Approved March 21, 1985
Date

MINUTES OF THE Senate COMMITTEE ON Agriculture.

The meeting was called to order by Senator Allen at
Chairperson

10:00 a.m./p.m. on March 19, 1985 in room 423-S of the Capitol.

All members were present ~~except~~:

Committee staff present: Raney Gilliland, Research Department
Jim Wilson, Revisor of Statutes Department

Conferees appearing before the committee: Rebecca Crenshaw, Committee of Kansas Farm Organizations
Archie Hurst, Dairy Commissioner, State Board of Agriculture
Bill R. Fuller, Kansas Farm Bureau
Jim Moore, Associated Milk Producers
Michael Seck, Attorney, General Foods Corp. Schreiber Food, Inc.
Dennis Johnson, Attorney from Washington D.C., Kraft Foods
Bob Blanton, Wapakoneta, Ohio, Fischer Cheese Co.

Senator Allen called the Senate Agriculture Committee to order at 10:00 a.m Senator Warren made a motion to approve the minutes of the committee meetings of March 4, 5, 6, 7, 8 and 11. Senator Montgomery seconded the motion. Motion carried.

Senator Allen ask Raney Gilliland to explain HB 2001.

Raney Gilliland explained that HB 2001 is a bill that is similar to a set of amendments that this committee heard last year. The bill pertains to food products that resemble or imitate any dairy product. The bill would require a comparative nutritional information listing on the label. The bill would exempt pizza, dry coffee whiteners, liquid coffee whiteners, dips, dressings, whipped toppings and margarine or margarine-type products. The bill would authorize the Secretary of the Board of Agriculture the authority to adopt rules and regulations to assure compliance with the bill and the authority to issue and enforce stop sale orders for products not labeled according to the requirements in the bill.

The chairman ask Rebecca Crenshaw, a proponent, to present her testimony.

Ms. Crenshaw stated the Committee of Kansas Farm Organizations supports HB 2001 which, if enacted, will allow consumers, with this required labeling, to know exactly what they are purchasing. (see attachment A)

Senator Allen called on Archie Hurst, Dairy Commissioner, to testify. Mr. Hurst stated the consumer is now confused by lack of labeling; this bill would require dairy products be labeled so the consumer will know if the products are real, or artificial products.

Senator Allen called on Bill Fuller to present his testimony. Mr. Fuller stated this bill is a consumer bill that with the proposed labeling will inform the consumer if a dairy product is real or artificial. Mr. Fuller explained the bill will not prohibit anyone from selling their products in Kansas as long as they label their products as the bill would require. (see attachment B).

MINUTES OF THE Senate COMMITTEE ON Agriculture,

room 423-S, Statehouse, at 10:00 a.m.~~p.m.~~ XXX on March 19, 1985

The chairman next called on Jim Moore, a proponent, to testify. Mr. Moore explained the artificial dairy products on the market do not all meet the nutritional quality of real dairy products. With the proposed labeling, consumers would have the information on the product wrapper. Mr. Moore stressed that dairy products are easy to duplicate or imitate and thus he encouraged support for this bill which would inform the consumer about the products in the dairy case.

Senator Allen called on Michael Seck, an attorney, who spoke as an opponent to the bill.

Michael Seck representing the General Foods Corporation and Schreiber Food, Inc., stated that Kansas would be in conflict with federal laws if this bill is adopted. (see attachment C) (see attachment D).

Senator Allen called on Dennis Johnson, an attorney, who testified as an opponent.

Dennis Johnson representing Kraft Foods testified that his company favored nationally uniform labeling regulations on dairy products. Mr. Johnson stressed state laws should conform with federal laws. (see attachment E).

Senator Allen called on Bob Blanton an opponent to testify.

Bob Blanton representing the Fischer Cheese Company explained his company felt that HB 2001 would interfere with interstate commerce. Mr. Blanton stated his company was complying with Minnesota labeling law and that now the federal government is challenging them because the federal regulations differ with the Minnesota law. Mr. Blanton stated HB 2001 would be a burden to the industry and that his company felt uniform federal regulations serve everyone the best.

Senator Allen declared the hearing closed on HB 2001 and the committee adjourned at 11:00 a.m.

GUEST LIST

COMMITTEE: SENATE AGRICULTURE DATE: March 19, 1985

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Rebecca Crenshaw	Topeka	Committee of Farm Orgs.
Jim Moore	Wichita	AMPI
Nancy Kantola	Topeka	KS Co-op Council
Doris Nagel	Topeka	Div. of Budget
Kenneth M. Wilke	Topeka	Bd of Agriculture
Archie Hurst	Topeka	Ks Bd Agri.
Robert Blanton	Wapakoneta Ohio	Fisher Cheese Co.
Dennis Johnson	Washington D.C.	Olsson + Frank Kraft Inc
Michael Seck	Topeka	Schreiber Foods & General Foods Inc
Bud Grant	Topeka	KCCI
Marsha Hutchison	Hutchinson	KG7DA
Harlan Page	Ottawa	Grid-am Dairymen
Bill Fuller	Manhattan	KFB
Don Snodgrass	Topeka	Walbert Enterprises Inc.
Larry D. Woodson	Topeka	KBOA
Ed Kessler	Galva	K.S. BA
Charles Hickey	Topeka	Ks Oil Marketers

Committee of . . .

Kansas Farm Organizations

Becky Crenshaw
Legislative Counsel
Box 4842
Topeka, Kansas 66604

Testimony of the

COMMITTEE OF KANSAS FARM ORGANIZATIONS

with respect to

HB 2022

presented by

Rebecca Crenshaw
Legislative Representative

Mr. Chairman and members of the committee, my name is Rebecca Crenshaw. I am the legislative representative for the Committe of Kansas Farm Organizations, a coalition of 19 agriculturally-related organizations representing Kansas farmers and ranchers on state legislative issues. Our committee certainly appreciates the opportunity to present our views on the labeling of artificial dairy products.

As our organization stated during the 1984 session and during the interim, we are supportive of the efforts being taken by the dairy industry in the area of labeling. The reasons for the committee's support are consistent with most farmers' views about marketing of raw farm products. Farmers, generally speaking, do not want to restrict consumers' choices but want consumers to know exactly what they are buying. The government has generally supported this belief for both informative and health promotional reasons.

Consequently, we have nutritional labels on most products and actual grading of may products showing which products are superior over others. Both the grading and labeling is designed to inform and protect the consumer. When imitations are packaged and advertised to resemble real dairy products and then sold side by side with dairy products in the dairy case, the consumer finds it difficult to differentiate between the two.

The dairy industry is not attempting to protect dairy products from competition. This legislation would, however, allow consumers to know exactly what is being purchased. The consumer shoudl not be subjected to being "tricked" by a name. If an oil product attempts to imitate a dairy product, the consumer should be able to glance at the label to determine if it is a dairy product since the product's appearance may be deceiving. It is highly probable many consumers will choose imitation dairy products for dietary purposes.

3/19/85 attachment A

We ask this committee to pass this legislation in its present form. We have been working with this issue for several sessions. It seems the possible problems with this type of legislation have been addressed. We urge your support and speedy passage of this bill.

Thank you, Mr. Chairman.

3-19-85
Bill Fuller
KDIS COPY

Kansas Farm Bureau, Inc.
2321 Anderson Avenue, Manhattan, Kansas 66502 / (913) 537-2261

STATEMENT

of

KANSAS FARM BUREAU

to

SENATE AGRICULTURE COMMITTEE
Senator Jim Allen, Chairman

RE: H.B. 2001--Requiring labels on artificial dairy products

by
Bill R. Fuller, Assistant Director
Public Affairs Division
Kansas Farm Bureau

March 19, 1985

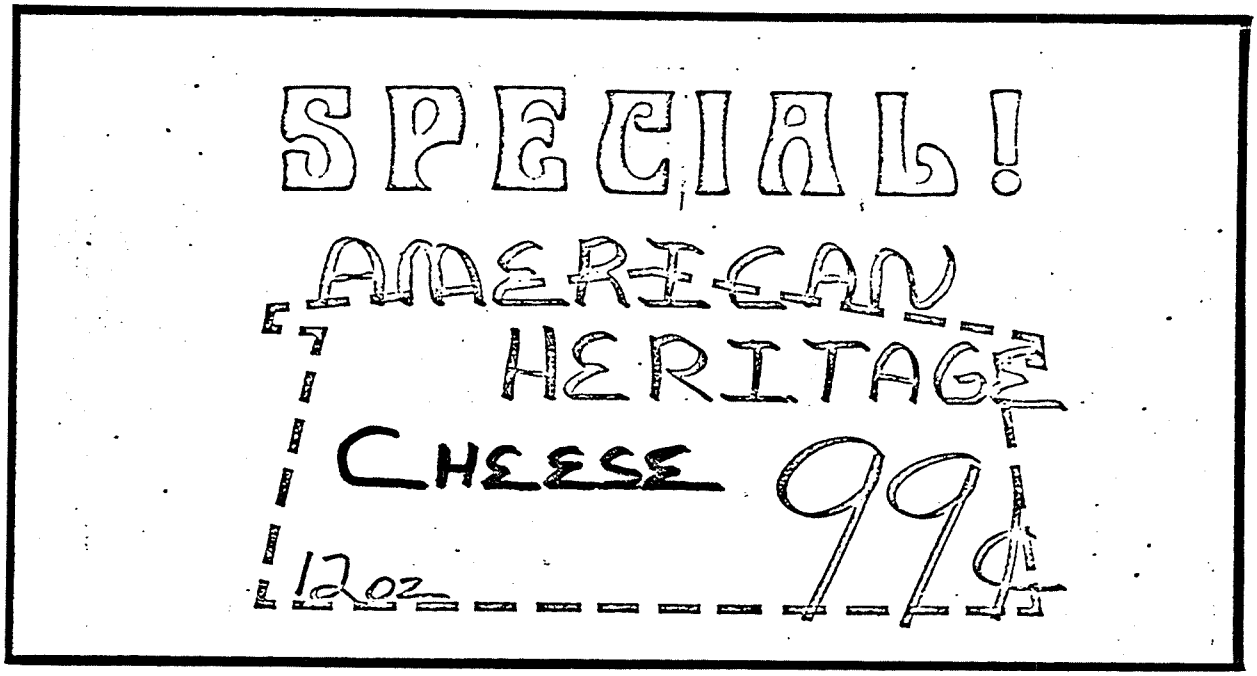
* *

Mr. Chairman and members of the Committee:

