

MINUTES OF THE House COMMITTEE ON Federal & State Affairs

The meeting was called to order by Robert H. Miller at \_\_\_\_\_  
Chairperson

1:30 a.m./p.m. on March 29, 1984 in room 526S of the Capitol.

All members were present except:

Committee staff present:

Mary Torrence, Revisor's Office  
Russ Mills, Research Department

Conferees appearing before the committee:

Larry Christ, Kansas Securities Commission  
Tom Kennedy, ABC  
Senator Wint Winter  
Sylvia Hoaglund, Department on Aging

The meeting was called to order by Chairman Miller.

Representative Peterson made a motion, seconded by Representative Hensley, to approve the minutes of the March 27 meeting. The motion carried.

The Chairman announced that another bill had been added to the agenda for a hearing.

SB413 - amending the Kansas Securities Act

Larry Christ, General Council for the Securities Commission, explained the bill and why he felt it was needed.

There was discussion concerning references to "general telephone solicitations".

Hearings were concluded.

SB859 - Exemption of oil & gas transactions from securities registration

Larry Christ, General Council for Securities Commission, explained the bill which clarifies an unintentional mistake added to the bill last year. The bill allows several different ways oil & gas transactions can be made without registering with the Securities Commission.

Hearings were concluded on SB413.

SB840 - Background colors on drivers licenses & non-drivers ID pictures.

Tom Kennedy explained the bill and showed problems with ID cards and how easily they can be altered. See attachment A.

Hearings were concluded.

SCR1662 - Memorializing Governor to appoint persons over 55 years of age or older to state boards and commissions.

Senator Wint Winter, Jr. explained that this resolution encourages persons over 55 to be on state boards and asks the Governor to take advantage of the expertise of these people.

Sylvia Hoaglund, Department on Aging, told the committee this resolution came about as a result of the Silvered Haired Legislature and she felt this would encourage older people to get on boards.

Hearings were concluded.

CONTINUATION SHEET

MINUTES OF THE House COMMITTEE ON Fed. & State

room 526S, Statehouse, at 1:30 a.m./p.m. on March 29, 1984

SB413 - Amending the Kansas Securities Act

Representative Vancrum made a motion, seconded by Representative Ediger, to strike all references to "any general telephone solicitation". The motion carried.

Representative Matlack made a motion, seconded by Representative Ediger, to report SB413 favorably as amended. The motion carried.

SB859 - Exemption of oil & gas transactions  
from securities registration

Representative Vancrum made a motion, seconded by Representative Matlack, to report SB859 favorable. The motion carried.

SCR1662 - Memorializing Governor to appoint persons 55 years and  
over to state boards and commissions

Representative Fuller made a motion, seconded by Representative Peterson, to report SCR1662 favorable for adoption. The motion carried.

SB840 - Background color on driver's license

Representative Fuller made a motion, seconded by Representative Ramirez, to report SB840 favorable for passage. The motion carried.

HB2785 - Increasing minimum wage

Representative Hensley made a motion, seconded by Representative Peterson, to report HB2785 favorable for passage. The motion carried.

HB3055 - Dairy labeling

Representative Ediger explained to the committee what the sub-committee had done. See attachment B.

Representative Ediger made a motion, seconded by Representative Ott, to amend HB3055 as recommended by his sub-committee. The motion carried.

Representative Smith made a motion, seconded by Representative Eckert, to amend HB3055 as per attachment C.

There was discussion about the differences between the two amendments and the definition of "artificial" and "imitation".

Representative Smith's motion was voted on, a division was called and the motion lost.

Representative Ediger made a motion, seconded by Representative Matlack, to report HB3055 favorable as amended. The motion lost.

SB769 - Abuse and neglect of aged and disabled persons

Representative Sughrue made a motion, seconded by Representative Peterson, to report SB769 favorable for passage. The motion carried.

The meeting was adjourned.

MEMORANDUM

TO: Honorable Robert H. Miller  
Chairman, House Federal and State Affairs Committee

FROM: THOMAS J. KENNEDY, Director, ABC Division

RE: Senate Bill No. 840

DATE: April 3, 1984

PURPOSE

Senate Bill 840 is an act concerning driver's licenses and nondriver's identification cards, amending K.S.A. 1983 Supp. 8-243 and 8-1328 to provide for a different background color on photographs on driver's licenses or identification cards that are issued to minors.

PERSPECTIVE

Senate Bill 840 provides that at the time a driver's license is issued, the photograph of the licensee shall have a background of one color if the licensee is then a minor and a background of a different color if the licensee is not a minor. Such background colors shall be selected by the director of vehicles and the colors selected shall be used consistently.

COMMENTS AND/OR RECOMMENDATIONS

Senate Bill 840 is intended to make it more difficult for a minor to alter his or her own driver's license. One of the more popular methods utilized by minors is to alter only the date of birth. Thus the picture, name, etc. remain accurate. The use of a different colored background on the photograph should eliminate this particular problem.

