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FUTURE OF COMMODITY CHECK-OFFS
— by Neil E. Harl*

The United States Supreme Court, in a six to three decision, on June 25 created a different playing field for commodity check-off programs.¹ The decision promises to be the center of the debate over mandatory check-off programs for several years. In the case before the court, United States v. United Foods, Inc.² the court said that the mandatory mushroom check-off violates the First Amendment free speech rights³ of mushroom producers.

The court opinion was written by Justice Anthony Kennedy who was joined by Justices Rehnquist, Stevens, Scalia, Souter and Thomas, with Stevens and Thomas concurring in the majority opinion. Justice Stephen Breyer dissented along with Justices Ginsburg and O’Connor. The line up represented quite a departure from the usual liberal-conservative split.

The statute in question, enacted by Congress in 1990, is the Mushroom Promotion, Research and Consumer Information Act.³ The legislation authorized the Secretary of Agriculture to establish a Mushroom Council and allowed the council to impose mandatory assessments on handlers of fresh mushrooms in an amount not to exceed one cent per pound of mushrooms produced or imported.⁴ Most of the funds raised by the assessments were spent for generic advertising.

Justice Kennedy noted that First Amendment concerns arise because of the fact that “producers subsidize speech with which they disagree.”⁵ The court noted that commercial speech is protected by the First Amendment to the U.S. Constitution. Justice Kennedy analyzed how the mushroom check-off was regulated. He said that greater regulation of the mushroom market might have been implemented but it was not.⁶ Justice Kennedy stated that the compelled contributions (in the form of the check-off) only served the advertising scheme in question. The check-off was not part of a broader regulatory framework. The advertising itself was the principal object of the regulatory scheme.

The earlier case

The court in United Foods was trying to juggle the facts in that case in light of an

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by Dr. Neil E. Harl and Prof. Roger A. McEowen
earlier Supreme Court decision, Glickman v. Wileman Brothers & Elliott, Inc. 8 In that case, the court upheld a marketing order that was part of a larger regulatory scheme with respect to California tree fruits. The court noted that producers in that case were compelled to contribute funds for cooperative advertising and were required to market their products according to cooperative rules. Moreover, the court noted that the marketing orders had received an antitrust exemption.

None of that was present in the United Foods case. 9 In United Foods, the funds were directed into generic advertising with nothing preventing producers from making their own marketing decisions, there was no antitrust exemption and there were no marketing orders regulating mushroom production. Also, nothing required the mushroom growers in United Foods to associate as a group making cooperative decisions.

Meaning of United Foods

The meaning of United Foods and the implications for other check-off programs will not be known until challenges to those other check-offs are litigated, probably all the way to the U.S. Supreme Court.

The most likely interpretation, at this point, is that the court will be inclined to evaluate each check-off on the basis of what is required and what is involved with the statute authorizing the check-off and related statutes and whether the statutory framework comprises a “marketing scheme,” as noted in United Foods. The fact that a particular commodity is subject to various types of federal regulation is not likely to be as important as whether the check-off law embraces a fairly comprehensive marketing program. If it does, there is less likelihood that the check-off interferes with free speech. As the court noted, in United Foods, if there is a “marketing scheme” involved, “[...mandated participation in an advertising program with a particular message is] the logical concomitant of a valid scheme of economic regulation.” 10

However, if the authorizing statute and the associated statutory framework does little more than levy the check-off rate against the commodity, and provide for the disbursement of funds, a challenge is more likely to be successful, and indeed, may well be unconstitutional.

That analysis would suggest that the pork and beef check-offs could be in jeopardy and the grain check-offs might, as well.

The beef check-off was litigated to the Tenth Circuit Court of Appeals in 1998 in the case of Gaetz v. Glickman 11 with the Tenth Circuit upholding the check-off. Certiorari was denied by the U.S. Supreme Court in 1999. 12 It is understood that the U.S. Supreme Court will be asked on August 9, 2001, to grant review of the case in light of United States v. United Foods, Inc. 13 If review is granted, a decision in the beef check-off could come relatively soon.

Reposition the check-offs?

An obvious question is how the various check-offs could be repositioned to better withstand a constitutional challenge.

One possibility would be for the check-off program to become part of a broader, comprehensive marketing program. A commodity marketing program would seem to be on firmer ground in resisting a challenge to the constitutionality of a check-off program which is ancillary to the marketing program.

Greater government involvement in marketing of the commodity in question otherwise could help withstand a legal challenge. Check-offs in conjunction with government farm programs could, conceivably, be fashioned in such a manner as to create some protection from a First Amendment challenge.

Another possible strategy would be to shift check-offs to a voluntary status. That would, of course, eliminate revenue from those who feel their free speech is being infringed plus revenue from those who would be content to let others pay for promotion even though they agree with the message.

The near term

For check-off programs that are not part of a comprehensive marketing program, legal challenges could drag on for several years. The key question: is there political support (and producer support) for taking steps to recast the check-off programs in a manner to withstand constitutional challenge? The answer, at this stage, is far from clear.

FOOTNOTES

2 Id.
3 U.S. Const., First Amendment.
5 7 U.S.C. § 6104(g)(2).
6 See note 1 supra.
9 See Note 1 supra.
11 149 F.3d 1131 (10th Cir. 1998), aff’g, 920 F. Supp. 1173 (D. Kan. 1996).
13 See note 1 supra.