

The Battle Is On: Interactions Between Marketing Orders and the Doctrine of Sovereign Immunity

INTRODUCTION

Federal marketing orders, authorized by Congress and administered by the Department of Agriculture, control the distribution and sale of many of the agricultural commodities produced in the United States, particularly fresh fruits and vegetables. Committees comprised of local producers¹ of the commodity administer many of the marketing orders. This kind of arrangement lends itself quite readily to allegations of self-dealing and has brought the marketing order system under attack. When suits arise, the producers who serve on marketing order boards point out that they are managing a governmental program and thus should be protected by sovereign immunity. This comment examines the limits of such immunity for the boards themselves and for the producers who serve on them. In other words, can immunity serve as a full suit of armor to absolutely protect the boards and their members, or is it merely a shield which can partially protect against oncoming attack? This comment also suggests particular actions which could result in liability for board members, and how a plaintiff can frame a complaint which will survive the immunity defense.

I. MARKETING ORDERS UNDER ATTACK

It makes "beer and chewing gum cost more."² It's a way "to make sure that American farmers don't produce any more . . . than they should . . ."³ It's "an out-and-out socialist relic of the New Deal."⁴

¹ For purposes of this comment, "producers" include farmers, growers, handlers, processors, shippers and packers of agricultural commodities.

² Thomas M. Lenard & Michael P. Mazur, *Harvest of Waste*, REGULATION, May/June 1985, at 19. Lenard and Mazur were each at one time economists for the Office of Management and Budget.

³ *News Conference with Senator Richard G. Lugar (R-Ind.), Re: Cuts in USDA Budget*, FEDERAL NEWS SERVICE, Feb. 21, 1992.

⁴ David Stockman, former director of the Office of Management and Budget, quoted in Jonathan Rauch, *Hidden in the Grocery Bag*, NATIONAL JOURNAL, Oct. 3, 1987,

"I have called it Communism!"⁵ It is "designed to improve the quality and economic returns from the marketing of fruit."⁶ It is the "only way that this type of research and promotion and advertising might occur"⁷ "It's a small program, it works, [and] it does not involve federal money"⁸

The "it" referred to in each of these quotations is the marketing order system authorized by Congress and administered by the Secretary of Agriculture (hereinafter sometimes referred to as the "Secretary"). Like the blind men describing an elephant, each speaker's analysis depends on which part of the creature he has grabbed onto. Each point of view is probably valid but each fails to consider other characteristics of the whole animal. Marketing orders have been criticized by politicians, economists and farmers,⁹ but the majority of farmers who operate under marketing orders continue to support them. Hence, the system continues to operate as authorized by the Agricultural Marketing Agreement Act of 1937 (AMAA).¹⁰

Those who are not in favor of marketing orders have tried a variety of methods of attack to do away with parts or the whole of the system. After an early constitutional challenge of the entire Act failed,¹¹ opponents attempted to sway public opinion, hoping that consumer ire at higher prices would induce politicians to take action against the marketing orders.¹²

at 2479.

⁵ Carl A. Pescosolido, Jr., a California orange grower, quoted in *A Good Deal for All or a Rip-Off?*, NATIONAL JOURNAL, Oct. 3, 1987, at 2481.

⁶ Editorial, *Marketing Orders' Sinister Side*, THE PACKER, Aug. 22, 1992, at 16.

⁷ J. Patrick Boyle, administrator of the Agricultural Marketing Service, quoted in Rauch, *supra* note 4, at 2481.

⁸ Representative Charles "Chip" Pashayan, Jr., a Republican from California, quoted in Rauch, *supra* note 4, at 2479.

⁹ For purposes of this comment, "farmers" will include producers, handlers, processors, shippers and packers of agricultural commodities.

¹⁰ Act of June 3, 1937, ch. 296, 50 Stat. 246 (codified as amended in scattered sections of 7 U.S.C.).

¹¹ *United States v. Rock Royal Coop*, 307 U.S. 533 (1939), *rehg. denied*, 308 U.S. 631 (1939).

¹² Growers standing in front of mounds of dumped fruit brought media attention when, in 1981, Richard Pescosolido, a California orange grower, was photographed in front of piles of oranges and again, in 1992, when Dan Gerawan, a California nectarine and peach grower, was pictured with mounds of his produce. See Conrad Mackeron, *Marketing Orders—Do They Help Some Farmers at the Consumer's Expense?*, NATIONAL JOURNAL, June 13, 1981, at 1072; *Outrage over Destruction of Small Fruit; Grower Must Dump Peaches, Nectarines*, S.F. CHRON., July 11, 1992, at B1; and James Bovard, *A Fruitless Massacre in California*, WALL ST. J., Aug. 11, 1992,

In addition, those farmers who oppose marketing orders have repeatedly filed suit against the Department of Agriculture. They have challenged the federal regulations and methods of implementation of the Act, seeking injunctive and monetary relief.¹³ Defendants have included everyone from the Secretary of Agriculture to the farmers who comprise the individual marketing order boards.¹⁴ For example, one successful suit invalidated a grower vote held by the Secretary because he had altered the procedural rules of the election without first allowing for notice and comment as required by the AMAA.¹⁵ Another suit claimed that the members of a marketing order board manipulated the order in which varieties of fruit were picked so that the varieties they grew were picked at the most opportune times. The plaintiffs in this action were growers who claimed to have been injured by this manipulation, and they were asking consequential damages.¹⁶ Suits like this, against members of marketing order boards, could hinder the system by deterring local farmers from serving on the marketing order boards for fear of potential liability. One court said: "Growers would not serve as members of administrative committees if they knew that dissatisfied growers could unleash the monster of . . . litigation upon them, with the resulting financial consequences."¹⁷

One common defense in suits against the Secretary and the boards is sovereign immunity. This defense shields from liability those who act with governmental authorization.¹⁸ Because board members would find this kind of protection invaluable, one issue to consider is whether the immunity extends to them, though they are not paid government em-

at A14. See also *supra* note 3. Opponents have also sought to appeal to health-conscious consumers by claiming marketing order quality controls lead to increased pesticide use. See *Press Briefing for the Future National Center for Food Agricultural Policy*, FEDERAL NEWS SERVICE, Nov. 28, 1988.

¹³ See, e.g., *Farmers Alliance for Improved Regulation v. Madigan*, 977 F.2d 588 (9th Cir. 1992). Leon Garoyan, *Marketing Orders*, 23 U.C. DAVIS L. REV. 707-12 (1990) (identifies all actions filed through 1990).

¹⁴ For example, in *Wileman Bros. & Elliott, Inc. v. Giannini*, 909 F.2d 332 (9th Cir. 1990), the plaintiff growers alleged self-dealing by growers serving on a marketing order board. On the other hand, in *Wileman Bros. & Elliott, Inc. v. Madigan*, No. CV-F-90-473, slip op. at 10 (E.D. Cal. Jan. 27, 1993), the plaintiffs, among other things, challenged decisions by the Secretary of Agriculture.

¹⁵ *Sequoia Orange Co. v. Yeutter*, 973 F.2d 752 (9th Cir. 1992).

¹⁶ *Wileman Bros. & Elliott, Inc. v. Giannini*, 909 F.2d 332 (9th Cir. 1990).

¹⁷ *Berning v. Gooding*, 643 F. Supp. 26, 30 (D. Or. 1985), *aff'd* 820 F.2d 1550 (9th Cir. 1987).

¹⁸ W. PAGE KEETON ET AL., *PROSSER AND KEETON ON TORTS* 1033 (5th ed. 1984).

ployees. Also, if the immunity does cover board members, exactly what actions will be protected?

This comment examines: (1) the AMAA and the functions of those who implement it; (2) how the doctrine of sovereign immunity and its subdivisions, absolute immunity and qualified immunity,¹⁹ have been applied in the past to members of the executive branch of the United States government; and (3) which particular actions by marketing order board members should be covered by sovereign immunity and which could result in personal liability.

