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California table grape advertising assessment violates First Amendment

In an action brought by brand name grape producers against the California Table Grape Commission ("Commission") challenging a state law that required grape producers to pay assessments to the Commission to fund generic advertising of grapes, the United States Court of Appeals for the Ninth Circuit Court of Appeals has ruled that the advertising assessments violated the plaintiffs' First Amendment rights and were therefore unconstitutional. *Delano Farms Co. v. California Table Grape Comm'n*, 318 F.3d 895, 899-900 (9th Cir. 2003).

In 1967, California enacted a statute that established the Commission. *See id.* at 896. The Commission was established for "'the promotion of the sale of fresh grapes for human consumption by means of advertising, dissemination of information,'" and other means. *Id.* at 897. The Commission was also created to aid "'producers of California fresh grapes in preventing economic waste in the marketing of their commodity' and in acting 'in the public interest to protect and enhance the reputation of California fresh grapes for human consumption in intrastate, interstate, and foreign markets.'" *Id.*

The Commission had authority to levy assessments "upon all fresh grapes shipped during each marketing season" to pay for generic advertising, marketing, market research, and development, and merchandising. *Id.* In 1996, when the case was filed, the assessment was $0.6087 per 100 pounds or approximately thirteen cents per box. *See id.*

The plaintiffs, Delano Farms, Susan Neill Company, and Lucas Brothers, sold grapes under a brand name rather than selling generic grapes. *See id.* They sold grapes to "'stores that ... [paid] more money for higher quality product, as opposed to large grocery chain stores.'" *Id.* Delano Farms shipped about 1.7 million boxes of its table grapes in 1996 and paid $221,000.00 in assessments to the Commission in 1996. *See id.* Susan Neill and Lucas Brothers paid over $35,000.00 in assessments in 1996. *See id.*

The plaintiffs brought a declaratory judgment action, arguing that the assessments violated their First Amendment rights. *See id.* They also sought an injunction against collection and a refund of the amount they paid in assessments. *See id.* The district court issued a preliminary injunction requiring the plaintiffs to pay the bulk of their assessments. *See id.* The parties stipulated to dismiss all causes of action, except for their constitutional challenge to the assessments for generic advertising. *See id.* Thus, the only issue remaining was whether the assessments for generic advertising were constitutional. *See id.* The district court ruled that the assessments were constitutional. *See id.* The plaintiffs appealed the district court's opinion to the Ninth Circuit. *See id.*

The court distinguished this case from *Glickman v. Wileman Brothers & Elliot*, 521 U.S.

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Cattle grazing an integral part of swine production

In an action brought by the state of Missouri against a swine production operation alleging that the operation violated the Missouri Farming Corporations Act ("MFCA"), Mo. Rev. Stat. §§ 350.015-350.016, when it leased cattle grazing rights to local farmers, the Missouri Court of Appeals has held that the term "the production of swine or swine products" contained the MFCA necessarily included cattle grazing, and that the operation's leasing of grazing rights was not prohibited, but came under an exception to the corporate farming prohibitions. *State ex rel. Nixon v. Premium Standard Farms, Inc.*, 100 S.W.3d 157, 157, 163 (Mo. Ct. App. 2003).

Section 350.015 of the MFCA restricts corporations from engaging in farming. *See id.* at 158. It provides that "[a]fter September 28, 1975, no corporation not already engaged in farming shall engage in farming; nor shall any corporation, directly or indirectly, acquire, or otherwise obtain an interest, whether legal, beneficial or otherwise, in any title

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457 (1997). *See id.* In *Glickman*, the assessments for generic advertising "were imposed by the federal government, not the state government as in the case at bar, pursuant to the Agricultural Marketing Act of 1937, a New Deal Program still in effect." *Id.* The Agricultural Marketing Act of 1937 was designed to substitute "'collective action' for the 'aggregate consequences of independent competitive choices,' including express exemption from the antitrust laws." *Id.* at 897-98. The program at issue in *Glickman* not only required the tree fruit growers to contribute to generic advertising, "but it also controlled the price, quality, and quantity of the commodities that could be marketed, and the disposition of any surplus that might depress market prices." *Id.* Several growers affected by the program challenged the generic advertising assessments, arguing that the assessments violated their First Amendment rights. *See id.*

In *Glickman*, the Supreme Court concluded the First Amendment rights of the growers challenging the assessments were not violated because the generic advertising was "'part of a broader collective enterprise in which their freedom to act independently was already constrained by the regulatory scheme.'" *Id.* (citation omitted). The Court also concluded that it was "'fair to presume that they agree with the central message of the speech' because they were themselves selling fruit benefited by it, so the body of law protecting people from being compelled to repeat what is to them an objectionable message did not apply." *Id.* (citation omitted).

