

**In re: KREIDER DAIRY FARMS, INC.
98 AMA Docket No. M 4-1.
Ruling on Certified Question filed December 21, 2000.**

Issue preclusion – Collateral estoppel – Claim preclusion – Res judicata.

The Judicial Officer on December 21, 2000, the Judicial Officer ruled, in response to a question certified by Administrative Law Judge Baker, that Respondent's Motion to Dismiss Amended Petition should be granted in part and denied in part. The Judicial Officer stated that Petitioner litigated the issue of its status as a producer-handler under Milk Marketing Order No. 2 in *In re Kreider Dairy Farms, Inc.*, 94 AMA Docket No. M 1-2 (*Kreider I*), and the Decision and Order on Remand in *Kreider I* decided the issue of Petitioner's status under Milk Marketing Order No. 2 during the period January 1991 through April 1997 when Petitioner sold fluid milk products to Ahava Dairy Products, Inc. (Ahava). The Judicial Officer concluded that issue preclusion bars relitigation, in *In re Kreider Dairy Farms, Inc.*, 98 AMA Docket No. M 4-1 (*Kreider II*), of Petitioner's status under Milk Marketing Order No. 2 during the period January 1991 through April 1997. The Judicial Officer found that Petitioner is not barred by issue preclusion from litigating Petitioner's status under Milk Marketing Order No. 2 during the period May 1997 through December 1999 when Petitioner did not sell fluid milk products to Ahava. The Judicial Officer also found that Petitioner was not barred by claim preclusion from litigating in *Kreider II* Petitioner's status under Milk Marketing Order No. 2 during the period May 1997 through December 1999 and found no basis for dismissing the Amended Petition for failure to comply with 7 C.F.R. § 900.52b.

Sharlene A. Deskins, for Respondent.
Marvin Beshore, Harrisburg, Pennsylvania, for Petitioner.
Ruling issued by William G. Jenson, Judicial Officer.

Certified Question

On October 24, 2000, Administrative Law Judge Dorothea A. Baker [hereinafter the ALJ] certified the following question to the Judicial Officer:

I am hereby certifying to the Judicial Officer the question of whether or not the Amended Petition filed September 7, 2000, should be dismissed for the reasons stated by Respondent, including collateral estoppel and res judicata.

Certification to Judicial Officer.

On October 25, 2000, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on the ALJ's certified question.

Kreider I

On December 28, 1993, Kreider Dairy Farms, Inc. [hereinafter Petitioner], instituted a proceeding, *In re Kreider Dairy Farms, Inc.*, 94 AMA Docket No. M 1-2 [hereinafter *Kreider I*], under the Agricultural Marketing Agreement Act of 1937, as amended [hereinafter the AMAA]; the marketing order regulating milk in the New York-New Jersey Marketing Area [hereinafter Milk Marketing Order

No. 2]; and the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Marketing Orders (7 C.F.R. §§ 900.50-.71) [hereinafter the Rules of Practice].

In *Kreider I*, Petitioner: (1) challenged the determination by the Market Administrator for Milk Marketing Order No. 2 [hereinafter the Market Administrator] that, beginning in November 1991, Petitioner was a handler regulated under Milk Marketing Order No. 2; (2) asserted that it was a producer-handler under Milk Marketing Order No. 2 exempt from the obligation under Milk Marketing Order No. 2 to pay into the producer-settlement fund; and (3) sought a refund, with interest, of the money it paid into the producer-settlement fund (*Kreider I* Pet. ¶¶ 13-14).

