

# SOLVING CALIFORNIA'S MILK CRISIS

## INTRODUCTION

In California, a battle rages over the retail price of milk. Two coalitions have dominated the public discourse, struggling to advance hidden economic interests under the guise of consumer protection. Several organizations, some with apparent good intentions, have aligned themselves with either of the two causes. At stake in this conflict are billions of dollars and the good health of millions of Californians. Consumers will have a role to play in solving this dilemma, but ultimately, the answer must come from California's legislature.

This comment will discuss the problem with California's retail milk prices, explore the controversy surrounding the issue, and review past attempts at solving the problem. Additionally, it will propose consumer action and legislation that might succeed where prior measures have failed.

## I. THE PROBLEM

Milk production is a huge industry in California and the United States.<sup>1</sup> Retail sales of fluid drinking milk in the United States account for about nineteen billion dollars annually.<sup>2</sup> California produces more milk than any other state<sup>3</sup> and more milk than Canada, Australia, or New Zealand.<sup>4</sup> The production of milk and cream in California is a \$3.7 billion industry.<sup>5</sup>

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<sup>1</sup> See Peter M. Rooney, Testimony Before the Resource Conservation Research and Forestry Subcommittee, House Agriculture Committee (May 13, 1998); RESOURCES, COMMUNITY, AND ECON. DEV. DIV., U.S. GEN. ACCOUNTING OFFICE, INFORMATION ON PRICES FOR FLUID MILK AND THE FACTORS THAT INFLUENCE THEM 1 (1998) [hereinafter INFORMATION ON PRICES].

<sup>2</sup> See Information on Prices, *supra* note 1.

<sup>3</sup> See *The Facts About California's Dairy Industry* (visited July 29, 1999) <<http://madaboutmilk.org/econ.htm>>.

<sup>4</sup> See Daniel A. Sumner & Christopher A. Wolf, *Quotas Without Supply Control: Effects of Dairy Quota Policy*, 78 CAL. AM. J. AGRIC. ECON. 354 (May 1996).

<sup>5</sup> See Rooney, *supra* note 1.

Milk is expensive in California.<sup>6</sup> Even though California's dairy industry has been very successful in exporting its products,<sup>7</sup> California's retail milk prices are "among the highest in the nation" and are out of line with prices in neighboring states.<sup>8</sup> Between January 1 and June 27, 1998, California supermarkets charged the highest average price for whole milk and one percent low-fat milk in the United States, exceeding the national average price by forty-six cents per gallon and seventy-nine cents per gallon, respectively.<sup>9</sup> One recent example of the disparity in prices found in California and adjacent states appeared in San Diego where consumers who bought one gallon of reduced-fat milk between January 1997 and February 1998 paid an average of ninety-four cents more than consumers paid 359 miles<sup>10</sup> away in Phoenix, Arizona.<sup>11</sup> During the same period, consumers who shopped in California's supermarkets paid an average of sixty-five cents per gallon more than the national average for one percent low fat milk.<sup>12</sup>

The high retail price of milk in California has led to a decrease in milk consumption in some segments of the state's population, exacting a terrible toll on the health of California's most vulnerable citizens.<sup>13</sup> When the retail price of milk is high, many of California's children do not drink enough milk and do not receive enough calcium in their diets.<sup>14</sup> This renders them vulnerable to increased health risks, including the risk of developing osteoporosis as adults.<sup>15</sup>

The high retail price of milk may prevent children and the poor from drinking enough milk and getting the nutrients that their bodies

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<sup>6</sup> See *White Liquid Gold: Bay Area Supermarkets Charge Too Much for Milk* (visited July 29, 1999) <<http://www.consunion.org/other/sfrptwc299.htm>> [hereinafter *White Liquid Gold*].

<sup>7</sup> See Robert Rodriguez, *Dairy Co-Op Merger Explored*, FRESNO BEE, Jan. 21, 1999, at C1 (reporting "California's dairy product exports totaled \$212 million in 1997").

<sup>8</sup> *White Liquid Gold*, *supra* note 6.

<sup>9</sup> See *Fatten Up Your Wallet if You're Buying Low-Fat Milk* (visited July 29, 1999) <<http://madaboutmilk.org/lowfat.htm>>.

<sup>10</sup> See Road Atlas A8 (Rand McNally 1998).

<sup>11</sup> See INFORMATION ON PRICES, *supra* note 1, at 149, 161.

<sup>12</sup> *Id.*

<sup>13</sup> See *The Land of Milk and Money: San Francisco Bay Area Retailers Charge Too Much for Milk* (visited July 29, 1999) <<http://www.consunion.org/other/sfmilkrtwc598.htm>> [hereinafter *The Land of Milk and Money*].

<sup>14</sup> See *Mad About Milk Facts* (visited July 29, 1999) <<http://www.madaboutmilk.org/key-pts.htm>>.

<sup>15</sup> See *Osteoporosis: The Silent Bone Thinner* (visited July 29, 1999) <<http://www.nih.gov/niha/health/pubpub/osteo.htm>>.

need.<sup>16</sup> One striking example appears at the Visitacion Valley Community Center where increases in milk prices have forced the director of the day-care center to decrease the portion of milk that each child receives and to stop serving other food.<sup>17</sup>

The impact of high prices is most evident in large supermarkets where the disparity in price is greatest.<sup>18</sup> Prices in California's large supermarkets are significantly higher than prices offered in smaller stores.<sup>19</sup> Ironically, many of California's poorest consumers purchase the most expensive milk because the supermarket chains generally accept food stamps and Women, Infant, and Children (WIC) coupons while many other stores do not.<sup>20</sup> Every one cent increase in the retail price of milk in California costs WIC \$39,577.<sup>21</sup> As a result of the high retail price of milk found in large supermarkets, WIC has been forced to drop clients, leaving 25,000 of California's poorest women, infants, and children unable to buy milk.<sup>22</sup>

Unfortunately, lower milk consumption may lead to calcium deficiency. The National Institute of Child Health and Human Development and the 1994 Consensus Conference on Optimal Calcium Intake named milk as the best source of calcium because of its wide availability and its high calcium content which can be easily absorbed.<sup>23</sup> Therefore, when the high retail price prevents California's children from getting enough milk, their bodies are deprived of the best source of calcium.