II. THE BATTLEGROUND: THE AGRICULTURAL MARKETING AGREEMENT ACT

A. *The Purpose Behind the Act*

As a modification of the Agricultural Adjustment Acts of 1933 and 1935, the AMAA was clearly a product of the Great Depression. Farmers, like much of the nation, were devastated by the depression. In the winter of 1932, there were so many foreclosures of farm mortgages in Iowa that farmers held "foreclosure riots" during which they kidnaped and threatened the lawyers and judges carrying out the foreclosures.²⁰ Speaking on the floor of the Senate in 1933, Utah Senator William H. King said:

The purpose of this bill should not be to build up monopolies but in a practical way to aid the farmers of the United States. It is obvious that there cannot be a revival of prosperity so long as commodity prices are at the present low level. The only justification that can be urged for the enactment of the pending measure is that agriculture is prostrate. Farmers are bankrupt, and many of them are being deprived of their homes and their entire estate. It is conceded that for the country to be prosperous,

¹⁹ This comment will use the terms "absolute immunity" and "qualified immunity" as they are used in *Scheuer v. Rhodes*, 416 U.S. 232 (1974), *Butz v. Economou*, 438 U.S. 478 (1978), *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), *Mitchell v. Forsyth*, 472 U.S. 511 (1985), and other cases. In this sense, "absolute immunity" is immunity which covers the highest government officials by virtue of the positions they hold. "Qualified immunity" attaches not to a person but to certain actions taken by a lesser official when the actions are discretionary and within the scope of the official's duties. Some Supreme Court cases, for example, *Westfall v. Erwin*, 484 U.S. 292 (1988), use the term "absolute immunity" for both types of immunity and discuss in what situations absolute immunity should attach to an official's actions. This seems less than clear, in part because if the immunity only attaches to certain actions then it is hardly absolute.

²⁰ WILLIAM MANCHESTER, *THE GLORY AND THE DREAM: A NARRATIVE HISTORY OF AMERICA 1932-1972*, at 67 (1973).

prosperity must also follow the labors of the farmers.²¹

Because 25% of the nation's population still lived on farms,²² Congress determined that "the purchasing power of farmers" and "the value of agricultural assets . . . support the national credit structure . . ." ²³ Thus, Congress believed that when farmers were harmed, the nation as a whole was harmed.

To cure this, Congress decided that farmers needed fair prices for their goods and that the greatest hindrance to this goal was "the disruption of the orderly exchange of commodities . . ." ²⁴ Congress wanted the Secretary of Agriculture to bring order to the exchange of commodities by gathering together the processors and handlers who buy the bulk of agricultural products and have them agree on a higher price which they would all pay for a particular product. This could be done most efficiently in small areas which have a distinct market. Thus, the Act facilitates detailed management of crops by narrow geographic areas and crop types; thus, Florida celery,²⁵ Hawaiian papayas,²⁶ South Texas onions,²⁷ and California nectarines²⁸ each have their own marketing orders. Localizing marketing orders was intended to maximize the effectiveness of the Act.²⁹

To "establish and maintain such orderly marketing conditions for agricultural commodities"³⁰ that would bring farmers fair prices for their products, Congress authorized the Secretary of Agriculture to establish research projects, packaging requirements, minimum quality and maturity standards, and grading and inspection requirements.³¹ In this way, the Secretary was to aid farmers by helping them control the supply of products on the market, insuring the quality of agricultural goods, improving varieties of crops available to farmers to grow, and

²¹ 77 CONG. REC. 1981 (1933).

²² Manchester, *supra* note 20, at 68.

²³ The AMAA's "Declaration of Conditions," 7 U.S.C.S. § 601 (Law. Co-op. 1992).

²⁴ *Id.*

²⁵ 7 C.F.R. § 967 (1992).

²⁶ *Id.* § 928.

²⁷ *Id.* § 959.

²⁸ *Id.* § 916.

²⁹ Additionally, specificity was required by previous Supreme Court decisions which had declared unconstitutional New Deal delegations of authority which were too vague. *See* Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935); Schechter v. United States, 295 U.S. 495 (1935).

³⁰ 7 U.S.C.S. § 602(3) (Law. Co-op. 1992).

³¹ *Id.*

providing common marketing systems.³²

To reach these goals, Congress gave the Secretary a broad grant of powers under the AMAA, including the power to issue "marketing orders,"³³ to form "agreements" with farmers³⁴ and to pay "commodity benefits."³⁵ Agreements and orders differ in that an agreement is a voluntary restriction on a market, resembling a contract between those who sign the agreement and the Secretary; an order, once validly promulgated, is a regulation issued by the Department of Agriculture, and it has the force of law over all farmers covered by its terms whether they agreed it should be enacted or not.³⁶

B. How Marketing Orders Are Created

The Secretary of Agriculture is empowered to create a marketing order whenever he or she has reason to believe the policies of the AMAA will be forwarded by doing so.³⁷ Usually this comes as result of a proposal for a marketing order submitted by people in the affected field.³⁸ Once the Secretary has such a belief, he or she is required to investigate the situation,³⁹ and if it appears a marketing order would effectuate the purposes of the Act, the Secretary must call for a hearing on the matter.⁴⁰ Notice of the hearing must be given, usually through publication in the *Federal Register*.⁴¹ After the hearing, the Administrator of the Agricultural Marketing Service considers all the evidence presented and recommends whether to establish an order.⁴² This recommendation is published in the *Federal Register*, and public comments are solicited.⁴³ After this period, the Secretary considers the recommendation and public comments and makes the final decision on

³² *Id.*

³³ *Id.* § 608c.

³⁴ *Id.* § 608(2).

³⁵ *Id.* § 608(3).

³⁶ *Id.* § 608c(5)-(7), (14).

³⁷ *Id.* § 608c.

³⁸ 7 C.F.R. § 900.3(a) (1992). *See also* Rauch, *supra* note 4, at 2479, for a one-sided discussion of the failure of egg farmers to succeed in their bid for a marketing order.

³⁹ *See supra* note 38.

⁴⁰ 7 C.F.R. § 900.3(b) (1992).

⁴¹ 7 U.S.C.S. § 608c(3) (Law. Co-op. 1992); 7 C.F.R. § 900.4 (1992).

⁴² 7 C.F.R. § 900.12(a)-(b) (1992). *See* 7 C.F.R. § 900.2(e) (1992) for the full definition of "Administrator."

⁴³ 7 C.F.R. § 900.12(c) (1992).

creation of a marketing order.⁴⁴

To a certain extent, the Secretary's decision functions as a recommendation to those in the affected industry. Before a marketing order can take effect, a referendum must be held and a majority of growers⁴⁵ must approve.⁴⁶ Generally, the Act requires the approval of two-thirds of the producers of the affected commodity; that percentage may be reached by having approval either of two-thirds of the total number of producers in the field or of those entities who together produce two-thirds of the total crop.⁴⁷ If the referendum supports the marketing order by the required percentage, then arrangements need to be made for its administration. Milk marketing orders are implemented by a market administrator who is appointed by the Secretary, while fruit and vegetable orders are handled by committees comprised primarily of industry representatives.⁴⁸ The expenses of the market administrator or the marketing committee are paid by those in the industry on a pro rata basis.⁴⁹ The proportion of expenses paid by each producer is called an assessment.⁵⁰ Several suits concerning marketing orders have arisen as a protest against the assessments themselves or against the uses to which they were put.⁵¹

After approval, marketing orders have the force of law. The Secretary has the power to investigate violations, and the Department of

⁴⁴ *Id.* § 900.13.

⁴⁵ "Grower" is generally said to be synonymous with "producer," meaning anyone who produces the commodity covered by the marketing order and who has a proprietary interest in the commodity. *See, e.g.*, 7 C.F.R. § 916.9 (1992).

⁴⁶ 7 U.S.C.S. § 608c(8)-(9) (Law. Co-op. 1992).

⁴⁷ *Id.* § 608c(8)(A).

⁴⁸ For milk marketing orders, *see* 7 C.F.R. § 1000.3 (1992). Each fruit and vegetable order contains its own specifications for the composition of its board; *see, e.g., id.* § 905.19 for Florida oranges, grapefruit, tangerines and tangelos; *id.* § 916.20 for California nectarines.

⁴⁹ For milk marketing orders, *see* 7 C.F.R. § 1004.83 (1992). Each fruit and vegetable order contains its own provisions indicating a handler's duty to share in expenses; *see, e.g., id.* § 905.41 for Florida oranges, grapefruit, tangerines and tangelos; *id.* § 916.41 for California nectarines.

⁵⁰ *See supra* note 49.

⁵¹ For example, two suits have maintained that marketing orders violated First Amendment rights by "forcing" farmers to advertise, denying them "the right not to engage in speech", or requiring them "to participate in a generic advertising program which is contrary to their personal, professional, ideologic, philosophic and commercial beliefs." *Saulsbury Orchards & Almond Processing, Inc. v. Yeutter*, 917 F.2d 1190, 1193 (9th Cir. 1990). *See also* *Wileman Bros. & Elliott, Inc. v. Madigan*, No. CV-F-90-473, slip op. at 52 (E.D. Cal. Jan. 27, 1993).

