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INSIDE

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IN FUTURE ISSUES

Court issues preliminary injunction enjoining USDA action on mad cow disease

In *Ranchers Cattlemen Action Legal Fund v. Veneman*, No. 04-BLG-RFC, 2004 WL 1151970 (D. Mont. May 5, 2004) (hereinafter *Ranchers II*), the United States District Court for the District of Montana issued a preliminary injunction that enjoined the United States Department of Agriculture (USDA) from implementing the terms of an agency memorandum that would have lifted a prohibition "on the importation of most kinds of bovine meat and other tissue from Canada for human consumption." The relevant facts and substantive rulings involved in *Ranchers II* are found in *Ranchers Cattlemen Action Legal Fund v. Veneman*, No. 04-CV-51, 2004 WL 1047837 (D. Mont. Apr. 26, 2004) (hereinafter *Ranchers I*).

The USDA has for several years issued regulations that prohibit the importation of ruminants and ruminant meat products from countries where bovine spongiform encephalopathy (BSE), commonly referred to as mad cow disease, is known to exist. *See Ranchers I*, 2004 WL 1047837, at *1. In May of 2003 a cow infected with BSE was discovered in Canada. *See id.* On May 29, 2003, the Animal and Plant Health Inspection Service, an agency within the USDA, responded by issuing a regulation that added Canada as a country from which ruminants and ruminant meat products could not be imported. *See id.* The regulation, however, provided that "'the Administrator may upon request in specific cases permit ruminants or products to be brought into or through the United States under such conditions as he or she may prescribe, when he or she determines in the specific case that such action will not endanger the livestock or poultry of the United States.'" *Id.* (quoting 40 C.F.R. § 93.401(a)). On August 8, 2003, USDA Secretary Ann Veneman announced that the USDA "'will begin immediately to accept applications for import permits for certain low-risk ruminant-derived products from Canada,'" including "'[b]oneless bovine meat from cows under 30 months of age.'" *Id.* On November 4, 2003, the USDA published a proposed rule that sought to amend its May 29, 2003, regulation. *See id.* at *2. The November 4, 2003, proposed rule would have allowed live ruminants and ruminant products, including "fresh meat from bovines less than 30 months of age, fresh bovine liver, and fresh bovine tongues," to be imported from Canada. *Id.*

An undated memorandum from APHIS addressed to "'U.S. Importers, Brokers, and Other Interested Parties'" (hereinafter APHIS memorandum) provided that "effective April 19, 2004, all existing permits to import beef from Canada 'will be deemed to cover

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Court considers dischargeability of patent infringement judgment

In *In re Wood*, No. 02-0597, 2004 WL 1089209 (Bankr. W.D. Tenn. Apr. 14, 2004), the United States Bankruptcy Court for the Western District of Tennessee held that damages incurred as a result of a debtor's patent infringement of a seed technology were a nondischargeable debt, while the damages incurred as a result of the debtor's infringement of another seed technology were dischargeable.

Debtor James Wood filed a Chapter 7 bankruptcy petition while a patent infringement claim brought against him by Monsanto Company (Monsanto) was before the United States District Court for the Western District of Tennessee. *See id.* at *1. Monsanto alleged that the debtor infringed the patent rights it held in Roundup Ready® soybean seed and Bollgard® with Roundup Ready® cottonseed when he saved and replanted the patent-protected seeds. *See id.* at *5. The district court held that the debtor infringed Monsanto's patents. *See id.* It did not, however, determine whether damages should be awarded to Monsanto or whether the debtor acted willfully or maliciously when he saved and

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all edible bovine meat products ...,' provided each shipment is accompanied by a statement that the meat was processed in 'establishments that are certified ... to [the Food Safety and Inspection Service] as eligible for export to the United States.'" *Id.* The APHIS memorandum effectively lifted a ban "on the importation of most kinds of bovine meat and other tissue from Canada for human consumption." *Id.* at *1.

Plaintiff Ranchers Cattlemen Action Legal Fund (R-CALF) challenged the APHIS memorandum and requested a temporary restraining order to prevent the terms of the memorandum from being implemented. *See id.* Defendant USDA Secretary Ann Veneman argued that judicial review was inappropriate because there had been no "final agency action." *See id.* at *3. The defendant further argued that the "August 8, 2003 notice that importation of boneless beef was no longer prohibited and the April19, 2004 [APHIS] memorandum ... were authorized by 40 C.F.R. § 93.401(a), the provision ... establishing the ban on imports from countries with BSE that allows case-by-case exceptions, pursuant to permit." *Id.*

The court explained that for an agency action to be considered a final agency action it "should mark the 'consummation' of the agency's decision-making process" and "must be one by which rights or obligations have been determined, or from which 'legal consequences will flow.'" *Id.* at *4 (citations omitted). The court held that the APHIS memorandum constituted a final agency action and that it was therefore judicially reviewable. *See id.* The court stated that the face of the memorandum establishes "'new criteria" for importing bovine meat products from Canada and that "all existing importation permits are now 'deemed to cover all edible bovine meat products.'" *Id.* It added that the APHIS memorandum "is a statement of general applicability covering all existing permits to import beef from Canada and governing any future permits. It is intended to affect individual rights and have the force of law. Thus, notice-and-comment rulemaking was required before its adoption." *Id.* (citation omitted).

