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Federal Raw Milk Suit: FDA Answers the Judge

by Pete Kennedy, Esq. - March 28, 2011

In an unsurprising response to questions submitted to it by a federal judge, the Food and Drug Administration (FDA) has asserted that any commercial transaction involving the transport of raw milk for human consumption across state lines is subject to the agency's jurisdiction and is illegal. It is now a matter of public record that, in FDA's view, even individual consumers crossing state lines to purchase raw milk and bringing the milk back to their home state to consume it are violating the law.

On September 17, 2010 Judge Mark W. Bennett stayed judicial proceedings in a lawsuit filed by the Farm-to-Consumer Legal Defense Fund and eight of its individual members challenging the federal regulation prohibiting raw milk for human consumption in interstate commerce. The purpose of the stay was to give FDA six months to answer the following hypothetical questions submitted by the judge:

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whether 21 C.F.R. §1240.61 [the federal regulation challenged in the suit] applies to and proscribes the conduct of the following persons:

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, legally purchase raw milk, 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 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 the principal's 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 person that he knows are from out of state?

What FDA wants is for consumers to live in fear without being able to challenge the agency's interpretation in court.

The individual plaintiffs in the lawsuit include consumers who went across state lines to obtain raw milk, an agent who went on behalf of consumers across state lines to obtain raw milk, and a farmer who knowingly sells raw milk to out-of-state consumers.

The regulation under challenge provides, in part, "no person shall cause to be delivered into interstate commerce or shall sell, otherwise distribute, or hold for sale or other distribution after shipment in interstate commerce any milk or milk product in final package form for direct human consumption unless the product has been pasteurized or is made from dairy ingredients (milk or milk products) that have all been pasteurized...."

In its March 16 response to the judge's questions, FDA took the position that "a person who purchases unpasteurized milk in one state with the intent to take it to another state (either for personal use or to distribute to others) is engaging in interstate commerce." As for consumers who cross state lines intending to take raw milk back home for personal use, FDA stated that it "has never sought to bring an enforcement action against a person because he or she crossed a state boundary to purchase and return with raw milk solely for his or her own use, and FDA has no present intent to bring an action against such a person in the



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future. Nevertheless...the hypothetical interstate traveler in this example would have 'caused' raw milk 'to be delivered into interstate commerce' in violation of 21 C.F.R. §1240.61."

What FDA is trying to accomplish with this answer is to let raw milk consumers know they are violating the law (by carrying raw milk across state lines for their personal consumption) while trying to get the consumer plaintiffs' case against it thrown out for lack of standing because the agency has never sought to bring an enforcement action against a consumer for violating the regulation; and trust them, they have no present intent to do so now even though they might change their mind later. What FDA wants is for consumers to live in fear without being able to challenge the agency's interpretation in court.

Thousands of people, in FDA's view, are violating the law by crossing state lines to obtain raw milk. Many of these people have no source of raw milk in their home state to enable them to exercise their legal right to consume the product.

Regarding the second question, FDA stated "the hypothetical agent...violates 21 C.F.R. §1240.61, first by causing raw milk to be delivered into interstate commerce, and second by 'distributing' the raw milk to another after shipment in interstate commerce." The situation involving the agent plaintiff, Eric Wagoner, is more than a hypothetical scenario. In October 2009, Wagoner and other members of the Athens Locally Grown food co-op in Georgia had been forced to dump raw milk over a hundred gallons of raw milk in Georgia that had been transported in Wagoner's truck after it had been obtained from a licensed raw milk producer in South Carolina. An FDA official was present at the dumping; the agency was a likely decision maker along with the Georgia Department of Agriculture in ordering the raw milk to be thrown out.

As to the final question, FDA found that the sale of raw milk to a hypothetical customer intending to transport the product across state lines would constitute "delivery into interstate commerce." The agency went on to state, "Whether or not FDA would consider an enforcement action against the hypothetical seller in this question would turn on many other facts not presented. For instance, to the extent that the producer solicits interstate sales and/or regularly sells raw milk that is ultimately transported across state lines, FDA would review the facts for possible regulatory action." If the raw milk producer advertises on the internet, is that soliciting interstate sales? If a producer regularly has people traveling in from other states to purchase raw milk, is the producer supposed to stop selling to those consumers in order to be in compliance with federal law?

Judge Bennett now has an opportunity to rule against a law that is really an economic regulation in the guise of a public health measure.

The next step in the case is for the judge to rule on the motion by FDA to dismiss that was filed last April. The judge has already denied part of the motion to dismiss while reserving judgment on the remainder. FDA is attempting to convince the judge to rule on the entire motion to dismiss. This is a case that needs to be heard on the merits. Thousands of people, in FDA's view, are violating the law by crossing state lines to obtain raw milk. Many of these people have no source of raw milk in their

home state to enable them to exercise their legal right to consume the product.

A 2008 survey conducted by CDC indicates, at that time, that there were over nine million raw milk drinkers; the number has only increased since. With this many people drinking raw milk, the number of foodborne illness outbreaks attributable to it does not represent the public health crisis FDA claims. The federal interstate ban is becoming increasingly indefensible. Unfortunately, the executive and legislative branches have failed to take a look at whether the ban should be lifted even though both have had



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chances to do so. Over two years ago, Mark McAfee of Organic Pastures Dairy Company filed a petition with FDA to partially lift the ban by allowing the shipment of raw milk from one state where the sale was legal to another state with a similar law. By law, FDA was required to respond to the petition no more than six months from the time it was filed; to this day, McAfee has received no answer from the agency.

In the last session of Congress, Rep. Ron Paul introduced a bill ([HR 778](#)) that would have effectively lifted the ban. HR 778 was assigned to the House Committee on Energy and Commerce where committee chair Henry Waxman, who had no intention of giving the bill a hearing, buried it. Judge Bennett now has an opportunity to rule against a law that is really an economic regulation in the guise of a public health measure

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### Hyperlinks for the PDF

**lawsuit** - Litigation: FDA Interstate Raw Milk Shipment Ban =  
<http://www.farmtoconsumer.org/litigation-FDA.htm>

**filed last April** – Pete Kennedy, “FDA’s Response to FTCLDF Suit over Interstate Raw Milk Ban”, 6 May 2010 =  
<http://www.farmtoconsumer.org/litigation-FDA-status.htm>

**2008 survey** – Steve Bemis, “Open Letter to FDA’s Dairy Head, John Sheehan: Why Hide Serious Government Data on Raw Milk Drinkers?”, 13 March 2011 =  
<http://www.farmtoconsumer.org/open-letter-to-fdas-dairy-head-john-sheehan-bemis.htm>

**HR 778** – Federal Legislation, “Ron Paul Introduces Bill to End Interstate Raw Milk Ban” =  
[http://www.farmtoconsumer.org/federal\\_bills-HR778.htm](http://www.farmtoconsumer.org/federal_bills-HR778.htm)