



FDA's Response to FTCLDF Suit over Interstate Raw Milk Ban

by Pete Kennedy, Esq. - May 6, 2010

On April 26, the United States Food and Drug Administration (FDA) submitted its response to a lawsuit filed earlier this year by the Farm-to-Consumer Legal Defense Fund (FTCLDF). The FTCLDF lawsuit claims that the federal regulations (21 CFR 1240.61 and 21 CFR 131.110) banning raw milk for human consumption in interstate commerce are unconstitutional and outside of FDA's statutory authority as applied to FTCLDF's members and the named individual plaintiffs in the suit. In its answer to the complaint, FDA made its position on the issue of 'freedom of food choice' a part of the public record. FTCLDF has until June 14 to file a reply to FDA's response.

The agency has long opposed 'freedom of food choice' but its response to the FTCLDF complaint represents FDA's strongest public statement yet on the freedom to obtain and consume the foods of one's choice.

FDA's Views on Freedom of Choice

Here are some of FDA's views expressed in its response on 'freedom of food choice' in general and on the right to obtain and consume raw milk in particular:

- "Plaintiffs' assertion of a new 'fundamental right' to produce, obtain, and consume unpasteurized milk lacks any support in law." [p. 4]
- "It is within HHS's authority . . . to institute an intrastate ban [on unpasteurized milk] as well." [p. 6]
- "Plaintiffs' assertion of a new 'fundamental right' under substantive due process to produce, obtain, and consume unpasteurized milk lacks any support in law." [p.17]
- "There is no absolute right to consume or feed children any particular food." [p. 25]
- "There is no 'deeply rooted' historical tradition of unfettered access to foods of all kinds." [p. 26]
- "Plaintiffs' assertion of a 'fundamental right to their own bodily and physical health, which includes what foods they do and do not choose to consume for themselves and their families' is similarly unavailing because plaintiffs do not have a fundamental right to obtain any food they wish." [p. 26]
- FDA's brief goes on to state that "even if such a right did exist, it would not render FDA's regulations unconstitutional because prohibiting the interstate sale and distribution of unpasteurized milk promotes bodily and physical health." [p. 27]
- "There is no fundamental right to freedom of contract." [p. 27]

The Fight for Food Freedom

Growing numbers of people in this country are obtaining the foods of their choice through private contractual arrangements such as buyers' club agreements and herdshare contracts. FDA's position is that the agency can interfere with these agreements because, in FDA's view, there is no fundamental right to enter into a private contract to obtain the foods of choice from the source of choice. As for the agency's contention that there is no fundamental right to obtain any food, including raw milk, here is what the 'substantive due process' clause of the Fifth Amendment to the United States Constitution provides: no person shall "be deprived of life, liberty, or property, without due process of law." Obtaining the foods of your choice is so basic to life, liberty and property that it is inconceivable that the 'right of food choice' would not be protected under the Constitution but FDA is saying "No".

Read FDA's response to FTCLDF complaint –

Posted at <http://www.ftcldf.org/litigation/ey100426--ds%20mtd%20memo%20in%20support.pdf>