The court next considered whether it should grant R-CALF's request for a temporary restraining order. *See id.* at *5. The court explained that a moving party is entitled to a temporary restraining order if it can show either "a combination of probable success on the merits and the possibility of irreparable injury," or "that the plaintiff's papers raise 'serious questions' on the merits and the balance of hardships tips sharply in its favor." *Id.* at *5 (citations omitted). The court also explained that a temporary restraining order "is not a preliminary adjudication on the merits but rather 'a device for preserving status quo and preventing irreparable loss of rights before judgment.'" *Id.* (citation omitted). *See also id.* (stating that "[t]he standard for issuing a temporary restraining order is substantially identical to the standard for issuing a preliminary injunction.") (citation omitted).

The court stated that under the Administrative Procedures Act (APA) R-CALF will succeed on the merits if it can establish that the APHIS memorandum was "'arbitrary, capricious, an abuse of agency discretion, or otherwise not in accordance with the law' or taken 'without observance of procedure required by law.'" *Id.* (citing 5 U.S.C. § 706(2)(A) and (D)). The court noted that the parties did not dispute that the APHIS memorandum was issued without complying with APA notice-and-comment procedures and that it had previously determined that the memorandum was a final agency action. *See id.* The court thus concluded that "it follows that it is likely Plaintiff will be able to demonstrate that Defendant violated the APA." *Id.* (citation omitted).

The court also concluded that there was a significant threat of irreparable injury. *See id.* at *8. It stated that "[t]he prevalence of BSE in Canadian cattle is not known, but two cases of BSE in Canadian-raised cows have been detected in the past 11 months, through very limited testing. If imported Canadian beef products contain the BSE agent, ... [the APHIS memorandum] action may result in a fatal, non-curable disease in humans who consume those products." *Id.* The court also noted testimony from an expert in agricultural economics who opined that if another case of BSE were discovered in Canadian cattle "the effect on demand for U.S. cattle could cripple the cattle growing industry" and that the "adverse impact on the business of R-CALF's ... members could be billions of dollars, and it would be substantially greater than the economic benefit of lower beef prices resulting from the greater supply." *Id.*

The court further concluded that the defendant would not be harmed significantly if a temporary restraining order were issued and that the balance of harms "tips sharply in favor" of R-CALF. *See id.* It noted that the restraining order would primarily effect Canadian beef exporters. *See id.* It also noted that while the increase in the beef supply that would result from Canadian imports may slightly reduce the price of meat for consumers, "USDA's economic analysis for the November 4, 2003 proposed rule predicts that even a full resumption of previous levels of imports would only reduce the price of beef by $0.05-0.06 per pound." *Id.* (citation omitted).

The court subsequently converted the temporary restraining order into a preliminary injunction. *See Ranchers II*, 2004 WL 1151970, at *1. The court stated that the preliminary injunction will terminate five days after R-CALF is notified of final agency action on the November 4, 2003, proposed rule and that Secretary Veneman must provide at least five days' notice of final agency action to R-CALF. *See id.* The court listed in a document attached to its order the bovine meat products that may be imported from Canada while the preliminary injunction is in effect. *See id.* This list was not available on the date this article was written for publication.

–Harrison M. Pittman

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replanted the patent-protected seeds. *See id.* Monsanto subsequently brought an adversary proceeding in the bankruptcy court alleging that the debtor's "conduct and resulting injury to Monsanto was willful and malicious ...." *Id.*

Monsanto contended that it should be awarded damages for injuries it suffered as a result of the debtor's patent infringement and that the damage award should be a nondischargeable debt. *See id.* The debtor argued that his saving and replanting of the patent-protected seeds was inadvertent and that he "lacked the intent necessary to cause a willful and malicious injury sufficient to except any damage award from discharge."*Id.* This summary does not discuss the court's holding as it relates to the awarding of damages.

The bankruptcy court explained that Bankruptcy Code § 523(a)(6) excepts from discharge those debts that are incurred "'for willful and malicious injury by the debtor to another entity or to the property of another entity.'" *Id.* at *6 (citation omitted). The court also explained that a finding that a debtor has committed a willful or malicious injury requires "'a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury.'" *Id.* (quoting *Kawaahau v. Geiger*, 523 U.S. 57 (1998)). *See also id.* (stating that courts have had difficulty applying the *Geiger* definition to particular case facts). The court further explained that under *Geiger*, a determination that a debtor acted willfully or maliciously requires a court "to look into the debtor's mind, subjectively." *Id.*

The court held that the debtor's patent infringement was willful. *See id.* at *7. It based this determination primarily on findings made by the district court, including the finding that the debtor saved cottonseeds from cotton produced on a part of the debtor's farm that was planted with Bollgard® with Roundup Ready® cottonseed and that he attempted to conceal the fact that he was saving the patent-protected cottonseed by using an alias to pay a company to delint the seeds so that they could be saved. *See id. See also id.* at 3-4 (detailing the district court's findings).

