IOWA STATE UNIVERSITY
CALT
Center for Agricultural Law and Taxation

Top Ten Agricultural Law Developments of 2005

2321 N. Loop Drive, Ste 200 • Ames, Iowa 50010 www.calt.iastate.edu

January 1, 2006

- by Roger McEowen

We begin 2006 with our annual look at the most significant agricultural law developments of the previous year. Legal issues continue to be at the forefront of developments that are shaping the present and future of American agriculture, and it is very likely that the involvement of the legal system in agriculture will continue to grow. The following is my list of what I view as the top ten agricultural law developments of 2005 based on their impact (or potential impact) on U.S. agricultural producers and the sector as a whole.

1. **U.S. Supreme Court upholds constitutionality of beef check-off.**
   In 2005, the U.S. Supreme Court upheld the constitutionality of the Beef Promotion and Research Act, vacating the decision of the United States Court of Appeals for the Eighth Circuit which had held that the Act violated the First Amendment. The 6-3 decision includes six different opinions, with various combinations of concurrences and dissents. The majority opinion, authored by Justice Scalia, held that generic promotion of beef funded by mandatory assessments on cattle producers was government speech beyond First Amendment challenge. While only four of the Justices actually believed that the check-off was government speech, the majority opinion concluded that the message of the promotional campaigns was effectively controlled by the Federal Government such that it was the Federal Government's message. While acknowledging that the Secretary of Agriculture did not write the ad copy, the Court noted that the Secretary had final approval authority over the content of each promotional campaign. The majority was also not troubled by the method of funding (mandatory assessments on producers, some of whom do not agree with generic promotion of beef) or the attribution of the ads to beef producers. The dissent argued that the ads could not possibly be found to be the speech of the Federal Government. In addition, Justice Thomas' concurring opinion left open the possibility that the beef check-off could be successfully challenged on First Amendment grounds if it can be shown on remand that the advertisements attribute their generic pro-beef message to the plaintiffs. As such, the Court's ruling does not necessarily end the beef check-off litigation, and is not entirely precedential for the pork check-off litigation. *Johanns v. Livestock Marketing Association*, 125 S. Ct. 2055 (2005).

   The practical effect of the ruling is to leave in place the various check-off programs and to place the burden (and cost) of continued challenges on the opponents.

   Note: In the first check-off opinion rendered by a federal court after the U.S. Supreme Court's opinion in the beef check-off case, the Federal District Court for the Central District of California issued a preliminary injunction against enforcement of the California pistachio check-off on the basis that the plaintiffs were likely to succeed on the merits of their claim that the program was unconstitutional. The court reasoned, based on *Johanns*, that the check-off was not government speech and that pistachio producers had sufficient alternatives as to how they wanted to market their pistachios. *ParamountLand Co. v. California Pistachio Commission*, No. CV 05-07156 MMM (PJWx)(C.D. Cal. Dec. 12, 2005).

2. **U.S. Supreme Court issues key ruling on regulatory takings.**
Much of environmental law involves limitations on the use of private property. The legal issue is how far use restrictions can go before amounting to a "taking" of the property requiring compensation under the Fifth Amendment. In general, over the past twenty years, the Court has provided greater protection to landowners from the intrusion of government regulation on land use activities. However, the Court's most recent property rights case may change much of that. The case involved an oil company that sued the state of Hawaii on the basis that a state statute capping the amount of rent the company could charge dealers that leased company-owned service stations was an unconstitutional taking. The purpose of the statute was to control retail gasoline prices, but it did not actually reduce the lessee-dealers' costs or retail prices.

Thus, the oil company argued that the statute failed to advance substantially a legitimate state interest and, as a result, was an unconstitutional taking. The U.S. Court of Appeals for the Ninth Circuit agreed with the company and the state of Hawaii appealed.

