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INSIDE

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IN FUTURE ISSUES

The new farm bill expands the availability of equitable relief for good faith violations of farm program rules

The new farm bill enacted on May 13, 2002 (the Farm Security and Rural Investment Act of 2002, Pub. L. 107-171), includes a provision, section 1613 (116 Stat. 219-221, to be codified at 7 U.S.C. 7996), that consolidates and strengthens authority for the provision of equitable relief to farm program participants for good faith violations of program rules, and provides important new authority for State executive directors to grant this relief. With the issuance, on October 31, 2002, of final regulations implementing section 1613 (*see* 67 Fed. Reg. 66304-66308, to be codified at 7 C.F.R. part 718, subpart D), it is a good time to examine what section 1613 does, and how it might help attorneys who represent farmers with farm program compliance problems.

For a number of years, U.S. Department of Agriculture (USDA) officials have had authority to grant equitable relief to farmers who violate farm program rules, but who do so acting in good faith reliance on an action of or information provided to the farmer by a USDA official. *See* former 7 U.S.C. § 1339a and 16 U.S.C. § 3830a[1], and 7 C.F.R. §§ 718.7 and 718.8.

This authority could be very important to farmers and their attorneys because the complexity of today's farm programs leads to many occasions of inadvertent noncompliance—either forms are filled out incorrectly or incompletely, or compliance requirements are misstated or misunderstood. At a time when a substantial portion of many farmers' annual income comes from USDA's program payments from the farm bill commodities (wheat, feed grains, cotton, rice, oilseeds, sugar, dairy, peanuts, and tobacco) or conservation program payments, program compliance is critical to the farmer's economic viability.

Unfortunately, this equitable relief authority has been used too sparingly, according to congressional aides. They say that the authority has not been used more often because it has required sign off by the national program office, which is a cumbersome process that removes the decision-making from the local level, where the equities involved in a particular case can better be understood.

Farmers who should have been taking advantage of this equitable relief authority did not. Instead, if the amount of money involved was not great, the farmer would be inclined

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A tribute to a pioneer:
Professor Harold (Hank) W. Hannah
January 16, 1911 – November 20, 2001

Harold "Hank" Winford Hannah, a respected lawyer, teacher, scholar, and agricultural law pioneer, died November 20, 2001 in Mt. Vernon, Illinois. Professor Hannah graduated from the University of Illinois College of Agriculture in 1932 and College of Law in 1935. He practiced law briefly but his destiny would be linked with two universities – his *Alma Mater* where he would spend thirty-nine years as a student, dean, director, and, most important, professor of agricultural law, and Southern Illinois University where he would later spend twenty years as an adjunct professor of agricultural law.

In December 1935, Professor Hannah first combined his love of agriculture and law by accepting a University of Illinois extension position working with production control programs of the New Deal. He became Assistant to the Dean after the U.S. Supreme Court declared parts of the Agricultural Adjustment Act unconstitutional, effectively eliminating Hannah's former position. He also served as Executive Secretary of the newly created Illinois State Soil Conservation Districts Board, an early step in his lifelong involvement with conservation. Professor Hannah's dream of an academic program

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to take the penalty without a fight. Or, if the loss of payments was substantial, the farmer was forced to use the slow, and sometimes costly, National Appeals Division process, where the outcome would be uncertain at best.

Thus, when Congress took up a new farm bill this year, several members of Congress expressed interest in recrafting the good faith reliance provision to make it more user-friendly for farmers. Their work resulted in the enactment of section 1613.

Section 1613 restates the substance of the equitable relief authority in the former 7 U.S.C. §1339a and 16 U.S.C. § 3830a, that is, that equitable relief may be granted when the farmer, acting in good faith, relies on the action or advice of a USDA official to the farmer's detriment. But, it also adds new equitable relief authority not found in the older statutes—relief for *any* failure to comply fully with program requirements if the farmer makes a good faith effort to comply, regardless of whether or not the failure is based on USDA action or advice. Sec. 1613(b). [NOTE: One of the former regulations—7 C.F.R. § 718.7—contains relief authority similar to the new statutory language, but it only applies to the award of price support benefits, and only if the regulations governing the specific price support program involved specifically authorized it.]

