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**Examine Implications of 1st Amendment
Court Decisions for State Commodity
Development Programs**

December 2, 2004

Staff Report to the Agriculture Committee

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Staff Report to the Agriculture Committee

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LEGISLATIVE RESOLUTION 274 Introduced by Senator Kremer

PURPOSE: On June 25, 2001, the United States Supreme Court ruled in *USDA v. United Foods* that mandatory assessments under the federal Mushroom Promotion, Research, and Consumer Information Act of 1990 violated first amendment protections of certain mushroom producers. Similar first amendment challenges to other federal and state commodity promotion programs have been litigated in other federal court venues and are now pending before the U.S. Supreme Court. The purpose of this study is to examine the implications of *USDA v. United Foods* and progeny federal court decisions for state commodity promotion programs funded through checkoff assessments against producers.

Introduction

On June 25, 2001, the United States Supreme Court ruled in USDA v. United Foods that mandatory assessments imposed under the federal Mushroom Promotion, Research and Consumer Information Act of 1990 violated first amendment protections of certain mushroom producers and marketers. Following this ruling, a series of 1st Amendment challenges to other federally and state enacted and administered commodity development programs also funded by mandatory assessments have been litigated in federal courts. The string of decisions arising from USDA v. United Foods have created uncertainty regarding collection and use of mandatory assessments to fund research, educational and promotional activities to strengthen demand for agricultural commodities in the marketplace. Although there exists a diversity of rulings on the constitutionality of the federal beef program, and the courts that have examined other checkoff programs from a 1st Amendment perspective have been somewhat inconsistent in their method of analysis, a number of mandatory checkoff programs have been found to be an unconstitutional form of “compelled speech”. It is possible, if not probable, that similar development programs authorized by state statute may be subject to challenge in the near future on the same legal principles.

There are currently mandatory “checkoff”¹ programs authorized by state law for wheat, corn, grain sorghum, and milk and voluntary (refundable) checkoff programs for dry beans, poultry and eggs, and potatoes. Nebraska producers also contribute to a number of mandatory checkoff programs authorized by federal law and administered by USDA, many of which share revenues collected between federal and designated state commodity boards. The most important of these federal programs in terms of relevance to Nebraska agriculture include programs for beef, pork, and soybeans. In the event of termination of federal programs due to constitutional defects or otherwise, there is likely to be interest among commodity groups to reconstitute programs at the state level.

There continues to be considerable support among producers for continuing activities paid for by their checkoff dollars and evaluatory evidence suggests that producer-funded developmental programs benefit both producers and consumers. On the other hand, segments of the agricultural community, often led by family farm and small farm advocates, charge that checkoff programs are increasingly at odds with diverse economic self-interest of categories of producers and other participants in the marketing of agricultural commodities. Legal and other developments that have occurred since the mid 1980’s when a number of the current checkoff programs came into being suggest that it is prudent to revisit the checkoff programs for compliance with 1st Amendment principals as well as in terms of compatibility with divergent and competing economic interests.

¹ Producer-funded commodity development programs are typically referred to as “checkoff” programs referring to the use of checkoff boxes marked by producers on sales forms to indicate the seller’s agreement to contribute a portion of the sale proceeds toward voluntary research and development programs. Although the checkoff forms are obsolete under programs funded by mandatory assessments that have largely supplanted voluntary programs, the term “checkoff” has remained in popular usage to refer to the assessments and the programs they fund.

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Commodity Development Programs

Generic promotion programs for agricultural commodities have grown in importance over the past few decades and have matured from primarily state level programs before the mid-1980's to a mixture of state and national programs. Currently a significant number of both federally legislated as well as state and regional commodity promotion programs are in effect. Generic commodity promotion describes activities when a standard industry-wide commodity, such as corn or beef, is promoted cooperatively on behalf of all producers as opposed to particular brands or the production of specific producers promoted by private players in a competition with one another.

Farmers, cooperatives, and processors have long attempted to organize commodity promotion programs. While collective efforts to stimulate demand and cultivate new markets for raw farm products began as privately-initiated voluntary efforts and were often an outgrowth of other types of cooperative activity, agricultural commodity promotion has evolved to primarily occur under governmental mandate and to occur independently from other forms of economic cooperation. Additionally, promotional programs, particularly at the state level, invest in additional elements of market development beyond simply domestic generic advertising, such as research, development of new forms of utilization, export enhancement, quality and marketing certification programs, and various other activities to establish, serve and expand markets for a commodity. The Agricultural Marketing Agreement Act (AMAA) of 1937 set the federal legislative foundation for generic promotion programs, and a number of national programs were organized under this legislation. In recent years, the growth in commodity promotion activities has come mostly from stand-alone legislation referring to programs that organize producers for market development purposes only and not other elements of economic cooperation that are available under the AMAA and similar state laws.

It is these stand alone programs that appear to be most directly placed in constitutional limbo by a recent series of U.S. Supreme Court and lower federal court rulings. This section reviews the history of commodity promotion, briefly describes those commodity development programs authorized by state law, and discusses the purposes and criticisms of commodity development programs.

The Evolution of Agricultural Commodity Promotion

The modern commodity development programs arise from a long history of public and private attempts to improve the welfare of producers by enabling them to gain greater control over the production and marketing of their commodities and thereby have greater leverage in negotiating prices. Even prior to the Great Depression era when farm prices and income declined precipitously, government policy encouraged producer marketing cooperatives to form. The Clayton Act of 1914 and the Capper Volstead Act of 1922 granted important anti-trust exemption to such farmer cooperatives to remove legal impediments to collective marketing of production from many farms. The cooperative organization also provides some ability to control overproduction and a structure to marshal resources to stimulate overall demand for a commodity and to distinguish the cooperative's production in the marketplace.

Although many examples of cooperative formation occurred in the early part of the 20th Century, few were successful or durable.² Many weaknesses of voluntary cooperatives became apparent. Voluntary cooperatives suffer from both deviation and free-rider effects. If a cooperative is successful in increasing prices or expanding markets, individual producer members are tempted to deviate, i.e. to disregard cooperative rules and sell production independently in the open market. Additionally, particularly for homogenous commodities, there is often little incentive for producers to join since they can enjoy the benefits of collective promotion undertaken by other producers without incurring any additional costs themselves. Thus, a critical factor for an agricultural cooperative to be successful is to gain control of the marketing of a monopoly, or at least a significant share, of production in any particular market, or, to represent a distinct, distinguishable premium product of a cohesive group of producers who would have difficulty in capturing premium markets independently.

With the Depression came renewed calls for addressing farm income through cooperative formation. Both at the state and the federal level, legislators responded to the limitations of voluntarily membership cooperatives by enacting legislation empowering the Secretary of Agriculture or an appropriate state authority to enter into marketing orders with groups of producers of a specific commodity or within a geographic region. The Agricultural Marketing Agreement Act (AMAA) of 1937, which continues today, provided for orders that essentially compel the association of affected producers for purposes of economic cooperation. Typically, a marketing order is first submitted to a referendum of affected producers and the order goes into effect if a requisite majority vote to be bound by the order. Additionally, market order legislation provides for mechanisms for rescinding the order upon a referendum of producers or upon the finding that the marketing order no longer serves the interests of producers or consumers.

When first enacted, the AMAA allowed producers to impose upon themselves economic regulations that focused mainly on supply control and product quality. Such marketing orders provide for mandatory assessments paid by all producers to fund enforcement and other costs associated with administering the order. Congress and USDA had been originally skeptical of generic promotional activities as a permitted element of mandated associations under a marketing order. But, by the 1950's, the costs of government farm programs had risen dramatically due to extensive government purchases of surplus commodities to prop up prices. Producer funded promotional programs gradually gained acceptance as adding a demand instrument to compliment supply controls and to reduce their costs. In 1954, Congress began amending the AMAA to include research and promotion as additional cooperative activities that could be conducted under authority of the Act. A part of the assessments collected from each producer for administration of the order could include an amount for purposes of any collective research and promotion program conducted.

The revisions to the AMAA to allow for generic promotional programs were also driven in part by the proliferation of state legislation to facilitate cooperative funding of research and promotional activities apart from production and marketing regulations. These “stand alone” programs typically provided for some manner of government support for and supervision of collection and expenditure of assessments through governing bodies representing the industry. These programs, sometimes referred to as “promotional orders”, were often authorized and administered by mechanisms similar to the AMAA marketing orders, with

² A handful of voluntary producer cooperatives formed in the early 20th Century remain today. Some products of these cooperatives are marketed under familiar brand names yet today. Blue Diamond almonds and Sun Maid raisons are two prominent examples.

collections beginning only after approved by producer referendum. By 1986, 316 state promotion programs were being funded by producer checkoffs authorized by state legislation. The first stand-alone federal statute authorizing general commodity promotion was the National Wool Act of 1954, enacted the same year as the previously discussed revisions to the AMAA. The Wool Act, however, did not directly assess producers. The money set aside for wool promotion was taken out of price support funds that would have been paid to wool producers.

There was a problem with commodity promotion programs on the state level due to the fact that most major commodities are produced in several states. To address this, some commodity groups established national organizations, with each state within the organization contributing to a national promotion program. This gave rise to more difficulties, however. Some states did not contribute to the program, and participating states also had varying assessment levels. Although there was cooperation among state organizations, many felt that federal legislation was necessary to ensure equity across the states. The first industry to pay a direct assessment on a national level was cotton. The Cotton Research and Promotion Act became law in 1966. Stand-alone legislation followed for the promotion of wheat in 1970, potatoes in 1971, eggs in 1974, and flowers in 1981.

The stand alone programs typically began as voluntary or refundable assessments. As voluntary programs, however, they were subject to the same weaknesses as wholly privately-initiated producer cooperatives. Free-rider criticisms undercut support from even willing contributors, and private promotional efforts by some opting out of the programs often worked at cross purposes devaluing the government-sponsored generic promotion. Perceptions that collective promotion would be more effectively and equitably carried out if all producers were required to contribute led to legislation providing for mandatory assessments for some commodities.

The first such stand-alone legislation requiring mandatory assessments without refund provisions was enacted in Florida in 1935. The Dairy Research and Promotion Act of 1983 was the first federal research and promotion program authorized without refund provisions. The 1985 Farm Bill added research and promotion statutes funded by mandatory, nonrefundable assessments for honey, beef, pork, and watermelons. Pecans, mushrooms, limes, soybeans, and fluid milk promotion and research statutes were added in the 1990 Farm Bill. Following the lead of the dairy industry, the cotton, potato and egg programs had all terminated refund authority by the end of 1990. There are no current federal commodity research and promotion programs that offer refunds on demand although refundable assessments are not uncommon under state authorized programs.

Congress further signaled its support for commodity promotion with the Commodity Promotion, Research, and Information Act of 1996. Among its findings, Congress stated that the commodity promotion programs are in the national public interest and vital to the welfare of the agricultural economy. The act included general language allowing for the creation of stand-alone programs for other commodities. Research and promotion programs for peanuts and blueberries have been established under this authority. Oversight of these programs is provided by the Agricultural Marketing Service (AMS) of the United States Department of Agriculture (USDA). AMS currently oversees research and promotion programs for cotton, potatoes, eggs, dairy, honey, beef, pork, lamb, mohair, watermelons, soybeans, mushrooms, fluid milk, peanuts, blueberries, and popcorn.

Nebraska Commodity Development Programs

There are currently mandatory "checkoff" programs authorized by state law for wheat, corn, grain sorghum, and milk, and voluntary (refundable) checkoff programs for dry beans, poultry and eggs, and potatoes. Nebraska producers also contribute to a number of mandatory checkoff programs authorized by federal law and administered by USDA, many of which share revenues collected between federal and designated state commodity boards. The most important of these federal programs in terms of relevance to Nebraska agriculture include programs for beef, pork, and soybeans. Commodity development programs collecting assessments authorized under state law are briefly summarized here.