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<sup>16</sup> See *The Land of Milk and Money*, *supra* note 13.

<sup>17</sup> See Michael Gardner, *State Senator Wants to Take the Bite Out of Milk Prices*, COPLEYS NEWS SERVICE, Feb. 16, 1999, available at LEXIS, News Library, News Group File.

<sup>18</sup> An informal survey conducted between Jan. 6, 1999 and Jan. 8, 1999, by Consumers Union showed that supermarket chains in San Francisco, California charged between \$.86 and \$1.36 more per gallon than smaller stores. The results of this survey are detailed in *White Liquid Gold*, *supra* note 6. One major supermarket chain, Cala Foods, charged \$4.23 for one gallon of whole milk while a smaller store, less than one block away, charged \$2.99.

<sup>19</sup> See *White Liquid Gold*, *supra* note 6.

<sup>20</sup> See *The Land of Milk and Money*, *supra* note 13.

<sup>21</sup> See Gardner, *supra* note 17.

<sup>22</sup> *Id.*

<sup>23</sup> See Secretary Shalala Announces Partnership to Increase Teen Calcium Consumption (visited July 29, 1999) <<http://www.nih.gov/nichd/docs/news/MILKPR.HTM>>; see also *Why Milk Matters: Questions and Answers for Professionals* (visited July 29, 1999) <[http://www.nih.gov/nichd/docs/MILK/why\\_milk\\_matters.htm](http://www.nih.gov/nichd/docs/MILK/why_milk_matters.htm)>.

Because the high retail price of milk prevents many Californians from getting enough calcium, they suffer a greater risk as adults of developing osteoporosis, a disease that thins and weakens bones, making them brittle and subject to fracture.<sup>24</sup> A diet low in calcium is one of the known causes of osteoporosis.<sup>25</sup> Osteoporosis can be prevented with regular exercise and “[a] diet rich in calcium and vitamin D.”<sup>26</sup> However, only 14.4% of those who face the greatest risk of osteoporosis get enough calcium.<sup>27</sup> As a result of the high retail price of milk, California’s children drink less milk, do not get enough calcium, and suffer a higher risk of developing osteoporosis.

The price of milk is influenced at every level of the marketing chain by a complex interaction of supply and demand factors.<sup>28</sup> Supply is determined by the cost of production, processing, and marketing; state and federal policies; competition; the relative market power of the entities involved; and the price of milk.<sup>29</sup> Demand is determined by the size, age, and income levels of the population, as well as the prices of milk and milk substitutes.<sup>30</sup> Retail prices are also influenced by pricing strategies employed by individual retailers.<sup>31</sup>

When California’s dairy industry was in its infancy, wild fluctuations in the price of milk threatened the reliable supply of milk.<sup>32</sup> Since the 1930s, California law has protected the dairy industry from price fluctuations.<sup>33</sup> These protections currently come in the form of a state milk marketing order, classified pricing, pooling, and quotas.<sup>34</sup> Federal law also protects California’s dairy industry with federal price supports and barriers to foreign imports.<sup>35</sup>

Now that California’s dairy industry is the largest in the nation,<sup>36</sup> some have called for counter measures to the laws that nurtured the

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<sup>24</sup> See *Osteoporosis: The Silent Bone Thinner*, *supra* note 15.

<sup>25</sup> See *id.*

<sup>26</sup> *Id.*

<sup>27</sup> See *A Worsening Calcium Crisis!* (visited July 29, 1999) <<http://www.californiamilk.com/nt-awcc.html>>.

<sup>28</sup> See Information on Prices, *supra* note 1, at 2.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> See *SB 1284 Senate Bill - Bill Analysis* (visited Dec. 18, 2000) <[http://info.sen.ca.gov/pub/99-00/bill/sen/sb\\_1251-1300/sb\\_1284\\_cfa\\_19990525\\_164002\\_sen\\_comm.html](http://info.sen.ca.gov/pub/99-00/bill/sen/sb_1251-1300/sb_1284_cfa_19990525_164002_sen_comm.html)> [hereinafter *SB 1284 Analysis*].

<sup>33</sup> See Sumner & Wolf, *supra* note 4.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> See *The Facts About California’s Dairy Industry*, *supra* note 3.

fledgling industry. Two groups which claim to represent California's consumers have become embroiled in a battle over the price of milk in California. One of the groups contends that California law stifles competition and places the state's consumers at a disadvantage.<sup>37</sup> While these groups claim to protect consumers, they appear to be conducting a turf war over California's enormous dairy market.<sup>38</sup>

## II. MAD ABOUT MILK<sup>39</sup>

Mad About Milk, which describes itself as an "alliance of consumer, senior, taxpayer and civic organizations working to end state barriers to cheaper milk and consumer choice,"<sup>40</sup> has been trying to open California's market to more competition from out-of-state dairy processors.<sup>41</sup> Among other things, the group supports an end to California's prohibition against selling milk below cost.<sup>42</sup> More significantly, Mad About Milk argues that the laws which establish California's current definition of milk stand as a barrier to interstate competition and cause California's retail milk prices to remain higher than prices in other states.<sup>43</sup> The group has gained a great deal of support from a wide array of legitimate public interest and political groups.<sup>44</sup> Most notably, the group has garnered support from California Advocates for Nursing Home Reform, Center for Public Interest Law, Congress of California Seniors, and the Libertarian Party of California.<sup>45</sup> Mad About Milk also claims the support of nearly twenty California cities.<sup>46</sup> After the group asked for support from the City of Los

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<sup>37</sup> See *Mad About Milk News Releases* (visited July 29, 1999) <<http://www.madaboutmilk.org/release.htm>>.

<sup>38</sup> See Steve Scott, *Milk Bills Emerge as Year's Major Turf War*, STATE NET CAPITOL J., Mar. 22, 1999.

