

MILK AND MILK PRODUCTS:
ORDINANCE OF CITY OF
ST. LOUIS:

Paragraphs B-11 and B-12 of Section 1 of Ordinance No. 47605 of the City of St. Louis, as amended by Substitute Board Bill No. 472, relating to milk sanitation and the regulation of the production, handling, and sale of milk and milk products, are invalid because of their conflict with Section 196.705, RSMo 1949; a product prepared by adding

hydrogenated vegetable fat, vanilla, and gelatin base stabilizer to cream containing 18% milk fat is a lawful product under the provisions of Section 196.705, RSMo 1949, if it is not in imitation or semblance of milk, cream, or skim milk.

H. M. Hardwicke, M. D.
Acting Director
Division of Health of Mo.
Jefferson City, Missouri

September 2, 1958



Dear Sir:

Your recent request for an official opinion reads:

"Attached is information from the files of the Missouri Division of Health regarding the production, sale and attempted grading of pasteurized imitation whipping cream manufactured by the Lange Topping Company, St. Louis, Missouri. A brief history of the situation is as follows:

In 1955 the St. Louis Health Division attempted to regulate the manufacture of imitation creams by amendment to the Ordinance and Regulations Governing the Handling and Sale of Fluid Milk and Fluid Milk Products, City of St. Louis, Missouri. It was discovered that the Sta-Whip Sales Company, presently operating as the Lange Topping Company was manufacturing a product consisting of 18% cream to which had been added vegetable fat, vanilla and a stabilizer. Efforts to establish sanitation standards for the vegetable fat, vanilla and stabilizer were not accomplished by the St. Louis Health Division and in March of 1958 the Board of Alderman of the City of St. Louis amended the Milk Ordinance of that city to define imitation creams and to provide for the grading of imitation creams.

In June of 1958 the St. Louis Health Division submitted to the Bureau of Food and Drug Inspection, Missouri Division of Health a proposed carton in

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which this Grade A imitation whipping cream was to be distributed. In reviewing the labeling of the carton, the Bureau of Food and Drug Inspection was of the opinion that the product was in violation of Section 196.705, Revised Statutes of Missouri, 1949, and that the proposed grading of such a product was not in compliance with the Division of Health Regulations Governing the Production and Handling of Fluid Milk and Fluid Milk Products, as filed with the Secretary of State.

With permission of the St. Louis Health Division, the Lange Topping Company was contacted directly regarding this matter and a hearing on the subject was held. As a result of the hearing, Mr. Lange's attorney, Mr. Ray T. Dreher, submitted to the Bureau of Food and Drug Inspection his analysis of the State Statutes and Regulations as they apply to this product.

We are requesting your review of the enclosed material consisting of the complete files of the Division of Health regarding this matter and further requesting your opinion in reference to the following two questions:

(1) Are paragraphs B-11 and B-12, Section 1 and paragraph K, Section 1 and Substitute Board Bill #472, all of which recognize the manufacture, production and grading of imitation creams, within the legislative jurisdiction of the Board of Aldermen of the City of St. Louis when considered in light of Section 196.705 and The Regulations of the Division of Health Governing the Production and Handling of Fluid Milk and Fluid Milk products?

(2) Is a product prepared by adding hydrogenated vegetable fat, vanilla and gelatin base stabilizer to cream containing 18% milk fat a lawful product under the provisions of Section 196.705, Revised Statutes of Missouri, 1949?

Your early attention to this request will be appreciated."

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The two sections of the St. Louis ordinances about which you inquire, B-11 and B-12, as originally promulgated by the city of St. Louis read:

"B-11. Imitation Creams--Imitation creams are products which result from the combination of milk, dried milk constituents, or concentrated milk constituents with water, cream, milk, or skimmed milk and non-milk fat and which comply in total fat content with the milk fat content of the various creams defined herein.

"B-12. Imitation Half and Half--Imitation half and half is a product which results from the combination of milk, dried milk constituents, or concentrated milk constituents with water, cream, milk, or skimmed milk and non-milk fat and which contains not less than 11 1/2% total fat content."

