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THE MUNICIPALITY AND MILK PRICES

By DAVID STAHL

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I. INTRODUCTION

An important trend of the post-war period is evidenced by the expanding role of the municipal attorney from watchdog of municipal contracts and defense counsel in tort actions to counsel for the city's consumer-citizens as well. Lack of consumer representation before state and national regulatory agencies, an expanded concept of the municipality's functions, and the urgent need for an advocate representing the general public¹ have been responsible for making the municipality and the city attorneys spokesmen for consumers in urban areas. While most municipal representation has been before public utility or public service commissions, a few cities, including the City of Pittsburgh,² have also represented the public's interest in matters concerning the regulation of milk prices. As in other matters pertaining to price regulation, the needs and welfare of the general citizen can be easily overlooked by well-organized lobbies of special-interest groups; the city can act as referee in highlighting these needs and protecting the interests of the general public.

While state health regulation of milk dates back to the nineteenth century, governmental price regulation of milk products was first initiated as a depression-fighting measure in the early 1930's when an attempt was made to stabilize the precarious economic position of the rural community. As stated in the Pennsylvania Milk Control Act of 1937:

Milk producers must make deliveries of their highly perishable commodity immediately after it is produced, and must generally accept any market at any price . . . Hence, milk producers are subject to fraud and imposition, and do

*In the preparation of this paper, the author is indebted to Marion Finkelhor, Assistant City Solicitor for the City of Pittsburgh, and gratefully wishes to acknowledge her assistance.

¹ In the 1959 session of the Pennsylvania Legislature, H.B. 2347 was introduced to create a state office of consumer counsel to represent the general public before regulatory agencies. The bill was not enacted. A number of other states, however, do provide for consumer representation of this nature at the state level.

² The City of Pittsburgh has also represented the public in other non-utility proceedings, such as hearings before the State Insurance Commissioner on Blue Cross and Blue Shield premiums and fire insurance rates.

not possess the freedom of contract necessary for the procuring of cost of production.³

New York passed legislation to control the price of fluid milk in 1933. By 1941, approximately half of the states had passed similar legislation.⁴

The federal government also entered the field when key legislation was passed in 1933 and 1935.⁵ These acts, however, limited federal orders to producer-minimum prices. These orders are instituted only upon request of area-producers,⁶ and are established by formulas designed to maintain a relationship between the price of milk and the national index of other prices.

The regulation of the price of milk has been sharply debated on an urban-rural basis with political pressures from interested groups. Smaller dealers or processors, as well as various farm groups, have supported milk controls in an attempt to eliminate competitive practices of nation-wide milk-processing corporations. Today, as a result, eighteen states⁷ have some form of milk price control, and each year shows new legislative activity either to decontrol milk in those states with controls, or to control it in those with free markets.⁸ Within the period 1958-1959, in three states presently controlled, the governor⁹ either requested legislation to abolish controls or vetoed more restrictive legislation. The legislative bodies of two of the states introduced decontrol bills in 1959,¹⁰ and one state¹¹ repealed state price control. Bills to initiate price regulation were introduced in eleven states¹² and one state¹³ adopted a control law.

Within the eighteen states which presently regulate milk prices,

3 Pa. Laws 1937, P. L. 417, as amended, Pa. Stat. Ann. Tit. 31, § 700j-101 (1958).

4 COHO, *Milk Price Control, A Developing Field of Administrative Law*, 45 Dick. L. Rev. 254 (1941). In Michigan, Utah, Maryland, Washington and Louisiana, the state supreme courts have held the statutes to be unconstitutional: *Johnson v. Michigan Milk Marketing Board*, 295 Mich. 644, 295 N.W. 346 (1940), (improper board members); *Rowell v. State Board of Agriculture*, 98 Utah 353, 99 P.2d 1 (1940), (lack of adequate standards); *State v. Maitrejean*, 193 La. 824, 192 So. 361 (1939), (unlawful delegation of legislative power); *Maryland Cooperative Milk Producers v. Miller*, 170 Md. 81, 182 Atl. 432 (1936), (invalid transfer of legislative responsibility); *Griffiths v. Robinson*, 181 Wash. 438, 43 P.2d 977 (1935), (lack of adequate standards). See generally annot. 119 A.L.R. 243 (1939); 155 A.L.R. 1383 (1945).

5 Agricultural Adjustment Act of 1935, 49 Stat. 753 as amended, 7 U.S.C. § 5 (1958).

6 In July 1960 there were 76 areas covered by federal milk-marketing orders.

7 Alabama, California, Florida, Georgia, Louisiana, Maine, Massachusetts, Montana, Nevada, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Vermont and Virginia. See Appendix of state laws following this article.

8 U.S. Dep't of Agriculture, *Role of Governments in Pricing Fluid Milk in the United States*, Agricultural Marketing Series No. 335, (Sept. 1959).

