

The Generic Advertising Controversy: How Did We Get Here and Where Are We Going?

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John M. Crespi

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Abstract.

Since the 1980s, generic advertising programs for dozens of farm commodities have been entangled in a great deal of litigation. The author looks at the history of generic advertising policies, discusses why the litigation arose when it did, and argues that the current round of litigation is simply an inevitable outgrowth of fairly recent Supreme Court rulings on commercial speech. The author further examines some of the economic studies that have been performed. The author predicts an increase in generic advertising litigation based upon the degree of collectivization in an industry and explains why recent Supreme Court rulings have resulted in more rather than less litigation in this area.

Key words: Farm policy, generic promotion, litigation, marketing orders

• John Crespi is Assistant Professor, Department of Agricultural Economics, Kansas State University. He may be reached at 785-532-3357 or by email: jcrespi@agecon.ksu.edu.

The Generic Advertising Controversy: How Did We Get Here and Where Are We Going?

In 1997, the Supreme Court ruled in *Glickman v. Wileman* (hereafter, *Wileman*) that federally mandated generic advertising for California peaches and nectarines does not violate the First Amendment. With that ruling, the 1990s' bout of commodity advertising litigation initially appeared to be ending. Just prior to the ruling, Mark Houston, president of the California Kiwifruit Administrative Committee, summed up the views of many growers when he said, "This issue needs to be cleared up and not become a full employment act for attorneys. . . . The controversy has pitted farmer against farmer at a time when it is getting tougher and tougher to farm" (Cline).

A 2001 U.S. Supreme Court ruling that a mushroom promotion program violates the First Amendment (*United States v. United Foods*), however, has brought the *Wileman* ruling's impact on generic advertising programs into question. While many are speculating what the decision means, it seems certain that the acrimonious history of the battles over industry-funded promotion programs will mean increased litigation. In order to understand where that litigation may be heading, this article examines the history of these controversial marketing programs and the economic analyses that have attempted to determine whether the programs are beneficial. The article concludes by recommending that future analyses should attempt to explain why certain producers are so opposed to these programs.

Background on Marketing Orders

A marketing order for promotion and advertising compels all growers under the order to jointly contribute funds for industry advertising. The program is administered by a board or commission elected by the growers under the auspices of the U.S. Secretary of Agriculture (for a federal order) or the State Secretary (for a state order). Forker and Ward define generic advertising as "the cooperative effort among producers of a nearly homogeneous product to disseminate information about the underlying attributes of the product to existing and potential consumers for the purpose of strengthening demand for

the commodity” (p. 6).

The Agricultural Marketing Agreement Act of 1937 created federal marketing orders and is often seen as merely a reaction to the dire economic consequences of the Great Depression. For example, during the Supreme Court testimony for the *Wileman* case, Justice Scalia referred to marketing orders for generic advertising as “time-warped” out of that era, “a remnant of the National Recovery Act.” However, the legislation was not merely an attempt to alleviate a problem created by the Depression. The problem had always existed; it was simply that the Depression made it more obvious.

The 1937 Act provides four types of regulatory actions: *i*) restrictions on the quantity of a commodity that can be sold, either through marketing allotments or reserve pools; *ii*) limits on the grade, size, or quality of the commodity; *iii*) regulation of packaging and container sizes; and *iv*) some limited generic promotion and advertising allowances (most notably for milk promotion, with broader provisions for generic advertising and promotion coming with later amendments, as discussed below). Marketing orders must be for specific commodities and in as small a region as possible to further the objectives of the order. A federal marketing order can only be set up by the Secretary provided that a two-thirds majority of affected growers vote in favor of one, and the Secretary must nullify the order upon a simple majority vote by the growers to do so.¹

While the idea is simple, the question that often arises is why must the producers be *compelled* to promote their products? The key is product homogeneity. Peaches are peaches and pork is pork or so it is argued. Richards (1995) provides a simple game-theoretic example. Suppose two growers of the same commodity each earn \$10 from crop sales. However, if they both contribute to an advertising program, their profits, net of the advertising expense, may rise to \$16 each. Now suppose that if one contributes and the other does not, the net profit for the contributor is \$8, but the “free rider” takes advantage of the fact that consumers do not distinguish between the goods and earns, say, \$18. Thus the free rider reaps the benefit of the advertising-induced increase in demand without paying for any of the cost. Even in this situation, industry profits (\$8 + \$18) are lower than if both growers contributed (\$16 +

\$16). Nevertheless, joint contribution will not arise voluntarily. The reason is that *not contributing* is better than *contributing*: if one grower contributes, the other is better off not contributing ($\$18 > \16) and if one does not contribute, the other grower is still better off not contributing ($\$10 > \8). The end result will be that neither grower will contribute to the advertising and the industry will be in the least profitable scenario with both growers earning only \$10.

Economists recognize this as the Nash equilibrium. Obviously different choices of numbers would change the outcome, but this game represents the rationale behind the marketing order: if the cost of advertising makes you worse off in the presence of a free rider, profits will increase in the industry only if all growers are compelled to fund the program. The strong assumption is that a grower who advertises would be worse off in the presence of a free rider. We will revisit this assumption at the end of the paper.

Because of the first-amendment right of freedom of association, compelling farmers to associate with each other needs more justification than the rationale that arises from a simple, two-person game. This paper shows that the arguments in numerous cases like *Wileman* and *United Foods* cannot readily be explained away by the conventional wisdom that these suits are the result of free riders, free-market extremists, or unbridled lawyers. Whether either side of the battle was aware of it, the issues grew out of a long, evolutionary process of economics, legislation, and litigation – that has been obscured behind the invective.

The First Shot in the Battle: *United States v. Rock Royal CO-OP (1939)*

The first test of the 1937 act came on October 27, 1938, when the United States filed a complaint against several milk processors for failing to pay their assessments under Milk Order No. 27. As discussed in Harl (70-11), the processors claimed the Order had been inappropriately adopted and that both the Milk Order and the act were unconstitutional infringements on their due process rights (Fifth Amendment), on rights reserved only for the states (Tenth Amendment), and on the processors' property

rights (Fourteenth Amendment). When the District Court concurred, the government appealed to the Supreme Court, which heard the case in April of 1939 (*United States v. Rock Royal CO-OP., Inc.*).

