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## EDITORIAL

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## MILK REGULATION IN NEW YORK\*

THE RECENT decision of the New York State Legislature to abandon the fixing of milk prices prompts an inquiry into the success of depression milk regulation. The emphasis in milk administration was first shifted from the protection of health and the maintenance of quality<sup>1</sup> to economic control of the milk business by the New York Milk Control Law, passed in 1933 in response to pressure of producers and large distributors.<sup>2</sup> Because of their weak bargaining power, producers had been forced to absorb the consequences of a market undermined by a large increase in the production of milk and a depression decrease in consumption, while the large distributors, though

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\*This Comment is a sequel to *Legislative Regulation of the New York Dairy Industry* (1933) 42 YALE L. J. 1259, a Comment written shortly after the enactment of the New York Milk Control Act which discusses the economic background, constitutionality, and probable success of the statute.

1. For a discussion of these types of control, see TOBEY, *LEGAL ASPECTS OF MILK CONTROL* (International Association of Milk Dealers, 1936).

2. Originally enacted in 1933 as an emergency measure for one year, the law was revised in 1934 largely in accordance with the recommendations of the milk adminis-

able to preserve their margin of profit, had suffered a reduction in total sales and profits as a result of lowered consumer demand and price-cutting by the smaller dealers.<sup>3</sup> The New York Milk Control Law was enacted in an attempt to relieve the depressed condition of dairy farmers and to stabilize the chaotic marketing and distribution structure.<sup>4</sup>

To achieve both of these purposes, the milk control law provided that the Commissioner of Agriculture and Markets might in his discretion fix minimum prices to be paid to farmers<sup>5</sup> and minimum and maximum prices to be charged on sales by dealers to other dealers, by dealers to stores, by dealers to consumers, and by stores to consumers.<sup>6</sup> In fixing prices the Commissioner was to follow a rather broad standard: "The commissioner shall investigate what are reasonable costs and charges for the producing, hauling, handling, processing and/or other services performed in respect to milk, and what prices for milk in the several localities and markets of the state, and under varying conditions, will best protect the milk industry in the state and insure a sufficient quantity of pure and wholesome milk to adults and minors in the state, and be most in the public interest. The commissioner shall take into consideration the balance between production and consumption of milk, the costs of production and distribution, and the purchasing power of the public."<sup>7</sup> Milk dealers handling milk that was not well advertised, and who had been engaged in business continuously since April 10, 1933, were permitted to sell milk to stores in New York City at one cent per quart less than milk sold under well advertised trade names—a differential which could be passed on by the stores to consumers.<sup>8</sup> Provision was made for notice and hearing to interested parties before the promulgation of any order in regard to the price of milk, and review of such orders was to be by *certiorari*.<sup>9</sup>

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tration. Report of the New York Milk Control Board (1934) 27-30. Many provisions of the 1933 law were then made permanent while the price fixing features, although reenacted, retained their emergency character. The references to the New York Milk Control Law in this Comment are to the law as revised in 1934.

3. See Comment (1933) 42 YALE L. J. 1259.

4. Other states besides New York attempted to care for the ills of the dairy industry. BLACK, THE DAIRY INDUSTRY AND THE A. A. A. (1935) 311-349. The milk control statutes are collected in Comment (1937) 14 N. Y. U. L. Q. REV. 375, n. 1.

5. N. Y. AGR. & MKTS. LAW § 258-m(1)(a). Producer cooperatives were permitted to blend the proceeds of their sales of milk in the various classes, deduct cooperative expenses, and pay their members a net pool price, even though the actual amount received by the farmer was less than he would have received if he had been paid directly the minimum prices fixed by the commissioner. § 258-n.

6. § 258-m(1)(b). The commissioner could also fix "the amount of handling and/or processing charges to be included in the price charged or paid by milk dealers for milk involved in transactions between dealers." § 258-m(1)(c).

7. § 258-m.

8. § 258-q.

9. § 258-m(3).

