



Legislative Background Brief

for the
Economic Affairs Interim Committee

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Milk Sales in Montana

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The question before the Economic Affairs Interim Committee is whether to continue to allow the Board of Livestock to determine sell-by dates through rule or whether to specify in statute any limits or guidance on milk sales. The question has been in dispute since 1980. Currently the issue of sell-by dates and the Board of Livestock's role are subjects of a case appealed to the Montana Supreme Court by Core-Mark, which markets fresh products and other goods to convenience stores among others. If the Economic Affairs Interim Committee were to propose legislation, the proposal is not dependent on the court case being decided one way or another. Rather the question is whether to replace a rule with a statute and whether milk safety is reflected through labeling.

Historical Background

Montana has a Board of Livestock, which is in charge of the Department of Livestock. Montana also has a Board of Milk Control, which has existed since 1971 and is administratively attached to the Department of Livestock. Senate Bill No. 286 in 2009 put more of the authority for milk pricing decisions under the Board of Milk Control rather than with the Department. However, the Board of Livestock is at the center of the lawsuit regarding the sell-by date.

Inspection responsibility --The Department of Livestock is responsible under 81-2-102, MCA, for adopting rules and orders for inspecting and controlling the sanitary conditions of dairies, milk depots, milk and its byproducts, and dairy cows, along with other animal products intended for human consumption. Under 81-2-103, MCA, the Department of Livestock is required to adopt and enforce rules related to inspection and tuberculin testing of dairy cattle.

Licenses are required for plants manufacturing dairy products under 81-22-208, MCA, which also allows milk and cream, equipment premises, and the means of transporting milk or cream to be inspected. The Department has the authority to enter a dairy or a dairy products or milk plant (and related plants) to inspect and take samples. Renewal licenses for Grade A milk producers are \$5. A Grade A plant renewal license costs \$50. A milk and cream hauler must pay \$5 to renew a license.

Montana's pasteurization process is regulated under 81-22-414, MCA, and labeling as well as other quality requirements are under Title 81, chapter 22, part 4.

Pricing responsibility -- In 1939 Montana's Legislature passed milk price control laws under the "police powers" of the state. A lawsuit in 1980, *Hinshaw v. Beatrice Foods, Inc.*, 37 St. Rep. 1677 (D.C. Mont. 1980), raised numerous questions of authority, but basically the milk price controls remained until 1995 when the Legislature ended minimum pricing controls on wholesale, jobber, and retail sales. The Board of Milk Control retained authority under 81-23-103, MCA, to supervise, regulate, and control the milk industry, from production to retail sales.

Important to the discussion of policies related to milk sales is the overarching statute stating policy related to general administration of the Board of Milk Control. The policy highlights supply as related to safety but also notes that under 81-23-102(1)(f), MCA, the state policy is ... "to eliminate speculation and waste, and to make the distribution of milk and cream and products manufactured from milk and cream between the producer and consumer as direct as can be efficiently and economically done, and to stabilize the marketing of those commodities..." The statute further states that "milk is a perishable commodity that is easily contaminated with harmful bacteria, that cannot be stored for any great length of time, that must be produced and distributed fresh daily, and the supply of which cannot be regulated from day to day but, due to natural and seasonal conditions, must be produced on a constantly uniform and even basis...". In looking at the question of "sell-by" dates, the Economic Affairs Interim Committee may also want to discuss whether scientific developments may have superseded this policy statement first adopted in 1939.¹

Distinction between food safety and labeling

A Grade A Pasteurized Milk Ordinance, which the Food and Drug Administration says is recognized as a national standard for milk sanitation, provides a guide for destroying unwanted microbes in milk through pasteurization. The website www.milkfacts.info notes: "Each state regulates their own dairy industry, but the state's guidelines usually meet or exceed those defined by the PMO (Pasteurized Milk Ordinance)."² Further, milk sold across state lines must meet the PMO

¹A website--www.milkfacts.info--notes: "In 1938, milk products were the source of 25% of all food and waterborne illnesses that were traced to sources, but now they account for far less than 1% of all food and waterborne illnesses. Accessed 1/22/2014: <http://www.milkfacts.info/Milk%20Processing/Heat%20Treatments%20and%20Pasteurization.htm>

²Milk processing information from: <http://www.milkfacts.info/Milk%20Processing/Milk%20Processing%20Page.htm>, accessed 1/22/14.

standards.