On review, the Supreme Court, in a unanimous opinion, reversed. The Court held that whether the statute advanced substantially a legitimate state interest was not a valid method of identifying regulatory takings. Such a test, the court reasoned, did not address the magnitude or character of the burden imposed on the oil company, nor did it assist in identifying those regulations whose effects were functionally comparable to government appropriation or invasion of private property. The Court went on to state that the effectiveness or ineffectiveness of the statute in furthering the state's goals had no bearing on the significance of the burden to the oil company. In addition, the court noted that a taking presupposes that the state acted in pursuit of a valid public purpose and that the underlying validity of the statute itself was a matter of due process rather than a measure of whether a taking occurred. With the opinion, the Court is returning to its pre-1980 takings analysis and will use a multi-factored balancing test for determining when regulation of private property constitutes a compensable taking, rather than requiring the government to prove that a particular regulation advances substantially a legitimate governmental interest. *Lingle, et al. v. Chevron U.S.A., Inc*., 125 S.Ct. 2074 (2005).

3. **Cattle producers lose captive-supply case on appeal.**
The plaintiffs were a national class of cattle producers who sold cattle solely on the cash market to the defendant meat-packing company. The defendant purchased cattle on the cash market from cattle producers such as the plaintiffs, but also purchased much of its cattle under private captive-supply contracts with select producers. The plaintiffs filed suit under the Packers and Stockyards Act (PSA), alleging that the marketing agreements were an unfair practice which manipulated cash market prices downward. The plaintiffs argued that the use of private contracts by the defendant (the largest participant in the market) depressed the cash market price of cattle by reducing the amount of cattle sold on the cash market. The trial court jury held that the practice violated the PSA's provision against price manipulation, and returned a verdict of $1.28 billion for the cattle producers. The trial court judge, however, vacated the verdict on the basis that the defendant had a legitimate business reason for utilizing private contracts. On review, the appellate court affirmed, ruling that the PSA's price manipulation clause required the plaintiffs to establish that the defendant had no business justification for utilizing private captive-supply contracts and that the lack of business justification had an adverse impact on the market. The court held that defendant's use of captive-supply contracts allowed them to acquire cattle at a lower price than they otherwise would have been able to, which allowed the defendant to compete more efficiently with other meat packers. The court did not require the defendant to show that it had less restrictive alternatives to accomplish the same objectives. *Pickett, et al. v. Tyson Fresh Meats, Inc.,* 420 F.3d 1272 (11th Cir. 2005), *aff'g,* 315 F. Supp. 2d 1172 (M.D. Ala. 2004).

Note: In an earlier opinion, the 11th Circuit ruled that the portion of the PSA at issue in *Pickett*(7 U.S.C. §192(a)) required a plaintiff alleging price manipulation to prove that the defendant's unfair, deceptive or discriminatory practice adversely affects or is likely to adversely affect competition. The court held that there was no PSA violation where the poultry grower failed to show that termination of the grower contract adversely affected competition or was likely to adversely affect competition. *London v. Fieldale Farms, Corp.*, 410 F.3d 1295 (11th Cir. 2005), *cert. den*., 2005 U.S. LEXIS 8627 (U.S. Nov. 28, 2005). The court's opinion in *London*, coupled with its opinion in *Pickett*, makes it virtually impossible for a producer to win a PSA price manipulation case (at least in the 11th Circuit).