The above sections are found in Section 1 of Ordinance 47605 which amends Chapter 40 of the Revised Code of St. Louis, City of St. Louis, Missouri. Section 3 of such ordinance provides:

"It shall be unlawful for any person to bring into, send into, or receive into the City of St. Louis, or its police jurisdiction, for sale, or to sell, or offer for sale therein, or to have in storage where milk or milk products are sold or served, any milk or milk products defined in this ordinance, who does not possess a permit from the Board of Public Service so to do."

Section 4 of the above ordinance provides that all containers enclosing milk products, as defined in Section 1 of such ordinance are to have the containers marked with the name of the contents as given in such definition in the ordinance.

As we stated above, Sections B-11 and B-12 are found in Section 1 of such ordinance. Therefore, it appears that, under the ordinances of St. Louis any product as defined in Chapter 40 of the revised code of St. Louis must be labeled according to the definition found therein and a permit must be secured before

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such product can be sold. It follows therefore that the product which conforms to the definition of imitation cream or imitation half and half, sold in St. Louis, must be labeled with such names.

In 1958 the City of St. Louis amended the aforesaid B-11 as follows by Substitute Board Bill No. 472:

"An Ordinance amending Chapter 40 of Volume 1 of the Revised Code of St. Louis, 1958, as amended by Ordinance 47605, relating to milk sanitation and the regulation of the production, handling and sale of milk and milk products by repealing Article I, Section 1, sub-section B-11, and all ordinances in conflict herewith and enacting in lieu thereof a new section to be known by the same number and relating to the same subject; and by adding a new paragraph at the end of Article One, Section 3, and containing an Emergency Clause.

BE IT ORDAINED BY THE CITY OF ST. LOUIS,
as follows:

Section One. Chapter 40 of Volume 1 of the Revised Code of St. Louis, 1948, as amended by Ordinance 47605, relating to milk sanitation and the regulation of the production, handling and sale of milk and milk products is hereby amended by repealing Article 1, Section 1, sub-section B-11, and enacting in lieu thereof a new subsection to be known by the same number and relating to the same subject, which shall read as follows:

Sub-section B-11. IMITATION CREAMS--
Imitation creams are products which result from the combination of milk, dried milk constituents, or concentrated milk constituents with water, cream, milk, or skimmed milk and approved harmless non-milk fat and which comply in total fat content with the milk fat content of the various creams defined herein." (Emphasis ours.)

Section 196.705, RSMo 1949, to which you refer, reads:

"It shall be unlawful for any person, firm or corporation, by himself or itself, his or its

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agent or servant, or as the servant or as agent of another to manufacture, sell or exchange, or have in possession with the intent to sell or exchange, any milk, cream, emulsified cream, skim milk, buttermilk, condensed or evaporated milk, powdered milk, condensed skim milk, or any of the fluid derivatives thereof, or any of them, to which has been added any fat or oil other than milk fat, either under the name of said product or articles of the derivatives thereof, or under any fictitious or trade name whatsoever."

It will be noted that the above section makes unlawful the sale or having in possession with intent to sell milk in various enumerated forms "to which has been added any fat or oil other than milk fat . . . "

It will also be noted that B-11 as amended provides that imitation creams are products which result from the combination of milk "and approved harmless non-milk fat."

In your first question you really ask two questions, the first of which is whether paragraphs B-11 and 12, supra, are in conflict with Section 196.705, supra, and, if so, whether B-11 and 12 can stand.

In 1938, in the case of Poole & Creber Market Co. vs. Bre-shears, 125 S.W. 2d 23, the Missouri Supreme Court gave extensive consideration to what is now Section 196.705, supra, and what was then Section 12408. At l.c. 27 the court stated:

"In our opinion the statute is not in contra-vention of the constitutional provisions re-ferred to. It was enacted in the exercise of the police power for the purpose, as indicated by its title, of protection of the public health and the prevention of fraud, subjects clearly within the scope of that power. * * *"

The above case established the constitutionality of what is now Section 196.705.