Dairy

Under the federal milk promotion program, a mandatory assessment of 15 cents / cwt is collected from all milk producers for promotional programs under federal law. However, individual states or milk marketing regions may retain and control up to 10 cents / cwt and forward only the difference between the local and federal checkoff directly to the federal program. The Nebraska Dairy Industry Development Act (§§2-3948 through 2-3964) was enacted in 1992 in anticipation of termination of the dairy promotion checkoff of the Nebraska-Western Iowa Federal Milk Order. The regional checkoff was rescinded by rule of the Secretary of Agriculture in December of 1998. The ending of the federal checkoff activated section §2-3958 which imposes a 10 cent / cwt assessment on all milk produced in the state for commercial use. The assessment is collected by the first purchaser of raw milk at the time of sale or delivery and remitted to the Board. The Nebraska Dairy Industry Development Board (Dairy Board) first began collecting the assessment in January, 1999.

Wheat

The Legislature enacted the Nebraska Wheat Resources Act in 1955. The Wheat Division within the Nebraska Department of Agriculture was separated into the Wheat Development, Utilization and Marketing Board in 1981. The Act declares the public policy of the State of Nebraska to protect and foster the health, prosperity, and general welfare of the state by protecting and stabilizing the wheat industry and the economy of areas producing wheat. The Wheat Board is declared the state agency created and vested with this responsibility, and is responsible for formulating the general policies and programs of the State concerning the discovery, promotion and development of markets and industries for utilization of wheat. The Board is authorized to collect an excise tax of up to 1.5 cents per bushel on all wheat marketed in the state. Currently, the Board collects an assessment of 1.25 cents per bushel. The Nebraska Wheat Board along with 19 other state wheat boards, is a member of the U.S. Wheat Associates which conducts overseas marketing activities. The Board is also a member of the Wheat Foods Council which works to strengthen demand for wheat based foods.

Corn

The Nebraska state corn development program was created in 1978 to promote the production, marketing, and utilization of corn. The Corn Development, Utilization & Marketing Board became a separate state agency in 1986. Prior to that time, it had been housed as a subprogram within the Nebraska Department of Agriculture. The primary intent of the Board is to develop, carry out, and participate in programs of research, education, market development, and promotion on behalf of the corn producers of Nebraska. The Board is authorized to collect a fee not to exceed

4/10th cents per bushel (current .25 cents) upon corn sold through commercial channels that is collected by the first purchaser of corn. In addition to direct expenditures by the Board, market development activities are conducted through contracts with national organizations such as the U.S. Grains Council and the U.S. Meat Export Federation.

Grain Sorghum

The Grain Sorghum Program was created in 1981 to fund market development, promotion, education, and research programs related to grain sorghum. Effective July 1, 1992, the Nebraska Grain Sorghum Board was granted separate agency status. Prior to that time, the Board was included as a subdivision of the Nebraska Department of Agriculture. Foreign and domestic market development activities of the Grain Sorghum Board are conducted through the U.S. Feed Grains Council and the National Grain Sorghum Producer's Association. Funding for the program is provided by a levy of 1 cent / cwt of grain sorghum sold in the state.

Potatoes

State law (§2-1801 et seq.) vests authority to conduct potato development programs in the Director of Agriculture funded by an assessment against shippers which is set periodically by the Director without a statutory maximum. The Act declares the public policy of the State of Nebraska to protect and foster the health, prosperity, and general welfare of the state by protecting and stabilizing the potato industry and the economy of areas producing potatoes. The Department of Agriculture is declared the state agency vested with this responsibility and a Potato Development Division is created by statute within the Department of Agriculture. The Nebraska Potato Development Act is designated part I of a broader Act which also provides for the Director to set and enforce potato grading standards. The Director appoints a Potato Advisory Council consisting of producers and shippers to advise the director on policies and investments of assessments collected.

Poultry and Eggs

State law (§2-3401 et seq.) vests authority to conduct development programs for poultry and eggs produced in Nebraska in the Director of Agriculture funded by a refundable assessment not to exceed 5 cents / case of eggs and 3 cents / turkey sold commercially. The Director carries out the functions through the Poultry and Egg Development Division created by statute within the Department of Agriculture. The Director appoints an advisory council consisting of directors of the Nebraska Poultry Industries Council and other ex. officio members to advise the director on policies and investments of assessments collected.

Dry Beans

In 1987, the Legislature created the Nebraska Dry Bean Commission under the provisions of the Dry Bean Resources Act (2-3701 et seq.). The Commission is declared a state agency with primary function, as defined by the Legislature, to adopt and devise a dry bean program consisting of research, education, advertising, publicity and promotion to increase total consumption of dry beans on a state, national and international level. The Commission's activities are funded by a refundable assessment not to exceed 10 cents / cwt (currently 7.5 cents) collected on dry edible beans grown in Nebraska and sold through commercial channels. Two thirds of the tax is paid by the grower and 1/3 by the first purchaser of the crop.

State Commodity Development Program Comparisons

| | Assessment Rate | Voluntary? | Governance | Statement of Legislative Intent/policy |
|---------------------------|--|--|---|--|
| Wheat | Assessment is designated by statute as an excise tax. Rate is set by Wheat Board but may not exceed 1.5 cents/bu. (currently 1.25 cents/bu.) | No | Wheat Board existing as state agency. Board consists of seven members representing seven geographical districts. Appointed by the Governor | Statute declares public welfare and policy of state to protect and stabilize wheat industry and declares Wheat Board as "agency of the state for such purpose." |
| Corn | Assessment is designated by statute as a "fee". Rate is set by Corn Board but may not exceed 4/10th cent/bu. (currently .25 cents/bu) | No | Corn Development, Utilization and Marketing Board existing as state agency consisting of 9 members, 8 appointed by Governor to represent geographical districts and 1 at-large member appointed by remainder of Board | Declared to be interest of state that producers be permitted and encouraged to carry out market development activities. Purpose of Act is to provide authority and mechanisms by which "corn producers in this state may finance [such activities]. |
| Dry Beans | Assessment is designated by statute as a "fee". Rate is set by Dry Bean Commission at rate not to exceed 10 cents/cwt. Grower is liable for 2/3 of fee and 1st purchaser liable for remaining 1/3. | Yes, assessment is refundable upon request | Dry Bean Commission existing as state agency consisting of 6 growers appointed by the Governor, 4 representing geographical districts and 2 appointed at-large, and 3 members appointed by Governor to represent processors. | Declared to be public welfare of state that producers & processors be permitted and encouraged to carry out market development activities. Purpose of Act is to provide authority and mechanisms by which "dry bean producers & processors in this state may f |
| Sorghum | Assessment is designated by statute as a "fee". Rate is set by Grain Sorghum Board not to exceed 1 cent/cwt. | No | Grain Sorghum Board consisting of 7 grower members, 6 appointed by governor to represent geographical districts, and 1 at-large appointed by remainder of board. | Declared to be public welfare of state that sorghum producers be permitted and encouraged to carry out market development activities. Purpose of Act is to provide authority and mechanisms by which "dry bean producers & processors in this state may financ |
| Potatoes | Assessment designated by statute as "excise tax" imposed upon potato shippers. Rate is indefinite. Paid annually with annual report of potato shipments | No | Potato Development Division established by statute within the Dept. of Agriculture. Authority to carry out potato development assigned to Director of Agriculture. Director may appoint potato advisory committee. | Statute declares public welfare and policy of state to conserve, develop and promote potato industry in Nebraska and declares Dept. of Agriculture as "agency of the state for such purpose." |
| Poultry & Eggs | Assessment designated by statute as a "fee". Rate set by Director of Ag not to exceed 5 cents/case on eggs sold commercially, and not to exceed 3 cents / turkey sold commercially. | Yes, assessment is refundable upon request | Poultry & Egg Development Division established by statute within the Dept. of Agriculture. Authority to carry out poultry & egg development assigned to Director of Agriculture. Statute designates directors of Nebraska Poultry Industries Inc. and additio | No statutory declaration of intent or policy |

Policy Considerations

Apart from addressing obvious shortcomings of privately initiated attempts by producers to collectively conduct promotional programs supported by voluntary contributions, there are a number of policy arguments supporting a governmental role in facilitating the association of producers for commodity development purposes. Conversely, in addition to potential infringement on 1st Amendment protections, there are implementational and philosophical issues associated with checkoff programs that have given rise to questions about the equity, utility and value of such government-sponsored programs. Briefly set out here are some of the more prominent discussion points, both supporting and critical.

Realizing the full potential of commodity development necessitates the elimination of free-rider problems

The basic economic rationale for collective promotion has not changed. For producers, especially those growing fungible commodities, in the absence of a significant market presence, there are disincentives for an individual producer or even groups of producers to privately engage in commodity development. This results in a suboptimal level of promotional investment since few individual producers are willing or capable of undertaking the expense. Additionally, some types of market development activities such as research, cultivation of foreign markets, and stimulation of value-added allied industries require significant, sustained investment over time. Such projects which are less likely to have immediate, certain and exclusive returns to an individual producer making the investment are even less likely than promotional expenditures to occur. Absent some manner of industry-wide participation private promotional programs find it difficult to marshal sufficient resources and overcome free-rider disincentives .

The alternatives to collective promotion programs are further consolidation and vertical integration of agricultural production

Mandatory programs arguably benefit small, independent farmers more than other producers. As agribusinesses become larger, more concentrated and vertically integrated, their ability to devote resources to promoting their own products greatly increases. Thus, elimination of generic promotion programs would arguably cede even greater competitive advantage to such producers in the marketplace. Often, it is the larger, integrated producers who have challenged the mandatory checkoff programs perceiving their contributions to generic promotional efforts as devaluing their own independent expenditures to promote their own branded products. Mandatory programs allow producers small and large to come together as one entity to promote their commodity. At the same time, nothing about these programs prevents individual producers from advertising the superiority of the products produced on their particular farm. Ideally, collective promotion universally supported by all producers would lead to expanded markets helping to avoid or reduce the impacts of market cannibalism that occurs under competitive promotion in a static market.

Research and promotion programs help farmers who are not subsidized

Research and promotion programs are also of particular benefit to those commodities that do not benefit from federal farm programs. Many of the commodities participating in research and promotion programs do not receive the government support that is provided to the major crop commodities. Without government payments in times of low income, it is especially

important that these commodities have an effective mechanism of maintaining and developing markets for their products. At the same time, pressures to reduce income and price supports to producers of commodities that do receive subsidies put a premium on industry-led marketing initiatives.

There are considerable external benefits to the broader public that derive from producers associating for commodity development purposes

A more economically robust agricultural economy is less dependant upon subsidies thereby freeing up public resources for other priorities. Presumably, promotional programs help create more favorable market conditions that contribute to a more vibrant agricultural economy than would otherwise occur. Development programs may directly benefit the larger public by marshalling resources that would otherwise not be made available for advancing widely held goals such as improved food safety, nutritional education and advocacy, and finding renewable alternatives for energy and other consumer and industrial needs. Through their checkoff dollars, producers have accelerated development of value-added activities that provide new employment opportunities for the general public and which contribute to the tax base supporting governmental services. Thus, there is considerable governmental interest in encouraging and facilitating the participation of all producers in commodity development efforts. There are, in fact, a number of examples where the objectives of commodity development and the public interest coincide to the extent that government resources have supplemented investments made by producers through development programs, for example in export promotion and food safety research.

Globalization of agricultural trade requires even greater emphasis on collective marketing efforts

Over the past 50 years, American agriculture has grown highly dependent upon export markets. In more recent times, American dominance in world markets has been eroded by new competition. Additionally, subsidized exports by competitors, regulatory barriers to our imports imposed by other nations, free trade rules which limit government export subsidies, and aggressive export promotion by other nations' producers have combined to make industry generated resources to promote U.S. products overseas an even more critical trade tool. For some commodities, wheat for example, a growing and even dominant investment of checkoff funds is in support of activities related to developing and maintaining relations with foreign customers and programs that enhance marketability of production from U.S. farms in international markets.