Taking their cues from the 1936 *United States v. Butler* decision, which had invalidated the 1935 Agricultural Adjustment Act, the milk processors made three main arguments. First, the defendants argued that their Fifth Amendment rights had been violated because the broad, price-fixing powers given to the Secretary violated due process laws. Second, the defendants argued that the Tenth Amendment had been violated since any attempt by the federal government at fixing the price of milk before any interstate commerce had commenced interceded such rights reserved to the states. Third, the defendants argued that the delegation of authority granted *i*) to the Secretary to establish marketing areas; *ii*) to producers to approve a marketing order without an agreement of the processors; and *iii*) to cooperatives to cast votes of producer patrons (so called “bloc voting”) went against earlier Court rulings about granting overly broad powers to the Executive Branch (*Schechter v. U.S.*).

The Supreme Court rejected these arguments upholding the 1937 Act and the Order in a 5 to 4 decision. For the first two of these three challenges, the Supreme Court held that the interstate commerce clause granted Congress the authority to regulate economic sectors, and that the timing of the regulation does not supersede such authority. Writing for the majority, Justice Reed affirmed, “Activities conducted within state lines do not by this fact alone escape the sweep of the Commerce Clause. Interstate commerce may be dependant on them.” For the third challenge, the Court found that, unlike the previous agricultural act, the provisions of the 1937 act with regard to delegation of authority were sufficiently narrow. Further, since Congress could authorize regulatory powers as it deemed necessary, there was nothing invalid about the cooperative bloc-voting scheme either (*United States v. Rock Royal Co-op., Inc.*, 569).

The importance of the *Rock Royal* decision can hardly be underestimated. By upholding the 1937 Act, the Supreme Court established the right of producers in dairy, fruit and vegetable markets to vote themselves into or out of a regulated industry. True, the years that followed would still be filled

with litigation involving marketing orders, but most of these complaints were along procedural grounds such as the timing or calling of board elections and voting (e.g. *United States v. Mills*, *Freeman v. Hygeria Dairy Co.*, *Consolidated-Tomoka Land Co. v. Butz*, *Sequoia Orange Co. v. Yeutter*, *Cecelia Packing v. U.S. Department of Agriculture*) or the Secretary's handling of various suspensions (e.g. *Carnation Co. v. Butz*, *Abbotts Dairies v. Butz*) and not about the constitutional validity of the programs. The strength of the Supreme Court decision in *Rock Royal* can be seen in the fact that there would be no challenge to the constitutionality of the 1937 Act for nearly 50 years.

Advertising, Abood, and Central Hudson

In the decades following the implementation of the 1937 Act, marketing orders and agreements had become rather mundane components of U.S. agriculture. The question that naturally arises, then, is why have things changed so much? While it is hardly surprising that few would notice a handful of events that occurred over 20 years, the generic advertising controversy can be traced directly to three seemingly unrelated events that would coalesce to create the biggest challenge to the 1937 act since *Rock Royal*. These three events; a 1954 amendment to the 1937 Act, and the *Abood* and *Central Hudson* cases are at the heart of today's marketing order challenges.

Event #1: 1954 Advertising Amendment to the Act

In 1954, Congress amended the 1937 act to authorize the Secretary to establish "marketing development projects," including advertising and promotion for a broad range of commodities, that would further the goals of the original act. With the exception of some minor provisions (for example in milk promotion), generic advertising had been left out of the original 1937 act because the USDA had concerns that advertising just changed market share from one commodity to another. By the 1950s, however, the government was purchasing a good deal of excess supply to maintain parity prices. Stimulating demand through advertising, it was hoped, would help increase farm prices while relieving

pressure for both governmental purchases of excess stocks and expanding governmental support to other commodities. Viewed in this light, generic advertising just added a demand instrument to the government's toolbox of supply controls. The stipulations of marketing orders for generic advertising are that advertising must truly be of a generic nature so as not to benefit some growers over others, and that the assessed money may not be used to promote political or ideological viewpoints.

Event #2: Abood v. Detroit Board of Education (1977)

The second event had nothing to do with agriculture. According to a provision of a collective bargaining agreement between the Detroit Federation of Teachers (Union) and the Detroit Board of Education, any teacher who had not become a Union member within 60 days of hire had to pay a service charge equal to the regular Union dues. D. Louis Abood and some other Detroit teachers objected to the notion of collective bargaining in the public sector, and, therefore, had ideological reasons for not associating with a Union. Further, these teachers objected to the service charges because they were being used, in part, for political endorsements. Beginning in a Michigan State Court in 1969, the case was finally decided by the U.S. Supreme Court in May 1977.

The Supreme Court ruled that if the government deems labor relations to be important in maintaining a healthy economy, then compelling payment for collective bargaining is valid even if some members disagree with it. However, the Union did not have a right to compel speech through Union dues or service charges if an individual disagreed with an ideological viewpoint unrelated to collective bargaining, contract administration or grievance adjustments. The Court ruled that, although Mr. Abood and the other teachers were not being prohibited from expressing their opinions, freedom of speech includes the right not to be compelled to speak. The Union could only use a dissenter's money in a way that was germane to the purpose of the compelled association, e.g. the collective bargaining. Thus, an *Abood* test merely requires that compelled assessments be relevant to the goals of the government interest and may not be used to fund ideological or political activities.

Event #3: Central Hudson Gas & Electric v. Public Service Commission of New York (1980)

In 1973, in order to temper the demand on shrinking fuel stocks, the Public Service Commission of New York ordered electric utilities in the state of New York to suspend all advertising that promoted electrical usage. In 1977, the Commission decided to make this ban permanent in light of the growing energy crisis. Citing a legal history that commercial speech is still protected, Central Hudson Gas & Electric Corp. opposed this ban on First Amendment grounds.

The Supreme Court decided the case in June 1980, and set up the “three-prong” test that must be administered in appropriate commercial speech cases. Provided the speech is lawful and not misleading, the three prongs are as follows. First, does the government’s program involve a substantial government interest? Second, does the regulation directly advance that governmental interest? And, third, is the government’s program narrowly tailored to minimize adverse impacts on First Amendment rights? Failure of any one of the three prongs of a *Central-Hudson* test means the regulation is unconstitutional.²

First Amendment Challenges to Generic Advertising

Abod and *Central Hudson* helped set the tone for a plethora of First Amendment cases destined to cause a re-examination of the speech (i.e., the advertising) and association components of marketing orders. A brief listing of certain rulings is instructive.