Following are two examples of the fact situations where each of these two relief authorities under section 1613 might come into play. (1) *Detrimental reliance*: the CED (County executive director) told a farmer that he could plant turnips on his farm and still receive AMTA payments (agricultural market transition payments under the farm bill) but was in error in giving that advice; due to the illegal plantings, however, the farmer is out of compliance and his AMTA payments must be stopped. (2) *Good faith effort*: A neighbor's cows escape and are spotted by the CED grazing on the farmer's conservation reserve program (CRP) acreage, putting the farmer out of compliance with CRP rules and thus nullifying his CRP contract, even though he rounded up the cattle on his own as soon as he discovered them and got them off his CRP land.

In addition, section 1613 extends the equitable relief power to the State executive directors (SEDs) of the Farm Service Agency (FSA). Sec. 1613(e).

The FSA programs, which are the loan and payment programs commonly known as the farm programs, are operated in a decentralized fashion—the national FSA office relies on state and county officials to actually deal directly with farmers, make payments, and ensure compliance. Each state is headed by a State executive director, and each county has a farmer-elected county committee, which in turn hires a county executive director to operate the county office.

The new equitable relief power given to the SED is the same as that spelled out for the national USDA offices in new section 1613. By extending the equitable relief authority down to the State level, it is believed that the process will be simplified and more timely (cutting out one level of review), and more responsive to farmers.

The new SED authority, however, is subject to several monetary limitations. The

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combining law and agriculture led to his 1939 appointment in the Department of Agricultural Economics. World War II, however, interrupted his budding academic career.

An officer in the US Army Reserve, H. W. Hannah volunteered to be a paratrooper and was transferred to the 506th Parachute Infantry Regiment. On June 6, 1944, Major Hannah parachuted into Normandy with the Army's 101st Airborne Division. On September 17, he jumped into Holland with the 101st as part of Operation Market-Garden, a campaign memorialized in a book and movie, *A Bridge Too Far*. Four days later shrapnel pierced his right shoulder. After an arduous year-long convalescence, Lt. Colonel Hannah, recipient of the Purple Heart, Legion of Merit, and Croix de Guerre, retired from the Army. He returned to the University of Illinois in October 1945.

With thousands of other veterans also returning as students under the GI Bill, the University of Illinois created the Division of Special Services for War Veterans, a unique academic unit analogous to a college. Professor Hannah was asked to serve as Director of the Division, which he led through its formative and most challenging years before returning to his department in 1947.

Professor Hannah was a superb teacher, an engaging speaker on and off campus, a prolific writer, a respected faculty colleague, a thoughtful but humble philosopher, and an early leader in developing agricultural and veterinary law in the United States. In 1949, Hannah published *Law on the Farm*, the first of his many books. In 1952 Hannah also began teaching Veterinary Jurisprudence in the College of Veterinary Medicine. During the McCarthy era Professor Hannah served as President of the local chapter of the American Association of University Professors; he helped to defeat two Illinois Senate bills that he thought would result in intrusive surveillance of textbooks and teachers. He also played an instrumental role in creating the Faculty Advisory Committee, an important institution for addressing faculty grievances.

Professor Hannah was Associate Dean and Director of Resident Instruction in the College of Agriculture from 1954-59 and, among other international accomplishments, helped build an agricultural university in Uttar Pradesh, India. But Hannah viewed the role of professor as the greatest job in the University. In this role he received many awards and recognitions, including the College's prestigious Paul A. Funk Award in 1971, the year he retired. During his farewell remarks, Professor Hannah shared an insight that would guide his remaining years: "If the concept of the educated man means anything, it means that age does not bring bitterness or the cessation of the use of our faculties. Disuse, not age, is the spoiler."

