



STATE OF KANSAS

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CURT T. SCHNEIDER
Attorney General

February 6, 1976

ATTORNEY GENERAL OPINION NO. 76- 52

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Kansas State Board of Agriculture
State Office Building
Topeka, Kansas 66612

Re: Dairy Products - Filled Milk and Filled Dairy
Products - Milnot

Synopsis: The Kansas filled milk statute and the Kansas Filled Dairy Products Act is not unconstitutional as applied to Milnot, and the determination whether it constitutes a prohibited filled dairy product rests with the Kansas Dairy Commissioner.

* * *

Dear Mr. Wilke:

You inquire concerning the application of the Kansas Filled Milk statute, K.S.A. 65-707(E)(2) and the Kansas Filled Dairy Products Act, K.S.A. 65-726 et seq. to the sale of the product Milnot in this state. The application of similar acts by both the federal government and various states has been a subject of substantial litigation, including cases involving this particular product. The constitutionality of the federal Filled Milk Act was upheld long ago by the United States Supreme Court, in cases involving the makers of Milnot. United States v. Carolene Products Co., 304 U.S. 144, 82 L. Ed. 1234, 58 S.Ct. 778 (1935) and Carolene Products Co. v. United States, 323 U.S. 18, 65 S.Ct. 1, 89 L.Ed. 15 (1944). The Kansas filled milk statutes are modeled after the federal law, their constitutionality, and was upheld by the Kansas Supreme Court in Carolene Products Co. v. Mohler, 152 Kan. 2, 102 P.2d 1044 (1940) and State ex rel. Mitchell v. Sage Stores Co., 157 Kan.

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404, 141 P.2d 655 (1943), in which the court enjoined the sale of Milnot in this state. The question presented here involves the continuing validity of the statutory proscription of Milnot.

The history of such laws is discussed briefly in Milnot Company v. Arkansas State Board of Health, 388 F. Supp. 901 (E.D. Ark. 1975) thus:

"Congress enacted the Federal Filled Milk Act, 21 U.S.C. §§ 61-64, in 1932 in the belief that the butterfat portion of milk was the only source of essential vitamins contained in milk. The Act also sought to aid the interests of milk producers to protect the consuming public from deception and confusion believed inherent in the sale of imitation dairy products . . . Between the years 1920 and 1940, many states adopted legislation prohibiting or severely limiting the sale of filled milk products, but shortly thereafter, as additional facts about filled milk became known, the absolute bar began to weaken. Post-war scientific studies quickly established the cholesterol laden properties of the butterfat portion of milk, and fortified items containing vitamins were developed. Today, many states have repealed filled milk laws or the statutes have been declared invalid by the courts." 388 F. Supp. at 902-903.

We understand that as of 1972, eleven states which had passed filled milk laws no longer had such laws in force, five states having repealed them and the courts in six states having declared them to be unconstitutional. See Milnot Company v. Richardson, 350 F. Supp. 221, at 224, N. 1 (S.D. Ill. 1972).

The Kansas Filled Milk statute, K.S.A. 65-707(E) (2) states thus:

"It shall be unlawful to manufacture, sell, keep for sale, or have in possession with intent to sell or exchange, any milk, cream, skim milk, buttermilk, condensed or evaporated milk, powdered milk, condensed skim milk, or any of the fluid derivatives of any of them to which has been added any fat or oil other than milk fat, either under the name of said products,

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or articles, or the derivatives thereof, or under any fictitious or trade name whatsoever."

K.S.A. 65-726, of the Filled Dairy Products Act, recites as follows:

"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 or offering for sale or exchange of filled dairy products creates a condition conducive to substitution, confusion, deception, and fraud, and one which if 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 act 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."

