements of laws administered by the Commission. They define and proscribe various practices deemed to be violative of such laws, and are thus designed to be of assistance to the industry members in keeping their trade practices and business behavior in full consonance with legal requirements.

Such rules become operative thirty (30) days from the date of their promulgation.

THE INDUSTRY AND ITS PRODUCTS DEFINED

(a) Members of the industry are persons, firms, corporations, or organizations engaged in the manufacture, processing, assembly, sale, offering for sale, or distribution of any kind of industry products as the term "industry products" is defined in the next paragraph.

(b) The term "industry products," as used in (a) above and in the following rules, includes eyeglasses and contact lenses which are designed to provide correction and improvement of eyesight, and parts (lenses, frames, etc.) or accessories therefor. As here used, the term "eyeglasses" includes spectacles and eyeglass clip-ons having non-prescription magnifying lenses, as well as eyeglasses with prescription lenses. Sunglasses, goggles and safety spectacles which are designed solely for the protection of eyes or eyesight, as distinguished from correction or improvement of eyesight, are not included; nor are precision lenses for telescopes, binoculars, etc., to be considered as included.

(Note: It is to be understood that the word "sale," as used in (a) of the above definition and in the rules which follow, is to be construed as including the dispensing of prescription eyeglasses or contact lenses by ophthalmologists, oculists, physicians, or optometrists, to their patients, as well as the dispensing of such products by opticians to their customers.)

THE RULES

The rules which follow are based on statutes administered by the Commission. Their application is subject to jurisdictional requirements specified in such statutes.1/ When such jurisdictional requirements are present, appropriate proceedings will be taken by the Commission in the public interest to prevent any member of the industry from engaging in any practice proscribed by such rules. When a formal complaint proceeding is instituted, the complaint charge will be that of violation the statutory provision on which the rule is based.

RULE 1 - DECEPTION (GENERAL).

(1) It is an unfair trade practice for any industry member to sell or offer for sale any industry product under any representation, circumstance, or condition, having the capacity and tendency or effect of deceiving a purchaser or prospective purchaser in any material respe

(2) Among the practices which are to be regarded as prohibited b (1) above are advertisements and sales presentations in newspapers, magazines, catalogues, telephone directories, radio or television broadcasts, or otherwise, which deceive purchasers or prospective purchasers with respect to -

(a) the composition, construction, design, type, quality, durabili or efficacy of any industry product or part thereof;

(b) the identity of the manufacturer, processor, or distributor of any industry product or part thereof;

(c) conformance of contact lenses, and lenses and frames of eyeglasses, to the requirements of the purchaser as prescribed b an ophthalmologist, oculist, physician, or optometrist;

(d) the extent of vision improvement that may reasonably be expected from use of the advertised eyeglasses or contact lense

(e) the probable length of time that the lenses of an advertised product will be satisfactory for use by the wearer without nee for polishing, processing, or replacement; or

(f) the immunity or degree of resistance possessed by an industr product, or part thereof, with respect to breakage, discolora tion, tarnish, or corrosion.

RULE 2 - FALSE ADVERTISING OF NON-PRESCRIPTION MAGNIFYING SPECTACLES.

It is an unfair trade practice for any industry member to publish, or cause to be published, any advertisement or sales presentation relating to non-prescription magnifying spectacles (sometimes referre to as ready-made spectacles) which represents, directly or by implication, that the spectacles so offered will correct, or are capable of correcting, defects in vision of persons, unless it is clearly and conspicuously disclosed in the advertisement or sales presentation that t correction of defects in vision by such products is limited to persons approximately 40 years of age and older who do not have astigmatism or diseases of the eye and who require only simple magnifying or reducing lenses; or to publish or cause to be published any advertiseme or sales presentation which has the capacity and tendency or effect of deceiving purchasers or prospective purchasers in any other materia

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1/The rules are based on Sections 5, 12, and 15 of the Federal Trade Commission Act, as amended, and Sections 2 and 3 of the Clayton Act, as amended.

For application of the prohibitions of Section 5 of the Federal Trade Commission Act, as amended, it is requisite that the practice be "in commerce." The term "commerce" is defined in said Act as follows:

"'Commerce' means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation."

Industry products are "devices" as the term is defined in Section 15 of the Act. Under Section 12 of the Act, the Commission has authority to take corrective action respecting any false advertisement of such products which is disseminated "by the United States mails, or in commerce by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly" a purchase of the advertised product; and under Section 13 of the Act, it also has authority to bring court suits to enjoin dissemination of false advertisements of such products pending the issuance by it (the Commission) of a formal complaint.

Though it has authority to take corrective action respecting the mislabeling, as well as false advertising, of industry products, it is the Commission's general policy to not exercise its authority respecting the mislabeling of the products, and to thus avoid duplication, and possible conflict, of effort with the Food and Drug Administration of the Department of Health, Education and Welfare, such Administration having responsibilities under specific statutes relating to the mislabeling of the products. This general policy is not to be considered as applicable to price pretic keting violative of Rule 6, nor to deception as to origin or place of manufacture violative of Rule 9; and there may be additional situations in which the Commission will exercise its jurisdiction over the mislabeling of the products.

For application of the prohibitions of Sections 2 and 3 of the Clayton Act, as amended, it is requisite that the parties be "engaged in commerce" and that the practice be "in the

RULE 3 - FALSE ADVERTISING OF CONTACT LENSES.