With his wife, Bowie, Professor Emeritus Hannah moved to White Oaks, a farm in southern Illinois where he could be close to the land, work with wood from his sawmill, enjoy his garden, and continue his engagement with the law. As Adjunct Pro-

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Michigan District Court finds pork promotion program unconstitutional

By Anne Hazlett

Nearly six months after a South Dakota district court found the beef check-off program to be in violation of the First Amendment, the future of the pork promotion program is threatened with a similar fate. On October 25, 2002, the United States District Court for the Western District of Michigan declared the Pork Production, Research and Consumer Education Act ("Pork Act"), 7 U.S.C. § 4801 *et seq.*, unconstitutional. *Michigan Pork Producers, et al. v. Ann Veneman*, 2002 U.S. Dist. Lexis 20865 (W.D. Mich., October 25, 2002). The court order would have halted all check-off collections and enjoined operation of the pork promotion program within thirty days. *Id.* at 59-60. However, on November 15th the Sixth Circuit Court of Appeals granted a request for stay made by the Department of Justice, which allows the pork check-off to continue while an appeal is pending.

Created in 1985, the pork check-off obligates producers to contribute 40 cents of every $100 dollars in sales to support a national marketing program for pork and pork products. Specifically, such assessments are used to fund promotional and informational campaigns as well as research in a variety of areas relating to pork consumption, including new product development. Known for its advertising slogan "Pork. The Other White Meat," the pork check-off boasts having increased pork consumption by twenty-one percent since its creation. Press Release, "Stay Granted by Appeals Court to Continue Pork Check-off," The National Pork Board, November 15, 2002, http://www.porkboard.org.

This dispute over the pork program's legality actually began as a judicial challenge to a 1998 referendum of producers asking whether the executive order authorizing the program under the Pork Act should continue. 2002 U.S. Dist. Lexis 20865, at 4-5. There, 15,951 producers voted in favor of terminating the program, with 14,396 producers voting for its continuation. *Id.* at 5. When the Secretary of Agriculture ("Secretary") directed the Agricultural Marketing Service to terminate the check-off, the National Pork Producers Council ("Producers Council") and several state pork producer associations, including the Michigan Pork Producers Association, brought suit to challenge both the counting of votes and the legal basis for the program termination. *Id.* (citing *Michigan Pork Producers Assn. v. Campaign for Family Farms*, 174 F.Supp.2d 637 (W.D. Mich. 2001)). Following the filing of that action, Secretary of Agriculture Ann Veneman settled with the plaintiffs by agreeing not to terminate the program based on the referendum vote. 2002 U.S. Dist. Lexis 20865, at 5 (citing 174 F.Supp.2d at 639).

Notwithstanding the terms of this settlement, the suit continued when the Campaign for Family Farms ("CFF"), a community and public interest advocacy group based in Minnesota, intervened to challenge the legality of the settlement. 174 F.Supp.2d at 639. Eventually bringing a cross-complaint against the pork producer plaintiffs and government defendants, CFF asserted that the pork check-off violates the First Amendment protections for freedom of speech and association under the United States Supreme Court's decision in *United States v. United Foods, Inc.*, 533 U.S. 405 (2001). 2002 U.S. Dist. Lexis 20865, at 5-6. CFF sought a declaration that the pork program is unconstitutional and an injunction preventing operation of the program and the taking of mandatory assessments. *Id.* at 7.

Each party filed a motion for summary judgment. *Id.* at 2. After extensive briefing, the court dispensed with oral argument and granted summary judgment in favor of CFF. *Id.* at 6, 58.