The court also held that the debtor's actions were malicious. *See id.* at *8. It stated that based upon "the totality of the proof" the debtor "subjectively knew that the consequences of his unauthorized saving of the cottonseed would be financial harm to Monsanto." *Id.* The court also stated that the evidence established that the debtor "intended to deprive Monsanto of profits from the sale of its patented seed by intentionally saving and replanting Monsanto's Bollgard® with Roundup Ready® cottonseed, and he knew that such a consequence was substantially certain to result." *Id.* It further stated that the debtor "clearly intended to avoid paying Monsanto's price for the seed and the technological license when he saved the patented cottonseed from his 1999 crop and replanted it, in knowing violation of Monsanto's restrictions." *Id.* The court pointed to, among other things, the facts that the debtor attempted to conceal his act of seed saving by using an alias and his "admission that he knew that Monsanto's seed was not to be saved." *Id.* The court reasoned that these facts demonstrated that the debtor "knew what he was doing, that it was wrong, and that it would harm Monsanto." *Id.*

The court held that there was not sufficient proof to determine whether the debtor's act of planting Roundup Ready® soybeans was a willful and malicious injury. *See id.* It explained that "there simply is no proof upon which this Court can find that Monsanto's detection of Roundup Ready® soybeans in Mr. Wood's 2000 fields establishes a willful and malicious injury." *Id.* The court therefore concluded that any damages that resulted from the debtor's patent infringement as it related to the soybean crop were not excepted from discharge. *See id.*

–Harrison M. Pittman

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provision is an impossible exercise.... We do, however, have evidence of the intent of individuals who drafted the amendment that went before the voters. It is clear that those *individuals* had a discriminatory purpose.") (emphasis added).

[39] *Hazeltine II*, 340 F.3d at 597. *See also MSM Farms*, 927 F.2d at 333 (holding in context of equal protection challenge that promoting family farms is a legitimate state interest).

[40] The facts in *Smithfield I* describe the relationship between Smithfield Foods, Inc., Murphy Farms, LLC, as well as another corporation, Prestage-Stoecker Farms, Inc.

[41] *See Smithfield I*, 241 F.Supp.2d at 978, 992 (S.D. Iowa 2003).

[42] Dan Glickman, *Address Before the National Press Club (Oct. 18, 1994)*, *Feedstuffs*, Nov. 6, 1995, at 10. *See also generally* USDA, *Grain Inspection and Packers and Stockyards Administration*, *Assessment of the Cattle and Hog Industries*: Calendar Year 2001 (2002). *See also* Christopher R. Kelley, *An Overview of the Packers and Stockyards Act*, *available at* http://www.nationalaglawcenter.org/assets/article_kelley_packers.pdf.

[43] *Id.* at *3 (citations omitted) (emphasis added).

[44] *See generally Hazeltine II*, 340 F.3d at 597 (holding that the defendants failed to show whether reasonable non-discriminatory alternatives exist to advance the legitimate local interests of promoting family farms and protecting the environment).

[45] It is important to note, however, that the Eighth Circuit may look to *Hazeltine I* to support a holding that a corporate farming law violates the dormant Commerce Clause under the *Pike* balancing test.

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The constitutionality of corporate farming laws in the Eighth Circuit

By Harrison M. Pittman

Several states have enacted statutory or constitutional provisions that limit the power of corporations to engage in farming or agriculture, or the power of corporations to acquire, purchase, or otherwise obtain land that is used or usable for agricultural production.[1] Such legal provisions are commonly referred to as corporate farming laws. Most corporate farming laws are enacted as statutes rather than constitutional amendments. Proponents of corporate farming laws argue that these laws are necessary to protect family farms from the negative economic consequences of competition with corporate-owned or corporate-operated agricultural operations. Opponents of corporate farming laws argue that these laws are unconstitutional and an impediment to a vibrant free trade economy among the states.[2]

A number of courts, including the United States Supreme Court, considered whether states' corporate farming laws violated the Equal Protection Clause, Due Process Clause, Privileges and Immunities Clause, and Contract Clause of the United States Constitution.[3] In the context of these challenges courts consistently upheld the constitutionality of the challenged law. During the twentieth century no state appellate court or federal court held that a state's corporate farming law was unconstitutional.[4]

The trend of systematically upholding the constitutionality of corporate farming laws ended when the United States District Court for the District of South Dakota held in *South Dakota Farm Bureau, Inc. v. Hazeltine*[5] (hereinafter *Hazeltine I*) that a corporate farming law enacted as a voter-approved amendment to the South Dakota constitution was unconstitutional because it violated the dormant Commerce Clause. Soon thereafter, the United States District Court for the Southern District of Iowa held in *Smithfield Foods, Inc. v. Miller*[6] (hereinafter *Smithfield I*) that the Iowa corporate farming statute in effect at that time violated the dormant Commerce Clause. These two cases marked the first instances in which a corporate farming law was challenged on dormant Commerce Clause grounds. In *South Dakota Farm Bureau, Inc. v. Hazeltine*[7] (hereinafter *Hazeltine II*), the United States Court of Appeals for the Eighth Circuit affirmed *Hazeltine I*, but did so on different grounds.