It is an unfair trade practice, in the offering for sale, sale, or distribution of contact lenses, for an industry member to publish or cause to be published any advertisement which represents directly or by implication that contact lenses -

(a) are suitable and safe for all persons, regardless of their age, health, or eye condition;

(b) can be worn satisfactorily and without discomfort by all, or nearly all, persons;

(c) can be fitted without any discomfort;

(d) can be worn for any short or long period without discomfort unless the advertisement clearly reveals that practically all persons will experience some discomfort when first wearing them and that in a significant number of cases the discomfort period may be prolonged;

(e) can be worn all day without discomfort by any person except after that person has become fully adjusted thereto and unless such is the fact;

(f) will completely replace eyeglasses in all, or nearly all, cases, or will provide better correction of vision than eyeglasses in all, or nearly all, cases;

(g) which are bifocal are as satisfactory to the wearer as prescription eyeglasses having bifocal lenses;

(h) will correct all defects in vision;

(i) will stay in place under all conditions; or under any specified conditions when such is not the fact;

(j) are unbreakable in all circumstances; or are unbreakable in any indicated circumstances when such is not the fact;

(k) can be adequately tried without financial obligation, unless such is the fact;

(l) will protect the eyes, unless such representation is limited in application to the portion of the eyes covered by such lenses and does not denote or connote a greater degree of protection to such portion, than is in fact the case;

(m) do not rest upon, or have contact with, the eyes;

(n) are more comfortable than all other types or kinds of contact lenses; (When represented as more comfortable than all other [illegible] design or construction or

have unique features, which assure of comfort during wear superior to that of any other contact lenses currently available for purchase;)

or which is misleading in any other material respect.

RULE 4 - BAIT ADVERTISING.

It is an unfair trade practice for an industry member to offer for sale any industry product when the offer is not a bona fide effort to sell the product so offered as advertised and at the advertised price.

(NOTE: In determining whether there has been a violation of this rule, consideration will be given to acts or practices indicating that the offer was not made in good faith for the purpose of selling the advertised product, but was made for the purpose of contacting prospective purchasers and selling them a product or products other than the product offered. Among acts or practices which will be considered in making that determination are the following:

(a) The creation, through the initial offer or advertisement, of a false impression of the grade, quality, make, value, currency of model, size, usability, or origin of the product offered;

(b) The refusal to show, demonstrate, or sell the product offered in accordance with the terms of the offer;

(c) The disparagement, by acts or words, of the product offered or the disparagement of the guarantee, credit terms, availability of service, repairs or parts, or in any other respect, in connection with it;

(d) The showing, demonstrating, and in the event of sale, the delivery, of a product which is unusable or impractical for the purpose represented or implied in the offer;

(e) The refusal, in the event of sale of the product offered, to deliver such product to the buyer within a reasonable time thereaft

(f) The failure to have available a quantity of the advertised product at the advertised price sufficient to meet reasonably anticipated demands.

It is not necessary that each act or practice set forth above be present in order to establish that a particular offer is violative of this Rule.)

RULE 5 - GUARANTEES, WARRANTIES, ETC.

It is an unfair trade practice to represent in advertising or otherw that a product is "guaranteed" without clear and conspicuous disclosu of:

(1) the nature and extent of the guarantee, and

(2) any material conditions or limitations in the guarantee which are imposed by the guarantor, and

(3) the manner in which the guarantor will perform thereunder, and

(4) the identity of the guarantor.

Guarantees shall not be used which under normal conditions are impractical of fulfillment or which are for such a period of time or are otherwise of such nature as to have the capacity and tendency of misleading purchasers or prospective purchasers into the belief that the product so guaranteed has a greater degree of serviceability, durability or performance capability in actual use than is true in fact.

This rule has application not only to "guarantees" but also to "warranties," to purported "guarantees" and "warranties," and to any promise or representation in the nature of a "guarantee" or "warranty."

RULE 6 - DECEPTIVE PRICING.

It is an unfair trade practice for any member of the industry to represent directly or indirectly in advertising or otherwise that an industry product may be purchased for a specified price, or at a saving, or at a reduced price, when such is not the fact; or otherwise to deceive purchasers or prospective purchasers with respect to the price of any product offered for sale; or to furnish any means or instrumentality by which others engaged in the sale of industry products may make any such representation.

Among the types of practices to be regarded as prohibited by the foregoing paragraph of this rule are the following:

(a) statements in advertising which represent or imply that a specified price for prescription eyeglasses or contact lenses includes the cost to the buyer of necessary eye examination and test by an ophthalmologist or optometrist for the purpose of determining his visual defects and prescribing suitable lenses for the relief or correction thereof, when such is not the case;

(b) statements in advertising which represent or imply that complete eyeglasses are purchasable for a specified price when an additional price is charged for a component part of the complete eyeglasses (such as the frames thereof);

(c) statements in advertising which represent or imply that a specified price is applicable to all types and kinds of eyeglasses or contact lenses when a higher price is charged for certain kinds or types (e.g., when the stated price has applicability to eyeglasses with single vision lenses and a higher price is charged for eyeglasses with bifocal lenses);

(d) statements in advertising which represent or imply that c tact lenses may be purchased at a specified price when an additio and undisclosed charge is made for processing and fitting service that are necessary and made evident after first use by the buyer during the period required for his adjustment to the use of such lens

(e) statements in advertising which represent or imply that products may be purchased on credit for the same price that is a plicable to cash sales; that no down payment is required in the ca of credit sales; that no finance charge or interest is required whe products are sold on credit or an installment payment plan; or th a finance or interest charge in the case of sales on credit will not exceed a specified amount or rate; when any such statement is fal or misleading;

(f) statements in advertising which represent or imply that th price at which an industry product may be purchased from the sel by a consumer purchaser is the "factory" or "manufacturer's" price when such price is higher than the usual and customary pri paid by wholesalers or others purchasing directly from the factor in the trade area or areas where the representation is made.

(g) representing or implying that a stated price is the seller' usual and regular price of an industry product when in fact such stated price is in excess of the price at which such product is reg larly and customarily sold by the seller in the usual and recent course of business.

(Note: The words and phrases "regularly," "usually," "formerly," "was____ now____," "_____% off" and "you save $_ when used in connection with prices constitute representations the advertiser's former usual and customary prices in recent course of business.)

(h) representing or implying that a stated price constitutes a duction from the trade area price unless the saving or reduction i from the usual and customary price of an industry product in the trade area, or areas where the representation is made.

(Note: The words and phrases "manufacturer's suggested lis $_____ -- our price $ _____," "sold nationally at $_____" and "value $_____" constitute representations of an article's usua and customary retail price in the trade area where the representations are made.)