In the same year as *Abod*, the Supreme Court ruled that the government cannot compel individuals to use their own property to endorse an ideological message with which they disagreed (*Wooley v. Maynard*). The Court strengthened this message by adding that the government may not force individuals to respond to a hostile message when they would prefer to remain silent (*Pacific Gas & Electric Co. v. Public Utilities Commission of California*). Nor may the government require an individual to be publicly identified or associated with another’s message (*Pruneyard Shopping Center v.*

Robins). The Supreme Court ruled in *Roberts v. United States Jaycees* that the government's interference in one's freedom of association could only be justified by "compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."³

Beginning with *Abood*, the Supreme Court of the 1980s was signaling that it would observe governmental involvement in the First Amendment, especially "commercial speech," with a great deal of scrutiny. It did not take long for opponents of marketing orders to take notice. With the *Abood* and *Central Hudson* cases to guide them, opponents of generic advertising argued that their First Amendment rights had been violated by the advertising campaigns that forced them to associate with their competitors and fund a promotional message with which they did not agree.

United States v. Frame (1989)

In 1985, Congress amended the Beef Promotion and Research Act of 1976 to strengthen and expand a foundering beef market through the use of advertising and promotion.⁴ The newly amended act required cattle producers and importers to finance a national beef promotional campaign by paying an assessment of \$1 per head of cattle sold. L. Robert Frame, Sr., who operated a cattle auction sales business and raised cattle in Pennsylvania, refused to pay. The Secretary of Agriculture brought action against Frame, winning in the District Court. Frame appealed, arguing that his First-Amendment rights of free speech and association had been violated by a generic advertising program compelling him to associate with his competitors and pay for advertising when he would prefer to remain silent.

In their 1989 ruling, the 3rd Circuit Court found that Frame's First Amendment rights had, in fact, been implicated by the forced association and the advertising (*Frame, L. Robert Sr., et al v United States*). Nevertheless, this did not justify nullifying the Beef Act. The rationale the Court used is insightful.

The government had argued that promotion and advertising was "government speech" by the

Cattlemen's Board and Operating Committee, an instrument created by the Secretary of Agriculture to further the goals of the Act. ("Government speech" is held to a much lower scrutiny than speech protected under the First Amendment.) Nevertheless, the Court rejected this argument and ruled that the beef promotion program, though compelled by the government, was, in fact a self-help, "commercial speech" program. Moreover, citing *Abood* and *Roberts*, the Court observed that this particular type of commercial speech had to be held to an even higher standard of scrutiny because Frame was compelled to associate with the Cattlemen's Board. Writing for the Court, Judge Scirica set forth the framework the Court would use to scrutinize the Act:

Accordingly, we will sustain the constitutionality of the Beef Promotion Act only if the government can demonstrate that the Act was adopted to serve compelling state interests, that are ideologically neutral, and that cannot be achieved through means significantly less restrictive of free speech or associational freedoms (*Frame*, 1134).

The Court was impressed with several features of the Beef Act. First, the act was put forward as a "self-help program" to insure the integrity of the independent cattlemen; second, the promotion was ideologically neutral, and third, the Act "expressly prohibits spending for political activity." Again citing *Abood*, Judge Scirica wrote, "Frame has failed to characterize his objection to the advertisements in a manner that would allow a reviewing court to reasonably infer a dispute over anything more than mere strategy" (*Frame*, 1135-37). Interestingly, the Court noted that the Beef Act would pass the three-prong test of *Central Hudson* which was, in fact, less restrictive than the *Abood* and *Roberts* tests used in *Frame*: the "*Central Hudson* test bolsters, rather than undermines, our conclusion that the Act is constitutional" (*Frame*, 1137). Thus, the 3rd Circuit Court rejected Frame's free speech and association argument, finding that, although the Beef Promotion Act did implicate the First Amendment rights of those compelled to participate, clearly the government "enacted this legislation in furtherance of an ideologically neutral compelling state interest, and has drafted the Act in a way that infringes on the contributors' rights no more than necessary to achieve the stated goal" (*Frame*, 1137). Frame's appeal to the Supreme Court was denied.⁵

Cal-Almond, Inc. v. U.S. Department of Agriculture (1993)

The federal generic advertising marketing order for almonds, established in 1950, differs slightly from many other advertising marketing orders in its provisions for collecting the advertising assessments. The almond order is administered by the Almond Board of California, which is composed of 10 industry members. Assessments are collected when growers bring their crops to a handler, many of whom are also growers. The assessments are based upon volume and administered by the Board to cover Board activities, such as research and development, quality control, volume regulation, and generic advertising and promotion. The biggest difference between this order and others is that during the 1980s, handlers could be reimbursed for the generic advertising portion of the assessment if the handler undertook its own consumer advertising program provided that the advertising met requirements set by the Board.

Some handlers felt that the Board requirements favored certain handlers, particularly the largest almond cooperative, Blue Diamond Almonds. In 1987, when the first round of litigation in the *Cal-Almond* case began, Blue Diamond had a 92 percent share of almonds sold in grocery stores and sold almonds through its own retail stores. Most of the other handlers sold to food processors, such as cereal makers. Also, because the almond marketing order allows for “bloc voting,” whereby a cooperative can vote on behalf of its grower members; the larger the cooperative, the more votes it may cast. Blue Diamond, representing more than half of the growers in the industry, maintained a majority position on the Almond Board.⁶

In 1984, Saulsbury Orchards and Almond Processing, Inc. refused to pay its annual advertising assessments. Most of Saulsbury’s sales were to cereal manufacturers and Saulsbury helped fund advertisements for some of the almond-containing cereals. Saulsbury also provided almond-related advertising for a chain of mini-markets in the Boise, Idaho area. However, when Saulsbury tried to recoup its advertising expenditures for these venues, the Board denied credit. The cereal expenditures

were denied because of Board regulations that the consumer product must contain at least 50 percent almonds in order for the advertising to be creditable. The mini-market advertising expenditures were unrecoverable because Board regulations denied credit for advertisements at retail outlets not operated by a handler.⁷

Another handler, Cal-Almond, Inc., sold most of its almonds to an ice cream manufacturer and helped advertise the products. Cal-Almond was also denied credit for advertising expenditures because the ice cream was less than 50 percent almond. Blue Diamond, on the other hand, was allowed to recoup its advertising expenditures. In 1987, Cal-Almond joined Saulsbury and Carlson Farms in challenging the almond order. The matter finally appeared before the 9th Circuit Court of Appeals in January 1993 as *Cal-Almond v. U.S. Department of Agriculture*.

