

OPINION NO. 80-069**Syllabus:**

1. For an article to constitute a "secondhand article of bedding" for the purposes of R.C. Chapter 3713, such article must meet three separate criteria: it must be an article of "bedding," as defined in R.C. 3713.01(B); it must have "been put to bodily use by, on, or about any person or animal"; and it must be "sold or offered for sale 'as is' "—that is, with a disclaimer of all implied warranties.
2. The term "as is," as used in R.C. 3713.01(G), refers to an article which is sold or offered for sale under language which operates as a disclaimer of all implied warranties, such as the implied warranties of fitness and merchantability, so that the buyer buys the article at his own risk.
3. The labeling provisions of R.C. 3713.05(B) and the sterilization provisions of R.C. 3713.051 are applicable only to "secondhand articles of bedding," as defined in R.C. 3713.01(G). Since an "article of bedding" which has been "put to bodily use" but is not sold or offered for sale under language which operates as a disclaimer of all implied warranties is not a "secondhand article of bedding," a seller need not label such an article pursuant to R.C. 3713.05(B) nor sterilize it pursuant to R.C. 3713.051 prior to selling or offering the article for sale.

To: Helen W. Evans, Director, Department of Industrial Relations, Columbus, Ohio
By: William J. Brown, Attorney General, October 30, 1980

I have before me your request for an opinion regarding the meaning and application of the term "secondhand articles of bedding," as used in R.C. 3713.01(G). It is my understanding that your concern is whether articles of bedding which have been used by the seller in a floor display, or delivered to a purchaser and subsequently returned, come within the definition of "secondhand articles of bedding," so that they must be labeled as "secondhand articles of bedding" pursuant to R.C. 3713.05(B) and sterilized pursuant to R.C. 3713.051.

R.C. 3713.05(B), which requires a seller to label any "secondhand article of bedding," provides, in pertinent part, as follows:

Any person selling, offering for sale, or having in his possession for sale any "secondhand article of bedding," shall, immediately upon receiving such secondhand article of bedding, remove the original tag or label and securely attach thereto a red tag or label, not less than four by eight inches in size, on which shall be legibly written or printed in black the words:

"SECONDHAND
PREVIOUSLY USED
CONTENTS UNKNOWN"

This section shall not apply to the sale of antique furniture or to the sale from the home of the owner directly to the purchaser. (Emphasis added.)

With the exception of casual sales made from the home of the owner to the purchaser or the sale of antiques, R.C. 3713.05 is applicable to any person selling, offering for sale, or having in his possession for sale any "secondhand article of

bedding," whether or not the person regularly engages in the sale of such articles. The provisions of R.C. 3713.05, therefore, are applicable to the sale by a wholesaler or a retailer of a floor model or an article (other than an antique) that has been delivered and returned, if such article comes within the definition of "secondhand articles of bedding."

R.C. 3713.051 which requires that "secondhand articles of bedding" be sterilized, provides as follows:

As used in this section, "secondhand stuffed toy" means any stuffed toy which has been used by any person or animal and is sold or offered for sale as is. The seller of any secondhand articles of bedding or any secondhand stuffed toys shall, prior to sale, sterilize all the items in accordance with rules of the bedding advisory board. This section shall apply only to sellers who regularly engage in the sale, either at retail or wholesale, of secondhand articles of bedding or secondhand stuffed toys and does not apply to casual sales from the home of the owner directly to the purchaser. (Emphasis added.)

R.C. 3713.051 is applicable only to the sale of "secondhand articles of bedding" and "secondhand stuffed toys" by "sellers who regularly engage in the sale" of such articles (emphasis added). Unlike R.C. 3713.05, it contains no exceptions for antique furniture. It has, therefore, been suggested that the provisions of R.C. 3713.051 were intended to apply only to so called "used furniture dealers," including dealers selling antiques, and not to wholesalers and retailers who do not deal in what is commonly known as "used furniture." The plain language of R.C. 3713.051, however, does not evidence that such was the legislative intent.