(i) pre-ticketing a product with any price figure or otherwis representing, contrary to the fact, that there is a usual and custo ary price for the product in the trade area where it is offered for and that the usual and customary price is the pre-ticketed price, pre-ticketing a product with any price if the pre-ticketed product usually and customarily sold at a lower price or at a variety of p significantly lower than the pre-ticketed price in the trade area c areas where it is offered for sale.

(j) disseminating pre-ticketed price figures for use in connection with the offer for sale of products at retail by others (even though they themselves are not engaged in retail sales) when the price figures do not meet the standard set forth in this rule.

(k) placing in the hands of others a means or instrumentality by which they may mislead the public. For the purposes of this rule pre-ticketing includes the use of price figures,

(1) affixed to the product by tag, label or otherwise, or

(2) in such a form as to be affixed to the product by others, or

(3) in material, such as display placards, which are used, or designed to be used, with the product at point of sale to the consuming public.

Example: A manufacturer pre-tickets his products with "Price $12.95." Although this price prevails in many trade areas, in other areas the product generally sells for $10.95. The pre-ticketed price would violate this rule in any trade area where the $12.95 price was not the usual and customary retail price.

(Note: Guides Against Deceptive Pricing adopted by the Commission October 2, 1958, are now in the process of revision. The new guides will supplement this rule by affording additional guidance on the subject. When approved, the new guides will be published in the Federal Register and copies thereof will be furnished upon request.)

RULE 7 - PROHIBITED PAYMENTS BY DISPENSERS TO DOCTORS: PROHIBITED TYING OF REFRACTIONS WITH DISPENSING, ETC.

(a) As used in this rule, the word "doctor" makes reference to any ophthalmologist, oculist, physician, or optometrist, who makes ophthalmic refractions for a patient and prescribes eyeglasses or contact lenses for the correction or improvement of the vision of such patient, and the word "dispenser" makes reference to any party who supplies eyeglasses or contact lenses, so prescribed, to any such patient. The terms are to be understood as embracing any agent, representative, or employee of the doctor or dispenser, and any employer, principal, or associate, corporate or otherwise, for which either acts or purports to act.

(b) It is an unfair trade practice for any dispenser to make or give directly or indirectly, to any doctor (whether such dispenser acts or purports to act as an agent of the doctor or otherwise), any payment arising out of or connected with his (the dispenser's) sale or dispensing of eyeglasses or contact lenses to a patient of such doctor, whether such payment be in the form of, or is described or regarded as, a rebate, credit, credit balance, gift, dividend, participation in or share in profits, or otherwise; or for a dispenser to enter into or participate in any

agreement, understanding, scheme, plan, or concert of action, with an doctor, or with any other party or parties, which provides for, or facil tates, any such payments.

(Note 1: It is to be understood that paragraph (b) of this rule does not have application to the dispensing of eyeglasses or contact lenses by a doctor (either himself or through a bona fide employee) in his own professional offices. Such dispensing is, however, to be considered as among the practices which are subject to the prohibitions of paragraph (c) of this rule.)

(Note 2: In 1951, in actions instituted by the Department of Justice decrees were entered in the United States District Court for the Northern District of Illinois, Eastern Division, which have application to oculists and ophthalmologists as a class, as well as other defendants, including ophthalmalic dispensers. These decrees perpetually enjoin such doctors -

"(a) From accepting, directly or indirectly, or designating an person to thus accept, from any dispenser (whether such dispenser acts or purports to act as an agent of the doctor, or otherwise), any payment arising out of or connected with dispensing to any patient of such defendant doctor, whether such payment is in the form of, or is described or regarded as, a rebate, credit, credit balance, gift, dividend, participation in or share in profits, or otherwise;

(b) Entering into or participating in any plan, arrangement, o scheme whereby said defendant doctor receives from any dispenser (whether such dispenser acts or purports to act as agen of the doctor, or otherwise) directly or indirectly in any form (including any of the forms and methods referred to above) any payment arising out of or connected with dispensing to any pati of such defendant doctor."

with explanation that the term "dispenser," as so used, does not have application "to a refractionist who engages in dispensing in h own professional offices (either himself or through a bona fide em ployee) to his own patients only." These decrees remain in force and effect, and nothing in this Rule 7, or any of the other rules, i to be construed as relieving any industry member or other party subject to such decrees from complying with the requirements and provisions thereof. In the interest of clarifying certain of the requirements of these decrees the Department has issued opinions i the form of three letters bearing dates of May 28, 1951, Sept. 10, 1951, and Sept. 24, 1951, which are set forth in an appendix to th rules.)

(c) It is an unfair trade practice to tie in or condition eye refract service for a patient with the dispensing of the prescribed eyeglasses contact lenses to the patient, when such practice effects, or has a re sonable probability of effecting, substantial injury to competition, or creates or tends to create a monopoly, at any competitive level in the

(Note: To be considered as subject to the prohibitions of paragraph (c), when effecting, or having a reasonable probability of effecting, substantial injury to competition at any competitive level in the trade area or areas where the practice is employed, are tyings of dispensing with refractions which are accomplished by -

(1) Refusal of the doctor to perform refractions, or to supply prescriptions based thereon, when and because the patient desires to have the dispensing of the product done by another party lawfully qualified to dispense same.

(2) The doctor requiring a higher fee for his refraction service when he does not dispense the products he prescribes than when he does dispense such products.

(3) The doctor falsely disparaging the competency or workmanship of others competing with him in the dispensing of the products.

(See also Rule 15, entitled "False Disparagement of Competitors or Their Products," Rule 16, entitled "Coercing Purchase of One Product as a Prerequisite to the Purchase of Another or Other Products," Rule 20, entitled "Prohibited Forms of Trade Restraints (Unlawful Price Fixing, Etc.," and Rule 21, entitled "Exclusive Dealing," which are applicable to all industry members.)

RULE 8 - PROHIBITED DISCRIMINATION.

