Court of Federal Claims lacks jurisdiction over boll weevil eradication foundation

An owner of a crop-dusting service who entered into a contract with a non-profit organization brought an action for breach of contract against the United States when the non-profit organization terminated the contract entered into between it and the crop-dusting service owner. *Morgan v. United States*, 55 Fed.Cl. 706, 708-9 (Fed. Cl. 2003). The United States Court of Federal Claims dismissed the crop-dusting owner's complaint for lack of jurisdiction because there was no privity of contract between the owner and the United States even though the non-profit organization complied with a federally-mandated regulatory scheme in spending federal monies pursuant to a boll weevil eradication program. *See id.* at 708-9.

Johnny C. Morgan, plaintiff, owned a crop-dusting service in Mississippi. *See id.* at 707. He entered into several contracts for crop-dusting services with the Southeastern Boll Weevil Eradication Foundation, Inc. ("Foundation"), a non-profit corporation organized under the laws of the state of Alabama. *See id.* The Foundation "ha[d] its roots in 7 U.S.C. § 1444a(d) (2000), which authorize[d] the Secretary of Agriculture to 'carry out programs to destroy and eliminate cotton boll weevils in infested areas of the United States.'" *Id.* The statutory scheme that authorized the boll weevil eradication program "envisage[d] federal money granted to state and local entities ... [that would] be 'responsible for the authority necessary to carry out the operations or measures.'" *Id.* (citation omitted). The boll weevil eradication program was administered by the Animal and Plant Health Inspection Service ("APHIS"). *See id.*

The APHIS entered into a Cooperative Agreement with the Foundation that outlined the APHIS' and the Foundation's respective rights and duties. See *id.* The APHIS "provide[d] thirty percent of the Foundation's costs," and its role was "limited to monitoring progress, providing technical advice, and giving guidance regarding use of federal funds." *Id.* Although the APHIS transferred federal property to the Foundation, it did not supervise how that property was used by the Foundation. *See id.* Morgan's crop-dusting service contract "was with the Foundation, and not the Department of Agriculture or APHIS" and the APHIS was not "involved in decisions made by the Foundation in connection with plaintiff's services." *Id.*

After the Foundation terminated its contract with Morgan, he brought an action against the Foundation and Hardeman County in the United States District Court for the Western District of Tennessee "pursuant to 42 U.S.C. § 1983 (2000), alleging violations of rights under the Fifth and Fourteenth Amendments to the Constitution, and alleging breach of contract by the Foundation." *Id.* The Foundation "sought dismissal of the contract claim on the ground that it should be brought in . . . [the Federal Claims Court]

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Debtors not engaged in farming operation at confirmation eligible for Chapter 12

The United States Bankruptcy Court for the District of Idaho has ruled that debtors who were actively engaged in dairy farming and were eligible for Chapter 12 relief on the date their petition was filed did not lose eligibility because they no longer operated their dairy farm at the time of the confirmation hearing. *In re Nelson*, 291 B.R. 861 (Bankr. D. Id. 2003). The court interpreted the phrase "engaged in a farming operation" contained in 11 U.S.C. § 101(18) to require only that "a debtor be farming at the time of filing . . . where there is an indication that a debtor has temporarily ceased farming activity during the pendency of the bankruptcy case, but intends to return to active farming operations when financially able to do so." *Id.* at 871.

Debtors Jeffrey and Terry Nelson operated a small dairy farm in Idaho. *See id.* at 864. They obtained a loan from Cache Valley Bank (Bank), creditor, so they could satisfy a debt owed to another creditor, Ron Randall. *See id.* When the loan proceeds were disbursed,

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and sought dismissal of the § 1983 claim because the Foundation was allegedly a federal agency, not amenable to suit." *Id.*

The district court ruled in favor of the Foundation on both counts and dismissed Morgan's complaint for lack of jurisdiction. *See id.* It determined that "'[b]ecause [the Foundation] [was] furthering a Congressional mandate and [was] under Federal government control as to how that mandate [was] carried out' it was a federal agency for purposes of eradication activities" and "was thus entitled to protection under § 1983 as 'the sovereign.'" *Id.* It also dismissed Morgan's breach of contract claim because it was within the Federal Claims Court's exclusive jurisdiction pursuant the Contract Disputes Act ("CDA"), 41 U.S.C. §§ 601-613. *See id.*

Morgan subsequently filed a new complaint for breach of contract in the Federal Claims Court against the Foundation. See *id.* The Foundation filed a motion to dismiss claiming "that the suit lack[ed] jurisdiction because it [was] not directed against the United States, as it must be in . . . [the Federal Claims Court]." *Id.* (citation omitted). After the Foundation filed its motion to dismiss, Morgan "sought leave to file an amended complaint that, it assert[ed], would cure any potential jurisdictional shortcomings of the first complaint." *Id.*

The Federal Claims Court stated that for purposes of evaluating Morgan's breach of contract claim, it would "assume that the grounds for jurisdiction have been restated as set out in [Morgan's] ... proposed amended complaint." *Id.* It explained that "[t]he proposed amended complaint [was] properly captioned against the United States, and asserte[d] that it acted through the Foundation." *Id.* It also explained that "[t]o the extent the contract is not subject to the CDA and the claim is for damages in excess of $10,000, as is the case here, ... [this court] is the exclusive judicial forum." *Id.* It also noted that "[i]f the contract is subject to the CDA, irrespective of the amount sought," the Federal Circuit "is the only judicial forum, although the appropriate board of contract appeals would have concurrent jurisdiction." *Id.* at 708 (citing 28 U.S.C. § 1346(a)(2) and 41 U.S.C. §§ 607, 609).