Justice has a duty to prosecute violators.⁵²

C. Immunity Given in the Act

Because the AMAA was intended to create more orderly marketing conditions, Congress believed it was necessary to allow farmers to form groups which could more effectively manage the markets. Congress sought to facilitate such groups by including immunity from antitrust prosecutions in the AMAA. Section 608b provides: "The making of any such agreement shall not be held to be in violation of any of the antitrust laws of the United States, and any such agreement shall be deemed to be lawful"⁵³

For marketing orders, the problem with this section is the use of the word "agreement." The AMAA discusses two ways the Secretary of Agriculture may regulate produce markets, calling one of these an "agreement" and the other an "order."⁵⁴ Whether this provision applies to marketing orders or merely to marketing agreements is arguable. Unfortunately, the Supreme Court has failed to consider and decide this question; rather, in its only decision on the issue, the Court simply assumed that marketing orders were included in the provision.⁵⁵

In accord with the Supreme Court, the Fifth and Ninth Circuits have also assumed that the section applied to both.⁵⁶ At the district court level, the District of Oregon court reasoned, "There is no substantial difference between the making of a marketing agreement and the issuance of a[n] . . . order" when that order is issued after recommendations from a committee of commodity producers.⁵⁷ The Western District Court of Missouri held to the contrary, finding that to extend 608b to marketing orders would be an expansion of the immunity beyond the plain language of the statute: "This court cannot properly create an immunity which the Congress refused to provide."⁵⁸

While the AMAA may or may not provide express immunity for

⁵² 7 U.S.C.S. § 608a(7) (Law. Co-op. 1992).

⁵³ *Id.* § 608b.

⁵⁴ *Id.* § 608.

⁵⁵ *United States v. Borden Co.*, 308 U.S. 188, 198, 201 (1939).

⁵⁶ The Fifth Circuit made this assumption in *Chiglaides Farm, Ltd. v. Butz* 485 F.2d 1125, 1134-35 (5th Cir. 1973), *cert. denied*, 417 U.S. 968 (1974), and the Ninth Circuit made this assumption in *Wileman Bros & Elliott, Inc. v. Giannini*, 909 F.2d 332, 335 n.4 (9th Cir. 1990).

⁵⁷ *Berning v. Gooding*, 643 F. Supp. 26, 29 (D. Or. 1985), *aff'd* 820 F.2d 1550 (9th Cir. 1987).

⁵⁸ *In re Midwest Milk Monopolization Litigation*, 380 F. Supp. 880, 886 (W.D. Mo. 1974).

marketing orders, it is likely most courts would follow the lead of the Supreme Court and allow coverage for marketing orders anyway, as being most in line with legislative intent. Through the AMAA, Congress sought to encourage orderly markets by allowing farmers in the same commodity to work together. Typically, when groups of people in the same industry band together to manipulate the market and to control prices, regulators scream, "Antitrust!" However, these are precisely the activities Congress sought to promote under the watchful eye of the Secretary of Agriculture, and both agreements and orders accomplish these goals. Thus, it would be logical to include marketing orders within this grant of express immunity from antitrust suits contained in the AMAA.

One way or another, this is the only form of immunity which is provided for by the Act itself. Thus, an examination of the immunity available to administrators of marketing orders must encompass analysis of the common law of sovereign immunity.

III. FULL ARMOR: ABSOLUTE SOVEREIGN IMMUNITY

A. *In General*

As Dean Prosser explains, the concept of sovereign immunity grows out of the ancient concept that no suit can be brought against the King; as the creator and enforcer of all laws, it was seen as illogical to think that suit could be brought against Him.⁵⁹ Despite its seeming archaism, it is still the accepted principle of law that "the United States, as sovereign, 'is immune from suit save as it consents to be sued'"⁶⁰ Because our government acts through a series of individual people, each person's immunity from suit has been questioned at some time. Absolute immunity has been afforded only to legislators and judges for actions taken during the course of their official functions,⁶¹ to executive officers engaged in adjudicative functions,⁶² and to the President.⁶³

The point of immunity is to spare a defendant the distraction and expense of defending his or her actions in court. For this reason, the issue of a defendant's immunity must be determined at the initial stages of a lawsuit, most often asserted as an affirmative defense in the re-

⁵⁹ KEETON ET AL., *supra* note 18, at 1033.

⁶⁰ United States v. Testan, 424 U.S. 392, 399 (1976) (quoting United States v. Sherwood, 312 U.S. 584, 586 (1941)).

⁶¹ For legislators, see Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975); for judges, see Stump v. Sparkman, 435 U.S. 349 (1978).

⁶² Butz v. Economou, 438 U.S. 478, 508-12 (1978).

⁶³ Nixon v. Fitzgerald, 457 U.S. 731, 749 (1982).

sponsive pleading.⁶⁴ If immunity is found, then the suit is dismissed.⁶⁵

B. Immunity of Marketing Order Boards as Entities

In addition to legislators, judges, and the President who may avail themselves of absolute immunity, the United States as an entity is also absolutely immune, and suits against agencies of the United States government are considered suits against the sovereign. Thus, agencies are covered by absolute sovereign immunity.⁶⁶ The theory is that in seeking to effect the actions of the agency, what a plaintiff is really trying to do is effect the operations of the sovereign which authorized the agency to act; thus, the real party in interest is the sovereign.⁶⁷ For example, if a plaintiff who objects to marketing orders is able to get damages from a local board, then the money used to pay the award will not be used for those activities the board is legislatively directed to perform. That plaintiff will then have been able to effect those actions Congress wished to take, not just the marketing order board.

Entities such as the Treasury Department or the Department of Agriculture serve as obvious examples of agencies of the United States, but beyond such obvious examples, the water becomes a bit muddier. In determining whether an entity is an agency of the government, courts look to (1) the entity's enabling statute and (2) the degree of control which the government has over the entity's actions.

1. Enabling Statutes⁶⁸

Often the statute which creates an entity will specify whether the entity is to be considered an agent of the United States. For example, Amtrak's enabling statute specifically provides that Amtrak shall not be an agency or instrumentality of the United States.⁶⁹ In contrast, the

⁶⁴ *Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982).

⁶⁵ *See Economou*, 438 U.S. at 507-08.

⁶⁶ *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949). The only exception to the absolute immunity of governmental agencies comes under the Administrative Procedure Act, 5 U.S.C.S. § 551 (Law. Co-op. 1993), which waives sovereign immunity for agency actions when plaintiffs seek equitable remedies and not monetary damages, 5 U.S.C.S. § 702 (Law. Co-op. 1993). In such a case, plaintiffs will be allowed to maintain their suit, and it will not be subject to dismissal as barred by sovereign immunity.

⁶⁷ CHARLES WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* 174 (1976).

⁶⁸ An enabling statute is "any statute enabling persons or corporations to do what before they could not. It is applied to statutes which confer new powers." BLACK'S *LAW DICTIONARY* 274 (5th ed. 1983).

⁶⁹ 45 U.S.C.S. § 541 (Law. Co-op. 1992).

Farm Credit Act of 1933 specifically states, "Each production credit association . . . shall continue as a federally chartered instrumentality of the United States."⁷⁰ Courts have interpreted this to mean production credit associations enjoy immunity from suit unless they waive that immunity.⁷¹ Similarly, the AMAA provides that the Secretary of Agriculture shall, in connection with marketing orders, have the power to select, or create a means for selecting, "an agency or agencies" to administer the marketing order.⁷² While not conclusive, use of the word "agency" raises a presumption that the marketing order boards created are agencies of the United States and would be able to avail themselves of absolute immunity.

2. Pervasive Control by the Government

The presumption of an agency relationship is reinforced by the amount of control which the Secretary of Agriculture exercises over these boards. Both the Eighth and Ninth Circuits considered "pervasive involvement" as a factor in determining an agency relationship in production credit association cases.⁷³ Marketing order boards are appointed and removed by the Secretary of Agriculture, and the Secretary can disapprove any action of a board at any time. The only powers and duties held by the boards are those granted to them by the Secretary.⁷⁴

This presumption is further reinforced by two decisions from the District Court for the Eastern District of California in which the court found marketing order boards to be agencies of the United States for purposes of the Freedom of Information Act and the False Claims Act.⁷⁵ The use of the word "agency" in the enabling statute, together with the Secretary's pervasive control and these court decisions, suggests that the marketing order boards themselves, as entities, should be entitled to absolute immunity from suit for actions taken in their official capacities.

