



Farm-to-Consumer  
Legal Defense Fund®

## FTCLDF Case Updates

by Gary Cox, Esq. - March 8, 2011

Here is a review of some of the cases currently being handled by the Farm-to-Consumer Legal Defense (FTCLDF) starting with the lawsuit against FDA.

### **Lawsuit against FDA Interstate Raw Milk Ban**

FTCLDF has filed suit against the U.S. Food and Drug Administration (FDA) and its parent agency, Health and Human Services (HHS), claiming that FDA's regulation banning the interstate transportation of raw milk and raw dairy products for direct human consumption constitutes several violations of the United States Constitution and federal law. [Click here for more details on the FDA case.](#)

The Court has ordered FDA to answer questions regarding the application of the interstate ban in three scenarios [see [December Update](#)]; FDA has until mid March 2011 to provide its answers. In the meantime, the Fund has filed a status report with the Court every month. The Fund's status reports include, in part, scientific studies and statistics demonstrating the health benefits and safety of raw milk; information sheets for various drugs approved by FDA that identify the harmful effects of taking the drugs, like amnesia, depression, suicidal thoughts, heart failure, liver problems, life threatening allergic reactions, etc.; and expert testimony demonstrating that it is riskier for one to drive a car to obtain one's raw milk than it is to actually consume one's raw milk. In its February 2011 status report, the Fund presented the Court with statistics from HHS showing the thousands of deaths related to: drownings in bathtubs; falls from ladders-beds-wheelchairs-buildings-trees; obesity; abuse of alcohol/drugs; lawnmower accidents; dog bites; accidental firearms discharges, etc. The Fund will continue to file such status reports until FDA answers the questions.

### **Iowa Shareholder Lawsuit against the State of Iowa**

The Fund is representing non-members Plaintiffs, Charles Freitag and Mindy Slippy, who are consumer shareholders in an Iowa dairy. Plaintiffs have filed a complaint for declaratory judgment against the State of Iowa Department of Agriculture and Land Stewardship (IDALS), asking the Court three basic questions: (1) can they own their own cow; (2) can they drink the milk from their own cow; and (3) can they enter into a boarding agreement with a farmer who will tend to, take care of and manage their cow? [Click here for more details on the Iowa cowshare case.](#)

The State of Iowa has successfully argued to the Court that the identity of the anonymous Amish farmer who is tending to the Plaintiff's cow should now be identified. Plaintiffs have until March 9th to reveal this Amish farmer's identity. At that point, the parties will begin to schedule depositions.

### **GrassWay Organics Lawsuit & Zinniker Lawsuit against Wisconsin DATCP**

FTCLDF has filed suit against the State of Wisconsin Department of Agriculture, Trade and Consumer Protection (DATCP) on behalf of Grassway Organics Farm Store LLC, operated by Fund farmer members Kay and Wayne Craig, and on behalf of GrassWay Organics Association an investor in the LLC. The suit claims that under Wisconsin law, the sale of raw milk to the LLC and Association members is legal when the LLC holds the Grade A permit and the LLC owns the cows. This Dane County case involves DATCP's convoluted and constantly changing interpretation of the law as it pertains to the "incidental" sale of raw milk to a consumer. [Click here for more details on the GrassWay case.](#)

In addition, the Fund has also filed suit on behalf of members Mark and Petra Zinniker, as well as Nourished by Nature LLC and individuals Phillip Burns, Gayle Loiselle and Robert Karp. The Zinnikers have sold ownership interests in cows to Nourished by Nature LLC, to Loiselle, and to Karp and Burns is a member of the LLC. The plaintiffs are claiming in their suit against DATCP that they have the contractual right to sell and purchase interests in cows, the contractual right to tend to and manage those cows on behalf of the owners of the cows, and the right to enjoy the use of their property, including the use of the raw milk produced by the cows they own. [Click here for more details on the Zinniker case.](#)



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The Zinniker case has now been consolidated with the GrassWay case. Both cases will now proceed together in Dane County. The Fund has served DATCP with discovery requests and DATCP has provided its answers. The parties have been ordered to file summary judgment motions by April 2011 and the matter will be submitted to the Court by May 2011. Depending on how the Court rules on the summary judgment motions, the case may be over or it may be proceeding to trial later in the summer of 2011. In the meantime, discovery continues.

