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DEPARTMENT OF LAW LETTER OPINION NO. 71-14-L (R-62)

REQUESTED BY: VERNON H. LASSEN
Commissioner
State Dairy Commission

QUESTION: Does A.R.S. § 3-663.B prohibit the use of the terms "cones", "shakes" or "malts" in the advertising and sale of a trade product as defined by A.R.S. § 3-661?

ANSWER: See body of opinion.

Since the time of their conception in 1904 at the St. Louis World's Fair, "cone(s)" have become associated with a real dairy product known as "ice cream". Likewise, in more recent years (confer Webster's International Dictionary), the term "shake(s)" or "malt(s)" or "malted(s)" has taken on a colloquial meaning (in America at least) which associates that term with milk shakes or beverages made from ice cream and/or milk. As such, they definitely are terms commonly used or associated with real products, as described in A.R.S. § 3-663.

The term "cone(s)", however, is a descriptive term which designates a sugar-wafer type eatable container. The term "shake(s)" does not describe a container, but describes the contents; usually a semi-liquid or semi-frozen drink by texture or composition. Today both of these terms have or are becoming associated with non-dairy or part dairy products, such as snow cones, ice milk cones and shakes and the more recent proliferation of trade products.

The main purpose of the Arizona Revised Statutes relating to trade products is to prevent fraud, deception or confusion among the public in the purchase of trade products which resemble real products. Full disclosure or revelation concerning the nature and constituent elements of trade products is mandatory under the Act. The sections do not per se

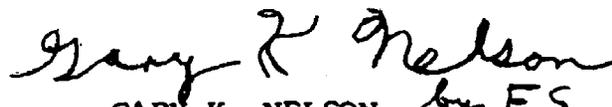
prohibit any type of trade products from being sold, but require only that all pertinent details as to composition and non-dairy nature be adequately revealed. A.R.S. § 3-663 does not require exclusive use as dairy associated terms in order to prevent their utilization in trade product advertising and sales.

Therefore, "shakes(s)", "malt(s)", "malted(s)" or other terms used to describe dairy base products may not be used by trade products manufacturers or retailers in advertising or sale of their products. This would not prohibit such persons from employing terms like "twistees" or "freezees" or other fanciful names. Labeling for such containers can comply with the statutes as would any other semi-permanent container made of paper or plastic.

The term "cone(s)", while associated with an ice cream cone, is also a term employed to describe a container and an eatable food product. Its use cannot be prohibited, but may be regulated. The term "cone(s)" can only be utilized for trade products with proper qualifications: i.e., a fanciful name plus the statement "available in cones" or "twistee cones, etc." Further, cones utilized to serve trade products may be placed in paper cones containing proper disclosures. The Commissioner may, by rule and regulation, determine the type and nature of containers acceptable and approve their name and ingredients statements.

Nothing contained herein is to be construed as prohibiting the use of these terms by manufacturers or retailers of dairy base products known as "iced milk". Nevertheless, all iced milk products must meet minimum standards and be fully disclosed as to their "iced milk" nature, pursuant to A.R.S. § 3-625.

Respectfully submitted,



GARY K. NELSON *by F.S.*
The Attorney General