COMMISSIONER OF AGRICULTURE:
FOODS AND DRUGS:
SKIMMED MILK CHEESE:

Product failing to conform to statutory definition of Par. 11, Sec. 196.525, RSMo 1949, is not cheese, and cheese labeling statutes are inapplicable to product, and product cannot be manufactured, sold, or offered for sale as "cheese" or "filled cheese". Manufacture and sale of such product not prohibited in Missouri.

JOHN M. DALTON
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February 19, 1953

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

Dear Sir:

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

"1. Is it permissible under existing statutes to manufacture cheese from milk, the milk fat content of which has been reduced to less than three and one-fourth per cent, and to which has been added oils derived from vegetable or animal sources, as distinguished from milk fat as defined in paragraph 38, Section 196.525, RSMo 1949?

"2. Providing it is your opinion that a product as named in the preceding paragraph is not in violation of existing statutes, would such a product have to comply with those statutes relating to the labeling and/or branding of skimmed milk cheese?

"3. Would such a product as named in paragraph No. 1 be properly branded and labeled if the product was labeled only by the words 'Filled Cheese'?

"4. Do existing statutes prohibit the manufacture and sale of a product labeled 'Filled Cheese', or the use of the word 'cheese' in connection with a product made from skimmed milk to which

> has been blended or combined oil foreign to milk fat? Cheese is defined by statute. Does the use of the word 'filled' convey to the potential consumer that the milk fat has been removed and vegetable or other animal fat substituted for the same?"

Since the opinion request refers to milk, skimmed milk, skimmed milk cheese, and milk fat, it will be necessary to quote from various paragraphs of Section 196.525, RSMo 1949, defining each of the words referred to.

Paragraph 37, defines milk as follows:

> "(37) 'MILK' is the whole lacteal secretion obtained by the complete milking of one or more health cows, excluding that obtained within fifteen days before and five days after calving or such longer period as may be necessary to render the milk practically colostrum free, and contains not less than eight per cent of solids not fat and not less than three and one-fourth per cent milk fat. The term 'milk' shall include milk which is standardized to comply with such standards. The term 'milk' unqualified, means cow's milk."

Paragraph 56, defines "skimmed milk" and reads as follows:

> "(56) 'SKIMMED MILK' is milk from which a sufficient portion of milk fat has been removed to reduce its milk fat percentage to less than three and one-fourth per cent;"

Paragraph 57, defines skimmed milk cheese, and reads as follows:

> "(57) 'SKIMMED MILK CHEESE' is the sound and ripened product made from skim milk by coagulating the casein thereof with rennet or lactic acid, with or without the addition of

> ripening ferments and seasoning. The addition of harmless coloring matter is permitted. When offered for sale or sold it must be correctly labeled."

The product referred to in the first inquiry of the opinion request simply mentions the manufacture of "cheese" without any qualifying words or statements as to the particular kind of cheese the writer had in mind, yet from the description of the milk used in the cheese we assume that the reference to "cheese" was intended to refer only to skim milk cheese as defined by paragraph 57, Section 196.525, supra.

We understand the first inquiry to be whether or not existing statutes permit the manufacture of cheese (meaning skim milk cheese) from milk having a milk fat content of less than three and one-fourth per cent, to which has been added oils derived from vegetable or animal sources as distinguished from milk fats, defined by paragraph 38, Section 196.525, supra.

From the language used in paragraph 57, Section 196.525, supra, it is apparent that it was the intention of the legislature to enact a law giving an exact definition of skim milk cheese, and to set up a standard by which all food products known as skim milk cheese were to be measured, and to protect the public from fraud or deception in the manufacture, sale, or offer to sell any such cheese which failed to meet that standard of quality. As an added measure of protection to the public, said section further provides that such cheese must be correctly labeled when offered for sale, or is sold.

Section 196.680, RSMo 1949, provides the specifications for the labeling of cheese, and the conditions under which cheese shall be deemed to be misbranded. Said section reads as follows:

> "Cheese shall be deemed to be misbranded:
>
> "(1) If its label is false or misleading in any particular;

"(2) If it is offered for sale under the name of any other food;

"(3) If it does not contain the common name of the product;

"(4) If in package form unless it bears a label containing;

"(a) The name and place of business, of manufacture, packager or distributor, or an equivalent symbol or identifying number imprinted on or attached to it; and

"(b) An accurate statement of the quantity of the contents in terms of weight and measure;

"(5) If it does not conform to the definitions or standards of quality as required by the Missouri dairy law and all amendments thereto;

"(6) If it does not contain the word 'pasteurized';

"(7) If it contains a symbol or identifying code number which has not been filed with the department of agriculture."