Standing and capacity

In rendering a decision in favor of CFF, the court faced two initial questions of whether CFF had the capacity to sue and whether CFF and its named members had standing. *Id.* at 21. On the first issue, the governmental defendants argued that CFF lacked capacity because it is a "campaign," not an "association." *Id.* at 23. In making its case, the government relied on *Brown v. Fifth Judicial District Drug Task Force*, 255 F.3d 475 (8th Cir. 2001), a case holding that a drug task force lacked standing to assert rights on behalf of its constituent law enforcement entities, and *Roby v. Corp. of Lloyd's*, 796 F.Supp. 103 (S.D.N.Y. 1992), a decision rejecting the capacity of a business syndicate. *Id.*

Rejecting this argument, the court first noted that Rule 17 of the Federal Rules of Civil Procedure, which requires that actions be prosecuted and defended by a "real party in interest," allows suit by an unincorporated association to the same extent as recognized by the laws of the forum state. *Id.* at 22. Here, the government had shown no controlling legal definitions that distinguish a campaign from an unincorporated association. *Id.* at 23. Moreover, the Court found that the precedents cited were inapplicable because different interests and organizational structures were at stake in this case. *Id.* at 24.

Turning to the issue of standing, the Court first set forth the standing requirements for unincorporated associations as enunciated by the Supreme Court in *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977). *Id.* at 25. Under *Hunt*, the standing requirements for an unincorporated association are: (1) the individual organization members would have standing in their own rights, (2) the interests sought to be protected are germane to the organization's purpose, and (3) neither the claims asserted nor the relief requested require participation by individual members. *Id.* (citing *Hunt*, 432 U.S. at 343). On the first prong, the Court pointed to sworn, unrebutted testimony that CFF includes 540 members who oppose mandatory assessments on hog sales. 2002 U.S. Dist. 20865, at 25. These members were contacted through telephone surveys and mailings to ascertain their opposition to the use of check-off funds. *Id.* This action was filed only after CFF had received objections to the pork promotion program from hundreds of its members. *Id.* at 26. From this evidence and "the lack of any real opposition to it," the Court found as a matter of law that CFF's individual members would have standing to sue in their own right. *Id.* As to the other two prongs, the Court concluded that the interests sought to be protected in this suit—the free speech and association interests of family farmers—are germane to CFF's purpose as an umbrella group for family farm organizations and individual farmers to challenge the pork promotion program. *Id.* at 30. Further, CFF's individual members need not participate to obtain the relief sought. *Id.* Thus, the court determined that CFF had standing to bring suit. *Id.*

In reaching this conclusion, the court rejected a contention that CFF lacked standing because some of its members receive federal subsidies as hog producers that are greater in value than the amount of check-off assessments paid. *Id.* The court reasoned that even if this premise is true, it is irrelevant as the government cannot "buy" a system of unconstitutional assessments through the creation of a separate and unrelated framework of farm subsidies. *Id.* at 31. In addition, the court declined to follow an argument that the four named members of CFF were without standing in light of the size of their hog operations, the amount of the assessments they paid and the likelihood that they will pay future assessments. *Id.* In the case of Lawrence Ginter, for example, the court concluded that he had standing despite having retired from hog

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sales in 2000 because he had "left the door open" to selling hogs in the future and, thus, was capable of incurring the same harm. *Id.* It then stated that concerns raised about the size of the members' production and the amount of money they paid into the check-off were inconsequential because the record revealed that each of the members had some financial interest in hogs sold subject to the check-off assessment and continue to have an interest in animals that will be sold in this manner. *Id.* at 32.

Government speech

Having denied challenges to CFF's capacity to sue and standing, the court considered whether communications funded by the pork check-off program were protected from a First Amendment challenge as government speech. *Id.* at 36. Before reviewing the federal decisions addressing this question, the court first analyzed the extent to which the government is involved in administration of the Pork Act. *Id.* at 38. There, the court concluded that the organizational structure behind promotional activities funded under the Pork Act entails extensive government oversight. *Id.*

The National Pork Board ("Pork Board"), the entity charged with administering the pork check-off, is a fifteen-member board appointed by the Secretary. *Id.* In drafting the Pork Act, Congress intended that the Pork Board employ private contractors for the purpose of carrying out check-off activities. *Id.* However, until July of 2001, the primary contractor for this function was the Producers Council, which is a not-for-profit corporation. *Id.* at 38-39.

