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A Legal History of Raw Milk in the United States

Editor's note: The Journal recognizes the importance of providing readers with practical and relevant legal information through Legal Briefs columns. In every other issue of the Journal, this information is presented by one or more of several insightful and dedicated columnists: Bill Marler, Denis Stearns, Drew Falkenstein, Patti Waller, and David W. Babcock, all of the law firm Marler Clark.

The attorneys at Seattle-based Marler Clark, LLP, PS (www.marlerclark.com) have developed a nationally known practice in the field of food safety. Marler Clark represents people who have been seriously injured, or the families of those who have died, after becoming ill with foodborne illness during outbreaks traced to restaurants, grocery chains, and other food suppliers. The attorneys have litigated thousands of food contamination cases throughout the United States, many of them high-profile, including the Jack in the Box and Odwalla E. coli outbreaks; the Malt-O-Meal, Sun Orchard, and Chili's Salmonella outbreaks; the Senor Felix Shigella outbreak; and the Subway and Chi-Chi's hepatitis A outbreaks.

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Winston Churchill once said, "There is no finer investment for any community than putting milk into babies." Perhaps he was right, but at the turn of the 20th century, the process of pasteurizing milk was still in its infancy, and the safety of milk was a preeminent public health challenge. As people in the United States moved from the countryside into cities, their milk supply became increasingly unhealthy. Milk from cows in the country was transported farther and stored at higher temperatures than in the past. Milk produced closer to cities came from cows kept under crowded and unsanitary conditions, and, as a result, many city residents, especially children, increasingly became sick and died after consuming contaminated milk.¹

Public health reformers and activists of the late 19th century put milk at the top of their agenda, and the safety of the milk supply became a matter of regular public concern, discussed in newspapers, medical journals, public health circles, and the legal system. In a 1914 decision, the Illinois Supreme Court described the importance of the question, saying, "There is no article of food in more general use than milk; none whose impurity or unwholesomeness may more quickly, more widely, and more seriously affect the health of those who use it."²

Urban areas were the first to act, but by 1920, milk regulations had reached every part of the country, with regulations beginning to appear in state statutes. By 1939, the U.S. Public Health Service had drafted the Model Milk Health Ordinance and was actively promoting it for adoption at the local level.³

Milk producers and sellers attacked the first regulations as unconstitutional and unwarranted governmental limitations on their

rights to produce and sell their products as they wished. In response, local and state authorities relied on their intrinsic legal police power duty and authority to enforce the regulations. Presented with growing evidence of the potential danger created by the sale of raw milk, most courts found these regulations to be valid, as a legitimate exercise of the government's police power.

In the representative case of *Pfeffer v. Milwaukee*, milk dealers claimed that a Milwaukee ordinance requiring that all milk sold within the city be pasteurized would hurt their business, and that the ordinance was an invalid exercise of police power because it did not promote public health.⁴ The Wisconsin Supreme Court, however, disagreed:

Public health demands that milk and all milk products should be pure and wholesome. It is also common knowledge that milk containing deleterious organisms is an unsuitable article of food. Milk is known to be a product easily infected with germ life and to require special attention and treatment in its production and distribution for consumption as an article of food. Scientific knowledge concerning these facts and the best method of pasteurizing milk for human use in course of production and distribution as a pure and wholesome food is so generally understood and known that courts take judicial notice of these facts.

The regulation of raw milk sales in the first half of the 20th century proved to be a major public health success in this country. In 1938, milkborne outbreaks constituted approximately 25 percent of all disease outbreaks from contaminated food and water. As of 2002, that figure was down to about 1 percent.⁵

Outbreaks of illness linked to the consumption of contaminated milk continued, however. The ban on the sale of raw milk was not universal, because at the time no federal law or regulation prohibited the sale of raw milk on a national level. The regulatory scheme controlling the sale of raw milk on the state and local levels was spotty; some states banned the sale of unpasteurized milk, and some did not. In states that did not ban the sale of raw milk, some cities and counties did. The ability to sell and purchase raw milk was thus determined more by the social and political nature of the individual jurisdiction than by scientific knowledge.

Efforts to comprehensively ban the sale of raw milk continued. In 1973, the Food and Drug Administration (FDA) proposed and adopted a regulation requiring that all milk moving in interstate commerce be pasteurized, but "certified" raw milk became exempt from the regulation after FDA received an objection from a producer of certified raw milk. Between 1974 and 1982, FDA accumulated evidence of the association of certified raw milk with human disease, and, in 1982, began drafting a proposed regulation to ban all interstate sales of raw milk and raw-milk products. In an attached memorandum supporting the regulation, FDA concluded that consumption of raw milk "presents a significant public health problem" and that pasteurization was the only feasible way to ensure the safety of milk. The proposed regulation, however, was again not adopted.⁶