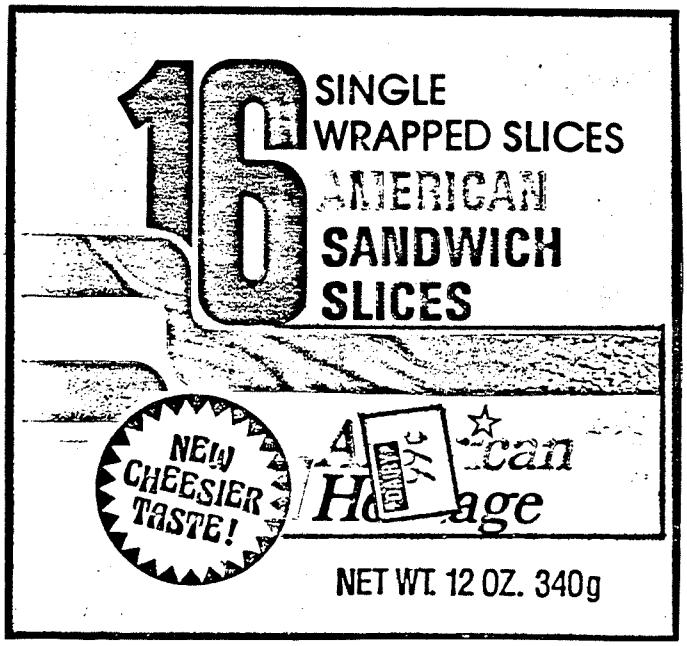
We express our appreciation for this opportunity to convey the views of the Kansas Farm Bureau membership to you as you consider H.B. 2001 which requires labeling of artificial dairy products.

Our members insist on proper labeling of food and other agricultural products. We believe consumers should have the opportunity to purchase any food product they desire. We also believe those same consumers have the right to expect adequate labeling so they may make informed judgments when considering artificial products. Proper labeling is a consumer issue! Farm Bureau has a significant stake in this consumer issue since our membership currently consists of 109,963 families--all are consumers.

attachment B
3/19/85



This sign advertised a SPECIAL! on "cheese" at a local supermarket. After examination of the item, it becomes apparent that it is actually an "artificial dairy product"--not cheese.



Additionally, the product is deceptively packaged and labeled:

1. "NEW CHEESIER TASTE!"
2. "DAIRY 99¢" (price label)

In August of 1983, the Federal District Court for the State of Kansas found the Kansas Filled Dairy Products Act unconstitutional. In abandoning this law which prohibited the manufacture and sale of dairy products to which non-dairy fats had been added, the Court suggested the consumer could be protected by less restrictive methods--labeling.

There are a number of reasons why Kansas consumers now need the protection of a "labeling law" in order to make informed purchases:

1. Kansas is now being flooded with artificial dairy products.
2. Artificial dairy products generally look, feel and taste like real dairy products.
3. Artificial dairy products are generally found in dairy cases in supermarkets.
4. Artificial dairy products often use the word(s) "dairy," "milk" or "cheese" as a part of their labeling.

Several concerns were expressed when the 1984 Kansas Legislature attempted to create a "labeling act." As a result, the Special Interim Committee on Agriculture held extensive hearings where representatives for Schreiber Foods, Jackson Ice Cream, Pillsbury, Quaker Oats, General Foods, Jenos Pizza and Tony's Pizza said the proposal would result in warehousing, distribution and labeling problems which in turn would increase consumer costs. I would like to share with you the finding of a shopping trip I made. I purchased these 3 products, all located side-by-side in the dairy case, at one supermarket on the same day. One package is natural cheese, the other two products are artificial cheese--one labeled in compliance with H.B. 2001, the other deceptively labeled.

Natural cheese	15.8¢ per oz.
Artificial cheese (deceptively labeled)	12.9¢
Artificial cheese (properly labeled)	9.9¢

Yes, the properly labeled artificial cheese was least expensive. In addition, nothing in the proposed legislation will prohibit food manufacturers from selling properly labeled artificial dairy products in all 50 states--unless they want to continue confusing and deceiving the consumer.

Legitimate concerns were addressed and the Interim Committee introduced H.B. 2001 which was recently approved by the House on a vote of 124-0.

H.B. 2001 labeling requirements are reasonable:

1. Product name →
2. Statement "Artificial Dairy Product" →
3. Differences in fat or oil used to replace nonfat milk solids →

IMITATION PASTEURIZED PROCESS CHEESE FOOD

AN ARTIFICIAL DAIRY PRODUCT

MADE WITH VEGETABLE OIL

16 SLICES INDIVIDUALLY WRAPPED

SPECIFICATION VALU TIME® APPROVED

A wholesome tasting product that is especially good when served in hot dishes and sandwiches.

NET WT 12 OZ 340 GRAMS

BEST WHEN PURCHASED BY DATE STAMPED ON PACKAGE

4. Nutritional panel expressing differences between the artificial product and the dairy product it resembles →

NUTRITIONAL INFORMATION PER SERVING COMPARISON
SERVING SIZE: 1 OZ(1 OZ=1-⅓ SLICES)
SERVING PER CONTAINER: 12

	IMITATION FOOD	CHEESE FOOD
CALORIES	90	90
PROTEIN	6g	6g
CARBOHYDRATE	1g	2g
FAT	7g	7g
SODIUM	400mg	337mg

PERCENTAGE OF U.S. RECOMMENDED DAILY ALLOWANCES (U.S. RDA)

	IMITATION FOOD	CHEESE FOOD
PROTEIN	15	10
VITAMIN A	4	6
VITAMIN C	0	0
THIAMINE	0	0
RIBOFLAVIN	8	6
NIACIN	0	0
CALCIUM	15	15
IRON	0	0

We base our statement on the "Labeling" resolution adopted by the voting delegates representing 105 county Farm Bureaus at the most recent Annual Meeting of the Kansas Farm Bureau:

Labeling

We support proper labeling of foods, fibers, and other agricultural products.

We oppose the use of the names of natural farm products on substitutes for such natural foods. We do not object to any new food product entering the market. Such products should stand on their own merits and be correctly labeled.

All products offered to the public in imitation of, or as a substitute for, or in the adulteration of, any farm product or any item processed from a farm product should be labeled to include the names of all ingredients and, where labeled "home grown" or "native," the point of origin.

In closing Mr. Chairman and members of the Committee, we believe that labeling is a consumer issue. We do not object to any new food product entering the market. However, we insist any such product be correctly labeled and should stand on its own merits.

Mr. Chairman and members of the Committee, we thank you for this opportunity to express the support of the members of Kansas Farm Bureau for the creation of a labeling act for artificial dairy products. Thank you!

TESTIMONY BEFORE THE SENATE COMMITTEE ON AGRICULTURE AND LIVESTOCK

KANSAS LEGISLATURE, TOPEKA, KANSAS, MARCH 19, 1985

SCHREIBER FOODS, INC. - GREEN BAY, WISCONSIN

My name is Michael Seck and I am an attorney with the Topeka firm of Fisher, Patterson, Sayler & Smith appearing today on behalf of Schreiber Foods. Schreiber Foods is engaged in the business of developing, producing, distributing and selling a wide variety of cheese throughout the United States. The development of new technology by Schreiber and other producers has resulted in many new wholesome and nutritious food products. We are a major processor and packager of cheese with plants in Wisconsin, Missouri, Utah and Arizona. We also produce and market alternate cheese products and are opposed to the Kansas statute being considered today.

Federal labeling requirements applicable to cheese and alternative cheese products are set forth in the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. Sections 341 and 343, and the Federal Code of Regulations, C.F.R. Parts 101, 102 and 133, and are administered by the United States Food & Drug Administration. Section 403(c) of the FDC Act, 21 U.S.C. Section 343(c), provides that a food shall be deemed to be misbranded if "it is an imitation of another food, unless it bears, in type of uniform size and prominence, the word 'imitation' and, immediately thereafter, the name of the food imitated."

The federal scheme of regulation for food labeling and, in particular, the federal requirements for the labeling of "imitation" foods are comprehensive and pervasive. In 1973 FDA issued final regulations pursuant to Section 403(c) of the FDC Act, 231 U.S.C. Section 343(c), defining the conditions under which the term "imitation" would apply to food products within its jurisdiction. 38 Fed. Reg. 20702 et seq., August 2, 1973. This regulation, codified at 21 C.F.R.

