

August 11, 2005: Antitrust Act

Honorable Leonard Lee Rawson
State Senator
P.O. Box 996
Las Cruces, NM 88004

Re: **Opinion Request--Antitrust Act**

Dear Senator Rawson:

You ask our advice on these questions:

1. What is the Attorney General's position on her duty to enforce Section 57-1-18 NMSA 1978, especially as Section 57-1-10 NMSA 1978 authorizes her to enforce or to delegate enforcement of the act to District Attorneys?
2. Would the Attorney General find it appropriate to prosecute or to delegate prosecution of a merchant who declines to sell goods for cash to an individual who owes the merchant a sum of money? Particularly, could you clarify whether Section 57-1-18 NMSA 1978 applies when a merchant declines to sell on the basis of outstanding debt? In this instance, the merchant does not wish to continue his business relationship while the debt remains unpaid.

Both your questions concern Section 57-1-18, in the context of a merchant who does not wish to sell to someone because that individual owes the merchant money. Specifically, you wish to know whether Section 57-1-18 applies in that specific circumstance. Addressing that specific question, we do not believe that Section 57-1-18 is intended to apply to the situation where a merchant, for legitimate business reasons, does not wish to do business with a specific individual. Section 57-1-18 is intended, we believe, to apply to the general practice of commercial advertising and to prohibit a certain form of commercial advertising and selling to the general public that the Legislature has determined is deceitful and unfair to the general consuming public.

Discussion.

NMSA 1978, § 57-1-18 (1955 as amended through 1995) and NMSA 1978, § 57-1-19 (1955) were first enacted in 1955 and were designed to prevent a type of unfair and deceitful commercial practice in which a merchant would advertise goods at a certain price and then, after having enticed or lured the consumer to his place of business by virtue of the advertised price, would thereafter impose a limit on the quantity of goods that the consumer could buy at that advertised price.

As first enacted, 1955 N.M. Laws, ch. 250 ("Chapter 250") provided:

Section 1. It shall be unlawful for any merchant in this state to advertise or offer for sale any item of merchandise with a limitation upon the number of such items which any purchaser may purchase at such advertised price. It shall further be unlawful for any merchant offering or advertising any such item of merchandise at any given price to refuse to sell to any prospective purchaser for cash the whole or any part of his stock of such items at such price.

Section 2. Any person convicted of violating this act shall be punished by a fine of not more than five hundred dollars (\$500) or by imprisonment of not more than ninety days, or by both such fine and imprisonment.

The title to Chapter 250 is: "An Act Relating to the Advertisement and Sale of Merchandise in the State of New Mexico; Making It Unlawful to Limit the Number of Items Any Purchaser May Purchase; and Providing a Penalty."

1957 N.M. Laws, ch. 30 ("Chapter 30") amended section 1 of Chapter 250 to allow the merchant to limit the number of purchases if the merchant advertised the limitation and also advertised the exact quantity of such items, which would be sold to a purchaser at the advertised price. The title to Chapter 30 is: "An Act Relating to the Advertisement and Sale of Merchandise in the State of New Mexico; Making it Unlawful to Limit the Number of Items Any Purchaser May Purchase Without Advertising the Limit."

1961 N.M. Laws, ch. 52 ("Chapter 52") removed the permissible limitation enacted by Chapter 30 and thus restored the statute to its original form, with minor differences. The title to Chapter 52 is: "An Act Relating to the Advertisement and Sale of Merchandise; Making it Unlawful to Limit the Number of Items Any Purchaser May Purchase, and Providing a Penalty."

1995 N.M. Laws, ch.19, § 1 ("Chapter 19") amended this statute, codified as § 57-1-18, to restrict its scope to exclude a "purchaser purchasing for resale," thus excluding a "wholesaler." Chapter 19 reflects the current version of § 57-1-18. The title to Chapter 19 is: "Relating to Trade Practices and Regulations; Providing For a Merchant's Right to Limit Purchases to Persons Buying for Resale; Amending the Antitrust Act; Amending the Unfair Practices Act."

In its present form, § 57-1-18 provides:

It is unlawful for any merchant to advertise or offer for sale any item of merchandise with a limitation upon the number of the item that any retail purchaser may purchase at the advertised price. It is further unlawful for any merchant offering or advertising any item of merchandise in his place of business at any given price to refuse to sell to any prospective retail purchaser for cash the whole or any part of his stock of such item at such price. However, this section shall not be applicable to a purchaser purchasing for resale.

