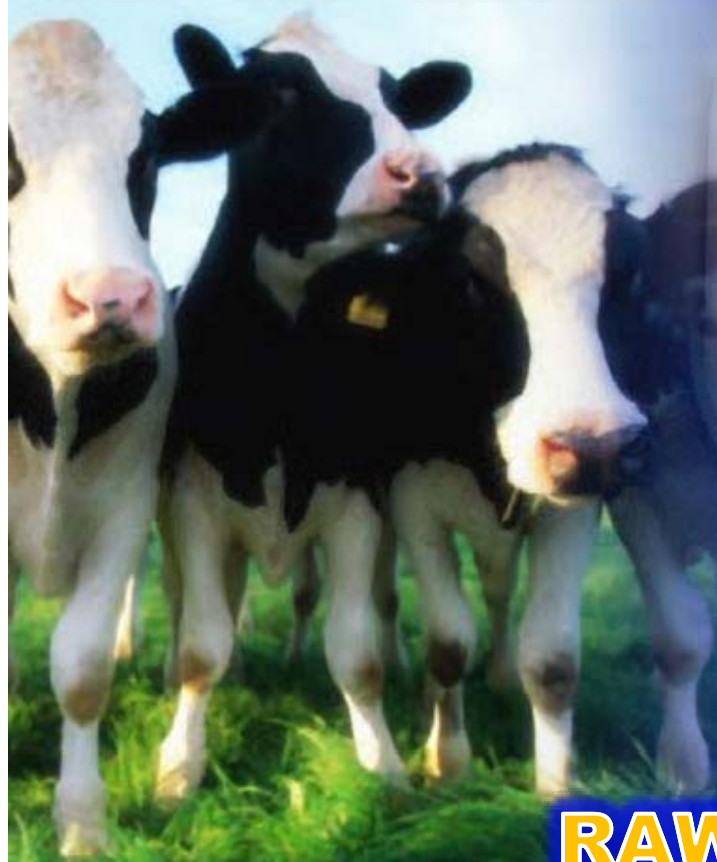




146th AVMA Annual Convention | July 11-14

AVMAconvenion
2009 seattle



Raw Milk Consumption

LEGAL IMPLICATIONS OF RAW MILK AND CASE STUDIES

William D. Marler, Esq.

MARLERCLARK
ATTORNEYS AT LAW, L.L.P., P.S.

Legal Implications



Strict Product Liability

The manufacturer of a defective product is liable if the defect rendered the product unreasonably dangerous, and the defective product caused the victim's injuries.



The Legal Standard: Strict Liability



The focus is on the product; not conduct.
A company is liable if:

- 1) The product was unsafe and thus defective, and
- 2) The defective product caused an injury

STRICT LIABILITY IS LIABILITY **WITHOUT**
REGARD TO FAULT

“Manufacturer”



- Many states exclude product sellers
- Non-manufacturers might have risk
- Working definition: entity that designs, constructs, or fabricates the product

Key Elements

- Milk is a “product” — raw or pasteurized
- *E. coli* O157:H7-contaminated milk is “unreasonably dangerous”
- Thus, the “manufacturer” – i.e. the dairy – is **strictly liable** for injuries caused



Related Issues

- Comparative fault
- Releases and Waivers
- Trade association liability
- Cow share arrangements



Comparative Fault

Personal injury “damages”
are reduced by plaintiff’s
share of fault



Examples of Comparative Fault

1. Consumer milks the cow and fails to follow sanitary measures
2. Consumer fails to refrigerate the raw milk
3. Consumer buys raw milk



Releases and Liability Waivers

1. Are they enforceable?
2. If so, what's the effect?

WAIVER

SUPREME COURT OF THE UNITED STATES

Supreme Court Case No. 05-5576

Paul Andrew Mitchell, Petitioner, v. ACK Time Warner Inc., et al., Respondents

I DO NOT DESIRE TO FILE A RESPONSE to the petition for a writ of certiorari unless one is required by the Court.

