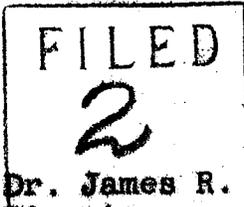


PURE FOOD AND DRUGS:  
ADULTERATION:  
MISBRANDING:  
MISLABELING:  
BUISMAN'S FAMOUS DUTCH FLAVORING:

Buisman's Famous Dutch Flavoring creates, when blended with coffee beans, an adulterated product whose sale is prohibited by Sec. 196.015(1), and the distribution to consumers of Buisman's Famous Dutch Flavoring (as presently labeled) is the sale of a mis-branded product, the sale of which is prohibited by the same section.



Dr. James R. Amos  
Director  
Division of Health  
Jefferson City, Missouri

December 1, 1955

Dear Sir:

The following opinion is rendered in reply to your inquiry which reads as follows:

"We have embargoed a stock of coffee extender which is labeled in part 'Buisman's Flavoring'. We think that the product is misbranded in accordance with Section 196.075, Chapter 196, Revised Statutes, Missouri 1949, and that the use of this product in coffee sold in a restaurant or in any type of a public eating establishment constitutes adulteration, and is a violation of Section 196.070, Chapter 196, Revised Statutes, Missouri 1949.

"It is our understanding that there has been an Arkansas Supreme Court Decision which permitted the sale of 'Buisman's Flavoring' in Arkansas, and that there has been a State of Washington Attorney General's Opinion which permitted the sale of 'Buisman's Flavoring' in the state of Washington. Therefore, we would like to know if we have taken proper action by embargoing this product. We would like to know if we can prohibit the sale of this product in the state of Missouri under its present label in accordance with Section 196.075, Chapter 196, Revised Statutes, Missouri 1949, and can we prohibit the sale of coffee in institutions, restaurants, and other public eating establishments as being adulterated under Section 196.070, Chapter 196, Revised Statutes, Missouri 1949?"

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"We would appreciate it if you would give us an official Opinion concerning 'Buisman's Flavoring'.

Buisman's Famous Dutch Flavoring (hereinafter Buisman's) has been manufactured since 1867 and sold widely throughout Europe and the British Empire. In 1950 it was introduced into the American market, being distributed at first in California. Its ingredients, caramelized starch and calcium phosphate, are not in themselves noxious, and no one has contended that the use of Buisman's jeopardizes health. Labeling, which includes all accompanying literature, asserts the following:

"Increases the yield of your favorite coffee."  
"Save up to one-half on coffee."  
"Make your coffee taste better - go further."  
"Double the yield."

A memorandum, circulated by its distributors, states, in fact, that "if Buisman's is blended with roasted coffee, per directions, on a 5% basis, then one need use the blend in only one-half the quantity that one would use of straight coffee, and get a very satisfactory cup of coffee." The nature of such claims led the Bureau of Food and Drugs to prohibit the sale of Buisman's in Missouri to restaurants, coffee shops, and institutions which mix Buisman's with coffee beans and sell the blend as "coffee." The Bureau has also stated that Buisman's may not be sold to housewives unless more properly labeled as an "extender" or "stretcher" rather than as a "flavoring." The Bureau charges, in short, that the beverage composed of Buisman's and coffee is an adulterated product, and that Buisman's Flavoring is misbranded, under the following statutes:

Section 196.015. "The following acts and the causing thereof within the state of Missouri are hereby prohibited:

"(1) The manufacture, sale, or delivery, holding or offering for sale of any food, drug, device, or cosmetic that is adulterated or misbranded;

"(2) The adulteration or misbranding of any food, drug, device, or cosmetic; \* \* \*"

Section 196.070: "A food shall be deemed to be adulterated:

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"(10) If any substance has been added thereto or mixed or packed therewith so as to increase its bulk or weight, or reduce its quality or strength or make it appear better or of greater value than it is; \* \* \* " (Emphasis supplied.)

Section 196.075. "A food shall be deemed to be misbranded:

"(1) If its labeling is false or misleading in any particular; \* \* \* "

I.

