

RAW MILK

A LEGAL PERSPECTIVE



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OVERVIEW

- **Statutes and regulations: pursuant to police powers to protect public health**
 - **Federal**
 - **State/Local**
- **Case law**



POLICE POWERS

- To police = to clean up



- Definition: Powers inherent in sovereignty under which a legislative body has authority to protect, preserve, and promote the health, safety, morals, and general welfare of the public.



- Limits on police powers—too broad application would undermine U.S. Bill of Rights.



- Public health laws/regs/rules generally upheld by courts as legitimate exercise of police powers.



- The power of the state generally outweighs individual rights when public health is at risk. Even when such individual wishes to not comply.



FEDERAL



CASE LAW

- Not dealing with regulation related to milk alone, but with an act generally regulating the sale of food products.



- “Milk is a food product; and if found to be impure, it will be held to be ‘**adulterated**’ within the provisions of the act.



- There is evidence that it is impossible to produce raw milk which does not contain bacteria.... adulteration is clearly established.”



Dade v. United States, 40 App.D.C. 94, 99 (C.A.D.C. 1913).

FDA Data Collection



- **From 1974-1982, FDA collected and reviewed scientific and medical information to determine if outbreak of some diseases was associated with consumption of raw milk**
- **Conclusion: consumption of all forms of raw milk and products was linked to the outbreak of serious bacterial diseases**

Public Citizen v. Heckler

602 F.Supp. 611, 613 (D.C.C.1985)

- ④ **Non-profit, Public Citizen, filed petition with FDA for issuance of a rule banning sale of unpasteurized milk (4/10/1984)**



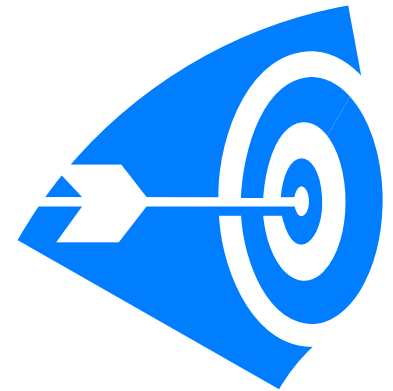
- ④ **Court ruled Secretary of HHS unreasonably delayed in responding to petition:**
 - **“officials at highest levels” concluded raw milk poses a serious health risk**
 - **Reasons for delay were “lame at best and irresponsible at worst”**



Public Citizen v. Heckler

602 F.Supp. 611, 613 (D.C.C.1985)

- **Court said HHS “has both authority and heavy responsibility to act to protect the nation’s health”**
- **Statutory source of authority:**
 - **42 U.S.C. §264—to control communicable diseases**
 - **21 U.S.C. §342—to control adulterated foods**



Public Citizen v. Heckler

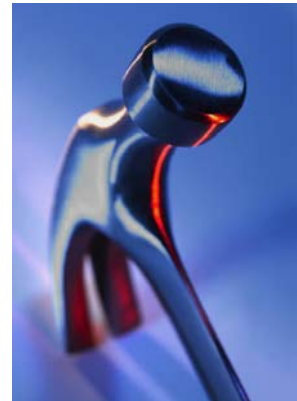
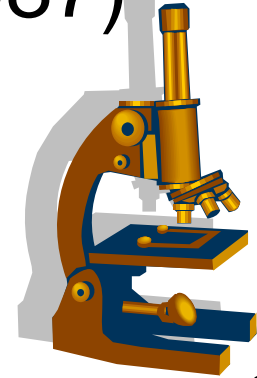
653 F.Supp. 1229 (1987)

- **Secretary of Health and Human Services still denied citizen's petition**
- **Non-profit then challenged denial as “arbitrary, capricious, and not in accordance with the law”**
- ➔ **Court found Secretary's action has no rational connection to the undisputed facts in the record**

Public Citizen v. Heckler



653 F.Supp. 1229, 1241 (1987)

- **Court stated that HHS spent over 13 years studying this matter**
- **“It is undisputed that all types of raw milk are unsafe for human consumption and pose a significant health risk.”**
- **Order: compel HHS to promulgate a regulation prohibiting the interstate sale of all types of raw milk and raw milk products**