After examining *Glickman*, the Ninth Circuit stated that the facts in the present case were closer to those involved in *United States v. United Foods, Inc.*, 553 U.S. 405 (2001). *See id.* In *United Foods*, the statute at issue mandated that assessments be collected that were to be spent mostly on generic mushroom advertising and promotion. *See id.* The case involved a federal statute, but not one that collectivized the industry. *See id.* United Foods objected to the mandatory assessments because it wanted to advertise its particular brand of mushrooms, not just any mushrooms. *See id.* In *United Foods*, the court concluded that the First Amendment protected the mushroom growers from being compelled to subsidize the speech to which it objected. *See id.*

In the present case, the court noted that in *Glickman* the generic advertising assessments were "ancillary to a more comprehensive program restricting marketing autonomy" and that in *United Foods* "there was no such 'comprehensive program,' just a scheme that consisted mostly of generic promotion of mushrooms." *Id.* (citation omitted). It also noted that, in *United Foods*, the tree fruit scheme made fruit growing "'part of a broader collective enterprise' that 'displaced many aspects of independent business activity,' and had so displaced competition that it expressly was exempted from the antitrust laws." *Id.* (citation omitted).

The court concluded that:

> Constitutional law classes will doubtless enjoy the superficially droll question, "why does the Constitution prohibit the government from compelling mushroom growers, but allow government to compel nectarine, peach and plum growers, to pay for generic advertising?" The Court's distinction, though, is clear and easy to apply to the case at bar. If the generic advertising assessment is part of a "comprehensive program" that "displace[s] many aspect of independent business activity," exempts the firms within its scope from the antitrust laws, and makes them "part of a broader collective enterprise," the assessment does not violate the First Amendment. If the program is, in the main, simply an assessment of independent and competing firms to pay for generic advertising, it does violate the First Amendment. Collectivization of the industry eliminates the otherwise extant First Amendment

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to agricultural land in this state ...." *Id.*

An exception to this general prohibition is found in § 350.016, which provides that the general restriction does not apply to corporate use of agricultural land for the production of swine in three counties located in Northeast Missouri. *See id.* Specifically, § 350.016 provides that:

> the restrictions set forth in Section 350.015 shall not apply to agricultural land in counties located north of the Missouri River and west of the Chariton River and having a population of more than three thousand five hundred and less than seven thousand inhabitants which border at least two other counties having a population of more than three thousand five hundred and less than seven thousand inhabitants which is used by a corporation or limited partnership for the production of swine or swine products.

Id.

Premium Standard Farms ("PSF"), respondent, owned and operated swine production facilities in Mercer, Putnam, and Sullivan counties in Missouri. *See id.* PSF was authorized by the Missouri Department of Natural Resources ("DNR") to operate these facilities under § 350.016 of the MFCA. *See id.* PSF allowed cattle owned by local farmers to graze on its property pursuant to lease agreements. *See id.*

The State of Missouri, appellant, filed a petition for "a preliminary injunction, permanent injunction, and a declaratory judgment prohibiting PSF from using its agricultural land to graze the cattle of local farmers." *Id.* The appellant alleged that although § 350.016 of the MFCA allows PSF "to produce swine and swine products in Mercer, Putnam, and Sullivan counties, grazing cattle on such land is not permitted." Id. at 160.

PSF asserted that the DNR issued National Pollutant Discharge Elimination System (NPDES) permits for each of its farms and noted that "these permits are no-discharge permits, under which PSF is required to land-apply effluent generated by its swine facilities." Id. at 169. PSF also asserted that under the NPDES permits, "it must remove the nitrogen that is added to

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Mushroom waste ruled point source pollution under Clean Water Act

Property owners brought an action against a mushroom storage and processing facility alleging that the facility's wastewater drained into a nearby stream that flowed into a pond located on their property in violation of, *inter alia*, the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1387. *Reynolds v. Rick's Mushroom Serv., Inc.*, 246 F.Supp.2d 449 (E.D. Pa. 2003). The United District Court for the Eastern District of Pennsylvania ruled that the wastewater was a "pollutant" and that the system designed by the facility to prevent the discharge of the wastewater into the nearby stream was a "point source" under the CWA. *See id.* at 453-58.

Plaintiffs Warren Reynolds, John Reynolds, and Wilmington Trust Company, owned property that contained a 6.5-acre pond fed by a stream known as Trout Run. *See id*. at 450-51. Defendant Rick's Mushroom Service, Inc. ("Rick's") operated a mushroom storage and processing facility adjacent to the plaintiffs' land and Trout Run. *See id.* at 451.