The court stated that "[t]he subject matter of the contract–crop dusting services–would, indeed, seem to fall within the sweep of the CDA" and that "[i]f that were the case, [the] plaintiff would face a preliminary obstacle–he would first have to obtain a decision by a contracting officer, presumably of the Department of Agriculture." *Id.* (citing 41 U.S.C. §§ 602(a)(2), 605). It also stated that "[a]s defendant points out, this is a jurisdictional requirement. Such a decision was not obtained and the case would need to be dismissed without prejudice until a decision was obtained. We decline to rely on that ground ... as it does not address the more basic problem with the suit," which is whether there was privity of contract between Morgan and the United States. *Id.*

The court explained that for it to exercise jurisdiction, privity of contract "must be found in a direct contractual relationship between two parties, one of whom is the United States." *Id.* It noted that "[t]he only two possible candidates for such a contract are the Cooperative Agreement between the Department of Agriculture and the Foundation and the crop-dusting contract between [the] plaintiff and the Foundation." *Id.* The court stated that "[t]he Cooperative Agreement containe[d] the proper defendant . . . but [the] plaintiff [was] not a party to that agreement" and that "[t]he second contract–between [the] plaintiff and the Foundation–[was] the more promising candidate, but only if the Foundation is an agency of the United States." *Id.*

Turning to the question of whether the Foundation was "'the United States' for purposes of § 1491(a)(1)," the court ruled that it was not. *Id.* It stated that

> The Foundation is a non-profit corporation organized under the laws of the State of Alabama. It is not a federally chartered corporation. The fact that the Foundation complies with a federally-mandated regulatory scheme in spending fed-

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AALA Editor.....Linda Grim McCormick

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

Contributing Editors: Randal Busby, Fayetteville, AR; Anne Hazlett, Indianapolis, IN; Gaby R. Jabbour, Fayetteville, AR; Roger McEowen, Manhattan, KS; Robert Achenbach, Eugene, OR.

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

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however, the Bank decided that the debtors' unsecured trade creditors should be paid instead of Randall. *See id.* The debtors' already difficult financial situation continued to worsen, and on October 18, 2002, they filed a Chapter 12 bankruptcy petition. *See id.*

The debtors continued to milk their cows after they filed their bankruptcy petition, even though many of their cows and equipment had been repossessed by secured creditors. *See id.* In December, 2002, they proposed "a Chapter 12 plan that called for them to retain the dairy operation and pay their debts primarily from its income." *Id.* (citation omitted). The debtors subsequently amended their plan and "agreed to allow the Bank relief from the automatic stay, and consented to the repossession and sale of their remaining cattle and equipment by the Bank." *Id.* The amended plan was to be funded primarily by the income Jeffrey earned as a dairy manager on another farm. *See id.* The debtors testified that they were committed to restarting their dairy operation as soon as they obtained the necessary funds. *See id.* at 864-65.

The Bank asserted that at the time of the confirmation hearing, the debtors "were not operating their farm, their cows and most of their farm equipment had been liquidated, and [that] they were generating no milk products nor farm income." *Id.* at 868. Thus, the Bank argued that the debtors were not eligible for Chapter 12 relief because at the time of confirmation they were not "engaged in any of the activities constituting a farming operation." *Id.* at 867. More specifically, the Bank argued that as a condition to having their plan confirmed, the debtors were required to demonstrate that they remained eligible for Chapter 12 relief at the time of their confirmation hearing. *See id.* at 868.

The Bank cited *In re Buckingham*, 197 B.R. 97 (Bankr. D. Mont. 1996), to support this argument, a case that held that "a Chapter 12 debtor must propose to 'engage in some farming operations over the entire duration of the plan . . .' to confirm a plan." *Id.* The court rejected the Bank's argument and discussed several decisions that contradicted the holding in *Buckingham*. *See id.*

In *In re Clark*, 288 B.R. 237 (Bank. D. Kan.