Buisman's chief attraction is the alleviation of that pressure on the family budget produced by the rapid rise in the price of coffee. As a Buisman's circular points out, "one pound of roasted coffee plus about 10¢ worth of Buisman's brews up to twice as many cups." It is apparent that the sale of a beverage composed of Buisman's and coffee satisfies not only the statutory definition of adulteration, but also the definition advanced by the Missouri Supreme Court in *City of St. Louis v. Beda Jud*, 139 S.W. 441, 236 Mo. 1, at page 6:

"Attending to that statute it deals not only with foreign substances or preservatives injurious to health, but goes on to denounce 'adulterated' milk. 'Adulterate,' means to corrupt, debase, or make impure by an admixture of a foreign or baser substance. (Web. Tit. 'Adulterate.' ) That standard work illustrates the application of the word. It states that articles are adulterated 'to improve or change their appearance or flavor in imitation of an article of higher grade or of a different kind.' Adulteration is a 'treatment to simulate a better article'--an 'artificial concealment of defects.' "

If the advertising claims are true, adulteration is clear; if such claims are false, a fortiori, the product is misbranded. Since we assume the advertisements to state correctly Buisman's attributes, we are compelled to hold that its mixture with coffee beans would produce an adulterated product, the sale of which is prohibited by Missouri law.

The opinion of the Attorney General of Washington, where the same product and an identical statute were involved, does not,

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of course, escape our attention. See CCH Food, Drug, Cosmetic Law Reports, Section 85, 146. In his opinion the Attorney General concluded that Buisman's could legally be sold in Washington. The Attorney General noted, however, that there was uncontradicted testimony at a hearing to the effect that Buisman's did not increase coffee bulk or weight (notwithstanding the advertising claims) and, consequently, he felt obliged to hold that, upon the facts with which he was presented, no adulteration existed.

In attempting to construe correctly the Missouri statute, we may examine the federal cases under the Federal Food, Drug and Cosmetic Act, the model after which Missouri patterned its legislation.\* It should be noted, of course, that the definitions of adulteration and misbranding in the Missouri act are similar to those in the federal act.

Mr. Chief Justice Stone, discussing the federal law, stated in Federal Security Administrator v. Quaker Oats Company, 318 U.S. 218, at page 230, 63 S. Ct. 589 (1943):

"Both the text and legislative history of the present statute plainly show that its purpose was not confined to a requirement of truthful and informative labeling. False and misleading labeling had been prohibited by the Pure Food and Drug Act of 1906. But it was found that such a prohibition was inadequate to protect the consumer from 'economic adulteration,' by which less expensive ingredients were substituted, or the proportion of more expensive ingredients diminished, so as to make the product, although not in itself deleterious, inferior to that which the consumer expected to receive when purchasing a product with the name under which it was sold.\* \* \*"

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\* 21 U.S.C.A., Sec. 342.

"A food shall be deemed to be adulterated--(b)(4) If any substance has been added thereto or mixed or packed therewith so as to increase its bulk or weight, or reduce its quality or strength, or make it appear better or of greater value than it is."

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In regard to the "economic adulteration" sections of the federal law, see, in addition, U.S. v. 716 Cases, More or Less, etc. Del Comida Blend Tomatoes, 179 F. 2d 174 (10th Cir. 1950.)

This beverage, whose ingredients are Buisman's and coffee beans, is to be sold under the name of "coffee." And yet, in U.S. v. O. F. Bayer and Company, 188 F.2d 555 (2nd Cir. 1951), the court stated, at page 557, that:

" . . . it is common knowledge of which a court may take judicial notice, that the drink called 'coffee' is made from roasted coffee beans."

As set forth in United States v. 88 Cases, More or Less, Containing Bireley's Orange Beverage, 187 F.2d 967 (3rd Cir. 1951), two conditions must be met in showing a violation of the federal definition of adulteration:

1. That a food exists superior to, and comparable to, the alleged adulterated food;
2. That the average consumer would be easily deceived into thinking the alleged adulterated food is the superior food.