⁷⁰ 12 U.S.C.S. § 2091 (Law. Co-op. 1990).

⁷¹ *Sparkman v. Merced Prod. Credit Ass'n*, 703 F.2d 1097, 1100-01 (9th Cir. 1983); *Rohweder v. Aberdeen Prod. Credit Ass'n*, 765 F.2d 109, 113 (8th Cir. 1985), and *Smith v. Russellville Prod. Credit Ass'n*, 777 F.2d 1544, 1549 (11th Cir. 1985).

⁷² 7 U.S.C.S. § 608c(7)(C) (Law. Co-op. 1992).

⁷³ *Sparkman*, 703 F.2d at 1101; *Schlake v. Beatrice Prod. Credit Ass'n*, 596 F.2d 278, 281 (8th Cir. 1979).

⁷⁴ 7 U.S.C.S. § 608c(7)(C)(i)-(iv) (Law. Co-op. 1992).

⁷⁵ For the Freedom of Information Act, see *Jensen v. Almond Bd.*, No. CVF-91-474, slip op. at 6 (E.D. Cal. Mar. 23, 1992). For the False Claims Act, see *United States ex rel. Sequoia Orange Co. v. Oxnard Lemon Co.*, No. CVF-91-194, slip op. at 13 (E.D. Cal. May 4, 1992).

IV. A SHIELD: QUALIFIED IMMUNITY FOR INDIVIDUAL OFFICIALS

A. *In General*

Aside from legislators, judges and the President, there is no absolute immunity for governmental officials, but there still exists its lesser cousin, qualified immunity. Through this type of immunity, the Court sought to balance the citizen's right to damages with "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority."⁷⁶

While there are specialized types of immunity that arise under particular statutes,⁷⁷ the most commonly quoted definition of the general qualified immunity comes from *Harlow v. Fitzgerald*.⁷⁸ There, the Supreme Court stated that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."⁷⁹

To be granted *Harlow* immunity, (1) the person acting must have been a government official, (2) the acts must have been discretionary and not "ministerial," and (3) there must not have been a violation of clearly established statutory or constitutional rights.⁸⁰ Other issues to consider are whether the acts were within the official's statutory authority,⁸¹ and whether they were done in good faith.⁸²

1. Government Official

Unlike absolute immunity, which attaches to an office, qualified immunity may attach to particular acts by a government official. With the

⁷⁶ *Butz v. Economou*, 438 U.S. 478, 506 (1978).

⁷⁷ *See, e.g.*, the Federal Tort Claims Act, which covers action within a federal employee's scope of employment, 28 U.S.C.S. § 1346(b) (Law Co-op. 1994), and the AMAA's antitrust immunity, 7 U.S.C.S. § 608(b) (Law Co-op. 1992).

⁷⁸ *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

⁷⁹ *Id.* at 818.

⁸⁰ *Id.* at 816.

⁸¹ This principle was established in *Little v. Barreme*, 2 Cranch 170 (1804) and has been repeatedly reaffirmed; *see, e.g.*, *Barr v. Matteo*, 360 U.S. 564 (1959). This progression is discussed in *Butz v. Economou*, 438 U.S. 478, 486-92 (1978).

⁸² Dean Prosser says this is not really a form of immunity at all but rather a protection for good-faith decisions. KEETON ET AL., *supra* note 18, at 1032. Qualified immunity is sometimes referred to as good faith immunity, *Harlow*, 457 U.S. at 815. After 1982, it has also simply been called *Harlow* immunity. *Wileman Bros. & Elliott, Inc. v. Giannini*, No. CV-F-88-251, slip op. at 30 (E.D. Cal. Apr. 5, 1993).

members of marketing order boards, the question arises whether they are even government officials because they receive no compensation from the government.

Courts have held, however, that it is not key to be paid by the government in order to qualify as an employee. More important are whether the person was acting on behalf of the government, the amount of control which the government exercised over the person's actions, and the ability of the government to hire or fire. In separate cases, the Ninth Circuit and the District Court for the Eastern District of California have held that members of marketing order boards are government officials for purposes of qualified immunity.⁸³

2. Discretionary Acts

Only discretionary acts will be covered by qualified immunity. This means the act in question must involve an exercise of decision-making which is within the official's statutory grant of authority. High officials with complex discretionary functions "require greater protection than those with less complex discretionary responsibilities."⁸⁴ Tasks which are merely "ministerial," or carrying out the decisions made higher up in the chain of command, will not be granted immunity. This is, of course, a subtle distinction. Courts generally consider the nature of the official's position and whether it is important to the functioning of the position that the official have a free range of decision-making. Many marketing order boards are "given discretion to take a wide variety of actions in furtherance of the marketing orders."⁸⁵ An example of this would be the ability of the nectarine board to decide when particular varieties of nectarines are ready to be harvested pursuant to the quality control provisions in the marketing order.⁸⁶ These are the type of actions which could be covered by qualified immunity.

3. Violations of Statutory or Constitutional Rights

Even if governmental officials do not exceed the scope of their statutory authority, they may still be personally liable if the method in

⁸³ *Saulsbury Orchards & Almond Processing, Inc. v. Yeutter*, 917 F.2d 1190, 1196, (9th Cir. 1990); *Wileman Bros. & Elliott, Inc.*, No. CV-F-88-251, slip op. at 30.

⁸⁴ *Harlow*, 457 U.S. at 807 (citing *Scheuer v. Rhodes*, 416 U.S. 232 (1974)).

⁸⁵ *Wileman Bros. & Elliott, Inc.*, No. CV-F-88-251, slip op. at 30. *Accord, Saulsbury Orchards & Almond Processing, Inc.*, 917 F.2d, at 1196 (assuming almond board members engaged in discretionary functions).

⁸⁶ 7 C.F.R. § 916.52 (1992).

which they used their authority was constitutionally invalid.⁸⁷ They cannot trample on legal or constitutional rights in the course of exercising their authority. However, the *Harlow* court emphasized that to defeat sovereign immunity the action complained about must have violated constitutional or legal rights which were "clearly established" at the time the action was taken.⁸⁸ An action which subsequently becomes illegal will not defeat otherwise-valid immunity.⁸⁹

On the other hand, constitutional provisions are so widely known that immunity would be defeated by a claim of a violation of those rights. For example, while most marketing order boards are empowered to make rules governing their administration of the order,⁹⁰ a board could not make a rule preventing one particular grower from speaking at their meetings because this would clearly violate that grower's First Amendment right to freedom of speech. Although boards would be within their statutory authority in making rules, their method of exercising power would be impermissible because it would violate constitutional rights in the process.

4. Other Considerations

a. Statutory Authority

The requirement that acts taken by an official must have been within the scope of powers given by statute has a long history. In 1883, the Supreme Court said, "To make out his defence he must show that his authority was sufficient in law to protect him."⁹¹ As the Court's most recent extensive discussion of the issue, *Butz v. Economou*⁹² firmly states that a federal official

may not with impunity ignore the limitations which the controlling law has placed on his powers. The immunity of federal executive officials began as a means of protecting them in the execution of their federal statutory duties A federal official who acted outside of his federal statutory authority would be held strictly liable for his trespassory acts.⁹³

After an exhaustive consideration of cases touching this issue, the Court concluded that federal officials are "accountable when they stray be-

⁸⁷ *Harlow*, 457 U.S. at 819-20.

⁸⁸ *Id.* at 818-19.

⁸⁹ *Id.*

⁹⁰ *See, e.g.*, 7 C.F.R. § 916.30 (1992).

⁹¹ *Cunningham v. Macon & Brunswick Rail Co.*, 109 U.S. 446, 452 (1883).

⁹² *Butz v. Economou*, 438 U.S. 478 (1978).

