NOTE

GOVERNMENT REGULATION OF PRICES: A STUDY OF MILK CONTROL IN PENNSYLVANIA *

I. INTRODUCTION

In the decade following World War I, the dairy industry enjoyed an era of prosperity; strong foreign and domestic demands supported heavy production and adequate prices. With the onset of the depression, however, widespread unemployment and reduced incomes severely eroded much of this demand while production and supply continued at relatively constant levels.[1] The usual result of such economic imbalance ensued: dairy prices were forced into a gradual and continuing decline.[2] Vicious price wars accompanied and contributed to the downward spiral.[3] The man in the middle—the distributor—naturally attempted to shift the effects to the producer, and the prevailing economic conditions and characteristics of the industry made this a relatively simple task. The dairies in a particular region were the principal outlet for nearby independent producers. The high cost of transporting fluid milk and the perishability of the product

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[1] Production not only failed to respond to the decreasing demand but actually increased during the depression. The number of cows kept for milk increased from 22,330,000 on January 1, 1929, to 26,062,000 on January 1, 1934. BLACK, THE DAIRY INDUSTRY AND THE AAA 60 (1935). The canned and condensed milk industry received its impetus in supplying the sharp increase in foreign demand during World War I. See Cadwallader, *Government and Its Relationship to Price Standards in the Milk Industry*, 22 MINN. L. REV. 789, 791-93 (1938). See generally HOLLINGSHEAD & WILLIAMSON, INTERNATIONAL TRADE IN CONCENTRATED MILK (U.S. Dep't of Commerce Trade Promotion Series No. 57, 1928).

[2] CASSELS, A STUDY OF FLUID MILK PRICES 180-81 (1937).

[3] See Steele's discussion following Corbett, *Milk Control Experience—Results and Problems of Federal and State Regulation*, 17 J. FARM ECON. 109 (1935), in *id.* at 121-22.

eliminated more distant buyers from the narrowly drawn boundaries of the farmer's market. With the unfavorable economic climate of weak demand combined with large surplus, it is not difficult to see that the farmer had little choice but to accept the price dictated by the available dairy. The alternative was spoilage of his entire production.[4]

Fearful that meager returns to the producer would result in the elimination of costly sanitary practices and the abandonment of many farms—both of which threatened the adequacy of a wholesome milk supply,[5] Pennsylvania joined many other states [6] in enacting remedial legislation: an emergency one-year milk control statute was passed in 1934.[7] After one extension,[8] the law was reenacted in permanent form in 1937.[9] It is this law, with supplementary amendments, which is implemented today by the Pennsylvania Milk Control Commission [10] in regulating the industry "for the protection of the public health and welfare and for the prevention of fraud." [11]

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[4] For a more detailed account of the economic events leading to the enactment of milk control laws, see Comment, 42 YALE L.J. 1259 (1933). Some farmers destroyed their production of milk rather than succumb to the price dictates of the dairies. Interview With James F. Hutton, Executive Vice President, and Lee F. Driscoll, Jr., General Counsel, both of the Slater System Co., in Philadelphia, Pa., June 15, 1960. See Comment, *supra* at 1264 & n.28.

[5] Historical Note, following PA. STAT. ANN. tit. 31, § 700j-101 (1958) (preamble to milk control act).

[6] Twenty-three states and the federal government enacted milk control laws during the depression. See Note, 14 N.Y.U.L. REV. 375 (1937).

[7] Pa. Laws Spec. Sess. 1933, act 37, §§ 1-26.

[8] Pa. Laws 1935, act 43, §§ 1-26.

[9] PA. STAT. ANN. tit. 31, §§ 700j-101 to -1302 (1958), as amended, PA. STAT. ANN. tit. 31, §§ 700j-402, -601 (Supp. 1959) [hereinafter cited as MILK CONTROL LAW].

[10] Section 700j-201 of the Milk Control Law provides that the Commission shall consist of three members, to be appointed by the governor with the advice and consent of two-thirds of the senate. Each commissioner is to serve for six years and "until their successors shall have been appointed and qualified." Although § 700j-202 states that the salary of the chairman shall be $7,250 and that of the members $6,750, the salaries are currently $10,500 and $10,000, respectively; the disparity between statutory and actual figures is caused by the fact that commission members are entitled to salary increases enacted by the general assembly. Snyder v. Barber, 64 Dauph. Co. Rep. 235 (C.P. 1953). At present, there are only two members on the Commission, Chairman Joab K. Mahood and Simon K. Uhl. Although Chairman Mahood's term has expired, he continues to serve since senate Republicans who wished to retain him last year refused to confirm the governor's selections. Pittsburgh Post-Gazette & Sun-Telegraph, June 5, 1960, p. 1, col. 1. After the senate adjourned sine die, the governor reappointed his original choices and stated that they could take office immediately; Chairman Mahood, however, contends that the governor's choice to replace him cannot claim the post until his nomination is confirmed by the senate. Chairman Mahood's challenge of the appointment may be short-lived, for the newly elected senate is likely to confirm the governor's selections. The Evening Bulletin (Philadelphia), Nov. 15, 1960, p. 3, col. 5.

[11] MILK CONTROL LAW § 700j-101. The Commission is empowered with the general power to supervise, investigate, and regulate the entire milk industry of Pennsylvania and can also establish reasonable trade practices. MILK CONTROL LAW § 700j-301. Finances for milk control in Pennsylvania come mainly from legislative appropriations and license fees. SPENCER & CHRISTENSEN, MILK CONTROL PROGRAMS OF THE NORTHEASTERN STATES pt. 2, at 27 (Cornell University Agricultural Experiment Station Bull. 918, 1955). The largest license fee assessed has been $20,000 per year. *Id.* at 35.

All milk dealers and handlers [12] who purchase a substantial volume of milk or who sell in a market[13] having a population over 1,000 are required by statute to obtain licenses from the agency.[14] However, automatic exemption from the licensing requirement is granted to retail stores purchasing milk from licensed dealers,[15] and the Commission is given power to exempt all such stores.[16] In practice, this discretionary power has little use, for nearly all retail stores acquire their milk from licensed dealers.[17]

The Milk Control Commission is empowered to refuse, suspend, or revoke a license if the applicant or licensee has committed any one of certain acts specified in the statute.[18] The Commission also enforces the

[12] A "milk dealer" or "handler" is defined as "any person, including any store or subdealer or subhandler . . . who purchases or receives or handles on consignment or otherwise milk within the Commonwealth, for sale, shipment, storage, processing or manufacture, within or without the Commonwealth, whether on behalf of himself or others, or both. A producer who delivers milk to a milk dealer or handler only shall not be deemed a milk dealer or handler." MILK CONTROL LAW § 700j-103.

[13] "'Market' includes any county, city, borough, incorporated town, or township in the Commonwealth, or any two or more such counties, cities, boroughs, incorporated towns, or townships, or any portions thereof, or any other land within the territorial limits of the Commonwealth designated by the commission as a marketing area." MILK CONTROL LAW § 700j-103.

[14] MILK CONTROL LAW §§ 700j-401, -402. In addition to the retail store exemption, see notes 15-16 *infra* and accompanying text, certain other persons are excused from this requirement. Section 700j-402 states that the "commission may . . . exempt from the license requirements . . . milk dealers or handlers who purchase or handle milk in a total quantity not exceeding one thousand five hundred pounds in any month, and milk dealers or handlers selling milk in any quantity only in markets of a population of one thousand, or less, for local consumption. The commission may, by official order, exempt stores, or any class thereof, from the license requirements provided by this act, and shall exempt stores selling milk all of which has been purchased or acquired from a licensed milk dealer or handler." However, those milk dealers exempted are still subject to all other provisions of the act, except that "in cash sales of milk, to consumers in containers owned and provided by the consumer, if he shall have produced all the milk on the farm where sold and such milk has at no time left the producer's farm prior to its sale to the consumer and he shall have neither purchased nor received milk from other producers or handlers and his total sales to consumers do not exceed two gallons to any one consumer in any one day, the producer so selling milk shall be exempt from the provisions of this act." MILK CONTROL LAW § 700j-402. There is little difficulty in obtaining a license from the Milk Control Commission—the requirements of § 700j-403 are not rigorous. Contrast the practice under the milk control laws of New York and Virginia, where licensing is restrictive in order to limit the number of dealers and the duplication of marketing facilities. SPENCER & CHRISTENSEN, *op. cit. supra* note 11, at 34-35.

[15] MILK CONTROL LAW § 700j-402.

[16] *Ibid.*

[17] SPENCER & CHRISTENSEN, *op. cit. supra* note 11, at 35.

[18] The Commission can refuse to grant a license to an applicant or, upon sufficient notice and after a hearing, suspend, revoke, or refuse to reissue a license if a dealer (1) has rejected, without reasonable cause, any milk purchased or acquired from a producer; (2) has failed to account and make payment for milk purchased from a producer; (3) has committed an act injurious to the public health or public welfare; (4) has made a general assignment for the benefit of creditors; (5) has been a party to a combination to fix prices in violation of law; (6) has failed to keep records or furnish accurate statements required by the Commission; (7) has violated any provision of the act or any rules, regulations, or orders of the Commission. MILK CONTROL LAW § 700j-404. Licensees and others not required to be licensed may also be cited for violation of other sections of the act. See MILK CONTROL LAW §§ 700j-807, -1001, -1002. For a discussion of the use of these sanctions to enforce minimum prices, see notes 326-54 *infra* and accompanying text.

legislative directive that all dealers who acquire milk from Pennsylvania producers be bonded.[19] The bonding procedure is designed to protect the farmers from unscrupulous dealers and is necessitated by the "utilization" method[20] of compensating producers, under which payment is impossible until two or three weeks after the dealer receives the milk. Bonding has been effective in Pennsylvania as a means of insuring payment and is recognized as one of the more important milk control functions.[21] In addition, the Commission has authority to control trade practices in the dairy industry,[22] to issue weighing permits,[23] to certify and check testers and scales used in measuring milk quality and quantity,[24] and to require dealers to keep records[25] and file reports.[26]

One of the most important and controversial of the Commission's economic regulatory powers is that of fixing minimum milk prices at the producer, dealer, and retailer levels.[27] It is the purpose of this Note to determine the present value and operation of this economic control and to examine the role of the Pennsylvania Milk Control Commission in administering its program of price regulation.

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[19] MILK CONTROL LAW § 700j-501. Pennsylvania also requires subdealers to file bonds before buying or receiving milk from dealers. MILK CONTROL LAW § 700j-513.

[20] In Pennsylvania milk is classified according to the use to which it is put. A higher price is paid for milk used for fluid consumption than for that used in making ice cream, cheese, and so on. After the dealer determines his "utilization," he pays his producers according to a "blended price"—meaning that all of his producers receive the same price per weight unit with small additions or subtractions depending upon the amount of butter fat contained in the individual farmer's original shipment. The "blend" or average price is computed by determining the total value of the milk utilized in each classification, adding together the totals of the various classifications, and then dividing by the total pounds of milk received from all producers. Thus, if the Class I price of milk were $5.00 per unit, Class II $4.00 per unit, and Class III $3.50 per unit, and the dealer received 100 units of milk utilizing 50 units in Class I, 30 units in Class II, and 20 units in Class III, the "blend" price would be 50 × $5.00 ($250.00), plus 30 × $4.00 ($120.00), plus 20 × $3.50 ($70.00)—or a total of $440.00 —divided by 100 units, equalling $4.40 per unit. Each farmer would receive $4.40 for each unit supplied by him. See Note, 14 N.Y.U.L. REV. 375, 381 n.62 (1937). See also Coho, *Milk Price Control—A Developing Field of Administrative Law*, 45 DICK. L. REV. 254, 262-63 (1941); Hanna, *Cooperative Milk Marketing and Restraint of Trade*, 23 KY. L.J. 217, 245-47 (1935); Note, *The "Rate Base" in Milk Control*, 45 DICK. L. REV. 135, 142 (1941).

[21] Interview With Joab K. Mahood, Chairman of the Pennsylvania Milk Control Commission, in Philadelphia, Pa., June 22, 1960.

[22] MILK CONTROL LAW § 700j-301.

[23] MILK CONTROL LAW § 700j-601.

[24] MILK CONTROL LAW § 700j-602. Inasmuch as it is the dealer's responsibility to weigh milk received and to test it for butter fat content, it is apparent that a dealer could easily defraud his producers by maintaining defective scales or testers. Therefore, the Commission is authorized to certify equipment to be used and to check the dealer's tests. Certification takes place at least once a year at each plant. SPENCER & CHRISTENSEN, *op. cit. supra* note 11, at 47.

[25] MILK CONTROL LAW § 700j-701.

[26] MILK CONTROL LAW § 700j-702.

[27] MILK CONTROL LAW § 700j-802, -803. Minimum price fixing is mandatory; the Commission also has discretionary power to fix maximum wholesale and retail prices but has never done so. See MILK CONTROL LAW § 700j-802.

II. Present Economic Validity of Milk Control

Are the economic judgments incorporated into the Milk Control Law valid today? Does the farmer still need price fixing to survive? Is he surviving under economic control? Has minimum pricing at the secondary and tertiary levels of distribution been effective in promoting the legislative goal of a decent producer profit and reasonable consumer prices? Has it tended to favor the interests of the distributors? Obviously, these are questions of a legislative character, but inasmuch as twenty-five years have elapsed since the law was enacted, an intense reexamination of milk control, similar to that conducted by the New York legislature in 1937,[28] would not be out of place. This would accord with the United States Supreme Court's view of "legislation at its fairest: frequent reconsideration, intensive study of the consequences of what has been done, readjustment to changing conditions, and safeguarding the future on the basis of responsible forecasts." [29]

In New York, it was discovered that dealers were evading price controls by means of out-of-state purchases and by forcing—through threats to discontinue business—in-state farmers to accept payments below the minimum.[30] This added margin enabled the dairies to give secret discounts at the wholesale level. Since the retail prices were followed, much of the benefit of price fixing accrued to restaurants and stores, rather than to producers and consumers. After an ineffectual period of strict enforcement, the legislature allowed the price-fixing provisions of the law to expire and enacted a permissive system of regulated prices applicable only on the producer level.[31] While the New York and Pennsylvania situations were thought so similar in 1933 [32] that legislators in the latter state passed pricing legislation identical in essential respects to the original New York law,[33] the review and revision described above has had no effect upon Pennsylvania milk control, even though the present evils and ineffectiveness of the regulatory mechanism closely parallel those existing in New York in 1937. A number of dairies import milk at prices below the minimum,[34]

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[28] See Spencer & Christensen, Milk Control Programs of the Northeastern States pt. 1, at 98 (Cornell University Agricultural Experiment Station Bull. 908, 1954); Report of the Joint Legislative Committee To Investigate the Milk Industry, N.Y. Legis. Doc. No. 81 (1937).

[29] East New York Sav. Bank v. Hahn, 326 U.S. 230, 234-35 (1945). The Supreme Court commended the New York legislature for following a course of moratorium legislation characterized as an "empiric process of legislation at its fairest . . . ." *Id.* at 234. In Pennsylvania the probability of reconsideration appears slight, in view of the strong representation of the dealers and producers in Harrisburg, the unwillingness of both political parties to lose rural votes, and the lack of knowledge and interest in milk control on the part of the consumers. See Pa. St. Univ. Dep't of Agricultural Econ. and Rural Sociology, Journal Series Paper No. 1807, Consumer Knowledge and Opinion of State Milk Control in Pennsylvania (1953).

[30] Spencer & Christensen, *op. cit. supra* note 28, at 17-18.

[31] N.Y. Agric. & Mkts. Law §§ 252-58n.

[32] Rohrer v. Milk Control Bd., 322 Pa. 257, 272, 186 Atl. 336, 343 (1936).

[33] *Id.* at 258, 186 Atl. at 343.

[34] Interview With Marvin D. Weintraub, Attorney for the Pennsylvania Milk Control Commission, in Philadelphia, Pa., July 15, 1960; see Business Review, April 1955, pp. 12-13.

and violation of the pricing features of the statute is apparently undeterred by the Commission's present enforcement program.[35]

A. *Producer Prices*

The principal argument currently made for minimum price fixing at the producer level is similar to that advanced when the act was first passed: producer prices cannot be set satisfactorily by the forces of competition.[36] It is contended that the meager prices of an uncontrolled market would cause the farmer to abdicate his responsibility of producing wholesome milk in sufficient quantity.[37] The continued vitality of the argument is doubtful on two grounds. First, open competition may not be so detrimental to the producer as is predicted. There is evidence that in Ohio, where milk prices are unregulated by the state,[38] the farmer is doing better economically than his Pennsylvania counterpart. In April 1960 the "blend" price received by Youngstown, Ohio, farmers was $4.32 per hundredweight, while dealers were paying producers in the Pittsburgh area $4.10.[39] Even in returns from the sale of class I milk, for which the Pennsylvania farmer obtains a higher price than does the Ohioan,[40] the Ohio producer recovers a larger share of the consumer dollar. A 1959 survey, conducted in seven cities in each state found that 54.4 per cent of the retail price went to the Ohio producer, as compared to 51.8 per cent in Pennsylvania.[41]

Second, there is evidence that the inability of many producers to make ends meet is an ailment incurable by the minimum pricing formula. Only if prices are pegged at a level which assures a profit to the least efficient producer will all farmers be protected. Thus, even with price protection, the smaller producers often find costs difficult to cover;[42] the expensive equipment necessary for economical production is frequently not within the financial means of such farmers.[43] The inevitable result is that the marginal operator gravitates to other work, and the larger, fully mechanized

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[35] See notes 326-54 *infra* and accompanying text.

[36] See notes 5-7 *supra* and accompanying text. For a more detailed elaboration of the argument, see SPENCER & CHRISTENSEN, *op. cit. supra* note 11, at 22 n.28.

[37] See Historical Note, following PA. STAT. ANN. tit. 31, § 700j-101 (1958).

[38] Bartlett, Trade Barriers in Milk Distribution, Feb. 2, 1960, p. 4 (paper presented at the dairy marketing session of the Agricultural Industries Forum, University of Illinois).

[39] Pittsburgh Post-Gazette & Sun-Telegraph, June 6, 1960, p. 1, col. 1.

[40] *Ibid.*

[41] Bartlett, *supra* note 38, at 5. The seven Ohio cities did have federal regulation of producer prices only.

[42] Interview With John S. Pfautz, Director of Research for the Pennsylvania Milk Control Commission, in Harrisburg, Pa., July 17, 1960.

[43] "Gravitating to other work" is more easily written than done, especially in the economically depressed areas of Pennsylvania. A wide range of considerations, other than obtaining the most efficient allocation of resources in the dairy industry, makes the choice between keeping the unneeded farmer down on the farm and absorbing him elsewhere an extremely complex one and one which lies beyond the scope of this Note. It is merely pointed out here that if the decision be made in favor of retaining the small farmer, producer price controls do not seem to be capable of achieving the end.

producers, together with those farms vertically integrated with the dairies, take over the job of providing the requisite milk supply.[44] The vanishing dairy farmer is one of the predicted by-products of a competitive system, and yet the same phenomenon appears to occur under regulation also. This is but further evidence that the farm problem cannot be solved by retention of the agricultural economy of a century ago. Evolution is creating a new type of farmer—the large corporate enterprise—and the process is not stopped by price control. These circumstances indicate that controlled prices at the farmer level may not be a panacea for the milk producers' ills; they also indicate that free competition is by no means certain to increase the gravity of those ills.

Conditions prevailing in Ohio provide reasonable assurance that, at least in normal times, the efficient producer will receive an adequate return under more competitive conditions. However, if permanent controls were eliminated, emergency controls might be retained to guard against producer difficulties in times which are somewhat less than normal.[45] If the drastic change represented by introducing a system of free competition with emergency checks is unfeasible, price control only upon approval of two-thirds of the farmers in a designated area[46] may be an acceptable middle ground. This plan offers a flexibility which cannot be achieved under mandatory price regulation.

