VOLUME 20, NUMBER 5, WHOLE NUMBER 234 APRIL 2003

INSIDE

Solicitation of articles: All AALA members are invited to submit articles to the Update. Please include copies of decisions and legislation with the article. To avoid duplication of effort, please notify the Editor of your proposed article.

IN FUTURE ISSUES

State law claims not completely preempted by Federal Crop Insurance Act

In an action brought by two insureds in state court against their crop insurance company in which the insurance company removed the matter to federal district court and filed a motion for summary judgment, the United States District Court for the District of North Dakota has denied the motion for summary judgment and ruled that the case was improperly removed to federal court. *Bullinger v. Trebas*, No. A4-02-13, 2003 WL 244989 (D. N.D. Jan. 30, 2003). The court ruled that the Federal Crop Insurance Act (FCIA), 7 U.S.C. §§ 1501-1515, did not create a federal cause of action against the insurance company and that the doctrine of complete preemption did not apply to the state law claims brought against it. *See id.* at *2-6.

Daniel and David Bullinger were farmers who lived in Bottineau County, North Dakota. *See id.* at *1. On or before March 15, 1999, they completed applications for multi-peril crop insurance with the help of Brad Trebas, a local agent for Rain and Hail, L.L.C. (Rain and Hail), defendant. *See id.* Rain and Hail is an insurance company licensed to do business in North Dakota. *See id.*

The policies were issued by Rain and Hail and reinsured by the Federal Crop Insurance Corporation. *See id.* In mid-1999, the Bullingers filed claims for prevented planting due to excessive moisture. *See id.* Rain and Hail denied portions of the claims in September, 1999, "because the Bullingers' acreage reports did not comply with the rotational requirements set forth in the policies." *Id.* The Bullingers alleged that they suffered a crop loss in 1999 that should have been covered by their policies "but [the indemnity] was not paid because of errors in their acreage reports." *Id.*

On February 4, 2002, the Bullingers filed suit against Trebas and Rain and Hail in North Dakota state court. *See id.* On February 15, 2002, Rain and Hail removed the action to federal court, asserting that the existence of a federal question justified the removal. *See id.* Rain and Hail argued that the federal question existed because the Bullingers' complaint implicated the FCIA and its implementing regulations. *See id.* The Bullingers did not challenge the motion for removal. *See id.*

On September 13, 2002, Rain and Hail filed a motion for summary judgment based on the expiration of a twelve-month statute of limitations. *See id.* (citing U.S.C. §1508(j)(2)(B)). On November 13, 2002, the Bullingers filed a response to the summary judgment motion.

Cont. on p. 2

USDA denied right of setoff in Chapter 12 case

The Bankruptcy Appellate Panel ("BAP") for the Tenth Circuit has ruled that the USDA did not have a right to setoff the amount it owed to two Chapter 12 debtors in farm program payments against what it claimed the debtors owed to it as a result of a foreclosure judgment. *In re Myers*, 284 B.R. 478, 479-81 (B.A.P. 10th Cir. 2002). The BAP determined that the debtors discharged their personal liability in their previous Chapter 7 bankruptcy case and therefore there was no claim that the USDA could set off against the debtors. *See id.* at 480.

The debtors were family farmers who owed the Farm Service Agency ("FSA"), an agency within the USDA, a substantial amount of money "which was secured by liens to their land and other assets." *Id.* at 479. The debtors defaulted on their FSA loan, and the FSA sued to foreclose its interest. *See id.* The debtors filed for Chapter 12 bankruptcy soon thereafter, but converted to a Chapter 7 bankruptcy the following year. *See id.* As a result, the amount owed by the debtors to the FSA was discharged pursuant to Bankruptcy Code § 727. *See id.* The FSA then brought its foreclosure complaint in federal district court "and obtained a stipulated foreclosure judgment against the debtors after the Chapter 7 discharge was issued and the case was closed." *Id.*

In March, 2000, the debtors filed a second Chapter 12 bankruptcy petition. *See id.* The parties subsequently entered into a stipulation agreement that provided that the debtors

Cont. on p. 2

See id. On November 22, 2002, Rain and Hail filed a reply in support of the motion. *See id.*

The Bullingers argued that their acreage reports were filled out incorrectly due to the negligence of Trebas and Rain and Hail, and, therefore, they should pay the loss. *See id.* The Bullingers also argued that the defendants had a duty to provide information and assist them in complying with the requirements in the insurance policies, and that the defendants breached that duty. *See id.* In addition, they argued that the applicable statute of limitations under North Dakota law was a six-year period. *See id.*

The court began its analysis with a discussion of the history of the FCIA. *See id.* The court explained that insurance companies refused to write multi-peril crop insurance policies in the early 1900s because of the high level of risk and that Congress attempted to remedy this situation by enacting the FCIA. *See id.* The FCIA was enacted in 1938 to "'promote the national welfare by improving the economic stability of agriculture through a sound system of crop insurance ....'" *Id.* (quoting 7 U.S.C. § 1502). The Federal Crop Insurance Corporation (FCIC) was created to carry out the FCIA. *See id.* The FCIC accomplished this by "1) selling insurance through private insurance agents; 2) reinsuring private insurance companies that provide crop insurance; and 3) providing crop insurance directly to the farmer." *Id.* (citing *Owen v. Crop Hail Management*, 841 F.Supp. 297, 300 (W.D.Mo. 1994)(also citing 7 U.S.C. §§ 1507 - 1508)).

