

Office of the Attorney General
State of North Dakota

Opinion No. 81-127

Date Reissued: November 23, 1981

Requested: Phil Park
North Dakota Dairy Commissioner

--QUESTION PRESENTED--

Whether the sale of a product which is clearly labeled so as not to be in imitation or semblance of any dairy product nor false, deceiving, misleading or confusing to the average consumer is prohibited by Section 4-30-43 of the North Dakota Century Code.

--ATTORNEY GENERAL'S OPINION--

It is my opinion that the sale of a product which is clearly labeled so as not be in imitation or semblance of any dairy product nor false, deceiving, misleading or confusing to the average consumer is not prohibited by Section 4-30-43 of the North Dakota Century Code.

--ANALYSIS--

Subsection 4-30-01(52), N.D.C.C., provides:

52. 'Filled dairy products' shall mean any milk, cream, or skimmed milk, or any combination thereof, whether or not condensed, evaporated, concentrated, frozen, powdered, dried, or desiccated, or any food product made or manufactured therefrom, to which has been added, or which has been blended or compounded with, any fat or oil other than milkfat so that the resulting product is in imitation or semblance of any dairy product, including but not limited to milk, cream, sour cream, butter cream, skimmed milk, ice cream, whipped cream, flavored milk or skim milk drink, dried or powdered milk, cheese, cream cheese, cottage cheese, creamed cottage cheese, ice cream mix, sherbet, condensed milk, evaporated milk, or concentrated milk; provided, however, that this term shall not be construed to mean or include:
 - a. Any distinctive proprietary food compound not readily mistaken for a dairy product, where such compound is customarily used on the order of a physician and is prepared and designed for medicinal or special dietary use and prominently so labeled;

- b. Any dairy product flavored with chocolate or cocoa, or the vitamin content of which has been increased, or both, where the fats or oils other than milkfat contained in such product do not exceed the amount of cacao fat naturally present in the chocolate or cocoa used and the food oil, not in excess of one-hundredths percentum of the weight of the finished product, used as a carrier of such vitamins; or
- c. Oleomargarine; . . .

Section 4-30-43, N.D.C.C., is a legislative declaration of policy regarding filled dairy products and prohibits their sale. This section provides:

4-30-43. FILLED DAIRY PRODUCTS--DECLARATION OF POLICY.--

- 1. Filled dairy products resemble genuine dairy products so closely that they lend themselves readily to substitution for or confusion with such dairy products and in many cases cannot be distinguished from genuine dairy products by the ordinary consumer. The manufacture, sale, exchange, transportation, possession, or offering for sale or exchange of filled dairy products creates a condition conducive to substitution, confusion, deception, and fraud, and one which is permitted to exist tends to interfere with the orderly and fair marketing of foods essential to the well-being of the people of this state. It is hereby declared to be the purpose of this section to correct and eliminate the condition above referred to; to protect the public from confusion, fraud, and deception; to prohibit practices inimical to the general welfare; and to promote the orderly and fair marketing of essential foods.
- 2. It shall be unlawful for any person to manufacture, sell, exchange, transport, possess, or offer for sale or exchange any filled dairy product.

Subsection 4-30-01(52), N.D.C.C., allows a dairy product to be sold to which has been added fat or oil other than milkfat, provided the resulting product is not in imitation or semblance of any dairy product. Subsection 1 of Section 4-30-43, N.D.C.C., states that filled dairy products so closely resemble genuine dairy products that they are readily substituted or confused with dairy products. This subsection further states that filled dairy products create a condition causing 'substitution, confusion, deception, and fraud' to the consumer. Subsection 2 of Section 4-30-43, N.D.C.C., is an absolute prohibition against filled dairy products. It is the Attorney General's opinion that the legislature sought to

prohibit the manufacture, sale, or exchange of dairy products which have added fat or oil other than milkfat only when the resulting product is in imitation or semblance of a dairy product, or conducive to substitution, confusion, deception, and fraud.

The Michigan Supreme Court made a similar determination of legislative intent in interpreting its state's filled dairy statute:

Because the statute does not differentiate between harmful and harmless foreign oils or fats, it is not an adulteration act. Its evident primary purpose is to prevent fraud of the public through sale of filled milk or its fluid derivatives as natural milk or its derivatives, whether marketed under its true name or under the subterfuge of a trade or fictitious name. *Carolene Products Co. v. Thomson*, 267 N.W. 608, 610 (Mich. 1936). See *Carolene Products Co. v. Banning*, 268 N.W. 313, 315 (Neb. 1936); and *State v. Carolene Products Co.*, 144 S.W.2d 153, 156 (Mo. 1940).

The Michigan Supreme Court in *Carolene Products Co. v. Thomson*, *supra* at 611, stated that the possibilities of fraud lie in:

(1) sale to the retailer without labeling of the container to indicate the true nature of the product; (2) sale to the consumer on misrepresentation by the retailer through words or conduct as before mentioned; (3) importation into a state and sale in bulk with resale as milk; and (4) serving the product as milk in eating places where the consumer cannot see the label. * * *

It seems incontrovertible that any possibility of fraud, sufficient in extent to be called public, in the sale of a harmless and nutritive food product may be avoided by regulations as to branding, disclosure of ingredients, kinds and marking of containers, requirement that eating places give notice to customers of its use as is already provided for oleomargarine. . . . There has been no attempt, by testimony or argument, to indicate that they [regulations] would not be effective in the vending of *Carolene* [filled milk], and, in view of the fact that both of the elements of the product are lawful objects of sale in the state, only their union is prohibited and the completed product is harmless, the remedy necessary to avoid infringement upon constitutional rights is by way of regulation, not prohibition.

Proper marketing and labeling practices can adequately protect the consumer and it is the responsibility of the regulatory agency to promulgate rules to ensure that the consumer can readily distinguish between a dairy product which has added fat or oil other than milkfat and a natural dairy product or by-product. As an example, an appropriate label for such a product might include the requirement that 'Imitation Milk--Not To Be Sold As Infant Formula' and a listing of the ingredients be clearly stated in large, bold type on the package.

Therefore, it is my opinion that such products may be lawfully sold if they are not 'in imitation or semblance of a dairy product' nor 'conducive to substitution, confusion, deception, and fraud.'

It is not the intent of this opinion to address the merits of these products, nor to imply that these products are a proper substitute for natural dairy products or by-products. To the extent that this opinion conflicts with the opinion dated January 23, 1968, written by Attorney General Helgi Johanneson to Dairy Commissioner C. R. Kragsted, the latter is superseded.

--EFFECT--

This opinion is issued pursuant to Section 54-12-01, N.D.C.C. It governs the actions of public officials until such time as the question presented is decided by the courts.

Robert O. Wefald
Attorney General

Prepared by: Nancy K. Hoff
Assistant Attorney General