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ATTORNEY GENERAL OPINION NO. 89- 66

The Honorable Ben E. Vidricksen
State Senator, Twenty-Fourth District
713 N. 11th Street
Salina, Kansas 67404-1814

Re: Taxation--Motor Vehicle Fuel Taxes; Motor-Fuel
Tax--Tax Imposed on Use, Sale or Delivery of
Motor-Vehicle Fuels; Pumps Labeled to Show Alcohol
Content

Synopsis: The Kansas labeling law found in subsection (b) of
K.S.A. 1988 Supp. 79-3408 that requires every
retail pump for motor vehicle fuel be labeled to
show content and percentage of any ethyl alcohol or
other alcohol combined or alone in excess of 1% by
volume does not violate Sections 1 and 2 of the
Kansas Constitution or the 14th Amendment of the
United States Constitution. Cited herein: K.S.A.
1988 Supp. 79-3408; Kan. Const., Arts. 1 & 2;
U. S. Const., 14th Amend.

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Dear Senator Vidricksen:

As Senator for the Twenty-Fourth District you inquire about
the constitutionality of subsection (b) of K.S.A. 1988 Supp.
79-3408, known as the Kansas Labeling Law, that states:
"[e]very retail pump for motor vehicle fuels shall be
conspicuously labeled to show the content and percentage of
any ethyl alcohol or other alcohol combined or alone in excess
of 1% by volume."

In addition to challenging the provision's constitutionality generally, you inquire:

1. Whether the Kansas Gasoline Labeling Law is arbitrary in that there is not reasonable basis to require the labeling of alcohol as an additive without requiring labeling of other additives;
2. Whether the labeling requirement is necessary and reasonable bearing some substantial relation to the public health, safety or morals, or to the general welfare, the public convenience, or the general prosperity;
3. Whether the labeling law is confusing and misleading, and whether it tends to substantially diminish the business of Kansas alcohol manufacturers, without serving a reasonable governmental interest.

You indicate that you seek review of the Kansas labeling law in light of a recent Alabama Supreme Court case where a similar statute was found unconstitutional. Friday v. Ethanol Corporation, 539 So.2d 208 (Ala. 1988) involved a declaratory judgment action by the Ethanol Corporation seeking a permanent injunction against a statutory amendment imposing an additional labeling requirement for motor fuel containing ethyl alcohol. The provision, subsection (c) amending Ala. Code 1975, §8-17-82, required that pumps dispensing any petroleum products used as motor fuel containing a minimum of 10% blend of ethyl alcohol be marked with the word "GASOHOL." The court found the statutory provision violated the due process clause of the 14th Amendment for being overly broad and unreasonable. 539 So.2d at 216.

Our analysis of the Kansas Labeling Law will similarly focus on whether the law violates the due process clause of the 14th Amendment and whether it violates Sections 1 and 2 of the Kansas Constitution, given that these provisions have much the same effect as the clauses of the 14th Amendment. Tri-State Hotel Co. v. Londerholm, 195 Kan. 748, 759 (1965). The legal issues are whether under the police powers of the state the ends sought to be attained are appropriate and whether the means selected are so unreasonably overbroad as to amount to a taking of private property or a stifling of personal fundamental liberties, when the ends can be more narrowly achieved. Two fundamental principles of law that preface any analysis of the constitutionality of a statute are: first, the constitutionality of a statute is presumed and before stricken, must clearly violate the constitution;

and second, we cannot address questions of legislative expediency nor legislative wisdom because these are purely legislative matters. State ex rel., Stephan v. Lane, 228 Kan. 379 (1980).

The essence of substantive due process is protection from arbitrary action resulting from arbitrary legislation. 16A Am.Jur.2d Constitutional Law §816 (1979). The statute in question is a commercial regulatory statute enacted under the police powers of the state that requires the labeling of a petroleum product. The police power of the state is an inherent power, as a sovereign, to prescribe within the limits of the state and federal constitutions reasonable regulations necessary to preserve the public order, health, safety and general welfare. 16A Am.Jur.2d Constitutional Law §363 (1979). Enacted under police powers, the statute must seek to attain an appropriate end. In other words, the statute must be reasonably calculated to achieve a purpose properly falling within the scope of the police power. Like the Alabama Supreme Court in Friday we conclude that the legislature has the power to require the labeling of a petroleum product. 539 So.2d 208, 216 (1988). Protecting the consumer from fraud and deception bears a substantial relationship to the public health, safety, and general welfare. Thus, in answer to our first question the end sought to be achieved by the labeling law is an appropriate end in that it protects the consumer from fraud and deception.

However, in order to comport with due process a statute cannot achieve a purpose, however legitimate, with a regulation or statute that broadly stifles fundamental personal liberties, when a more narrow means is available. See generally Zwickler v. Koota, 389 U.S. 241, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967) (for a discussion of the overbreadth doctrine). Overbreadth was the problem in Friday v. Ethanol Corp. The court found a violation of due process because the statutory amendment required that all alcohol-blended gasoline be labeled "GASOHOL." Making no distinction for the consumer between methanol and ethanol, the Court reasoned the amendment served more to confuse the consumer than to protect him from fraud and deception. The Alabama Supreme Court concluded:

"The legislature has the power to require the labeling of petroleum products, but does not have the power to require labeling that would confuse and mislead the consuming public and substantially

diminish the plaintiffs' business by doing so. Since subsection (c) of Act. No. 87-277 would do both, it is unconstitutional for being overly broad and unreasonable." 539 So.2d at 216. See Dissent p. 216-218.

We must therefore look to the language of the statute in question to determine whether the labeling required by the statute is so unreasonably overbroad to amount to a taking. The Kansas labeling law requires that every retail pump for motor vehicle fuel be labeled to show content and percentage of ethyl alcohol or other alcohol combined or alone when the alcohol content of the gasoline exceeds one percent by volume. In order to be reasonable and justify the state's assertion of its authority on behalf of the public, the interference must appear necessary and must reasonably accomplish its purpose, while not unduly burdening individuals. The statute in our opinion is not so onerous or overbroad as to close the business entirely or even to confuse the consumer at the expense of the industry like in Friday. It is not axiomatic that the industry will suffer given that the statute simply allows the purchaser to choose between alcohol-blended gasoline and gasoline that may contain less than one percent alcohol by volume. It is fundamental that when the rights of the citizen come in conflict with actual public welfare, the rights of the former must yield. Labeling that provides content information is in the public's interest and clearly necessary to prevent fraud and deception. The resulting injury, if any, to producers of ethyl alcohol due to the labeling of alcohol-blended gasoline must yield to the furtherance of a public good. We note in passing that the legislature's wisdom in not requiring that other additives be labeled is purely a legislative matter.

It is therefore our opinion that the state can under its police power require the labeling of motor fuel as to content of ethyl alcohol and that the means chosen to attain such are reasonable and not confusing nor unduly burdensome. We conclude the Kansas labeling law that requires every retail pump for motor vehicle fuel be labeled to show the content and percentage of any ethyl alcohol or other alcohol combined or alone in excess of 1% by volume does not violate sections one

and two of Kansas Constitution or the due process clause in
the 14th Amendment of the United States Constitution.

Very truly yours,



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