Rick's was in the business of storing and processing waste generated by mushroom production called "spent mushroom substrate" ("SMS"). *See id.* SMS is "a waste material that remains after mushrooms have been grown and harvested, and consists mostly of manure." *Id*. Rick's stored and processed the SMS it received from mushroom growers and later disposed of it at an off-site location. *See id*. Rick's stored the SMS at its facility that was not disposed of off-site for a year or more "to allow certain constituents in the waste to leach out so that it ... [could] be sold as potting soil." *Id*. On at least one occasion, heavy rains caused a black oil-like substance (hereinafter "wastewater") to leach out of Rick's SMS piles. *See id*. The plaintiffs asserted that "this wastewater drains into Trout Run, and then flows with the stream for about 400 feet before entering . . . [their pond]." *Id.*

The plaintiffs claimed that in 1999, Rick's did not maintain any proper controls to prevent the wastewater from draining into Trout Run. *See id*. The plaintiffs also claimed that in September, 1999, unusually heavy rains caused a large amount of wastewater to flow from the SMS piles into Trout Run and ultimately into their pond, thereby causing a massive fish kill. *See id.* They reported the incident to the Chester County Conservation District ("CCCD"), and the CCCD notified the Pennsylvania Department of Environmental Protection ("PADEP") of the situation. *See id.*

In November, 1999, the PADEP inspected Rick's facility "and issued a Notice of Violation . . . for discharging pollutants into Trout Run without a permit." *Id*. Instead of requiring Rick's to obtain a permit, however, the PADEP allowed Rick's to work with the USDA Natural Resources Conservation Service to eliminate the wastewater discharge. *See id*. Working with the Natural Resources Conservation Service, "Rick's installed structures to collect the SMS wastewater, including berms around the SMS piles that direct wastewater flow into a concrete sedimentation basin where solid material can settle out." *Id*. at 451-52. The wastewater flowed from the basin into a larger line impoundment and from the impoundment "the wastewater ... [was] pumped into a system of pipes leading to two adjoining fields, where it ... [was] sprayed onto the fields using an array of twelve spray guns." *Id*. The plaintiffs claimed that the system failed in various ways and discharged wastewater on the stream flood plain and into Trout Run. *See id*.

On January 17, 2001, the CCCD collected a sample of the wastewater from the impoundment and discovered levels of ammonia and phosphates that the plaintiffs described as "high." *See id*. The plaintiffs subsequently hired a consultant to determine whether it was feasible to apply the wastewater from Rick's impoundment to its fields. *See id*. The consultant gathered samples "from the impoundment and the sedimentation basin ... [and] concluded that applying the wastewater to the ... fields could result in degradation of streams and groundwater on ... [the plaintiffs'] farm because of high levels of ammonia, bacteria, and salts in the wastewater." *Id*.

The plaintiffs also retained another consultant to test the discharges from Rick's. *See id.* The consultant gathered several samples from "the channel that receives runoff from the spray areas just prior to the channel's confluence with Trout Run." *Id.* It also gathered several samples of wastewater that seeped through Rick's SMS storage area berm. *See id.* After examining these samples, the consultant discovered that "the wastewater discharges at various times violated Pennsylvania water quality standards for ammonia, chloride, nitrate and nitrite, phosphorus, sulfate, dissolved solids, coliform bacteria, fecal coliform bacteria, copper, lead, nickel, zinc, oxygen levels, and Delaware standards of turbidity." *Id*.

The plaintiffs provided notice to Rick's, the PADEP, and the U.S. Environmental Protection Agency ("EPA") that Rick's "continued discharge of pollutants violated federal and state environmental laws, and that [p]laintiffs planned to sue." *Id.* On July 26, 2001, the plaintiffs brought an action against Rick's, alleging, *inter alia*, violations of the CWA. *See id.* The plaintiffs subsequently filed a motion for partial summary judgment. *See id.* Rick's failed to file a timely response. *See id.*

The CWA is designed to "'restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'" *Id.* (quoting 33 U.S.C. § 1251). It prohibits the "'discharge of any pollutant' into navigable waters from any 'point source' without a permit." *Id.* (quoting 33 U.S.C. § 1311(a)). The plaintiffs alleged that Rick's violated § 1311 because it discharged and continues to discharge wastewater from their SMS piles into Trout Run. *See id.* at 453-54.

The court explained that for the plaintiffs to establish liability under § 1311, they were required to demonstrate that Rick's "(1) discharged, i.e., added (2) a pollutant (3) to navigable waters (4) from a point source (5) without a National Pollution Discharge Elimination System ("NPDES") permit." *Id*. at 454. (citations omitted). Rick's conceded that Trout Run was a navigable water and that it did not have a NPDES permit. *See id.* Therefore the court did not address these elements. *See id.*

The court first examined whether the plaintiffs had presented evidence sufficient to demonstrate "that the wastewater flows from the SMS piles constituted a 'discharge' of a 'pollutant,' and that the discharge actually entered Trout Run." *Id.* (citation omitted). Under the CWA, a "pollutant" is "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water ...." *Id.* (citing 33 U.S.C. § 1362(6)).

After reviewing the conclusions reached by the consultants that had been hired by the plaintiffs, the court stated that the plaintiffs presented "ample evidence to support their contention that the wastewater flowing from ... [Rick's] SMS piles is a 'pollutant' .... This evidence adequately supports [the] [p]laintiffs' contention that the wastewater located on and flowing from ... [Rick's] is a 'pollutant' as that term is defined in the Clean Water Act." *Id.* at 454-55.

