Update on Checkoff Litigation

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I. INTRODUCTION

In the 1980s, Congress enacted a number of mandatory commodity checkoff programs. The primary goal of the programs was to increase demand for those particular agricultural commodities. The checkoff programs are funded entirely by mandatory assessments levied against producers at the point of sale, and are based on a percentage of net sales or a set rate per unit.

In the late 1980s, producers began challenging the legitimacy of various checkoffs, complaining that the boards that administer them had become unresponsive to producers' needs. The challenges have included petition drives and referenda, and litigation.

At least eight different legal challenges to national checkoff programs are currently working their way through the federal courts. Courts also have struck down as unconstitutional four different state checkoff programs.

II. LEGAL CHALLENGES TO MANDATORY CHECKOFFS

A. Legal Basis of Challenges: Compelled Speech

The challenges to the mandatory checkoff programs are based on the First Amendment to the U.S. Constitution. The Supreme Court has established a distinct line of First Amendment jurisprudence governing compelled speech, which holds:

> Just as the First Amendment may prevent the government from prohibiting speech, the Amendment may prevent the government from compelling individuals to express certain views . . . or from compelling certain individuals to pay subsidies for speech to which they object.

United States v. United Foods, *Inc*., 533 U.S. 405, 410 (2001) (*citing Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977); *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990)).

The first compelled speech case was *Barnette*, in which the Supreme Court held that a state could not compel a public school student to recite the Pledge of Allegiance. In the words of Justice Jackson:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

319 U.S. at 642. Applying *Barnette*, the Supreme Court in *Wooley* held that the State of New Hampshire could not require individuals to display the state motto "Live Free or Die" upon their passenger vehicle license plates when the motto was repugnant to their moral, political, and religious beliefs. *Wooley*, 430 U.S. at 714. The Court held that "the right of freedom of thought, protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Ibid.*

In *Abood*, the Supreme Court addressed a Michigan statute authorizing compelled assessments against public employees to fund union activities. The Court first held that, while mandatory fees for "agency shop" collective bargaining activities impinged on individuals' First Amendment rights by compelling them to associate with unions and their activities, that impingement was constitutionally justified because collective bargaining furthered the national interest in labor peace and uniformity. 431 U.S. at 222-27. The Court, however, held that the compelled assessments unconstitutionally infringed on the employees' First Amendment rights to the extent they funded activities that were not germane to collective bargaining. *Id*. at 234. The Court stated: "[A]t the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State." *Id*. at 234-35. The Court did not bar unions from making expenditures that were not germane to collective bargaining; rather, it held that "the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment." *Id*. at 235-36.

Similarly, the Supreme Court in *Keller* found the state's interest in the improvement of the quality of legal services for the citizens of California, as well as the fact that the legal profession is self-regulating, sufficient to permit compelled payment of dues by attorneys to the integrated bar association. 496 U.S. at 13-14. The Court held, however, that the State Bar of California could not use compulsory dues from attorneys to finance political and ideological activities that were not germane to the greater purpose that justified the compelled association. *Id*. at 14.

B. Supreme Court Precedent on Checkoffs

The Supreme Court has addressed the issue of compelled payments in two distinct agricultural statutory contexts. In *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997), the Supreme Court rejected a First Amendment challenge to compelled assessments for advertising pursuant to federal marketing orders for California tree fruit. The Court held that the extensive regulation of the tree fruit industry, which had effectively replaced competition with collective action, justified the compelled assessments. *Id.* at 474. The Court reasoned that, like the assessments used to further collective bargaining in *Abood,* and the assessments used to further the integrated bar activities in *Keller*, the compelled contributions

were germane to a separate, comprehensive statutory scheme, which Congress determined was necessary to maintain a stable market. *Id.* at 461.

The Supreme Court reached a different result four years later with regard to the mushroom checkoff, finding that it was not part of a "broader regulatory system," and therefore the assessments constituted a violation of mushroom producers' First Amendment rights. *United Foods*, 533 U.S. at 415. Applying *Abood* and *Keller*, the Supreme Court found that, since the primary purpose of the Mushroom Act was the speech itself, and the Mushroom Act was not part of a greater collectivized scheme, the compelled subsidies pursuant to the Act could not be "germane to a purpose related to an association independent from the speech itself . . . ." 533 U.S. at 415. The Supreme Court observed that: "The only program the Government contends the compelled contributions serve is the very advertising scheme in question. Were it sufficient to say speech is germane to itself, the limits observed in *Abood* and *Keller* would be empty of meaning and significance." *Id*. The Court thus held that the assessments were not permitted under the First Amendment. *Id.* at 416.