As in *Frame*, the appellants argued that the generic advertising program was an infringement on their First Amendment rights of free speech and association. The District Court, from which this case was appealed, held that the almond marketing program neither implicated nor violated the appellants' First Amendment rights because no one was compelled to advertise and because handlers could get their assessments back if they participated in creditable advertising. The 9th Circuit Court disagreed with the lower court's reasoning, however, precisely because the Order does compel the handlers to expend money on assessments or creditable advertising, which, as the 3rd Circuit Court had found in *Frame*, burdened the handlers' First Amendment rights.

The 3rd Circuit Court cited *Abood* and *Roberts* in arriving at its decision. The 9th Circuit Court, however, applied the three prongs of the *Central Hudson* test. The Court agreed with the language of the almond order that stimulating demand for almonds to increase industry returns involved a substantial government interest. However, it balked at supporting the government in prongs two and three.

Recall, *Central Hudson*'s second prong test asks whether the restrictions directly advance the government's interest. The Court first focused its attention on the creditable advertising restrictions and held that, to satisfy *Central Hudson*, the USDA must show that *i*) the advertising that received credit is

better at stimulating demand than the Board's own advertising efforts, and *ii*) the advertising that is denied credit is worse than the Board's. In concluding that the generic promotion did not pass the second prong, the Court mainly relied on two observations. First, the USDA could provide no evidence showing that the Board's advertising had any effect on almond demand. Thus, USDA had no basis for claiming that the generic advertising "directly advanced" the government's interest. Second, the Court wondered whether handlers could provide any evidence that the credit-back regulations helped them sell more almonds. Clearly Saulsbury's and Cal-Almond's experience suggested otherwise. However, even the largest handler could provide no evidence that the regulations helped. Roger Baccigaluppi, Blue Diamond's president and chief executive officer and Walter Payne, Blue Diamond's vice president for sales, marketing and distribution, testified that the company would advertise the same in the absence of the credit regulations. In the 9th Circuit Court's ruling, Judge Brunetti summarized "the regulations do not 'directly advance' the government's asserted interest in increased almond sales and are therefore an unconstitutional restriction on appellants' First Amendment rights" (*Cal-Almond*, 439).

The Court now turned to the third prong of *Central Hudson*: are the regulations more extensive than necessary to further the government's interest in selling almonds? The Court agreed that advertisements for which credit is permitted will increase almond sales, but chided USDA for not justifying the restrictions that denied credit. The USDA had argued that "the regulations reflect a reasonable judgment that the Board will make better use of those monies in its market promotion programs" than handlers in their non-creditable advertising expenditures. Again, Judge Brunetti writes,

It is true that the fit between means and ends need not be perfect, but there seems to be no logical justification for these types of restrictions other than the restrictions are designed to benefit Blue Diamond, who overwhelmingly dominates the retail almond market, at the expense of smaller handlers such as appellants, who sell primarily to ingredient manufacturers. . . . The creditable advertising regulations . . . are more extensive than necessary to serve the interest of increasing almond sales (*Cal-Almond*, 440).

Having failed on two of the three prongs, the 9th Circuit Court ruled that the advertising portion of the almond order was an unconstitutional violation of the appellants' First Amendment rights.

The Fallout from *Frame* and *Cal-Almond*

Following years of stability, marketing orders were now facing a real Constitutional threat as dozens of challenges arose. The California Apple Commission, the California Cling Peach Growers Advisory Board, the California Cut Flower Commission, the California Grape Rootstock Improvement Commission, the California Kiwifruit Commission, the California Milk Advisory Board, the California Plum Marketing Board, the California Table Grape Commission, the Cattleman's Beef Board, Marketing Orders 916 and 917 (California peaches, plums and nectarines), the Mushroom Council, and Promo-Flor (a national floral group) were some of the programs that came under attack. Some would succeed; others would not. Court opinions showed seeming disagreement on the application of *Abood*, *Central Hudson*, and related Supreme Court decisions (see, for example, *Goetz v. Glickman*). There is little need to present these cases except to note that confusion among interested parties was growing. The 3rd Circuit in *Frame* and the 9th Circuit in *Cal-Almond* had proffered different conclusions on very similar programs and there was no clear indication of which ruling would be applied by district judges. Sooner or later, the U.S. Supreme Court would have to get involved.

Glickman v. Wileman (1997)

In February of 1995, two years after its decision in *Cal-Almond*, the 9th Circuit heard a similar argument from 16 handlers of California nectarines, peaches and plums. The tree-fruit case began as a dispute over size and quality regulations in the marketing orders. The case wound its way through the courts of an Administrative Law Judge, who ruled in favor of the handlers; a USDA Judicial Officer, ruling in favor of the Secretary of Agriculture, and a District Court that also sided with the Secretary. Adding a First Amendment argument, the handlers appealed the District Court's ruling to the 9th Circuit (*Wileman Bros. & Elliott, Inc. v. Espy*; later renamed *Wileman Bros. & Elliott, Inc. v. Glickman*). Like the handlers in *Cal-Almond*, the tree-fruit handlers in *Wileman* objected to the generic advertising

assessments on First Amendment grounds. The case differed from *Cal-Almond* in that the tree-fruit marketing order did not allow for creditable advertising for the handlers' own promotion campaigns. Still, many of the same arguments in *Cal-Almond* were also made here. In particular, there was the charge that certain generic advertisements favored products distributed by some handlers over others. For example, the handlers argued that certain generic ads stated "red is better" and cited a promotional chart, financed by the assessments, that listed a proprietary variety of nectarine, the "Red Jim," which was owned by a member of the Nectarine Administrative Committee.

The 9th Circuit Court used its own standard as laid out in *Cal-Almond* and applied the three prongs of *Central Hudson* to the *Wileman* case. The 9th Circuit Court found that the government did have a substantial interest in enhancing tree-fruit grower returns: "The handlers point to no reason why the government's interest in promoting peaches and nectarines is any less substantial than it is for almonds." The Court agreed with the Secretary's claim that generic advertising had increased sales, "However, according to *Cal-Almond*, the question is not whether the generic advertising program has increased peach and nectarine sales—it undoubtedly has. Rather, the question is whether the mandatory generic advertising program sells the product more effectively than the 'specific, targeted marketing efforts of individual handlers.'" The 9th Circuit ruled that there was no evidence that the tree-fruit generic program was better at increasing demand than individual handler advertising, and, therefore, the generic program failed the second prong of *Central Hudson*. Third, the 9th Circuit concluded that the tree-fruit marketing orders for generic advertising were more restrictive than the almond order (because the tree-fruit orders lacked a credit-back provision for individual advertising). Thus, because the less restrictive almond order failed the third prong of *Central Hudson* (i.e., it was not sufficiently narrowly tailored) so did the orders for tree fruits. Having failed two of the three prongs, the generic promotion aspect of the tree-fruit orders, like that of the almond order, was ruled an unconstitutional infringement on the handlers' rights of free speech and association.⁸

