

New and Commentary

Regulatory updates: Maine Milk Commission

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by Ralph Townsend

The Maine Dairy Stabilization Fund, which sought to increase the incomes of Maine's dairy farmers, was recently invalidated under a decision from the U.S. Supreme Court on a similar Massachusetts program. The Maine Dairy Stabilization Fund imposed a retail tax on milk, which increases when the minimum federal price of milk falls. Most of the proceeds of that tax were then distributed to dairy farmers. The effect was to stabilize dairy farm income in Maine. In the Massachusetts case (*West Lynn Creamery, Inc. v. Healy*), the U.S. Supreme Court in June 1994 declared the tax-cum-subsidy approach to milk price control violated the commerce clause of U.S. Constitution. The U.S. Circuit Court recently found that the logic applied equally to Maine's milk tax.

This decision is a major blow to Maine's efforts to pursue its goals of raising the incomes of Maine dairy farmers. The Maine Milk Commission can raise milk prices by regulation, but such higher prices encourage Maine stores to buy milk at lower wholesale prices from out-of-state processors. The Dairy Stabilization Fund allowed Maine to pursue its objectives of higher farmer incomes with minimal economic distortions in markets. After the Supreme Court decision, Maine's milk policy options are much less attractive.

The U.S. Supreme Court decision in this case may ultimately have broad implications for state efforts to regulate economic activity within their borders. On the one hand, this decision closes a long-standing loophole in the Court's decisions on the commerce clause. While it has been clearly illegal to place discriminatory taxes on interstate commerce, subsidies to in-state businesses have been acceptable. That left the uncomfortable possibility that a state could impose a de jure non-discriminatory tax on all sellers with a rebate of the tax to in-state firms, and thereby create a de facto discriminatory tax. The *West Lynn Creamery* case seems to have closed forcefully this loophole. On the other hand, this decision may open the door to legal challenges to a whole array of taxes, subsidies, and regulations imposed by states. For example, what if a state imposed a tax on all providers of intrastate long distance and used the proceeds to subsidize local service? Or what if the state accomplished the same effect by regulation? In fact, one might read into the recent stream of commerce clause decisions a coherent effort by the Supreme Court to reduce the state role in economic activity. While the Supreme Court angst over tax-cum-subsidy regulation is understandable, it is not clear that its decision in this case has laid out a path towards coherent public policy.