

Approved April 8, 1983
Date

MINUTES OF THE HOUSE COMMITTEE ON AGRICULTURE AND LIVESTOCK

The meeting was called to order by Rep. Bill Fuller at
Chairperson

9:00 a.m./~~p.m.~~ on January 25, 1983 in room 423-S of the Capitol.

All members were present except:

Committee staff present:

Bruce Hurd, Revisor of Statutes' Office
Raney Gilliland, Legislative Research Department
Kathleen Moss, Committee secretary

Conferees appearing before the committee:

Harland Priddle, Secretary of the Board of Agriculture
Kenneth Wilke, Attorney for the Board of Agriculture

Chairman Fuller reminded the committee that tomorrow we would begin two or three days of hearings on continuation of the funding for the Kansas Meat and Poultry Inspection Program. If we do not get through Thursday, we will have a meeting on Friday.

Chairman Fuller introduced Harlan Priddle, Secretary of the Board of Agriculture and said we are very fortunate to have him with us today. Mr. Priddle gave a slide presentation of the Board of Agriculture. He outlined the three divisions, - they are a regulatory agency, and have the marketing division and water division. He distributed a pamphlet, "By the Farmer For the Farmer". See Attachment No. 1.

Mr. Priddle introduced Ken Wilke, Attorney for the Board. Mr. Wilke talked on the subject of filled milk and dairy products. His testimony was mainly on court actions and brought the committee up to date on what has happened on the filled dairy products issue. His prepared statement is Attachment No. 2.

Time was limited for questions but there was discussion on proper labeling of the filled dairy products. Industry people need to be informed of legislation and Mr. Priddle said they do the best they can but that isn't always enough.

Chairman Fuller invited The Board of Agriculture to meet with the Committee for any type of legislation they feel is needed.

The meeting was adjourned at 10:00 a.m.

The next meeting will be at 9:00 a.m. on Wednesday, January 26, 1983 in Room 423-S.

Attachment No. 1 - 1-25-83

House Agriculture Committee

By the Farmer For the Farmer

**Kansas
State Board of Agriculture**

**Kansas State Board of Agriculture
109 S.W. 9th Street
Topeka, Kan. 66612-1280**



A Unique Part of the State's History— The Kansas State Board of Agriculture

Back in 1857, a group of farmers established the Kansas Agriculture Society during an open-air meeting in Topeka. Like farmers today, they wanted to promote the interests of agriculture.

In 1872, the Kansas Legislature turned the structure of that society into the Kansas State Board of Agriculture. It was the first department of agriculture in any of the 50 states.

In its early days, the Board of Agriculture's main purposes were to hold a state fair and to act as a sort of immigration agency to attract settlers to homestead in Kansas.

Slowly but surely, Kansas lost its image as part of the Great American Desert, a dry, dusty arid place where only Indians and grasshoppers could prosper. Farms and towns sprang up on the fertile plains of what was to become the Wheat State.

The Board of Agriculture, through its Annual Report and various publications, began to serve as a source of information and new techniques of farming. It later was to pass that role to the Extension Service at Kansas State University.

The Board of Agriculture's responsibilities eventually came to center around three major areas—promoting Kansas agriculture; agency services to farmers or consumers, such as inspection and grading of agricultural products and the improvement of product marketing; and, its largest function, the administration of nearly 60 laws, mostly regulatory in nature, which are assigned to the department by the legislature.



By the Farmer for the Farmer— Structure of the Board of Agriculture

The basic structure of the Board of Agriculture has changed very little since it began in 1872. It still is an apolitical agency in the executive branch of government. It still is governed by farmers and devoted to the interests of Kansas agriculture—the state's most dependable and largest industry.

The 12 men or women who make up the Board of Agriculture are elected by and responsible to Kansas farmers. The way in which they are selected is governed by state law.

Board members are selected by delegates to the Annual Meeting of the Board. Under that law, the meeting is held during the second week of January each year in Topeka.

Entitled to elect one delegate to the Annual Meeting are all county Grange, Farm Bureau, National Farmers Organization, Farmers Union or Kansas Livestock Association groups with a membership of 100 or more; all county or district agricultural societies composed of one or more



counties; all state breed or commodity organizations; each state or statewide fair; and each of the nine Kansas Co-op Council districts with a membership of 100 or more. A farmer who does not belong to such a group can become a delegate by presenting a petition signed by 150 other qualified farmers. With the exception of county and district agricultural societies, all delegates must be farmers.

During the Annual Meeting, delegates will attend educational sessions and elect the 12 members of the Board of Agriculture. Two board members are chosen from each of six Kansas districts. They all must be practicing farmers. They represent all areas of the state and varying segments of agriculture.

