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INSIDE

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IN FUTURE ISSUES

- International trade and the future of farm programs

Trade fight over Canadian hogs

On April 6, 2005, the International Trade Commission ("ITC") in a 5-0 vote ruled that Canadian Hog Producers were not violating international trade law.[1]

In March 5, 2004, in spite of record high hog prices,[2] the National Pork Producers Council ("NPPC"), a substantial number of individual producers of live swine, and numerous state pork producer organizations (collectively "Hog Producers"), filed an international trade case against Canadian live-hog producers (breeding stock was not included).[3] Nick Giordano, International Trade Counsel with the NPPC argued that "[w]e are not trying to close the border or otherwise disadvantage Canadian producers. We are looking for a way to mitigate the impact of the subsidies."[4] However, not every hog producer agreed with the NPPC. According to Pete Hisey, from Meatingplace.com, the Pork Trade Action Coalition placed an advertisement in the *Des Moines Register* titled "Don't Tax Our Pigs." Seventy-seven Iowa hog farmers who rely on access to Canadian pigs to keep their independent farms profitable sponsored the advertisement.[5] Packers and producers joined forces to both support and oppose this case.

The investigation focused on whether (1) the Canadian government gave unfair incentive payments (also known as countervailing duties or subsidies) to Canadian Hog Producers to raise hogs which violate trade agreements, and (2) Canadian Hog Producers sold hogs in the U.S. for lower prices than in Canada (Anti-dumping).

The investigation of the Hog Producer's allegations started with the U.S. Department of Commerce ("DOC") focusing on Canadian countervailing duties.[6] In August 2004, the DOC investigation provided an initial determination that the Canadian live swine industry was *not* the recipient of countervailable subsidies. On March 11, 2005 the ITC agreed with the DOC and overturned the countervailing determination.[7]

In October 2004, the DOC initiated an anti-dumping tariff on Canadian hogs ruling there are "reasonable indications" that dumping is occurring. Canadian Hog Producers had to post a bond of approximately 13%-15% of the value of each hog that crossed the border. The bond amount was held until the ITC ruled on the issue in April 2005. The ITC sought to determine whether a U.S. industry is materially injured by reason of the imports under investigation.[8]

Had the ITC ruled that Canadian Hog Producers had violated anti-dumping rules; the money collected would have been paid to the hog producers and packers that petitioned the government to impose the tariffs. The return of money to petitioners is a controversial amendment inserted in H.R. 4461, The Agriculture, Rural Develop-

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Federal Register summary from May 7 to June 10, 2005

DISASTER PAYMENTS. The 2004 Dairy Disaster Assistance Payment Program was established to provide up to $10 million in assistance to dairy producers in counties declared disaster areas by the President due to a hurricane in 2004. The CCC has issued proposed regulations implementing the program. **70 Fed. Reg. 30009 (May 25, 2005)**.

IRRADIATION OF FRUITS AND VEGETABLES. The APHIS has issued proposed regulations to revise the approved doses for irradiation treatment of imported fruits and vegetables. This proposed regulations establish a new minimum generic dose of irradiation for most arthropod plant pests, establish a new minimum generic dose for the fruit fly family, reduce the minimum dose of irradiation for some specific fruit fly species, and add nine pests to the list of pests for which irradiation is an approved treatment. In addition, the proposed regulations provide for the irradiation of fruits and vegetables moved interstate from Hawaii, Puerto Rico and the U.S. Virgin Islands at the pest specific irradiation doses that are now approved for imported fruits and vegetables. The proposed regulations add irradiation as a treatment for bananas from Hawaii and to add vapor-heat treatment as an optional treatment for sweet potatoes

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ment, Food and Drug Administration, and Related Agencies Appropriations Act for FY 2001, known as "The Byrd Amendment" written by Senator Robert Byrd (D-WV) to protect the U.S. steel industry.[9] Prior to the Byrd Amendment, the money went to the U.S. Treasury. Upon signing the bill, President Clinton in a statement said "…I note that this bill will provide select U.S. industries with a subsidy above and beyond the protection level needed to counteract foreign subsidies….I call on the Congress to override this provision…."[10] On January 16, 2003, the World Trade Organization Appellate Body ruled the Byrd Amendment was unfair.[11] Under the Byrd Amendment, a producer who supported the case, could potentially collect large sums of money. The payment was unavailable to any entity that opposed the tariff. Then, for each year, the amount of the tariff would be raised or lowered depending on the actual damage, providing an income for years to come.