The state made unlawful the sale of milk purchased from out-of-state farmers at a price lower than that required to be paid to farmers within the state.<sup>10</sup>

The first act of the milk administration was to set minimum resale prices<sup>11</sup> which varied for different localities.<sup>12</sup> But since the benefits of the increased prices received by dealers as a result of this type of price-fixing were not passed on to farmers, orders were soon issued establishing minimum prices to be paid to producers.<sup>13</sup> The setting of prices in both of these situations was upheld against constitutional attack in the cases of *Nebbia v. New York*<sup>14</sup> and *Hegeman Farms Corporation v. Baldwin*,<sup>15</sup> the Supreme Court holding in the latter case that the spread between minimum prices to be paid to farmers and minimum resale prices did not have to be sufficient to guarantee dealers a fair return.

The effectiveness of price-fixing in accomplishing its objectives depended on an efficient enforcement system. The machinery set up by the Act re-

10. § 258-m (4). New York also made a noble attempt to aid other states in the enforcement of their milk control laws by providing that dealers buying milk from New York state farmers for shipment into another state where prices were also fixed should pay New York farmers as much for their milk as the dealers would have been required to pay farmers in such other state. § 258-m (1) (a).

11. Report of the New York Milk Control Board (1934) 3-4.

12. Thus, for instance, dealers selling Grade B milk to consumers were required to charge a minimum of 12 cents a quart in specified "upstate" counties, townships, and cities; 11 cents in certain counties, cities, and villages; and 10 cents in other designated cities and villages and in all areas within a radius of three miles of such cities and villages. Division of Milk Control, Official Order No. 103, May 6, 1936. At the same time, the minimum price required to be charged for such milk in the metropolitan area, made up of New York City and four adjacent counties, was 13 cents. Division of Milk Control, Official Order No. 106, May 6, 1936. A further variation in price existed since dealers in New York City handling unadvertised brands of milk could sell to stores at one cent below the established minimum price. See note 8 *supra*. The constitutionality of this differential was upheld in a five to four decision on the ground that "the discrimination embodied in the law is but a perpetuation of a classification created and existing by the action of the dealers" themselves before the passage of the milk control law. *Borden's Farm Products Co. v. Ten Eyck*, 297 U. S. 251 (1936), (1936) 84 U. OF PA. L. REV. 786. See note 60 *infra*.

13. The utilization of classified price plan was adopted, after considerable discussion, as the method for computing prices to be paid by dealers to farmers. Report of the Milk Control Board (1934) 4. Nine different classes were set up, the prices to be paid by dealers for milk used in the various classes ranging, at the time the first orders were issued, from approximately 1½ to 4 cents per quart.

14. 291 U. S. 502 (1934). The case has been widely discussed. See *e.g.*, Hale, *The Constitution and the Price System: Some Reflections on Nebbia v. New York* (1934) 34 COL. L. REV. 401; Horack and Cohen, *After the Nebbia Case: the Administration of Price Regulation* (1934) 8 U. OF CIN. L. REV. 219.

15. 293 U. S. 163 (1934), (1934) 34 COL. L. REV. 1551, (1934) 33 MICH. L. REV. 961. Prices set in prior-made contracts were held superseded by the prices fixed by the commissioner. *Knoeller v. Karsten*, 157 Misc. 130, 283 N. Y. Supp. 58 (N. Y. City Ct. 1935).

quired all dealers to secure licenses,<sup>16</sup> and vested the commissioner with power to grant, suspend, or revoke licenses in accordance with specified standards,<sup>17</sup> any such action being subject to review by *certiorari*.<sup>18</sup> The Commissioner might also bring an action to enjoin violations of his orders without alleging or proving that there was an adequate remedy at law.<sup>19</sup> Provision was made for detecting violations by setting up an inspection force and by empowering milk administration employees to inspect the books of dealers,<sup>20</sup> besides requiring dealers to keep records<sup>21</sup> and submit reports.<sup>22</sup>

That there was widespread disregard of the price-fixing provisions is not surprising since farmers could not be expected to resist the persuasion or threats of powerful distributors and since retailers were eager to purchase milk at less than the prescribed prices. The milk administration was faced with a difficult task in ferreting out violations and in exerting sanctions once transgressions were discovered. The farmers and retailers were of little aid in unearthing violations, for the former hesitated to incur the displeasure of a powerful dealer and the latter were hardly willing to discard a competitive advantage. Detection was made more difficult by the varied and devious methods used by dealers to camouflage price-cutting.<sup>23</sup> Thus they often "leased" their country receiving plants at exorbitant rentals to farmers, or to company cooperatives formed under dealer auspices.<sup>24</sup> And cooperatives sometimes covered up secret rebates to dealers by entering "management" expenses on their books. The books of one cooperative, for instance, revealed that during one month it had rebated \$23,507.98 to the dealer and had distributed \$34,761.09 among the farmers.<sup>25</sup> As a result of this manipulation, the producers actually received less than 3 cents a quart instead of the nearly 5 cents to which they were entitled. Under another device used commonly, a dealer would buy through a broker instead of following the usual