9 Florida, Massachusetts and New Hampshire.

10 Maine and Rhode Island.

11 Connecticut.

12 Arkansas, Delaware, Maryland, Michigan, Minnesota, New Mexico, North Dakota, Ohio, South Dakota, Tennessee and Wisconsin.

13 Louisiana.

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there is statutory authority to regulate producer (i.e., farm) prices in seventeen and resale prices in twelve. While most states, such as Pennsylvania, regulate only the minimum price, this regulation frequently becomes the maximum. Statutes in Alabama, Florida, Georgia, New Hampshire, Vermont and Virginia¹⁴ authorize both a minimum and maximum price. Most acts include some provision requiring that dealers and handlers be licensed, that reports be filed by dealers to assure payment of the established price, and that dealers furnish bonds to insure compliance with price regulations.

Administrative organization of milk controls ranges from a single executive, usually attached to the State Agriculture Department,¹⁵ to a commission which frequently includes representatives of the special-interest groups directly concerned with the pricing problem. As stated by Mr. Justice Spence of the California Supreme Court, in commenting on the California Milk Marketing Act, "The Act is aimed primarily at what the producer shall receive, and not at what the dealer or consumer shall pay . . ."¹⁶

In the administration of milk price-control laws a state may be divided into pricing areas with or without special local control boards in each area. While most statutes provide for the initiation of price regulation by the commission, the statutes in New York, Florida, Nevada, California, Alabama and Louisiana follow the federal practice, and do not institute controls without a petition from a specified percentage of the producers in the price area.¹⁷ Other than in their general position as voters, consumers usually have little voice as to whether or not an area is controlled, and representatives of consumer interests tend to be outnumbered as members of the state commissions.¹⁸ However, in the final analysis, the urban dweller is the major purchaser of fluid milk and milk products, and so there is a need for the representation of his views in any price-fixing proceedings. While statutes generally contain language requiring consideration of consumer interests, obviously such interests can be protected only by adequate representation.

II. PARTY IN INTEREST

In many instances, a municipal corporation may bring a representative action on behalf of its citizens to protect a common right even though these citizens could bring individual suits. As stated in *American Jurisprudence*:

A municipality has authority to file a bill to restrain a breach of a contract for the furnishing of utility service under specified terms, notwithstanding its inhabitants or citizens can redress the wrong individually or collectively, and is a proper party in proceedings to require a public service company to continue the performance of its public service in a reasonably adequate manner for the benefit of the municipality and its inhabitants. . . .¹⁹

¹⁴ *Safeway Stores v. Milk Comm'n* 197 Va. 69, 87 S.E.2d 769 (1955) (commission denied power to establish single price).

¹⁵ New York, New Jersey and California are examples of this type of administrative organization.

¹⁶ *Knudsen Creamery Co. v. Brock*, 37 Cal. 2d 485, 490, 234 P.2d 29 (1951).

¹⁷ *Role of Governments in Pricing Fluid Milk in the United States*, op. cit., supra, Note 8, at 29-38.

¹⁸ The constitutionality of commissions composed of a majority of producers and dealers has been upheld: *Board of Supervisors v. State Milk Comm'n*, 191 Va. 1, 60 S.E. 2d 35 (1950); *Fleisher v. Duncan*, 195 Ga. 309, 24 S.E. 2d 15 (1943); *Thompson v. Statte Milk Control Board*, 241 Ala. 100, 1 So. 2d 381 (1941). *Contra*, *Johnson v. Milk Marketing Board*, 295 Mich. 644, 295 N.W. 346 (1940).

¹⁹ 38 Am. Jur. *Municipal Corporations* § 720 (1941).

Under this theory of consumer representation, it has become a common practice for the municipality to represent the public's interest in price-fixing hearings before state and national regulatory agencies.

Furthermore, national and state administrative procedure acts have explained which persons are entitled to appear before an administrative agency. While not applicable to state agencies, the Federal Administrative Procedure Act, for example, provides that:

So far as the orderly conduct of public business permits, any interested person may appear before any agency . . . for the presentation, adjustment, or determination of any issue, request, or controversy in any proceeding. . . .²⁰

The Pennsylvania Administrative Agency Act of 1945,²¹ similar to procedure acts in other states, is even more specific, and defines a party with a "direct interest" to include "federal, state or local instrumentalities, political subdivisions or officers thereof." A city has been held to have a sufficient interest both as a consumer and as a municipality to enable it to file complaints and participate in public utility hearings relating to gas²² and water²³ rates. This concept of persons entitled to appear before an administrative agency is substantially broader than the common law doctrine of parties with a legally-protected right.