The ITC ruled against the Hog Producers on April 6, 2005 and terminated the Live Swine From Canada investigations.[12] Tariffs were dropped and previously collected bond money was returned to Canadian Hog Producers.

The June, 2005 *Journal of the Association of Corporate Counsel* contains a detailed article about using anti-dumping for business advantage.[13]

–Jeffrey A. Feirick, Hatfield, PA

Any opinions, findings, conclusions, or recommendations expressed in this article are those of the author and do not necessarily reflect the view of The Clemens Family Corporation.

[1] *See U.S. Int. Trade Comm. Public Report: Live Swine From Canada,*(Investigation No. 731-TA-1076 (Final), USITC Publication 3766, April 2005). The report contains background information concerning the facts the Commission used in its decision. Commissioner Daniel R. Pearson did not participate in this case.

[2] *Id.*, p.4

[3] U.S. Int. Trade Comm. General Information, Instructions, and Definitions for Commission Questionnaires, Live Swine from Canada investigations Nos. 701-TA-438 (Preliminary) and 731-TA-1076 (Preliminary) p.2.

[4] *See Why Canadian Hog Subsidies Are Injuring U.S. Hog Producers,* at http://www.nppc.org/hot_topics/banfftradetalk012005.pdf pages 23, 24.

[5] *See Group hits Canadian pork anti-dumping duties,* Pete Hisey at http://www.meatingplace.com/DailyNews/pop.asp?ID=13319, November 1, 2004

[6] *See Notice of Initiation of Countervailing Duty Investigation: Live Swine From Canada,* 69 FR 19818 (April 14, 2004)

[7] Int. Trade Comm. Investigation No. 701-TA-438, Live Swine From Canada, 70 Fed. Reg. 13542 (March 21, 2005)

[8] 19 U.S.C. § 1673d(b).

[9] *See 106th Cong. 106-387,* Included in that bill as amendment Title X, was inserted by Senator Robert Byrd (D-WV), the Continued Dumping or Subsidy Offset Act of 2000 (known as the Byrd Amendment).

[10] Statement by the President: H.R. 4461, The Agriculture, Rural Development, Food and Drug Administratin, and Related Agencies Appropriations Act for FY 2001. (October 28, 2000)

[11] *See WTO Appellate Body Condemns the "Byrd Amendment" The US Must Now Repeal It, at http://www.eurunion.org/news/press/2003/2003003.htm.* January 16, 2003

[12] *See U.S. Int. Trade Comm. Public Report: Live Swine From Canada,*(Investigation No. 731-TA-1076 (Final), USITC Publication 3766, April 2005).

[13] Neeraj Bali and John Fotiadis, Using Anti-dumping for Business Advantage, ACC Docket 23, no. 6: p. 74-85.

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Letters and editorial contributions are welcome and should be directed to Linda Grim McCormick, Editor, 2816 C.R. 163, Alvin, TX 77511, 281-388-0155.

Federal Register/Cont. from page 1

from Hawaii. **70 Fed. Reg. 33857 (June 10, 2005)**.

PINE SHOOT BEETLE. The APHIS has issued interim regulations amending the pine shoot beetle regulations by adding counties in Illinois, Indiana, New York, Ohio, Pennsylvania and Wisconsin to the list of specific quarantined areas in which the pine shoot beetle has been located. In addition, the interim regulations designate the states of New Hampshire and Vermont, in their entirety, as quarantined areas based on their decision to no longer enforce intrastate movement restrictions. **70 Fed. Reg. 30329 (May 26, 2005)**.

PINE SHOOT BEETLE. The APHIS has issued proposed regulations which amend the pine shoot beetle regulations to allow pine bark products to be moved interstate from quarantined areas during the shoot feeding stage (July 1 through October 31) of the pine shoot beetle's life cycle without treatment. The proposed regulations also establish a management method to allow pine bark products to be moved interstate from quarantined areas during the over wintering stage (November 1 through March 31) and spring flight stage (April 1 through June 30) of the pine shoot beetle's life cycle. **70 Fed. Reg. 32733 (June 6, 2005)**.

