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RAW MILK SALES

The sale of unpasteurized, or raw milk, to consumers has become an increasingly contentious issue in Wisconsin and other states. Currently, the Food and Drug Administration (FDA) bans the sale of raw milk packaged for consumer use across state lines (interstate commerce). Each state, however, regulates the sale of raw milk within the state (intrastate), and approximately half of the states in the U.S. allow it to be sold. In some states where the sale of raw milk for human consumption is legal, it may be sold in stores. In other states, raw milk may only be sold to consumers directly from the farm.

In Wisconsin, the intrastate sale of raw milk is prohibited, but there is an exemption for the “incidental sale” of raw milk directly to a consumer at the dairy farm where the milk is produced. The interpretation of this exemption pits consumers and advocates of raw milk and the farmers that produce it against its skeptics, including public health officials, food safety specialists, and some agricultural organizations like the Wisconsin Farm Bureau. The Department of Agriculture, Trade and Consumer Protection (DATCP), in consultation with the Department of Health Services (DHS), issue rules governing the production and sale of milk.

During the 2009-2010 legislative session, Assembly Bill 628 and Senate Bill 434 were introduced to allow farmers to sell raw milk directly to consumers, with regulations. This brief provides background information on raw milk and pasteurization and a summary of current law and legislation in Wisconsin.

BACKGROUND

Raw milk is milk taken directly from animals (cows, sheep, and goats) and then

rapidly cooled to around 36-38 degrees Fahrenheit and bottled. The only processing that occurs with raw milk is filtration and cooling. Pasteurized milk undergoes a heating process designed to destroy harmful bacteria and enzyme activity. Along with sterility, the pasteurized product also has a much longer shelf life.

History of Milk Pasteurization

In the mid-1800s, Louis Pasteur pioneered the concept of heating liquids to kill natural pathogens. Pasteurization destroys most disease producing organisms and limits fermentation in milk, beer, and other liquids by partial or complete sterilization.

At the turn of the 20th century, the process of pasteurizing milk was still in its infancy. Around this time, the safety of the milk supply became a public health concern when milk was transported farther and stored at higher temperatures than in the past because more people were moving from rural areas into cities. As a result of urbanization, many city residents, especially children, increasingly became sick and died after consuming contaminated milk.

By 1920, milk regulations had reached every part of the country, with regulations beginning to appear in state statutes. By 1939, the U.S. Public Health Service had drafted the Model Milk Health Ordinance, a model milk sanitation program that called for vigilance at every stage of production, processing, pasteurization, and distribution of milk and milk products. The first opponents of pasteurization were milk producers and sellers that attacked the new regulations as unconstitutional and unwarranted governmental limitations on their rights to

produce and sell their products. In response, local and state authorities relied on their duty and authority to enforce the regulations. With growing evidence of the potential danger of raw milk, most courts found the regulations to be valid.

The regulation of raw milk sales in the first half of the 20th century proved to be a major public health success in the United States as the incidence of milkborne illness was sharply reduced. In 1938, milkborne outbreaks constituted 25 percent of all disease outbreaks due to infected foods and contaminated water; as of 2002, that figure was down to less than 1 percent.

Milk pasteurization first made its appearance in Wisconsin law in 1949 when the legislature passed Chapter 517, Laws of 1949, requiring milk dealers to have a license and to sell only pasteurized milk. In 1955, Chapter 580 added very specific provisions to the milk pasteurization process and required all milk and fluid milk products sold for consumption in fluid form to be produced, processed, and distributed in accordance with definitions and standards for grade A milk as set forth in the milk ordinance and code. With this, the sale of raw milk became illegal.

Raw vs. Pasteurized Milk Debate

The raw milk debate places the alleged benefits of consuming raw milk against the public health threat of harmful pathogens.

Proponents of raw milk include consumers of raw milk, some farmers, and nonprofit organizations like the Weston A. Price Foundation and the Farm-to-Consumer Legal Defense Fund (FCLDF) that support sustainable family farms, on-farm processing, consumer choice, and direct-to-consumer distribution. Supporters believe that raw milk has health benefits that are destroyed in the pasteurization process, arguing that pasteurization: 1) changes the content of nutrients; 2) destroys enzymes and hormones; and 3) destroys healthy bacteria. Proponents

maintain that unpasteurized milk raises one's metabolism, boosts muscle growth, strengthens the immune system, and eases ailments, including lactose intolerance, digestive problems, and allergies.

