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Office of The Attorney General
State of Connecticut

January 26, 2004

The Honorable George M. Wilbur
State Representative
27 Simmons Pond Road
Colebrook, Connecticut 06098

Dear Representative ^{George} Wilbur:

During the 2003 General Assembly session, we worked collaboratively on legislation to address the issue of retail milk prices remaining at high levels even though milk commodity prices paid to dairy farmers had fallen to very low levels. The attached September 22, 2003 draft legislation prohibits unconscionably excessive milk prices by limiting the mark-up which a processor or retailer in Connecticut may add to fluid milk to a percentage of the price the processor or retailer paid for the milk. The draft also allows the Commissioner of Agriculture to grant exceptions to processors that can demonstrate financial hardship caused by limiting the mark-up on fluid milk.

You have been asked whether such legislation is constitutional. I am confident that this legislation will not violate the Commerce Clause of the United States Constitution and will vigorously defend the statute if it is enacted and challenged.

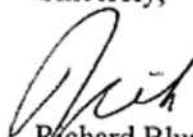
The dormant commerce clause protects interstate commerce from unreasonable state interference. In particular, the courts first review the challenged state statute to determine whether it directly regulates interstate commerce or discriminates against interstate commerce. It is likely that a court would find that the statute does not directly regulate or discriminate against interstate commerce because the statute applies evenly to all milk sales and does not put out of state processors at a disadvantage vis a vis state processors of milk.

If a court determines that the statute does not directly regulate or discriminate against interstate commerce, the court will then balance the putative local benefits against the possible restraint of interstate commerce consistent with standard established by the United States Supreme Court decision in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Because there is a strong state interest in ensuring a stable, reasonably priced milk supply, there is ample justification for the state of Connecticut to enact legislation prohibiting unconscionably excessive mark-up of the price of milk. Further, this statute only applies to milk sold at retail in Connecticut and applies even-handedly to such milk regardless of whether it was processed in Connecticut or outside of Connecticut.

The Honorable George M. Wilbur
State Representative
January 26, 2004
Page 2

I hope this letter addresses your concern. I look forward to working with you on this important legislation during the 2004 legislative session.

Sincerely,



Richard Blumenthal

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Attachment

AAC THE FAIR PRICING OF MILK
September 22, 2003

Section 1. (NEW) (*Effective July 1, 2004*) As used in sections 2 and 3 of this act:

- (1) "Consumer" means a consumer, as defined in section 22-205 of the general statutes;
- (2) "Commissioner" means the Commissioner of Agriculture;
- (3) "Fluid milk" means homogenized milk, low-fat milk, fortified low-fat milk and skimmed milk, as defined in section 22-127 of the general statutes that is sold in quart, half-gallon or gallon containers and shall not include flavored milk, chocolate milk, ultra-high-temperature processed and aseptically packaged milk and milk product or ultrapasteurized as defined in section 22-127;
- (4) "Processor" means any person engaged in the sale of milk other than a producer or retailer, as defined in this section, who is subject to registration pursuant to section 22-173 of the general statutes and includes a subdealer;
- (5) "Producer" means any person who is engaged in the production of milk and who is subject to registration pursuant to section 22-172 of the general statutes and includes cooperative marketing associations, as defined in section 22-205 of the general statutes;
- (6) "Retailer" means any person engaged in the sale of milk at retail to consumers and who is subject to registration pursuant to section 22-173 of the general statutes but shall not include any retailer operating less than five retail stores and whose annual sales of all consumer goods at retail is less than twenty million dollars; and
- (7) "Subdealer" means a subdealer, as defined in section 22-205 of the general statutes.

Sec. 2. (NEW) (*Effective July 1, 2004*) (a) No processor or retailer shall sell or offer for sale fluid milk for a price that is unconscionably excessive.

- (b) A price for fluid milk in a gallon container is unconscionably excessive if (1) the price charged by a processor to a retailer exceeds one hundred forty per cent of the price actually paid to the producer by the processor for the same fluid milk less the amount received from the sale of cream derived from such milk; (2) the

price charged by a retailer to a consumer exceeds (A) one hundred thirty per cent of the price actually paid to the processor by the retailer for the same fluid milk or (B) two hundred percent of the price paid by the processor to the producer for the same fluid milk. For purposes of this subsection, the price actually paid to the producer by the processor shall be deemed to be the price set for milk within the state pursuant to the Northeast milk marketing order plus any documented premium paid by the processor to the producer in connection with such milk.