Section I. Prohibited Discriminatory Prices, Rebates, Refunds, Discounts, Credits, Etc., Which Effect Unlawful Price Discrimination. It is an unfair trade practice for any member of the industry engaged in commerce, in the course of such commerce, to grant or allow secretly or openly, directly or indirectly, any rebate, refund, discount, credit, or other form of price differential, where such rebate, refund, discount, credit, or other form of price differential, effects a discrimination in price between different purchasers of goods of like grade and quality, where either or any of the purchases involved therein are in commerce, and where the effect thereof may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided however -

(a) That the goods involved in any such transaction are sold for use, consumption, or resale within any place under the jurisdiction of the United States, and are not purchased by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit, as supplies for their own use;

(b) That nothing contained in Section I of this rule shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered;

(Note 1: Cost Justification to be Based on Net Savings in Cost of Manufacture, Sale or Delivery. Cost justification unde the above proviso depends upon net savings in cost based on all facts relevant to the transactions under the terms of proviso (b) For example, if a seller regularly grants a discount based upo the purchase of a specified quantity by a single order for a sing delivery, and this discount is justified by cost differences, it does not follow that the same discount can be cost justified if granted to a purchaser of the same quantity by multiple orders or for multiple deliveries.)

(Note 2: Credit or Refund for Returned Goods. In determir ing whether a price differential based on cost savings under th above proviso is warranted there shall be taken into account an portion of the goods involved which are returned by the custome purchaser to the seller for credit or refund. See also Note und Section V of this rule.)

(c) That nothing contained in this rule shall prevent persons engaged in selling goods, wares, or merchandise in commerce fro selecting their own customers in bona fide transactions and not in restraint of trade;

(d) That nothing contained in Section I of this rule shall prevent price changes from time to time where made in response to changi conditions affecting the market for or the marketability of the good concerned, such as but not limited to obsolescence of seasonal goo distress sales under court process, or sales in good faith in discor tinuance of business in the goods concerned;

(e) That nothing contained in this rule shall prevent the meetin in good faith of an equally low price of a competitor.

(Note 1: In complaint proceedings, justification of price dif ferentials under subsections (b), (d) and (e) of Section I of this rule is a matter of affirmative defense to be established by the person or concern charged with price discrimination.)

(Note 2: Subsection (b) of Section 2 of the Clayton Act, as amended, reads as follows:

"Upon proof being made, at any hearing on a complaint und this section, that there has been discrimination in price or ser ices or facilities furnished, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justi fication shall be affirmatively shown, the Commission is author ized to issue an order terminating the discrimination: Provide however, That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any pu chaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnish

Section II. The following are examples of some of the price differential practices which are to be considered as subject to the prohibitions of Section I of this rule WHEN - -

(a) the commerce requirements specified in Section I of this rule are present; and

(b) the goods involved are of like grade and quality and are sold for use, consumption, or resale within any place under the jurisdiction of the United States, and are not purchased by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit, as supplies for their own use; and

(c) the price differential has a reasonable probability of substantially lessening competition or tending to create a monopoly in any line of commerce, or of injuring, destroying, or preventing competition with the industry member or with the customer knowingly receiving the benefit of the price differential, or with customers of either of them; and

(d) the price differential is not justified by cost savings /see (b) of Section I/; and

(e) the price differential is not made in response to changing conditions affecting the market for or the marketability of the goods concerned /see (d) of Section I/; and

(f) the lower price was not made to meet in good faith an equally low price of a competitor /see (e) of Section I/.

Example 1. Payment terms of 2/10th prox. are granted by an industry member to some customers on goods purchased by them from the industry member. Another customer or customers are, nevertheless, allowed to take a 5% instead of a 2% discount when making payment to the industry member within the time prescribed.

Example 2. An industry member sells goods to one or more of his customers at a lower price than he charges other customers therefor, basing his justification for the price difference solely on the fact that the goods sold at the lower price bear the private brand name of customers.

Example 3. An industry member sells goods to one or more of his customers at a higher price than he charges other customers for like merchandise. It is immaterial whether the goods sold at the lower price are classified by the industry member as "seconds," "secondary line," "rejects," or are otherwise represented by the industry member as inferior, if in fact of like grade and quality as the goods sold at the higher price.

Example 4. An industry member sells to a customer, which operates as both a wholesaler and a retailer, industry products which the customer resells in its capacity as a retailer, and the industry member charges such customer a lower price therefor than such industry member charges

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Section III. Prohibited Brokerage and Commission. It is an unfa trade practice for any member of the industry engaged in commerce, the course of such commerce, to pay or grant, or to receive or accep anything of value as a commission, brokerage, or other compensatio or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or me chandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermedia is acting in fact for or in behalf, or is subject to the direct or indirec control, of any party to such transaction other than the person by whc such compensation is so granted or paid.

Section IV. Prohibited Advertising or Promotional Allowances, F It is an unfair trade practice for any member of the industry engaged commerce to pay or contract for the payment of advertising or promo tional allowances or any other thing of value to or for the benefit of a customer of such member in the course of such commerce as compen tion or in consideration for any service or facilities furnished by or through such customer in connection with the processing, handling, s or offering for sale of any products or commodities manufactured, so or offered for sale by such member, unless such payment or conside tion is made known to and is available on proportionally equal terms all other customers competing in the distribution of such products or commodities.

(Note 1: Industry members giving allowances for advertising sales promotion must, in addition to according same to all compe customers on proportionally equal terms, exercise precaution an diligence in seeing that all such allowances are used by the custo for such purpose. Customers receiving such allowances must no use same for any other purpose.

When an allowance is made ostensibly for advertising or sales promotion of products and is not in fact used for that purpose the practice may constitute a price discrimination. In such case, the party giving the allowance may violate Section I of this rule and t party receiving same may violate Section VI of this rule.)

(Note 2: When an industry member gives allowances to compe customers for advertising in a newspaper or periodical, the fact a lower advertising rate for equivalent space is available to one c more, but not all, such customers, is not to be regarded by the industry member as warranting the retention by such customer o customers of any portion of the allowance for his or their person use or benefit.)