K.S.A. 65-727(b) defines the prohibited products thus:

"(b) The term 'filled dairy product' means 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 milk fat, or any solids other than milk solids, except sweeteners, stabilizers and flavorings, so that the resulting product is an imitation or semblance of any dairy product, including but not limited to, milk, sour cream, butter cream, skimmed milk, ice cream, ice milk, whipped cream, flavored milk or skim milk drink, dried or powdered milk,

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cheese, cream cottage cheese, ice cream mix, sherbert, condensed milk, evaporated milk, or concentrated milk: Provided, however, That this term shall not be construed to mean or include: (1) Any distinctive proprietary food compound not readily mistaken for a dairy product, when 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; (2) 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 milk fat contained in such product do not exceed the amount of cocoa fat naturally presented in the chocolate or cocoa used and the food oil, not in excess of one-hundredth of one percent of the weight of the finished product, used as a carrier of such vitamins; or (3) oleo-margarine, when offered for sale and sold as and for oleomargarine."

The Kansas Filled Milk statute, in effect, imposes an absolute prohibition against the sale or manufacture of filled milk products without qualification as to use, contents, purpose, or need. The all-encompassing definition of filled milk brings within its ambit milk from which butterfat has been removed and to which oils or fat have been added. Thus, any product composed of skim milk and oil or fat is barred in this state. The fact that such items are sold as dietary foods or as infant formulas does not exempt them from the act, nor does the addition of additives which alter the taste, smell, or texture afford any exemption from its prohibition.

In Carolene Products Co. v. Mohler, 152 Kan. 2, 102 P.2d 1044 (1940), the court stated that "one of the chief purposes of the statute is the prevention of fraud and deception on the consuming public." The issue as to wholesomeness and nutrition of the product in that case appears to have turned upon the question whether coconut oil is a wholesome and nutritious product. The trial court refused to find that coconut oil was wholesome and

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nutritious. Nonetheless, there was no affirmative finding that it was indeed unwholesome and deleterious, and in the court on appeal equivocated on the question, concluding that "if the added ingredient is harmless in itself, the legislature may prohibit the manufacture and sale of the adulterated compound on the grounds of the fraud and deception practiced in its sale."

The Kansas Filled Milk statute does not prohibit fraud and deception, but prohibits absolutely the sale of milk from which butterfat has been removed and to which fat or oils have been added.

The increasingly questionable justification for filled milk statutes has led the courts to devote close scrutiny to questions of discriminatory enforcement. Two such cases are of particular pertinence to this question. In Milnot v. Richardson, 305 F. Supp. 221 (S.D. Ill. 1972), the manufacturer of Milnot sought a declaratory judgment that Milnot was not within the prohibition of the federal filled milk act, or alternatively, that the act violated the Fifth Amendment to the United States Constitution. The court readily concluded that Milnot was a product contemplated by the Act, and that the "Filled Milk Act does by its terms prohibit interstate shipment of the present-day product known as Milnot." Concerning the alleged especial attention given to Milnot, the court stated thus:

"From the undisputed facts in the record here, it appears crystal clear that certain imitation milk and dairy products are so similar to Milnot in composition, appearance, and use that different treatment as to interstate shipment caused by application of the Filled Milk Act to Milnot violates the due process of law to which Milnot Company is constitutionally entitled. No useful purpose is served by listing such products here by name or otherwise, or by discussing the dairy market conditions and dangers of confusion which led to the passage and judicial upholding of the Filled Milk Act many years ago. Suffice it to say that this court finds that the latter have long since ceased to exist.

It is true that equal protection of the laws does not require identical treatment among those similarly situated, but it does require that arbitrary or capricious distinctions not be made. [Citation omitted.] It is uncontested that many of

these imitation milk and dairy products contain as basic and primary ingredients skim milk and vegetable oil. The defendant does argue that certain of these products on the retail market are not 'in imitation or semblance of milk' to the extent that Milnot is. While each product, including Milnot, has, by design of its producer, its own unique taste, it appears clear that at least six other food products now moving in interstate commerce have almost identical appearance and consistency to milk (or evaporated milk) and to each other, both in the package and when poured. The defendant may well be correct in determining that each such product, other than Milnot, is not within the purview of the Filled Milk Act; but this circumstance seems simply to lend support to the conclusion that an act which produces such incongruous results regarding interstate shipment alone is devoid of rationality. The possibility of confusion, or passing off, in the marketplace, which justified the statute in 1944, can no longer be used rationally as a constitutional prop to prevent interstate shipment of Milnot.