C. "Government Speech"

Since the Supreme Court's ruling in *United Foods*, producers and others have challenged numerous national and state checkoff programs. The government and commodity organizations have been trying to defend national mandatory checkoff programs by arguing that the speech generated by the programs is actually the government's speech, and therefore is immune from First Amendment challenges. The Supreme Court did not address that argument in *United Foods* because the government failed to raise it in the Court of Appeals. No other Supreme Court case has directly addressed that defense in this context.

1. Supreme Court Precedent

No Supreme Court case has clearly described what is meant by "government speech." The common element in the cases in which the Court did discuss government speech, however, is that the cases involved government funding — *i.e.*, funding from general tax funds as opposed to compelled assessments by a discrete group of individuals.

The starting point for an analysis of the "government speech" doctrine is *Rust v. Sullivan*, 500 U.S. 173 (1991), in which the Supreme Court upheld regulations that restricted what doctors who worked for federally funded projects could say about abortions. The Court relied upon the fact that the projects were federally funded, noting that the Title X grantees could continue to do whatever they like with regard to abortions through programs that "are separate and independent from the project that receives Title X funds." 500 U.S. at 196. Citing *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 545 (1983), the Court relied on Congress's "spending power" to uphold the regulations that proscribed

what the doctors could say. *Rust,* 500 U.S. at 197-99. Although the Court later said *Rust* was decided on "government speech" grounds (*see Legal Services Corp. v. Velazquez*, 531 U.S. 533, 541 (2001)), nowhere in the *Rust* opinion is there any mention of the government's "right" to speak, or sanction of any broad doctrine granting the government "immunity" from First Amendment scrutiny.

The Supreme Court later characterized the *Rust* decision as involving "government speech," in *Velazquez*. In *Velazquez*, the Court struck down restrictions that prohibited recipients of LSC funds from undertaking legal representation that involved an attempt to challenge existing welfare law. 531 U.S. at 548-49. The Court rejected the government's argument that the LSC attorneys were engaging in "government speech" when they represented indigent clients through federal funding and therefore the government could circumscribe what they say. *Id.* at 542-43. Proponents of the "government speech" defense rely on the Court's *dicta* in that case, which said:

> The Court in *Rust* did not place explicit reliance on the rationale that the counseling activities of the doctors under Title X amounted to governmental speech; when interpreting the holding in later cases, however, we have explained *Rust* on this understanding. We have said that viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker, [*citing Southworth,* 529 U.S. at 229, 235], or instances, like *Rust*, in which the government "used private speakers to transmit information pertaining to its own program."

Id. at 541 (*citing Rosenberger,* 515 U.S. at 833).

The government also relies on *dicta* from *Rosenberger v. Rectors and Visitors of Univ. of Va.,* 515 U.S. 819 (1995). In *Rosenberger*, a student organization sued the University for denying it funds from the Student Activities Fund to pay for its Christian publication. 515 U.S. at 827. The Supreme Court held the denial was a violation of the group's free speech rights because it constituted viewpoint discrimination. *Id.* at 845-46. In response to arguments by the University that it was entitled to make content-based choices because it (as the state) was "speaking," the Court distinguished the case from *Rust* as follows:

> There [in *Rust*], the government did not create a program to encourage private speech but instead used private speakers to transmit specific information pertaining to its own program. We recognized that when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes. [*citing Rust,* 500

> U.S. at 194] When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee. *See* [*Rust*] at 196-200.

Id. at 833. In contrast, the Court held that the disbursement of the Student Activities Fund was not intended to convey a government message, but rather the University (state) had created a public forum to "encourage a diversity of views from private speakers," *Id*. at 834, and, having established a public forum, it could not discriminate on the basis of viewpoint.