<sup>39</sup> Shortly before publication of this comment, the author discovered that the Mad About Milk web site had been removed. Telephone calls to Mad About Milk were answered by employees of the lobbying firm, Kahl/Pownall. The firm refused to discuss why the site was removed but did indicate that it would not be replaced. Printed copies of all Mad About Milk web pages cited in this comment are on file with the *San Joaquin Agricultural Law Review*.

<sup>40</sup> *Mad About Milk Questions and Answers* (visited July 29, 1999) <<http://madaboutmilk.org/qa.htm>>.

<sup>41</sup> See *Mad About Milk News Releases*, *supra* note 37.

<sup>42</sup> See S.B. 419, 1999-2000 Reg. Sess. (Cal. 1999).

<sup>43</sup> See *Milking Consumers* (visited July 29, 1999) <<http://www.madaboutmilk.org/report.htm>>.

<sup>44</sup> See *Coalition* (visited July 29, 1999) <<http://madaboutmilk.org/coalition.htm>>.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

Angeles, California, the City Council unanimously voted to call for a Federal Trade Commission investigation of California's high milk prices.<sup>47</sup> Mad About Milk is certainly well situated to influence public opinion.<sup>48</sup>

Mad About Milk states that its goal is to encourage competition and consumer choice by allowing the sale of Food and Drug Administration (FDA)-approved milk in addition to "California-style" milk.<sup>49</sup> The group claims that California's definition of milk sets the level of "milk solids not fat"<sup>50</sup> significantly higher than the level required by the FDA.<sup>51</sup> Mad About Milk believes the FDA requirements more closely mirror the levels that occur in natural milk.<sup>52</sup>

While others claim that California's standards promote better nutrition,<sup>53</sup> Mad About Milk contends that there are only negligible differences in the nutrient content of California milk and milk sold in the rest of the nation.<sup>54</sup> Mad About Milk claims that California's definition of milk does not promote better nutrition and was created to protect the revenue of California's dairy industry.<sup>55</sup> According to Mad About Milk, the only significant differences between milk sold in California and milk sold in the rest of the nation are the price and the comparative nutrient value.<sup>56</sup> One report published by Mad About Milk suggests that because milk costs more in California, Californians drink twenty-five percent to thirty percent less milk per capita than residents of bordering states.<sup>57</sup> The group points to this as evidence that California's standards have led to the loss of health benefits associated with

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<sup>47</sup> See *Federal Probe Sought into State Milk Prices* (visited Oct. 30, 2000) <<http://www.modbee.com/business/story/0,1157,35394,00.html>>.

<sup>48</sup> See Scott, *supra* note 38. One of the principle backers of Mad About Milk, Shamrock Foods, retained the services of the lobbying firm, Kahl/Pownall and the public relations firm, Woodward-McDowell.

<sup>49</sup> See *Fact or Fiction? California's Dairy Industry Deceives Consumers* (visited July 31, 1999) <<http://madaboutmilk.org/fiction.htm>>.

<sup>50</sup> "Milk solids not fat" are the dry nonfat component in milk. CAL. CODE REGS. tit. 3 § 457 (1999).

<sup>51</sup> See *Key Points* (visited July 29, 1999) <<http://madaboutmilk.org/key-pts>>.

<sup>52</sup> *Id.*

<sup>53</sup> See *Fact or Fiction? California's Dairy Industry Deceives Consumers*, *supra* note 49.

<sup>54</sup> See *Fact Sheet* (visited July 29, 1999) <<http://madaboutmilk.org/fact-sht.htm>>.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* (citing data provided by Dairy Council of California, A.C. Nielsen Scantrack, and International Dairy Foods Association, which indicate milk sold in California costs 33% more for the same amount of protein and 17.64% more for the same amount of calcium).

<sup>57</sup> See *Key Points*, *supra* note 51.

the consumption of milk.<sup>58</sup>

Mad About Milk does not stop at criticizing the current state of California law. It directly attacks California's dairy industry and the California Department of Food and Agriculture (CDFA), claiming that they use lies and deception to preserve artificial barriers to competition.<sup>59</sup> Mad About Milk characterizes California's dairy industry as a boastful giant<sup>60</sup> and accuses it of lying about the relative nutritional value of California milk and United States Department of Agriculture (USDA) milk.<sup>61</sup> The group also accuses California's dairy industry of trying to deceive California's consumers by telling them that they do not pay more for milk than consumers in nearby states.<sup>62</sup>

### III. WHY ARE THEY SO MAD?

One commentator suggests Mad About Milk may be a "false front" for Shamrock Foods, bringing into question the true motivation of the group.<sup>63</sup> Perhaps not coincidentally, Mad About Milk's principal backer, Shamrock Foods, owns a milk processing operation in Arizona.<sup>64</sup> Shamrock Foods purchases milk from Shamrock Farms of Arizona and distributes packaged milk products to several western states, including California.<sup>65</sup> After the CDFA informed Shamrock Farms and Shamrock Foods (Shamrock) that its milk had to meet the same standards as all milk produced and marketed in California,<sup>66</sup> Shamrock

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<sup>58</sup> *Id.*

<sup>59</sup> See *Fact or Fiction? California's Dairy Industry Deceives Consumers*, *supra* note 49.

<sup>60</sup> See *The Facts About California's Dairy Industry*, *supra* note 3.

<sup>61</sup> See *Fact or Fiction? California's Dairy Industry Deceives Consumers*, *supra* note 49.

<sup>62</sup> *Id.*

<sup>63</sup> See Steve Scott, *Milk Wars: State Producers Fend Off Deregulation Bids for Now*, STATE NET CAPITOL J., Apr. 26, 1999.

<sup>64</sup> See *Shamrock Farms Co. v. Veneman*, 146 F.3d 1177, 1178 (9th Cir. 1998).