On the facts before us, we believe that "coffee," as defined in U.S. v. O. F. Bayer and Company (supra), is that food to which a mixture of Buisman's and coffee beans may be compared, and that it is the superior food made only of roasted coffee beans which meets the second prerequisite.

We are aware that the recent case of Austin v. Onnes, 278 S.W. 2d 93, construing a statute identical to Missouri's, holds that Buisman's may legally be sold in Arkansas. This case stemmed from a suit to enjoin the Director of Food and Drug Division of the Arkansas Board of Health from interfering with the sale and distribution of Buisman's. The Supreme Court of Arkansas, affirming the injunction granted by the lower court, stated, at page 95:

"The weakness in appellant's contention is in the fact that there is neither a standard nor a definition for what is to be contained in the liquid composing a cup of coffee. The most recently published revision of the Rules and Regulations of the Arkansas State Board of Health was issued in 1952; and it has nothing

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covering the point at issue. Sec. 19 of Act 415 is the general section allowing promulgation of regulations; but no new regulations have yet been issued under the Act 415. Sec. 9 of the Act 415 gives the State Board of Health the power to '\* \* \* promulgate regulations fixing and establishing for any food or class of food a reasonable definition and standard of identity, and/or reasonable standard of quality and/or fill of container. In prescribing a definition and standard of identity for any food or class of food in which optional ingredients are permitted, the Board of Health shall, for the purpose of promoting honesty and fair dealing in the interest of consumers, designate the optional ingredients which shall be named on the label. \* \* \*' But we know judicially that the State Board of Health has not issued any definition or standard of identity for the liquid in a cup of coffee.

"Meyer v. State. 218 Ark. 440, 236 S.W. 2d 996, was a case involving food adulteration; and we resorted to the dictionary definition for 'bologna', 'wiener,' 'frankfurter' and 'hamburger'. But we cannot resort to the dictionary definition of coffee as a liquid served in a cup, because the dictionaries contain a variety of such definitions. \* \* \*"

"\* \* \* In short, neither the dictionary nor common usage afford us any definition or standard as to what is supposed to be contained in the liquid coffee served in the cup. Furthermore the strength of the liquid coffee served in the cup varies greatly as to individual tastes.

"In the light of all these variables, and until the State Board of Health issues regulations fixing and establishing a reasonable definition and standard of identity for the liquid coffee served in the cup, it is not fair to say that Buisman's -- a harmless ingredient -- cannot be sold as a separate product to be added by the purchaser, if so desired, to make the liquid coffee. All liquid coffee is an adulteration of water in one sense of the word, and the adding of Buisman's--if

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known--is no more an adulteration of water than the ground coffee is itself an adulteration of water.

"Until such time as the State Board of Health, acting under Sec. 9 of the Act 415, duly issues regulations fixing and establishing a standard of identity and quality for the liquid contained in a cup of coffee as sold in this State, we cannot say that the adding of Buisman's is an adulteration; and likewise we cannot say that Buisman's is misbranded because the label states exactly what it is and there is no law that fixes the standard of the product to which it is added."

Squarely opposed to this Arkansas decision is United States v. 36 Drums of Pop'n Oil, 164 F.2d 250 (5th Cir. 1947) in which the court stated clearly, at page 252, that application of the adulteration sections is not dependent upon the prior promulgation of a definition or standard of identity.

"Even in the absence of a reasonable definition and standard of identity, promulgated under 21 U.S.C.A. Sec. 341, truthful labeling does not exempt an article from the provisions of 21 U.S.C.A. Sec 342 (b) (3) and (4), \* \* \*

"In the instant case, mineral oil has been artificially colored and flavored to make it look like butter or vegetable oil. That mineral oil is inferior to melted butter on popcorn is plain. It is also inferior to cocoanut, soybean, or cotton-seed oil. To conclude that a food for which a standard of identity has not been promulgated is exempt from the economic adulteration provisions of the Act would result in rendering inoperative all of 21 U.S.C.A. Sec. 342(b). The Administrator is not required to promulgate definitions and standards of identity for foods under any and all conditions. Administrative selectivity in such standardization is a part of his discretion and responsibility. To permit a class of foods not so selected to escape other applicable provisions of the law would create a loophole which the Act sought to avoid."