The Secretary of Agriculture appealed the 9th Circuit's ruling to the U.S. Supreme Court on the

grounds that the *Wileman* decision was in conflict with the 3rd Circuit's decision in *Frame*. The Supreme Court granted the Secretary's petition and heard testimony in December 1996 (*Glickman, Secretary of Agriculture v. Wileman Brothers & Elliott, Inc. et al.*). In a 5-4 ruling, the Supreme Court reversed the 9th Circuit. The Court found that the handler's disagreement with the content of some of the advertising had no bearing on the validity of the entire generic program and that the 9th Circuit had erred in using *Central Hudson* to test the constitutionality of the program.⁹

Writing for the Court, Justice Stevens repeatedly stressed the statutory context within which the generic promotion program had arisen and that the generic campaigns had to be viewed in light of the regulatory scheme Congress had put forward.

The legal question that we address is whether being compelled to fund this advertising raises a First Amendment issue for us to resolve, or rather is simply a question of economic policy for Congress and the Executive to resolve.

In answering that question we stress the importance of the statutory context in which it arises. California nectarines and peaches are marketed pursuant to detailed marketing orders that have displaced many aspects of independent business activity that characterize other portions of the economy in which competition is fully protected by the antitrust laws. The business entities that are compelled to fund the generic advertising at issue in this litigation do so as a part of a broader collective enterprise in which their freedom to act independently is already constrained by the regulatory scheme (*Wileman*, 468-70).

The Court pointed out that there were three characteristics of the generic advertising orders' regulatory scheme that distinguished them from other laws found to violate the First Amendment. First, the orders do not prevent producers from communicating any message to any audience, a fact that distinguishes this case from *Central Hudson*. Second, the marketing orders do not compel handlers to engage in any actual or symbolic speech. Third, the marketing orders do not compel handlers to endorse or finance any political or ideological views, which also distinguishes this case from *Abood*. "Thus," Justice Stevens writes, "none of our First Amendment jurisprudence provides any support for the suggestion that the promotional regulations should be scrutinized under a different standard from that applicable to the other anticompetitive features of the marketing orders."¹⁰

The Court stressed that the regulatory nature of the marketing orders necessitated that generic advertising be judged differently than other commercial speech cases. Congress made a regulatory decision that, right or wrong, certain commodities should be marketed jointly.

The basic policy decision that underlies the entire statute rests on an assumption that in the volatile markets for agricultural commodities the public will be best served by compelling cooperation among producers in making economic decisions that would be made independently in a free market. It is illogical, therefore, to criticize any cooperative program authorized by this statute on the ground that competition would provide greater benefits than joint action (*Wileman*, 474-75).

Thus, the 9th Circuit Court's application of the three prongs of *Central Hudson*, especially that Court's requirement that the Secretary prove demand had been increased more effectively by generic advertising than by the marketing efforts of independent producers, was "inconsistent with the very nature and purpose of the collective action program" (*Wileman*, 475).

The Supreme Court did note the similarity with *Abood* and subsequent cases in that "assessments to fund a lawful collective program may sometimes be used for speech over the objection of some members of the group" (*Wileman*, 472). Recall, the *Abood* test merely requires *i*) that the assessments be spent on promotion relevant to the statutory goals, and *ii*) that participants not be compelled to fund non-relevant, ideological speech. The Court found that the tree-fruit orders satisfied both requirements. Under *Central Hudson*, the 9th Circuit Court ruled that the generic advertising passed the first prong (the government had a substantial interest in increasing demand). With an *Abood* test, however, the Supreme Court indicated that the government need not show even this: the government's legislative action alone was enough to satisfy the program's necessity. As long as the regulatory means furthered the goals of the acts and did not compel ideological speech, that was all that was necessary to satisfy the acts' constitutionality. The question of whether individual handlers were hurt was not considered since they had chosen to operate in a regulated environment.

In sum, what we are reviewing is a species of economic regulation that should enjoy the same strong presumption of validity that we accord to other policy judgments made by Congress. The mere fact that one or more producers "do not wish to foster" generic advertising of their product is not a sufficient reason for overriding the judgement of the

majority of the market participants, bureaucrats, and legislators who have concluded that such programs are beneficial (*Wileman*, 477).

Rulings in all of the pending First Amendment marketing-order challenges had been postponed until the Supreme Court's ruling in *Wileman*. After the Supreme Court's decision, appellants in other cases tried to argue that those marketing orders were, in some sense, different from the tree-fruit orders. For example, the handlers in *Cal-Almond* contended that *Wileman* did not apply because the credit-back assessment mechanism was different than that of the tree-fruit orders. In light of *Wileman*, the 9th Circuit rejected this argument, reversing its previous ruling in *Cal-Almond*. In all of the cases that had been put on hold pending the Supreme Court decision, every federal appeals court applied *Wileman* to uphold the constitutionality of the promotion programs. . . except one.

Here We Go Again

In November 1999, the 6th Circuit Court of Appeals ruled that the Mushroom Promotion Act of 1990 was unconstitutional because it was not in the same spirit as the broader, collective regulation embodied in the 1937 Act.¹¹ The Mushroom Promotion Act, like the Beef Act in *Frame*, is termed a “stand-alone” program, as it was not formed under the original 1937 Act. However, given that the Supreme Court saw no distinction between the stand-alone promotion program in the Beef Act and the promotion program in the tree-fruit orders, the 6th Circuit's ruling surprised many on both sides of the marketing order debate.

United Foods, Inc., a Tennessee food processor, challenged the 1990 Mushroom Act on the grounds that the assessments were compelled commercial speech and that the mushroom industry differed from the tree-fruit industry in the *Wileman* case. A U.S. District Judge for Western Tennessee ruled against United Foods citing the *Wileman* decision and United Foods appealed.