In addition to raw milk's proclaimed health benefits, the issue of consumer rights has been brought to the forefront of the debate. Proponents believe that consumers who buy raw milk are purposely looking for it and that it is a consumer's right and responsibility to educate themselves and decide whether it is worth their risk to consume the product. At a time when dairy farmers in the state are struggling and milk prices are low, supporters also see raw milk as an important niche market for struggling dairy farmers.

Critics of raw milk include regulatory agencies that monitor public health and food safety, part of the medical and scientific community, and some agricultural organizations. They argue that raw milk may harbor a host of disease-causing pathogens, including campylobacter, listeria, salmonella, and E. coli. Common symptoms of foodborne illness include diarrhea, stomach cramps, fever, headache, vomiting, and exhaustion. While most people recover from foodborne illness within a short period of time, others may have symptoms that are chronic, severe, or life-threatening. Children, the elderly, and those with compromised immune systems are most at risk for severe infections.

The health claims of raw milk are also dismissed by some critics, countering the three arguments that are often made by raw milk proponents. First, critics argue that pasteurization does not significantly change the nutrient content of milk. Since Vitamin D is generally added to milk as it is pasteurized, some food scientists contend that our bodies actually gain more benefit from pasteurized milk since the calcium is more readily absorbed. Second, critics maintain that the enzymes and hormones in raw milk are rapidly broken down by the digestive system,

making it impossible for people to receive any benefit to their immune systems. Third, opponents of raw milk argue that while pasteurization does destroy some bacteria which may be healthful, the public health benefit gained by destruction of harmful bacteria outweighs any disadvantage.

Raw milk advocates argue that with significant improvements in standards and inspections, raw milk would be produced hygienically if sales were made legal. Opponents, however, believe that it is not possible to ensure that raw milk is safe and that if an outbreak does occur, the reputation of the state's dairy industry is at stake.

Both supporters and opponents claim that scientific evidence supports their respective positions. Raw milk proponents argue that pasteurization is not a panacea, claiming that none of the reports frequently cited by regulatory agencies like the FDA generate any statistical evidence proving that pasteurization would have prevented the outbreak and associating raw milk with outbreaks may also be greatly exaggerated. Opponents of raw milk argue that science has not shown a connection between drinking raw milk and disease prevention, nor the alleged harm of pasteurization.

CURRENT WISCONSIN LAW

The Wisconsin Statutes generally prohibit the sale of unpasteurized milk to the public:

No person may sell or distribute any milk or fluid milk products which are not grade A milk or grade A milk products to consumers, or to any restaurant, institution or retailer for consumption or resale to consumers. Grade A milk and grade A milk products shall be effectively pasteurized. (Section 97.24 (2) (b), Wisconsin Statutes)

The law does not prohibit a dairy farmer from consuming the raw milk that he or she produces. In addition, the statute contains an exception that allows "incidental sales" of raw milk directly to a consumer at the dairy farm

where the milk is produced, for consumption by that consumer (Section 97.24 (2) (d)2., Wisconsin Statutes). DATCP has broad power under state law to regulate dairy farms, as outlined in Section 97.24 (3), Wisconsin Statutes.

Interpretation of Exemptions

In states where dairy regulations forbid consumers to purchase raw milk in stores or directly from farmers, consumers are entering into "cow share agreements" with farmers. In these agreements, consumers buy an ownership interest in the cow. They pay the farmer a fee for boarding their cow, caring for the cow, and milking the cow. The cow share owner then obtains the milk from the cow. In Wisconsin, a case came before an administrative law judge concerning the legality of cow share agreements in 2002.

The judge pointed out that from 1959 to 1994 DATCP's rules included an interpretation of the statutory exemption from the prohibition on the sale and distribution of raw milk to consumers. The rule basically stated that sales made in the regular course of business or preceded by any advertising to the public were not permitted. The rule allowed sales of raw milk to employees and "persons shipping milk to the dairy plant." The judge also referred to a DATCP policy guideline, issued in 1985, which states that repeat or regular sales to a member of the public do not qualify as "incidental" sales. The guideline provides that regular, on-farm sales to employees do qualify for the exemption.

The decision in the case held that sales under the cow share agreements were illegal. However, the judge indicated that DATCP's interpretation of the statute allowed the distribution of raw milk to individuals who are shareholders or partners in the entity holding the dairy farm license, if that entity is a corporation or partnership. The opinion stated that DATCP recognizes an exception to the prohibition on distribution of raw milk for persons willing to take on the responsibilities

of owning a milk producer license. In 2004, another administrative opinion was issued clarifying the opinion in the 2002 case. The later opinion stated that investments in entities holding milk producers licenses may not be solely for the purpose of purchasing unpasteurized milk.

