

*Growers Legal Update*

# Legal Issues Related to “Cow Share” Agreements in North Carolina

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# Farm Act of 2018

- Legislative response to Smithfield swine nuisance lawsuits
- Placed further restrictions on a person's ability to sue a neighboring farmer for nuisance
  - Changes to Right to Farm Act, limiting proximity and statute of limitations
- Voluntary Ag District requirement of “proximity notice” to certain farms
- **Exemption of distribution of “raw milk” from definition of a “sale”**

# Changes to NCGS § 106-266.35

## ALLOW THE DISPENSING OF RAW MILK AND RAW MILK PRODUCTS TO INDEPENDENT OR PARTIAL OWNERS OF LACTATING ANIMALS FOR PERSONAL USE OR CONSUMPTION

**SECTION 15.2.(a)** G.S. 106-266.35 reads as rewritten:

### " § 106-266.35. Sale or dispensing of milk.

(a) Except as provided in subsection (d) of this section:

(1) Only milk that is Grade "A" pasteurized milk may be sold or dispensed directly to consumers for human consumption.

(2) Raw milk and raw milk products shall be sold or dispensed only to a permitted milk hauler or to a processing facility at which the processing of milk is permitted, graded, or regulated by a local, State, or federal agency.

(b) The Board of Agriculture may adopt rules to provide exceptions for dispensing raw milk and raw milk products for nonhuman consumption. Any raw milk or raw milk product dispensed as animal feed shall include on its label the statement "NOT FOR HUMAN CONSUMPTION" in letters at least one-half inch in height. Any raw milk or raw milk product dispensed as animal feed shall also include on its label the statement "IT IS NOT LEGAL TO SELL RAW MILK FOR HUMAN CONSUMPTION IN NORTH CAROLINA." **"Sale"–This labeling requirement does not apply to raw milk or raw milk products dispensed for personal use or consumption to the independent or partial owner of a cow, goat, or other lactating animal.**

**(c) As used in this section, the term "sale" or "sold" shall mean means** any transaction that involves the transfer or dispensing of milk and milk products or the right to acquire milk and milk products through barter or contractual arrangement or in exchange for any other form of ~~compensation including, but not limited to, the sale of shares or interest in a cow, goat, or other lactating animal or herd~~ **compensation. The term "sale" or "sold" does not include the transfer or dispensing of raw milk or raw milk products to, or the right to acquire raw milk or raw milk products by, the independent or partial owner of a cow, goat, or other lactating animal.**

**(d) Nothing in this section shall prohibit the dispensing of raw milk or raw milk products for personal use or consumption to, or the acquisition of raw milk or raw milk products for personal use or consumption by, an independent or partial owner of a cow, goat, or other lactating animal."**

# The Effect: Removal of regulatory jurisdiction of NCDA&CS

- Milk distribution regulated by state regulation
  - Only Grade A (“pasteurized”) milk may be **sold** to humans
  - Must be only be dispensed to permitted milk hauler or regulated (permitted and graded) milk processor (on farm or off-farm)
- All other milk must be sold for non-human consumption and conspicuously labeled as such
  - Includes dispensation when no money changes hands
  - EXCEPT: milk distributed to owner of the animal
  - No longer a “sale”, no longer subject regulation as a sale

## NCD&CS Response

- **“Not a sale, not within our jurisdiction to regulate”** (phone call with regulator)
  - Legal concept that the executive may only make regulatory law if statute authorizes it to do so
- Issued policy statement
  - Reminder of documented risks of raw milk consumption (CDC reports on Salmonella, Listeria and E. coli.)
  - **“NCD&CS has no authority or regulatory oversight** over the dispensing of raw milk under a legal “cow or herd share” program.”
  - **NCD&CS will continue to investigate any allegations of foodborne illness** with our partners at Public Health.
- Anecdotally: NCD&CS will provide **not testing** of raw milk planned for distribution under “cow share” arrangement

# Federal Regulation of Raw Milk

- Initially, FDA refused to issue regulations concerning ban on raw milk
- Ordered by federal court in *Public Citizen v. Heckler*, 653 F.Supp. 1241, 1241 (1986)
  - Protect citizens in other states with no influence on other states political or regulatory process
  - Court does not order FDA to regulate *intrastate* sale of raw milk
- Left to the states to decide whether and how to allow

## Basic Arrangement: “Agistment”

- Cow is now co-owned by one or more parties.
- Unclear whether individual who originally purchased the animal retains an ownership
- “Ownership” of a share is evidenced by an “agister agreement”
  - Agister is a 14<sup>th</sup> century English term for one who takes another's livestock for grazing on crown lands
  - Still in modern usage in New Zealand and Western United States
- Agistment indicates a **fee care arrangement** for the animal that includes distributing its milk product