The Eighth Circuit's decision in *Hazeltine II* is important for several reasons, not the least of which is that the Eighth Circuit exercises jurisdiction over six of the nine states that have enacted corporate farming laws.[8] Thus, any decision rendered by the Eighth Circuit regarding corporate farming laws is significant. Furthermore, it is probable that other courts, namely courts within the Seventh Circuit and the Tenth Circuit, would look to Eighth Circuit case law on this issue in considering whether a corporate farming law violates the dormant Commerce Clause.[9]

The most recent activity in the Eighth Circuit regarding the constitutionality of corporate farming laws occurred on May 21, 2004, when in *Smithfield Foods, Inc.* v. *Miller*[10] (hereinafter *Smithfield II*) the Eighth Circuit remanded *Smithfield I* to the federal district court. The Iowa legislature amended the statute at issue in *Smithfield I* while the matter was on appeal to the Eighth Circuit. In *Smithfield II* the Eighth Circuit stated that "[s]ince ... [the statute at issue] has been amended, we cannot resolve this important constitutional question on the current record and must remand the case to the district court for further consideration."[11] There are at least two obvious questions following the *Smithfield II* decision: first, what will the federal district court hold post-remand now that the Iowa statute has been amended, and, second, what will the Eighth Circuit hold when it reviews that decision?[12] This article ignores the former question and focuses on the latter because the former question may be irrelevant in light of *Hazeltine II*.

Based on the holding and reasoning of *Hazeltine II*, the Eighth Circuit can hold that the amended Iowa statute at issue in *Smithfield* is unconstitutional under the dormant Commerce Clause without ever examining the amended or pre-amended forms of that statute. Moreover, after *Hazeltine II* it may be that most any corporate farming law challenged before the Eighth Circuit can be held unconstitutional on dormant Commerce Clause grounds.

This article suggests that the Eighth Circuit could have held that the Iowa statute violated the dormant Commerce Clause if the types of evidence it relied upon in *Hazeltine II* had been a part of the appeal record in *Smithfield II* and that this holding could have been reached without the Eighth Circuit examining or relying on the statutory language. Thus, one might question why the court remanded the matter with the statement "[s]ince ... [the statute at issue] has been amended, we cannot resolve this important constitutional question ...." Before examining the relevant aspects of *Hazeltine II* and its implications, it is useful to discuss briefly the dormant Commerce Clause and the analysis applied when a state law is challenged on dormant Commerce Clause grounds.

Dormant Commerce Clause[13]

The Commerce Clause of the Constitution grants Congress the exclusive authority to regulate commerce.[14] Thus, a federal law controls over a state law if the state law conflicts with a federal law enacted pursuant to the Commerce Clause. The Constitution, however, does not expressly define the extent of Congress' Commerce Clause authority in the event that Congress has not spoken. In a circumstance where Congress has not clearly spoken and where a state has enacted legislation that arguably regulates commerce, courts must sometimes grapple with a legal doctrine commonly referred to as the dormant Commerce Clause. The dormant Commerce Clause has been summarized as follows: "The dormant Commerce Clause is the negative implication of the Commerce Clause: states may not enact laws that discriminate against or unduly burden interstate commerce."[15]

Courts that consider dormant Commerce Clause challenges to state laws, including the *Hazeltine* and *Smithfield* courts, apply a two-tiered analysis. Under the first tier, courts examine whether the challenged law discriminates against interstate commerce.[16] Discrimination in the dormant Commerce Clause context refers to "'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'"[17] Three "indicators" have been identified to determine whether a challenged state law is discriminatory: (1) whether a statute was enacted with a discriminatory purpose, (2) whether a statute has a discriminatory effect, and (3) whether a statute discriminates against interstate commerce on its face.[18] If a challenged law is determined to be discriminatory, it is subject to the "strictest scrutiny" and will be upheld only if it can be shown that the law sought to accomplish a legitimate local interest and that there were no other means available to advance that legitimate local interest.[19]

A law that is not discriminatory may still be held unconstitutional under the second tier of dormant Commerce Clause analysis. Under the second tier, commonly referred to as the *Pike* balancing test, a challenged law will be struck down "if the burden it imposes on interstate commerce 'is clearly

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excessive in relation to its putative local benefits.'"[20]

Hazeltine II

In 1998, voters in South Dakota approved by nearly 60% a ballot initiative that amended the state constitution to prohibit corporations and syndicates, subject to certain exceptions, from acquiring or obtaining any interest in any real estate used for farming, and from engaging in farming. The constitutional amendment is commonly referred to as Amendment E. Several plaintiffs challenged the constitutionality of Amendment E on several grounds, including the dormant Commerce Clause.