⁹³ *Id.* at 489-90.

yond the plain limits of their statutory authority”⁹⁴

In the Court’s more recent decisions on qualified immunity, the question of statutory authority has been ignored. The Court has quoted the *Harlow* formulation for immunity but the *Economou* line of cases has never been overruled or even repudiated. As a result it would appear that acting within statutory authority is a dormant requirement.

b. Good Faith

While we would always hope our government’s officials were acting in good faith, bad faith alone will not be enough to subject a public officer to liability for performing statutorily authorized duties.⁹⁵ In one early case, the Postmaster General was sued for circulating a notice which allegedly injured the reputation of the plaintiff.⁹⁶ The Supreme Court found it immaterial whether the Postmaster had acted out of malice because it was within his statutory authority to issue the notice.⁹⁷ This standard shifted briefly when, in *Wood v. Strickland*,⁹⁸ the Supreme Court found that a defense of immunity could be defeated if a public official “took the action with the malicious intention to cause a deprivation of constitutional rights”⁹⁹ While the *Wood* court limited its holding to the context of school discipline,¹⁰⁰ subsequent cases quoted the standard as a general limitation on qualified immunity.¹⁰¹ In 1982, the Court returned to the historic standard and returned good faith to its subordinate position, stating “bare allegations of malice should not suffice” to defeat a claim of sovereign immunity.¹⁰² Currently then, bad faith can be the icing on a plaintiff’s cake, but there is no case if the actions complained of were within an official’s discretionary authority.

B. Immunity for the Members of Marketing Order Boards

Working with these standards, *Butz v. Economou*¹⁰³ established that cabinet members, such as the Secretary of Agriculture, and those work-

⁹⁴ *Id.* at 495.

⁹⁵ *Bradley v. Fisher*, 13 Wall. 335 (1872).

⁹⁶ *Spaulding v. Vilas*, 161 U.S. 483 (1896).

⁹⁷ *Id.* at 499.

⁹⁸ *Wood v. Strickland*, 420 U.S. 308 (1975).

⁹⁹ *Id.* at 322.

¹⁰⁰ *Id.*

¹⁰¹ *See, e.g., Procunier v. Navarette*, 434 U.S. 555, 562-63, 566 (1978).

¹⁰² *Harlow v. Fitzgerald*, 457 U.S. 800, 817 (1982).

¹⁰³ *Butz v. Economou*, 438 U.S. 478 (1978).

ing under their command, such as agents of the Secretary, are entitled, not to absolute immunity, but to qualified immunity for discretionary acts. *Economou* defendants included the Secretary and Assistant Secretary of Agriculture, the Department of Agriculture's chief hearing examiner and its judicial officer, and the Department's attorney who had prosecuted an enforcement proceeding against the plaintiff in the current action.¹⁰⁴ The Supreme Court used the same standards in considering the potential immunity of the Secretary and each of the individuals working under his direction, regardless of their level in government. Because this has been the only set of standards used by the Supreme Court, presumably the same standards should be used in extending immunity to other agents of the Secretary of Agriculture, such as the members of marketing order boards. Thus, while the marketing order boards as entities would probably be granted absolute immunity, the individual members of the boards could only hope for qualified immunity which would encompass actions which were within their discretionary authority.

1. *United States v. Borden Co.*¹⁰⁵

Several cases have considered the potential qualified immunity granted to individuals under the AMAA. The granddaddy of immunity cases, *United States v. Borden Co.*,¹⁰⁶ is one of the few marketing order cases to have gone to the Supreme Court.¹⁰⁷ In *Borden*, milk distributors and a milk cooperative, previously covered under a marketing order, were accused of violating the Sherman Anti-Trust Act¹⁰⁸ by conspiring to fix milk prices.¹⁰⁹ Their defense was that agricultural

¹⁰⁴ *Id.* at 482.

¹⁰⁵ *United States v. Borden Co.*, 308 U.S. 188 (1939).

¹⁰⁶ *Id.*

¹⁰⁷ Other Supreme Court cases involving marketing orders: *Block v. Community Nutrition Inst.*, 467 U.S. 340 (1984) (holding consumers do not have standing to sue under marketing orders); *Lehigh Valley Coop. Farmers, Inc. v. United States*, 370 U.S. 76 (1962) (finding the AMAA does not authorize setting up trade barriers to prevent the importation of milk from one area to another); *Milk Producers Ass'n v. United States*, 362 U.S. 458 (1960) (rejecting the same assertions made in *Borden*, that the AMAA completely removed agricultural producers from the Sherman Anti-Trust Act); *Brannan v. Stark* 342 U.S. 451 (1952) (holding the system of deductions and payments utilized under the marketing order in this case was not authorized by the Act); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110 (1942) (finding the Secretary of Agriculture has the power, under the Act, to regulate intrastate, as well as interstate, movements of milk).

¹⁰⁸ 15 U.S.C.S. § 1 (Law. Co-op 1989).

¹⁰⁹ *Borden*, 308 U.S. at 191. Municipal officials, labor union officers, and arbitra-

producers and cooperatives entering into collective marketing agreements were immune from prosecution under the Sherman Anti-Trust Act after the passage of the AMAA, because the latter was intended to facilitate such agreements between producers and distributors.¹¹⁰ The Supreme Court agreed that the AMAA provided antitrust immunity for agricultural producers, but this was the case *only* when a formal marketing order or agreement existed with the Secretary of Agriculture.

Defendants could be liable for conduct violating the Sherman Anti-Trust Act both before and after that area's milk marketing order was in existence. The Supreme Court said:

An agreement made with the Secretary as a party, or an order made by him, or an arbitration award or agreement approved by him, pursuant to the authority conferred by the Agricultural Act and within the terms of the described immunity, would of course be a defense to a prosecution under the Sherman Act to the extent that the prosecution sought to penalize what was thus validly agreed upon or directed by the Secretary. Further than that the Agricultural Act does not go.¹¹¹

The Supreme Court strictly interpreted the temporal scope of the AMAA's antitrust immunity and emphasized that the Act would provide no protection for actions taken without the participation of the Secretary of Agriculture. Thus, immunity was denied to producers who, though once covered by a marketing order, acted when the order was not in place.

2. *Berning v. Gooding*¹¹²

a. *At the District Court*

The Oregon district court considered the potential immunity for members of a duly authorized, concurrently existing marketing order board in *Berning v. Gooding*.¹¹³ The commodity in question, hops, was covered by a marketing order issued by the Secretary of Agriculture. As a part of the order, the Hops Administrative Committee was created to make recommendations to the Secretary on the amount of hops which should be marketed in any given year and how that quantity should be distributed among hops growers.¹¹⁴ This committee was composed of

tors were also defendants in the action.

¹¹⁰ *Id.* at 191-92.

¹¹¹ *Id.* at 201-02.

¹¹² *Berning v. Gooding*, 643 F. Supp. 26 (D. Or. 1985), *aff'd* 820 F.2d 1550 (9th Cir. 1987).

¹¹³ *Id.* [hereinafter *Berning I*].

¹¹⁴ *Id.* at 28.

hops growers appointed by the Secretary.¹¹⁵ The plaintiff sued the members of the committee, alleging that in carrying out their duties under the marketing order, they had violated antitrust laws and had tortiously interfered with his ability to do business.¹¹⁶ He claimed they manipulated their recommendations to the Secretary to arrange the hops market in a way which was most favorable to themselves.¹¹⁷ The members of the committee asserted immunity as their defense.¹¹⁸

As in *Borden*, the *Berning I* court considered the immunity expressly provided in section 608b of the AMAA and agreed that in terms of the antitrust allegations, members of the committee were "immune for acts committed within their statutory authority."¹¹⁹ Further, the court looked to the Code of Federal Regulations where, as a part of the marketing order itself, there was a provision saying committee members would not be

personally responsible, either individually or jointly with others, in any way whatsoever, to any person for errors in judgment, mistakes or other acts, either of commission or omission, . . . except for acts of dishonestly, willful misconduct, or gross negligence.¹²⁰

Such expressly granted immunity allowed for the dismissal of both of the plaintiff's claims because there were "no charges that fit the exceptions to immunity."¹²¹ This is a broad reading of the grant of immunity, and a court less willing to grant immunity could find claims which fit the exceptions in many complaints. Nonetheless, provisions like this can be very important to board members as a way to limit liability, if such a section is included in the particular marketing order for which the board was created. In case of future suits, all board members should determine whether such a provision exists in their marketing order.

Even after finding a basis for dismissal, the *Berning I* court considered whether there might be another type of immunity which would cover the committee members. The court determined that at least as far as the antitrust claim was concerned, there was also immunity inherent or implied by the statutory scheme, because it was "necessary to make

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 27.

¹¹⁷ *Id.* at 28. Specifically, the plaintiff said the committee members sought to "usurp the market for hops to themselves"

¹¹⁸ *Id.* at 29.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 29-30.

