From: John Vetne
To: ronald cotterill
Sent: Friday, December 22, 2006 12:52 PM
Subject: Re: RE additional opinion

OK, Ron. I will put that on hold for now. I wondered why you wanted more specific conclusions on the Marketing Board bill when the folks in your meeting were leaning the other way.

My direct answer to your questions would be: A Marketing Board approach with direct payments to OOS farmers would probably be found lawful under the Commerce Clause. This is an abstract opinion, however, because we do not know now how the Board would actually structure its regulations. And, of course, we do not know the disposition of of individual judges that might hear the case, or whether they got up on the wrong side of the bed on the day they may make their decision.

My current view is that payment of state subsidies to OOS farmers is not per se unlawful under the Commerce Clause. Again, further opinions would be useful when and if a Board structured its regulations.

I might add that payment of subsidies using state funds, whether to in-state or out-of-state producers, can plausibly put the state in a position as "market participant" rather than "market regulator" for fund distribution purposes. This is an important distinction under Commerce Clause analysis, though its refinement and development under Commerce Clause jurisprudence is still new and narrowly applied. If the state is deemed to act as a "market participant," Commerce Clause limitations do not apply. The state may do what it likes in the purchase or sale of goods. The market participant doctrine was first articulated as a Commerce Clause exemption in Huges v Alexandria Scrap, 426 U.S. 794 (1976), and has been applied in a few appellate and Supreme Court cases since that time, most of which rejected the application of Huges to the regulations or activity in question.

Hughes v Alexandria Scrap involved a Maryland program that paid a bounty, from state funds, for scrap processing of abandoned and junkk-yard vehicles found within the state. Payments were made to in-state and out-of-state scrap processors, but documentation burdens were greater for abandoned cars with out-of-state titles. The Supreme Court concluded that Maryland's bounty program was effected in the State's proprietary capacity as a market participant (even though the state did not take title to the vehicles). In effect, the state paid a premium for private services to further the public interest in aesthetic appearance of the state.

Similarly, when the issue arises, the state can argue that payments from state funds to dairy farmers constitute a similar type of 'bounty' by the state to further its citizens' interest in maintaining a supply of nearby fresh milk, as well as state interest in the aesthetic and rural economic benefits that dairy farms provide. Of course, I can't say for sure that this argument will succeed, but it is one that can be made. The legislative history of any of the milk bills can be created to maximize the merits of a market participant defense to a Commerce Clause claim.

john

> ----- Original Message -----
> **From:** ronald cotterill
> **To:** Vetne John
> **Sent:** Friday, December 22, 2006 12:17 PM
> **Subject:** RE additional opinion
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> Perhaps it is better to just let things stay as they are. I do not want to put you out on a limb or more accurately put us out on a limb. If we ever return to the Board in the future we can address the issues then. Ron

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