CONSTRUCTION OF STATUTES: Sections 196.125, 196.130 and 196.135, RSMo 1949, to be read and construed along with other sections of RSMo 1949, particularly Sections 196.010, 196.045, and 196.050.
FOOD AND DRUGS:
NONALCOHOLIC DRINKS: Nonalcoholic drink a food within meaning of Section 196.010. Manufacturer of such drink containing fluoride compound, who makes, sells, offers or exposes to sale, or has same in his possession with intention to sell, when drink is adulterated, is subject to criminal prosecution for violating Sections 196.130 and 196.135, unless satisfactory evidence offered to State Division of Health as provided by Section 196.085, that fluoride compound in drink was required or could not be avoided in manufacturing process. Division of Health to promulgate regulations limiting fluoride compounds, and allow production to continue. Product not deemed adulterated, and manufacturer cannot be criminally prosecuted under Sections 196.130 and 196.135, RSMo 1949.

September 17, 1953

Honorable James R. Amos, M. D.
Director of Division of Health
Jefferson City, Missouri

Dear Sir:

This department is in receipt of your recent request for a legal opinion which reads in part as follows:

> "We respectfully request your opinion on the interpretation of sections 196.125 196.130, 196.135 and 196.400 of the state statutes with section 196.135 in reference to fluoride compounds being most pertinent.
>
> * * * * * * * * * * * * * *
>
> "It has been our policy to construe section 196.135 as pertaining to the control of the manufacturer with reference to the ingredients used in the manufacture of his product and that it was not intended to include the materials within a public water supply which he uses in the manufacture of the product. Since the fluoridation process is considered a sound public health measure we do not feel that the addition of fluorides to public water as recommended in this process is violating the intent of section 196.135.
>
> "There is ample evidence to prove that fluoridation of public waters is well adapted to its purpose which is the reduction of the incidence of dental caries.

> The Division of Health considers the incidence of dental caries to be serious enough in the state to make the utilization of every means of controlling it desirable. Accordingly, on February 1, 1952 the Division created a policy favorable to the fluoridation process.
>
> "It is interesting to note that 17 municipalities in Missouri have public waters with near the optimum amount of 1 part per million of fluorides in them. Two municipal water supplies have more than 3 parts per million of fluorides. Investigations carried out in town with a water supply taken from the Missouri River (Jefferson City, Boonville) indicate that the concentration of fluorides in the water supply at St. Joseph will range between 0.3 p.p.m. and 0.5 p.p.m. Fluorides, then are already being supplied in the water used by St. Joseph food and beverage manufacturers.
>
> "On February 17, 1952 the acting Federal Security Administrator issued a statement to the general effect that the Federal Food and Drug Administration would not regard fluoridation of local water supplies or use of fluoridated water in food manufacturing as actionable under the Federal Food, Drug and Cosmetic Act. In connection with this and with reference to sections 196.010 to 196.120, section 196.050 of the Revised Statutes of Missouri 1949 states that the Division of Health shall not prescribe more stringent regulations than prescribed by the federal act. With special reference to section 196.135 we feel that we should concur with the federal attitude."

From the opinion request and attached correspondence it appears that the inquiry is for a construction of above mentioned statutes, and, under the provisions of same whether the manufacturer of a nonalcoholic drink who uses water in his product containing a fluorine compound would be subject to criminal prosecution for the manufacture and sale of said product, or for the commission of any other acts specifically mentioned in Section 196.130, RSMo 1949, which are declared to be unlawful. It appears that the manufacturer in the particular instance referred to in the opinion request has not added the fluorine compound during the manufacturing process but that the fluorine compound was added by the water company which furnished water to said manufacturer.

Section 196.125, RSMo 1949, defines the term nonalcoholic drink and reads as follows:

> "That the term 'nonalcoholic drink,' as used herein, shall include carbonated beverages of all flavors, sarsaparilla, ginger ale, soda water of all flavors, lemonade, orangeade, root beer, grape juice, and all other nonintoxicating drinks."

Section 196.130 RSMo 1949, provides that nonalcoholic drinks shall not be adulterated and reads as follows:

> "That it shall be unlawful for any person, firm or corporate body, by himself, herself, itself or themselves, or by his, her, its or their agents, servants or employees, to manufacture, sell, offer for sale, expose for sale, or have in possession with intent to sell, any article of nonalcoholic drink which is adulterated or misbranded, within the meaning of sections 196.125 to 196.145."

Section 196.135, RSMo 1949, provides when nonalcoholic drinks shall be deemed to be adulterated, and reads as follows:

> "A nonalcoholic drink shall be deemed to be adulterated, within the meaning of sections 196.125 to 196.145, if it contains any added boric acid or borates, salicylic acid or salicyates, formaldehyde, sulphuorous acid or sulphides, hydrofluoric acid or fluorides, fluoborates, fluosilicates, or other fluorine compounds, dulcin, glucin, betanaphthol, hydronaphthol, abrastrol, asaprol, oxides of nitrogen, nitrous acid or nitrates, compounds of copper, pyroligneous acid, or other added substance deleterious to health."