Public Citizen v. Heckler

653 F.Supp. 1229, 1241 (1987)

- **Court declined to ban intrastate sales of raw milk**

- **Said individual states need to decide on issue of raw milk as “purely local concern”**

- **Court added that if “...interstate sale of raw milk continues, it is within HHS’s authority at that time to institute an intrastate ban as well.”**

Resulting Regulation

- **21 CFR 1240.61 (8/10/1987)**
 - Mandates the pasteurization of all milk and milk products for direct human consumption
 - Only applies to interstate commerce

FDA Enforcement of 21 CFR 1240.61

- Issued Warning Letters based on evidence of interstate sales



- Issued two Import Alerts



- Provide testimony at state hearings



- Presentations at milk conferences



- 3/2/2007 issued press release with CDC on dangers of raw milk consumption



STATE/LOCAL



CASE LAW

State's Regulation of Raw Milk

Federal courts uphold police power of state:

- "...to protect the public health, and to prevent the adulteration of dairy products, and fraud in the sale thereof..."

Powell v. Commonwealth of Pennsylvania, 127 U.S. 678, 684 (U.S. 1888).



- If opponents of this law can only say law is unwise or it is “unnecessarily oppressive” to them, then “their appeal must be to the legislature, or to the ballot-box, not to the judiciary.” *Id.* at 686.

CASE LAW: Federal, continued

- A state may regulate the milk industry within its confines as exercise of police power, including licensing and defining what constitutes milk and milk products, as long as not “unreasonable, arbitrary or discriminatory nature.” *Aerated Products Co. of Penn v. Dept. of Health, NJ*, 59 F.Supp.652, 657 (D.C.N.J. 1945).



- A milk product manufactured in another state is subject to inspection by the receiving state “...for at this point it sheds its interstate character and thenceforth its movements in commerce are intrastate in nature.” *Id.* at 658.

CASE LAW: Federal, continued

- **Farmers produced, partly in their home, goat cheese for public consumption and refused inspections by Virginia arguing a 4th Amendment right to refuse warrantless inspections. Farmers lost in state district court and appealed. While pending, farmers also filed in federal court alleging VA law unconstitutional and violated 4th Amendment.**



- **Fundamental principle of federal court that absent showing of “bad faith, harassment, or other extraordinary circumstances”, state courts entrusted to decide own constitutional matters.**
Hill v. Courter, 344 F.Supp.2d 484, 488, 494 (E.D.Va., 2004).

CASE LAW: State



Supreme Court of Illinois

Municipal ordinance requiring milk pasteurizers to use recording device held valid as city could not physically inspect all facilities. Courts cannot overrule city council that a particular method of protecting the public health should be used unless so clearly and manifestly wrong.

Koy v. City of Chicago, 263 N.E. 1104, 1108 (Ill. 1914).

Supreme Court of Wisconsin

City ordinance requiring that all milk sold in city must be pasteurized because public health demands that milk should be pure and wholesome so that disease-causing germs are destroyed was upheld. Court ruled ordinance is a proper, appropriate, and valid regulation to protect the people's health.


Pfeffer v. City of Milwaukee, 177 N.W. 850, 851 (Wis. 1920)

CASE LAW: State, continued

Supreme Court of North Carolina

City in exercise of its police power may require milk for human consumption to be pasteurized and this is reasonable law.

State v. Edwards, 121 S.E. 444 (N.C. 1924)



Supreme Court of Oklahoma

City ordinance classifying milk, requiring differing fees, and pasteurization is not arbitrary, unjust, or oppressive. No constitutional or statutory right will be infringed by the enforcement of this ordinance.

Stephens v. Oklahoma City, 1 P.2d 367, 369 (Okla. 1931)

CASE LAW: State, continued

Supreme Court of California

City and County ordinance regulating sale and distribution of milk required that all milk be pasteurized, except for certified raw milk. Court held that this ordinance was in addition to state regulatory scheme and valid as it did not make arbitrary and unreasonable distinction. Milk may be strickly regulated as exercise of police powers as it is vital to the welfare of the nation and susceptible of being a carrier of disease.