These 12 persons elect the Secretary of Agriculture, who serves as administrator for the department. The seriousness they bring to this task is attested to by the fact that only nine secretaries have served in the Board's long history.

Members of the Board of Agriculture serve as a body to set major policies about the duties and responsibilities of the department. They meet quarterly to hear reports from the various divisions of the department, approve the budget and the selection and hiring of chief administrative personnel.

Although the Board of Agriculture has no official voice on policy on national farm programs or other policy matters, it often serves as a forum for the concerns of farmers across the state.

The Board of Agriculture administers some 60 agricultural laws. It is divided into nine divisions with responsibilities for various laws.

The nine divisions of the Board of Agriculture are the dairy division, control division, weights and measures division, weed and pesticide division, entomology division, marketing division, statistical division, water resources division and meat and poultry inspection division.

The central office of the Board includes the offices of the Secretary and Assistant Secretary and serves the rest of the department with fiscal, legal, administrative and information services.

Look for the Product Label

The **control division** of the Kansas State Board of Agriculture administers laws which require honest labeling of commercial feeds, fertilizers, agricultural seeds, agricultural chemicals, livestock remedies, soil amendments and agricultural liming materials. Labels must contain truthful statements pertaining to contents as well as adequate directions for use.

These laws protect both sellers and purchasers of agricultural products. Legal requirements for honest labeling and compliance with product standards create a strong basis for fair and equitable competition in industry.

Because of the activities of the control division, the consumer knows what he or she is purchasing; the seller who gives better service receives an advantage in the market; and a climate of confidence is created because products are tested by the control division rather than each individual consumer.

Agricultural inspectors located across the state sample products and a professionally staffed laboratory in Topeka analyzes agricultural products to ensure they comply with labels and guarantees. The seed portion of the laboratory tests seed samples for germination, weed seed content and purity.

From Moo to You— Safe Kansas Dairy Products

Some city folks may think they get their milk directly from a carton in the store, but we know better. It takes hard work and rigorous standards to produce healthful dairy products.

The perishable nature of milk makes it vital for special attention to be paid to cleaning and maintenance of all equipment involved with milk and dairy products.

The **dairy division** of the Board of Agriculture administers laws protecting quality and wholesomeness of products as they move from producer to consumer. The division's work is concerned with production, processing, handling, transportation, testing and sale of milk and milk

products. Licenses and permits are issued to dairy farms and individuals who engage in business and conduct specific dairy industry work.

In the dairy area of the Board of Agriculture's Agricultural Laboratory, some 26,000 samples are tested each year. Some 70,000 determinations of quality are made of products. Tests are made for bacterial quality, pesticide residues and adulteration.

An Ounce of Prevention . . .

Kansas has an incredible capacity for crop production. It also has a corresponding number of insects and crop diseases, all seemingly determined to destroy those crops each year.

The Kansas State Board of Agriculture's **entomology division** works to detect and control those plant diseases and destructive insects. When division personnel help farmers avoid destruction of their crops, they take food out of the insects' mouths and put it into the hands of consumers.

Entomologists in the division work all over the state looking for insects and diseases in crops. By early detection of such destructive trends, farmers can utilize modern techniques to save their crops.

Surveys for such persistent crop pests as grasshoppers, chinch bugs and greenbugs pinpoint trouble areas. The division then prepares and sends its "Growing Season Update" to newspapers, radio and television stations across the state. With early warning farmers can nip many such problems in the bud.

Other services offered by the entomology division include inspections and licensing of the state's nurseries, licensing of pest control operators and investigation of fraud by pest control firms, inspections of hives and bees to protect the state's honey industry, and inspections of agricultural products slated for export. By issuing what are called phytosanitary certificates, division inspectors can assure foreign countries that Kansas grain shipments meet their individual requirements.

Now That We've Grown It, Where Do We Sell It?

Agricultural research, technical advances and the tireless work of Kansas farmers have given the state the ability to produce far more than can be consumed just by Kansans.

The main work of the Kansas State Board of Agriculture's **marketing division** is to promote Kansas-grown and produced foods and fiber. Division personnel provide services and education to producer groups and develop materials to educate potential consumers and buyers of Kansas products.

Services of the division include market information, voluntary grading services for fruits and vegetables, administration of the Kansas Egg Law, and meat and poultry plant facilities planning and labor efficiency studies.

Several programs work to enhance and increase export markets for all sorts of Kansas products. In addition to cooperating with national groups which promote international sales, the marketing division's export marketing section conducts campaigns to increase sales and unites Kansas producers with potential foreign buyers.

The Kansas Grain Sorghum, Corn and Soybean Commissions also operate under the administration of the marketing division. Check-off funds from sales of those three crops are used by the commissions to promote sales and marketing and to fund valuable research projects.