Under the Pork Act, the Pork Board's planning and operations are to be overseen and approved by the Secretary. *Id.* at 39. In this role, the Secretary has administrative authority to fire Pork Board members when continued service would be detrimental to the purposes of the Pork Act. *Id.* at 40. Further, the Department of Agriculture regularly reviews the advertising and project budgets of the Pork Board. *Id.* at 41. The Department also reviews the budgets of the state pork associations who receive a portion of assessment funds. *Id.* As part of these reviews, the Department can request modification of the budgets submitted. *Id.* It can also require repayment of disallowed items. *Id.* Finally, the Department reviews each advertisement funded under the Pork Act before it is aired. *Id.* at 42. In such reviews, the Department ensures that the advertisement is factual, not disparaging of other commodities and consistent with the purposes of the Pork Act. *Id.* In addition, the Department also reviews the advertisements funded by state pork associations. *Id.*

Against this background, the court reviewed two recent cases that have addressed the government speech question in the context of a constitutional challenge to the beef check-off program. First, the court looked at the Third Circuit's decision in *United States v. Frame*, 885 F.2d 1119 (3rd Cir. 1989). *Id.* at 42. Like the case at hand, the court in that case found a close connection between activities financed under the Beef Promotion and Research Act, 7 U.S.C. § 2901 *et seq.*, and the government. *Id.* at 43. Under the beef check-off, the Cattlemen's Board and its operating committee are appointed by the Secretary. *Id.* Members of the Board as well as the Operating Committee may be removed if the Secretary determines that the person's continued service would be detrimental to the purposes of the beef check-off statute. *Id.* at 44. Moreover, the Secretary makes all final decisions about projects funded under the promotion program. *Id.* All budgets, plans and projects approved by the Board must also be approved by the Secretary. *Id.* And, no contracts for implementation of any promotion plan may be entered into without the Secretary's approval. *Id.*

Nevertheless, the *Frame* court concluded that the communications funded under the Beef Promotion Act were not properly characterized as government speech. *Id.* at 44-45. Looking at the Supreme Court's decisions in *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), and *Wooley v. Maynard*, 430 U.S. 705 (1977), the court reasoned that the justification for distinguishing compelled support of the government from support of a private association does not fit comfortably with a "self-help" measure like the beef check-off. *Id.* at 46-47. In *Abood*, the Supreme Court upheld a First Amendment challenge to the use of union dues by a public school system to finance political speech. According to Justice Powell, the rationale for allowing the government to compel the payment of taxes and to spend money on controversial projects is that the government is representative of the people. *Id.* at 47. In that case, the same could not be said of a union because a union is representative of only one segment of the population whose members have certain common interests. *Id.*

Applying that logic to the beef promotion program, the Third Circuit concluded that the Cattlemen's Board is an entity "representative of one segment of the population, with certain common interests." *Id.* Members of the Cattlemen's Board and its operating committee are not government officials despite being appointed by the Secretary. *Id.* Rather, they are individuals from the private sector. *Id.* Further, the pool of nominees from which the Secretary selects Board members is determined by private industry organizations from the various states. *Id.* Organizations are eligible to participate in Board nominations only if they have a history of stability and permanency as well as a primary or overriding purpose to promote the economic welfare of cattle producers. *Id.* Thus, the *Frame* court determined that the Secretary's extensive supervision of beef check-off activities did not transform the beef promotion program into government speech. *Id.* at 48.

In addition to the *Frame* decision, the court also addressed the District of South Dakota's recent ruling in *Livestock Marketing Assn. v. United States Dept. of Agriculture*, 207 F.Supp.2d 992 (D. S.D. 2002). *Id.* There, on the government speech question, that court wrote: "Common sense tells us that the government is not 'speaking' in encouraging consumers to eat beef. After all, is the 'government message' therefore that consumers should eat no other product or at least reduce the consumption of other products such as pork, chicken, fish or soy meal? The answer is obvious." *Id.* (quoting 207 F.Supp.2d at 1006).

