LABELING PROBLEMS INVOLVED IN "SUBSTITUTE" AND "IMITATION PRODUCTS"

CHARLES M. FISTERE
Fister & Habberton
General Counsel, Dairy Industry Committee,
Continental Building, Washington, D. C.

The Dairy Industry perhaps more than of the other food industries has been concerned over the years with imitation and substitute products. The reason that this is so is not hard to discover. Invariably it is the valuable article which is most usually imitated. It was said back in 1800 by one Charles Caleb Colton that "imitation is the sincerest of flattery." I suppose that diamonds among all of the precious stones have been the subject of the most intensive simulation and this is because diamonds, in addition to being a girl's best friend, are regarded as being the most precious of all gems. It is a recognition of the intrinsic value of milk and other dairy products which has led to so many attempts to imitate dairy products and to trade upon the good name of milk and other dairy products. Although the subject assigned to me relates to the matter of imitations and substitutes, specifically with their labeling, it occurs to me that some background concerning imitations in the dairy field might be a valuable prelude.

A good deal has been written about oleomargarine and filled milk and there is not a person in this audience who does not possess considerable familiarity with the subject of filled milk and oleomargarine. Nevertheless, a few general observations would seem to be in order.

In common understanding oleomargarine is certainly an imitation of butter. It looks like butter, it smells like butter, it tastes like butter, it is confusable with butter and so far as the scientists have been able to determine, it approximates very closely butter in nutritional value. As a matter of fact oleomargarine is so close an imitation of butter that few there are who are able to distinguish the two products by organoleptic method.

There is really only one point which needs to be made here about oleomargarine and that is to recall to you that here is a product about which it might be said to have been conceived in sin but has reached a point in public acceptance where its production and sale is greater than the product it was conceived to imitate. Oleomargarine achieved complete legal legitimacy upon the happening of two events. The establishment of a definition and standard of identity under the Federal Food Drug and Cosmetic Act and the repeal of the five cent per pound tax on yellow oleomargarine. The fascinating history of oleomargarine has yet to be written but the point I wish to make is this, even though oleomargarine is as close an imitation of another food as you can possibly get, no one at this late date could seriously advance a regulation which would require that it be called "imitation butter." As a matter of fact, the Circuit Court of Appeals for the Eighth Circuit settled that question in 1943. The final judgment on the matter was rendered in Land O'Lakes vs. McNutt, 132 F. 2d. 653. The case was not appealed to the Supreme Court. In dismissing the contention that oleomargarine was legally an imitation the court said: "Oleomargarine is a well known food product with an identity of its own." And that gentlemen is that so far as the law of imitations relates to oleomargarine.

The substitute commonly known as "filled milk" has had a different history and its present status is vastly different from oleomargarine and yet there is a curious similarity between oleomargarine and filled milk. "Filled milk" as defined may not be shipped in interstate commerce and its manufacture and sale in many states is prohibited. Like oleomargarine, filled milk has been the subject of fortification with vitamins and in litigation it has not been shown to be inferior to evaporated milk in the matter of nutrition. It is interesting although not very profitable to speculate as to the evolution of oleomargarine if the legislation designed to regulate and control it had followed the pattern later adopted in the so-called Federal Milk Law. Filled milk is defined under the federal statute as being any milk, cream or skim milk whether condensed, evaporated or dried to which has been added a fat or oil other than milk fat so that the resulting product is in imitation or semblance of milk or cream whether condensed, evaporated or dried. It will be seen from this that there are two distinct criteria involved in the definition. First there must be a combining of vegetable oil with certain named dairy ingredients, and secondly the resulting product must simulate one of the enumerated dairy products. Thus, it is entirely lawful to combine vegetable oil with non-dairy proteins producing a product which simulates one of the enumerated dairy products and still escape the sanction of the law. On the other

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hand, it is also possible to combine the forbidden dairy ingredients with vegetable oil and produce a product which simulates one of the enumerated dairy products. On two occasions the validity of the Federal Filled Milk Act has been passed upon by the Supreme Court of the United States and upheld as being constitutional. It is interesting to note that the last time the Supreme Court passed upon the Federal Milk Act, which was in 1944, the product involved was one which had been fortified with Vitamin A and D. In that case, Carrolene Products Company vs. United States, 323 U. S. 18, while the court recognized that initially the vitamin deficiencies of filled milk was an efficient cause of bringing about the legislation, there was an additional reason asserted by Congress. This was that filled milk compounds lent themselves readily to substitution for or confusion with milk products. It is not easy to distinguish between the factual situations surrounding filled milk on the one hand and oleomargarine for example, (a) the labels of both products are fully informative of the identity; (b) both products are combinations of vegetable oil and milk solids not fat; (c) they both have been fabricated in such a way as to simulate very closely evaporated milk on the one hand and butter on the other, and (d) both have been fortified with vitamins to the point where neither can be said to be significantly inferior nutritionally to the dairy products which they simulate. Yet from a federal law standpoint one of the products has achieved complete legitimacy whereas the other one may not lawfully be shipped in interstate commerce.