Laws administered through this division include the Labeling of Agricultural Products Law; Egg Law; Marketing Law; and Kansas Grain Commodities Act.



When is a Hamburger Not a Hamburger?

When a hungry Kansan tucks into a juicy, tasty t-bone steak or fragrant broiled pork chop, he or she can be assured it is a pure, healthy beef or pork product. Less than a quarter of a century ago, that might not have been true.

The **meat and poultry inspection division** of the Kansas State Board of Agriculture has administered the Kansas Meat and Poultry Inspection Act since 1969. Because of that law, facilities where animals are slaughtered and processed for sale are served by trained agricultural inspectors.

These inspectors enforce rigid standards of sanitation and cleanliness. Livestock and poultry which are to be slaughtered for sale in Kansas are inspected both before and after slaughter, assuring consumers that the animals are free of any condition which could injure human health.

Such products sold across state lines are inspected by federal employees; meat products sold in Kansas are Kansas inspected and passed. The Kansas program is designated "equal to" the federal meat inspection program.

Besides their regular duties at meat processing plants, inspectors are available to various state institutions to make sure meat or meat products they purchase meet their specifications—such as 20 percent fat in hamburger to meet the dietary needs of patients. Technicians and a chemist in the Agricultural Laboratory make some 10,000 analyses on samples of meat each year.

Activities of the meat and poultry inspection division benefit the producer by creating a climate of confidence and encouraging fair competition. Kansas consumers benefit by being assured they are receiving pure meat products.

100 Years of Agricultural Facts

The **statistical division** of the Board of Agriculture, also known as the Kansas Crop and Livestock Reporting Service, is a good example of cooperation between state and federal government. The division is staffed both by United States Department of Agriculture and Kansas agricultural employees.

A clear picture of the growth of Kansas agriculture is available because the statistical division has gathered and shared facts on crop and livestock production and prices for more than 100 years.

Kansas farmers are the backbone of this division. As voluntary reporters, they furnish important information for crop and livestock reports.

Reports published by the Kansas Crop and Livestock Reporting Service are provided, free of charge, to farmers and agribusiness firms which provide basic data for the reports, and to cooperating USDA and state agencies. Others are required to pay an annual fee for the publications.

Available publications include the weekly crop-weather report, issued March 1-Nov. 30; a monthly crop report, which includes data on acreage, crop production, grain stocks, prices, farm income, land values, wheat quality and varieties; a monthly livestock report including data on bluestem pastures, cattle inventory, calf crop, cattle on feed, slaughter, eggs, chickens, turkeys, milk and dairy products, and sheep and wool; and a report on hogs and pigs issued in March, June, September and December. Write the State Statistician, 444 S.E. Quincy, Topeka, Kan., 66683 for reports.

Bulletins are issued on wheat quality (in cooperation with the Kansas Wheat Commission and Kansas State University), grain marketing and transportation, and custom rates. The "Farm Facts" section of the Board of Agriculture's "Annual Report" provides an ongoing picture of Kansas agricultural production.

Both farmers and consumers benefit from the work of this division.

Water: Turning Desert to Breadbasket

"Westward ho" was a rallying cry for settlers who began moving across Kansas. It also heralded the need for laws to protect the rights of water users as settlers began diverting stream waters to irrigate crops.

The outgrowth of early laws which attempted to deal with the problems of use of surface or ground water for irrigation is today's Water Appropriation Act.

One of the most consuming activities of the Board of Agriculture's **water resources division**, the act in short makes it illegal for anyone to take water from any source for beneficial use without applying for and receiving a permit to appropriate water through the division of water resources. The person with the earliest dated permit is the first in right to appropriate such water, according to the law.

It is easy to illustrate the importance of the Water Appropriation Act. Irrigation today accounts for approximately 80 percent of the water used in Kansas; production of electrical energy accounts for 10 percent; municipal, industrial, recreational and water power use approximately eight percent. Kansas' limited supplies of that important natural resource must be protected.

Along with the Water Appropriation Act, the division of water resources is responsible for some 22 Kansas laws and the administration of certain programs, cooperative agreements and memorandums of understanding pertaining to irrigation, drainage, flood control and related problems to the conservation and utilization of the water resources of Kansas.

The division works with other states through interstate river compacts; it coordinates the National Flood Insurance program; and it is responsible for the inventory and inspection of dams under the National Dam Inspection Act.

Water can be a precious resource or a dangerous force. The division of water resources works to protect supplies of water for use today and in future years; it administers laws designed to protect Kansans from the destruction water sometimes can cause.

Safe Pesticides for Bountiful Crops

The Kansas State Board of Agriculture's **weed and pesticide division** centers its activities around the eradication of noxious weeds and the safe use of pesticides.

The efforts of this division affect both producers of crops and consumers of food by avoiding needless losses of agricultural production from weeds and pests and by making sure that needed agricultural chemicals are used safely.