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16. For administrative reasons, however, it was provided that the Commissioner might exempt from the license requirements dealers "who purchase or handle milk in a total quantity not exceeding three thousand pounds in any month, and/or milk dealers selling milk in any quantity in markets of one thousand population or less." § 257. The license fees for milk dealers ranged from \$25 to \$5,000 a year depending upon the average amount of milk the dealer handled daily. § 258-a.

17. § 258-c.

18. § 258-d.

19. § 258-e, *Baldwin v. Burdick*, 243 App. Div. 250, 276 N. Y. Supp. 675 (3d Dep't 1935). Violations of the milk control statute or of the Commissioner's orders issued thereunder could be prosecuted as misdemeanors. *Nebbia v. New York*, 291 U. S. 502 (1934); *People v. Bratowsky*, 154 Misc. 432, 276 N. Y. Supp. 418 (N. Y. City Magistrates' Ct. 1934).

20. § 256. See note 54, *infra*.

21. § 258-f.

22. § 258-g.

23. Report of the Division of Milk Control (1937) 6.

24. Report of the Milk Control Board (1934) 13-14.

25. Report of the Division of Milk Control (1937) 9-10.

procedure of purchasing directly from farmers. The broker would deduct large fees from the farmers' checks in return for his generally nominal services, returning the bulk of such "fees" to the dealer.<sup>26</sup> This scheme was also often employed to break down resale prices, for the rebates received by the broker were then distributed to customers of the dealer who had previously paid the price set by the milk administration,<sup>27</sup> and the dealer's books thus indicated that he had paid for and sold milk at the established prices. And other less subtle methods of giving rebates to retailers, ranging from the supplying of free ice to the insertion of fictitious names on the payrolls of distributors, were widely utilized.

Even when the milk administration was able to discover violations, enforcement was severely hampered by dilatory court procedure. The initial requirement that all milk dealers should be licensed, it is true, was enforced without much difficulty,<sup>28</sup> especially after courts refused to give unlicensed dealers any contractual remedies.<sup>29</sup> And while the mere threat of an investigation was occasionally sufficient to bring recalcitrant dealers into line,<sup>30</sup> more generally dealers violated price fixing orders with impunity, knowing that the Commissioner would find it difficult to secure an injunction against such violation within a reasonable time,<sup>31</sup> and that an attempt by the Commissioner to revoke or suspend a license<sup>32</sup> or to condition its continuance upon the performance of certain acts<sup>33</sup> could be effectively blocked by stays

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26. N. Y. Times, Jan. 10, 1937, § 2, p. 1, col. 4. An attempt to secure control over the activities of brokers was made at the recent session of the Legislature by the passage of a bill which has been signed by Governor Lehman, requiring such brokers to be licensed annually at a fee of \$25. N. Y. Times, May 21, 1937, p. 2, col. 4.

27. Report of the Division of Milk Control (1935) 93-94.

28. *Baldwin v. Lenahan*, 293 N. Y. Supp. 742 (Sup. Ct. 1935). Report of the Milk Control Board (1934) 24; Report of Division of Milk Control (1935) 124-126.

29. *Rosasco Creameries, Inc. v. Cohen*, 249 App. Div. 193, 292 N. Y. Supp. 1, 249 App. Div. 228, 292 N. Y. Supp. 9 (1st Dep't 1936).