4. **Supreme Court decides key eminent domain case.** In mid-2005, the Court upheld a Connecticut Supreme Court opinion that the government's eminent domain power can be exercised on behalf of private parties to take private homes, land and businesses for commercial development. The case involved the planned development in New London, Connecticut, of a Pfizer global research facility. The company's arrival was anticipated to bring much-needed jobs and tax revenue to the city. The city created a development corporation to plan the development around the new facility and granted the entity the power of eminent domain. The development corporation filed condemnation proceedings against the plaintiffs (homeowners in the targeted area who refused to sell) in an attempt to condemn their homes. The homeowners sued, but the Connecticut Supreme Court found that the city's use of eminent domain for the purposes of "economic development" did not violate either the state or U.S. Constitution. Under the Fifth Amendment, the government is given the power to "take" private property. However, all takings must be for a "public use" and even takings that are for a public use must be accompanied by compensation. The question in the case was whether a taking for private development met the "public use" requirement on the basis that the taking would result in an increase in jobs and tax revenue for the area. On review, the Supreme Court upheld the taking. The result is not surprising – given that the Court has largely eliminated the "public use" requirement of the Fifth Amendment in several cases dating back to 1954. The Court will generally defer to actions of state government if the taking is rationally related to a legitimate purpose of government. Increasing tax revenue and jobs meets the test. While a concurring opinion by Justice Kennedy stated that a taking would not be approved if it was merely to benefit a private developer, he did not spell out the standard for reviewing such cases. So, landowners should be engaged in local politics and state legislative activities that involve developmental issues. The Court will defer to the judgment of local decisionmakers in most situations. *Kelo,et al. v. City of New London,* 125 S. Ct. 2655 (U.S. Sup. Ct. Jun. 23, 2005),*aff'g*, 268 Conn. 1, 843 A.2d 500 2004).

   Note: In the wake of the Supreme Court's decision, legislation has been introduced in both the U. S. House and Senate designed to narrow the scope of the opinion such that "public use" does not include "economic development" and/or deny federal funding to any project that uses eminent domain to take property for private, rather than public business. It is unclear on what basis the Congress derives the authority to redefine the Constitution in this manner.

5. **U.S. Supreme Court clarifies the ability of farmers to sue pesticide manufacturers.** The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), limits the ability of injured parties to sue pesticide manufacturers on either an inadequate labeling or wrongful death claim. A significant question has been whether state law damage claims for pesticide-related agricultural crop injury are pre-empted by FIFRA and whether FIFRA pre-emption of damage claims is limited to the specific subjects that the Environmental Protection Agency (EPA) reviews at the time it first approves a pesticide product's labeling.

In this case, the plaintiffs were 29 Texas peanut farmers who claimed that in the 2000 growing season their crops were severely damaged by the application of the defendant's pesticide. The farmers claimed that the defendant knew or should have known that the pesticide would stunt the growth of peanuts in acidic soils. However, the pesticide label stated that the pesticide was recommended in all areas where peanuts were grown. Before the 2001 growing season the defendant reregistered the pesticide with the EPA, and the EPA approved a supplemental label that specified that the product was not to be used on peanuts grown in soils with a high acidity level (pH of 7.2 or greater). After negotiations failed, the farmers gave notice of intent to sue under Texas law, and the defendant filed a motion for declaratory judgment in Federal District Court on the grounds that FIFRA preempted the farmers' claims. The farmers also brought tort claims based in strict liability and negligence, fraud, breach of warranty and violation of the Texas Deceptive Trade Practices-Consumer Protection Act. The District Court granted the defendant's motion, finding that FIFRA preempted the farmers' claims. On appeal, the Fifth Circuit affirmed, reasoning that the farmers' claims were preempted on the basis that if the claims were successful, the defendant would be induced (as opposed to being actually required) to change its label. Accordingly, the farmers' successful claim would impose an additional "requirement" on the defendant under state law – something the states cannot do under FIFRA.

The Supreme Court began its analysis by noting that FIFRA preemption applies to state rules that (1) establish a requirement for labeling or packaging that; (2) is in addition to or different from what FIFRA requires. The Court noted, therefore, that rules that require manufacturers to design reasonably safe products, use due care in conducting appropriate testing of their products, market products free of manufacturing defects, and to honor their express warranties or other contractual commitments are not preempted because they do not qualify as requirements for labeling or packaging. Thus, the Court ruled that the farmers' claims for defective design, defective manufacture, negligent testing, and breach of express warranty were not preempted. The Court rejected the Fifth Circuit's "inducement" test as overbroad, but ruled that the farmers' fraud and negligent-failure-to-warn claims were premised on common law rules that qualified as "requirements" for labeling or packaging. But, such claims are only preempted, the Court reasoned, if the state level common law rules establish requirements that are "in addition to or different from" FIFRA's standards. The farmers claimed that their claims based on fraud and failure-to-warn were not preempted because these common law duties were equivalent to FIFRA's requirements that a pesticide label not contain "false or misleading" statements, or inadequate instructions or warnings.