<sup>65</sup> *Id.*

<sup>66</sup> After Shamrock continued to sell nonconforming milk in California, the State of California brought suit in state court, seeking civil penalties and an injunction. In *Lockyer v. Shamrock*, 87 Cal. Rptr. 2d 525 (Ct. App. 1998), Acting Presiding Justice Benke of the Fourth Appellate District of California, delivered a concurring opinion which interpreted California Agriculture Code section 32912 as modifying the California standard such that milk meeting federal standards can be sold lawfully in California as long as it is properly labeled. The California Supreme Court reversed in *People ex rel. Lockyer v. Shamrock Foods Co.*, 24 Cal. 4th 415 (Cal. 2000), holding that section 32912 does not adopt the less stringent federal standards of identity for milk and milk products.

sued the state of California in federal district court.<sup>67</sup> Shamrock argued that California law establishing standards for milk solids not fat and the state's milk pricing and pooling laws violated the Commerce Clause and the Fourteenth Amendment.<sup>68</sup> The district court disagreed and dismissed the claim.<sup>69</sup> The Court of Appeals for the Ninth Circuit upheld the ruling.<sup>70</sup> The court determined that Congress intended to protect California's milk standards<sup>71</sup> and pricing and pooling laws<sup>72</sup> from Commerce Clause limitations, and that maintaining a stable and plentiful milk supply is a legitimate interest sufficient to withstand equal protection and due process challenges under the Fourteenth Amendment.<sup>73</sup> Having failed in federal court, Shamrock and Mad About Milk turned their attention toward gaining access to California's milk market through the legislative process.<sup>74</sup>

#### IV. REDEFINING MILK

Mad About Milk took its struggle to gain access to California's milk market to the California Senate, in the form of California Senate Bill 1284 (S.B. 1284). S.B. 1284, inspired by Mad About Milk, was sponsored by Senator Debra Bowen (D-Marina del Rey).<sup>75</sup> The bill was supported by the California School Boards Association, California WIC Association, Mad About Milk, Orange County Hunger Coalition, Shamrock Foods Company, and the United Organizations of Taxpayers, Inc.<sup>76</sup> S.B. 1284 would have added sections 35758 and 36607 to the Food and Agricultural Code, allowing the sale of milk and milk products that meet the requirements set forth in federal law, but fail to meet the California requirements for milk fat and solids not fat.<sup>77</sup> The

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<sup>67</sup> See *Shamrock Farms Co. v. Veneman*, No. CIV. S-96-889 LKK, 1996 U.S. Dist. LEXIS 20653 (E.D. Cal. Sept. 20, 1996).

<sup>68</sup> *Id.* at \*4.

<sup>69</sup> *Id.* at \*12.

<sup>70</sup> See *Shamrock Farms Co. v. Veneman*, 146 F.3d 1177, 1183 (9th Cir. 1998).

<sup>71</sup> *Id.* at 1180.

<sup>72</sup> *Id.* at 1182.

<sup>73</sup> *Id.* at 1183.

<sup>74</sup> See S.B. 1284, 1999-2000 Reg. Sess. (Cal. 1999).

<sup>75</sup> *Id.*

<sup>76</sup> See *SB 1284 Analysis*, *supra* note 32.

<sup>77</sup> S.B. 1284 specifically exempts milk meeting federal standards from California Food & Agriculture Code sections 35631, 35784, 35784.1, 35786, 36992, 38181, 38191, 38221, 38251, 38451, 38511, 38652, 38701, 38872, 39713, 39714, 39722, 39732, 39742, 39752, 39762, 39792, 39832, and 39842.



bill was introduced February 26, 1999 and amended April 5, 1999.<sup>78</sup> On April 20, 1999, it failed passage before the Senate Committee on Agriculture and Water Resources, which granted reconsideration.<sup>79</sup> Supporters indicated they would redouble their efforts to pass the bill.<sup>80</sup>

The bill's failure was decisive, though inconsequential. S.B. 1284 fell flat, gaining only one vote.<sup>81</sup> But even if the bill had come back for reconsideration and its proponents had managed to shepherd it into law, passage of S.B. 1284 may not have ended California's struggle with high milk prices. S.B. 1284 appears to blame the high price of milk on California's definition of milk, but California's higher nutritional standards only add approximately one cent to the retail price of a glass of milk.<sup>82</sup> Assuming that retailers would pass along any savings created by S.B. 1284, one cent per glass will not span the divide between California's prices and prices in neighboring states.<sup>83</sup>

## V. CALIFORNIANS FOR NUTRITIOUS MILK

As consumer oriented as Mad About Milk claims to be, questions remain about the source of the group's true motivation. The harshest criticism of the group comes from Californians for Nutritious Milk, which describes itself as a "coalition of leading health, nutrition and education experts and dairy producers working to ensure that Californians continue to drink the most nutritious milk in the nation."<sup>84</sup>

Californians for Nutritious Milk characterizes Mad About Milk as a "political front group funded by out-of-state dairy interests who want to 'water-down' California's milk standards so they can sell an inferior substandard product alongside California milk."<sup>85</sup> The group accuses

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<sup>78</sup> See *SB 1284 Senate Bill - History* (visited Dec. 18, 2000) <[http://info.sen.ca.gov/pub/99-00/bill/sen/sb\\_1251-1300/sb\\_1284\\_bill\\_20000201\\_history.html](http://info.sen.ca.gov/pub/99-00/bill/sen/sb_1251-1300/sb_1284_bill_20000201_history.html)> [hereinafter *SB 1284 History*].

<sup>79</sup> *Id.*

<sup>80</sup> See *Mad About Milk News Releases*, *supra* note 37.

<sup>81</sup> See *SB 1284 History*, *supra* note 78.

<sup>82</sup> See *Same Lies, Different Packaging* (visited July 29, 1999) <<http://www.californiamilk.com/mam02.html>>.

<sup>83</sup> See INFORMATION ON PRICES, *supra* note 1, at 149, 161 (stating the price of reduced-fat milk in California exceeds the price in neighboring states by as much as 94 cents per gallon.)

<sup>84</sup> *Californians for Nutritious Milk* (visited July 29, 1999) <<http://www.californiamilk.com/coalition.html>>.