In 1940 the Missouri Supreme Court, en banc, rendered its opinion in the case of State vs. Carolene Products Co., 144 S.W. 2d 153. This case took note of the Poole and Creber case noted above and stated (l.c. 155 et seq.):

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"In the case of Poole & Creber Market Co. v. Breshears, 343 Mo. 1133, 125 S.W. 2d 23, the constitutionality of the above named sections was before us, but not their construction. In that case, the plaintiff who had been selling the respondent's products, which at that time did not contain vitamins A and D, sought to enjoin the enforcement of these sections because they were unconstitutional. We said (125 S.W. 2d loc. cit. 25): 'Upon final hearing the circuit court found for the defendants, holding the statute valid, and dismissed plaintiff's bill. Plaintiff appealed. The question presented here is whether or not said statutory provisions are valid. If they are the judgment below was right.' (Italics ours.) Thus, we see that the Poole & Creber case is no aid to us in construing the filled milk statutes of this state.

"Standing alone and literally construed, Section 12408, supra, prohibits the sale of any milk, whole or skim milk to which has been added any fat or oil other than milk fat. Section 12409 defines filled milk to mean 'any milk, cream or skim milk, * * * to which has been added * * * any fat or oil other than milk fat, so that the resulting product is in imitation or semblance of milk, cream or skim milk * * * Provided that the above definition shall not include any distinctive proprietary food compound, not readily mistaken in tests for milk or cream, or for evaporated, condensed or powdered milk or cream: Provided, however, that such compound is prepared and designed for feeding infants and young children and customarily used on the order of a physician; is packed in individual cans containing not more than sixteen and one-half ounces and bearing the label in bold type, that the contents are to be used only for said purposes; is shipped in interstate or foreign commerce exclusively to physicians, wholesale or retail druggists, orphan asylums, child welfare associations, hospitals and similar institutions and generally

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distributed by them" (Italics ours.)

"[1] So, under Section 12409, supra, skim milk to which has been added fat or oil other than milk fat can be sold, provided the resulting product is not 'in imitation or semblance of milk, cream or skim milk.' Even milk to which fat or oil is added and which is in imitation or semblance of milk, cream or skim milk can be sold, provided it is a 'distinctive proprietary food compound * * * designed, for feeding infants and young children' and customarily used on the order of a physician, packed in cans containing not more than sixteen and one-half ounces, and shipped in interstate or foreign commerce exclusively to physicians, druggists, orphan asylums, child welfare associations, etc. Section 12410 deals with emulsified cream which is not involved in this case. Section 12411 declares 'that filled milk, and emulsified cream as herein defined, are adulterated articles of food injurious to the public health.' Section 12412 is a penalty section.

"We will undertake first to determine the intention of the Legislature in passing the house bill of 1923.

"[2,3] It is a cardinal rule of construction that every word, clause, sentence and section of an act must be given some meaning unless it is in conflict with the legislative intent. State v. Wipke et al., Mo. Sup., 133 S. W. 2d 354; State ex rel. Kansas City Power & Light Co. v. Smith, 342 Mo. 75, 111 S.W. 2d 513; Holder v. Elms Hotel Co., 338 Mo. 857, 92 S.W. 2d 620, 104 A.L.R. 339. 'It is the duty of the court, in construing statutes which appear to be in conflict, to reconcile them, if possible, with the general legislative purpose.' Dysart v. City of St. Louis, 321 Mo. 514, 11 S.W. 2d 1045, loc. cit. 1050, 62 A.L.R. 762. With these rules of construction in mind, we believe the apparent conflict between Section 12408, supra, and Section 12409

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can be reconciled, and reading these two sections together we have come to the conclusion the Legislature sought to prohibit the sale, manufacture or exchange of milk, or skim milk blended with fat or oil other than milk fat when the resulting product is in imitation or semblance of milk."

At l.c. 157 the Court stated:

"Nor do we find from the return that the respondent's products are sold in imitation or semblance of milk, but on the contrary these products are a unique cooking compound and are not sold as or for evaporated milk.

"Not only does the label on respondent's products plainly state that it is not to be sold for evaporated milk and that it is 'especially prepared for coffee, baking and for other culinary purposes,' but the return also states that respondent's dealers do not sell these products for evaporated milk. From the facts above set out we are unable to see how the buying public could be deceived into thinking that they were buying milk when purchasing respondent's products."