Section V. Prohibited Discriminatory Services or Facilities. It an unfair trade practice for any member of the industry engaged in c merce to discriminate in favor of one purchaser against another pur chaser or purchasers of a commodity bought for resale, with or with processing, by contracting to furnish or furnishing or by contributin the furnishing of, any services or facilities connected with the proce ing, handling, sale, or offering for sale of such commodity so purch

upon terms not made known to and accorded to all competing purchasers on proportionally equal terms.

(Note No. 1: Subsection (b) of Section 2 of the Clayton Act, as amended, which is set forth in the note concluding Section I of this rule is applicable to Section V.)

(Note No. 2: Among the practices prohibited by Section V of this rule is that of an industry member according to one or more customers the privilege of returning for credit or refund any or all of the goods purchased by them and failing to accord the same privilege to another or other competing customers on proportionally equal terms. In this connection see also Note No. 2 under cost justification proviso (b) of Section I of this rule.)

Section VI. Inducing or Receiving an Illegal Discrimination in Price, Advertising or Promotional Allowances, or Services or Facilities. It is an unfair trade practice for any member of the industry engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price, advertising or promotional allowances, or services or facilities, prohibited by the foregoing provisions of this rule.

RULE 9 - DECEPTION AS TO ORIGIN OR PLACE OF MANUFACTURE.

In the sale, offering for sale, or distribution of industry products, it is an unfair trade practice -

(a) To misrepresent the origin or place of manufacture of an industry product or any part thereof; or

(b) Subject to the exemptions hereinafter specified, to fail to adequately disclose that an industry product, or any substantial part thereof, is of foreign origin, or has been manufactured, processed, or assembled in a foreign country, when the failure to make such disclosure has the capacity and tendency or effect of deceiving purchasers or prospective purchasers.

The disclosure required by (b) above shall be in the form of a legible marking or stamping on the industry product, or on a label or tag which is affixed thereto with such degree of permanency as to remain on or attached to the product, in legible form, until consummation of the consumer sale thereof, and shall be of such conspicuousness as to be likely observed by purchasers and prospective purchasers making casual inspection of the product. The disclosure shall name the foreign country of origin or manufacture, and when not applicable to the entire product, shall specify the part or parts to which it has applicability. If such disclosure on the product is concealed or obscured by reason of packaging or manner in which it is mounted in a container or on a display card, and is displayed and offered for consumer sale in such form, then the disclosure shall also appear on such packaging, container, or display card with such conspicuousness as to be likely observed by consumer purchasers and prospective consumer purchasers before consummation of their purchase of the product.

Exemptions. To be regarded as exempt from the disclosure requirements of (b) above are -

sheet, wire, tubing, and similar basic material, whether of plastic, metal, or other substance, when imported in that form; and

rivets, springs, screws, bolts, brads, washers and similar small parts of eyeglass frames, when imported in an unassembled state and thereafter used in the manufacture of eyeglass frames;

small and basically decorative and non-functional imported parts; and

imported parts, which because of substantial domestic processing or merger with other parts after importation, no longer retain the appearance and essential characteristics possessed by them at the time of their importation. (Note: In this connection it is to be understood that the installation of lenses into frames in this country, though involving cutting, edging, and beveling of the lenses, and boring of holes in the frames or edges of the lenses, does not exempt from the requirements of (b) above when either the lenses or frames so assembled, or both such parts, have been imported from a foreign country.)

(Note: Nothing in this rule is to be construed as relieving any industry member from compliance with the requirements of custom laws of the U. S. having application to industry products and parts imported from a foreign country.)

RULE 10 - MISREPRESENTING PRODUCTS AS CONFORMING TO A STANDARD.

In the sale, offering for sale or distribution of industry products, it is an unfair trade practice to represent, directly or indirectly, that any such product, or any part thereof, has been designed or constructed so as to conform to a standard when -

(1) No disclosure is made of the identity of the standard (whether private, official, or otherwise); or

(2) The standard to which reference is made has been rescinded, amended, or superseded, and no disclosure is made of such fact; or

(3) The product or part does not fully conform to the requirements of the standard.

RULE 11 - MISREPRESENTATION AS TO CHARACTER OF BUSINESS.

It is an unfair trade practice for any industry member, in connection with his sale, offering for sale, or distribution of industry products, to misrepresent the character, extent, or type of his business.

RULE 12 - FALSE INVOICING.

It is an unfair trade practice to withhold from or insert in invoices any statements or information by reason of which omission or insertion a false record is made, wholly or in part, of the transactions represented on the face of such invoices, with the capacity and tendency or effect of thereby misleading or deceiving purchasers, prospective purchasers, or the buying public in any material respect.

In order to prevent misunderstanding, confusion, or deception, the invoice or billing should disclose that the products of the industry covered thereby are seconds, defective, or other than first-quality merchandise, when such is the fact.

RULE 13 - CONSIGNMENT DISTRIBUTION.

(a) It is an unfair trade practice for any member of the industry to employ the practice of shipping industry products on consignment without the express request or prior consent of the purchasers.

(b) Nothing in this rule shall be construed as authorizing any understanding or agreement, combination or conspiracy, or planned common course of action, by and between industry members, mutually to conform or restrict their practice of shipping goods on consignment.

RULE 14 - COMMERCIAL BRIBERY.

It is an unfair trade practice for a member of the industry, directly or indirectly, to give, or offer to give, or permit or cause to be given, money or anything of value to agents, employees, or representatives of customers or prospective customers, or to agents, employees, or representatives of competitors' customers or prospective customers, without the knowledge of their employers or principals, as an inducement to influence their employers or principals to purchase or contract to purchase products sold or offered for sale by such industry member, or to influence such employers or principals to refrain from dealing in the products of competitors or from dealing or contracting to deal with competitors.

RULE 15 - FALSE DISPARAGEMENT OF COMPETITORS OR THEIR PRODUCTS.

It is an unfair trade practice for any industry member to represent or imply that a competitor is incompetent or not qualified to make, process, or fit industry products, or certain kinds or types of industry products, or that a competitor's products are inferior to those of the industry member, when such is not the case; or in any other manner to falsely disparage a competitor or his products.

