INSIDE

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IN FUTURE ISSUES

Tyson Foods, Inc., liable for $891,660.00 in damages

The Arkansas Supreme Court has affirmed a decision that awarded an Arkansas hog farmer $891,600.00 in damages in an action brought by the hog farmer against Tyson Foods, Inc., for fraud, promissory estoppel, and negligence. *Tyson Foods, Inc. v. Davis*, 66 S.W.2d 568, 570 (Ark. 2002). The court ruled that the plaintiff's fraud and promissory estoppel claims were not precluded by the three-year statute of limitations and that the issues submitted to the jury were supported by substantial evidence. *See id.* at 571. A dissenting opinion stated that the hog farmer's fraud claim was precluded by the three-year statute of limitations. *See id.* at 581.

Tom Johnson was a regional manager for Tyson Foods, Inc. ("Tyson"). *See id.* He testified that in approximately 1990 Tyson decided to expand its hog processing operation into Oklahoma and Missouri. *See id.* Johnson testified that Tyson began constructing the necessary facilities in Oklahoma and Missouri soon thereafter. *See id.* According to Johnson's testimony, "problems arose in completing the finishing units in Missouri when another producer there got into pollution problems, and the State of Missouri stopped issuing permits to operate waste lagoon systems." *Id.* Johnson testified that this prompted Tyson to consider the "bedded-floor" system as an alternative method of raising hogs because it would not require the environmental permits that the slatted concrete floor housing units in Missouri required. *See id.* at 571-72.

The bedded-floor program is a "process of raising hogs indoors on a dirt floor that is covered with sixteen to eighteen inches of 'bedding' consisting of either wood shavings, wood shavings combined with straw, or rice hulls." *Id.* at 571, n.1.

Tyson studied the bedded-floor program extensively and eventually experimented with its first bedded-floor program in 1994. *See id.* at 572. Johnson testified that Tyson was pleased with the results of its studies and experiments of the bedded-floor program and that "[a]t this point ... Tyson decided to go forward with a bedded-floor program as a 'temporary stop-gap measure until we could get things built in Missouri.'" *Id.*

In the summer of 1994, Johnson traveled to an Arkansas Pork Producers meeting with a hog farmer named Roger Hammond. *See id.* While on this trip, Johnson and Hammond discussed the possibility of Hammond raising hogs for Tyson using the bedded-floor program. *See id.* Johnson testified that he explained to Hammond that the bedded-floor program was only a temporary program and would only be used until the construction

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Eleventh Circuit rules that rainfall removed by pumping is a "stormwater discharge" under Clean Water Act

The United States Court of Appeals for the Eleventh Circuit has ruled that a Florida sugar cane farming operation was not required to obtain a National Pollutant Discharge Elimination System ("NPDES") permit to discharge water from its water management system into an adjacent lake. *Fisherman Against Destruction of the Environment, Inc. v. Closter Farms, Inc.*, No. 01-11932, 2002 WL 1804952 (11th Cir. Aug. 7, 2002). The court determined that an NPDES permit was unnecessary because the pollutants discharged into the lake fell within the scope of the agricultural exemptions contained in the Clean Water Act, 33 U.S.C. §§ 1251-1376. *Id.* at *2.

The Clean Water Act ("CWA") requires "any party that discharges pollutants from a 'point source' into navigable waters to have a NPDES permit, unless the discharges fall into an exception." *Id.* at *1 (citing 33 U.S.C. §§ 1311, 1342). A point source is "'one which enters navigable waters from a discrete, defined source.'" *Id.* (quoting 33 U.S.C. § 1362(14)). The CWA exempts from the definition of point source "'agricultural stormwater discharges and return flows from irrigation agriculture.'" *Id.* at *2 (citing § 1362 (14)).

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was completed on the Missouri hog units. *See id.*

Hammond later informed Don Davis, the plaintiff, about Tyson's intention to raise hogs using the bedded-floor program. *See id.* Davis had several empty turkey houses on his property that were well-suited for the bedded-floor program. *See id.* Davis testified that Hammond explained to him that the bedded-floor program would only be short term– for only one or two years. *See id.* Davis determined that the program was not a good business opportunity for him because "it was not financially feasible over such a short time." *Id.*

Davis testified that he later called Tyson "to see if he could look at one of their bedded units to understand how they were operated." *Id.* Davis testified that "when he called Tyson, he was connected with Johnson who then asked if he would be interested in raising hogs for Tyson." *Id.* Davis and Johnson later met on Davis's farm to discuss the matter in more detail. *See id.*

Davis testified that at this meeting Johnson informed him that the program was not short term, as allegedly reported by Hammond. *See id.* at 573. According to Davis, he explained to Johnson that he was not interested in raising hogs for only a short period of time because he needed "twenty years or better" to make the opportunity financially feasible. *See id.* Davis testified that Johnson stated that Tyson only gave year-to-year contracts with every grower they contracted with. *See id.* Davis also testified, however, that Johnson then told him that Tyson did not plan on going out of business and that "'well, I don't see any reason it won't last twenty years or till death do us part.'" *Id.* A witness to the conversation testified that he heard Johnson say to Davis that "'he would be growing hogs all his life if he wanted to.'" *Id.*

Johnson claimed that he never represented to Davis that Tyson would provide hogs for twenty years or longer or that the bedded-floor program was a long-term business prospect. *See id.* at 572-73. Johnson testified that he specifically explained to Davis that the bedded-floor program was temporary and would only last until the Missouri facilities were able to raise hogs. *See id.*