B. *Secondary Prices*

The dairies, the most strenuous advocates of resale pricing,[47] paint a bleak picture of the situation which would exist in the milk industry if wholesale and retail price regulation were eliminated. Price wars, it is said, would be rampant.[48] The farmer would suffer even if producer prices continued to be set by the Commission; he would not be paid by some dairies, caught up in the competitive squeeze and eventually forced out of business; he would lose buyers to the producers of cheaper out-of-state milk.[49] The public, too, would suffer by being exposed to the danger of unwholesome milk, produced by local and foreign farmers whose production conditions may not be the most sanitary.[50] The dairies' fears, however,

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[44] Interview With John S. Pfautz, Director of Research for the Pennsylvania Milk Control Commission, in Harrisburg, Pa., July 17, 1960.

[45] See N.Y. AGRIC. & MKTS. LAW § 258-m.

[46] *Ibid.*

[47] This appears to be the general attitude of milk dealers interviewed and to whom questionnaires were sent.

[48] See, *e.g.*, Interview With John B. Martin, Counsel for the Philadelphia Milk Dealers Association, in Philadelphia, Pa., July 7, 1960.

[49] Interview With Robert J. Harbison, III, President of Harbison Dairies, Inc., in Philadelphia, Pa., June 23, 1960. Importation seems to be increasing even with resale price regulation. In 1952, 92,262,000 pounds of Class I milk were imported from Ohio as compared to 109,534,000 in 1958. See Pittsburgh Post-Gazette & Sun-Telegraph, June 6, 1960, p. 1, col. 1.

[50] Interview With Robert J. Harbison, III, President of Harbison Dairies, Inc., in Philadelphia, Pa., June 23, 1960.

do not seem well founded. Is not the farmer protected to some extent against the business failure of his buyers by the bonding and surety provisions of the statute?[51] If it were advantageous to shop out-of-state for milk, would the dairy not be doing so now in order to maximize profits?[52] The obvious answers to these questions, coupled with the evidence from Ohio, indicate that most of the producers currently operating in the black would continue to survive if secondary controls were eliminated.[53] And the allegation that removal of economic controls would be adverse to the consumer interest because of the potential impurity of the supply is similarly unjustified. Sanitary standards could be adequately maintained by other provisions of existing legislation directed explicitly at assuring a milk supply which is free from unwholesome elements.[54] Furthermore, unless price wars were carried to the extreme of leaving one or two dealers in a position to dominate the market, it is clear that nonregulation would benefit the consumer in the form of lower prices. In Cleveland, where competition has been termed "intense," the lowest price of a quart of milk in 1959 was slightly above sixteen cents; in Pittsburgh, approximately 130 miles away, the lowest price was about twenty-five cents a quart.[55] The distributors' gross margin in the Ohio city was about seven cents per quart, as contrasted to the Pittsburgh margin of over eleven and one-half cents.[56] It is reasonably certain that the concern of the middleman over returning to a competitive system is primarily one of self-interest and not of anxiety over the fate of the producer or consumer.

Although it is likely that prices would drop if control of secondary prices were eliminated, it certainly does not follow that they would fall to the below-cost level often accompanying a full-scale destructive price war. Experience indicates that below-cost battles are not inevitable; such activity has not occurred in the seventeen states which have repealed resale price control legislation.[57] But even if it be assumed that potentially destructive price wars would occur upon the elimination of secondary controls, means other than minimum price fixing could be specifically di-

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[51] See notes 19-21 *supra* and accompanying text.

[52] However, some dairies are willing to forego the widest possible profit margin in order to obtain other benefits from their supplier-farmers. Interview With Robert J. Harbison, III, President of Harbison Dairies, Inc., in Philadelphia, Pa., June 23, 1960. Many of these dairies pay the Pennsylvania Class I price to foreign producers. See Pittsburgh Post-Gazette & Sun-Telegraph, June 6, 1960, p. 1, col. 1.

[53] See Bartlett, *supra* note 38, at 4-8.

[54] See PA. STAT. ANN. tit. 31, §§ 521-683 (1958), as amended, PA. STAT. ANN. tit. 31, §§ 645-63 (Supp. 1959). Similar protective legislation may be found in the states bordering Pennsylvania. See DEL. CODE ANN. tit. 3, §§ 3101-50 (1953), as amended, DEL. CODE ANN. tit. 3, § 3109 (Supp. 1958); MD. ANN. CODE art. 43, §§ 569-97, art. 66C, §§ 440-50 (1957); N.J. STAT. ANN. §§ 24:10-38 to -51, -53 (1940), as amended, N.J. STAT. ANN. §§ 24:10-42, -50 (Supp. 1960); N.Y. AGRIC. & MKTS. LAW §§ 46-58; OHIO REV. CODE ANN. §§ 3717.01-.13 (Page 1954); W. VA. CODE ANN. §§ 2035-38(13) (1955), as amended, W. VA. CODE ANN. § 2037 (Supp. 1960).

[55] Bartlett, *supra* note 38, at 6.

[56] *Ibid.*

[57] See Davidson, *Milk 12¢ A Quart—Why Not in Your Town?*, Collier's, April 29, 1955, p. 44.

rected toward preventing such occurrences. For example, the Commission might be empowered to prohibit sales of milk below cost upon a showing that the practice was endangering the continued supply of wholesome milk.[58] A minor variant of such a program would require that dealers periodically submit lists of prices to be charged by them during a fixed future period;[59] this method would give the agency sufficient time to investigate and stop excessive price-cutting before it begins.

Another justification urged for maintaining resale price fixing is that its elimination would drive the store price of milk to such a low level that door-to-door service would no longer be economically feasible.[60] Some dairies argue that this service must be continued because it increases consumption of milk.[61] The housewife, it is contended, may be deterred from store purchases by the bulkiness of the product or inclement weather, problems which she does not have to face with home delivery.[62] Store owners respond that their sales would increase if wholesale prices were lowered to a greater extent than consumer prices;[63] this greater margin, they say, would enable them to utilize displays and other means of sight buying in an effort to increase distribution.[64]

It may well be that home deliveries would suffer with a return to nonregulation. The Ohio-Pennsylvania comparison shows that store sales predominate in the competitive Ohio market, while door-to-door deliveries are the primary means of distribution in Pennsylvania.[65] Any change in buying habits would most probably be traceable to the consumer's search

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[58] In Commonwealth v. Zasloff, 338 Pa. 457, 13 A.2d 67 (1940), the supreme court held that the "Fair Sales Act," which prohibited the sale of any merchandise below cost, was unconstitutional on substantive due process grounds. The "sweeping prohibition" was found to have no reasonable relation to the protection of the public welfare. However, the opinion makes it clear that the below-cost controls proposed here would pass the constitutional test: "If the Act confined itself to prohibiting sales below cost when intended to destroy competition, it would undoubtedly be valid . . . ." *Id.* at 461, 13 A.2d at 70. For the present modified version of the act, see PA. STAT. ANN. tit. 73, §§ 211-17 (1960). See also 58 MICH. L. REV. 905 (1960).

[59] See SPENCER & CHRISTENSEN, *op. cit. supra* note 28, at 118-19, which discusses New Jersey's limited success using this plan.

[60] Interview With Director of Field Services for a Philadelphia Dairy, in Philadelphia, Pa., June 22, 1960.

[61] *Ibid.*

[62] *Ibid.*

[63] Interviews With Store Owners in the Philadelphia Area, July-August 1960. See Questionnaires distributed by the *University of Pennsylvania Law Review*, June-August 1960.

[64] *Ibid.*

[65] Bartlett, *supra* note 38, at 4. In New York after the elimination of resale price fixing, door-to-door service decreased until now only about ten per cent of sales are made on this basis, as compared to eighty-five per cent in Philadelphia. Interview With Joab K. Mahood, Chairman of the Pennsylvania Milk Control Commission, in Philadelphia, Pa., June 22, 1960. On the other hand, Baltimore, which also has no resale price fixing, has about the same percentage of sales by home delivery as does Philadelphia. Interview With Robert J. Harbison, III, President of Harbison Dairies, Inc., in Philadelphia, Pa., June 23, 1960.

for the lowest price.[66] It is doubtful that the consumption of milk—a necessary food—would fall off if home delivery were discontinued.[67] On the contrary, one could at least expect that lower prices would cancel out the inconvenience of store buying.

It is likely that the preservation of home delivery is a goal attributed to milk control only by those who have substantial interests in this type of distribution.[68] The dairies, for example, have a large capital investment in delivery equipment; the truck and tire suppliers derive substantial business from home delivery; and the delivery truck drivers owe their jobs directly to door-to-door service. All these groups would tend to favor the retention of controlled prices if it were a means of saving home delivery.

One further aspect of Pennsylvania price control deserves mention in a discussion of the value of regulation. The Milk Commission has authority to issue rules of trade practices,[69] and the violation section of the statute, in addition to outlawing bald underselling, prohibits the use of devices aimed at evading the established minimum price.[70] There is no doubt that such evasive schemes would provide an easy method of escaping the price controls; thus their prohibition is a necessary component of effective regulation. But the pervasive ban against "free service, trading stamps, advertising allowances, or extension of credit" [71] also comprehends much activity commonly designated as nonprice competition. This necessary regimentation of the industry is a factor which must be considered in evaluating the merits of the present system as compared to a system of free competition.

III. Constitutional Limits

A. *Due Process Constitutionality*

The first serious challenge to the constitutionality of the price-setting provisions of the Pennsylvania Milk Control Act occurred in *Rohrer v. Milk Control Bd.*,[72] where the 1934 emergency act was attacked under both federal and state constitutions. The Pennsylvania high court considered the federal due process argument foreclosed by the Supreme Court's landmark decision in *Nebbia v. New York*,[73] where the Court, finding that

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[66] See the comparison of retail prices in Ohio (a nonregulated state) with those of Pennsylvania (a regulated state), in Bartlett, *supra* note 38, at 4-6.

[67] See Spencer & Christensen, *op. cit. supra* note 28, at 98.

[68] Interview With James F. Hutton, Executive Vice President, and Lee F. Driscoll, Jr., General Counsel, both of the Slater System Co., in Philadelphia, Pa., June 15, 1960.

[69] Milk Control Law § 700j-301.

[70] Milk Control Law § 700j-807.

[71] *Ibid.*

[72] 322 Pa. 257, 186 Atl. 336 (1936).

[73] 291 U.S. 502 (1934).

economic regulation of the milk industry was reasonably related to the promotion of the public welfare,[74] sustained the retail price-fixing provisions of the New York milk control statute.[75] Since the Pennsylvania and New York statutes were virtually identical,[76] *Nebbia* was viewed as dispelling any possibility that the Pennsylvania act was violative of the fourteenth amendment.[77] A *Nebbia*-type analysis[78] similarly disposed of an independent challenge under the state due process clause.[79] When the legislation was reenacted in permanent form, it was again upheld: *Colteryahn Sanitary Dairy v. Milk Control Comm'n*[80] answered the reiterated constitutional questions with no more than a short reference to *Rohrer*.[81]

In the years following these decisions, the concept of economic substantive due process has lost nearly all of its vitality at the federal level.[82] But many state courts have been unwilling to follow the Supreme Court in

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[74] On this point, *Nebbia* was unquestionably a departure from the earlier test of permissible state regulation of business. See Duane, *Government Regulation of Prices in Competitive Business*, 10 TEMP. L.Q. 262 (1936). Until 1933 regulation was permissible only if the business was "affected with a public interest"—*i.e.*, was of such a character that it might be assumed that it had been devoted to a public use, such as a public utility or a monopoly. See Tyson & Brother—United Theatre Ticket Offices, Inc. v. Banton, 273 U.S. 418, 432 (1927). A number of "private" businesses were tested under this standard in cases following *Tyson*; invariably they were found not to be affected with a public interest sufficiently to allow state regulation of industry prices. See Williams v. Standard Oil Co., 278 U.S. 235 (1929) (fixing prices of gasoline); Ribnik v. McBride, 277 U.S. 350 (1928) (fixing fees charged by employment agents); Fairmont Creamery Co. v. Minnesota, 274 U.S. 1 (1927) (punishing discrimination in purchasing of milk). The *Nebbia* Court, however, abandoned the strict standard of *Tyson*, 291 U.S. at 536, and held that a business essentially private in character could be controlled by a state if there was adequate reason to regulate it in the interest of the public welfare and if the statute had a reasonable relation to the legislative purpose. *Id.* at 537.

[75] N.Y. Laws 1933, ch. 158 (now N.Y. AGRIC. & MKTS. LAW §§ 252-58n).

[76] Rohrer v. Milk Control Bd., 322 Pa. 257, 258, 186 Atl. 336, 337 (1936). Depressed economic conditions were also prevalent in both states. *Id.* at 272, 186 Atl. at 343.

[77] 322 Pa. at 258, 186 Atl. at 337.

[78] See 322 Pa. at 266-72, 186 Atl. at 340-43.

[79] PA. CONST. art. 1, § 9.

[80] 332 Pa. 15, 1 A.2d 775 (1938).

[81] 332 Pa. at 20, 1 A.2d at 778. For other state court decisions holding constitutional the milk control laws of their jurisdictions, see Franklin v. State *ex rel.* Alabama State Milk Control Bd., 232 Ala. 637, 169 So. 295 (1936); Jersey Maid Milk Prods. Co. v. Brock, 13 Cal. 2d 620, 91 P.2d 577 (1939); Shiver v. Lee, 89 So. 2d 318 (Fla. 1956); Albert v. Milk Control Bd., 210 Ind. 283, 200 N.E. 688 (1936); Schwegmann Bros. Giant Super Mkts. v. McCrory, 237 La. 768, 112 So. 2d 606 (1959); Milk Marketing Bd. v. Johnson, 295 Mich. 644, 295 N.W. 346 (1940); Opinion of the Justices, 88 N.H. 497, 190 Atl. 713 (1937); State *ex rel.* State Bd. of Milk Control v. Newark Milk Co., 118 N.J. Eq. 504, 179 Atl. 116 (Ct. Err. & App. 1935); State *ex rel.* Milk Comm'n v. Galloway, 249 N.C. 658, 107 S.E. 631 (1959); Savage v. Martin, 161 Ore. 660, 91 P.2d 273 (1939); Reynolds v. Milk Comm'n, 163 Va. 957, 179 S.E. 507 (1935); State *ex rel.* Finnegan v. Lincoln Dairy Co., 221 Wis. 1, 265 N.W. 197 (1936).

[82] See, *e.g.*, Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955); Daniel v. Family Sec. Life Ins. Co., 336 U.S. 220 (1949). In *Daniel*, the Court stated: "We cannot say that South Carolina is not entitled to call the funeral insurance business an evil. Nor can we say that the statute has no relation to the elimination of those evils. There our inquiry must stop." 336 U.S. at 224.

discarding this type of due process inquiry as a tool of judicial review.[83] In the milk control area, comparatively recent decisions in Georgia [84] and South Carolina [85] have invalidated all price-fixing provisions of their state programs on substantive due process grounds. Both courts found unconstitutional deprivation of property rights; [86] both held that the milk industry is not a business "affected with a public interest." [87]

Commentators have typified Pennsylvania as one of the states in which substantive due process is still very much alive.[88] But the state supreme court's position regarding the doctrine is not so easily classified.[89] In almost every area in which substantive due process attacks have been made upon legislative regulation, conflicting language may be found [90] as to the

[83] Carpenter, *Our Constitutional Heritage: Economic Due Process and the State Courts*, 45 A.B.A.J. 1027 (1959); Hetherington, *State Economic Regulation and Substantive Due Process of Laws*, 53 Nw. U.L. REV. 226 (1958); Paulsen, *The Persistence of Substantive Due Process in the States*, 34 MINN. L. REV. 91 (1950).

[84] Harris v. Duncan, 208 Ga. 561, 67 S.E.2d 692 (1951). During the course of the opinion, the Georgia court made explicit its disagreement with the *Nebbia* decision: "We are . . . impressed by the sound view expressed by Mr. Justice McReynolds in his dissenting opinion in Nebbia v. People of State of New York . . . ." 208 Ga. at 564, 67 S.E.2d at 694. The Georgia legislature has countered the *Harris* decision with new legislation, designed to achieve indirect control over milk prices while avoiding the constitutional difficulties engendered by direct price fixing. GA. CODE ANN. §§ 42-551, -554 (Supp. 1960); GA. CODE ANN. § 42-553 (1957). If the elaborate procedure involved in making a sale under this "voluntary" system (based on the Commission's "recommended" prices) is not followed, then the pricing orders are binding. GA. CODE ANN. § 42-555.1 (Supp. 1960). The new statutory device is untested in the Georgia courts.

[85] Gwynette v. Myers, 115 S.E.2d 673 (S.C. 1960).

[86] Harris v. Duncan, 208 Ga. 561, 565, 67 S.E.2d 692, 694 (1951); Gwynette v. Myers, 115 S.E.2d 673, 676 (S.C. 1960).

[87] 208 Ga. at 565, 67 S.E.2d at 694; 115 S.E.2d at 679.

[88] Paulsen, *supra* note 83, at 117; Note, *State Views on Economic Due Process: 1937-1953*, 53 COLUM. L. REV. 827, 835 n.60 (1953).

[89] There is no doubt that many Pennsylvania cases use language which supports this conclusion. *E.g.*, Gambone v. Commonwealth, 375 Pa. 547, 553, 101 A.2d 634, 638 (1954) (statute limiting size of signs advertising price of gasoline held unconstitutional): "Unless a business is affected with a public interest, or unless there is involved a question of monopoly in restraint of trade, the right of an owner to fix a price at which his property shall be sold is an inherent attribute of the property itself and as such within the constitutional protection of the requirement of due process of law." In support of its statement, the court cites three pre-*Nebbia* cases (Ribnik v. McBride, 277 U.S. 350 (1928); Fairmont Creamery Co. v. Minnesota, 274 U.S. 1 (1927); Tyson & Brother—United Theatre Ticket Offices, Inc. v. Banton, 273 U.S. 418 (1927)) and Old Dearborn Distrib. Co. v. Seagram-Distillers Corp., 299 U.S. 183 (1936). For other examples of Pennsylvania Supreme Court language revealing a substantive due process inclination, see Commonwealth *ex rel.* Woodside v. Sun Ray Drug Co., 383 Pa. 1, 17, 116 A.2d 833, 841 (1955); Hertz Drivurself Stations, Inc. v. Siggins, 359 Pa. 25, 40, 58 A.2d 464, 474-75 (1948); Flynn v. Horst, 356 Pa. 20, 25, 32, 51 A.2d 54, 57, 60 (1947). However, cases evincing an opposite approach can be found, although they are perhaps fewer in number. See Bilbar Constr. Co. v. Easttown Twp. Bd. of Adjustment, 393 Pa. 62, 141 A.2d 851 (1958); Maurer v. Boardman, 336 Pa. 17, 7 A.2d 466 (1939), *aff'd sub nom.* Maurer v. Hamilton, 309 U.S. 598 (1940); Carolene Prods. Co. v. Harter, 329 Pa. 49, 59, 60, 197 Atl. 627, 629, 630 (1938).