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Court affirms tools of trade exemption for wife

A bank and a bankruptcy trustee challenged a "tools of the trade" exemption claimed by debtors in certain farm equipment on the grounds that the debtor-wife did not have an ownership interest in the farm equipment. *In re Lampe*, No. 02-3221, 2003 WL 21267778 at *1 (10th Cir. June 3, 2003). Alternatively, they argued that the debtor-wife had an ownership interest in the equipment so that a partnership existed that precluded both debtors from claiming a "tools of the trade" exemption. *See id.* The United States Court of Appeals for the Tenth Circuit ruled that the bankruptcy trustee failed to prove that the debtor-wife lacked an ownership interest in the farm equipment and failed to meet its burden that a partnership existed between the husband and wife that would have precluded the debtors from claiming a "tools of the trade" exemption. *See id.*

As a married couple, Donald and Sheila Lampe established a farming operation over a period of two decades. *See id*. They filed for Chapter 7 bankruptcy. *See id*. Each claimed $7,500.00 worth of farm equipment as "tools of the trade" under the applicable Kansas exemption statute, Kan. Stat. Ann. § 60-2304(e). The bankruptcy trustee objected to Sheila's exemption and argued that "she did not have a sufficient ownership interest in the farm equipment to claim the exemption." *Id*. The United States Bankruptcy Court for the District of Kansas agreed with the trustee, and the Lampes appealed. *See id*.

The BAP reversed the bankruptcy court's decision and ruled that Sheila was entitled to the exemption. *See id.* The BAP concluded that the Lampes' farming operation was a "'family business operating as a proprietorship with each Debtor as a co-owner of the equipment.'" *Id.* (quoting *In re Lampe*, 278 B.R. 205, 213 (B.A.P. 10th Cir. 2002)). The bankruptcy trustee appealed the BAP's decision to the Tenth Circuit. *See id*.

The Kansas "tools of the trade" exemption, Kan. Stat. Ann. § 60-2304(e), provides as follows:

> Every person residing in [Kansas] shall have exempt from seizure and sale upon any attachment, execution, or other process issued from any court in this state, the following articles of personal property: . . . (e) The books, documents, furniture, instruments, tools, implements, and equipment . . . or other tangible means of production regularly and reasonably necessary in carrying on the person's profession, trade, business or occupation in an aggregate value not to exceed $7500.

Id. at *3 (quoting Kan. Stat. Ann. § 60-2304(e)). The court explained that to claim the exemption "the farm equipment must 'belong to' the debtor and must be 'necessary' and 'personally used for the purpose of carrying on his [or her] trade or business.'" *Id*. (quoting *Reeves & Co. v. Bascue*, 91 P. 77, 77 (Kan. 1907)).

The court stated that the trustee did not dispute that Sheila was a farmer or that she had to use farm equipment in her line of work. *See id*. Rather, the trustee argued that Sheila had no ownership in the farm equipment at issue and was not entitled to the exemption. *See id*. The court explained that once a party declares an exemption during bankruptcy, the burden of proving an invalid exemption rests with the objecting party. *See id.* It also explained that "'exemption laws are to be construed liberally in favor of exemption.'" *Id*. (quoting *In re Ginther*, 282 B.R. 16, 19 (Bankr. D. Kan. 2002)).

The trustee argued that Sheila Lampe did not acquire a property interest in the farm equipment merely because of her marriage with Donald. *See id*. However, the court stated that a wife can claim a "tools of the trade" exemption on farm equipment under certain circumstances. *See id*. at *4. The court "agree[d] with the trustee that spouses can own separate property under Kansas law, [but] they need not do so. Spouses may co-own property." *Id.* (citations omitted). The court further stated that "[t]hus, we agree with the BAP that the test for co-ownership for purposes of the tools of the trade exemption is not whether a spouse can demonstrate he or she acquired an ownership interest by purchase with separate property, gift, or inheritance .... Instead, the debtors' intent and conduct controls." *Id*. (citations omitted).

Applying the intent and conduct test, the court reiterated that the Lampes' testimony corroborated that they jointly owned the equipment. *See id*. at *5. Through their own statements, the Lampes established that Sheila had "worked on the farm and operated all equipment except the planter and combine." *Id*. The court ruled that "the trustee failed to meet its burden of proving Sheila Lampe lacked ownership interest in the farm equipment." *Id*.

In the alternative, the trustee argued that if Sheila had ownership, then a partnership existed between her and her husband, not a sole proprietorship. *See id*. Under Kansas law, this would exclude both from receiving the exemption because partners in a partnership are not allowed to claim a "tools of the trade" exemption. *See id*. The court stated that the BAP had already rejected this analysis and "held that the Lampes' farming operation 'was not a partnership in the legal sense, but a family business operated as a proprietorship with each Debtor as co-owner of the equipment.'" *Id*. (quoting *In re Lampe*, 278 B.R. at 213). The court stated that:

> [t]he Lampes co-owned the farm equipment, jointly participated in the work, and shared the profits. Thus, their farm operation reflects some elements of a partnership. But the existence of a partnership where the alleged partners are spouses raises complex legal issues. The usual indicia of a partnership are blurred by the marital relationship. The co-owning of property, sharing of profits, and the apparent authority for one spouse to act on behalf of the other are all common to the marital relationship even absent a business.

Id. at *6. (citations omitted). The court concluded that "[a]bsent a showing of some other indicia of a partnership beyond those incident to the marital relationship, the trustee has not met its burden of proving a partnership existed, and Sheila Lampe therefore is entitled to claim the 'tools of the trade' exemption." *Id*.

