

COMMISSIONER OF  
AGRICULTURE:  
FOODS AND DRUGS:

Product containing less than 8% milk fats; or one in which milk fats have been substituted by use of non-milk type fats; and product to which such oils have been added to ingredients provided by Sec. 196.850 RSMo 1949, defining ice cream; and manufacture, sale, or offer to sell products as, or for ice cream is illegal, but manufacture, sale or offer to sell product not as or for ice cream not illegal.



November 19, 1952

11-20-V-2

Mr. Joseph T. Stakes  
Director of Dairy Division  
Department of Agriculture  
Jefferson City, Missouri

Dear Sir:

This is to acknowledge receipt of your request for a legal opinion of this department, which reads as follows:

"Section 196.850 RSMo 1949 defines ice cream as a dairy product and a 'frozen mixture' containing several other named ingredients.

"Section 196.525 RSMo 1949, paragraph 19, defines 'dairy product'.

"Section 196.600 RSMo 1949 makes it unlawful to expose for sale any dairy product containing any foreign substance.

"Section 196.705 RSMo 1949 prohibits the use of oils or fats other than milk fat under the name of said product or articles of the derivatives thereof, or under any fictitious or trade name whatsoever. This paragraph specifically mentions fluid derivatives of several dairy products. In this connection, ice cream should be considered a liquid. All of the ingredients, such as: milk and cream, with the exception, perhaps, of sugar and fruits going into the manufacture of ice cream are liquid.

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"When these ingredients are combined, they form an ice cream mix which is also a liquid. When the ice cream is drawn from the freezer in a semi-frozen nature, it is also in a liquid state.

"The Federal Food and Drug Administration has decreed that ice cream should be stated in terms of measure generally used by consumers to express quantity--conceding, of course, that ice cream shall be treated as a liquid. Therefore it appears that there should be no question but that ice cream should be considered a liquid.

"An opinion is requested as to whether or not: first, the use of fats other than milk fats in the manufacture of ice cream constitutes a violation of existing statutes? Second, would a product containing skim milk, milk solids, sugar, flavorings, and oils other than milk fat--which product would be similar to ice cream--be in violation of existing statutes? Third, if any product explained in paragraphs one and two above were offered for sale--even though the carton containing such products did not state that the product was ice cream--would this act be in violation of existing statutes?"

Reference is made in the opinion request to certain sections of the RSMo 1949, to all of which sections we shall refer in our discussion, with the exception of 196.705. This section makes it unlawful to use fats or oils other than milk fats in the manufacture of any of the dairy products named, or any of the fluid derivatives of any of them, or to sell exchange, or to have any of such fats or oils in one's possession for the purpose of selling or exchanging same.

The dairy product and frozen mixture which another section of the statute defines as ice cream has not been mentioned in Section 196.705, supra, and since it is not wholly a derivative of any of the products specifically named, it is apparent that this section does not apply to the manufacture or sale of ice cream, and for this reason we find it unnecessary to make any further reference to same in our discussion of the questions found in the opinion request.

The first question found in the opinion request is whether or not the use of fats other than milk fats in the manufacture of ice cream constitutes a violation of existing statutes.

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For the purposes of our discussion herein we find it practical to limit our consideration of the statutes to Sections 196.850 to 196.890 of that portion of Chapter 196, RSMo 1949, entitled, "Manufacture and Sale of Ice Cream."

The exact meaning of the inquiry is not indicated, and it is difficult to determine whether the writer meant to ask if Section 196.850, (the ice cream definition statute) would be violated if the manufacturer substituted non-milk type fats for milk type fats, or whether this section would be violated if the manufacturer placed all the ingredients required by this statute in his product and then added non-milk type fats. Since the writer may have intended to refer to the alleged violations under either set of circumstances, we shall discuss the matter and give our opinion as to whether said statutes will have been violated under each set of such circumstances.