Originally, only the FCIC was allowed to issue crop insurance policies and handle claims. *See id.* at *2. However, in 1980, the FCIA was amended to allow private companies to provide crop insurance directly to farmers. *See id.* These private companies were reinsured by the FCIC. *See id.* The policies at issue in this case were issued by Rain and Hail and reinsured by FCIC. *See id.*

Rain and Hail argued that the Bullingers' action was barred by the twelve-month statute of limitations contained in 7 U.S.C. § 1508(j) because more than eighteen months had elapsed since the denial of their claims and the filing of their lawsuit. *See id.* Section 1508(j) provides that "[i]f you do take legal action against us, you must do so within 12 months of the date of denial of the claim. Suit must be brought in accordance with the provisions of 7 U.S.C. § 1508(j)." *Id.* 7 U.S.C. § 1508(j)(2) provides as follows:

> (A) In general
> Subject to subparagraph (B), if a claim for indemnity is denied by the Corporation or an approved provider, an action on the claim may be brought against the Corporation or Secretary only in the United States district court for the district in which the insured farm is located.
>
> (B) Statute of limitations
> A suit on the claim may be brought not later than 1 year after the date on which final notice of denial of the claim is provided to the claimant.

Id.

The Bullingers argued that Rain and Hail "misinterpreted their claims." *Id.* They did not contest the policy provisions; instead, they alleged that the defendants were in breach of contract and breach of duty. *See id.* The Bullingers contended that "they relied upon the knowledge, skill, and expertise of Trebas and representatives of Rain and Hail to ensure that their insurance applications were properly completed and that the necessary forms were filled out to provide coverage for their crop losses." *Id.* Rain and Hail responded that the policies and the FCIA made no distinction between contract claims and tort claims, and consequently the one-year statute of limitations applied. *See id.* at *3. The court disagreed. *See id.*

Even though the plaintiffs did not challenge the action's removal to federal court, the court stated that it had a duty to examine whether federal jurisdiction was appropriate in federal court. *See id.* (citing *Magee v. Exxon Corp.*, 135 F.3d 599, 601 (8th Cir. 1998) (explaining that subject matter jurisdiction cannot be waived)). "A defendant may remove a state court case to federal court only if the case could have been originally filed in federal court." *Id.* (citing *Caterpillar, Inc. v. Williams*, 482 U.W. 386, 392 (1997); *Gore v. Trans World Airlines*, 210 F.3d 944, 948 (8th Cir. 2000)).

Without diversity of citizenship, the defendant must establish federal question jurisdiction or some other basis for jurisdiction. *See id.* The court explained that the "well-pleaded complaint rule" is the guiding principle for determining the presence of federal question jurisdiction. *See id.* The rule provides that the face of the complaint must demonstrate a federal question to invoke the jurisdiction of the federal courts. *See id.* This prevents defendants from using federal law defenses to move an otherwise state law claim into federal court. *See id.*

The court also explained that one excep-

Cont. on p.3

VOL. 20, NO. 5, WHOLE NO. 234 April 2003

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

Contributing Editors: Jay Kiiha, University of Arkansas, Fayetteville, AR; Sean Brister, University of Arkansas, Fayetteville, AR; Anne Hazlett, Washington, D.C.

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

Agricultural Law Update is published by the American Agricultural Law Association, Publication office: Maynard Printing, Inc., 219 New York Ave., Des Moines, IA 50313.

Setoff/Cont. from p. 1

were authorized to participate in farm subsidy programs. *See id.* The stipulation provided that "[t]he Department of Agriculture does not waive any rights it may have as to setoff or recoupment as to any amounts which become payable to Debtors as a result of enrollment for the years 2000, 2001, 2002, in any such program.'" *Id.* (citation omitted). The stipulation also stated that "the debtors do not admit that the Department of Agriculture has any rights of setoff." *Id.* (citation omitted). The BAP noted that "[i]t is significant to our decision that this stipulation was made after the debtors had received their Chapter 7 discharge." *Id.*

After entering into the stipulation agreement, the USDA "moved to modify the automatic stay in order to set off payments made to the debtors against what it claims the debtors owed to it." *Id.* The bankruptcy court denied relief from the stay, and the USDA appealed the bankruptcy court's decision to the BAP for the Tenth Circuit. *See id.* The BAP stated that:

> [T]his appeal of an order denying ... relief from the stay turns on the issue of whether the appellant may set off funds

Cont. on p.3

Preemption/cont. from p, 2

tion to the "well-pleaded complaint rule" is the doctrine of complete preemption. *See id.* (citing *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 65 (1987)). Under this doctrine, preemption occurs when federal law so extensively regulates an area that there is no room for state law supplementation. *See id.* (citation omitted). If a complaint is based on state law claims that have been preempted, then the complaint is "converted to one stating a federal claim for purposes of the 'well-pleaded complaint rule.'" *Id.* (citation omitted). This allows federal jurisdiction even when a defendant "raises the federal question as a defense which does not appear on the face of the complaint." *Id.* Once a court finds "that federal law completely preempts state law in a certain area, then the federal court has jurisdiction." *Id.* However, if a plaintiff's claims are not entirely preempted by federal law, and there is no other means of establishing jurisdiction, then the court lacks jurisdiction and is required to remand the case to state court. *See id.* (citation omitted).