30. Report of the Division of Milk Control (1937) 19.

31. Report of the Milk Control Board (1934) 8.

32. For cases in which licenses have been revoked, see *Hegeman Farms Corp. v. Baldwin*, 293 U. S. 163 (1934); *Eisenberg Farms, Inc. v. Baldwin*, 265 N. Y. 662, 193 N. E. 434 (1934), *aff'g*, 242 App. Div. 748, 274 N. Y. Supp. 1003 (3d Dep't 1934); *Matter of Karsten Dairies, Inc.*, 243 App. Div. 656, 276 N. Y. Supp. 659 (3d Dep't 1935); *Linden Farms Milk & Cream Co. v. Ten Eyck*, 246 App. Div. 869, 284 N. Y. Supp. 721 (3d Dep't 1936); Report of the Milk Control Board (1934) p. 24. Before the courts will affirm an order of the Commissioner revoking a license they must be satisfied that the alleged offender has been given a full and fair hearing. *Coney Island Dairy Products Corp. v. Baldwin*, 243 App. Div. 178, 276 N. Y. Supp. 682 (3d Dep't 1935); *Beyerdale Dairy, Inc. v. Ten Eyck*, 292 N. Y. Supp. 580 (3d Dep't 1937).

33. Report of the Division of Milk Control (1936) 118. Courts have indicated in several cases that, in their opinion, the commissioner has utilized his power in regard to the conditioning of licenses in such a way as to usurp the functions of the courts.

—frequently granted by the courts—pending the final determination of *certiorari* proceedings.<sup>34</sup> Thus, dealers whose licenses had been revoked as far back as 1933 were still operating in March, 1937,<sup>35</sup> and they frequently continued the practices which had led to the revocation of their licenses.<sup>36</sup>

Perhaps the severest blow to effectuation of the price-fixing provisions was the decision of the Supreme Court in *Baldwin v. Seelig*<sup>37</sup> that New York could not constitutionally prevent a milk dealer, who had purchased milk outside the state at a price lower than that he would have been required to pay New York producers, from bringing that milk into the state and selling it either in the original containers or in bottled form. Not only did this decision greatly accelerate the importation of out-of-state milk,<sup>38</sup> but it also gave dealers another powerful weapon to be used in persuading New York State farmers to sell milk at a price lower than the established minimum.<sup>39</sup> To meet the situation caused by this decision, the Commissioner of Agriculture and Markets instituted conferences with authorities of other states in the New York milkshed and of the United States in order to secure uniform milk control by means of interstate or federal compacts.<sup>40</sup> Lengthy negotiations aimed at an interstate compact or a federal marketing agreement under the A.A.A. for the New York market proved unavailing because

Matter of Grandview Dairy, Inc. v. Baldwin, 239 App. Div. 640, 269 N. Y. Supp. 116 (3d Dep't 1934); Royce v. Rosasco, 159 Misc. 236, 287 N. Y. Supp. 692 (Sup. Ct. 1936).

34. The courts refused to grant injunctions against the milk administration, however, and required compliance with the statutory provision that review of the commissioner's orders should be by *certiorari*. Dairy Sealed v. Ten Eyck, 248 App. Div. 352, 289 N. Y. Supp. 85 (1st Dep't 1936), *rev'g*, 159 Misc. 716, 288 N. Y. Supp. 641, (Sup. Ct. 1936); Co-operative Dairywomen of Frazer v. Ten Eyck, 158 Misc. 726, 286 N. Y. Supp. 351 (Sup. Ct. 1936); *cf.* Matter of Ideal Farms, Inc. v. Baldwin, 149 Misc. 902, 269 N. Y. Supp. 467 (Sup. Ct. 1933) (application by milk dealer for prohibition order denied). As a practical matter, stay orders had the same effect as injunctions.

35. Report of the Joint Legislative Committee to Investigate the Milk Control Law (1937) N. Y. LEGIS. DOC. No. 81, p. 16.

36. See statement by H. A. Cronk, president of the Borden's Farm Products division of the Borden Company, N. Y. Times, Jan. 10, 1937, § 2, p. 1, col. 4.

37. 294 U. S. 511 (1935).

38. Report of The Joint Legislative Committee to Investigate the Milk Control Law (1937) N. Y. LEG. DOC. No. 81, p. 15, where it is stated that following the *Seelig* decision "the importation of milk into the metropolitan area produced in other states or produced and shipped through another state to give it the status of interstate milk increased tremendously and came into this valuable market like an avalanche, crowding out the intrastate milk governed by control board prices. It has reached such great proportions today that at least 40 per cent of the fluid milk consumed in the metropolitan area is interstate milk and is not governed by the Milk Control Board." See Report of the Federal Trade Commission on the Sale and Distribution of Milk and Milk Products (1937) 75th Cong., 1st Sess., H. R. Doc. No. 95, p. 101.