Economic evaluations generally conclude that contributions to commodity development programs are a good investment for producers

The 1996 Farm Bill requires that all federal commodity promotion programs periodically conduct economic evaluations of their impacts. Although there is disagreement among economists who have studied promotional programs, and methods of evaluation are imperfect and evolving, in general, research findings over time have concluded that generic programs provide positive benefits to producers and society.

Generic commodity promotion may be perceived as increasingly irrelevant and conflicting with changing industry structure

Significant change in the structure of production agriculture, characteristics of producers and their economic interests present challenges to generic development programs. As agricultural production becomes more consolidated and coordinated, the private sector may be increasingly capable of carrying out commodity development functions without the intervention of government. Large and integrated producers who have the ability to promote branded products question the utility of collective promotion. These producers, major contributors to mandatory programs, find economic self-interest in promoting their own production and may resent contributing to programs that promote the products of competitors equally. The resentment may be further founded upon a belief that collective, government-sponsored promotional activity is inherently less effective and competent than private promotions. At the other extreme, smaller independent producers may also perceive economic self-interest in pursuing specialized, niche markets and cultivating consumer preference for presumed food qualities and social values associated with traditional production methods. These producers may view generic advertising as masking important differences in food origins and production practices and therefore interfering with consumers' ability to make enlightened food choices. As food production becomes more concentrated at the same time markets become more dispersed and specialized, it is more difficult to conduct generic promotions without creating conflict with commercial interests of commodity subgroups.

Promotional programs are often interconnected with advocacy organizations active in policy arenas whose views segments of producers disagree with

To varying extent, commodity development functions are carried out in subcontract with industry trade associations who concurrently are active in policy making arenas. It is perhaps inevitable that policy positions adopted by these organizations will be at odds with the views of some individuals who contribute to mandatory programs. This can lead to a perception that checkoff dollars directly or indirectly support the formulation and dissemination of political activities and viewpoints that individual producers may disagree with. Even if it can be shown that subcontracting groups' use of checkoff funds is confined to legitimate checkoff purposes and does not subsidize the group's lobbying activities, the checkoff funds may enhance the stature and visibility of these organizations, thereby indirectly aiding their membership recruitment and clout in policy discussions.

It is questionable as both a legal and policy matter whether commodity development is a purpose in and of itself that justifies the compelled association of producers

The Supreme Court's United Foods decision casts considerable uncertainty over the constitutionality of stand alone promotional programs, i.e. those not carried out by associations of producers who are already bound together for other cooperative purposes. While litigation has generally been mostly motivated by perceived commercial conflict with commercial speech promulgated by mandatory programs, an underlying issue is whether government's role in encouraging and even compelling the association of producers for commodity development purposes only is an appropriate intervention in the free market.

Cross commodity impacts

Some economists have questioned whether commodity promotion leads to greater overall welfare for the agricultural production economy, suggesting that promotion of one commodity may merely take market share away from competing commodities. For example, does beef promotion hurt sales of pork, poultry or other competing protein sources? Some investigations of this issue suggests that promotional programs are complimentary, but other research suggests that in some cases there can be cross commodity impacts and that there should be greater coordination of promotional activities.

Lack of apparent, tangible benefit to producers

Although evaluations of the value of promotional programs generally find that producers benefit from them, it is difficult to demonstrate a direct value to individual producers due to the fact that promotional activity is only one of many factors that affect prices and the availability of markets. Additionally, if development programs are successful in expanding markets and achieving higher prices, this may stimulate greater production and a new cycle of oversupply that in theory negates the value achieved by the promotional investment.

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1st Amendment Litigation

At least eight different legal challenges to mandatory federal checkoff programs are currently working their way through the federal courts. Additionally, courts have also struck down as unconstitutional a handful of state checkoff programs. These challenges are based on the proposition that mandatory assessments violate the 1st Amendment freedom of speech protections -- more specifically they are a form of compelled speech prohibited by the 1st Amendment. This chapter examines the compelled speech theory underlying current litigation challenging the constitutionality of commodity development and promotion programs funded by mandatory assessments against producers and other market participants.

Compelled Speech Case Law Prior to Glickman and United Foods

The 1st Amendment of the U.S. Constitution is normally thought of in terms of limiting the extent to which government may regulate the private expression of ideas and dissemination of information, or the voluntary association of its citizens. That the government is limited in the extent to which it may impose association or compel individuals to participate in or subsidize collective speech is a reciprocal concept the courts have recognized to be embedded in the 1st Amendment as well.

“Just as the First Amendment may prevent the government from prohibiting speech, the Amendment may prevent the government from compelling individuals to express certain views . . . or from compelling certain individuals to pay subsidies for speech to which they object.”
United States v. United Foods, Inc., 533 U.S. 405 at 410

An early case before the U.S. Supreme Court to explore this principle, West Virginia Bd. of Education v. Barnette, 319 U.S. 624 (1943), held that a state could not compel a public school student to recite the Pledge of Allegiance. In Wooley v. Maynard, 430 U.S. 705 (1977), the Supreme Court held that the State of New Hampshire could not require individuals to display the state motto, “Live Free or Die” upon their license plates when the motto was contrary to religious and political beliefs. In its ruling, the court stated *“Where the State’s interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh the individual’s First Amendment right to avoid becoming the courier for such message.”*

Abood v. Detroit Bd. of Education, 431 U.S. 209 (1977) and Keller v. State Bar of California, 496 U.S. 1 (1990) laid the foundation for analyzing compelled association and subsidization of collective speech and have been repeatedly cited precedent for examining mandatory commodity checkoff programs in a 1st Amendment context. In Abood, the Supreme Court examined a Michigan statute that authorized school districts and other public employers to compel assessments to fund activities of unions recognized as the collective bargaining agent for public employees in an “agency shop. The case involved teachers in the Detroit School District who objected to the requirement to financially support union resources they would not have independently chosen to represent them in wage and grievance matters and who also objected to certain political activities and messages disseminated by the union. The court held that mandatory fees imposed upon teachers infringed upon their 1st Amendment rights by compelling them to associate with unions and their activities. However, as the Supreme Court restated in United Foods,

“In Abood, the infringement upon First Amendment associational rights worked by a union shop arrangement was ‘constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress’.”³

The court, however, qualified its holding by also ruling that the government could not require public school teachers to pay fees to the school teachers union for purposes not germane to the public policy reason for compelling union membership, (e.g. for political involvement and policy advocacy). The court did not bar unions from engaging in activities beyond collective bargaining, but held that *“the Constitution requires only that such activities be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and are not coerced into doing so against their will by the threat of loss of government employment.”*

In Keller, members of the California State Bar claimed use of their dues to fund certain ideological and political activities engaged in by the Bar Association violated their 1st Amendment rights. Similarly to the earlier Abood holding, the Supreme Court found that the infringement upon the objecting attorneys’ 1st Amendment rights by requiring their membership in the State Bar as a condition of practicing law was allowed only to the extent that the compelled association advanced the overriding public and governmental interest to guard and improve the quality of legal services. The court held that the State Bar of California could not use compulsory dues to finance political and ideological activities that were not germane to the purpose that justified the compelled association.

In both Abood and Keller, the court distinguished the policy advocacy and ideological activities engaged in by the teachers union and the state bar from “government speech.” Generally stated, the government speech doctrine affords greater immunity of speech engaged in by the government from 1st Amendment compelled speech attacks even when the government employs private actors to promulgate and disseminate its message. This is based on the premise that to function effectively, government must have the ability to engage in social and economic intervention and advocacy to advance public welfare goals even though such activity may be objected to by some segments of the public.

“It is inevitable that government will adopt and pursue programs and policies within its constitutional powers but which nevertheless are contrary to the profound beliefs and sincere convictions of some of its citizens. The government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties. Within this broader principle, it seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies.” Board of Regents of Univ. of Wisconsin v. Southworth, 529 U.S. 217,(2000); at 229

Even though in both Abood and Keller the government compelled membership in private organizations to advance governmental policies, the Supreme Court explained that compelled support of a private association is fundamentally different from compelled support of government. As stated in a concurring opinion in Abood, the associations themselves were not part of the government -- rather, they represented only a small segment of the public with common interests in contrast to government which is representative of the people as a whole. Whereas government may advance legitimate policy purposes by engaging in speech and advocacy paid for by funds derived from fees and taxes, some of which may be

³ United States v. United Foods, Inc., 533 U.S. 405 at 411

paid by objecting taxpayers, such associations when engaging in activities beyond their associational purposes may only do so from funds contributed voluntarily.

In 1989, the Third Circuit Court of Appeals directly addressed the government speech defense in a 1st Amendment challenge to the national beef checkoff program. United States v. Frame, 885 F. 2d 1119 (3rd Cir. 1989). The 3rd Circuit acknowledged that the question of whether the generic advertising compelled by the Beef Act was a form of government speech and therefore subject to less strict 1st Amendment scrutiny was a close one.⁴ However, relying on the concurring opinion in Abood described earlier, the court found that the Beef Board which largely implemented the checkoff expenditures was representative of only one segment of the population, and that the speech was funded by a specific group of private individuals, rather than the government, to be controlling factors:

“Both the right to be free from compelled expressive association and the right to be free from compelled affirmation of belief presuppose a coerced nexus between the individual and the specific expressive activity. When the government allocates money from the general tax fund to controversial projects or expressive activities, the nexus between the message and the individual is attenuated. In contrast, where the government requires a publicly identified group to contribute to a fund earmarked for the dissemination of a particular message associated with that group, the government has directly focused its coercive power for expressive purposes.”

Although the 3rd Circuit labeled the beef checkoff as merely “an industry self-help program” and not government speech, it ultimately upheld the constitutionality of the program. Since the case raised allegations of both compelled speech and association, the Frame court analyzed the beef checkoff program under the standard of scrutiny employed in Roberts v. United States Jaycees, 468 U.S. 609 (1984). In that case, the Supreme Court stated that government interference with association rights must be “justified by compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms”. The Frame court concluded that the public interest in expanding beef markets and demand through the mechanisms of collectively-funded generic beef promotion and research was sufficiently compelling. It also found that the program engaged only in commercial speech on behalf of producers that distinguished it from earlier precedents where those compelled to associate objected to ideological or political expression. Thus, the court concluded that the Beef checkoff’s infringement on 1st Amendment rights was comparatively slight and justified.

Glickman v. Wileman Bros. & Elliot

Together with the U.S. Supreme Court ruling in United Foods, Glickman v. Wileman Bros. & Elliot, 521 U.S. 457 (1997) establishes the current framework for evaluating the permissibility of compelled subsidies for generic promotion within the context of agricultural marketing. Previous precedent derived from principles laid out in Abood and Keller suggest broadly that compelled association and subsidy of collectivized commercial speech are permissible to the extent that such association serves compelling public interests and does not impose a requirement that individuals fund ideological or political messages they disagree with. What

⁴ The court observed that the amount of oversight in the checkoff program was considerable -- the Secretary of Agriculture appoints members of the Beef Board, approves budgets, plans, projects and contracts, and holds ultimate editorial control of advertising content. The court further agreed that the program served a national interest articulated by Congress in maintaining and expanding beef markets.

appears to distinguish Glickman, as further explained in United Foods, is that the Supreme Court more carefully identified when a compelling public interest exists to justify compelled subsidy of commercial speech on behalf of agricultural producers.

In Glickman, the Supreme Court emphasized the regulatory context in which the question of 1st Amendment infringement arises. Wileman Brothers & Elliot Inc., a large producer of tree fruits that packed and marketed its own production as well as that of other producers, objected to many aspects of the marketing order that had essentially collectivized the California tree fruit industry⁵. Under authority of the Agricultural Marketing Agreement Act (AMAA) of 1937, USDA had established marketing orders that set uniform prices, established product and packaging standards, limited the quality and quantity of the commodity that could be marketed, provided for inspection and enforcement activities, and imposed other conditions for participation in the tree fruit market. Among the collective activities authorized by the AMAA is joint research and development projects, including “any form of marketing promotion including paid advertising.” Pursuant to the AMAA, the expense of administering the tree fruit order, including research and promotion, are paid from assessments collected from growers and handlers.