After his meeting with Johnson, Davis met with his banker, Don Stimpson, to inquire about obtaining an operating loan for the hog operation. *See id.* at 573. Davis testified that he communicated to Stimpson what Johnson had allegedly communicated to him. *See id.* Stimpson testified that he called Johnson to verify what Davis had told him. *See id.* Stimpson testified that Johnson stated to him that "'Don Davis was going to be growing hogs as long as he wants.'" *Id.* The bank subsequently loaned Davis the money he needed to start his hog farming operation. *See id.* Davis then signed a one year contract with Tyson, and Tyson delivered the first batch of hogs to Davis. *See id.*

Davis testified that in the Spring of 1995 "when Tyson brought some individuals by to observe the operation, he overheard the Tyson employee telling those observing that the bedded-floor program was only short term." *Id.* According to Davis, when he confronted Johnson with this information he was assured by Johnson that this information was inaccurate and that he had not heard anything from the "big wigs" about the program being temporary. *See id.* Johnson denied making these representations to Davis. *See id.* Davis also testified that Johnson continued to inquire about whether he knew of any other facilities that could be placed in the bedded-floor pro-

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AALA Editor.....Linda Grim McCormick
2816 C.R. 163, Alvin, TX 77511
Phone: (281) 388-0155
E-mail: lgmccormick@teacher.esc4.com

For AALA membership information, contact Donna French Dunn, Executive Director, 4115 South Duff Avenue, Suite C, Ames, IA 50010-6600. Phone: (515) 956-4255.

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STORMWATER/C*ontinued from page 1*

An environmental organization known as the Fisherman Against Destruction of the Environment ("FADE") brought a citizen suit against Closter Farms alleging that Closter Farms violated the CWA when it discharged pollutants into Lake Okeechobee without obtaining a NPDES permit. *See id.* (citing 33 U.S.C. § 1311(a)). Closter Farms was a Florida sugar cane operation that leased land located next to Lake Okeechobee. *See id.* The lease agreement required Closter Farms to operate a water management system that provided drainage for its agricultural lands as well as the drainage for several other adjacent properties. *See id.* This water management system removed the excess water from the irrigation canals that flowed through Closter Farms and pumped it into Lake Okeechobee. *See id.*

The district court ruled that, although Closter Farms discharged pollutants into Lake Okeechobee, the plaintiffs "'failed to establish the addition of a pollutant which would not be exempt'" from the permit requirements under the CWA. *Id.* FADE appealed that decision to the Eleventh Circuit, arguing that the water discharged by Closter Farms did not fall within either the "stormwater discharge" nor "return flows from irrigation agriculture" exemptions, and therefore Closter Farms ha[d] been illegally discharging pollutants without a permit." *Id.*

The Eleventh Circuit stated that the "[e]vidence established that the sources of the water being pumped into Lake Okeechobee [were]: (1) rainfall, (2) groundwater withdrawn into the irrigation canals from the areas being drained, and (3) seepage from the lake." *Id.*

The court concluded that the district court's characterization of the discharged rainwater as "'agricultural stormwater discharge'" was a reasonable determination. *See id.* (citing *Concerned Area Residents for the Env't v. Southview Farm*, 34 F.3d 114, 121 (2d Cir. 1994) ("holding that 'agricultural stormwater discharge' exemption applies to any 'discharges [that] were the result of precipitation'")). The Eleventh Circuit explained that "[t]he fact that the stormwater is pumped into Lake Okeechobee rather than flowing naturally into the lake does not remove it from the exemption. Nothing in the language of the statute indicates that stormwater can only be discharged where it naturally would flow.'" *Id.* (citing 33 U.S.C. § 1362(14)).

The court also ruled that "the discharged groundwater and seepage can be characterized as 'return flow from irrigation agriculture.'" *Id.* The court explained that Closter Farms irrigated its crop through a process known as "flood irrigation." *See id.* "Flood irrigation" is a process where the irrigation canals are flooded in order to force water to flow from the canals and into

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gram. *See id.* at 573-74.

According to Davis, Johnson came out to his farm in the summer of 1995 to discuss the possibility of purchasing more land so that Davis could raise more hogs. *See id.* at 574. Davis claimed that when he mentioned his concerns about maintaining a continued supply of hogs that Johnson assured him that "'I'm going to have hogs . . . hogs is no problem. You'll get plenty of hogs.'" *Id.* Davis claimed that based upon this representation he purchased another farm so that he could expand his hog farming operation. *See id.*

In 1996 Johnson was promoted and replaced by Jack Gorely. *See id.* Reece Hudson was assigned as a liaison to Davis's farm at about this same time. *See id.* Hudson testified that Johnson inquired "again and again" about whether he would receive hogs in the future, telling him that "he was promised hogs forever by Johnson." *Id.* Hudson testified that "he told Davis he understood it was for a 'certain length of time' under his contract." *Id.* Davis testified that Hudson told him during this particular conversation the bedded-floor operations were doing well and that "'they was gonna be around for years to come.'" *Id.* Davis continued to receive hogs on batch-to-batch contracts, pursuant to the terms and conditions of the year-to-year contracts he had signed with Tyson. *See id.*