Another recent Supreme Court case discussing "government speech" is *Board of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000), in which a student raised a First Amendment objection to a portion of his student activity fee. The Court concluded that, under *Abood* and *Keller*, the student was entitled to some First Amendment protection, but that the "germaneness" test applied in those cases made little sense in the context of a university-created forum whose purpose was to encourage and facilitate a wide range of speech. In that context, the Court concluded, the student's First Amendment rights would be protected by ensuring "viewpoint neutrality" in the program's administration.

Proponents of the "government speech" defense cite to and extensively quote from *Southworth dicta* for their support:

> It is inevitable that government will adopt and pursue programs and policies within its constitutional powers but which nevertheless are contrary to the profound beliefs and sincere convictions of some of its citizens. The government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties. Within this broader principle it seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies. [*citing Rust*, 500 U.S. 173; *Regan,* 461 U.S. at 548-9]. The case we decide here, however, does not raise the issue of the government's right, or to be more specific, the state-controlled University's right, to use its own funds to advance a particular message. The University's whole justification for fostering the challenged expression is that it springs from the initiative of the students, who alone give it purpose and content in the course of their extracurricular endeavors. . . . If the challenged speech here were financed by tuition dollars and the University and its officials were responsible for its content, the case might be evaluated on

> the premise that the government itself is the speaker. That is not the case before us.

529 U.S. at 229.

Citing the *dicta* from these cases, the government and commodity groups argue that the boards that administer the checkoffs are part of the government, that the checkoffs are government programs because they were enacted by Congress, and that checkoffs fall under the *Southworth* "taxes and other exactions" language. Checkoff challengers respond that the checkoffs are administered and funded by private individuals, and that the Supreme Court cases discussed above apply only to decisions made by the government when it funds its own programs from general tax revenues. Many producers find the government's and commodity groups' positions on government speech ironic, since the checkoff programs have always been touted as "producer" or "self-help" programs. *See, e.g.,* www.cottonboard.org/index.cfm/4,364,62,32,html.

2. Emerging Appellate Court Trends

The Third Circuit has directly addressed the "government speech" defense in a challenge to the beef checkoff program. In *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989), the Third Circuit rejected the argument that the compelled speech funded by the Beef Act constituted government speech. Relying on Justice Powell's concurring opinion in *Abood*, the Third Circuit found the fact that the speech was funded by a group of private individuals, rather than the government, to be a controlling factor:

> Both the right to be free from compelled expressive association and the right to be free from compelled affirmation of belief presuppose a coerced nexus between the individual and the specific expressive activity. When the government allocates money from the general tax fund to controversial projects or expressive activities, the nexus between the message and the individual is attenuated. In contrast, where the government requires a publicly identified group to contribute to a fund earmarked for the dissemination of a particular message associated with that group, the government has directly focused its coercive power for expressive purposes.

885 F.2d at 1132 (internal citation omitted). The Third Circuit held that the beef checkoff

> more closely resembles the *Abood* situation, where the unions, as exclusive bargaining agents, served as the locators for a distinguishable segment of the population,

> *i.e.,* the employees, or the *Wooley* case, where the state "required an individual to participate in the dissemination of an ideological message. . . .

Id. at 1132-33. While the Third Circuit's holding in *Frame* that the beef checkoff was constitutional is no longer valid after the Supreme Court's decision in *United Foods*, its findings and reasoning on whether checkoffs are government speech are still good law.