Ultimately, the Court ruled that it had not received sufficient briefing on whether FIFRA preempted the farmers' fraud and failure-to-warn claims brought under Texas law, and remanded the case to the Fifth Circuit for a resolution of those claims. In remanding on these claims, the Court emphasized that a state law labeling requirement must in fact be equivalent to a requirement under FIFRA to survive preemption. If, for example, the element of falsity contained in a Texas common law fraud action imposes a broader obligation than FIFRA's requirement that labels not contain "false or misleading statements," the action would be preempted to the extent of the difference. The Court also opined that state law requirements must be measured against any relevant EPA regulations that give content to FIFRA's misbranding standards. Likewise, the Court stated that jury instructions must ensure that nominally equivalent labeling requirements are genuinely equivalent – a pesticide manufacturer should not be held liable under a state labeling requirement unless the manufacturer is also liable for misbranding under FIFRA. *Bates v. Dow Agrosciences LLC,* 125 S. Ct. 1788 (2005).

> **Note:** In rejecting the "inducement" test of the Fifth Circuit and utilizing a "parallel requirements" test for determining FIFRA preemption, it is likely that more claims against

pesticide manufacturers will survive preemption. It is no longer a valid ground for preemption that a state-based claim, if successful, would induce a manufacturer to change a label. Under the "parallel requirements" test, preemption applies only to claims that, if successful, would actually require a label to be changed. Thus, the key is whether applicable state law imposes broader obligations on pesticide manufacturers than does FIFRA.

6. **Comprehensive bankruptcy law reform bill signed into law.**
On April 20, 2005, the President signed into law major changes to existing bankruptcy law. The legislation sets up a new test for measuring a debtor's ability to repay creditors, requires bankruptcy filers to pay for credit counseling and gives top priority to a spouse's claim for child support among creditors' claims, among other things. The bill also makes significant changes to Chapter 12 (farmer) bankruptcy. Perhaps the most significant features of the legislation for agriculture are that it makes Chapter 12 a permanent part of the bankruptcy Code. Also, the bill changes the definition of a "family farmer" to allow an individual (or an individual and spouse) engaged in farming to have aggregate debts not exceeding $3,237,000 (up from $1,500,000 under prior law), with not less than 50 percent of the aggregate, noncontingent, liquidated debts (excluding debt on the principal residence) arising out of a farming operation (down from 80 percent under prior law). In addition, the requirement that more than 50 percent of gross income must be received from a farming operation the taxable year preceding filing is relaxed to allow the 50 percent test to be met, in the alternative, during the second and third tax years preceding the filing. Thus, a Chapter 12 filer must have more than 50 percent of its gross income from farming in either the tax year prior to the filing or in both the second and third tax years prior to filing the Chapter 12 petition. The dollar requirements are also to be adjusted for inflation at three year intervals. The bill, however, does not impose the 50 percent gross income test on otherwise eligible partnerships and corporations for family farmers. That was an omission in the original 1986 enactment of Chapter 12 and was not changed in the 2005 amendments.

Another provision of immense importance to Chapter 12 filers is that a Chapter 12 debtor can treat claims arising out of "claims owed to a governmental unit" as a result of "sale, transfer, exchange, or other disposition of any farm asset used in the debtor's farming operation" to be treated as an unsecured claim that is not entitled to priority under Sec. 507(a) of the Bankruptcy Code, *provided the debtor receives a discharge.* Nothing in the legislation, however, specifies when the property can be disposed of to be eligible for unsecured claim status. The taxing agencies must receive at least as large an amount as they would have received had the claim been a pre-petition unsecured claim. The key point is that, under prior law, taxes were a priority claim and had to be paid in full. Even though the priority tax claims could be paid in full in deferred payments under prior law, in many instances the debtor did not have sufficient funds to allow payment of the priority tax claims in full even in deferred payments. The new provision should permit Chapter 12 plans to be modified to allow the sale of assets so long as the modified plan made provision to make payments to the taxing bodies in an amount that would equal or exceed what would have been received had it been a pre-petition unsecured claim. Upon discharge, the claim of the governmental body for taxes on the sale of assets used in the farming business would also be discharged.