3/19/85 attachment C

Section 101.3(e), was promulgated under the authority Congress granted to the Secretary of Health and Human Services pursuant to 21 U.S.C. Section 371(a). In addition, the regulation was issued for the efficient enforcement of the Fair Packaging and Labeling Act (FPL Act). 38 Fed. Reg., 20702, August 2, 1973. The congressionally declared policy of the FPL Act is to "Facilitate value comparisons" of consumer goods by American purchasers. 15 U.S.C. Section 1451.

FDA regulations require that the label of a food which is an imitation of another food bear the word "imitation" in uniform size and prominence and immediately preceding the name of the food imitated. 21 C.F.R. Section 101.3(e). FDA defines "imitation food" as follows:

> (1) A food shall be deemed to be an imitation and thus subject to the requirements of section 403(c) of the act if it is a substitute for and resembles another food but is nutritionally inferior to that food.
>
> (2) A food that is a substitute for and resembles another food shall not be deemed to be an imitation provided it meets the following requirements:
>
> (i) It is not nutritionally inferior to the food for which it substitutes and which it resembles.
>
> (ii) Its label bears a common or usual name that complies with the provisions of Section 102.5 of this chapter and that is not false or misleading, or in the absence of an existing common or usual name, an appropriately descriptive term that is not false or misleading. The label may, in addition, bear a fanciful name which is not false or misleading. (Emphasis supplied.)

Federal regulations clearly provide that a food shall be deemed an "imitation" only if it is a substitute for and resembles another food and is nutritionally inferior to that food. The regulation also provides that a food which is a substitute for and resembles another food, and is not nutritionally inferior to such a product, is allowed to bear its own common or usual name or a non-misleading descriptive or fanciful name.

Over the last ten years cheese analogs have established themselves as legitimate products in their own right and have gained acceptance by the consuming public. These foods have earned the right to be sold in the marketplace without impediments imposed by this proposal.

Many cheese substitutes are especially healthful and nutritious. They provide dietary advantages to consumers over traditional standardized cheeses, including lower cholesterol, less sodium, and reduced calories. They contain all of the nutrients specified in FDA regulations concerning nutritional equivalency. Many products are made with vegetable oils and are very low in cholesterol and higher in unsaturated fats compared to real cheese that contains milkfat. Although the cholesterol issue is still being debated by health care professionals, a large segment of our citizenry and many professionals consider the use of vegetable oils beneficial to the well being of many individuals, reducing the rate of heart disease. Cheese substitutes also provide many desirable functional properties when used as ingredients in other foods such as longer shelf life and favorable melting properties, and are often preferable to consumers for religious or economic as well as dietary reasons. These innovative alternative products are wholesome foods, labeled in full compliance with federal requirements including complete and accurate names and ingredient information.

Many alternative cheese products manufactured and sold by Schreiber throughout the United States and in Kansas are either nutritionally equivalent or nutritionally superior to standardized cheeses. Under FDA's imitation labeling regulations, these products are not deemed to be imitations and they are not required to bear the disparaging term "imitation" but, rather, may be identified with a fanciful name which is not false or misleading.

The proposed Kansas statute serves to jeopardize the interest of the public in that they frustrate value comparisons by requiring all alternative cheese products, regardless of nutritional content, to be identified as an artificial dairy product. For example, if the ingredients or characteristics of the alternative cheese products are important to consumers for dietary reasons, requiring alternative products to be labeled as "artificial" will create the erroneous impression of product inferiority which will result in consumers selecting a "non-artificial" product that will not be in their best interest. In addition, because nutritionally inferior, superior and equivalent alternative cheese products are afforded the same treatment under the Kansas statute and regulations, the statute and regulations present an obstacle to the development and marketing of products with improved nutritional content. Consumers will be discouraged from selecting nutritionally equivalent alternative products because of the disparaging labeling requirements in Kansas.

It is the opinion of Schreiber's legal counsel that the H.B. 2001 conflicts with federal laws and regulations and is, therefore, preempted by the Federal Food, Drug, and Cosmetic Act. As mentioned before the FDA requires that all substitute products which are nutritionally inferior to the products for which they substitute be labeled with the term "imitation," alerting the consumer to the fact that the product is inferior. The federal agency has determined, as well, that nutritionally equivalent or superior products may not be labeled as

imitations because such labeling would mislead the consumer to believe that the product is inferior. Since this regulation was promulgated to effect the two important congressional objectives of providing consumers with information regarding the actual characteristics and properties of each food product and encouraging the development of food products with improved nutritional content, a state law which attempts to impose labeling requirements which conflict with or obstruct the goals of the federal requirements is preempted by federal law. This doctrine has repeatedly been upheld by the United States Supreme Court.

The provisions of H.B. 2001 are in direct conflict with and obstruct the goals of the federal food laws and the imitation regulations and policies of FDA in that they require nutritionally equivalent or superior products to be labeled with a term which connotes inferiority, misleading the consumer as to the characteristics and properties of the product. Kansas cannot avoid the preemptive effect of the federal scheme by substituting the term "artificial" for the word "imitation." The term "artificial" connotes inferiority just as the term "imitation" does, and is therefore misleading when used to describe a product which is not inferior in any way.

Statutes similar to the Kansas proposal have been successfully challenged in other states. In a very recent challenge in the Federal District Court in New York, the New York Imitation Cheese Law and implementing regulations which contain labeling provisions similar to those of H.B. 2001, were held unconstitutional on the grounds that they were preempted by the FDC Act and constituted an unconstitutional burden on interstate commerce. GMA v. Gerace v. Block, ___ F.Supp. ___ (E.D.N.Y. 1984). The Court found that requiring nutritionally equivalent and superior food products to be labeled with the disparaging term "imitation" misleads the consumer and discourages manufacturers from developing alternative products with nutritionally improved content. The

labeling provision of the statue was held to be in conflict with the federal scheme and, therefore, preempted by federal law. The Second Circuit Court of Appeals affirmed the trial court on this issue. This rationale is equally applicable to H.B. 2001.

In Kansas, the Filled Dairy Products Act was held unconstitutional as a violation of the equal protection and due process clauses of the United States Constitution. General Foods v. Priddle, No. 82-4111 (D.Kan. August 9, 1983). In the Priddle case the State of Kansas was required to pay $45,000.00 in legal fees for the plaintiff under a provision of a civil rights statute. Kansas taxpayers were therefore required to bear the cost of this litigation. In order to avoid the imposition of an additional burden on the taxpayers of this state, we urge this committee to carefully examine the constitutional issues involved and to reject H.B. 2001 which in the view of our food and drug counsel will not withstand a constitutional challenge.

Preponents of this rule would have us believe that their only concern is truth in labeling and that their concern is for the consumer who has a right to know what is purchased. It is our policy to assure consumers' right to know and have always striven to provide accurate labeling on our products. We believe most consumers will use ingredient labeling if interested in the contents of a frozen meat pizza. A study conducted by the Decision Center in February, 1984 disclosed that consumers know what is in the ingredient label and will use it if they desire to determine the contents of a food. If the consumer is concerned about the issue of real or substitute cheese, he can look for the "Real Seal". The American Dairy Association has done an admirable job in providing consumers with a voluntary means of identifying products containing dairy cheese. Their promotion of the use of the "Real Seal" is extremely helpful to those consumers

interested in distinguishing between products with dairy and substitute cheese. The "Real Seal" will give consumers a truly positive means of identifying dairy cheese.

STATEMENT PRESENTED TO
SENATE AGRICULTURAL COMMITTEE
TOPEKA, KANSAS
MARCH 19, 1985

Thank you for the opportunity to speak before your committee today. My name is Michael Seck and I am an attorney with Fisher, Patterson, Sayler & Smith in Topeka. I am appearing today on behalf of various interested parties, including General Foods Corporation, who oppose Kansas House Bill No. 2001. These firms are manufacturers of a variety of food products distributed throughout Kansas, the nation, and the world. Each of these companies would like to express its concern with respect to H.B. 2001 and the potentially devastating impact that this bill could have, both to industry and to consumers, within the State of Kansas.

1. The Nature of Products Affected and Advantages to Consumers

Kansas H.B. 2001 proposes to regulate the labeling of foods that either resemble or imitate dairy products. In recent years there have been vast strides in the development of wholesome and nutritious food products that are alternatives to some of the more traditional and well known dairy products. these new and innovative products include a variety of dairy, part-dairy and non-dairy foods, many of which are either nutritionally equivalent or nutritionally superior to traditional dairy products, for which standards of identity have been established. Each of these alternative products is labeled in full compliance with federal requirements including complete and accurate names and ingredient information. Many also bear nutrition labeling.

Many of these alternative products provide dietary advantages such as lower cholesterol, lower sodium and reduced calories, as well as desirable functional

3/19/85 attachment D

properties such as longer shelf life and favorable melting properties. Such products are often preferable to consumers for dietary, religious or economic reasons. Consequently, many of these new alternative products have received enthusiastic acceptance and demand by consumers.

However, the wide use and acceptance of alternative products clearly does not justify an attempt to limit competition with real dairy products. The effect of the Kansas H.B. 2001 would be to impose labeling burdens so oppressive that consumers will be discouraged from buying and manufacturers will be discouraged from selling certain products that compete with products supported by the Kansas dairy industry. Numerous cases have held that the state may not use its powers as a basis to suppress competition or to protect a particular industry within the state. Such attempts at economic protectionism not only deny equality in the marketplace, but they also stifle innovation and deprive consumers of many desirable and nutritious products.