Although the various milk-control statutes use different pricing and administrative techniques, most statutes include the consumer as an interested party in milk-pricing procedures. For example, the California milk law defines "consumer" as "any person who buys milk, cream or dairy products for consumption and not for resale," and further provides that "any order of the director thereunder substantially affecting the rights of any interested party may be reviewed by any court of competent jurisdiction."²⁴ The Virginia Milk Code provides for an appeal from a price order or any other "general action, rule, regulation or order of the commission" by any "aggrieved" person.²⁵

The Pennsylvania Milk Control Law provides for notice of hearing to all "interested persons," i.e., "all persons who may be affected by an order of the commission fixing prices,"²⁶ and who have signified their desire to be notified. "Any person aggrieved" by an order of the commission has the right to appeal.²⁷ In interpreting these provisions, the Pennsylvania Supreme Court has found producers to be such an "aggrieved person" in an order affecting dealers;²⁸ but a labor union representing the milk drivers throughout the state was held not to be a party in interest even though the ruling regulating deliveries would affect some member-drivers. In *Pennsylvania Commercial Drivers Conference v. Pennsylvania Milk Control Comm'n*,²⁹ Mr. Justice Linn stated:

Here, the general order appealed from is capable of

²⁰ 60 Stat. 240 (1946), 5 U.S.C. § 1005 (1952).

²¹ Pa. Stat. Ann. Tit. 71, § 1710.1 (Supp. 1959).

²² *City of Pittsburgh v. Public Utilities Comm'n*, 158 Pa. Super. 229, 234, 44 A. 2d 614 (1945).
²³ *City of Pittsburgh v. Public Utilities Comm'n*, 153 Pa. Super. 83, 33 A.2d 641 (1943).

²⁴ *Inter-State Water Co. v. City of Danville*, 379 Ill. 41, 39 N.E. 2d 356 (1942).

²⁵ Cal. Agr. Code § 4255.

²⁶ Va. Code Ann., § 3-371 (1950).

²⁷ Pa. Stat. Ann., tit. 31 § 700i-801 (1958).

²⁸ Pa. Stat. Ann., tit. 31 § 700i-901 (1958).

²⁹ *Colterlyahn Sanitary Dairy v. Milk Control Comm'n*, 332 Pa. 15, 1 A.2d 775, (1933).

³⁰ 360 Pa. 477, 484, 62 A.2d 9, 13 (1948).

directly affecting only "persons engaged in business as milk dealers, handlers or distributors, consumers and producers." Therefore any effect which it may have upon persons employed by milk dealers, handlers and distributors individually, or upon their representative union, is a remote consequence of the order and is therefore indirect and incidental.

Similarly, dealers were held not to be a party in interest in a pricing order limited to subdealers.³⁰ But, in *American Can Co. v. Milk Control Board*,³¹ the Massachusetts Supreme Court found that the statutory designation "person aggrieved"³² included a manufacturer of milk containers and granted the right to appeal from a milk commission order. Mr. Justice Qua stated:

Furthermore, we think that a person "interested" and a person "aggrieved" need not be within the class of persons who are directly commanded by the order of the board either to act or to refrain from acting, nor need he be engaged in any branch of the milk business.³³

In interpreting their statute, the New York courts have limited the right of appeal to only the parties of record; consequently, one

³⁰ *Rieck Dairy Co. v. Milk Control Comm'n*, 69 Dauph. 345 (Dauphin Co. C.P. Ct. 1958).

³¹ 313 Mass. 156, 46 N.E.2d 542 (1943).

³² Mass. Ann. Laws, ch. 24A, § 21 (1954).

³³ 313 Mass. 156, 46 N.E.2d, 542, 544 (1943).



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who has not appeared at the public hearing was not qualified to seek review of the commission's order.³⁴

In one case, the City of Pittsburgh appealed to the court from a procedural ruling of the Pennsylvania commission, and the city's status to maintain such an appeal was recognized.³⁵ In *Board of Supervisors v. State Milk Comm'n*,³⁶ an action against an order of the Virginia Milk Control Commission was brought by both the board and interested civic groups. Again, while the court rejected the constitutional arguments of the parties, their right to bring the action was not questioned.

The language of milk-control statutes appears to be sufficiently broad in its recognition of consumer interests to permit action by municipal governments to protect the common rights of all citizens.

III. RATE OF RETURN

The early cases relating to milk price-control were primarily concerned with the constitutionality of the new laws. Beginning in 1933, with the Rochester grocer who sold two quarts of milk and a 5¢ loaf of bread at the bargain price of 18¢, in violation of the 9¢ per quart order established by the New York Milk Control Board,³⁷ the status of milk as a product "affected with a public interest" has withstood constitutional attack. As stated by Mr. Justice Jackson in *Hood & Sons v. DuMond*:

Production and distribution of milk are so intimately related to public health and welfare that the need for regulation to protect those interests has long been recognized and is, from a constitutional standpoint, hardly controversial. Also, the economy of the industry is so eccentric that economic controls have been found at once necessary and difficult. These have evolved detailed, intricate and comprehensive regulations, including price fixing. They have been much litigated but were generally sustained by this Court as within the power of the state. . . .³⁸

Questions as to whether the statute was an unlawful delegation of legislative power,³⁹ lacked adequate standards of control,⁴⁰ constituted special legislation⁴¹ or whether the emergency aspects of the depression had ended⁴² have in most instances been resolved in favor of the state milk-control commissions. But the thorny problem of finding a standard by which to establish a "fair price" for producer, dealer and consumer has remained.

