

VOLUME NO. 36

Opinion No. 58

INTERSTATE COMMERCE — Licensing residents of other states under the Milk Control Act; LICENSES — Authority of Department of Business Regulation under Milk Control Act; MONTANA MILK CONTROL ACT — Producer's and distributor's assessments. Sections 27-403, 27-408, 27-409, 27-423, Revised Codes of Montana 1947.

- HELD:**
- 1. The retail branch of this chain is not liable for payment of the producer's and/or distributor's assessment specified in section 27-409, R.C.M. 1947 with respect to the dairy products imported from another state for ultimate sale within this state.**
 - 2. The licensed manufacturing and distribution branch of the chain is liable for the payment of the distributor's assessment specified in section 27-409, R.C.M. 1947 with respect to raw milk or finished product imported from another state for ultimate sale within this state.**
 - 3. A producer, distributor or producer-distributor resident of another state may be required to obtain a license from the Department of Business Regulation under section 27-408, R.C.M. 1947 before marketing its products in this state.**

March 1, 1976

Mr. K.M. Kelly, Administrator
Milk Control Division
Department of Business Regulation
805 North Main Street
Helena, MT 59601

Dear Mr. Kelly:

You have requested an Attorney General's Opinion on three questions based upon a stated factual situation. The factual situation you posed is as follows:

An operator of a chain of supermarkets sells, at retail, various dairy products processed from Class I, II and III milk as defined in Section 27-403, R.C.M. 1947. This retailer (a) purchases certain of such products from distributors licensed under the Montana Milk Control Act, (b) imports certain other such products which were processed in another State from milk not produced within Montana and (c) receives certain products processed from Class I milk from a plant operated by the retailers manufacturing and distribution branch which is licensed as a distributor under the Montana Milk Control Act. A portion of said plant's supply of raw milk is imported from producers resident of another State.

The questions you presented, based upon the above factual situation are as follows:

- (1) Is the retail branch of this chain liable for payment of the producer's and/or distributor's assessment specified in Section 27-409, R.C.M. 1947, with respect to the dairy products imported from another State when said products are not handled by its manufacturing branch?
- (2) Is the licensed manufacturing and distribution branch of the chain liable for the payment of the producer's and/or distributor's assessment specified in Section 27-409, R.C.M. 1947, with respect to raw milk or

finished product imported from another State for ultimate sale within this State?

(3) Pursuant to the licensing authority vested in the Department of Business Regulation by Section 27-408, R.C.M. 1947, may a producer, distributor or producer-distributor resident of another state be required to obtain a license from the Department under the above referenced statute before marketing its products in this state?

In regard to your first question, section 27-409, R.C.M. 1947 provides that the Department shall in each year before April 1, for the purpose of securing funds to administer and enforce the Milk Control Act, levy an assessment upon producers, producer-distributors, and distributors based upon a fee per hundredweight on the total volume of all milk subject to the Milk Control Act produced or sold by the licensee. Section 27-408, R.C.M. 1947 provides for the licensing of producers, producer-distributors, distributors and jobbers. Neither of these statutes provide for the licensing of retailers or the levying of assessments upon retailers.

It is important to note, however, that section 27-408, *supra*, specifically provides as follows:

In any market, where the provisions of this chapter apply it is unlawful for a producer, producer-distributor, distributor or jobber to produce, transport, process, store, handle, distribute, buy or sell milk unless the dealer is properly licensed as provided by this chapter. It is unlawful for a person to buy, sell, handle, process, or distribute milk which he knows or has reason to believe has been previously dealt with or handled in violation of any provision of this chapter...

Section 27-403(1)(b), R.C.M. 1947, defines "person" to mean "a person, firm corporation, or cooperative association". Section 27-403(1)(h), *supra*, defines "dealer" to mean "a producer distributor, producer-distributor, jobber, or independent contractor."

The above referenced sections do not provide for the licensing of retailers or the levying of assessments upon retailers. Therefore, with respect to your first question, it is my opinion that the retail branch of a chain of supermarkets is not liable for the payment of the producer's and/or distributor's assessment. However, under section 27-408, *supra*, it would be unlawful for a retailer to buy or sell milk which he knows or has reason to believe was purchased from an unlicensed dealer.

Your second question concerns whether a licensed manufacturing and distribution branch of the chain is liable for the payment of the producers and/or distributors assessments, with respect to raw milk or finished product imported from another state for ultimate sale within this State.

