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Beef and Pork Check-offs Ruled Unconstitutional; What Does the Future Hold for Agricultural Check-offs?

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BEEF AND PORK CHECK-OFFS RULED UNCONSTITUTIONAL; WHAT DOES THE FUTURE HOLD FOR AGRICULTURAL CHECK-OFFS?

— by Roger A. McEowen*

On July 8, 2003, the United States Court of Appeals for the Eighth Circuit affirmed the Federal District Court for the District of South Dakota and held the beef check-off to be unconstitutional.¹ More recently, on October 22, 2003, the United States Court of Appeals for the Sixth Circuit affirmed the Federal District Court for the Western District of Michigan and invalidated the pork check-off on constitutional grounds.² Another case involving the beef check-off is pending in the U.S. Circuit Court of Appeal for the Ninth Circuit.³ The outcome of that case, along with the recent opinions of the Eighth and Sixth Circuits, will have an important bearing on the future of agricultural check-offs.

U.S. Supreme Court Guidance

In *United States v. United Foods, Inc.*,⁴ the U.S. Supreme Court held that mandatory assessments for mushroom promotion under the Mushroom Promotion, Research, and Consumer Information Act⁵ violated the First Amendment. The assessments were directed into generic advertising, and some handlers objected to the ideas being advertised. In an earlier decision,⁶ the Court had upheld a marketing order that was part of a greater regulatory scheme with respect to California tree fruits. In that case, producers were compelled to contribute funds for cooperative advertising and were required to market their products according to cooperative rules. In addition, the marketing orders had received an antitrust exemption. None of those facts was present in *United Foods*,⁷ where the producers were entirely free to make their own marketing decisions and the assessments were not tied to a marketing order.

Based on its two rulings involving mushrooms and California tree fruits, the U.S. Supreme Court has established guidelines for lower courts evaluating the constitutionality of check-offs. Under the Supreme Court's analysis, each check-off is to be evaluated 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*.⁸ 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

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noted in *United Foods*,⁹ 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.” However, if the authorizing statute and the associated statutory framework do little more than levy the check-off rate against the commodity and provide for the disbursement of funds, a constitutional challenge to the check-off assessment is more likely to be successful.

The Government Speech Argument – USDA Switches Horses

Before the U.S. Supreme Court reversed the United States Court of Appeals for the Sixth Circuit and invalidated the mushroom check-off on constitutional grounds,¹⁰ USDA lawyers in other cases then being litigated were arguing that the beef check-off was identical in all relevant aspects to the mushroom check-off. When the Supreme Court struck down the mushroom check-off, the USDA switched its main legal argument to argue that the check-off advertising programs were government speech – that the beef check-off did not violate the First Amendment because government, instead of private, speech is involved.

To constitute government speech, a check-off must clear three hurdles according to the U.S. Supreme Court.¹¹ The government must exercise sufficient control over the content of the check-off to be deemed ultimately responsible for the message, the source of the check-off assessments must come from a large, non-discrete group, and the central purpose of the check-off must be identified as the government’s. The beef check-off likely clears only the first hurdle. The source of funding for the beef check-off comes from a discrete identifiable source (cattle producers) rather than a large, non-discrete group, and the check-off has as its central purpose that of being a “self-help” program designed to improve markets for beef. That central purpose has been articulated clearly by the Congress in the legislative history of the Act.¹² As for the pork check-off, the Sixth Circuit held that government speech was not involved because of the pork industry’s extensive control over the check-off’s promotional activities, the private funding of the check-off by mandatory assessments on pork producers, and only limited governmental oversight over the check-off programs.¹³

