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FILE NO. S-923

AGRICULTURE:
Size of Containers

Robert J. Williams, Director
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State of Illinois
Junior Livestock Building
Illinois State Fairgrounds
Springfield, Illinois 62706

Dear Director Williams:

This responds to your request for an opinion as to whether the Illinois Department of Agriculture may permit the sale of milk at retail in three quart containers. For the reasons discussed below, I am of the opinion that the Department may not.

Section 47 of the Weights and Measures Act (Ill. Rev. Stat. 1973, ch. 147, par. 147) provides as follows:

"§ 47. All fluid dairy products, including but not limited to whole milk, skimmed milk, cultured milk, sweet cream, sour cream and butter-

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milk, shall be packaged for retail sale only in units of 1 gill, 1/2 liquid pint, 10 fluid ounces, 1 liquid pint, 1 liquid quart, 1/2 gallon, 1 gallon, 1 1/2 gallon, 2 1/2 gallons or multiples of 1 gallon. However, packages in units of less than 1 gill shall be permitted."

Under section 7 (Ill. Rev. Stat. 1973, ch. 147, par. 107) the Director of the Illinois Department of Agriculture is charged with enforcement of the provisions of the Act. Section 56 of the Act (Ill. Rev. Stat. 1973, ch. 147, par. 156) further provides the penalty for violation of any provision of the Act as follows:

"§ 56. A person who, by himself or by his servant or agent or as the servant or agent of another person, performs any of the acts enumerated in subparagraphs (1) through (9) of this Section is guilty of a Class B misdemeanor, and upon a second or subsequent conviction thereof, he shall be guilty of a Class A misdemeanor.

* * *

(7) Retain for the purpose of sale, advertise, or offer or expose for sale, or sell, any commodity, thing or service in a condition or manner contrary to law or regulation.

* * *

(9) Violate a provision of this Act or of the regulations promulgated pursuant to this Act for which a specific penalty has not been prescribed."

This Act is an exercise of the police power of the State. The police power of the State is that inherent or plenary

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power which enables the State to prohibit all things hurtful to the comfort, safety and welfare of society. It is not confined to regulations looking to the preservation of life, health, good order and decency, but may also include regulations for the detection and prevention of imposition and fraud. City of Chicago v. Bowman Dairy Co., 234 Ill. 294.

The Act in question standardizes the size of milk containers. Such standardization could enhance quality and price competition, facilitate trading, protect the buyer from deception and prevent unfair competition. The proliferation of odd-sized containers could make it difficult for the consumer to determine the unit cost of a product and thus impose upon him an undue burden in determining the most economical purchase.

Economic regulation of this sort is an example of one of the earliest exertions of police power in the United States. (Pacific States Co. v. White, 296 U.S. 181.) The United States Supreme Court has specifically upheld a statute which requires that lard, other than that sold in bulk, be sold in containers holding one, three or five pounds, or multiples thereof. (Armour and Co. v. North Dakota, 240 U.S. 510.) The Supreme Court of Illinois has specifically recognized the authority of municipalities to regulate the sizes of loaves of bread. City of Chicago v. Schmidinger, 243 Ill. 167; aff.

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Schmidinger v. Chicago, 226 U.S. 578.

The Arizona Supreme Court in State v. DeWitt, 63 P. 2d 659 (1937) specifically had before it a statute which read as follows:

"* * * 'Bottles used for the sale of distilled water, milk, and cream, shall be of the capacity of one-half gallon, three pints, one quart, one pint, one-half pint, and one gill, filled full to the bottom of the lip.'

* * *

The defendant in this case was charged with using a bottle, in selling milk, of a different capacity than those authorized by statute, i.e. in one-third quart bottles. The Arizona court held the statute was a valid exercise of the police power and did not violate any fundamental law of the State or nation.

Regulation of the milk industry, in particular, including the character and capacity of milk containers, has long been recognized as necessary for the public health. In Koy v. City of Chicago, 263 Ill. 122, the Illinois Supreme Court stated as follows at page 130-131:

"*** There is no article of food in more general use than milk; none whose impurity or unwholesomeness may more quickly, more widely and more seriously affect the health of those who use it. The regulation of its sale is an imperative duty which has been universally recognized. This regulation in minute detail is essential, and

extends from the health and keeping of the cows which produce the milk, through all the processes of transportation, preservation and delivery to the consumer. Not only may laws and ordinances require that milk offered for sale shall be pure, wholesome and free from the bacilli of any disease, but they may and do, in order to produce this result, prescribe the manner in which such purity, wholesomeness and freedom from disease shall be secured and made to appear. The cows may be required to be registered with a designated public authority; the dairies to be conducted and managed according to prescribed regulations, and, together with the dairy utensils, subjected to inspection; the receptacles in which milk is contained to be of prescribed character and capacity; the labels to be placed according to fixed regulations and to contain certain required information; the milk to be prepared in the manner, at the times and by the means directed and at all times to be subject to inspection. These may be drastic restrictions upon a private business, but experience and the increasing knowledge of the causes of disease and the agencies of its propagation have demonstrated the necessity of such restrictions to the preservation of the public health. The object of all such restrictions is the preservation of the public health, and as a means to that end the protection of the general public against dishonest vendors of milk. They all impose inconveniences and expense upon the dealers in milk, but they are not on that account unreasonable, unjust or oppressive. * * *

(emphasis added.)