As mentioned in response to the first question, section 27-409, *supra*, provides for the levying of an assessment upon producers, producer-distributors, and distributors. That section further provides, in sub (3) that "the fee assessed on a producer or on a distributor may not be more than one-half (1/2) the fee

assessed on a producer-distributor". It is clear from this section that only the "producer-distributor" may be assessed for both the producer and distributor assessment.

With respect to question number two, therefore, it is my opinion that the licensed manufacturing and distribution branch of the chain is liable only for the payment of the distributors assessment as specified in section 27-408, supra. It is important to note here, as in question number one, that section 27-408, supra, makes it unlawful for a distributor to deal in milk that he knows or has reason to believe came from an unlicensed production or distribution source.

Your third question concerns whether a producer, distributor, or producer-distributor resident of another state may be required under section 27-408, supra, to obtain a license from the Department of Business Regulation before marketing its products in this state.

This question must be answered with reference to both the Montana Milk Control Act and the commerce clause of the United States Constitution (Article I Section 8). Section 27-423 R.C.M. 1947 provides as follows:

This chapter does not apply to foreign or interstate commerce except in so far as it may be effective in compliance with the United States Constitution, and with the laws of the United States. It is the intention of the legislature, however, that the instant, when ever that may be, that the handling, within the state by a dealer, of milk produced outside of the state, becomes the subject of regulation by the state in the exercise of its police powers, the provisions of this chapter, affecting intra-state milk, immediately apply and the powers conferred by this chapter attach thereto.

Section 27-408, supra, provides that it is unlawful for a dealer to buy or sell milk within this state without a license. This section further provides that it is unlawful for a person to buy or sell milk from an unlicensed source. It follows therefore, that the Montana Milk Control Act contemplates that producers or distributors not resident of this state be licensed in order to sell milk within this state. It remains to determine whether this licensing would be in conflict with the commerce clause of the United States Constitution.

The commerce clause of the United States Constitution provides in Article 1, Section 8 that "The congress shall have the power ... to regulate commerce with foreign nations, and among the several states, and with the Indian tribes;" The regulation of the production and sale of milk has long been recognized as an area requiring local control. This recognition is based in the interest of the safety, health and well-being of local communities. **Parker v. Brown**, 317 U.S. 341, 87 L.Ed. 385, 63 S.Ct. 307 (1943); **Dean Milk Co. v. Madison**, 340 U.S. 349, 95 L.Ed. 329, 71 S.Ct. 295 (1951).

The regulation of the milk industry has been held to be a constitutional exercise of states' police power in many cases. The constitutionality of the Montana Milk Control Act has been upheld by the Montana Supreme Court in **Montana Milk Control Board vs. J.D. Rehberg**, 141 Mont. 149, 376 P.2d 508

(1962). State and local regulation of milk is valid provided that the regulation does not substantially affect or impose an undue burden on interstate commerce. **Polar Ice Cream and Creamery v. Andrews**, 375 U.S. 361, 11 L.Ed. 389, 84 S.Ct. 378 (1964).

It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business. **Western Live Stock v. Bureau of Revenue**, 303 U.S. 250, 254, 82 L.Ed. 823, 58 S.Ct. 546 (1938). Out of state producers and distributors share the benefits and protections of milk control within the state, e.g., minimum pricing and protection from unfair trade practices. Therefore, they should bear their share of the burden for providing this protection. Even interstate business must pay its way. **Postal Telegraph Cable Company v. Richmond**, 249 U.S. 252, 63 L.Ed. 590, 39 S.Ct. 265, (1919).

Since the Montana Milk Control Act licensing requirements do not discriminate against non-residents and do not tend to exclude milk shipped in interstate commerce, it appears that the burden upon interstate commerce, if any, is not substantial or undue and would not be prohibited by the commerce clause of the United States Constitution. Therefore, producers, distributors, and producer-distributors resident of another state may be required to obtain a license pursuant to the provisions of section 27-408, supra, before marketing their products in this state.

THEREFORE, IT IS MY OPINION:

1. The retail branch of this chain is not liable for payment of the producer's and/or distributor's assessment specified in section 27-409, R.C.M. 1947 with respect to the dairy products imported from another state for ultimate sale within this state.
2. The licensed manufacturing and distribution branch of the chain is liable only for the payment of the distributor's assessment specified in section 27-409, R.C.M. 1947 with respect to raw milk or finished product imported from another state for ultimate sale within this state.
3. A producer, distributor or producer-distributor resident of another state may be required to obtain a license from the Department of Business Regulation under section 27-408, R.C.M. 1947 before marketing its products in this state.

Very truly yours,
ROBERT L. WOODAHL
Attorney General