Paragraph 57, Section 196.525, supra, gives an exact definition and standard of the product known as skim milk cheese, and such product can only contain the ingredients named and is to be manufactured under the conditions therein provided. Vegetable or mineral oils are not one of the ingredients of such cheese, and their addition is not authorized by this or any other section of the statutes. The product made from ingredients other than those authorized would not in our opinion constitute skim milk cheese.

In this connection we call attention to the case of Libby, McNeill & Libby v. United States, 148 Fed. (2d) 71.

In this case the facts involved tomato catsup conforming to government standards, except for the presence of sodium benzoate, which had been added as a preservative, and the product "purported" to be tomato catsup although it had been truthfully labeled "tomato catsup" with preservative. It was held that the product was misbranded and subject to condemnation under the provisions of the Federal Food, Drug and Cosmetic Act. The court's holding, among other matters, was to the effect that the product did not comply with the regulations defining tomato catsup.

At l.c. 73, the court said:

> "The district court found the product under seizure to conform in all respects to the definition and standard promulgated by the Administrator, except for the addition of the small quantity of benzoate of soda, but held that it purported to be catsup, and so, since it did not conform to the standard, was misbranded. Decision therefore turns upon the meaning of the word 'purport' as used in Section 403(g). The appellant contends that the label is controlling, that its product does not thereby purport to be catsup, even though it conforms in all respects to the standard, except for the added ingredient. It is a specific article, namely, tomato catsup with preservative, and since its label truthfully so indicates, there is no misbranding. The label may be disregarded only if it is assumed that Section 403(g) expresses an intent on the part of the Congress to outlaw the manufacture of foods not conforming to applicable standards which, but for the standard, would be sold under the same common and usual name.
>
> "It is impossible for us, in the light of controlling authority, to accept the

contention. The condemned food is tomato catsup, and purports to be tomato catsup. If producers of food products may, by adding to the common name of any such product mere words of qualification or description, escape the regulation of the Administrator, then the fixing of a standard for commonly known foods becomes utterly futile as an instrument for the protection of the consuming public. Here is no arbitrary or fanciful name, neither 'representative or misrepresentative' of a common food product, as in Judge Geiger's unreported case of United States v. 24-7/8 Gallons of Smack, D.C., E.D. Wis. 1926. Such designations invite inquiry as to what the food really is. The present product is intended to satisfy the demand and supply the market for -catsup. Emphasis is laid on its conforming to standard except for the preservative. The argument defeats itself, for if it is an article of food, distinguished from the standard by the qualification, then other ingredients may be added or defined ingredients or processes omitted without conflicting with the regulation, if containers are truthfully labeled.

"In Federal Security Administrator v. Quaker Oats Co., 318 U.S. 218, 63 S. Ct. 589, 87 L. Ed. 724, it was said that the statutory purpose to fix a definition of identity of an article of food sold under its common or usual name, would be defeated if producers were free to add ingredients, however wholesome, which are not within the definition, and so it was not an unreasonable choice of standards for the Administrator to adopt one which defined the familiar farina of commerce without permitting vitamin enrichment, and at the same time a standard for 'enriched' farina which permitted a restoration of vitamins removed from whole wheat by milling. The respondent

in that case had marketed 'Quaker Farina Wheat Cereal, Enriched with Vitamin D.' Since this did not conform either to the standard adopted for farina, or to the standard adopted for enriched farina, it was held to be misbranded, although the label there as truthfully described the product as does the present label. The district judge was unable to distinguish the present case from the Quaker Oats case, and neither can we.

"In reviewing the text and legislative history of the present statute, Mr. Justice Stone, in the Quaker Oats case, pointed out that its purpose was not confined to a requirement of truthful and informative labeling. False and misleading labeling had already been prohibited by the 1906 Act. The remedy chosen was not a requirement of informative labeling, rather, it was the purpose to authorize the Administrator to promulgate definitions and standards of identity under which the integrity of food products could be effectively maintained, and to require informative labeling only where no such standard had been promulgated; where the food did not purport to comply with the standard; or where the regulations permitted optional ingredients, or required their mention on the label, and that the provision for such standards of identity reflect a recognition by Congress of the inability of consumers to determine, solely on the basis of informative labeling, the relative merits of a variety of products superficially resembling each other. The court was unable to say that such standard of identity, designed to eliminate a course of confusion to purchasers, will not promote honesty and fair dealing within the meaning of the statute.

"Neither the decision nor its rationalization in the Quaker Oats case, can be escaped by a product that looks, tastes, and smells like catsup, which caters to the market for catsup, which dealers bought,

> sold, ordered, and invoiced as catsup, without reference to the preservative, and which substituted for catsup on the tables of low priced restaurants. The observation in the opinion that it was the purpose of the Congress to require informative labeling, 'where the food did not purport to comply with a standard' is not to be lifted out of its context, given a meaning repugnant to the decision, so as to limit 'purport' to what is disclosed by the label and to that alone."