PLANT QUARANTINE. The APHIS has adopted as final regulations amending the plant health regulations by adding to 7 CFR Part 305 treatment schedules and related requirements that now appear in the Plant Protection and Quarantine Treatment Manual and by removing the Plant Protection and Quarantine Treatment Manual from the list of material that is incorporated by reference into the regulations. **70 Fed. Reg. 33263 (June 7, 2005)**.

TUBERCULOSIS. The APHIS has issued interim regulations which amend the regulations concerning tuberculosis in cattle and bison by reducing, from 6 months to 60 days, the period following a whole herd test during which animals may be moved interstate from a modified accredited state or zone or from an accreditation preparatory state or zone without an individual tuberculin test. **70 Fed. Reg. 29579 (May 24, 2005)**.

–Robert P. Achenbach, Jr., AALA Executive Director

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Supreme Court rules that beef check-off is government speech; but check-off litigation may not be over

By Roger A. McEowen

On May 23, 2005, the U.S. Supreme Court upheld the federally-mandated beef promotion program against a First Amendment challenge on the basis that the program constituted government speech.[1] The Court, however, left open the possibility that the beef check-off could be successfully challenged on First Amendment grounds if it can be shown on remand that the advertisements attribute their generic pro-beef message to the plaintiffs.[2] As such, the Court's ruling does not necessarily end the beef check-off litigation, and is not entirely precedential for the pork check-off litigation that awaits a determination as to whether the Supreme Court will hear the case.[3]

The statutory framework

The Beef Promotion and Research Act[4] (Act) was passed by the Congress as part of the Food Security Act of 1985.[5] Under the statute, the Secretary of Agriculture (Secretary) was directed to issue a Beef Promotion and Research Order (Order).[6] The Act also directed the Secretary to appoint a Cattlemen's Beef Promotion and Research Board (Board)[7] which convened an Operating Committee (Committee) and imposed a $1 per-head assessment (the "check-off")[8] on all sales or importation of cattle, which is to be used to fund beef-related projects, including promotional campaigns designed by the Committee and approved by the Secretary.[9]

It is clear from the legislative history of the Act that the program was only intended as enabling legislation to establish an industry "self-help" program.[10]

The government speech issue

The case involved (in the majority's view) a narrow facial attack on whether the statutory language of the Act created an advertising program that could be classified as government speech. That was the only issue before the Court. While the government speech doctrine is relatively new and is not well-developed, prior Supreme Court opinions not involving agricultural commodity check-offs indicated that to constitute government speech, a check-off must clear three hurdles - (1) the government must exercise sufficient control over the content of the check-off to be deemed ultimately responsible for the message; (2) the source of the check-off assessments must come from a large, non-discrete group; and (3) the central purpose of the check-off must be identified as the government's.[11] Based on that analysis, it was believed that the beef check-off would clear only the first and (perhaps) the third hurdle, but that the program would fail to clear the second hurdle. Indeed, the source of funding for the beef check-off comes from a discrete identifiable source (cattle producers) rather than a large, non-discrete group. The point is that if the government can compel a targeted group of individuals to fund speech with which they do not agree, greater care is required to ensure political accountability as a democratic check against the compelled speech.[12] That is less of a concern if the funding source is the taxpaying public which has access to the ballot box as a means of neutralizing the government program at issue and/or the politicians in support of the program.[13] While the dissent focused on this point, arguing that the Act does not establish sufficient democratic checks,[14] Justice Scalia, writing for the majority, opined that the compelled-subsidy analysis is unaffected by whether the funds for the promotions are raised by general taxes or through a targeted assessment.[15] That effectively eliminates the second prong of the government speech test. The Court held that the other two requirements were satisfied inasmuch as the Act vests substantial control over the administration of the check-off and the content of the ads in the Secretary.[16]

