

RAW MILK: LEGAL HISTORY AND CURRENT CONTROVERSY©

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Arthur P. Kreiger, Esq.
ANDERSON & KREIGER LLP
One Canal Park, Suite 200
Cambridge, MA 02141
617-621-6540
akreiger@andersonkreiger.com

This paper addresses two issues in the debate about raw milk. First, it describes some of the most recent compilations of data regarding the public health risks of raw milk consumption. Second, it summarizes the regulation of raw milk sales at the federal level and in the states, including particularly in New England and New York.

The data and information in this paper were obtained from the Farm-to-Consumer Legal Defense Fund (*see* www.farmtoconsumer.org), the other websites listed below, and other sources available from the author upon request.¹

I. PUBLIC HEALTH DATA

As in many public health controversies, each side of the raw milk debate cites data supporting its position and ignores the other side's data. Different sets of data are inconsistent, partly because they may address different time periods or include raw milk products (butter, cheese, etc.) in addition to raw milk itself. Valid data are sometimes taken out of context, and there is no comparison to the data on other public health threats. The result is that the two sides often talk past each other. If sensible public policy is to be developed, the starting point must be the data on the actual threat to public health posed by raw milk in comparison to that posed by other foods.

Here are some of the statistics on this issue:

¹ This paper is intended to be educational, and as accurate and current as possible. However, it does not constitute legal advice for any particular person or situation, and no one should rely on it without such advice.

- ❖ The Food and Drug Administration has published “Questions & Answers: Raw Milk.” The first two Q&As are as follows:

1. Is it safe to consume raw milk?

No. FDA and other health agencies such as the Centers for Disease Control [CDC] and organizations such as the American Academy of Pediatrics agree that raw milk is unsafe because it can contain disease-causing pathogens....

2. Have any illnesses or deaths been caused by consuming raw milk products?

Based on CDC data, literature, and state and local reports, FDA compiled a list of outbreaks that occurred in the U.S. from 1987 to September 2010. During this period, there were at least 133 outbreaks due to the consumption of raw milk and raw milk products. These outbreaks caused 2,659 cases of illnesses, 269 hospitalizations, 3 deaths, 6 stillbirths and 2 miscarriages. Because not all cases of foodborne illness are recognized and reported, the actual number of illnesses associated with raw milk likely is greater.

<http://www.fda.gov/Food/FoodborneIllnessContaminants/BuyStoreServeSafeFood/ucm122062.htm> (March 1, 2007, updated November 1, 2011).

- ❖ A recent article on the CDC website surveyed United States disease outbreaks after consumption of dairy products, 1993-2006:

<u>Product</u>	<u>Outbreaks</u>	<u>Illnesses</u>	<u>Hospitalizations</u>	<u>Deaths</u>
Nonpasteurized				
Fluid milk	46	930	71	0
Cheese	27	641	131	2
Total	73	1,571	202	2
Pasteurized				
Fluid milk	10	2,098	20	0
Cheese	38	744	17	1
Total	48	2,842	37	1
All dairy	121	4,413	239	3

Langer, *et al.*, “Nonpasteurized Dairy Products, Disease Outbreaks, and State Laws – United States, 1993-2006” (March 2012), published at <http://wwwnc.cdc.gov/eid/article/18/3/pdfs/11-1370.pdf>.

- ❖ According to the CDC, there were 1,733 documented raw milk-related illnesses in the United States in the period 1973-1992. A 2004 National Association of State Departments of Agriculture survey found 29 states that recorded outbreaks of raw milk-related illness. From 1998 to May 2005, states reported at least 45 such outbreaks. See Adams, *et al.*, *Udder Nonsense? The Emerging Issue of Raw Milk Regulation in Florida, Part I: Regulation*, Florida Bar Journal (October 2008).
- ❖ According to a CDC database for the United States for 1998-2010, there were 1,414 illnesses, 80 hospitalizations and 0 deaths attributed to raw milk. Some of these figures may include raw milk products. There also were 2,227 illnesses, 27 hospitalizations, and 3 deaths from *pasteurized* milk in that period.

There were 2,301,076 illnesses, 10,317 hospitalizations and 223 deaths from all foods in that period, including the following:

- Fruit salad 1,323 illnesses, 29 hospitalizations and 1 death.
- Tuna 1,415 illnesses, 41 hospitalizations and 3 deaths (not including raw tuna or sushi).
- Pizza 1,614 illnesses, 20 hospitalizations and 3 deaths.

<http://wwwn.cdc.gov/foodborneoutbreaks>.