—Randal Busby, National AgLaw Center Research Assistant

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Debt Collection Improvement Act clarification

The FSA has issued a notice that, under the Debt Collection Improvement Act of 1996 (DCIA), a person delinquent on a non-tax debt to the federal government is ineligible for federal financial assistance, including direct loans (other than disaster loans), loan insurance and loan guarantees. Under The Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act of 2001, the DCIA excluded 2001 crop year Marketing Assistance Loans (MAL) and Loan Deficiency Payments (LDP) from the DCIA requirement. The FSA notice states that, because the 2002 appropriations act did not exempt MAL and LDPs from the DCIA requirement, the DCIA requirement shall apply to 2003 and subsequent crop year MAL and LDPs. Notice LP-1930.

—Roger McEowen,

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Eighth Circuit rules against beef check-off

By Anne Hazlett

In a long-awaited decision, a three-judge panel of the Eighth Circuit Court of Appeals has ruled against the Cattlemen's Beef Promotion and Research Board to enjoin the beef check-off program as unconstitutional. *Livestock Mktg. Ass'n v. USDA*, 2003 U.S. App. LEXIS 13630 (8th Cir., July 8, 2003). Issued on July 8, 2003, the ruling affirmed a decision by Judge Charles Kornmann of the United States District Court for the District of South Dakota that the national beef promotion program violates the First Amendment rights of cattle producers. *See Livestock Mktg. Ass'n v. USDA*, 207 F.Supp.2d 992 (D. S.D. 2002). Unless reversed in a rehearing by the full court or on review by the Supreme Court, the appellate decision will end the program in the Eighth Circuit.

Established in the 1985 Farm Bill, the beef check-off assesses $1 per head on the sale of live domestic and imported cattle along with a comparable assessment on imported beef products. States keep up to 50 cents on the dollar while forwarding the remaining money to the Cattlemen's Beef Promotion and Research Board ("Beef Board"), which administers the national promotion program subject to approval by the Department of Agriculture ("USDA"). These revenues can be used for promotion, education, and research initiatives that will improve the marketing climate for beef, including the highly-successful "Beef: It's What's for Dinner" campaign.

This litigation began when three South Dakota ranchers, along with the Livestock Marketing Association ("LMA") and Western Organization of Resource Councils, sued USDA and the Beef Board because they did not agree with the particular message they were being forced to support through the check-off assessments. The Eighth Circuit's decision upholding their right not to pay for speech to which they object is a blow to the survival of the beef promotion program. Of equal importance, the ruling also dims the outlook for the future of several other commodity promotion programs that are currently under legal challenge, including the nearly identical pork check-off.

Background

Under the Beef Promotion and Research Act ("Beef Act"), which created the beef check-off, the program was subject to approval by qualified beef producers through a referendum vote. 2003 U.S. App. LEXIS 13630 at 4. In 1988, the program was put to an initial referendum vote and approved. *Id.* at 5. Shortly thereafter, LMA began efforts to challenge continuation of the program. *Id.*

On November 12, 1999, LMA filed a petition with USDA requesting a referendum on whether to terminate or suspend the beef check-off program. *Id.* When the Secretary failed to take action on its petition, LMA, along with the Western Organization of Resource Councils (collectively "Check-Off Opponents"), brought suit in the United States District Court for the District of South Dakota. *Id.* There, the court granted a preliminary injunction on February 23, 2001, that enjoined the Beef Board from further use of beef check-off assessments to create or distribute any communications for the purpose of influencing governmental action or policy concerning the beef check-off program. *Id.* at 6; *See Livestock Marketing Ass'n v. United States Dep't of Agric.*, 132 F.Supp. 2d 817 (D. S.D. 2001).

Three months after the injunction was granted, the United States Supreme Court issued its decision in *United States v. United Foods, Inc.*, 533 U.S. 405 (2001). 2003 U.S. App. LEXIS 13630 at 6. That decision held that mandatory assessments imposed on mushroom producers for the purpose of funding generic mushroom advertising under the Mushroom Promotion, Research and Consumer Information Act of 1990, 7 U.S.C. § 6101 *et seq.*, violated the First Amendment. *Id.* at 6-7. The Court distinguished the circumstances in *United Foods* from those in *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997), where it upheld the promotion aspects of a marketing order for California tree fruits. *Id.* at 7. Specifically, the Court reasoned: "[In *Glickman*], the producers of tree fruit who were compelled to contribute funds for use in cooperative advertising 'did so as part of a broader collective enterprise in which their freedom to act independently was already constrained by the regulatory scheme.'" *Id.* (quoting *United Foods*, 533 U.S. at 412). In *United Foods*, by contrast, "the compelled contributions for advertising [were] not part of some broader regulatory scheme." 2003 U.S. App. LEXIS 13630 at 7-8 (quoting *United Foods*, 533 U.S. at 415). The advertising itself was the "principal object" of the regulatory scheme. 2003 U.S. App. LEXIS 13630 at 8 (quoting *United Foods*, 533 U.S. at 415).