Milk price statutes are usually based upon price schedules for

³⁴ *Niagara Frontier Co-operative Milk Producers v. DuMond*, 297 N.Y. 75, 74 N.E.2d 315 (1947); *Beck v. Ten Eyck*, 162 Misc. 5, 294 N.Y.S. 541 (1937). See also *City of Pittsburgh v. Public Utilities Comm'n* 153 Pa. Super. 83, 33 A.2d 641 (1943).

³⁵ *City of Pittsburgh v. Milk Control Comm'n* 5 D. & C. 2d 685 (Dauphin Co. C. P. Ct. 1954).

³⁶ *Board of Supervisors v. State Milk Comm'n*, 191 Va. 1, 60 S.E.2d 35 (1950).

³⁷ *Nebbia v. New York*, 291 U.S. 502 (1934). The present New York statute is limited to producer prices.

³⁸ 336 U.S. 525, 529 (1948).

³⁹ *Highland Farms Dairy v. Agnew*, 300 U.S. 608 (1937); *Franklin v. State*, 232 Ala. 637, 169 So. 295 (1936); *Abbotts Dairies v. Armstrong*, 141 N.J. 319, 102 A.2d 372 (1954). *Contra*, *Johnson v. Milk Marketing Board*, 295 Mich. 644, 295 N.W. 346 (1940). See also *Ann.*, 110 A.L.R. 644 (1937); 119 A.L.R. 243 (1939); 155 A.L.R. 1383 (1945).

⁴⁰ *Board of Supervisors v. State Milk Comm'n*, 191 Va. 1, 60 S.E.2d 35 (1950); *Taylor v. State*, 237 Ala. 178, 186 So. 463 (1939).

⁴¹ *United States v. Rock Royal Co-op.*, 307 U.S. 533 (1939). *Contra*, *State v. Stoddard*, 126 Conn. 623, 13 A.2d 586 (1940).

⁴² *Camp Farms, Inc., v. Foran*, 6 N.J. Super. 306, 71 A.2d 201 (1950); *Milk Comm'n v. Dade County Dairies*, 145 Fla. 579, 200 So. 83 (1940).

different classes of milk and upon attempts to regulate the production of fluid milk by one of the following plans:

1. Base-rate quotas,⁴³
2. Classification of use,⁴⁴
3. Pooling of returns,⁴⁵
4. Relationship of fluid milk to manufactured dairy products, or to a general commodity price index.⁴⁶

Federal milk marketing orders utilize all four approaches, but control may be terminated at the request of fifty percent of the producers within the federal marketing area.

Orders by state regulatory bodies as to the minimum price to be paid to producers and minimum or maximum prices to be charged by milk dealers are founded upon these basic marketing plans, and may often provide an unrealistic picture of actual milk prices. Thus, in states which authorize payment by the ultimate utilization of the product, the "blend" or utilization price determines the actual income of the producer rather than the individual price for any given class of milk.⁴⁷ Furthermore, the utilization price may fall, even though the minimum price order does not change. While these practices may seem remote to the urban consumer, these factors are the paramount economic bases for milk price control and directly affect the resulting retail prices.

Most state statutes and court decisions tend to emphasize the factors of cost of production and distribution as the base for a milk price which will yield a reasonable return to producer and dealer. This is different from the more conventional criteria of "net assets," "return on investment" or "net worth," which are among the tools of public utility regulation.

The New York Act of 1937, as subsequently amended, requires the commissioner to take into consideration the balance between production and consumption of milk, "the cost of production and

⁴³ Ala. Code Ann., § 223 (Supp. 1955). Base-rate quotas attempt to limit the production of milk to the amount necessary to supply the fluid milk demands of the consumer by limiting each producer to a base quota for Class I, i.e., bottled milk. Production in excess of this allowance must be sold at manufactured milk prices.

⁴⁴ Pa. Stat. Ann., tit. 31 § 700i-801 (1958). Classification of use provides for payment for the producers output at a "blend price", based upon the ultimate utilization of the milk by the processor.

⁴⁵ New York Consol. Laws, art. 21 § 258 (m) (1954); Cal. Agri. 21. Code § 4294. The system of "pooling", originated by cooperative milk marketing associations and utilized by the Milk Control Division of the New York State Department of Agriculture divides returns on an area basis so that each producer receives an equivalent return for his total product regardless of the utilization of an individual farmer's output.

