Get Ready for More Commodity Promotion Litigation

by

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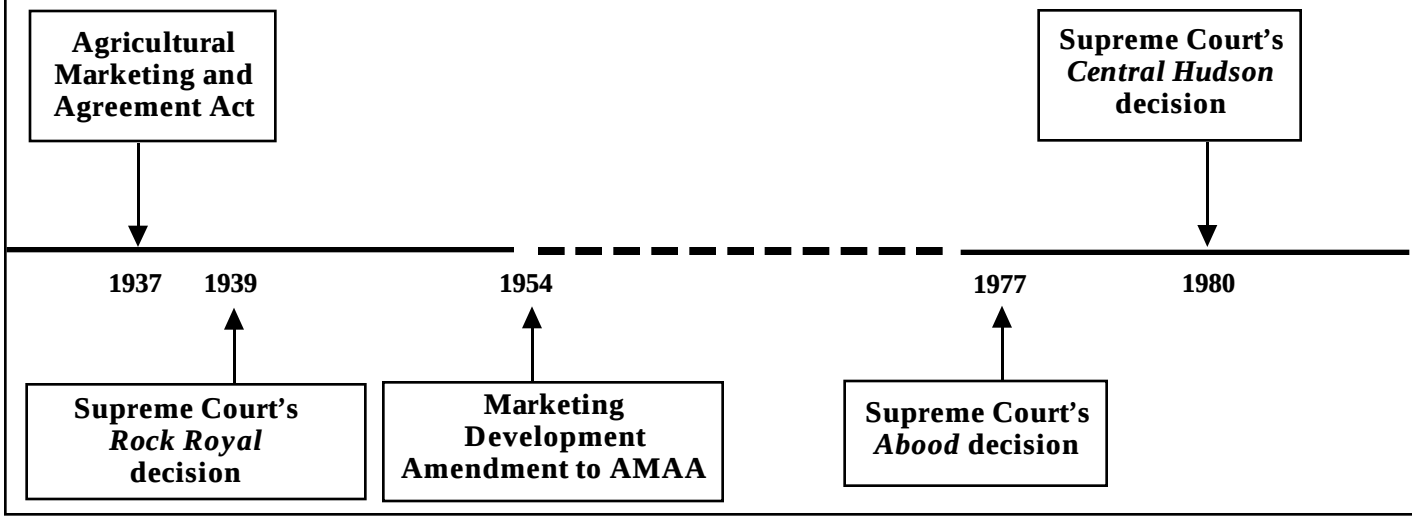
Throughout the 1990s, generic advertising programs were enmeshed in litigation over their constitutionality. The key arguments evolved around the First Amendment rights of industry participants who were compelled to fund generic advertising programs. In 1997, the U.S. Supreme Court ruled in *Glickman v. Wileman* that programs for California nectarines, peaches and plums did not infringe upon the First-Amendment rights of participants. Although the decision was slim (5-4), most observers believed that the ruling would allow celebrities to continue wearing milk mustaches with impunity. As expected, cases that had been pending in lieu of the Court's decision in *Wileman* were quickly dispensed. Thus, it was quite a shock when in November of 1999, the 6th Circuit Court of Appeals ruled that the Mushroom Promotion Program was unconstitutional. The Department of Justice has until June 21st to decide whether or not to ask the Supreme Court to take up the issue of generic advertising once again. Until the Supreme Court rules on this issue, expect more litigation, especially in regards to so-called "stand-alone" promotion programs that were created after the original depression-era legislation that had established the marketing orders.

Recall how the generic advertising litigation came about in the first place. In 1937, the Agricultural Marketing and Agreement Act (AMAA) was established, providing the statutory authorization for marketing orders. Not without controversy itself, the AMAA survived an important initial challenge of its constitutionality before the Supreme Court in *United States v. Rock Royal CO-OP* in 1939. In 1954, Congress amended the AMAA to authorize "marketing development projects" that included provisions for generic promotion and advertising to be funded through mandatory assessments on producers in the marketing order (provided, of course, that the program passes the necessary grower referendum; for more information on marketing orders see the Agricultural Marketing Service's Web site at www.ams.usda.gov). Popular media advertisements like, "Got Milk?", the California dancing raisins and "California Real Cheese" are examples of such industry-funded, generic advertisements. In the late 1980s, producers began to challenge these programs on the grounds that they violated their rights to be free of compelled speech. One may wonder why a 1954 Act of Congress seemed to go unchallenged until the late 1980s. The simple answer is that the marketing-order litigation could not have started any sooner, as it was a natural extension of two Supreme Court rulings that were not handed down until 1977 and 1980.

