



Raw Milk Battle Continues in Wisconsin

by Elizabeth Rich, Esq. - October 20, 2010

Battle lines between Wisconsin farmers and the Department of Agriculture, Trade and Consumer Protection (DATCP) have been drawn in two lawsuits. The first, brought by the FTCLDF, GrassWay Organics farm, and members of the Association that obtain milk from the farm, alleges that DATCP's interpretations of state statutes governing sale and distribution of raw milk are arbitrary and capricious, and that under well-established Wisconsin corporate law, GrassWay Association members have a bona fide interest in the entity that holds the milk producer license. The suit further challenges DATCP's jurisdictional authority to regulate the farm store, which is a private, members-only entity.

The second case was brought by the FTCLDF, Zinniker Farm, and individual owners of cows on the farm. The individuals seek declarations from the Court confirming that (i) they are entitled to own personal property in the form of a cow; (ii) they are entitled to own, ingest and use food produced by their cow; (iii) they are entitled to enter into a boarding contract with a farmer to have the farmer care for their cow; and (iv) such conduct is not a violation of Wisconsin law governing raw milk. The Zinniker case also raises several constitutional issues, including freedom of association and the right to privacy, which the plaintiffs allege includes the fundamental right to be free from governmental interference with one's bodily and physical health.

Despite government challenges, the two pending lawsuits are moving forward. Most recently, on October 6, Dane County Judge Fiedler ruled that the GrassWay and Zinniker cases should be consolidated but granted our request for a six-month discovery period extending into April 2011. We are now proceeding to use the discovery process to gather information through written interrogatories and depositions.

Our goal is to present the Court with a complete record upon which a reasoned decision can be based. The State is seeking summary disposition of the case without any type of evidentiary hearing. One of the key issues is the extent to which DATCP may exercise unfettered discretion in its interpretation and enforcement of laws and agency rules regulating unpasteurized milk. We maintain that fundamental Constitutional principles—and just plain common sense—require that the agency's actions be subject to judicial checks and balances.

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Of course, DATCP does have some discretion in how it exercises its regulatory authority and how it allocates its enforcement resources, no matter how strange those decisions may seem. One such strange decision was revealed in the summer of 2009, when a Madison television station reported that of 15,000 consumer complaints sent to the agency during the past year and a half, only one resulted in a formal administrative action. The vast majority of the complaining consumers received no contact from the agency at all, even in particularly

egregious cases. One roofing company was named in 127 complaints—yet no action was taken by DATCP against the company. In a letter sent to one of the roofing company's victims, the agency said it could provide no help, citing the "huge expense to investigate" and the agency's "lack of staff." This leaves those of us familiar with the agency's extraordinary dedication of resources to the raw milk wars scratching our heads. Indeed, during the spring and summer of 2009, DATCP conducted extensive undercover investigations of numerous small Wisconsin farms suspected of distributing



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raw milk to those wishing to purchase it. Our open records review revealed that DATCP employees spent hundreds of hours infiltrating private buying clubs, visiting the farms to make “buys,” filing inspection reports, conferring on their plan of attack, sending many threatening letters, and ultimately bringing formal administrative actions in at least five cases.

Why DATCP would choose to expend so many resources pursuing hard-working, honest farmers instead of bringing to justice companies that may have bilked hundreds of consumers—many of them senior citizens on fixed incomes—out of their life savings for faulty home improvement projects is anyone’s guess. (One guess, suggested by the presence of nine—count ‘em—FDA agents and attorneys on DATCP’s monthly raw milk telephone conference calls and other email correspondence obtained in public records reviews, is that DATCP is acting like a puppet whose strings are pulled by the FDA.) Ultimately, however, the law doesn’t allow us to second-guess the agency’s expenditure of resources. Our focus is on what checks we can impose on DATCP’s actions: (i) to require that the agency make determinations that are not arbitrary and capricious; (ii) to require that the agency not exceed the authority granted it by the laws of the State; (iii) to require that the agency respect and honor the Constitutional rights of citizens of the State; and (iv) to require that the agency respect and honor the property rights of citizens of the State.

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We look forward to our day in court.

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HYPERLINKS for PDF

GrassWay – Litigation page for GrassWay Organics case in Wisconsin = http://farmtoconsumer.org/litigation-wi_grassway.htm

Zinniker – Litigation page for Zinniker case in Wisconsin = http://farmtoconsumer.org/litigation-wi_zinniker.htm

five – Pete Kennedy, “How DATCP Denies Raw Milk Consumers Their Rights”, 10 February 2010 = <http://www.ftcdf.org/news/news-10feb2010-wi.htm>