Other circuits have begun to develop a test to determine whether speech is "government speech" and therefore immune from First Amendment scrutiny in other contexts. In determining what is "government speech," some courts have looked at four factors: 1) the central purpose of the program in which the speech occurs; 2) the degree of control over the content of the speech exercised by the government or private entities; 3) the literal speaker; and 4) the entity that retains ultimate responsibility for the content of the speech. *See, Sons of Confederate Veterans, Inc. v. Commissioner of the Virginia Dep't of Motor Vehicles*, 288 F.3d 610, 618 (4th Cir. 2002) (finding no government speech in a state program that allowed private groups or individuals to purchase special license plates); *Knights of the Ku Klux Klan v. Curators of the Univ. of Missouri*, 203 F.3d 1085, 1094 (8th Cir.), *cert. denied,* 531 U.S. 814 (2000) (finding government speech where the state university-owned public radio station's radio staff members themselves composed the scripts); *Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003, 1011-12 (9th Cir. 2000), *cert. denied*, 532 U.S. 994 (2001) (finding government speech where the public high school provided a bulletin board on school property that it controlled and claimed responsibility for); *Wells v. City and County of Denver*, 257 F.3d 1132, 1142 (10th Cir.), *cert. denied,* 534 U.S. 997 (2001) (finding government speech where city built, paid for, owned, and maintained a public sign); *Griffin v. Secretary of Veteran Affairs*, 288 F.3d 1309, 1324-25 (Fed. Cir.), *cert. denied*, 123 S.Ct. 410 (2002) (finding government speech in decisions on which flags to fly at national cemeteries); *Edwards v. California Univ. of Pennsylvania*, 156 F.3d 488, 491-92 (3d Cir. 1998), *cert. denied*, 525 U.S. 1143 (1999) (state-funded university may make decisions as to the content of its curriculum). In addition, the Eighth Circuit in *KKK* found that "an additional factor relevant to the inquiry is who the listener believes to be the speaker." *KKK*, 203 F.3d at 1094 n.9.

USDA and commodity groups argue that these factors weigh in their favor, pointing to the Secretary of Agriculture's authority to appoint and remove members of the oversight boards and her authority under the various acts to veto ads or projects. Checkoff opponents argue that courts should not reach these factors in the first place because the checkoffs are funded by the government, which is the lynchpin of any "government speech" doctrine. Even if courts apply these factors, however, the checkoff opponents argue that the purpose of the programs has always

been to allow producers to help themselves, that government oversight of a program does not transform that program into "government speech," and that the "speakers" in all of the programs are always producers, not the government.

D. Challenges to National Checkoff Programs

1. Beef Checkoff

There currently are two cases challenging the beef checkoff pending in different courts of appeal – the *LMA* case in the Eighth Circuit and the *Charter* case in the Ninth Circuit. A third case may make its way to the Federal Circuit Court of Appeals.

On July 8, 2003, a three-judge panel of the Eighth Circuit issued a unanimous decision affirming the district court's order holding the beef checkoff unconstitutional in its entirety. *Livestock Mktg. Ass'n v. USDA,* 335 F.3d 711 (8th Cir. 2003). The panel rejected the government's argument that the beef checkoff was immune from First Amendment scrutiny under the government speech doctrine; rather, it held that the claims were governed by the Supreme Court's "compelled speech" line of cases that culminated in the *United Foods* decision. The panel then applied the balancing test for commercial speech set forth by the Supreme Court in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980), and found that the government's interest in the mandatory beef checkoff was not substantial enough to justify the infringement of the challengers' constitutional rights. The court concluded that "the beef checkoff program is, in all material respects, identical to the mushroom checkoff program at issue in *United Foods,*" and, like the mushroom checkoff, violated the producers' First Amendment free speech rights.

On appeal, the government had also attempted to minimize the impact of the district court's ruling, seeking an order limiting the injunction to only the named plaintiffs in the case and only a certain portion of the checkoff assessments. The appeals panel rejected these arguments, holding that the district court properly made the injunction applicable to all cattle producers who are compelled to pay the checkoff and properly enjoined all assessments under the program.

On October 16, 2003, the Eighth Circuit denied the government's motion for rehearing *en banc.* On October 29, 2003, the Eighth Circuit granted a stay pending a decision on an anticipated petition for *certiorari*.

USDA and the Nebraska Cattlemen requested an extension of time in which to file their *certiorari* petitions. The Supreme Court granted the extension, and their writ petitions are due on February 13, 2004.

Pending before the Ninth Circuit Court of Appeals is the decision by a federal district court judge in Montana rejecting cattle ranchers' First Amendment challenge to the beef checkoff program. *See Charter v. USDA*, 230 F. Supp. 2d 1121, 1129 (D. Mont. 2002). In 1998, USDA had brought a compliance action against the Charters for failure to pay their beef checkoff. After a USDA administrative judge ordered the Charters to pay $417 in assessments and late fees and a $12,000 fine, the Charters sought an injunction in federal court challenging the constitutionality of the program. On November 1, 2002, the judge ruled that the case was governed by *United Foods* and not *Glickman*, but adopted the government's argument that the speech sponsored by the beef checkoff is "government speech" and therefore is immune from a First Amendment challenge. However, because the court found that the Charters had raised a serious constitutional question, it ruled that the $12,000 fine was arbitrary and capricious and ordered that the Charters pay only the $417 in assessments and late fees.