In a statewide program, the division works with county, city, township and state officials to prevent, control and eradicate the weeds which have been declared noxious by the Kansas Legislature.

The weed and pesticide division also is responsible for enforcement of the agricultural application of pesticides under the 1976 Kansas Pesticide Law. That law requires all persons who apply pesticides to be trained and certified in their use. It also requires that commercial and governmental pesticide applicators be licensed.

Safe and accurate aerial spraying techniques, testing of biological weed control methods, surveying for new noxious weeds and training of the public and government personnel in the safe use of pesticides are a few of the division's activities.



This Division is a Scale Model

Most Kansans would be surprised to know that there is an employee and a division of the Kansas State Board of Agriculture standing behind just about every purchase and transaction they make.

The **weights and measures division** does just what the name implies. It assures all of us—producers and consumers—that we are getting what we pay for, whether it is a yard of material, a gallon of gas, a pound of hamburger or buying or selling a bushel of grain.

The division has an administrative staff in Topeka, a laboratory staffed with a professional metrologist for weights and measures testing, and agricultural inspectors across the state.

Weights and measures inspectors weigh packaged goods to check the net weight statement on the label. They test large and small scales, LP gas meters and all sorts of measuring devices for accuracy. Baler and binder twines are tested for tensile strength, feet per pound and weight. To ensure accurate testing, the division is the custodian of official state standards of weights and measures which are traceable to international standards.

As We Produce, So We Consume

If you are a farmer, the Kansas State Board of Agriculture plays a double role for you. It affects you in many aspects of your daily life.

As a professional farmer, you produce bountiful crops and livestock. The Kansas Board of Agriculture provides services to protect and help you.

As a consumer, you buy seed, feed and fertilizer which are regulated and guaranteed by the Board of Agriculture. When you sit down to a meal cooked with food produced in Kansas, the Board of Agriculture has assured you that food is pure and healthful.

Research and promotion funded or provided by the Board of Agriculture help the farmer grow a better crop, save money or sell a product. They also ensure that food will be available to Kansas consumers.

Inspection and regulatory services from the Board of Agriculture allow farmers to sell products to consumers with a guarantee they are pure and healthful. Grading of meat and poultry products, eggs and milk makes it possible to shop with assurance. Weights and measures testing assures farmers and consumers alike that a bushel is a bushel, an inch an inch and a gallon a gallon.

With an eye on the future of Kansas agriculture, the Board of Agriculture continues to emphasize finding new and larger export and domestic markets for farm products. As the demand for Kansas products increases, the Kansas farmer can produce profitably at full capacity.

When the Board of Agriculture serves as a forum for diverse agricultural groups, it helps them attain a strong and unified voice to speak to government, whether it is in Topeka or Washington, D.C.

When the Board of Agriculture releases news and information to the public, it helps farmers and consumers take advantage of the expertise and services it offers.

Agriculture is Kansas' largest industry, and it must become even stronger. When the farm economy suffers, so does the economy of the state. The effects of a troubled farm economy reach all the way from the small town merchant to the big city by losses of related industry jobs and revenues.

When the Board of Agriculture works for the farmer and the consumer, it is working for the future of a strong and prosperous Kansas.

Kansas Secretaries of Agriculture

(in office)

Alfred Gray	1872-1880
J.K. Hudson	1880-1881
William Simms	1882-1888
Martin Mohler	1888-1894
F.D. Coburn	1894-1914
J.C. Mohler	1914-1950
Roy Freeland	1950-1976
W.W. "Bill" Duitsman	1976-1982
Harland E. Priddle	1982-

MI-1878

TESTIMONY ON BEHALF OF THE KANSAS STATE BOARD OF
AGRICULTURE REGARDING FILLED MILK AND FILLED DAIRY PRODUCTS

Mr. Chairman, members of the committee, ladies and gentlemen, my name is Kenneth M. Wilke and I am chief counsel for the Kansas State Board of Agriculture. Today's briefing concerns the subject of filled milk and filled dairy products. On behalf of the Kansas State Board of Agriculture, I would like to present testimony regarding this subject in these areas: a brief history of the legislative and judicial action in Kansas and a brief summary of present litigation in State and Federal Courts.

At the outset, a definition of filled dairy product will place this whole topic in perspective. Consider three containers, one which contains cream or half and half, a dairy product; one which contains a non-dairy coffee creamer, such as Meyer's Non-Dairy Coffee Creamer or Coffee-Rich; and one container which is empty. The dairy product is legal under present laws in Kansas because it contains no combination of dairy products and non-dairy fats or oils. The non-dairy coffee creamer is legal in Kansas because it does not contain any dairy ingredients whatsoever. It is a totally artificial product usually made from hydrogenated vegetable fats and oils. If these two products are combined, we have a filled dairy product; i.e., a product which very closely resembles cream for your coffee but which contains a combination of a dairy ingredient and a non-dairy fat or oil.

