

Opinion No. 2013-107

December 20, 2013

The Honorable Jeremy Gillam
State Representative
1825 Missile Base Road
Judsonia, Arkansas 72081-9169

Dear Representative Gillam:

You have requested my opinion on the following question: “In accordance with Arkansas Code § 20-59-248, can Grade ‘A’ milk producers sell raw milk?”

RESPONSE

The answer to this question is in all likelihood “no,” in my opinion. Although section 20-59-248 does not expressly declare its effect on Grade “A” milk producers, the state agency charged with regulating Grade “A” dairies has determined, based on its interpretation of the relevant statutes, that Grade “A” dairies are not permitted to sell raw milk. A court will uphold this interpretation of the relevant statutes unless it is “clearly wrong.” Given three features of section 20-59-248, which are discussed below, I conclude that a court would likely decline to hold the agency’s interpretation clearly wrong. Therefore, in my opinion, a court faced with your question would likely hold that Grade “A” dairies are not permitted to sell raw milk.

DISCUSSION

By the term “raw milk,” I will assume you are referring to milk that has not been pasteurized.¹

¹ Section 20-59-248 (Supp. 2013) does not use the term “raw milk.” Rather, the statute refers to “whole milk that has not been pasteurized,” which I take to be the subject of your question

Arkansas Code Annotated § 20-59-248 was amended in the 2013 legislative session to add several provisions, including the following, regarding the sale of “whole milk that has not been pasteurized:”

This subchapter [i.e., A.C.A. §§ 20-59-201 to -248] does not prohibit incidental sales of raw goat milk and whole milk that has not been pasteurized directly to consumers at the farm where the milk is produced or preclude the advertising of incidental sales of goat milk and whole milk that has not been pasteurized.”²

In addition to stating that sections 20-59-201 to -248 “do not preclude” certain activities, the amended section 20-59-248 establishes three conditions that must be met in order to legally sell raw milk. First, the farmer who sells the milk must permit the customer to inspect the farmer’s “cows and barns” when requested.³ The second and third conditions relate to notifying the customer about the product. In short, the seller must post the following message at the point of sale and affix it to each individual unit sold:

This product, sold for personal use and not for resale, is fresh whole milk that has NOT been pasteurized. Neither this farm nor the milk sold by this farm has been inspected by the State of Arkansas. The consumer assumes all liability for health issues that may result from the consumption of this product.⁴

Your question, in effect, is whether the foregoing provisions enable Grade “A” milk producers to sell raw milk.

In addressing this question, we can make three preliminary observations:

regarding “raw milk.” I will use the term “raw milk” in this opinion, meaning unpasteurized milk as referenced in section 20-59-248.

² A.C.A. § 20-59-248(b) (Supp. 2013).

³ A.C.A. § 20-59-248(d).

⁴ A.C.A. § 20-59-248(c).

- First, section 20-59-248 is simply silent as to which types of milk producers it was intended to address. So, as an initial matter, we can say that section 20-59-248 does not *expressly* address the question whether Grade “A” milk producers may sell raw milk.
- Second, when subsection 20-59-248(b) states that “[t]his subchapter does not prohibit incidental sales” of raw milk,” the phrase “this subchapter” is referring to sections 20-59-201 to -247. But these statutes are not the primary statutes addressing Grade “A” milk. The latter can be found at A.C.A. §§ 20-59-401 to -407 and the accompanying regulations promulgated by the Arkansas Department of Health.
- Finally, and perhaps most significant, the foregoing notifications (under subsection 20-59-248(c), excerpted above) that must be provided to raw-milk customers contain representations that cannot be made by Grade “A” milk producers. That notice—posted at the point of sale and affixed to each unit sold—must state that “[n]either this farm *nor the milk sold by this farm* has been inspected by the State of Arkansas.” (Emphasis added.) But this representation cannot be made by Grade “A” milk producers because their milk products **are** subject to inspection.⁵

In sum, while section 20-59-248 does not expressly declare its effect on Grade “A” milk producers, the statute’s context and notification provisions strongly suggest that the General Assembly did not intend the statute to apply to Grade “A” milk producers.

Additionally, it is important to note that the state agency charged with regulating Grade “A” milk producers—the Arkansas Department of Health—has determined that the statute does not apply to Grade “A” milk producers. Courts will follow an agency’s interpretation of statutes it is charged with administering unless that interpretation is “clearly wrong.”⁶ Given the three preliminary observations noted above, I believe it is highly unlikely that a court would declare the agency’s interpretation clearly wrong.

⁵ See generally A.C.A. §§ 20-59-403, -404; A.C.A. § 20-59-205(a)(1) (requiring the Department of Health to inspect all dairy products plants and places where dairy products are produced or handled).

⁶ E.g., *Dooley v. Automated Conveyor Sys. Inc.*, 84 Ark. App. 412, 419, 143 S.W.3d 585, 590 (2004).

Therefore, in my opinion, a court faced with your question would in all likelihood be persuaded that section 20-59-248 is inapplicable to Grade “A” milk producers. I believe the court would base this conclusion on both the statute’s text and the interpretation of the agency charged with the statute’s regulation. Accordingly, it is my conclusion that the answer to your question is “no.” In my opinion, A.C.A. § 20-59-248 does not authorize Grade “A” milk producers to advertise and sell raw milk.

Assistant Attorney General Ryan Owsley prepared the foregoing opinion, which I hereby approve.

Sincerely,

DUSTIN MCDANIEL
Attorney General

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