⁴⁶ 45 Stat. 753 (1935), as amended, 7 U.S.C. § 5 (1952).

⁴⁷ For a complete discussion of the economic aspects of the "rate base" in milk control, see Griswold, *The Control "Rate Base" in Milk*, 45 Dick. L. Rev. 135 (1941) and Coho, *Milk Price Control—A Developing Field of Administrative Law*, 45 Dick. L. Rev. 254 (1941).

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distribution . . . the cost of feeding stuffs . . . the supply of milk in each market and the purchasing power and welfare of the public."⁴⁸ The North Carolina Act of 1953 includes, in addition to production and distribution costs, "the prices of other foods and other commodities."⁴⁹ Resale prices in California, however, are determined not only on production and distribution costs, but also include "a reasonable return upon necessary capital investment," based upon representative distributors and retail stores engaged in the distribution of milk.⁵⁰ The Montana statute provides that retail price of milk per quart shall not be more than "twice the price paid by the distributor to the producer for the same grade and butterfat content of fluid milk."⁵¹

In Pennsylvania, a "reasonable return" to the producer is defined as "cost of production and a reasonable profit," but the standard of a "reasonable return" for the dealer is undefined. In ascertaining a basis for arriving at a "reasonable return," the Pennsylvania statute further provides that "the commission shall utilize a cross-section representative of the average or normally efficient producers and dealers or handlers in the area."⁵²

As early as 1934, the effect of fixed minimum prices upon the high-cost processors was questioned by the Supreme Court in *Hegeman Farms Corp. v. Baldwin*.⁵³ Mr. Justice Cardozo stated:

The appellant would have us say that minimum prices must be charged whenever a particular dealer can show that the effect of the schedule in its application to himself is to deprive him of a profit. This is not enough to subject administrative rulings to revision by the courts. If the designation of a minimum price is within the scope of the police power, expenses or losses made necessary thereby must be borne as an incident, unless the order goes so far beyond the needs of the occasion as to be turned into an act of tyranny *The Fourteenth Amendment does not protect a business against the hazards of competition.* (Emphasis added).

The Pennsylvania Supreme Court in *Colteryahn Dairy v. Milk Control Comm'n*, interpreted the Pennsylvania law as providing that all factors enumerated in the statute should be considered by the commission as follows:

The theory that segregation of the classes is essential in determining fair return, no doubt led the court below to adopt the sales dollar return as a convenient basis for price fixing. We do not hold this theory incorrect applied to the total business of the dealer although it is a new standard and may produce a return of a very large per cent on fair value. It may be that "fair return" should be based upon the same rules governing the return of a public utility or upon a combination of these two theories, or some other standard may be adopted. We do not attempt to lay down

48 New York Consol. Laws, art. 21, § 258 (m) (1954).

49 N.C. Gen. Stat. Ann., § 106-266.8 (Supp. 1959).

50 Cal. Agri. Code §§ 4354, 4360. See also *Challenge Cream & Butter Ass'n v. Parker*, 23 Cal.2d 137, 142 P.2d 737 (1943); *Jersey Milk Products v. Brack*, 13 Cal.2d 620, 91 P.2d 577 (1939).

51 Mont. Rev. Code Ann., § 27-407 (1947).

52 Pa. Stat. Ann., Tit. 31 § 700j-801 (1958). See also *Nev. Rev. Stat., Tit. 51 § 584-568* (1959).

53 293 U.S. 163, 170 (1934).

any theory of fair return. It is the duty of the Commission to devise such a theory as will conform to the law, basing its conclusion on sufficient evidence⁵⁴

The actual result of the *Colteryahn* decision, however, has been to focus the attention of the Pennsylvania Milk Control Commission on the dealer's cost of production and the percentage of net return on his sales. Calculation of costs is further complicated by the Pennsylvania commission's practice of presenting these dealer costs in evidence as an aggregate figure including the larger as well as smaller dealers. In statistics prepared by the Pennsylvania Milk Control Commission for a recent hearing held to fix milk prices in the Pittsburgh area, a percentage of 1.89% return on net sales yielded 10.39% return on net assets. This figure, obviously, is substantially larger than the permissible return in the public utility field.⁵⁵ Representatives of consumers, including the City of Pittsburgh, have attempted to shift commission attention to the inflationary aspect of "net sales" as the basis for milk prices.

