

COMMISSIONERS OF

AGRICULTURE: Manufacture and sale of a frozen food
FOOD AND DRUGS : product which contains vegetable fat
does not violate provisions of Section
196.705, RSMo 1949.



November 21, 1952

11-21-52

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

Dear Sir:

This will acknowledge receipt of your request for
an official opinion which reads:

"Section 196.850, RSMo 1949, defines ice
cream as a dairy product and a frozen mixture
containing several other main ingredients.
Section 196.705 RSMo 1949 prohibits the use
of oils or fats other than milk fat under
the name of said product or article of the
derivatives thereof or under any fictitious
or trade name whatsoever.

"This paragraph, it appears, prohibits the
combination of vegetable oils with milk
solids. Attached hereto is a carton being
used to package a frozen food product which
contains vegetable fat. It is to be noted
that this carton is of the type that is
traditionally used to package ice cream
in. Also, it has printed thereon several
cuts which imply that the frozen mixture
is being merchandised as or in the semblance
of ice cream. There is the traditional
ice cream cone, ice cream soda, ice cream
sundae, and the slice of pie which has on
it a portion of ice cream.

"Also, it is to be noted it states on the
carton that the frozen mixture is not an
ice cream. The ingredients contained in this

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product are claimed to be: milk solids, sugar, stabilizer, vegetable fat, and certified color.

"An opinion is requested as to whether or not: first, the use of a vegetable oil in combination with milk solids constitutes a violation of Statute 196.705 RSMo 1949; second, is the merchandising of this frozen mixture in violation of Section 196.885 RSMo 1949 in view of the fact that it is a frozen mixture and does not conform to the standards of ice cream. Also, in view of the illustrations used to merchandise the product, notwithstanding the fact that the words 'not an ice cream' are contained on the carton. Third, would the wording 'not an ice cream' relieve the manufacturer of this product of his responsibilities even though he might merchandise the product as a frozen mixture and in the semblance of ice cream?

"If the intent of Section 196.705 RSMo 1949 was not to prohibit the combining of vegetable fats with milk products--and if the wording of this Statute is not such as to prohibit the same--it would seem that manufacturers could legitimately use vegetable oils in combination with other milk solids as found in such products as cheese or butter.

"Information is available that points out the favorable nutritive value of milk fat as compared to other fats of vegetable origin."

Your opinion request relates principally to the frozen food product which contains vegetable fat, so our opinion shall particularly apply to whether this product comports with the laws of Missouri relating to the manufacture and sale of such product.

You ask three questions and we shall answer them in the order stated in your request.

First, you inquire if the use of a vegetable oil in combination with milk solids constitutes a violation of Section 196.705, RSMo 1949. That section reads:

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

For the sake of this opinion, we shall assume that the ingredients shown on the carton enclosed with your request are correct. It shows thereon that the product contains milk solids, sugar, stabilizer, vegetable fat and certified coloring. The foregoing statute prohibits the manufacture, sale or exchange or possession with intent to manufacture, sell or exchange any milk, cream, condensed or evaporated milk, skim milk or any of the fluid derivatives thereof, to which is added any fat or oil other than milk fat, either under the name of the product or articles of the derivative thereof. It would be unlawful to manufacture and sell said product if this product can be classified as a derivative of milk. The company further admits that the product does contain milk solids. In answering your request, it is essential to determine what milk is and its contents. To do this, it is essential that we refer to some recognized authority, and we cite the text of "Milk and Its Products" by H. H. Wing, Chapter 2, which sets out the composition of milk and reads in part:

"The constituents of milk are numerous and of diverse character, but may be easily classified into a few well marked groups as follows: (a) water, (b) fats, (c) substances containing nitrogen (albuminoids), (d) sugar, (e) ash. Excepting the water, they are collectively known as milk solids. The solids exist partly in solution, partly in semi-solution, and partly in suspension in the water. Milk from the various classes of animals has the same general constitution and properties, and

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varies only in the relative proportions of the various proximate constituents. Cow's milk is typical of all milks, and as it is the only milk used in processes of manufacture in the United States, all of our discussions have reference to it alone. * * *

Webster's International Dictionary has defined "derivative" as follows:

"1. One that is derived; anything obtained or deduced from another.

"2. Chem. A substance so related to another substance by modification or partial substitution as to be regarded as theoretically derived from it, even when not obtainable from it in practice; thus, the amino compounds are derivatives of ammonia."

Also, the appellate courts have to a great extent followed this definition. In *State v. Wong Fong*, 241 P. 1072, 75 Mont. 81, the court defined the word "derivative" as that which is derived, anything obtained or deduced from another, as alkalied from cocoa leaves, is a derivative from cocoa leaves.

The primary rule of construction of statutes is to ascertain and give effect to lawmakers' intent and this should be done from words used, if possible, considering the language honestly and faithfully. See *City of St. Louis v. Senter Commission Company*, 85 S.W.2d 21, 337 Mo. 238.

While it is true ice cream is measured as a liquid and often milk solids are considered fluids, in view of the above we must hold that in the manufacturing of this product, Section 196.705, RSMo 1949, is not violated.

You next inquire if the merchandising of this frozen mixture is in violation of Section 196.885, RSMo 1949, which reads:

"It shall be unlawful for any person, firm, copartnership, association or corporation to whom or to which sections 196.850 to 196.890 apply, to manufacture, sell or offer for sale in this state any frozen mixture, as, or for, ice cream which does not conform to the standard prescribed in section 196.850."

The foregoing statute requires anyone before manufacturing

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ice cream to obtain a permit from the Commissioner of Agriculture. To answer the question, we must determine if the product is an ice cream. While the carton that contains this product specifically states that it is not an ice cream, it is well established that the mere statement to that effect is not of itself sufficient if the actual ingredients, under the law, show it to be ice cream. In other words, we must look to the contents of the produce itself to actually determine if it is ice cream and not just take for granted the statement of the manufacturer. If the Commissioner of Agriculture is required to not look beyond such statements of manufacturers as to what their products contain, it is easy to see that it would not be difficult to flout the law. Again assuming for the sake of this opinion, as we have no other way presently of determining the actual contents of this product, that it contains the ingredients shown on the carton, it is conceded that this is a frozen product containing milk solids which is, at least as shown above, a part of milk, however not a derivative of milk. It also contains sugar and certified coloring which, under the law, are parts comprising ice cream. However, it does not show any stiffeners unless that is the same as a stabilizer; furthermore, it does not contain milk fat, but does contain vegetable fat. So, these last two items are missing, and, therefore, the product cannot be declared an ice cream for the reason that it does not contain all of the ingredients as required under Section 196.850, supra. So, we must hold that it is not an ice cream as defined by the statutes.

We think it unnecessary to answer your last question as we have covered that matter hereinabove.

CONCLUSION

Therefore, it is the opinion of this department that the use of vegetable oil in the manufacture of a frozen food product is not a violation of Section 196.705, RSMo 1949; that the merchandising of such frozen food product is not in violation of Section 196.885, RSMo 1949, which provides that anyone manufacturing or selling ice cream must first obtain a permit, since this product is not an ice cream; that the mere statement on a carton by the manufacturer that the product is not an ice cream does not relieve the manufacturer of said product of his responsibility under the law if in fact the product is actually an ice cream.

Respectfully submitted,

APPROVED:



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