Unresolved issue

The court did not address (indeed, the issue was not before the court) whether the advertisements, most of which are credited to "America's Beef Producers," give the impression that the objecting cattlemen (or their organizations) endorse the message. Because the case only involved a facial challenge to the statutory language of the Act, the majority examined only the Act's language and concluded that neither the statute nor the accompanying Order *required* attribution of the ads to "America's Beef Producers" or to anyone else. Thus, neither the statute nor the Order could be facially invalid on this theory. However, the Court noted that the record did not contain evidence from which the Court could determine whether the actual application of the check-off program resulted in the message of the ads being associated with the plaintiffs.[17] Indeed, Justice Thomas, in his concurring opinion, noted that the government may not associate individuals or organizations involuntarily with speech by attributing an unwanted message to them whether or not those individuals fund the speech *and whether or not the message is under the government's control*.[18] Justice Thomas specifically noted that, on remand, the plaintiffs may be able to amend their complaint to assert an attribution claim which ultimately could result in the beef check-off being held unconstitutional.[19] If those facts are developed on remand, and the ads are found to be attributable to the complaining ranchers or their associated groups, the beef check-off could still be held to be unconstitutional.

Implications of the decision

It seems clear from the opinion that the Secretary now must take steps to affirmatively exercise the authority vested in the Secretary under the Act, and run the check-off as the government program the Court says it is.[20] Likewise, organizations that purport to speak for ranchers must actually represent them – failure to do so, coupled with receipt of check-off dollars (or indirect benefit from check-off dollars), will bolster a constitutional claim by members of non-check-off recipient cattle organizations (who must pay the assessment) on freedom of association grounds.[21]

The opinion is also not entirely precedential for the pending pork check-off litigation.[22] That case involves not only a government speech issue, but also a freedom of association claim.[23] Thus, the pork case[24] contains a remaining open claim on the compelled association issue.

The opinion may prove ultimately to not be that useful of a precedent on the government speech issue. Only four of the six justices that formed the majority in the case really believe that the beef ads constitute government speech. Justice Ginsburg concurred separately and stated that while she did not believe the beef ads amounted to government speech, the majority reached an adequate decision for the wrong reason. Justice Breyer also concurred separately and stated his continued belief that the beef check-off is a permissible form of economic regulation, but that the majority's government speech theory was an acceptable solution

In any event, the majority opinion would appear to expand the application of the government speech doctrine. Apparently it is no longer the rule that permissible compelled public support for speech is limited to situations where the government does not exercise control over the speech and takes a viewpoint-neutral approach that lets private parties determine the content of the speech being

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supported.

What remains clear is that check-off funds cannot be used to promote the check-off itself.[25]

What's next?

The Court remanded the case to the Federal District Court in South Dakota. The Livestock Marketing Association will have to decide whether it will continue the litigation on the ad attribution rationale suggested by Justice Thomas. Beyond that, it is difficult to determine why the Court seemingly expanded the government speech doctrine. Clearly, Justices Scalia, Thomas and Rehnquist (all part of the majority) are sympathetic to the government speech analysis in the context of abortion,[26] and they may have ruled as they did in the beef case to expand the government speech doctrine for application in a case they will decide next term involving a federal law[27] (known as the Solomon Amendment) that removes federal funds from institutions of higher education that do not permit military recruiters on campus.[28] That case has been positioned as a government speech case (among other claims), and in late 2004 the United States Court of Appeals for the Third Circuit ruled that the Solomon Amendment was unconstitutional because it forced schools to agree with the government's policy of allowing gays to serve in the military only if they do not openly declare their sexual orientation.[29]

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[1] *Johanns, et al. v. Livestock Marketing Association*, Nos. 03-1164, 03-1165, 2005 U.S. LEXIS 4343 (U.S. May 23, 2005), *rev'g sub nom., Livestock Marketing Association v. United States Department of Agriculture*, 335 F.3d 711 (8th Cir. 2003).

[2] Justice Thomas, in his concurring opinion, noted that the respondents (the original plaintiffs in the case) may be able to amend their complaint on remand to assert an attribution claim.

[3] *Michigan Pork Producers Association v. Veneman*, 348 F.3d 157 (6th Cir. 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).

[4] 7 U.S.C. § 2901 *et. seq.*

[5] Pub. L. 99-198, 99 Stat. 1362 (1985), *enacting* 7 U.S.C. § 1281 *et. seq.*

[6] 7 U.S.C. § 2903.

[7] 7 U.S.C. § 2904(1).

[8] 7 U.S.C. § 2904(4)(A).

[9] 7 U.S.C. § 2904(4)(B),(C).