A minor qualifies for a driver's license in Kansas at age sixteen. Driver's licenses are good for four years. As a result, many Kansas driver's licenses issued to minors would expire on their 20th or 21st birthdays. For this reason, there should not be any significant inconvenience in converting driver's licenses at age twenty-one.

The purchasing of alcoholic liquor by minors is still a major problem in Kansas. In FY 1983, this agency alone issued 65 citations to retailers for selling to minors. Many of those incidents involved alleged or actual use of false or altered identification cards. In FY 1984, all indications are that the

*ALC h. A*

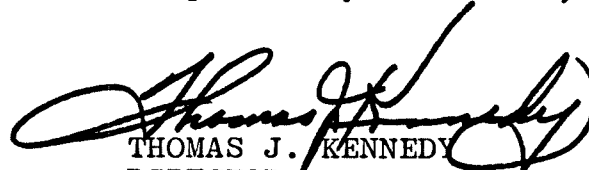
April 3, 1984  
SB 840

number will increase significantly. We have no reliable figures for the number of incidents in which minors purchased liquor and were not caught.\*

Senate Bill 840 will not completely solve the problem of minors purchasing and consuming alcoholic liquor. However, it will make it much more difficult for minors seeking to purchase alcoholic liquor to alter their driver's licenses or state identification cards and circumvent the law in that way.

For the foregoing reasons, we strongly urge passage of SB 840.

Respectfully submitted,



THOMAS J. KENNEDY  
DIRECTOR

\*Recently the Wichita Police Department assigned one officer to full time liquor law enforcement. That officer in one month arrested 29 minors for purchasing or attempting to purchase alcoholic liquor.

TJK:cjk

STATE OF KANSAS

STEVEN A. EDIGER  
REPRESENTATIVE, ONE HUNDRED FOURTH DISTRICT  
422 EAST 15TH STREET  
HUTCHINSON, KANSAS 67501



TOPEKA

HOUSE OF  
REPRESENTATIVES

COMMITTEE ASSIGNMENTS  
MEMBER FEDERAL AND STATE AFFAIRS  
GOVERNMENTAL ORGANIZATION  
JUDICIARY  
JOINT COMMITTEE ON SPECIAL  
CLAIMS AGAINST THE STATE

March 28, 1984

TO: House Federal and State Affairs Committee

RE: Subcommittee Report on House Bill 3055

The Imitation Milk Bill is a complex and controversial legal issue. It cannot be quickly explained, but I will try to summarize the subcommittee's actions.

1. The current definition of "Imitation Dairy Product" was changed to conform to Federal law because:
  - a) Federal rules define "imitation foods" as food which is a substitute for and resembles another food but which is nutritionally inferior." 21 C.F.R. §101.3(3).
  - b) The Federal Food, Drug and Cosmetic Act regulates labeling of all food in interstate commerce.
  - c) The Federal laws provide that states may regulate concurrently with the Federal laws. States may not impose labeling requirements "in addition to or different than" the Federal laws.
  - d) HB 3055, by labeling all products "imitation" regardless of its nutritional content, contradicts Federal law and is prohibited under the Supremacy Clause of the Constitution. This was why a very similar provision in a New York law was declared unconstitutional just three weeks ago.

The subcommittee therefore adopted the definition of "imitation" be aligned with Federal law in Sections 2(d) and 3.

2. Section 4(d) was stricken because it conflicts with Federal law.
3. The Subcommittee rejected striking Sections 4(3) concerning comparative panels.
4. Section 7 was struck because enforcement of the Kansas Food, Drug and Cosmetic Act labeling law already lies with the Department of Health and Environment.
5. The Subcommittee made no recommendation as to the bill, but merely suggested the above amendments.

*Ach. B*

March 28, 1984

Page Two

As it now stands, enforcement after the Subcommittee's amendments, lies with the Board of Agriculture. However, this may conflict with Section 3. An amendment may be needed to resolve this.

6. The Subcommittee also exempted component foods, wholesalers and food service establishments. This exempts pizza toppings, restaurants, bars, etc. To do otherwise would pose an unconstitutional burden on interstate commerce. Similar provisions have been struck down in other states.
7. A severability clause was added to protect the whole act from any unconstitutional provision.

Representative Steven Ediger  
Representative Bob VanCrum  
Representative Bob Ott  
Representative Marvin Smith

[As Amended by House Committee of the Whole]

As Amended by House Committee

Session of 1984

HOUSE BILL No. 3055

By Committee on Agriculture and Livestock

2-21

0021 AN ACT concerning dairy products; requiring labels on certain  
0022 ~~artificial imitation~~ dairy products[; declaring certain acts to be  
0023 unlawful and providing penalties for violations].