(c) The price charged for a quart container of fluid milk is unconscionably excessive if (1) the price charged by a processor to a retailer exceeds one hundred fifty-five per cent of the price actually paid to the producer by the processor for the same fluid milk less the amount received from the sale of cream derived from such milk; (2) the price charged by a retailer to a consumer exceeds (A) one hundred thirty per cent of the price actually paid to the processor by the retailer for the same fluid milk or (B) two hundred percent of the price paid by the processor to the producer for the same fluid milk. For purposes of this subsection, the price actually paid to the producer by the processor shall be deemed to be the price set for milk within the state pursuant to the Northeast milk marketing order plus any documented premium paid by the processor to the producer in connection with such milk .

(d) The price charged by a processor or retailer for a half gallon container of fluid milk is unconscionably excessive if (1) such price is more than one hundred forty five percent of the price actually paid to the producer by the processor for the same fluid milk less the amount received from the sale of cream derived from such milk; (2) the price charged by a retailer to a consumer exceeds (A) one hundred thirty per cent of the price actually paid to the processor by the retailer for the same fluid milk or (B) two hundred percent of the price paid by the processor to the producer for the same fluid milk. For purposes of this subsection, the price actually paid to the producer by the processor shall be deemed to be the price set for milk within the state pursuant to the Northeast milk marketing order plus any documented premium paid by the processor to the producer in connection with such milk.

(e) Notwithstanding the provisions of subsection (b) of this section, the Commissioner of Agriculture may permit a processor to sell fluid milk at a price no more than one hundred fifty percent of the price actually paid to the producer by the processor for the same fluid milk less the amount received from the sale of cream derived from such milk if the Commissioner determines, after a hearing, that the increase in the price that the processor must pay the producer in order to cover the processor's reasonable direct and indirect costs of processing and distributing the fluid milk in compliance with the one hundred forty percent price restriction in subsection (b) would result in the processor charging an

uncompetitive price for such milk sold to a retailer. As used in this subsection, a price is uncompetitive if the commissioner determines that the processor's sales will be reduced significantly if milk is sold at such price.

(f) Notwithstanding the provisions of subsection (b) of this section, the Commissioner of Agriculture may establish a price surcharge that a processor may charge a retailer for a delivery of not more than two hundred gallons in excess of the price authorized under subsection (b). Such price surcharge may not exceed the reasonable, incremental costs associated with the delivery of not more than two hundred gallons of milk.

(g) No processor or retailer shall structure a transaction for the sale of milk for the purpose of avoiding the requirements of the statute. Failure to comply with this subsection shall be deemed to be an unfair or deceptive trade practice under subsection (a) of section 42-110b.

(h) As used in this section, the price charged by the producer or processor shall include the invoice price and all other adjustments to such invoice price, including but not limited to bill backs, discounts, allowances for promotion or advertising and slotting fees.

(i) The provisions of this section shall not apply to producer-dealers, as defined in section 22-205 of the general statutes.

(j) The University of Connecticut Department of Agricultural and Resource Economics may provide assistance to the Commissioner of Agriculture in carrying out his responsibilities under this act.

Sec. 3. (NEW) (*Effective July 1, 2004*). The Commissioner of Agriculture may periodically review the price limitations contained in section 2 of this act to determine if such limitations are encouraging the delivery of milk at a fair price without causing significant loss of jobs or share of the milk market by producers, processors and retailers and make recommendations to the legislative committee having cognizance over the issue of pricing of milk.

Sec. 4. (NEW) (*Effective July 1, 2004*) (a) The commissioner may investigate any violations of section 2 of this act and may refer any violations to the Attorney General who may bring an action in superior court for the judicial district of Hartford to enforce the provisions of section 2 of this act.

(b) If a court finds that a person has violated any provision of section 2 of this act, the court may award injunctive relief, restitution, a civil penalty not to exceed one thousand dollars per violation and such other relief as the court deems equitable. Each day of violation of section 2 of this act shall be considered a distinct and separate violation.