Davis testified that in December, 1998, he was notified that Tyson would not deliver any more hogs to him. *See id.* He claimed that this was when "he first learned that Tyson had misrepresented to him that the bedded-floor operation was a long-term program." *Id.* Davis brought an action against Tyson for negligence, fraud, and promissory estoppel on February 24, 1999. *See id.* at 575, 576. The general verdict form returned by the jury stated that "[w]e the jury find for Don Davis on his claim for damages and award damages against Tyson Foods, Inc., in the amount of $891,660.00." *Id.* Tyson appealed this decision to the Arkansas Supreme Court. *See id.*

Tyson argued that Davis was barred by the applicable statute of limitations from asserting claims for fraud and promissory estoppel and that "Davis waived any claim for fraud or implied contract by signing and performing under new contracts after Davis admitted he knew there was no long-term contractual obligation to provide him with hogs." *Id.* at 577-79. Tyson also argued "that the trial court erred in denying its motion of a directed verdict on a lack of substantial evidence and particularly on a lack of evidence of reasonable reliance." *Id.* at 579. Finally, Tyson argued that the evidence pertaining to damages that was submitted to the jury was "fatally flawed" and that the jury was incorrectly instructed on the issue of damages. *See id.* at 580. The Arkansas Supreme Court rejected each of these arguments. *See id.* at 577-80.

The court did not specifically address either the promissory estoppel or negligence arguments, but rather focused primarily on Davis's fraud claim. *See id.* at 577-81. The court stated that for Tyson to prevail on its objections to the negligence cause of action, it must establish that the statute of limitations had run for both the fraud and promissory estoppel claims. *See id.* at 576. Because the court ruled that the fraud action was not barred by the three-year statute of limitations, it was not necessary to discuss either the negligence or promissory estoppel claims. *See id.*

The court stated that "[f]undamental to an understanding of this case is recognizing the distinctions between what each party asserts as the role the contracts play in this case." *See id.* On the one hand, Tyson asserted that the parties' relationship was defined solely by the terms of the year-to-year contracts. *See id.* Tyson argued that by claiming that he was promised hogs on a long-term basis "Davis is asserting an oral modification to the one-year written contracts." Tyson also argued that "at the latest in October 1995, Davis knew there was no such obligation because the one-year contract on the new farm executed at that time contained no such obligation." *Id.* Davis, on the other hand, argued that "the written contracts provided . . . what Tyson represented they would provide, and what he expected, because Johnson represented to him that the bedded-hog program would be handled like the poultry programs where the contracts would be one year or less but where Tyson was in the business and provided poultry for the long term." *Id.*

After examining the allegations in Davis's complaint, the court explained that Davis was not attempting to argue that Tyson had a contractual obligation to deliver hogs to him long-term, "but rather that he was induced to enter into bedded-floor hog production for Tyson because of misrepresentations by Tyson of its market for such production." *Id.* at 575. The court stated that "[t]he contracts and their contents cast no light on the issue of the representations made by Tyson because Davis was expecting precisely the short-term contracts he received." *Id.* The court added that "[t]his is a misrepresentation, fraud, or promissory estoppel cause of action, not a contract cause of action." *Id.*

The court next examined Tyson's argument that Davis was barred by the statute of limitations from bringing an action for fraud. *See id.* at 576. Under Arkansas law, the statute of limitations for a fraud action is three years. *See id.* at 579 (citing Ark. Code Ann. § 16-56-105 (1987) and *Hampton v. Taylor*, 887 S.W.2d 535 (Ark. 1994)). To maintain an action for the tort of fraud a plaintiff must prove by a preponderance of the evidence "a false representation of a material fact; knowledge that the representation is false or that there is insufficient evidence upon which to make the representation; intent to induce action or inaction in reliance upon the representation; justifiable reliance on the representation; and damage suffered as a result of the reliance." *Id.* at 577 (citing *Ultracuts Ltd. v. Wal-Mart Stores, Inc.*, 33 S.W.3d 128 (2000) and *Medlock v. Burden*, 900 S.W.2d 552 (1995)).

Tyson asserted that "the last date on which Davis might reasonably argue he knew he had been lied to was in October 1995 when he signed a one-year contract on the new farm." *Id.* Tyson contends that because the written contract stated that hogs would only be delivered for one year Davis "had to know that there was a problem." *Id.* Because more than three years passed before Davis filed suit (February 24, 1999), Tyson contended that the fraud action was barred by the statute of limitations. *See id.* The court rejected this argument. *See id.*

The court stated that "[d]amages are an essential element to fraud, and there must be an allegation of sufficient facts to satisfy those elements or the case is subject to a motion to dismiss" and that "[f]alse or fraudulent representations not resulting in injury are not actionable." *Id.* (citing *McAdams v. Ellington*, 970 S.W.2d 203 (1998) and *Harris v. Byers*, 197 S.W.2d 730 (1946)). The court reasoned that Davis did not suffer an injury, thereby giving rise to a fraud action "until he was told by Tyson in 1998 that he would receive no more hogs." *See id.* The court added that "Davis could not have filed a complaint for fraud until 1998 when he was told by Tyson there would be no more hogs without suffering a dismissal." *Id.* Because these events occurred within three years of Davis's filing suit against Tyson, the court concluded that there was no merit to Tyson's statute of limitations argument. *See id.*