Courts are reluctant to find preemption without clear direction from Congress. *See id.* at *4. In this case, the court found that the complete preemption doctrine was the only basis for federal jurisdiction. *See id.* The issue addressed by the court was "whether the Federal Crop Insurance Act so completely preempts state law that the plaintiffs' claims against the defendants are considered to arise from federal law." *Id.* The court stated that if complete preemption was not found, then the case must be remanded back to state court. *See id.*

The district court stated that the Eighth Circuit had not specifically addressed this question, but that many other district and circuit courts had. *See id.* The majority of these courts have held that the FCIA "does not completely preempt state law causes of action." *Id.* (citing *Holman v. Laulo-Rowe Agency*, 994 F.2d 666, 669 (9th Cir. 1993); *Halfmann v. USAG Ins. Servs., Inc.*, 118 F.Supp.2d 714 (N.D. Tex. 2000); *Bullard v. Southwest Crop Ins. Agency, Inc.*, 984 F.Supp. 531 (E.D. Tex. 1997); *Horn v. Rural Cmty. Ins. Servs.*, 903 F.Supp. 1502 (M.D. Ala. 1995); *Hyzer v. Cigna Prop. Cas. Ins. Co.*, 884 F.Supp. 1146 (E.D. Mich. 1995); *O'Neal v. Cigna Prop. Cas. Ins. Co.*, 878 F.Supp. 848 (D. S.C. 1995)).

The court noted that only two district courts have determined that the FCIA completely preempted state law causes of action. *See id.* (citing *Brown v. Crop Hail Mgmt., Inc.*, 813 F.Supp. 519 (S.D. Tex. 1993); and *Owen v. CropHail Mgmt., Inc.*, 841 F.Supp 297 (W.D. Mo. 1994)). It explained that *Brown* and *Owen* had been criticized and were not persuasive. *See id.*

The court stated that it found persuasive the courts that specifically found that the FCIA "and its regulations do not preempt state law causes of action under the defense of federal preemption." *Id.* (citing *Meyer v. Conlon*, 162 F.3d 1264, 1268 (10th Cir. 1998); *Williams Farms of Homestead v. Rain and Hail Ins.*, 121 F.3d 630 (11th Cir. 1997); *Nobles v. Rural Cmty. Ins. Servs.*, 122 F. Supp. 2d 1290, 1294 (M.D. Ala. 2000)). The court was also persuaded by *Reimers v. Farm Credit Services Ag. Country*, No. A3-00-168, 2001 WL 1820379 (D. N.D. 2001). In *Reimers*, the court concluded that "the FCIA does not have the extraordinary preemptive force necessary for the application of the doctrine of complete preemption." *Id.*

The court agreed with the courts that have held that no federal cause of action against private reinsured companies and no complete preemption of state law was created by 7 U.S.C. § 1508(j)(2) or any other FCIA provision. *See id.* at *5. The court also based its decision on the permissive language of 7 U.S.C. § 1508(j)(2)(A) and (B). *See id.* The court explained that these sections use "may" and do not mention FCIC-reinsured entities. *See id.*

The court stated that its decision was supported by the FCIA's legislative history. *See id.* The court concluded that "as a matter of law, . . . 7 U.S.C. § 1508(j)(2) does not create a federal cause of action against private reinsured companies nor does the Act grant exclusive jurisdiction to the federal courts over claims against private entities reinsured by the Federal Crop Insurance Corporation." *Id.*

It added that a clear reading of 7 U.S.C. § 1508(j)(2)(B) leads to the conclusion that the twelve-month limitation period was not mandatory and that the FCIA did not preempt state law causes of action. *See id.* The court explained that the twelve-month period was permissive and did not bar the Bullingers' claims. *See id.* The court also stated that no federal cause of action was created against a private insurance company reinsured by the FCIC. *See id.*

The court concluded that it lacked federal question jurisdiction, stating that it was "clear that Congress intended to leave insureds with their traditional breach of contract or tort remedies against their insurance companies." *Id.* It therefore remanded the matter back to state court. *See id.* at *6.

— Sean Brister, National Ag Law Center Graduate Fellow

This material is based on work supported by the U.S. Department of Agriculture under Agreement No. 59-8201-9-115. Any opinions, findings, conclusions or recommendations expressed in this article are those of the author and do not necessarily reflect the view of the U.S. Department of Agriculture.