The greatest problem in attempting to maintain existing price patterns for consumers is probably the wide economic range represented by the various milk processors. Nationwide multi-product dealers⁵⁶ with large budgets and administrative costs compete with the family-operated milk distributor. Under the New York milk control statute of 1933, a price differential established between advertised and non-advertised brands of fluid milk was upheld by the United States Supreme Court as a valid classification based upon existing trade practices.⁵⁷ In more recent years, however, some consumer groups have successfully emphasized the need for the settling of maximum as well as minimum prices. In a New Jersey case decided in 1954, the court approved the power of the state director to establish the minimum as *the maximum price* under the New Jersey milk price control law. In interpreting this statute which was silent on the question of maximum price, the New Jersey court stated:

It is true that the immediate evil in 1933 was price cutting The legislative intervention was grounded entirely upon the public interest and the Legislature may properly have believed that in undertaking to exercise control over the milk industry it ought empower its administrative agent not only to fix, if necessary, minimum prices fair to the industry but also, if necessary, maximum prices fair to the consuming public.⁵⁸

The broad legal standards of cost of production, rate of return and fair price to consumers are only partial aspects of milk control legislation. As in establishing a fair return in other regulated industries, the economic problems and conflicting economic interests compete within the legal statutory framework.

⁵⁴ 332 Pa. 15, 30, 1 A.2d 775, 783 (1938).

⁵⁵ *Business and Economic Conditions, First National City Bank of New York, 1958.*

⁵⁶ National Dairy Products Corp. reported sales of \$1,605,725,000 for 1959 and an increase in net earnings for the eighth consecutive year. *Pittsburgh Post-Gazette*, March 22, 1960.

⁵⁷ *Borden's Farm Products Co. v. Ten Eyck*, 297 U.S. 251 (1936); *Mayflower Farms, Inc. v. Ten Eyck*, 297 U.S. 266 (1936) (Differential allowed only to existing dealers).

⁵⁸ *Abbotts Dairies, Inc. v. Armstrong*, 14 N.J. 319, 102 A.2d 372, 375 (1954).

IV. CURRENT PROBLEMS

In the quarter of a century since the inception of milk control, there have been three distinctly different periods of economic conditions and marketing problems. During the thirties, the prime objective was to alleviate the depression and to raise milk prices from depression levels. Shortages and nationwide price controls dominated the milk marketing scene during World War II. The postwar period has been identified by rising commodity prices, the growth of interstate milksheds, the expansion of nationwide dairy corporations and the continuing problem of a milk surplus.

The preamble of the Louisiana Orderly Marketing Law of 1958 illustrates this change in emphasis:

Whereas it is the intent of the legislature to prevent the economic destruction of many dairy farmers, dairy plants, ice cream dealers and resale merchants as a result of discriminatory trade practices by certain business organizations financially strong enough to sell below their own costs for an extended period of time which presents a situation detrimental to the health, welfare and economy of the people of this state . . . ⁵⁹

While the Louisiana act provides for the control of farm prices when requested by at least fifty percent of the producers in a given market, the bulk of the statute regulates the resale practices of discount rebates, advertising costs, free storage and refrigeration equipment supplied to retailers and other similar trade practices. Highly competitive practices⁶⁰ in the wholesale and retail aspects of milk distribution have forced other state commissions to regulate such competition along with price controls. New York State has attempted to control competition by limiting the number of dealer licenses in areas where it is shown "that the issuance of a license will lead to destructive competition in a market adequately served," or where the issuance of the license "is not in the public interest."⁶¹

In *Shearer's Dairies, Inc. v. Milk Control Comm'n*, the Pennsylvania Superior Court stated:

. . . . Although governmental price fixing and its concomitants may run counter to the philosophy of free enterprise, it has been firmly established in relation to milk for over a quarter of a century; that milk control is founded upon price control; and that to maintain an established price, *it is necessary to prevent the seller from giving to the purchaser any thing of value related to the sale, which is in addition to the product and service for which the price was established.* (Emphasis added).⁶²

As federal marketing orders under the agricultural adjustment acts are limited to minimum producer prices, trade practices between processor and retailer are regulated primarily at the state level.

⁵⁹ La. Code Ann., Tit. 40 § 940.1, (Supp. 1959). This statute was upheld in *Schwegmann Bros. v. McCrory*, 237 La. 768, 112 So. 2d 606 (1959). See also Cal. Agri. Code § 4360 (6).

⁶⁰ In one area of Pennsylvania advertising costs for nineteen dealers according to the dealers own exhibit totaled \$1,388,274.00. Dealers Exhibit 2, Milk Control Commission Hearings February 10, 1960, Pittsburgh, Pa.

⁶¹ New York Consol. Laws, art. 21, § 258 (c) (1954). See also *Grimstead v. Carey*, 150 N.Y.2d 657 (1956); *Friendship Dairies v. DuMond*, 131 N.Y.S. 2d 51 (1954).

⁶² 191 Pa. Super. 574, 576, 159 A.2d 268, 269-70 (1960). See also *Milk Maid Dairy Products, Inc. v. Milk Control Comm'n*, 190 Pa. Super. 410, 134 A.2d 274 (1959).