In the case of State vs. Hershman, 143 S.W. 2d 1025, at l.c. 1026, the Missouri Supreme Court took note of the case of State vs. Carolene Products Co., supra, and adopted the result reached therein in the following language:

"Under the construction placed upon the statutes in that opinion it was held upon a consideration of them as a whole that the legislative intent was 'to prohibit the sale of filled milk, and that filled milk is only that milk to which has been added fat or oil other than milk fat "so that the resulting product is in imitation or semblance of milk, cream or skim milk," and that if the product does not come within the statutory definition of filled milk it can be lawfully sold in this state.'" [Italics mine.]

From the above it will be seen that the Missouri Supreme Court has reached two conclusions regarding this matter: First that Section 196.705 is constitutional and is not in conflict with any

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other statutes of Missouri; and second, that any product which is "in imitation" of a milk product is contrary to the aforesaid Section 196.705. Section B-11 is entitled "Imitation Creams." The product itself (See photostatic copy attached) is labeled in large, black, capital letters, "IMITATION WHIPPING CREAM," and that it is to be used as "Cake Whip." Since the Supreme Court of Missouri has held in the Carolene Products case, extensively cited above, that a product which would come within the definition of imitation cream or imitation half and half can be legally sold in this state so long as it is not an imitation of or semblance of milk or cream, it would appear that the requirement of the city ordinance that the product before being sold in St. Louis must be labeled imitation, is invalid because of its conflict with the state law as enunciated in the Carolene and Hershman cases. The gist of the invalidity is that the ordinance requires a product to be labeled an imitation whereas the Supreme Court has held that it is a legal product unless it is an imitation.

In reply to your second question it would be our opinion that the product about which you inquire is a lawful product so long as it is not in imitation or semblance of milk or cream and that it is not in imitation or semblance of milk or cream if it is not so labeled, but is labeled in accordance with the principles laid down in the Carolene case.

The fact that the City of St. Louis is a charter city would not in any way place it in a different position with respect to the necessity of its ordinances conforming to this statute than if it were not a charter city. In the case of State vs. Carey, 136 S.W. 2d 324, at l.c. 325, the Missouri Supreme Court stated:

"Respondent also contends that Sec. 92 of the registration act is invalid. He argues that it conflicts with the city charter, which makes provision for the payment of claims against the city. If so, the provisions of the charter must yield to the constitution and laws of the state. The rule follows: When the ordinances or charter provisions are or become in conflict with prior or subsequent state statutes, such ordinances or charter provisions are or become, void, and must yield to the higher law."

In the case of State vs. Matthews, 274 S.W. 2d 286, at l.c. 292, the Missouri Supreme Court stated:

"Respondents also invoke the provisions of Art. III, § 26, of the Charter and Ordinance No. 46 of the County of St. Louis as authorizing them to designate the type and number

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of machines to be purchased and used. The charter authorizes the Council to establish procedures governing the making of county purchases. The ordinance, enacted pursuant to the charter provision, creates a Division of Purchasing, and provides 'all bids for any * * * purchase may be rejected and new bids advertised for at the discretion of the Supervisor.' The provisions of the charter and ordinances of the county which are in conflict with prior or subsequent state statutes relating to governmental matters must yield. State ex rel. Volker v. Carey, 345 Mo. 811, 136 S.W. 2d 324, 325 [4]; Kansas City v. J. I. Case Threshing Machine Co., 337 Mo. 913, 87 S.W. 2d 195, 202, 203 [8,9]." (Emphasis ours.)

CONCLUSION

It is the opinion of this department that paragraphs B-11 and B-12 of Section 1 of Ordinance No. 47605 of the City of St. Louis as amended by Substitute Board Bill No. 472 relating to milk sanitation and the regulation of the production, handling, and sale of milk and milk products, are invalid because of their conflict with Section 196.705, RSMo 1949.

It is the further opinion of this department that a product prepared "by adding hydrogenated vegetable fat, vanilla and gelatin base stabilizer to cream containing 18% milk fat" is a lawful product under the provisions of Section 196.705, RSMo 1949, if it is not in imitation or semblance of milk, cream, or skim milk.

This opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Very truly yours,

John M. Dalton
Attorney General

HPW:gm