39. Report of The Division of Milk Control (1936) 101.

40. The milk control statute empowered the commissioner to take such action. N. Y. AGR. & MKTS. LAW § 258-p.

of the opposition of large distributors.<sup>41</sup> Even if the federal government had undertaken the task of regulating the New York market, however, it is doubtful if such control would have been sustained,<sup>42</sup> for the lower federal courts have almost uniformly invalidated control of the milk business by the A.A.A. in other localities either as a regulation of intrastate commerce<sup>43</sup> or, where the milk shipments are clearly in interstate commerce, as an attempt to control the production of milk.<sup>44</sup>

The difficulty of detecting violations and of securing speedy enforcement and the inability to control out-of-state milk purchased at lower prices than those set by the Commissioner combined to render the price-fixing provisions almost nugatory. Dealers did not pay farmers established prices, and practically every retailer in New York City purchased milk at less than the prices fixed.<sup>45</sup> The only regulations reasonably well complied with were those setting prices to be charged consumers. The operation of price fixing was thus generally unsatisfactory. The price of milk to consumers increased considerably,<sup>46</sup> while prices paid farmers rose more slowly than the general

41. Statement by Peter G. Ten Eyck, Commissioner of Agriculture and Markets, N. Y. Herald-Tribune, Mar. 5, 1937, p. 5, col. 4.

42. See generally as to federal milk regulation, BLACK, *THE DAIRY INDUSTRY AND THE AAA* (1935); NOURSE, *MARKETING AGREEMENTS UNDER THE AAA* (1935) 196-230; Duane, *Marketing Agreements Under the A. A. A.: Their Contents and Constitutionality* (1933) 82 U. OF PA. L. REV. 91; Comments (1934) 34 COL. L. REV. 1336, (1936) 46 YALE L. J. 130.

43. *Berdie v. Kurtz*, 75 F. (2d) 898 (C. C. A. 9th, 1935); *Darger v. Hill*, 76 F. (2d) 198 (C. C. A. 9th, 1935); *United States v. Greenwood Dairy Farms*, 8 F. Supp. 398 (S. D. Ind. 1934); *Douglas v. Wallace*, 8 F. Supp. 379 (W. D. Okla. 1934); *United States v. Neuendorf*, 8 F. Supp. 403 (S. D. Iowa 1934); *Royal Farms Dairy v. Wallace*, 8 F. Supp. 975 (D. Md. 1934); *Allen v. Wallace*, 12 F. Supp. 515 (N. D. Okla. 1935). *Contra*: *United States v. Shissler*, 7 F. Supp. 123 (N. D. Ill. 1934), in which Judge Holly stated that "there is no escaping the finding of the Secretary set forth in the license that the intrastate and interstate transactions are so inextricably intermingled that interstate commerce in fluid milk in the Chicago Sales area cannot be effectively regulated without regulating that portion which is intrastate."

44. *Edgewater Dairy Co. v. Wallace*, 7 F. Supp. 121 (N. D. Ill. 1934); *Columbus Milk Producers' Co-operative Association v. Wallace*, 8 F. Supp. 1014 (N. D. Ill. 1934); *United States v. Seven Oaks Dairy Co.*, 10 F. Supp. 995 (D. Mass. 1935); *Ganley v. Wallace*, 17 F. Supp. 115 (D. C. 1936). The courts have split on the question as to whether or not the decision of the Supreme Court in *United States v. Butler*, 297 U. S. 1 (1936), invalidated the marketing provisions of the Agricultural Adjustment Act. *United States v. Edwards*, 14 F. Supp. 384 (S. D. Cal. 1936) (valid). *Contra*: *United States v. Buttrick*, 15 F. Supp. 655 (D. Mass. 1936). The problem is thoroughly discussed in Comment (1936) 46 YALE L. J. 130. To correct this situation a bill to reenact the marketing provisions of the Agricultural Adjustment Act was introduced in the current session of Congress. 75th Cong., 1st Sess., H. R. 5722. The bill has been passed by the House. N. Y. Times, Apr. 20, 1937, p. 17, col. 4.