[10] See, e.g., 121 Cong. Rec. 38,116 (only "self-help" legislation proper for industry not traditionally recipient of government subsidies) (statement of Sen. Hansen); 121 Cong. Rec. 31,439 ("In keeping with their true free enterprise nature, cattlemen are asking only for enabling legislation") (statement of Rep. Santini). In *United States v. Frame, 885 F.2d 1119 (3d Cir. 1989),* the court stated, "The purpose underlying the Beef Promotion Act is ideologically neutral. The federal government…harbors no intent to prescribe orthodoxy or communicate an official view."

[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. 219 (1995); *Rust v. Sullivan*, 500 U.S. 173 (1991).

[12] *See, e.g., Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 573 (1995)("[T]he fundamental rule of protection under the First Amendment [is] that a speaker has the autonomy to choose the content of his own message").

[13] *See, e.g., Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) (noting that reason for allowing the government to compel payment of taxes and to spend money on controversial projects is that government is representative of the people); *Massachusetts v. Mellon*, 262 U.S. 447 (1923) (noting that when government speech is funded with general tax revenue no individual taxpayer or groups of taxpayers can lay claim to special, or even strong, connection to money spent).

[14] Indeed, Justice Souter, in his dissent, noted that the Act did not even require the beef ads to show any sign of being speech by the government and that experience has shown how effective the government has been at masking its role in producing the ads.

[15] In any event, the majority opined that the beef advertisements were subject to sufficient political safeguards inasmuch as the basic message of the ads is prescribed by federal statute, specific requirements for the ads' content are imposed by federal regulation promulgated after notice and comment, and that the Secretary (whom the court termed a politically accountable official – albeit unelected) has the statutory authority to oversee the program, appoint and dismiss key personnel and exercise veto power over the content of the ads.

[16] The Court noted that while the advertising was controlled by non-governmental entities (the Board and Committee) the message was effectively controlled by the Federal Government. Congress and the Secretary, the majority pointed out, pursuant to the Act, have the authority to establish the overarching message and some of the campaign's elements and have left the development of the remaining details to the Committee, half of whose members are appointed by the Secretary and all of whom are subject to removal by the Secretary. The majority also noted that the statutory language gave the Secretary final approval authority over every word in every promotional campaign, and that government officials attend and participate in meetings at which proposals are developed.

[17] Justice Souter, in his dissenting opinion, pointed out that the challenge involved in the case was to the application of the statute through actual, misleading ads, not just, as the majority viewed the case, a facial challenge to the statutory language.

[18] *See, e.g., West Virginia Board of Education v. Barnette*, 319 U.S. 624, 633-634 (1943); *Wooley v. Maynard*, 430 U.S. 705, 713-717 (1977) (government may not compel individuals to convey messages with which they disagree); *Boy Scouts of America v. Dale*, 530 U.S. 640, 653 (2000) (government cannot associate individuals or groups with unwanted messages).

[19] See note 2 *supra.*

[20] That undoubtedly requires more than mere acquiescence to the decisions of the Board.

[21] This is an important point given the growing number of cattlemen in recent years that are subject to the mandatory assessment, but are members of the producer group, R-CALF USA, that does not receive check-off dollars or indirect benefits from the check-off and is often politically opposed to the policy positions of the national cattle group that does receive check-off dollars and indirect check-off benefits.

[22] *Michigan Pork Producers Association v. Veneman*, 348 F.3d 157 (6th Cir. 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).

[23] The First Amendment provides for the right of people peaceably to assemble. The Supreme Court has expressly recognized that a right to freedom of association and belief is implicit in the First, Fifth and Fourteenth Amendments. This implicit right is limited to the right to associate for First Amendment purposes. The right of freedom of association prevents the government from compelling individuals to express themselves, hold certain beliefs, or belong to particular associations or groups. Thus, the concurring opinion of Justice Thomas points out that if the beef ads can be tied to the particular plaintiffs in the case, a violation of the freedom of association may be present because the government cannot compel individuals to hold certain beliefs even though the speech involved is government speech.

[24] *Michigan Pork Producers Association v. Veneman*, 348 F.3d 157 (6th Cir. 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).

[25] *Livestock Marketing Association v. United States Department of Agriculture*, 207 F. Supp. 2d 992 (D. S.D. 2002).

[26] *See, e.g.,* Rust v. Sullivan, 500 U.S. 173 (1991) (Court upheld government regula-

Cont. on p. 6

Beef check-off/Cont. from p. 5
tions limiting ability of Title X fund recipients to engage in abortion-related activities). While the Court's opinion was issued before Justice Thomas became a member of the Court, it is reasonable to believe he would have sided with the majority in *Rust*.