While the United States Supreme Court did not address the government speech issue in *United Foods*¹⁴ (the issue was neither raised nor addressed in the Court of Appeals), the issue has been addressed by several Circuit Courts of Appeal. The U.S. Court of Appeals for the Third Circuit, in *United States v. Frame*,¹⁵ upheld the beef check-off as constitutional in 1989, but in so doing rejected the USDA’s argument that the beef check-off was government speech. However, in light of the U.S. Supreme Court’s 2001 opinion in *United Foods*,¹⁶ the Third Circuit’s opinion is no longer good law on the constitutional issue. But, because the U.S. Supreme Court did not rule on the government speech issue, the Third Circuit’s ruling that the beef check-off does not constitute government speech is still good law. The Tenth Circuit Court of Appeals in *Goetz v. Glickman*,¹⁷ upheld the beef check-off, but the court’s opinion was rendered before *United Foods*,¹⁸ and is no longer viewed as good law. As noted

above, the Eighth Circuit’s opinion of July 8, 2003, and the Sixth Circuit’s opinion of October 22, 2003 also held that the beef and pork check-offs did not involve government speech.¹⁹ Other courts have also ruled that various check-offs do not constitute government speech.²⁰ On the other hand, the Federal District Court for Montana has ruled that the beef check-off is constitutional because the program constituted government speech.²¹ That opinion, however, runs counter to the opinions of the Third, Sixth and Eighth Circuits and is expected to be overturned by the Ninth Circuit on appeal.

Current Status of Check-Offs

Ultimately, there could be a conflict amongst the Circuit Courts of Appeal, depending on the outcome of the pending case in the Ninth Circuit. That appears to be unlikely, however, at the present time. If all of the Circuit Court opinions are consistent, there would be little reason for the U.S. Supreme Court to take up the issue.

FOOTNOTES

- ¹ *Livestock Marketing Association, et. al. v. United States Department of Agriculture*, 335 F.3d 711 (8th Cir. 2003), *aff’g*, 207 F. Supp. 2d 992 (D. S.D. 2002).
- ² *Michigan Pork Producers Association, Inc., et. al. v. Veneman*, No. 02-2337/02-2338, 2003 U.S. App. LEXIS 21358 (6th Cir. Oct. 22, 2003), *aff’g sub. nom.*, *Michigan Pork Producers, et. al. v. Campaign for Family Farms, et. al.*, 229 F. Supp. 2d 772 (W.D. Mich. 2002).
- ³ *Charter v. United States Department of Agriculture*, 230 F. Supp. 2d 1121 (D. Mont. 2002), presently on appeal to the Ninth Circuit.
- ⁴ 533 U.S. 405 (2001).
- ⁵ 7 U.S.C. § 6101 *et seq.*
- ⁶ *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997) (marketing orders effectively “collectivized,” free of restraint of antitrust laws, the marketing of products that the assessments promoted; thus, mandated participation in an advertising program with a particular message was the logical result of a valid scheme of economic regulation not violative of First Amendment).
- ⁷ 533 U.S. 405 (2001). See Harl, “Future of Commodity Check-Offs,” 12 *Agric. L. Dig.* 113 (2001).
- ⁸ *Id.*
- ⁹ *Id.*
- ¹⁰ *Id.*
- ¹¹ See, e.g., *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001); *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000); *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995); *Rust v. Sullivan*, 500 U.S. 173 (1991).
- ¹² See 7 U.S.C. § 2901(b) (purpose of the Beef Act is to serve as “on orderly procedure for financing . . . and carrying out a coordinated 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 and beef products”). The same point applies to the pork check-off. See 7 U.S.C. § 4801(a)(1-4).

- ¹³ Michigan Pork Producers, Association, Inc., et. al. v. Veneman, No. 02-2337/02-2338, 2003 U.S. App. LEXIS 21358 (6th Cir. Oct. 22, 2003).
- ¹⁴ 533 U.S. 405 (2001).
- ¹⁵ 885 F.2d 119 (3d Cir. 1989).
- ¹⁶ 533 U.S. 405 (2001).
- ¹⁷ 149 F.3d 1131 (10th Cir. 1998), *cert. denied*, 525 U.S. 1102 (1999).
- ¹⁸ 533 U.S. 405 (2001).
- ¹⁹ Livestock Marketing Association, et. al. v. United States Department of Agriculture, 335 F.3d 711 (8th Cir. 2003), *aff'g*, 207 F. Supp. 2d 992 (D. S.D. 2002); Michigan Pork Producers Association, Inc., et. al. v. Veneman, Nos. 02-2337; 02-2338 (6th Cir. Oct. 22, 2003); *aff'g sub. nom.*,