In light of this ruling, the district court granted the Check-Off Opponents leave to amend their complaint to include a First Amendment claim. 2003 U.S. App. LEXIS 13630 at 8. On August 3, 2001, they filed an amended complaint adding a claim that the generic advertising conducted under the beef check-off program violates their rights to freedom of speech and freedom of association. *Id.* In particular, the plaintiffs objected to the use of their check-off dollars "to promote all cattle rather than American cattle," "to promote imported beef," "for generic advertising of beef," "for generic advertising which implies that beef is all the same," and for "messages that are contrary to the belief that only American beef should be promoted." *Id.* at 9 (quoting *Livestock Marketing Ass'n*, 207 F.Supp. 2d at 996-97).

Following a bench trial, the district court declared the check-off unconstitutional and prospectively enjoined the Beef Board from any further collections within three weeks of the order. 2003 U.S. App. LEXIS 13630 at 14. Importantly, the district court found:

> The beef check-off is, in all material respects, identical to the mushroom check-off: producers and importers are required to pay an assessment, which assessments are used by a federally-established board or council to fund speech. Each sale of a head of cattle requires a one dollar payment as a check-off. Thus, the beef check-off is more intrusive, if you will, than was the case with the mushroom check-off. The evidence presented to the court in this case was that at least 50% of the assessments collected and paid to the Beef Board are used for advertising. Only 10-12% of assessments collected and paid to the Beef Board are used for research. Clearly, the principal object of the beef check-off program is the commercial speech itself. Beef producers and sellers are not in any way regulated to the extent that the California tree fruit industry is regulated. Beef producers and sellers make all marketing decisions; beef is not marketed pursuant to some statutory scheme requiring an anti-trust exemption. The assessments are not germane to a larger regulatory purpose.

Id. at 10-11 (quoting *Livestock Marketing Ass'n*, 207 F.Supp. 2d at 1002).

From this decision, the Department of Justice filed an appeal on behalf of USDA. 2003 U.S. App. LEXIS 13630 at 14. A stay was granted that allowed the check-off to continue without interruption. *Id.* On appeal, the Eighth Circuit affirmed the lower court's ruling. *Id.*

While the decision struck down the Beef Act in its entirety, check-off assessments will continue pending further notification from the court. *Id.* at n. 3. The Department of Justice has 45 days to decide whether to ask for a rehearing en banc. News Release, "Appeals Court Upholds Ruling Against Beef Check-Off," National Cattlemen's Beef Association, July 9, 2003, http://www.beefboard.org. Further, the Beef Board has asked USDA and the Depart-

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Anne Hazlett is an attorney with Sommer Barnard Ackerson in Indianapolis, Indiana.

ment of Justice to begin the petition process for a writ of certiorari to the Supreme Court. *Id.*

Analysis

In affirming the district court, the Eighth Circuit first addressed the Beef Board's assertion that the Check-Off Opponents' First Amendment claim was barred because the advertising conducted pursuant to the Beef Act is government speech and, therefore, immune from scrutiny. 2003 U.S. App. LEXIS 13630 at 16-17. In so doing, the Eighth Circuit noted that the Supreme Court has never specifically addressed the government speech question in the context of a case involving a check-off program. *Id.* at 17. In *United Foods*, it was undisputed that a government speech argument had not been addressed in the court below. *Id.*

Since *United Foods*, several district courts have addressed the government speech issue in determining the constitutionality of different check-off programs. *Id.* However, in this case, the Beef Board specifically urged the Eighth Circuit to follow the reasoning and disposition of a Montana district court's decision in *Charter v. United States Dep't of Agric.*, 230 F.Supp. 2d 1121 (D. Mont. 2002). *Id.* at 18. Citing the Court's decision in *Ku Klux Klan v. Curators of the Univ. of Mo.*, 203 F.3d 1085 (8th Cir. 2000), the Beef Board contended that government speech may be identified based on the central purpose of the program, the degree of editorial content exercised by the government over the content of the message, and the extent to which the government bears responsibility for the content of the message. *Id.* at 20. In addition, the Beef Board cited the Supreme Court's ruling in *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374 (1995), where the Court stated that when "the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment." *Id.* at 20-21 (quoting *Lebron*, 513 U.S. at 400).

Applying these principles, the Beef Board emphasized that it was created pursuant to the Beef Act, that members of the Board serve at the discretion and under the control of the Secretary, that the Beef Act itself prescribes the content of the Beef Board's speech as generic promotion of beef and beef products, and that the Beef Act defines the powers and duties of the Beef Board vis-à-vis those promotional activities. 2003 U.S. App. LEXIS 13630 at 21. Moreover, the Beef Board argued that the First Amendment exemption for government speech applies whether it is the government itself speaking or a private entity enlisted by the government to speak on its behalf. *Id.*