As stated above, it is our thought that a product containing, in addition to the other ingredients provided by paragraph 57, Section 196.525, supra, vegetable or animal oils, would not be skim milk cheese, and that the sale of such a product as or for skim milk cheese would be a violation of said section, and a criminal offense, the punishment of which is fixed by Section 196.690, RSMo 1949, which section reads as follows:

> "Any person, or any officer, agent, representative, servant or employee of such person, who violates any of the provisions of sections 196.520 to 196.690 shall be deemed guilty of a misdemeanor and punished as provided by law, and in addition thereto his or their license shall be subject to suspension or revocation by the commissioner as provided in these sections."

In the event the products were labeled as skim milk cheese, and sold or offered for sale as such, paragraph 5, Section 196.680, RSMo 1949, would be violated, the punishment of which is fixed by Section 196.690, supra.

Such product may be manufactured and sold in this state so long as it is not sold as cheese. We call attention to the case of Dairy Queen of Wisconsin v. McDowell, 51 N.W. (2d) 34, in which the Department

of Agriculture sought to prohibit the sale of a semi-frozen food product similar to ice cream, but containing less butterfat, on the ground that the public needed to be protected. The product was a healthful food and was not sold as ice cream, the court held that the public did not need any protection, and that the sale could not be prohibited. At l.c. 37 the court said:

> "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 manner as the department may direct, to indicate that it is not intended to be marked 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."

The purpose of statutes regulating the manufacture and sale of food products is to protect the public from the sale of unhealthful or sub-standard foods, and such statutes have many times been legally upheld as a proper exercise of the police power of the state. However, no such statutes prohibit the sale of a healthful human food product which fails to comply with a statutory definition of a particular product so long as the product is not manufactured, sold, or offered for sale as the one defined by statute.

We believe this to be the import of the Dairy Queen of Wisconsin case, and since we have no Missouri statutes prohibiting the manufacture and sale of a food product which fails to comply with a statutory definition of that product, we believe the holding in this case is fully applicable to the facts involved in inquiry number one of the opinion request.

It is therefore our thought, and in answer to your first inquiry, that a product containing the ingredients listed in Paragraph 57 of Section 196.525 and containing less milk fat than three and one-fourth per cent, to which has been added vegetable or animal oils, is not skim milk cheese within the meaning of said section. The manufacture of said product is not prohibited under existing Missouri statutes, but such product cannot be sold or offered for sale as skim milk cheese.

Paragraph 57, Section 196.525, supra, defining skim milk cheese provides that when such cheese is sold or offered for sale it must be correctly labeled. We have also referred to Section 196.680, supra, which states the conditions under which cheese shall be deemed to be misbranded.

Since we have stated that in our opinion the product referred to in the first inquiry of the opinion request is not skimmed milk cheese within the meaning of the statutory definition, such a product could not be legally labeled as skim milk cheese, and the labeling statutes have no application to the labeling of such a product.

Paragraph 11, Section 196.525, supra, defines cheese as follows:

> "(11) 'CHEESE' is the product made from the separated curd obtained by coagulating the casein of milk, skimmed milk, or milk enriched with cream. The coagulation is accomplished by means of rennet or other suitable enzyme, lactic fermentation or by a combination of the two. The curd may be modified by heat, pressure, ripening ferments, special molds, or suitable seasoning. Certain varieties of cheese are made from the milk of animals other than

> the cow, and any cheese defined in sections 196.520 to 196.690 may contain added coloring matter. The name 'cheese,' unqualified, means Cheddar cheese (American cheese, American Cheddar cheese.)"

It is noted that this definition and description of the process of making cheese makes no reference to the addition of vegetable or animal oils, and it appears that a product to which such oils have been added would not be cheese within the meaning of said section, therefore, in answer to your third and fourth inquiries the words cheese or "filled cheese" cannot be used to describe the product mentioned above, which is not cheese.

CONCLUSION.

It is therefore the opinion of this department that a product containing vegetable or non-milk animal fats, which fails to conform to the definition of cheese provided by paragraph 11, Section 196.525, RSMo 1949, is not cheese, and cheese labeling statutes are inapplicable to such product, and it cannot be manufactured, sold, or offered for sale as "cheese", or "filled cheese". There is no prohibition against the manufacture or sale of such a product in this state.

This opinion, which I hereby approve, was prepared by my Assistant, Paul N. Chitwood.

Very truly yours,

JOHN M. DALTON
Attorney General

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