The legislature, in enacting R.C. 3713.051, chose to employ the term "sellers who regularly engage in the sale" rather than the term "used furniture dealers" or "secondhand furniture dealers." Webster's New World Dictionary 1196 (2d college ed.) defines the word "regular" as "characterized by conformity to a fixed principle or procedure; usual; customary." In construing a statute, it must be presumed that the legislature has used words that intelligently and advisedly express its intent. Watson v. Doolittle, 10 Ohio App. 2d 143, 226 N.E. 2d 771 (Williams County 1967). Therefore, it must be presumed that the legislative intent, in employing the term "sellers who regularly engage in the sale," was for R.C. 3713.051 to apply to all sellers who as a matter of custom or procedure sell articles which come within the definition of "secondhand articles of bedding."

Consequently, if a wholesaler or retailer, as a matter of custom or practice, sells articles which have been used as floor models or have been delivered and subsequently returned, and such articles constitute "secondhand articles of bedding," then such wholesaler or retailer "regularly engages in the sale" of secondhand articles of bedding and is subject to the provisions of R.C. 3713.051. The answer to your inquiry, therefore, is dependent upon the definition of "secondhand articles of bedding."

R.C. 3713.01(G) defines "secondhand articles of bedding" as "any article of bedding which has been put to bodily use by, on, or about any person or animal and is sold or offered for sale 'as is'" (emphasis added). The use of the word "and" in R.C. 3713.01(G), rather than the word "or," leads to the conclusion that for an article to constitute a "secondhand article of bedding" it must meet three separate criteria: it must be an article of "bedding"; it must have "been put to bodily use"; and it must be "sold or offered for sale 'as is'." See Heald v. City of Cleveland, 19 Ohio N.P. (n.s.) 305, 323 (C.P. Cuyahoga County 1916) (the word "and" means "with, along with, together with, also, moreover").

The term "bedding" is defined in R.C. 3713.01(B) to include "any upholstered furniture filled with material, any mattress, upholstered spring, comforter, bolster, pad, cushion, pillow, mattress protector, quilt, and any other upholstered article, to be used for sleeping, resting, or reclining purposes, and any glider, hammock, or other substantially similar article which is wholly or partly upholstered." The term "upholstered furniture" is defined in R.C. 3713.01(J) as "any article of furniture

wholly or partly stuffed or filled with material and which is used or intended for use for sitting, resting, or reclining purposes." In light of the definitions embodied in R.C. 3713.01(B) and (J), the determination as to whether an article is an "article of bedding" presents little problem. The determination, however, as to whether an "article of bedding" has "been put to bodily use by, on, or about any person or animal," which is the second characteristic or criterion of a "secondhand article of bedding," is somewhat more difficult.

The term "put to bodily use. . ." is not defined for the purposes of R.C. Chapter 3713. Moreover, I am not aware of any other statutes or case law in which the term "put to bodily use" is defined. In construing the provisions of R.C. 3713.01(G), therefore, the term "put to bodily use" must be given its plain and ordinary meaning.

Webster's New World Dictionary 1564 (2d college ed.) states that the term "put to use implies the putting of a thing. . .to a given purpose so as to accomplish an end." The word "bodily" is employed in R.C. 3713.01(G) to modify the word "use" and to describe the purpose to which the article must be put. In light of these factors, it must be concluded that an article has been "put to bodily use," as that term is defined in R.C. 3713.01(G), if that article has been utilized in connection, or in contact, with the body of a person or animal for the purposes of that person or animal.

Whether a specific article has been "put to bodily use" is, of course, a factual determination which cannot be made in the abstract, but rather must be made on a case by case basis in light of all factual circumstances. In determining whether an article of bedding which has been delivered to a purchaser and returned has been "put to bodily use," relevant factors for consideration include the time the article remained in the purchaser's home, the reason for which the article was returned, and the likelihood that the article was placed in an environment where it reasonably would have been utilized by persons or animals. In regard to an article that has been used as a floor model, the fact that the purpose of displaying such an article is to enable the public to view, touch and test the article appears to be the determinative factor in establishing that the article has been "put to bodily use."

A determination that an article is an "article of bedding which has been put to bodily use" does not necessarily mean, however, that such an article is a "secondhand article of bedding" for the purposes of R.C. Chapter 3713. To be a "secondhand article of bedding," an article must meet the third criterion or characteristic of a "secondhand article of bedding": it must be "sold or offered for sale 'as is'."

