MEMORANDUM

To: Mr. Pat Gurrentz
From: Steve Scheinert
Date: 21 February 2005
Re: Legal Analysis of Veneman (United States Department of Agriculture) v. Livestock Marketing Association, 335 F.3d 711.

As per your request from January 8th, I have prepared a legal memorandum regarding the issues presented in the case of Veneman v. LMA, currently before the US Supreme Court.[1] I have found none of my prior writings on it to be sufficient, and have prepared a fresh written analysis. In it, I present a legal argument on the case, rather than try to "read the tealeaves" about which Justice will decide which way; I do not feel I am qualified to make those kind of predictions regarding any case. Also, if you would like it, I can prepare a brief economic analysis of the program. And I promise I won't take as long to do it.

Legal Analysis

QUESTION PRESENTED

Stated most simply, the *LMA* asks whether or not the Beef Promotion and Research Act of 1985 ("the Beef Act"), as currently implemented by the USDA, with a primary focus on funding generic beef advertising, funded through the Beef Check-off Program, is constitutional. In seeking to answer this overarching question, *LMA* asks two more specific questions, namely: are the generic advertisements funded by the Cattleman's Beef Promotion and Research Board ("the Beef Board") through the Beef Check-off protected under the First Amendment as government speech, and if not, are the advertisements protected as commercial speech.

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[1] Oral arguments were made before the United States Supreme Court on December 8th, 2004, but the Court has yet to render its decision.

FACTS

Under authority granted by the Beef Act, the Secretary of Agriculture promulgated the Beef Promotion and Research Order ("the Beef Order"), thereby establishing the Beef Promotion and Operating Committee ("the Beef Committee"), and formulating the Beef Board and the beef check-off program. *See* 7 U.S.C. § § 2903, 2904. The Beef Act required the USDA hold a referendum of beef producers to ratify the Beef Order. Such a referendum was held in 1988, and the Beef Order went into effect.

In November of 1999, the LMA submitted a petition to the USDA for a new referendum on the Beef Order. The Beef Boards had used the funds raised from the check-off program for a variety of uses, primarily for research into beef-related issues and for generic beef commercials.[2] The Secretary of Agriculture took no action. A year later, in December 2000, the LMA filed suit requesting the district court to declare the Beef Act, or the Secretary of Agriculture's actions pursuant to it illegal.

DISCUSSION

The LMA's complaints arose largely from how the Beef Board spends the funds raised from the check-off program. More than 50% of the funds raised in the check-off program were being used to fund generic advertising, while only 10% - 12% of the funds raised were being spent on research. The LMA claimed that, since the portion of the funds spent on advertising were so high, that the primary objective of the Beef Boards was the advertising campaign, and since paying into the check-off program is mandatory, it represents forced speech. The LMA further stated that its membership objected to the generic advertising, believing it contrary to their interests. While acknowledging that advertisement is beneficial to sales, American domestic producers objected to the advertising because it did not aid them over their competitors; that the commercials did not differentiate between domestic American beef and imported foreign beef.

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[2] The commercials funded by the Beef Board are the well-known, "Beef, it's what's for dinner," commercials.

The original complaint and suit sought not to have the Beef Act overturned, but to force the Secretary of Agriculture to honor the petition and hold a new referendum of beef producers over the implementation of the Act. As the case progressed, new precedent became available and the goal of the suit became declaring the Beef Act unconstitutional as written. The LMA cited the case of *United States v. United Foods, Inc.,* 533 U.S. 405, 413, 121 S.Ct. 2334, 150 L.Ed.2d 438 (2001), in which the Courts declared the Mushroom Act unconstitutional, stating that the First Amendment protection of freedom of speech prohibits groups from mandating support for statements when members of that group object to the statement but "must remain [a member] of that group by law or necessity" (citing *LMA*). The LMA claimed that the Beef Act is substantially the same as the Mushroom Act, and all the courts that have so far tried this case have agreed.

The Government has claimed that this is irrelevant; they claim that two legal doctrines, the protections for government speech and commercial speech as not subject to First Amendment scrutiny, supersede the *United Foods* precedent. To date, the Court has clarified the commercial speech doctrine by defining a test for its application. Should the court find this test applicable, then the Beef Check-off will not be subject to First Amendment scrutiny, and the *United Foods* precedent will not be applicable. This is, however, unlikely. The court, however, has not clearly defined any kind of national precedent or test regarding what constitutes government speech. It is likely that the case as a whole will swing on how much the government stresses and how will it argues this portion of the case during oral arguments.