Congress enacted the Federal Filled Milk Act in 1923. Shortly thereafter the Kansas Legislature enacted a Filled Milk Act in 1923 which prohibited the manufacture, sale or distribution of filled milk products within the state. Under the Kansas Act, a filled milk product was any milk, cream, skim milk, buttermilk or condensed or evaporated milk to which had been

added any fat or oil other than milk fat. This law was modified slightly in 1927. Its present form appears in K.S.A. 65-707 (E)(2) and is referred to as FMA. Note that this Act concerns only fluid dairy products. The primary purpose of this Act was to preserve the public health by preventing commercial distribution of imitation dairy products which might contain harmful additives. Another purpose was to prevent consumer fraud and deception in the marketplace because various filled milk products at that time were quite a bit like evaporated milk and it was virtually impossible for the purchaser of such a product to distinguish between true evaporated milk and the filled dairy product unless a chemical analysis was made.

This law was first challenged in 1940 when the Carolene Products Company marketed a filled milk product called "Milnut" whose basic substitute oil was coconut oil. In Carolene Products v. Mohler, 152 Kan. 2, the Supreme Court upheld this statute as a valid exercise of the state's police power and also upheld the District Court's determination that the existence of such a product in the marketplace caused confusion among consumers.

The Carolene Products Company again challenged this statute in 1943. The basic distinction between the product marketed in 1943 and the prior product is two-fold: the product's name had been changed from Milnut to Milnot and the substitute oil was now cottonseed oil instead of coconut oil. In State ex rel. v. Sage Stores Company, 157 Kan. 404, the State prevailed and the Supreme Court ruled that Sage Stores and Carolene Products Company would be enjoined from marketing the Milnot product in Kansas. Carolene Products Company appealed this decision to the Supreme Court of the United States on the issue of whether the Kansas statute was arbitrary, unreasonable and discriminatory and in interference with defendant's property rights. The United States Supreme Court upheld the Kansas statute on this issue.

As a result of the litigation in 1942 and 1945, the legislature, confident in its position regarding these products, enacted Senate Bill 458 which became the Filled Dairy Products Act (FDPA) now found at K.S.A. 65-725 et seq. The FDPA, enacted in 1953, expanded the coverage of the FMA to include additional dairy products such as sour creams, cottage cheeses and other cheese products. The Kansas FDPA contains prohibitions similar to the FMA mentioned earlier, but it also contains certain exemptions for distinctive proprietary food compounds, for dairy products flavored with chocolate or cocoa or which use oils as carriers for vitamins and for oleomargarine. At the time the FDPA was passed, the distinctive proprietary food compounds considered were infant formulas whose sale would have been barred but for this exemption.

In 1972, the Carolene Products Company challenged the Federal Filled Milk Act in court action in Illinois. In Milnot v. Richardson, 350 F. Supp. 221 (S.D. Ill. 1972), the United States District Court for the Southern District of Illinois declared the Federal Filled Milk Act to be unconstitutional as applied to the Milnot product. Since that action was not appealed by the Federal Food and Drug Administration, that decision has been used in several courts to strike down filled milk acts in various states.

In 1973, the Milnot Company, a successor to the Carolene Products Company, filed a suit in Montgomery County District Court requesting a declaratory judgment regarding the interpretation of the FDPA as applied to the then current product "Milnot." In October, 1974, this case was dismissed for lack of prosecution.

In 1975 Milnot again appeared in the marketplace in Topeka, Kansas. At this time the product was virtually identical to the Carolene product which had been before the Kansas Supreme Court on two separate occasions; now the substitute oil was soybean oil. The composition of the product was otherwise unchanged. Milnot officials asked the Dairy Commissioner for permission to sell Milnot in Kansas. The Dairy Commissioner and the State Board of Agriculture advised Milnot that this product could not be sold in view of the provisions of both the FMA and the FDPA. Milnot then initiated a test case by marketing the product in Kansas. The State Board of Agriculture sought assistance from then Attorney General Curt T. Schneider and enforcing the Act. On August 2, 1976, Attorney General Curt Schneider filed an action seeking an injunction to prevent the marketing of Milnot in Kansas.