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The average consumer of a Buisman's and coffee bean blend would be unaware that he was drinking a beverage inferior to that which he thought that he had ordered. It must again be emphasized that a necessary factor in showing adulteration is not that the added product was deleterious, but that a less expensive ingredient had been substituted for roasted coffee beans. It seems to us that Missouri statutory and case law defining adulteration, reinforced by federal decisions, would be violated by restaurants', coffee shops', and institutions' mixing this product with coffee beans and selling the final blend as "coffee."

## II.

In determining whether this product is misbranded, we must keep clearly in mind that one purpose of the Missouri statute is to prevent injury to the public by prohibiting the sale of products which are not completely and truthfully labeled. The consumer is entitled to assurance that an article which he buys is what it purports to be, and nothing else. See Section 196.010 2, RSMo 1949.\*

Printed on a one pound container of Buisman's are the following words:

"Buisman's Famous Dutch Flavoring.  
Mix with your favorite brand of coffee  
for delicious flavor.

"HOW TO USE AND SAVE MONEY.

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\*196.010 2. "If an article is alleged to be misbranded because the labeling is misleading, then in determining whether the labeling is misleading, there shall be taken into account, among other things, not only representations made or suggested by statement, word, design, device, sound, or in any combination thereof, but also the extent to which the labeling fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the article to which the labeling relates under the conditions of use prescribed in the labeling thereof or under such conditions of use as are customary or usual;" (Emphasis supplied.)

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"Mix 4/5 oz. (one rounded tablespoon) of Buisman's Famous Dutch Flavoring with ONE LB. of roasted coffee or mix ONE LB (contents of this tin) with TWENTY LB. of roasted coffee; blend thoroughly in a container with plenty of shaking space.

"Use this mixture in any strength desired according to taste.

"CONTAINS NO  
CHICORY

CONTAINS NO  
CAFFEINE

"Important: To retain the flavor re-  
place lid TIGHTLY and keep in a DRY  
place. If contents forms (sic) a crust,  
this is a normal condition and does not  
affect the purity of the product. It  
should be mixed in powder form and crushed  
with a spoon if necessary."

Admittedly, this particular label does not assert that the product may extend or stretch a pound of coffee. The term "labeling" (by which a product may be misbranded) is defined, however, in Section 196.010(10), RSMo 1949, as:

". . . all labels and other written,  
printed, or graphic matter upon any  
article or any of its containers or  
wrappers, or accompanying such article;  
\* \* \*"

Assertions that Buisman's may be used as an "extender" or "stretcher" can be found in many examples of its labeling. (See p. 2, supra.) The words found on the one pound container do not, thus, state the entire story which a consumer deserves to know before buying. Taking such claims as correct, and to do otherwise would be to accuse Buisman's of deliberately falsifying its advertising, we are constrained to hold that Buisman's is sold primarily as an "extender" or "stretcher." Buisman's distributors do not emphasize the flavor to be derived from mixing Buisman's with coffee, but rather stress the monetary savings to be effectuated by such blending. We believe that the real applicability of Buisman's "flavoring" should be clearly indicated to the buying public, and that use of the words "extender" or "stretcher" would more nearly meet this requirement than does the present labeling.

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CONCLUSION

It is, therefore, the opinion of this office that Buisman's Famous Dutch Flavoring creates, when blended with coffee beans, an adulterated product whose sale is prohibited by Section 196.015 (1), and that the distribution to consumers of Buisman's Famous Dutch Flavoring (as presently labeled) is the sale of a misbranded product, the sale of which is prohibited by the same section.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Walker La Brunerie, Jr.

Yours very truly,

John M. Dalton  
Attorney General

WLaB:vlw:hw