



Farm-to-Consumer Legal Defense Fund Case Updates

by D. Gary Cox, Esq. - December 28, 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

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 transport 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.](#)

FDA filed a motion to dismiss the complaint which the Court had denied in part while reserving judgment on the remainder. Shortly after the court's decision, the parties filed a status report with the Court, suggesting that the Court refer some questions to the FDA that would impact how the case would go forward. The Court did so on September 17th and gave the FDA six months to answer the following questions:

Does FDA's ban against the interstate distribution of raw milk apply to or 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.

Until FDA answers these questions, the parties are required to file monthly status reports with the Court. The Fund has filed such status reports in [October](#) and [November](#). Each of the Fund's status reports includes scientific studies and statistics demonstrating the health benefits and safety of raw milk. The Fund will continue to file such status reports until FDA answers the questions above.

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.

Plaintiffs, Charles Freitag and Mindy Slippy, in this case are not members of the Fund; yet they are consumer shareholders in an Iowa dairy who are represented by the Fund. Plaintiffs have filed a complaint for declaratory judgment, 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?

The parties have engaged in discovery and the State is demanding the identity of the anonymous farmer who is tending to the Plaintiff's cow. Plaintiffs have objected to identifying their farmer, arguing it is not relevant to the issue in the case and that if identified the farmer will then be



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harassed by the State. The State has asked the Court for an Order compelling the identity of this farmer and a hearing has been scheduled for January 2011 to address the matter.

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 Gayle Loiselle and Robert Karp. The Zinnikers have sold ownership interests in cows to Nourished by Nature LLC, to Loiselle, and to Karp. 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.](#)

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.

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 premises off the farm.

In the criminal case, Armand Bechard was found guilty of operating a "retail food establishment" without a license and has appealed that conviction to a higher court. 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 Bechard's 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.

New York Agriculture & Markets Civil Action against Breese Hollow Dairy

In this case, the FTCLDF 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



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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. The Fund then indicated it wished to conduct the depositions of the laboratory personnel who analyzed Mr. Phippen's milk when Ag. & Mkts. went back to the Court seeking "clarification" of the entry that denied the summary judgment motion. Ag. & Mkts. is now claiming that the Court actually meant to grant a partial summary judgment on the issue of the presence of listeria even though there is no such indication in the Court's entry that was the Court's intent. Once this unfounded claim is resolved, the Fund 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.

Colorado Herdshare Statute Being Called into Question

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. Recently, however, Ms. Cattell has received a letter from the Colorado Department of Public Health and Environment (CDPHE) which claims that the herdshare statute allows the distribution of only raw fluid milk, not raw dairy products. Ms. Cattell disagrees with this interpretation and the parties are in the process of negotiating a resolution of this matter.

The Fund is negotiating with CDPHE on Ms. Cattell's behalf and has obtained affidavits from the Senate and House sponsors of the statute that will inform CDPHE of the intent behind the legislation that legalized herdshares in Colorado in 2005.

Morningland Dairy Goes on the Offensive

The Fund is representing Joe and Denise Dixon, owners of Morningland of the Ozarks, LLC, an artisanal cheesemaking facility located in Missouri. The State has filed suit against Morningland, claiming that it has violated a "destruction" order and that it has distributed "adulterated" cheese contaminated with listeria. The Dixons deny the allegations and have filed their answer to the State's complaint. The Dixons have also counterclaimed and are seeking injunctions lifting the embargo and destruction orders, are seeking an order prohibiting the State from enforcing the embargo and destruction orders, and are seeking damages for the value of their cheese that has spoiled because of the embargo.

Because the Dixons have had their cheese "embargoed" and with the passage of time their inventory of cheese (which is their livelihood) spoils, they have convinced the Court that this matter should be heard at the earliest possible moment. Consequently, a trial on the merits in this matter has been scheduled for January 2011. In the meantime, the Fund has taken the deposition of the State's "expert" and got that expert to admit that, at this time, he does not have sufficient information to render an expert opinion on whether the Dixon's cheese does or does not present a threat to human health. Additional depositions of the State's and the Fund's witnesses are being scheduled, and the State has answered the Fund's first and second sets of discovery requests. [Click here for background on the Morningland case.](#)

Fund Represents Victim of Crop Dusting Overspray

The Fund is representing Bruce McMahan, a consumer member of the Legal Defense Fund. Mr. McMahan grows his own food in Illinois and was the victim of a crop duster who oversprayed Mr. McMahan's fields with chemicals. The Fund has initiated negotiations with the insurance carrier of



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the crop duster and will attempt to achieve a resolution that will make Mr. McMahon whole, i.e., recover his damages and losses. This is the first time the Fund has represented an individual in a case like this and if successful may prove of value in other similar cases.

Brigitte Ruthman Now Being Represented

The Brigitte Ruthman, a dairy farmer in Massachusetts, has now 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 distribute raw milk to shareholders in the cowshare program she operates. 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.

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 (MDA). Rae Lynn was the object of a search warrant at her home for being a distribution center for raw milk and other foods for members of a private cooperative. [Click here for more details.](#)

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. The Fund will be engaging in a dialogue with MDA in an effort to convince the agency that Rae Lynn has not violated any applicable law.

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HYPERLINKS for PDF version:

Click here for more details on the FDA case – Litigation page, "FDA Interstate Raw Milk Shipment Ban" =

<http://www.ftcldf.org/litigation-FDA.htm>

Click here for more details on the GrassWay case – Litigation page, "Wisconsin: GrassWay Organics Lawsuit against DATCP" =

http://www.ftcldf.org/litigation-wi_grassway.htm

Click here for more details on the Zinniker case – Litigation page, "Wisconsin: Zinniker Lawsuit against DATCP" =

http://www.ftcldf.org/litigation-wi_zinniker.htm

Click here for background on the Morningland case – Action alert, "Cheesemakers Under Attack" =

<http://www.farmtoconsumer.org/aa/aa-9november2010.htm>

cowshare program – News excerpt, "Farmer, Mass. in milk tussle" published in *Berkshire Eagle* =

<http://www.ftcldf.org/news/news-8november2010.htm#3>

Click here for more details – "Minnesota: MDA Considering Criminal Prosecution of Consumer" =

<http://www.ftcldf.org/swarms/mn-mda-consumer-kennedy.htm>