## Treatment in Other States (Virginia)

- *Kenley v. Solem*, 532 Va. 202, 375 S.E.2d 532 (1989)
  - No exemption
  - Farmer buys **goat A**, sells two 24% shares, keeps 52% ownership share of **goat A**
  - Charges \$3.00/day maintenance fee
  - Goat A's milk pooled with milk from rest of herd
  - Court declares sham arrangement, sees “maintenance fee” tied to delivery of milk (**payment coincided with delivery**)



## Treatment in Other States (Maryland)

- *Oyarzo v. Dept. of Health*, 978 A.2d 804, 187 Md. App. 264 (Md. App., 2009)
- MD law has no exception for ownership share
- “Bovine Sale and Agistment Agreement”
  - Percentage of milk (from herd)
  - Receive pro-rata share of sale of cow
  - Non-transferrable ownership interest (w/o agister consent)
  - Liability waiver
  - Agister may cancel agistment services, accompanied by right of first refusal to purchase back ownership interest

## Maryland Case

“when the entire package is considered—including the fact that the specific **agister's services are a *mandatory component*** of the purchase of the interest in the herd, the fact that the arrangement requires the recipients of the raw milk to continue ***paying ongoing fees*** to the dairy farmer for as long as the ownership interest in the herd continues, and the fact that the **most apparent benefit**, if not the only benefit, the contracting parties receive for monies paid to [the farmer] would be the ***right to receive raw milk***—the scheme has sufficient characteristics of a sale of milk to be an arrangement the Department may regulate and prohibit.”

# Basic Issue for producer/agister and consumer/owner

Without regulation, there is no government actor that can “foot the bill” and ensure your safety (consumer/owner) or protect you from liability for following the regulation (producer/agister)

Anything can happen in a court room when left to a common law claim in front of a jury

Does this arrangement arise to the level of reckless endangerment?

# Questions About Ownership Interest

- NC statute is fairly specific that the ownership interest is “a” (i.e. **a single**) cow or goat, etc.
  - Statute does not appear to exempt ownership of a herd
  - Can another animal be substituted when *the* animal runs dry (or dies or is sick for a time)
- Do all co-owners have to appear on the animal’s registration for the ownership to be legitimate?
- Contract damages (if animal dies under agister’s care) limited to value of specific cow, goat or sheep?
- Right to insurance proceeds for loss of animal in disaster event?
- Contract requirements of best practices for agister care

# Legal Issues on Liability

- Liability (Negligence)
  - Does Agister owe a contractual duty to share-owner
    - To keep cow safe and healthy?
    - Operate in “clean” environment
      - What are evidentiary standards in absence of regulation?
      - Does the regulated environment set the legal standard for an unregulated environment?
  - Contributory Negligence
    - North Carolina follows a strict contributory negligence standard: if you contribute to own injury, other party is not liable
  - Assumption of the Risk
    - Available as a defense in a contractual relationship
    - Liability waiver in “agister agreement”
  - Negligence per se? (no regulation to violate)
- As a co-owner, can **you** be held liable for another co-owner injury?
  - You can be sued (costs of defending without insurance)
  - Evidence of participation in a scheme that produced injury?

# Assumption of the Risk

**ASSUMPTION OF RISK:** While there may be possible **health benefits** associated with consuming **pure, clean**, raw milk from healthy grass fed animals, I acknowledge that the FDA has concluded that the risks associated with the consumption of raw milk outweigh any possible health benefits that may arise from consuming raw milk.<sup>4</sup> The consumption of raw milk or raw milk products may have inherent risks and dangers as well as risks that may be individual in nature, and may put me and members of my family in my household at risk of **SERIOUS** **FOODBORNE ILLNESS, DISEASE, INFIRMITY or EVEN DEATH** from **pathogenic bacteria such as Salmonella, E coli O157:H7; Listeria, Campylobacter and Brucella**. Illnesses caused by such pathogens may manifest symptoms including but not limited to diarrhea, abdominal cramps, body ache, vomiting, fever, headache, nausea, and dehydration and such illnesses can be especially severe for pregnant women, the elderly, infants, young children and people with weakened immune systems. I hereby certify that I understand the possible health risks that may be associated with the consumption of raw milk and raw milk products. In consideration of being allowed to purchase raw milk or raw milk products from Redmond or Real Foods, I ASSUME ALL RISKS AND RESPONSIBILITY FOR ANY ILLNESS, DISEASE, INFIRMITY, HEALTH AILMENT, OR EVEN DEATH, OF MYSELF AND ANY FAMILY MEMBERS IN MY HOUSEHOLD ASSOCIATED WITH THE CONSUMPTION OF RAW MILK OR RAW MILK PRODUCTS I OR ANYONE FROM MY HOUSEHOLD MAY PURCHASE FROM REDMOND OR REAL FOODS.

## Other Issues

- Danger to Existing Grade A cooperative contracts?
- If Coop contract is not full output requirement contract, can producer/agister pull milk from the same tank?
  - Does the producer need a second tank?
- How does producer track the output from single cow or goat or sheep?
  - Record-keeping as **evidence of ownership**

# THANKS FOR INVITING ME!

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