The court also determined that there was "more than adequate support for finding that the wastewater runoff is a 'discharge' under the Clean Water Act ...." *Id.* at 455. It noted that before Rick's constructed its sprayer system, the PADEP determined that the wastewater drained from Rick's property into Trout Run. *See id.* It also noted that after Rick's constructed the sprayer system, another consultant hired by the plaintiffs "observed the flow of wastewater from the spray fields." *Id.* That consultant reported that "the wastewater drains into channels which have been constructed

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South Dakota Amendment E ruled unconstitutional – is there a future for legislative involvement in shaping the structure of agriculture?

By Roger A. McEowen and Neil E. Harl

In *South Dakota Farm Bureau, Inc. et. al. v. Hazeltine*,[1] the U.S. Court of Appeals for the Eighth Circuit upheld the Federal District Court for the District of South Dakota and ruled the South Dakota anti-corporate farming law unconstitutional on "dormant commerce clause" grounds. The opinion is viewed as critical to the future viability of anti-corporate farming restrictions in other states[2] and, more generally, to the ability of state legislatures to shape the structure of agriculture within their borders.

Anti-corporate farming restrictions

Currently, nine states prohibit corporations from engaging in agriculture to various degrees.[3] Advocates for anti-corporate farming laws believe that consolidation in almost every aspect of the farm economy has further threatened the continued viability of a vibrant, independently owned and widely dispersed farm production sector with the specter of being vertically integrated (largely through contractual arrangements) in the production, processing and marketing functions. Thus, as concentration of agricultural production has accelerated in recent years, legislatures in many of these same states have attempted to legislate protections for the economic autonomy of individual farmers and the environmental health and safety of both the rural and non-rural sectors.

The South Dakota provision

The South Dakota restriction dates from 1974, and in 1998 South Dakota voters amended the state constitution (known as "Amendment E") to prohibit corporations and syndicates from owning an interest in farmland (with numerous exceptions).[4] Section 21 states:"[n]o corporation or syndicate may acquire, or otherwise obtain an interest, whether legal, beneficial, or otherwise, in any real estate used for farming in this state, or engage in farming."

Section 22 exempts "family farm corporations" or "family farm syndicates" as follows:

> a corporation or syndicate engaged in farming or the ownership of agricultural land, in which a majority of the partnership interests, shares, stock, or other ownership interests are held by members of a family or a trust created for the benefit of a member of that family. The term, family, means natural persons related to one another within the fourth degree of kinship according to civil law, or their spouses. At least one of the family members in a family farm corporation or syndicate shall reside on or be actively engaged in the day-to-day labor and management of the farm. Day-to-day labor and management shall require both daily or routine substantial physical exertion and administration.

The plaintiffs, a collection of farm groups, South Dakota feedlots, public utilities and other farm organizations, challenged Amendment E on the basis that it would prevent the continuation of their existing farming enterprises unless those enterprises changed organizationally to come within a statutory exemption. Specifically, several of the plaintiffs feed livestock in their South Dakota feedlots under contracts with out-of-state firms and claimed that Amendment E would apply to their out-of-state contracting parties and hurt economically their South Dakota livestock feeding businesses.[5]

The "Dormant Commerce Clause"

The Commerce Clause of the U.S. Constitution (Article I, § 8, Clause 3) forbids discrimination against commerce, which repeatedly has been held to mean that states and localities may not discriminate against the transactions of out-of-state actors in interstate markets even when the Congress has not legislated on the subject.[6] The overriding rationale of the commerce clause was to create and foster the development of a common market among the states and to eradicate internal trade barriers. Thus, a state may not enact rules or regulations requiring out-of-state commerce to be conducted according to the enacting state's terms.[7]

Historically, dormant commerce clause analysis has attempted to balance national market principles with federalism, and was never intended to eliminate the states' power to regulate local activity, even though it is incidentally related to interstate commerce.[8] Indeed, if state action also involves an exercise of the state's police power, the impact of the action on interstate commerce is largely ignored.[9] Absent an exercise of a state's police power, the courts evaluate dormant commerce clause claims under a two-tiered approach. If the state has been motivated by a discriminatory purpose, the state bears the burden to show that it is pursuing a legitimate purpose that cannot be achieved with a nondiscriminatory alternative.[10] However, if the state regulates without a discriminatory purpose but with a legitimate purpose, the provision will be upheld unless the burden on interstate commerce is clearly excessive in relation to the benefits that the state derives from the regulation.[11] In essence, a state may regulate transactions that occur within its borders,[12] but not those that occur elsewhere.[13]