Please check one of the following boxes:

☐ Please enter my signature as Counsel of Record for all respondents.

☒ There are multiple respondents, and I do not represent all respondents. Please enter my signature as Counsel of Record for the following respondent(s):

Internet Outlier Solutions

I certify that I am a member of the Bar of the Supreme Court of the United States (Please explain if your name has changed since your admission):

Signature: Charles M. Stein / by permission

Date: July 27, 2003

(Type or print) Name: Charles M. Stein

☒ Mr. ☐ Ms. ☐ Mrs. ☐ Miss

Home Office, Internet Outlier Solutions, P.O. Box 8140

Address: 233 Twin Oak Drive, Suite 140

City & State: Redwood Shores, California Zip: 94065

Phone: 650-438-4188

A COPY OF THIS FORM MUST BE SENT TO PETITIONER'S COUNSEL OR TO PETITIONER IF PRO SE. PLEASE INDICATE BELOW THE NAMES OF THE RECIPIENTS OF A COPY OF THIS FORM. NO ADDITIONAL CERTIFICATE OF SERVICE IS REQUIRED.


SEE REVERSE FOR INFORMATION CONCERNING THE STATUS OF A CASE ON THE DOCKET.

CC: Paul Andrew Mitchell

Enforceability

- Rules differ from state to state
- Common elements of enforceability
 - **Conspicuous**—
e.g. waiver clause is not in “the fine print”
 - **Clarity**—e.g. waiver clause identifies the risk
 - **Meaningful opportunity to understand**—
e.g. the consumer has an opportunity to read and digest the terms of the contract

Legal Effect of Waivers

- 
- Enforceable waivers **may** bar claims for damages
 - Cannot waive an illegal act
 - But most outbreaks involve kids who did not sign the waiver

Can a parent sign away his child's right to sue?

Trade Association Liability:

- Trade associations can be held liable for consumer injuries
- The crux of trade association liability is whether consumers rely on the association's information and expertise
- This depends, in part, on the association's prominence

The "Price" of Weston A. Price's Prominence

A Campaign for
Real Milk
PASTURE-FED UNPROCESSED FULL-FAT

Americans!
Go for the
Real Thing!
Boycott counterfeits!
Vote with your
pocketbooks!
Join A Campaign for
Real Milk



Enter here
to find out
more about
Real Milk

A Campaign for Real Milk is a project of [The Weston A. Price Foundation](#).
For sources of Real Milk contact your [local chapter](#)
or visit our [WHERE](#) page.

WHY A Campaign for
Real Milk?

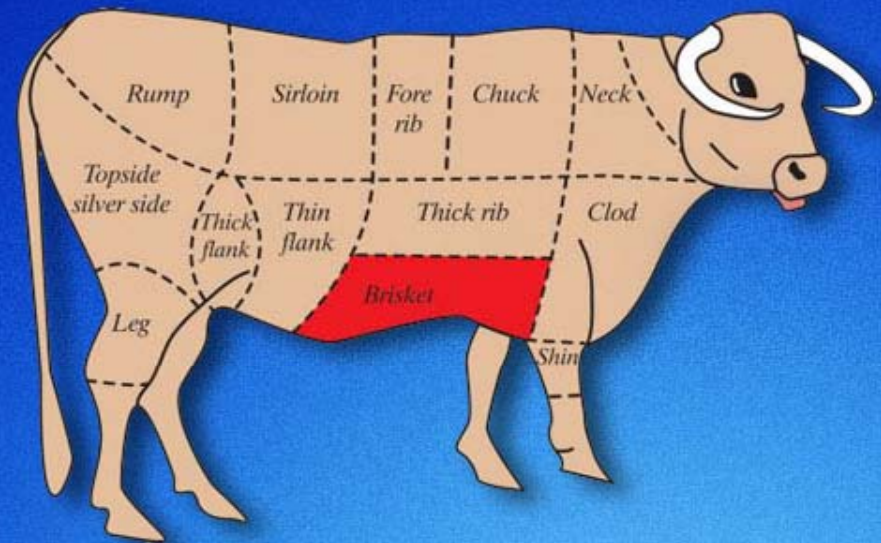
WHAT is
Real Milk?