* * *

Prevention of confusion in the market, however valid in 1944, is no longer a valid basis to sustain the Filled Milk Act, and thus to prevent only the interstate shipment of Milnot (or any other product of milk which is exactly like it). [Emphasis by the court.]

* * *

This court limits its decision to the conclusion, as a matter of law, that the Filled Milk Act, as applied to prohibit interstate shipment of Milnot,

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deprives the plaintiff of due process of law and provides no rational means for the achievement of any announced objective of the Act."

The court did not declare the act to be unconstitutional on its face, nor did it conclude that its enforcement against Milnot alone resulted in a denial of equal protection; it specifically concluded that its application to Milnot alone, or to any product exactly like it, constituted a denial of due process of law to the manufacturers and vendors thereof.

Similar relief was granted, but on equal protection grounds, in Milnot Co. v. Arkansas State Board of Health, 388 F. Supp. 901 (E.D. Ark. 1975), where, once again, the application of the state filled milk law to Milnot alone was questioned. Milnot pointed out the defendant permitted other and similar products to be sold, i.e., products composed of milk from which butterfat had been removed and to which oils or fat had been added. Indeed, the parties stipulated that:

"(1) numerous products are sold in Arkansas which contain primarily a blend of skim milk or non-fat milk solids to which has been added vegetable or soya oils and vitamin additives; (2) the removal of butterfat from natural milk results in a product commonly called 'skim milk'; and (3) a content analysis of these foods demonstrates that they fall within the definition of filled milk under the Arkansas Filled Milk Act."

The state sought to distinguish Milnot from other filled milk products which it permitted to be sold, listed as:

"Enfamil Infant Formula, Modilac Infant Formula, Nutriment, Sego Liquid Diet Food, Similac Concentrated Infant Formula, Slender, Sealtest Sour Dairy Dressing, Similar ADVANCE Liquid Food and Pet Imitation Sour Cream. The defendants contend that Milnot is an imitation milk product while the other products sold in Arkansas are primarily dietary and infant food products; hence a rational basis exists for the different treatment by the Arkansas Board of Health."

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The court rejected this attempted distinction sharply:

"Both Milnot and these other products permitted to be sold in Arkansas primarily consist of milk from which the butterfat portion has been removed and replaced with vegetable oil and then fortified with vitamins. While these other products contain more vitamins than Milnot and thus are more suitable as a complete meal substitute, Milnot serves as a dietary substitute for milk and other high protein products since it contains no cholesterol. In short, all these products, including Milnot, are essentially the same in composition, use and appearance, and this Court finds that no rational basis exists for distinguishing between them. Accordingly, the Court holds that the plaintiff is guaranteed by the Fourteenth Amendment."

This inquiry is prompted by the reintroduction of Milnot in markets in Topeka, Kansas, in late 1974 and early 1975. On January 27, 1975, Brace Rowley, Kansas Dairy Commissioner, received a letter from counsel for Milnot, advising that the company wished to market its product through Falley's Market, Inc. of Topeka. The Commissioner responded that the product, in his judgment, was a filled dairy product under K.S.A. 65-727 et seq., and was thus prohibited. The Filled Dairy Products Act was passed in 1953. The product had earlier been determined to be a filled milk product under the filled milk statute, now K.S.A. 65-707(E) (2), by the Kansas Supreme Court in 1940. Although apparently soyabean oil is now used instead of coconut oil, the applicability of the statute is unchanged.