[27] 10 U.S.C. § 983.

[28] The court, in early 2005, stayed its opinion pending the U.S. Supreme Court agreeing to hear the case. *Forum for Academic and Institutional Rights v. Rumsfeld*, 390 F.3d 219 (3d Cir. 2004), *rev'g*, 291 F. Supp. 2d 269 (D. N.J. 2003), *cert. granted*, 2005 U.S. LEXIS 3756 (U.S. May 2, 2005).

[29] *Id.*

Editor's note: Roger McEowen submitted this late-breaking development in this case:

June 16, 2005, the U.S. Court of Appeals for the Ninth Circuit vacated the opinion of the federal district court for the district of Montana in *Charter v. USDA*. The trial court had held that the beef checkoff was constitutional because (in the court's opinion that pre-dates the Supreme Court opinion) it was government speech. However, in light of the Supreme Court decision of May 23, 2005, the 9th Circuit vacated the trial court's opinion because the trial court failed to analyze the ad attribution theory (freedom of association) that Justice Thomas mentioned in his concurrence.

The plaintiff (Jeanne Charter) had filed an affidavit pointing out that she was compelled to support the speech that she was opposed to and the message of a group (NCBA) of which she was not a member.

The 9th Circuit instructed the trial judge to determine if the ads could be attributed to the Charters and, if so, whether there is a constitutional violation. *Charter v. U.S.D.A.,* No. 02-36140 (9th Cir. June. 16, 2005) vac'ng and rem'g, 230 F. Supp. 2d 1121 (D. Mont. 2002).

Economic loss doctrine

In *Insurance Co. of North America v. Cease Electric, Inc.*, 688 N.W.2d 462 (Wis. 2004), aff'g, 674 N.W.2d 886 (Wis. Ct. App. 2003), the plaintiff chicken egg farmer hired the defendant to upgrade the ventilation system in one of the chicken barns so that all existing fans were tied to a central control system which would automatically control the air quality in the barn. The defendant installed a central control unit purchased by the plaintiff from a third party. The central control unit failed, resulting in the loss of 18,000 chickens. The plaintiff sued the defendant for negligent performance of the wiring services because the evidence showed that the central control unit was not properly installed in that the backup control was not connected to the power circuits. The jury returned a verdict for the plaintiff and the defendant appealed.

The defendant argued that the action was barred by the economic loss doctrine in that the defendant had provided only a product, the ventilation system, and not a service. The court held that the contract was primarily for the services of the defendant in that the main item installed, the central control unit, was supplied by the plaintiff from a third party manufacturer. Although the defendant claimed to have provided additional parts for the system, the defendant did not provide any evidence to identify the additional parts. The court discussed the split authority outside of Wisconsin on the issue of whether the economic loss doctrine, limiting damages to the value of the contracted for services or product, should apply to contracts for services provided to commercial parties. The court declined to extend the doctrine to contracts for services because such contracts do not have the same remedies under the Uniform Commercial Code as do product contracts. Therefore, the court held that the plaintiff's action in negligence was not barred by the economic loss doctrine.

—Roger A. McEowen, Reprinted by permission from 16 Agric. L. Dig. 22 (2005).