Section 196.145, states that the violation of Sections 196.125 to 196.145, is a misdemeanor and fixes the penalty to be imposed upon those convicted of such offenses. Said section reads as follows:

> "Any person who shall violate any of the provisions of section 196.125

> to 196.145 shall be guilty of a misdemeanor, and upon conviction thereof, shall be sentenced to pay a fine of not less than twenty-five dollars, nor more than one hundred dollars, or not more than six months in jail, or both."

Upon first thought it would appear that one who manufactured, sold or did any one or more of the prohibited acts relating to the adulteration of nonalcoholic drinks would be subject to criminal prosecution and punishment therefor. However, for the reasons to be noticed hereafter it is our contention that the mere fact that nonalcoholic drinks containing any of the prohibited substances mentioned in Section 196.135, supra, would not of itself be sufficient grounds upon which to base a criminal prosecution against the manufacturer of such drinks under the provisions of 196.130, supra.

If the sections referred to in the opinion request were taken out of Chapter 196 of the Revised Statutes of 1949, and construed separately and without any reference to the remainder of said sections, then the literal construction and application of said sections to the facts before us would be that any manufacturer of any nonalcoholic drinks who manufactured, sold, offered or exposed same for sale, or had said drinks in his possession with the intention of selling them when such drinks had been adulterated within the meaning of Section 196.135, supra, would be subject to criminal prosecution and punishment and it would be immaterial, in so far as the prosecution was concerned whether the manufacturer, his employees, or the water company had added the fluorine compound to any of the ingredients used in the manufacture of said nonalcoholic drinks so long as the finished product contained such fluorine compound.

It is our further contention that the sections of the statute referred to in the opinion request cannot be given their proper construction without reading and construing them along with other applicable statutes, particularly those of Chapter 196, RSMo 1949, entitled "Food and Drugs." By a proper construction of said statute we refer to the one which would give the meaning and effect intended to be given to them by the General Assembly at the time of enactment of same.

In this connection we first direct your attention to Section 192.080, RSMo 1949, which provides that all powers and duties pertaining to the administration of the laws related to the food and drug statutes shall be exercised by the Division of Health, and reads in part as follows:

> "All powers and duties pertaining to administration of laws relating to food and drugs shall be exercised by the division of health. The director of health may appoint a deputy who, under the director, shall be chiefly responsible for administration of laws pertaining to food and drugs, and particularly to enforce all laws that now exist or that may hereafter be enacted regarding the production, manufacture or sale of any food products, or any ingredients that are used in the preparation of foodstuffs, or the misbranding of the same; and personally, or by his assistants, inspect any article of food or drug made or offered for sale in this state which he may, through himself or his assistants, suspect or have reason to believe is impure, unhealthful, adulterated or misbranded, and shall have power to cause to be arrested and prosecuted, any person or persons engaged in the manufacture or sale of foods or drugs or any food ingredients contrary to the laws of this state. The director shall make orders and findings for carrying out the provisions of this chapter and such orders and findings shall conform as nearly as practicable to the orders and findings at present established for the enforcement of the act of congress, approved, and known as 'The Food and Drug Act,' together with any amendments thereto."

Section 196.045, authorizes the Division of Health to promulgate for the enforcement of Sections 196.010 to 196.120 and reads in part as follows:

> "(1) The authority to promulgate regulations for the efficient enforcement of sections 196.010 to 196.120 is hereby vested in the division of health. The division shall make the regulations promulgated under said sections conform, insofar as practicable, with those promulgated under the federal act."

Section 196.050 provides that the regulations promulgated by the Division of Health shall not be more stringent than those provided by the federal act and reads as follows:

> "In no event shall the said division of health prescribe or promulgate any regulation fixing or establishing any definitions or standards which are more rigid or more stringent than those prescribed by the federal act applying to any commodity covered by sections 196.010 to 196.120 and if any product or commodity covered by said sections shall comply with the definitions and standards prescribed by the federal act for such product or commodity, such product or commodity shall be deemed in all respects to comply with sections 196.010 to 196.120."

Subsection 7 of Section 196.010 defines the term "food" and reads as follows:

> "(7) The term 'food' means articles used for food or drink for man or other animals, chewing gum, and articles used for components of any such article; * * *."