[90] *E.g., compare* Best v. Zoning Bd. of Adjustment, 393 Pa. 106, 111-12, 141 A.2d 606, 610 (1958), *with* Bilbar Constr. Co. v. Easttown Twp. Bd. of Adjustment, 393 Pa. 62, 72, 141 A.2d 851, 856 (1958). *Compare* Hertz Drivurself Stations, Inc. v. Siggins, 359 Pa. 25, 40, 58 A.2d 464, 474-75 (1948), *with* Maurer v. Boardman, 336 Pa. 17, 22-25, 7 A.2d 466, 471-73 (1939), *aff'd sub nom.* Maurer v. Hamilton, 309 U.S. 598 (1940).

extent of the judicial role in reexamining the premises and reasoning which support the legislative conclusion that the regulation "is designed to serve a proper public purpose." [91] Legislative regulation of economic activity has not escaped this dual constitutional approach. On occasion, economic regulation has been accepted with a judicial unhesitancy quite similar to the federal attitude.[92] On other occasions, language and action have not been consistent even within the same case: for example, in holding constitutional an act regulating the sale of evaporated skimmed milk,[93] the court intensively examined the purposes of the questioned act for seven pages, and then concluded its discussion by noting that "the regulations and restrictions adopted by the legislature being within the general scope of its power, and not being unreasonable, it is for that branch of the government, not the courts, to determine the exact methods to be employed to promote the public health, welfare and safety . . . ." [94] And in still other cases, the state court has readily accepted a role which makes it the ultimate arbiter of the purposes of legislation and the means used to accomplish them:

> [A] law which purports to be an exercise of the police power must not be unreasonable, unduly oppressive, or patently beyond the necessities of the case, and the means which it employs must have a real and substantial relation to the objects sought to be attained. Under the guise of protecting the public interests the legislature may not arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations. The question whether any particular statutory provision is so related to the public good and so reasonable in the means it prescribes as to justify the exercise of the police power, is one for the judgment, in the first instance, of the law-making branch of the government, but its final determination is for the courts.[95]

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[91] Bilbar Constr. Co. v. Easttown Twp. Bd. of Adjustment, 393 Pa. 62, 71, 141 A.2d 851, 856 (1958).

[92] See, *e.g.*, Burche Co. v. General Elec. Co., 382 Pa. 370, 115 A.2d 361 (1955). *But see* Gulf Oil Corp. v. Mays, 401 Pa. 413, 164 A.2d 656 (1960). See also Commonwealth v. Zasloff, 338 Pa. 457, 13 A.2d 67 (1940) (fair sales act precluding retail sales at prices below "cost" held unconstitutional).

[93] PA. STAT. ANN. tit. 31, §§ 551-58, 581-83 (1958).

[94] Carolene Prods. Co. v. Harter, 329 Pa. 49, 59, 197 Atl. 627, 629 (1938).

[95] Cott Beverage Corp. v. Horst, 380 Pa. 113, 118, 110 A.2d 405, 407 (1955). *Cott* held that an act which prohibited the sale of articles of food and drink containing artificial sweetening agents, unless such articles carried an "appropriate warning statement," was unconstitutional insofar as it applied to the use of "sucaryl," a nonfattening sweetener, in the manufacture of soft drinks. Note that this treatment of the statute involves a substantive due process inquiry of a most intensive nature: while the general legislative purpose in passing the statute—to protect the public against products containing possibly harmful drugs—might be commendable, "sucaryl" cannot, according to the court, be classified as harmful. Such a treatment obviously involves an independent judicial examination of the possible deleterious effects of "sucaryl" and an independent judicial judgment that no such effects are reasonably likely to be caused by use of that substance. Compare Williamson v. Lee Optical, Inc., 348 U.S. 483, 487 (1955): "The Oklahoma law [prohibiting opticians from fitting or duplicating lenses without a prescription from an ophthalmologist or optometrist] may exact a needless, wasteful requirement in

Which fork of this dichotomous constitutional approach would be followed in the event of a renewed attack upon the milk control law, and especially upon its price-fixing provisions, is far from clear. On the one hand, the legislation has withstood numerous constitutional challenges in the state supreme court [96] and the act's constitutionality is insulated by emphatic judicial statements that the industry is undoubtedly affected with a public interest.[97] On the other hand, indications are not lacking that the court will take cognizance of changed conditions which might "take away the right of regulation." [98] Clearly, the counsel who persuades the court that the widespread economic sickness of twenty-five years ago has been substantially eradicated in the milk industry by forces other than regulation will have brushed aside much of the buttressing weight of the previous precedents and taken a long step toward securing de novo consideration of the substantive due process aspects of minimum price regulation. But having secured such a reconsideration, counsel must still show that the specific evils which the legislature sought to remedy—and on whose presence the court rested its previous holdings of constitutionality—have been so far eliminated that minimum price regulation no longer bears "a real and substantial relation" to the public interest in insuring a wholesome supply of milk.[99] He must show that the industry's marketing structure—"to which the conditions sought to be controlled by the Milk Control Laws are directly attributable" [100]—no longer places the producer at the mercy of

many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement." *But cf.* Gitlow v. New York, 268 U.S. 652, 670 (1925): "[W]hen the legislative body has determined generally, in the constitutional exercise of its discretion, that utterances of a certain kind involve such danger of substantive evil that they may be punished, the question whether any specific utterance coming within the prohibited class is likely, in and of itself, to bring about the substantive evil, is not open to consideration. It is sufficient that the statute itself be constitutional and that the use of the language comes within its prohibition."

[96] See, *e.g.*, Harrisburg Dairies v. Eisaman, 338 Pa. 58, 11 A.2d 875 (1940); Colteryahn Sanitary Dairy v. Milk Control Comm'n, 332 Pa. 15, 1 A.2d 775 (1938).

[97] Rohrer v. Milk Control Bd., 322 Pa. 257, 272, 186 Atl. 336, 345 (1936); *cf.* Flynn v. Horst, 356 Pa. 20, 51 A.2d 54 (1947).

[98] Rohrer v. Milk Control Bd., 322 Pa. 257, 263, 186 Atl. 336, 339 (1936).

[99] As to specific changes in the methods of production, processing, and distribution, see HINDS & JOHNSTONE, DAIRY ECONOMICS HANDBOOK 13-15 (U.S. Dep't of Agriculture Handbook No. 138, 1958).

[100] Harrisburg Dairies, Inc. v. Eisaman, 338 Pa. 58, 63, 11 A.2d 875, 877 (1940) (holding constitutional the act's bonding provisions). The most significant change in the market structure of the industry has been its increasing concentration, not only at the processing and distributing level but also at the producing level. As to processing and distributing, three of the dairy industry's largest members, National Dairy Products Corp. (Sealtest), Borden Co. (Sylvan Seal), and Beatrice Foods Co., have been charged with violating the antitrust laws by acquiring all or part of the stocks or assets of 251 dairy companies since 1951. Federal Trade Commission Complaints, Nos. 6651-53, cited in Memorandum on Behalf of Petitioner Country Maid Dairies, Inc., p. 7, *In re* Philadelphia Milk Marketing Area, Milk Marketing Area No. 1, Pa. Milk Control Comm'n Hearing, April 20, 1960, to June 23, 1960. On the producing level, it has been estimated that the number of independent producing units in Pennsylvania has been decreasing at a rate of 800 units a year. Interview With John S. Pfautz, Director of Research for the Pennsylvania Milk Control Commission, in Harrisburg, Pa., July 27, 1960. Although the resulting large units tend to be economically independent, it may be that the smaller operator, faced with larger and more mechanized competition, needs protective legislation as much

the dealer;[101] he must show that the danger of a return to the producer less than the cost of production no longer is present;[102] he must show that the "high cost of maintaining sanitary conditions of production and standards of purity"[103] is being returned to the producer and that the existence of minimum price fixing—or at least minimum price fixing at secondary and tertiary levels—bears no reasonable relation to this return. The would-be attacker of the statute bears a heavy burden; but the recent experience in Georgia and South Carolina demonstrates that it is a burden which can be sustained.[104]

B. *Problems of Federalism*

The effectiveness of state milk control regulation in accomplishing its declared purposes is dependent to a large extent upon the capacity of the state regulatory power to implement its controls on a state-wide basis—or at least to regulate comprehensively within a given marketing area. Unfortunately, however, marketing areas as defined by economic realities do not correspond with the artificial, politically created boundaries between the states.[105] Milk, like most commodities, moves in commerce across state lines, from producer to processor to distributor to consumer. This interstate movement not only creates conflict between milk control commissions attempting to prescribe regulations and prices for milk produced in one

today as he did in the 1930's. Many Pennsylvania farmers claim that they cannot make ends meet even with price protection. See notes 42-44 *supra* and accompanying text. On the other hand, if larger dairies and producers could alone furnish an adequate supply of milk, that purpose of the Milk Control Law might be achieved without the elimination of price competition.

[101] See Rohrer v. Milk Control Bd., 322 Pa. 257, 265, 186 Atl. 336, 340 (1936).

[102] *Ibid.*

[103] Historical Note, following PA. STAT. ANN. tit. 31, § 700j-101 (1958) (preamble to milk control act).

[104] See notes 84-87 *supra* and accompanying text. The Pennsylvania Milk Control Act has also withstood attack on the ground that it is an unconstitutional delegation of legislative power to the Commission. See Rieck-McJunkin Dairy Co. v. Milk Control Comm'n, 341 Pa. 153, 18 A.2d 868 (1941); Rohrer v. Milk Control Bd., 322 Pa. 257, 186 Atl. 336 (1936). Such an attack has been successful in other states where similar statutes have been voided in that "the power of regulation has been assigned . . . with no defined standard set for the manner or extent of its exercise," Ferretti v. Jackson, 88 N.H. 296, 304-05, 188 Atl. 474, 480 (1936), or on the grounds that the effectiveness of the act was contingent upon the request of "a substantial proportion of the producers and/or consumers, and/or distributors," thus resulting in a redelegation of power to the citizenry, Maryland Co-op. Milk Producers, Inc. v. Miller, 170 Md. 81, 87, 88, 182 Atl. 432, 434, 435 (1936). The Maryland court also noted the vagueness of the statutory language "substantial proportion" and looked with disfavor on the discretion given to the administrative body in the definition of the term. Other statutes whose operation is contingent upon voter approval specify the numerical proportion necessary for effectiveness. See, *e.g.*, N.Y. AGRIC. & MKTS. LAW § 258(m)(6) (two-thirds). Such a numerical-proportion provision was upheld in United States v. Rock Royal Co-op., Inc., 307 U.S. 533, 577 (1939). The effectiveness of the Pennsylvania act is not contingent upon a request by a certain number of those affected.

[105] All of the seven major milksheds in the northeastern states area consist of parts of two or more states. The Boston milkshed covers parts of seven states; Philadelphia and New York, five states each; Washington and Pittsburgh, three states each; and Baltimore and Connecticut, two states each. See Business Review, April 1955, p. 12.

state and processed or consumed in another, but also involves the federal government, through its power to regulate interstate commerce, in the jurisdictional controversy over who can regulate what and under what conditions.

1. Interstate Transactions and the State Regulatory Power

The mere fact that a transaction has interstate ramifications does not, of course, automatically preclude the state from regulating the price at which and the conditions under which it shall take place. An out-of-state milk dealer, for example, cannot escape Pennsylvania's price controls by setting up his own retail outlets in the commonwealth.[106] The same is true of deliveries from outside the state: the Supreme Court has held that the state may validly impose minimum retail prices on such traffic, regardless of the details of the transaction—sale and payment at the door, or payment to the dealer by check and delivery on a pre-order basis.[107]

The extent to which the Pennsylvania Milk Control Law may operate upon business of an interstate nature is illustrated by *Milk Control Bd. v. Eisenberg Farm Prods.*[108] Defendant, a Pennsylvania corporation, operated a milk receiving plant in the northern part of the state and purchased from 175 local farmers. These producers transported their milk to defendant, who held it without processing for less than twenty-four hours before shipping the entire supply to New York for sale there. The Pennsylvania Supreme Court found that Eisenberg's business was interstate in character and held that state regulation of his buying oppressively burdened interstate commerce.[109] The United States Supreme Court reversed, holding that, inasmuch as the producer-receiver transaction occurred entirely within Pennsylvania, state control of the sale placed only an incidental burden on interstate commerce.[110] Important to the conclusion that the state regulation's effect on commerce was incidental and therefore not violative of the commerce clause was the fact that only ten per cent of all milk produced in Pennsylvania was eventually shipped to other states.[111] The "incidental effect" doctrine might be difficult to sustain if the evidence in a similar case

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106 Milk Control Comm'n v. McAllister Dairy Farms, 384 Pa. 459, 121 A.2d 144 (1956); see Highland Farms Dairy, Inc. v. Agnew, 300 U.S. 608 (1937).

107 County Bd. v. State Milk Comm'n, 346 U.S. 932 (1954) (per curiam), affirming an unreported decision of the Supreme Court of Appeals of Virginia, which "affirmed" a lower court ruling by refusing to allow appeal. In the process of this disposition, the supreme court stated that the lower court decree was "plainly right" and that the effect of its denial was "to affirm the decree of the said circuit court." County Bd. v. State Milk Comm'n, Va. Sup. Ct. App., Jan. 26, 1953. *Cf.* Pennsylvania Gas Co. v. Public Serv. Comm'n, 252 U.S. 23 (1920); Public Util. Comm'n v. Landon, 249 U.S. 236 (1919).

108 306 U.S. 346 (1939).

109 Milk Control Bd. v. Eisenberg Farm Prods., 332 Pa. 34, 200 Atl. 854 (1938).

110 306 U.S. 346 (1939). The Commission, however, has not exerted control over such milk. See note 273 *infra*.

111 306 U.S. at 353.

demonstrated that a large percentage of the state's production was channeled into interstate commerce.[112]

Despite the latitude which *Eisenberg* gives to state regulation, the commerce clause does represent a limitation upon the power of the state to regulate. And to the extent that this limitation prevents the state from regulating comprehensively, it may also preclude the state from regulating effectively. By acquiring milk from extrastate rather than intrastate producers, the milk dealer or retailer may escape some, but not all, of his own state's price and trade regulations. Thus a Pennsylvania dealer purchasing milk from a producer in another state cannot be compelled by the Pennsylvania Milk Control Commission to pay its minimum producer prices, for such state control would unduly burden interstate commerce.[113] Under the same reasoning, a local store owner is free to purchase milk from an out-of-state dealer at a bargained price.[114] In these two instances, the limitation of the state's attempt to provide uniform and comprehensive regulation may bring about inequitable effects which play at cross purposes with the goals sought by the state when the original regulatory scheme was enacted. For example, posit two dairies operating in a competitive situation in the Pittsburgh area. One dairy buys its milk in Pennsylvania at the minimum producer prices stipulated by the Milk Control Commission, while the other buys from farmers in the Ohio market, free from state regulation. If the latter's negotiated price is lower than the former's regulated price, the dealer buying in Pennsylvania is competitively disadvantaged because of his own state's price regulation.[115] But the dealer who buys in Ohio cannot pass his price advantage along to the consumer in the form of lower prices, for upon resale he must comply with the Pennsylvania wholesale and retail minimum pricing structure;[116] his competitive advantage can be reflected only in his profits. Under such circumstances, it is unlikely that the dealer buying only in Pennsylvania will long continue his in-state purchasing policy. However, his shift to Ohio producers —and their lower prices—clearly works to the detriment of his previous Pennsylvania suppliers. Thus, legislation initially designed to protect the income of the in-state producer results, in an interstate context, in a reduced

[112] The Court in *Eisenberg* distinguished Lemke v. Farmers' Grain Co., 258 U.S. 50 (1922), and Shafer v. Farmers' Grain Co., 268 U.S. 189 (1925), on the grounds that in those cases ninety per cent of the product produced in the state eventually went into interstate commerce. 306 U.S. at 353.

[113] Baldwin v. G. A. F. Seelig, Inc., 294 U.S. 511 (1935). Nor need the dealer be concerned over forfeiting bond upon failure to pay the out-of-state producer, because the foreign producer cannot take advantage of the statutory bonding provisions. Milk Control Comm'n v. Valleywood Milk Co., 64 Pa. D. & C. 89 (C.P. 1949).

[114] Highland Farms Dairy, Inc. v. Agnew, 300 U.S. 608, 614-15 (1937) (dictum).

[115] In 1959 farmers in four of the six states bordering Pennsylvania received lower prices for their milk than did Pennsylvania producers. The Pennsylvania farmer received an average price for milk and cream of $4.91 per hundredweight. Comparable prices in the bordering states were: Ohio, $4.16; New York, $4.58; Maryland, $4.76; West Virginia, $4.79; Delaware, $4.95; and New Jersey, $5.44. U.S. AGRIC. MKT. SERV., DAIRY STATISTICS 11-15 (Supp. 1959).

[116] See Highland Farms Dairy, Inc. v. Agnew, 300 U.S. 608 (1937).

demand for his higher-priced product and a consequent reduction of his income.

It is doubtful that the inadequacy of single-state regulation can be remedied by resort to informal interstate cooperation or to its more formalized counterpart, the interstate compact. This doubt is especially acute in the case of Pennsylvania, since four of the six states bordering the commonwealth have no milk price control program whatsoever.[117] Moreover, there is little in the history of milk control legislation which would indicate that any cooperative effort among the states could adequately cope with the problem—few instances of successful cooperation can be singled out as precedent for a new effort along these informal lines.[118] And never has a formal compact been concluded; Pennsylvania legislation authorizing the Milk Control Commission to enter into a five-state compact with regard to the New York City marketing area has remained unimplemented for thirteen years,[119] the original movement for the compact having failed because of doubts as to its necessity and its acceptability.[120] Certainly, the diverse political interests between producer and consumer states (and between similar groups within the same state) make the formulation of an acceptable multistate compact unlikely, if not impossible.

2. Effect of Federal Controls

Control of milk marketing is not an exclusive function of the states; the federal government also regulates the milk industry in specified localities designated as federal marketing areas.[121] Should these concurrent regulatory efforts not be coordinated, the effectiveness of both would obviously be limited. A glaring example of such a lack of coordination and cooperation currently exists in the Philadelphia milk marketing area,[122] where the federal milk administrator, pursuant to the Agricultural Marketing Agreement Act,[123] has established a minimum producer price below that promulgated for the region by the state commission.[124] Beyond the actual effects of such inconsistent regulation, however, there exists a legal issue as to whether the

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117 Delaware, Maryland, Ohio, and West Virginia have no legislation governing milk price control.

118 See SPENCER & CHRISTENSEN, MILK CONTROL PROGRAMS OF THE NORTHEASTERN STATES pt. 2, at 102-03 (Cornell University Agricultural Experiment Station Bull. 918, 1955).

119 PA. STAT. ANN. tit. 31, §§ 700.1-.5 (1958).

120 SPENCER & CHRISTENSEN, *op. cit. supra* note 118, at 103-04.

121 See 49 Stat. 754, 7 U.S.C. § 608c(2) (1958).

122 See 7 C.F.R. § 961.5 (Supp. 1960).

123 Agricultural Marketing Agreement Act of 1937, § 608(c), 49 Stat. 753 (1935), 7 U.S.C. § 608c (1958).

124 7 C.F.R. § 961 (Supp. 1960). The federal minimum prices are about fifty to sixty cents per hundredweight lower than the Pennsylvania minimum prices established for the Philadelphia marketing area. Interview With Marvin D. Weintraub, Attorney for the Pennsylvania Milk Control Commission, in Philadelphia, Pa., July 15, 1960. The Commission has requested advice from the state attorney general on the applicability of the Pennsylvania Milk Control Law in federally regulated areas. *Ibid.*

state controls can be effective at all—that is, whether the action of the federal government in a marketing area preempts state attempts to control the subjects of federal regulation in the same area.[125]

If Congress intended that its legislation and subsequent administrative action under that legislation should "occupy the field" [126] of milk regulation, state extension or supplementation of the federal regulatory limits would be precluded.[127] Such a congressional intent may be evidenced by an express statement of federal exclusiveness in the statute; [128] but even where the intent is not explicitly stated, it may be attributed to Congress through a judicial finding that the "scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," [129] or that the statute touches "a field in which the federal interest is so dominant that the federal system [must] be assumed to preclude enforcement of state laws on the same subject," [130] or that state regulation "presents a serious danger of conflict with the administration of the federal program." [131]

In the area of milk control, it is unnecessary to allude to these rather unhelpful attributive tests of supersession, for sections 608c(5)(A) and 608c(5)(B) of the Agricultural Marketing Agreement Act [132] contain language which strongly indicates that a state is precluded from supplementing federal regulation. In prescribing the content of pricing orders, the statute provides:

> Such [minimum] prices [for each use classification] *shall be uniform* as to *all* handlers, subject *only* to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and

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125 The problem is much simpler if the state has promulgated a *lower* minimum price than that established by the federal government. In that case, the state control would be in direct conflict with the federal regulation, and the former would have to yield. See Benanti v. United States, 355 U.S. 96 (1957); Hines v. Davidowitz, 312 U.S. 52 (1941); note 126 *infra*.