2. The Need for Uniformity and The Burden on Interstate Commerce

Our country's economic well-being and the abundance of products available to the consumer are derived largely from the absence of trade barriers between the states. Products move freely within the United States in reliance upon the constitutional protection against unreasonable burdens on interstate commerce. Kansas House Bill 2001 clearly would result in trade barriers unreasonably burdening interstate commerce. The proposal, if enacted, would be subject to a constitutional challenge as an unreasonable burden on interstate commerce.

Uniformity of laws is absolutely essential in the area of food labeling. This need for uniformity is critical to industry as well as consumers. The labeling requirements proposed in H.B. 2001 are different from federal laws and the laws of most other states.

For industry to comply with the special labeling requirements proposed by H.B. 2001, companies would be required to establish and implement separate labeling and product inventories, separate distribution channels, special recordkeeping systems, and special advertising programs for the State of Kansas. In many instances distributors will not and cannot maintain separate inventories to comply with different state laws. Ultimately, these special requirements may force manufacturers to raise the prices of products sold in Kansas or to discontinue the sale of these products in the State of Kansas. Kansas consumers will, thus be faced with increased costs or the inability to purchase many wholesome and desirable food products.

In addition, uniformity in food labeling is essential for consumers to make informed choices in the marketplace. If "artificial dairy products" are labeled in a manner different from other imitation foods, consumers will receive a negative impression of inferiority that does not accurately reflect the true character of the food. Numerous alternative or substitute foods now found in the marketplace would not be governed by this proposal. The effect of the proposed labeling requirements would be to confuse and mislead the consumer with negative and disparaging labeling and to discourage manufacturers from selling nutritionally equivalent alternative products within the State of Kansas. Some products that contain only natural ingredients or only dairy ingredients would be required to bear the term "artificial", and thus mislead the buying public. If these same products are nutritionally inferior, they would be required by federal law to also bear the label "imitation".

3. Federal Pre-emption

The federal scheme of regulation for food labeling is comprehensive and pervasive. The labeling of food products is governed by the Federal Food, Drug,

and Cosmetic Act, the Fair Packaging and Labeling Act, and the Federal Code of Regulations, administered by the United States Food and Drug Administration (FDA). The FDA regulations specifically provide requirements for the labeling of imitation and substitute foods. Thus the proposed legislation, if enacted, would be subject to a judicial challenge on the grounds of federal pre-emption. Therefore, we strongly urge that Kansas conform to the federal regulations with the defeat of H.B. 2001.

4. Judicial Precedents

Statutes similar to the Kansas proposal have already been successfully challenged in various states. In Kansas, the Filled Dairy Products Act was held to be unconstitutional as a violation of the equal protection and due process clauses of the U.S. Constitution. The State of Kansas was permanently enjoined from enforcing that statute. General Foods v. Priddle, No. 82-4111 (D.Kan. August 9, 1983). In addition, attorney fees in the amount of $45,000 were awarded against the State of Kansas and Kansas taxpayers were ultimately required to bear this cost.

Most recently, the New York imitation cheese labeling statute and implementing regulations were held to be unconstitutional and a permanent injunction was entered prohibiting their enforcement by the State of New York. GMA v. Gerace, 83 Civ. 8629 (S.D.N.Y. March 8, 1984) (Copy attached). There, the state imitation labeling law was invalidated because it was pre-empted by federal law and because it created an unreasonable burden on interstate commerce. On appeal, the United States Court of Appeals for the Second Circuit affirmed the trial court's opinion as it related to labeling requirements under the New York law.

5. Conclusion

In conclusion, we appreciate the exemption granted to whipped toppings under H.B. 2001. However, we respectfully oppose the balance of the proposed Bill and urge this committee to vote against it as it is presently drafted.

3-19-85
10:00
Lois
Cont

Testimony of Dennis R. Johnson
on Behalf of Kraft, Inc.
Before the
Senate Committee on Agriculture
Kansas Legislature
on Artificial Dairy Products Labeling
House Bill No. 2001

Good morning. My name is Dennis R. Johnson of the Washington, D.C. law firm Olsson and Frank, P.C. I am here today on behalf of Kraft, Inc. (Kraft) of Glenview, Illinois, a producer of a wide variety of wholesome and nutritious food products, including all dairy cheeses, cheese substitutes or alternate cheese products, and imitation cheeses. Kraft is strongly opposed to proposed House Bill 2001 and urges the Kansas legislature to amend the proposed Bill and conform it to the labeling rules adopted by the U.S. Food and Drug Administration, the U.S. Department of Agriculture, as well as the vast majority of the States.

Kraft is engaged in the business of developing, producing, distributing, and selling a wide variety of food products throughout the United States. Development of new technology by Kraft has resulted in many new wholesome and nutritious food products, some of which are alternatives to dairy cheese products. These alternative cheese products have numerous advantages over standardized cheeses. Many cheese substitute products are nutritionally equivalent or superior to standardized cheeses. In addition, these products provide several dietary and medical advantages to consumers over traditional standardized cheeses, including lower cholesterol and lower calories. Cheese substitutes also provide desirable functional properties when used as ingredients

3/19/85 attachment E

in other products, including a longer shelf life and favorable melting properties. Finally, cheese substitutes provide an economic advantage to consumers because they are offered for sale at a much lower cost than standardized cheeses.

Kraft manufactures and labels its products in strict compliance with the statutes, regulations, and policies of the U.S. Food and Drug Administration. See 21 C.F.R. Parts 101-169. Cheese alternate products manufactured by Kraft, which are nutritionally equivalent or superior to the standardized cheeses, are labeled as "Cheese Substitutes" or by other appropriate descriptive names in strict accordance with FDA regulations. See 21 C.F.R. §101.3. Cheese alternate products which are nutritionally inferior to standardized cheeses are prominently labeled as "Imitation," also in accordance with FDA regulations.

It is critically important to Kraft, as well as all other food manufacturers who sell in interstate commerce, to have one uniform set of compositional and labeling requirements. Different or inconsistent labeling requirements imposed by state or local governments create impermissible trade barriers and tend to artificially raise to the consumer the price of these wholesome and nutritious food products. If Kansas moves forward with proposed H.B. 2001, Kraft will be required to develop a separate label inventory just for its products sold in Kansas. This would create a tremendous burden on Kraft and could also lead to other States imposing their own unique labeling requirements,

different from the Kansas requirements, ultimately resulting in up to 50 different labels for the same product sold throughout the United States.

Three sections of proposed H.B. 2001 impose labeling requirements which differ significantly from those imposed by FDA and a vast majority of other states.

1. Proposed §4 requires all products not meeting a standard of identity for dairy cheeses to be identified as "an artificial dairy product" in extremely large type size. The Federal food labeling rules do not require "artificial" labeling. Instead, under FDA regulations, foods not meeting established standards of identity for dairy cheeses must be labeled with the name "cheese substitute" or with another descriptive name which properly identifies the product without being false or misleading. See 48 Fed. Reg. 37665 (August 19, 1983). Moreover, FDA does not impose the same type size requirements which are included in the proposed Kansas bill. See 21 C.F.R. §101.3 and §101.15. Accordingly, adoption of the Kansas bill would result in labeling requirements for these products which differ substantially from Federal requirements. Compliance with both sets of rules would be impossible.

2. Proposed §4(d) requires that all "artificial dairy products" include a statement on the label of the major differences between the artificial dairy product and the dairy product it resembles. FDA does not impose such a requirement; therefore, there would be a substantial difference between Federal and Kansas requirements.

3. Proposed §4(e) requires comparative nutrition information between the "artificial dairy product" and the dairy product it resembles. FDA does not require comparative nutrition information for cheese alternates.

Kraft urges the Kansas legislature to conform to proposed §4(d) which appears to require that "artificial dairy products"

comply with all applicable Federal compositional and labeling requirements. Kraft currently produces and labels its products in strict compliance with the Federal rules. There appears to be no reason for Kansas to adopt requirements which differ from the Federal rules. Moreover, it would be impossible to comply with both the Kansas law and Federal law. As a consequence, a court would most probably find the Kansas law unconstitutional. See General Foods Corp. v. Priddle, 569 F. Supp. 1378 (D. Kan. 1983).

Federal courts have uniformly held that state and local governments should not impose unique or different labeling requirements on food products. Jones v. Rath Packing Company, 430 U.S. 519 (1977). Just recently, the U.S. Court of Appeals for the Second Circuit ruled that New York's imitation cheese labeling regulation was unconstitutional under the theory of Federal preemption because it imposed labeling rules for cheese alternate products different from FDA's. Grocery Manufacturers of America v. Gerace, Civ. Nos. 84-6141, 84-6149 (2nd Cir. February 14, 1985)(Attachment 1). Similarly, imposition of a Kansas artificial dairy products labeling law, which conflicts with the applicable FDA laws and regulations, would be held unconstitutional by a Federal court.

If the Kansas legislature or other interested parties in the State of Kansas are of the opinion that the Federal requirements are inadequate, we suggest that petitions or requests be submitted

to the U.S. Food and Drug Administration setting forth the inadequacies of the Federal rules and recommending appropriate changes be made across the board. This is the appropriate vehicle for addressing such concerns to protect the legitimate interests of interstate food companies and Kansas consumers.