¹²¹ *Id.* at 30.

the regulatory system work."¹²² This theory of immunity was based on a Supreme Court ruling, *Keogh v. Chicago & Northwestern Railway Co.*¹²³ A private plaintiff could not bring an antitrust action based on a conspiracy to fix prices when those same price levels had previously been approved by a governmental agency.¹²⁴ Because a suit could not be brought on these terms, the effect was that those who had taken the actions complained of were immune.

The *Berning I* court relied on a Ninth Circuit case which described specific requirements for this "implied immunity."¹²⁵ First, the circuit court said there must be "explicit congressional approval of the ultimate anticompetitive effect of the challenged conduct" ¹²⁶ Then, there must be "explicit authorization by Congress to an agency or private entity to order the challenged anticompetitive conduct" ¹²⁷ Finally, there must be "no inconsistency between the challenged conduct and an express policy of the governing agency."¹²⁸ The district court found all these elements were satisfied in *Berning I*:¹²⁹ the AMAA authorizes the anticompetitive effect of the marketing order and the conduct undertaken by the marketing order board members, and the conduct complained of by the plaintiff was precisely what the board members were authorized to do.¹³⁰ Thus, the *Berning I* court found the board members were also immune from antitrust suits.

Thus, at least one district court has found three types of immunity from antitrust allegations which applied to board members: one written into section 608c of the AMAA itself; another written into the regulations governing the marketing order; and a third implied by necessity in the regulatory system. With respect to the claim of tortious interference, the court found immunity for the board members in the marketing order's governing regulations.¹³¹

¹²² *Id.*

¹²³ *Keogh v. Chicago & Northwestern Ry. Co.*, 260 U.S. 156 (1922).

¹²⁴ Explained in *Berning I*, 643 F. Supp. 26, 30 (D. Or. 1985).

¹²⁵ *Phontele, Inc. v. American Tel. & Tel. Co.*, 664 F.2d 716 (9th Cir. 1981), *cert. denied*, 459 U.S. 1145 (1983).

¹²⁶ *Id.* at 731-32.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Berning I*, 643 F. Supp. 26, 30 (D. Or. 1985).

¹³⁰ *Id.*

¹³¹ The dismissal of the claim of tortious interference was not based on immunity, but rather on a lack of subject matter jurisdiction because it had been pendant on the dismissed federal antitrust claim. *Id.* at 37.

b. *At the Ninth Circuit*

The *Berning I* decision was affirmed by the Ninth Circuit¹³² with no mention of the immunities expressly given in the AMAA or the regulations. The circuit court, however, was uncomfortable with the district court's discussion of an "implied immunity." It said the decision referred to by the lower court, *Keogh*,¹³³ had been criticized for its reliance on immunity in a later Supreme Court decision, *Square D Co. v. Niagara Frontier Tariff Bureau*.¹³⁴ This was an antitrust suit where the plaintiff complained about actions which had previously been approved by a governmental agency.¹³⁵ The *Square D* court said the *Keogh* court had improperly characterized the issue as one of immunity.¹³⁶

Rather, the court discussed the injury which antitrust laws were designed to redress.¹³⁷ Antitrust laws, like the Sherman Anti-Trust Act, give a cause of action to someone who has been "injured in his business or property."¹³⁸ The *Square D* court determined that injury, in this sense, must have been caused by a violation of the plaintiff's legal rights.¹³⁹ Unfortunately for plaintiffs, if the activity complained of was lawful, because it had been previously approved by the government, then no legal rights were violated by the activity.¹⁴⁰ Thus, if the plaintiff's legal rights have not been violated because there was no illegal activity, then the plaintiff has not been injured within the meaning of the Sherman Anti-Trust Act.

What this circular reasoning brings us to is: to sue under the anti-trust laws, a plaintiff must have suffered an injury which is redressable by those laws; yet anticompetitive actions which have been approved by some form of government, however injurious, are not thereby redressable. In essence, the Supreme Court will not allow the Sherman Act to dictate what governmental agencies may or may not do.

Thus, rather than finding immunity from suits based on pre-approval by a governmental agency, the Supreme Court simply would find no cause of action when pre-approved actions are taken. However,

¹³² *Berning v. Gooding*, 820 F.2d 1550 (1987) [hereinafter *Berning II*].

¹³³ *Keogh v. Chicago & Northwestern Ry. Co.*, 260 U.S. 156 (1922).

¹³⁴ *Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409 (1986).

¹³⁵ *Id.* at 411-12.

¹³⁶ *Id.* at 422.

¹³⁷ *Id.*

¹³⁸ Sherman Anti-Trust Act, ch. 647, § 7, 26 Stat. 210 (1890) (current version at 15 U.S.C.S. § 15(a) (Law Co-op. 1985)).

¹³⁹ *Square D*, 476 U.S. at 416.

¹⁴⁰ *Id.*

the end result is the same because governmental officials engaged in pre-approved acts cannot be sued in antitrust. This semantic sidestepping reflects the belief that sovereign immunity is an archaic concept and should not be relied on unless absolutely necessary.¹⁴¹ Courts are reluctant to “imply” immunity. It would be more intellectually honest to admit that the result is a form of implied immunity for officials acting with the prior approval of a governmental agency which has been empowered by Congress to undertake such activities.

Nonetheless, because of the Supreme Court’s decision in *Square D*, the Ninth Circuit, while affirming the *Berning I* decision, did so based on the failure of the plaintiff to state a claim upon which relief could be granted, rather than upon a claim of immunity by the board members. Board members must be aware of this important distinction as they seek to defend against antitrust allegations.

3. *Wileman Bros. & Elliott, Inc. v. Giannini*¹⁴²

a. *At the Ninth Circuit*

The only other reported case dealing with the immunity of marketing order board members is also from the Ninth Circuit, *Wileman Bros. & Elliott, Inc. v. Giannini*.¹⁴³ In its 1990 decision, the Ninth Circuit followed the principles embodied in *Berning I* and *Berning II* and reached opposite results.

Like *Berning I*, the case involved an existing marketing order. The commodities in question were plums and nectarines, each of which was covered by its own marketing order. The defendants were producers of these commodities who sat on the marketing order boards.¹⁴⁴ While fruit maturity was regulated by the marketing orders, the plaintiffs accused the board members of issuing and enforcing heightened maturity standards, without the prior approval of the Secretary of Agriculture, as a means of manipulating the market in their favor and to the detriment of the plaintiffs.¹⁴⁵ The case was brought under the state antitrust

¹⁴¹ Justice Frankfurter said sovereign immunity “undoubtedly runs counter to modern democratic notions of the moral responsibility of the State. Accordingly, courts reflect a strong legislative momentum in their tendency to extend the legal responsibility of Government.” *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 57 (1944) (dissenting opinion). For cases where immunity has been strictly construed, see *Federal Hous. Admin. v. Burr*, 309 U.S. 242 (1940) and *Block v. Neal*, 460 U.S. 289 (1983).

¹⁴² *Wileman Bros. & Elliott, Inc. v. Giannini*, 909 F.2d 332 (9th Cir. 1990).

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 333.

¹⁴⁵ *Id.* at 333-34.

statute, and the board members claimed immunity from such antitrust allegations under section 608b of the AMAA.

As could be expected, the circuit court found that immunity afforded to board members under that section is not absolute; rather, it is a qualified immunity which covers only those actions which board members are specifically authorized to take.¹⁴⁶ The court said, "Any immunity for action directed by marketing orders extends only to 'such qualified authorization and such requirements as they contain.'"¹⁴⁷ The court examined the federal regulations comprising the marketing order to see if there was authorization for the acts allegedly taken by the board members and concluded there was none.¹⁴⁸ All maturity standards had to be approved by the Secretary *before* they were implemented, and the Secretary's inaction in not disapproving the standards was not equivalent to prior approval.¹⁴⁹ The court concluded the board members would not be entitled to immunity under section 608b for the actions which were alleged in the complaint unless they could show "some other form" of authorization by the Secretary.¹⁵⁰

The court then considered the quasi-immunity as outlined in *Berning I* and determined it did not apply. For this kind of immunity, express approval of the anticompetitive acts by a governmental agency is required, and the complaint in *Wileman Bros. & Elliott, Inc.* alleged actions taken by board members without prior approval.¹⁵¹ As a result, the circuit court reversed the district court's dismissal of the action and remanded the case for further proceedings.¹⁵² Thus, the complaint defeated claims of immunity by specifically alleging bad faith actions beyond the board members' discretionary authority for which there was no prior approval.

b. On Remand

On remand, the plaintiffs added a number of state law tort claims and alleged violation of the Sherman Anti-Trust Act. In an April 1993 decision on the defendants' motion to dismiss or for summary judgment, the district court found the defendants had still not presented any evidence sufficient to show authorization of their actions by the Secretary

¹⁴⁶ *Id.* at 334-35.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 336.