In *Hazeltine II,* the Eighth Circuit held that Amendment E was discriminatory under the first tier of dormant Commerce Clause analysis because the evidence in the record established that Amendment E was enacted with a discriminatory purpose.[21] In so doing, the Eighth Circuit expressly declined to consider whether Amendment E violated the dormant Commerce Clause under the second tier of analysis, the *Pike* balancing test. It also expressly declined to consider whether Amendment E was discriminatory on its face or in its effect. The court based its determination that Amendment E was enacted with a discriminatory purpose solely on "direct" and "indirect" evidence in the record. The only evidence the court considered direct evidence of a discriminatory purpose were an election pamphlet issued by the Secretary of State prior to the referendum on Amendment E that described "pro" and "con" arguments for and against Amendment E, statements made by individuals at Amendment E drafting meetings, and statements made at trial. The only evidence the court considered to be indirect evidence of a discriminatory purpose were "irregularities in the drafting process," such as statements made at trial that referenced the drafting process.[22] The specific items of evidence considered by the court and the interpretation given them is discussed below.[23]

Direct evidence

The court explained that the "most compelling" evidence in the record indicating a discriminatory purpose was "pro" language contained in the election pamphlet distributed by the Secretary of State prior to the referendum. The court found two statements troublesome. The first was the statement that "without the passage of Amendment E, '[d]esperately needed profits will be skimmed out of local economies and into the pockets of distant corporations.'"[24] The second was a statement that "'Amendment E gives South Dakota the opportunity to decide whether control of our state's agriculture should remain in the hands of family farmers and ranchers or fall into the grasp of a few, large corporations.'"[25] The court concluded that the "pro" statement (it did not specifically identify which statement) was "'brimming with protectionist rhetoric.'"[26]

The court then turned to its examination of statements made by individuals at Amendment E drafting meetings. The court pointed to a meeting in which discussions were held "concerning the best way to combat Tyson, Murphy, and others."[27] It also pointed to a memorandum written by the director of Dakota Legal Action, a group that assisted in drafting Amendment E and a defendant in the *Hazeltine* cases, that stated in reference to an earlier drafting meeting that "'[m]any have commented that just as they do not want Murphys and Tysons walking all over them, they don't want Farmland or Minnesota Corn Producers walking over them ... either.'"[28] The Eighth Circuit stated that these particular comments "concern the drafters' desire to prohibit out-of-state cooperatives, in addition to corporations, from farming in South Dakota."[29] The court further noted that the meetings that led to the drafting of Amendment E were known as the "hog meetings," a description it considered to be "a specific reference to the out-of-state corporations who enter into contracts with South Dakota farmers to raise hogs."[30]

The court also determined that two statements made at trial were direct evidence that Amendment E was enacted with a discriminatory purpose. First, the court noted that a person who assisted in drafting Amendment E testified that Tyson Foods and Murphy Family Farms were proposing to construct hog farming facilities in South Dakota "and that Amendment E's supporters wanted 'to get a law in place to stop them.'"[31] Second, the court noted that a co-chairman of an organization that helped draft Amendment E testified that "Amendment E was at least motivated in part by 'the Murphy hog farm unit [in North Carolina] and what its [sic] done to the environment.'"[32]

Indirect evidence

The court explained that "irregularities in the drafting process" can be a "hint" of indirect evidence that Amendment E was enacted with a discriminatory purpose. It added the following:

> Our concern in this case about the drafting process is the information used by the drafters. In this case, the record leaves a strong impression that the drafters and supporters of Amendment E had no evidence that a ban on corporate farming would effectively preserve family farms or protect the environment, and there is scant evidence in the record to suggest that the drafters made an effort to find such information.[33]

As support for its determination that there were "irregularities in the drafting process" the court noted testimony given at trial by Mary Napton, the Secretary of the Amendment E drafting committee and a "registered environmental professional." The court explained that Napton testified during the trial that she was "unfamiliar with all of South Dakota's environmental regulations at the time Amendment E was drafted" but that she "nevertheless believed that Amendment E would be necessary even if the State's current environmental regulations were enforced."[34] The court stated that it was "disconcerting that Napton ... could not explain the present and future effects of the current environmental laws. If she lacked this information, we can presume that the entire committee did, too."[35]

The court also determined that based on the record there was insufficient evidence to show that the drafters of Amendment E considered how it would affect the economic viability of family farmers. The court noted that the drafters relied on studies that "correlated industrialized farming with higher levels of poverty" but that the record was devoid of evidence that the drafters "utilized or commissioned any economic forecasts as to the effect of wholly shutting out corporate entities from farming in South Dakota."[36] The court concluded that "this lack of information serves as indirect evidence of the drafters' intent to create a law specifically targeting out-of-state businesses, which the drafters viewed as the sole cause of the perils facing family farmers and leading potential cause of environmental damage."[37] The court further concluded that "the evidence ... demonstrates that the drafters made little effort to measure the probable effects of Amendment E and of less dramatic alternatives. We are thus left, like the South Dakota populace that voted on Amendment E, without any evidence as to the law's potential effectiveness."[38]

Having held that Amendment E was discriminatory, the court considered whether there was any other method of advancing the legitimate local interests of promoting the family farm and protecting the environment existed. The court explained that although the record contained evidence that linked corporate farming with poverty and environmental degradation, it did not contain evidence "that suggests, evaluates, or critiques alternative solu-

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tions."[39] The court also noted that the defendants submitted a federal government report that advocated regulations designed to favor family farms. After describing several of the alternatives proposed in the report, the court determined that the defendants had failed to satisfy the high burden of demonstrating the ineffectiveness of any of the proposals. The court therefore held that the defendants had failed to show that there was no other method of advancing the legitimate local interests of promoting the family farm and environmental protection.