WHERE can I find
Real Milk?

WHAT'S happening with
Real Milk?

Cow Share Agreements

- Agreements that seek to avoid bans on unlicensed sale of raw milk
- Instead of selling raw milk, the farmer sells a "portion of the cow"
- Not a valid interpretation of many States' licensing requirements



Cow Share = Offshore Tax Shelter

Case Just Finished – Organic Pastures

- *E. coli* O157:H7, September 2006
- 6 children with O157:H7 and/or HUS residing in 4 California counties; 5 PFGE matches
- Common exposure was consumption of raw dairy products from Organic Pastures
- Outbreak strain **NOT** found in product taken from store shelves and the dairy
- Farm + for O157 but different strain



Current Case – Town Farm Dairy

- *E. coli* O157:H7, Sept. 2008
- 5 persons with O157:H7 and/or HUS residing in Simsbury, Connecticut; All PFGE matches
- Common exposure was consumption of raw milk produced at Town Farm Dairy and sold at Whole Foods
- Cooperative dairy certified to sell raw milk in Connecticut
- Outbreak strain found in a cow at the dairy

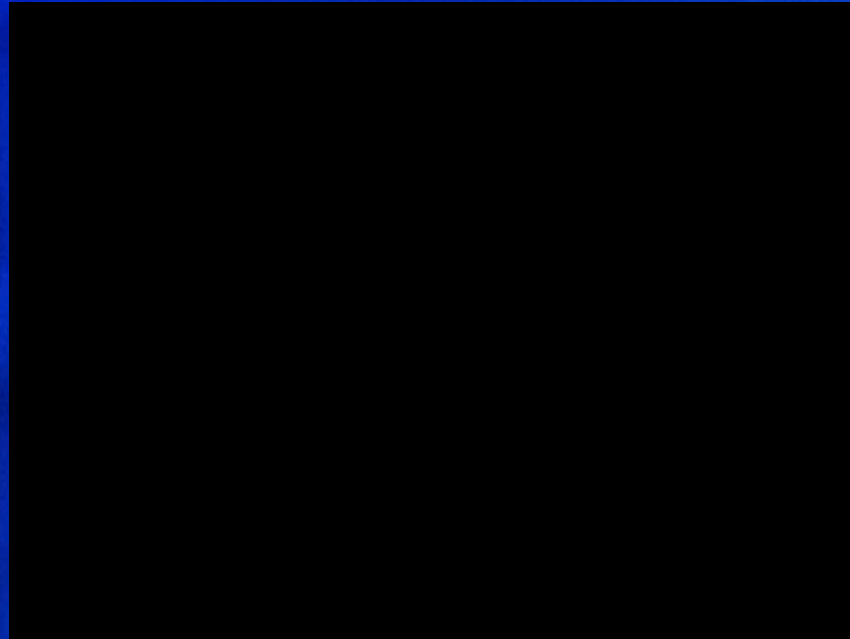


Current Case – Herb Depot



- *E. coli* O157:H7, April 2008
- 4 children with O157:H7 and/or HUS residing in 4 southwest Missouri counties; Most PFGE matches
- Common exposure was consumption of raw goat milk purchased at Herb Depot
- Illegal to sell raw milk in stores in Missouri
- Farm owner refused to provide investigators with milk samples for testing

Current Case – The Alexandre Eco Farms Dairy Raw Milk Outbreak



Questions?

William D. Marler
Marler Clark LLP, PS
6600 Columbia Center
701 Fifth Avenue
Seattle, Washington 98104
(206) 346-1890

www.marlerblog.com



MARLERCLARK
ATTORNEYS AT LAW, L.L.P., P.S.