In addition to technical objections to validity of many details of the marketing regulations under the order, the company raised 1st Amendment objections to the portion of the assessments it paid for administration of the program that underwrote promotion. While alleging disagreement with the content of the collective advertising, the company based its argument primarily on the assertion that the collective, generic advertising campaign could not be shown to be more effective in stimulating consumer demand than promotional mechanisms industry participants might have otherwise invested in. The 9th Circuit Court of Appeals agreed and held that the program therefore failed a key test of the validity of regulation of speech described in Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557 (1980)⁶.— specifically that the regulation must directly advance the governmental interest asserted and that the regulation is not more extensive than necessary. This conflicted with the earlier 3rd Circuit ruling in Frame, which upheld the Beef checkoff, not only in the ultimate outcome but also because the 9th Circuit’s ruling would have imposed an additional burden not present in Frame.

The U.S. Supreme Court rejected the 9th Circuit’s reliance on Central Hudson to test the constitutionality of market order assessments for promotional advertising. Instead, the court stated that “*the legal question that we address is whether being compelled to fund this advertising raises a 1st Amendment issue for us to resolve, or rather is simply a question of economic policy for Congress and the Executive to resolve.*”

The Supreme Court concluded that the characteristics of the regulatory scheme in which the collective advertising arises distinguished the California tree fruit marketing order from laws found to unconstitutionally infringe upon freedom of speech protected by the 1st Amendment. The court noted that the generic advertising in question was unquestionably germane to the purposes of the AMAA authorizing the marketing orders that compelled the producers to market cooperatively. The orders also did not impose any restraint on market participants

⁵ The regulations at issue in Glickman are contained in Marketing Order 916 (see 4 Fed Reg 2135) first issued in 1939 and Marketing Order 917 (see 7 CFR 937) first issued in 1958.

⁶ Although Central Hudson pertains to the validity of government restrictions on privately initiated commercial speech, the standards set forth in that case have been cited often in inverse form as implying standards for evaluating the validity of compelled subsidy of collective speech endorsed or sponsored by the government.

from engaging in their own promotions apart from the collective promotional campaign, and they did not compel producers to endorse or finance any political or ideological speech. But more significantly, however, was the finding as restated in United Foods;

“The mandated assessments were ‘ancillary to a more comprehensive program restricting marketing autonomy . . . producers of tree fruit who were compelled to contribute funds for use in cooperative advertising ‘did so as a part of a broader collective enterprise in which their freedom to act independently was already constrained by the regulatory scheme.’ The opinion and the analysis of the [Glickman] Court proceeded upon the premise that the producers were bound together and required by the statute to market their products according to cooperative rules. To that extent, their mandated participation in an advertising program with a particular message was the logical concomitant of a valid scheme of economic regulation.” United Foods, at 409-410

In essence, Glickman determined that the relevant issue was whether the entire marketing order compelling cooperation among producers in making economic decisions was valid. If so, then a 1st Amendment issue did not exist in the case since the cooperative advertising conducted pursuant to the order was merely a small but integral piece of a more comprehensive economic regulation.

United States v. United Foods, Inc.

The Supreme Court held in Glickman that a highly regulated commodity market that constrained the ability to market independently was a significant factor justifying compulsory assessments to collectively fund promotion on behalf of market participants. That interpretation by itself would not necessarily be inconsistent with Frame and other rulings upholding federal checkoff programs. However, in United States v. United Foods, Inc., 533 U.S. 405 (2001), the Supreme Court arguably went one step further by restating Glickman to hold that a high degree of collectivization of a commodity market similar to the California tree fruit industry is more than just a relevant condition – it is a necessary prerequisite.

In 1990, Congress enacted the Mushroom Promotion, Research and Consumer Information Act.⁷ Under the Act, mushroom producers and importers collectively fund projects of mushroom promotion, research, and consumer and industry information through a mandatory assessment paid by handlers of fresh mushrooms. At the time of the issue was in question, the revenues raised by the assessments were expended almost exclusively for generic advertising to promote mushroom sales. United Foods, Inc., a large agricultural enterprise based in Tennessee that grows and distributes a diversity of vegetable crops including mushrooms, refused to pay the assessment beginning in 1996. The company protested on the basis that the generic advertising it was forced to subsidize conflicted with its own efforts to build customer loyalty to its brand of mushrooms which it promoted as superior to mushrooms in general. Therefore, the forced subsidy for generic advertising was a violation of its 1st Amendment protections.

In evaluating the question, the court acknowledged that United Foods' conflict with the generic mushroom promotion was a commercial one rather than ideologically based, and further acknowledged that the court has established “*standards for determining the validity of speech regulations which accord less protection to commercial speech than to other*

⁷ 7 U.S.C. §6101 et seq.

expression". However, the Supreme Court emphasized at several points that the fact the mushroom promotion program compelled speech in aid of a commercial purpose was not void of 1st Amendment significance⁸ and did not deprive United Foods of all 1st Amendment protections.

As in Glickman, the Court in United Foods minimized the relevance of Central Hudson which held that government regulation of commercial speech could be upheld despite its 1st Amendment infringement provided that the regulation has sufficient nexus to a compelling governmental interest.⁹ Rather, the Court found the most directly controlling precedent in Abood, Keller and Glickman. The Court interpreted that these rulings required that there be a broader associational purpose germane to advancing important social or economic policy objectives to justify mandatory assessments to fund collective activities of those compelled to associate. In Glickman, the Court found a parallel between, on the one hand, the collectivization of the California tree fruit industry in advancement of agricultural stability policy objectives articulated by Congress through the Agricultural Marketing Agreement Act, and the compulsory union membership of teachers in Abood consistent with the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress. A similar parallel was found with the compulsory state bar membership in Keller.

The court distinguished the assessments for generic advertising under the mushroom program from the assessments for administration of the California tree fruit marketing order which included expenditures for generic promotion as one component of the system of cooperative marketing imposed by the order.

“ . . . the compelled contributions for advertising are not part of some broader regulatory scheme. The only program the Government contends the compelled contributions serve is the very advertising scheme in question. . . . The cooperative marketing structure relied upon by a majority of the Court in Glickman to sustain an ancillary assessment finds no corollary here; the expression [United Foods, Inc.] is required to support is not germane to a purpose related to an association independent from the speech itself. . . . ” United Foods, at 413

Noting that USDA itself had argued in Glickman that the compelled contributions for advertising under the California tree fruit marketing order were “*part of a far broader regulatory system that does not principally concern speech,*” the Court went on to state that its rulings “*have not upheld compelled subsidies for speech in the context of a program where the principal object is speech itself.*”

On a significant related issue, the Court declined a request by USDA to consider whether the mushroom promotional program was governmental expression that enjoys greater protection

⁸ For example, consider the following quotes from the United Foods ruling: “*The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish*” (quoting Edenfield v. Fane, 507 U.S. 761 (1993)) . . . *even viewing commercial speech as entitled to lesser protection, we find no basis under either Glickman or our other precedents to sustain the compelled assessments sought in this case.*” [United States v. United Foods, Inc. at 535]; “*The subject matter of speech may be of interest to but a small segment of the population; yet those whose business and livelihood depend in some way upon the product involved no doubt deem 1st Amendment protection to be just as important for them as it is for other discrete, little noticed groups in a society which values the freedom resulting from speech in all its diverse parts.*” [at 536]; “*We take further instruction, however, from Abood’s statement that speech need not be characterized as political before it receives 1st Amendment protection.*” [at 539]

⁹ In addition, USDA did not raise this defense.

from 1st Amendment objections. This refusal was based on technical grounds that the issue had not been properly raised in the lower courts. While the government speech defense in relation to checkoff programs has been addressed at the federal district and circuit court levels, the issue has not yet been decided by the U.S. Supreme Court. Whether the checkoff programs qualify as government speech, and if so, to what degree they are protected from 1st Amendment attack, has been raised in a number of cases now working through the federal courts.

Additional Litigation

Even though the rulings in Glickman and United Foods appear to set a definitive standard, several points of ambiguity have remained. A number of court rulings on 1st Amendment challenges to both state and federal commodity development programs since United Foods have addressed many of these unresolved issues. Although some clear patterns have emerged in how the courts have applied the Supreme Court's holdings in Glickman and United Foods, there appear to be inconsistencies among the federal district and circuit courts in interpreting their meaning. Additionally, there exists a diversity of outcomes in the lower courts regarding the constitutionality of the federal beef promotion program resulting from differing evaluations of whether promotional programs are protected government speech. Summaries of a selection of rulings regarding the beef program and other court rulings following United Foods are set forth below to acquaint the reader with issues that are still being litigated.

Livestock Marketing Association v. USDA

In Livestock Marketing Assn. v. USDA, 335 F. 3d 711 (8th Cir. 2003), the 8th Circuit Court ruled the Beef Promotion and Research Act of 1985 and its implementing regulations unconstitutional and upheld the order of the Federal District Court for South Dakota to permanently enjoin collection of mandatory assessments from beef producers. On May 24, 2004, the Supreme Court granted certiorari and will review the matter in its upcoming term.

Congress enacted the Beef Promotion and Research Act¹⁰ as Title XVI, Subtitle A, of the Food Security Act of 1985. The Act authorizes the Secretary of Agriculture to carry out a program of "promotion and research designed to strengthen the beef industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for beef." The program is overseen by the Cattlemen's Beef Board and funded by a mandatory assessment upon producers and importers of \$1/ head per sales transaction. The revenues from this assessment collected in each state are divided approximately 50% to the Beef Board and 50% to Qualified State Beef Councils. State beef councils in turn typically invest a portion of assessments retained at the state level in development programs at the national & international level coordinated by the Federation of State Beef Councils and other entities.

The Act compels the Secretary of Agriculture to hold a referendum on whether the checkoff should be continued if a threshold percentage of beef producers request a referendum. In 1998, the Livestock Marketing Association (LMA) initiated a petition drive to obtain a referendum and submitted petitions to USDA in November, 1999. However, USDA

¹⁰ 7 U.S.C. 2901 et seq.

determined that the number of valid signatures was insufficient to require the referendum vote. This case originally began as an action in the U.S. District Court for South Dakota to order the Secretary of Agriculture to hold a referendum on continuation of the checkoff and also to require a refund of a portion of assessments LMA alleged were spent contrary to the Act¹¹. During the course of the litigation, the Supreme Court handed down its ruling in United Foods leading the District Court to conclude that it must first determine whether the Act was constitutionally valid before proceeding to decide the underlying issue of whether its provisions for referendum had been correctly adhered to. The court therefore allowed LMA to amend its petition to seek a ruling on the constitutionality of the beef checkoff under 1st Amendment principles, and to add additional parties. On June 21, 2002, the District Court for South Dakota found that the Act instituted compelled speech in violation of petitioners' 1st Amendment rights and ordered termination of the checkoff. Respondents, (USDA and certain state beef associations) successfully obtained a stay of the District Court order and appealed to the 8th Circuit Court which issued its ruling in July, 2003.

LMA and other plaintiffs raise several substantive objections to the nature of the generic advertising to which they contribute through mandatory assessments. They allege the generic message's suggestion that all beef is worth consuming to be in conflict with some producers' desire to market, and build consumer demand for, beef with specific qualities such as hormone-free, grass fed, organic, raised under humane conditions, etc.. Plaintiffs also object on the basis that the checkoff advertising does not distinguish between domestically grown and imported beef.