<sup>85</sup> *Mad About Milk's Misleading Claims* (visited July 29, 1999) <<http://www.californiamilk.com/mam01.html>>.

Mad About Milk of misleading consumers and legislators by claiming that California law is designed to keep out-of-state milk off the market.<sup>86</sup> Californians for Nutritious Milk claims the laws are intended to improve the nutrition and health of California's consumers.<sup>87</sup>

The group also takes issue with Mad About Milk's statements about the comparative nutritional value of California and USDA milk, asserting that California Milk provides up to thirty-three percent more calcium than USDA milk.<sup>88</sup> Additionally, Californians for Nutritious Milk contends Californians drink less milk today because of health and fat consciousness, not high prices as Mad About Milk claims.<sup>89</sup> Californians for Nutritious milk even takes issue with Mad About Milk's claim that milk is more expensive in California, calling its pricing data incomplete and suggesting that its analysis of the data is invalid.<sup>90</sup>

Not surprisingly, Californians for Nutritious Milk is not an entirely neutral consumer advocate either. It serves as a front for California dairy interests and large retail chains.<sup>91</sup> Its activities are filtered through The Dolphin Group, a large public relations and lobbying firm.<sup>92</sup> In fact, a spokesperson for Californians for Nutritious Milk admitted that the group was created as a reaction to Mad About Milk: "They've been putting their spin out for a year and a half, so we decided to put out our spin."<sup>93</sup>

## VI. CONSUMERS UNION

While Mad About Milk blames farmers for California's high retail prices, and Californians for Nutritious milk denies that the problem exists, a third group, Consumers Union, indicates that the real problem occurs at the retail level.<sup>94</sup> Consumers Union, publisher of Consumer Reports, describes itself as an "independent, nonprofit testing and information organization serving only consumers" whose mission is to "test products, inform the public, and protect consumers."<sup>95</sup> The or-

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<sup>86</sup> See *id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> See Scott, *supra* note 63.

<sup>92</sup> *Id.*

<sup>93</sup> Scott, *supra* note 38.

<sup>94</sup> See *Farm Price of Milk Drops Dramatically in December and January* (visited Oct. 6, 2000) <<http://www.consumersunion.org/other/release1299.htm>>.

<sup>95</sup> *About Consumers Union* (visited July 31, 1999) <<http://www.consumersunion.org/aboutcu/about.htm>>.

ganization is funded by the sale of Consumer Reports and other services, contributions, grants, and fees.<sup>96</sup> It reports on issues of concern to consumers and acts as a consumer advocate to influence government policy.<sup>97</sup>

Consumers Union stands as a neutral voice in the public debate and as an invaluable source of unbiased information.<sup>98</sup> Although Consumers Union appears to genuinely represent Californians, even it is not immune to the political sniping that has become characteristic of this controversy. After Consumers Union rejected Mad About Milk's request that Consumers Union join their coalition,<sup>99</sup> Mad About Milk began accusing Consumers Union of spreading lies and deception about Mad About Milk.<sup>100</sup>

Consumers Union has identified a California statutory restriction that it believes prevents the state's milk prices from dropping.<sup>101</sup> Inspired by Consumers Union and designed to repeal the statute, California Senate Bill 419 (S.B. 419) was sponsored by Senator Jackie Speier (D-Daly City).<sup>102</sup> It is supported by Consumers Union, American Academy of Pediatrics, Asia Law Caucus, California WIC Association, Mad About Milk, Shamrock Foods, and Visitacion Valley Community Center, among others.<sup>103</sup> In its original form, S.B. 419 would have amended Sections 61375 and 61379 of the California Food and Agricultural Code and repealed Sections 61383 and 61384.<sup>104</sup> These changes would have ended California's current prohibition against

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<sup>96</sup> *See id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *See Consumers Union Declines to Join "Mad About Milk" Campaign* (visited July 29, 1999) <<http://www.consunion.org/other/madmilkwc1297.htm>>.

<sup>100</sup> Mad About Milk did not substantiate its claims on its web site. The accusation was made against Consumers Union, the California dairy industry, and the CDFA. Mad About Milk generally accused the three groups of responding to Mad About Milk with lies and deception. The specific accusations were all titled "dairy industry deception" and related to Mad About Milk's goal, the relative levels of calcium and protein contained in "California-style" and "FDA-approved" milk, why Californians pay more for milk, and whether Californians pay more for milk than consumers in nearby states. *See Fact or Fiction? California's Dairy Industry Deceives Consumers*, *supra* note 49.

<sup>101</sup> *See Retail Milk Price Bill to be Heard by Senate Committee* (visited Oct. 6, 2000) <<http://WWW.CONSUMERSUNION.ORG/other/milkadwc499.htm>>.

<sup>102</sup> *See* S.B. 419, 1999-2000 Reg. Sess. (Cal. 1999).

<sup>103</sup> *See SB 1284 Senate Bill - Bill Analysis* (visited Dec. 18, 2000) <[http://info.sen.ca.gov/pub/99-00/bill/sen/sb\\_1251-1300/sb\\_1284\\_cfa\\_19990525\\_164002\\_sen\\_comm.html](http://info.sen.ca.gov/pub/99-00/bill/sen/sb_1251-1300/sb_1284_cfa_19990525_164002_sen_comm.html)>.