45. See note 35, *supra*.

46. Report of the Division of Milk Control (1937) 24; *cf.* N. Y. Times, Feb. 26, 1937, p. 2, col. 5, Feb. 27, 1937, p. 26, col. 4.

price level<sup>47</sup> and remained below the cost of production.<sup>48</sup> Moreover, New York state farmers lost some of their fluid milk market since dealers found it to their advantage to buy more of their fluid milk supplies outside the state. The large distributors, however, continued to make large profits while price fixing orders were in effect,<sup>49</sup> although they were hampered somewhat by the one cent price differential allowed in favor of unadvertised brands. Since the majority of the producers, the large distributors, and consumers were not in favor of price fixing,<sup>50</sup> the provisions of the New York Milk Control Law in regard thereto were allowed to lapse on March 31, 1937.<sup>51</sup>

The Milk Control Law made other provision, besides fixing prices, for obtaining its ends of securing to farmers a more adequate return for their product and of stabilizing the marketing and distribution structure. Several provisions were designed to insure to the farmer treatment that he could not obtain because of his weak bargaining position. Thus, a partial check upon dealers in their payments to farmers was provided by requiring dealers to file monthly reports of their purchases and sales of milk and the prices at which the milk was bought and sold.<sup>52</sup> When these reports revealed that farmers had been underpaid, action was taken to secure adjustments.<sup>53</sup> Since the more astute milk dealers would undoubtedly submit flawless reports, the milk administration also undertook, despite strenuous opposition, the task of auditing the books and records of many dealers.<sup>54</sup> In addition, dealers

47. Report of the Joint Legislative Committee to Investigate the Milk Control Law (1937) N. Y. LEG. DOC. No. 81, pp. 13-14. A study of prices received by farmers supplying milk to a number of markets in the United States revealed that prices paid to farmers in the New York market had recovered least of all. Spencer, *The Milk Situation in New York* (1937) N. Y. State Coll. of Agr. Bull. 365, pp. 15-16.

48. Report of the Division of Milk Control (1935) 96. For a valuable collection of data as to cost of production of milk, see Martin, *The Public Utility Aspects of the Production and Distribution of Fluid Milk* (Unpublished thesis in the Yale University Library, 1934) 17-27.

49. N. Y. Times, March 9, 1937, p. 42, col. 1, Mar. 12, 1937, p. 42, col. 1, Apr. 22, 1937, p. 37, col. 1.

50. Report of the Joint Legislative Committee to Investigate the Milk Control Law (1937) N. Y. LEG. DOC. No. 81, p. 19.

51. The immediate effect of the withdrawal of price fixing has been a sharp drop in the cost of milk to the consumer. N. Y. Times, Apr. 1, 1937, p. 1, col. 4, Apr. 2, 1937, p. 1, col. 7, Apr. 6, 1937, p. 25, col. 6, Apr. 20, 1937, p. 3, col. 5; Dairymen's League News, May 11, 1937, p. 1, col. 1.

52. Cf. *Eisenberg Farms, Inc. v. Baldwin*, 265 N. Y. 662, 193 N. E. 434 (1934), *aff'g*, 242 App. Div. 748, 274 N. Y. Supp. 1003 (3d Dep't 1934).

53. Between the passage of the milk control law and the close of 1936, 953 dealers who had been underpaying producers were compelled by the milk administration to pay nearly \$300,000 to 27,481 farmers. Report of the Division of Milk Control (1937) 20. Other cases involving large sums of money were pending in court. *Ibid.*

54. Although § 256 of the milk control statute clearly conferred upon the milk administration the power to make such audits, the Borden Company, for example, re-

were generally required to file bonds with the Commissioner to guarantee payment to farmers.<sup>55</sup>

The statute also provided for the equalization of returns to farmers when all producers and dealers in the New York milkshed were brought into a plan.<sup>56</sup> The object of this provision was to alleviate the evils of a pricing mechanism that had enabled dealers to capitalize on the ever-present milk surplus to drive down prices paid to farmers. The price paid for milk varies according to its ultimate use, higher prices being paid for milk destined for consumption in fluid form and lower prices for milk eventually converted into milk products, such as butter, cheese and evaporated milk. And since only from 40 to 60 per cent of New York State milk is sold for fluid use,<sup>57</sup> farmers must secure a share of the fluid milk market to have any chance of meeting the high costs of producing milk in New York State, for milk used for manufacturing purposes sometimes sells at no more than 1½ cents a quart. There has been no arrangement generally employed in New York whereby the fluid market is divided equitably among the farmers, the large distributors having seen to it that no one cooperative has attained sufficient size to perform this function adequately.<sup>58</sup> The attempt made by the Milk Control Law to equalize returns was rendered impotent because the central control required by the statute could not be set up for the New York milkshed.