The 8th Circuit's analysis addressed the government's defense that plaintiff's 1st Amendment claim was barred because the collective advertising pursuant to the Beef Act is government speech and therefore immune to 1st Amendment scrutiny. The government cited Knights of the Klu Klux Klan v. Curators of the University of Missouri, 203 F. 3d 1085, (*cert. denied*, 531 U.S. 814 (2000)) for the proposition that "*government speech may be identified based upon the central purpose of the program, the degree of editorial control exercised by the government over the content of the message, and whether the government bears the ultimate responsibility for the content of the message.*"¹² In addition, the government cited Supreme Court precedent that "*when the government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment.*"¹³ The government asserted that the Beef Act and the generic advertising it funds substantially meets these standards considering that the Beef Board is created by statute, members of the Beef Board are appointed by the Secretary of Agriculture, the Beef Act itself prescribes the generic nature of the beef promotions, and the Secretary has ultimate editorial control of the advertising content.

In assessing whether the government speech doctrine applied to beef checkoff activities, the 8th Circuit first noted that the government, when speaking, is not automatically immune from 1st Amendment challenge. More significantly, however, the 8th Circuit largely avoided the question of whether the beef program constitutes government speech altogether by concluding that the issue presented was more properly characterized as a compelled speech

¹¹ LMA alleged that checkoff funds had been used improperly to influence beef producers not to sign the referendum petition.

¹² Livestock Marketing Assn. v. USDA, 335 F. 3d 711, at 721

¹³ Livestock Marketing Assn. v. USDA, at 721, quoting Lebron v. National Railroad Passenger Corp., 513 U.S. 374 (1995)

matter rather than one arising from disagreement with the content of the government's message.

“Unlike in Klu Klux Klan, where the plaintiffs challenged a decision concerning the content of government speech, appellees in the present case are challenging the government’s authority to compel them to support speech with which they personally disagree; such compulsion is a form of “government interference with private speech.” and “. . . we ask not whether the expression at issue is protected but rather whether appellees have a protected interest in avoiding being compelled to pay for the expression at issue.” Livestock Marketing Assn. v. USDA, at 726

As a question of compelled subsidy of commercial speech, the 8th Circuit asserted that the correct evaluation should occur under the Central Hudson test where the question is whether the governmental interest in the checkoff-funded advertising is sufficiently substantial to justify the infringement upon the complaining livestock producers’ 1st Amendment right not to be compelled to subsidize it.¹⁴ However, the Court then found that the Supreme Court in Glickman and United Foods had essentially stated that the government’s interest was sufficiently substantial only when the compelled subsidies for generic advertising were merely a component of a more comprehensive statutory scheme imposing a cooperative marketing structure such as that present in the California tree fruit industry. Since the beef program is in all respects materially identical to the mushroom program which the Supreme Court in United Foods had concluded lacked such underlying cooperative marketing structure, the 8th Circuit reasoned the beef program also lacked sufficient governmental interest to allow the 1st Amendment infringement.

The Court further disposed of a secondary issue that had been raised by USDA. Although the 8th Circuit did not substantively discuss the question of whether activities other than generic advertising might justify mandatory checkoffs, it rejected USDA’s suggestion that a portion of the assessments could continue for purposes other than generic beef promotion¹⁵. However, the court based its decision on factors specific to the Beef Act; first that Congress had made a clear expression of non-severability¹⁶ and secondly the court’s finding that “*the ‘principle object’ of the Beef Act was the very part that made it unconstitutional and therefore no remaining aspects of the Act could survive.*”

Charter V. USDA

A federal district court ruling in Charter v. United States Department of Agriculture, 230 F. Supp. 2d 1121 (D. Mont. 2002), currently under review by the 9th Circuit Court of Appeals, reaches a very contradictory result upholding the Beef Promotion and Research Act as a valid exercise of government speech. The case arises as an appeal to the Federal District Court for Montana of an administrative enforcement action by USDA to compel payment of beef checkoff assessments. Ranchers Jeanne and Steve Charter asked the court to find that

¹⁴ Under such a balancing of interests rule, the court did not rule out that whether the checkoff-funded advertising is indeed government speech was a relevant consideration. Nonetheless, the court concluded that the Supreme Court in Glickman and United Foods had defined when the governmental interest was sufficiently substantial regardless of whether the checkoff funded advertising is or is not government speech.

¹⁵ USDA has continued collecting mandatory assessments for mushroom research and consumer information activities after United Foods, but collects only voluntary contributions for generic promotion. The 8th Circuit decision in LMA does not definitively address whether this is consistent with its ruling in United Foods.

¹⁶ When the Beef Act was amended in 1985, Congress specifically deleted a pre-existing severability provision.

the Beef Act is an infringement upon their 1st Amendment protections and to enjoin USDA from enforcement of checkoff assessments. The Charters produce grass-fed, hormone free beef and object that the Beef Act requires them to support advertising that does not differentiate between their product and other beef products.

In Charter, the Montana District Court interpreted Glickman and United Foods as setting forth a two-part test to determine whether an agricultural marketing program funded by mandatory assessments against market participants is subject to 1st Amendment scrutiny -- if the program 1) compels ideological speech, or 2) is not germane to a larger regulatory scheme. Finding that the checkoff-funded advertising was not integrally linked to a more comprehensive marketing regulation governing the beef industry, the Court concluded that the Beef Act failed the second part of the test and was therefore not immune from 1st Amendment scrutiny. The court then proceeded to the question of whether the beef checkoff program unconstitutionally violated the Charter's 1st Amendment protections.¹⁷

In its decision, the Montana District Court went to considerable lengths to examine whether checkoff-funded advertising is government speech, noting that the question had not been raised in either Glickman or United Foods. Additionally, the court stated that the 3rd Circuit's decision in United States v. Frame finding that the Beef Act was not government speech was not controlling for various technical and philosophical reasons.¹⁸ Furthermore, the Court found that Frame had been superceded by subsequent caselaw where defining government speech was important to the outcome, citing Sante Fe Indep. School District v. Doe, 530 U.S. 290 (2000) as particularly analogous. In Santa Fe, the Supreme Court determined that, even though the pre-game invocation was given by a student chosen by the student body, student-led prayers prior to football games were government speech by virtue of the fact that the school district's policy authorized the prayer, determined the manner in which the person assigned responsibility to deliver the prayer was chosen, and required that the content of the prayer conform to certain regulations.

The court reasoned that the Beef Program must easily meet the conditions the Supreme Court set forth in Santa Fe as important in identifying government speech since the government's control of beef advertising was far more extensive than that of the school district. The court further noted that the beef advertising was clearly consistent with policy objectives articulated by Congress in enacting the Beef Act, and that through the Act, "Congress and the USDA use private speakers to disseminate a government message." The central question in determining whether the generic beef advertising constitutes government speech is whether Congress and USDA exercise sufficient control over private speakers to attribute the speech to the government. That threshold was easily met, in the court's view,

¹⁷ Here, the Montana Court differs markedly in its interpretation of United Foods. The court appears to view the underlying regulatory scheme as relevant only to the extent of determining whether the program is subject to 1st Amendment challenge at all. Other cases appear to interpret United Foods as identifying the underlying regulatory scheme as the decisive factor in determining whether the compelled speech is permissible.

¹⁸ In particular, the Montana District Court strongly criticized Frame's reliance on a footnote in a concurring opinion in Abood that the 3rd Circuit and other courts have utilized as the philosophical justification for compelled subsidy of governmental speech while striking down compelled subsidy of speech promulgated by other entities. That principle, generally stated, is that compelled subsidy of speech by private entities is prohibited because there is a coerced nexus between the message and the complaining individual when the group generating the speech is representative of the interests of only a small segment of the population. Therefore, by inverse implication, a condition for speech to be defined as government speech is that the link between the message and individuals is attenuated by the fact that the speaker is the government or its proxy speaking for all citizens.

pointing to statutory mechanisms for, and actual exercise of, the Secretary of Agriculture's oversight, including the following passage:

“The Secretary of Agriculture, by way of his staff, controls the checkoff-funded speech. Therefore, the speech must be attributed to the government. In fact, [7 CFR 1260.215 requires that] any patents, copyrights, inventions, or publications developed through the use of the beef checkoff funds are the property of the ‘U.S. Government as represented by the Beef Board.’ This regulation demonstrates two important points. First, the federal government owns the projects and advertisements generated with beef checkoff funds. Second, the Beef Board is a representative of the government.” Charter v. USDA, at 1159

Concluding that the promotional activities pursuant to the Beef Act qualified as government speech, the Montana District Court further concluded that the program enjoyed considerable latitude with respect to content and that the advertising easily met standards set forth in recent government speech cases (i.e. is non-ideological, does not prohibit or establish religion, etc.) Finally, although rejecting that government speech is subject to the Central Hudson test,¹⁹ the court stated that the checkoff-funded advertising would easily meet that standard as well, agreeing with Frame that the government's interest in promoting beef sales was a sufficiently compelling one and that the program was not more intrusive than necessary to accomplish its purpose.

Michigan Pork Producers Association v. Veneman

In 1985, Congress enacted the Pork Promotion, Research and Consumer Information Act as part of the farm bill. Similar to other commodity promotion programs, the Act authorizes a program of research, advertising and consumer information to promote the use of pork and to address problems associated with pork production. The program is funded by a mandatory assessment not to exceed 50 cents / \$100 of value assessed against domestic sellers of swine and importers per sales transaction. Proceeds of the assessment are divided between qualified state pork producer associations and the national Pork Board.

The Act compels the Secretary of Agriculture to hold a referendum among producers on whether the checkoff should be continued if a threshold percentage of pork producers request a referendum. In 1999, the Campaign for Family Farms (CFF) spearheaded an effort to collect sufficient signatures to trigger a referendum vote. Since 1989, CFF has worked to end the pork checkoff believing that the advertising it funds favors processed pork to the disadvantage of smaller producers, misrepresents the safety and desirability pork raised in large commercial operations, and downplays the benefits of family farms. Although it was determined CFF collected an insufficient number of valid signatures, then Secretary of Agriculture Dan Glickman ordered that a referendum be conducted. A majority of producers nationwide participating in the referendum voted to terminate collection of assessments.²⁰

Following the vote, Secretary Glickman ordered USDA to publish notice of a rule to terminate the checkoff whereupon the Michigan Pork Producers filed in federal district court asking the court to stay the USDA from publishing a final termination rule. During the time that this court challenge was pending, incoming Secretary of Agriculture, Ann Veneman, settled the pending court case. Through the settlement agreement, USDA agreed not to terminate the checkoff but agreed to

¹⁹ See footnote 5, and previous discussion of application of Central Hudson

²⁰ About 58% of Nebraska producers participating voted to terminate collection of assessments.

changes in the manner in which the program was administered. CFF intervened, challenging the authority of the Secretary to settle the lawsuit. Although the court eventually ruled USDA had authority to settle the case, the court allowed CFF to name USDA and the Michigan Pork Producers Assn. as cross-defendants in challenging the pork order as a violation of the 1st Amendment. The U.S. District Court for Western Michigan issued its ruling on this portion of the case in late October, 2001, finding the pork order unconstitutional as prohibited compelled speech and also ordered termination of the checkoff within thirty days of the ruling. USDA and Michigan Pork Producers obtained a stay on execution of the District Court's order while the case was appealed to the Circuit Court. On March 14, 2003, the 6th Circuit published its decision generally upholding the District Court's ruling of unconstitutionality.

In analyzing the 1st Amendment challenge, the 6th Circuit first examined the issue of whether the advertising funded by assessments under the Pork Act is private speech or governmental speech. The Court acknowledged that *“the Supreme Court has made clear that the government may dictate the content and even the viewpoint of speech when the government itself is the speaker.”* However, the court concluded that the pork promotion could not be attributed to the government due to the pork industry's extensive control. The Court noted that the Act itself declares its primary purpose to be to advance the welfare of pork producers and that its administrative mechanisms do not participate in general government.²¹ Finally, the court observed that the Act is funded by a distinct segment of the public and explicitly not funded by general tax revenues (a typical characteristic of speech found to be governmental in nature), and characterized the USDA's oversight as merely pro-forma.

“In sum, the costs and content of the speech in question are almost completely the responsibility of members of the pork industry. The First Amendment does not lie dormant merely because the government acts to consolidate and facilitate speech that is otherwise wholly private.”