Analysis

As a practical matter, it is likely that in enacting or amending a corporate farming law, the types of evidence relied upon in *Hazeltine II* would be created during the enacting or amending process. For example, it is likely that pamphlets or other similar documents that describe the "pros" and "cons" of a particular law will be distributed to legislators or voters. Citizens and committee members, like those in South Dakota who sought to amend their state constitution, will stand up at high school gymnasiums, community centers, and other meeting places and give their opinions as to why they believe a corporate farming law should be enacted or modified. In the event that a law is challenged it is not unlikely that some of these individuals would testify about their motives for supporting the enactment or modification of the law. When a corporate farming law to be enacted or modified is statutory, such as the statutes considered in *Smithfield I* and *II*, legislators presumably will make publicly available statements about why the statute should be enacted or modified. Such communications are unavoidable in enacting and amending constitutional and statutory provisions; such provisions are not enacted telepathically.

Moreover, it is not improbable that proponents of corporate farming laws will or would from time to time specifically name the corporation or corporations sought to be prohibited from engaging in agricultural production in their state. In *Hazeltine II*, it was noted that citizens specifically named Tyson Foods, Inc. and Murphy Family Farms; in *Smithfield I*, it was noted that an Iowa legislator specifically named Smithfield Foods, Inc.[40] The courts in both cases found such specific naming of companies to be evidence that the law at issue was enacted with a discriminatory purpose.[41] Consider the following the statement made in 1994 by then Secretary of Agriculture Dan Glickman: "Perhaps the single biggest issue I have heard about while traveling the country the last several months has been about concentration in the meat processing industry. Today, four companies control nearly 95% of the industry. Four companies control this country's supply of meat ...."[42] This statement highlights that it is neither an accident nor a surprise that proponents of the corporate farming laws at issue in the *Hazeltine* and *Smithfield* cases could and would name specific agricultural companies they wished to prohibit from operating within their state.

The direct and indirect evidence relied upon in *Hazeltine II* had no relationship to the language of Amendment E. In *Smithfield II*, however, the Eighth Circuit stated that the matter should be remanded in part because the statute at issue–i.e., the language of the statute at issue–had been amended. One could presume that if the types of direct and indirect evidence relied upon in *Hazeltine II* had been a part of the record before the Eighth Circuit in *Smithfield II,* the court would have ruled that the Iowa statute was enacted with a discriminatory purpose. One could also presume that when the Eighth Circuit revisits *Smithfield* it can strike the amended Iowa statute down as unconstitutional without ever examining the statutory language, just as it did not examine the language of Amendment E *Hazeltine II*. The court would only need the types of direct and indirect evidence it relied on in *Hazeltine II* to make its determination that the Iowa statute is discriminatory.

Perhaps the reason the Eighth Circuit remanded *Smithfield* is contained in the second half of the following passage, which was quoted earlier in this article: "[s]ince ... [the statute at issue] has been amended, *we cannot resolve this important constitutional question on the current record and must remand* the case to the district court for further consideration. In the final portion of its opinion in *Smithfield II* the court stated that:

> [o]n the *record* before us, we are unable to determine whether the ... [amended statute] possesses a discriminatory purpose. Courts look to *direct and indirect evidence* to determine whether a state adopted a statute with a discriminatory purpose. This evidence includes (1) statements by lawmakers; (2) *the sequence of events leading up to the statute's adoption, including irregularities in the procedures used to adopt the law*; (3) the State's consistent pattern of "disparately impacting members of a particular class of persons"; (4) the statute's historical background, including "any history of discrimination by the [state]"; and (5) the statute's use of highly ineffective means to promote the legitimate interest asserted by the state.[43]

This passage could be construed as a direct invitation from the Eighth Circuit to the parties challenging the Iowa statute to include the types of direct and indirect evidence in the record that the court will need to hold that the statute was enacted with a discriminatory purpose. The parties challenging the Iowa statute need only to place the necessary indirect and direct evidence in the record before the matter is revisited by the Eighth Circuit; the statutory language–amended or unamended–is not necessarily relevant in light of *Hazeltine II*.

Conclusion

Post-*Hazeltine II*, the Eighth Circuit should have little difficulty finding the direct and indirect evidence needed to hold that a corporate farming law is discriminatory under the first tier of dormant Commerce Clause analysis. Given that this type of evidence will almost always exist, it is reasonable to assume that such evidence will be part of the record (or be remanded with instructions to make such evidence part of the record).