In its same form as enacted in 1955, § 57-1-19 provides:

Any person convicted of violating this act [57-1-18, 57-1-19] shall be punished by a fine of not more than five hundred (\$500) or by imprisonment of not more than ninety days, or by both such fine and imprisonment.

Apart from Chapter 19 (excluding wholesalers), the titles to the original and amending acts have consistently read: "Relating to the advertisement and sale of merchandise; making it unlawful to limit the number of items any purchaser may purchase." As evidenced by these titles, commercial advertising and selling to the general public is the focus of § 57-1-18.

The titles of acts may be used to ascertain legislative intent. See State v. Smith, 2004-NMSC-032, ¶ 13-14 (court looks to not only statutory language but also to titles; stating that the title of a statute may be used to construe a statute's meaning); Harriett v. Lusk, 63 N.M. 383, 388, 320 P.2d 738,742 (1958) (title of an act may be utilized as an aid in determining legislative intent and to resolve doubts as to meanings); State v. Richardson, 48 N.M. 544, 549, 154 P.2d 224, 227 (1944) ("For the purpose of determining legislative intent, a court may look to the title of a statute, and ordinarily it may be considered as part of the statute if necessary to its construction.").

The purpose of § 57-1-18 is to prevent merchant trickery of the general consuming public who are baited or lured into a selling establishment because of the advertised price of a particular item, only to be confronted by a merchant who surprises them with a limitation on the quantity of items that they may buy at that advertised price. Section 57-1-18 is not intended to alter a merchant's legitimate business practices in, for example, choosing not to sell to a particular individual for legitimate business reasons.

As in the fact situation presented, if a merchant does not wish to do business with a particular individual because that individual owes the merchant money in connection with past business dealings, we believe § 57-1-18 has no application. In that situation, the merchant is not "limiting" the sale of an advertised item to the general public; instead, the merchant is simply choosing not to sell at all to a particular individual due to a matter extraneous to the merchant's commercial advertising to the general public.

Section 57-1-18 presupposes a "willing" buyer and a "willing" seller. Section 57-1-18's use of the term "prospective retail purchaser" connotes that willingness. The term "prospective" means "expected or likely to happen or be in the future." Concise Oxford English Dictionary 1148 (10th ed., revised, 2002). In the fact situation presented, there is no willing seller and hence no "expected" or "likely" purchaser.

Construed as a harmonious whole and in a compatible manner, especially by reading together the first and second sentences of § 57-1-18,¹ that statute simply prohibits a merchant, who presumably wants to sell, from limiting, in the merchant's advertisements or offerings for sale, the quantity of items which a prospective retail purchaser, such as the ordinary consumer, might buy at the advertised price, and further prohibits that merchant's refusal to sell for cash "the whole or any part of his stock of such item at

such [advertised] price." The language, "whole or any part of his stock," reinforces the prohibition against limiting the quantity of items that a prospective purchaser may buy.

Moreover, as a penal statute, a court is likely to construe § 57-1-18 narrowly and, for that reason, to have no application to the hypothetical fact situation you present. In State v. Shop Rite Foods, Inc., 74 N.M. 55, 390 P.2d 290 (1964), the New Mexico Supreme Court upheld the trial court's decision to quash certain criminal informations that charged the store with violating § 57-1-18, because the store advertised two different prices, specifically, one price per pound for the first turkey and a second, higher, price per pound for additional turkeys.² Applying the rule of statutory interpretation that penal statutes are strictly construed and the "plain language" rule, the court held that: "[I]t becomes apparent that the advertised price was one or two items at one price and additional items at a higher price. The informations charged neither a limitation upon the number of items which any purchaser might buy at the advertised price nor a refusal to sell to any prospective purchaser the whole or any part of such items of merchandise at the advertised price." *Id.* at 57, 390 P.2d at 438.³

Shop Rite indicates that a court is likely to construe § 57-1-18 narrowly and is likely to restrict it to a "commercial advertising" context, where the issue concerns the merchant's refusal to sell to the general public a "quantity" of items at the advertised price. We believe a court is unlikely to extend that statute to apply to a specific, individual case where a merchant, for legitimate business reasons unrelated to the merchant's commercial advertising aims, does not wish to do business with a specific individual.⁴

Regarding your general question about the statutory authority of the Attorney General under NMSA 1978, § 57-1-10 (1979)⁵ to prosecute under § 57-1-19 for violations of § 57-1-18, the Attorney General necessarily must be satisfied that any such prosecution is warranted, substantiated and justified as in furtherance of the state's interest. We cannot speculate on which cases would or would not be brought. That is by necessity a fact-specific determination that is not conducive to broad speculation.