The term "as is" is not defined for the purposes of R.C. Chapter 3713. That term, however, is employed in R.C. 1302.29(C)(1) in reference to the disclaimer of warranties in the sale of goods. R.C. 1302.29(C)(1) provides that "unless the circumstances indicate otherwise all implied warranties are excluded by expressions like 'as is,' 'with all faults,' or other language which in common understanding calls the buyer's attention to the exclusion of warranties" (emphasis added). Pursuant to R.C. 1302.29(C)(1), the implied warranty of merchantability, which arises pursuant to R.C. 1302.27, and the implied warranty of fitness, which arises pursuant to R.C. 1302.28, are excluded by the use of the term "as is." The courts have interpreted the term "as is" when used in respect to the sale of goods as excluding all implied warranties, so that the buyer of the goods is put on notice that he buys at his own risk. Regula v. Gerber, 34 Ohio Op. 206, 70 N.E. 2d 662 (C.P. Tuscarawas County 1946).

¹The term "as is" serves to exclude only implied warranties and does not serve to exclude any express warranties which may be made by the seller. A seller, therefore, may make certain express warranties but exclude any implied warranties by accompanying such express warranties with the terms "as is" or "otherwise sold as is." See generally Gilliam v. Indiana National Bank, 337 So. 2d 352 (Ala. Civ. App. 1976); Williams v. McClain, 180 Miss. 6, 176, So. 712 (1937); Henderson v. Ford Motor Co., 547 S.W. 2d 663 (Tex. Civ. App. 1977).

Since the term "as is" in R.C. 3713.01(G) is employed with respect to the sale of goods, there is no reason to presume that the legislative intent was to have that term interpreted differently for the purposes of R.C. Chapter 3713 than the term is interpreted for the purposes of other statutes. It is, therefore, my opinion that the term "as is," as used in R.C. 3713.01(G), means that the "article of bedding" is sold or offered for sale without accompanying implied warranties, such as the implied warranties of fitness and merchantability, so that the buyer buys the "article of bedding" at his own risk. Consequently, even if an "article of bedding" has "been put to bodily use," such article is not a "secondhand article of bedding" for the purposes of R.C. Chapter 3713 unless it is sold or offered for sale "as is," without any accompanying implied warranties. Stated another way, if the seller does nothing to disclaim the implied warranties which would arise under the Uniform Commercial Code (R.C. 1302.27-.28), the item is not a "secondhand article of bedding" for purposes of R.C. 3713.01(G).

As previously discussed, the provisions of R.C. 3713.05 and R.C. 3713.051 are applicable only to "secondhand articles of bedding." Since an "article of bedding" which has "been put to bodily use" but is not sold or offered for sale "as is" is not a "secondhand article of bedding," a seller need not label such article as a "secondhand article of bedding" pursuant to R.C. 3713.05(B) nor sterilize it pursuant to R.C. 3713.051 prior to selling or offering the article for sale.

In conclusion, then, it is my opinion, and you are so advised, that:

1. For an article to constitute a "secondhand article of bedding" for the purposes of R.C. Chapter 3713, such article must meet three separate criteria: it must be an article of "bedding," as defined in R.C. 3713.01(B); it must have "been put to bodily use by, on, or about any person or animal"; and it must be "sold or offered for sale 'as is'"—that is, with a disclaimer of all implied warranties.
2. The term "as is," as used in R.C. 3713.01(G), refers to an article which is sold or offered for sale under language which operates as a disclaimer of all implied warranties, such as the implied warranties of fitness and merchantability, so that the buyer buys the article at his own risk.
3. The labeling provisions of R.C. 3713.05(B) and the sterilization provisions of R.C. 3713.051 are applicable only to "secondhand articles of bedding," as defined in R.C. 3713.01(G). Since an "article of bedding" which has been "put to bodily use" but is not sold or offered for sale under language which operates as a disclaimer of all implied warranties is not a "secondhand article of bedding," a seller need not label such an article pursuant to R.C. 3713.05(B) nor sterilize it pursuant to R.C. 3713.051 prior to selling or offering the article for sale.