From the standpoint of the producer, there is the traditional agricultural problem of maintaining a balance between supply and demand. Despite improved methods of breeding to equalize the flow of milk, spring overproduction continues to be a factor in decreasing the producer's return. Many states like Pennsylvania have attempted to discourage seasonal flooding of the market by a decrease in prices for these months. However, an attempt by the New Jersey milk director to impose a production-controlling "norm and excess" plan upon producers and dealers under the guise of price control was held by the New Jersey Supreme Court to be beyond his statutory power.⁶³

Even more threatening to the dairy farmer are the changing habits of milk consumption. While total consumption of milk has increased, the sales of cream and premium fluid milk with a high butterfat content have declined.⁶⁴ The July report of the United States Department of Agriculture shows a spring-time increase of eight percent over 1959 in the sale of skim milk. The increased sales of fortified skim and new low fat products can reduce producer "blend" prices based on butterfat content. Furthermore, many states have adulterated-milk statutes which specifically define the butterfat content of fluid milk and prohibit the sale of such low fat products.⁶⁵ The paradoxical question of when milk is "milk" may have to be resolved by either state legislative bodies or the courts through the interpretation of adulterated-milk statutes.

The United States Department of Agriculture reports that during the period 1956-1959, the traditional pattern of milk distribution has shifted from the quart to multiple-quart containers, and from home delivery to retail sales outlets, with resulting price differentials. In *Safeway Stores v. Milk Comm'n*, Justice Spratley attempted to distinguish between a "legal" and an "illegal" price differential as follows:

The words "grade, quantity, or class" . . . permit classification of milk according to "grade, quantity or class." They do not permit classification according to the method of distribution; i.e., whether by home-delivery or store-delivery. The quality of the milk of a particular grade or class is not affected merely by reason of the method of delivery, the character of its container, or the quantity involved.⁶⁶

A discount based on quantity is not a price differential based on grade such as is prohibited. The price is the same for the same grade in any quantity involved. A differential measured by quantity results in no discrimination between distributors or between consumers. It applies to all alike, and allows an economic saving both to seller and purchaser.⁶⁷

However, the Massachusetts Supreme Court in *American Can Co. v. Milk Control Bd* stated that minimum prices should take into

⁶³ Appeals of Port Murray Dairy Co., 6 N.J. Super 285, 71 A.2d 208 (1950).

⁶⁴ Smith and Hermann, *Changing Patterns in Fluid Milk Distribution*, U.S.D.A., p. 1. (Aug. 1956).

⁶⁵ The Act of June 8, 1911, P.L. 712, as amended, Pa. Stat. Ann., Tit. 31 § 521 (1958), provides that it is unlawful to sell milk "which contains less than three and one quarter (3¼) per centum of butter fat" except that ". . . not more than one half (½) of one (1) per centum of butter fat may be sold, if sold as skimmed milk".

⁶⁶ 197 Va. 69, 87 S.E.2d 769, 773 (1955).

⁶⁷ *Id.* at 774.

account not only the kind or quality of the product sold, "but the entire service rendered by the seller in making the sale, so that a higher minimum price can be fixed for milk that is delivered at the residence of the buyer."⁶⁸ (emphasis added). While there has been no litigation on this question, price differentials between home and store purchases exist in Pennsylvania and many other states.

Quantity discounts for purchases of two or more quarts have been upheld in Montana subject to the price standard based on producer prices of Montana's statute⁶⁹ and such discounts are included within the California statute itself.⁷⁰

A California court found that a price differential based upon glass versus paper containers violated the state milk-control law of that state.⁷¹ A recent California decision, however, held that the packaging costs of the cheapest carton could not be used to determine minimum prices, but that the commission would have to consider packaging costs of representative distributors.⁷² A recent New Jersey case upheld the legality of the gallon jug as a container for milk distribution.⁷³ Recent hearings before the Pennsylvania Milk Control Commission in the Philadelphia area have revolved around the validity of a price differential based on this method of distribution.

Classification of milk by butterfat content has been the usual practice under most state control laws.⁷⁴ However, attempts to establish separate prices for milk from Guernsey cows as opposed to other types of milk have been held to be unreasonable.⁷⁵ Originally, milk containing Vitamin A was classified by dealers as a premium product. While this is still true in many states, the infinitesimal cost of these additives, considerably less than a half cent per quart, has raised questions on the validity of such differentials.⁷⁶ The city attorneys of Pittsburgh and Philadelphia have repeatedly raised this question in hearings before the Pennsylvania Milk Commission. Recently the Director of the New Jersey Office of Milk Industry eliminated this practice in the state.⁷⁷

Where a specific exemption does not exist, any governmental institution, including federal agencies,⁷⁸ are subject to the state minimum-price orders. Some price control statutes, however, specifically exempt certain governmental corporations and charitable institutions.⁷⁹ In other states, the commission or administrator may establish a separate classification and price differential.⁸⁰ As milk is required under the federal school lunch program, the cost of this product may often determine the scope and quantity of other food

68 316 Mass. 337, 55 N.E.2d 453, 454 (1944).