RULE 16 - COERCING PURCHASE OF ONE PRODUCT AS A PREREQUISITE TO PURCHASE OF ANOTHER OR OTHER PRODUCTS.

The practice of coercing the purchase of one or more products as a prerequisite to the purchase of one or more other products, where the

effect may be to substantially lessen competition or tend to create a monopoly or to unreasonably restrain trade, is an unfair trade practice.

RULE 17 - INDUCING BREACH OF CONTRACT.

Knowingly inducing or attempting to induce the breach of existing lawful contracts between competitors and their customers or between competitors and their suppliers, or interfering with or obstructing the performance of any such contractual duties or services, under any circumstance having the capacity and tendency or effect of substantially injuring or lessening competition, is an unfair trade practice.

Nothing in this rule is intended to imply that it is improper to solicit the business of a customer of a competing industry member; nor is the rule to be construed as in anywise authorizing any agreement, understanding, or planned common course of action by two or more industry members not to solicit business from, or sell to, the customers of either of them, or customers of any other industry member.

RULE 18 - ENTICING AWAY EMPLOYEES OF COMPETITORS.

It is an unfair trade practice for any member of the industry wilfully to entice away employees or sales-contract personnel of competitors with the intent and effect of thereby unduly hampering or injuring competitors in their business and destroying or substantially lessening competition; provided, that nothing in this rule shall be construed as prohibiting employees from seeking more favorable employment, or as prohibiting employers from hiring or offering employment to employees of a competitor in good faith and not for the purpose of inflicting injury on such competitor.

RULE 19 - DECEPTIVE USE OR IMITATION OR SIMULATION OF TRADE OR CORPORATE NAMES, TRADE-MARKS, ETC.

It is an unfair trade practice for any member of the industry -

(a) to imitate or simulate the trade-marks, trade names, brands, or labels of competitors, with the capacity and tendency or effect of misleading or deceiving purchasers or prospective purchasers; or

(b) to represent by use of any trade name, corporate name, trade-mark, or other trade designation that any industry member is a manufacturer, wholesaler or importer when such is not the fact; or

(c) to use any trade name, corporate name, trade-mark, or other trade designation, which has the capacity and tendency or effect of misleading or deceiving purchasers or prospective purchasers as to the name, nature, or origin of any product of the industry, or of any material used therein, or which is false, deceptive, or misleading in any other material respect.

RULE 20 - PROHIBITED FORMS OF TRADE RESTRAINTS (UNLAWFUL PRICE FIXING, ETC.).2/

It is an unfair trade practice for any member of the industry, either directly or indirectly, to engage in any planned common course of action, or to enter into or take part in any understanding, agreement, combination, or conspiracy, with one or more members of the industry, or with any other person or persons, to fix or maintain the price of any goods or otherwise unlawfully to restrain trade; or to use any form of threat, intimidation, or coercion to induce any member of the industry or other person or persons to engage in any such planned common course of action, or to become a party to any such understanding, agreement, combination, or conspiracy.

RULE 21 - EXCLUSIVE DEALING.

It is an unfair trade practice for any member of the industry to contract to sell or sell any industry product, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the purchaser thereof shall not use or deal in the products of a competitor or competitors of such industry member, where the effect of such sale or contract for sale, or of such condition, agreement, or understanding, may be substantially to lessen competition or tend to create a monopoly in any line of commerce.

2/The prohibitions of this rule are subject to Public Law 542, approved July 14, 1952 -- 66 Stat. 632 (the McGuire Act, commonly referred to as the Fair Trade Amendment) which provides that with respect to a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, a seller of such a commodity may enter into a contract or agreement with a buyer thereof which establishes a minimum or stipulated price at which such commodity may be resold by such buyer when such contract or agreement is lawful as applied to intrastate transactions under the laws of the State, Territory, or territorial jurisdiction in which the resale is to be made or to which the commodity is to be transported for such resale, and when such contract or agreement is not between manufacturers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.

APPENDIX

Set forth below are copies of the letters of the Department of Justice which are referred to in Note 2 of Rule 7 of the foregoing trade practice rules for the Optical Products Industry.

DEPARTMENT OF JUSTICE
Suite 820, 208 South LaSalle Street
Chicago 4, Illinois

May 28, 1951

Re: /Title of case/

Dear Doctor:

I am enclosing a copy of the final judgment which has been approved by the Court and entered in this case. Certain provisions of this judgment are binding upon you as a defendant class doctor and therefore this letter, which has been approved by the Court, is being written to you, in order that you may understand why the judgment is binding upon you, as well as the purpose and effect of the judgment, as it affects you.

Final judgments containing identical provisions forbidding doctors from sharing profits connected with the sale of glasses have been approved and entered in all six of the "Optical Rebating" cases which were brought by the Government. These cases are United States v. Bausch & Lomb Optical Company et al., United States v. American Optical Company et al., United States v. House of Vision-Belgard-Spero, Inc., et al., United States v. Uhlemann Optical Company et al. (all filed in Chicago), United States v. N. P. Benson Optical Company et al. (filed in Minneapolis, Minnesota), and United States v. The White-Haines Optical Company et al. (filed in Columbus, Ohio). These six final judgments directly bind you, and the approximately 4,000 other doctors who were sued in those cases. These judgments were entered with the consent of the parties who had signed them (and for that reason frequently are called "consent decrees"), but they have the same binding effect as a judgment entered by the Court after trial.

When the complaints in this case and the related cases were first filed, the Government anticipated trying them in court. A date was set by the Court for the trial of the first of these cases and the Government made extensive preparations for trial in all six cases. Counsel representing the defendants in the various cases then opened negotiations with the Government with a view to disposing of the cases by consent instead of undergoing what undoubtedly would be lengthy trials. The final judgment which you now have is the result of negotiations which extended over a period of more than two years.