"Dormant Commerce Clause" precedent in the Eighth Circuit

In *Hampton Feedlot. v. Nixon*,[14] the court upheld against a dormant commerce clause challenge provisions of the Missouri Livestock Marketing Law that the state legislature passed in 1999 preventing livestock packers that purchase livestock in Missouri from discriminating against producers in purchasing livestock except for reasons of quality, transportation costs or special delivery times.[15] The law requires any differential pricing to be published.[16] The trial court held the law to be unconstitutional, but the Eighth Circuit reversed. While the court noted that the Act closely resembled an earlier South Dakota law that had been found unconstitutional,[17] the court noted that the Missouri provision did not eliminate any method of sale–it simply requires price disclosure. More importantly, however, the court noted that the Missouri statute, unlike the South Dakota provision, only regulates the sale of livestock sold in Missouri. As such, the extraterritorial reach that the court found fatal to the South Dakota statute was not present in the Missouri statute. The court reasoned that the statute was indifferent to livestock sales occurring outside Missouri and had no chilling effect on interstate commerce because packers could easily purchase livestock other than in Missouri to avoid the Missouri provision. The court also noted that the Missouri legislature had legitimate reasons for enacting a price discrimination statute, including preservation of the family farm and Missouri's rural economy, and an improvement in the quality of livestock marketed in Missouri.[18] Specifically, the court opined that the Missouri legislature had the authority to determine the course of its farming economy and that the legislation was a constitutional means of doing so.

The *Hazeltine* court's rationale

In a discussion involving the issue of the plaintiffs' standing, the court in *Hazeltine* cited an Ohio statute that charged out-of-state natural gas vendors at a higher sales tax rate than certain in-state vendors.[19] The court reasoned that the South Dakota livestock feeders contracting with out-of-state firms that were not within an exemption

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under the South Dakota law were similarly disaffected because of the imminent loss of business if Amendment E were to be enforced. However, the court did not discuss the obvious difference between the Ohio statute and Amendment E. The Ohio statute treated out-of-state natural gas vendors differently from in-state vendors. Amendment E treats *all* businesses operating in South Dakota under the same set of rules, regardless of whether the business is a South Dakota business or an out-of-state enterprise. Under the *Hampton*[20] rationale, the test is whether Amendment E has an extraterritorial reach requiring business transactions conducted in states other than South Dakota to be governed in accordance with South Dakota law, not whether South Dakota businesses are financially injured because of business relations with companies not coming within an exemption to the law. While the court was addressing legal standing on this point, the court was also framing the dormant commerce clause issue. The court did not reference its prior opinion in *Hampton Feedlot*.[21]

The court also provided no analysis on the issue of what entity is actually performing farming operations under the contract feeding arrangements. If the South Dakota feeding operations are making the relevant production decisions under the contracts and are the ones rendering material participation, then it seems highly unlikely that the out-of-state contracting parties could be found to be engaged in farming in South Dakota in a manner that Amendment E prohibits.[22] The court, again without discussing the matter, simply assumed that Amendment E would apply to the contract feeding situations in the case.[23]

Without any analysis of the actual language of Amendment E, the court determined that South Dakota voters had acted with a discriminatory purpose in enacting Amendment E. The court noted that the record contained a substantial amount of evidence on the point.[24] The court also found relevant on the discrimination issue statements of drafters, as well as a statement of a co-chairman of the Amendment E promotional organization that Amendment E was motivated in part by the environmental problems caused by large-scale hog operations in other states.[25] The court called this statement "blatant" discrimination.[26] The court also found indirect evidence of discrimination in that the drafters and supporters of Amendment E had no evidence that a ban on corporate farming would preserve family farms or protect the environment, and that no economic studies had been undertaken to determine the economic impact of "shutting out corporate entities from farming in South Dakota."[27] Because the court found that Amendment E was enacted with a discriminatory purpose, the state bore the burden to show that it had no other way to advance legitimate state interests. The court held that the state failed to meet its burden.

Implications of the decision

If left standing, the *Hazeltine* court's opinion raises serious concerns about the analysis of future dormant commerce clause cases in the Eighth Circuit, the doctrine of *stare decisis*, the theory of separation of powers and the ability of states to regulate business conduct within their borders.[28] The court's willingness to ignore its prior opinion in *Hampton Feedlot*[29] and not evaluate the actual language of Amendment E on dormant commerce clause grounds poses difficulty for other states defending against either current or future challenges to anti-corporate farming laws.[30] It would appear at this time, however, that the court is not favorably disposed to anti-corporate farming laws in general, and may also strike down other laws designed to deal with the structural conditions presently facing family farming and ranching operations. The court's opinion represents a complete shift from its opinion in *Hampton Feedlot*,[31] and the court appears to have adopted the modern economic theory of free trade as its framework for evaluating commerce clause cases involving state regulation of business activity.[32] Unfortunately, the court failed to note that the types of production contract arrangements involved in the case have been used in other settings to provide vertically integrated firms with market power and to exclude producers from competitive market outlets for their products.[33]

It is hoped that the Eighth Circuit will reconsider its decision in *Hazeltine* and continue the judicial path laid down in *Hampton Feedlot*.[34]

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[1] No. 02-2366, 2003 U.S. App. LEXIS 17018 (8th Cir. Aug. 19, 2003), *aff'g*, 202 F. Supp.2d 1020 (D.S.D. 2002).

