



Farm-to-Consumer
Legal Defense Fund®

FTCLDF Case Updates

by Gary Cox, Esq. – December 9, 2011

Here is a review of some of the cases currently being 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 transportation of raw milk and raw dairy products for direct human consumption constitutes several violations of the United States Constitution and federal law.

The FDA has filed a renewed motion to dismiss which the Fund has opposed. FDA is arguing, in part, that we do not have constitutional rights to carry raw milk across state lines or to consume raw milk after transporting it across state lines. We are waiting on a ruling from the Court on FDA's renewed motion to dismiss.

In addition, the Fund has filed a motion for summary judgment that could dispose of the case without having to proceed to trial. The Fund is arguing in its summary judgment motion, in part, that we have do have constitutional rights to carry raw milk across state lines and to consume raw milk after transporting it across state lines. We are waiting on a ruling from the Court on the Fund's motion for summary judgment. If the Fund is successful in its suit, citizens and their agents would be able to cross State lines with packaged raw milk and other raw dairy products in their possession, and would be able to consume those raw dairy products in their States of residence.

On November 1, 2011, FDA issued a press release and stated it had no intention of bringing an enforcement action against any consumer who traveled across state lines with raw milk in their possession for their own consumption. This recent press release constitutes a change in FDA's position, whereby FDA previously informed the court that although a consumer who crosses state lines with raw milk in their possession would be in violation of 1240.61, FDA would reserve to itself the discretion of whether the facts warranted an enforcement action.

Because FDA has now changed its position, the Fund filed motions with the court, seeking to include the FDA press release as part of the record, seeking to amend its brief in support of its motion for summary judgment, and seeking to amend its brief in resistance to FDA's renewed motion to dismiss, arguing that FDA's change in position was pertinent to the issues in the case. The court agreed and stated "I conclude that the press release and arguments about its impact are clearly relevant to this litigation." FDA has filed a response to the Fund's amended brief, claiming it has not changed its position.

Iowa Shareholder Lawsuit against the State of Iowa

Plaintiff Mindy Slippy in this case is not a member of the Fund. However, she is a consumer shareholder in an Iowa dairy and the dairy is represented by the Fund. Ms. Slippy has filed a complaint for declaratory judgment, asking the Court three basic questions: (1) can she own her own cow; (2) can she drink the milk from her own cow; and (3) can she enter into a boarding agreement with a farmer who will tend to, take care of and manage her cow?

The State has filed a motion for summary judgment claiming that Ms. Slippy does not have standing to bring the suit, that Ms. Slippy's contracts with her farmer constitute an "illegal sale" of raw milk, and that the State's actions do not constitute an interference with her contracts. We have opposed that motion and await a ruling from the Court.



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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.

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.

The Court issued a ruling stating that the Plaintiffs constitutional arguments on right to privacy, right to contract and right to own property did not have any merit and that all of the Plaintiffs are violating applicable law by selling raw milk without a license.

In the GrassWay portion of the case, we filed a motion to reconsider because the Court was under the impression that zero percent of the milk produced by GrassWay went to the "human food chain" when in fact 90% of the milk went to the public with only 10% of the milk going to the GrassWay shareholders. That motion to reconsider remains before the Court and we await a ruling.

In the Zinniker portion of the case, we filed a motion for clarification asking whether the right to own property included the right to own a cow, whether the right to privacy included the right to consume the milk from one's cow, and whether the right to contract included the right to board one's cow at the farm of a farmer. The Court answered "no" to all of these questions and the Zinnikers have appealed this decision.

Fund Defends Bechard Family Farm against State of Missouri

The Fund 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 parties conducted depositions in this case back in August and November 2010; and there has been no activity in the case since then.

Fund Defends Breese Hollow Dairy against New York Ag & Markets

In this case, the Fund 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 penalties for alleged food adulteration because Mr. Phippen allegedly distributed "listeria contaminated" milk. The parties have exchanged discovery, including answering interrogatories and producing documents. Based on the documents produced by the Department, we wish to conduct a deposition of one of the Department's witnesses. The Department objected so we have to file the appropriate motion. The Department has indicated it will be opposing that motion and then we will have to wait for the Court to issue a ruling on the motion.



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Judge Finds against Morningland Dairy

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

After trial, the Court found that Morningland had produced contaminated cheese that was properly embargoed. Because of this, the Court dismissed Morningland's counterclaims. Subsequently, the State attempted to enforce its judgment and we filed a motion to stay pending appeal, which was granted. The State also attempted to obtain sales records from Morningland and we defended that action, arguing that no such records exist because Morningland no longer sells any cheese. That issue remains unresolved. At this time, Morningland has filed a notice of appeal of the trial court's decision and is in the process of preparing a transcript of the trial court's proceedings for purposes of completing the record on appeal.