<sup>104</sup> *See* S.B. 419, 1999-2000 Reg. Sess. (Cal. 1999).

sales of milk for less than cost.<sup>105</sup>

If S.B. 419 had passed in its original version, the average retail price of milk in California might have dropped significantly. S.B. 419, as introduced, called for an end to California's prohibition against using milk as a loss-leader.<sup>106</sup> This would have been accomplished by repealing Section 61384 of the Food and Agriculture Code which states, "The sale by any wholesale customer, manufacturer, distributor, including any producer-distributor or nonprofit cooperative association acting as a distributor, of milk, cream, or any dairy product at less than cost is an unlawful practice."<sup>107</sup> California's rules regarding meeting competition<sup>108</sup> would influence the potential benefit, but in general, repeal of the prohibition against using milk as a loss-leader would tend to lower average retail prices.<sup>109</sup>

After the bill failed to pass a vote before the Senate Agriculture and Water Resources Committee by a margin of four to seven, Senator Speier revised it several times.<sup>110</sup> In its final form, the bill passed the Senate on September 7, 1999 and was approved by the governor on October 6, 1999.<sup>111</sup>

The bill approved by the governor, however, bears little resemblance to the original bill and represents a complete abandonment of its goal. The revised bill calls for "an act to add and repeal Article 11 (commencing with Section 61581) to Chapter 1 of Part 3 of Division 21 of the Food and Agriculture Code, relating to agriculture."<sup>112</sup> The final focus of the bill is the creation of the Consumer Milk Price Sur-

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<sup>105</sup> "So-called 'loss-leader' pricing is a promotional strategy that applies to well-known articles that are purchased frequently. The idea is that consumers will patronize the business to purchase the loss leaders, but also buy regularly priced merchandise, thereby increasing the firm's total sales and net profit." *SB 419 Senate Bill - Bill Analysis* (visited Dec. 18, 2000) <[http://info.sen.ca.gov/pub/99-00/bill/sen/sb\\_0401-0450/sb\\_419\\_cf\\_a\\_19990419\\_105344\\_sen\\_commi.html](http://info.sen.ca.gov/pub/99-00/bill/sen/sb_0401-0450/sb_419_cf_a_19990419_105344_sen_commi.html)>.

<sup>106</sup> See *Retail Milk Price Bill to be Heard by Senate Committee*, *supra* note 101.

<sup>107</sup> S.B. 419, 1999-2000 Reg. Sess. (Cal. 1999).

<sup>108</sup> CAL. CODE REGS. Tit. 3 § 1931(a) (1999) (prohibiting retailers from lowering prices to undercut the competition).

<sup>109</sup> See *Vin Suprynowicz, The Milk Tax* (visited Oct. 7, 2000) <<http://www.nguworld.com/vindex/96/061996vs.htm>>; cf. James F. Thompson and W. Frank Edwards, *Dairy Policy and Public Interest: The Economic Legacies* (visited Oct. 7, 2000) <<http://www.cato.org/pubs/pas/pa057.html>> (arguing that a federal prohibition against the use of milk as a loss-leader would tend to raise the average level of retail milk prices).

<sup>110</sup> See *SB 419 Senate Bill - History* (visited Dec. 18, 2000) <[http://info.sen.ca.gov/pub/99-00/bill/sen/sb\\_0401-0450/sb\\_419\\_bill\\_19991010\\_history.html](http://info.sen.ca.gov/pub/99-00/bill/sen/sb_0401-0450/sb_419_bill_19991010_history.html)>.

<sup>111</sup> *Id.*

<sup>112</sup> S.B. 419, 1999-2000 Reg. Sess. (Cal. 1999), as amended July 13, 1999.

vey.<sup>113</sup> The survey will produce a report of retail milk prices in rural Northern California, the greater San Francisco Bay area, Central California, Los Angeles, Orange, and Ventura Counties, and other Southern California markets.<sup>114</sup> A monthly survey and a report will be published on the Internet and will be available to consumers by way of a toll-free number.<sup>115</sup>

Unfortunately, passage of S.B. 419 will not end high milk prices in California. Indeed, the bill, as amended, does not seek to influence milk prices directly.<sup>116</sup> The availability of current, accurate, and unbiased information about California's milk prices should help consumers who want to know where the best prices are available. It should promote public awareness of the issue in general. However, it contains no provision that will directly influence California's retail milk prices.<sup>117</sup>

## VII. FARM PRICE

Mad About Milk focuses its blame on California's farm-level milk price and the laws that control it.<sup>118</sup> In response, one might suggest that California drop its unique milk pricing rules and join the other forty-nine states in the national system. Indeed, the Farm Act of 1996 makes such a change possible by opening the door to California's participation in the Federal Milk Marketing Order system.<sup>119</sup> From a taxpayer's standpoint, this proposition holds some appeal. Presently, Californians are paying for administration of both the California system and the federal system. Eliminating the California system would provide a measure of relief to California's taxpayers. Unfortunately, switching to the federal system would not meet the goal of bringing California's retail milk prices in line with the prices found in neighboring states.<sup>120</sup>

California's farm-level milk prices are set in a manner substantially

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<sup>113</sup> See *id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> See *The Facts About California's Dairy Industry*, *supra* note 3.

<sup>119</sup> See William A. Thomas, *Federal Milk Marketing Orders*, U. GA., C. OF AGRIC. & ENVTL. SCI. COOPERATIVE EXTENSION SERV., May 1998.

<sup>120</sup> See *Californians for Nutritious Milk Statement Regarding Mad About Milk's Fundamentally Flawed Report* (visited Oct. 7, 2000) <<http://www.californiamilk.com/pr-00-08-09.html>> (indicating that the difference between the farm price in Phoenix and the average farm price in California was only two cents in August 2000).

similar to the way prices are set under the federal system.<sup>121</sup> Producers in all states are currently protected by federal price support policy and import barriers.<sup>122</sup> Both the California and federal systems feature milk marketing orders, classified pricing, and blend prices.<sup>123</sup>

The only significant difference between the two systems is California's use of quotas.<sup>124</sup> Under the federal system, all producers in a marketing order receive the same blend price with allowance for quality differentials.<sup>125</sup> In contrast, the price that a California producer is paid depends on how much milk it produces, relative to the quantity of milk quota the producer owns.<sup>126</sup> The more a farmer's production exceeds the "amount" of quota he or she has, the lower the blend price he or she will receive.<sup>127</sup> Even this inconsistency does not cause a major difference in the way the two systems operate. According to the USDA, the average blend price in California does not differ significantly from the prices paid to dairies in neighboring states.<sup>128</sup>

Switching to the federal system might provide some benefit to California, but it will not solve the problem of high retail milk prices. As one would expect, the farm-level price for milk in California is generally very similar to the prices that producers are paid in neighboring

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<sup>121</sup> See Sumner & Wolf, *supra* note 4.

