

FOOD AND DRUG: Imitation vanilla not labeled "imitation"

HEALTH: violates provisions of Pure Food and Drug Act.

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3-29

Mr. Warren E. Lofton
Director, Bureau of Food
and Drug Inspection
Jefferson City, Missouri

Dear Sir:

This is in reply to your request of February 15, 1949,
which reads as follows:

"On January 30, 1949, I entered a store
in Missouri and made several purchases.
In the course thereof, I asked for a
bottle of vanilla. The clerk proceeded
to a shelf in the store on which were
displayed extracts and flavors. He
picked up a bottle of X X X Superior
Flavor. The label read substantially
as follows:

X X X
SUPERIOR FLAVOR
CONTAINS:
VANILLIN
COUMARIN
VANILLA
ALCOHOL GLYCOL SYRUP
CARAMEL COLOR
AND WATER

.....
NOTICE

This excellent flavor
is not offered for sale or (Small print)
sold as an imitation of
any other product

.....
Mfg. by
X X X MANUFACTURING CO.

"I asked the clerk if that was vanilla extract, and he said 'yes.' I took the bottle and looked at the label and told him that it was labeled 'Superior Flavor' and I was not sure it was vanilla. He stated that this article had been sold by them for some time as vanilla extract.

"Again, on February 12, 1949, I visited another store in Missouri and found X X X Superior Flavor displayed on a shelf with a pure vanilla extract. On a shelf above the vanilla several imitation flavors were displayed. I picked up a bottle of X X X Flavor and asked the lady at the cashier's desk if this article was vanilla extract. She said 'Yes, it was.'

"Will you kindly furnish us with an opinion as to whether or not the labeling of X X X Superior Flavor, as set out above, violates the Food and Drug Laws of the State of Missouri."

Section 9866, Mo. R. S. A., reads as follows:

"A food shall be deemed misbranded--
"(a) If its labeling is false or misleading in any particular.

* * * * *

"(c) If it is an imitation of another food, unless its label bears, in type of uniform size and prominence, the word 'imitation,' and, immediately thereafter, the name of the food imitated.

* * * * *

Section 9866, supra, is a part of the Missouri Pure Food and Drug Act which is similar to the Federal Pure Food and Drug Act.

In the case of United States v. Schider, 246 U. S. 519, 38 Sup. Ct. 364, 62 L. Ed. 863, the court declared the purpose of the Pure Food and Drug Act as follows, i.c. (L. Ed.) 865:

"We have heretofore said: 'The purpose of the act is to secure the purity of food and drugs and to inform purchasers of what they are buying. Its provisions are directed to that purpose and must be construed to effect it.' United States v. Antikamnia Chemical Co. 231 U.S. 654, 665, 58 L. Ed. 419, 424, 34 Sup. Ct. Rep. 222, Ann. Cas. 1915A, 49. 'The legislation, as against misbranding, intended to make it possible that the consumer should know that an article purchased was what it purported to be; that it might be bought for what it really was, and not upon misrepresentations as to character and quality.' United States v. Lexington Mill & Elevator Co. 232 U. S. 399, 409, 58 L. Ed. 658, L.R.A. 1915B, 774, 34 Sup. Ct. Rep. 337. And see United States v. Coca Cola Co. 241 U. S. 265, 277, 60 L. Ed. 995, 1001, 36 Sup. Ct. Rep. 573, Ann. Cas. 1917C, 487.

"The stuff put into commerce by defendant was an 'imitation,' and, if so labeled, purchasers would have had some notice. To call it 'compound essence of grape' certainly did not suggest a mere imitation, but, on the contrary, falsely indicated that it contained something derived from grapes. See Frank v. United States, 113 C. C. A. 188, 192 Fed. 864. The statute enjoins truth; this label exhales deceit."

In the case of Day-Bergwall Co. v. State, 207 N.W. 959, the Supreme Court of Wisconsin had under consideration a case wherein the defendant was charged in an information with violations of the Pure Food Laws of the state. Defendant was a manufacturer of a compound known as "Van cu co." The state contended that the compound was colored in imitation of the genuine color of another substance, viz., vanilla extract. We will set out at length the parts of the court's opinion in this case because of the similarity between the product then under consideration and the instant product, l.c. 961, 962:

"Van cu co is sold in bottles contained in cartons, which are properly labeled, as follows:

"Net contents 1½ fluid ozs. VAN CU CO. A compound composed of artificial vanillin and coumarin, sugar, water and alcohol. Colored with caramel color. Manufactured by Day-Bergwall Co., Milwaukee."