During the 1977 legislative session, Senate Bill 453 was introduced which would have repealed the FMA and it would have modified the FDPA to allow the sale of filled dairy products in Kansas provided they were properly labeled. While that bill did not pass, it was assigned to a Special Interim Committee on Agriculture and Livestock for interim study during the summer of 1977. This was studied as Proposal No. 4 that year. During 1977, also, two other suits were filed against the Secretary of the State Board of Agriculture and the Dairy Commissioner. These suits involved the products Bar-Scheeze and Matey Imitation Sour Cream and Matey Imitation Sour Cream With Chives. In 1980, the Shawnee County District Court decided the Milnot case in favor of the State and enjoined Milnot from selling its product in Kansas. Milnot Company appealed but subsequently withdrew that appeal. In the other two cases, the Bar-Scheeze product was removed from the marketplace in Kansas and the Matey products were reformulated to remove the dairy ingredients.

In the 1981 legislative session, two bills were introduced which would amend or modify the FDPA. House Bill 2325 would have amended the exemption for distinctive proprietary food compounds to permit the sale of products similar to Kraft Golden Image. House Bill 2353 would have repealed the Filled Dairy Products Act. Neither of these two bills were enacted in either 1981 or 1982.

In August of 1982, the Dairy Commissioner learned that an imitation lowfat dry milk manufactured by Meadow Fresh Farms, Inc., was being distributed and sold throughout the state. After determining that said product was a filled dairy product and could not be sold in Kansas because it violated the Filled Dairy Products Act. In December of 1982, Dr. Chester H. Strehlow, a seller of this product, sued the Dairy Commissioner seeking a declaratory judgment determining the FDPA did not apply to a Meadow Fresh product or, in the alternative, that the Act was unconstitutional. On April 15, 1982, Shawnee County District Court enjoined the Dairy Commissioner from enforcing the FDPA against the Meadow Fresh product on the grounds the application of the Act to this product was unconstitutional. The Dairy Commissioner appealed this decision to the Kansas Supreme Court and the Kansas Supreme Court, on January 15, 1983, sustained the decision rendered in the Shawnee County District Court.

During this period, two additional suits involving the FDPA were filed in the United States District Court for the District of Kansas here in Topeka. The first case involves the frozen whipped toppings, "Dover Farms Frozen Whipped Topping" and "Extra Creamy Cool Whip Dairy Recipe," manufactured by General Foods. This case was filed in Federal District Court on May 14, 1982. At present the Court has temporarily enjoined the Dairy

Commissioner from enforcing the FDPA against these products and is allowing the sale of these products in Kansas. A decision in that suit has not been rendered.

In October of 1982, Kraft Foods filed a similar suit in Federal Court to permit the sale of its frozen whipped topping, La Creme, and to permit the sale of Kraft Golden Image Cheese substitutes in Kansas. The Court has temporarily enjoined the Dairy Commissioner from enforcing the FDPA against these products. The matter is presently awaiting a decision in the General Foods case before further action is taken.

Regarding other states, as summary of action taken by their states which have either filled milk or filled dairy product type statutes is attached in tabular form.

KANSAS FILLED MILK ACT (FMA)
K.S.A. 65-707 (E)(2)

(2) 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, or articles, or the derivatives thereof, or under any fictitious or trade name whatsoever.

KANSAS FILLED DAIRY PRODUCTS ACT (FDPA)
K.S.A. 65-725 et seq.

65-725. Filled dairy products act; title. This act may be cited as the Kansas filled dairy products act.

History: L. 1953, ch. 8, § 1; April 14.

Research and Practice Aids:

Hatcher's Digest, Food § 1.

CASE ANNOTATIONS

1. Act discussed in holding 65-720 and 65-721 constitutional. Dairy Belle, Inc., v. Freeland, 175 K. 344, 345, 351, 264 P.2d 894.

65-726. Same; purpose; legislative finding. 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.

History: L. 1953, ch. 8, § 2; April 14.

Research and Practice Aids:

Food—2.

Hatcher's Digest, Health § 4.

C.J.S. Food § 3 et seq.

65-727. Same; definitions. Whenever used in this act:

(a) The term "person" includes individuals, firms, partnerships, associations, trusts, estates, corporations and any and all other business units, devices, or arrangements.

(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, stabi-

lizers and flavorings, so that the resulting product is in 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, cheese, cream 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: (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 present 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) oleomargarine, when offered for sale and sold as and for oleomargarine.

History: L. 1953, ch. 8, § 3; April 14.

65-728. Same; unlawful acts. It shall be unlawful for any person to manufacture, sell, exchange, or offer for sale or exchange any filled dairy product.

History: L. 1953, ch. 8, § 4; April 14.

65-729. Same; penalties. Any person who shall violate any of the provisions of this act, and any officer, agent, or employee thereof who directs or knowingly permits such violations or who aids or assists therein, shall, upon conviction thereof, be subject to a fine of not more than five hundred dollars (\$500) or by imprisonment for not more than one year, or both.

History: L. 1953, ch. 8, § 5; April 14.