<sup>122</sup> *Id.*

<sup>123</sup> See Sumner & Wolf, *supra* note 4. "Basically, a milk order is a legal document issued to regulate the minimum prices paid to dairy farmers by handlers of Grade A milk in a specified marketing area." FEDERAL MILK MKT. ADM'R'S OFFICE, U.S. DEP'T AGRIC., FEDERAL MILK ORDERS: PURPOSE, SCOPE, AND OPERATION. "Under classified pricing, the minimum prices that handlers are required to pay are established according to the use made of milk." For example, under the federal system, "[m]ilk used in perishable fluid products is designated Class I and commands the highest price." *Id.*

Under market wide pooling, the total order value of the milk used in all classes by all handlers in a market is divided by the total milk deliveries to determine the blend price for the market. The blend price is paid to each producer or cooperative under the order. The price paid to a particular producer is adjusted to reflect where the milk was received by the handler and variation in butterfat content (and protein or solids-not-fat content in some markets) of the individual producer's milk. Thus, each producer shares proportionately in the returns generated by all milk uses in the market.

*Id.*

<sup>124</sup> Sumner & Wolf, *supra* note 4.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> See FEDERAL MILK MKT. ADM'R'S OFFICE, *supra* note 123.

states.<sup>129</sup> A recent study published in the American Journal of Agricultural Economics showed that if California were to switch to the federal system there would be no significant lasting change to the retail price of milk.<sup>130</sup>

One might also suggest that California abandon its system entirely and allow market conditions to dictate milk prices. Theoretically, the forces of supply and demand would bring an equilibrium tailored to California's needs.<sup>131</sup> If over production caused prices to drop too low, producers would cut production and the supply would dry up, bringing prices to a sustainable level.<sup>132</sup> Similarly, if prices became too high, producers would increase supply and consumers would cut their consumption of milk.<sup>133</sup> The lowered demand and increased supply would drive prices down.<sup>134</sup> Furthermore, California's dairy industry would still be protected by foreign trade barriers that benefit dairy concerns throughout the United States.<sup>135</sup>

Unfortunately, the factors that created a need for government intervention in milk pricing are still present and warn against deregulation. Milk is a perishable commodity which must be shipped promptly whether or not prices are high enough to cover costs.<sup>136</sup> Also, milk production correlates strongly with environmental variations.<sup>137</sup> Production tends to jump above average levels in the spring when temperatures rise, and drop dramatically in the fall when temperatures decline.<sup>138</sup> The demand for milk is relatively stable throughout the year and production tends to exceed demand during the spring when environmental conditions are ideal.<sup>139</sup> With the end of the federal price supports at the end of 1999,<sup>140</sup> abandonment of the California system

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<sup>129</sup> See INFORMATION ON PRICES, *supra* note 1. The average "mailbox" prices paid between January 1999 and February 1999 to producers in Denver, Colorado; Las Vegas, Nevada; Phoenix, Arizona; Sacramento, California; Salt Lake City, Utah; and San Diego, California fell within a five cent range. *Id.* at 127, 149, 157, 159, 161.

<sup>130</sup> See Sumner & Wolf, *supra* note 4.

<sup>131</sup> See Jim Dickrell, *Changing Times*, DAIRY FARMER, Mar. 3, 1998, at 76; Bill Prast et al., *Marketing Key to Gold Mining Profitability*, MINING J., June 14, 1996, at 1.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> See Sumner & Wolf, *supra* note 4.

<sup>136</sup> See FEDERAL MILK MKT. ADM'R'S OFFICE, *supra* note 123.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> See Geoffrey S. Becker et al., *Congressional Research Service Report for Con-*

would leave the state vulnerable to radical price fluctuations that would threaten the reliable supply of milk.<sup>141</sup>

Independent producers would be hard hit by deregulation.<sup>142</sup> The loss of minimum prices would make wild fluctuations in the farm-price and wholesale price of milk possible again.<sup>143</sup> Although the strongest players might be able to weather the storm, deregulation might cause smaller producers to lose their market access entirely.<sup>144</sup>

Deregulation is not the answer for California's high milk prices. First, California's dairy industry is already competitive and does not need to abandon the current system.<sup>145</sup> Furthermore, the current farm prices are not a major factor in the high retail prices.<sup>146</sup> Because of the absence of a suitable substitute, "milk consumption is relatively insensitive to retail price fluctuations."<sup>147</sup> Some studies indicate that the consumption of milk varies only 1.5% with a retail price fluctuation of 10%.<sup>148</sup> Even assuming that the farm price would drop, the retail price would not likely decrease significantly as a result of deregulation.<sup>149</sup>

#### VIII. A FOCUS ON RETAIL

As noted above, one of the factors that influences the retail price of milk is the individual retailer's pricing strategy.<sup>150</sup> Retailers may employ horizontal<sup>151</sup> or vertical<sup>152</sup> pricing strategies or a combination of

*gress, The 1996 Farm Bill: Comparison of Selected Provisions with Previous Law*, Apr. 4, 1996.

<sup>141</sup> See *SB 1284 Analysis*, *supra* note 32.

<sup>142</sup> See *Comments on Federal Milk Marketing Orders* (visited Oct. 9, 2000) <[http://www.inform.umd.edu/EdRes/Topic/AgrEnv/ndd/marketin/COMMENTS\\_ON\\_FEDERAL\\_MILK\\_MARKETING\\_ORDERS.html](http://www.inform.umd.edu/EdRes/Topic/AgrEnv/ndd/marketin/COMMENTS_ON_FEDERAL_MILK_MARKETING_ORDERS.html)>.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> See *The Facts About California's Dairy Industry*, *supra* note 3.

<sup>146</sup> See *Californians for Nutritious Milk Statement Regarding Mad About Milk's Fundamentally Flawed Report*, *supra* note 120.

<sup>147</sup> Telephone interview with Hoy Carman, Professor of Economics, U.C. Davis (July 25, 1999); see also *INFORMATION ON PRICES*, *supra* note 1, at 31.