[2] The opinion takes on even greater significance because many of the states with the major restrictions on corporate involvement in agriculture are located in the Eighth Circuit. See, e.g., Minn. Stat. § 500.24; Mo. Ann. Stat. Ch. 350; Neb. Const. Art. XII, § 1; Iowa Code § 9H; N.D. Cent. Code § 10-06-01.

[3] The states are Iowa (Iowa Code § 9H.1 et. seq.); Kansas (Kan. Stat. Ann. § 17-5901 et. seq.); Minnesota (Minn. Stat. Ann. § 500.24 et. seq.); Missouri (Mo. Ann. Stat. § 350.15); Nebraska (Neb. Const. Art. XII, § 8(1)); North Dakota (N.D. Cent. Code § 10-06.1-02); Oklahoma (Okla. Const. Art. XXII, 2); South Dakota (S.D. Codified Laws § 47-9A-3); and Wisconsin (Wis. Stat. Ann. § 182.001).

[4] S.D. Const. Art. XVII, §§ 21-24.

[5] Two of the plaintiffs feed cattle under contract with out of state firms, one plaintiff raises contract hogs and another raises contract lambs.

[6] *See, e.g., Dean Milk Co. v. Madison*, 340 U.S. 349 (1951) (holding as unconstitutional a city ordinance prohibiting sale of milk in city unless bottled at approved plant within five miles of city); *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977) (state statute requiring all closed containers of apples sold or shipped into state to bear "no grade other than applicable U.S. grade or standard" held unconstitutional discrimination against commerce).

[7] *See, e.g., American Meat Institute, et. al. v. Barnett*, 64 F. Supp.2d 906 (D. S.D. 1999) (South Dakota price discrimination statute declared unconstitutional because it applied to livestock slaughtered in South Dakota regardless of where livestock purchased).

[8] *See, e.g., Huron Cement Co. v. Detroit*, 362 U.S. 440 (1960) (state legislation designed to maintain clean air constituted legitimate exercise of police power allowing state to act in many areas of interstate commerce).

[9] *Id.* A strong argument can be made that Amendment E was also enacted according to the state's police power to protect South Dakotans from adverse health and environmental effects of large-scale, vertically integrated livestock operations. In that event, the impact of the law on interstate commerce would be less of a concern.

[10] *See, e.g., Hughes v. Oklahoma*, 441 U.S. 322 (1979). But, the plaintiff bears the initial burden of proving discriminatory purpose. *Id*.

[11] *See, e.g., Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) (state law prohibiting interstate shipment of cantaloupes not packed in compact arrangements in closed containers, even though furthering legitimate state interest, held unconstitutional due to substantial burden on interstate commerce).

[12] *Milk Control Board v. Eisenberg Farm Products*, 306 U.S. 346 (1936) (court upheld Pennsylvania price control statute as applied to purchasers of milk in Pennsylvania by a dealer who intended to ship all the milk out of state; Court stated that purpose of statute was "to reach a domestic situation" and that the activity regulated was "essentially local").

[13] *Baldwin v. G.A.F. Seeling, Inc.*, 294 U.S. 511 (1935) (court struck down statute requiring milk purchased out-of-state to not be sold in New York unless out-of-state producers had received New York minimum price); but see *Nebbia v. New York*, 291 U.S. 502 (1934) (court upheld New York law setting minimum prices paid to milk producers, as applied to purchases by New York retailers from New York producers).

[14] 249 F.3d 814 (8th Cir. 2001).

[15] Mo. Stat. Ann. §§ 277.200; 277.203; 277.212 (2000).

[16] Mo. Stat. Ann. § 277.203(2).

[17] S.D. Codified Laws § 40-15B *et. seq*.

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[18] The court found persuasive the testimony of a witness for the state that by providing an incentive for packers to buy livestock on the basis of quality through the grade and yield method, producers would make better genetic decisions, raise better quality animals and earn a better price. The court also noted that, under the current system, larger producers receive premiums for their livestock, giving them an economic advantage over smaller farmers.

[19] An Ohio manufacturing facility purchased nearly all of its natural gas from out-of-state suppliers subject to the higher sales tax rate, and was held to have standing to challenge the statute because it was financially injured.

[20] 249 F.3d 814 (8th Cir. 2001).

[21] *Id.*

[22] For a discussion of the issue of packer ownership and control of livestock through contractual relationships and the effort, at the federal level, to ban packer ownership of livestock, see McEowen, Carstensen and Harl, "The 2002 Senate Farm Bill: The Ban on Packer Ownership of Livestock," *7 Drake J. of Ag. L. 267* (2002).

[23] It is noted, however, that had the court analyzed the issue and determined that the out-of-state companies were engaging in farming in South Dakota under the contracts, the issue would have remained as to whether Amendment E discriminated against these businesses by treating them in a more disadvantageous manner than in-state businesses.