In 1977, the Supreme Court issued a ruling in *Abood v. Detroit Board of Education* that made certain union assessments compulsory, but limited how the unions could use that money. Simply, an *Abood* test requires that the funds collected be relevant to the goals of the government interest and may not be used to fund ideological activities. In 1980, the Supreme Court ruled in *Central Hudson Gas & Electric v. Public Service Commission of New York* that compelled commercial speech had to meet three requirements in order to pass constitutional muster. First, the program must involve a substantial government interest. Second, the regulation must directly advance that interest. And, third, the government's program must be narrowly tailored to minimize adverse impacts on First Amendment rights.

> *[W]hat we are reviewing is a species of economic regulation that should enjoy the same strong presumption of validity that we accord to other policy judgements made by Congress. The mere fact that one or more producers "do not wish to foster" generic advertising of their product is not sufficient reason for overriding the judgement of the majority of the market participants, bureaucrats, and legislators who have concluded that such programs are beneficial.*
>
> Justice Stevens
> *Glickman v. Wileman*
> U.S. Supreme Court, 1997

Figure 1. Important Dates in Marketing Order Litigation



Following *Abood* and *Central Hudson*, the first test of generic promotion programs came in 1988 with the 3rd Circuit's hearing of *United States v. Frame*. Robert Frame, a Pennsylvania cattle rancher and auctioneer, refused to pay assessments mandated under a 1985 amendment to the Beef Promotion and Research Act of 1976. Frame argued that his First-Amendment rights had been violated because the beef promotion program compelled him to associate with his competitors and pay for advertising when he would prefer to remain silent. Citing *Abood*, the 3rd Circuit Court ruled that, indeed, Frame's rights were implicated, but that the government had demonstrated that the Beef Act served compelling state interests (to aid a struggling beef industry), and the promotion was ideologically neutral, and, therefore, constitutional.

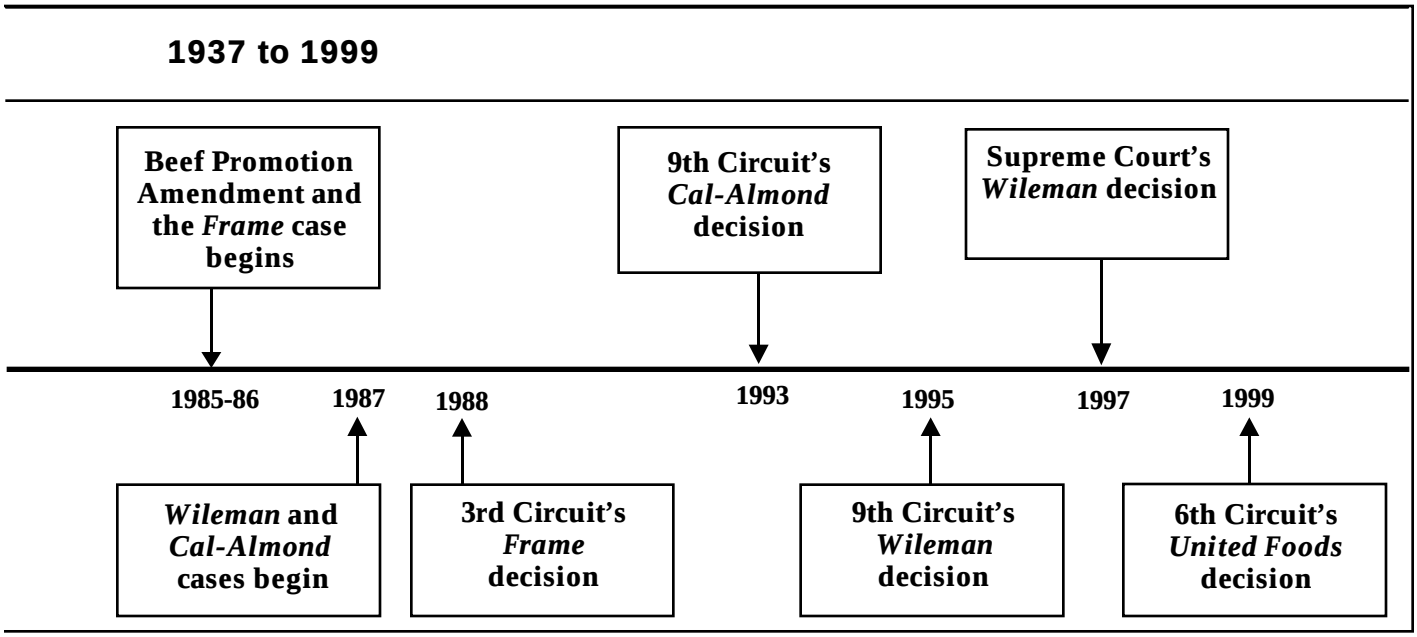
Around the same time, some California almond handlers raised a similar challenge against the almond marketing order (*Cal-Almond v. USDA*). When the case finally made its way to the 9th Circuit Court of Appeals in 1993, rather than using *Abood*, the 9th Circuit applied the three standards of *Central Hudson*. The 9th Circuit agreed that increasing the return to the almond industry by stimulating demand was a substantial government interest. Nevertheless, the Court found no evidence that the Almond Board's advertising had any effect on almond demand, and, therefore, could not be said to further the goals of the regulation. Moreover, the Court cited inconsistencies in the order's credit-back provisions, that were "more extensive than necessary to serve the interest of increasing almond sales." Having failed on prongs two and three, the generic advertising and promotion program of the almond marketing order was judged unconstitutional.