The court also rejected Tyson's argument that "Davis waived any claim for fraud or implied contract by signing and performing under new contracts after Davis admitted he knew there was no long-term contractual obligation to provide him with hogs." *Id.* at 579. The court stated that "Davis has not asserted a contractual obligation to provide him with hogs long-term. Davis testified he received the contracts Tyson represented would be provided, and that because the bedded-floor program was being run as the poultry business was run, he did not expect a long-term contract." The court concluded "[t]hus, there [was] no waiver under contract." *Id.* The court added that "Davis's execution and performance under the short-term contracts does not show he had knowledge of the misrepresentation or, in other words, that he knew Tyson intended to cut off the bedded-floor program once the Missouri finishing units were ready. There is no merit to the claim of waiver." *Id.*

In addition, the court rejected Tyson's argument that the trial court erred when it

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South Dakota judge finds beef promotion program unconstitutional

By Anne Hazlett

Over the past thirty-five years, Congress has authorized generic promotion programs, known as "check-off" programs, for a variety of commodities. *See Federal Farm Promotion Programs*, Congressional Research Service (July 2002). A well-known example of those measures is the beef check-off program. Created in the 1985 Farm Bill, the beef check-off assesses $1 per head on the sale of live domestic and imported cattle, to be used for the promotion, education, and research programs designed to improve the marketing climate for beef.

With its memorable slogan "Beef: It's What's For Dinner," the beef check-off program has emerged as one of the most prominent promotion schemes of its kind. On June 21, 2002, however, the United States District Court for the District of South Dakota ruled that the beef check-off measure is unconstitutional as a violation of the First Amendment. 2002 U.S. Dist. Lexis 11625 (D. S.D. June 21, 2002). The court order would have halted all check-off collections on July 15, 2002. *Id.* at 41. At present, there is a stay of the injunction pending resolution of an appeal to the Eighth Circuit Court of Appeals.

The events surrounding this action effectively began in 1998 when the Livestock Marketing Association ("LMA") initiated a petition drive to obtain a referendum on the question of the continuation of the beef check-off. 2002 U.S. Dist. Lexis 11625, at 4. When the Secretary did not act to validate the petitions and schedule a referendum vote, the LMA and Western Organization of Resource Councils ("WORC") brought suit, along with five individual producer plaintiffs, against the United States Department of Agriculture and the Cattlemen's Beef Board.

In their complaint, the plaintiffs asserted that the beef check-off communication activities violate the First Amendment by using check-off funds to disseminate public relations messages, including anti-referendum communications. *Id.* at 5. In addition, they claimed that the 1985 law authorizing the promotion program and the Secretary's action or inaction pursuant thereto is unconstitutional as a violation of their rights to due process and equal protection. *Id.* at 4. The complaint was later amended to add a claim that the beef check-off program violates their First Amendment rights to freedom of speech and freedom of association. *Id.* at 6.

The parties filed cross motions for summary judgment on the new First Amendment claims. *Id.* Those motions were denied. *Id.* The First Amendment claims were later bifurcated, and a trial to the Court on those issues held on January 14, 2002. *Id.*

Standing

In rendering a decision in favor of the plaintiffs, the court faced an initial question of whether the LMA and WORC had standing to raise the First Amendment claims at issue. *Id.* at 7. At trial, the parties spent considerable time trying to establish or attack the organizational standing of the LMA and WORC. *Id.* at 9. In rejecting the defendants' contentions, the Court noted that it is sufficient to confer standing if at least one of the plaintiffs qualifies. *Id.* at 7. If that standard is met, a court need not consider the standing issue as to any other plaintiffs in the action. *Id.*

The court then found that each of the individual producer plaintiffs met the test for standing. *Id.* at 9. For example, in the case of plaintiff Herman Schumacher, the Court found:

> Herman Schumacher is a cattle producer from Herried, South Dakota. He also owns a livestock auction. He believes that generic advertising increases foreign imports which hurts his business. Foreign grown beef is in direct competition with his business. He objects to the use of his check-off dollars for generic advertising of beef.

Id. Because one plaintiff is sufficient to confer jurisdiction over the claim and afford complete relief, the court concluded that the defendants' claim of lack of standing was without merit. *Id.* at 10.

First Amendment issues

From this issue, the court moved into the substantive question of whether the beef check-off program violates the plaintiffs' First Amendment rights. In resolving this issue, the court first looked at the Supreme Court's decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). *Id.* There, the Supreme Court held that the First Amendment does not necessarily prohibit Congress from compelling individuals to associate for a common purpose. *Id.* In *Abood*, the Court recognized that requiring public employees to help finance a union as a collective bargaining agent is "constitutionally justified by the legislative assessment of the important contributions of the union shop to the system of labor relations established by Congress." *Id.* (quoting *Abood*, 431 U.S. at 222). However, the Court noted that the use of compelled "dues" for advancing ideological causes objectionable to any member of the group violates the First Amendment. Compelling individuals to make contributions for speech to which they object works an infringement of their constitutional rights. 2002 U.S. Dist. Lexis 11625, at 11-12 (citing *Abood*, 431 U.S. at 234).

But, this rule is not absolute. In later cases, the Supreme Court enunciated the so-called "germaneness test," which says that an association may constitutionally fund activities that are germane to the purpose for which compelled association was justified out of the mandatory dues from all members. It may not, however, fund activities of an ideological nature that fall outside of those areas of activity. *See Keller v. State Bar of Cal.*, 496 U.S. 1, 13 (1990); *Glickman v. Wileman Bros. & Elliot, Inc.*, 521 U.S. 457, 473 (1997).