Later in this paper I will have something to say concerning frozen desserts which simulate ice cream or ice milk but where there has been a substitution of fat and/or protein, yes, and even a substitution of carbohydrates. At this point I wish mainly to say that the International Association of Ice Cream Manufacturers has been acutely conscious of the evolution of oleomargarine and of filled milk and has attempted in the development of its policies to give expression to the lessons which have been learned by a study of a history of these two classic substitute products, namely oleomargarine and filled milk.

It will be instructive at this point I trust, to discuss the leading court case on the subject of "imitations".

Most of you are aware I am sure that the Food and Drug Act contains a section which provides that a food shall be deemed to be misbranded 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.

"Congress did not give an esoteric meaning to the word imitation," said Mr. Justice Frankfurter, speaking for the Supreme Court of the United States in the landmark "Imitation Jam Case." "Congress left the meaning of the word to the understanding of ordinary English speech" said the Justice.

These remarks are from the opinion of the court in a misbranding case brought by the Food and Drug Administration against 62 cases of a jam product which was composed of 55% sugar, 25% fruit and 20% pectin. The product was labeled "Delicious Brand Imitation Jam." The government contended that the product purported to be the standard jam and since it contained only 25% fruit instead of 45% as required in the jam standard, it was not a lawful article for interstate commerce under any labeling. The company's position was that the product was labeled in strict conformance with the requirements of Section 403(c) of the Act which provides that a food shall be deemed to be misbranded 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.

The court in upholding the contention of the manufacturer said that the name "imitation jam" at once connotes exactly what the product is — a different, an inferior preserve not meeting the defined specifications.

Shortly after the decision in the imitation jam case the Food and Drug Administration thereafter proceeded against a vegetable oil frozen dessert called "Chil-Zert" the label of which did not bear the words "Imitation Ice Cream." This case was brought prior to the promulgation of the ice cream standards. Here, in a Federal District Court, the judge found the omission on the label of the words "Imitation Ice Cream" to constitute misbranding. This product contained no dairy ingredients whatsoever. Its label carried statements that it did not contain milk or milk fat. It was prominently labeled "not an ice cream." The court found, however, that it had the same characteristics of color, taste, texture, body and melting qualities as chocolate ice cream and hence was an imitation of ice cream, and under Section 403(c) its label was required to bear the words "Imitation Ice Cream." Since its label did not bear these words, it was held to be misbranded. These cases taken together illustrate that there may be imitations

21 CFR 3.205.
of both standardized and unstandardized foods.

The position of the Food and Drug Administration has been further enunciated in an informal statement of general policy in connection with jams and jellies containing artificial sweeteners. In a published statement Food and Drug has said that sugar is one of the basic ingredients of jam and jelly. Its presence in these foods is required by the standards of identity for the products. An artificially sweetened jam or jelly must be labeled as an imitation even though the fruit or fruit juice content equals or exceeds that of the standardized article.

These decisions and rulings follow a common dictionary definition of imitation, namely: "... that which is made to resemble something else; a counterfeit." As an adjective the dictionary says "... made to resemble something superior or of better material." Thus a paper doilie is characterized as "imitation lace."

The test seems to be: does the deviation result in making the finished food look like or taste like another standardized or otherwise generally recognized food.

In a symposium on the subject of substitutes held at Atlantic City last year, Dr. Morse of the Thomas J. Lipton Co. and Dr. Spilman of Foremost Dairies opened up some scientific vistas which have already made possible and foretell still greater use of the imitation section of the Food and Drug Act to that situation. I would not question it. I think there is no question but that the product would be misbranded unless its label bore the words "Imitation Ice Cream." If, however, the product is sold, as indeed it universally is, in consumer size packages and designated as "Dietetic Frozen Dessert," or "Diabetic Frozen Dessert," and otherwise labeled in accordance with Section 403(j), it is my opinion that 403(c) (imitations) does not and should not apply.

The differences between ice cream and the frozen dessert for special dietary uses are clearly and fully revealed by the labeling required by Section 403(j). This meaningful information would become cloudy if additionally the label had to bear the words "Imitation Ice Cream."

