Legal Commentary on the Internet Sale of Human Milk

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As the authors of the article, "Got Milk? Sharing Human Milk Via the Internet,"[1] discuss, several public health concerns exist regarding the growing practice of women selling their breast milk through informal channels such as the Internet. Despite such concerns, under the current state and federal legal regime, informal sellers of human milk may be liable for their actions only under very limited circumstances.

State tort and contract laws may potentially provide an injured buyer with recourse against a seller. Sellers may be liable under state tort laws, such as fraudulent or negligent misrepresentation if the seller sold contaminated or volume-enhanced milk (e.g., human milk supplemented with water or cow's milk to increase the volume), or breach of contract if the milk received did not conform to the seller's representation of the product. However, given the perishable nature of human milk and the fact that most buyers will not have the means to test the quality and composition of the milk upon receipt, it is unlikely that buyers would prevail in lawsuits under either cause of action.

Laws prohibiting the sale of bodily materials also provide little protection against the informal sale of human milk, as human milk is not included within the scope of the National Organ Transplant Act (which makes the selling of human organs a federal crime),[2] and many states exclude "replenishable" or "self-replicating" body fluids and tissues, such as human milk, hair, and sperm, from the scope of their laws prohibiting the sale of certain bodily materials.[3] In February 2010, a Tennessee lawmaker introduced a state bill that would have made it a misdemeanor to sell human milk through informal channels such as the Internet; however, the bill never made it out of committee review.[4]

Sellers may face criminal liability under federal and state laws if they know they have certain communicable diseases that are transmitted through breast milk, such as human immunodeficiency virus, tuberculosis, and syphilis, and nevertheless sell their milk to unknowing buyers.[3] In addition, sellers may be liable under federal law for shipping adulterated products,[5] or under federal and state criminal and tax laws in certain circumstances.[6–8] However, because these laws have yet to be enforced against informal sellers of human milk, they are unlikely to serve as deterrents to this practice.

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Given the limited ability of meaningful legal recourse for injured buyers and the serious health threats to infants of receiving contaminated or volume-enhanced human milk, the lack of a broader regulatory scheme to protect buyers upfront is particularly concerning. Despite the Food and Drug Administration's recent warning regarding the risks of obtaining donor milk from sources such as the Internet,[9] the informal sale of human breast milk, whether through the Internet or some other means, is not regulated by the federal government or any state government. Although states such as California, New York, and Texas have laws pertaining to the procurement and distribution of human milk, these laws pertain to milk donated through a licensed milk bank, and not to individual sellers in the informal "gray" market.[10–15] As the informal sale of human milk continues to grow, lawmakers should consider adopting specific regulations governing the sale, processing, and shipment of human milk, particularly with regard to impersonal and informal Internet sales, to better ensure the health and safety of children in these potentially dangerous transactions.

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