126 This power of Congress derives from the supremacy clause of the Constitution. U.S. CONST. art. VI. See Charleston & W.C. Ry. v. Varnville Furniture Co., 237 U.S. 597 (1915); *Ex parte* McNeil, 80 U.S. (13 Wall.) 236, 240 (1871).

127 The doctrine of federal preemption has been extensively treated. See, *e.g.*, Grant, *The Scope and Nature of Concurrent Power*, 34 COLUM. L. REV. 995 (1934); Note, *Pre-Emption By Federal Criminal Statutes*, 55 COLUM. L. REV. 83 (1955); Note, 60 HARV. L. REV. 262 (1946); Note, 12 STAN. L. REV. 208 (1959); Note, 86 U. PA. L. REV. 532 (1938); 108 U. PA. L. REV. 1224 (1960).

128 See United States Warehouse Act, 46 Stat. 1465 (1931), 7 U.S.C. § 269 (1958), which provides that "the power, jurisdiction and authority conferred [by this act] . . . shall be exclusive . . . ." However, even such explicit language may not settle the question. See Note, 12 STAN. L. REV. 208, 211 (1959).

129 Pennsylvania v. Nelson, 350 U.S. 497, 502 (1956), quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

130 Pennsylvania v. Nelson, 350 U.S. 497, 504 (1956), quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

131 Pennsylvania v. Nelson, 350 U.S. 497, 505 (1956).

132 Agricultural Marketing Agreement Act of 1937, §§ 608c(5)(A), (B)(i), (B)(ii), 49 Stat. 754, 755 (1935), 7 U.S.C. §§ 608c(5)(A), (B)(i), (B)(ii) (1958).

(3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

(B) Providing:

(i) for the payment to *all* producers and associations of producers delivering milk to the same handler of *uniform prices* for all milk delivered by them . . . .

(ii) for the payment to *all* producers and associations of producers delivering milk to all handlers of *uniform prices* for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered; subject, in either case, only to adjustments . . . [identical to those listed above].[133]

The clear import of the statutory language is that uniformity of prices paid to producers shall prevail, subject only to specified exceptions. State regulation setting a different price is not such an exception, and the nonuniformity thereby introduced into a marketing area in which a federal producer price is in effect does not seem to be reconcilable with the statute.[134]

State regulation of minimum producer prices is also difficult to square with the statute where the local control has the effect of limiting the marketing of milk in a federal area.[135] Section 608c(5)(G) states that: "No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States."[136] With regard to federal orders, there is some dispute as to whether the word "limit" in this section applies to "milk" or only to "milk products."[137] However, this disagreement was no deterrent to the Supreme Court in *H. P. Hood & Sons, Inc. v. DuMond*,[138] where section 608c(5)(G) was viewed as relevant to New York's attempt to deny a license to a dealer who intended to ship the purchased milk in interstate commerce. The Court stated that, regardless of the construction given section 608c(5)(G), "the policy of

[133] *Ibid.* (Emphasis added.)

[134] In other areas, state acts have been declared operative only until the federal government regulates on the subject which the state seeks to control. See H. P. Welch Co. v. New Hampshire, 306 U.S. 79 (1939) (state highway regulation operative until effective date of ICC order); Northwestern Bell Tel. Co. v. Nebraska State Ry. Comm'n, 297 U.S. 471 (1936) (state order setting depreciation rates operative in absence of ICC action); Minnesota Rate Cases, 230 U.S. 352 (1913). See also Parker v. Brown, 317 U.S. 341 (1943), where the Court, upholding California's power to regulate the marketing of raisins, noted that the Secretary of Agriculture, operating under the Agricultural Marketing Agreement Act of 1937, had in fact co-operated with the state in implementing the state program. *Id.* at 352-59.

[135] See H. P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525, 542-43 (1949).

[136] Agricultural Adjustment Act § 608c(5)(G), as amended, 49 Stat. 755 (1935), 7 U.S.C. § 608c(5)(G) (1958).

[137] See H. P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525, 543 (1949).

[138] 336 U.S. 525 (1949).

the provision is inconsistent with the State's contention that it may, in its own interest, impose such a limitation as a coincident or supplement to federal regulation." [139]

Under the broad reading given the statute in *Hood,* it would seem that in the legislative language proscribing federal obstruction of commerce, there is implicit a similar prohibition of any state attempt to supplement an applicable federal pricing order by setting a higher minimum price for local producers within the jurisdiction of the federal marketing area. The effect of this pricing practice by the state would be to induce local dealers to go out of state in order to buy milk at the lower federal price. This circumstance tends to limit the marketing of locally produced milk in the affected federal marketing area, contrary to the mandate of section 608c(5)(G).

Another section of the statute lends additional strength to the argument that existing federal controls are to be exclusive. In an effort to protect the consumer, the federal authority is specifically instructed to authorize "no action . . . which has for its purpose the maintenance of prices to farmers *above* the level which it is declared to be the policy of Congress to establish . . . ." [140] The area consumers in the regulating state would be forced to pay more for their milk than would otherwise prevail under the federal price, inasmuch as the state establishes the retail price and the mark-up to dealers based upon its higher producer's minimum. Once again, if the federal agency cannot authorize an agreement which has for its purpose the establishment of prices above the federal level, the implication is that the state cannot do so unilaterally within the marketing region.[141]

3. Federal Control Over Intrastate Commerce

If existing federal controls take precedence over those of the state in federal marketing areas, it becomes relevant to determine the extent to which the national government—in the interests of uniformity and cohesive regulation—may regulate milk in intrastate commerce. Although early lower federal court decisions held that intrastate dealers did not have to pay federally established minimum producer prices,[142] the Supreme Court,

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[139] 336 U.S. at 544.

[140] Agricultural Adjustment Act § 602(2)(b), as amended, 49 Stat. 751 (1935), 7 U.S.C. § 602(2)(b) (1958). (Emphasis added.)

[141] *Cf.* H. P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525, 544-45 (1949): "These sections and reports indicate that it is the deliberate policy of the Congress to prevent federal officers from placing barriers in the way of the interstate flow of milk. While a statutory prohibition against federal interference with certain phases of it may not always imply that the state too is precluded, it is obvious that a state limitation on export for the benefit of its own consumers is not authorized by this Federal Act."

[142] Berdie v. Kurtz, 75 F.2d 898 (9th Cir. 1935); Royal Farms Dairy v. Wallace, 8 F. Supp. 975 (D. Md. 1934); United States v. Neuendorf, 8 F. Supp. 403 (S.D. Iowa 1934); United States v. Greenwood Dairy Farms, Inc., 8 F. Supp. 398 (S.D. Ind. 1934), *appeal dismissed,* 76 F.2d 1020 (7th Cir. 1935); Douglas v. Wallace, 8 F. Supp. 379 (W.D. Okla. 1934); Hill v. Darger, 8 F. Supp. 189 (S.D. Cal. 1934), *aff'd,* 76 F.2d 198 (9th Cir. 1935); Edgewater Dairy Co. v. Wallace, 7 F. Supp. 121 (N.D. Ill. 1934), *appeal dismissed,* 75 F.2d 1022 (7th Cir. 1935).

in *United States v. Wrightwood Dairy Co.*,[143] held that a federal pricing order in the Chicago milk market was applicable to milk produced and handled entirely within the state of Illinois. The Court found that this milk "competed" with interstate milk in the marketing area; thus, in order to render effective the regulation of interstate transactions,[144] it became necessary to control also intrastate milk. While the fact that milk imported from other states comprised forty per cent of the market supply[145] may give some support to the argument that the *Wrightwood* rule is limited to situations in which a substantial part of an area's milk needs are met through interstate commerce, a more recent district court case held that, where out-of-state sources supplied merely one-half of one per cent of the market's demand, there was sufficient interstate commerce to make the federal pricing order applicable in the region.[146] Since no appeal was taken in the case and since federal minimum price orders have been issued without challenge in other marketing areas,[147] it would seem that government producer-price regulation of milk in intrastate commerce has become an accepted part of the federal regulatory scheme.[148]

4. Sales to Agencies of the Federal Government

A federal-state problem of a somewhat different nature arises when a state attempts to regulate the milk prices paid by federal installations and agencies located within the regulating jurisdiction. One case involved a request by the government purchasing officer for bids to supply milk to the Indiantown Gap Military Reservation, located in Pennsylvania. The state milk commission notified dealers of the minimum price on which the bidding was to be based. Penn Dairies underbid the minimum and was promptly cited for violating the commission order. The resulting litigation culminated in a United States Supreme Court decision upholding the agency's order as applicable to sales made to the military reservation.[149] It was stressed that the camp was established by the United States on land belonging to Pennsylvania under a permit which involved *no surrender* of the state's jurisdiction or authority over the area.[150] On the same day,

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143 315 U.S. 110 (1942).

144 A similar argument was successful in upholding the applicability of § 605 of the Federal Communications Act, 48 Stat. 1103 (1934), 47 U.S.C. § 605 (1958), to wiretaps of strictly intrastate communications. Weiss v. United States, 308 U.S. 321 (1939).

145 United States v. Wrightwood Dairy Co., 315 U.S. 110, 118 (1942).

146 Balazs v. Brannan, 87 F. Supp. 119 (N.D. Ohio 1949). See also United States v. Adler's Creamery, Inc., 107 F.2d 987 (2d Cir. 1939), *cert. denied*, 311 U.S. 657 (1940); United States v. Beck, 36 F. Supp. 307 (N.D. Iowa 1941); United States v. Krechting, 26 F. Supp. 266 (S.D. Ohio 1939), *appeals dismissed sub nom.* J. H. Berling Dairy Prods. Co. v. United States, 108 F.2d 1014 (6th Cir.), Willer v. United States, 108 F.2d 1023 (6th Cir. 1940).

147 See SPENCER & CHRISTENSEN, *op. cit. supra* note 118, at 74.

148 The trend is toward increased regulation by the federal government. *Ibid.*

149 Penn Dairies, Inc. v. Milk Control Comm'n, 318 U.S. 261 (1943).

150 *Id.* at 267.

the Court decided *Pacific Coast Dairy, Inc. v. Department of Agriculture*.[151] There, California had attempted to regulate the minimum price to be charged for milk sold to the Army installation at Moffett Field. The Court held, however, that the state milk authority could not control the price inasmuch as the base was situated on land *ceded* by California to the United States. On this theory, state minimum pricing was proscribed by the Constitution, which gives Congress power "to exercise exclusive legislation . . . over all Places purchased by the Consent of the Legislature of the State in which the Same shall be . . . ." [152]

This strict "cession" distinction [153] was severely criticized not only by Justices Frankfurter and Murphy [154] but also by the thirty states which joined California's petition for rehearing,[155] subsequently denied by the Court.[156] State dissatisfaction with the rule may lead to attempts to carve out exceptions to it,[157] such as concluding, whenever possible, that sales to the government agencies are consummated in another part of the state where the local milk control law is applicable.[158]

The rigid application of the exclusive jurisdiction clause has adverse effects on state milk control programs in "cession" states.[159] First, inasmuch as the costs of servicing these agencies are not segregated from other costs reported by the dealers, the final price determined by the commission must be sufficiently high to counteract the lower profits returned on the sales to unregulated federal buyers. Second, if resale price control is to be effective, it must extend to substantially all sales of milk within the state;[160] and the impact of excluding sales to units of the federal govern-

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151 318 U.S. 285 (1943).

152 U.S. CONST. art. I, § 8.

153 The exclusive jurisdiction clause has not always been so literally interpreted. See James Stewart & Co. v. Sadrakula, 309 U.S. 94 (1940); *cf.* James v. Dravo Contracting Co., 302 U.S. 134 (1937).

154 318 U.S. at 296, 303. "Opposite legal results are thus reached for precisely the same practical situations. The justification for this incongruity . . . is attributed to the difference in the nature of the Government's proprietary interest in each of the two Army sites . . . . The power given to Congress by Article I, § 8 of the Constitution . . . is not so tyrannical as to preclude in law what good sense requires." *Id.* at 298 (Frankfurter, J., dissenting).

155 SPENCER & CHRISTENSEN, *op. cit. supra* note 118, at 73.

156 318 U.S. 801 (1943).

157 Compare United States v. Sunshine Dairy, Inc., 215 F.2d 879 (9th Cir. 1954).

158 See Mr. Justice Frankfurter, dissenting, 318 U.S. at 302: "Is the result to turn upon the niceties of the law of sales and contracts? Suppose, for example, that the negotiations occur and the contracts are signed off Moffett Field, but delivery takes place there. Must inquiry be made as to where title has 'passed' and the sale consummated?" See Commonwealth v. Rohrer, 37 Pa. D. & C. 410 (C.P. 1940).

159 "Indeed both the federal government and the nation as a whole suffer if the solution of legitimate matters of local concern is thus thwarted and local animosity created for no purpose." 318 U.S. at 305 (Murphy, J., dissenting).

160 See Milk Control Comm'n v. Rieck Dairy Div., 193 Pa. Super. 32, 37, 163 A.2d 891, 894 (1960); note 350 *infra*.

ment may be considerable.[161] Finally, it would seem that here it would be appropriate to make every effort to construe the constitutional provision in such a manner that problems attributable to our federal form of government would be minimized.[162]

IV. Establishing a Minimum Price

A. *Hearings*

The most important and by far the most difficult and controversial task of the Pennsylvania Milk Control Commission is that of balancing the conflicting interests of producers, dealers, and consumers in establishing the minimum prices which the dealers must pay to producers and charge to consumers.[163] In ascertaining and fixing the prices which the statutory directive characterizes as "most beneficial to the public interest," [164] the Commission is required to hold hearings and base its determinations on the evidence there received.[165] Hearings are generally held within a marketing area [166] every eighteen months; [167] however, they may be called annually if costs are rising rapidly in the area.[168] They can be initiated by the agency [169] but are usually requested by producers or dealers.[170]

The procedural requisites of commission hearings received judicial refinement in *Colteryahn Sanitary Dairy v. Milk Control Comm'n*,[171] where the Pennsylvania Supreme Court elaborated on the statutory hearing requirement. First, hearings before the Commission that involve price fixing must be complete—evidence is not to be initially withheld by the

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[161] This is especially true if the government agencies are the largest buyers in the state, as was the Indiantown Gap Reservation in Pennsylvania. The reservation ordered 67,500 gallons of milk for a four-month period. Penn Dairies, Inc. v. Milk Control Comm'n, 148 Pa. Super. 261, 263, 24 A.2d 717, 718 (1942).

[162] See 318 U.S. at 305-06 (Murphy, J., dissenting); *cf.* Schwartz v. Texas, 344 U.S. 199, 202-03 (1952).

[163] Milk Control Law §§ 700j-802, -803.

[164] Milk Control Law § 700j-801.

[165] *Ibid.* In Judson v. Milk Control Comm'n, 56 Dauph. Co. Rep. 405 (C.P. 1945), where the Commission had issued a pricing order without first holding a hearing, it was held that the requirement of § 700j-801 that a hearing be held is mandatory and an order made without compliance with the requirement is void. The Commission is also required to hold a second hearing or conference to effectuate its order and may also change an order within twenty days after the effective date without a further hearing, provided that the revision is founded upon evidence received at the latest hearing. Milk Control Law § 700j-801. All of the milk control states except Connecticut and New Jersey require hearings to be held before the issuance of price-fixing orders. Spencer & Christensen, Milk Control Programs of the Northeastern States pt. 1, at 13 (Cornell University Agricultural Experiment Station Bull. 908, 1954).

[166] Interview With John S. Pfautz, Director of Research for the Pennsylvania Milk Control Commission, in Harrisburg, Pa., July 27, 1960.

[167] Interview With Joab K. Mahood, Chairman of the Pennsylvania Milk Control Commission, in Philadelphia, Pa., June 22, 1960.

[168] *Ibid.*

[169] Milk Control Law § 700j-801.

[170] Interview With Marvin D. Weintraub, Attorney for the Pennsylvania Milk Control Commission, in Philadelphia, Pa., July 15, 1960.

[171] 332 Pa. 15, 1 A.2d 775 (1938).

interested parties and later presented on appeal.[172] Second, whenever a pricing order is issued, a general statement of findings of fact, along with reasons for the order, must be filed.[173] Third, the procedure required for changing or revising an order is the same as that to be followed in promulgating an order.[174] Fourth, the production of proof before the Commission is not subject to strict rules of evidence.[175] Fifth, the results of any survey taken by the agency "should be placed on the record of the hearing . . . and the parties who made the survey should be subject to such cross-examination as is proper." [176] Sixth, "interested parties should be accorded opportunity to test the reliability of the Commission's evidence before an order is promulgated, revised or changed." [177]

Although these standards are normally satisfied in practice, deviation has occurred. For example, the informal evidentiary standard is sometimes forsaken for lengthy argument on the admissibility of evidence or the propriety of a line of questioning.[178] The recent hearing concerning Country Maid Dairies' proposed introduction into the Philadelphia marketing area of the gallon jug container [179]—which would make milk available

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[172] *Id.* at 21, 1 A.2d at 779: "By this it is meant that all 'essential facts in the first instance' should be submitted 'to the Commission at its hearing' either by the dealers or the producers in any application for change of price or contest over price . . . . It was not the intention of the legislature that dealers or producers should withhold evidence at such hearing, and then, on appeal, submit that evidence to the Dauphin County court, thus presenting an entirely new case . . . ."

[173] 322 Pa. at 20, 1 A.2d at 778.

[174] *Ibid.*

[175] 322 Pa. at 21, 1 A.2d at 778. See notes 178-84 *infra* and accompanying text.

[176] 322 Pa. at 21, 1 A.2d at 778.

[177] *Ibid.* The Commission may also be required to grant a continuance if such is justified by the situation. In one case defendant's counsel was called out of town on the day of a hearing involving complicated questions of law and fact in regard to defendant's underpayments to farmers. Defendant requested a continuance of three hours so that his counsel could be present, but the Commission refused. It was held that the refusal to grant the continuance was unreasonable under § 700j-906, and the case was remanded to the Commission with directions to take further testimony. See Levengood v. Eisaman, 36 Pa. D. & C. 184 (C.P. 1940). But where the city solicitor of Pittsburgh was denied a continuance which he requested in order to allow him to prepare for cross-examination of a commission witness, the refusal was held not violative of due process inasmuch as the city had received twenty days advance notice of the hearing and the same expert witness had given the same testimony at previous hearings. The court indicated that the city had ample time and was on notice of what would be presented at the hearing and therefore should have been prepared to cross-examine. See City of Pittsburgh v. Milk Control Comm'n, 68 Dauph. Co. Rep. 127 (C.P. 1955).

[178] *Cf.* Milk Control Comm'n v. Nicoson, 57 Pa. D. & C. 166 (C.P. 1946). On appeal of a hearing in which the Commission had revoked a dealer's license, the court found "the record presented . . . most unsatisfactory for the purposes of an intelligent review. Of the 59 pages of testimony, well over half of them are taken up by objections (particularly on the part of double counsel for the commission), rulings, statements, colloquies between opposing counsel and between counsel and the hearing commissioner. As a result of these persistent interjections, and interpolations, the normal sequence has been practically destroyed and it is most difficult to properly appraise the value of the testimony that is in the record." *Id.* at 167.