65-730. Same; enforcement of act by dairy commissioner; injunction. The dairy commissioner of the state of Kansas is authorized and directed to administer and supervise the enforcement of this act; to provide for such periodic inspection and investigation as he may deem necessary to disclose violations; to receive and provide for the investigation of complaints; and to provide for the institution and prosecution

of civil or criminal actions or both. The provisions of this act may be enforced by injunction in any court having jurisdiction to grant injunctive relief, and filled dairy products illegally held or otherwise involved in a violation of this act shall be subject to seizure and disposition in accordance with an appropriate court order.

History: L. 1953, ch. 8, § 6; April 14.

65-731. Same; invalidity of part. If any provision of this act, or any part of any section hereof, is declared unconstitutional or the applicability thereof to any person, circumstance, or product is held invalid, the validity of the remainder of this act and the applicability thereof to other persons, circumstances or products shall not be affected thereby.

History: L. 1953, ch. 8, § 7; April 14.

Research and Practice Aids:

Statutes—64(2).

C.J.S. Statutes § 96 et seq.

65-732. Same; act supplemental. This act shall be supplemental to existing statutes and shall not be deemed as repealing any section of the dairy law of the state of Kansas.

History: L. 1953, ch. 8, § 8; April 14.

<u>YEAR</u>	<u>CASE</u>	<u>PRODUCT</u>	<u>STATUTE</u>	<u>COURT'S DECISION</u>	<u>OTHER ACTION</u>
1940	<u>Carolene Products Co. v. Mohler</u>	Milnut	FMA	FMA valid Injunction affirmed	Product withdrawn
1943	<u>State, ex re. Mitchell v. Sage Stores Co.</u>	Milnot	FMA	FMA valid <u>1/</u> Injunction issued	Product withdrawn
1973	<u>Milnot Company v. Richard A. Medley, County Attorney Montgomery County</u>	Milnot	FMA & FDPA	Case dismissed for lack of prosecution	Product withdrawn
1976	<u>State ex rel. Stephan v. The Milnot Company</u>	Milnot	FMA & FDPA	FMA & FDPA valid <u>2/</u> Injunction issued (1980)	Product withdrawn
1977	<u>Win Schuler's, Inc., v. William W. Duitsman, Secretary of the Kansas State Board of Agriculture, et al.</u>	Bar-Scheeze	FDPA	Case dismissed (1980)	Product withdrawn
1977	<u>Presto Food Products Inc., v. William W. Duitsman, Secretary of the Kansas State Board of Agriculture, et al.</u>	Matey Imitation Sour Cream	FDPA	Case dismissed (1980)	Product reformulated
1981	<u>Dr. Chester H. Strehlow et al. v. Kansas State Board of Agriculture</u>	Meadow Fresh Imitation Low Fat Dry Milk	FDPA	FDPA as applied to product uncon- stitutional. Injunction against enforcement affirmed by Kansas Supreme Court. (Jan. 14, 1983)	

<u>YEAR</u>	<u>CASE</u>	<u>PRODUCT</u>	<u>STATUTE</u>	<u>COURT'S DECISION</u>	<u>OTHER ACTION</u>
1982	<u>General Foods Corp.</u> <u>v. Harland E. Priddle,</u> <u>Secretary of the Kansas</u> <u>State Board of Agri-</u> <u>culture, et al.</u>	Dover Farms Whipped Topping with Real Cream & Cool Whip Extra Creamy Dairy Recipe	FDPA	Temporary injunction against enforcement. Final decision pending.	
1982	<u>Kraft, Inc., v.</u> <u>Harland E. Priddle,</u> <u>Secretary of the Kansas</u> <u>State Board of Agri-</u> <u>culture, et al.</u>	La Creme and Golden Image Cheese Substitutes	FDPA	Temporary injunction against enforcement. Final decision pending.	

1/ This decision was affirmed by the United States Supreme Court in Sage Stores Co. v. Kansas (1944).

2/ This decision, rendered in 1980, was appealed to the Kansas Supreme Court, but the appeal was withdrawn.

LEGISLATIVE SUMMARY

YEAR	BILL	PURPOSE OF BILL	ACTION TAKEN
1977	SB 453	Repeal of FMA and change FDPA to permit sale of filled dairy products which are so labeled.	Referred for interim study. See Proposal No. 4, "Filled Milk and Filled Milk Products" in <u>Report on Kansas Legislative Interim Studies to the 1978 Legislature</u> . The bill was not enacted.
1981	HB 2325	Bill modified "distinctive proprietary food compound" exception.	Bill was not enacted.
1981	HB 2353	Repeal FDPA	Bill was not enacted.