Before applying this test to the beef check-off, the district court reviewed the Supreme Court's analysis of two other promotion programs. First, the Court considered application of the germaneness test to the generic advertising program for California tree fruits. 2002 U.S. Dist. Lexis 11625, at 16. In *Glickman v. Wileman Bros. & Elliot, Inc.*, *supra*, the Supreme Court ruled that requiring producers to support generic advertising for California nectarines and peaches did not violate the First Amendment. *Id.* In so doing, the Court held that the compelled contributions at issue were germane to the purpose of the promotion program:

> Generic advertising is intended to stimulate consumer demand for an agricultural product in a regulated market. That purpose is legitimate and consistent with the regulatory goals of the overall statutory scheme.... In sum, what we are reviewing is a species of economic regulation that should enjoy the same strong presumption of validity that we accord to other policy judgments made by Congress. The mere fact that one or more producers 'do not wish to foster' generic advertising of their product is not a sufficient reason for overriding the judgment of the majority of market participants, bureaucrats, and legislators who have concluded that such programs are beneficial.

2002 U.S. Dist. Lexis 11625, at 16 (quoting *Glickman*, 521 U.S. at 476-77). The Court then concluded that the assessments were not used to fund ideological activities. 2002 U.S. Dist. 11625, at 17 (citing *Glickman*, 521 U.S. at 473). Specifically, the Court instructed:

> Here, however, requiring respondents to pay the assessments cannot be said to engender any crisis of conscience. None of the advertising in this record promotes any particular message other than encouraging consumers to buy California tree fruit. Neither the fact that re-

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Anne Hazlett is an associate counsel with the House Agriculture Committee in Washington, D.C.

> spondents may prefer to foster that message independently in order to promote and distinguish their own products, nor the fact that they think more or less money should be spent fostering it, makes this case comparable to those in which an objection rested on political or ideological disagreement with the content of the message.

2002 U.S. Dist. Lexis 11625, at 17-18 (quoting *Glickman*, 521 U.S. at 471-73). Moreover, the Court noted that California tree fruits were marketed pursuant to detailed marketing orders that had displaced many aspects of independent business activity. 2002 U.S. Dist. Lexis 11625, at 18 (quoting *Glickman*, 431 U.S. at 469).

Second, the court reviewed the Supreme Court's evaluation of the mushroom promotion program in *United States v. United Foods, Inc.*, 533 U.S. 405 (2001). 2002 U.S. Dist. Lexis 11625, at 19. In that case, the Supreme Court held that the mushroom program authorized under the Mushroom Promotion, Research and Consumer Information Act, 7 U.S.C. § 6101, violated the First Amendment because it mandated assessments on handlers of fresh mushrooms to fund advertising to which some of the handlers objected. In reaching this conclusion, the Court stated that the compelled contributions were not collected for activities germane to a larger regulatory purpose. *Id.* at 22 (quoting *United Foods*, 533 U.S. at 414). In contrast to the California tree fruit program in *Glickman*, where the mandated assessments were ancillary to a comprehensive program restricting market autonomy, the compelled contributions for advertising mushrooms were not part of some broader regulatory scheme. 2002 U.S. Dist. Lexis 11625, at 20, 22 (citing *United Foods*, 533 U.S. at 415). To the contrary, advertising was the principal object of the mushroom promotion program. *Id.* at 20. (quoting *United Foods*, 533 U.S. at 411-12). The Court wrote: "Beyond the collection and disbursement of advertising funds, there are no marketing orders that regulate how mushrooms may be produced and sold, no exemption from the antitrust laws, and nothing preventing individual producers from making their own marketing decisions." 2002 U.S. Dist. Lexis 11625, at 21 (quoting *United Foods*, 533 U.S. at 412-13).

In applying these cases to the beef check-off, the district court concluded that the beef check-off is identical, in all material respects, to the mushroom promotion program. 2002 U.S. Dist. Lexis at 24. First, producers and importers are required to pay assessments that are used by a federally-established board or council to fund speech. *Id.* The Court found that the beef check-off is actually more intrusive than the mushroom assessment because it requires one dollar per head instead of one cent per pound. *Id.* at 25. Second, like the mushroom check-off, the principal focus of the beef check-off program is clearly commercial speech. *Id.* The Court found that at least fifty percent of the assessments collected and paid to the Cattlemen's Beef Board are used for advertising. *Id.* Only ten to twelve percent of the assessments collected by the Board are used for research. *Id.* Third, the Court determined that beef producers and sellers are not regulated to the extent that the California tree fruit industry is regulated. *Id.* Like mushroom handlers, beef producers and sellers make all marketing decisions independently as beef is not marketed pursuant to some statutory scheme that requires an anti-trust exemption. *Id.* Therefore, the beef assessments are not germane to a larger regulatory purpose. *Id.*

Given these similarities, the court held that this case was controlled by the Supreme Court's decision in *United Foods* and not by *Glickman*. *Id.* It then concluded that the beef check-off violates the First Amendment because it requires the plaintiff members to pay for speech to which they object. *Id.* at 26. Specifically, the court found that the plaintiffs object to the generic advertising campaign because they believe that it increases the demand for cheaper foreign beef. *Id.* They also object to having to pay for the advertisement of steak because they do not sell steak. *Id.* Lastly, they object to paying for advertising that benefits restaurants, meat packers, wholesale food outlets, and retail groceries who sell beef and beef products, rather than live cattle. *Id.*

Having ruled the beef check-off unconstitutional, the court rejected an assertion that the promotional materials paid for by the beef check-off constitute government speech and, therefore, are not subject to a First Amendment challenge. *Id.* at 27. Under the so-called "government speech" doctrine, the Supreme Court has stated that compelled support of a private association is fundamentally different than compelled support of government. *Id.* (quoting *Abood*, 431 U.S. at 259). In the latter, the government may compel the use of coerced financial contributions for public purposes. 2002 U.S. Dist. Lexis 11625, at 27.