- Michigan Pork Producers, et. al. v. Campaign for Family Farms, et. al., 229 F. Supp. 2d 772 (W.D. Mich. 2002).
- ²⁰ *In re* Washington State Apple Advertising Commission, 257 F. Supp. 2d 1290 (E.D. Wash. 2003) (Washington State Apple check-off did not involve government speech); Tampa Juice Services, Inc. v. Florida, No. GC-G-00-3488 (10th Cir. Fla. Mar. 31, 2003) (Florida citrus box tax did not involve government speech); Pelts & Skins, L.L.C. v. Jenkins, 259 F. Supp. 2d 482 (M.D. La. 2003) (alligator product check-off did not involve government speech).
- ²¹ Charter v. United States Department of Agriculture, 230 F. Supp.2d 1121 (D. Mont. 2002).

CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr

BANKRUPTCY

CHAPTER 12

PLAN. The debtors' Chapter 12 plan provided for payment of an oversecured claim and provided that late fees and reasonable attorney's fees, as allowed under the loan documentation, were to be added to the claim. The creditor filed a claim for the unpaid principal of the loan and added late fees for loan payments not made prior to the bankruptcy filing and for attorney's fees. The debtors argued that the claim was limited to the principal owed on the loan. The court held that the pre-petition late fees and attorney's fees were allowed under both the plan provision for the fees and the loan documentation. *In re Heath*, 297 B.R. 556 (Bankr. S.D. Ill. 2003).

The debtor raised cattle on a farm which also provided feed crops for the cattle. The debtor's fifth plan provided for semiannual plan payments which were supposed to be generated by sales of cattle. The debtor's supporting income and expense schedules listed income in excess of the historical income claimed on federal income tax forms and expenses less than the expenses listed on the tax returns. The supporting expense schedule did not include the cost of replacing cattle sold. The court held that the debtor failed to file a feasible plan and, because the plan was the fifth amended plan, the court dismissed the case since further plans would unreasonably delay enforcement of the debts and result in further loss of estate property. *In re Weber*, 297 B.R. 567 (Bankr. N.D. Iowa 2003).

FEDERAL AGRICULTURAL PROGRAMS

COUNTRY-OF-ORIGIN LABELING. The AMS has issued proposed regulations implementing the country-of-origin labeling program passed by the Farm Security and Rural Investment Act of 2002. Covered commodities include muscle cuts of beef (including veal), lamb, and pork; ground beef, ground lamb, and ground pork; farm-raised fish and shellfish; wild fish and shellfish; perishable agricultural commodities (fresh and frozen fruits and vegetables); and peanuts. The proposed rule contains definitions, the requirements for consumer notification and product marking, and the recordkeeping responsibilities of both retailers and suppliers. The AMS noted that most of the proposed regulation provisions were mandated by the statute and did not leave the agency with much discretion. Under the Act, the ingredients in a processed food item are excluded from the definition of a covered commodity. The proposed regulations define "processed food item" under a two-step approach. If the covered commodity has undergone a physical or chemical change which causes the character of the commodity to be different, then the commodity is a processed food item. Examples provided in the explanation included squeezed orange juice, peanut butter and fish sticks. Ground meat is specifically defined as a covered commodity. Under the second step, a retail item derived from a covered commodity that has been combined with either other covered commodities, or other substantive food components (e.g., chocolate, stuffing) resulting in a distinct retail item that is no longer marketed as a covered commodity is considered a processed food item. See McEowen, "Country of Origin Labeling," 14 *Agric. L. Dig.* 65 (2003). **68 Fed. Reg. 61943 (Oct. 30, 2003).**

FARM CREDIT. The Economic Research Service has issued