



Legislative Fiscal Bureau

One East Main, Suite 301 • Madison, WI 53703 • (608) 266-3847 • Fax: (608) 267-6873

February 17, 2004

TO: Members
Joint Committee on Finance

FROM: Bob Lang, Director

SUBJECT: Assembly Bill 485: Payment of Claim to Mullins Cheese, Inc.

SUMMARY OF BILL

Assembly Bill 485 was introduced on August 26, 2003, and referred to the Joint Committee on Finance. AB 485 would direct the state to pay \$17,568.12 from the Department of Administration's GPR sum sufficient claims awards appropriation for payment of a claim against the state made by Mullins Cheese, Inc., to compensate the company for whey cream that was destroyed in response to Department of Agriculture, Trade and Consumer Protection (DATCP) testing that found antibiotic residue in milk produced by the Mosinee plant in May, 2002. The bill specifies that acceptance of the payment would release the state from any further liability resulting from the condemnation.

BACKGROUND

Under federal and state rules, DATCP's Division of Food Safety regulates dairy plants. In addition, federal and state rules require dairy plants to conduct tests of their milk to determine whether there is an unacceptable level of antibiotic residue in the milk before the milk is processed for human consumption.

The federal Food and Drug Administration has reviewed and approved a number of tests (which all meet the requirements of all milk regulatory programs in the United States) that are capable of detecting at least four of the six beta lactam drugs that are of concern to regulatory officials. These six beta lactam antibiotics are widely used to treat disease in lactating dairy cattle, and have been found by the FDA to leave a residue in milk when misused. These approved tests do

not identify the specific beta lactam drug residue found in the event a positive test occurs, but rather only indicate whether there is, or is not, drug residue present.

As part of a May 6, 2002, regular, but unannounced, inspection of the Mullins Cheese, Inc. plant, DATCP tested bulk milk loads at the plant to determine whether there was an acceptable level of antibiotics in the milk before the milk was processed. Results of the tests performed by DATCP were not immediately available. Mullins continued to process the milk, which tested negative for antibiotic residue under a less sensitive test performed by the dairy, mingling it with a larger quantity of other milk, and producing cheese, dried whey, whey cream, and permeate (sugar water) from the milk. Some of the whey cream that was affected by the testing was subsequently shipped to two dairies, one of which, Grassland Dairy, mixed the cream with products from other sources. Upon receiving positive results for antibiotic residue from the tests it performed, DATCP notified Mullins (verbally on May 7, and formally on May 8) and requested the disposal of adulterated products (May 9). Mullins responded by requesting that DATCP send samples to the federal Food and Drug Administration lab in Denver for further testing, which DATCP agreed to do.

While the FDA tests were pending, all finished products that resulted from the milk load that tested positive were placed on hold. In addition, due to the products' short shelf life, Mullins and one of its customers destroyed permeate made from the milk load in question. Grassland Dairy, which had commingled whey cream it received from Mullins (made from the milk load in question) with whey cream it had received from other sources, destroyed all of the resulting whey cream and filed a claim with its insurance carrier. Grassland's insurance carrier subsequently rejected Grassland's insurance claim for the dumped product. Mullins then reimbursed Grassland for its loss and filed a claim worth \$17,568.12 with the state, representing the total value of the whey cream that was destroyed as a result of the testing.

The tests performed by the FDA lab in Denver (whose results were received by DATCP on May 28) identified the specific drug present in the milk, ceftiofur, and determined it was present in an amount that did not exceed the FDA's safe tolerance level of 50 parts per billion, but did not determine the exact amount of ceftiofur present in the milk. Subsequently, DATCP released the cheese inventory that was on-hold at the Mullins plant.

DATCP asserts that it instructed Mullins that the milk would be considered adulterated and subject to disposal if its tests showed excessive antibiotics were present in the milk. DATCP also states that it encouraged Mullins not to mix loads of the milk that had been tested until DATCP's tests showed the milk to be safe, although this is not required by rule. Further, the test used by DATCP on the milk from the Mullins Cheese, Inc. plant was able to detect all six of the beta lactam drugs that are of concern to regulators, while the test used by Mullins on its milk was only able to detect four of the six beta lactam drugs, one of which was not ceftiofur.

The state's administrative rules that govern positive drug residue test results for milk quality standards do not specifically list ceftiofur or the level of ceftiofur necessary to be present in order

for the test to be considered positive. But, the administrative rules do forbid the presence of drug residue in any milk received from a dairy farm. Further, as a beta lactam drug (and one of the six beta lactam antibiotics of concern to the FDA), ceftiofur falls under DATCP's regulatory authority. State administrative rules reserve DATCP the right to take enforcement action where beta lactam drug residues are found, even if at levels below federal and state action levels, as was the case in this instance.

The claimant argues that DATCP's actions in the case were inappropriate and the milk ultimately tested as safe, as the company's original test had indicated. On May 15, 2003, the state Board of Claims unanimously recommended (by a vote of 5 to 0) that Mullins Inc.'s claim be paid in the amount of \$17,568.12 based on equitable principles.

FISCAL EFFECT

The bill would direct the state to pay \$17,568.12 from the Department of Administration's GPR sum sufficient claims awards appropriation to Mullins Cheese, Inc. The appropriation is estimated at \$23,700 annually. As of February 11, 2004, no expenditures had been made from the appropriation in 2003-04.

Prepared by: Christopher Pollek