In considering whether the beef check-off program's generic advertising scheme constitutes "government speech," the court first looked at whether the speech is funded from general tax revenues. *Id.* at 34. It found that here the speech is not supported with general tax funds. *Id.* Rather, the assessments are collected from one narrow sector of society—cattle producers, importers, and all others who sell cattle. *Id.* That segment of society is not representative of the population in general. *Id.* at 34-35. The court then concluded that the beef check-off is not part of a regulatory scheme as in the case of California tree fruit. *Id.* at 35. Cattle producers are regulated with respect to food safety and practices at auction yards but are not regulated on the farm or ranch or in marketing cattle. *Id.* Rather, they take what is offered to them from buyers and do not sell collectively. *Id.*

Weighing these considerations, the Court acknowledged that the Cattlemen's Beef Board is created by statute to further the policy of Congress to promote beef. *Id.* Appointments to the Board must be approved by the Secretary of Agriculture. *Id.* at 36. Department of Agriculture employees attend all Board meetings. *Id.* Finally, all projects spending check-off funds must be approved by the Secretary. *Id.* However, the Court found none of these factors to be persuasive. Instead, it countered that the Board itself is comprised of private individuals who are not government employees. *Id.* at 35. Approval of any appointments to the Board is merely *pro forma*. *Id.* at 36. Any oversight of the check-off by the Department of Agriculture is ministerial. *Id.* Communications to producers stress that the beef check-off is an "industry run program" and that the Cattlemen's Beef Board is accountable to producers. *Id.* at 36-37. Nothing in these communications suggests that the speech being paid for by the producers is that of the federal government. *Id.* at 37. All audits of the Board are done by the private sector, not the Office of the Inspector General. *Id.* The actual advertisements bear the copyright of the National Cattlemen's Beef Association and the Cattlemen's Beef Board, not the Government Printing Office. *Id.* Finally, the authorizing statute treats assessment funds differently than general tax funds with respect to investing. *Id.* at 38.

The remedy

Determining that the generic advertising funded by the beef check-off is not government speech to be excepted from the First Amendment, the court fashioned a remedy. As an initial matter, the Court stated that it would be impossible to separate what portion of an individual's check-off assessment is related to the objectionable generic beef promotion activities and what portion is used for the unobjectionable research and educational activities. *Id.* at 39. In addition, the court explained that it could not limit the terms of this ruling to the contributions paid and to be paid by the plaintiffs as that would only encourage numerous other parties to file additional lawsuits. *Id.* at 40.

Under these confines, the court issued a permanent injunction to prohibit the use of beef check-off assessments for generic promotion activities. *Id.* at 41. It ordered that the defendants stop collecting any beef check-off dollars starting July 15, 2002. *Id.* at 44. In so doing, the court determined that this relief should be prospective only. *Id.* The court further prohibited the defendants from using any check-off funds, directly or indirectly, for the purpose of lauding the merits of the check-off program, or creating or distributing any material for the purpose of influencing governmental ac-

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BEEF CHECKOFF/Cont. from page 5
tion or policy with regard to the beef check-off or the Board or both. *Id.* at 44-45. The court's order left open the question of whether the plaintiffs are entitled to $10,048,677 in check-off assessments alleged to have been collected and illegally expended on "producer communications" to promote the check-off itself and to oppose the referendum sought by the plaintiffs. *Id.* at 43.

On July 8, 2002, the United States Department of Justice filed a motion to request a stay of the Court's order. Press Release, "NCBA Pleased with Checkoff Appeal, Request for Stay of Injunction," National Cattlemen's Beef Association, July 8, 2002, http://www.beef.org. In its motion, the Department of Justice requested a full stay pending appeal, or a temporary stay pending consideration of the stay, as well as an expedited briefing and oral argument schedule. *Id.* Two days later, this motion was granted by the Eighth Circuit. Press Release, "Court Grants Stay of Injunction in Beef Checkoff Case," National Cattlemen's Beef Association, July 10, 2002, http://www.beef.org. The stay allows the beef check-off program to continue without interruption while the appeal is pending. *Id.*

TYSON/Cont. from p. 1
denied Tyson's motion for a directed verdict based on "a lack of substantial evidence and particularly on a lack of evidence of reasonable reliance." *Id.* The court explained that "[s]ubstantial evidence is that which goes beyond suspicion or conjecture and is sufficient to compel a conclusion one way or the other." *Id.* (citing *Ethyl Corporation v. Johnson*, 49 S.W.3d 644 (2001)). The court stated that although the testimony was conflicting, "there was substantial testimony and other evidence in this case that was sufficient to compel a conclusion one way or the other." *Id.* at 580.