Of course, a finding that a challenged law is discriminatory is still subject to the question of whether the law was enacted to accomplish a legitimate local interest and whether there existed any other means by which to accomplish that legitimate local interest, assuming one existed. *Hazeltine II* signals that this question will not prevent the Eighth Circuit from holding that a law that is first determined to be discriminatory is unconstitutional under the "legitimate local interest" test.[44] *Hazeltine II* does not, however, completely shut the door on arguments raised by proponents or opponents of corporate farming laws on this portion of the dormant Commerce Clause analysis. Because of the likelihood that the Eighth Circuit will hold that the statute at issue in *Smithfield* was enacted with a discriminatory purpose, the "legitimate local interest" portion of the first tier dormant Commerce Clause analysis could be either the last stand for proponents of the Iowa statute or the last hurdle for opponents of the statute. The "legitimate local interest" test therefore could be very important when the Eighth Circuit revisits *Smithfield* or when it considers other challenges to corporate farming laws.[45]

–Harrison M. Pittman

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[1] N.D. Cent. Code §§ 10-06.1-01 - 27 (North Dakota); Neb. Const. Art. XII § 8 (Nebraska); Kan. Stat. Ann. § 17-59-4 (Kansas); Okla. Const. Art. XXII, § 2, and Okla. Stat. Ann. Tit. 18 § 951 (Oklahoma); Wis. Stat. Ann. § 182.001 (Wisconsin); Minn. Stat. Ann. § 500.24 (Minnesota); Iowa Code §§ 202B.101, 202.B.201, & 202B.202 (Supp. 2004) (Iowa Code); Mo. Rev. Stat. § 350.015 (Missouri); and S.D. Complied Laws Ann. §§ 47-9A-1 - 23 (South Dakota).

[2] The policy debate over corporate farming laws is somewhat more complex than these two arguments imply. A discussion of whether corporate farming laws are desirable or undesirable is not within the scope of this article. This article does not argue whether corporate farming laws are constitutional or unconstitutional.

[3] *See Asbury Hospital*, 326 U.S. 207 (1945) (equal protection, due process, privileges and immunities, and contract clauses); *State ex rel. Webster v. Lehndorff Geneva, Inc.*, 744 S.W.2d 801 (Mo. 1988) (equal protection and due process clauses); *Omaha Nat'l Bank v. Spire*, 389 N.W.2d 269 (Neb. 1986) (equal protection clause); *Hall v. Progress Pig, Inc.*, 610 N.W.2d 420 (Neb. 2000) (equal protection and due process clauses); *Asbury Hospital v. Cass County*, 7 N.W.2d 438 (N.D. 1943) (equal protection, due process, privileges and immunities, and contract clauses); *Asbury Hospital v. Cass County*, 16 N.W.2d 523 (N.D. 1944) (equal protection, due process, privileges and immunities, and contract clauses); *Coal Harbor Stock Farm, Inc. v. Meier*, 191 N.W.2d 583 (N.D. 1971) (equal protection clause); *State v. J.P. Lamb Land Co.*, 401 N.W.2d 713 (N.D. 1987) (due process clause).

[4] In *J.P. Lamb*, 401 N.W.3d 713, the North Dakota Supreme Court stopped short of holding that a provision of the North Dakota corporate farming statute violated the due process clause. The provision at issue required a corporation to divest agricultural land within one year of an adjudication that the corporation held that land in violation of the statute. The corporation arguably was in compliance with the state's corporate farming law (which was originally enacted in 1932) prior to its amendment in 1981, but was found to be in violation of the statute in its post-amendment form. The court held that under the unique and particular circumstances of the case, the corporation should be allowed the longer period of ten years to divest the land, rather than the one-year period established under the statute. The court did not, however, hold that the one-year period violated the due process clause.

[5] 202 F.Supp.2d 1020 (D.S.D. 2002) (*Hazeltine I*).

[6] 241 F.Supp.2d 978 (S.D. Iowa 2003) (*Smithfield I*).

[7] 340 F.3d 583 (8th Cir. 2003) (*Hazeltine II*), *cert. denied*, 124 S.Ct. 2095 (2004).

[8] Arkansas is the only state within the Eighth Circuit that has not enacted a corporate farming law.

[9] Oklahoma and Kansas are in the Tenth Circuit. Wisconsin is in the Seventh Circuit.

[10] *See Smithfield Foods, Inc. v. Miller*, No. 03-1411, 2004 WL 1124476 (8th Cir. May 21, 2004) (*Smithfield II*).

[11] It also stated that it could not determine whether an offending portion of the law could be severed from the statute so as to preserve the constitutionality of the remaining statute.

[12] This second question assumes that *Smithfield* will be revisited by the Eighth Circuit. It is reasonable to assume that it will be revisited. On the outside chance it is not, however, this article is applicable because the constitutionality of other states' corporate farming laws may be considered by the Eighth Circuit.

[13] For an excellent discussion of the origins, historical development, and current status of the dormant Commerce Clause, see Boris I. Bittker, *Bittker on the Regulation of Interstate and Foreign Commerce*, §§ 6.01-6.08 (1999).

