



# THE ATTORNEY GENERAL OF TEXAS

AUSTIN, TEXAS 78711

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ATTORNEY GENERAL

May 9, 1975

The Honorable Joe A. Hubenak  
Chairman  
Committee on Agriculture and Livestock  
House of Representatives  
P. O. Box 2910  
Austin, Texas 78767

Letter Advisory No. 103

Re: Constitutionality of House  
Bill 922

Dear Representative Hubenak:

You have requested our opinion regarding the constitutionality of House Bill 922, which would amend Chapter 17 of the Business and Commerce Code to require unit pricing on all "consumable commodities" sold at retail by any vendor who in the previous calendar year has grossed \$150,000.00 or more in retail sales of such consumable commodities.

"Consumable commodity" is defined to include "food, foodstuffs, and any item ordinarily used in the performance of chores rendered within the household by members of the household and consumed or expended in the course of use." The seller is required to display the unit price on each item, rounded to the nearest tenth of one cent, "either on each consumable commodity sold or offered for sale, or near the display of consumable commodities offered for sale."

Authority to enforce the proposed statute and to promulgate regulations thereunder is conferred upon the Texas Department of Agriculture, and any violation of either statute or regulation is punished as a Class C misdemeanor. Specifically, you ask whether the requirement of unit pricing contravenes the Commerce Clause of the United States Constitution.

It is well established that federal law touching the Commerce Clause is preemptive of state law regarding any particular subject on which Congress has legislated. Amalgamated Ass'n of Street, Electric Rwy. & Motor Coach Employees of America, Division 998 v. Wisconsin Employment Relations Board, 340 U. S. 383 (1951). State law which attempts to legislate in an area preempted by the Congress or which is in conflict with a federal law is invalid under the supremacy clause. U. S. Const., art. 6, cl. 2. In

the Fair Packaging and Labeling Act, 15 U. S. C. § 1451. (1966), et seq., Congress has acted to preclude the states from requiring "the labeling of the net quantity of contents of the package of any consumer commodity covered by this chapter which are less stringent than or require information different from the requirements of section 1453 of this title or regulations promulgated pursuant thereto." (emphasis added) 15 U. S. C. § 1461.

"Consumer commodity" is defined in § 1459 of the Act as:

(a). . .any food, drug, device, or cosmetic. . . and any other article, product, or commodity of any kind or class which is customarily produced or distributed for sale through retail sales agencies or instrumentalities for consumption by individuals, or use by individuals for purposes of personal care or in the performance of services ordinarily rendered within the household, and which usually is consumed or expended in the course of such consumption or use.

The definition then specifically excepts:

- (1) any meat or meat product, poultry or poultry product, or tobacco or tobacco product;
- (2) any commodity subject to packaging or labeling requirements imposed by the Secretary of Agriculture pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act, or the provisions of the eighth paragraph under the heading 'Bureau of Animal Industry' of the Act of March 4, 1913, commonly known as the Virus-Serum-Toxin Act;
- (3) any drug subject to the provisions of section 353 (b)(1) or 356 of Title 21;
- (4) any beverage subject to or complying with packaging or labeling requirements imposed under the Federal Alcohol Administration Act; or
- (5) any commodity subject to the provisions of the Federal Seed Act.

Sec. 1459(a)

It is apparent that, except as to those items specifically excepted under section 1459, the Legislature is not constitutionally permitted to require the affixing of any net quantity of contents information to a commodity itself or to the package in which it is contained. As is indicated, however, by the legislative history of the Fair Packaging & Labeling Act, the statute is not intended to preclude the states from directing that unit price information be affixed to consumable commodities offered for sale. Senate Report No. 1186 (May 25, 1966) declares:

Section 12 provides that regulations promulgated under the act shall supersede State law only to the extent that the States impose net quantity of contents labeling requirements which differ from requirements imposed under the terms of the act. The bill is not intended to limit the authority of the States to establish such packaging and labeling standards as they deem necessary in response to State and local needs. 3 U. S. Code Cong. & Ad. News 4077, 89th Cong., 2d Sess., (1966).

The Minority Report indicates even more clearly that the Act does not address the question of price posting:

. . . the bill will not assure any improvement in the consumer's ability to make price comparisons. This is so because the price is set, not by the producer, but by the retailer -- and set wholly outside the scope of this bill. Nothing in the bill requires even the posting of a price. U. S. Code Cong. & Ad. News, supra, at 4089.

Finally, in the only reported case which has considered the "net contents" preemption of section 1461, the court held that

The Fair Packaging and Labeling Act only supersedes State "net contents" regulations. Congress, by omitting an express limitation on the State's power to regulate product names, did not intend to preempt this area of regulation. Atlantic Ocean Products, Inc. v. Leth, 292 F. Supp. 615, 618 (D. Ore., 1968).

We believe that the same may be said for price posting. Thus, it is our opinion that, except as to those items specifically excepted under section 1459 of the Fair Packaging and Labeling Act, H. B. 922 does not conflict with any portion of the federal act.

A number of the items excepted under section 1459 are, however, subject to preemption under other statutes. As to meat and meat products, a state may not impose "marking, labeling, packaging or ingredient requirements in addition to, or different than, those made under [the Meat Inspection Act]." 21 U. S. C. § 678.

Thus, as to meat and meat products, that portion of H. B. 922 which directs that the unit price be displayed on, affixed to, or accompanying the item, is preempted by section 678 and thus must be deemed an unconstitutional burden on interstate commerce.

Virtually identical provisions obtain with regard to poultry and poultry products, 21 U. S. C. §§ 453, 467e, and with regard to pesticides, 7 U. S. C. §§ 136(p), 136v, and as to such items, the Legislature may not validly require the posting of prices on, affixed to, or accompanying the commodity. On the other hand, preemption is not statutorily required for products covered by the Virus-Serum-Toxin Act or for the drugs subject to the provisions of 21 U. S. C. § 353(b)(1) and § 356. Likewise, we have discovered no federal statute which would preclude the State from requiring unit pricing for tobacco and tobacco products; for alcoholic beverages subject to or complying with packaging or labeling regulations imposed under the Federal Alcohol Administration Act; or for commodities subject to the provisions of the Federal Seed Act. As to this limited class of items, the unit pricing provisions of H. B. 922 are constitutional in their entirety.

In summary, it is our opinion that H. B. 922 does not contravene the Commerce Clause of the United States Constitution except as to meat and meat products, poultry and poultry products, and pesticides. As to these items, the proposed bill may not validly require that the unit price be on, affixed to or accompanying the commodity offered for sale.

Very truly yours,

  
JOHN L. HILL  
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APPROVED:



DAVID M. KENDALL, First Assistant



C. ROBERT HEATH, Chairman  
Opinion Committee

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