In conclusion, Kraft urges the Kansas legislature to either reject H.B. 2001 or amend it to make it consistent with the food labeling provisions of the Federal Food, Drug and Cosmetic Act and FDA's implementing food labeling regulations. In the event the Kansas legislature concludes that additional action is necessary, Kraft, Inc. recommends that H.B. 2001 be amended as follows:

1. Proposed §4(b) should provide that products meeting the definition of "artificial dairy products" be labeled as such or with another common or usual or descriptive name which properly identifies the product and differentiates it from dairy cheese products. The name chosen by the manufacturer should be one that meets current Federal law and regulation.

2. Comparative nutritional labeling requirements contained in proposed §4(e) should be deleted.

3. Proposed §4(d) requiring a statement of the differences between the dairy substitute and the standardized product should be deleted.

Kraft appreciates this opportunity to present its views.

Attachment

Dated: March 19, 1985

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 177, 388 August Term, 1984

(Argued September 26, 1984 Decided February 14, 1985)

Docket Nos. 84-6141, 84-6149

GROCERY MANUFACTURERS OF AMERICA, INC., a Delaware Corporation,

Plaintiff-Appellee
Cross-Appellant,

v.

JOSEPH GERACE, COMMISSIONER, NEW YORK DEPARTMENT OF AGRICULTURE AND MARKETS, and THE NEW YORK DEPARTMENT OF AGRICULTURE AND MARKETS,

Defendants-Appellants
Cross-Appellees,

JOHN R. BLOCK, as Secretary of Agriculture of the United States and THE DEPARTMENT OF AGRICULTURE OF THE UNITED STATES, MARGARET M. HECKLER, as Secretary of Health and Human Services of the United States, and THE DEPARTMENT OF HEALTH AND HUMAN SERVICES OF THE UNITED STATES,

Additional Defendants
on Counterclaim-Appellees.

B e f o r e: FRIENDLY, MESKILL and PIERCE, Circuit Judges.

Appeal from judgment entered in the United States District Court for the Southern District of New York, Duffy, J., enjoining the enforcement of N.Y. Agric. & Mkts. Law § 63 and invalidating that provision and its regulations on preemption and Commerce Clause grounds.

Affirmed in part, reversed in part.

THOMAS G. CONWAY, N.Y. Department of Agriculture and Markets, Albany, New York (Robert Abrams, Attorney General of the State of New York, New York, New York, of counsel), for Defendant-Appellant New York Department of Agriculture and Markets.

FRANKLIN H. STONE, Assistant United States Attorney, Southern District of New York, New York, New York (Rudolph W. Giuliani; United States Attorney for the Southern District of New York, Jane E. Booth, Assistant United States Attorney, Southern District of New York, Beverly Sherman Nash, U.S. Department of Justice, Frederick H. Degnan, Food and Drug Administration, Thomas D. Edmundson, U.S. Department of Agriculture, Washington, D.C., of counsel), for Counterclaim-Appellees Block and Heckler.

GEORGE M. BURDITT, Chicago, Illinois (Robert G. Epsteen, Burditt, Bowles & Radzius, Ltd., Chicago, Illinois, Sheldon Oliensis, Richard A. DeSevo, Kaye, Scholer, Fierman, Hays and Handler, New York, New York, of counsel), for Plaintiff-Appellee Grocery Manufacturers of America.

MESKILL, Circuit Judge:

This is an appeal from a judgment entered in the United States District Court for the Southern District of New York, Duffy, J., granting the motion of plaintiff-appellee Grocery Manufacturers of America (GMA) for preliminary and permanent injunctive relief. The district court, in a decision reported at 581 F.Supp. 658 (S.D.N.Y. 1984), enjoined the enforcement of N.Y. Agric. & Mkts.

Law § 63 (section 63), which it found invalid on federal preemption and Commerce Clause grounds.

We affirm in part and reverse in part.

BACKGROUND

This litigation [illegible] state and federal regulatory schemes that require descriptive labeling of cheese alternatives: products composed wholly or partly of food that looks, smells and tastes like cheese, but is not, in fact, cheese. The major focus of the dispute concerns the use and meaning of the modifier "imitation" as applied to these products. A brief discussion of cheese-making is in order.

Real cheese is made from milk with its milkfat content intact. Cheese alternatives may be made in two ways. One method begins with either milk from which the milkfat has been removed or casein, natural milk protein extracted from milk. The altered milk or casein is then combined with vegetable oil, which substitutes for milkfat. This type of alternative cheese is lower in calories and cholesterol than real cheese. It sells at prices fifty to sixty percent lower than real cheese. The other type of alternative cheese is chemically similar to real cheese but is made wholly or in part with substitute dairy products. This is presumably even less expensive to manufacture than the former. Vitamins and minerals may be added to raise the nutritional level of alternative cheese. Record of Administrative Rulemaking Proceedings in the Adoption of Imitation Cheese Labeling Regulations (before the New

York Department of Agriculture and Markets), Record Doc. #6 at 152-60.

Alleging that New York's imitation cheese law was in conflict with federal labeling requirements and with the Commerce Clause, GMA commenced this litigation with a complaint requesting injunctive and declarative relief against defendants-appellants New York Department of Agriculture and Markets and the department's Commissioner, Joseph Gerace (collectively New York). New York counterclaimed and included as additional defendants the United States Department of Agriculture (USDA); the United States Department of Health and Human Services (HHS), the bureaucratic parent of the Food and Drug Administration (FDA); and the respective department secretaries. The counterclaim sought to have 21 C.F.R. § 101.3 (1984), the federal regulation that defines the term imitation for purposes of food package labeling, declared invalid.

The text of New York's section 63, enacted in 1982, is set out in the margin.[1/] Briefly, it requires that alternative cheese products feature labels that display prominently the descriptive term "imitation." It also directs that anyone who sells prepared foods containing cheese alternatives, whether for carry out or for consumption on the premises, must display a sign that discloses in three inch letters those foods that contain "imitation cheese." Further, it provides that restaurant menus must append the words "contains imitation cheese" to the item designation of any offering containing alternative cheese. And, finally, alternative cheese products available for use by customers

on the premises -- as, for example, something resembling grated parmesan -- must be conspicuously labeled as "imitation cheese."

Section 63 does not define imitation. The regulations promulgated pursuant to the statute define "imitation cheese" as any food simulating "cheese" as described or standardized by regulation but failing to meet that description or standard. N.Y. Admin. Code tit. 1, § 18.1(c). Neither the statute nor any of its regulations is concerned with nutritional values.

The federal scheme implicated here, which establishes the requisite information content of package labels for foods shipped in interstate commerce, involves three federal statutes and two federal agencies. Food labeling generally is governed on the federal level by the Federal Food, Drug, and Cosmetic Act (FDCA), 21 U.S.C. § 301 et seq. (1982), and its regulations, which come under the administrative aegis of the FDA. The FDCA does not contain any express preemption language.

The labeling of meat and poultry products shipped in interstate commerce is specifically controlled by the Federal Meat Inspection Act (FMIA), 21 U.S.C. § 601 et seq. (1982), and the Poultry Products Inspection Act (PPIA), 21 U.S.C. § 451 et seq. (1982), and their respective regulations, 9 C.F.R. § 317 et seq. (1984). The FMIA and the PPIA are administered by the USDA. Both statutes contain substantially identical preemption language which permits some concurrent state enforcement but prohibits state "[m]arking, labeling, packaging, or ingredient requirements in

addition to, or different than, those" mandated by federal law. 21 U.S.C. § 678 (FMIA); see also 21 U.S.C. § 467e (PPIA).

The FDCA specifically prohibits, among other things, misbranded foods. Under the FDCA, a food is misbranded if it is sold under the name of any other food, 21 U.S.C. § 343(b), or if it purports to be a food, such as cheese, for which a standard of identity has been prescribed by regulation and it does not conform exactly to that standard, 21 U.S.C. § 343(g). In addition, a food that "is an imitation of another food" is misbranded unless its label contains the word "imitation" in prominent letters immediately preceding the name of the food imitated. 21 U.S.C. § 343(c).

The FDCA does not define imitation; that task was accomplished by regulation in 1973. An imitation food is defined as a food which "is a substitute for and resembles another food but is nutritionally inferior to that food." 21 C.F.R. § 101.3(e)(1). Nutritional inferiority is determined by comparing the percentages of so-called "essential nutrients" in the substitute to those in the food for which it substitutes. 21 C.F.R. § 101.3(e)(4). The essential nutrients are protein and the nineteen vitamins and minerals for which the federal government has established recommended daily allowances (U.S.). Id.; § 101.9(c)(7)(iv). Basically, if the substitute contains less of any essential nutrient present to a measurable degree in the food substituted for, the substitute must be labeled with the word "imitation."

A nutritionally equivalent or superior substitute food would be misbranded under federal law if it was labeled with the

term "imitation."[2/] Such foods must be identified by an appropriate common or usual name or, if none exists, a descriptive term.[3/] The fact that such foods are substitute foods would thus be evident from the foods' labels, albeit less so than if the word "imitation" was used.

The FMIA and the PPIA contain misbranding provisions essentially identical to the FDCA's. Compare 21 U.S.C. § 453(n) (PPIA) and § 601(n) (FMIA) with 21 U.S.C. § 343 (FDCA). Unlike the FDCA, both the PPIA and the FMIA, to prevent misbranding, require that all proposed labels be reviewed and approved by USDA agents prior to use. 21 U.S.C. § 457(c) & (d) (PPIA); § 607(d) & (e) (FMIA). Neither the text of nor the regulations under either the FMIA or the PPIA define imitation. However, the USDA avers that it has adopted the FDA's definition.