0024 *Be it enacted by the Legislature of the State of Kansas:*

0025 Section 1. It is the intent of the legislature to protect the  
0026 consumers of this state from confusion, fraud and deception, to  
0027 prohibit practices inimical to the general welfare and to promote  
0028 the orderly and fair marketing of dairy products.

0029 Sec. 2. (a) "Person" means any individual, firm, partnership,  
0030 association, trust, estate, corporation and any other business unit,  
0031 device or arrangement; \_\_\_\_\_ □

0032 (b) "dairy product" means milk, cream, sour cream, butter  
0033 cream, skimmed milk, ice cream, whipped cream, flavored milk  
0034 or skim milk drink, dried or powdered milk, cheese, cream  
0035 cheese, cottage cheese, creamed cottage cheese, ice cream mix,  
0036 sherbet, condensed milk, evaporated milk, concentrated milk  
0037 and any other food products that are manufactured principally  
0038 from milk or milk derivatives; \_\_\_\_\_ □

0039 (c) "secretary" means the secretary [of the state board] of  
0040 agriculture; \_\_\_\_\_ □

0041 (d) ~~"artificial imitation dairy product" means any food which~~  
0042 ~~by its composition, intended use, sensory qualities, physical~~  
0043 ~~properties, package or label description purports to resemble or~~  
0044 ~~imitate any dairy product, but does not include: (1) Any distinc-~~  
0045 ~~tive proprietary food compound not readily mistaken for a dairy~~  
0046 ~~product, which is customarily used on the order or advice of a~~  
0047 ~~physician and is prepared and designed for medicinal or special~~

3055-2

0048 ~~dietary use and predominantly so labeled; or (2) any dairy~~  
 0049 ~~product flavored with chocolate or cocoa or enriched with vi-~~  
 0050 ~~tamins when the nonmilk fats or oils contained in the product do~~  
 0051 ~~not exceed the amount of cocoa fat naturally present in the~~  
 0052 ~~chocolate or cocoa used and the food oil, not in excess of .01% of~~  
 0053 ~~the weight of the finished product, used as a carrier of the~~  
 0054 ~~vitamins.~~

is a substitute for and resembles a dairy product but is nutritionally inferior to that dairy product

0055 (e) "milk" means milk, skim milk, cream, lowfat milk, nonfat  
 0056 dry milk and any fluid derivative of the listed items.

(f) "Nutritionally inferior" means having reduced content of an essential nutrient that is present in an amount of 2% or more of the U.S. recommended daily allowance of protein or of any vitamin or mineral listed under 21 C.F.R. §105.3(b) per average usual serving or, if the food is customarily not consumed directly, per average usual portion, as established in 21 C.F. §101.9.

0057 Sec. 3. It shall be unlawful for any person, directly or indi-  
 0058 rectly, to knowingly manufacture, ~~sell, exchange or possess,~~ an  
 0059 artificial imitation dairy product which does not adhere to the  
 0060 labeling requirements of this act. ~~[Any person violating or failing~~  
 0061 ~~to comply with any provision of this act or any authorized rule~~  
 0062 ~~and regulation promulgated thereunder shall be deemed guilty~~  
 0063 ~~of a class B misdemeanor.]~~

or sell

0064 Sec. 4. (a) The statement "an artificial imitation dairy prod-  
 0065 uct" must be indicated in the upper 30% of the principal display  
 0066 panel of the package or container of an artificial imitation dairy  
 0067 product. The statement shall not be less than 1/2 of the size of the  
 0068 product name or 1/4 of an inch or 18 point type, whichever is  
 0069 larger. The statement must be of similar type, style and color to  
 0070 the product name.

Any imitation dairy product manufactured, sold or exchanged in violation of this act shall be considered a misbranded food under the Kansas food, drug and cosmetic act and the penalties and remedies provided by that act shall apply.

0071 (b) Artificial Imitation dairy products shall comply with the  
 0072 applicable federal requirements set forth in section 403 of the  
 0073 federal food, drug and cosmetic act and in sections 101 and 105 of  
 0074 title 21 of the code of federal regulations.

0075 (c) The product name of an artificial imitation dairy product  
 0076 must be presented in bold face type on the principal display  
 0077 panel and must be in lines generally parallel to the base of the  
 0078 container or package.

0079 ~~(d) Every artificial imitation dairy product shall provide, or~~  
 0080 ~~the principal display panel, a statement of the major differences~~  
 0081 ~~between the artificial imitation dairy product and the dairy~~  
 0082 ~~product it resembles. The information must be in a type size~~  
 0083 ~~which is at least 25% of the name of the artificial imitation dairy~~  
 0084 ~~product, nor less than 1/8 of an inch. This information shall~~



0085 ~~include the differences in the fat or oil used and the major~~  
0086 ~~difference in the basic ingredients used to replace nonfat milk~~  
0087 ~~solids.~~

(d)

0088 (c) A nutritional panel must be provided on an artificial  
0089 imitation dairy product which indicates the quantitative  
0090 nutritional differences between the artificial imitation dairy  
0091 product and the dairy product that it resembles in comparative  
0092 columns. The nutrients to be included are those for which a U.S.  
0093 recommended daily allowance has been established.