- ❖ The CDC has published other data on raw milk for 1998-2011:

Total Illnesses	325
Total Hospitalizations	27
Total Deaths	0

See CDC Foodborne Outbreak Online Database FOOD, 1998-2011, <http://wwwn.cdc.gov/foodborneoutbreaks/Default.aspx>.

Conclusion

Reconciling these data takes some effort. However, several important points emerge:

- During 1998-2010, there were 0 deaths from raw milk and 3 deaths from pasteurized milk. Any deaths associated with raw milk are attributable to raw milk products such as cheese.
- Many other common foods have caused similar numbers of illnesses, hospitalizations and death.

These points do not mean that the statistical risk of drinking raw milk is as low as that of consuming pasteurized milk or other foods, because far more people consume those other products. But they do mean that raw milk has not been the public health scourge that it is sometimes portrayed to be.

II. REGULATION OF RAW MILK

A. Federal Law

In 1987, after extensive regulatory proceedings and litigation, the Food and Drug Administration banned the sale of raw fluid milk to the consumer in interstate commerce. That ban remains in effect today. 21 C.F.R. [Code of Federal Regulations] Part 1240. The regulations exempt certain aged raw milk cheeses, which may be sold across state lines. 21 C.F.R. § 1240.61. In 2011, an advocacy group and individuals sued the Secretary of Health and Human Services over the ban on the interstate sale of raw milk. *Farm-to-Consumer Legal Defense Fund, et al. v. Sebelius*, Civil Action No. C 10-4018-MWB (N.D. Iowa). That case was dismissed for lack of standing in 2012. However, in that litigation, the FDA represented that it would not take enforcement action against consumers who transport raw milk across state lines for their own consumption.

In May 2011, Representative Ron Paul introduced (again) HR 1830, a bill to legalize the interstate sale of raw milk. That bill was referred to a subcommittee and remains there.

B. State Law

The FDA has left it to the states to regulate milk sales entirely within their borders (“intrastate”), and the states have adopted a variety of regulatory schemes. Since 2010, Michigan, North Dakota, Wisconsin and Wyoming have relaxed their regulation of raw milk in various ways.

In June 2013, the Farm-to-Consumer Legal Defense Fund published a State-by-State Review of Raw Milk Laws. Its map and chart of those laws are attached as Exhibit 1. In addition, in July 2011, the National Association of State Departments of Agriculture (NASDA) released the results of a national Raw Milk Survey summarizing the regulation of raw milk. NASDA’s news release describing its results is attached as Exhibit 2. (Both the FTCLDF and NASDA documents are included here because they present their information differently.)

The regulation of raw milk sales in New England and New York is as follows (this summary is necessarily simplified and should not be relied on without more detailed analysis):²

² For example, legislation regarding raw milk was recently passed in New Hampshire and vetoed in Maine. Analysis of those events is beyond the scope of this paper, but the Farm-to-Consumer Legal Defense Fund has more information about them.

CT	Retail and farmers markets sales are legal with a permit.
MA	Licensed on-farm sale is legal.
ME	Retail and farmers markets sales are legal with a permit.
NH	Retail and farmers markets sales are legal with a permit; unlicensed on-farm sale (volume is limited) and delivery are legal.
NY	Licensed on-farm sale is legal.
RI	Sale illegal.
VT	Unlicensed on-farm sale (volume is limited) and delivery are legal.

1. Massachusetts regulation

Several points about raw milk regulation in Massachusetts are noteworthy. First, the Massachusetts Department of Agricultural Resources (“MDAR”) has explained that it is legal to buy raw milk: it issues “Certificates of Registration” under Massachusetts General Laws Chapter 94 permitting dairy farms to sell raw milk on the farm. *See* MDAR “FAQ’s About Buying Raw Milk in Massachusetts” (June 2010), attached as Exhibit 3. Massachusetts’ statutory scheme for regulating raw milk is described in more detail in Section III.C., below. Farmers applying for certificates must meet various standards for construction and operation. In the author’s experience, MDAR attempts to work with farmers regarding those standards, but satisfying the standards still can be difficult and even prohibitively expensive.

Second, in Massachusetts (and perhaps other states), local municipalities are also authorized to regulate raw milk. Farmers should check for any regulations in their cities or towns before selling raw milk.