The discussion before the Economic Affairs Interim Committee is not about the merits of pasteurization or reasons for raw milk. That's another issue. What may be helpful is knowing whether labeling can provide consumers with relevant information about product safety or quality. Similarly, consumers may want to know whether a product was ultra-pasteurized (heated to a higher temperature) or if the product went through aseptic processing, which means that product likely does not need refrigeration, at least not until it is opened.

Sell-by date issues

Montana rule requires a pasteurization date for Grade A milk sold in the state, but that is not usually the most visible date. Rather, the visible date is a "sell-by" date. Montana rule prohibits the sale of Grade A milk 12 or more days after pasteurization. This leads to destruction of milk that some retailers feel is still palatable as well as safe. The dairy industry benefits from more sales of fresher milk, but the flip side of the discussion is a concern about wasted milk and potentially lost income.

Further exacerbating the milk labeling issue is that consumers often are confused by dates put on containers. Are they the "bottled on" or the pasteurization date, or the "best if used by" date? A report from the Natural Resources Defense Council and Harvard University Food Law and Policy Clinic said that "misinterpretation" of date labels is a key factor leading to the waste of still usable food in the United States.³ The report specifically recommended against the visible use of "sell-by" dates, which "generate confusion and offer consumers no useful guidance once they have brought their purchases home". The report notes that Congress has authority under the Commerce Clause of the U.S. Constitution to regulate date labeling but has not done so. The Food and Drug Administration has enforcement powers under the Food, Drug, and Cosmetic Act of 1938 to charge a company with misbranding if a food label is false or misleading, according to the Harvard report.

Since there are no national labeling standards, some states have stepped in with their own labeling requirements. Montana is one of 15 states and the District of Columbia that regulate labeling for the sale of milk. Montana's Department of Livestock adopted the 12-day sell-by date rule, 32.8.202 of the Administrative Rules of Montana, in 1980 along with a rule requiring a pasteurized date (32.8.203 ARM). The rules were adopted under authority of 81-2-102, MCA, under which the Department of Livestock establishes standards for sanitation and food

³Harvard Food Law and Policy Clinic and the Natural Resources Defense Council, "The Dating Game: How Confusing Date Labels Lead to Food Waste in America", September 2013.

safety. Amendments were made in 1987 and 2000. The 2000 amendments redefined terms and recognized ultra-pasteurization and aseptic processing.

Exempt from these rules are organic milk that is either ultra-pasteurized or has undergone an aseptic milk process and milk that is not sold or distributed to the public, such as milk produced at dairies run by the state prison system. Milk sold out of state does not require a label with a pasteurization date under 32.8.204 ARM.

32.8.202 TIME FROM PROCESSING THAT FLUID MILK MAY BE SOLD FOR PUBLIC CONSUMPTION

(1) When 12 days or more have passed following pasteurization of a unit of grade A milk, there will be no quantities of that unit of milk sold or otherwise offered for public consumption.

(2) No grade A pasteurized milk may be put in any container marked with a sell-by date which is more than 12 days after pasteurization of the milk for sale in Montana.

(3) Unless otherwise agreed upon, the person who offers the milk for sale to the public is responsible for removing the milk at or before the expiration of the 12 days.

32.8.203 LABELING OF MILK CONTAINERS TO SHOW THE PASTEURIZED DATE AND LAST DAY OF LEGAL SALE

(1) Each container into which grade A pasteurized milk is placed for sale for public consumption must be marked with a pasteurized date and a sell-by date.

(a) The sell-by and pasteurized date will be displayed in Arabic numerals or standard abbreviations for day and month, which shows the last day the milk may be sold as required by ARM 32.8.202.

(2) No person, other than the packager of the milk, may mark the package with a pasteurized date and a sell-by date without permission of the department of livestock.

Options for statutory language

A decision to replace a rule with statutory language does not necessarily mean that the Legislature would overturn the 12-day "sell by" label for Grade A milk. That time limit could remain under statute. The years-long effort by Core-Mark, milk distributors, against the Board of Livestock to revise the 12-day sell-by rule, however, indicates that changing the rule to a statute would gain little traction with those protesting the hard-and-fast sell-by date. Among other available options are:

- no labeling, which the Harvard report indicates is the case for milk sales in 35 states.
- labeling that uses alternate language of "best by" or "packaged on" or other similar options. The language could be paired with a requirement to ban the sale of the milk, as is currently done under 32.8.202 ARM, or allow retailers to discount the product

price and let "buyers beware" of post-dated sales.