[24] For example, the court noted that the "pro" Amendment E statements compiled by the Attorney General informed voters that without passage of Amendment E, "[d]esperately needed profits will be skimmed out of local economies and into pockets of distant corporations," and "Amendment E gives South Dakota the opportunity to decide whether control of our state's agriculture should remain in the hands of family farmers and ranchers or fall into the grasp of a few, large corporations." The court claimed that these statements were "brimming with protectionist rhetoric."

[25] Why the court found statements of intent relevant to the discrimination issue without discussing the content of the language of Amendment E is not explained.

[26] However, state legislation designed to maintain clean air has been held to constitute a legitimate exercise of the state's police power allowing the state to act in many areas of interstate commerce. *See, e.g., Huron Cement Co. v. Detroit*, 362 U.S. 440 (1960).

[27] The court failed to mention the numerous exemptions under the South Dakota provision.

[28] It is noted that South Dakota is expected to file a petition for rehearing with the court.

[29] 249 F.3d 814 (8th Cir. 2001).

[30] The state of Iowa presently has an appeal pending with the Eighth Circuit involving the state's ban on packer ownership of livestock. *Smithfield Foods, Inc. et. al. v. Miller*, 241 F. Supp.2d 978 (S.D. Iowa 2003). Most of the states with major anti-corporate farming laws are located within the Eighth Circuit.

[31] 249 F.3d 814 (8th Cir. 2001).

[32] Indeed, the court cited *H.P. Hood & Sons v. DuMond, 336 U.S. 525 (1949)*, where the Court stated that "the vision of the Framers was that every farmer ... shall be encouraged to produce by the certainty that he will have free access to every market in the Nation."

[33] For a discussion of these issues see, McEowen, Carstensen and Harl, note 22 *supra*; Stumo and O'Brien, Antitrust Fairness vs. Equitable Unfairness in Farmer/Meat Packer Relationships, *8 Drake J. of Ag. L. 91* (2003); and Carstensen, Concentration and the Destruction of Competition in Agricultural Markets: The Case for Change in Public Policy, *2000 Wis. L. Rev. 531* (2000).

[34] 249 F.3d 814 (8th Cir. 2001).

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protection for firms' commercial speech. *Id.*

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Cattle grazing/Cont. from page 2

the land through the application of the "effluent" and that there were "three primary methods by which nitrogen can be removed from a field: (1) growing and harvesting crops on the field; (2) growing and baling hay on the field; and (3) pasturing cattle or other livestock on the field." *Id.* PSF claimed that the grass takes up the nitrogen and by using its field as a pasture, the cattle that are grazed on the field remove the nitrogen by eating the grass. *See id.* PSF also claimed that its lagoons were designed to store one year of effluent. See id. It asserted that "if cattle were not allowed to graze on the land, the nitrogen would not be removed, more effluent could not be applied, the lagoons would fill up, and the production of swine would come to a halt." *Id.*

The trial court held that "(1) § 360.016 is clear and unambiguous; (2) if agricultural land is used for swine production then § 350.015 does not apply; and (3) § 350.016 does not require that the land must be used solely or exclusively for swine production." Id. at 158. It added that "it would have been a very simple matter for the legislature to completely change the meaning of the statute by inserting the word 'exclusively' or 'solely' into section 350.016 RSMo." *Id.* at 159. The State of Missouri appealed the trial court's decision to the Missouri Court of Appeals. *See id.*

The appeals court first noted that "courts must ascertain the intent of the legislature from the language used and give effect to that intent, if possible, and to consider the words used in their plain and ordinary meaning." *Id.* at 161 (quoting *Butler v. Mitchell-Hugeback, Inc.*, 895 S.W.2d 15, 19 (Mo. 1995)). It added that to determine whether a statute is clear and unambiguous, it looks to "whether the language is plain and clearto a person of ordinary intelligence." *Id.* (citing *Russell v. Mo. State Employees' Ret. Sys.*, 4 S.W.3rd 554, 556 (Mo. Ct. App. 1999)). The court also stated that it will "look past the plain and ordinary meaning of a statute only if the language is ambiguous or if its plain meaning would lead to an illogical result." *Id.* (citing *Lonergan v. May*, 53 S.W.3d 122, 126 (Mo. Ct. App. 2001)).

Next the court examined whether the phrase "the production of swine or swine products within Section 360.016 is ambiguous," and if so, whether "cattle grazing [fell] within the meaning of swine production" under the MFCCA. *Id.* It noted that a person of ordinary intelligence might not comtemplate all that is entailed in the production of swine or swine products and that the phrase, as used in § 350.016, was amgibuous and required statutory interpretation. *See id.*

The court stated that the purpose of § 350.015 was "to prevent the concentration of agricultural land, and the production of food therefrom, in the hands of business corporations to the detriment of traditional family units and corporate aggregations of

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to divert flow around the wastewater impoundment, flows a short distance into channels that have eroded in the floodplain of Trout Run, and then discharges directly into Trout Run." *Id.* (citations omitted). Thus, the court concluded that "the evidence adequately supports [the] [p]laintiffs' contention that the wastewater runoff from ... [Rick's] constitutes 'pollution,' and that such 'pollution' was discharged into Trout Run." *Id.*

The court next examined whether Rick's was discharging the wastewater from a "point source." *See id.* A "point source" is

> [a]ny discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from agriculture.