0094 (f) The provisions of this section shall not apply to nonliquid  
0095 toppings, dry coffee whiteners, frozen liquid whiteners, dips,  
0096 dressings, margarine-type products or packages containing an  
0097 individual serving of less than  $\frac{1}{2}$  ounce or  $\frac{1}{2}$  fluid ounce of an  
0098 artificial imitation dairy product for use in a restaurant, institu-  
0099 tion or passenger carrier, and not otherwise packaged for sale at  
0100 retail.

0101 Sec. 5. The secretary shall adopt any rules and regulations  
0102 necessary and proper to assure compliance with the provisions of  
0103 this act, provide for periodic inspections, investigate violations  
0104 and complaints and institute and prosecute civil or criminal  
0105 actions for violations. The provisions of this act may be enforced  
0106 by injunctions granted by any court of competent jurisdiction.  
0107 Artificial Imitation dairy products which are in violation of any of  
0108 the provisions of this act are subject to seizure and disposition in  
0109 accordance with an appropriate court order or rules and regula-  
0110 tions adopted by the secretary.

0111 Sec. 6. The provisions of this act are supplemental to all  
0112 other laws relating to artificial imitation dairy products not ex-  
0113 pressly referred to therein, and to all laws relating to the man-  
0114 ufacture, sale, exchange or transportation of artificial imitation  
0115 dairy products within or outside the state of Kansas and shall not  
0116 be construed to modify, repeal or in any way effect any part or  
0117 provision of any such laws not expressly repealed therein.

0118 ~~Sec. 7. The secretary or authorized representatives of the~~  
0119 ~~secretary shall have the authority to issue and enforce a written~~  
0120 ~~or printed stop sale order to the owner or custodian of any~~  
0121 ~~quantity of imitation dairy products which the secretary or duly~~

0122 authorized representatives of the secretary determine to be in  
 0123 violation of any of the provisions of this act or rules and regula-  
 0124 tions promulgated thereunder. The order shall prohibit further  
 0125 sale and movement of such imitation dairy products, except upon  
 0126 approval of the enforcing officer, until such officer has evidence  
 0127 that the law had been complied with, and the officer has issued a  
 0128 release from the stop sale order of such imitation dairy products.  
 0129 The owner or custodian of such imitation dairy products shall  
 0130 have the right to appeal from the order to a court of competent  
 0131 jurisdiction in the county in which the imitation dairy products  
 0132 are located for a release from such order and for the discharge of  
 0133 such imitation dairy products from the order prohibiting the sale,  
 0134 processing and movement of such products in accordance with  
 0135 the findings of the court. The provisions of this section shall not  
 0136 be construed as limiting the right of the enforcement officer to  
 0137 proceed as authorized by other sections of this act.

0138 [Sec. 8. The following products shall be exempt from the  
 0139 provisions of this act: Nonliquid toppings, dry coffee whiteners,  
 0140 frozen liquid whiteners, dips, dressings, whipped toppings and  
 0141 margarine or margarine-type products.]

0142 Sec. 7 [9]. This act shall take effect and be in force from and  
 0143 after its publication in the statute book.

7

(a)

(b) Products made of two or more components, not all of which are imitation dairy products.

(c) Sales of imitation dairy products to or by a food service establishment licensed pursuant to K.S.A. 36-503 and amendments thereto or by a food vending machine of a food vending machine company licensed pursuant to K.S.A. 36-504 and amendments thereto.

Sec. 8. If any provisions of this act or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of the act which can be given effect without the invalid provisions or application. To this end the provisions of this act are severable.

3055-1

LAW OFFICES OF  
BOYER, DONALDSON & STEWART

1030 FIRST NATIONAL BANK BUILDING  
WICHITA, KANSAS 67202

GEORGE J. HONDROS (1910-1962)  
PAUL J. DONALDSON (1911-1978)

JOHN E. BOYER  
KENNETH P. STEWART  
JAMES R. HANSON  
ROBERT L. SMITH  
JOHN H. GIBSON  
MICHAEL L. NORTH  
LELAND E. COX  
PAMELA E. BAILEY

March 26, 1984

264-7321  
AREA CODE 316

Mr. Steve Ediger  
House of Representatives  
State House  
Topeka, Kansas 66612

Re: House Bill 3055

Dear Representative Ediger:

Enclosed is a copy of an office memorandum in which we have analyzed the decision of the Federal Court of New York (Grocery Manufacturers of America, Inc., v. Joseph Gerace, Commissioner, New York Department of Agriculture and Markets, et al.)