As you know, this case and the five other Optical Rebating cases are "class actions." Only a selected number of doctors (in no one case more than 30) were named in each of the complaints that were filed in the cases, but those were chosen as being representative of a much larger "class" of doctors. This is the authorized procedure where

a number of persons sued in a case is large. Clearly it would have been impractical to name as individual defendants the approximately 4,000 doctors who we knew had received rebates and to require each one of them to appear in court to file answers and otherwise defend themselves in the suits.

All of the doctors in this case who were sued individually and as representatives of the "class doctors" have consented to the entry of this final judgment. Of the 75 doctors who were sued as representatives of the class doctors in the six cases, all have agreed to the entry of similar judgments. In each of the six cases a considerable number of "class doctors," i. e., those not named as individual defendants in the complaint, voluntarily filed statements submitting to the jurisdiction of the court and agreeing to be bound by whatever judgment might be entered. The remaining "class doctors" were served with "show cause orders" which informed the doctor as to his status in this case. These "show cause orders" also gave him the right, if he objected to being represented by the doctors named as representative defendants in the complaint or to being bound by a final judgment entered in the case, to answer the complaint and defend himself as an individual defendant. It is noteworthy that not a single doctor of the 4,000 involved in the six cases availed himself of the "day in court" afforded by the show cause order.

Over two years after the show cause orders were issued, one doctor (who shortly thereafter died and whose position was assumed by two doctors) filed a motion attacking the theory and operation of the class action in this case and seeking to have this case dismissed as to all "class doctors." The Court denied the motion and upheld the class suit as being a valid and proper one. A copy of the Court's memorandum opinion on that question is sent you herewith. Considering all the foregoing, it is the Government's opinion that the final judgment in this case is as binding on you as if you had been personally present in court as an individual defendant and had in that capacity given your assent to its entry against you.

Your attention is called particularly to paragraph III of this final judgment and to the relevant definitions contained in paragraph II. These are the provisions which will probably be of greatest interest to you and the other doctors. Paragraph III is the order of the Court enjoining the individual and class defendant doctors from accepting, directly or indirectly, from any dispenser any payment, however described, arising out of or connected with dispensing to any person and further enjoining any entry into or participation in any plan, arrangement, or scheme under which any defendant doctor receives any such payment from any dispenser.

The final judgment does not prevent you from following the normal professional practice and procedure of prescribing lenses for your patients and giving the prescription to the patient, who then takes the prescription to an optical supply company (dispensing optician) to be filled. The optical supply company then fulfills the purely business function of filling the prescription, selling the glasses to the patient,

and making the necessary fitting of the glasses to the patient's face. Doctors continue to be free to follow this procedure. They are, of course, subject to those provisions in the final judgment which prohibit the rebating practice in all its forms.

In our opinion, the provisions of this final judgment would not prevent any individual doctor from doing his own dispensing in his own professional offices (either himself or through a bona fide full time employee) to his own patients only. The same holds true as to doctors who operate through a partnership for purely professional purposes, or in a clinic, or through other similar arrangements involving the occupancy by the doctors in the group of common, or contiguous and inter-connected professional office space, and the sharing of such common facilities as the reception room, telephone operator, receptionist, stenographic help, and the like. Such "group practice" doctors could likewise share in the common utilization of the services of a bona fide employee of such doctors who does dispensing to the patients of such doctors only, in the professional offices of such doctors.

It is clear to us, however, that the individual doctors or "group practice" doctors as described above, who do their own dispensing or use a bona fide employee to do such dispensing to patients of such doctors only, could not enter into any agreement or understanding or concert of action with any other persons, including other doctors or other dispensers, with respect to the prices to be charged for the spectacles and parts thereof dispensed.

It is also clear to us that all forms of arrangements between doctors (other than the above arrangements associated with "group practice"), directed at setting up or utilizing a dispenser whose services shall be shared by more than one doctor and from whom such doctors derive any payments arising out of or connected with such dispensing to their patients, whether such payment be in the form of or regarded as a rebate, credit, credit balance, gift, dividend, participation in or share in profits or otherwise, would be prohibited under the decree.

Sincerely yours,

H. G. Morison
Assistant Attorney General
By Willis L. Hotchkiss
Chief, Midwest Office
Antitrust Division

(TEXT OF DEPARTMENT'S SEPTEMBER 24, 1951 LETTER PERTAINING TO INVESTMENT BY DOCTORS IN CORPORATIONS ENGAGED IN DISPENSING)

* * *

Your second inquiry concerns the applicability of the Judgments to the investment by doctors in corporations engaged in dispensing. The situation which you describe may be summarized as follows:

Four doctors and a layman form a corporation which is to engage in optical dispensing. Each of these persons pays $2,000 for 20% of the stock. The doctors direct their patients to the company without disclosing their ownership interest therein. Each doctor and the layman receives dividends proportionate to the amount of stock held by each, without regard to the number of referrals. The doctor-stock-holders "have no connection whatsoever with the prices charged."

It is not our general practice to give our construction of a consent judgment except with respect to the facts of specific and identified cases involving parties to the judgment. However, it is our view that the "stock investment" plan outlined in the preceding paragraph would be in violation of the Optical Rebating Judgments.

Sincerely yours,

H. G. Morison
Assistant Attorney General

(TEXT OF DEPARTMENT'S SEPTEMBER 10, 1951 LETTER ON CHARGE AND SEND PLANS)

Since receiving your letter requesting an opinion on the question whether the final judgment in this case applies to the type of "charge and send" plan you describe, we have had a number of inquiries relating to variations of the same plan asking whether such plans are permissible under the final judgments entered in the optical rebating cases. These inquiries have provided us with considerable information on the operation and effect of the various plans.

The basic "charge and send" plan consists of the following procedure:

(a) the doctor makes a refraction for which he charges the patient a professional fee, writes a prescription, and sends the patient to a designated optical house to have it filled;

(b) the optical house makes the necessary measurements, displays the frames and mountings from which the patient makes his selection, quotes the patient the consumer price for the finished glasses, grinds the lenses to the prescription and mounts them;

(c) the patient later returns to the optical house to have the glasses fitted and adjusted, and the optical house then sends the glasses to the doctor rather than turning them over to the patient;

(d) the patient returns to the doctor who turns the glasses over to the patient and collects the consumer price for them, remits to the optical house the wholesale price plus the fitting fee, and

retains for himself the difference between that amount and the consumer price.