Nat'l Milk Producers Ass'n v. City and County of San Francisco, 124 P.2d 25, 33 (CA. 1942)



U.S. Supreme Court

Appealed above decision alleging ordinance violated 14th Amendment because it prohibited sales of other nonpasteurized mild but allowed “certified” raw milk. Court held that issue was moot as subsequent to trial San Francisco determined that no non-pasteruized milk could be certified as free from harmful bacteria.

Nat'l Milk Producers Ass'n v. City and County of San Francisco, 317 U.S. 423, 424 (U.S. 1943)

CASE LAW: State, continued

- Supreme Court of Texas



City ordinance that prohibited sale of non-pasteurized milk that State law allowed did not run counter to the state law.

Court took judicial notice of fact that pasteurization of milk is a widely recognized and approved method of prevention of disease and one commonly followed in U.S. This is proper police regulation.

City of Veslaco v. C.P. Melton, 308 S.W.2d 18, 21 (TEX.1958).

STATE CASELAW Animal Sharing



Animal (goat/cow) Sharing

- Not many appellate court cases on issue
- Saga of cases in Virginia involving C. Solem, a goat owner, who was determined to sell raw milk despite 1970 state regulation prohibiting sale.

1974: began raising goats and sold for 4 years to health food store and marked “not for human consumption”-stopped 1979 for violations by State

1980: charged with violations for “lease-a-goat program” where customers reserved the goat, signed a lease, paid a \$3 rental fee, and was entitled to receive all by-products in 24 hour period and could use the goat as a family pet (as long as left goat at farm). Continued leasing program after temporary injunction, but marked milk for “animal use”

1983: Supreme Court of Virginia held that leasing goat not relevant. Title to raw milk was passed when Solem completed act of delivery after value being given for the milk and was violation of state law.

Carbaugh v. Solem, 302 S.E.2d 33, 34-35 (VA. 1983)

Animal Sharing, Solem continued

1986: Solem devised a plan to sell “undivided interests” in her goats and charges a \$3 “maintenance” fee and owner receives a gallon of raw milk a day. Solem files a declaratory judgment action asking court if this violates state law. District court rules does not.

1989: Supreme Court of Virginia rules that selling undivided interests in goats is not relevant. Sale of raw milk is violation and the “substance of the transaction” is receiving \$3 for a gallon of raw milk a day. Solem has set up “nothing more than a sham for payment for the gallon of milk received by the owner from Solem on that day.” Solem in violation of state law.

Kenley, M.D. v. Solem, 375 S.E.2d 532, 533 (VA. 1989).

Animal Sharing, Solem continued

1994: Solem sues Virginia Dept of Agri & Consumer Services in federal district court who dismisses her lawsuit.

1995: Solem appeals dismissal. Court rules that she is precluded from raising 14th Amendment due process claim in federal court as she should have raised claim in state court actions. Federal courts give “full faith and credit” to state court judgments and she had ample opportunity to raise constitutional claims.

Solem v. Courter, III, 64 F.3d 659 (C.A.4 Va. 1995).

1995: Solem appeals to U.S. Supreme Court who denies her writ of certiorari.

Solem v. Courter, III, 516 U.S. 1076 (U.S. 1996).

- Solem is a “true believer” (who must have money).

Public Health v. Individual Rights

- Always going to be “true believers” in raw milk



- Always going to be tension between individual rights and public health concerns



- Standard: laws/regs/rules and actions to pass that are not unreasonable, arbitrary, or capricious



- Even-handed and consistent enforcement of laws/regs/rules on the books

Goal of Public Health Related to Raw Milk Regulation

- Overall, prevent outbreaks of diseases/illness
- Not required to have sick people to take enforcement action (best if prevention works)
- Not easy job to oppose “true believers”



- **Remember, that your enforcement saves lives and prevents outbreaks of diseases/illness, as unpleasant as may be to deal with “true believers” of raw milk!**

The End