In reaching its conclusion that the beef checkoff was immune from First Amendment scrutiny, the court relied primarily on the Supreme Court's decision in *Santa Fe Independent Sch. Dist. v. Doe*, 530 U.S. 290 (2000). That reasoning, however, seems weak, since *Santa Fe* involved an Establishment Clause challenge to a public school policy that permitted student-led prayer at football games. The Supreme Court in *Santa Fe* did not hold that the speech at issue was "government speech" so to immunize the speech from First Amendment challenges; rather, the Court held that there was sufficient state action to trigger application of the Establishment Clause. *Id.* at 302-05.

The Charters appealed the decision to the Ninth Circuit Court of Appeals. All of the briefs have been filed in the appeal, but no date has been set for oral argument.

To make matters somewhat more complicated, on July 11, 2003, the Federal Circuit Court of Appeals issued yet another ruling concerning the beef checkoff in a case titled *Orleans International v. United States*. In June 2002, the U.S. Court of International Trade had thrown out a challenge to the beef checkoff brought by importers, holding that only federal district courts have jurisdiction to determine the constitutionality of the beef checkoff. 206 F. Supp. 2d 1318 (Ct. Int'l Trade 2002). A panel of the Federal Court of Appeals reversed the lower court's jurisdictional holding in a 2-1 vote, and sent the case back to the Court of International Trade. The panel made no comment on the merits of the importers' constitutional claim. 334 F.3d 1375 (Fed. Cir. 2003).

Once the Court of International Trade makes a final decision on the merits of the importers' First Amendment challenge to the beef checkoff, that decision could also be appealed to the Federal Circuit Court of Appeals.

In December 2003, an Arkansas pork producer filed a class action complaint in Arkansas state court seeking an accounting and refund of all beef checkoff funds paid by Arkansas cattle producers since 1985.

2. Pork Checkoff

On October 25, 2002, a federal district judge rejected USDA's "government speech" defense in a challenge to the mandatory pork checkoff and ruled that the checkoff was "unconstitutional and rotten." *Michigan Pork Producers Ass'n v. Campaign for Family Farms*, 229 F. Supp. 2d 772 (W.D. Mich. 2002). The government appealed the decision to the Sixth Circuit Court of Appeals. Oral argument was heard on March 14, 2003. On October 22, 2003, the Sixth Circuit upheld the district court's decision and ruled the entire program is unconstitutional. On December 22, 2003, the Sixth Circuit granted USDA's motion for a stay pending appeal to the U.S. Supreme Court.

On January 19, 2004, the private intervenors filed a *certiorari* petition on behalf of the six state pork associations and three pork producers who were parties to the proceedings below. Notably, the National Pork Producers Council, which was one of the private intervenors in the proceedings below, is not one of the Supreme Court petitioners.

USDA sought and obtained an extension for its *certiorari* petition due date, which now is due February 19, 2004.

3. Dairy Checkoff

In early 2002, Pennsylvania dairy producers brought a First Amendment challenge against the national Dairy Promotion Program. On March 23, 2003, a federal district judge rejected the producers' challenge and granted summary judgment for USDA, finding that *Glickman v. Wileman Bros.* controlled the case rather than *United Foods*. Concluding that the dairy industry was subject to interrelated economic regulatory programs including price supports, marketing orders, and import controls, the court concluded that the dairy promotion program was "ancillary to a more comprehensive program restricting marketing autonomy." Applying the more limited test used in *Wileman Bros.*, the court held that the dairy checkoff did not violate dairy producers' free speech or free association rights. *Cochran v. Veneman*, 252 F. Supp. 2d 126 (M.D. Penn. 2003). That decision has been appealed to the Third Circuit Court of Appeals. The Third Circuit heard oral argument on January 12, 2004. No decision has yet been published.