One question which is necessarily implicit in this entire inquiry, and which was discussed in the two federal court decisions involving this very product, is that of alleged discriminatory enforcement. In a conference with staff of this office, counsel for Milnot urged that each of the nine products listed above by the court in Milnot v. Arkansas State Board of Health, is permitted to be sold in Kansas, that each is a filled milk or a filled dairy product, that Milnot alone, or nearly alone, has been excluded from the state under these acts, and that the enforcement of the act against it alone constitutes a denial of equal protection and/or due process.

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In Milnot v. Richardson, supra, the court stopped just short of declaring the federal filled milk statute unconstitutional on its face. The court did not base its ruling in favor of the product expressly on denial of equal protection, but on a denial of due process, the ruling being restricted only to application of the act to Milnot. In Milnot v. Arkansas State Board of Health, supra, the court based its decision squarely upon its finding that nine other products which were sold in the state were substantially indistinguishable from Milnot insofar as concerned the federal filled milk statute.

I want to emphasize that whether the Kansas filled milk statute and filled dairy products act are constitutional on their face is a question which can only be determined by a court. That judgment necessarily entails a determination whether there exists any reasonable basis for the legislative determination underlying the prohibitions imposed by those acts. Arguable as the justifications for the acts may be thought by some, we have no basis for concluding purely as a matter of law that either act is on its face a denial of due process to those affected by the prohibitions. Thus, the question which we must consider is only the enforceability of the act against Milnot alone.

It has been urged that each of the nine products listed above is permitted to be sold in this state. We are further advised that the Commissioner has determined that seven of those products fall within a statutory exception in the filled dairy product act, which provides that the term "filled dairy product" shall not include:

"Any distinctive proprietary food compound not readily mistaken for a dairy product, when 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."

One of the products listed is barred by the Commissioner from the state. This office is empowered to render opinions only upon questions of law. The question whether a statute has been discriminatorily applied is, of course, usually a highly factual question, and it is certainly so in this matter. The Commissioner

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is an administrative officer charged with the enforcement of the act. We cannot as a matter of law gainsay his considered administrative determination that various of the enumerated products fall within the statutory exception. The exception is itself characterized in highly factual terms, e.g., whether a product is "not readily mistaken for a dairy product," whether a product is customarily used upon the order or recommendation of physicians, and the manner in which it is labeled. These are factual determinations, necessarily involving some technical expertise. It would be presumptuous and arbitrary for this office to undertake to determine purely as a matter of law these highly factual matters. Certainly, I have no basis upon which to conclude that this determination of the Commissioner is arbitrary, capricious, without any rational basis whatever, or oppressive. Lacking any grounds for such a determination, those determinations must be taken as presumptively valid for the purposes of this opinion. Those questioned products thus having been determined by the proper administrative officer to be permitted under the statutory exception, I cannot conclude as a matter of law that Milnot is alone being barred from the state in an arbitrary application of the two laws. Unlike the Arkansas case, there exists a statutory basis, applied with colorable justification, for admitting to sale in this state certain of those products mentioned in that opinion. Only a court, having the authority to hear and receive evidence bearing upon the question, could gainsay that determination, and conclude that enforcement of the Kansas filled milk statute and the filled dairy products act to Milnot results in a denial of equal protection of the law.

It should be pointed out that in State ex rel. Mitchell v. Sage Stores Co., 157 Kan. 404, 141 P.2d 655 (1943), the court ordered allegations of discriminatory enforcement stricken from the answer, and did not entertain questions of denial of due process of law. In the consideration of this opinion, we are advised that over the last several years, the Commissioner has indeed ordered removed from Kansas markets a variety of products which he had determined to constitute either filled milk or filled dairy products. In each instance, the company complied with his request for removal, and no litigation was necessary to accomplish the purposes of the act.