Finally, the court rejected Tyson's argument that the jury was incorrectly instructed on damages and that "the evidence submitted on damages was fatally flawed in that a lost-profits analysis was improper, and that instead the measure of damages should have been under a reliance analysis, in other words, what Davis bought minus what he received." *Id.* The court stated that during the trial both sides analyzed "loss of profits as well as losses due to purchase and sale of real property and equipment." *Id.* The court also stated that "[b]oth parties appeared to argue what they believed the total economic loss was. There was sufficient evidence. The evidence was presented to the jury, and the general verdict casts no light on what decision the jury reached other than liability and an amount of damages." The court stated that "[w]e are left in the position of not knowing the basis for the jury's verdict, and we will not question nor theorize about the jury's findings." *Id.* (citing *Esry v. Carden*, 942 S.W.2d 846 (1997)).

The dissenting opinion stated that Davis was precluded by the three-year statute of limitations from bringing a fraud action against Tyson. *See id.* at 581. The dissent reasoned that Davis was given notice that Tyson's alleged misrepresentations were false on May 1995, when he overheard a Tyson employee state that the bedded-floor program was only a short-term arrangement. *Id.* at 582. The dissent also reasoned that "[n]ot only was Davis told in May, 1995, that there was no long-term deal, he read and signed a written contract on October 19, 1995, expressing clearly that there was no long-term commitment." *Id.* Further, the written contract "specifically stated that it superseded prior agreements between the parties 'whether oral or written.'" *Id.*

The dissent stated that "[o]nce alerted to the false representation of the long-term agreement, and thereafter signing a one-year agreement extinguishing all oral agreements, it cannot be disputed that Davis had full knowledge that any cause of action that he had for fraud could have been filed at any time." *Id.* The dissent added that "Davis formally acknowledged this repudiation of any long-term commitment when he signed the written contract for one year in October of 1995, and testified that it did not contain his alleged long-term agreement." *Id.* The dissent concluded that "[n]early four years elapsed after he signed this contract, and before he filed this action. Clearly the statute of limitations had run." *Id.*

—Harrison Pittman, Staff Attorney, National AgLaw Center, University of Arkansas School of Law

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STORMWATER/Cont. from p. 2
the sugar cane fields. *See id.* The court stated that "[a]ll of the water that has seeped into the canals from Lake Okeechobee, either above or below ground, has been used in the irrigation process and therefore discharging it back into the lake is a 'return flow.' Flood irrigation is exempted from permitting requirements in the same manner as traditional irrigation." *Id.* (citing S. Rep. No. 95-370 (1970) *reprinted in* 1997 U.S.C.C.A.N. 4326, 4360)).

FADE also argued that Closter Farms' water management system did not qualify under the CWA agricultural exemptions because the "water management system stores rainwater and allows pollutants to settle before it pumps into Lake Okeechobee." *Id.* at *3, n.1. FADE relied on *United States v. Frezzo Bros., Inc.*, 546 F.Supp. 713 (E.D. Pa. 1982), "for the proposition that the agricultural exception should only apply to water being used exclusively for farming." *Id.* at n.1. The Eleventh Circuit ruled that *Frezzo Brothers* was inapplicable because "[i]n that case, mushroom farmers were using part of their farm to produce compost primarily to sell to others, and the district court found that the agriculture exception did not apply to that aspect of the business" whereas "Closter Farms's only purpose in operating the water management system [was] to allow it to grow sugar cane." *Id.* at n.1.

The circuit court stated that "[w]e find no error in the district court's determination that there were no non-exempt pollutants discharged into Lake Okeechobee originating from properties adjacent to Closter Farms because we conclude there is insufficient evidence that there were any such pollutants at all." *Id.*

—Harrison Pittman, NCALRI

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IOWA/Cont. from p. 7
that it did not moot the appeal, it thus did not moot the appeal. USDA also acknowledged in its request for Director Review that the plaintiffs had reserved the right to appeal. Finally, the court found nothing in the wetland restoration agreement itself that would moot the appeal

—Thomas A. Lawler, Parkersburg, IA

—State Roundup—

NEBRASKA. *Nebraska Supreme Court restricts farm and ranch worker compensation exemption*. Agricultural workers comprise 6.6% of the Nebraska workforce; yet 33% of the Nebraska workplace fatalities from October 1, 2001-September 30, 2002 were agricultural related. This means that agricultural work related fatalities were 500% of agriculture's proportionate share. Obviously agriculture is a hazardous industry. Nonetheless, Nebraska statutes §48-106(2) states that "the following are declared not to be hazardous occupations...: employers of household domestic servants and employers of farm and ranch laborers ...." On July 26, 2002, the Nebraska Supreme Court ruled in *Larsen v. D. B. Feedyards*, 264 Neb. 483, that a cattle feedlot was not entitled to the farm and ranch laborer exemption where 50-75% of the cattle in the feedlot were being custom-fed. The farm laborer exemption was part of the 1913 worker compensation statute. The ranch worker exemption was added in 1945. The rationale for the 1913 farm laborer exemption may have been that most farm labor was provided by family members. That is probably still true for smaller Nebraska farms and ranches but not for larger operations.The Nebraska Supreme Court has consistently ruled, prior to the 2002 *Larsen* decision, that employees involved in custom work for others, rather than in direct agricultural production by the employer, are not covered by the farm or ranch laborer exemption. The cases include *Campos v. Tomoi*, 175 Neb. 555 (1963) (employee injured during commercial hay grinder operation) and *Hawthorne v. Hawthorne*, 184 Neb. 372 (1969) (employee injured during commercial custom combining operations). In both cases the Nebraska Supreme Court ruled that if the employee was engaged in providing commercial services to other farmers, the work was custom (or commercial) work and not farm labor, and the injured employee was entitled to worker compensation benefits. In 1969, the Nebraska Supreme Court observed that "the statement contained in §48-106(2) to the effect that farm or ranch labor is not a hazardous occupation is patently silly...." This was a clue that the Nebraska Supreme Court was uncomfortable with the farm and ranch laborer exemption and would likely interpret that exemption as narrowly as possible in order to allow no-fault worker compensation recovery to more injured workers. In Larsen the employee injured his thumb while roping a steer in the defendant's feedlot. Fifty to seventy-five percent of the cattle fed in defendant's feedlot were custom fed, and the steer being roped at the time of the injury was being custom fed. The injured employee filed a worker compensation claim. The Worker Compensation Court judge and the three-judge Worker Compensation Court appeals panel both ruled that the employee was not covered by the farm and ranch laborer exemption and was entitled to recovery as against the feedlot.The Nebraska Supreme Court ruled that the following factors justified the worker compensation judge ruling that the injured employee was not a farm or ranch laborer: (1) the feedlot was organized as a commercial business of custom cattle feeding, (2) the feedlot averaged 5,000 cattle on feed, 50-75% of which were being custom fed, and (3) the plaintiff was injured when roping a custom-fed steer.