Third, two bills regarding raw milk were introduced in the Massachusetts legislature in 2012. House Bill 1995 would allow licensed raw milk farmers to deliver raw milk directly to the consumer off the farm. This bill passed out of the Joint Committee on Environment, Natural Resources and Agriculture and was referred to the House Committee on Ways and Means. House Bill 3273, would permit any person with a partial or complete ownership interest in a dairy animal [*see* below regarding cow-shares] to use any product derived from that animal without being licensed or inspected by the state. This bill was assigned to the Joint Committee on Environment, Natural Resources and Agriculture and a public hearing was held in June 2012. http://www.farmerconsumer.org/newsletters/Jun_13_2011_Issue-aa.htm#H3273; <https://malegislature.gov/Bills/187/House/H03273> (link to text and history).

III. COW-SHARES

In response to this federal and state regulation (and perhaps to try to limit products liability claims regarding the milk), some farmers have entered into cow-share (also called herd-share) arrangements with consumers. In such an arrangement, consumers buy an interest in one or more cows, which entitles each of them to a share of milk and any other products from those cows. The point of a cow-share arrangement is that the milk is not “sold” because the consumer is drinking milk from his or her own cow. Such arrangements are not a recent invention to circumvent prohibitions on raw milk sales; they have a long and respected lineage dating back to Myles Standish’s purchase of a 1/6 share in a red cow in 1627.

A cow-share arrangement should be implemented with a Bill of Sale, like any other sale of personal property. In addition, it often is described in an agistment agreement. To “agist” is, under English law, to take cattle to graze in exchange for payment. (It originally referred specifically to the proceeds of pasturage in the king’s forests.) An agister is a farmer or other person to whom horses, mules, cattle, or sheep are entrusted for feeding, herding, pasturing and other purposes.

A. Federal Law

One federal court has permanently enjoined a farmer from distributing raw milk to consumers across state lines even though the parties had cow-share arrangements. *U.S. v. Allgyer*, Civil Action No. 11-02651 (E.D. Pa. 2012). The court concluded that the cow-share agreements were “a subterfuge for sales of raw milk.”

B. State Law

The states have responded to cow-share arrangements in various ways. *See* Exhibit 1. In the Northeast, none of the New England states or New York has any specific statutory or regulatory provisions regarding cow-shares. However, in at least one case, the MDAR has issued a cease-and-desist order to try to shut down a 1-cow cow-share arrangement. It asserted that anyone operating a cow-share arrangement must obtain a certificate of registration and/or a milk dealer’s license, as described below.

C. Massachusetts Treatment of Cow-Share Arrangements

1. Massachusetts General Laws Chapter 94 – Inspection and Sale of Food, Drugs and Various Articles

Chapter 94 states that “no person shall sell or offer or expose for sale milk produced on a dairy farm, for use or disposal elsewhere than on such farm, [without a certificate of registration from MDAR]....” M.G.L. c. 94, § 16A. It defines “dairy farm” as a place where “more than two cows are kept and a part of all of the milk produced thereon is sold or delivered for sale to any person.” § 16. (Note that, notwithstanding this definition, MDAR has taken enforcement action against a *1-cow* cow-share arrangement as noted above.)

The statute specifies information that must be provided on the application for a certificate of registration. § 16B. A certificate is valid for up to a year, expiring on June 30 for a farm in Massachusetts and December 31 for an out-of-state farm, and it may be renewed. § 16C.³

³ MDAR’s authority over a non-Massachusetts farm for the sale of raw milk on the farm may be unconstitutional. Nothing prohibits an out-of-state farm from obtaining a Massachusetts certificate of registration, but it is doubtful that MDAR can take any enforcement action against such a farm for selling milk on the farm without a certificate. The author is not aware of any case or administrative action addressing this issue.

2. Massachusetts General Laws Chapter 94A – Milk Control

Milk Dealers

Chapter 94A defines a “milk dealer” as:

any person, irrespective of whether such person is also a producer or an association of producers, who, on his own account or on behalf of producers, is engaged ... in the business of receiving, purchasing, pasteurizing, bottling, processing, distributing or otherwise handling milk [except a producer who delivers raw milk only to a milk dealer]....

M.G.L. c. 94A, § 1. It defines a “producer” as “a person producing milk.” It does not define “producing,” but presumably includes anyone obtaining milk from a cow.

Licensing

The statute requires milk dealers to be licensed as follows:

No milk dealer ... shall... buy or receive milk from producers or others, or sell or distribute milk, or pasteurize, bottle, package, or otherwise process milk for sale, unless he is duly licensed as provided in this chapter....

G.L. c. 94A, § 4(a). Even if a milk dealer does not “sell” milk because of a cow-share arrangement, distributing milk appears to require a license under this section.