[179] *In re* Philadelphia Milk Marketing Area, Milk Marketing Area No. 1, Pa. Milk Control Comm'n Hearing, June 17, 1960 (Country Maid Dairies' petition to introduce the sale of milk in gallon jugs in the Philadelphia milk marketing area).

at four or five cents less than the present home price[180]—was a considerable departure from the informal and procedurally relaxed norm. Each time counsel for Country Maid asked a question in cross-examining a Philadelphia dairy witness, they were met by objections from one or more of the numerous lawyers representing dealers in the Philadelphia region.[181] Then would follow long dissertations on the allowance or disallowance of the question, which was often re-read by the stenographer to remind the adversaries of the subject of their argument.[182] At times the Commission found it necessary to call a recess to rule on an objection.[183] Although informality in the extreme might be equally objectionable, the type of procedure illustrated by the Country Maid case does not lead to speedy hearings, clear and concise records for courts to review on appeal,[184] or efficient use of the funds allocated to the milk commission.

1. Evidence: General Considerations

The criteria to be utilized by the Commission in its determination are indicated in broad form by section 700j-801 of the Milk Control Law:

> The commission shall base all prices upon all conditions affecting the milk industry in each milk marketing area,[185] including the amount necessary to yield a reasonable return to the producer, which return shall not be less than the cost of production and a reasonable profit to the producer, and a reasonable return to the milk dealer or handler. In ascertaining such returns, the commission shall utilize a cross-section representative of the average or normally efficient producers and dealers or handlers in the area.[186]

Final decision by the Commission is still pending. Chairman Mahood indicated that resolution of the case will not only be difficult, but will require a considerable amount of time, since the hearing covered eighteen days and resulted in over 3,500 pages of testimony. Interview With Joab K. Mahood, Chairman of the Pennsylvania Milk Control Commission, in Philadelphia, Pa., June 22, 1960.

180 Brief for Petitioner, p. 2, *In re* Philadelphia Milk Marketing Area, *supra* note 179.

181 Much of the dispute concerned direct testimony that the gallon jug would provoke price wars in the Philadelphia region. Although commission attorney Weintraub pointed out that this evidence is irrelevant in a regulated market, the testimony was admitted. Upon cross-examination, counsel for Country Maid Dairies attempted to show what occurred in the alleged price war areas. Every time he questioned the witness on the practices of one of the dairies in those sectors, however, the attorney representing that particular dealer would object—usually on the ground that the sole question was the existence of a price war and that inquiries as to who starts them or how they are conducted are irrelevant. It would seem that once the price war issue was injected into the hearing, exploration of the cause of this "competition" should be allowed. Observation of *In re* Philadelphia Milk Marketing Area, *supra* note 179.

182 *Ibid.*

183 *Ibid.*

184 See Milk Control Comm'n v. Nicoson, 57 Pa. D. & C. 166, 167 (C.P. 1946).

185 There are thirteen milk marketing areas currently delineated within Pennsylvania. PA. ST. UNIV. DEP'T OF AGRICULTURAL ECON. AND RURAL SOCIOLOGY, A.E. & R.S. No. 25, CHARACTERISTICS OF FLUID MILK SALES IN PENNSYLVANIA 3 (1960).

186 MILK CONTROL LAW § 700j-801.

The *Colteryahn* case sharpened these general rules to some extent. The court stated that all factors which enter into the conduct of the milk industry should be considered in arriving at a minimum price, and the scope of the Commission's inquiry should extend to consideration of the maintenance of a just consumer's price, the adjustment of supply and demand, and a fair return to the producer and dealer which will not only compensate for reasonable operating expenses but permit an adequate profit on investment.[187] In determining "fair return," the agency should not select the most efficient producers and dealers but should use a cross-section of the normally efficient operators in the district.[188] Milk prices in other areas should not be taken as a guide unless it appears that the region provides a fair comparison and the conditions in each are similar.[189] Although the Commission has the aid of this legislative and judicial outline, the supreme court emphasized that, in the final analysis, it is the agency's responsibility to determine the factors relevant to setting the minimum price and that such price determinations will not be disturbed unless the exclusion or inclusion of certain items is arbitrary or capricious.[190]

In practice, the Commission's pricing orders are usually based not only on evidence produced by the parties represented at the hearing but also upon evidence brought forth by the agency on its own initiative. Despite the rule that any interested person may submit evidence,[191] the participation of the different interest groups varies considerably. Because of lack of organization and a somewhat justified feeling of ineffectiveness when appearing individually,[192] consumers have rarely been present at the hearings.[193] The dairies have been the most vociferous group.[194] Producers, like consumers, seldom present evidence on an individual basis, but they do participate in hearings through representatives of their group.[195]

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187 Colteryahn Sanitary Dairy v. Milk Control Comm'n, 332 Pa. 15, 27, 1 A.2d 775, 781 (1938).

188 *Ibid.*

189 332 Pa. at 31, 1 A.2d at 783.

190 332 Pa. at 32, 1 A.2d at 783.

191 MILK CONTROL LAW § 700j-801.

192 See, *e.g.*, Interview With John J. Ormand, Director of Purchases for Linton's Restaurants, in Philadelphia, Pa., July 21, 1960; Interview With James F. Hutton, Executive Vice President, and Lee F. Driscoll, Jr., General Counsel, both of the Slater System Co., in Philadelphia, Pa., June 15, 1960. The difficulty of an attempt by wholesale consumers to obtain a price change beneficial to them is indicated by Milk Control Comm'n v. United Retail Grocers Ass'n, 361 Pa. 221, 64 A.2d 818 (1949), and Food Distribs. Ass'n v. Milk Control Comm'n, 60 Dauph. Co. Rep. 183 (C.P. 1949); see notes 260-71 *infra* and accompanying text.

193 See SPENCER & CHRISTENSEN, *op. cit. supra* note 165, at 33; PA. ST. UNIV. DEP'T OF AGRICULTURAL ECON. AND RURAL SOCIOLOGY, JOURNAL SERIES PAPER NO. 1807, CONSUMER KNOWLEDGE AND OPINION OF STATE MILK CONTROL IN PENNSYLVANIA 13-15 (1953).

194 Interview With Joab K. Mahood, Chairman of the Pennsylvania Milk Control Commission, in Philadelphia, Pa., June 22, 1960; Interview With Marvin D. Weintraub, Attorney for the Pennsylvania Milk Control Commission, in Philadelphia, Pa., July 15, 1960.

195 PA. ST. UNIV. DEP'T OF AGRICULTURAL ECON. AND RURAL SOCIOLOGY, *op. cit. supra* note 193, at 13.

2. Producer Participation

Evidence introduced by producers is directed primarily toward showing the cost of production and includes such items as the population of dairy herds and the supply of milk in the area,[196] the condition of pastures, the amount of rainfall, cost of feed and other products, wage rates, the availability of farm labor, and milk prices in other areas.[197] The reliability of this evidence is difficult to appraise inasmuch as it consists largely of observations gathered by the producer representatives from individual farmers, who do not ordinarily keep extensive records or maintain accounting departments.[198] It is often questionable whether such presentations satisfy the requirement of section 700j-801 that the Commission utilize a cross section representing the average or normally efficient producers and dealers in the area. To guard against an unrepresentative sample, the Commission has sponsored and relied upon periodic studies of production costs conducted by the Department of Agricultural Economics and Rural Sociology of the Pennsylvania State University.[199]

Producers are far from pleased with the minimum prices set for their products by the Commission. In a survey conducted by Pennsylvania State University, two-thirds of the 1,121 farmers interviewed believed that the price they received for milk did not cover their production costs.[200] While the lack of cost and receipt records might cast doubt on the reliability of this figure, a 1948 study of Pennsylvania dairy farms seems to support the farmers' contention.[201] Inefficiency in production may be one cause of the smaller farmer's unfavorable financial situation;[202] the prohibitive price tags on the machinery needed to become "efficient" and the slim or nonexistent profit margin which results from unmechanized operation have caused Pennsylvania to lose 800 to 1,000 dairy farmers annually.[203]

3. Dealer Interests

The principal purpose of the evidence submitted by the dairies is to show the cost of distribution; often, however, only the records of dairies

196 See Food Distribs. Ass'n v. Milk Control Comm'n, 60 Dauph. Co. Rep. 183 (C.P. 1949) (evidence showing effect of profits on herd population).

197 SPENCER & CHRISTENSEN, *op. cit. supra* note 165, at 32.

198 PA. ST. UNIV. DEP'T OF AGRICULTURAL ECON. AND RURAL SOCIOLOGY, *op. cit. supra* note 193, at 17.

199 SPENCER & CHRISTENSEN, *op. cit. supra* note 165, at 32.

200 PA. ST. UNIV. DEP'T OF AGRICULTURAL ECON. AND RURAL SOCIOLOGY, *op. cit. supra* note 193, at 16.

201 Unpublished data from a survey of costs of producing milk conducted in 1948 by the Department of Agricultural Economics and Rural Sociology at the Pennsylvania State University and supervised by R. D. Hess, as reported *id.* at 17 & n.13.

202 Interview With John S. Pfautz, Director of Research for the Pennsylvania Milk Control Commission, in Harrisburg, Pa., July 27, 1960.

203 *Ibid.* The producer problem is discussed in connection with the economic value of the price control legislation at notes 36-46 *supra* and accompanying text.

with high costs and low profits are presented.[204] To obtain a more representative picture of milk marketing within the area, the agency conducts its own survey,[205] using information gleaned from the monthly operations reports[206] and yearly financial statements which the dairies are required to file with the Commission.[207] After a random audit of the entire market area and audits of all dealers who show a substantial increase in a cost item within a year,[208] the statistical department of the agency tabulates the dairies' financial statements, with discretion to include or omit from the compilation all or part of the records of various dealers in the area.[209] The Commission then must have one of its witnesses place the results of the survey in the record so that interested parties may have an opportunity to cross-examine with regard to the comprehensiveness and accuracy of the report.[210]

At a recent hearing in the Pittsburgh milk marketing area, initiated by the dairies seeking an alteration in minimum prices, the agency submitted a survey of seventy dealers handling eighty-nine per cent of the class I and IA milk sales volume in the region. The report sought to delineate the financial circumstances of an average dairy in order to aid the Commission in determining the need for a price change. The survey demonstrated that the seventy dealers had an average return on net worth of 10.39% of annual sales, an average return on net capital of 7.19% of annual sales, and an average net profit before taxes of 2.96% of annual sales. When seven dealers operating at a loss were excluded from the compilation, the remaining dairies showed average return on net worth of 10.99% of sales, average return on employed capital of 7.52% of sales, and average net profit before taxes of 3.15% of sales. Finally, three dealers who had comparatively high operating costs were eliminated, and the com-

204 Interview With Marvin D. Weintraub, Attorney for the Pennsylvania Milk Control Commission, in Philadelphia, Pa., July 15, 1960; Interview With former attorney for the Pennsylvania Milk Control Commission, in Philadelphia, Pa., July 8, 1960; see Colteryahn Sanitary Dairy v. Milk Control Comm'n, 332 Pa. 15, 1 A.2d 775 (1938).

205 Interview With John S. Pfautz, Director of Research for the Pennsylvania Milk Control Commission, in Harrisburg, Pa., July 27, 1960.

206 "This report of Production, Receipts, Purchase, Sale, Manufacture and Classification of Payments to Producers and Dealers shall be filed not later than the 22nd day of each month for the preceding month." Milk Dealer's Monthly Report (Pa. Milk Control Comm'n Form 62).

207 MILK CONTROL LAW § 700j-702; see SPENCER & CHRISTENSEN, MILK CONTROL PROGRAMS OF THE NORTHEASTERN STATES pt. 2, at 100 (Cornell University Agricultural Experiment Station Bull. 918, 1955).

208 Interview With John S. Pfautz, Director of Research for the Pennsylvania Milk Control Commission, in Harrisburg, Pa., July 27, 1960. For example, Mr. Pfautz indicated that a milk dealer's usual cost of advertising is less than one per cent of the sales dollar. Therefore, if a dealer shows a seven per cent cost allocation for advertising, his statement is audited. However, Mr. Pfautz noted that usually the dealers' statements are fairly accurate; rarely does the Commission audit more than five per cent of the reports.

209 See notes 186 and 188 *supra* and accompanying text. This procedure is illustrated in the Pittsburgh survey method set out in text at notes 211-14 *infra*.

210 Colteryahn Sanitary Dairy v. Milk Control Comm'n, 332 Pa. 15, 21, 1 A.2d 775, 779 (1938).

parable figures for the remaining sixty were 11.48%, 7.69%, and 3.22%. The milk commission found that these sixty dealers were representative of the average or normally efficient dealers in the area [211] and that the ten excluded dairies distorted the norm.[212] On the evidence as thus viewed, it was concluded that an increase of one-half cent per quart was sufficient to cover increased operating costs [213] and to allow these average dealers a reasonable return, while at the same time continuing milk as a relatively cheap commodity.[214]

It is not surprising that some dairies are of the opinion that the established prices generally favor the producer.[215] But there is a substantial amount of opinion that the Commission favors the dairies in its price determinations.[216] The chairman of the Commission, in offering an explanation for this feeling, stated that, since the agency bases its decisions on the evidence adduced at the hearings, it is only natural that the group presenting the most reliable evidence in the largest quantities stands the best chance of convincing the Commission that its position is the correct one and of securing a favorable price.[217] Certainly there is nothing improper about persuasive advocacy. But if the chairman's explanation is true, the Commission is allowing itself to be convinced by quantity rather than quality, for even the agency—by conducting its own surveys to determine average dairy costs—tacitly admits that the dairies' own figures are not completely reliable. Regardless of the validity of the dairy favoritism charge, however, it cannot be doubted that increased participation by other interests, counterbalancing the representation of the dairies, would be desirable.

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211 The failure to eliminate "the most efficient . . . dealers" was not a violation of the *Colteryahn* rules. See text accompanying note 188 *supra*. In this instance, there were no dairies which stood out above the rest.

212 Findings of Fact in Support of Official General Order No. A-587 Amending Official General Order No. A-578, Regulating the Pittsburgh Milk Marketing Area, Area No. 2, p. 4, July 13, 1960.

213 The cost increase was primarily due to an increase in the wage rate. Interview With John S. Pfautz, Director of Research for the Pennsylvania Milk Control Commission, in Harrisburg, Pa., July 27, 1960. Certain dealers have expressed apprehension over the rapid rise in the wage rate. That labor might price itself out of work is not an unreal possibility; many drivers in New York were rendered jobless when labor costs rose so high that it was not economically feasible to continue door-to-door service. Interview With Robert J. Harbison, III, President of Harbison Dairies, Inc., in Philadelphia, Pa., June 23, 1960.

214 Findings of Fact in Support of Official General Order No. A-587 Amending Official General Order No. A-578, Regulating the Pittsburgh Milk Marketing Area, Area No. 2, pp. 6-7, July 13, 1960.

215 Interview With Robert J. Harbison, III, President of Harbison Dairies, Inc., in Philadelphia, Pa., July 7, 1960; see Interview With John B. Martin, Counsel for the Philadelphia Milk Dealers Association, in Philadelphia, Pa., July 7, 1960. For a case finding that a commission order classifying milk and milk payments favored one producer group over another, see Weiss v. Milk Control Comm'n, 71 Dauph. Co. Rep. 47 (C.P. 1957).

216 See, *e.g.*, Interviews With Wholesale Consumers at the 1960 Convention of the Pennsylvania Restaurant Owners Association, in Galen Hall Mountain Resort, Pa., June 28-29, 1960.

217 Interview With Joab K. Mahood, Chairman of the Pennsylvania Milk Control Commission, in Philadelphia, Pa., June 22, 1960.

There is no evidence that the alleged commission unfairness in pricing determinations is a product of conscious favoritism or corruption. Those who have worked closely with the agency are of the opinion that it attempts to be unbiased in fixing minimums.[218] To some extent the charges are a natural by-product of advocating one's interest to the full. A considerable portion of this feeling also emanates from people who are somewhat removed from commission activities[219] and who may not be aware of the difficulties inherent in setting an equitable price. This is not to say that the system of regulation does not benefit the distributors to the detriment of the consumers. Dairy satisfaction with the status quo,[220] in part due to the insulation from competition afforded by any price-fixing scheme, is increased by the ease with which the minimums may be avoided where this is found to be advantageous. In this respect—laxness of enforcement[221]—the Commission may be regarded as "favoring" the distributors' interests.

4. Consumer Protection

While the farmers have to some degree achieved greater participation by having members of their group act in their behalf,[222] the consumer—though recognizing that the hearing is the proper forum for the presentation of his case,[223] has remained inert.[224] In view of this lack of representation, the Commission must take special care in protecting the interests of the buying public. It would not be improper for the agency, using processes similar to the supplementation of deficient dealer evidence, to make its own investigation and determination of consumer needs and abilities.

There are indications that some members of the state legislature are aware of the difficulties of consumer advocacy. In 1959, a bill was introduced in the General Assembly which provided for a "Bureau of Consumer Protection."[225] As introduced, the bill gave the bureau broad powers to aid the buying public:

> (1) To present and represent the viewpoint of the consuming public in matters before any . . . agency of the State . . . including but not limited to any proceedings seeking a change of rates or services or costs of services or commodities . . . .

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218 Interview With Marvin D. Weintraub, Attorney for the Pennsylvania Milk Control Commission, in Philadelphia, Pa., July 15, 1960.

219 This appears to be the general attitude of the wholesale consumers interviewed and to whom questionnaires were sent.

220 See notes 47-49 *supra* and accompanying text.

221 See text preceding note 350 *infra*.

222 See note 195 *supra*.

223 See notes 192-93 *supra*.

224 *Ibid.*

225 Pa. H.R. 2347, 143d Gen. Ass. (1959).

(5) To foster the creation and activities of independent consumer organizations to promote consumer education and to cooperate with existing consumer representatives.

(6) To conduct studies, investigations and research in all matters affecting consumer interests, advise the executive and legislative branches on matters affecting consumer interests, assist in developing executive policies and legislative programs to protect the consumer, secure all available information on . . . costs of commodities and services and make such information available to the various agencies of government and to the public.[226]

The bill also notes that the bureau's functions would not be a substitute for the duty of the milk commission and "other agencies . . . to safeguard the consumer." [227] Although amendment restricted the bureau's duties to public utility matters,[228] further revision restored the measure's original scope.[229] Unfortunately, the proposed legislation failed to pass.[230] Should the bill be reintroduced this year, enactment would be a step toward the realization of the goal of milk pricing policies which properly reflect the interests of consumers as well as of dealers and producers.

B. *Judicial Review of Pricing Orders*

General commission orders fixing or revising minimum prices may be appealed to the court of common pleas for Dauphin County.[231] Further appeal from that court's decision will lie to the Pennsylvania Supreme

226 Pa. H.R. 2347, 143d Gen. Ass. § 1 (1959).

227 *Ibid.*

228 Pa. H.R. 2347, 143d Gen. Ass. (1959) (as amended on second reading). Aside from doing "such other acts as may be incidental to the exercise of its powers and functions," the bureau's activities were limited to presenting the consumer interest "relating to any proceedings seeking a change of rates or services or costs of services in public utility matters . . . ." This amended version also stated that "the duties and functions of the [bureau] . . . shall not be in substitution for the obligation of the Pennsylvania Public Utility Commission . . . ." The reference to the milk commission and other agencies was deleted.

229 36 PA. LEGISLATIVE J. 4153-54 (1959) (as amended on third reading). As restored, subsections 5 and 6 of the original bill were inserted unchanged as subsections 4 and 2. The important first subsection was changed to give the bureau the power to represent the interests of the consumer before agencies "including but not limited to any proceedings seeking a change of rates or services or costs of charges in matters by State agencies . . . ." The provision relating to the continued consumer obligations of other agencies, formerly limited to the public utilities commission, was also revised. The reference to the utilities agency was deleted and the provision was made to read "[bureau functions] shall not be in substitution of the obligation of other agencies having a duty to safeguard the consumer."