In February 2008, a new DATCP rule on the sale and distribution of raw milk went into effect (Section ATCP 60.235, Wisconsin Administrative Code). It permits the distribution of raw milk to an individual who has a "bona fide ownership interest" in the entity that owns a dairy farm if the ownership entity is not an individual or married couple. The rule reiterates the department's position that "a sale is not incidental if it is made in the regular course of business" or is preceded by advertising to the general public. The rule allows the sale or distribution of unpasteurized milk to the employees of the dairy farm, but does not (as the former rules had) mention persons shipping milk to a dairy plant.

In 2009, the Division of Food Safety at DATCP sent "request for interrogatories" to dairy farms it suspected of selling raw milk in the regular course of business. The letters were met with backlash from the raw milk community. In a press release, Representative Chris Danou criticized the department's actions as "over the top" in enforcing an ambiguous raw milk policy.

RAW MILK LEGISLATION

The legislature addressed the issue of raw milk with the introduction of Assembly Bill 628 and Senate Bill 434 during the 2009-2010 legislative session. AB-628 was introduced on December 18, 2009, by Representatives Danou and Steve Hilgenberg. SB-434 was introduced on December 21, 2009, by Senators Pat Kreitlow and Glenn Grothman. The companion bills would authorize a dairy farmer with a grade A dairy farm permit to sell unpasteurized milk, buttermilk, butter, and cream directly to consumers on the farm if the

dairy farmer obtains a raw milk permit from DATCP, the container is prepared and filled in a sanitary manner, and the dairy farmer displays a sign indicating that raw milk does not provide the protection of sterilization. If these conditions are met, dairy farmers are immune from civil liability for the death of or injury to an individual caused by the product.

In January 2010, DATCP Secretary Rod Nilsestuen appointed 22 members representing a wide array of stakeholders and experts in Wisconsin's dairy industry to a Raw Milk Policy Working Group. The purpose of the group is to consider whether there are legal, regulatory means that might allow dairy farmers to sell unpasteurized fluid raw milk directly to consumers, and, if so, what conditions would be necessary to protect public health. The group met for the first time on March 15, 2010.

On March 10, 2010, a public hearing was conducted by the Senate Agriculture and Higher Education Committee and the Assembly Rural Economic Development Committee. The 10-hour public hearing drew a large number of participants to the Chippewa Valley Technical College in Eau Claire.

On March 17, 2010, 10 legislators asked for a Legislative Council study on issues related to the sale of raw milk. The study committee would report to the 2011 Legislature. On the same day, the Senate Agriculture and Higher Education Committee voted 5 to 0 for a substitute amendment to Senate Bill 434 that would serve as an "interim solution" until the Legislative Council and DATCP's advisory board determine policy recommendations. The Assembly Rural Economic Development Committee passed, 8 to 1, a similar substitute amendment for Assembly Bill 628 on March 30, 2010.

The amended versions of the two bills includes the following provisions:

- Authorizes a dairy farmer with a grade A dairy permit to sell raw milk if he or she registers with DATCP.
- The authorization to sell raw milk for human consumption ends on December 31, 2011.
- Sales can only take place at farms where the milk is produced.
- Farmers are prohibited from advertising the availability of raw milk, except for an on-farm sign.
- A sign must be displayed where the milk is sold with information about raw milk, specifically that it does not provide the benefits of pasteurization, may contain disease-causing pathogens, and is not recommended for certain people. This information must also be on the containers.
- Farmers are **not** immune from civil liability as outlined in the original bill.
- Farmers must keep daily samples of the milk for a period of time, maintain records of each sale, and have the milk tested for certain pathogens at DATCP-certified labs.

- License to sell raw milk could be suspended if pathogens are detected in two of four consecutive monthly samples.

The final floorperiod for the 2009-2010 legislative session begins on April 13, 2010, three days after the Second Annual Raw Milk Symposium which will be held in Madison. Both bills are expected to be taken up at this time.

FOR MORE INFORMATION

For the text and legislative history of Senate Bill 434 and Assembly Bill 628, access the Wisconsin State Legislature Web site at: www.legis.state.wi.us and use the legislative proposal search tool. Links to a Legislative Council amendment memo and fiscal estimates are also provided.

For more information on the administrative law decisions related to the sale of raw milk, access DATCP's Web site at: www.datcp.state.wi.us/case_decisions/food/prohibiting_sale.jsp.