In addition to this defense, the Beef Board also disputed a conclusion by the district court that the entity is more "akin to a labor union or state bar association whose members are representative of one segment of the population" than to a government entity that is "representative of the people." *Id.* at 12, 22 (quoting *Livestock Marketing Ass'n*, 207 F.Supp. 2d at 1004). In reaching this conclusion, the district court relied on the Third Circuit's decision in *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989), where the Court emphasized that funding for advertising under the Beef Act comes from an identifiable group rather than a general tax fund and reasoned that this type of funding creates a "coerced nexus" between the message and the group. 2003 U.S. App. LEXIS 13630 at 22. The Beef Board denounced this rationale, arguing that such reasoning based on a "coerced nexus" has been rejected by the Supreme Court. *Id.*

In evaluating the Beef Board's position, the court initially drew a clear distinction between government speech and compelled speech cases. *Id.* at 25. It criticized the Beef Board for framing its argument in a government speech context that considers the content of statements made. *Id.* The Check-Off Opponents have not invoked the First Amendment to influence the content of the generic beef advertising. *Id.* at 27. Rather, they assert their First Amendment free speech and free association rights to protect themselves from being compelled to pay for that speech with which they disagree. *Id.* With this posture, the court's analysis is governed by the Supreme Court's line of compelled speech cases. *Id.*

In compelled speech cases, the Supreme Court has generally applied a balancing-of-interests test to determine whether or not the challenged governmental action is justified. *Id.* at 28. For example, in *Keller v. State Bar*, 496 U.S. 1 (1990), the Court held that the compelled association and integrated bar were justified by the state's interest in regulating the legal profession and improving the quality of legal services. *Id.* Applying such a balance here, the Eighth Circuit was faced with a unique question of what constitutional standard applies when compelled subsidies are used to fund generic commercial advertising. *Id.* at 29.

On this issue, the Beef Board contended that even if the Beef Act is not immune from First Amendment scrutiny under the government speech doctrine, it passes constitutional muster as regulation of commercial speech under the Supreme Court's decision in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980). *Id.* *Central Hudson* involved a regulation promulgated by the New York Public Service Commission that completely banned promotional advertising by a utility company. *Id.* at 32, n. 7. The Court held that the rule violated the company's free speech right under the First Amendment because it was more extensive than necessary to further the state's governmental interest in energy conservation. *Id.* In reaching this conclusion, the Court explained its analysis as follows:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id. at 32 (quoting *Central Hudson*, 447 U.S. at 566).

Considering whether the *Central Hudson* standard was applicable to generic advertising for beef, the Eighth Circuit first noted that this issue was not directly addressed in *United Foods*. 2003 U.S. App. LEXIS 13630 at 29. There, the Supreme Court stated: "We have used standards for determining the validity of speech regulations which accord less protection to commercial speech than to other expression. That approach, in turn, has been subject to some criticism. We need not enter into that 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." *Id.* at 29-30 (quoting *United Foods*, 533 U.S. at 409-10). Beyond consideration of prior case law, the Supreme Court stated that the government had not relied on *Central Hudson* to challenge the lower court decision. 2003 U.S. App. LEXIS 13630 at 30.

Without direct instruction, the Eighth Circuit concluded it could infer that had the government relied on *Central Hudson* in *United Foods,* the Supreme Court would have adapted the *Central Hudson* test to the circumstances of that case. *Id.* at 31. In so doing, the Court acknowledged that *Central Hudson* involved a restriction on speech while the present case involves compelled speech. *Id.* at 31-32. However, it maintained that this distinction was outweighed by the fact that both *Central Hudson* and this matter involve government interference with private speech in a commercial

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Beef check-off/Cont. from page 5
context. *Id.* at 32.

In this case, the Eighth Circuit determined that the *Central Hudson* test would ask whether the Check-Off Opponents have a protected interest in avoiding being compelled to pay for the generic beef advertising—not whether the expression itself is protected. 2003 U.S. App. LEXIS 13630 at 33. Under the compelled speech line of cases, the Check-Off Opponents have a protected First Amendment interest at stake—the right to protect themselves from being compelled to pay for speech with which they disagree. *Id.* The central questions remaining are whether the governmental interest in the beef check-off is substantial and, if so, whether the beef program directly advances that governmental interest and is not more extensive than necessary to serve that interest. *Id.*

To resolve the first question, the court took into account the quasi-governmental nature of the Beef Board and the oversight exercised by the Secretary over the generic advertising conducted pursuant to the Beef Act. *Id.* at 34. Generally speaking, the greater the government's responsibility for the speech in question the greater the government's interest. *Id.* But, here the court agreed with the district court's conclusion that the advertising in question was not government speech and, therefore, considered the substantiality of the government's interest to be highly doubtful. *Id.*

Even if the Beef Board did have a substantial government interest protected by the check-off program, the court would have to consider whether the government's interest was sufficiently substantial to justify infringement of the Check-Off Opponents' First Amendment rights. *Id.* At that point, the analysis turns largely on the nature of the speech in question. *Id.* For example, in *Keller and Abood* the Supreme Court considered the nature of the speech at issue in terms of whether or not it was germane to the institutional purposes that justified imposition of mandatory dues in the first place. *Id.* at 36.