On the basis of these two precedents, the court concluded that the government speech defense to scrutiny of the pork promotion program failed as a matter of law. *Id.* at 49. Describing the pork check-off as a "self-help program" for pork producers, the court stated that the Secretary's involvement with the workings of the Pork Board did not translate the program's advertising and marketing into government speech as that term has been interpreted by the federal courts. *Id.* In closing on this issue, the court scolded: "You cannot make a silk purse from a sow's ear." *Id.*

Freedom of speech and association

After ruling that the pork check-off was not immune from a First Amendment challenge, the Court then turned to the freedom of speech and association claims. *Id.* at 49-50. With respect to freedom of speech, CFF cited a variety of factors in support of its opposition to generic advertising of pork. *Id.* at 7. First, CFF members asserted that they raise hogs, not pork in the sense of processed meat. *Id.* Thus, the pork promotion program supports a commodity that they do not sell. *Id.* Second, CFF maintained that the pork check-off benefits packers and retailers to the detriment of its members because the percentage revenue for hog producers from each dollar of pork sold has declined in recent years while the check-off has been operating. *Id.* at 7-8. Third, CFF claimed that generic advertising fails to promote the unique qualities and attributes of hogs raised on family farms. *Id.* at 8. Fourth, CFF contended that the pork check-off promotes "lean pork" which its members are opposed to because of the unhealthy and inhumane conditions that they believe are connected to its production. *Id.* Fifth, several CFF members opposed the pork check-off advertising campaign because it misrepresents pork as a white meat and discourages the sale of bacon and ham. *Id.* Finally, CFF argued that the pork program supports some brand name advertising of large processors such as Hormel and Smithfield. *Id.* at 9. CFF

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stated that in cases where its members are raising and slaughtering hogs in "non-factory" conditions, this brand advertising is directly supporting its competitors. *Id.*

Beyond generic advertising, CFF also opposed the educational programs carried out under the pork check-off. *Id.* Specifically, CFF views these efforts as "misinformation programs" because they propagate the view that large commercial farming operations are humane. *Id.* For example, one CFF member stated: "These programs are for people that work in the corporate hog factories that have never seen a hog before they went to work for a huge conglomerate. I object because this is independent producer money going to a program that is focused on corporate hog factories and not the independent producers who believe in animal husbandry and who have been handling hogs humanely for years." *Id.* at 10.

Lastly, CFF challenged research funded under the pork check-off. *Id.* As part of the program's research component, the Pork Board has funded expenditures for "antimicrobial resistance and alternatives research." *Id.* Some CFF members oppose these efforts and believe that positions taken by the Pork Board regarding antibiotic use jeopardize the safe consumption of pork. *Id.*

As to freedom of association, CFF objected to "forced" association with the Pork Board, the Producers Council, and the state producer associations who receive a percentage of the assessments to fund their own advertising. *Id.* at 11. CFF members asserted they are "forced" to associate with the Pork Board in that they are required to obtain a pork quality assurance certification to sell hogs, which is issued by the Board. *Id.* Until 2002, this certification also associated producers with the Producers Council, which carried out the Pork Board's activities. *Id.* CFF members stated they oppose being associated with the state producer associations because these groups are involved in marketing and lobbying activities to which CFF members have strong philosophical and commercial objections. *Id.*

With these contentions, the court set forth the two Supreme Court decisions guiding its review: *United States v. United Foods, Inc.*, 533 U.S. 405 (2001) and *Glickman v. Wileman Brothers*, 521 U.S. 457 (1997). *Id.* at 50. In *United Foods*, the Supreme Court considered the constitutionality of the Mushroom, Promotion, Research and Consumer Information Act of 1990, 7 U.S.C. § 6101 *et seq.*, which created a generic mushroom advertising program funded through mandatory assessments on mushroom sales. *Id.* In analyzing a First Amendment challenge to this program, the Court reviewed its decision in *Glickman*, which upheld a generic marketing program for California tree fruits. *Id.* at 51. The *United Foods* decision explained this ruling as follows:

> 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 'collective 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 'did so as a part of a broader collective enterprise in which their freedom to act independently was already constrained by the regulatory scheme.' The opinion and the 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 mandated participation in an advertising program with a particular message was the logical concomitant of a valid scheme of economic regulation.