NCALRI is a federally-funded research institution located at the University of Arkansas School of Law Web site: http://www.nationalaglawcenter.org/ · Phone: (479) 575-7646 · Email: NCALRI@uark.edu

Setoff/Cont. from p. 1

> it owes to the appellee-debtors for certain crop payments against what it claims the debtors owe to it as holder of a foreclosure judgment. The complaint was decided below on complex issues of which one of various Farm Service Agency administrative regulations and programs applies to the case at hand. Under our analysis of the issues, the case can be decided on a straightforward interpretation of applicable provisions of the Bankruptcy Code, and we affirm.

Id. at 479.

The BAP explained that when the debtors' Chapter 7 discharge was filed, they were discharged from "'all debts that arose before the date of the order for relief.'" *Id.* at 480 (citation omitted). It also explained that under Bankruptcy Code § 348 "the date of the order for relief was in June, 1998, and no one disputes that their debt ... arose before that date." *Id.*

Under Bankruptcy Code § 101(12), "debt" is defined as "'liability on a claim.'" *See id.* Bankruptcy Code § 101(5)(A) defines "liability on a claim" as "'right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured . . . .'" *Id.* (citation omitted). The BAP stated that "[t]his means that . . . ever since the discharge was entered the debtors have had no personal liability for their debt to [the USDA.] Or, put in other terms, since that date the [USDA] has had no claim against the debtors." *Id.*

In addition, the BAP noted that Bankruptcy Code § 553(a), which controls setoff under the bankruptcy code, provides that "'this title does not affect any right of a creditor to offset a mutual debt owing by

Cont. on page 7

Commodity promotion update: district courts resolve challenges to apple, milk advertising check-off campaigns

By Anne Hazlett

Since the mid-1970s, Congress has authorized the creation of national generic promotion programs, known as "check-off" programs, for several farm commodities. Geoffrey S. Becker, Congressional Research Service, Federal Farm Promotion Programs at 1 (November 2002). During the 1980s and 1990s, check-off programs became a popular means of providing federal support for farm products with minimal government involvement and expense. *Id.* Today, federally-sanctioned programs are operating for sixteen commodities. [1] *Id.*

Check-offs are funded by assessments charged to producers, and some importers, at the time product is sold. *Id.* Advocates of these programs often view their advertising, research, and marketing activities as self-help for farmers. *Id.* However, some growers, by contrast, characterize check-off assessments as a "tax" for activities that they would not support voluntarily. *Id.*

In the past five years, a growing diversity in production practices, farm size, and farm ownership coupled with a substantial downturn in many commodity markets have prompted litigation challenging the validity of several check-off programs.

In 2001, the Supreme Court dealt a blow to the continued viability of these promotional campaigns in its decision in *United States v. United Foods, Inc.*, 533 U.S. 405 (2001). In *United Foods*, the Court considered the constitutionality of a statute assessing handlers of fresh mushrooms to fund advertising for mushroom products. Concluding that the mandate violated the First Amendment, the Court distinguished its ruling from *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997), an earlier decision upholding the generic advertising of California tree fruits: "In *Glickman*, the mandated assessments for speech were ancillary to a more comprehensive program restricting marketing autonomy. Here, for all practical purposes, the advertising itself, far from being ancillary, is the principal object of the regulatory scheme." *United Foods*, 533 U.S. at 411-12.

Since the *United Foods* decision, disgruntled producers of several commodities subject to check-off assessments have responded to the Court's ruling with litigation to clarify the constitutionality of their own programs. In March of this year, two district courts issued opinions addressing the constitutionality of assessments used to fund the Washington apple advertising and Milk Mustache/Got Milk?® campaigns. *In re Washington State Apple Advertising Commission*, 2003 WL 1900705 (E.D. Wash. March 31, 2003); *Cochran et al. v. Veneman*, 2003 U.S. Dist. LEXIS 4361 (M.D. Pa. March 24, 2003). Given the effectiveness and level of consumer familiarity with both advertising schemes, these cases have attracted considerable attention while offering further insight into application of the *United Foods* ruling.

This month's article will address the *Washington Apple* decision. Next month's issue of the *Update* will examine the *Cochran* ruling and consider what the cases together contribute to the growing body of case law in this important area of federal agricultural policy.

In re Washington State Apple: background

In 1937, the Washington state legislature created the Washington Apple Advertising Commission, currently known as the Washington State Apple Advertising Commission, in response to a growing concern that Washington-grown apples were handicapped by high freight rates when placed in competition with apples grown in the eastern United States and foreign countries. 2003 WL 1900705 at 4. The enabling statute allowed the Commission to assess growers one cent on each box of apples packed for fresh market. *Id.* Today, growers pay 25 cents per box. *Id.*

The monies collected are used to pay for advertising, educational campaigns, and research. *Id.* In years 1998 through 2002, the Commission spent between 62.5 and 85 percent of its budget on "marketing" activities. *Id.* at 3. The vast majority of those expenditures fit into four categories: (1) publications, (2) trade advertising, (3) consumer advertising, and (4) promotions. *Id.* These efforts have been implemented in all fifty states and more than fifty-five countries in which Washington apples are sold. News Release, "Judge Rules on Washington Apple Commission Preliminary Injunction," March 14, 2003, http://www.bestapples.com/pressreleases.