230 The bill was defeated on final reading, November 17, 1959. The vote was very close—89 supporting the measure, 94 opposed. HISTORY OF HOUSE BILLS & RESOLUTIONS, SESSION OF 1959, at 269 (1959) (final issue).

231 MILK CONTROL LAW § 700j-901. Special orders directed to a particular person or persons, such as revocations and suspensions, are appealable in the common pleas court of the residence or place of business of the recipient of the order. If the aggrieved party has neither within the commonwealth, the proper court is the Dauphin County common pleas court. MILK CONTROL LAW § 700j-902.

Court.[232] If an appeal questions the correctness of an order, it must be taken within twenty days after the order is issued;[233] an appeal after this date is considered a collateral attack and will not be allowed.[234] However, an argument based on the milk commission's lack of authority or constitutional right to make such an order will be heard if brought within a reasonable time after the statutory period has run.[235]

1. Standing

The mandate of section 700j-801—that the Commission shall hold a hearing "in which all interested persons shall be given reasonable opportunity to be heard"[236]—allows a wide class to submit evidence at the hearing. However, those who may appeal from a commission order comprise a considerably narrower group; section 700j-901 provides that the would-be appellant must be a "person aggrieved."[237] The problem of when one has an interest of sufficient magnitude to support an appeal is a question for the court; the agency has no power to stipulate that a particular party is an aggrieved person.[238] In deciding the issue, the judiciary has given the statutory language a more restrictive meaning than a literal reading would indicate: to qualify as "aggrieved," a party must demonstrate that the order he wishes to question has a direct adverse effect upon his pecuniary interests.[239]

The Pennsylvania Supreme Court has twice dealt with the issue of an appellant's standing to question an order of the Commission. *Colteryahn Sanitary Dairy v. Milk Control Comm'n*[240] merely stated the obvious: where the order establishes prices pertaining to a particular group, that

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[232] MILK CONTROL LAW § 700j-908. Further appeal of special orders may be taken by either party to the superior court. *Ibid.* However, if the action originates as a summary criminal case before a justice of the peace and there is a reversal of conviction in the common pleas court, the Commission may not appeal further. Commonwealth v. Hollinger, 170 Pa. Super. 180, 84 A.2d 794 (1951). This is in accord with the usual Pennsylvania rule regarding criminal defendants. See, *e.g.*, Commonwealth v. Weber, 66 Pa. Super. 180 (1917).

[233] MILK CONTROL LAW § 700j-901.

[234] Rohrer v. Milk Control Bd., 322 Pa. 257, 186 Atl. 336 (1936); Commonwealth v. Jackson, 146 Pa. Super. 328, 22 A.2d 299 (1941), *aff'd per curiam*, 345 Pa. 456, 28 A.2d 894 (1942); Commonwealth v. Ziegler Dairy Co., 139 Pa. Super. 224, 11 A.2d 669 (1940).

[235] Rohrer v. Milk Control Bd., *supra* note 234; Milk Control Comm'n v. Hollinger, 79 Pa. D. & C. 49 (Quar. Sess.), *appeal quashed*, 170 Pa. Super. 180, 84 A.2d 794 (1951).

[236] MILK CONTROL LAW § 700j-801.

[237] MILK CONTROL LAW § 700j-901: "Any person aggrieved by an order of the commission fixing, revising or amending the price at, or the terms upon, which milk may be bought or sold, or by any other general action, rule, regulation or order of the commission, may . . . file an appeal therefrom . . . ."

[238] Pennsylvania Commercial Drivers Conference v. Milk Control Comm'n, 360 Pa. 477, 62 A.2d 9 (1948).

[239] "And not only must a party desiring to appeal have a direct interest in the particular question litigated, but his interest must be immediate and pecuniary, and not a remote consequence of the judgment." 360 Pa. at 484, 62 A.2d at 13.

[240] 332 Pa. 15, 1 A.2d 775 (1938).

group may appeal since the order unquestionably has an immediate and direct effect upon their interests.[241] *Pennsylvania Commercial Drivers' Conference v. Milk Control Comm'n* [242] raised a more troublesome problem. The milk commission had issued an order limiting home deliveries by dairies to every other day. This method of delivery was originally instituted by the Federal Office of Defense Transportation as a wartime measure directed toward the conservation of gasoline and rubber; after the war emergency ended, every-other-day delivery was adopted by the Pennsylvania Milk Control Commission on the ground that it resulted in lower distribution costs which in turn allowed lower consumer prices.[243] The union argued that the frequency of deliveries was a matter appropriately left to the collective bargaining process and that "the order limits . . . the obligations of milk dealers . . . to reemploy veterans . . . and also destroys employment opportunities and job security in the industry." [244] The supreme court avoided the merits by holding that the union did not have sufficient standing to prosecute the appeal:

> But [the union] . . . interest in this proceeding is obviously not a direct interest, but an interest that is too remote to constitute a person aggrieved; it is not an interest that at the time the order was made was the subject of pecuniary consideration to appellants in any collective bargaining then in process; it may never become a subject of such consideration and therefore does not constitute a substantial interest in this proceeding affecting appellant.[245]

The court disregarded the union's obviously strong interest in the number of days available for truck delivery on the reasoning that "the general order appealed from is capable of directly affecting only 'Persons engaged in business as milk dealers, handlers or distributors,' 'consumers' and producers." [246] It is difficult to comprehend how the producer, consumer, or retail store interest is any more direct than that of the union and its drivers.

A few early lower court cases, each involving secondhand pecuniary injury, had read the standing requirements in a more liberal manner and

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241 332 Pa. at 25-26, 1 A.2d at 780-81.

242 360 Pa. 477, 62 A.2d 9 (1948).

243 360 Pa. at 479, 480, 62 A.2d at 11.

244 Burns v. Milk Control Comm'n, 63 Pa. D. & C. 126, 128 (C.P. 1947).

245 Pennsylvania Commercial Drivers' Conference v. Milk Control Comm'n, 360 Pa. 477, 484, 62 A.2d 9, 13 (1948).

246 *Id.* at 484, 62 A.2d at 13. When a dairy contested a conviction for violating the commission order of every-other-day delivery in Milk Control Comm'n v. Hollinger, 79 Pa. D. & C. 49 (Quar. Sess.), *appeal quashed*, 170 Pa. Super. 180, 84 A.2d 794 (1951), the court found that the agency had exceeded its delegated power in promulgating the order and held it void. Although the *Hollinger* case nullified the agency action, the Commission has not considered the case controlling and has continued the regulation in most parts of the state. See Harbison's Dairy, A. & I. No. W-146 (Pa. Milk Control Comm'n March 3, 1959); Levengood Dairies, A. & I. No. W-42 (Pa. Milk Control Comm'n Sept. 15, 1958).

allowed appeal from the Commission's order;[247] this aspect of these decisions, however, must be deemed overruled by the *Commercial Drivers* case. Although the Pennsylvania appellate courts have not since spoken concerning the standing needed to attack milk commission orders,[248] the subsequent county reports evidence no deviation from the rule espoused in *Commercial Drivers*.[249]

2. The Burden of Proof and Substantial Evidence

When an order of the Commission is challenged on appeal, the court must determine whether the agency's action is "reasonable and in conformity with law."[250] In challenging a general pricing order, the appellant must show that the Commission's result is "unreasonable or illegal,"[251] and in measuring the order's reasonableness, the courts have utilized the test that the order must be supported by substantial evidence.[252] The rigor

[247] Wilson v. Milk Control Comm'n, 57 Pa. D. & C. 452 (C.P. 1946); Local Union No. 205 v. Milk Control Comm'n, 55 Dauph. Co. Rep. 254 (C.P. 1944). In *Wilson*, the Commission had revoked a dealer's license; twenty-four producers who had sold milk to this dealer appealed. They claimed to be aggrieved because the order would require them "to find other markets for their milk and find other persons to haul their milk to market, requiring them to receive less money for their milk . . . ." 57 Pa. D. & C. at 453. The court allowed the appeal. It is arguable that a producer in these circumstances may appeal even under the more stringent rule of *Commercial Drivers*. Such an argument relies heavily on the language in that case to the effect that producers might properly have challenged the Commission's every-other-day order. But if the "direct" test there enunciated means what it says, producers have standing in neither situation. See notes 242-46 *supra* and accompanying text. In the *Local Union* case, the union sought to overturn an agency ruling establishing a price for milk sold at the store which was lower than the door delivery price. The appellant's contention was that "the differential would result in disruption and confusion in the delivery and distribution of milk to home consumers." Local Union No. 205 v. Milk Control Comm'n, 55 Dauph. Co. Rep. 254, 267 (C.P. 1944). The court held that the union's interest was adequate to support the appeal. If the possibility of fewer jobs for union members because of every-other-day delivery was not a sufficient interest in the *Commercial Drivers* case, it is clear that the possibility of fewer jobs for union members because of an increase in store purchases cannot be regarded as an interest sufficient to give standing today.

[248] The *Commercial Drivers* rule retains vitality in other areas of Pennsylvania law. *Compare* Elliott Estate, 388 Pa. 321, 131 A.2d 357 (1957), *and* Commuters' Comm. v. Pennsylvania Pub. Util. Comm'n, 170 Pa. Super. 596, 88 A.2d 420 (1952), *with* Delaware County Nat'l Bank v. Campbell, 378 Pa. 311, 106 A.2d 416 (1954). The rule was applied but more liberally interpreted in Hazle Township Annexation Case, 183 Pa. Super. 212, 130 A.2d 230 (1957).

[249] See Rieck Dairy Co. v. Milk Control Comm'n, 69 Dauph. Co. Rep. 345 (C.P. 1956). This case involved a dairy appeal from a commission order increasing the spread between the subdealers' buying and selling prices. The dairy's arguments on the standing issue were that the prices it must charge the subdealers were too high, that the subdealers' profit margins were too low and that if they were not increased the subdealers might discontinue business. A consequent loss of sales by the dairy, it was contended, might result. The court held that the dairy was not an aggrieved person.

[250] MILK CONTROL LAW § 700j-906. The determination of the court is the same whether the appeal is from a general order, MILK CONTROL LAW § 700j-901, or from a special order, MILK CONTROL LAW § 700j-902.

[251] MILK CONTROL LAW § 700j-906.

[252] See, *e.g.*, Meadow Gold Dairies, Inc. v. Milk Control Comm'n, 70 Pa. D. & C. 223 (C.P. 1949); Local Union No. 205 v. Milk Control Comm'n, 55 Dauph. Co. Rep. 254 (C.P. 1944). Compare the Pennsylvania Public Utility Code, which states that "the order of the [public utility] commission shall not be vacated or set aside, either

of the standard may vary, however, depending upon whether the order is promulgated as an original ruling or a revision, or whether it merely continues in effect an existing order.

In *Meadow Gold Dairies, Inc. v. Milk Control Comm'n*,[253] the agency, after public hearing, issued an order reducing the resale prices of skim milk, buttermilk, and cream. No evidence was presented at the hearing concerning the existing prices of these items. The court held that, in order to set a valid price or validly change an existing price, the Commission must hold a hearing at which sufficient competent evidence is introduced to enable the agency to make findings of fact justifying the pricing order. Tested by such a standard, the reduction was found to be invalid. A similar rule was expressed in *Local Union No. 205 v. Milk Control Comm'n*.[254] There, the appeal attacked the validity of an order establishing an optional differential to retail stores one-half cent below the price of milk delivered to the door. The milk dealers argued that the promulgation of the differential was based on incompetent evidence, consisting for the most part of general opinions that there "should" be a store differential. The court held that the order was not supported by competent and substantial evidence and that therefore it failed to meet the requisites of section 700j-801.[255] Although producer and dealer cost evidence was introduced, "the Record is bare of specific testimony relating to the probable effect of the establishing of a retail price differential, upon the retail store dealer . . . or its effect upon those consumers of milk receiving home delivery. Further, there was no evidence relating to the percentage of those consumers who buy on a cash-and-carry basis, and those receiving home delivery." [256] The court thought it especially important in this case that the Commission gather evidence of this nature, for only five years before the agency had eliminated a similar price differential on the ground that it contributed to chaotic conditions in the industry.[257]

While a considerable volume of evidence is submitted at the agency's hearings, the Commission may properly reject portions of it so long as

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in whole or in part, except for error of law or lack of evidence to support the finding, determination or order of the commission . . . ." PA. STAT. ANN. tit. 66, § 1437 (1959). The superior court has interpreted this language as specifying the substantial evidence standard for reviewing agency rate determinations. Duquesne Light Co. v. Pennsylvania Pub. Util. Comm'n, 174 Pa. Super. 62, 99 A.2d 61 (1953), *modified*, 176 Pa. Super. 568, 107 A.2d 745 (1954); *cf.* Reading Co. v. Pennsylvania Pub. Util. Comm'n, 188 Pa. Super. 146, 146 A.2d 746 (1958). Compare Philadelphia v. Pennsylvania Pub. Util. Comm'n, 173 Pa. Super. 38, 95 A.2d 244 (1953). The federal statute providing for natural gas rate regulation by the Federal Power Commission specifically incorporates a substantial evidence test. Act of June 21, 1938, 52 Stat. 831, as amended, 15 U.S.C. § 717r(b) (1958); see FPC v. Hope Natural Gas Co., 320 U.S. 591 (1944). See also Administrative Procedure Act § 10(e)(5), 60 Stat. 243 (1946), 5 U.S.C. § 1009(e)(5) (1958).

253 70 Pa. D. & C. 223 (C.P. 1949).

254 55 Dauph. Co. Rep. 254 (C.P. 1944).

255 MILK CONTROL LAW § 700j-801, set out in text at note 186 *supra*.

256 Local Union No. 205 v. Milk Control Comm'n, 55 Dauph. Co. Rep. 254, 265 (C.P. 1944).

257 *Id.* at 265-66.

there remains a core upon which a responsible determination can be based. In reviewing an agency change in the minimum prices which dealers were to charge to subdealers, the court stated that "the Milk Control Commission is not required to take a cross section of a particular type of dealer whose operation might be inefficient, or whose operation might result in too many 'middlemen' receiving profits before the milk gets into the hands of the public." [258] Even though the order in question set prices slightly lower than those indicated by the total survey figures (the Commission probably excluded a number of subdealers' cost data), this action did not amount to an abuse of discretion.[259]

A different situation exists when the agency's decision is not an initial promulgation or change of a pricing order, but a continuation of an existing order. In this instance, the Commission has wider latitude in rejecting evidence [260] and its decision to retain the present price may be justified by evidence previously given at the initial hearing on this price.[261] Thus, wholesale purchasers have been consistently thwarted in their efforts to secure a revised order reflecting allegedly changed conditions. Their burden of proof is similar to that in utility rate cases, in which one who attacks an existing rate has the burden of showing by positive and clear proof the necessity for change.[262] In *Milk Control Comm'n v. United Retail Grocers Ass'n*,[263] the retailers sought an increase in the permissible grocery store markup in the Scranton area and presented the testimony of three witnesses as to operating costs. The milk commission rejected the testimony as insufficient to require a change in the spread already in effect; the evidence was found to be fragmentary, speculative, and indefinite. The lower court invalidated the agency disposition,[264] holding that since the cost testimony was disregarded and since there was no independent survey conducted, the Commission had no evidence on which to ground its essentially negative determination.[265] This decision was reversed by the supreme court [266] on the grounds that nothing in section 700j-801 compels

[258] Reick Dairy Co. v. Milk Control Comm'n, 69 Dauph. Co. Rep. 345, 350 (C.P. 1956).

[259] *Id.* at 352.

[260] See Milk Control Comm'n v. United Retail Grocers Ass'n, 361 Pa. 221, 64 A.2d 818 (1949); Food Distribs. Ass'n v. Milk Control Comm'n, 60 Dauph. Co. Rep. 183 (C.P. 1949).

[261] See MILK CONTROL LAW § 700j-801: "All provisions of all price-fixing orders of the commission shall be presumed to be valid, and the burden of proving any invalidity of any provisions thereof shall be upon the person asserting the same."

[262] See Peoples Natural Gas Co. v. Public Util. Comm'n, 141 Pa. Super. 5, 14 A.2d 133 (1940); Baltimore & O.R.R. v. Public Util. Comm'n, 135 Pa. Super. 20, 4 A.2d 628 (1939); Cheltenham & Abington Sewerage Co. v. Public Serv. Comm'n, 122 Pa. Super. 252, 186 Atl. 318 (1936).

[263] 361 Pa. 221, 64 A.2d 818 (1949), *reversing* 59 Dauph. Co. Rep. 275 (C.P. 1948).

[264] United Retail Grocers Ass'n v. Milk Control Comm'n, 59 Dauph. Co. Rep 275 (1948).

[265] *Id.* at 278.

[266] Milk Control Comm'n v. United Retail Grocers Ass'n, 361 Pa. 221, 64 A.2d 818 (1949).

the milk board to conduct a survey if the evidence before it is insufficient—particularly where the proceeding is not one involving an original order but one in which the revision of an existing order is in issue.[267] Previous orders, said the court, should be assumed to be fair in the absence of proof of changed economic conditions; the burden, therefore, was upon the grocers to show facts sufficient to require a price alteration. Absent such a rule, any interested party could reopen a pricing order at any time and force the Commission to justify its position de novo.[268] And although complete agency surveys at frequent intervals might be theoretically desirable, the heavy expense and the time wasted on petitions dedicated only to self-interest render such a plan unfeasible.

A similar problem was presented when the Food Distributors Association requested a three-quarter-cent reduction in the existing wholesale price with no change in the retail price;[269] in effect, the requested change would have increased the retail markup from a flat two cents to two and three-quarters cents. Clearly, either the milk dealers or the producers would have had to bear the effect of the proposed reduction; the retail stores, however, made no specific representation that it was to be deducted from producers' or dealers' prices. Both groups intervened and offered evidence of their own increased costs and of the effect of profit diminution on dairy herd population and area milk supply. The commission order retaining the existing price was sustained on appeal on the ground that the retailers had failed to carry their burden of proof. Essential to their case was not only a showing of the necessity for a reduction in minimum wholesale prices but also proof of the ability of others in the industry to absorb the increased spread.[270]

3. Difficulties Attributable to Evidentiary Rules

The two cases discussed above[271] illustrate the difficulty facing retail stores attempting to realize a price change, whether the change be needed for the welfare of the industry or desired on self-serving grounds. How are retailers, who bear the burden of proof, to obtain from dairies and farmers the cost data and other material necessary for proof that a decrease in profits could be absorbed at the secondary and primary levels of distribution? The task is clearly impossible without cooperation, and cooperation is unlikely when the results desired are considered. A major objection to the Commission's stringent rule is that economic conditions may move well

267 361 Pa. at 225, 64 A.2d at 820.

268 361 Pa. at 226, 64 A.2d at 820.

269 Food Distribs. Ass'n v. Milk Control Comm'n, 60 Dauph. Co. Rep. 183 (C.P. 1949).

270 *Id.* at 190. The court stated that "the appellants . . . were obliged on the whole record to show that other parts of the industry could absorb the desired increased spread."

271 Milk Control Comm'n v. United Retail Grocers Ass'n, 361 Pa. 221, 64 A.2d 818 (1949); Food Distribs. Ass'n v. Milk Control Comm'n, 60 Dauph. Co. Rep. 183 (C.P. 1949).

beyond the point at which a change is necessary before action is taken. One suggestion would be to place the initial burden on the proponents of change to demonstrate conclusively that price alteration is necessary from their point of view. Upon such a showing, other persons who would be adversely affected by the proposed change could come forward with evidence of their inability to operate under a decreased profit situation. This change in the rules of evidence would increase the responsiveness of the pricing mechanism and provide a more realistic allocation of the burden in price change proceedings, without encouraging a constant flood of self-serving petitions.