<sup>148</sup> See *Information on Prices*, *supra* note 1, at 31 n.6.

<sup>149</sup> Two cents will not remedy the forty-six cents per gallon and seventy-nine cents per gallon differences discussed in *Fatten Up Your Wallet if You're Buying Low-Fat Milk*, *supra* note 9.

<sup>150</sup> See *INFORMATION ON PRICES*, *supra* note 1, at 2.

<sup>151</sup> *Id.* at 32. Retailers using a horizontal pricing strategy seek to create an image of competitiveness by keeping their prices at the low end of the retail market spectrum. *Id.* The use of this strategy with respect to milk is limited in California by California Code of Regulations title 3 section 1931 (1999). Retailers may meet a lawful competitive price but may not undercut the competition. The rule states:



the two.<sup>153</sup> The retailer's pricing strategy will be influenced by its estimation of the relative importance of milk with respect to other products in influencing the perception of its customers.<sup>154</sup> The greater a retailer's estimation of the importance of milk pricing in shaping consumer perception, the more likely the retailer will be to adopt a horizontal pricing strategy.<sup>155</sup> Having adopted a horizontal strategy, the retailer will remain more aware of competing prices.<sup>156</sup> To maintain the store's competitive image, the retailer will be motivated to match the competition's lowest prices.<sup>157</sup>

#### IX. CONSUMER ACTION

Consumers and legislators should put pressure on retailers to offer prices that are reasonable in light of the retail prices in neighboring states. Legislators from all districts in California should speak with their constituents about California's high retail milk prices and let the people know how they can help. As consumers become more aware of the disparity between the retail price of milk in California and nearby states, they will become better equipped to make informed choices about where they shop. The Consumer Milk Price Survey will prove a valuable source of information for consumers and legislators. As much control as the retailers have over pricing strategy, even the largest retail chain can ill afford to ignore consumer choice.

The retailers who already price their milk competitively can help alleviate the problem by accepting food stamps and WIC coupons. Consumers should vote with their wallets by doing all of their shopping in stores that provide competitive milk prices and accept these alternate

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Wholesale customers may meet a lawful competitive price of dairy products of similar defined composition or standard only within the same geographic marketing area.

It shall be lawful to meet a competitive price subject to the following provisions:

(a) The competitive price being met must be a current price of the competition and shall be not less than the competitor's price.

(b) A lawful competitive price may be met whether or not that price results in a below cost sale by the wholesale customer.

*Id.*

<sup>152</sup> Retailers using a vertical pricing strategy focus on maintaining a particular return on investment on each sale of milk. *Id.* at 31.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 32.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

forms of payment. Consumers Union suggests that consumers take their business to small neighborhood markets or discount, co-op, or specialty stores.<sup>158</sup> They also point out that the difference in quality of most brands of milk is very small.<sup>159</sup> Therefore, consumers should make price the primary consideration when choosing between the various brands available in the store. The current "wait-and-see" attitude adopted by California's retailers<sup>160</sup> will quickly subside in the face of a clear message from consumers.

#### X. LEGISLATION

The state legislature must intervene into the process that determines the price of milk by regulating its mechanisms and removing regulatory obstacles that currently inflate prices. First, the wholesale price should not be subject to a minimum price limitation. This would allow the market to reduce wholesale prices by allowing wholesale milk distributors to compete. Under current regulation, the farm price is well maintained. Therefore, removing the wholesale floor price would force wholesale prices to normalize toward the farm price, leaving a reasonable markup for efficient wholesale competitors.

With wholesale prices in check, the legislature should focus on encouraging competition among retailers and implementing a variable ceiling on retail prices. The first of these objectives can be achieved by removing the prohibition of loss-leading and the prohibition of undercutting the competition. With lower wholesale prices, retailers will be better able to deliver milk at lower retail prices without compromising their profit margins. Perhaps more significantly, because milk is a staple item which most grocery shoppers buy, it is an attractive candidate for use as a loss-leader. With the prohibition repealed, competitive retailers will seek to attract customers to their stores with milk priced below cost. Any loss they incur on the sale of milk will be more than offset by the increased sales volumes in higher margin items.

With a stable farm price and a competitive wholesale market, retailers who maintain high prices would reap greater than ordinary profits

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<sup>158</sup> See *Advice to Bay Area Consumers* (visited July 29, 1999) <<http://www.consunion.org/other/advicefwc299.htm>>.

<sup>159</sup> *Id.*

<sup>160</sup> When asked to take a position on California Senate Bill 419, Dave Heylen, Director of Communications for California Grocers Association was quoted as responding, "We're taking a neutral position on this whole thing right now . . . We don't know if it will indeed affect prices. We're taking a wait-and-see approach." Norman D. Williams, *Bill Aims to Repeal Milk Law*, SACRAMENTO BEE, Feb. 17 1999, at C1.

on the sale of milk. Some retailers might find the temptation too great. Therefore, the legislature should enact legislation tying the retail price to the farm price. This could be accomplished by placing a variable ceiling on retail prices, above which sales would be prohibited. The retail ceiling should be defined by statute as a function of the farm price and the consumer price index. As a result, retailers would be prevented from diverting the wholesale savings from consumers. The use of the consumer price index would ensure a steady increase in retail prices to reflect current economic conditions. This system would prevent profiteering, while preserving the ability to profit on the retail sale of milk.

#### CONCLUSION

To the extent that Mad About Milk, Californians for Nutritious Milk, and Consumers Union have fueled public debate, they have provided a genuine benefit to California's consumers. Though many of their claims are contradictory and some question the motivation of each group, their struggle has brought the issue of California's high retail milk prices to the political and social forefront. California's legislature has also made an effort to remedy the situation. Unfortunately, all attempts have fallen short.

If California is to bring its retail milk prices in line with prices in nearby states, consumers must exercise their fiscal might. Furthermore, the legislature must remove barriers to competition and enact legislation tying the retail and farm prices together. Only then will California's consumers stand on equal footing with their neighbors.

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