Attorneys for United Foods used a very interesting argument to distinguish the mushroom industry from the tree-fruit industry in *Wileman*. Focusing on the language of Justice Stevens' opinion

concerning regulation and compelled association, they emphasized that the regulatory environment that justified the tree-fruit order was almost completely absent in the mushroom industry. Further, they argued that tree fruits need a generic program because the order's grading and standards regulations fostered product homogeneity. Mushrooms, on the other hand, are not subject to such grading regulations and truly are heterogeneous, so a generic program provides no real benefit as "mushroom producers can freely differentiate their product and stimulate demand through individual competitive advertising."¹² The government argued that *Wileman* was not based on the degree of regulation in an industry, but the 6th Circuit found the limited-regulation argument persuasive. Writing for the majority, Judge Merritt's opinion was that "The Court's holding in *Wileman*, we believe, is that nonideological, compelled, commercial speech is justified in the context of the extensive regulation of an industry but not otherwise."¹³ Therefore, without the extensive regulation present in the tree-fruit marketing orders, there is no justification for any further limits on compelled speech.

Arguing that the 6th Circuit Court's ruling was in conflict with the U.S. Supreme Court's ruling in *Wileman*, the government appealed. The U.S. Supreme Court agreed to hear the case and, in a surprise to many who were following the marketing order debates, ruled in a 6-3 decision to uphold the 6th Circuit Court's ruling. Writing for the majority, Justice Kennedy stated, "The program sustained in [*Wileman*] differs from the one under review in a most fundamental respect. In [*Wileman*] the mandated assessments for speech were ancillary to a more comprehensive program restricting marketing autonomy. Here, for all practical purposes, the advertising itself, far from being ancillary, is the principal object of the regulatory scheme."¹⁴ Because of this, the Court could not uphold "compelled subsidies for speech in the context of a program where the principal object is speech itself." In other words, as long as the generic advertising is part of a broader, regulatory scheme (like the marketing orders for tree fruit), the assessments would pass Constitutional muster, but if the generic advertising were the primary purpose for collecting assessments, they violated the First Amendment.

Although the Court left a great deal of room in determining what is "a broader regulatory

scheme,” it is important to note exactly how Justice Kennedy and the majority viewed the mushroom market as different from tree-fruits. “Beyond the collection and disbursement of advertising funds, there are no marketing orders that regulate how mushrooms may be produced and sold, no exemption from the antitrust laws, and nothing preventing individual producers from making their own marketing decisions.” Neither has the mushroom market been “subjected to a uniform price, or otherwise subsidized through price supports or restrictions on supply.”¹⁵ For both opponents and supporters of generic advertising programs, these distinctions should be noted carefully. It would seem that almonds, which also have supply controls as part of the marketing order, would certainly pass the *United Foods* test, but what about beef, pork or cotton? Although the Supreme Court had earlier declined to hear the *Frame* case, it is not clear that a future Court might do so, as *Frame* did not address the overall degree of regulation in the beef industry. In fact, most state-authorized orders and commissions exist primarily to fund collective research and promotion without additional industry collectivization or other regulations (Lee *et al.* identified 36 such state-authorized promotion programs in California alone). Further, what happens if Congress adjusts the regulations in an industry? Will the advertising programs be implicated if, say, a grading regulation is abandoned? Does this create incentives for generic promotion supporters to seek out more regulations for their industry in order to protect their advertising programs?

As this article was being prepared for publication, a “new” old argument emerged. In 2002, US District Court judges in South Dakota and Michigan, respectively, ruled that the beef and pork promotion programs were unconstitutional (*Livestock Marketing Association v. USDA*; *Michigan Pork Producers v. Campaign for Family Farms*). Both judges followed the high court’s rulings in *United Foods* to make their decisions, but what differed in these cases from previous cases was the government’s argument. Rather than basing their cases on the degree of regulation in the industry, the government argued that the promotion programs did not infringe on producers’ free speech because the speech is not being made by producers—the promotion is *government* speech. Recall this argument had carried no weight in the earlier *Frame* case. Nevertheless, in November 2002, Montana District Court

Judge Richard Cebull ruled that the beef program *was* constitutional because the assessment “creates programs where the government utilizes private cattlemen to disseminate a single message, a message prescribed by Congress and the USDA” (*Charter & Charter et al. v. USDA*). In other words the government is making the speech *through* the cattlemen not *for* the cattlemen. Unsurprisingly, all of these cases are being appealed. If this new government speech argument is upheld at the appeals level, it is a near certainty that the U.S. Supreme Court will be involved yet again.

Does Generic Advertising Even Work?

Previous sections review the controversy surrounding the promotion programs in the courts. But are these programs even profitable to the farmers who pay for them? Interestingly, this question has been largely absent from the litigation, which might make some believe economists have seldom studied generic advertising. In fact, the opposite is true. Some of the earliest discussions of generic advertising can be found in the 1959 proceedings of the American Agricultural Economics Association. Six papers by Hoos, Waugh, Robert, Banks, Baum, and Telser provide some of the first discussions of the theories underlying generic commodity promotion and the inherent problems.

Later, as computational techniques became more practical and data became available, many of these ideas were tested. In fact, under section 501(c) of the 1996 Farm Bill such testing is now required for federal programs. The majority of empirical studies have found generic advertising programs not only to be profitable, but also to be under-funded. A number of the studies, however, have caused controversy. Kinnucan and Nichols, for example, argue that many studies are “incomplete” because they have not taken into account “supply response, demand interrelationships, trade, policy setting, marketing channel, opportunity cost, and tax shifting” (p. 463). Two important texts *Commodity Advertising: The Economics and Measurement of Generic Programs* by Forker and Ward and *Commodity Advertising and Promotion* edited by Kinnucan, Thompson and Chang, as well as articles by Kinnucan (1996), Kinnucan (1999), Davis and Kinnucan and Myrland discuss the limitations in generic

promotion analyses and the care that must be taken in order to estimate the benefits. Given the critiques of the models, the goal of this section is to provide a broad sampling of the findings in order to demonstrate there is support for the argument that these programs are profitable even if the studies may be controversial.

One of the earliest empirical studies is a 1961 analysis by Nerlove and Waugh, who developed a theoretical model of cooperative advertising and tested its implications for Florida oranges. Nerlove and Waugh's examination of the cooperative orange advertising by Sunkist Growers and the Florida Citrus Commission found that in a short-run (fixed-supply) case, "an added dollar of advertising would raise gross returns to orange producers by over \$20. Thus, if orange production were held constant, orange growers would obviously find it profitable to spend more for advertising" (p. 835).