The Judicial Officer dismissed the *Kreider I* Petition concluding the Market Administrator correctly determined that Petitioner was a handler and that Petitioner was not a producer-handler exempt from the obligation under Milk Marketing Order No. 2 to pay into the producer-settlement fund. The Judicial Officer held the producer-handler exemption in Milk Marketing Order No. 2 clearly requires that, in order to be a producer-handler, a person must exercise complete and exclusive control over all facilities and resources used for the production, processing, and distribution of milk. The Judicial Officer found Petitioner relinquished the complete and exclusive control of milk distribution necessary for producer-handler status under Milk Marketing Order No. 2 when Petitioner delivered milk to two subdealers, Ahava Dairy Products, Inc. [hereinafter Ahava], and The Foundation for the Propagation and Preservation of the Torah Laws [hereinafter FPPTL], which milk was subsequently distributed by Ahava and FPPTL to their retail and wholesale customers. *In re Kreider Dairy Farms, Inc.*, 54 Agric. Dec. 805 (1995).

Petitioner sought judicial review of *In re Kreider Dairy Farms, Inc.*, 54 Agric. Dec. 805 (1995). The United States District Court for the Eastern District of Pennsylvania found that neither the plain language of the producer-handler exemption in Milk Marketing Order No. 2 nor the rulemaking proceeding applicable to the producer-handler exemption in Milk Marketing Order No. 2 supports a finding that Petitioner should be denied producer-handler status without further factual findings that Petitioner was “riding the pool.” *Kreider Dairy Farms, Inc. v. Glickman*, No. 95-6648, slip op. at 24, 1996 WL 472414, at *11 (E.D. Pa. Aug. 15, 1996). The Court remanded the action to the Secretary of Agriculture for further factual findings and a decision regarding whether Petitioner was “riding the pool.” The Court explained the purpose of its remand order, as follows:

The [Judicial Officer] and Defendant assert that to allow producer-handlers to sell to subdealers would frustrate the economic purpose behind [Milk Marketing] Order [No.] 2’s producer-handler exemption. The JO explains the economic purpose as follows:

“[M]ilk marketing orders were adopted to end the chaotic conditions previously existing, by enabling all producers to share in the [fluid milk] market, and, also, requiring all producers to share in the necessary burdens of surplus milk . . . through means of the producer-settlement fund. The only justification for exempting a producer-handler from the pooling requirements is because the producer-handler is a self-contained production, processing and distribution unit. Since a producer-handler does not share its [fluid milk] utilizations with the other producers supplying milk to the area, it is vital to the regulatory program that the producer-handler not be permitted to “ride the pool,” i.e., to count on milk supplied by other producers to provide milk for the producer-handler during its peak needs. That principle has been frequently stated”

In re: Kreider, 1995 WL 598331, at *32 (citations omitted). How this “pool riding” problem arises when a producer-handler is allowed to sell to subdealers is explained as follows:

[Kreider] does not have to produce enough milk to satisfy its customers’ needs in the period of short production, because, during the period of short production, [Kreider] can count on Ahava’s other suppliers to supply pool milk to meet the needs of the firms ultimately buying [Kreider's] milk. If a producer-handler could turn over its distribution function to a subdealer, it could achieve the same result as if it were permitted to receive milk from other sources. That is, during the period of short production, it could meet the needs of its (ultimate) customers by means of the subdealer getting pool milk from other handlers during the period of short production.

Id. at *31. In other words, Kreider receives an unearned economic benefit unavailable to handlers who do not enjoy producer-handler status: Unlike other handlers, Kreider does not need to pay into the producer-settlement fund, and, unlike other handlers, Kreider has no surplus-milk concerns because it never has to produce an over-supply to satisfy its customers during times when cows produce less milk.

This court finds that this purported economic benefit is not supported by the record before it. In its Amicus brief, Ahava states that in order for Kreider’s milk to receive Ahava’s certification that the milk is kosher, there must be “direct and daily supervision and control over the production and processing facilities by appropriate rabbinical authorities” and that such supervision is “extensive.” (Amicus Ahava’s Mem. Supp. Pl.’s Mot. Summ. J. at 3 & 3 n.2.) Because of Ahava’s special requirements, it is not apparent from the record that Kreider can depend on other handlers from the pool to supply Ahava’s needs in the period of short production.