Congress certainly intended that the several subsections of 403 had for their purpose the prevention of fraud, deception and confusion. Congress could not have intended that their application should result in the confusion and consumer frustration that would result by piling the requirements of Sec. 403(c) on top of 403(j) labeling.

Frozen desserts for special dietary uses are not imitative of ice cream. Obviously 403(c) is intended to prevent the palming off of inferior and counterfeit products as compared with the product imitated. It cannot be said of a dietetic or diabetic...
frozen dessert that it is inferior or a counterfeit as compared with ice cream. The substitution of sorbitol and cyclamate for sucrose and corn syrup solids is not going to decrease the manufacturer's costs.

Dietetic frozen desserts are purchased and consumed for a particular dietary use. If consumers of such products, having been given on the label full information concerning ingredients, calories, composition in terms of protein, fat, carbohydrates, etc., are then confronted with the term "Imitation Ice Cream," the whole purpose of the 403(j) labeling, it seems to me, is destroyed because it is bound to raise a question in the mind of the consumer as to the nature of the difference between this product and ice cream which is not revealed by the Sec. 403(j) labeling.

As far as the consumer who wishes to purchase ice cream is concerned, he is not deceived or confused. The name of the product "Frozen Dietary Dairy Dessert," the distinctive 403(j) labeling, the higher price—all would tell the consumer it is not ice cream.

Turning now to Section 403(g), for which the government at first contended in the Jam case, the court decided, as was pointed out earlier, that a substandard food, deficient in fruit in this case, was nevertheless a lawful article of commerce if labeled "Imitation Strawberry Jam" in accordance with 403(c). But, imitation jam is not a special dietary food. It does not have to bear 403(j) labeling, and therein lies, it seems to me, the important difference.

It should be remembered in the jam case the Food and Drug Administration took the position that the imitation jam "purported" to be the standard jam and hence could not be the subject of interstate commerce at all. The court disagreed. The product was held to be lawful for interstate commerce if labeled "imitation" in accordance with 403(c). It is my view that the court would hold that if a product is properly labeled under 403(j) it is not subject to 403(c).

It seems to me that the courts should rule that if a frozen dessert bearing a distinctive descriptive name, such as Frozen Dietary Dairy Dessert, and was properly labeled as to dietary information as required by Section 403(j) that it need not bear an "imitation" label.

Let us look back again for a moment to the oleomargarine situation. I can think of no food which more clearly imitates another food than oleomargarine imitates butter. Why is oleomargarine not required to be called imitation butter? Why does not the imitation section 403(c) apply to oleomargarine?

The reason is to be found in Sec. 403(g) of the Act. This subsection provides that a food shall be deemed to be misbranded if it purports to be a food for which a definition and standard of identity has been prescribed if it does not conform to the standard and unless its label bears the name specified in the standard. A standard has been established for oleomargarine and oleomargarine is required to bear the labeling required by 403(g). But because a standard has been established for oleomargarine, does it make it resemble butter any the less? It still looks and tastes like butter—it still is in fact an imitation of butter even though in law it is not. I am of course, not suggesting that oleomargarine be subject to Section 403(c)'s imitation brand. To the contrary, it is my view that any product which meets the requirements of 403(g) is not subject to Sec. 403(c).

Similarly, it is my view that a special dietary food which meets all of the requirements of Sec. 403(j) should not be subject to the imitation section.

Earlier I mentioned that the International Association of Ice Cream Manufacturers has been mindful of the lessons to be learned from oleomargarine and filled milk. There has been a development with the Association in the field of standards for so-called "imitation products" which I would like to mention. In 1955 the Association developed a model bill for the purpose of state legislation defining and establishing a definition and standard of identity for Mellorine, a frozen dessert made with fats and oils other than butterfat. The adoption of such a standard would take it out of the class of imitations in the states adopting it. The federal problem still remains.

More recently the Association's Committee on Definitions and Standards at the direction of the Board of Directors has been considering drafts of standards for a low-fat vegetable oil product, the counterpart of ice milk and counterpart of sherbet, tentatively to be known as "Lorine" and "Sherbline" respectively. The Committee also considered state standards for two types of special dietary frozen desserts—one containing dairy ingredients, the other not. These latter standards are so closely related to the FDA's extensive revision of the regulations governing foods for special dietary uses now under way, that work on these standards has had to be suspended.

In summary, it is our feeling that something better than the crepe label "Imitation" should be accorded to foods which do not masquerade as something they are not and which deviate from the standard foods which they resemble because science has pointed a new way to meet a need in the human dietary.