On the question of whether the Pork Act unconstitutionally compels subsidy of speech objected to by certain pork producers, the 6th Circuit held that the issue is settled by whether the pork marketing program resembles that upheld in Glickman or the mushroom promotion program struck down in United Foods, i.e. whether the Pork Act provided for generic advertising as part of a more comprehensive collective marketing regulation, or whether it existed for the principle object of producing the commercial speech objected to. Observing that the pork promotion program was identical in all material respects to the mushroom promotional program the U.S. Supreme Court had invalidated, the 6th Circuit held that the Pork Act must likewise violate the 1st Amendment.

Particularly relevant was the Court finding that the generic pork advertising is not related to an associational purpose independent from the speech itself, and therefore governed by United Foods rather than Glickman, despite arguments that the pork checkoff accomplished associational purposes beyond promotion. The Michigan Pork Producers Assn. attempted to distinguish the pork program from the mushroom program by suggesting that less than 50% of program expenditures were used for generic advertising and itemized expenditures for research and other non-advertising purposes. In effect, they argued that generic advertising was not the “principle object” of the Pork Act, rather it was only a component of a program that provided for a diversity of associational purposes beyond generating advertising

²¹ Citing Keller, the court implied a parallel between the Pork Board and the California State Bar. The 6th Circuit asserted that Keller, “categorized as private the speech of an organization created ‘not to participate in general government of the State, but to provide specialized professional advice to those with the ultimate responsibility of governing the legal profession’.”)

revenues. The 6th Circuit rejected this argument, primarily on the basis that the court disputed whether actual expenditures spent directly for “demand enhancement” did not exceed 50% of program revenues, and also agreeing with the district court that even expenditures that were not spent directly for advertising were designed specifically for enhancing the program’s promotional aspects.

The 6th Circuit further rejected application of Central Hudson to test whether the 1st Amendment infringement was nevertheless allowed. According to the court, Central Hudson was not relevant because it pertained only to the extent to which government may regulate privately initiated commercial speech, a far different question than to what extent government may compel individuals to subsidize speech. Also significantly, the 6th Circuit upheld the District Court’s remedy of striking down the Pork Act in its entirety rather than simply enjoining use of checkoff fees for the advertising that was objected to. The court found that the Act was not severable in that the clear intent of the law was to promote pork, and that research and other expenditures were only incidental to and supportive of the promotional purposes of the Act.

“It would contort Congressional intent if we were to take a statute that seeks entirely to promote a particular product and then strain to preserve the purportedly non promotional provisions of that very statute. . . . The district court was correct in striking down the entire Pork Act.”

Cochran v. Veneman

In Cochran v. Venemen, (3rd Circuit, Feb. 24, 2004), the United States 3rd Circuit Court overturned a ruling of the District Court for the Middle District of Pennsylvania and found that the federal Dairy Checkoff program an unconstitutional violation of 1st Amendment freedoms. The dairy checkoff, authorized by the Dairy Promotion Stabilization Act of 1983, requires milk producers to pay mandatory assessments of 15 cents per cwt. of milk sold. The mandatory assessments are used to fund the “advertisement and promotion of the sale and consumption of dairy products and for research projects related thereto.” Plaintiffs Joe and Brenda Cochran brought an action in the District Court against the Secretary of Agriculture and the National Dairy Promotion Board, arguing that the checkoff unconstitutionally compels them to subsidize speech with which they disagree.

Ruling in favor of the USDA and the Dairy Board, the District Court had held that the case was governed by the U.S. Supreme Court’s Glickman ruling rather than United Foods. Noting that Glickman had stressed the statutory context in which the 1st Amendment challenge arises, the District Court observed that unique characteristics of milk as a commodity along with various federal and state law, encouraged and largely resulted in milk being marketed through producer cooperatives, and that milk production was subject to a myriad of regulations and marketing orders for food safety and price support. Therefore, the District Court found that the dairy checkoff was distinguishable from the mushroom checkoff struck down in United Foods because dairy industry was sufficiently regulated to consider the compulsory collective advertising analogous to the California tree fruit assessments upheld in Glickman, i.e. ancillary to a more comprehensive scheme of economic regulation.

The 3rd Circuit, however, held that the District Court had misapplied Glickman, noting that United Foods clearly recognized that Glickman only applied in situations in which individuals

are bound together in a collective enterprise which is not present in the dairy industry in a manner similar to the California tree fruit industry.

“the provisions of the Dairy Act do not require milk producers to participate in a collective enterprise and do not compel them to market their product according to any rules of a cooperative. Although the dairy industry is ‘regulated’ in the sense that it is subject to a patchwork of state and federal laws, there is no association that all milk producers must join that would make the dairy industry analogous to . . . the collective enterprise at issue in Glickman.”

The court then determined that similar to the mushroom program, the dairy advertising was the principle purpose of the Dairy Act, noting that virtually all funds collected under the act were spent directly for generic advertising. The 3rd Circuit interpreted United Foods as instructing clearly that compelled subsidies for speech may not be upheld where they are germane only to a program whose principle object is speech itself. Furthermore, the 3rd Circuit reaffirmed both its finding and reasoning in its 1989 Frame decision that the beef checkoff was not protected government speech “because it required only beef producers to fund it and it attributed the advertising under the program to beef producers.” Finding the role of the government in the dairy program the same in all material respects as under the beef checkoff, the court stated that the Secretary’s supervisory responsibilities under the Dairy Act “are not sufficient to transform the dairy industry’s self-help program into government speech.”

In re Washington State Apple Advertising Commission

Although only decided at the federal District Court level, In re Washington State Apple Advertising Commission, 257 F. Supp 2d 1290 (2003) is one of the most interesting cases for interpreting the implications of Glickman and United Foods because it directly probes many of the ambiguities remaining after those decisions. It is also one of a handful of cases since United Foods to examine state authorized mandatory checkoff programs for 1st Amendment compliance

This case began as an unusual preemptive legal action. In response to United Foods, the Commission initiated a class action suit against itself in state court hoping to confirm the Commission’s authority to collect promotional fees assessed apple producers and handlers. The Commission encouraged two apple growers to serve as defendants refusing to pay the assessment whereupon during the course of the resulting enforcement action, the Commission petitioned for declaratory judgment that its assessment and promotional activities were constitutionally valid and binding upon the named defendants and all other Washington apple producers and handlers. During the course of the litigation, the case was moved to federal district court and a group representing organic growers and additionally three warehouses intervened as defendants. The Federal District Court for the Eastern District of Washington issued its ruling on March 31, 2003 holding that the Commission was not a government entity for purposes of the 1st Amendment and that mandatory assessments it collected violated the 1st Amendment.

In cross-motions, the parties presented several issues : 1) are the Commissions activities government speech insulated from 1st Amendment scrutiny, 2) do the Commission’s promotional activities exist as part of a broader, comprehensive regulatory scheme, 3) is the Commission’s assessment structure a constitutionally permitted infringement on commercial speech, and 4) even if the Commission has violated the 1st Amendment, is the Commission

permitted to continue to collect assessments to carry out non-speech activities? The court's ruling disposed of these questions one-by-one as discussed below.

Beginning with the government speech defense, the District Court stated that there are two possible ways in which the Commission's activities might be characterized as government speech: 1) if the Commission itself were a Washington state governmental entity; or 2) if the Commission was an entity employed by the state of Washington to disseminate the government's speech. The Commission asserted that it met this threshold, citing substantial public policy and welfare objectives articulated by the Legislature in authorizing legislation creating the Commission that were served by increasing consumption of Washington apples.²² The Commission also argued that although it was a corporation created by special law to carry out the program it had many characteristics of a government agency – it was subject to annual audit by the State Auditor, its employees were part of the state employees retirement system and protected by state job security rules, and that it is subject to the state open meetings and administrative procedure rules that governed state agency activities. All of this clearly pointed, the Commission argued, to a finding that the Commission was a quasi-governmental entity designated by the State of Washington to disseminate the government's message in support of sales of Washington apples.

The court responded that similar to the state bar in Keller, the Apple Commission did not participate in general government, and that its membership and funding was limited to those eligible to participate in its activities.²³ The court further noted that the State of Washington was not liable for the Commission's debts or actions, and that the Commission was not in any direct or practical way accountable politically. As to the question of whether the Commission was merely employed to disseminate the State of Washington's speech, the Court failed to find sufficient governmental oversight to attribute the advertising generated independently by the Commission to the government. Recognizing that as a member of the 9th Circuit, the case was subject to the instruction of Charter in which another 9th Circuit Court (Montana District Court) had held that the federal beef promotion was government speech, the District court distinguished the activities of the Commission from those of the Beef Board. Unlike the statutory and actual oversight exercised by the Secretary of Agriculture, the Court observed that the Washington Director of Agriculture did not have power to appoint members of the Commission, and did not have final approval authority for projects and budgets or ultimate editorial control.

The District Court next turned to the question of whether the Washington apple industry was regulated to a degree that the compelled subsidy of generic promotion of Washington apples was a logical and necessary adjunct of that broader regulation. Anticipating that the question would be relevant in any 1st Amendment litigation against the Commission, the Washington Legislature had recently revised its statutory authority by painstakingly listing a myriad of regulations governing the marketing of apples and legislatively decreed that *"In order to develop and promote apples and apple products as part of a comprehensive scheme to regulate those products, the Legislature declares: . . . that the apple industry is a highly*

²² Following United Foods and prior to the Commission's lawsuit, the Washington Legislature extensively revised the commission's statutes, notably expanding the statement of Legislature purpose and intent describing in considerable detail broader societal benefits of a vigorous apple industry beyond just the economic welfare of apple producers.

²³ *"Because the Commission is representative of only one special group in Washington, apple growers and producers, from whom its funding comes, and to whom the benefits of its activities flow, the Court finds that it is not a government entity."*

regulated industry and that [Apple Commission assessments] and the rules adopted under it are only one aspect of the regulation of the industry. . . . “ This legislative intervention attempted to exploit a perceived ambiguity as to whether United Foods dictates that the statutory context withstanding a 1st Amendment challenge to compelled contributions requires producers to be cooperatively organized to the degree present in the California tree fruit industry, or whether such was only an example of a statutory scheme that would sustain compelled subsidies. At trial, the Commission argued that the Washington Legislature had declared that the Apple Commission’s activities did not occur in isolation but were embedded within a regulatory network that substantively approximated the highly regulated market sustained in Glickman.

While agreeing that factual findings of the Legislature were entitled to deference, the court rejected the suggestion that it was precluded from independently arriving at its own factual finding regarding the regulatory context in which the assessments occurred. The court then went on to find that the regulations cited did not result in a marketing structure for Washington apples that met the criteria described in Glickman.

“ . . . The court reads Glickman and United Foods to hold that only a comprehensive economic-based regulatory scheme, which restricts the freedom of its members to market their products, effectively collectivizing the industry, can fit with the Glickman ruling. . . . The Court concludes that the health, safety and consumer protection regulations identified by the Commission do not render this a comprehensive regulatory scheme. “

Thus finding that the Commission’s commercial speech activities were not immune from 1st Amendment scrutiny by virtue of being germane to a more reaching economic regulation of the Washington apple industry, the court further found the Commission to exist for the principle purpose of generating the commercial speech objected to. As such, it violated the defendants’ 1st Amendment protection from being compelled to subsidize it.

Having determined that a 1st Amendment infringement had occurred, the court then addressed the issue of whether the Commission’s promotional program was nevertheless a permissible regulation of commercial speech under Central Hudson. Although noting that United Foods had not explicitly rejected use of the Central Hudson test, the court stated its belief that the Supreme Court had essentially deemed it inapplicable to checkoff programs where the issue is not one of regulating privately-initiated commercial speech, but rather one of compelled subsidy of speech.²⁴

Finally, arguing that the Commission engaged in activities beyond generic advertising, the Commission asked the court to enjoin collection of only that portion of its mandatory assessments that supported the promotional activities, leaving the Commission free to continue to collect and expend mandatory assessments for other purposes. However, having determined that the Commission’s principle object was the dissemination of commercial speech, the court declined to limit its holding in that manner and declared the Commission’s collection of assessments unconstitutional.