Virginia Meat Broker Runs Afoul of Paperwork Requirements

Brett Wilson, owner of Horse and Buggy meats, has been represented by the Fund in his struggles with the Virginia Department of Agriculture and Consumer Services. The Department was claiming that Brett was selling meat (beef and pork) without first having that meat inspected. The Department eventually brought five criminal charges against Brett in Albermarle County (Charlottesville) and three separate criminal charges in Henrico County (Richmond). All of the charges are misdemeanors.

The Fund negotiated a settlement with the Albermarle county prosecutor whereby Brett pled guilty to two of the charges, agreed to pay a \$500 fine per each charge, and the prosecution agreed to drop the other three charges and not to seek jail time, restitution or probation.

Brett's Henrico County charges remain pending, but we may have achieved a plea bargain whereby Brett would plead guilty to one of the charges, pay a \$250 fine, and the prosecution would drop the other two charges and agree not to seek restitution, jail time or probation.

Michael Hulme/Evergreen Acres Challenges Applicability of California's Milk Licensing Law to Herdshares

The Fund is representing goat farmer Michael Hulme and three shareholders of his herdshare operation. Michael received a 'cease and desist' letter from the Santa Clara County District Attorney's office, claiming that Michael's herdshare operation constituted the illegal sale/distribution of raw milk without the necessary milk producer's license.

The Fund, on behalf of Michael and his shareholders, filed a declaratory judgment action against the Santa Clara County District Attorney and the California Department of Food and Agriculture (CDFA). The complaint seeks declarations that Michael's herdshare operation does not require a milk producer's license, and that his shareholders have the rights of privacy, contract and substantive due process to own a goat, to drink the milk from their goat, and to board their goats at Michael's goat farm. The complaint also seeks declarations that Michael has a substantive due process right to engage in a lawful business, i.e., a herdshare, and that an injunction should issue preventing the CDFA and the County from taking any enforcement action against Michael for his legal activity.

The County and CDFA filed a motion to strike, claiming that the Fund lacks standing and that Michael was not entitled to an injunction that would prevent the County and CDFA from enforcing the law. That motion



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to strike was denied by the trial court; the next step is for the parties to meet with the Judge to determine the case management schedule (e.g., when discovery will take place, when briefs will be due). This meeting will be taking place in May if there is not a resolution to the case before then.

Victoria Bloch Defended by the Fund for Her Involvement with Rawesome Foods

The Los Angeles District Attorney has charged Victoria Bloch with several crimes, including a felony for "conspiring" to distribute raw dairy products without a milk producer's license. The Fund is working as co-counsel with her local California attorney in defending Victoria against these unfounded charges.

The prosecution has produced an initial round of discovery documents yet more discovery documents remain to be produced. The Fund is working with local counsel in preparing Victoria's defense, which may include the filing of a motion to dismiss. The Fund and its local counsel have also served several subpoenas upon several state agencies in preparation for its defense.

Estrella Family Creamery

The Fund is representing members Kelli and Anthony Estrella of Estrella Family Creamery in a civil forfeiture action brought by the federal Food and Drug Administration (FDA) in the United States District Court for the Western District of Washington. The FDA is claiming that the Creamery has distributed contaminated cheese in interstate and has obtained a seizure order against all of the Estrella's cheese.

After the FDA filed the case, the Estrellas subsequently destroyed all of their cheese by feeding it to their pigs. The FDA then sought to amend its complaint by adding the Estrellas as individual defendants. The Fund opposed this motion to amend and argued that since the Estrellas have gone out of business, have stopped producing cheese, have stopped distributing cheese in interstate commerce, and have destroyed all of the cheese that was seized, that the case is moot and the relief the FDA seeks is futile. The court has granted FDA's motion to amend; a meeting to determine the case management schedule is set for January.

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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.*

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#### HYPERLINKS for PDF version:

**filed suit against** – Litigation, "FDA Interstate Raw Milk Shipment Ban" = <http://www.farmtoconsumer.org/litigation-FDA.htm>

**informed the court** – Pete Kennedy, "Federal Raw Milk Suit: FDA Answers the Judge", 28 March 2011 = <http://www.farmtoconsumer.org/fda-answers-judge-kennedy.htm>

**FDA press release** – FDA, "Food Safety and Raw Milk", 1 November 2011 = <http://www.fda.gov/Food/FoodSafety/Product-SpecificInformation/MilkSafety/ucm277854.htm>

**issued a ruling** – Pete Kennedy, "WI: Judge Denies Basic Property Rights and Fuels Outrage", 28 September 2011 = <http://www.farmtoconsumer.org/wi-judge-denies-basic-property-rights.htm>