We have concluded that the New York decision is primarily based (besides being limited to one product) on the question of preemption, which would render the Kansas law unconstitutional if it were determined that the proposed Kansas statute is preempted by federal law. The New York Federal Court determines FIRST that there is no express preemption contained in the Federal Food, Drug and Cosmetic Act; and SECOND that there is an implied preemption because the New York state law is in conflict with the federal law, i.e., the New York state law fails to distinguish between imitation and substitute dairy products.

In our opinion, House Bill 3055 specifically avoids any possibility of a failure to recognize this distinction when it is specifically provided in Section 4-b that:

"imitation dairy products shall comply with the applicable federal requirements set forth in Section 403 of the Federal Food, Drug and Cosmetic Act and in Sections 101 and 105 of Title XXI of the Code of Federal Regulations."

As a matter of fact, the legislative draftsman, by using the technique of referring to the federal statute, permits the proposed legislation to be an effective tool for enforcement by the Dairy Commissioner even though there should be a later change in the federal statute. The determination of violation of the

Mr. Steve Ediger

March 26, 1984

Page . . . . 2

labeling requirements for an "imitation dairy product" will have to be made under House Bill 3055, based upon the federal requirements for an imitation dairy product as contained in 21 C.F.R. 101.3(e).

Although the New York Federal Court refers to a question of burden on interstate commerce, this is probably in the nature of dictum since it is unnecessary for the court's conclusion. In any event, as indicated by our analysis, we conclude that there is no evidence of any substantial burden on interstate commerce which can be reasonably contemplated under the proposed legislation.

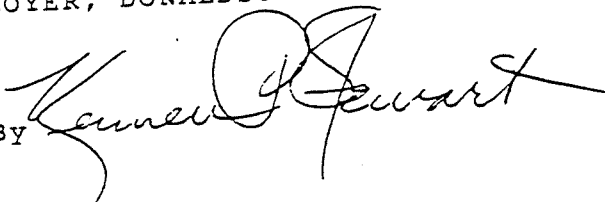
As indicated by telephone, I am sending this letter and this opinion on to you for your use with the subcommittee and the making of your recommendation to the full committee concerning the proposed legislation.

If this correspondence and written opinion should give rise to any questions, please do not hesitate to contact Ms. Pam Bailey in our office or myself.

Thanks for your consideration.

Very truly yours,

BOYER, DONALDSON & STEWART

BY 

KPS:cpf  
Enclosure

bcc: Mr. Jim Moore  
Mr. Norman Barker  
Mr. Ardith Sauerwein  
Mr. Ken Wilke

MEMORANDUM

TO: BOYER, DONALDSON & STEWART  
FROM: Pamela E. Bailey/llr  
RE: House Bill 3055, Labeling of Imitation Dairy  
Products  
DATE: March 26, 1984

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QUESTION PRESENTED

Whether House Bill 3055, a proposed act requiring the labeling of imitation dairy products, is unconstitutional?

DISCUSSION

I. Review of Recent New York Federal Case.

The United States District Court for the Southern District of New York recently rendered an opinion, Grocery Manufacturers of America, Inc. v. Joseph Gerace, Commissioner, New York Department of Agriculture and Markets, et al, 83 Civ. 3629, March 8, 1984 (GMA v. NY), holding New York's statute requiring the labeling of imitation cheese unconstitutional. The New York statute required products deemed under New York law to be imitation cheese or imitation cheese food to be labeled as imitation. The statute further required food service establishments to post signs and state on their menus the names of products containing imitation cheese food.

Judge Duffy in GMA held the New York statute's labeling requirements to be unconstitutional because the state's definition of imitation directly conflicted with the federal definition of imitation contained in federal regulations, and stood as an obstacle to the accomplishment of the purpose of the federal law. The New York regulations defined imitation cheese as:

"Any food which is similar in texture, color, flavor, taste and appearance to cheese."  
1 NYCRR §§18.1(c) (d).

The federal regulations define imitation food as a food which:

". . . is a substitute for and resembles another food but is nutritionally inferior to that food."  
21 CFR §101.3(e) (1).

Because the New York statute did not define imitation to mean only those products which were "nutritionally inferior," products which would be considered substitute foods by federal standards would be required to be labeled as imitation in New York. Judge Duffy ruled that only nutritionally inferior products were to be labeled imitation by federal law, and therefore the New York statute directly conflicted with federal regulations. Judge Duffy also ruled that the New York statute frustrated the FDA's dual purpose of encouraging the development of nutritious foods and of informing the public of the actual characteristics and properties of a new food product. Because the New York statute directly conflicted with the federal regulations and was an obstacle to the accomplishment of the purposes of the federal law, the court held the New York statute labeling requirement to be preempted.