Alston, Carman and Chalfant and Kinnucan (1999) extended Nerlove and Waugh's model to include international trade. Kinnucan (using an example for generic egg promotion) shows that studies ignoring trade aspects can bias the benefit-cost analyses in favor of the promotion program. Alston *et al.* (1997) measured the effects of promotion activities by the California Table Grape Commission on the demand for table grapes. The mid-range of their estimates suggested that the marginal benefit-cost ratio for the Table Grape Commission's domestic promotion program was 20:1, with a 4:1 ratio for export promotion.¹⁶ Alston *et al.* (1998) analyzed the generic promotion campaign of the California Prune Board and the branded advertising campaign of Sunsweet growers, the largest marketer of California prunes. Their results showed that promotion by the California Prune Board yielded marginal returns of approximately 3:1. Analyzing the effectiveness of promotion expenditures by the California avocado industry, Carman and Craft showed an average benefit-cost ratio of 5:1 in the short run and 2:1 in the long-run, as supply responded to increased demand. Schmit and Kaiser incorporated an index of consumer dietary concerns about cholesterol in a model of U.S. domestic demand for eggs. They found that while most of the observed change in egg demand could be attributable to consumers' concerns regarding dietary cholesterol, generic advertising did have a positive and significant effect on per-capita

egg consumption. Few benefit-cost studies ask whether the money expended could have been better spent elsewhere. Using data from the soybean checkoff program, Williams found that not only were the soybean checkoff's benefits greater than its costs, it was a more profitable use of the money than either investing in Treasury bills or paying down farm debt.

Generic almond promotion has been studied on three separate occasions. Halliburton and Henneberry found a 2:1 marginal benefit-cost ratio, and Kinnucan and Christian found a marginal ratio close to 1:1. Crespi and Sexton's study included both generic and branded promotion and found the marginal benefit-cost ratio in a range of 3:1 to 7:1, depending on alternative hypothesized values of the supply elasticity. Because the authors had data that spanned the suspension of the almond promotion program during the *Cal-Almond* litigation, Crespi and Sexton were given a natural experiment to test the effect from the suspension. Their study found that over the 4 years of the suspension (1990/91-1993/94), the accumulated loss to almond growers ranged between \$90 and \$234 million.

Since the beef program led the court battles over generic advertising, it is not surprising that meat demand studies have been the most controversial, providing mixed results as to the effectiveness of generic advertising. Ward (1992) found positive returns to generic promotion, with an average producer rate of return of approximately \$6 for every \$1 spent on promotion. In a later re-evaluation of the program, Ward and Lambert found a similar 5:1 return. In contrast, Brester and Schroeder, Kinnucan *et al.* and Jensen and Schroeter found that generic beef and pork advertising have little if any effect on consumer demand. Because of the controversy, researchers have tried to determine why the analyses arrived at differing conclusions. The reader is referred to works by Alston and Chalfant; Piggott; Tomek; Coulibaly and Brorsen; and Ward (1999) who discuss the sensitivity of meat demand models to data sources, time periods, and, especially, functional forms.

Dairy is another widely studied industry. Forker and Liu, and Ward and Dixon are two of the more cited studies. Lenz, Kaiser and Chung and Kaiser and Chung estimated the responsiveness to fluid milk advertising in New York State, finding an average rate of return on generic promotion of about 2:1

and 3:1, respectively, although, Reberte *et al.* warn that demand elasticities with respect to dairy promotion fall over time. Kaiser and Chiambalero found that the Dairy Production and Stabilization Act of 1983 and the Fluid Milk Promotion Act of 1990 did have significant, positive impacts on dairy prices, with an average price increase of five percent attributable to the acts. Kaiser, Liu, Mount and Forker also concluded that taxpayers benefited from dairy promotion because the increased demand lowered the amount of milk purchased by the government to support prices. Although nearly every researcher assumes a perfectly competitive market (see Davis, p. 473), Suzuki and Kaiser examined whether the assumption of perfect competition in the U.S. dairy industry leads to biased findings of the impacts of generic dairy advertising campaigns. Using two models, one under perfect competition and one under imperfect competition, the authors found that the competitive model understated the impact of generic milk advertising on price and overstated the impact on quantity compared with the non-competitive model. Nevertheless, the authors concluded that the difference in magnitude of impacts was so small that the presumption of perfect competition in previous dairy studies is innocuous.

Partly in response to the growing debate surrounding the programs, the focus of the research has begun to shift as agricultural economists have become increasingly concerned about the distribution effects of commodity promotion. In *Wileman*, one concern that Justice Souter raised was why is it necessary that the government promote, for example, California peaches but not Georgia peaches? Why not simply promote all peaches if the government is trying to alleviate a marketing problem? The same logic could be extended to any commodity that competes for the consumer's shopping cart. In other words, if a "farm problem" exists, granting a generic advertising program to select groups creates a conundrum because increased advertising that helps one producer may be coming at the expense of another. Alston, Chalfant and Piggott, for example, examined the effects of beef promotion on substitute goods, such as pork and poultry. They found that, because cross-commodity effects were negative (e.g., pork advertising benefits pork producers partly at the expense of beef producers), the net welfare effects (e.g., the sum of the increase in beef, chicken and pork producer welfare from, say, beef

promotion) were smaller than the distribution effects (e.g., the welfare effect to beef producers from beef promotion). Alston, Freebairn and James extended this idea by simulating the optimal amount of funding that would arise if beef and pork producers cooperated in the choosing of their advertising expenditures. They found that the optimal total expenditures from cooperating could be as much as three times less than the expenditures needed in a non-cooperative situation.

Kinnucan and Miao looked at milk advertising and its effects on the welfare of other beverage producers but arrived at ambiguous conclusions attributable to the spillover effects of milk advertising. They generally found that non-alcoholic beverages also benefited from milk advertising, but there were distribution effects suggesting that milk and juice producers may be gaining at the expense of soft-drink and tea producers. Chung and Kaiser (2000) wondered whether the size of participants in an industry affected the returns to producers, i.e., do larger producers get a higher or lower return for their generic advertising contribution than smaller producers? Investigating milk advertising in New York, they found that there was some inequality in per-unit sales between large and small firms, though it was not substantial. In what might be termed a distribution reversal, Brown, Lee and Spreen found that U.S. orange juice growers face lower prices from their generic advertising because the increased demand leads to greater foreign competition by exporters who free ride on the generic advertising. Richards' (1999) model allows for the possibility that consumers' tastes and preferences can change over time as new information about a product becomes available. Richards used this model to evaluate the effectiveness of advertising and promotion expenditures by the Washington Apple Commission and found that the promotion program not only had a significant effect on the demand for Washington apples, there were also positive spillovers on the demand for other fruit.