Before the Commission was created, Washington grew fifteen percent of the apples grown in the United States. 2003 WL 1900705 at 1. Today, apple growers in Washington state sell seventy percent of the fresh-market apples produced in the country. *Id.* Despite its success in creating demand for Washington apples, the Commission grew concerned about the certainty of its future following the Supreme Court's decision in *United Foods* as it knew that some Washington growers do not support its existence or its programs. News Release, "Apple Commission Seeks Clarification of Status in Court," Aug. 10, 2001, http://www.bestapples.com/mediakit. On August 9, 2001, the Commission filed an action against Jack Nickell and Ron Myers, two local apple growers, seeking declaratory relief to clarify the constitutional status of the organization's programs. *Id.* A group of packers and organic apple growers later intervened as defendants in the action.

On March 14, 2003, Judge Edward Shea of the United States District Court for the Eastern District of Washington granted a motion for preliminary injunction filed by the intervenors. In his ruling, Judge Shea ordered the Commission to place all assessments collected from the intervenors in escrow pending entry of a final judgment in the case. Order Granting Intervening Defendant's Motion for Preliminary Injunctive Relief at 31 (E.D. Wash. March 14, 2003)(No. CS-01-0278-EFS).

Four days later, the court heard oral argument on cross-motions for summary judgment. 2003 WL 1900705 at 1. In its subsequent order, the court granted the motions of the defendants while dismissing the Commission's claims that its collection of assessments was constitutional. *Id.*

In re Washington State Apple: analysis

In reviewing the parties' cross-motions for summary judgment, the court considered three central issues: first, whether the Commission's activities constitute government speech, which is insulated from First Amendment scrutiny; second, whether the Commission's communications are economic regulation rather than a restriction on speech; and third, whether the Commission's assessment structure is an infringement on commercial speech permitted by the Constitution. [2] *Id.* at 6.

Government speech

The Commission asserted that because its activities are government speech delivered by the Washington state government, they are protected from constitutional scrutiny. *Id.* Under the government speech doctrine, the government can speak and make policy judgments about what it will say without offending the First Amendment rights of those who disagree with its message. *Id.* Thus, when speech can be characterized as government speech, the government can fund those communications without First Amendment concerns. *Id.*

In examining the Commission's activi-

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

ties under the government speech doctrine, the court first noted that the Supreme Court did not address the specific question of whether advertising funded by mandatory assessments is government speech in its *United Foods* decision as the government had not raised the issue on appeal. *Id.* The court then explained that the Commission's activities in this case could be characterized as government speech in one of two ways: (1) if the Commission itself is a Washington government entity, or (2) if the Commission is an entity charged by the Washington government to disseminate its message. *Id.*

On the question of whether the Commission is a government entity, the Commission maintained that it is simply a state agency like a municipal corporation or a regulatory agency. *Id.* In *Keller v. State Bar of California*, 496 U.S. 1 (1990), the Supreme Court rejected an assertion that the California State Bar was a government entity whose speech was protected by the government speech doctrine based on three factors: (1) the principal funding for its activities came from dues levied on its members, (2) its membership was restricted to lawyers admitted to practice in the state, who were required to join, and (3) while it performed important tasks to regulate the profession, its services were advisory in nature as the actual enforcement was reserved to the state supreme court. *Id.* at 7. Applying those factors to the case at bar, the court concluded that the Commission is not part of the Washington government. *Id.*

Specifically, the court found that the Commission's funding, like the state bar association budget, comes exclusively from assessments levied against those eligible to participate in Commission activities. *Id.* Further, similar to the state bar, only apple growers and dealers may be members of the Commission. *Id.* People and organizations are eligible for election to the Commission because they are growers and dealers of apples, not because they are residents of a particular area, like a school board, or Washington citizens or voters. *Id.* Lastly, although the Commission is nominally granted the power to enforce and prosecute violations of its governing statute, county and state law enforcement officers are charged with enforcement while state superior courts are vested with jurisdiction to prevent and restrain violations of the law. *Id.*

Turning to the second possibility, the court also failed to conclude that the Commission is charged to speak for the Washington state government. *Id.* at 8. The Supreme Court has recognized that where the government creates a corporation by law for the furtherance of government objectives and retains permanent authority to appoint a majority of its directors, the corporation is part of the government for purposes of the First Amendment. *Id.* (quoting *Lebron v. National R.R. Corp.*, 513 U.S. 374, 400 (1995)). Speech becomes government speech only where the government is responsible for it. 2003 WL 1900705 at 8. When the government funds a private speaker, it is responsible for that communication when it dictates the message to be conveyed and retains control over its content. *Id.*