The legislation also adds a new provision requiring an individual Chapter 12 debtor to be current on post-petition domestic support obligations as a condition of confirmation of a plan. In addition, the bill specifies that the homestead exemption is limited to $125,000 if the debtor purchased the residence less than three years and four months (defined as 1215 days) before filing. There are exceptions for (1) the residence of a "family farmer" and (2) any amount rolled over from another residence acquired by the debtor before the 1215-day period provided the prior and current residences are located in the same state. The reduction of the homestead exemption constitutes a

significant change for the five states that had unlimited homestead exemptions (Florida, Iowa, Kansas, South Dakota and Texas). *Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, S. 256, 109th Cong., 1st Sess. (2005).*

7. **Federal court strikes down Nebraska anti-corporate farming law.**
In late 2005, the Federal District Court for the District of Nebraska held the Nebraska Constitutional provision restricting unauthorized corporate involvement in certain types of agricultural activities unconstitutional on "dormant commerce clause" grounds and on the basis that the provision violates the Americans with Disabilities Act (ADA).The plaintiffs were engaged in agricultural activities to one degree or another. They all claimed that I-300 barred their proposed activities and challenged the law on the basis that it violated the "dormant commerce clause," the Privileges and Immunities Clause and the Equal Protection Clause of the U.S. Constitution. Two of the plaintiffs were disabled and claimed that I-300 also violated the ADA because of the requirement that at least one family member be "a person residing on or actively engaged in the day to day labor and management of the farm or ranch."

The court held that Initiative 300 was facially discriminatory because it "was conceived and born in protectionist fervor," and that the ballot title and language of Initiative 300 clearly indicated that Nebraskans would be given "favored treatment" on the basis that it would be more economically feasible for those living in close proximity to Nebraska farm and ranches to provide "day-to-day physical labor and management." The court also found a discriminatory effect associated with the requirement that a family member provide (as the court referred to it) "day-to-day physical labor and management."

Likewise, the court also found that I-300 was invalid under the Constitution's Supremacy Clause because it conflicted with the ADA on the basis that two of the plaintiffs were disabled and could not perform the daily physical labor that the court believed I-300 required.

The Nebraska Attorney General is appealing the ruling. *Jones, et al. v. Gale, et al.*, No. 8:04-CV645, 2005 U.S. Dist. LEXIS 35361 (D. Neb. Dec. 15, 2005).

8. **EPA announces air quality consent agreement.**
On January 21, 2005, the Environmental Protection Agency (EPA) announced the Air Quality Compliance Agreement (Consent Agreement). A 2002 report by the National Academy of Sciences emphasized that scientifically credible methodologies for estimating emissions from Animal Feeding Operations (AFOs) needed to be developed. Beginning in 2002, EPA and agricultural industry representatives began discussions on a proposed agreement that would facilitate the development of these methodologies. During 2002-2004, EPA met with many groups to discuss the proposed Consent Agreement. The primary goals of the Consent Agreement are to reduce air pollution, ensure compliance with applicable Clean Air Act, Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and Environmental Planning and Community Right-to-Know Act (EPCRA) provisions, monitor and evaluate AFO emissions, and promote a national consensus on methodologies for estimating emissions from AFOs. Participating AFOs will be required to (1) pay a civil penalty, ranging from $200 to $100,000, depending on the size and number of AFOs; (2) pay up to $2,500 into a fund for a nationwide emissions monitoring program; (3) make facilities available for monitoring; (4) apply for all applicable air permits and comply with permit conditions; (5) install best available control technology or control technology meeting the lowest achievable emission rate on all sources that exceed the "major source" threshold for their area; and (6) report any qualifying releases of ammonia and hydrogen sulfide as required by federal law. Participating AFOs that meet the requirements will not be sued for past violations of the Clean Air Act permitting requirements or