The *Larsen* decision was a split decision, with the justices voting 3-2. Two dissenting opinions were issued. The first suggested that it was absurd to rule that a feedlot worker was exempt from worker compensation if injured while roping a non-custom fed steer, but would be entitled to compensation if injured while roping a custom-fed steer. This observation ignores that whose steer was roped was only one of the three factors the Supreme Court identified as justifying the decision, as well as the two previous cases ruling that custom work is not farm or ranch labor. The majority opinion in *Larsen* probably would have allowed recovery by the injured feedlot worker even if the steer being roped was not a custom-fed steer. The second dissenting opinion recognized that the Nebraska Supreme Court has long been uncomfortable with the farmand ranch laborer exemption and that the 1969 decision quoted earlier was a clear signal to the Legislature to reconsider it. The dissent encouraged the Legislature to revisit that issue soon. No doubt the Unicameral will address this issue in 2003.

—J. David Aiken, Professor, Water & Ag Law Specialist, University of Nebraska, Lincoln

IOWA. *Once a wetland, not always a wetland* The District Court for the Northern District of Iowa has ruled in two companion cases that a Certified Wetland Determination by the United States Department of Agriculture (USDA) Natural Resources Conservation Service (NRCS) is subject to review when there is a later determination that that wetland has been converted and that the producer will be denied benefits. *Edward A. Branstad and Monroe Branstad v. Ann Veneman, Secretary of United States Department of Agriculture*, Numbers C00-3082-MWB and C01-3030-MWB, available at United States District Court for the Northern District of Iowa website www.iand.uscourts.gov (Decisions/Opinions/Mark W. Bennett).

NCRS in 1987 and 1991 made Wetland Determinations which were treated as certified. Both determinations were done off'site. When the 1991 determination was done, the Agency had marked "VOID" on the 1987 determination. However, the Agency continued to rely on both determinations during the case.

After the plaintiffs acquired the property, they sought and obtained permission to repair the existing tile on the tract. This repair was done in 1997, with CRS being fully aware of the repair. Then in 1998, a "whistle blower" complaint was filed with USDA. Ultimatel the determination of USDA was that the Branstads had converted the wetland.

In appealing the Converted Wetland Determination, the Branstads asked NRCS to review its previous Wetland Determinations based on evidence the Branstads presented to the Agency about the tiling system that existed on the wetland which had been installed prior to December 23, 1985. When the Branstads appealed the Converted Wetland Determination to the National Appeals Division (NAD), the Hearing Officer determined that the prior Wetland Determinations were subject to review. The Hearing Officer held that they were in error and thus the Converted Wetland Determination was in error. However, USDA requested a review by the Director of NAD, and the Director of NAD determined that the 197 and 1991 determinations were not appealable because they were Certified Wetland Determinations.

The courts concluded that the Determinations were appealable because a Certified Final Wetland Determination is valid only until the person affected by the determination requests review of the certification by the Secretary. 16 .S.C. section 3822(a)(4) as amended April 4, 1996. Page 36 of opinion. The court also pointed out that the statute and the Agency's regulations require an on-site determination before a producer is held ineligible for benefits. The on-site review would be meaningless if the result were a foregone conclusion. The court's ruling is that the Acting Director's determination that the 1987 and 1991 determinations were not reviewable was arbitrary, capricious, an abuse of discretion, and contrary to law.

The Acting Director of NAD has argued that the Branstads had mooted the appeal when they signed a Good-faith Restoration Agreement. The Farm Service Agency (FSA) County Committee determined that the Branstads' conversion was in good faith. The Branstads signed the restoration agreement to remain eligible for benefits and to stop attempts to collect back benefits.

At the time they entered into the agreement, they were told that they would still be able to continue the appeal. However, the Acting Director of NAD held that the signing of the agreement mooted the appeal. The court held that this mootness determination was arbitrary, capricious, an abuse of discretion, and contrary to law. The court based its ruling on the fact that because USDA had agreed at the time the wetland restoration agreement was signed

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