



## Farm-to-Consumer Legal Defense Fund Case Updates

by D. Gary Cox, Esq. - September 22, 2010

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

### Lawsuit against FDA Interstate Raw Milk Ban

The Farm-to-Consumer Legal Defense Fund 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 transport of raw milk and raw dairy products for direct human consumption constitutes several violations of the United States Constitution and federal law. After it was sued by the Fund and several of its members, FDA filed a motion for the Court to dismiss the case on all counts.

In its motion FDA claimed, in part, that (1) none of the plaintiffs had suffered an injury and therefore they lacked "standing;" (2) because FDA had not enforced the interstate ban against any of the plaintiffs and none of them had suffered any "injury" their claims were "ripe" for review; and that (3) none of the plaintiffs had first petitioned FDA for a change in the rule or, in other words, had first "exhausted" their "administrative" remedies, something that FDA claimed is required before a lawsuit can be filed in court.

On August 18, 2010, the Court disagreed on all of these issues, ruled in the Fund's favor, and denied FDA's motion on those issues. However, the Court did not rule on plaintiffs' constitutional claims for the reason that certain "questions *ante*" needed to be answered before the Court would consider plaintiffs' constitutional claims, i.e, their right to travel with raw milk in their possession and their right to consume and feed their children the foods of their choice. Instead, the Court gave the parties the option of having FDA make an "initial administrative determination" on the following questions: whether the interstate ban applies to and proscribes the conduct of

- (1) persons who travel from one state, where it is not legal to purchase raw milk, to another state, where it is legal to purchase raw milk, who then legally purchase raw milk, and then return to the original state where they consume the raw milk themselves or give it to their friends or family members; or
- (2) a principal and agent who agree that the agent will obtain raw milk out-of-state, where it is legal to do so, and to deliver it to the principal in the principal's home state, where sales of raw milk are not permitted, where the principal then consumes the raw milk or gives it to their friends or family members; or
- (3) a producer of raw milk who sells raw milk in a state where it is legal to do so in an intrastate transaction to persons that he knows are from out of state.

The parties filed a status report with the Court on September 17, 2010, requesting that the Court refer these questions to FDA and that FDA have six months to provide an answer. On the same day, the court issued an order granting the request. Depending on how FDA answers these questions, the Fund anticipates that the case will either proceed to the discovery phase of the case or that FDA will admit that the interstate ban does not apply to the three situations described above.

[Click here for more details on the FDA case.](#)



## Farm-to-Consumer Legal Defense Fund Case Updates

by D. Gary Cox, Esq. - September 22, 2010

### Missouri Civil Action against Bechard Family Farm

FTCLDF 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 location off the farm premises. On August 20 a Springfield Municipal Court judge found Armand Bechard guilty for operation of a food establishment without a permit. On August 30, the judge ordered that Bechard be fined \$250 dollars. Armand, who is being represented by local counsel in the criminal case, has appealed the judgment.

On the civil side of matters, the State of Missouri has answered the Fund members' Bechard's interrogatories and request for production of documents. Those answers to interrogatories will form the basis of an eventual motion for summary judgment to be filed by the Bechards. In addition, the Fund will soon be conducting depositions of several Missouri Milk Board individuals and certain laboratory personnel to further marshal the evidence in support of its motion for summary judgment.

### Iowa Shareholder Lawsuit

FTCLDF has brought a suit against the State of Iowa Department of Agriculture and Land Stewardship (IDALS) on behalf of two consumers, Charles Freitag and Mindy Slippy who are shareholders in Iowa. The suit claims that it is legal to own a cow, that it is legal to drink the milk from one's own cow, that it is legal to board one's cow at the farm of a dairy farmer, and that it is legal to enter into a contract with a dairy farmer to have the farmer tend to, manage and take care of the cow on behalf of the owner.

The case is currently in discovery with the two Plaintiffs having provided their answers to the State of Iowa's discovery requests. The State was apparently not satisfied with their response and has asked the Fund for supplemental answers. The parties are in the process of resolving those allegedly "unacceptable" answers. The Fund anticipates that it will soon be serving its own set of discovery requests on the State of Iowa and that before the year is out depositions of Iowa state employees will be scheduled.

### Herdshare Lawsuit against Wisconsin DATCP

In this case, Fund members Mark and Petra Zinniker have sold interests in cows to Nourished by Nature, LLC and to individuals Gayle Loiselle and Robert Karp. These plaintiffs are claiming in their suit against the Wisconsin Department of Trade, Agriculture and Consumer Protection (DATCP) that they have the contractual right to sell 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.

DATCP asked the Court to transfer the case to Dane County, Wisconsin, where the Fund has filed another separate yet different suit against DATCP. The Court transferred the case to Dane County and this case is now the subject of a DATCP motion to consolidate this case with another case that is currently pending before a court in Dane County, Wisconsin. (See the Grassway Organics case



## Farm-to-Consumer Legal Defense Fund Case Updates

by D. Gary Cox, Esq. - September 22, 2010

below). Thus, this case now resides in Dane County and it remains to be seen whether it will be consolidated with the Grassway Organics case or whether it will remain separate from that case.

### Grassway Organics 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 of Grassway Farm who along with members of Grassway Organics Association are investors in the LLC. The suit claims that under Wisconsin law, the sale of raw milk to LLC members is legal when the LLC holds the Grade A permit and owns the cows. DATCP has filed a motion for judgment on the pleadings; the Fund has opposed that motion, and the matter is under advisement before the Dane County court.

DATCP has also asked that the case of Mark and Petra Zinniker [see the Herdshare Lawsuit above], which was transferred by the Walworth County court to a court in Dane County, be consolidated with this case of Grassway. The Fund has opposed DATCP's motion to consolidate, arguing that the facts and legal issues of the two cases are completely different.

The Fund anticipates that the Dane County court will deny the motions to consolidate and for judgment on the pleadings and that the Grassway and Zinniker cases will proceed separately in two different Dane County courts before two different Dane County judges.

[Click here for more details on the Grassway case.](#)

=====

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

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

**Click here for more details on the Grassway case** – News: FTCLDF Files Suit over Raw Milk in Wisconsin = <http://www.ftcldf.org/news/news-18Dec2009.html>