Various other provisions were designed to assist in stabilizing the market structure by preventing the further addition of distribution facilities to an already overburdened distribution system. The statute forbade the Commissioner to issue new licenses unless he was "satisfied that the applicant is qualified by character, experience, financial responsibility and equipment to properly conduct the proposed business, that the issuance of the license will not tend to a destructive competition in a market already adequately served,

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fused to open its records to the milk administration. *N. Y. Times*, Jan. 20, 1937, p. 23, col. 1, Feb. 20, 1937, p. 3, col. 5. The legislature thereupon enacted a law providing for the compulsory auditing of the books of dealers and cooperatives. *N. Y. Times*, May 21, 1937, p. 2, col. 4. Since the bill carries an appropriation of only \$50,000, its effectiveness is doubtful since each of the three larger distributors in New York City pay approximately \$25,000 for an audit of their books. Report of the Milk Control Board (1934) 6.

55. § 258-b. See *Andes Co-operative Dairy Co. v. Baldwin*, 238 App. Div. 726, 266 N. Y. Supp. 18 (3d Dep't 1933) *aff'd*, 263 N. Y. 578, 189 N. E. 705 (1933); *Ten Eyck v. Columbia Casualty Co.*, 246 App. Div. 867, 284 N. Y. Supp. 691 (3d Dep't 1936); *Baldwin v. Hegeman Farms Corp.*, 154 Misc. 285, 277 N. Y. Supp. 705 (Sup. Ct. 1934). As to the constitutionality of bonding statutes in general, see *Legis. (1936) 21 Conn. L. Q.* 366.

56. § 258-o.

57. Report of the Division of Milk Control (1935) 92-93.

58. Report of the Joint Legislative Committee to Investigate the Milk Industry (1933) N. Y. LEG. Doc. No. 114, pp. 151-155.

and that the issuance of the license is in the public interest."<sup>59</sup> The Commissioner was further empowered to designate the place or places where the dealer could receive milk from farmers as well as to restrict dealers to certain types of milk business and to the sale of milk in specified geographical areas.<sup>60</sup> Under these provisions, many persons have been denied entrance to the milk business, or else admitted on a limited basis, but none of the existing duplication has been eliminated.<sup>61</sup>

The New York Milk Control Law thus failed to achieve either its aim of improving the economic position of the farmer<sup>62</sup> or of recasting the market structure. The essential theory of the Milk Control Law, only partially carried out, was that the milk industry should be regulated as a public utility, with prices fixed and entry into the business limited. The inability of the state to control out-of-state milk, however, severely limited the effectiveness of the price-fixing provisions. This defect may be remedied in various ways: health inspection requirements might be used to curb the inflow of out-of-state milk to some extent.<sup>63</sup> State control might more readily be effectuated by the passage of a federal statute making it unlawful to bring milk into any state in violation of state laws,<sup>64</sup> but since the dairy industry has grown beyond the confines of any state, it might be more advisable, until effective federal control can be secured, to adopt a system similar to that in force in Indiana where certain markets are controlled jointly by the federal government and by the Indiana Milk Control Board.<sup>65</sup>

The problems of the milk business, however, will not be solved even if price fixing works out effectively and brings about a much needed increase

59. § 258-c. The Court of Appeals appears to be favorably inclined towards this provision. *Elite Dairy Products v. Ten Eyck*, 271 N. Y. 488, 3 N. E. (2d) 606 (1936).

60. § 258. *Crowley's Milk Co. v. Ten Eyck*, 270 N. Y. 328, 1 N. E. (2d) 119 (1936), *aff'g*, 246 App. Div. 654, 283 N. Y. Supp. 166 (3d Dep't 1935). Section 258-q of the statute, denying to dealers who entered the milk business after April 10, 1933, and who did not have a well-advertised trade name, the right to sell milk to stores at one cent per quart below the established minimum price also tended to keep down the number of dealers. The Supreme Court, however, declared this provision to be invalid under the 14th Amendment in *Mayflower Farms, Inc. v. Ten Eyck*, 297 U. S. 266 (1936).