After finding the New York labeling requirement to be preempted by federal regulations, the court then addressed the constitutionality of the menu and sign posting requirements. Because no federal legislation would potentially preempt New York's menu and sign posting requirements, their constitutionality was challenged upon the grounds that they posed an undue burden on interstate commerce. The New York court first looked to (1) the purpose of the New York statute, and (2) whether the menu and sign posting requirements effectuated the purpose of the statute. The New York statute was enacted to promote informed consumerism and fair competition by preventing fraud and deception in the marketing of alternative cheese products. The court held that New York did have a legitimate state interest in protecting consumers from unknowingly consuming inferior cheese substitutes. The court stated, however, that the blanket labeling of all substitutes as imitation when some of the substitutes were nutritiously equivalent or superior reached beyond New York's limited state interest. The court ruled that the posting required by the state statute without differentiating between nutritionally inferior and equivalent products would not effectuate the state's limited interest.

After ruling that the state's limited legitimate interests would not be furthered by the posting requirements, the court then examined the New York regulation's burden on interstate commerce. Since the court had already found the posting requirements did not effectuate the statute's purpose, the court's examination of its burden on interstate commerce appears cursory. The court held that the New York posting requirements would impact interstate commerce. This position was taken because manufacturers were not required to comply with the labeling provisions, only retailers fell under the statute. Since food service establishments had no method of determining whether the products they served were imitation, the court felt that if a food service establishment attempted to comply with the statute, it would (1) serve only natural cheese, or (2) insist that the manufacturer provide information sufficient for the retailer to comply. Both these measures taken by the retailers would burden interstate commerce. The court held these to be an unreasonable burden. As stated earlier, this decision appears conclusory as the court did not comprehensively analyze the benefits of the state law against the "burden" on interstate commerce. Presumably, this was not done because the court had already found the posting requirements to be ineffectual at meeting the statute's purpose.

## II. Comparison of the New York Statute and House Bill 3055.

### A. Preemption

Because GMA recently held the New York labeling and posting requirements to be unconstitutional, a comparison of the New York statute and House Bill 3055 is critical. The first conclusion one draws from this comparison is that under the rationale of GMA, House Bill 3055 would not be preempted by federal legislation. Judge Duffy in GMA held the FDCA did not expressly preempt state legislation, nor was state legislation impliedly preempted by evidence of any congressional intent to occupy the field. (See pages 16, 17, 18, GMA.) Preemption was found because the New York state regulations conflicted with the federal definition of imitation, and because the state regulation interfered with the accomplishment and execution of the full purposes and objectives of the FDA's regulations. Such a conflict does not occur with House Bill 3055, for Section 4(b) of the bill provides that:

"imitation dairy products shall comply with the applicable federal requirements set forth in Section 403 of the Federal Food, Drug and Cosmetic Act and in Sections 101 and 105 of Title XXI of the Code of Federal Regulations."

Contained in 21 CFR 101.3(e) is the definition of imitation. This definition, by virtue of House Bill 3055, Section 4(b), would be controlling in Kansas.

Besides not conflicting with federal legislation, the proposed Kansas statute also would not frustrate the FDA's dual purpose of encouraging the development of nutritious foods and of informing the public of the actual characteristics and properties of a new food product. House Bill 3055 would require on the principal display panel a statement of the major differences between the imitation dairy product and the dairy product it resembles. Furthermore, the proposed legislation requires a nutritional panel indicating the quantitative nutritional differences between the imitation dairy product and the dairy product it resembles to be displayed in comparative columns. These requirements would undoubtedly serve the FDA's stated dual purpose and, in particular, the goal of informing the public of the actual characteristics and properties of a food product. Using the New York Federal District Court's preemption analysis, House Bill 3055 would not be preempted.

#### B. Burden on Interstate Commerce

Since House Bill 3055 would not be preempted by federal legislation, an examination of the proposed legislation's effect on interstate commerce must be made. The first issue in determining whether House Bill 3055 would impose an undue burden is (1) whether Kansas has a legitimate public interest in this area, and (2) whether Kansas' proposed legislation effectuates this public interest. The purposes of the Kansas statute are undoubtedly similar to those in New York - informed consumerism and fair competition. The court in GMA recognized this as a legitimate public interest, but held that this interest was not effectuated by applying the New York statute to nutritiously equivalent products. Because House Bill 3055 follows the federal definition of imitation, Kansas' labeling requirements do not overstep their intended purpose. By virtue of the specific labeling requirements contained in House Bill 3055 - the requirement of the statement of differences and a comparative nutritional panel - Kansas' proposed legislation appears to effectuate its purpose.



A valid public, health, safety or welfare objective, such as the one behind House Bill 3055 carries a strong presumption of validity and would not be invalid unless it furthers the state's interest only marginally and imposes a substantial burden on interstate commerce. See Kassel v. Consolidated Freightways Corporation, 101 S. Ct. 1309 (1981). The court in GMA did not fully analyze the New York statutes' burden on interstate commerce since it felt the statutes did not effectuate their purpose. Nonetheless, the court's arguments regarding interstate commerce were all directly related to the fact the New York statute did not require manufacturers to comply with its labeling provisions. The food service establishments faced with compliance would find it nearly impossible to comply. The court stated that the New York statute would directly impact interstate commerce by increasing costs, and potentially causing a loss of sales.