the CERCLA hazardous substance reporting requirements arising from releases of ammonia and hydrogen sulfide from animal confinement structures and/or waste lagoons. The Consent Agreement also establishes a nationwide monitoring program. Based on EPA criteria, researchers at Purdue University will manage the monitoring program and will select for monitoring approximately 28 farms that represent major animal groups, different types of operations and different geographic regions. Monitoring will occur at the selected lagoons and barns. Based on the findings of the monitoring program, EPA will set national air policies, identify farm emission thresholds, and then regulate excessive levels.

9. **Portions of EPA confined animal feeding regulations invalidated.**
On January 12, 2001, EPA issued proposed rules designed to address water quality problems with livestock operations. The proposed rules revised effluent standards for confined animal feeding operations (CAFOs) under the CWA. Among other things, the rules lowered the threshold for cattle from 1,000 animal units to 500 (300 if the facility is discharging pollutants into the navigable waters of the United States). In addition, the proposed rules allow land application of manure only with a permit, and corporate owners of contract livestock would have to be co-permitted if they exercise "substantial operational control." The final rules, effective, April 14, 2003, reduce by more than half the number of livestock operations that would have been subject to the rules, allow livestock producers substantial authority to draft their own anti-pollution management plans (plans must be in place by the end of 2006), eliminate the requirement that corporate owners of contract livestock be co-permitted, retain the same threshold numbers of animals to qualify as a CAFO, and the 25-year, 24-hour storm exemption that freed CAFOs from permit liability during extreme storm events, such as a hurricane. Later in 2003, environmental and agricultural industry groups filed court action challenging the final rules. The environmental groups were most concerned about the removal of the co-permitting requirement and the lack of review of manure management plans in the final rules, while the industry groups wanted to eliminate from the final rules the ability of EPA to require National Pollution Discharge Elimination System (NPDES) permits without evidence of water pollution problems.

Specifically, the final regulations require that all CAFO owners or operators must apply for an individual National Pollution Discharge Elimination System (NPDES) permit or submit a notice of intent for coverage under an NPDES general permit. An exception exists, however, if the owner or operator secures a determination from the director of the relevant permitting authority that the CAFO has no potential to discharge manure, litter or process wastewater. The regulations also include a requirement that each CAFO develop and implement a nutrient management plan. In addition, while all land application discharges from a CAFO are subject to NPDES requirements (requires a permit), if a CAFO land-applies waste in accordance with a site-specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in that waste, any subsequent "precipitation-related" discharge is considered to be an "agricultural stormwater discharge" that is exempt from regulation under the Clean Water Act. The regulations also establish effluent limitation guidelines that apply to land application discharges by CAFOs and to the "production areas" of CAFOs.

The court invalidated those portions of the regulation that allowed NPDES permitting authorities to issue permits to CAFOs without reviewing the terms of the nutrient management plans, that allowed permitting authorities to issue permits that did not include the terms of the nutrient management plans, and that required CAFOs to apply for NDPES permits regardless of whether they had actual discharges. Thus, nutrient management plans must be explicitly included in the permit, reviewed and approved by the state or federal regulating agency, and be open and available to the public for scrutiny, comment and changes. On this point, the court followed the Ninth Circuit's analysis in *Environmental Defense Center, Inc. v. EPA, 344 F.3d 832 (9th Cir.*