Public Citizen v. Heckler was filed on September 19, 1984.⁷ Public Citizen (a public service organization), the American Public Health Association, and others brought the suit to compel the Secretary of Health and Human Services (HHS) to ban all domestic sales of raw milk and raw-milk products. Claiming that federal officials had long known of serious risks to human health from consumption of raw milk, the plaintiffs contended that the Secretary had unreasonably delayed her decision, in violation of the Administrative Procedure Act. The court's opinion was explicitly direct, and its ruling simple:

The facts here speak for themselves and need little elaboration. Officials at the highest levels of the Department of Health and Human Services have concluded that certified raw milk poses a serious threat to the public health. Leading health organizations are unanimous in proposing that sales of any raw milk should be banned.... The Department's justification for its continued delay is lame at best and irresponsible at worst. "When the public health

may be at stake, the agency must move expeditiously to consider and resolve the issues before it." *Public Citizen Health Research Group v. Commissioner of Food and Drugs*, 740 F.2d at 34. The Department has wholly failed to meet that mandate here.

The court then ordered that the department publish a proposed regulation within 60 days of its order.

On August 10, 1987, FDA published a final regulation mandating the pasteurization of all milk and milk products in final package form for direct human consumption.⁸ This regulation banned the shipping of raw milk in interstate commerce and became effective September 9, 1987. In the *Federal Register* notification for the final rule, FDA announced a number of findings, including the following: "Raw milk, no matter how carefully produced, may be unsafe."⁹

Today, it is a violation of federal law to sell raw milk packaged for consumer use across state lines (interstate commerce), but each state regulates the sale of raw milk within the state (intrastate), and some states allow it to be sold. Nationally, the variations between applicable laws in individual states are bewildering. As of 2006, 25 states had laws making the sale of raw milk for human consumption illegal. In the remaining states, dairy operations may sell raw milk to local retail food stores or to consumers directly from the farm, or at agricultural fairs or other community events, depending on the state law. Restrictions vary, from specific requirements about labeling to requirements that milk be bought only with personal bottles, to requirements that the purchase of raw milk be made through cow shares exclusively, to permitting a sale only with a written prescription from a doctor, to sales of raw goat milk only, and to sales of a limited daily quantity only if made without advertising. Even in states that prohibit intrastate sales of raw milk, some people have tried to circumvent the law by "cow sharing" or "cow leasing."

Because raw-milk sales have not been outlawed altogether, outbreaks associated with raw milk continue to occur. There have been numerous documented outbreaks of *E. coli*, *Salmonella*, and *Campylobacter* infections directly linked to the consumption of unpasteurized milk in the past 20 years. CDC reports that from 1998 to 2005 there were 39 outbreaks in which unpasteurized milk, or cheese made from unpasteurized milk, was implicated as the cause. These outbreaks occurred in 22 states, and two were multistate outbreaks. An estimated 831 illnesses, 66 hospitalizations, and one death were associated with these outbreaks.¹⁰

In December 2005, following an outbreak that sickened at least 19 people in Washington State, FDA again publicly warned consumers to avoid drinking raw milk.¹¹

Government regulation of the food industry is commonly accepted as a means both of protecting public health and of maintaining public confidence in the food supply. Despite great success in reducing raw milk outbreaks during the past hundred years, however, government regulation and enforcement have not yet succeeded in wholly eradicating the sale of raw milk. The sale of raw milk continues to be legal, in some form or another, in almost half the country's states, and the attendant risk of raw milk-related outbreaks therefore also continues to be present. 🐄

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References

1. R. Wright, & P. Huck, "Counting Cases About Milk, Our "Most Nearly Perfect Food," 36 *Law & Soc'y Rev* 51 (2002).
2. *Koy v. City of Chicago*, 104 N.E. 1104 (1914).
3. "Counting Cases About Milk," *supra* at fn 1.
4. *Pfeffer v. Milwaukee*, 171 Wis. 514 (1920).
5. Grade "A" Pasteurized Milk Ordinance, 2001 Revision, Introductory Information, U.S. Food and Drug Administration, May 15, 2002. Available at <http://www.cfsan.fda.gov/~ear/pmo01.html>.
6. "Sale/Consumption of Raw Milk-Position Statement," U.S. Food and Drug Administration, Center for Food Safety and Applied Nutrition, March 19, 2003. Available at <http://www.cfsan.fda.gov/~ear/mi-03-4.html>.
7. *Public Citizen v. Heckler*, 602 F. Supp. 611 (1985).
8. See, Federal Register at 21 CFR Part 1240.61.
9. "Sale/Consumption of Raw Milk-Position Statement," *supra* at fn6.
10. Cindy Leonard, "On the Safety of Raw Milk (with a Word About Pasteurization)," Presentation to the National Conference on Interstate Milk Shipments NCIMS (2005). Available at <http://www.cfsan.fda.gov/~acrobot/milksafe.pdf>.
11. "FDA Warns Consumers to Avoid Drinking Raw Milk," *FDA News*, December 16, 2005. Available at <http://www.fda.gov/bbs/topics/NEWS/2005/NEW01278.html>.