In this case, the court found that the State of Washington has no oversight over the Commission's communications because it has no authority to edit, change, or censor the speech. *Id.* Further, the court noted that while the Director of the Washington Department of Agriculture is an *ex officio* member of the Commission, he is a non-voting member with no authority to change the Commission's advertisements and no power to veto its decisions. *Id.* In highlighting these facts, the court contrasted the Director's role in the Commission with the Secretary of Agriculture's involvement in the Cattlemen's Beef Promotion and Research Board. *Id.* There, the Secretary appoints the Board's members and holds final approval authority for its budget, plans and projects, including advertising. *Id.*

Economic regulation

Beyond government speech, the Commission argued that its system of generic advertising funded by mandatory assessments is constitutionally permissible under the Supreme Court's decision in *Glickman v. Wileman Bros. & Elliott, Inc. Id.* at 9. In *Glickman*, a group of California tree fruit producers sought to prevent compelled assessments on their sales from being used to support advertising. *Id.* at 5. The court denied their claims, reasoning that the advertising at issue was germane to the purpose of a tree fruit marketing order and the assessments were not being used to fund ideological activities. *Id.* In so doing, it held that the constitutional test applicable to generic advertising funded by assessments is not based on the First Amendment because such programs are "a species of economic regulation that should enjoy the same strong presumption of validity that we accord to other policy judgments made by Congress." *Id.* at 9 (quoting *Glickman*, 521 U.S. at 477).

Importantly, the Court later described its rationale as follows:

> In *Glickman*, we stressed from the very outset that the entire regulatory program must be considered in resolving the case. In deciding that case, we emphasized the 'importance of the statutory context in which it arises.' The California tree fruits were marketed 'pursuant to detailed marketing orders that had displaced many aspects of independent business activity.' Indeed, the marketing orders 'displaced competition' to such an extent that they were 'expressly exempted from the antitrust laws.' The market for the tree fruit regulated by the program was characterized by '[c]ollective action, rather than the aggregate consequences of independent competitive choices.' The producers of tree fruit who were compelled to contribute funds for use in cooperative advertising 'd[id] so as a part of a broader collective enterprise in which their freedom to act independently [wa]s already constrained by the regulatory scheme.' The opinion and analysis of the Court proceeded upon the premise that the producers were bound together and required by the statute to market their products according to cooperative rules. To that extent, their mandatory participation in an advertising program with a particular message was the logical concomitant of a valid scheme of economic regulation.

United Foods, 533 U.S. at 412.

Relying on *Glickman* to support the constitutionality of its activities, the Commission maintained that its assessments exist as part of a broader, comprehensive regulatory scheme. 2003 WL 1900705 at 10. Specifically, it pointed to language in the legislation creating and regulating the Commission, which reads:

> The history, economy, culture and future of Washington state's agricultural industry involves the apple industry. In order to develop and promote apples and apple products as part of an existing comprehensive scheme to regulate those products, the legislature declares:
> ...
>
> (d) That the apple industry is a highly regulated industry and that this chapter and the rules adopted under it are only one aspect of the regulation of the industry. Other regulations and restraints applicable to the apple industry include:
>
> (i) Washington agriculture general provisions, chapter 15.04 RCW;

Cont. on page 6

Commodity promotion update/Cont. from page 5

> (ii) Pests and diseases, chapter 15.08 RCW;
>
> (iii) Standards of grades and packs, chapter 15.17 RCW;
> ...

Id. at 11 (quoting RCW 15.24.900(2)). Further, the Commission submitted the opinions of two experts, Jim Jesernig, a former Washington state legislator and Washington Director of Agriculture, and Jonathon Field, the CEO of the California Tree Fruit Agreement at issue in *Glickman*. 2003 WL 1900705 at 11. Both experts stated that the extensive network of federal and state regulatory schemes governing Washington growers has transformed the state's apple industry to one with comprehensive regulation like that in *Glickman*. *Id.*

Despite these facts, the court rejected the Commission's argument on the basis that only a comprehensive economic-based regulatory scheme, which restricts the freedom of its members to market their products, can fit within the Supreme Court's ruling in *Glickman*. *Id.* In *United States v. United Foods*, the Supreme Court limited its holding in *Glickman* to those cases where the challenged speech is merely part of a larger program restricting marketing autonomy of individual growers. *Id.* at 9. Holding a generic advertising program for mushrooms unconstitutional, the Supreme Court explained:

> 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 anti-trust laws, and nothing preventing individual producers from making their own marketing decisions. As the Court of Appeals recognized, there is no 'heavy regulation through marketing orders' in the mushroom market. Mushroom producers are not forced to associate as a group which makes cooperative decisions.
> ...
>
> We have not upheld compelled subsidies for speech in the context of a program where the principal object is speech itself. Although greater regulation of the mushroom market might have been implemented under the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, 7 U.S.C. § 601 *et seq.*, the compelled contributions for advertising are not part of some broader regulatory scheme. The only program the Government contends the compelled contributions serve is the very advertising scheme in question.

United Foods, 533 U.S. at 412, 415.