²⁴ This finding is somewhat in contradiction to the ruling in Charter by a separate district court within the 9th Circuit to which the case would have been appealed. In Charter, decided prior to Washington Apple Commission, the District Court stated that the Central Hudson test did not apply because the beef program qualified for government speech immunity from 1st Amendment scrutiny. However, as discussed above, the Charter court suggested that even if the beef program was not immune for that reason, it easily survived Central Hudson.

Pelts and Skins, L.L.C. v. Jenkins

In an action brought by an alligator farmer against the Secretary of the Louisiana Department of Wildlife and Fisheries ("DWF") to permanently enjoin the agency from collecting mandatory fees to finance generic marketing of alligator products, the United States District Court for the Middle District of Louisiana has ruled that the mandated fees violated the First Amendment as unconstitutional compelled commercial speech. Pelts & Skins, L.L.C. v. Jenkins, No. CIV.A.02-CV-384, 2003 WL 1984368, (M.D. La. Apr. 24, 2003).

Pelts & Skins, L.L.C. operated an alligator farm with its own system of grading quality. It marketed its products by advertising the "quality and uniqueness of its branded alligator product." The operation of the alligator farm was conditioned upon payment of mandatory license and tag fees to the DWF. The statute at issue required that "every resident alligator hunter or farmer or nonresident alligator hunter" attach a tag when shipping alligator or alligator skins out-of-state. Resident alligator hunters and farmers and nonresident hunters were also required to pay an alligator shipping label fee for each alligator and an alligator tag fee for each raw skin. Each alligator part had to have a label bearing the DWF license number and other relevant information to be shipped out of state. The fees were "deposited into both the Louisiana Fur and Alligator Public Education and Marketing Fund and Louisiana Alligator Resource Fund." The statute provided for appointment of an eleven-member Alligator Advisory Council responsible for "reviewing and approving recommended procedures and programs to be funded from the Resource Fund and the Education and Marketing Fund" and ensuring that the revenues from the funds were spent for the specific goals of the Council. The DWF, with the advice of the Alligator Advisory Council, used a portion of the funds to finance "generic marketing of alligator products without differentiating any particular type, quality, or brand of alligator product." Fees were also expended to carry out the DWF's general responsibilities for controlling and supervising "all wildlife within the state, including fish," and the "management, protection, conservation, and replenishment of the wildlife and fish" in addition to regulation of the shipping of skins. The Agency had statutory authority to "establish regulations and licensing procedures regarding the taking, possessing, and shipping of all alligators, raw alligator skins, and alligator parts."²⁵

Pelts & Skins sued to permanently enjoin the DWF from generically marketing alligators with the mandatory license and tag fees. The DWF argued that the generic marketing did "not dilute product image in the mind of the consumer" and did "not reduce producer profits by lowering prices." The DWF also contended that its generic advertising and public education programs were government speech because the state maintained "a degree of editorial control," was the "literal speaker," and was "ultimately responsible for the speech." In addition, the DWF argued that the licensing fees were the "only sources of income for the Education and Marketing Fund" and were "de minimus compared to the tag fees that account for the majority of the Resource Fund."

The court rejected the DWF's contention that the generic marketing was government speech and ruled that the fees used for generic advertising violated First Amendment principles. The court explained that the "essence of government speech is when the government speaks in

²⁵ This is suggestive that the promotional fees could be considered to be merely embedded within a larger regulatory context whose principle object was the sound stewardship of natural and wildlife resources, and that perhaps some linkage could be made that the promotional activities advanced the larger resource management objectives. It is not clear how skillfully or extensively the Louisiana DWF pursued this argument.

favor of a public policy." It also explained that the greater the degree of involvement, the greater chance that the government speech doctrine will be invoked. The court noted that although the Secretary appointed nine of the Alligator Council's eleven members, the Secretary did not sit on the Council. The court also noted that the Council did not represent the Secretary but represented the "cross section of alligator trappers, hunters, farmers, and coastal landowners from across the state."

The court noted that the resource fund was not funded through tax dollars, but through the tag and license fee revenues.²⁶ The court concluded that the fees paid by the alligator trappers, farmers, and hunters were similar to the membership dues paid to the union in Abood and the California State Bar in Keller because the alligator trappers, farmers, and hunters could "easily be considered a narrow segment of society with common interests and one not representative of the general population." The court also noted that there was "no evidence that the Alligator Advisory Council was created to participate in the state's general government." It concluded that "the nexus between the trappers and hunters' mandatory fees and the Council's particular message" could not "rightfully be characterized as attenuated."

The court ruled that because the generic advertising involved was not governmental speech, Pelts & Skins was "free to challenge such advertising on First Amendment grounds." In addressing Pelts and Skins' challenge, the court explained that the regulatory scheme more nearly resembled the one considered in United Foods than the one considered in Glickman. The court noted that nothing prevented the farmers or trappers from making their own marketing, advertising, and branding decisions and that the alligator farmers set their own prices and standards of quality. The DWF was not statutorily authorized to regulate prices, buyers, and marketing. The Louisiana alligator industry was not exempt from the antitrust law of the United States, and in the view of the court, could not be considered heavily regulated in the manner relevant to 1st Amendment considerations. Considering this, the court concluded that it could not "characterize the statutory scheme as a 'broad collective enterprise,' which constrains an alligator producer's freedom to act" and therefore the advertising was not "ancillary to a more comprehensive program restricting market autonomy which the Court considered to be significant in United Foods."

The court noted that the Louisiana statutory scheme provided for funding from the fees for many "useful and productive activities to which plaintiff could not (and does not) object on First Amendment grounds" such as law enforcement, research and development of alligator habitat and protection and management of the species. The court concluded that the state's compelled generic advertising program was completely severable from those conservation activities. The court permanently enjoined the DWF from "future approving, authorizing or expending [of] revenues from the Louisiana Fur and Alligator Public Education and Marketing Fund or from the Louisiana Alligator Resource Fund for the purpose of generic alligator marketing."

²⁶ The court ruled that it had jurisdiction to hear the case, despite the Tax Injunction Act, 28 U.S.C. § 1341. First, the court noted that the Tax Injunction Act did not bar the action because Pelts & Skins was not seeking to enjoin the collection of the fees but was seeking to enjoin the DWF from funding generic marketing with the fees. Second, the court noted that the fees were not "taxes." *'a regulatory scheme will not constitute a tax unless the real purpose and effect of the statute and regulations promulgated thereunder is to raise revenues for the general support of the government.'*

Potential Checkoff Program Reforms

The preceding section's review of compelled speech caselaw vis-à-vis checkoff funded promotional programs suggests there is prudence in revisiting Nebraska's commodity development programs from a 1st Amendment perspective. There are perhaps two prongs to that inquiry. The first is a technical one – are Nebraska's state checkoff programs distinguishable from those that have been found to impermissibly infringe upon the 1st Amendment protections of objecting producers, and are there alterations available to further distinguish them? Secondly, are there reforms available that would tend to reduce or eliminate the potential for checkoff programs to create actual or perceived commercial and philosophical conflicts with commodity subgroups and thus remove both the motive and basis for challenging programs on 1st Amendment principles.

Review of Issues

In order to begin addressing these questions, it is first helpful to review legal questions, and related policy and economic issues, associated with checkoff programs that have been relevant to the 1st Amendment inquiry of the courts.

On what basis have producers claimed a 1st Amendment infringement?

As explained by the Supreme Court in United Foods, “*mandated support for speech is contrary to the First Amendment principles set forth in cases involving expression by groups which include persons who object to the speech, but who, nevertheless must remain members of the group by law or necessity.*” As a technical matter, the mandatory checkoff programs create a compelled association for the purpose of developing and strengthening markets whose membership consists of those who engage in marketing commodities. Individual producers have no practical means of avoiding the association due to their livelihood being largely dependent upon selling the commodities they produce through commercial channels. It is significant that in the cases that the courts have studied, it has been observed that, in practice, the checkoff programs have accomplished market development largely through advertising and other forms of commercial expression although arguably other distinct means are employed as well. In United Foods, the Supreme Court said “*it is only the overriding associational purpose which allows any compelled subsidy for speech,*” but that it “*has not upheld compelled subsidies for speech in the context of a program where the principle object is speech itself.*”

As a policy matter, the issue is defined by the specific objections that producers have raised to the commercial advocacy on their behalf to which the mandatory checkoff programs compel producers to contribute. Checkoff programs have arisen from the rationale that it is inherently impracticable for producers of basic agricultural commodities to independently invest in market development activities. This is due in part to it being cost prohibitive. But it also because commodities are usually considered fungible items regardless of who produces them or how they are produced. Thus, it would be difficult to justify individual producers' effort to distinguish their production in the marketplace as well as plaguing any such efforts with free-rider problems. Private commodity promotion primarily occurs when producers have direct access to consumers, or when producers have either organized themselves into

cooperative production and marketing units or when integration has occurred to the extent to enable the qualities of the commodity or the food products made from them to be distinguished in the marketplace. However, private promotion efforts necessarily must encourage consumers to choose promoted products at the expense of commodities produced by other producers. Additionally, private programs have less incentive to invest in research and development of new uses of commodities. Collectively-funded generic promotional activities, whether voluntary or mandatory, attempt to overcome limitations of a competitive system of market development.²⁷ Conceptually, checkoff programs have been designed with the seemingly neutral intention of enhancing overall demand for a particular commodity which would be presumed to have beneficial implications for all of its producers. Ideally, an expanded market would help avoid market cannibalism that occurs through isolated private promotion in a smaller, static market.

Perhaps as often as not, the checkoff related issues being battled in the courts arise not as direct disagreements with the concept of collective commodity development per se, but instead are an adjunct of broader dissatisfaction with industry trends and policy directions arrived at in other forums. Agriculture is experiencing tremendous structural shifts producers may view as threatening to their economic self interest or to be in conflict with societal values and the well being of agriculture in general. Consolidation has brought a lot of societal issues to the forefront such as integrated vs. independent marketing, industrial vs. traditional production methods, implications of technological change, and the globalization of agricultural trade. Despite statutory and constitutional firewalls against the use of checkoff funds for political or policy advocacy, segments of producers still may perceive certain checkoff activities as effectively abetting structural changes they oppose. That perception is likely further enhanced if governance and implementation of checkoff programs is believed to be dominated by, or is integrated with, organizations active in policy arenas perceived as either allied with or indifferent to such structural change.

That is not to dismiss that generic promotional programs themselves can indeed be in conflict with legitimate and sincerely held commercial and philosophical interests of commodity subgroups. These groups can be characterized as 1) challenging an essential premise that the commodity they produce is necessarily homogenous with that grown by other producers they are associated with through the checkoff program, and 2) asserting that generic promotion masks important differences in food qualities, origins and production practices and therefore interferes with the ability of consumers to make educated and enlightened food choices that would tend to favor certain types of operations and production practices and disfavor others. Thus, some producers may perceive their self interest is better served by distinguishing commodities with certain attributes that consumers would likely prefer, and perhaps even be willing to pay a premium for, if made aware of presumed food qualities and social values associated with its production.²⁸ Additionally, it creates a logical paradox for producers who, as an economic and moral imperative, favor social policies that tend to reserve agricultural production to traditional farming operations while contributing to programs that do not make a similar value distinction among beneficiaries of the programs.

²⁷ See *Commodity Promotion Policy, 1995 Farm Bill Policy Options*, Armbruster, Walter J.; Texas A&M University, October 1994

²⁸ This perception need not be limited to small, independent farmers who see themselves as competing in a market dominated by large or integrated producers. Indeed, it was a large, integrated corporate producer and handler of mushrooms motivated by the desire to enhance its own branded advertising which successfully challenged the federal mushroom program and whose 1st Amendment arguments are now being utilized by family farm advocates to challenge other programs.