V. Enforcement

A. *Selling Below the Minimum Price*

1. What Is a Violation?

Section 700j-807[272] of the Milk Control Law leaves few roads open[273] for the producer, dealer, or handler seeking to engage in milk transactions below the fixed minimum price. Variations in the mechanics of the transfer make no difference: sales, consignments,[274] and other means of making available or handling milk are covered.[275] Nor is any distinction drawn between the two sides of the bargain—both parties violate the act

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[272] Milk Control Law § 700j-807: "After the commission shall have fixed prices to be charged or paid for milk, whether by class, grade, use or otherwise, it shall be unlawful for a milk dealer or handler or producer, knowingly or unknowingly, or any other person knowingly, by himself or through another, to sell or deliver, or make available on consignment or otherwise, or buy or receive, or handle on consignment or otherwise, or offer to [do any of the above] . . . or advertise for sale, delivery, purchase or receipt, or hold one's self out as willing to sell, deliver, buy or receive milk at any price below the minimum price . . . ." A later part of the section prevents sales, etc. of milk "at a price computed upon false or erroneous weight, butterfat test, grade or classification; or at a price from which have been made deductions not authorized by law or in excess of any deductions so authorized, whether such illegal deductions be in the form of excessive transportation charges or otherwise."

[273] A dealer may buy from an out-of-state producer or an out-of-state dairy at a bargained price. See notes 113-14 *supra* and accompanying text. Despite the holding in Milk Control Bd. v. Eisenberg Farm Prods., 306 U.S. 346 (1939), see notes 108-12 *supra* and accompanying text, the milk commission does not regulate the price of milk purchased in Pennsylvania for shipment in interstate commerce. This allows in-state purchases, at freely negotiated prices, shipment to an out-of-state bottling plant, and subsequent sales to retailers at freely negotiated prices. Interview With Marvin D. Weintraub, Attorney for the Pennsylvania Milk Control Commission, in Philadelphia, Pa., July 15, 1960.

[274] In Green v. Milk Control Comm'n, 340 Pa. 1, 16 A.2d 9 (1940), *cert. denied*, 312 U.S. 708 (1941), a dealer entered into contracts with farmers in which he designated himself as a factor and referred to the milk he received as merely "consigned" to him, with title remaining in the producers. The court held that since the act mentioned only purchases and sales, it was inapplicable to consignments. This case was repudiated by the legislature in 1941, when § 700j-807 was amended to cover consignment transactions. See Milk Control Law § 700j-807.

[275] Milk Control Law § 700j-807.

if the price agreed upon undercuts the minimum.[276] The section also comprehensively bans schemes of evasion:

> No method or device shall be lawful whereby [milk is transferred for] . . . a price less than the minimum price applicable to the particular transaction, whether by any discount, premium, rebate, free service, trading stamps, advertising allowance, or extension of credit, or by a combined price for such milk, together with another commodity or a service which is less, or is represented to be less, than the aggregate of the price of the milk and the price or value of such commodity or service . . . .[277]

Whether this list of devices is exhaustive or illustrative presents a close question of statutory construction,[278] but the answer is of little consequence in enforcing the section. Even if it be deemed exhaustive, many of the individual items are sufficiently broad[279] to cover virtually all price avoidance techniques. In applying the section, the courts have demonstrated a willingness to give effect to the evident pervasiveness of the language.[280] Aside from specific statutory violations, such as issuance of trading stamps[281] and granting of advertising allowances,[282] the following devices have been held illegal: a dairy's practice of furnishing porch boxes to its home consumers free of charge;[283] a contest conducted by a dealer selling through grocers in which every prize won by a consumer resulted in a

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[276] *Ibid.* The section has an additional paragraph concerning the dealer-transferee: "It shall be unlawful for any milk dealer or handler to store, manufacture, process, sell or handle or deliver or make available on consignment or otherwise, any milk for which he has paid, or agreed to pay, a price lower than that fixed by the commission for milk of that class or grade."

[277] MILK CONTROL LAW § 700j-807.

[278] The "whether by . . . or . . ." clause, containing no catchall language, militates toward the exclusive interpretation; the strong language at the beginning of the paragraph—"no method or device"—can be made the basis for an argument that the listing is illustrative only.

[279] *E.g.*, "discount, premium, rebate, free service." Compare "trading stamps, advertising allowance."

[280] "The methods and devices whereby milk can be sold at a price less than the minimum fixed by the commission are as unlimited as the genius of man . . . . Milk control is founded upon price control. As soon as dealers find a method or device to break down the commission's control over the price actually being paid, milk control will become chaotic, and soon non-existent. The legislature understood this. It is evident from reading Section 807 of the Milk Control Law . . . that it attempted, by every conceivable means, to close every 'loop hole' which would enable one dealer to obtain a price advantage over another." Milk Control Comm'n v. Reick Dairy Div., 193 Pa. Super. 32, 37, 163 A.2d 891, 894 (1960).

[281] Food Fair, Inc., A. & I. No. V-216 (Pa. Milk Control Comm'n Dec. 10, 1957); Acme Market, A. & I. No. V-210 (Pa. Milk Control Comm'n Oct. 7, 1957). Compare Bristol-Myers Co. v. Lit Bros., 336 Pa. 81, 6 A.2d 843 (1939) (issuance of trading stamps not a violation of Pennsylvania Fair Trade Act).

[282] Milk Control Comm'n v. Reick Dairy Div., 193 Pa. Super. 32, 163 A.2d 891 (1960).

[283] Martin Century Farms, A. & I. No. A-36 (Pa. Milk Control Comm'n June 21, 1960).

duplicate prize for the grocer;[284] and the sale to merchants at the minimum price, followed by a repayment of ten per cent of the price to a merchant-owned corporation as compensation for soliciting, investigating credit ratings, collecting bills, servicing accounts, advertising, and the use of the corporation brand name—similar services were rendered to other suppliers at little or no charge.[285]

The comprehensiveness of the act's prohibitions is illustrated by *Penn Cress Ice Cream Co. v. Stites.*[286] There, the dealer was awarded a contract to supply milk to a sanatorium at the minimum price established by a commission order. The order was silent on whether the addition of vitamin D to the milk affected the milk's price. The dealer included the vitamin at no extra charge. The court, finding that the inclusion considerably increased the dealer's costs, held that vitamin D was a commodity within the meaning of section 700j-807, which prohibits the sale of milk together with any other commodity for the price of the milk alone.[287] Violation was also found by the Pennsylvania Supreme Court in *Milk Control Comm'n v. McCallister Dairy Farms.*[288] In *McCallister*, defendant retailer sold milk in gallon and half-gallon bottles upon which customers paid a five-cent deposit that was refundable when the bottles were returned. However, defendant displayed a notice informing buyers that a short walk to a nearby service station would be well worthwhile when it came time to return the bottles: the service station was offering twenty-five cents for the gallon jugs and twenty for the half-gallon containers. The court found that the defendant and the service station were acting in concert and that the deposit scheme resulted in a rebate prohibited by section 700j-807.[289] In current use is the device of "loans" by dairies to wholesaler-buyers with the understanding that they need not be repaid.[290] This practice has not been tested in the courts, but it would seem to be a clear violation of the statute.

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284 Dairymen's League Co-op., A. & I. No. W-193 (Pa. Milk Control Comm'n Sept. 17, 1959).

285 Shearer's Dairies, Inc. v. Milk Control Comm'n, 191 Pa. Super. 574, 159 A.2d 268 (1960).

286 43 Pa. D. & C. 80 (C.P. 1941).

287 *Id.* at 84-85.

288 384 Pa. 459, 121 A.2d 144 (1956).

289 *Id.* at 462-64, 121 A.2d at 146. Although § 700j-807 was not involved, Grow v. Milk Control Comm'n, 52 Pa. D. & C. 225 (C.P. 1944), held that a scheme used by an operator in the dual position of milk dealer and milk producer which resulted in underpayments to other producers was illegal. Defendant attempted to segregate the milk from his own herd and place it in a higher-paying utilization class while placing the milk of other producers in a lower category. This had the effect of reducing the blend price, see note 20 *supra*, to other producers below the payments which would have been owing had all the milk been used in computing the blend price. The court held that under the Commission's General Order B-1 the scheme was illegal; the producer-dealer must treat all milk equally.

290 Interview With Marvin D. Weintraub, Attorney for the Pennsylvania Milk Commission, in Philadelphia, Pa., July 15, 1960; questionnaire distributed by the *University of Pennsylvania Law Review*, June-August, 1960.

2. Commission Action and Prohibited Conduct

Section 700j-807 is not the Commission's only statutory weapon against devices designed to evade the agency's established minimum prices. In at least two instances, the courts have failed to find violations of section 700j-807 in practices which might reasonably be considered the granting of "premiums" or "free service." In each case, however, subsequent administrative action was capable of controlling the practices even though they did not fall within the explicit statutory proscription. In 1950 the Milk Control Commission issued a bulletin[291] warning that the giving of free refrigeration equipment would be considered a method of selling below the minimum price. Sylvan Seal Dairy continued to offer equipment to buyers free of charge and was promptly cited by the agency for violating section 700j-404(10), which allows the Commission to invoke sanctions against a licensee who "has violated any of the provisions of this act, or any of the rules, regulations or orders of the commission . . . ."[292] The court found that the bulletin was not a "rule, regulation or order" within the meaning of the subsection.[293] Intent to undersell was considered a necessary element of a section 700j-807 violation by means of device,[294] and here "the obvious purpose and effect of leasing the cabinet is to stimulate the sale of milk and to influence grocers; by means other than by price concessions, to become, or remain, customers of Sylvan Seal."[295] In 1956 the Commission followed the formal notice provisions of the statute[296] and issued rules of trade practices which forbid the giving of free refrigeration equipment and provide that a fair rental is to be charged for all such equipment furnished.[297] In *Milk Maid Dairy Prods., Inc. v. Milk Control Comm'n*,[298] the trade practice rules were upheld and the citation for their violation was affirmed.

Similarly, on grounds that the issuance of free samples with sales was a customary and sometimes permitted industry practice and that the statute provided no notice that the practice was a violation,[299] the court in *Greenville Dairy Co. v. Pennsylvania Milk Control Comm'n*[300] found no transgression of section 700j-807. However, the court indicated that the practice might be controlled by administrative order,[301] and the agency

291 Pa. Milk Control Comm'n Bull. No. 248.

292 MILK CONTROL LAW § 700j-404(10).

293 Sylvan Seal Milk, Inc. v. Milk Control Comm'n, 74 Pa. D. & C. 289, 296 (C.P. 1951).

294 *Id.* at 298-99. *But see* Milk Control Comm'n v. Rieck Dairy Div., 193 Pa. Super. 32, 163 A.2d 891 (1960).

295 74 Pa. D. & C. at 299.

296 The notice provisions of the statute are found in §§ 700j-307, -308, -309.

297 Pa. Milk Control Comm'n Rules of Trade Practices A-1, Dec. 12, 1956.

298 190 Pa. Super. 410, 154 A.2d 274 (1959).

299 It would seem that the word "premium" in the list of devices contained in § 700j-807 might cause a dairy some uneasiness.

300 68 Pa. D. & C. 597 (C.P. 1949).

301 *Id.* at 608.

has since promulgated rules[302] regulating the type and amount of free samples. Inasmuch as the increased dealer costs resulting from free sampling are reflected in consumer prices, the milk commission has attempted to enforce these rules strictly.[303] But the effort cannot be termed a success: in 1958 approximately $1,500,000 in free samples were given out in the Philadelphia area alone.[304]

3. Specific Intent as an Element of the Offense

In *Commonwealth v. Jackson*,[305] defendant was cited for violating the Milk Control Act when his dairymaid sold milk to commission investigators at a price below the minimum. Jackson contended that he had no knowledge of his servant's activity and sought to rely on the common-law rule that one is not liable for the criminal acts of another in which the former did not participate directly or indirectly.[306] Finding the common-law rule unavailable in the case of a statutory violation, the court reasoned that if a knowing violation were required, the legislature would have so specified.[307]

Two months prior to the *Jackson* decision in the superior court, the legislature did make its position clear—knowledge or intent was not an essential element of a section 700j-807 violation.[308] The amendment also provided that "the act of a director, officer, agent or other person acting for or employed by a milk dealer shall be deemed the act of such milk dealer."[309] The *Jackson* court, in footnote, viewed this addition as mere clarification of existing law.[310] Although the holding of the case clearly coincides with and is aided by this interpretation, in one important respect the amendment spreads a broader net than did the unchanged statute as construed in *Jackson*. There is dictum in the decision that "only a disregard by the servant of positive orders of the employer will relieve him

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302 Pa. Milk Control Comm'n Bull. No. 277, issued by the Commission on January 12, 1949, prohibited the distribution of any free samples. Subsequent regulations have allowed limited free sampling. *E.g.*, Official General Order No. B-6, § 1(a) provides: "A milk dealer or handler shall be limited to the distribution of one free sample of any type of fluid milk and one free sample of any other milk product to a prospective retail customer in any one six months' period."

303 Interview With Marvin D. Weintraub, Attorney for the Pennsylvania Milk Control Commission, in Harrisburg, Pa., July 27, 1960.

304 *Ibid.*

305 146 Pa. Super. 328, 22 A.2d 299 (1941), *aff'd per curiam*, 345 Pa. 456, 28 A.2d 894 (1942).

306 *Id.* at 331. See Commonwealth v. Johnston, 2 Pa. Super. 317 (1896).

307 Commonwealth v. Jackson, 146 Pa. Super. 328, 333, 22 A.2d 299, 301-02 (1941), *aff'd per curiam*, 345 Pa. 456, 28 A.2d 894 (1942): "Other sections of the act, imposing other duties, e.g., §§ 401, 608, specifically provide that proof of guilty knowledge or intent *is* essential to impose liability for failure to perform them. If it were the intention of § 807 to relieve a proprietor except upon proof of his knowledge of sales, below the price fixed by law, the legislature would have said so. The omission is significant."

308 MILK CONTROL LAW § 700j-807. The phrase "knowingly or unknowingly" was added.

309 *Ibid.*

310 146 Pa. Super. at 333 n.2, 22 A.2d at 302 n.2.

from the penalty of § 807." [311] With regard to all those who are milk dealers,[312] this statement cannot stand in the face of the statutory directive that acts of employees *"shall be deemed"* the acts of the dealer.[313]

The Pennsylvania appellate courts [314] and the milk commission [315] have carried out the legislative intent by holding that section 700j-807 may be violated by sale or by device,[316] despite an absence of specific intent on the part of the actor. However, a few of the decisions at the county level indicate dissatisfaction with the per se rule and tend to emphasize motive in their reasoning. In one case,[317] defendant's practice of selling skim milk back to his producers was considered by the Commission to be a device to sell below the minimum price. The defendant had previously contacted the agency on an informal basis concerning the practice, but evidently he did not satisfy the Commission in complying with arrangements designed to effectuate his plan legally. In finding the commission action unreasonable under the circumstances presented, the court held that the practice was not a "device" within the meaning of section 700j-807, noting a lack of "stealth or hiding." [318] Since defendant's activity was done *in good faith* [319] and

[311] 146 Pa. Super. at 333, 22 A.2d at 301.

[312] For the broad statutory definition of "milk dealer or handler," see note 12 *supra.*

[313] See Sealtest Food Prods., A. & I. No. W-143 (Pa. Milk Control Comm'n March 25, 1959): "[W]ith largeness comes responsibility and if the defendant is so large [that supervision of employees was impossible], it must be large enough to maintain proper supervisory personnel so that violations will not take place in the future." *But see* Carver's Dairy, A. & I. No. V-218 (Pa. Milk Control Comm'n Dec. 16, 1957), where the Commission stated that defendant was guilty because there had been no showing that the unlawful acts were contrary to the company's express orders. This case does not, of course, decide the issue squarely, and no case has been found which does so. But if expressly ordering employees not to do a prohibited act is a sufficient defense, as is hinted in the *Carver* case, the proscriptions of § 700j-807 could be easily avoided.

[314] Commonwealth v. Jackson, 345 Pa. 456, 28 A.2d 894 (1942), *affirming per curiam* 146 Pa. Super. 328, 22 A.2d 299 (1941); Milk Control Comm'n v. Rieck Dairy Div., 193 Pa. Super. 32, 37, 163 A.2d 891, 894 (1960): "The motive is not important. It is the effect of the transaction which determines whether it constitutes a method or device to sell milk at a price less than the minimums set by the commission. The effect of the transactions was to permit the income of some of the dealer's large customers to be increased through payments made to them by the dealer for a purpose connected with the sale of the dealer's milk."

[315] Lyken's Dairy, A. & I. No. W-167 (Pa. Milk Control Comm'n May 13, 1959); Abbott's Dairies, A. & I. No. W-147 (Pa. Milk Control Comm'n March 30, 1959); Sealtest Food Prods., A. & I. No. W-143 (Pa. Milk Control Comm'n March 25, 1959); Shade's Dairy, A. & I. No. W-97 (Pa. Milk Control Comm'n Oct. 16, 1958).

[316] Milk Control Comm'n v. Rieck Dairy Div., 193 Pa. Super. 32, 163 A.2d 891 (1960).

[317] Milk Control Comm'n v. Nicoson, 57 Pa. D. & C. 166 (C.P. 1946).

[318] *Id.* at 177. The court in Greenville Dairy Co. v. Milk Control Comm'n, 68 Pa. D. & C. 597, 606 (C.P. 1949), did not find it necessary to evade the issue; it clearly indicated that intent *was* important with regard to devices: "However, if the act in itself is not unlawful but becomes so only when it is a part of a scheme, or device, or method to evade the law or other lawful order, then the intention and purpose of the actor might become vitally material."

[319] Although it was held that there had been no sale or offer to sell below the minimum price in Country Belle v. Milk Control Comm'n, 19 Pa. D. & C.2d 420 (C.P. 1959), and although it was there admitted that knowledge is immaterial, *id.* at 424, it appears that the court was aided in reaching the result by the fact that there was "not a scintilla of evidence of bad faith or of fraud" and that "it is beyond the bounds of reason to subject one to a penalty for following in good faith . . . ." *Id.* at 425, 426.

before the eyes of the agency, he had employed no device and was therefore not guilty.[320]

Likewise, in *Milk Control Comm'n v. Parris*,[321] the exemption contained in section 700j-802 was utilized to protect a vending machine operator selling milk from his machines in manufacturing establishments at less than the minimum price. The section states, *inter alia*, that the Commission may fix prices of sales from stores to consumers "except for consumption at the store where sold. Nothing herein contained shall be construed to empower the commission to fix the price at which milk may be sold by any milk dealer or handler . . . to consumers for consumption on the premises of such milk dealer or handler or producer . . . ." [322] The court found no violation since defendant was operating a "store" for the sale of milk to be consumed on the premises.[323] There is considerable strain involved in reconciling a vending machine with the statutory definition of " store," [324] and in agreeing that drinking defendant's milk in the locale of the vending equipment in another's plant is synonymous with "consumption on the premises of such milk . . . handler . . . ." [325] As it stands, it is apparent that the case protects not only unknowing deviation but also deliberate underselling by such a vendor.

B. *Sanctions*

1. Availability and Use

Although the Milk Control Law contains sections prescribing penalties [326] and injunctive remedies [327] available to the agency and interested

[320] Milk Control Comm'n v. Nicoson, 57 Pa. D. & C. 166 (C.P. 1946). The lower court in the *Rieck* case, reversed at 193 Pa. Super. 32, 163 A.2d 891, used a similar approach. In the words of the superior court, "it concluded that [advertising allowances] . . . did not constitute a method or device to sell milk at a price less than the minimum established by law . . . . The legislature, the court concluded, did not make all advertising allowances illegal, and the burden was upon the commission to show that the motive of the milk dealer in giving these advertising allowances was other than to carry out an honest and legitimate advertising program." 193 Pa. Super. at 36-37, 163 A.2d at 894.