With this guidance, the court in this case concluded that the health, safety and other consumer protection regulations identified by the Commission do not render the apple advertising program a comprehensive regulatory scheme. 2003 WL 1900705 at 12. The court based its decision on this specific issue in large part on *Delano Farms v. California Table Grape Commission*, 318 F.3d 895 (9th Cir. 2003), a recent Ninth Circuit application of *United Foods* to the California Table Grape Commission. *Id.* at 11. There, the Table Grape Commission attempted to justify its generic advertising program by arguing that grapes are regulated by a series of California statutes addressing a wide range of industry concerns such as testing, equipment and standards for fruit maturity. *Id.* The Ninth Circuit rejected this claim stating: "Such consumer protection and information regulations apply to much of the economy, and are far from rising to the level of collectivization that controlled the result in *Glickman*." *Id.* (quoting *Delano Farms*, 318 F.3d at 899).

Beyond the nature of the Commission's regulatory structure, the court focused on four factors enunciated in *United Foods* that distinguished the mushroom market from *Glickman's* comprehensive regulatory scheme. 2003 WL 1900705 at 12. First, the court found that the Washington apple industry is not subject to any marketing orders. *Id.* Rather, producers make their own marketing decisions without a mandatory organization setting prices or imposing quantity controls, quotas, or market allocations. *Id.* Second, the court stated that while the activities of the Commission are exempt from antitrust laws, the Commission did not show that it is authorized to enter into agreements to violate the antitrust statutes. *Id.* Specifically, the Commission is not empowered to: (1) set minimum or maximum prices, (2) set minimum or maximum quantities of output, (3) set the number of suppliers, (4) set a minimum quality of product, (5) set other terms of sale, (6) limit entry into the market, (7) limit independent advertising by producers, or (8) limit the amount or type of information that can be disseminated. *Id.* Lastly, the court determined that prices in the Washington apple market are highly responsive to both supply and demand. *Id.* This could only be true in a highly competitive market as in a collectivized market the price would not respond to a fixed supply or demand. *Id.*

From these facts, the court concluded that the Commission's essential purpose is the advertisements and other marketing that it produces. *Id.* at 13. Because this communication is not part of a larger scheme of economic regulation, the court then held that its activities are not constitutionally acceptable under *United Foods*.

Commercial speech

Finally, the Commission contended that even if its activities are not government speech immune from First Amendment scrutiny or acceptable under *United Foods*, they are still a permissible regulation of commercial speech. *Id.* Under the Supreme Court's decision in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980), commercial speech, which is "expression related solely to the economic interest of the speaker and its audience," is protected under the First Amendment but to a lesser degree than other forms of constitutionally protected expression. *Id.* The level of protection afforded to a particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation. *Central Hudson*, 447 U.S. at 562. *Central Hudson* requires that any restriction on commercial speech not be more extensive than necessary to serve the interest it is designed to protect. *Id.* at 564.

The applicability of this doctrine to compelled assessments for generic advertising is not entirely clear. While advertising fits the classical definition of commercial speech, the Commission's assessments are not a restriction on the commercial speech of the defendant growers and packers in the sense that a restriction on their ability to advertise would be. 2003 WL 1900705 at 13. Rather, the objecting participants are compelled to pay for commercial speech. *Id.* In *Glickman*, the Supreme Court reversed the Ninth Circuit's application of *Central Hudson* for the purpose of testing the constitutionality of market order assessments for promotional advertising. *Glickman*, 521 U.S. at 474. In so doing, the Court stated in a footnote: "The Court of Appeals fails to explain why the *Central Hudson* test, which involved a restriction on commercial speech, should govern a case involving the compelled funding of speech." *Id.* (quoting footnote 18). Later, the Court in *United Foods* had an opportunity to consider application of *Central Hudson* to the challenged mushroom assessments but chose not to, stating: "We need not enter into the controversy, for even viewing commercial speech as entitled to lesser protection, we find no basis under either *Glickman* or our other precedents to sustain the compelled assessments sought in this case." *United Foods*, 533 U.S. at 412.

With these two decisions as guidance, the court in this case concluded that *Central Hudson* presupposes a restriction on speech. 2003 WL 1900705 at 13. Here, the defendant growers and packers' speech is being com-

Commodity promotion update/Cont. from page 5
pelled, not restricted. *Id.* Because the Commission's assessments do not restrict speech, the court concluded that it was "inappropriate" to apply *Central Hudson* to determine the constitutionality of the Commission's activities. *Id.*

***In re Washington State Apple*: remedy and aftermath**

In determining the scope of relief, the court faced an initial question of whether it should determine what percentage of the Commission's expenditures are unconstitutional and enjoin only that use. *Id.* at 14. There, the Commission would be compelled to refund only that portion of past assessment used to fund generic promotion and be free to collect future assessments to be spent for other constitutional purposes. *Id.*

After weighing the Commission's assertion that it has activities beyond advertising speech that merit funding with mandatory assessments, the court determined that the Commission's principal purpose is speech. *Id.* It noted that *United Foods* held that compelled subsidies were unconstitutional where their principal object is speech itself. *Id.* The court then held that because the Commission's principal purpose is speech and its assessments funding that speech are unconstitutional, the Commission should not be "recreated" in a constitutional form. *Id.* Rather, that task should be left to the Washington state legislature "where all stakeholders can engage in robust public debate, with the final decision left to those elected by the citizens of the State of Washington." *Id.*