If the record cannot support the economic justification behind the Defendant’s action, then it appears arbitrary, especially since, as noted previously, the language of [Milk Marketing] Order [No.] 2 is ambiguous and the [Market Administrator’s] action is not clearly supported by the promulgation history of [Milk Marketing] Order [No.] 2 or departmental interpretation. . . . Therefore, this action is remanded to the Secretary to hold such further proceedings necessary to determine whether in fact Kreider is “riding the pool.” To this end, the Secretary must determine whether it is in fact feasible for Ahava to turn to other handlers in a period of short production.

Kreider Dairy Farms, Inc. v. Glickman, No. 95-6648, slip op. at 18-21 (footnote omitted), 1996 WL 472414, at *8-9 (E.D. Pa. Aug. 15, 1996).

On December 30, 1996, Administrative Law Judge Edwin S. Bernstein issued a notice of hearing stating:

In a December 30, 1996, telephone conference with Denise Hansberry and Marvin Beshore, counsel for the parties, the following were agreed and/or decided:

I reviewed with counsel that the remand was triggered by the following language in the Judicial Officer's September 28, 1995, Decision:

Respondent is arguing that Petitioner avoids producing a great deal of surplus milk. That is, Petitioner does not have to produce enough milk to satisfy its customers' needs in the period of short production, because, during the period of short production, Petitioner can count on Ahava's other suppliers to supply pool milk to meet the needs of the firms ultimately buying Petitioner's milk. If a producer-handler could turn over its distribution functions to a subdealer, it could achieve the same result as if it were permitted to receive milk from other sources. That is, during the period of short production, it could meet the needs of its (ultimate) customers by means of the subdealer getting pool milk from other handlers during the period of short production. [*In re Kreider Dairy Farms, Inc.*, 54 Agric. Dec. at 847-48.]

Based upon this language, the United States District Court for the Eastern District of Pennsylvania stated in its August 15, 1996, Decision:

Because of Ahava's special requirements, it is not apparent from the record that Kreider can depend on other handlers from the pool to supply Ahava's needs in the period of short production. [p. 19]

....

Therefore, this action is remanded to the Secretary to hold such further proceedings necessary to determine whether in fact Kreider is 'riding the pool.' To this end, the Secretary must determine whether it is in fact feasible for Ahava to turn to other handlers in a period of short production. p[p. 20-21]

....

The issue is, during the Ahava and Kreider dealings going back to November 1990, were there any instances of short production by Kreider when Ahava acquired kosher milk from other handlers from the pool? This includes the following questions:

Are there seasonal periods of shortages in milk production from Kreider and other similar producer-handlers?

What are the patterns as to whether and how regularly Kreider maintains a surplus?

Summary of Telephone Conference--Notice of Hearing, filed in *Kreider I*, December 30, 1996.

On April 23, 1997, Administrative Law Judge Edwin S. Bernstein conducted a hearing in Washington, DC, to receive evidence on the remand issue. On August 12, 1997, Administrative Law Judge Edwin S. Bernstein issued a Decision and Order [hereinafter Decision and Order on Remand]: (1) finding it was feasible for Ahava to obtain fluid milk products from other handlers in periods of Petitioner's short production; (2) finding Ahava was supplied with fluid milk products by at least one producer other than Petitioner during the period January 1991 through December 1996; (3) finding an inference can be made that Petitioner was able to reduce its surplus because of its ability to rely on other producers to meet Ahava's needs; (4) finding Petitioner was "riding the pool" and receiving an unearned economic benefit; (5) concluding the decision of the Market Administrator to deny Petitioner producer-handler status under Milk Marketing Order No. 2 must be upheld; and (6) dismissing Petitioner's *Kreider I* Petition (*Kreider I* Decision and Order on Remand at 4, 7, 10).

Petitioner failed to file a timely appeal, and the *Kreider I* Decision and Order on Remand became final.

Kreider II

On February 17, 1998, Petitioner instituted the instant proceeding, *In re Kreider Dairy Farms, Inc.*, 98 AMA Docket No. M 4-1 [hereinafter *Kreider II*], under the AMAA, Milk Marketing Order No. 2, and the Rules of Practice.