¹⁴⁹ *Id.* at 337.

¹⁵⁰ *Id.* at 336.

¹⁵¹ *Id.* at 337-38.

¹⁵² *Id.* at 339.

of Agriculture.¹⁵³ Thus there was no immunity which would lead to summary judgment on the antitrust issues.¹⁵⁴

The district court did grant summary judgment of the state tort claims under the Federal Tort Claims Act (FTCA).¹⁵⁵ The FTCA indicates that the federal government should be substituted for a federal employee when a suit arises out of negligent or wrongful acts committed by the employee in the scope of his or her employment.¹⁵⁶ The district court found that the members of marketing order boards are federal employees and that the acts alleged were committed within the scope of their employment as that term is defined by state law.¹⁵⁷ Thus the tort claims have disappeared but the antitrust claims live on.

On June 27, 1995, the Ninth Circuit affirmed the legality of the heightened maturity standards when it decided the long-delayed Administrative Procedure Act (APA) challenge to the California Tree Fruit Marketing Order.¹⁵⁸ The 1980 version of the heightened maturity standards, which the Ninth Circuit found in 1990 to be ambiguous on its face,¹⁵⁹ was held by the court in 1995, after a review of the lengthy administrative record, to clearly authorize the committees' challenged maturity regulations and determinations.¹⁶⁰ Turning to the merits, the court held that consumer surveys in the administrative record, reinforced by strong, generally unanimous, committee recommendations, provided the required substantial evidence to sustain the maturity regulations.¹⁶¹

¹⁵³ *Wileman Bros. & Elliott, Inc. v. Giannini*, No. CV-F-88-251, slip op. at 11, 33-34 (E.D. Cal. Apr. 5, 1993).

¹⁵⁴ *Id.* at 35.

¹⁵⁵ *Id.* See *infra* part V for a more detailed discussion of the FTCA.

¹⁵⁶ 28 U.S.C.S. § 2679 (Law Co-op. 1994).

¹⁵⁷ *Wileman Bros. & Elliott, Inc. v. Giannini*, No. CV-F-88-251, slip op. at 12-29.

¹⁵⁸ *Wileman Bros. & Elliott, Inc. v. Espy*, No. 93-16977, 1995 WL 379682 (9th Cir. June 27, 1995) (rehearing petition pending). Plaintiffs' section 15(A) administrative challenge, pursuant to 7 U.S.C. § 608c(15)(A), was first filed in 1987, amended in 1989 and rejected by the United States Department of Agriculture (USDA) in 1991. The district court affirmed the USDA's actions in 1993, and the Ninth Circuit affirmed in part and reversed in part in 1995.

¹⁵⁹ *Wileman Bros. & Elliott, Inc. v. Giannini*, 909 F.2d 332, 335-36 (9th Cir. 1990).

¹⁶⁰ *Wileman Bros. & Elliott, Inc. v. Espy*, No. 93-16977, 1995 WL 379682, at *11 ("[I]t is clear that the Secretary intended to raise the maturity standards and to allow the committees to promulgate the implementing regulations, just as they had with numerous standards in the past.").

¹⁶¹ *Wileman Bros. & Elliott, Inc. v. Espy*, No. 93-16977, 1995 WL 379682, at *11-*12, *17 n.12.

V. CRACKS IN THE ARMOR OF SOVEREIGN IMMUNITY

While qualified immunity may only be partial armor in protecting governmental officials from the onslaught of litigious battles, it is better than no armor at all. Over time, though, the doctrine of sovereign immunity has increasingly come to be viewed as a vestige of an earlier system of government, and many have called for its constriction. One scholar maintains that the history of current immunities reflects the abandonment and limitation of immunities which existed in full at an earlier time.¹⁶³ As a result, immunity may now be pierced in a number of ways.

A. Waivers

Monetary damages may be recovered from the United States or its agencies or instrumentalities when the government has waived its immunity; however, "a waiver of sovereign immunity cannot be implied but must be unequivocally expressed."¹⁶³ Beginning in the early 1930's, Congress included various forms of waivers in the legislation creating agencies,¹⁶⁴ most typically empowering an agency to "sue and be sued."

There is a long-standing debate, though, whether such waivers should be strictly or liberally construed. In 1940, in *Federal Housing Administration v. Burr*, the Supreme Court stated that

such waivers by Congress of governmental immunity . . . should be liberally construed. This policy is in line with the current disfavor of the doctrine of governmental immunity from suit . . . [I]t must be presumed that when Congress launched a governmental agency into the commercial world and endowed it with authority to 'sue or be sued', that agency is not less amenable to judicial process than a private enterprise under like circumstances would be.¹⁶⁵

Despite this strong anti-immunity language, only one short year later, in *United States v. Sherwood*, the Court reversed itself. It said a code section which includes a waiver, "since it is a relinquishment of a sovereign immunity, must be strictly interpreted."¹⁶⁶ The Court then set about "[c]onstruing the statutory language with that conservatism

¹⁶³ PETER H. SCHUCK, *SUING GOVERNMENT* (1983).

¹⁶³ *United States v. Testan*, 424 U.S. 392, 399 (1976).

¹⁶⁴ Early federal agencies that could sue and be sued included the Federal Crop Insurance Corporation, 52 Stat. 72, 73 (1938), the Farmer's Home Corporation, 50 Stat. 522, 527 (1937), and the Reconstruction Finance Corporation, 47 Stat. 5, 6 (1932).

¹⁶⁵ *Federal Hous. Admin. v. Burr*, 309 U.S. 242, 245 (1940).

¹⁶⁶ *United States v. Sherwood*, 312 U.S. 584, 590 (1941).

which is appropriate in the case of a waiver of sovereign immunity"¹⁶⁷

Such has been the state of the debate over the construction of waivers for fifty years, a classic battle between liberals and conservatives. For example, in 1989, the Supreme Court found that a waiver in the U. S. Bankruptcy Code "abrogates sovereign immunity 'only to the extent necessary for the bankruptcy court to determine a state's rights in the debtor's estate.'"¹⁶⁸ In finding this narrow purpose, the Court thus limited the reasons for which a state can be joined in a bankruptcy action and preserved governmental immunity for all other purposes. The dissenters in this case, Justices Marshall, Brennan, Blackmun and Stevens, maintained that the plain language of the code section revealed a waiver of sovereign immunity, and even if it didn't, a liberal reading of the language did.¹⁶⁹ In its presently conservative climate, the Supreme Court concentrates on strict constructions of waivers. If the current administration in Washington has an opportunity to appoint more liberal justices to the Court, this would clearly be one area where their influence could be felt, and plaintiffs could have an easier time seeking redress against government officials.

A swing to liberalism will be necessary, too, before plaintiffs will be able to recover money damages suffered as a result of a marketing order. In two cases in the Eastern District of California, plaintiffs sued for consequential damages which resulted from what they claimed were invalid marketing orders.¹⁷⁰ The district court found, "Nothing in the AMAA suggests that the government has consented to suits for damages."¹⁷¹ There is no language saying the Secretary or any of his agents will be liable for anything, nor is there a "sue or be sued" clause.

There are limited waivers, however, contained in the same provisions within marketing orders granting immunity to board members. Such

¹⁶⁷ *Id.*

¹⁶⁸ *Hoffman v. Connecticut Dep't of Income Maintenance*, 492 U.S. 96, 100 (1989) (quoting the court of appeals in *In re Willington Convalescent Home*, 850 F.2d 50, 55 (1988)).

¹⁶⁹ *Hoffman*, 492 U.S. at 106-13.

¹⁷⁰ *Cal-Almond, Inc. v. Yeutter*, 756 F. Supp. 1351 (1991); *Wileman Bros. & Elliott, Inc. v. Madigan*, No. CV-F-90-473 (E.D. Cal. Jan. 27, 1993).

¹⁷¹ *Cal-Almond*, 756 F. Supp. at 1356. In the other case, the district court found, "Plaintiffs also seek consequential damages against the Secretary resulting from the alleged actions of the members of the committees, as his agents, in creating and maintaining the Tree Fruit Reserve in violation of federal and state antitrust law. Sovereign immunity bars this claim." *Wileman Bros. & Elliott, Inc. v. Madigan*, No. CV-F-90-473, slip op. at 12 n.8.

provisions commonly allow liability "for acts of dishonesty, wilful misconduct, or gross negligence."¹⁷² A reasonably alert board member should be able to avoid these pitfalls; thus, this type of waiver should not prove to be too troublesome. The biggest problem that such a waiver will cause board members is that complaints which can credibly allege such acts will not be immediately barred by sovereign immunity but will be allowed to proceed through discovery and trial.