Clearly, the Commissioner has determined Milnot to be a filled dairy product. It may or may not be that with alterations in labelling, the Commissioner would have a basis for altering that determination. You ask what guidelines may the Commissioner

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use to determine whether a given product, including Milnot, is a distinctive food compound within the meaning of the exception quoted above. Our own independent research of texts on nutrition and allied subjects discloses that the term "distinctive proprietary food compound" is not a term of art in that field. Nor do we find any statutory or judicially-created definitions of the term. Lacking any technical meanings for the term, it must be construed "according to the context and the approved usage of the language," K.S.A. 77-201, Second. "Distinctive" and "proprietary" are terms in common usage: the former indicating identifiability from others of a like kind, while the latter, construed in its context referring to compounds customarily used on the order of a physician, may be taken to refer to a nonprescription drug or preparations with therapeutic properties designed for discretionary self-administration. The further conditions enumerated to define products within the exception are self-explanatory, and require no elaboration here.

You ask whether Milnot falls within the purview of any of the statutory exceptions in K.S.A. 65-727(b), and if so, which and why. As indicated above, that determination must be made by the Commissioner. It is not one which we can resolve purely as a question of law. Questions whether the product is not "readily mistaken for a dairy product," the nature of its customary use, whether it is prepared and designed for special dietary use, and the manner of its labeling, are highly factual matters, which we cannot and will not presume to determine purely as a matter of law.

You further inquire whether, since the constitutionality of the Kansas Filled Dairy Products Act has not been judicially determined, the application of the statutory classification to the product Milnot violates the due process clauses of the Kansas and the United States Constitutions. The classification scheme in question requires that a product be composed entirely of artificial ingredients or entirely of dairy ingredients, except as provided by K.S.A. 65-727(b), and not of a combination of natural and artificial ingredients.

The classification scheme is certainly one which merits reconsideration and review by the legislature. In State ex rel. Brewster v. Sage Stores Co., 157 Kan. 404, 141 P. 2d 655 (1943), involving the filled milk statute, the court stated that the sale of a filled milk product, although wholesome and nutritious:

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"may be constitutionally prohibited as well as merely regulated if the legislature has some basis for believing the product is inferior to whole milk or evaporated whole milk and that the sale of the product offers an opportunity for fraud and deception and that prohibition rather than mere regulation of its sale is necessary for the adequate protection of the public health or general welfare." 157 Kan. at 412.

As stated above, there may obviously be differences of personal opinions concerning the continued justification for the statute. However, a determination of the factual basis for the prohibition in the exercise of the police power must be made by the courts. It would be entirely improper for me to interject my personal opinion of the merits of the law as the basis for a constitutional judgment, and I refuse to do so. It is possible, however unlikely as it may be believed to be, that a rational basis may be demonstrated for the classification, and I cannot as a matter of law foreclose that possibility. The statute must be presumed to be constitutional. Leek v. Theis, 217 Kan. 784, ___ P. 2d ___ (1975). Accordingly, I cannot conclude purely as a matter of law that the statutory classification operates to deny Milnot due process of law.

You ask, further, whether K.S.A. 65-707(F)(2) is constitutional, in light of the cited federal district court decisions in Illinois and Arkansas. As stated above, those decisions were based upon facts which I cannot conclude exist in Kansas, or upon factual findings which are beyond the scope of an opinion upon questions purely of law.

There is in my opinion no conflict between the Kansas filled milk statute and the filled dairy products act with regard to Milnot.

Lastly, you ask whether the injunction issued in State ex rel. Brewster v. Sage Stores Co., supra, is applicable to the present Milnot product. The changed ingredient composition does not appear to afford any legal distinction from the order issued in that case, granting a writ of quo warranto sought by the Attorney General against Sage Stores Co. questioning their authority to

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market the product then being manufactured and distributed by Carolene Products Co., which we understand to be the predecessor of the present manufacturer. Under that decision, the product has been determined to be a filled milk product, although not a filled dairy product, the act prohibiting the latter having been passed after the date of that decision.

Yours very truly,



CURT T. SCHNEIDER
Attorney General

CTS:JRM:HTW:bv