61. Report of the Division of Milk Control (1935) 110.

62. In fact, the past four years of milk regulation in New York state may have substantially decreased the bargaining power which cooperatives formerly possessed. See *Dairymen's League News*, Apr. 20, 1937, p. 4, col. 2.

63. The policy followed by health authorities of New York City and New York State in regard to the inspection of out-of-state farms is described in Report of the Joint Legislative Committee to Investigate the Milk Industry (1933) N. Y. LEG. DOC. No. 114, p. 34.

64. See Corwin, *National-State Cooperation—Its Present Possibilities* (1937) 46 *YALE L. J.* 599, 610-615.

65. Communication to the *YALE LAW JOURNAL* from C. W. Humrickhouse, Executive Secretary, Indiana Milk Control Board, April 22, 1937. Because of the conflicting interests of the various states and the opposition of large distributors, the possibility of securing interstate compacts appears remote.

in producer prices.<sup>66</sup> For the objects of milk regulation should be not only to secure an adequate return for farmers but also, if possible, to lower the price of milk to consumers. This might be accomplished by the application of a second principle of public utility regulation, the elimination of wasteful competition.<sup>67</sup> Costly and unnecessary duplication exists at every stage of milk distribution—in country receiving stations, transportation, pasteurizing and bottling plants, and wholesale and retail facilities.<sup>68</sup> Thus, dealers in Philadelphia were able by means of larger retail loads and heavier block distribution to sell milk at approximately two cents per quart less than in New York City.<sup>69</sup> And if prices to consumers were materially decreased, consumption of milk, now well below the minimum deemed sufficient by medical authorities for an adequate diet, might increase to such an extent that there would be a shortage rather than a surplus of milk.<sup>70</sup> While powerful farmer and consumer cooperatives might be able to increase distribution efficiency,<sup>71</sup> no thoroughgoing changes can be expected without government

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66. The Rogers-Allen Bill, recently enacted in New York State after considerable controversy [N. Y. Times, May 20, 1937, p. 2, col. 2] will not bring about any fundamental improvements in milk marketing save in so far as it may tend to strengthen farmer cooperatives. This new law, which adds four sections to the N. Y. AGR. & MKTS. LAW, permits cooperatives in the various "production areas" of the state to form producers' bargaining agencies to negotiate with distributors' bargaining agencies concerning prices to be paid to farmers for their milk [§ 258-1 (a)], and, subject to the approval of the Commissioner of Agriculture and Markets, may enter into marketing agreements with distributors' bargaining agencies [§ 258-1 (b)]. The price fixing and other provisions of such marketing agreements may be made effective as to the entire production area by an order of the Commissioner [§ 258-m(5)]. And even though no marketing agreement has been made, the commissioner, upon the petition of and approval by certain designated percentages of producers, may fix prices to be paid to producers in the particular production area. § 258-m (1).

67. For discussions of public utility regulation see BLACK, *op. cit. supra* note 42, at 255-7; Martin, *supra* note 48, at 162-178; Report of the Mayor's Committee on Milk (N. Y. City, 1917) 85; Report of the Milk Inquiry Commission (British Columbia, 1929) 105-112; Manley, *Constitutionality of Regulating Milk as a Public Utility* (1933) 18 CORN. L. Q. 410. At the present session of the New York Legislature, careful consideration was given to a Bill that declared the milk business to be a public utility, placed it under the jurisdiction of the public service commission, and subjected it to the usual public utility regulations. The McCall Bill, Senate Introductory No. 1657, Print No. 1959 (1937).

68. CHASE, *THE TRAGEDY OF WASTE* (1926) 224-225; Martin, *supra* note 48, at 102-120.

69. Report of the Mayor's Committee on Milk (N. Y. City, 1917) 81.

70. See Martin, *supra* note 48, at 61-93.

71. See Report on the More Economic Distribution and Delivery of Milk in the City of Chicago (Chicago City Council, 1917) Municipal Reference Bull. No. 8, p. 12, where examples of milk distribution by farmer cooperatives are given and it is stated: "After all is said, the final adequate solution of milk distribution will come only through municipal delivery or the organization of producing distributors. A cooperative