Section 196.850, supra, gives the definition of ice cream and reads as follows:

"'Ice cream' is a dairy product and a frozen mixture made of milk and cream or the products thereof; with sugar, stiffeners, flavors or extracts, and with or without certified coloring and containing not less than eight per cent milk fat. Icecream, as in this section defined, and the various ingredients thereof, shall be free from filth, manure or other harmful or diseased-bearing germs, or any element, ingredient or constituent deleterious to health. The manufacture or sale in this state of ice cream having a milk fat content less than required by sections 196.850 to 196.890, or containing any filth, manure or other harmful or disease-bearing germs, or any element, ingredient or constituent deleterious to health, shall be unlawful."

Your inquiry necessarily calls for a construction of the sections relating to the manufacture and sale of ice cream, particularly Section 196.850 and in attempting to construe said sections certain rules are to be followed, especially the primary rule of statutory construction.

Such primary rule of statutory construction has been given in the case of *Wallace v. Woods*, 102 S.W. (2d) 91, in which the court said at l. c. 95:

"The primary rule of construction of statutes is to ascertain the lawmakers' intent, from the words used if possible;

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and to put upon the language of the Legislature, honestly and faithfully, its plain and rational meaning and to promote its object, and the "manifest purpose of the statute, considered historically," is properly given consideration. \* \* \* 2 Lewis, Sutherland on Stat. Const. (2d Ed.) Sec. 363; Endlich on Interpretation of Statutes, Sec. 329; and Maxwell on Statutes (5th Ed.) 425."

The general rule prevailing in most jurisdictions that the state or municipality, when clothed with the necessary statutory authority, may regulate the manufacture and sale of food products has long been held to be the law, and also applies to ice cream. Such general rule has been aptly stated in Am. Jur., Vol. 22, 848-9 to be as follows:

"A state or municipality, if the latter is clothed with the necessary statutory authority, has the right, without violation of constitutional restrictions, to regulate with reasonable limits the manufacture and sale of ice cream or frozen milk products for the purpose of the prevention of disease or deception of the public and the securing of a wholesome product. An act the title of which recites that it is 'an act relating to food standards' is sufficiently definite to include regulations relating to ice cream. \* \* \*"

From the language used in Section 196.850, supra, it is apparent that it was the intention of the legislature to enact a law giving an exact definition of ice cream. This was not an arbitrary exercise of power on the part of the legislature but a valid exercise of the police power of the state in order to effectuate the purpose of the law. It is also apparent that the purpose of the law was to set up a standard by which all food products known as ice cream were to be measured, and to protect the public from fraud in the manufacture and sale of products which failed to measure up to that standard.

It is noted that it was the intention of the lawmakers to not only provide that a nonconformity to statutes regulating the manufacture and sale of ice cream would be deemed a violation of that law, but that such violations were declared to be misdemeanors, and punishable under the criminal laws.

The only offense specifically provided to be a violation of Section 196.850, supra, is the manufacture or sale in this state of ice cream containing less than 8% milk fat, or containing any

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filth, manure or harmful or disease bearing germs, or any element, ingredient or constituent deleterious to health. However, Section 196.885, provides that it shall be unlawful to manufacture, sell or offer for sale any ice cream which does not conform to the standard fixed by Section 196.850. Section 196.885 reads as follows:

"It shall be unlawful for any person, firm, copartnership, association or corporation to whom or to which sections 196.850 to 196.890 apply, to manufacture, sell or offer for sale in this state any frozen mixture, as, or for, ice cream which does not conform to the standard prescribed in section 196.850."

Section 196.890 provides the penalty that may be inflicted for a violation of any of the provisions of Sections 196.850 to 196.890, supra, and reads as follows:

"Whoever shall violate any of the provisions of sections 196.850 to 196.890 shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof, be punished by imprisonment in the county jail for a period of not exceeding thirty days, or by a fine of not less than twenty-five dollars nor more than three hundred dollars, or by both such fine and imprisonment."