### **Fund Defends Bechard Family Farm against State of Missouri**

The Fund is defending Missouri dairy farmers Armand and Teddi Bechard of Bechard Family Farm in a civil action brought by the State of Missouri. Two undercover agents from the Springfield-Greene County Health Department have alleged they bought raw milk from the Bechards' daughters at a central distribution point. The State has filed for a permanent injunction. The county district attorney's office has also brought a criminal action against Armand Bechard for allegedly selling milk at a premise off the farm.

In the criminal case, Armand Bechard was found guilty by a lower court of operating a "retail food establishment" without a license and has appealed that conviction to a higher court. On Appeal, the Fund assisted Mr. Bechard in the preparation of his case and eventually had the case dismissed because the district attorney's office could not prove its case.

In the civil case, the Fund has deposed the county inspectors who allegedly "purchased" raw milk from the Bechards and has also deposed a representative from the Missouri Milk Board. The Milk Board representative admitted during her deposition that there are no statutes that regulate the Bechards' conduct. The Fund still needs to conduct the deposition of some laboratory personnel to question them about the validity of some test results of milk samples. The Fund will soon be filing a summary judgment motion with the Court seeking to obtain an order that disposes of the case in favor of the Bechards.

### **Fund Defends Breese Hollow Dairy against New York Ag & Markets**

In this case, the Fund represents dairy farmer David Phippen who has received letters from the New York State Department of Agriculture and Markets (Ag. & Mkts.) demanding the payment of civil penalties for alleged food adulteration because Mr. Phippen allegedly distributed "listeria contaminated" milk.

Ag. & Mkts. filed a motion for summary judgment that was opposed and the Court denied that motion. After the Fund indicated it wished to conduct the depositions of the laboratory personnel who analyzed Mr. Phippen's milk, Ag. & Mkts. went back to the Court seeking "clarification" of the entry that denied the summary judgment motion, claiming that the Court actually meant to grant a partial summary judgment on the issue of the presence of listeria even though there was nothing in the Court's entry indicating that was the Court's intent. The Court denied the motion seeking clarification and the Fund now anticipates it will proceed with the depositions of the laboratory personnel to get to the bottom of whether the laboratory followed proper protocols in conducting its analysis.

### **Fund Questions Meaning of Colorado's Herdshare Statute**

The Fund is acting on behalf of Meg Cattell, a herdshare operator in Colorado who has historically been distributing raw fluid milk and other raw dairy products to her shareholders under Colorado's statute that allows for herdshares. However, Ms. Cattell received a letter from Colorado's Department of Public Health and Environment (CDPHE) that claimed the herdshare statute allows the distribution of only raw fluid milk, not of raw dairy products.

Ms. Cattell disagreed with this interpretation; the Fund negotiated with CDPHE on Ms. Cattell's behalf; obtained affidavits from the Senate and House sponsors of the statute demonstrating it was the legislature's intent to allow the distribution of all raw dairy products; and submitted those affidavits to the



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Department. Not surprisingly, the Department did not agree with the sponsors of the statute and refused to honor the legislature's intent. Consequently, the Fund will be advising Ms. Cattell on her options.

### **Judge Finds against Morningland Dairy**

The Fund is representing Joe and Denise Dixon, owners of Morningland of the Ozarks, LLC, an artisanal cheese making facility located in Missouri. The State filed suit against Morningland, claiming that Morningland violated a "destruction" order and that it distributed "adulterated" cheese contaminated with listeria.

The Dixons denied the allegations; filed their answer to the State's complaint; and counterclaimed, seeking injunctions lifting the embargo and destruction orders, an order prohibiting the State from enforcing the embargo and destruction orders, and damages for the value of their cheese that has spoiled because of the embargo. A trial on the merits was conducted on January 11th and 12th and Morningland's witnesses included one of its owners, Denise Dixon, its cheese plant manager Jedadiah York, and two experts, Tim Wightman and Dr. Ted Beals. The parties subsequently filed post-trial briefs and the Court ruled against Morningland finding that its cheese was manufactured (1) from milk that came from cows afflicted with a disease and (2) under unsanitary conditions. The Court made an "inference" that since the only way to cure a herd of mastitis was to cull the herd, and since the Dixons culled their herd, there must have been mastitis in the herd. The Court also decided that "observations" made by a Milk Board inspector over two years amounted to "sanitary" violations even though that same inspector testified his observations did not rise to the level of sanitary violations. The Fund is advising Morningland to file various motions challenging the decision and the scope of the injunction that was issued.