The way this statute reads, a farmer who holds a Chapter 94 certificate also needs a Chapter 94A license to bottle, package, etc., but MDAR has taken the position that a Chapter 94 certificate is enough. The converse, however, is not true: a Chapter 94A license does not avoid the need for a Chapter 94 certificate of registration. *See* G.L.c. 94A, § 4(b) (“Licenses required by this chapter shall be in addition to any other license required by law.”).

Inspection

Chapter 94A broadly authorizes MDAR to inspect milk dealers to administer that statute:

[T]he commissioner or any ... representative ..., may enter, at all reasonable hours, every place where milk is being produced, stored, bottled or otherwise packaged, processed, sold or otherwise handled for sale or distribution. Any such person may also, at all reasonable hours, inspect and verify by reference to the actual operations and transactions all books and records relating to milk in any place within the commonwealth for the purpose of ascertaining facts required for proper administration of this chapter.

G.L. c. 94A, § 13(a). Thus, a milk dealer licensed under Chapter 94A may have both its farm and its books and records (at the farm or anywhere else) inspected “at all reasonable hours.”

3. Application of Massachusetts Law to Cow-Share Arrangements

MDAR has addressed the application of these statutes to cow-share arrangements. It has issued an Interpretation Regarding Cow Share or Herd Share Agreements and Application of 330 [Code of Massachusetts Regulations] 27, stating as follows:

The terms “sell”, “offer”, and ”expose milk for sale” apply to partial-ownership agreements that exchange one-time purchase payments and/or monthly maintenance fees for any volume of milk. Partial-ownership agreements that the Department reviewed show the receipt of milk to be the primary of sole benefit to the partial-owner. Even when additional products, such as manure, hides, and meat, are offered to the partial-owner, the transfer of any amount of milk is a “sale” for purposes of the regulation. As such, any dairy farm employing partial-ownership agreements to sell milk may only do so provided they hold a Certificate of Registration.

MDAR Interpretation 2010-1 (November 15, 2010), attached as Exhibit 4.

In an enforcement action, MDAR also has taken the position that, even if the cow-share owners are merely drinking their own milk rather than buying it, any person doing the milking and bottling need a milk dealer’s license under Chapter 94A. Such a license is more onerous than a certificate of registration under Chapter 94, partly because of the broad inspection authority described above.

Farmers with cow-share arrangements can argue that, just as they are not “selling” milk for purposes of a certificate of registration under Chapter 94, they are in the business of selling cow-shares and caring for the cows, not bottling, distributing or handling milk for purposes of a milk dealers license under Chapter 94A. However, even if they are not “selling” the milk, they appear to be in the business of bottling, distributing and handling it. Their argument may be especially hard to win if the cow-share owners pay them by the bottle.

4. Farmers’ Options in Massachusetts

Besides merely hoping that MDAR does not learn about their operations or care enough about them to take enforcement action, farmers operating cow-share arrangements have the following alternatives under these statutes:

- Apply for raw milk certificates of registration under Chapter 94. This step can be coupled with applications for grant money and negotiations with MDAR over the improvements needed for the certificate (no covering on the walls and beams, using bedding in the milking area instead of a drain, etc.).
- Sue MDAR for a declaration that they are not selling raw milk under Chapter 94 because of the cow-share arrangements. This argument would be difficult to win because of the deference that the courts give to agencies in interpreting and

applying their own regulations. Moreover, even if the farmers win that argument, they may still need to obtain milk dealer's licenses under Chapter 94A, as described above.

- Mount a political/public relations effort to amend the statutes and regulations to exempt cow-shares from any certificate or licensing requirement. Presumably, farmers still would be subject to requirements for testing, adequate written agreements, etc.

IV. CONCLUSION

The appropriate level of regulation of raw milk deserves a serious policy debate, free of scare tactics by opponents or denial by advocates. Raw milk unquestionably can present serious health risks. However, those risks should be evaluated in relation to the risks of pasteurized milk and other foods. They also should be weighed against any public health benefits of raw milk, *i.e.*, the beneficial enzymes and vitamins that pasteurization destroys. Those benefits are disputed by the CDC and others, but the importance of our internal microflora and the role of probiotics to our health are increasingly being recognized, and further studies on the benefits of raw milk are important. The benefits of raw milk should be debated based on data rather than anecdotal evidence, and those data should be debated as objectively as the data on the risks.

The debate also should include consideration of the effects of raw milk sales on small farmers and the rural economy. Those factors are well-recognized and significant, and they are critical for the development of any sound public policy.