For the reasons given above we repeat that it was the apparent intention of the legislature in the enactment of Section 196.850, supra, to give an exact definition of ice cream and to set a standard for the manufacture and sale of ice cream. This being true, it follows as a matter of course when the provisions of this law are applied to individual cases, that any product manufactured and sold, or offered for sale as or for ice cream which does not contain the ingredients specified by the statute, or otherwise fails to comply with the standard fixed by the statutory definition is not ice cream, regardless of how nutritious or valuable it may be as a human food, and that the manufacture, sale, offering for sale as or for ice cream of such a product is unlawful.

<sup>11</sup> In order to sustain our position as given in the preceding paragraph, we call attention to the case of United States v. 62 Cases More Or Less, Six Jars of Jam, etc., 183 Fed. 2d 1014. In this case it was held that the jam in question which failed to comply with certain provisions of the Federal Food, Drug and Cosmetic Act, defining fruit jam, could not be legally represented to be, or to be used as fruit jam, nor could it be legally sold as fruit jam.

At. l.c. 1017-1018, the court said:

"It is significant that Congress in Section 343(g), in dealing with misbranding by failure

to conform to the definition and standard of identity, did not permit departure from the standard if the label disclosed that the food did not conform to the standard, whereas in Section 343(h) (1) (2), in dealing with misbranding by failure to conform to standard of quality and standards of fill of container, Congress permitted departure from the standard if the label on the food set forth, in the manner and form specified in the regulation, a statement that it fell below the standard, thus indicating a Congressional intent to permit departure from standards of quality and fill of container, where such departure was shown by truthful labeling, but not to permit a departure from a definition and standard of identity, even though such departure was disclosed by the label.

"Whether a food purports to be, or is represented to be, a food for which a definition and a standard of identity has been prescribed by regulation, is not to be determined solely from obscure disclosures on the label. If it is sold under a name of a food for which a definition and standard has been prescribed, if it looks and tastes like such a food, if it is bought, sold and ordered as such a food, and if it is served to customers as such a food, then it purports to be, and is represented to be, such a food.

"We conclude that the jams under seizure purported to be, and were represented to be, fruit jams, for which a definition and standard of identity had been promulgated; that they did not conform to the definition and standard of identity, and that the manufacturer could not escape the impact of Section 341 and Section 343(g) by labeling them imitations of jams and by truthfully setting forth on the label the proportions of sugar, fruit and other ingredients contained therein.

"It is urged that the effect of our discussion will be to compel the manufacturer of these jams to take such product off the market and to deprive persons of modest means of an inexpensive and wholesome food product; and that the portion of the Senate Committee Report set forth in Note 6, infra, shows the Congress did not intend the operation of Section 343(g) to

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produce such results. But the results envisioned will not necessarily follow. The manufacturer may market the product as syrup and fruit thickened with pectin, or syrup flavored with fruit and thickened with pectin, but the product may not be lawfully sold or served to customers under the name of fruit jam and in such a manner that it purports to be, or is represented to be fruit jam."

(Underscoring ours.)

Again in this connection we call attention to the case of Dairy Queen of Wisconsin v. McDowell, 51 N.W. 2d 34. From the statement of facts given in this case, it was sought by the Department of Agriculture to stop the sale of a semi-frozen food product similar to ice cream but containing less butter fat than ice cream, on the ground that the public needed to be protected. The product was a healthful nutritive food, and was not offered for sale as ice cream, and the court held that the public needed no protection under such circumstances, and that the sale of the product could not be stopped.