2003). Likewise, CAFOs that do not discharge into regulable waters have no obligation to seek or obtain an NPDES permit. Also, the court upheld the exemption for stormwater runoff from land application fields where application has been made in compliance with a nutrient management plan that ensures appropriate agricultural utilization. While the court rejected the argument that all CAFO stormwater discharges are subject to regulation, along with the argument that CAFO activities are "industrial" rather than "agricultural," the court also rejected the argument that only "collected" runoff from land application is a point source discharge. Indeed, the court opined that "any land application discharge that is not agricultural stormwater is a discharge from a CAFO that can be regulated as a point source discharge." Thus, runoff to waters of the United States from CAFO land application areas is deemed to be a "point source" discharge if the CAFO's land application practices do not conform with appropriate management practices (as defined by EPA). The court upheld EPA's exclusion of groundwater-related requirements from various effluent limitation guidelines on the basis that groundwater requirements are best implemented as needed on a case-by-case basis, rather than categorically through national effluent limitation guidelines.

The court remanded other aspects of the CAFO regulation and directed the EPA to select a proper standard for pathogen reduction as required by federal law, to clarify the new source performance standard allowed under federal regulations, and to clarify the basis for failing to promulgate water quality based effluent limitations for discharges other than agricultural stormwater discharges. *Waterkeeper Alliance, Inc. v. American Farm Bureau Federation, et al.*, 399 F.3d 486 (2d Cir. 2005).

10. **Federal court rules that non-organic substances cannot be included in food bearing an organic label.**
In early 2005, the United States Court of Appeals for the First Circuit ruled that small amounts of non-organic ingredients such as vitamins, spices, and citric acid cannot be included in food labeled as organic. The court held that multiple provisions of the National Organic Program Final Rule (Final Rule) were inconsistent with the Organic Foods Production Act of 1990 (OFPA). The OFPA regulates organic products by setting national standards for production and processing of organic products. To be labeled or sold as "organic," an agricultural product must be produced without the use of synthetic substances, such as chemical pesticides, and in accordance with an organic plan agreed to by an accredited certifying agent and the producer and handler of the product. Exceptions to the OFPA general prohibition on the use of synthetic substances in organic products appear on a National List of Allowed and Prohibited Substances. The OFPA requires the Secretary of Agriculture to promulgate regulations to carry out the Act, and the Secretary published the Final Rule in late 2000. Among other things, the Final Rule established a four-tier labeling scheme based on the percentage content of organic ingredients. In general, food labeled as "organic" must have at least 95 percent organic ingredients. The exceptions are primarily utilized when food is processed. Products containing 70-94 percent organic ingredients may be labeled as "made with organic ingredients," a less marketable claim. The plaintiff challenged the Final Rule as inconsistent with the OFPA and the appellate court held that: (1) nonorganic ingredients not commercially available in organic form but used in the production of items labeled "organic" must have individual reviews in order to be placed on the National List of Allowed and Prohibited Substances; (2) synthetic substances are barred in the processing or handling or products labeled "organic"; and (3) dairy herds converting to organic production are not allowed to be fed feed that is only 80% organic for the first nine months of a one-year conversion. *Harvey v. Veneman*, 396 F.3d 28 (1st Cir. 2005).

Note: In the FY 2006 agricultural appropriations bill (H.R. 2744), signed into law on November 10, 2005, Congress amended the pertinent provision of the OFPA authorizing the

Secretary to develop emergency procedures for designating agricultural products that are commercially unavailable in organic form for placement on the National List for a period of up to 12 months. The provision does not define what an "emergency procedure" is and, as a result, it appears that the Secretary has the authority to describe the term's parameters and to select the substances for the National List. The bill also amends the OFPA to allow the placement of synthetics on the National List for use during processing or post-harvest handling of a covered product. The bill also amends the OFPA to allow crops and forage from land included in the organic system plan of a dairy farm that is in the third year of organic management to be consumed by the dairy animals of the farm during the 12-month period immediately before the sale of the organic milk or milk products. Generally, crops or forage intended to be sold or labeled as "organic" can not have prohibited substances under the OFPA applied to them for the three years immediately before the harvest of the crop. Thus, the amendment appears to allow feed for dairy animals to come from a crop that is still transitioning to organic status.