When assessing the nature of speech in the context of compelled speech issues, the Supreme Court has consistently stated that the analysis often comes down to a difficult exercise in drawing lines. *Id.* at 38. Nevertheless, in this case the Eighth Circuit declined to define a line, stating that the Supreme Court had already drawn the relevant boundary in *United Foods*. *Id.* at 39. There, the Supreme Court wrote:

> The statutory mechanism as it relates to handlers of mushrooms is concededly different from the scheme in Glickman; here the statute does not require group action, save to generate the very speech to which some handlers object. In contrast to the program upheld in Glickman, where the Government argued the compelled contributions for advertising were 'part of a far broader regulatory system that does not principally concern speech,' there is no broader regulatory system in place here. 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, ... 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.

Id. (quoting *United Foods*, 533 U.S. at 415-16). Applying this guidance to the beef check-off, the Eighth Circuit held that the district court did not err in holding that the Beef Act and check-off assessments are unconstitutional and unenforceable. 2003 U.S. App. LEXIS 13630 at 42. The court ruled that the beef check-off program is identical to the mushroom promotion program in all material respects. *Id.* at 41. Accordingly, it concluded that the government's interest in protecting the welfare of the beef industry by compelling producers and importers to pay for generic beef advertising was not sufficiently substantial to justify infringement on the Check-Off Opponents' First Amendment right to free speech. *Id.*

Implications

Beyond affirming the substance of the district court's decision, the Eighth Circuit also held that the district court did not abuse its discretion in fashioning a remedy. *Id.* at 42. When Congress established the beef check-off program in 1985, a severability provision was specifically omitted from the legislation. *Id.* In view of legislative history containing a clear expression of non-severability and the fact that the principal object of the Beef Act is what makes it unconstitutional, the court held that no aspects of the law can survive. *Id.*

Reaction to this decision from the National Cattlemen's Beef Association has been one of disappointment but not surprise. In a press statement issued on the day of the ruling, Eric Davis, president of the NCBA and an Idaho beef producer, stated: "We are deeply disappointed in the court's ruling today, but remain committed to our goal of protecting the future of the beef check-off. The beef check-off is absolutely critical to protecting the long-term marketing climate for beef. Without the check-off and its 'Beef: It's What's for Dinner' consumer promotions, the beef industry would not be as successful as it is today." News Release, "Court Upholds Ruling Against National Beef Checkoff," National Cattlemen's Beef Association, July 8, 2003, http://www.mobeef.org. Nevertheless, Davis went on to explain: "This ruling is not unexpected. Throughout the lengthy litigation process, we have anticipated that this decision would ultimately need to be made by the U.S. Supreme Court. America's beef producers can rest assured we will see this through to the end. Despite this court's decision, we believe in the merits of our case and in the merits of the beef check-off. We are confident that the beef check-off will ultimately prevail." *Id.*

The stay of the district court's injunction that has been in effect since the case was appealed to the Eighth Circuit will remain in place until the Beef Board determines its next course of action. In the meantime, the Ninth Circuit is currently considering an appeal in *Charter v. United States Dep't of Agric.*, 230 F.Supp.2d 1121 (D. Mont. 2002), where Judge Richard Cebull of the United States District Court for the District of Montana held the beef check-off program to be constitutional. Once decided, that decision and the Eighth Circuit's ruling in this matter will confront the Third and Tenth Circuit's opinions in *Goetz v. Glickman*, 149 F.3d 1131 (10th Cir. 1998), and *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989), where both courts upheld the check-off against constitutional challenge prior to the Supreme Court's decision in *United Foods*.

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> eral monies does not convert it into an agency of the government. As defendant correctly points out, it is well settled that federal control and supervision do not convert a private entity or an instrumentality of local government into the United States for purposes of determining privity of contract.

Id. (citations omitted).

The court concluded that the contract between Morgan and the Foundation did not establish a privity of contract with the United States, and it therefore dismissed Morgan's action for lack of jurisdiction. *See id.* at 709. It added that

> [w]hat we have said should not be taken to imply our disagreement with the district court's assessment that it did not have jurisdiction over a contract claim against the United States. In that respect we agree. If this were a contract claim against the United States, it would not properly be brought in district court, as plaintiff sought more than $10,000, and, in any event, the subject would seem to fall within the CDA. For that reason, transfer …. would be pointless.

Id.

—Gaby R. Jabbour, National AgLaw Center Research Assistant

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2003), the bankruptcy court determined that a Chapter 12 debtor was eligible for relief "even though the plan proposed to leave all farm land fallow under a government program that paid farmers to do so." *Id.* In *Clark*, the court held that "'[n]owhere does the Code suggest that a debtor must *continue* to satisfy the test for a 'family farmer' throughout the pendency of the case or through completion of the plan of reorganization. Nor does the Code suggest that a farmer's post-confirmation change in status divests him of eligibilty.'" *Id.* (quoting *Clark*, 288 B.R. at 246).