Following the almond case, dozens of commodity promotion cases arose. Because the 3rd and 9th Circuit Courts had given decidedly different opinions in very similar cases, it was inevitable the Supreme Court would become involved. That day came in December 1996 when the Supreme Court heard arguments in *Glickman v. Wileman*. The case had been appealed from the 9th Circuit, which had found that the promotion programs for California nectarines, peaches, plums, like the almond program, failed the second and third prongs of *Central Hudson*.

In the *Wileman* case, a five-member majority ruled that the correct standard to be used was that of *Abood*, while the dissenting opinion favored that of *Central Hudson*. Writing for the Court, Justice Stevens time and time again stressed the statutory context within which the generic promotion programs had arisen and that the generic campaigns had to be viewed in light of the regulatory scheme that Congress had put forward. Simply, as long as the regulatory means furthered the programs' goals and did not compel ideological speech, that was all that was necessary to satisfy the programs' constitutionality (see the text box on page 5 for Justice Stevens' own words).

In the two years following the 1997 *Wileman* decision, cases that had been pending around the country were quickly decided in favor of the promotion programs. The *Cal-Almond* decision, for example, was reversed following *Wileman*. That is why it came as a shock when in November of 1999, the 6th Circuit ruled that the stand-alone mushroom promotion program was unconstitutional.

A Tennessee food processor challenged the 1990 Mushroom Act arguing that the regulatory



environment of the mushroom industry differed enough from that of the California tree-fruit industry so as to make the *Wileman* decision inapplicable (*United Foods v. USDA*). The 6th Circuit, deciding that the mushroom industry was much less regulated than the tree-fruit industries, ruled that "compelled commercial speech is not a price the members must pay . . . to further their self interest." Although the 6th Circuit's ruling is limited to programs in its jurisdiction, it threatens perhaps an even greater litigation headache.

What is imperative to see in the 6th Circuit's ruling is that the conflict that has now arisen is different from the previous conflict that the Supreme Court settled with the 1997 *Wileman* ruling. In the previous conflict involving the *Frame* and *Wileman* decisions, Courts were disagreeing over the test to apply (*Abood* or *Central Hudson*), not the degree of regulatory differentiation among programs. If other courts follow the 6th Circuit's interpretation of *Wileman*, the constitutionality of a promotion program will be judged upon the *extent* of regulation in an industry, no small task given the complexities of government intervention in agriculture. Any commodity board member who believes the 6th Circuit's decision is only a minor detraction from the "omnipotence" of the *Wileman* ruling may be unduly optimistic. At least twenty commissions and councils established separately from the AMAA exist in California alone, with regulatory provisions only for research and/or promotion. When the 9th Circuit, whose skepticism toward generic advertising brought about the *Wileman* case, reversed itself in *Cal-Almond* (September 21, 1999), Judge O'Scannlan (quoting Stevens) wrote, "it would appear that the almond handlers are 'part of a broader collective enterprise in which their freedom to act independently is already constrained by the regulatory scheme.'" Such a premise for ruling against the almond handlers sounds a peculiar note of similarity to the 6th's ruling in favor of United Foods. In other words, the 6th Circuit's viewpoint may not be contrary to the 9th Circuit's because the mushroom program, unlike the almond program, is *not* part of a broader regulatory scheme.

The 6th Circuit's ruling may very well stand for some time, as the Supreme Court may not wish to take on promotion programs so soon after their last decision, and the Department of Justice may wait for a clearer conflict among the Circuits to arise. In either case, expect growers and handlers around the country, especially those in stand-alone programs, to test judges' interpretations of the regulatory necessities of *Wileman*. Is commodity *A*'s promotion program constitutional because *A* is more regulated than commodity *B*? Nectarines might be more regulated than mushrooms, but what about beef, or walnuts, or kiwifruit? Would eliminating a grading regulation mean a new fight over the constitutionality of a program because now the industry is "less regulated"? Sooner or later, the Supreme Court will need to be involved, until then, get ready for more litigation.

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