At, l. c. 37, the court said:

"It is contended that Dairy Queen is an imitation ice cream in that it resembles ice cream in taste, texture and consistency. Appellant does not concede this, but even if it were so, a resemblance to ice cream does not make the product an imitation. There is no artificiality employed in producing Dairy Queen. Its ingredients are the same natural ingredients contained in ice cream, but in different proportions. We can see where imitation and adulteration may be present and fraud perpetrated upon the public where; as in *Carolene Products Co. v. United States*, 1944, 323 U. S. 18, 65 S. Ct. 1, 89 L. Ed. 15, abstracted butter fat is replaced with vegetable oil; and where, as in *Day-Bergwall Co. v. State*, 1926, 190 Wis. 8, 207 N.W. 959, the product was admittedly an artificial vanilla. \* \* \*"

"According to the stipulation, Dairy Queen will not be sold as ice cream. Whatever resemblance it may have to ice cream, therefore, cannot mislead the public in buying it.

"Respondent argues that in removing some of the butter fat, which is the more expensive ingredient,

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and adding more of the cheaper non-fat solids, the appellant manufactures and inexpensive product which would tempt retailers to pass it off as ice cream. This so-called substitution has no effect upon the wholesomeness or nutritious properties of the product, and is not sufficient reason to bar it, especially in view of the authority granted to the respondent by ch. 93, Stats., to regulate its manufacture and sale.

"Under ch. 93, Stats., the department of agriculture has the power to establish standards for food products and to prescribe regulations governing marks and tags upon such products. Those standards shall not affect the right of any person to dispose of a food product not conforming to the standards, sec. 93.09(4), Stats., 'but such person may be required to mark or tag such product, in such a manner as the department may direct, to indicate that it is not intended to be marketed as of a grade contained in the standard and to show any other fact regarding which marking or tagging may be required under this section.' The purpose is clear. The legislature does not intend to deny any person the right to make and sell a food product so long as its consumption does not endanger public health and welfare. It does intend, however, to so regulate its sale that the public is not subjected to the injury of buying a product different from that which is intended to be bought. See *City of New Orleans v. Toca*, 1917, 141 La. 551, 75 So. 238, L.R.A. 1917E, 761.

\* \* \* \* \*

"It is our conclusion that the general welfare does not require prohibition of the manufacture and sale of the product here in question, the power of regulation being sufficient to prevent any fraud upon the consuming public." "

(Underscoring ours.)

Therefore, in answer to your first inquiry, it is our thought that if ice cream were manufactured, sold, or offered for sale which contained less than 8% milk fats, or if it contained manure or other harmful or disease-bearing germs, or any element, ingredient, constituent deleterious to health, then the provisions of Section 196.850, will have been violated, since all of such actions are expressly



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prohibited by this section. If the product were sold or offered for sale as ice cream, this would also constitute a violation of Section 196.885, supra.

In the event the product contained every ingredient required by Section 196.850, which defines ice cream, and non-milk type fats were added, it is our further thought that the product would not be ice cream. While it might be as highly nutritive a human food as ice cream it would not comply with the definition and standard provided by the statute, and consequently would not be ice cream.

None of the provisions of Sections 196.850 to 196.890, relating to the manufacture and sale of ice cream prohibit the manufacture and sale of a frozen mixture and food product similar to ice cream, but which does not comply with Section 196.850, supra. However, if such food product is manufactured, sold or offered for sale as or for ice cream, then the provisions of Sections 196.850 and 196.885, will have been violated.

We find it unnecessary to discuss the second and third inquiries of the opinion request for the reason that said inquiries have been fully answered above in our discussion of the first inquiry.


#### CONCLUSION

It is therefore the opinion of this department that a product containing less than 8% milk fats, or one in which the milk fats have been substituted by use of oils containing no milk type fats; or a product to which such oils have been added to the ingredients provided by Sec. 196.850, RSMo 1949, defining ice cream, is not ice cream within the meaning of the section. The manufacture, sale, or offer to sell such product, as or for ice cream is a violation of Section 196.850 and 196.885, RSMo 1949. However, if the product is not manufactured, sold or offered for sale as or for ice cream, said statutes will not be violated.

Respectfully submitted,

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APPROVED:

  
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