The Court has so far defined two precedents for assessing when commercial speech may be regulated without being subject to First Amendment scrutiny. The first of these precedents is a test defined in the case *Central Hudson Gas & Electric Corporation v. Public Service Commission*, 447 U.S. 557, 570-571, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980).[3] In its decision, the Court defined what has become known as the *Central Hudson* test for restricting commercial speech. Before applying the test, the Court must

[3] The case found a regulation by the New York Public Service Commission violated the First Amendment protection of freedom of speech, since it was more extensive than was necessary in pursuit of the government's goals of energy conversation by banning all promotional advertising by a utility company.

determine that the First Amendment does indeed protect the speech in question. If it is protected, then the following test is applied:

1. The speech in question is legal and not misleading,
2. The government has a substantial interest in pursuing the regulation,
3. Regulations implemented or proposed advance the government interest,
4. The government regulations being implemented or proposed are not more extensive than are necessary. (citing *LMA*)

If all of these criteria are met, then the specific restriction is not in violation of the First Amendment.

It is difficult to assess whether or not the Court will find that *LMA* passes the *Central Hudson* test or not. Even a very quick reading of the test will find that a great deal of subjective consideration is inherent in parts 2 and 4, in considering whether or not the government has a substantial interest in pursuing the regulation, and whether or not the regulation goes too far. Part 3 can also be subjected to great debate, especially if the goal is economic or political, two fields in which it is often far from clear if any specific policy will actually produce the desired results, and are often marked by heated debates between experts with some opposing and some supporting the policy, often on more complex grounds than straight effectiveness. But, even further, no lower court has yet attempted to really apply the test to *LMA*. The specifics of the *Central Hudson* case were that the regulation in question in that case restricted the speech of a corporation, whereas in *LMA*, the regulation and government action compel speech. For this reason, the lower courts have turned to the second precedent for commercial speech, the *Glickman* case.

Actually quite similar to *LMA*, the case of *Glickman v. Wileman Brothers & Elliot, Incorporated*, 521 U.S. 457, 117 S.Ct. 2130, 138 L.Ed.2d 585 (1997) featured a regulatory scheme in the California tree fruit industry that, among many other items, included mandatory assessments from producers to pay generic advertising. In *Glickman*, the Court held that mandatory assessments for generic advertising, even when some members of the group objected to the advertising, did not violate the First

Amendment if it was part of a broader regulatory scheme.[4] This case does provide some insight useful in predicting the final outcome for *LMA*. The funds from the Beef Check-off are used for multiple purposes, and so arguably part of a larger regulatory scheme. That said, once the amount of money used for advertising, over 50% of the total funds, is considered, it becomes quite clear that the main point of the regulatory scheme is the advertising. The Court has already declared that this may not be done; it is why the Court declared the Mushroom Act unconstitutional in *United Foods*. Based then, on the same logic used in *United Foods*, it appears likely that the decision of the 8th Circuit Court of Appeals will be upheld, and the Beef Act declared unconstitutional.

However, predicting the outcome becomes more difficult again once the government speech doctrine is considered. First, the Supreme Court has not considered the doctrine in any case similar to *LMA*. And, while the regulations in *United Foods* were declared to be substantially the same as those in *LMA*, neither side raised the question of government speech, so the Court declined to consider it for the purposes of that case. The doctrine holds that government speech, when it is identified as speech by a government agency, is protected by the First Amendment just as speech by a private citizen or firm. It therefore stands that, should the Beef Board, the organization acting to fund the commercials stand as a government organization, then the commercials funded by the Beef Board would stand as government speech.

The 8th Circuit Court, however found that the commercials did not gain protection as government speech. The court maintained the validity of the argument, and it did not challenge the commercials status as government speech. The court, however, found that the complaint from the LMA was not with the content of the speech, but with the government's authority to compel financial support of that speech. The court, therefore, held that the advertisements were not protected as government speech (Citing *LMA*). It would therefore seem likely that decision will be upheld.

However, among a plethora of decisions among lower courts regarding the government speech doctrine after the *United Foods* decision, is the decision of *Charter v. United States Department of Agriculture*, 230 F.Supp.2d 1121 (D.Mont.2002). In this

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[4] In *Glickman*, specifically, the Court found that the assessments were constitutional since they were bought of a broader regulatory scheme, which included other anti-competitive features. (Citing *LMA*)

case, the check-off program was upheld as constitutional as government speech. While this decision does not carry the weight of precedent in the United States Supreme Court, since it is from a lower federal district court, it offers the possibility that a reasonable argument may be made in support of protection as government speech. In *Charter*, the court found that the Beef Board was so closely tied to the Secretary of Agriculture as to essentially be part of the Department of Agriculture. The court then declared that mandatory support of a government institution carries a different legal standing than does mandatory support for a private institution. The court therefore concluded, since the Beef Board was tied closely enough to the Secretary of Agriculture that it stood as a government agency, then its speech, of which the generic advertisements included, the advertisements stood as government speech, whose contents are subject to First Amendment challenges from those required to pay for the speech.

CONCLUSION

On balance, it is difficult to see how the Court will decide. The commercial speech issue is clearly in favor of the appellants (LMA). The government speech issue is unclear. With the proliferation of cases on the government speech and the variety of decisions found in them, it is likely that the Court accepted the case in order to clarify the government speech doctrine and to establish a national precedent on the issue. It can therefore be expected that the Supreme Court arguments focused heavily on this issue, rendering the final outcome difficult to predict, due to a lack of clear precedent.