You have described a variant whereby the doctor would keep a case of sample frames in his professional office from which the patient would make his selection, with the doctor then quoting to the patient the consumer price.

It is our opinion that the basic "charge and send" plan is prohibited under the optical rebating judgments. The same is true as to the variations which you describe, and those variations similar thereto, such as the "C. O. D. charge and send." Each of these procedures constitutes a plan, arrangement, or scheme whereby the doctor obtains a financial return arising out of or connected with dispensing to his patient, with the doctor performing no real function in the dispensing procedure other than collecting the consumer price. The procedures accomplish by indirection, and by a complex and artificial procedure, what was done directly and simply under the old rebate system. The procedures therefore come under the prohibition of the final judgments in this and the related optical rebating cases.

Sincerely yours,

H. G. Morison
Assistant Attorney General
By Willis L. Hotchkiss
Chief, Midwest Office
Antitrust Division

Promulgated by the Federal Trade Commission June 30, 1962.

Joseph W. Shea,
Secretary.

New Jersey Optometric Association

DENNIS J. YOUNG
Executive Director

514 Greenwood Avenue / Trenton, New Jersey 08609 / 609-695-3456

June 10, 1975

Assemblyman Byron M. Baer
35 Liberty Road
Bergenfield, New Jersey 07631

Dear Mr. Baer,

After carefully reviewing the statements, testimony and position papers, both pro and con, presented at the May 22 Public Hearing on behalf of Assembly Bills 3263 and 3264, we stand more resolute than ever in our original opposition to the commercialization and price advertising within the profession of optometry. As the likelihood of vast, outside monopolistic interests developing becomes more and more apparent, we urge you as a legislator, responsible for what is in the best interest of New Jersey residents, to consider the long term effects, if such a trend were permitted within our health care delivery system.

In Texas, where commercialization and price advertising is permitted, Deputy Attorney General Robert Oliver has outlined in testimony attached to our original position paper, how the large corporate system operates just within the fringes of the law to reap large corporate profits. Under one large roof we have the state licensed optometrist who has been hired (and set-up in an office complete with ophthalmic equipment for a small rental fee) working adjacent to an interconnecting door where the optician waits for referrals -- or vice versa.

California became so concerned about this particular unhealthy characteristic of the monopolistic corporation that the following statement appeared in the Report and Recommendations of the California Attorney General's Inflation Committee's Report: "It is the opinion of this Committee that the potential harm to the consumer inherent in any such relationship between optician and optometrist is so great that elimination of the referral requirement of section 655(a) will strengthen the statute whereby an optician and a captive optometrist having a financial interest in the issuing of a prescription which will then be filled by his landlord, the optician, will be precisely prohibited."

Even Professor Lee Benham, whose statistical data Virginia Annich, (New Jersey Consumer Affairs Director), supports, notes in the Effect of Advertising on Prices, December 15, 1971 -- the share of the market held by large commercial firms declines when advertising is prohibited. Therefore, one can only conclude there is an evident correlation between the commercialization/price advertising concept and the profit motivated monopolies. The realization of more pronounced lucrative renumerations is apparently very promising in New Jersey for already, we have operating chains. And if testimony presented by Dr. Bernard Miskiv of Cherry Hill, in opposition to A-3263 is considered, a pattern similar to that of Texas is already being established in New Jersey. If Mrs. Annich fully understood the cost of mass media advertising, today, she would realize the far reaching implications of advocating the price advertising of ophthalmic devices and professional services. It is quite obvious who will be paying for this advertising -- the consumer.

It is blatantly clear, the cost of mass media advertising prohibits the independent practitioner from reaching the public on the same scale. While the Consumer Affairs Division is not concerned with the "individual" mode of practice, neither do we believe it is the intention of any state legislator to bury the solo practitioner's professional expertise in the mass communication techniques of the conglomerate able to spend colossal sums in advertising.

We fully believe that the public should be allowed their choice of eye care delivery. In an effort to educate the public to the importance of proper eye care and criteria for judging same, we have for many years, placed a high priority on making available, at our own expense, eye care brochures, optometrists to speak, display units, eye care emergency care packets, posters, bookmarks, etc., to New Jersey residents, state agencies, schools, civic groups, education organizations, service organizations, nursing homes, industry and health fairs. Additionally, we have sponsored seminars for school nurses, emergency care personnel and individual elementary classrooms, as well as performing year round free vision screenings, in many instances for the specific detection of amblyopia and glaucoma.

In contrast to relying on slick marketing tactics to bait the consumer, we feel we have an obligation to educate the consumer in a positive, constructive manner, placing emphasis on the function of the eyes, various afflictions of the eyes, the importance of proper eye care and what constitutes a proper examination.

When one takes all the aspects of A-3263 and A-3264 into consideration: lowering of eye care standards, outside monopolistic controls, profit oriented advertising claims, increased cost factors -- we would have to admit the New Jersey consumer's position in relation to eye care delivery is very precarious indeed!

It is interesting, also, to consider that Medicaid, the largest single third party plan in the United States, will not permit health care practitioners to advertise that they accept Medicaid patients for fear of establishing Medicaid patient mills and corporate control. We seriously doubt whether any National Health Insurance Plan enacted by the federal government will permit advertising of health care services for the very same reasons.

Nineteen states have recently had to consider the commercialization and/or price advertising within the profession of optometry, and not a single state's legislature have recognized enough long range, creditable merits on behalf of the consumer to warrant passage of such destructive and monopolistic legislation. We urge that you, as concerned legislators, do the same with regard to Assembly Bills 3263 and 3264.

Sincerely,

Charles S. Papier, O.D.
President
New Jersey Optometric Assn.

CSP:msk

cc: Members of the Commerce, Industry and Professions Committee