Having defined the appropriate scope of its relief, the court granted a declaratory judgment that Washington Revised Code section 15.24.100, which permits the Commission to assess growers to fund its activities, is unconstitutional under both the United States and Washington Constitution. *Id.* Further, it granted equitable relief enjoining the Commission from collecting assessments under the statute. *Id.* Finally, it ordered the parties to file a joint report detailing the measure of damages for each defendant class member. *Id.*

Since the court's decision, the Commission has decided to close its doors according to a recent press release. C.R. Roberts, *Washington State Apple Commission Shuts Down Soon After Ruling on Fees*, *The News Tribune*, April. 11, 2003, http://www.tribnet.com/news/government/story. In implementing this decision, the Commission has dismissed thirty-three of its forty-eight employees and canceled the contracts of fifteen overseas representatives. *Id.* Approximately fifteen employees will be retained to finalize business. "Washington Apple Commission Folds," *Fruit Grower News*, Apr. 11, 2003, http://www.fruitgrowersnews.com/pages.

In its release, the Commission stated that it would be developing a plan to protect its intellectual property. *Id.* The Commission will also continue to fund commitments to other industry partners such as the U.S. Apple Association, which will be fully funded through August 31, 2003 and then funded at 25 percent through July 2004. The Commission ceased collecting mandatory assessments on March 31st, the day of the court's ruling.

ENDNOTES

[1] These programs include: beef (implemented in 1986; $86 million in annual assessments); blueberries (implemented in 2000; $1 million in annual assessments); cotton (implemented in 1966; $60 million in annual assessments); dairy products (implemented in 1984; $254 million in annual assessments); eggs (implemented in 1976; $18 million in annual assessments); fluid milk (implemented in 1993; $110 million in annual assessments); Hass avocados (assessment collections began in January 2003); honey (implemented in 1986; $3.5 million in annual assessments); lamb (implemented in July 2002; $3 million expected); mushrooms (implemented in 1993; $2 million in annual assessments); peanuts (implemented in 1999; $10 million in annual assessments); popcorn (implemented in 1997; $600,000 in annual assessments); pork (implemented in 1986; $57 million in annual assessments); potatoes (implemented in 1972; $9 million in annual assessments); soybeans (implemented in 1991; $62 million in annual assessments), and watermelons (implemented in 1990; $1.5 million in annual assessments). Geoffrey S. Becker, Congressional Research Service, Federal Farm Promotion Programs at 1-2 (November 2002).

[2] Beyond these issues, the Court also considered whether the Commission's assessments fail under the Washington Constitution whose Article I, Section V provides slightly greater protection for free speech than the First Amendment. 2003 WL 1900705 at 14. Because the Court determined that the Commission's activities violate the United States Constitution, it further concluded without discussion that the mandatory assessments also violate the state Constitution. *Id.*

Setoff/Cont. from p. 1
such creditor to the debtor that arose before commencement of the case under this title *against a claim of such creditor against the debtor* that arose before the commencement of the case ....'" *Id.* (emphasis supplied). The BAP stated that "[b]ecause the debtors had been discharged of personal liability for their debt to the [USDA] before commencement of [the] case, there is no 'claim of such creditor against the debtor.'" *Id.* It added that it "follows that because the [USDA] has no claim against the debtors it has nothing to setoff against what it owes to the debtors under the various agricultural programs." *Id.*

The BAP rejected the USDA's argument that it had a right to set off because the Chapter 7 discharge "only extinguished the debtors' personal liability and not *in rem* liability." *Id.* (citation omitted) (emphasis supplied). The USDA cited *In re Davidovich* , 90 F.2d 1533 (10th Cir. 1990) to support it argument. *See id.*

In *Davidovich*, the debtor brought suit against his former law partner for funds obtained via post-petition arbitration proceedings. *See id.* The defendant argued that he had a right to setoff the debt. *See id.* The bankruptcy court allowed the setoff and the holding was upheld by the district court. *See id.* On appeal to the Tenth Circuit, the debtor argued against setoff "because the defendant had not filed proof of claim and the debtor had already received his discharge." *Id.* The Tenth Circuit upheld the lower court's decision to allow the defendant a right of setoff "because [the defendant] held an *in personam* pre-petition claim against the debtor." *Id.* (emphasis supplied). In the present case, the BAP stated that the facts in *Myers* were not on point and the USDA had no right to setoff because it "held no pre-petition claim against the debtors due to the previous Chapter 7 discharge." *Id.*

—By Jay Kiiha, Ag Law Center Graduate Fellow

This material is based on work supported by the U.S. Department of Agriculture under Agreement No. 59-8201-9-115. Any opinions, findings, conclusions or recommendations expressed in this article are those of the author and do not necessarily reflect the view of the U.S. Department of Agriculture.

NCALRI is a federally-funded research institution located at the University of Arkansas School of Law Web site: http://www.nationalaglawcenter.org/ · Phone: (479) 575-7646 · Email: NCALRI@uark.edu