On March 12, 1998, the Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], filed a Motion to Dismiss stating the doctrine of res judicata requires the dismissal of the *Kreider II* Petition. On June 20, 2000, the Hearing Clerk received Petitioner's untitled document opposing Respondent's Motion to Dismiss. On June 29, 2000, Respondent filed Respondent's Reply to Petitioner's Opposition to Motion to Dismiss. Petitioner filed Final Reply Brief of Petitioner Kreider Dairy Farms, Inc.

in Opposition to Respondent's Motion to Dismiss. On September 15, 2000, the ALJ denied Respondent's Motion to Dismiss stating that neither the factual nor the legal issues raised in the *Kreider II* Petition were decided in *Kreider I* (*Kreider II* Ruling on Motion to Dismiss).

On September 7, 2000, Petitioner filed an Amended Petition in *Kreider II*. Petitioner: (1) challenges the determination by the Market Administrator that Petitioner was a handler regulated under Milk Marketing Order No. 2 during the period December 1995 through December 1999; (2) asserts that it was a producer-handler under Milk Marketing Order No. 2 exempt from the obligation under Milk Marketing Order No. 2 to pay into the producer-settlement fund during the period December 1995 through December 1999; and (3) seeks a refund, with interest, of the money it paid into the producer-settlement fund during the period December 1995 through December 1999 (*Kreider II* Amended Pet. ¶¶ 13-16).

Petitioner alleges the six Milk Marketing Order No. 2 customers to whom it sold fluid milk products during the period December 1995 through December 1999 were Ahava, FPPTL, Jersey Lynn Farms, Parmalat Farmland Dairies, D.B. Brown, Inc., and Readington Farms, Inc. Further, Petitioner identifies which of its six Milk Marketing Order No. 2 customers paid for fluid milk products in each month during the period December 1995 through December 1999. Petitioner alleges that Ahava paid for fluid milk products in each month during the period December 1995 through April 1997. (*Kreider II* Amended Pet. ¶ 14-15.)

On September 29, 2000, Respondent filed Respondent's Motion to Dismiss Amended Petition II; Motion for Reconsideration; Motion to Certify Question for the Judicial Officer; and Answer to Petition II and Amended Petition II [hereinafter Motion to Dismiss Amended Petition]. On October 23, 2000, the Hearing Clerk received Petitioner's Opposition to Motion to Dismiss Amended Petition II; Opposition to Respondent's Motion for Reconsideration; and Opposition to Motion to Certify Question for Judicial Officer.

Response to Certified Question

Issue preclusion (also called collateral estoppel or direct estoppel) and claim preclusion (also called *res judicata*) concern the preclusive effect of prior adjudication.¹ Issue preclusion refers to the effect of a judgment in foreclosing

¹*Baker v. General Motors Corp.*, 522 U.S. 222, 233 n.5 (1998); *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 77 n.1 (1984); *Gregory v. Chehi*, 843 F.2d 111, 115-16 (3^d Cir. 1988); *United States v. Athlone Indus., Inc.*, 746 F.2d 977, 983 n.4 (3^d Cir. 1984).

relitigation of an issue of fact or law that has been litigated and decided.² Issue preclusion bars parties and their privies from relitigating issues which have been adjudicated on the merits in a prior action.³

Petitioner litigated the issue of its status as a producer-handler under Milk Marketing Order No. 2 in *Kreider I*. The *Kreider I* Decision and Order on Remand decided, on the merits, the issue of Petitioner's status under Milk Marketing Order No. 2. However, the *Kreider I* Decision and Order on Remand is limited to the time during which Petitioner sold fluid milk products to Ahava. Therefore, the issue of Petitioner's status under Milk Marketing Order No. 2 was decided in *Kreider I* only with respect to the time during which Petitioner sold fluid milk products to Ahava. Issue preclusion bars only that part of Petitioner's claim in the *Kreider II* Amended Petition that relates to the time during which Petitioner sold fluid milk products to Ahava. Thus, Petitioner is barred by issue preclusion from relitigating in *Kreider II* Petitioner's status under Milk Marketing Order No. 2 during the period December 1995 through April 1997.