Water rights debate

In *Spear T Ranch, Inc. v. Knaub, et al.*, 269 Neb. 177 (2005), a decision that is likely to intensify the water-rights debate in Nebraska, the Nebraska Supreme Court held that a western Nebraska ranch that has surface water rights (dating to 1954) to Pumpkin Creek could sue irrigators who pump from the ground for taking too much water and drying up the stream. The case represents the first time the court has been confronted with the question of whether a surface water appropriator may bring a common law claim against the user of hydrologically connected ground water. Nebraska law ignores the hydrological fact that groundwater and surface water are linked, and the law establishes two separate systems for allocating stream flows and groundwater. Under the Nebraska Constitution and statutory law, stream flows are allocated by priority in time (prior appropriation doctrine), but groundwater is governed by the common law rule of reasonableness and the Ground Water Management and Protection Act (GWMPA). The ranch claimed that water pumped from neighboring wells caused Pumpkin Creek to be dry, thereby preventing the ranch from irrigating crops and providing water for livestock. While the court held that the doctrine of prior appropriation did not apply to groundwater even though groundwater and surface water are hydrologically connected, and that the common law claim of conversion did not apply because the right to appropriate surface water does not involve ownership of property that can be converted, the court held that it would recognize a common law claim for interference with surface water by the user of hydrologically connected groundwater. In so holding, the court determined that common law claims were not abrogated by the GWMPA and that state law did not allow state natural resource districts (the regulatory body governing groundwater) to award monetary damages. The court noted that the common law should acknowledge and attempt to balance the competing equities of groundwater users and surface water appropriators. Under the test established by the court, the withdrawal of groundwater must have a direct and substantial effect upon a watercourse or lake and unreasonably cause harm to a person entitled to the use of its water. The Court reversed the trial court's opinion in favor of the groundwater irrigators and remanded the case to the trial court for a trial on the merits.

—Roger A. McEowen, reprinted by permission from 16 Agric. L. Dig. 32 (2005).

Fenced livestock

In *Klobnak v. Wildwood Hills, Inc.*, 688 N.W.2d 799 (Iowa 2004), the plaintiffs were injured when their car struck two horses owned by the defendant. The horses had escaped a fenced area on the defendant's property. The plaintiffs sued in negligence for failure to maintain properly the fences to prevent the horses from escaping. The defendant argued that the Iowa Legislature had repealed Iowa Code Chapter 169B, which required livestock to be fenced in by owners, and there was no duty at common law to fence in the horses. The trial court had granted the defendant's motion to dismiss on these grounds. The appellate court agreed that the "fencing in" statute had been repealed in 1994 and that no common law duty to fence in horses existed. However, the court cited *Flesch v. Schlue, 191 N.W. 63 (1922),* which held, prior to enactment of the statute, that a livestock owner owed a duty of ordinary care to prevent livestock from wandering on to highways. The court characterized the statute as providing a presumption of negligence where livestock is not fenced in, and, as such, only supplemented the case law in effect. The court noted cases in other jurisdictions consistent with a duty of ordinary care by livestock owners. Therefore, the court held that the dismissal of the case was improper and remanded the case for trial.

—Roger A. McEowen, Reprinted by permission from 16 Agric. L. Dig. 27 (2005).

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—Drew L. Kershen, Professor of Law, The University of Oklahoma, Norman, OK

Drake to Offer Summer Ag Law Institute Classes

The Agricultural Law Center at Drake is offering five summer courses which are available for attorneys to take as CLE credit. The courses, instructors and dates still available for this year's institute are:

Classes still available:
Law and Rural Development, Prof. Neil D. Hamilton, Drake July 11 - 14
Traceability of Food and Agricultural Products, Prof. Michael Roberts, National Center for Agricultural Law, Univ. of Arkansas, July 18 - 21
The tuition for CLE credits (each seminar is 14 hours) is $400. To register please contact Prof. Neil Hamilton at neil.hamilton@drake.edu. For more information about the courses please visit the Drake web site at www.law.drake.edu.

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Agricultural Law Update

AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

From the Executive Director:

Annual Conference: President-elect Don Uchtmann has completed the program for the 2005 Annual Agricultural Law Symposium on October 7 & 8, 2005 at the Country Club Plaza Marriott in Kansas City, MO. The complete conference brochure is posted on the AALA web site and is being printed and mailed to all members. See the link on the main home page.

The conference brochure contains a reminder about the 2005 Membership Recruitment Program and three membership brochures. If you recruit a non-member to attend the 2005 conference, you will receive four chances in a drawing to win $345.00, the cost of a member registration to the conference. You can request additional conference brochures from me. Be sure to add your name to the conference registration form for any non-member you recruit for the conference.

If your firm would like to sponsor one of the food breaks, breakfasts, lunches or the Friday evening reception, please let me know.

Nominations for Annual Scholarship Awards. The Scholarship Awards Committee is seeking nominations of articles by professionals and students for consideration for the annual scholarship awards presented at the annual conference. Please contact Jesse Richardson, Associate Professor, Urban Affairs and Planning, Virginia Tech, Blacksburg, Virginia 24061-0113,(540) 231-7508 (phone) (540) 231-3367 (fax) email: jessej@vt.edu

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