"These labels, so displayed, are neither deceptive nor misleading, for they contain a true statement of all the ingredients that are used in the manufacture of the compound. Without the addition of caramel, the product would assume the color of water, and be transparent, and such product so manufactured and sold would not constitute a violation of the statutes in question; and the only objectionable feature contained in the composition, and complained of, consists in the addition of caramel in such quantities as will produce a coloring which is either identical or similar to that of vanilla extract.

* * * * *

" * * * Both vanilla extract and van cu co are sold to consumers for the sole purpose of adding flavor to food. Vanilla extract, as is well known, has been used for many years in the preparation of foods, and it serves the purpose of adding a delicious flavor. Its principal ingredient is vanillin, and, although the latter is synthetically prepared, it is of equal quality and serves fully the same purpose as the true product derived from the vanilla bean. A gallon of vanilla in the market costs about seven times as much as a gallon of van cu co, and it is sold at retail at a much higher price. Van cu co, as one of its principal ingredients, contains vanillin,

which is also the principal element in vanilla extract. Therefore it clearly appears that the product known as van cu co, colored as it is to imitate vanilla extract, lends itself readily to the perpetration of fraud in the retail trade, and the Pure Food Law of the state was not only enacted and designed for the protection of the public health, but for the protection of the public from fraud.

* * * * *

"In the instant case, as is indicated by the label, the imitation of the color of vanilla is achieved by the addition of caramel color to the compound, and it thus becomes clearly apparent that the object of the defendant in using such coloring matter is not for the purpose of adding an additional flavor or bouquet, but of producing a substance which in its appearance can readily be taken for vanilla extract. The use of mere coloring matter, even though the same be harmless, is equivalent to the use of a harmless dye, and where a dye is used to produce the color of another substance, the court or jury is warranted in finding that the imitation so resulting was a conscious one, and not a mere incident. Furthermore, the use of an ingredient which produces merely an imitation color is persuasive of a conscious attempt to imitate, especially where, as here, the defendant had a choice of ingredients. * * *"

Also, in that case, the court, in its summary of the evidence adduced at the trial, brought out the fact that the agents of the Food Department on numerous occasions in purchasing vanilla extract were given Van cu co by the dealers.

From a consideration of the cases heretofore cited and the provisions of our act, we believe that the product in question is misbranded, in that it is an imitation of another food and the label does not bear the word "imitation" and immediately thereafter the name of the food imitated, because it violates Subsection (c) of Section 9866, Mo. R. S. A.

The manufacturer attempts to avoid the effect of Subsection (c) of Section 9866, Mo. R. S. A., by the addition of a notation in small print, as follows: "This excellent flavor is not offered for sale or sold as an imitation of any other product." We believe that it is clearly evident that the product is an imitation. Such a statement on the label would seem to violate Subsection (a) of Section 9866, Mo. R. S. A.

The statement by the Supreme Court of the United States in the case of *United States v. Ninety-five Barrels*, 265 U. S. 438, 44 Sup. Ct. 529, 68 L. Ed. 1094, is appropriate as applied to the facts of this case. At l.c. 1097 (L. Ed.) the court said:

"The statute is plain and direct. Its comprehensive terms condemn every statement, design, and device which may mislead or deceive. Deception may result from the use of statements not technically false, or which may be literally true. The aim of the statute is to prevent that resulting from indirection and ambiguity, as well as from statements which are false. It is not difficult to choose statements, designs, and devices which will not deceive. Those which are ambiguous and liable to mislead should be read favorably to the accomplishment of the purpose of the act. The statute applies to food, and the ingredients and substances contained therein. It was enacted to enable purchasers to buy food for what it really is. *United States v. Schider*, 246 U. S. 519, 522, 62 L. ed. 863, 865, 38 Sup. Ct. Rep. 369; *United States v. Lexington Mill & Elevator Co.* 232 U. S. 399, 409, 58 L. ed. 658, 651, L. R. A. 1915B, 774, 34 Sup. Ct. Rep. 337; *United States v. Antikammia Chemical Co.* 231 U. S. 654, 665, 58 L. ed. 419, 424, 34 Sup. Ct. Rep. 222, Ann. Cas. 1915A, 49."

Conclusion.

Therefore, it is the opinion of this department that the label, as set out in the opinion request, is misbranded within

Mr. Warren E. Lofton

-7-

the meaning of the Pure Food and Drug Act of the State of Missouri, in that it is false and misleading and is an imitation of another food and the label does not bear the word "imitation" and immediately thereafter the name of the food imitated.

Respectfully submitted,

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APPROVED:

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JRB:ml