[321] 63 Pa. D. & C. 674 (C.P. 1949).

[322] MILK CONTROL LAW § 700j-802.

[323] Milk Control Comm'n v. Parris, 63 Pa. D. & C. 674, 677 (C.P. 1949).

[324] MILK CONTROL LAW § 700j-103: " 'Store' includes a grocery store, hotel, restaurant, soda fountain, dairy products store, or any similar mercantile establishment which sells or distributes milk."

[325] MILK CONTROL LAW § 700j-802.

[326] MILK CONTROL LAW § 700j-1001 deals with first and second offenses and provides for a fine of $25.00 minimum and $300.00 maximum. If the fine is not paid, the violator may be imprisoned for not less than five nor more than thirty days. No offense which took place more than five years before the violation being considered may be considered in determining whether the violator is a first or second offender. Section 700j-1002 provides that for a third or subsequent offense, within a five-year period, the violator shall be guilty of a misdemeanor and may be fined $500 to $1,000, or imprisoned for not more than one year, or both.

[327] MILK CONTROL LAW § 700j-1003 provides that actions to enforce compliance may be instituted by "the commission or any person, marketing committee, union or association, composed of persons affected by the orders, rules or regulations of the commission . . . ." MILK CONTROL LAW § 700j-1004 empowers the Commission to obtain mandatory and prohibitive injunctive relief. (The venue provisions of this section are now controlled by PA. R. CIV. P. 1503.)

groups upon violation of the act (or rules, regulations, or orders made under it), the current commission approach in nearly every pricing case is to apply instead the sanctions of section 700j-404.[328] That section empowers the Commission to revoke or suspend the license of a milk dealer or handler or to halt the milk operations of an exempted dealer.

The extreme sanction of revocation is rarely used by the Commission; it is considered far too severe for the ordinary case and is reserved for those instances in which other methods of correction prove fruitless.[329] While the Commission has on occasion employed lengthy suspensions as an alternative, even these lesser sanctions have been considered too drastic by the courts in several cases. A six-month suspension of a dairy for a $1,000 underpayment to farmers was held unreasonable in view of the competitive nature of the business.[330] It was thought that other dealers would take away defendant's customers during the suspension period, with the result that defendant would be forced out of business. The court, upon condition that the $1,000 deficit be paid, shortened the suspension to five days, effective in ninety days, and stipulated that it could be further reduced by "good behavior" during the ninety-day period. And in *Greenville Dairy Co. v. Milk Control Comm'n*,[331] a fifteen-day suspension, to begin five days after notice, was found harsh and unreasonable.[332]

Evidently the Commission has similar fears concerning the harshness of the suspension sanction. In 1957 the agency was successful in persuading the legislature[333] to enact section 700j-404.1, whereby the Commission might accept fifty dollars for each day of suspension in lieu of the dealer or handler's temporarily halting operations.[334] The Commission today issues comparatively short suspensions and invariably offers the option of paying the alternate monetary penalty.[335] In the case of constant violators,

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[328] MILK CONTROL LAW § 700j-404: "The commission may . . . suspend, revoke or refuse to transfer a license already granted to a milk dealer or handler, or may prohibit a milk dealer or handler exempted from the license requirements of this act from continuing to operate as a milk dealer or handler . . . ."

[329] Interview With Joab K. Mahood, Chairman of the Pennsylvania Milk Control Commission, in Harrisburg, Pa., June 22, 1960; SPENCER & CHRISTENSEN, MILK CONTROL PROGRAMS OF THE NORTHEASTERN STATES pt. 2, at 58-59 (Cornell University Agricultural Experiment Station Bull. 918, 1955).

[330] Wolfe v. Milk Control Comm'n, 40 Pa. D. & C. 687 (C.P. 1940).

[331] 68 Pa. D. & C. 597 (C.P. 1949).

[332] *Id.* at 610.

[333] Interview With Joab K. Mahood, Chairman of the Pennsylvania Milk Control Commission, in Harrisburg, Pa., June 22, 1960.

[334] MILK CONTROL LAW § 700j-404.1: "In any case where the commission shall suspend a license, the commission may accept from the licensee an offer in compromise at the rate of fifty dollars ($50) for each day of suspension as a penalty in lieu of such suspension, and thereupon rescind the suspension."

[335] *E.g.*, Lyken's Dairy, A. & I. No. W-167 (Pa. Milk Control Comm'n May 13, 1959) (two-day suspension or optional $100.00 payment); Abbott's Dairies, A. & I. No. W-147 (Pa. Milk Control Comm'n March 30, 1959) (three-day suspension or optional $150.00 payment; previous violations); Sealtest Food Prods., A. & I. No. W-143 (Pa. Milk Control Comm'n March 25, 1959) (fifteen-day suspension or optional $750.00 payment; previous violations); Shade's Dairy, A. & I. No. W-97 (Pa. Milk Control Comm'n Oct. 16, 1958) (six-day suspension or optional $300.00 payment; previous violations); Carver's Dairy, A. & I. No. V-218 (Pa. Milk Control Comm'n Dec. 16, 1957) (three-day suspension or optional $150.00 payment).

the obvious effect of this practice is to license them to do business illegally.[336] Enforcement is further weakened by a wide range of circumstances which mitigate the sanction or even lead to dismissal of the case. Among the circumstances which have resulted in such lighter penalties or dismissal are that: (1) the violation resulted from the defendant's negligent supervision of his dairy while he was running for elective office;[337] (2) the violation consisted of underselling to maintain a "competitive" position in the face of secret discounts given by other dealers;[338] (3) the violator made a firm promise "never to do it again";[339] (4) the defendant had no previous violations;[340] (5) the violation was attributable to the "matter of public relations" involved in deducting a "donation" from a bill for milk sold to the local fire company which operated a stand at an annual fair;[341] (6) the violation resulted from a mechanical defect in a vending machine;[342] (7) the dealer had instituted better methods of supervising drivers in giving out free samples;[343] (8) the offending driver was

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[336] In Harbison's Dairy, A. & I. No. W-146 (Pa. Milk Control Comm'n March 3, 1959), defendant was found guilty of giving excessive samples and suspended ten days with an option to pay the $500.00 penalty. Defendant was cited and found guilty of the same offense on July 22, 1957, and Sept. 8, 1958, the optional payments in each case being set at $300.00 and $500.00, respectively. The Commission did not increase the penalty for the 1959 offense because it was felt that the dairy was trying to correct its illegal operations. Sealtest Food Prods., A. & I. No. W-143 (Pa. Milk Control Comm'n March 25, 1959), also involved a conviction for excessive sampling. The sanction was fifteen days suspension or the optional $750.00 payment. Defendant had previously been cited July 29, 1957, and July 16, 1958. The fines were merely increased on each occasion—from $300.00 in 1957, to $500.00 in 1958, to $750.00 in 1959.

[337] Zimmerman's Dairy, A. & I. No. W-194 (Pa. Milk Control Comm'n Sept. 17, 1959) (violation charged was giving free equipment; two-day suspension or optional $100.00 payment).

[338] Engle Farm Dairies, A. & I. No. A-13 (Pa. Milk Control Comm'n March 2, 1960) (underselling minimum; one-day suspension or optional $50.00 payment); Brookfield Dairy, A. & I. No. W-185 (Pa. Milk Control Comm'n July 10, 1959) (underselling minimum; five-day suspension or optional $250.00 payment); Hill Crest Farms, A. & I. No. W-139 (Pa. Milk Control Comm'n March 2, 1959) (giving excessive samples; previous violations; six-day suspension or optional $300.00 payment); Williamsport East End Dairy, A. & I. No. W-68 (Pa. Milk Control Comm'n Sept. 22, 1958) (underselling minimum; no previous violations; four-day suspension or optional $200.00 payment).

[339] Furman, A. & I. No. V-213 (Pa. Milk Control Comm'n Aug. 10, 1957) (failure to file monthly report; case dismissed).

[340] See, *e.g.*, Turner & Westcott, Inc., A. & I. No. W-80 (Pa. Milk Control Comm'n Sept. 11, 1958) (giving excessive samples; one-day suspension or optional $50.00 payment); Wengert's Dairy, Inc., A. & I. No. V-221 (Pa. Milk Control Comm'n Jan. 6, 1958) (selling equipment to customer without filing contract of sale with Commission; two-day suspension or optional $100.00 payment).

[341] Behren Bros. Bear Creek Dairy, A. & I. No. W-118 (Pa. Milk Control Comm'n Oct. 28, 1958) (underselling minimum; case dismissed).

[342] Leonard Dairy, A. & I. No. W-119 (Pa. Milk Control Comm'n Oct. 28, 1958) (underselling minimum; case dismissed).

[343] Harbison's Dairy, A. & I. No. W-146 (Pa. Milk Control Comm'n March 3, 1959) (giving excessive samples; several previous violations; ten-day suspension or optional $500.00 payment); The Borden Co., A. & I. No. W-48 (Pa. Milk Control Comm'n Sept. 8, 1958) (giving excessive samples; six-day suspension or optional $300.00 payment).

instructed before the Commission "not to do it again";[344] (9) the defendant showed that all dealings with the customer to whom rebates were given had been discontinued;[345] (10) the violation resulted from error or accident;[346] (11) the violation was attributable to dealer misunderstanding of an agency order;[347] and (12) the violation resulted from an attempt to prevent customer hardship.[348] Although certain of these considerations may justify mitigation,[349] the list on the whole leaves the impression that the Commission is overly lenient with those who transgress the Milk Control Law.

2. Effectiveness

The difficulty which the Commission experiences in policing the milk industry may be partially explained by the pervasiveness of the violation section of the statute—so much is illegal. But the nature of the action prohibited makes the job even more arduous. In an economy where competition is the usual rule, the legislature has attempted to insulate the milk industry from many forms of competitive enterprise. It is not surprising, therefore, that violations are rampant. Naturally, this persisting illegality is not solely the product of inability to shed normal business traits; there are obvious economic benefits to be gained by evasion of the statutory

[344] Spojnia Farm Dairy, A. & I. No. W-95 (Pa. Milk Control Comm'n Sept. 2, 1958) (underselling minimum; case dismissed).

[345] Frankford Dairies, Inc., A. & I. No. A-6 (Pa. Milk Control Comm'n April 30, 1960) (underselling minimum; one-day suspension or optional $50.00 payment).

[346] Foremost Dairies, A. & I. No. W-144 (Pa. Milk Control Comm'n April 16, 1959) (giving excessive samples; previous violation; one-day suspension or optional $50.00 payment); Schneider's Dairy, A. & I. No. W-165 (Pa. Milk Control Comm'n April 8, 1959) (giving excessive samples; one-day suspension or optional $50.00 payment). But laziness on the part of an employee appears to be no excuse. See Otto's Suburban Dairy, Inc., A. & I. No. W-54 (Pa. Milk Control Comm'n Oct. 1, 1958), where defendant's employee sold two quarts of milk at the half-gallon price rather than returning to the plant to obtain the half-gallon container. The dairy was cited for underselling the minimum price and received a one-day suspension or optional $50.00 payment.

[347] See Brookfield Dairy, A. & I. No. A-7 (Pa. Milk Control Comm'n March 2, 1960) (giving excessive samples; one-day suspension or optional $50.00 payment); Meadow Gold Dairy, A. & I. No. W-217 (Pa. Milk Control Comm'n Dec. 18, 1959) (giving excessive samples; six-day suspension or optional $300.00 payment). *But see* Willow Ridge Farm, A. & I. No. V-219 (Pa. Milk Control Comm'n Dec. 16, 1957), where defendant viewed chocolate milk as a "milk product" as distinguished from "fluid milk" within the meaning of the Commission's order limiting the dealer to the "distribution of one free sample of any type of fluid milk and one free sample of any other milk product . . . ." The Commission disagreed. Defendant received a two-day suspension or optional $100.00 payment. Note also that where defendant's *attorney* incorrectly interprets an order and misadvises his client as to permissible practices, this does not constitute an excuse. Harmony Dairy Co., A. & I. No. W-179 (Pa. Milk Control Comm'n Sept. 17, 1959) (giving excessive samples; ten-day suspension or optional $500.00 payment).

[348] Levengood Dairies, A. & I. No. W-42 (Pa. Milk Control Comm'n Sept. 15, 1958). The violation charged was delivering more than once within a forty-eight hour period; the "hardship" pleaded was that the retail customer needed a large supply of milk daily and her refrigerator was of limited capacity. The case was dismissed.

[349] *E.g.*, the defective vending machine. See note 342 *supra* and accompanying text.

commands. These illegal practices reduce the regulatory scheme to a meaningless fiction which benefits some at the expense of others. If the middleman is to engage in prohibited price-cutting operations, his gross receipts must be high enough to enable him to give discounts and still be assured of a profit. Thus, by paying the prices set by the Commission, some buyers are subsidizing the distributors and making it possible for the latter to afford the "deals" given to the larger, more desirable accounts. The consumer rarely benefits from this procedure. Before the reduction can filter to his level, a further violation—reselling below the retail minimum—must be committed. And the insignificant volume purchased by a single consumer and his great need of the product make price cutting at the retail level an unattractive and unnecessary step. In such a context, it is obvious that the demand for more rigid enforcement by the Commission is commensurate with the difficulties inherent in controlling this type of lawlessness.

It may be that the overall picture of repeated violations combined with enforcement which cannot be termed vigorous merely reflects public dissatisfaction with the law. Perhaps the unwanted aspects of the statute—if such there be—should be eliminated. But these are problems to be answered by the legislative judgment. Meanwhile, the law remains on the statute books and, if the Commission is to carry out the standing legislative mandate, penalties should be stiffened in an attempt to effect compliance with minimum prices, rather than doling out periodic fines whose payment entitles the violator to another span of business as usual. Only then will the price controls operate effectively.[350]

One further use of sanctions by the Commission deserves mention. In addition to the mitigating factors previously discussed, the agency also considers the defendant's failure to contest the citation.[351] Standing alone, this factor has the desirable attributes of conserving the time and effort of the Commission by encouraging admissions by the guilty. But the Commission has, at least once in the past, provided for an *increased* penalty if an appeal were taken from its decision.[352] Such a policy has no place in our judicial or administrative system.[353] The resulting discouragement of

[350] "Milk control is founded upon price control. As soon as dealers find a method or device to break down the commission's control over the price actually being paid, milk control will become chaotic, and soon non-existent." Milk Control Comm'n v. Rieck Dairy Div., 193 Pa. Super. 32, 37, 163 A.2d 891, 894 (1960).

[351] Harrisburg Dairies, Inc., A. & I. No. A-16 (Pa. Milk Control Comm'n April 12, 1960) (giving excessive samples; three-day suspension or optional $150.00 payment); Conewago Dairy, A. & I. No. W-122 (Pa. Milk Control Comm'n Dec. 18, 1958) (underselling minimum; one-day suspension or optional $50.00 payment).

[352] Greenville Dairy Co. v. Milk Control Comm'n, 68 Pa. D. & C. 597, 608-09 (C.P. 1949). After meting out a ten-day suspension, to be effective in thirteen days, the Commission's order stated: "That if this Order be appealed from and a supersedeas granted, should said appeal be dismissed or otherwise terminated favorable to the Commission, any license issued for any period subsequent to April 30, 1949 shall be automatically suspended *five* days after the termination of the appeal for a period of *fifteen* (15) days."

[353] Such an order hardly seems reconcilable with the equal protection and due process clauses of the Constitution. *Cf.* Griffin v. Illinois, 351 U.S. 12 (1956); United States v. Wiley, 278 F.2d 500 (7th Cir. 1960).

potentially valid defenses is intensified when such a rule is combined with one which invites initial no-contest pleas. Any recurrence of the *Greenville Dairy* technique—the imposition of an additional five days' suspension if an appeal be taken—has not been discovered.[354] With the elimination of this improper sanction, the Commission should now channel its energy in the direction of deterring those who do persistently violate the law.

VI. Conclusion

Although enforcement of the Commission's minimum prices has been intensified in recent years,[355] noncompliance is still a major problem. The inability to reach a larger number of violators than is presently the case may be traced to the fact that the Commission's enforcement arm is understaffed.[356] With an increased number of investigators, policing could be stepped up, and control—now virtually nonexistent[357]—of the buyers who accept "deals" from the dairies could be undertaken.[358] But apart from widening the scope of enforcement, the Commission should increase the severity of its penalties if price controls are to be at all meaningful.[359] These are the teeth in the law, but they are dulled by the easily met alternative of relatively mild monetary payments. If the sanctions of suspension and revocation were utilized, the industry would quickly realize that violation is no longer profitable. While a strictly enforced, firm control over prices and related forms of competition might not be as desirable as an unregulated or less regulated milk economy, it certainly makes more sense than going through the motions of fixing a minimum price which is ignored with regularity.

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354 All commission cases since *Greenville Dairy* were examined.

355 No appreciable amount of enforcement was undertaken until approximately five years ago. Interview With Marvin D. Weintraub, Attorney for the Pennsylvania Milk Control Commission, in Philadelphia, Pa., July 15, 1960; Interview With former attorney for the Pennsylvania Milk Control Commission, in Philadelphia, Pa., July 8, 1960. This is also evident upon review of the citation hearings on file with the Commission in Harrisburg.

356 Interview With Joab K. Mahood, Chairman of the Pennsylvania Milk Control Commission, in Philadelphia, Pa., June 22, 1960.

357 Interview With former attorney for the Pennsylvania Milk Control Commission, in Philadelphia, Pa., July 8, 1960. This view is substantiated upon examination of cases and citations concerning violations; in the vast majority of proceedings, buyers are noticeably absent as defendants.

358 Several wholesale consumers state that the act is "making thieves of honest men." Interviews With Wholesale Consumers at the 1960 Convention of the Pennsylvania Restaurant Owners' Association, in Galen Hall Mountain Resort, Pa., June 28-29, 1960. Those who do not have arrangements with distributors feel that they are subsidizing the deals given to others.

359 Some dairies are candid about the situation and admit that violations are numerous. Interview With attorney for a Philadelphia Dairy, in Philadelphia, Pa., July 7, 1960. Although some voiced the opinion that violations are at a minimum, with only slight amounts of illegal activity throughout the state, *e.g.*, Interview With Attorneys Representing Several Philadelphia Dairies, July 27, 1960, a commission attorney states that illegality is rampant and that a new evasive device appears as soon as another is halted. Interview With Marvin D. Weintraub, Attorney for the Pennsylvania Milk Control Commission, in Philadelphia, Pa., July 15, 1960.

At present, because of widespread disregard of the law and certain inherent limitations of the system itself, the benefits of price fixing appear to be channeled in directions not contemplated by the legislature—perhaps to the detriment of the farmers and consumers, the very groups for whose protection the law was enacted. Some dairies, by purchasing at out-of-state competitive prices and selling at high in-state fixed prices, have been able to maintain profit margins higher than those forecasted by the Commission. Thus dairies doing business only within the borders of Pennsylvania are placed at a competitive disadvantage. The farmer in turn is prejudiced by the loss of business to foreign producers; but he is forbidden to attempt to meet this competition by matching the lower prices. These high dealer margins, coupled with the enforcement lag, make under-the-minimum sales to large wholesale buyers a profitable venture. And the beneficiaries of these underselling schemes are naturally able to reap larger profits upon resale than can their less fortunate competitors.

All of these "deals" and schemes to evade the Commission's minimum prices would not be worthwhile, however, if the parties were not certain of the price to be obtained upon the ultimate sale to the milk drinker. Thus the consumer, who stands last in the distributive line and pays the high minimum price, in effect subsidizes the illegal activity accompanying his milk through the channels of distribution.

R. S. L.