The Illinois statute under consideration is quite clear in its prohibition of the sale of milk in any size container other than those specifically permitted. "There is a presumption of constitutionality of legislation once it becomes the law of the State, and all reasonable doubts must be

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resolved in its favor". (Northshore Post No. 21 v. Korzen, 38 Ill. 2d 231, 233.) Furthermore, the burden of proof is on the party asserting that a statute is unconstitutional.

(Grenier & Co. v. Stevenson, 42 Ill. 2d 289.) In particular, it is the duty of the Attorney General to indulge in the presumption that all statutes are constitutional and to defend the constitutionality of such statutes and uphold the same unless courts declare them unconstitutional or they clearly violate some constitutional provision. 1932 Ill. Att'y. Gen. 527; 1912 Ill. Att'y. Gen. 689; 1910 Ill. Att'y. Gen. 166.

You enclosed with your opinion request material which sets forth two arguments asserting that the prohibition of three quart containers is invalid. I will therefore discuss them.

The first argument is that since this is a criminal statute and should be strictly construed, any size container which is not specifically prohibited is permitted. The decision of the Wisconsin Supreme Court in State v. Land O'Lakes Ice Cream Co., 18 N.W. 2d 325 (1945) is drawn to my attention. That case concerned a statute similar to the one under discussion which listed the sizes of containers in which milk and cream were to be sold. All size containers were half gallon or less.

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It further declared that a person who packaged such other products in other size containers would be guilty of using false weights or measures. The defendant used gallon and other size containers not specifically permitted. Although the containers did not conform to the statute, they did contain the amount of product specified on the container. The Wisconsin Supreme Court held that he could not be convicted under the statute because the statute attempted to declare something a false weight and measure which in fact was not a false weight and measure and because it did not expressly prohibit other size containers.

I do not view this case as controlling. The Illinois statute under consideration does not declare the use of a prohibited size container the use of a false weight or measure. It simply says that anyone who violates the Act is guilty of a misdemeanor. For its other point, the Wisconsin court relied upon the decision of the United States Supreme Court in United States v. Acme Can Co., 299 U.S. 207, and its companion case United States v. Resnick. In that decision the United States Supreme Court reversed the conviction of a person for manufacturing a two quart size hamper for fruits and vegetables. The statute there under consideration listed nine specified sizes

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for hampers for fruits and vegetables, none smaller than one-eighth bushel (four quarts) and did not specifically prohibit the manufacture or sale of two quart hampers. The Illinois statute under consideration, however, clearly regulates all sizes of containers in which fluid milk products are to be sold, and makes it a violation of the Act to sell any commodity in a manner contrary to the Act.

The second argument is that the prohibition of the sale of milk in three quart containers is arbitrary and unreasonable. My attention is directed to the decision of the Michigan Supreme Court in Grocers Dairy Company v. McIntyre, 138 N.W. 2d 767 (1966). In that case the Supreme Court of Michigan had before it a statute similar to the Illinois statute under consideration which permitted the sale of milk products only in specified sizes of one-half gallon or less. In that decision the Michigan court held that the prohibition of the sale of milk products in one gallon containers was unreasonable and arbitrary. It cited evidence which showed that there was no appreciable increase in the danger to health in the use of gallon size containers and that several other States permitted the use of the gallon size container and that there would be no confusion to the consumer. The Attorney General of Michigan,

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relying on this decision, has advised that the prohibition of the use of the three quart container is also arbitrary and unreasonable.

I cannot agree that the prohibition of the use of the three quart container is either arbitrary or unreasonable. It is not unreasonable to limit the number of different sizes of containers, especially where, as in Illinois, the range runs from one gill to two and one-half gallons and multiples of one gallon. If the prohibition of a particular size can be attacked on a case by case basis, soon the number of different permitted sizes would proliferate, creating confusion to the consumer.

The Michigan case dealt with a statute that prohibited any container larger than one-half gallon. The Illinois statute, on the other hand, sets forth a number of different sizes of containers in which fluid dairy products may be sold. These include sizes both larger and smaller than three quarts. I do not see that such regulation is either arbitrary or unreasonable.

Very truly yours,

A T T O R N E Y G E N E R A L