[14] U.S. Const. Art I, § 8, cl. 3 (stating that Congress has the authority to "regulate Commerce with foreign nations, and among the several States, and with Indian Tribes"). *See also generally* John E. Nowak & Ronald D. Rotunda, *Constitutional Law* §§ 8.1-8.11 (6th ed. 2000).

[15] *Hazeltine*, 340 F.3d at 592 (citing *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992)).

[16] *See id.* at 593 (citing *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994)).

[17] *Id.* (quoting *Or. Waste*, 511 U.S. at 99).

[18] *Smithfield Foods, Inc. v. Miller*, No. 03-1411, 2004 WL 1124476 (8th Cir. May 21, 2004) (citing and quoting *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984) (discriminatory purpose), *Maine v. Taylor*, 477 U.S. 131, 148 n.19 (1986) (discriminatory effect), and *Chem. Waste Mgmt. v. Hunt*, 504 U.S. 334, 342 (1992) (facially discriminatory)).

[19] *Hazeltine II*, 340 F.3d at 593 (quoting *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 93, 99 (1994)).

[20] *Id.* (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970)). *See also* David S. Day, *Revisiting Pike: The Origins of the Nondiscrimination Tier of the Dormant Commerce Clause Doctrine*, 27 Hamline L. Rev. 45 (2004).

[21] Ironically, *Hazeltine I* held explicitly that Amendment was not discriminatory on its face, in its purpose, or in its effect. Rather, the district court held that Amendment violated the dormant Commerce Clause under the *Pike* balancing test. In this sense, *Hazeltine I* and *Hazeltine II* are paradoxical to one another.

[22] *See Hazeltine II*, 340 F.3d at 593 (stating "[t]he Plaintiffs have the burden of proving discriminatory purpose . . . and can look to several sources to meet that burden. The most obvious would be direct evidence that the drafters of Amendment E or the South Dakota populace that voted for Amendment E intended to discriminate against out-of-state businesses.") (citations omitted).

[23] In relying on this evidence the court recognized that although the Supreme Court "has not laid out a specific test for determining discriminatory purpose," it was "guided by precedent in selecting the types of evidence on which we have relied to reach our conclusion." The precedents cited by the court may be distinguishable in several ways from the facts, law, and circumstances of *Hazeltine II*. A discussion of these precedents is outside the scope of this article.

[24] *Id.* at 594 (citation omitted).

[25] *Id.* (citation omitted).

[26] *Id.* (citation omitted).

[27] *Id.* (citation omitted).

[28] *Id.* (citation omitted).

[29] *Id.*

[30] *Id.*

[31] *Id.* (citation omitted).

[32] *Id.* (citation omitted).

[33] *Id.*

[34] *Id.* (citations omitted).

[35] *Id.* at 595.

[36] *Id.*

[37] *Id.*

[38] *Id.* at 595-96. *But see MSM Farms, Inc. v. Spire*, 927 F.2d 330 (8th Cir. 1991). In *MSM Farms*, the Eighth Circuit rejected an equal protection clause challenge to the Nebraska corporate farming law, which like Amendment E, was a constitutional provision. In *MSM Farms*, the court stated that "[i]t is up to the people of the State of Nebraska, not the courts, to weigh the evidence and decide on the wisdom and utility of measures adopted through the initiative and referendum process." *MSM Farms*, 927 F.3d at 333. It added that "[w]e agree with the district court that voters reasonably could have believed that by enacting the initiative in question they would be promoting family farm operations by preventing non-family corporate ownership of farmland." *Id. See also Hazeltine II*, 340 F.3d at 596 (examining the mindset of the *drafters* of Amendment E, rather than the mindset of the *voters* as it did in *MSM Farms*, to wit: "discerning the purpose of a constitutional

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Agricultural Law Update

AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

AALA's first Executive Director passes away

It is with great sorrow that I pass on the news that Bill Babione passed away on Tuesday, June 1, 2004. Funeral services were held Friday, June 4 at Good Shepherd Lutheran Church in Fayetteville, Arkansas. Bill served as the first AALA Executive Director and held this post for many years, often volunteering hours of his time for our benefit. He was responsible for recruiting many of our members and was always a tireless advocate for the Association. He was the Distinguished Service Award recipient in 2001. His friendship and good humor will be greatly missed.

Anyone wishing to contact his wife Barbara may do so by mail at 37 Smith Robinson Avenue, West Fork, AR 72774.

–Susan A. Schneider, President, AALA

Note from the Executive Director:

Although I have only been executive director for just over a month, I can already realize the great service Bill Babione provided for this association. I hope to build upon his great legacy, which is the AALA of today.

Also, I sent out the above announcement by e-mail to all current members of whom we had valid e-mail addresses. If you did not receive the e-mail announcement, we may not have your current e-mail address. Please send an e-mail to me using the e-mail address you would like us to use for future important announcements and I will update your record. You may also update your membership information in the "Members Only" section of the AALA web site: www.aglaw-assn.org.

Robert Achenbach
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