



What Is Life Without Risk? by Steve Bemis, Esq. – June 16, 2010

Consider the Grand Canyon. The views are spectacular. The dangers are palpable and present. Sometimes people fall—some of those trails can be your death if you're just bumped into by a passing jogger—but millions assume those risks every year. The risk goes with the beauty. Should the Park be closed? Should there be signs everywhere? Should the Park Service assume the duty of being a nanny to everyone who sets foot into that Park?

Every sign erected in the Park—every warning given by a Ranger—suggests there is a duty to shepherd the Park visitors to that extent, and even perhaps to some greater extent beyond which there is no logical end to the warnings which might be required.

Speaking of duties, can we forget lawyers? can we forget laws? As the sun rises, lawyers need laws—and to them—the more laws, the better. The more laws there are, the more opportunities for lawyers to argue that a boundary has been crossed, a duty has been breached, a crime committed. In a civil case, the prize is money; won not by proving scientific cause-and-effect, but by clearing the relatively low hurdle of 'more-likely-than-not', or 51% sure.

I have argued that there is a place for rules and regulations regarding raw milk. When sales occur in retail venues, far from the farm, the consumer is left to trust that the milk was produced in a clean, ethical manner. Retail producers can inspire consumer confidence by adopting the highest voluntary standards to ensure cleanliness of the product. Likewise for retail raw milk, there is also a role for product testing and process controls set by the state. The paths should be well-marked for the experienced and inexperienced alike.

In the world of private arrangements, however, the state and regulators should have no role. Voluntary standards are still important; however, if private parties wish to arrange for raw milk, or for any other locally-produced food, the government should not interfere. What can be more basic than the right to choose and obtain one's own food? Raw milk has its dangers if contaminated, just as any food; but once that basic risk is known, individuals should be free to choose.

There are many other considerations to be raised in the raw milk discussion. Last year, I offered up a few notions as set forth in the modestly-titled "[11 Great Thoughts](#)," which was originally contributed as comments on David Gumpert's blog, [The Complete Patient](#).

Here is the refreshed "11 Great Thoughts" as a contribution to the current raw milk dialogue:

1. Efforts to remove FDA from regulating the interstate commerce of raw milk just because it is not pasteurized include Mark McAfee's citizen petition, the federal bill HR 778, and the current FTCLDF lawsuit against FDA.
2. Consistency is needed in the identification (e.g., labeling) of raw milk and raw milk products coupled with standard warning language.
3. Health benefit claims in producer advertising should be allowed if limited to customer testimonials or peer-reviewed scientific papers.
4. Testing of raw milk should be required by state law for retail sales in which customers are likely not acquainted with the producer.



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5. Direct transactions between farmer and consumer, whether on farm or otherwise, need only be regulated by individual agreement. The same goes for farmers of herds smaller than a yearly average of [100] milking cows.
6. Parents are free to feed their children whatever foods they choose.
7. Absent of reckless behavior or actual knowledge of pathogens or other significant risk factors, farmers and individual providers of raw milk and raw milk products should have legal protection in litigation so long as proper product identification and warnings were effectively communicated. In the case of a minor, such information was effectively conveyed to the minor's parent or guardian.
8. Educational materials (directed to both farmers and consumers) for the safe production, processing and handling of raw milk and raw milk products should be developed and widely distributed.
9. All instances of disease outbreak should be approached in an open, collaborative, transparent and scientifically-rigorous neutral manner with a shared commitment by producers, consumers and public health officials to protect both the public health and the continued viability of accountable producers. Public health warnings which prove to have been unfounded, shall be followed by public health advisory followups which are communicated with the same level and extent of publicity as the initial warning, including exoneration of producers as appropriate.
10. Independent research (including analyses of testimonials and other real-life evidence as well as traditional reductionist studies) should be publicly funded to examine the nutritional value, environmental impacts of production, and the acute and chronic impacts on human health from raw and traditional foods and from industrially-produced foods.
11. As a counterweight to 'regulation-by-litigation', broader availability of insurance for producers and other risk-sharing and preventive approaches need to be developed - most importantly, to assure raw milk and raw milk products of the highest and safest quality, farmers should consider adopting voluntary production standards, testing protocols and should constantly strive to protect and develop herd health. The same could be accomplished by demonstrating years of problem-free operation.

In summary, regulatory officials need to recognize the difference between public versus private activities and respect that government really has no jurisdiction in the affairs of private production and consumption of raw milk. Likewise, officials need to acknowledge the right of consumers to contract the services of an agent. When a direct relationship between farmer and consumer is discovered, officials should back off.

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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. The opinions expressed in this article are those of the author and do not necessarily represent the views or the position of the Farm-to-Consumer Legal Defense Fund.*

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### HYPERLINKS for PDF version:

**11 Great Thoughts** - Steve Bemis, "11 Great Thoughts", reprint of 30 October 2009 comment = <http://www.farmtoconsumer.org/news/news-11-Great-Thoughts.html>

**The Complete Patient** – David Gumpert's blog = <http://www.thecompletepatient.com>