In *In re Lockard*, 234 B.R. 484 (Bank. W.D. Mo. 1999), the bankruptcy court considered a creditor's objection to a proposed Chapter 12 plan based in relevant part on the fact that "the debtors no longer resided on the farm property, the husband-debtor had taken up other employment, the farm operation was turned over to a hired manager, and the debtors had entered into a lease/purchase agreement with the manager for the eventual sale of the farm operation." *Id.* There the court ruled that "no Code provision requires a Chapter 12 debtor to continue farming, or to even represent he or she will do so, in order to remain eligible for Chapter 12 relief." *Id.*

The court also examined *In re Tart*, 73 B.R. 78 (Bankr. E.D.N.C. 1987), a decision relied on in *Buckingham*. *See id.* In *Tart*, the bankruptcy court ruled that:

> [s]ection 101[18] states that a "family farmer" means an individual "engaged in a farming operation;" no such language is found in the section 101[(20)] definition of "farmer." The inclusion of this language in § 101 [(18)] suggests that Congress intended to require more than that a "family farmer" be engaged in a farming operation during the taxable year preceding the year in which the petition was filed. If Congress intended to focus only on this time period, the "engaged in a farming operation" language would be superfluous since it would appear that an individual who, for the taxable year preceding the year in which the petition is filed, incurred at least 80% of his debt and received at least 50% of his income from a farming operation he owned or operated, as required by § 101[(18)], would necessarily have been engaged in a farming operation during that same time period. A statute should not be interpreted so as to render one part inoperative, superfluous, or insignificant.

Id. (quoting *Tart*, 73 B.R. at 81).

In the present case, the court explained that the "troubling aspect of the court's analysis in *Tart* as applied in *Buckingham* is that it goes too far." *Id.* It stated that in *Tart* the bankruptcy court correctly determined that the phrase "'engaged in a farming operation' in § 101(18) requires an examination of more than the debtor's tax returns for the taxable year preceding the year of a debtor's filing." *Id.* "That said, however," the court added, "the statutory language is ambiguous in that it can also be logically interpreted to require merely that the debtor, in addition to farming in the preceding year, also be actively farming at the time of filing." *Id.*

The court concluded that:

> [r]ead in this fashion, a debtor who engaged in farming last tax year, but who sold the farm assets and permanently discontinued the operation before filing for bankruptcy this year would, justifiably, not be eligible for relief under Chapter 12 to reorganize any remaining debt." Such were the facts in *Tart*. The Court agrees this is the result intended by Congress. Under such facts, the phrase ... "engaged in a farming operation" bridges the gap between a potential Chapter 12 debtor's activities at the end of the prior year and the time of filing in the current year. While such a reading gives meaning to all the language contained in § 101(18) and prevents the use of Chapter 12 by debtors who have permanently abandoned the business and lifestyle of family farming, it stops short of imposing the additional requirement advanced by *Buckingham*–a policy not expressed by Congress–that a debtor must continue farming operations over the entire course of the plan to qualify for the protections of Chapter 12.

Id. (citation omitted).

It also stated that "[a] debtor who temporarily discontinues operation of the family farm, who would otherwise qualify, would also seem worthy of relief under the provisions of Chapter 12." *Id.* It added that "a close reading of the cases relied upon in *Buckingham* further supports interpreting § 101(18) as requiring only that the debtor be engaged in farming at the time of filing in order to be eligible for Chapter 12 relief." *Id.* (citation omitted).

Finally, the court stated that "depending upon the facts of each case, the better-reasoned case law supports interpreting the phrase 'engaged in a farming operation' in § 101(18) as requiring only that a debtor be farming at the time of filing." *Id.* at 871. It added that "[t]his approach is certainly preferable ... where there is an indication that a debtor has temporarily ceased farming activity during the pendency of the bankruptcy case, but intends to return to active farming operations when financially able to do so." *Id.*

The court concluded that it "declines to adopt a broad, and potentially unnecessarily harsh, interpretation of the *Buckingham* decision, [but] [r]ather views that decision as limited to situations in which the debtor, after filing for bankruptcy, intends to permanently abandon active family farming." *Id.* It overruled the Bank's objection because the debtors "were obviously qualified for Chapter 12 relief on the date they filed their petition" and that they intend to recommence active farming "as soon as possible." *Id.*

The Bank also objected to the debtors' plan because it did not contain clear lien retention language and was not submitted in good faith. *See id.* at 863-67. The court's discussion of these objections is not included in this summary.

—Gaby R. Jabbour, National AgLaw Center Research Assistant

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Age of a child

The IRS has issued a revenue ruling which sets a uniform method of determining the age of a child for purposes of I.R.C. section 21 (dependent care credit), I.R.C. section 23 (adoption credit), I.R.C. section 24 (child tax credit), I.R.C. section 32 (earned income credit), I.R.C. section 129 (dependent care assistance programs), I.R.C. section 131 (foster care payments), I.R.C. section 137 (adoption assistance programs), and I.R.C. section 151 (dependence exemptions). For each of these provisions, a child reaches an age on the anniversary of the date of the child's birth, e.g., a child born on January 1, 1987, is 17 on January 1, 2004. Rev. Rev. 2003-72, I.R.B. 2003-33.

—Robert Achenbach,

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