



**Public Informational Hearing on the Transparency of Dairy Pricing –
December 9, 2009**

Subject of Testimony: State Regulation of Dairy Pricing and the Dormant Commerce Clause

Provided to: Pennsylvania Senate Agriculture and Rural Affairs Committee

Presented by: Ross H. Pifer, J.D., LL.M., Director, The Agricultural Law Resource and Reference Center at The Pennsylvania State University, The Dickinson School of Law

Chairman Brubaker, Chairman O’Pake, Members of the Senate Agriculture and Rural Affairs Committee, I thank you for the opportunity to appear before you today to discuss issues surrounding the regulation of dairy pricing in Pennsylvania. My name is Ross Pifer, and I am the Director of The Agricultural Law Resource and Reference Center at Penn State University’s Dickinson School of Law. The Agricultural Law Center was established by the Pennsylvania Legislature on January 29, 1998, 3 PA. STAT. §§ 2201 – 2209, following the merger between The Pennsylvania State University and The Dickinson School of Law. The statutory purpose of the Agricultural Law Center is to serve the Commonwealth “as a resource on agricultural law and related issues for farmers and agribusinesses, attorneys, officials at all levels of government, community groups and the public.” 3 PA. STAT. § 2205. This mission is accomplished through a variety of work product including the provision of educational presentations and programs, the preparation of written materials, the distribution of a monthly publication entitled *The Agricultural Law Brief*, and the maintenance of a Web site at www.law.psu.edu/aglaw. The Center is reliant upon state funding to fulfill its statutory charge, and I want to thank this body for its historic support of the Center.

I have been asked to appear before you today to discuss constitutional issues implicated in the state regulation of milk pricing. The price that Pennsylvania dairy farmers receive for their milk is dependent upon both a federal and state regulatory framework. The authority for federal regulation of milk pricing is the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601 *et seq.*, and the authority for state regulation of milk pricing in Pennsylvania is the Pennsylvania Milk Marketing Law, 31 PA. CONS. STAT. § 700j. For my brief remarks today, I will not address the details of each of these regulatory systems, but rather will focus on the extent to which a state can regulate milk pricing within the confines of the so-called Dormant Commerce Clause of the United States Constitution.

The United States Constitution provides Congress with the authority to enact legislation “[t]o regulate Commerce . . . among the several States.” U.S. CONST. art. I, § 8, cl. 3. This is referred to as the Commerce Clause of the Constitution. Although not explicitly stated in the Commerce Clause, this grant of Congressional power to regulate interstate commerce carries with it a negative corollary – referred to as the Dormant Commerce Clause – that imposes limitations upon a state’s ability to act with regard to matters bearing upon interstate commerce. Generally speaking, the Dormant Commerce Clause is designed to prevent a state from protecting in-state economic interests at the expense of out-of-state economic interests.

The exact extent to which a state may legislate or regulate without infringing upon the Dormant Commerce Clause is an issue that has been litigated before the United States Supreme Court and the various United States Courts of Appeals in a number of cases. Several of these cases have addressed the impact of the Dormant Commerce Clause on state milk regulations with the 1994 case of *West Lynn Creamery v. Healy*, 512 U.S. 186 (1994), being the most recent Supreme Court case on point. Pennsylvania milk laws, in particular, have been at issue in cases

such as the 1939 United States Supreme Court decision of *Milk Control Board of Pennsylvania v. Eisenberg Farm Products*, 306 U.S. 346 (1939), and the two separate decisions, rendered in 2003 and 2006, of the United States Court of Appeals for the Third Circuit in the *Cloverland* case. *See Cloverland-Green Springs Dairies, Inc. v. Pa. Milk Mktg. Bd.*, 462 F.3d 249 (3d Cir. 2006); *See also Cloverland-Green Springs Dairies, Inc. v. Pa. Milk Mktg. Bd.*, 298 F.3d 201 (3d Cir. 2002). Because of their relatively recent nature, the Supreme Court opinion in *West Lynn Creamery* and the 2006 Third Circuit opinion in *Cloverland* are the most instructive in providing the general framework through which a challenge to a state milk regulation, using Dormant Commerce Clause grounds, must be analyzed.