4. Hass Avocado Checkoff

Hass avocado importers brought a First Amendment challenge to the Hass avocado checkoff program in the U.S. District Court for the District of

Columbia. On February 14, 2003, the U.S. District Court for the District of Columbia denied the importers' motion for a preliminary injunction, ruling that they were unlikely to succeed on their claim that the avocado checkoff violates their free speech rights because the Hass Avocado Board's speech qualified as "government speech." Although the court did hold that the importers were likely to prevail on their claim that the checkoff violates their freedom of association rights, the court found that the free speech claim was "the heart of their argument." *Avocados Plus, Inc. v. Veneman*, *available at* www.agriculturelaw.com/avocado1.pdf. On April 14, 2003, however, the court amended its opinion to dismiss the case entirely, holding that the Hass Avocado Act required the importers to exhaust their administrative remedies, which they had not done. That decision is being appealed to the D.C. Circuit Court of Appeals. Briefing should be completed by March 23, 2004, and oral argument is scheduled for May 13, 2004.

5. Honey Checkoff

Producers filed a First Amendment challenge to the honey checkoff program in U.S. District Court for the Eastern District of California. No decision has yet been issued.

6. Cotton Checkoff

Importers recently filed a challenge to the cotton checkoff (which is one of the oldest checkoff programs) in the Court of International Trade and have filed a request that the case proceed as a class action. That motion has not yet been ruled on.

E. Challenges to Mandatory State Checkoff Programs

Producers have had success challenging state checkoff programs covering everything from fruit to alligators on the same constitutional grounds that the Supreme Court applied in *United Foods*.

1. California Table Grape Checkoff

In *Delano Farms v. California Table Grape Commission,* 318 F.3d 895 (9th Cir. 2003), the Ninth Circuit Court of Appeals found the California state table grape checkoff unconstitutionally infringed on producers' First Amendment rights. The court held that the growers were entitled to First Amendment protection against state compulsion to fund generic advertising because, as was true in *United Foods*, the challenged statute was not part of a collectivization or comprehensive economic regulation of the table grape industry. The commission did not raise a government speech defense in its briefs. The commission notified the Ninth Circuit that it did not intend to file a petition for Supreme Court review, but is instead asking the district court for further discovery on the level of

control it exercises over the program. Delano Farms then moved for a judgment on the pleadings, which was heard on August 28. No decision has been issued as of the date this article went to print.

2. Washington Apple Checkoff

On March 31, 2003, a federal court ruled that the Washington State apple checkoff program is unconstitutional and issued an order enjoining further collections under the program. The court rejected the apple commission's argument that the speech generated by the program was government speech, holding that the commission was not a state agency nor was it charged by the state legislature with disseminating government speech. Finding that the commission's "principal purpose is speech," the court rejected the argument that only assessments used for advertising should be enjoined and instead held that the assessments as a whole were unconstitutional. *In Re Washington Apple Advertising Commission,* 257 F. Supp. 2d 1290 (E.D. Wash. 2003).

3. Florida "Box Tax"

Also on March 31, 2003, a state court in Florida similarly ruled that the Florida citrus checkoff program is unconstitutional in *Tampa Juice Services v. State of Florida*, No. GC-G-00-3488 (Fla. Cir. Ct. March 31, 2003). That court also rejected the government speech defense, noting that, like the beef and pork checkoffs, the citrus checkoff was created as a self-help program funded by growers rather than a government program paid for out of general taxpayer funds. According to press reports, the parties reached a settlement that provides for refunds to the plaintiffs and allows processors to opt out of paying up to two-thirds of future checkoff payments. The commission agreed not to collect two-thirds of the payments from processors pending legislative approval.

4. Louisiana Alligator Checkoff

On April 24, 2003, a federal court in Louisiana ruled that the Louisiana state alligator checkoff is unconstitutional, similarly holding that the compelled speech could not be government speech because it was funded by producers and not general taxpayer funds. That decision, *Pelts & Skins, L.L.C. v. Jenkins,* 259 F. Supp. 2d 482 (M.D. La. 2003), is being appealed to the Fifth Circuit Court of Appeals.

5. Arkansas Wheat Checkoff

In December 2003, Arkansas wheat producers filed a class action complaint in state court seeking an accounting and a refund of wheat checkoff funds paid by Arkansas wheat producers since 1985.

6. Minnesota Cultivated Wild Rice Checkoff

In May 2003, a producer and a processor filed a complaint in United States District Court for the District of Minnesota, challenging Minnesota's cultivated wild rice checkoff. Dispositive motions have not yet been filed.

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