Id. at 51-52 (quoting *United Foods*, 533 U.S. at 412). Applying *Glickman* to the mushroom promotion scheme, the Court in *United Foods* held that the program was contrary to the First Amendment. 2002 U.S. Dist. Lexis 20865, at 52. Unlike the tree fruit program, the mushroom statute involved an industry that was not collectivized, was not exempt from anti-trust laws, and was not the subject of a marketing order. *Id.* On those facts, the court reasoned: "The mandated support is contrary to the First Amendment principles set forth in cases involving expression by groups which include persons who object to the speech, but who, nevertheless, must remain members of the group by law or necessity." *Id.* at 52-53 (quoting *United Foods*, 533 U.S. at 412).

Using this guidance, the court stated that it would apply the rule in *United Foods* as the pork check-off more closely resembles the facts in that case than those in *Glickman*. 2002 U.S. Dist. Lexis 20865, at 53. Like the mushroom industry, pork is not subject to a comprehensive and collectivized marketing order. *Id.* And, because pork is not a specialized industry there is no need for a mandated marketing approach. *Id.* Beyond these similarities, the court then described the importance of CFF's philosophical, political and commercial objections to the speech funded by the pork promotion program:

> In days of low return on agriculture, the decisions of an individual farmer to devote funds to uses other than generic advertising are very important. Indeed, the frustration of some farmers are likely to only mount when those funds are used to pay for competitors' advertising, thereby depriving the farmer of the ability to pay for either niche advertising or non-advertising essentials (such as feed for livestock). This is true regardless of whether objecting farmers are correct in their economic analysis that the assessments and speech do not sufficiently further their own particular interests.

Id. at 54. In concluding that the pork program violates the First Amendment rights of CFF members to freedom of speech and association, the court warned: "The government has been made tyrannical by forcing men and women to pay for messages they detest. Such a system is at the bottom unconstitutional and rotten." *Id.*

Remedy

Determining that the generic advertising funded by the pork check-off is contrary to the First Amendment, the court granted both the declaratory and injunctive relief requested by CFF. *Id.* at 57. The court issued a declaration stating that the Pork Act is unconstitutional. *Id.* at 59. It then enjoined the collection of assessments under the Pork Act and ceased operation of the pork check-off program effective November 24th. *Id.* at 59-60.

On November 12, 2002, the Department of Justice filed a request for stay on behalf of the Department of Agriculture. Within three days, the Sixth Circuit granted this request allowing the pork check-off to continue without interruption while an appeal is pending. Press Release, "U.S. Court of Appeals Rules that Pork Producers and Importers Must Continue to Pay Pork Checkoff Assessments," U.S. Department of Agriculture, Nov. 15, 2002, http://www.usda.gov.

Tribute/Cont. from p.2

fessor of Law at Southern Illinois University-Carbondale, Professor Hannah taught agricultural law in the School of Law (1975-95) and in the College of Agriculture. He also practiced law and served as legal counsel for the Illinois Veterinary Medical Association. Hannah helped to found the American Agricultural Law Association, being the "senior" participant in the 1979 and 1980 pre-organizational meetings held in Chicago and Urbana. In Minneapolis, at the December 1980 organizational meeting of AALA, Hannah gave a special invited address – the forerunner of the Association's annual President's Address.

In the years that followed, Professor Hannah continued to write–books and chapters, monthly legal briefs for the *Journal of the American Veterinary Medical Association*, and articles in law reviews. He also helped

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Equitable relief/Cont. from p. 2
SED cannot grant a farmer relief from an error, if the relief will amount to more than $20,000 in benefits; nor can the SED grant relief to a farmer who already has obtained equitable relief from other errors during that year that total $5,000. Further, the SED may not grant relief to a farmer and other farmers with the same error if the cumulative amount of relief to all such farmers totals more than $1,000,000. For example, if the CED told 100 farmers that they could plant turnips on their program acreage, and all 100 farmers apply for relief that totals more than $1,000,000, then the SED cannot act. Of course, FSA's national office could offer the relief, but the petition would have to be directed there.