One area that has not been considered is an investigation into the strategies behind the court challenges themselves. As described in the previous section, the challenges could only arise because of the Supreme Court's free-speech rulings in the 1980s. But once the legal groundwork had been set, would some producers benefit over others from eliminating the programs? Have certain producers

become so large or their products so differentiated, for example, that branded advertising is now viable, circumventing the free-rider effect?

Consider Richard's (1995) simple game presented at the beginning of this article. What if the benefits to advertising are such that, even if there is a free rider, the grower who advertises makes a greater profit than in the situation where no advertising takes place? Increasing the contributor's profit from \$8 to, say, \$11 in the scenario where one grower contributes and the other does not, but leaving everything else unchanged, moves the game from its equilibrium where no contribution occurs to one where one grower contributes and the other does not. From the perspective of the contributing grower this may not seem "fair" but it would be a stable equilibrium: facing a free rider, it would still be in the grower's best interest to advertise. In an industry that is currently under a marketing order, do potential free riders sense that the game has somehow changed? Or, has the nature of marketing changed so growers can slightly differentiate their products, making a private advertising program viable? Such a simple game, however, tells us nothing about who will be the contributing grower or the free rider (notice, there are two Nash equilibria in the new game), and a story could be formulated whereby either grower might want out of a generic advertising program. Davis has criticized researchers for not taking the structure of the industry into account when designing their promotion-evaluation models. A good place to start might be in analyzing why growers in one industry are more likely to challenge a promotion program than others, as well as looking more closely at who those growers are.

Conclusion

This article has argued that the recent challenges to marketing programs arose because fairly recent Supreme Court decisions concerning commercial speech implicated the generic advertising programs. Given the evolution of the court cases, the natural question after *Wileman* is, "How much industry regulation is needed for the order to be legal?" The Court's response came with the ruling in *United Foods*. However, as the Court did not set out a specific formula to determine the degree of

regulation, one should expect further challenges to arise. In fact, the Court has likely introduced a strange incentive into the battle: the *United Foods* case sends a signal to growers who support generic advertising that more regulation is better than less. Another interesting, recent development is the re-emergence of the argument that these programs are government speech, though it is too early to determine how fruitful this argument will be.

Research has shown (for the most part) these programs are effective at increasing producer revenues. However, the question remains, Why are some producers so opposed to the programs that they are willing to undertake such enormous litigation expenses to fight them? Perhaps these producers are what economists refer to as “outliers”--observations that cannot be readily explained. Given that these producers have been fighting against these promotion programs for years, however, economists should be bothered by such *persistent* outliers. A more complete answer to the question of why these programs are so controversial will come when we incorporate the controversy into our analyses.

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Notes

¹ This voting provision is often neglected in press accounts, leading some to believe that marketing orders are simply imposed on growers by the government. For example, a fifteen-paragraph, *Wall Street Journal* article that attempts to answer the question, “Should Government Market Pork and Peaches?” (Felsenthal) mentions neither the original grower referenda that started the programs nor the subsequent grower votes that keep them running. Promotion programs are also called “checkoffs” although not all checkoffs are marketing orders. Throughout this article I will not make a distinction between marketing orders and other checkoffs. The reason for this is that although there is a statutory difference, the courts have not seemed to interpret a significant legal one.

² In the *Central Hudson* case, the Court found that only the first two prongs were satisfied.

³ Justice Brennan, writing for the majority in *Roberts v. United States Jaycees*, 623.

⁴ The Beef Promotion and Research Act is not part of the 1937 Agricultural Marketing and Agreement Act, which covered the dairy, fruits and vegetables industries. The Beef Act is termed a “stand alone” marketing program. Nevertheless, the administration, promotion and assessment aspects of such stand-alone programs are nearly identical to those of the marketing orders.

⁵ *Frame v. United States*, 110 U.S. (1990): 1168.

⁶ Market share figures come from *Cal-Almond, Inc. v. U.S. Dept. of Agriculture*, 14 F.3d, 9th Cir. (1993): 429, footnote 9. The court documents, however, are not accurate as Blue Diamond’s share refers to its branded consumer snack products only. In fact, Blue Diamond faced significant competition from Planters and Dole, especially in baking almonds, for which Dole’s market share was larger than Blue Diamond’s (Barron).

⁷ *Saulsbury Orchards and Almond Processing, Inc. v. Yeutter*.

⁸ *Wileman Bros. & Elliott, Inc. v. Espy*: 439.

⁹ Petition granted in 517 U.S. 1232. *Glickman, v. Wileman Brothers Inc. et al.*, 521 U.S. (1996): 457. It is also important to note that the Supreme Court felt inclined to rule on what was seen as a contradiction between the 9th Circuit’s *Wileman* ruling and the 3rd Circuit’s *Frame* ruling. After the Supreme Court’s *Wileman* decision, some attorneys argued that *Wileman* had no bearing on stand-alone programs (like the Beef Act and the Mushroom Promotion Act). However, the Supreme Court’s actions on deciding to take the *Wileman* case (given that there was a conflict with *Frame*) signals that the Court did not view the First Amendment issues involved in stand-alone programs as distinct from those in marketing orders.

¹⁰ See also Breyer, 156-161.

¹¹ *United Foods, Inc. v. United States of America*, 197 F.3d, 6th Cir. (1999): 221.

¹² The author is grateful to Bradley A. MacLean of the Nashville firm of Farris, Warfield & Kanaday, PLC for providing me with excerpts from the brief.

¹³ *United Foods, Inc. v. United States of America*, 197 F. 3d: 224.

¹⁴ *United States et al. v. United Foods, Inc.*, 533 U.S. 6.

¹⁵ *United States et al. v. United Foods, Inc.*, 533 U.S. 6.

¹⁶ The benefit-cost studies undertaken typically calculate either an average or a marginal ratio. Calculations of *average* benefit-cost ratios determine what demand would have been without the promotion program over the period of the study and compare that hypothetical level with a prediction of the demand occurred with the program. The gain in revenue attributed to the promotion is then divided by the cost of the promotion to obtain the benefit-cost ratio. However, such studies can be problematic because of the statistical uncertainty of determining what demand would have been without the program. The *marginal* ratio is calculated by looking at small hypothetical changes in demand that lie within the bounds of the statistical model used and represents the return to the last dollar expended. The advantage of a marginal over an average ratio is that small changes do not present any serious statistical problems in the analysis. The drawback comes in interpretation as a marginal benefit-cost ratio greater than one simply means that the advertising expenditure should have been greater than what it was (as profit maximization occurs when the marginal return is equal to the marginal cost). See the critiques of interpretations of the marginal and average ratios in Kinnucan and Myrland and in Davis.