Over the course of the past year, there have been a number of calls for state action to raise the prices paid to the Commonwealth's dairy farmers for raw milk or otherwise to improve the economic conditions for dairy farmers. To determine whether one of these proposals would withstand judicial scrutiny under a Dormant Commerce Clause challenge, the proposal must be considered using a two-part analysis. First, one must determine whether the standard of "heightened scrutiny" is applicable to the regulation in question. If not, then the second part of the two-part analysis requires application of the balancing test enunciated by the United States Supreme Court in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). I will address each aspect of this two-part analysis in turn.

A state law must be reviewed using the heightened scrutiny standard when the law is enacted for the purpose, or has the effect, of discriminating against interstate commerce. There are two, sometimes overlapping, ways that this discrimination can manifest itself. A law will be determined to be discriminatory if it has application out-of-state so as to eliminate a competitive advantage that is held by an out-of-state economic interest. *See Baldwin v. G.A.F. Seeling, Inc.*,

294 U.S. 511 (1935); *See also Cloverland*. A law also will be determined to be discriminatory if it benefits in-state economic interests at the expense of out-of-state economic interests. *See Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361 (1964); *See also West Lynn Creamery*. Thus, as examples of discriminatory laws, state legislation that requires out-of-state farmers be paid a minimum price before milk can be sold in-state as was done in *Baldwin* is discriminatory; a state's imposition of a premium on all milk sold in the state where the premium is then disbursed solely to in-state farmers as was done in *West Lynn Creamery* is discriminatory; and a state requirement that all in-state processors purchase milk from in-state producers as was done in *Polar Ice Cream* is discriminatory.

Where an out-of-state economic interest alleges that a state law eliminates a competitive advantage that it holds, under the authority of *Cloverland*, it must establish that the advantage arises due to its out-of-state status. It is not enough that one out-of-state interest holds a competitive advantage over one in-state competitor unrelated to its locational status.

If it is determined that a state law does discriminate against interstate commerce, under the heightened scrutiny standard, the law will be upheld only if the state can prove that the law was enacted for a legitimate local purpose and that any available nondiscriminatory alternatives would not accomplish this same purpose. This is a very difficult test to meet. Accordingly, nearly all laws to which heightened scrutiny applies will be invalidated.

Although it is difficult for a state law to survive the heightened scrutiny analysis, the *Cloverland* decision states that Courts of Appeals and “the Supreme Court have clearly recognized” that heightened scrutiny is not always the appropriate standard to apply to state milk regulation. *Id.*, 462 F.3d at 265. When a state law does not have a discriminatory purpose or effect, the law in question must be reviewed under the *Pike* balancing test. Under this test, the

legitimate local benefits of the law are weighed against the incidental burdens on interstate commerce. The law will be struck down as being unconstitutional only if the burdens on interstate commerce are clearly excessive to the local benefits. The application of this balancing test is much more likely to result in a state law being upheld than would the heightened scrutiny standard. Accordingly, the determination of which standard must be applied to the law – heightened scrutiny or the *Pike* balancing test – often determines the ultimate fate of the state law.

The analysis of whether a state law is violative of the Dormant Commerce Clause is dependent upon the facts of each case. Any challenge to a state law, including one that regulates milk pricing, must utilize the analytical framework described above. This legal framework cannot be used in a vacuum, but rather must be used together with the specific economic and market facts implicated by the law in question. Because of the different factual impact of each law, it is not possible to render an opinion on the constitutionality of a proposed law without a thorough review of its specific facts. One general type of state law that does appear to pass constitutional scrutiny, however, is the direct subsidization of a state industry. *See West Lynn Creamery.*

In conclusion, the Dormant Commerce Clause does not prevent a state from enacting a law regarding milk pricing. The Dormant Commerce Clause, however, does provide limitations on the scope of any such law. If a state milk pricing law is determined to be discriminatory, then the law must be evaluated under the heightened scrutiny standard. Application of the heightened scrutiny standard likely will result in the law being invalidated. On the other hand, if a state milk pricing law only incidentally burdens interstate commerce, then the law must be evaluated by

weighing the local benefits of the law against any burdens on interstate commerce. A state law is much more likely to be upheld if it is evaluated using this balancing test.

I once again thank you for the opportunity to appear before this Committee. For questions or additional information, I can be reached as listed below.

Sincerely,

Ross H. Pifer

Ross H. Pifer,
Center Director

Ross H. Pifer, J.D., LL.M.
Director, The Agricultural Law Resource and Reference Center
Penn State University, The Dickinson School of Law
207C Lewis Katz Building
University Park, PA 16802
(814) 865-3723
rpifer@psu.edu
www.law.psu.edu/aglaw