Thus federal labeling requirements for alternative cheese products and for meat and poultry products containing cheese alternatives are uniform. If the product is nutritionally inferior to the food it resembles, it must be labeled "imitation." If, however, it is nutritionally equivalent or superior to its model, it would be misbranded if it was labeled "imitation."

In the court below, the parties agreed and the district judge found that there were no unresolved material issues of fact. 581 F.Supp. at 661. The judge therefore deemed summary judgment as to GMA's motion for preliminary and permanent injunctive relief appropriate. Id. Accordingly, the court held that New York's labeling requirements as applied to alternative cheese were

preempted by the FDCA because the federal requirements, as applied in compliance with the FDA's definition of imitation, and the state requirements were in actual conflict. Further, it held that the state labeling requirements as applied to meat and poultry products containing alternative cheese were preempted by the FMIA and the PPIA because the USDA's adoption of the FDA's definition of imitation created actual conflict between the state and federal schemes and, also, because of the express preemption language in the federal statutes. Finally, the district court held that the sign, menu and container provisions were invalid because they placed an undue burden on interstate commerce in violation of the Commerce Clause.

On appeal, New York challenges all three of the district court's conclusions. It argues that the state labeling provisions are not preempted by the FDCA because the federal regulation defining imitation violates the meaning and purpose of the FDCA and is therefore invalid. Invalidation of the regulation, of course, would vitiate the actual conflict between the state and federal schemes. New York also maintains that even if the definition is valid under the FDCA, the USDA's adoption of the definition was procedurally defective. Thus, New York reasons, the state statute is not in conflict with either the FMIA or the PPIA. Further, New York claims that the requirements of the state statute fall outside the reach of the preemption provisions of the FMIA and the PPIA. And finally, New York contends that the sign, menu and container provisions do not violate the Commerce Clause.

DISCUSSION

I. Federal Preemption

A. Generally

The preemption doctrine is rooted in the Supremacy Clause of the United States Constitution, Art. VI, cl. 2. Its application compels judicial divination of congressional intent. Preemption is mandated in two general contexts: when a state legislates in a field that Congress intended to occupy totally and when the state and federal laws actually conflict.

Any state law intruding upon an area that Congress intended to control exclusively is preempted, "whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977). Absent explicit preemption language, congressional intent to occupy the field regulated may nevertheless be inferred on the basis of the pervasiveness of the federal scheme, the dominance of the federal interest involved or because the federal statute in combination with the nature of its directives reveals the purpose to preclude state action. Fidelity Federal Savings & Loan Association v. de la Cuesta, 458 U.S. 141, 153 (1982); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

"Even where Congress has not entirely displaced state regulation in a specific area, state law is pre-empted to the extent that it actually conflicts with federal law." Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development

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"Even where Congress has not entirely displaced state regulation in a specific area, state law is pre-empted to the extent that it actually conflicts with federal law." Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development

Commission, 461 U.S. 190, 204 (1983). An actual conflict exists "when it is impossible to comply with both state and federal law, Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143 (1963), or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress, Hines v. Davidowitz, 312 U.S. 52, 67 (1941)." Silkwood v. Kerr-McGee Corp., 52 U.S.L.W. 4043, 4046 (U.S. Jan. , 1984).

Moreover, preemption is compelled not only when the conflict involves a federal statute, but also when it involves valid federal regulations. Provided that they are reasonable exercises of an agency's duly authorized discretion and not in conflict with congressional intent, United States v. Shimer, 367 U.S. 374, 381-82 (1961), "[f]ederal regulations have no less pre-emptive effect than federal statutes." Fidelity Federal Savings & Loan, 458 U.S. at 153; accord Blum v. Bacon, 457 U.S. 132, 145-46 (1982).

B. The FDCA

The preemptive effect of the FDCA depends entirely on whether the FDA's definition of imitation is valid and therefore entitled to our deference. Characterizing 21 C.F.R. § 101.3(e) as an attempt to administratively alter(?) the FDCA, New York argues that we should disregard the regulation and give the word imitation its ordinary meaning.

New York's challenge to the FDA regulation is grounded in the language, legislative history and, most particularly, the pre-1973 (i.e., prior to the promulgation of 21 C.F.R. § 101.3(e))

judicial construction of the FDCA and its predecessor statutes. The fulcrum of the state's argument is the United States Supreme Court decision in 62 Cases of Jam v. United States, 340 U.S. 593 (1951). That litigation involved a product labeled "Delicious Brand Imitation Jam" which the government claimed was misbranded because it resembled fruit jam but contained less than the federally standardized amount of fruit. The controversy actually involved a perceived conflict between the FDCA subsection deeming a food misbranded if it substituted for and resembled another food but was not labeled "imitation" and the subsection deeming a food misbranded if it purported to be a food that had been standardized by regulation. In concluding that the product purported to be not fruit jam but imitation jam and, therefore, that it was not misbranded, the Court reasoned that "the ordinary meaning of the statute" should control. 340 U.S. at 600.

The 62 Cases of Jam Court discussed and distinguished an earlier Supreme Court case relied on by New York and also decided under the FDCA, Federal Security Administrator v. Quaker Oats Co., 318 U.S. 218 (1943). 62 Cases of Jam, 340 U.S. at 598-99. In upholding the government's contention that a food was misbranded even though its label disclosed the presence of a nondeleterious substance that was not a standard ingredient, the Quaker Oats Court explained that the purposes of the FDCA went beyond mere prohibition of false and misleading labeling. Such prohibition alone could not

> protect the consumer from "economic adulteration," by which less expensive ingredients were substituted, or

> the proportion of more expensive ingredients diminished, so as to make the product, although not in itself deleterious, inferior to that which the consumer expected to receive when purchasing a product with the name under which it was sold.

318 U.S. at 230. To guard the integrity of food products, the act authorized promulgation of standards of identity, requiring "informative labeling only where no such standard had been promulgated, where the food did not purport to comply with a standard, or where the regulations permitted optional ingredients and required their mention on the label." Id.

New York also refers us to United States v. 651 Cases, More or Less, of Chocolate Chil-Zert, 114 F.Supp. 430 (N.D.N.Y. 1953) (Chil-Zert), which, drawing on the Supreme Court precedents, attempted to flesh out the judicial definition of imitation. "The word connotes inferiority in the sense that [the product] is cheapened by the substitution of ingredients[;]" the result is "something less than the genuine article." Id. at 432 (citations omitted).

New York correctly notes that the FDA's regulatory definition of imitation is at odds with the judicial gloss placed on the term. Consequently, the state avers, we should disregard the definition and follow the reasoning of Swift & Co. v. Walkley, 369 F.Supp. 1198 (S.D.N.Y. 1973), decided under the FMIA. The Swift Court acknowledged that the USDA, in approving a label for a frankfurter-like product that did not contain the word "imitation," had relied on the findings of the White House Conference on Food, Nutrition and Health Final Report 120 (1969), J. App. at 139 (White

House Report), particularly that "[c]onsumers are reluctant to purchase products labelled 'imitation' even though the products are very good and highly nutritious." 369 F.Supp. at 1200 (quoting USDA official's affidavit). Nevertheless, the court rejected the USDA's position and upheld the state's ban on the sale of the product because, lacking the modifying "imitation frankfurters," the product was misbranded.

If we were addressing the validity of the FDA regulation in or about 1973, the year of its promulgation, we might be inclined to reject it. But the regulation has been in effect for eleven years. Congress' failure during this period to alter the relevant statutory language or to otherwise condemn the regulatory definition, while not a failsafe guide, allows us at least to infer that it has acquiesced in the FDA's construction. See, e.g., Hair v. Agee, 453 U.S. 280, 300 (1981); United States v. Rutherford, 442 U.S. 544, 554 & n.10 (1979); Zemel v. Rusk, 381 U.S. 1, 11 (1965); Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 313 (1933); Costanzo v. Tillinghast, 287 U.S. 341, 345 (1932); but see SEC v. Sloan, 436 U.S. 103, 119-21 (1978). Moreover, the two courts of appeals that have considered the regulation have upheld its validity. National Milk Producers Federation v. Harris, 653 F.2d 339 (8th Cir. 1981); Federation of Homemakers v. Schmidt, 539 F.2d 740 (D.C. Cir. 1976).

We could scarcely improve on the D.C. Circuit's perspicacious decision in Federation of Homemakers sustaining the FDA's definition against a challenge brought by a national consumer

group. Addressing arguments similar to those raised by New York, the court explained that the earlier and undeniably reasonable judicial construction of imitation did not "prevent the promulgation of an equally reasonable definition by the agency charged with administering the [FDCA]." 539 F.2d at 743. We concur with that court; "our deference to the enforcing agency's interpretation limits our review to determining only whether the regulation violates the language of the statute or is arbitrary and capricious." Id. The FDA's regulation furthers the twin goals of "better informing consumers so that they may exercise a knowledgeable choice of differing foods within general categories" and "encouraging manufacture of nutritional food products;" it is both reasonable and within the ambit of the agency's discretion. Id. at 744; accord White House Report at 120, J. App. at 139.

