

An Article by Peter H. Gunst

## **CHECK-OFF FUND GETS FAVORABLE LEGAL CHECK UP**

Because TIA, like many other industry associations, has been actively considering pursuing federal legislation to establish a “check-off” fund for its industry, a recent decision by the United States Supreme Court upholding the funds’ validity was of particular interest.

Congress has created numerous industry “check-off” funds in order to fund research, training, education and promotion activities on an industry-wide basis. They are funded through assessments placed on the sale or importation of the product affected, and often play a major role in preserving or expanding an industry’s marketshare.

Generally, legal challenges to check-off funds have focused on the generic promotion and advertising campaigns that they support, which are geared to improving the lot of an entire industry. Objectors usually are industry participants who prefer to promote their own brand rather than the industry as a whole through generic advertising. They argue that their First Amendment free speech rights are violated because they are compelled to contribute to a fund that finances advertising that they disfavor.

Some federal courts had agreed with such arguments, and thus had created real doubt about the funds’ validity despite the success that they had enjoyed in the marketplace.

At the vortex of the legal maelstrom was the highly successful “Beef. It’s What’s For Dinner” campaign, which is financed by the imposition of a \$1-per head assessment on the sale or importation of cattle. To resolve the issue of the assessment’s legality, the United States Supreme Court agreed to review a lower court order that had struck down the facilitating statute as violative of the objectors’ First Amendment rights.

The challenged statute -- The Beef Promotion and Research Act -- is a typical check-off fund enactment. The cabinet official having responsibilities pertaining to the impacted industry -- there the Secretary of Agriculture -- is empowered by Congress to appoint members to an industry promotion and research board and to impose assessments on industry participants in order to fund industry-related projects designed by board representatives and approved by the Secretary. Similar statutes have been passed to benefit the producers of many other agricultural and non-agricultural products, including cotton, potatoes, pork, eggs, lamb and heating oil.

The Beef Act case was the third occasion on which the Supreme Court had reviewed check-off funds in eight years, a remarkable level of review concerning the rather arcane nature of the issue. Previously, the Supreme Court had upheld a law imposing mandatory assessments on producers of California tree fruits and struck down another law impacting the mushroom industry. The critical difference between the two legislative schemes, the Supreme Court had concluded, was that the promotion campaign funded by the tree fruit assessments was merely a constituent part of a comprehensive program of industry regulation, while the primary -- if not sole -- objective of the mushroom legislation was to pursue industry-wide generic advertising.

Thus, the mushroom statute was vulnerable because of its more direct nexus with an important First Amendment concern -- the compelled subsidization commercial speech.

On its face, the Beef Act appeared equally vulnerable because it more closely resembled the stricken mushroom legislation than the upheld tree fruit legislation. Yet, on May 23, 2005, the Supreme Court upheld the constitutionality of the Beef Act by a 6-to-3 vote in *Johanns v. Livestock Marketing Association*.

What saved the day for the Beef Act and its “beef for dinner” campaign was a new legal defense that the Supreme Court had refused to consider in the mushroom case for purely procedural reasons. The government, which defended the Act, argued that the objectors’ reliance on their First Amendment rights was misplaced because the “beef for dinner” campaign constituted “governmental speech,” rather than private speech.

Compelled subsidy of “governmental speech” is fundamentally different from compelled subsidy of private speech because it is an inevitable and necessary result of the governmental process. It is fundamental that the government may fund its own programs and policies through taxation and other assessments, and that some of the funds so raised will be spent for “governmental speech” intended to advocate and defend those programs and policies. This use of tax dollars is fundamentally different from the government compelling some citizens to fund the private speech of other citizens, with which they disagree.

The Supreme Court found that the “beef for dinner” promotional campaign qualified as “governmental speech” because of the Secretary’s mandated involvement with the beef board and the need to obtain the Secretary’s approval before any promotional message could be released.

The Supreme Court’s ruling has broad implications outside of the beef industry. An attorney representing opponents of an analogous dairy program told the press that “under the Supreme Court’s recent decision” the best that his clients could now hope for would be to obtain a labeling change or a modification as to what was said about the program’s sponsorship. The core concept of the check-off fund, however, now appears to be unchallengeable.

Non-advertising functions supported by check-off fund dollars are even less open to legal attack. Research, education and training activities probably do not constitute protectable First Amendment “speech” at all, because those activities are not intended “to convey a particularized message,” the hallmark of what is considered to constitute constitutional “speech.” As the Supreme Court said in a fairly recent decision:

It is possible to find some kernel of expression in almost every activity a person undertakes – for example walking down the street, or meeting one’s friends at a shopping mall – but such a kernel is not sufficient to bring the activity within the protection of the First Amendment.

The Agriculture Department has said that it supports check-off programs because they stimulate product demand while preventing some program beneficiaries from acting as “free riders” -- reaping the benefits without chipping in. It is difficult to fault that logic.

TIA’s proposed TIRES program is intended to benefit the industry by permitting the development of long needed educational, safety, training, research and promotional programs. Both from a political and legal standpoint, the timing appears to be right to pursue the initiative. Both houses of Congress recently approved the continuation of the heating oil industry’s program by a unanimous vote, and the Supreme Court’s decision now appears to lay to rest the only significant legal objection raised with respect to check-off programs.

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