Kreider I did not decide the issue of Petitioner's status under Milk Marketing Order No. 2 during the period in which Petitioner sold no fluid milk products to Ahava. Thus, Petitioner is not barred by issue preclusion from litigating in *Kreider II* Petitioner's status under Milk Marketing Order No. 2 during the period May 1997 through December 1999.

Claim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated because of a determination that the matter should have been advanced in an earlier suit.⁴ Claim preclusion gives dispositive effect to a prior judgment if a particular issue, although not litigated in the prior action, could have been raised.⁵ Claim preclusion requires: (1) a final judgment on the merits in a prior suit involving; (2) the same parties or their privies; and (3) a

²*Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 77 n.1 (1984); *Gregory v. Chehi*, 843 F.2d 111, 116 (3^d Cir. 1988); *United States v. Athlone Indus., Inc.*, 746 F.2d 977, 983 n.4 (3^d Cir. 1984).

³*Witkowski v. Welch*, 173 F.3d 192, 198-99 (3^d Cir. 1999); *Swineford v. Snyder County*, 15 F.3d 1258, 1266 (3^d Cir. 1994); *Bradley v. Pittsburgh Bd. of Educ.*, 913 F.2d 1064, 1070 (3^d Cir. 1990).

⁴*Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 77 n.1 (1984); *Gregory v. Chehi*, 843 F.2d 111, 116 (3^d Cir. 1988).

⁵*Corestates Bank v. Huls America, Inc.*, 176 F.3d 187, 194 (3^d Cir. 1999); *Witkowski v. Welch*, 173 F.3d 192, 198 n.8 (3^d Cir. 1999); *Swineford v. Snyder County*, 15 F.3d 1258, 1266 (3^d Cir. 1994); *Board of Trustees of Trucking Employees of North Jersey Welfare Fund, Inc. v. Centra*, 983 F.2d 495, 504 (3^d Cir. 1992); *Bradley v. Pittsburgh Bd. of Educ.*, 913 F.2d 1064, 1070 (3^d Cir. 1990).

subsequent suit on the same cause of action.⁶

Administrative Law Judge Edwin S. Bernstein limited the scope of the April 23, 1997, *Kreider I* hearing to Petitioner's status during the period Petitioner sold fluid milk products to Ahava.⁷ Based on the limited scope of *Kreider I* after remand and the date of the *Kreider I* hearing after remand, I do not find that Petitioner could have advanced its claim that it was a producer-handler after it ceased selling fluid milk products to Ahava. Therefore, based on the record before me, I do not find that Petitioner is barred by claim preclusion from litigating in *Kreider II* Petitioner's status under Milk Marketing Order No. 2 during the period May 1997 through December 1999.

Respondent also seeks to dismiss the Amended Petition because it does not comply with the requirements in 7 C.F.R. § 900.52b (Motion to Dismiss Amended Pet. at 3). Respondent does not explain the basis for Respondent's contention that the Amended Petition does not comply with 7 C.F.R. § 900.52b. Based on the record before me, I find no basis for dismissing the Amended Petition for failure to comply with 7 C.F.R. § 900.52b.

Therefore, Respondent's Motion to Dismiss Amended Petition should be granted in part and denied in part, in accordance with this Ruling on Certified Question.

⁶*Corestates Bank v. Huls America, Inc.*, 176 F.3d 187, 194 (3^d Cir. 1999); *Board of Trustees of Trucking Employees of North Jersey Welfare Fund, Inc. v. Centra*, 983 F.2d 495, 504 (3^d Cir. 1992); *United States v. Athlone Indus., Inc.*, 746 F.2d 977, 983 (3^d Cir. 1984).

⁷See Summary of Telephone Conference--Notice of Hearing, filed in *Kreider I*, December 30, 1996; *Kreider I* Decision and Order on Remand.