It should be noted that section 1613 does not apply to agricultural credit or the crop insurance programs (section 1613(a)(2)(B)); nor does the new SED authority apply to payment limitations or highly erodible land and wetland conservation requirements (section 1613(e)(3)). Further, USDA decisions on good faith relief petitions under section 1613 are not subject to judicial review under the Administrative Procedure Act (5 U.S.C. ch. 7). Sec. 1613(f).

As a way for Congress to monitor USDA's use of its section 1613 authorities, the agency will have to report to the agriculture committees of Congress annually on the number of requests for equitable relief and the disposition of the requests. Sec. 1613(g).

Subsection (c) of section 1613 spells out five categories of equitable relief that are available: (1) the farmer will be allowed to keep loans, payments, or other benefits he or she otherwise would be required to return; (2) the farmer's eligibility to receive future benefits will be restored; (3) the farmer will be allowed to continue to participate in any contract executed under a program (especially of note for the AMTA and CRP programs, which are governed by multi-year contracts); (4) in the case of conservation programs, the farmer will be permitted to re-enroll land into the program; and (5) such other relief as FSA determines appropriate. *See also* 67 Fed. Reg. 66307-66308, to be codified in 7 C.F.R. § 718.305(a).

On the other hand, as a condition of obtaining the relief, the farmer can be required to take action to remedy the failure to comply, i.e., to pull up those offending turnips. Sec. 1613(d), 67 Fed. Reg. 66308, to be codified in 7 C.F.R. §718.305(b)

The section 1613 good faith relief authority will not solve every problem that arises when a farmer inadvertently trips over a farm program requirement. For one thing, the term "good faith" is not defined in the law, and no doubt USDA will err on the side of caution in interpreting it. Further, the regulations add rules not in section 1613 that might limit the use of equitable relief. First, the regulations provide that good faith relief is not available if the farmer "had sufficient reason to know that the action or information upon which they relied was improper or erroneous or where the participant acted in reliance on their own misunderstandings or misinterpretation of program provisions, notices or information." 67 Fed. Reg. 66307, to be codified in 7 C.F.R. §718.303(b). Second, the regulations provide that, to obtain relief in FSA programs, the FSA approval official must first determine that the farmer has rendered "substantial performance," a concept not defined in the regulation and on its face opaque. 67 Fed. Reg. 66307, to be codified in 7 C.F.R. § 718.304(b).

Nonetheless, Congress spent much effort in crafting this rewrite and improvement of the equitable relief authorities, and no doubt will be reviewing the annual reports to see if it is working for farmers. Section 1613 thus holds promise of being a valuable new tool farmers and their attorneys can use in dealing with USDA.

1 These two U.S. Code provisions were repealed by subsection (j) of section 1613. The new substantive provisions on equitable relief replacing them are found in subsections (a) through (h) of section 1613.

—Phillip L. Fraas, Washington, D.C.

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found the American Veterinary Medicine Law Association and continued to be active in AALA, attending as many conferences as he could. He was delighted to receive cards signed by attendees of the 2000 and 2001 AALA conferences in St. Louis and Colorado Springs. He received the last of these cards, an expression of gratitude for being a pioneer in agricultural law, a few weeks before his death on November 20, 2001.

In January 2002, Professor Hannah was selected posthumously as a Laureate of the Academy of Illinois Lawyers, which was formed to recognize those who represent the best of the legal profession. As a teacher, writer, professor, practicing lawyer, agricultural law pioneer, and gentleman, Professor Hannah was a superb example and inspiration to his many students, colleagues, and friends. The sparkle in his eyes and his sense of humor were ageless. In a remarkable way, Professor Hannah continued to engage life fully–family, friends, ideas, nature, beauty, music, poetry, the law–through the last hours of his extraordinary life. We are indebted to Harold (Hank) W. Hannah for a lifetime of unselfish and exemplary service to his profession and for helping to lay the foundation for the American Agricultural Law Association.

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