B. *The Federal Tort Claims Act*

The FTCA is an unusual blend of waiver and grant of immunity. It is a waiver to the extent that it allows many suits claiming tortious acts by federal employees to be brought to court.¹⁷³ On the other hand, it functions as a form of immunity for federal employees because so long as the actions which resulted in the tort were within the scope of their government employment, then the United States is substituted as the party defendant in the lawsuit, and there is no liability for the employee.¹⁷⁴

Additionally, scope of employment is to be determined under state law and is broadly interpreted in some states.¹⁷⁵ It is irrelevant that an employee may partly be motivated by personal concerns not related to his or her employment. Under California law, actions are within the scope of employment if there is any way the employee could have been directly or indirectly serving his or her employer.¹⁷⁶

It is through this principle that the district court in the *Wileman* remand could grant summary judgment on the state law tort claims. The plaintiffs had alleged that the defendants had self-servingly manipulated the quality standards in the marketing order. The district court found that even if these allegations were true, "[n]o evidence was offered to demonstrate the defendant committee members were not act-

¹⁷² See 7 C.F.R. §§ 916.70, 991.74 (1992).

¹⁷³ 28 U.S.C.S. § 2674 (Law Co-op. 1994).

¹⁷⁴ *Id.* § 2679.

¹⁷⁵ In fact, just about anything can be found to be within the scope of employment. The same steps are followed in determining scope of employment for purposes of vicarious liability as for qualified immunity, so vicarious liability cases come to be quoted in FTCA cases. Based on California law, the Ninth Circuit held the Republic of China vicariously liable for a murder committed by one of its officials. Because the person killed was a critic of the Republic of China, the conclusion was drawn that the employee could have been acting to further his employer's interests. *Liu v. Republic of China*, 892 F.2d 1419 (9th Cir. 1989). This case is quoted in *Wileman Bros. & Elliott, Inc. v. Giannini*, No. CV-F-88-251, slip op. at 20-21.

¹⁷⁶ *John R. v. Oakland Unified Sch. Dist.*, 48 Cal.3d 438, 447 (1989).

ing, at least in part, to further the business of their employer, *i.e.*, the promotion of the tree fruit industry by regulating fruit by maturity and quality."¹⁷⁷ The substitution of the federal government in this case resulted in summary judgment against the plaintiffs because they had not exhausted their administrative remedies as is required under the FTCA.¹⁷⁸

As a result, even though the FTCA started out to be a waiver of sovereign immunity, read this way, the FTCA becomes a powerful grant of immunity for individual members of marketing order boards. So long as board members in some way serve the purposes of the marketing order, they will be shielded from state law tort claims because the federal government will step in as the defendant.

C. Exceeding Statutory Authority

Immunity coverage is most certain within an official's statutory authority. Determining what is included here can be a complex task for marketing order board members because the marketing orders under which they function consist of many, many separate regulations which together form their statutory authority.

An example can help illuminate this point. The marketing order regulating California nectarines appears in Title 7 of the *Code of Federal Regulations* beginning at § 916.1. From § 916.1 through § 916.356, there are over 50 separate regulations which comprise the whole of the nectarine marketing order. Among these are sections which establish the Nectarine Administrative Committee (NAC)¹⁷⁹ and describe how its meetings shall be conducted.¹⁸⁰ There is also a section which delineates the general powers of the NAC, such as administering the marketing order and reporting violations.¹⁸¹ The next section lists the general duties of the NAC; among these are submitting a budget, acting as an intermediary between the Secretary and growers, investigating and assembling data on the nectarine market, and giving the Secretary notice of its meetings.¹⁸²

In addition to these two general sections, there are at least 11 sections which deal with specific powers and obligations. These powers

¹⁷⁷ *Wileman Bros. & Elliott, Inc. v. Giannini*, No. CV-F-88-251, slip op. at 24.

¹⁷⁸ 28 U.S.C.S. § 2675 (Law Co-op. 1994).

¹⁷⁹ 7 C.F.R. §§ 916.20, 916.22, 916.23 (1992).

¹⁸⁰ *Id.* § 916.32.

¹⁸¹ *Id.* § 916.30.

¹⁸² *Id.* § 916.31.

include being reimbursed for expenses incurred as board members,¹⁸³ establishing research projects and advertising,¹⁸⁴ and recommending new regulations to the Secretary.¹⁸⁵ All these sections, together with the rest of the marketing order, constitute the board members' statutory authority.

While many items are fairly specific, such as preparing a budget and giving the Secretary notice of meetings, some are more nebulous. For example, it is not clear exactly what it means to "act as an intermediary"¹⁸⁶ or "to investigate and assemble data on nectarine marketing conditions,"¹⁸⁷ or how this assembling should be done. Under this provision, could a grower/board member insist on entering a competitor's packing shed to investigate marketing conditions there? This certainly doesn't seem right, but it would apparently fit within the authority given in this section. Obviously, a liability-conscious board member would want to avoid an action which doesn't seem right, but if it is something which must be done, then the board member should seek the prior approval of the Secretary and postpone acting until such approval is received. This is necessary to bring the board member within the *Square D/Keogh* quasi-immunity discussed earlier, and it will protect the board member in case of future suit.

In evaluating vague grants of power, a court should look to the whole of the marketing order to see if other sections clarify the boundaries of a board member's statutory authority. Often, vague, general grants of authority will be clarified by subsequent sections in a marketing order. For example, assume for a moment a board member wanted to enter a competitor's packing shed to investigate marketing conditions. There are several sections, such as § 916.60, which describe specific information about the nectarine market which the NAC is supposed to gather. Section 916.60 provides that from reports completed by han-

¹⁸³ *Id.* § 916.33.

¹⁸⁴ *Id.* § 916.45.

¹⁸⁵ *Id.* § 916.51. Other specific sections give the NAC the power to create a marketing policy, *see id.* § 916.50; to incur expenses as a board, *see id.* § 916.40; to receive or borrow money to cover those expenses, *see id.* § 916.41; to carry over any excess from one fiscal period into the next, *see id.* § 916.42; to notify handlers of new regulations, *see id.* § 916.52; to recommend to the Secretary when existing regulations should be changed or suspended, *see id.* § 916.53; to collect the costs of inspections performed by the Federal-State Inspection Service, *see id.* § 916.55; to arrange meetings of growers to nominate NAC members, *see id.* § 916.102; and to prepare an annual report, *see id.* § 916.34.

¹⁸⁶ *Id.* § 916.31.

¹⁸⁷ *Id.*

dlers, the NAC may extract general information about nectarine marketing without disclosing private information about the handler.¹⁸⁸ In light of sections such as § 916.60, a court could determine that entering a competitor's place of business exceeded the board member's statutory authority even though, on its face, the action might appear to fall within the more general grant of power in § 916.31.¹⁸⁹ Thus, it is important for board members to be aware of the contents of the entire marketing order under which they function in order to evaluate the scope of their statutory authority. Only those actions within the statutory scope of authority are covered by qualified immunity.

CONCLUSION

Even as marketing orders are under attack, so is the doctrine of sovereign immunity. It becomes a smaller and smaller shield to hide behind, and the shield could shrink even further with a liberalization of the Supreme Court. Liberal readings of waivers of sovereign immunity, combined with strict readings of grants of statutory authority, would cause government officials more worry. All the same, qualified immunity will never disappear completely; public officers must be protected when they implement statutes authorizing their actions, or they will hesitate to take any actions at all, and our system of government will cease to function effectively. Even the most liberal of benches will preserve protection for officials acting clearly within their statutory authority; thus it becomes even more important for officials, such as marketing order board members, to understand precisely what the boundaries of their statutory authority are and to stay within them. If there is any doubt about whether a particular act will exceed those bounds, then officials should get prior approval from superiors. In this way, the shield of sovereign immunity can still provide protection for board members and others who are responsible for furthering governmental policies. It remains to be seen how long that shield will persevere in the ongoing battle over marketing orders.

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¹⁸⁸ *Id.* § 916.60. These handlers' reports are to be highly specific including, in part, the location, date and time of departure and the license number of the truck carrying the shipment.

¹⁸⁹ *Id.* § 916.31.