House Bill 3055 applies directly to manufacturers and therefore most of the arguments made in GMA are inapplicable to Kansas' proposed legislation. Furthermore, the Federal New York Court's discussion of increased costs and potential loss of sales has no merit. Even if House Bill 3055 would increase costs and create a loss of sales, state laws enacted for public health, safety or welfare reasons are not unconstitutional if interstate commerce is burdened - a substantial burden must be imposed. The court in GMA did not use a balancing test to analyze the effects of the New York legislation and determine if a substantial burden had been imposed. Therefore, GMA cannot be used as precedent regarding this issue.

#### CONCLUSION

House Bill 3055 could not be declared unconstitutional using the rationale of the Federal District Court for the Southern District of New York contained in GMA. The Kansas statute is not in conflict with federal legislation and is not preempted. Neither does House Bill 3055 unduly burden interstate commerce, for it effectively serves a legitimate public interest and cannot be said to impose a substantial burden on interstate commerce.

Smith

[As Amended by House Committee of the Whole]

As Amended by House Committee

Session of 1984

HOUSE BILL No. 3055

By Committee on Agriculture and Livestock

2-21

0021 AN ACT concerning dairy products; requiring labels on certain  
0022 artificial imitation dairy products; declaring certain acts to be  
0023 unlawful and providing penalties for violations].

artificial

0024 Be it enacted by the Legislature of the State of Kansas:

0025 Section 1. It is the intent of the legislature to protect the  
0026 consumers of this state from confusion, fraud and deception, to  
0027 prohibit practices inimical to the general welfare and to promote  
0028 the orderly and fair marketing of dairy products.

0029 Sec. 2. (a) "Person" means any individual, firm, partnership,  
0030 association, trust, estate, corporation and any other business unit,  
0031 device or arrangement;

0032 (b) "dairy product" means milk, cream, sour cream, butter  
0033 cream, skimmed milk, ice cream, whipped cream, flavored milk  
0034 or skim milk drink, dried or powdered milk, cheese, cream  
0035 cheese, cottage cheese, creamed cottage cheese, ice cream mix,  
0036 sherbet, condensed milk, evaporated milk, concentrated milk  
0037 and any other food products that are manufactured principally  
0038 from milk or milk derivatives;

0039 (c) "secretary" means the secretary [of the state board] of  
0040 agriculture;

0041 (d) "artificial imitation dairy product" means any food which  
0042 by its composition, intended use, sensory qualities, physical  
0043 properties, package or label description purports to resemble or  
0044 imitate any dairy product, but does not include: (1) Any distinc-  
0045 tive proprietary food compound not readily mistaken for a dairy  
0046 product, which is customarily used on the order or advice of a  
0047 physician and is prepared and designed for medicinal or special

artificial

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0048 dietary use and predominantly so labeled; or (2) any dairy  
0049 product flavored with chocolate or cocoa or enriched with vi-  
0050 tamins when the nonmilk fats or oils contained in the product do  
0051 not exceed the amount of cocoa fat naturally present in the  
0052 chocolate or cocoa used and the food oil, not in excess of .01% of  
0053 the weight of the finished product, used as a carrier of the  
0054 vitamins.

0055 (e) "milk" means milk, skim milk, cream, lowfat milk, nonfat  
0056 dry milk and any fluid derivative of the listed items.

0057 Sec. 3. It shall be unlawful for any person, directly or indi-  
0058 rectly, to knowingly manufacture, sell, ~~exchange or possess~~ an  
0059 artificial ~~imitation~~ dairy product which does not adhere to the  
0060 labeling requirements of this act. ~~[Any person violating or failing~~  
0061 ~~to comply with any provision of this act or any authorized rule~~  
0062 ~~and regulation promulgated thereunder shall be deemed guilty~~  
0063 ~~of a class B misdemeanor.]~~

0064 Sec. 4. (a) The statement "an artificial ~~imitation~~ dairy prod-  
0065 uct" must be indicated in the upper 30% of the principal display  
0066 panel of the package or container of an artificial ~~imitation~~ dairy  
0067 product. The statement shall not be less than 1/2 of the size of the  
0068 product name or 1/4 of an inch or 18 point type, whichever is  
0069 larger. The statement must be of similar type, style and color to  
0070 the product name.

0071 (b) ~~Artificial Imitation~~ dairy products shall comply with the  
0072 applicable federal requirements set forth in section 403 of the  
0073 federal food, drug and cosmetic act and in sections 101 and 105 of  
0074 title 21 of the code of federal regulations.