From the definition of food given by the subsection, it appears that nonalcoholic drinks would be included within the definition and that whenever the term food is used in Chapter 196, supra, it is also meant to refer to nonalcoholic drinks and that this is true when the term is mentioned in Section 196.085. Said section reads as follows:

> "Any poisonous or deleterious substance added to any food except where such substance is required in the production thereof or cannot be avoided by good manufacturing practice, shall be deemed to be unsafe for purposes of the application of subdivision (2) of section 196.070; but when such substance is so required or cannot be so avoided, the division of health shall promulgate regulations limiting the quantity therein or thereon to such extent as the division finds necessary for the protection of public health, and any quantity exceeding the limits so fixed shall also be deemed to be unsafe for purposes

7

> of the application of subdivision (2) of section 196.070. While such a regulation is in effect limiting the quantity of any such substance in the case of any food, such food shall not, by reason of bearing or containing any added amount of such substance, be considered to be adulterated within the meaning of subdivision (1) of section 196.070. In determining the quantity of such added substance to be tolerated in or on different articles of food, the division shall take into account the extent to which the use of such substance is required or cannot be avoided in the production of each such article and the other ways in which the consumer may be affected by the same or other poisonous or deleterious substances."

From the provisions of this section it is believed that a manufacturer is not authorized or justified in adding certain substances poisonous or deleterious to the health of human beings to his products during the course of the manufacturing process except under the conditions specifically provided by Section 196.085, and if it appears that the product does contain such substances, and in the present instance, if a nonalcoholic drink contains a fluorine compound as an adulteration, in violation of Section 196.130, supra, the mere presence of such substance will not be grounds for a criminal prosecution if the manufacturer can show that he is exempt from same and that his product is not to be deemed adulterated under the provisions of Section 196.085, supra.

As we read Section 196.085, in those instances when the manufacturer adds poisonous or deleterious substances to his product or when the substance, regardless of whether it was added by him or others, is necessary, or that its presence cannot be avoided, and the method of production followed by such manufacturer is deemed to be in accordance with good manufacturing practices, the manufacturer is not subject to criminal prosecution, and his product is not deemed to be adulterated, provided that he follows any regulations promulgated by the Division of Health limiting the quantity of the poisonous or deleterious substance present in the finished product.

Applying the provisions of Section 196.085, supra, and the principles of law involved within the sections stated above, it is our thought that where the manufacturer of a nonalcoholic drink added water containing a fluorine compound during the manufacturing process, which water was supplied by the water

company which had actually placed the objectionable substance in the water before supplying manufacturer with same, is a question of fact, but that is immaterial as to what persons added the fluorine compound so long as the finished product sold or offered for sale contains same and the product is adulterated within the meaning of Sections 196.130 and 196.135, RSMo 1949. Such manufacturer would, under these conditions be subject to criminal prosecution for one or more unlawful acts under the provisions of said sections unless he can offer evidence satisfactory to the Division of Health that he is not subject to prosecution for the reasons that he is exempt from same under the provisions of Section 196.085, supra. In the event the Division of Health is satisfied that the manufacturer is entitled to the exemption provided by said section, then it shall promulgate appropriate regulations limiting the quantity of fluorine compound which may be allowed in said nonalcoholic drink and permit the manufacturer to continue the production of his product under such restrictions but the regulations thus promulgated shall not be more stringent than any similar regulations under the federal food and drug act then in effect. Under these conditions only can said nonalcoholic drink be produced and offered for sale, and the manufacturer not be subject to criminal prosecution, or his product be deemed adulterated within the meaning of Section 196.135, supra.

CONCLUSION

It is therefore the opinion of this department that in construing the provisions of Section 196.125, 196.130 and 196.135, RSMo 1949, according to the apparent intention of the General Assembly as expressed in said statutes, and in applying them to the above mentioned facts, said sections must be read and construed along with other applicable provisions of the Missouri Revised Statutes of 1949, particularly Sections 196.010, 196.045, 196.050 and 196.085. Consequently, a nonalcoholic drink as defined by Section 196.125 would be a food within the meaning of paragraph 7 of Section 196.010 and a manufacturer of such drink, who manufactured, sold, offered or exposed for sale or had the product in his possession with intent to sell as provided by Section 196.130, supra, when it had been adulterated by the addition of a fluorine compound, prohibited by Section 196.135, supra, would be subject to criminal prosecution for violation of said section, and upon conviction to the punishment provided by Section 196.145, RSMo 1949. However, in the event said manufacturer offers satisfactory evidence to the State Division of Health (the administrators of the Missouri food and drug laws) that the added fluorine compound in his product was either required in the production or that it could not be avoided, even though good manufacturing practices had been followed by him. Then under the provisions of Section 196.085, supra, the Division

of Health shall promulgate regulations limiting the quantity of the fluorine compound which may be permitted, and may allow the manufacturer to continue the production of the nonalcoholic drink, and to sell same. That under these conditions only said drink shall not be considered to be adulterated, and the manufacturer of same will not be subject to criminal prosecution under the provisions of Sections 196.130 or 196.135, supra.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul N. Chitwood.

Very truly yours,

JOHN M. DALTON
Attorney General

PNC:hr