Unless contrary to the indications of the statute itself, see SEC v. Sloan, 436 U.S. at 117-19, the construction and application of a statute by the agency charged with its administration is entitled to substantial deference. Blum v. Bacon, 457 U.S. at 141; United States v. Rutherford, 442 U.S. at 553; Udall v. Tallman, 380 U.S. 1, 16 (1965). The FDA's definition of imitation is entitled to our deference.

Thus, as applied to alternative cheese, the New York labeling scheme is in direct conflict with its federal counterpart. Including the term imitation on the label of a nutritionally superior alternative cheese in order to comply with New York law, would render the product misbranded under federal law. Compliance

with both the state and federal requirements is impossible. To the extent that it attempts to regulate the labeling of alternative cheese, the New York law is preempted.

C. The FMIA and the PPIA

Whether the New York law as applied to meat and poultry products that contain alternative cheese is also preempted requires us to determine whether the reach of the preemption provisions of the FMIA and the PPIA extends to the New York labeling requirements. This inquiry requires us to decide, also, whether the USDA's adoption of the FDA's regulatory definition of imitation was valid.

New York argues that the adoption was improper because it was not in accordance with the rulemaking provisions of the Administrative Procedure Act, 5 U.S.C. § 551 et seq. (1982). The district court determined, and the federal parties agree, "that the USDA's imitation food policy is more akin to a statement of general policy or an interpretive rule than to a rule which requires formal notice and comment proceedings." 581 F.Supp. at 665. The federal agencies also claim that the USDA's action could be correctly characterized as an express adoption of a standing policy through adjudication.

It is well established that an agency may adopt prospective rules of general effect through either rulemaking or adjudication; the choice of method rests within the discretion of the agency. E.g., NAACP v. FPC, 425 U.S. 662, 668 (1976); NLRB v. Bell Aerospace Co., 416 U.S. 267, 290-95 (1974); SEC v. Chenery

Corp., 332 U.S. 194, 202-03 (1947); New York State Commission on Cable Television v. FCC, 669 F.2d 58, 62 n.9 (2d Cir. 1982). In support of its claim of adoption through adjudication, the USDA cites In re Castleberry's Food Co., 40 Agric. Dec. 1262 (1981), a USDA adjudicative proceeding under the FMIA, which expressly adopted what it identified as agency practice: use of the FDA definition of imitation in the case-by-case approval of food labels. Id. at 1277-78. Indeed, as the court in Swift & Co. v. Walkley, 369 F.Supp. at 1200, indicated, the agency had begun narrowing the application of the term "imitation" as early as 1970, just after the issuance of the White House Report. Moreover, formal notice and comment rulemaking procedures concerning the practice were initiated on or about August 5, 1983. 48 Fed. Reg. 35,654 (1983). The initiating notice explained that

> [t]he proposed disclosure requirement for substitute and imitation cheese ingredients would not affect current requirements for "imitation" labeling. Thus, for example, in addition to the disclosure statement concerning its cheese content, any standardized meat product whose required ingredients include "cheese" would still be required to bear "imitation" labeling, if the use of imitation cheese caused the product to be nutritionally inferior to the standardized product.

Id. at 35,658.

Even if it should be classified as an interpretive rule or a statement of general policy, rather than as a formal rule adopted via adjudication, the USDA's practice of following the FDA definition of imitation when reviewing meat and poultry product labels is valid. The distinctions between formal rules and interpretive rules or general statements of policy are often vague.

Noel v. Chapman, 508 F.2d 1023, 1029-30 (2d Cir.), cert. denied, 423 U.S. 824 (1975); Pacific Gas & Electric Co. v. FPC, 506 F.2d 33, 37-40 (D.C. Cir. 1974). But we need not explore the nuances. If the USDA's practice is merely interpretive, it is a reasonable interpretation and therefore entitled to judicial respect. Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 566 (1980); National Nutritional Foods Association v. Weinberger, 512 F.2d 688, 696 (2d Cir.), cert. denied, 423 U.S. 827 (1975). And, while we recognize that we are not bound by interpretive rules, American Postal Workers Union v. United States Postal Service, 707 F.2d 548, 560 (D.C. Cir. 1983), cert. denied, 52 U.S.L.W. 3687 (U.S. Mar. 19, 1984); Board of Education v. Harris, 622 F.2d 599, 612-13 (2d Cir. 1979), cert. denied, 449 U.S. 1124 (1981), we discern no reason to reject the USDA's longstanding interpretation of the FMIA and PPIA misbranding provisions. Cf. United States v. Clark, 454 U.S. 555, 565 (1982) ("Although not determinative, the construction of a statute by those charged with its administration is entitled to great deference, particularly when that interpretation has been followed consistently over a long period of time."). Consequently, the New York requirements are "different from" the federal requirements, as administered, and they are therefore preempted.

Notwithstanding the conflict created by its use of "imitation," the New York law imposes other labeling requirements that are "in addition to[] or different than" the federal requirements. The preemption language of the FMIA, essentially identical to that in the PPIA, was addressed by the Supreme Court in Jones v.

Rath Packing Co., 430 U.S. at 528-32. The Court had before it the federal and California standards of accuracy for net weight labeling. California's inspection sampling technique implicitly permitted the inevitable slight deviations resulting from the manufacturing process. But it did not allow for weight loss "resulting from moisture loss during the course of good distribution practice." Id. at 531. In contrast, the USDA had interpreted the FMIA to permit reasonable variations, including such moisture loss. Id. at 529. Thus, the Court held that the California regulations were explicitly preempted by the FMIA. Id. at 532.

Analogously, New York's section 63 mandates the precise size of the letters in and relative location of the word "imitation" on package labels. These requirements do not comport exactly with the federal specifications.[4/] Therefore, the state requirements are preempted.

II. Commerce Clause

Our preemption holdings make it unnecessary for us to determine whether the New York labeling provisions are invalid under the Commerce Clause as well. Accordingly, we direct our Commerce Clause analysis only to the New York sign, menu and container provisions, subsections 3, 4 and 5 of section 63.[5/]

The Supreme Court has mapped our course quite clearly:

> Where [a state] statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. Huron Cement Co. v. Detroit, 362 U.S. 440, 443. If a legitimate local

> purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

The district court correctly determined that the New York law regulates evenhandedly. 581 F.Supp. at 670. The state requirements do not distinguish between alternative cheese products from in-state manufacturers and those from out-of-state manufacturers. And, to the extent that they indirectly advantage the dairy industry, that effect is not necessarily limited to in-state dairy producers.[6/]

Further, the local interest which the New York scheme was designed to protect is a legitimate one. States have traditionally acted to protect consumers by regulating foods produced and/or marketed within their borders. E.g., Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 144 (1963). Under federal law, foods packaged for wholesale or retail marketing are labeled to indicate that they fit into one of three categories: real cheese, alternative cheese that meets or exceeds federal nutritional guidelines or alternative cheese that falls below nutritional guidelines. New York has determined that patrons of food service establishments and restaurants -- heretofore wholly uninformed as to the composition of any cheese-like substance served to them -- are entitled to know at least whether they are buying real cheese or a cheese alternative. The record shows that health and nutrition

professionals strongly disagree about the intrinsic value of the federal nutritional guidelines applied to alternative cheese products. See, e.g., In re Considering the Adoption of Regulations Relating to Labeling and Notification Required Prior to the Serving of Imitation Cheese, Imitation Cheese Food and Products Containing Imitation Cheese or Imitation Cheese Food, J. App. at 45, 50 (rejecting federal government's nutritional equivalency arguments); Record of Administrative Rulemaking Proceedings in the Adoption of Imitation Cheese Labeling Regulations, vol. 2 at 557-59, Record Doc. #7 at 557-59 (reproducing Kotula & Briggs, "The Nutritional Aspects of Imitation and Substitute Foods," 46 Nutrition News, no. 1 at 1-3 (Feb. 1983), which rejects the premise of the federal government's nutritional equivalency arguments). The very existence of this controversy persuades us that New York's nutritional concerns are not unreasonable. In addition to promoting those concerns, the state requirements are intended to prevent deception and unfair competition, to promote honesty and fair dealing and to permit consumers to clearly discern whether they are buying real cheese or not. We believe that the sign, menu and container provisions effectuate a legitimate, local public purpose.

The final step of our Commerce Clause analysis requires us to balance the local interest served against the burden imposed on interstate commerce by the disputed sections. Interestingly, the federal government did not join in GMA's challenge to the sign, menu and container provisions. Neither did the operators of any

restaurants or food service establishments, though they are surely the persons most directly affected by these provisions.

The only evidence in the record establishing a connection between the provisions and interstate commerce comprises three affidavits.[7/] The affidavits, at bottom, claim but a single impact on commerce: restaurants and food service establishments will discontinue the use of alternative cheese products rather than comply with the sign, menu and container provisions. Of those filed, only the affidavit of Olindo DiFrancesco, President of Olindo's Food, Inc., really supports the alleged purchasing shift, J. App. at 401; the others are merely conclusory, see affidavit of George W. Cawman, J. App. at 201; affidavit of Thomas Brennan, J. App. at 417. Olindo's Food, Inc. distributes foods, including cheese and cheese alternatives to restaurants, pizza parlors and grocery stores. According to DiFrancesco, prior to passage of the New York law, most of the pizzerias that purchased from Olindo's Food used a mozzarella substitute. After the law's passage, however, sales of the cheese alternative began to decline. Naming two specific customers (representing thirty-seven pizza parlors) who discontinued such purchases, DiFrancesco averred that his sales of cheese alternatives have dropped from 12,000 to 2,000 pounds per week or approximately $7,500 per week. His losses have not been offset by increases in sales of real mozzarella. Ironically, Olindo's Food is located in New York State.