STATES WHOSE STATUTES HAVE BEEN REPEALED
OR WHOSE CONSTITUTIONALITY HAS BEEN QUESTIONED

<u>State</u>	<u>Statute</u>	<u>Citation</u>
Arizona	A.R.S. §3-630	<u>State v. A.J. Bayless Markets, Inc.</u> , 86 Ariz. 193, 342 P.2d 1088 (1959)
Arkansas	Ark.Stats. §§82-919, 920	<u>Milnot Co. v. Arkansas State Board of Health</u> , 388 F.Supp. 901 (E.D. Ark. 1975)
Colorado	C.R.S. 1963, 7-6-25 to 7-6-32	<u>People ex rel. Orcutt v. Instantwhip Denver, Inc.</u> , 176 Colo. 396, 490 P.2d 940 (1971)
Georgia	Georgia Code §42-511	<u>Department of Agriculture v. Quality Food Products, Inc.</u> , 224 Ga. 585, 163 S.E.2d 704 (1968)
Idaho	I.C. §§37-1102 to 37-1103	<u>Sun Ray Drive-In Dairy, Inc. v. Trenhaile</u> , 94 Idaho 308, 486 P.2d 1021 (1971)
Illinois	Smith-Hurd Stat. 1935, p. 1699	<u>Carolene Products Co. v. McLaughlin</u> , 365 Ill. 62, 5 N.E.2d 447 (1937)
Kansas	K.S.A. 65-725, et. seq.	<u>Strehlow v. Kansas State Board of Agriculture</u> , Case No. 81-CV-1503 (1982)
Michigan	Comp. Laws 1929, §§5358-5360	<u>Carolene Products Co. v. Thomson</u> , 276 Mich. 172, 267 N.W. 608 (1936)
Nebraska	Comp. St. 1929, §§1022, 1024	<u>Carolene Products Co. v. Banning</u> , 131 Neb. 429, 268 N.W. 313 (1936)
West Virginia	Code W. Va. 19-11-2	<u>Milnot Company v. Douglas</u> , 452 F.Supp. 505 (S.D.W.Va., 1978)
Wisconsin	W.S.A. 97.48	<u>Dean Foods Co. v. Wisconsin Department of Agriculture</u> , 478 F.Supp. 224 (W.D.Wis. 1979) modified in 504 F.Supp. 520 (1980)

ADMINISTRATIVE CASES

<u>State</u>	<u>Statute</u>	<u>Citation</u>
Michigan	MCLA 288.171 et. seq. WSA 12.618(21) et. seq.	Attorney General's Opinion No. 4902 (1975)
North Dakota	Section 54-12-01, N.D.C.C.	Attorney General's Opinion No. 81-127 (1981)

LEGISLATIVE REPEALS

<u>State</u>	<u>Statute</u>	<u>Citation</u>
Maine	M.R.S.A. 7 §3002	Repealed 1971, c. 99, §3
Nebraska	Neb.Stat. §81-233(a)	Repealed 1980, LB 632, §47
New Jersey	N.J. Stat. §24:10-29	Repealed 1964, c. 62, §30
Pennsylvania	Penn. Stat. 31 §553	Repealed 1961, Aug. 8, P. 975, §10
Wisconsin	§97.48	Repealed 1982, S.B. 773

STATES WHERE STATUTES ARE INTACT

<u>State</u>	<u>Statute</u>	<u>Opinions Construing Statute</u>
Alabama	C.A. 2-13-4	<u>Quality Food Products, Inc., v. Beard,</u> 286 F.Supp. 351 (M.D. Ala. 1968)
Connecticut	C.G.S.A. 22-171	none found
Delaware	3 Del. C.1953, §3107	none found
Florida	F.S.A. 502.161-171 F.S.A. 502.018	none found
Minnesota	M.S.A. 32.529-32,534	none found
Missouri	V.A.M.S. 196.695	<u>Poole & Creber Mkt. Co. v. Breshears,</u> 125 S.W. 2d, 23(1940) <u>State ex rel. McKittrick v. Carolene</u> <u>Products Co.,</u> 144 S.W. 2d 153 (1940) <u>State v. Hershman,</u> 143 S.W. 2d 1025, (1940)
Montana	R.C.M. 81-22-411	none found
South Dakota	S.D.C. 39-7-1-39-7-8	none found
Texas	T.P.C. Title 71, Article 4474a	<u>Martin v. Wholesome Dairy, Inc.,</u> 437 S.W. 2d 586 (1969)
Washington	R.C.W. 15.38.001-15.38.050	<u>Reesman v. State,</u> 445 P.2d 1004 (1968), <u>State v. 28 Containers of Thick &</u> <u>Frosty,</u> 514 P.2d. 140 (1973)
Arizona	A.R.S. 3-626.01- 3-626.02	<u>Odle v. Imperial Ice Cream Co.,</u> 463 P.2d. 98 (1970)
Colorado	C.R.S. 35-24-201 as amended by L. 81, P.1702, Section 6-10	none found