Summary

The Economic Affairs Interim Committee through its monitoring responsibility for the Department of Livestock may propose legislation to address related constituent concerns. The apparent reason for a 12-day "sell-by" date has been concerns about consumer safety, which some scientists say already is protected if the milk has been pasteurized because the milk will sour before harmful organisms flourish. Another reason for the language regarding no sales for milk 12 days after pasteurization or older is implied by the policy statute outlining the Board of Milk Control's governance. Under 81-23-102(1)(j), MCA, the state wants to avoid "adequate supply" turning into a surplus, which could "undermine and destroy the milk industry". Deciding the balancing point between protecting public health and protecting the dairy industry in Montana is at the heart of the current question about what, if any, regulation is appropriate.

Appendix: Policy for the Board of Milk Control

81-23-102. Policy. (1) It is hereby declared that:

- (a) milk is a necessary article of food for human consumption;
- (b) the production and maintenance of an adequate supply of healthful milk of proper chemical and physical content, free from contamination, is vital to the public health and welfare;
- (c) the production, transportation, processing, storage, distribution, and sale of milk in the state of Montana is an industry affecting the public health and interest;
- (d) unfair, unjust, destructive, and demoralizing trade practices have been and are now being carried on in the production, transportation, processing, storage, distribution, and sale of milk and products manufactured from milk, which trade practices constitute a constant menace to the health and welfare of the inhabitants of this state and tend to undermine the sanitary regulations and standards of content and purity of milk;
- (e) health regulations alone are insufficient to prevent disturbances in the milk industry and to safeguard the consuming public from further inadequacy of a supply of this necessary commodity;
- (f) it is the policy of this state to promote, foster, and encourage the intelligent production and orderly marketing of milk and cream and products manufactured from milk and cream, to eliminate speculation and waste, and to make the distribution of milk and cream and products manufactured from milk and cream between the producer and consumer as direct as can be efficiently and economically done, and to stabilize the marketing of those commodities;
- (g) investigations have revealed and experience has shown that, due to the nature of milk and the conditions surrounding the production and marketing of milk and due to the vital importance of milk to the health and well-being of the citizens of this state, it is necessary to invoke the police powers of the state to provide a constant supervision and regulation of the milk industry of the state to prevent the occurrence and recurrence of those unfair, unjust, destructive, demoralizing, and chaotic conditions and trade practices within the industry which have in the past affected the industry and

which constantly threaten to be revived within the industry and to disrupt or destroy an adequate supply of pure and wholesome milk to the consuming public and to the citizens of this state;

(h) milk is a perishable commodity that is easily contaminated with harmful bacteria, that cannot be stored for any great length of time, that must be produced and distributed fresh daily, and the supply of which cannot be regulated from day to day but, due to natural and seasonal conditions, must be produced on a constantly uniform and even basis;

(i) the demand for this perishable commodity fluctuates from day to day and from time to time making it necessary that the producers and distributors shall produce and carry on hand a surplus of milk in order to guarantee and ensure to the consuming public an adequate supply at all times, which surplus must of necessity be converted into byproducts of milk at great expense and often at a loss to the producer and distributor;

(j) this surplus of milk, though necessary and unavoidable, unless regulated, tends to undermine and destroy the milk industry, which causes producers to relax their diligence in complying with the provisions of the health authorities and often to produce milk of an inferior and unsanitary quality;

(k) investigation and experience have further shown that, due to the nature of milk and the conditions surrounding its production and marketing, unless the producers are guaranteed and ensured a reasonable profit on milk, both the supply and quality of milk are affected to the detriment of and against the best interest of the citizens of this state whose health and well-being are thereby vitally affected;

(l) where no supervision and regulation are provided for the orderly and profitable marketing of milk, past experience has shown that the credit status of both producers and distributors of milk is adversely affected to a serious degree, thereby entailing loss and hardship upon all within the community with whom these producers and distributors carry on business relations;

(m) due to the nature of milk and the conditions surrounding its production and distribution, the natural law of supply and demand has been found inadequate to protect the industry in this and other states and in the public interest it is necessary to provide state supervision and regulation of the milk industry in this state.

(2) The general purpose of this chapter is to protect and promote public welfare and to eliminate unfair and demoralizing trade practices in the milk industry. It is enacted in the exercise of the police powers of the state.

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