It is important to note that the courts have not required plaintiffs to substantiate claims of commercial or philosophical conflict with checkoff promotional activities —i.e. to conclusively demonstrate that the aspects of the promotional programs they object to actually harm their personal commercial interests or actually advance social and economic conditions that they object to. For example, organic apple growers were not required to produce evidence that the generic apple promotion program actually resulted in reduced consumer interest in or demand for organically grown products than would otherwise have been the case. Plaintiffs alleging checkoff programs abet industrial production at the expense of traditional, smaller-scale pork production, were not required to prove such a causal relationship actually occurs.

Are commodity development programs a government activity serving broader public interest, or does the government, through the checkoff programs, merely facilitate private commercial advocacy?

Legislative enactments can legitimately articulate broad public benefits that derive from a vibrant agricultural community, and that promotional programs help create market conditions that contribute to a vibrant agricultural economy. A more economically robust agricultural economy is less dependant upon subsidies thereby freeing up public resources for other priorities. Checkoff programs may directly benefit the larger public by marshalling resources that would otherwise not be made available for advancing widely held goals such as improved food safety, nutritional education and advocacy, and finding renewable alternatives for energy and other consumer and industrial needs. Through their checkoff dollars, producers have accelerated development of value-added activities that provide new employment opportunities for the general public and which contribute to the tax base supporting governmental services.

It is therefore easy to demonstrate a substantial governmental interest in producers associating for purposes of collective commodity development and promotional activities. However, federal district and circuit courts have repeatedly appeared to interpret Glickman and United Foods as diminishing the fact that such interest exists as factor in determining whether any 1st Amendment infringement worked by checkoff programs is justified, particularly where the emphasis of the program is upon commercial expression. Courts have been asked to adapt the Central Hudson test of government regulation of privately initiated commercial speech to compelled subsidy of commercial speech – i.e. that even though a producer's 1st Amendment protections have been incrementally violated, the violation is justified if the governmental interest is substantial. Thus far, the Supreme Court has yet to establish precedent that such a test in relation to compelled subsidy of commercial advocacy on behalf of producers of an agricultural commodity exists or is valid.

Whether the checkoff programs are government speech has been a central question following United Foods. Despite externalities of value to the public, courts have generally been inclined to view government's role in mandatory checkoff programs as merely consolidating and facilitating commercial advocacy that is otherwise wholly private. Federal courts have begun to develop a test to determine whether commercial advocacy through checkoff programs is "governmental speech" which enjoys greater immunity to 1st Amendment objections. In determining what is government speech, courts have looked at four factors; 1) what is the central purpose of the program in which the commercial advocacy occurs, 2) what degree of control over the content of the speech is exercised by the

government, 3) who is the literal speaker; and 4) who maintains ultimate responsibility for the content of the speech²⁹.

Legislative intent often specifically indicates that the primary purpose of checkoff programs is to benefit a specified segment of the public suggesting that any spin-off benefits to the larger public, though possibly real and anticipated, are more or less thought of as incidental. Furthermore, the fact that checkoff programs' funding is imposed only on a distinct segment, and findings that checkoff governing bodies consist almost exclusively of industry participants, that such boards are not representative of or politically accountable to the general public, and that governmental oversight and editorial control is essentially pro-forma, have contributed to the conclusion reached by several courts that checkoff activities are not attributable to the government.

Are 1st Amendment issues associated with checkoff programs confined to generic promotion?

Under the assumption that checkoff programs are not government speech, the Supreme Court in United Foods has been interpreted to place a very high bar for government facilitated collective promotion, limiting compelled subsidies for commercial advocacy to situations whether producers are already required to associate for other purposes. In United Foods, as quoted earlier, the Supreme Court said "*it is only the overriding associational purpose which allows any compelled subsidy for speech.*" The preponderance of caselaw arising since United Foods interprets that compelled subsidies for promotion are permissible only when they are merely an element of broader economic regulation that results in the removal of the ability of individual producers to make independent production and marketing choices. Again, the Supreme Court noted in United Foods that it "*has not upheld compelled subsidies for speech in the context of a program where the principle object is speech itself*".

However, in the view of some, the Supreme Court did not specifically prescribe what level of regulation is needed to insulate collective promotional activities from 1st Amendment attack.³⁰ Some have also suggested that the Court has not necessarily ruled unconstitutional all forms of compelled association of producers, particularly if for purposes broader than promotion, or that such associations may not engage in speech germane to the reason justifying the compelled association. Reviewing Keller v. State Bar of California, the Supreme Court in United Foods stated the following:

"[Lawyers] who were required to pay a subsidy for the speech of the association already were required to associate for other purposes, making the compelled contribution of monies to pay for expressive activities a necessary incident of a larger expenditure for an otherwise proper goal requiring the cooperative activity." United States v. United Foods, at 540

In Keller, the Supreme Court upheld compulsory state bar membership as a condition of practicing law in California and only disallowed subsidies for speech that were not germane to the larger regulatory purpose that justified the required association. The compulsory association was permitted even though lawyers are not subject to economic regulation that

²⁹ See Stokes, Susan J. "Update on Checkoff Litigation" Farmers Legal Action Group (Jan. 2004) [online – http://www.flaginc.com/pubs/arts/Checkoff_Update20040126%20.pdf; accessed August 11, 2004]

³⁰ See Becker, Geoffrey S., *Federal Farm Promotion ("Checkoff") Programs*; Congressional Research Service Report for Congress; CRS 95-353 (July 11, 2002)

allocates the market for legal services. Lawyers are free to make independent economic choices – where they practice, what types of clients they accept, how much they charge, etc. The legal profession is regulated primarily for ethical, quality and disciplinary purposes, not in any manner that resembles the marketing regulations that governed the California tree fruit industry.

Checkoff programs can and do engage in a variety of market development strategies in addition to generic advertising and other types of direct promotional campaigns. For example, checkoff dollars underwrite research investigating new ways to utilize the commodity, to improve the safety, appeal and utility of food products for consumers, and development of solutions for environmental and production problems facing the industry. Checkoff dollars subsidize some types of certification programs and a significant expenditure of checkoff money is used in merchandizing activities, particularly in developing relationships with foreign customers.

The primary questions courts have been presented with is whether producers could be required to contribute funds toward commercial speech, i.e. advertising, etc. Courts have largely declined to directly address whether compelled subsidy for other types of market development activities are permissible by virtue of the fact that they are not, per se, speech, which is subject to stricter legal scrutiny. The matter has thus far been dealt with only indirectly based primarily on severability principles. The courts have found based on the allocative emphasis of checkoff funds, stated legislative intent, lack of express severability or even intuitively, that promotional speech is inherently the primary purpose of checkoff programs. Therefore, the courts have concluded that activities other than direct promotion were largely incidental to and supportive of the promotional aspects of the program that were found to be unconstitutional, and thus could not be easily severed from direct promotional activities. Whether the necessity of collective activity to fully realize the fruits of commodity development programs justifies the compelled association of producers for that purpose is questionable but not definitively resolved for the time being.

Potential Checkoff Reform Concepts

It is possible to conceive of a number of options that could be considered to help distinguish Nebraska's mandatory state checkoff programs from other state and federal checkoff programs that have been struck down by the courts. Additionally, the concern with the constitutionality of checkoff programs perhaps provides an opportunity to address policy questions regarding their purpose and implementation and thereby reduce actual and perceived conflicts that have led to litigation. A number of potential reform alternatives are presented here, although the list is not necessarily exhaustive.

However, it is necessary to caution that many of these suggestions relate to unresolved questions remaining after United Foods that are still being addressed by the courts. The outcome of the challenge to the federal beef checkoff currently before the Supreme Court is anticipated to provide more definitive guidance on the extent to which the state and commodity groups may realize commodity development goals through compelled association and mandatory checkoff mechanisms. Additionally, these are not recommendations, but rather presented only as ideas or concepts. They are presented only because they may have value in addressing criticisms of checkoff programs that have been cited in litigation and the elements of the 1st Amendment scrutiny that might be applied to state checkoff programs.

Practicalities and desirability of implementing any of the suggestions is left for further discussion. And finally, this report does not attempt to reach any conclusion as to the desirability of continued state involvement in commodity development, whether through mandatory or voluntary checkoff programs. That is a matter for policy makers in consultation with producers and their representatives.

Enhancing Government Speech Aspects

One of the central questions associated with mandatory checkoff programs is whether they are a form of government speech. Substantial precedent suggests that government speech enjoys a considerable degree of immunity from 1st Amendment scrutiny. However, no Supreme Court case has clearly defined “government speech” in the context of compelled subsidy of speech generated by essentially private associations – the common element of cases that have discussed the government speech issue is that they involved objections by discrete groups to governmental expression funded through general public revenues. As discussed above, a test for determining whether commercial advocacy facilitated by the government is government speech is beginning to emerge from the accumulation of cases that have been tried in the federal district and circuit courts.

Although it would likely entail some degree of aligning checkoff purposes more closely with broader public interests and imposing a greater degree of political accountability of checkoff programs, measures to enhance the role of the government as the literal speaker could be considered, such as:

- Assigning commodity development functions to an agency, such as the Dept. of Agriculture, and reformulating commodity boards as advisory to the Director in that duty, or alternatively, allowing the Director to contract with producer representative associations to implement the programs subject to the Directors supervisory oversight, including budget approval and ultimate editorial control of content.
- South Carolina model – Create Commodity Development Council as separate state agency governed by body representative of cross section of agricultural and consumer interests (similar in concept to Environmental Quality Council) who would qualify and approve individual commodity programs initiated by producers.
- Articulate in legislative findings and statements of purpose governmental interest in the public welfare benefits beyond production agriculture that accrue from commodity promotion programs. Revise permissible uses of checkoff funds where possible and as appropriate to be consistent with public welfare objectives.
- Authorize public fund match of checkoff funds, perhaps limited to areas where governmental interests and commodity producer interests coincide.

Reorient Mandatory Checkoff Programs Toward Greater Emphasis to Non-Speech Aspect of Commodity Development

A second area with the potential for distinguishing state mandatory programs from invalidated programs is in development activity emphasis. In cases litigated thus far, the Courts have dealt

with programs oriented toward direct promotional activities (generic advertising) where the courts concluded that the commercial speech generated was not germane to a larger associational purpose that justified the compelled association. Again, there is no definitive decision by the Supreme Court that clearly prohibits all manner of compelled association for commodity development goals although it is likely that any purposes of such association would be required to have a nexus to broader public welfare goals and objectives having very broad consensus among producers.

- Maintain mandatory assessments for research, nutritional education, export development, health and marketability certification programs, etc. and collect voluntary contributions for advertising and other direct promotional activities.
- Manage program budgets to maintain commercial expression, including generic promotion, less than expenditures for other development activities
- In legislative findings and statements of purpose, identify and define non-speech development activities necessitating cooperative activity, and authorizing speech that is incidental to the larger expenditure for such identified associational purposes.
- Add express severability

Reducing points of conflict with commodity subgroups

A final strategy for addressing potential 1st Amendment issues lies in minimizing technical prerequisites that create a 1st Amendment infringement. This might be accomplished in two ways, 1) examine means of allowing opt-out of compelled contributions by producers whose commercial interests are clearly incompatible with generic promotion, or 2) finding ways to accommodate and promote diverse commercial interests within the context of a generic program.

- Develop opt out options for producers who can demonstrate bona-fide commercial conflict with generic promotion program or transform to entirely voluntary programs.
- Exempt certain categories of producers, for example, certified organic producers, that have obvious and compelling interest in distinguishing their production from other commodities in the marketplace.
- Adopt modified generic promotional messages – Generic messages promoting the commodity in general but simultaneously advising the public of ability of industry to provide consumers with choices of products.
- Design checkoff activities and dedicate a defined portion of checkoff funds specifically for development of direct and attribute markets for the commodity. Authorize appropriately representative committees to be appointed to recommend expenditures to commodity board.
- Provide for periodic referendum