Id. (quoting 33 U.S.C. § 1362).

The court explained that in *United States v. Earth Sciences, Inc.*, 599 F.2d 368 (10th Cir. 1979), the Tenth Circuit "examined a system specifically designed to prevent polluted runoff from entering an adjacent creek." *Id.* at 456-57 (citation omitted). Due to heavy snow melt, this system overflowed on several occasions and discharged a toxic solution into the nearby creek. *See id.* (citation omitted). The Tenth Circuit stated that:

> [w]hen [the system] fails because of flaws in the construction or inadequate size to handle the fluids utilized, with resulting discharge, whether from a fissure in the dirt berm or overflow of a wall, the escape of liquid from the confined system is from a point source. Although the source of the excess liquid is rainfall or snow melt, this is not the kind of general runoff considered to be from nonpoint sources under the [Clean Water Act].

Id. at 457.

In the present case the court stated the following:

> The Court finds it significant that the Tenth Circuit in *Earth Sciences* viewed the system as a whole to be a "point source." The Court is of the opinion that this approach best effectuates the purposes of the Clean Water Act, and will utilize the same approach here. Like in *Earth Sciences*, ... [the system] in this case [was] designed to prevent the discharge of pollutants. This system was designed in conjunction with state authorities, and consists primarily of land gradations, berms around the SMS, the sedimentation basin, the wastewater impoundment, and the sprayer system . . . . Yet, if this system breaks down, such as it apparently did when [p]laintiffs' expert observed leaks in the berms, or when the system is used improperly, it can and has resulted in a discharge of polluted wastewater into Trout Run. The Court concludes that . . . [Rick's] operation is clearly the kind of system that Congress intended to include within the definition of "point source."

Id.

The court stated that its conclusion was appropriate with respect to the EPA's interpretation of "point source" in the context of concentrated animal feeding operations ("CAFOs"). *See id.* (citing 33 U.S.C. § 1362) (including expressly CAFOs in the definition of "point source"). It also stated that Rick's system "of wastewater collection and spraying is very similar to systems implemented at CAFOs, where the operators often spray wastewater and manure onto grass fields, a practice sometimes called 'land application.'" *Id.* at 457-58 (citing *Concerned Area Residents for the Environment v. Southview Farm*, 34 F.3d 114 (2d Cir. 1994)). It added that :

> [h]aving concluded that [p]laintiffs have presented adequate evidence to support a finding that . . . [Rick's] discharged a pollutant into navigable waters from a point source without a NPDES permit, and finding no disputed issues of material fact, the Court holds that . . . [Rick's has] violated the Clean Water Act . . . and summary judgment is appropriate . . . .

Id. at 458.

The plaintiffs also alleged that Rick's violated the Pennsylvania Clean Streams Law ("PCSL"), 35 P. Stat. Ann. §§ 691.1-691.401, and brought several common law claims against Rick's. *See id.* at 458-60. The court's analysis with respect to these issues is not included in this summary.

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Cattle grazing/Cont. from page 6

natural persons primarily engaged in farming." *Id.* at 162. The court also stated that:

> [i]t seems probable that the legislature did not anticipate that farming—e.g., growing hay or allowing cattle to graze on land—would play any role in or be a part of swine production. This is highly probable because the statute does not provide for what happens when swine production entails, necessarily or as a matter of economic necessity, crop-growing. Because specific intent is a mystery, the plain meaning rule applies, supplemented with a due consideration of statutory purpose.

Id.

The court stated that if it did not "consider methods of effluent removal as included within the phrase 'the production of swine and swine products,' it would require [it] to create a statutory interpretation that is illogical." *Id.* at 162-63. It added that a part of the process of production of swine "requires the land application of effluent and the grazing of cattle to remove nitrogen as required by PSF's NPDES permit." *Id.* at 163. It noted that "if the local cattle farmers are not allowed to graze cattle upon PSF's land they will be harmed by the same statute that sought to protect them; and PSF will not be able to continue operation, rendering the exception set out in Section 350.016 meaningless." *Id.*

Finally, the court noted that "the pasturing of cattle on the property used for swine production was for the purpose of satisfying the essential element of removing nitrogen from the land to keep the land usable for swine production" and that "the leases in question are not prohibited but allow the production of swine and are sheltered by Section 350.016." *Id.*

The appeals court affirmed the trial court's judgment and ruled that the term "the production of swine or swine products necessarily includes cattle grazing for the purpose of nitrogen removal from the land application of effluent." *Id.*

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