69 *Heimbichner v. Montana Milk Control Board*, 134 Mt. 366, 332 P.2d 922 (1958).

70 Cal. Agri. Code § 4357.

71 *Challenge Cream & Butter Ass'n. v. Parker*, 23 Cal. 2d 137, 142 P.2d 737, (1943); *Amer. Can Co. v. Milk Control Board*, 316 Mass. 337, 55 N.E.2d 453 (1944).

72 *Sentell v. Jacobsen*, 163 Cal. 2d 748, 329 P.2d 932 (1958).

73 *Pied Piper Super Market v. Hoffman*, 160 A.2d 135 (N.J. 1960).

74 *State v. Farmers Union Co-op.*, 160 Ore. 205, 84 P.2d 471 (1938).

75 *New York State Guernsey Breeders Co-op. v. Wickard*, 141 F.2d 805 (2d Cir. 1944); *Weiss v. Milk Control Comm'n* 71 Dauph. 33 (Dauphin Co. C. P. Ct. 1957).

76 *New Jersey Office of Milk Industry Order No. 60-1*: "... For a period of years this office has authorized a differential of one cent per quart over regular milk prices to be charged for milk containing Vitamin D. The testimony . . . indicates that the costs of the additive are almost negligible. I, therefore, find that the Vitamin D differential is not justified".

77 *Ibid.*

78 *Penn Dairies v. Milk Control Comm'n* 318 U.S. 261 (1943). Cf. *Pacific Coast Dairy, Inc. v. Dept. of Agriculture of Cal.* 318 U.S. 285 (1943).

79 See *State v. Auclair*, 110 Vt. 147, 4 A.2d 107 (1939).

80 *New Jersey and Pennsylvania.*

items. For this reason the City Solicitor of Philadelphia, in a milk-price hearing in June, 1960,⁸¹ specifically requested that school milk be specially classified as a decontrolled item under the Pennsylvania law. In a recent California case,⁸² the court found that a reduction in price to schools of noncontrolled dairy products, by a dealer selling school milk, was not a violation of price control as "such sales were severable," even though the total transaction actually represented a reduction in price.

V. CONCLUSION

There are many who advocate elimination of state milk pricing agencies and the return to free competitive markets. Conversely, there are advocates of state control laws in free market states. The milk industry is unique in that it includes big and little business, farmer and processor, economic giants and dwarfs, all involved in a product subject to health hazards and vital to the urban consumer. Perhaps such a maelstrom of conflicting interests requires a referee in the form of a state commission or administrator to arbitrate the demands of each group.

In states where retail milk prices are regulated, urban consumers are interested parties. The municipal solicitor, with his growing experience before other regulatory agencies, appears to have a logical role in milk price proceedings. Traditional municipal regulation of the sanitary aspect of the production and distribution of milk sets a precedent for municipal interest in this field. As dealers and producers organize into trade lobbies and associations with full time, able counsel, it is only equitable that the urban resident also have adequate legal representation.

Appendix A

- Alabama Code Ann., Tit. 22, Sec. 205 (1941 Supp. 1955).
- California Ag. Code Ann., C. 17, Sec. 4200 (1954 Supp. 1959).
- Florida Stat. Ann., Tit. 31, Sec. 501.01 (1943 Supp. 1959).
- Georgia Code Ann., C. 42, Sec. 523 (1957).
- Louisiana Code Ann., Tit. 40, Sec. 940.1 (1951 Supp. 1959).
- Maine, C. 33, Sec. 1 (1954).
- Massachusetts Gen. Laws Ann., C. 94A, Sec. 21 (1954).
- Montana Rev. Code Ann., Sec. 27-401 (1947).
- Nevada Rev. Stat., Tit. 51, Sec. 584-315 (1959).
- New Hampshire Rev. Stat., Tit. XIV, Sec. 183 (1955).
- New Jersey Stat. Ann., Tit. 4, Sec. 12-A (1959).
- New York Consol. Laws, Art. 21, Sec. 252 (1954).
- North Carolina Gen. Stat. Ann., Sec. 106-260 (1952 Supp. 1959).
- Pennsylvania Stat. Ann., Tit. 31, Sec. 700-j-101 et seq (1958).
- Rhode Island Gen. Laws, Sec. 21-4-1 (1956).
- South Carolina Code Ann., Tit. 32, Sec. 1610 (1952 Supp. 1959).
- Virginia Code Ann., C. 17, Sec. 3-346 (1950).
- Vermont Stat. Ann., Tit. 6, C. 147, Sec. 2501 (1958).

⁸¹ Milk Commission Hearings, Philadelphia, Pennsylvania, June 6 et seq 1960.
⁸² *Jacobsen v. Dairy Mart Farms, Inc.*, 154 Cal. 2d 287, 315 P.2d 932 (1957).