The facts are not disputed in this case. Thus, we accept that sales of cheese alternatives to food service establishments

have declined. But this decline is susceptible of at least two interpretations. One is that the sign, menu and container requirements are so onerous that food service establishments and restaurants are willing to use real cheese and thus forego the advantages of cheese substitutes, economic and otherwise, rather than comply. Equally probable, however, is that food service establishment operators and restauranteurs will not use less expensive cheese alternatives in place of real cheese if they have to disclose that use to customers.

GMA relies substantially on American Meat Institute v. Ball, 550 F.Supp. 285 (W.D. Mich. 1982), aff'd on other grounds sub nom. American Meat Institute v. Pridgeon, 724 F.2d 45 (6th Cir. 1984), for its Commerce Clause argument. That decision struck down a Michigan law that required federally inspected meats not in compliance with Michigan ingredient requirements to be accompanied by a prominent placard stating, in part, "The following products do not meet Michigan's high meat ingredient standards but do meet lower federal standards." Id. at 286 n.1. However, in that case the court found that the federal standards, in many respects, were actually higher than Michigan's and that the required placard was thus not only misleading but wrong. Accordingly, it held that the state law did not promote a legitimate state interest and, therefore, that it violated the Commerce Clause.

The New York sign, menu and container provisions do not produce such an inaccurate or misleading result that they fail to serve a legitimate state purpose. And although complying with the

sign posting requirement will certainly not enhance the decor of most restaurants, that negative is not a violation of the Commerce Clause. Indeed, consumers seeking low cholesterol foods may be benefited by the prominence of the signs. The disputed provisions here are the result of legislative choices. The arguments against the provisions "relate[] to the wisdom of the statute, not to its burden on commerce." Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 128 (1978). That wisdom is better reconsidered in Albany than Foley Square.

A state regulatory scheme "is not invalid simply because it causes some business to shift from a predominantly out-of-state industry to a predominantly in-state industry. Only if the burden on interstate commerce clearly outweighs the State's legitimate purposes does such a regulation violate the Commerce Clause." Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 474 (1981) (emphasis added). The disputed provisions place a relatively minor burden on commerce and advance an important state interest. We are not persuaded that the use of a term other than "imitation" or the posting of smaller signs would both serve the local interest and have a lesser effect on commerce. We therefore reverse the district court and hold that the sign, menu and container provisions, subsections 3, 4 and 5 of section 63, do not violate the Commerce Clause.

We draw additional support for our conclusion from the language of 21 U.S.C. § 25 (1982). That section provides, in part, that "imitation cheese[] or any substance in the semblance of . . .

cheese not the usual product of the dairy and not made exclusively of pure and unadulterated milk or cream, transported into any State . . . and remaining therein for use, consumption, sale, or storage" is subject to the laws of that state. Enacted to override judicial decisions that prevented states from prohibiting sales of oleomargarine, the statute "indicates a Congressional purpose not to hinder the free exercise of state power, except as it may be inconsistent with the federal legislation." Cloverleaf Butter Co. v. Patterson, 315 U.S. 148, 161 (1942). The sign, menu and container provisions are not inconsistent with federal legislation governing cheese alternatives because they address an area in which Congress has not acted. The expansiveness of 21 U.S.C. § 25 thus confers upon those provisions, if not a shield, at least a sturdy buffer against the Commerce Clause.

III. Equal Protection

GMA also alleged in its complaint that the sign, menu and container provisions violated the Equal Protection Clauses of the federal, U.S. Const. amend. XIV, § 1, and state, N.Y. Const. art. 1, § 11, constitutions. Because the district court held that the provisions were void under the Commerce Clause, it did not reach the equal protection issue. GMA's claim wholly unpersuasive.

As applied to this type of legislation, the federal and state guarantees of equal protection prohibit statutory classifications that embody distinctions not rationally related to the object of the legislation. Barry v. Barchi, 443 U.S. 55, 67 (1979); New

York v. Acme Markets, 37 N.Y.2d 326, 331-32, 372 N.Y.S.2d 590, 595 (1975). We have already discussed the legitimate interest advanced by the sign, menu and container provisions. We have stated our belief that those requirements, which distinguish between producers of real cheese and manufacturers of cheese alternatives, reasonably address New York's legitimate concerns. Accordingly, we conclude that the provisions establish classifications rationally related to the state's purpose and thus do not violate equal protection.

IV. Attorney's Fees

GMA also argues that, as a prevailing party on a 42 U.S.C. § 1983 (1982) claim, it is entitled to reasonable attorney's fees as authorized by 42 U.S.C. § 1988 (1982). We need not determine whether this litigation is even remotely related to the type in which Congress intended that attorney's fees be awarded. Our decision is mandated by the language of 42 U.S.C. § 1988, which leaves the decision whether to award fees solely to the discretion of the trial judge. Judge Duffy specifically denied GMA's request. 581 F.Supp. at 672. We see no abuse of discretion here.

CONCLUSION

To the extent that it held the labeling provisions of the New York statute, N.Y. Agric. & Mkts. Law § 63(1) & (2), and their accompanying regulations in violation of the Supremacy Clause, the decision of the district court is affirmed. Insofar as it held that the sign, menu and container provisions, N.Y. Agric. & Mkts. Law § 63(3), (4) & (5), and their accompanying regulations in

violation of the Commerce Clause, it is reversed. We affirm the denial of attorney's fees.

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FOOTNOTES

1/ Section 63, N.Y. Agric. & Mkts. Law, provides in its entirety:

1. Whenever the brand name or product designation of imitation cheese or imitation cheese food appears on a package, the brand name or product designation, whichever is larger, shall be immediately preceded, without intervening printed or graphic material by the word imitation and the name of the food imitated, in letters of the same color and on the same contrasting background and of equal size as the brand name or product designation, whichever is larger.

2. On the label of any product containing imitation cheese or imitation cheese food, the product designation shall be immediately preceded or followed by the words "contains imitation cheese" or "contains imitation cheese food" whichever is appropriate, in letters of the same color and on the same contrasting background and of equal size as the product designation.

3. Whenever imitation cheese or imitation cheese food is used in a product which is offered for sale for carry out or on premises consumption, a sign shall be prominently posted at the place of sale which states the product designation of the food followed immediately by the words "contains imitation cheese" or "contains imitation cheese food," whichever is appropriate. The letters on such sign shall be in block letters at least three inches in height and on a contrasting background which can be easily read by consumers under normal conditions of purchase.

4. Whenever any product which contains imitation cheese or imitation cheese food product is offered for sale on the menu of any service food establishment, the product designation on such menu shall be immediately followed by the words "contains imitation cheese" or "contains imitation cheese food", whichever is appropriate, in letters of equal size and on a contrasting background.

5. Whenever any imitation cheese or imitation cheese food product is placed on the tables or otherwise made available for use by customers in any service food establishment, the container of such product shall be conspicuously labeled "imitation cheese", or "imitation cheese food product".

6. The commissioner shall promulgate such rules and regulations as are necessary and appropriate to carry out the provisions of this section, including specific identification of imitation cheese and imitation cheese food.

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FOOTNOTES

2/ This outcome could be modified by the exercise of 21 C.F.R. § 101.3(e)(4)(iii):

> If the Commissioner concludes that a food is a substitute for and resembles another food but is inferior to the food imitated for reasons other than those set forth in this paragraph, he may propose appropriate revisions to this regulation or he may propose a separate regulation governing the particular food.

3/ Subsection (2) of 21 C.F.R. § 101.3(e) provides:

> A food that is a substitute for and resembles another food shall not be deemed to be an imitation provided it meets each of the following requirements:
>
> (i) It is not nutritionally inferior to the food for which it substitutes and which it resembles.
>
> (ii) Its label bears a common or usual name that complies with the provisions of § 102.5 of this chapter and that is not false or misleading, or in the absence of an existing common or usual name, an appropriately descriptive term that is not false or misleading. The label may, in addition, bear a fanciful name which is not false or misleading.

Subsection (3) further restricts the ambit of "imitation:"

> A food for which a common or usual name is established by regulation (e.g., in a standard of identity pursuant to section 401 of the act, in a common or usual name regulation pursuant to Part 102 of this chapter, or in a regulation establishing a nutritional quality guideline pursuant to Part 104 of this chapter), and which complies with all of the applicable requirements of such regulation(s), shall not be deemed to be an imitation.

FOOTNOTES

4/ , See section 63(1), supra note 1. The PPIA misbranding section, 21 U.S.C. § 453(h)(3), and the FMIA misbranding provision, 21 U.S.C. § 601(n)(3), both provide that a product is 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.

5/ Similarly, we do not address GMA's claim that the labeling provisions violate the Equal Protection Clause.

FOOTNOTES

6/ Some cheese alternatives contain a percentage of real cheese; many are made with dairy products. Thus, any disadvantage to the alternative cheese product manufacturers may have a similar impact on at least some segment of the New York dairy industry.

7/ The district court erroneously determined that interstate commerce would somehow be burdened because restauranteurs and other food service operators would be unable to determine whether items that they used in food preparation would require sign, menu or container disclosure. But because those items would presumably be labeled in accordance with federal requirements, the label would show that the item was not real cheese.