In conclusion, we do not believe that Section 57-1-18 is intended to apply to the situation described by the facts presented where a merchant, for legitimate business reasons, does not wish to do business with a specific individual. Section 57-1-18 is intended, we believe, to apply to the general practice of commercial advertising and to prohibit a certain form of commercial advertising and selling to the general public that the Legislature has determined is deceitful and unfair to the general consuming public.

If we may be of further assistance, please let us know. Your request to us was for a formal Attorney General's Opinion on the matters discussed above. Such an opinion would be a public document available to the general public. Although we are providing you our legal advice in the form of a letter instead of an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the public.

Sincerely,

Andrea R. Buzzard
Assistant Attorney General
Deyonna Young
Assistant Attorney General

[1] All portions of a statute are read in connection with every other part to produce a harmonious whole. State v. Vaughn, 2005-NMCA-076, ¶ 33, ___ N.M. ___, 114 P.3d 354, cert. denied, 2005-NMCERT-6, ___ N.M. ___, ___ P.3d ___; General Motors Acceptance Corp. v. Anaya, 103 N.M. 72, 76, 703 P.2d 169, 173 (1985).

[2] The opinion in Shop Rite reflects the following version of § 57-1-18 that was in effect when the case was prosecuted:

It is unlawful for any merchant to advertise or offer for sale any item of merchandise with a limitation upon the number of such items which any purchaser may purchase at the advertised price. It is further unlawful for any merchant offering or advertising any such item of merchandise in his place of business at any given price to refuse to sell to any prospective purchaser for cash the whole or any part of his stock of such items at such price.

[3] In State v. Barber's Supermarket, Inc., 74 N.M. 58, 390 P.2d 439 (1964), the New Mexico Supreme Court affirmed, on the basis of Shop Rite, the trial court's ruling dismissing criminal charges brought under § 57-1-18. As did the defendant in Shop Rite, Barber's Supermarket advertised margarine at 10 cents for the first three pounds and a higher price for additional quantities.

[4] The facts of the situation you present suggest only a refusal to sell to a specific individual for legitimate business reasons. Under other circumstances, however, that might not be the case. If, for example, a merchant employed debt collection practices in especially unfair and overreaching circumstances, the conduct might fall under NMSA 1978, § 57-12-2 (E) (2003) of the Unfair Practices Act, defining "unconscionable trade practice" as "an act or practice in connection with the sale ... of any goods ... or in the collection of debts which to a person's detriment: (1) takes advantage of the lack of knowledge, ability, experience or capacity of a person to a grossly unfair degree...".

[5] The Attorney General's enforcement authority regarding the Antitrust Act is set forth at § 57-1-10, enacted by 1979 N.M. Laws, ch. 374, § 11:

DISTRICT ATTORNEYS--ENFORCEMENT.--In order to promote the uniform administration of the Antitrust Act in New Mexico, the attorney general is to be responsible for its enforcement, but he may, on a case-by-case basis, delegate this authority to the district attorneys of the state and when this is done, the district attorneys shall have every power and duty conferred upon the attorney general by this act.

NMSA 1978, § 57-1-1.1 (1979) states the scope of the New Mexico's Antitrust Act as follows: "Sections 57-1-1 through 57-1-15 may be cited as the 'Antitrust Act.'" Although § 57-1-18 is outside this stated scope, the title to Chapter 18 of 1995 N.M. Laws, amending § 57-1-18, states, in part: "Amending the Antitrust Act." To the extent doubt regarding the authority of the Attorney General to prosecute violations of § 57-1-18 were raised because of the scope stated in § 57-1-1.1, Chapter 18's title could be looked to in order to resolve that doubt. "For the purpose of determining legislative intent, a court may look to the title of a statute, and ordinarily it may be considered as part of the statute if necessary to its construction." State v. Richardson, 48 N.M. 544, 549, 154 P.2d 224, 227 (1944). See also State ex rel. Sedillo v. Sargent, 24 N.M. 333, 337, 171 P. 790, 791-92 (1918) (in construing statutes, if the meaning thereof is doubtful, the title, if expressive, may have the effect to resolve doubts by extension of the purview or by restraining it or to correct an obvious error).