

Opinion No. 70
Milk Control Board—Containers—
Price Differential.

Held: A "container charge," to be fixed for milk sold in paper containers as distinguished from milk sold in glass bottles, cannot be fixed arbitrarily by the Montana Milk Control Board. To come within the objects and purposes of the Montana Milk Control Act any such "container charge" must be based upon clear and satisfactory evidence that in the long run paper containers are more costly than containers of glass or of other materials which can be used more than once, so that a dealer who sells milk in paper containers furnishes to his customer a different and more expensive service than one who sells the same milk in some other container and is therefore reasonably entitled to the benefit of a higher price fairly proportional to the higher cost.

October 16, 1947

Montana Milk Control Board
 State Capitol Building
 Helena, Montana

Attention: Mr. A. A. Klemme,
 Executive Secretary

Gentlemen:

You have presented this question:

"Can the Milk Control Board require a distributor selling milk in paper containers to charge more if cost surveys prove that paper containers are more expensive than glass?"

The Montana Milk Control Board's price fixing powers are set out in Section 7 of Chapter 204 of the Laws of 1939:

"Prior to the fixing of prices in any market the board shall conduct a public hearing. . . The board shall by means of such hearing and by any other means available or from facts within its own knowledge, in-

vestigate and determine what are reasonable costs and charges for producing, hauling, handling, processing, and/or other services performed in respect to milk and what prices for milk in the several localities and markets of the State, and under varying conditions, will best protect the milk industry in the State and insure a sufficient quantity of pure and wholesome milk to adults and minors in the State, and be most in the public interest.

"The board shall take into consideration the balance between production and consumption of milk, the costs of production and distribution, and the purchasing power of the public.

"The board after making such investigation shall fix by official order: . . .

"(b) The minimum wholesale or retail prices to be charged for milk in its various grades and uses handled within the State for fluid consumption. . . .

"A minimum wholesale or retail price to be charged for milk shall not be fixed higher than is necessary to cover the costs of ordinarily efficient and economical milk dealers, including a reasonable return upon necessary investment. . . ."

The general purpose of the Milk Control Act, as stated in Section 2 of Chapter 204, is "to protect and promote public welfare and to eliminate unfair and demoralizing trade practices in the fluid milk industry"—and it "is enacted in the exercise of the police powers of the State."

The question whether a milk control authority may set a different price for milk packaged in paper or fiber containers has been before the courts of three states within the last four years: California, Virginia, and Massachusetts.

In *Challenge Cream and Butter Association v. Parker*, (1943) 142 Pac. (2d) 737, the Supreme Court of California held the milk control act of that state did not authorize a differential between the prices of milk

packaged in paper cartons and milk bottled in glass containers. The court held such a differential to be arbitrary and capricious, inasmuch as—in the court's opinion—the construction of the containers does not affect the quantity, quality, and type of delivery and a difference in price would increase intertrade friction and violate the aim of a uniform minimum price in the particular marketing area.

In *Lucerne Cream and Butter Company v. Milk Commission*, (1944) 29 S. E. (2d) 397, the Supreme Court of Appeals of Virginia ruled a price fixing regulation of the milk commission was invalid insofar as it undertook to establish a difference in price for the same grade of milk based on the type of container in which milk was sold. The Virginia court viewed the packaging of the milk as only one of many essential and important factors to be considered in fixing the price, and concluded a price differential could not be established on any one cost factor alone.

In *American Can Company v. Milk Control Board*, (1944) 55 N. E. (2d) 453, the Supreme Judicial Court of Massachusetts denied the milk control board's power to fix a "container charge" where the board had admitted in substance the price differential of one cent was prohibitive and prevented the American Can Company from doing business in the area. The court went on to say, in substance, the foundation for a price differential between glass bottle and carton distribution lies not in the use of a paper carton, but in whether proof can be made to milk control board that delivery in paper cartons is a more expensive type of distribution, entitling the user of paper cartons to a price higher than that of the user of glass bottles.

The Massachusetts milk control act more closely resembles the Montana act than do the acts of California and Virginia. I am impressed by that fact as well as the reasoning of the Massachusetts court, (p. 454-455):

" . . . in accordance with a fair construction of the law as a whole, the board in fixing minimum prices can take into 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 than for the same kind and quality of milk not so delivered, and a higher minimum price can be fixed for milk where the container is furnished than where it is not furnished. But all price classifications and all rules in respect to prices must bear some rational relation to the expressed purpose of the law to provide for the establishing of minimum prices for milk which 'will be most beneficial to the public interest,' will 'best protect the milk industry,' and 'insure a supply of pure, fresh milk adequate to cover consumer needs.' Section 10. The paper container is, or may be, a proper container for milk. When of the required capacity and 'sealed as measures,' paper containers 'may be used as provided by law for glass milk jars and bottles.' G. L. (Ter. Ed.) c 98 No. 16. **The board has no power to discriminate arbitrarily against the use of such containers by imposing an added charge upon milk sold in them to the disadvantage of persons interested in that form of container. In order to be valid any such added charge must have some tendency to promote the objects of the milk control law. Only for the promotion of those objects does the board have power to make regulations affecting the manner in which milk dealers shall conduct their businesses and make deliveries or to make regulations affecting the business and property of persons who, like the petitioner, are not engaged in the milk business. We can conceive of no way in which such a (container charge) can reasonably be supposed to have any tendency to accomplish the objects of the law, and none has been pointed out to our satisfaction, unless it is a fact that in the long run paper containers are more costly than containers of glass or of other materials which can be used more than once, so that a dealer who sells milk in paper containers furnishes to his customer a different and more expensive service than one who sells the same**

milk in some other container and is therefore reasonably entitled to the benefit of a higher minimum price fairly proportional to the higher cost. We are of the opinion that the test of the validity of the so-called 'container charge' is to be found in the answer of the question whether the use of the container with respect to which the charge is imposed is a more costly method of selling milk than is the use of containers with respect to which no charge is imposed. . . .

"... If a difference in the quality of the transaction is accompanied by a difference in cost we think that the foundation might be laid for a difference in price. . . ." (Emphasis mine).

I cannot emphasize too strongly the Massachusetts rule, *supra*, specifically enjoins the milk control board from arbitrary action in determining that a price differential shall exist between milk sold in paper cartons and milk sold in glass bottles. The power of the board is limited to the accomplishment of the purposes of the milk control act as a whole.

Because—as I have already indicated—the authorities are not unanimous on the question of price differentials such as we are considering here, your board must exercise sound discretion and great caution in fixing any price differentials. Such differentials, if ultimately fixed must be supported by clear and satisfactory evidence to warrant them in order to show beyond doubt that they are not arbitrary and prohibitive. Under Section 7 of the Milk Control Act, quoted *supra*, public hearings will be necessary in consideration of establishment of such price differentials. And I point out, as well, Section 5 of the act gives to your board "the power to subpoena milk dealers, their records, books and accounts and any other person from whom information may be desired or deemed necessary to carry out the purposes and intent" of the Milk Control Act.

It is my opinion a "container charge," to be fixed for milk sold in paper containers as distinguished from milk sold in glass bottles, can-

not be fixed arbitrarily by the Montana Milk Control Board. To come within the objects and purposes of the Montana Milk Control Act, any such "container charge" must be based upon clear and satisfactory evidence that in the long run paper containers are more costly than containers of glass or of other materials which can be used more than once, so that a dealer who sells milk in paper containers furnishes to his customer a different and more expensive service than one who sells the same milk in some other container and is therefore reasonably entitled to the benefit of a higher price fairly proportional to the higher cost.

Sincerely yours,
R. V. BOTTOMLY,
Attorney General