### **Fund Represents Victim of Crop Dusting Overspray**

The Fund is representing Bruce McMahon, a consumer member of the Legal Defense Fund. Mr. McMahon grows his own food in Illinois and was the victim of a crop duster who oversprayed Mr. McMahon's fields with chemicals. The Fund has initiated negotiations with the insurance carrier of the crop duster and will attempt to achieve a resolution that will make Mr. McMahon whole, i.e., recover his damages and losses.

A claims examiner from the crop duster's insurance company has inspected Mr. McMahon's property and we will be submitting additional information to the claims adjuster detailing the basis of Mr. McMahon's damages.

### **Fund Represents Brigitte Ruthman in Massachusetts**

Brigitte Ruthman, a dairy farmer in Massachusetts, has asked for and the Fund has agreed to provide representation in her struggles against the Massachusetts Department of Agricultural Resources (MDAR).

MDAR is claiming that Brigitte needs a license to sell raw milk to her shareholders and the Fund is responding that Brigitte is not violating any applicable law. For the moment, MDAR is considering a request that it not engage in any enforcement action against Brigitte. As this matter develops that Fund may have to initiate litigation to protect the interests of Brigitte and her shareholders.

### **Minnesota Consumer Represented by the Fund**

Rae Lynn Sandvig, a consumer from Minnesota, has asked the Fund for representation in her struggles against the Minnesota Department of Agriculture. Rae Lynn was the object of a search warrant at her home for being a distribution center for the legal distribution of raw milk and other foods for members of a private cooperative. To the Fund's knowledge, this is the first time any governmental entity has executed a search warrant at the private residence of a citizen that was used as a distribution point for food.



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On Rae Lynn's behalf, the Fund met with representatives from the Department and argued that Rae Lynn has not violated any applicable law and that it will initiate litigation if necessary to protect Rae Lynn and her family from further harassment from the State. At this time, we are waiting on the outcome of the meeting with the Department and an indication from the Department on how it will be proceeding in this matter.

### **Criminal Charges Against Mark McAfee Now Dismissed**

The Fund had been representing Organic Pastures Dairy Company (OPDC) owner and its CEO Mark McAfee since mid 2008 when the United States brought criminal charges against both OPDC and Mr. McAfee. The United States had alleged that OPDC and Mr. McAfee had illegally sold raw dairy products in interstate commerce. The parties resolved the matter through a negotiated plea agreement in which criminal charges against both would be dropped if they complied with the terms of the plea agreement for 24 consecutive months. The 24-month period concluded in January 2011 without there being a violation of the agreement; on February 23, the court ordered that criminal charges against Mr. McAfee be dismissed. On February 25, the court issued a second order dismissing criminal charges against OPDC.

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*This article is intended for educational and informational purposes only and is not intended to be nor should it be construed as either a legal opinion or as legal advice.*

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#### **HYPERLINKS for PDF version:**

**Click here for more details on the FDA case** – Litigation, “FDA Interstate Raw Milk Shipment Ban” = <http://www.farmtoconsumer.org/litigation-FDA.htm>

**December Update** – FTCLDF Case Updates, 28 December 2010 = <http://www.farmtoconsumer.org/case-updates-122810.htm>

**Click here for more details on the Iowa cowshare case** – “Fund Represents to Iowa Cow Share Owners” = <http://www.farmtoconsumer.org/litigation-cow-share-owners.htm>

**Click here for more details on the Grassway case** – Litigation, “Wisconsin: GrassWay Organics Lawsuit against DATCP” = [http://www.farmtoconsumer.org/litigation-wi\\_grassway.htm](http://www.farmtoconsumer.org/litigation-wi_grassway.htm)

**Click here for more details on the Zinniker case** – Litigation, “Wisconsin: Zinniker Lawsuit against DATCP” = [http://www.farmtoconsumer.org/litigation-wi\\_zinniker.htm](http://www.farmtoconsumer.org/litigation-wi_zinniker.htm)