0075 (c) The product name of an artificial ~~imitation~~ dairy product  
0076 must be presented in bold face type on the principal display  
0077 panel and must be in lines generally parallel to the base of the  
0078 container or package.

0079 (d) Every artificial ~~imitation~~ dairy product shall provide, on  
0080 the principal display panel, a statement of the major differences  
0081 between the artificial ~~imitation~~ dairy product and the dairy  
0082 product it resembles. The information must be in a type size  
0083 which is at least 25% of the name of the artificial ~~imitation~~ dairy  
0084 product, nor less than 1/8 of an inch. This information shall

or exchange

artificial

Any artificial dairy product manufactured, sold or  
exchanged in violation of this act shall be con-  
sidered a misbranded food under the Kansas food,  
drug and cosmetic act and the penalties and  
remedies provided by that act shall apply.

artificial

Artificial

artificial

0085 include the differences in the fat or oil used and the major  
0086 difference in the basic ingredients used to replace nonfat milk  
0087 solids.

0088 (e) A nutritional panel must be provided on an artificial  
0089 ~~imitation~~ dairy produce product which indicates the quantitative  
0090 nutritional differences between the artificial ~~imitation~~ dairy  
0091 product and the dairy product that it resembles in comparative  
0092 columns. The nutrients to be included are those for which a U.S.  
0093 recommended daily allowance has been established.

artificial

0094 (f) The provisions of this section shall not apply to nonliquid  
0095 toppings, dry coffee whiteners, frozen liquid whiteners, dips,  
0096 dressings, margarine-type products or packages containing an  
0097 individual serving of less than 1/2 ounce or 1/2 fluid ounce of an  
0098 artificial ~~imitation~~ dairy product for use in a restaurant, institu-  
0099 tion or passenger carrier, and not otherwise packaged for sale at  
0100 retail.

0101 Sec. 5. The secretary shall adopt any rules and regulations  
0102 necessary and proper to assure compliance with the provisions of  
0103 this act, provide for periodic inspections, investigate violations  
0104 and complaints and institute and prosecute civil or criminal  
0105 actions for violations. The provisions of this act may be enforced  
0106 by injunctions granted by any court of competent jurisdiction.

Artificial

0107 ~~Artificial imitation~~ dairy products which are in violation of any of  
0108 the provisions of this act are subject to seizure and disposition in  
0109 accordance with an appropriate court order or rules and regula-  
0110 tions adopted by the secretary.

0111 Sec. 6. The provisions of this act are supplemental to all  
0112 other laws relating to artificial ~~imitation~~ dairy products not ex-  
0113 pressly referred to therein, and to all laws relating to the man-  
0114 ufacture, sale, exchange or transportation of artificial ~~imitation~~  
0115 dairy products within or outside the state of Kansas and shall not  
0116 be construed to modify, repeal or in any way effect any part or  
0117 provision of any such laws not expressly repealed therein.

artificial

0118 [Sec. 7. The secretary or authorized representatives of the  
0119 secretary shall have the authority to issue and enforce a written  
0120 or printed stop sale order to the owner or custodian of any  
0121 quantity of ~~imitation~~ dairy products which the secretary or duly

0122 authorized representatives of the secretary determine to be in  
 0123 violation of any of the provisions of this act or rules and regula-  
 0124 tions promulgated thereunder. The order shall prohibit further  
 0125 sale and movement of such ~~imitation~~ dairy products, except upon  
 0126 approval of the enforcing officer, until such officer has evidence  
 0127 that the law had been complied with, and the officer has issued a  
 0128 release from the stop sale order of such ~~imitation~~ dairy products.  
 0129 The owner or custodian of such ~~imitation~~ dairy products shall  
 0130 have the right to appeal from the order to a court of competent  
 0131 jurisdiction in the county in which the ~~imitation~~ dairy products  
 0132 are located for a release from such order and for the discharge of  
 0133 such ~~imitation~~ dairy products from the order prohibiting the sale,  
 0134 processing and movement of such products in accordance with  
 0135 the findings of the court. The provisions of this section shall not  
 0136 be construed as limiting the right of the enforcement officer to  
 0137 proceed as authorized by other sections of this act.

artificial

0138 [Sec. 8. The following ~~products~~ shall be exempt from the  
 0139 provisions of this act: ~~Nonliquid toppings, dry coffee whiteners,~~  
 0140 ~~frozen liquid whiteners, dips, dressings, whipped toppings and~~  
 0141 margarine or margarine-type products.]

(a)

coffee

0142 Sec. 7 ~~(9)~~. This act shall take effect and be in force from and  
 0143 after its publication in the statute book.

10

(b) Sales of artificial dairy products to or by a food service establishment licensed pursuant to K.S.A. 36-503 and amendments thereto.

Sec. 9. If any provisions of this act or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of the act which can be given effect without the invalid provisions or application. To this end the provisions of this act are severable.