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Texas Cattle Feeders v. Oprah Winfrey:
The First Major Test of the “Veggie Libel Law”

by

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The First Major Test of the "Veggie Libel Law"

T After the Alar (a chemical applied to apples) scare profoundly affected apple growers' sales and incomes in 1989, thirteen states passed legislation prohibiting food product disparagement (Harl), the so-called "veggie libel laws." Persons suing under these laws generally had to prove that the defendant made a false statement to someone else disparaging a food product, that the defendant acted with malice or intent to harm, and that the statement played an important part in inducing others not to deal with the person claiming damages.

The first major judicial test of the "veggie libel laws" was to be *Texas Beef Group et al., Paul Engler and Cactus Feeders, et al. v. Oprah Winfrey, Harpo Productions, Inc., Howard Lyman and King World Productions, Inc.*, Case No. 2-96-CV-208 and 233, District Court, Northern District of Texas, Amarillo Division. The trial took place in Amarillo, Texas (a major cattle feeding area), in January and February 1998. The celebrity status of the defendant Oprah Winfrey and the first amendment issues in this case attracted national media coverage. Two of the largest Texas cattle feeders from Amarillo (Engler and Cactus Growers, Texas Beef Group) and some business associates charged that false statements about the risks of Bovine Spongiform Encephalopathy (BSE, or "mad cow disease") were made on an Oprah Winfrey syndicated television talk show entitled "Dangerous Food" on 16 April 1996. They claimed the statements disparaged the American cattle industry and the safety of American beef, causing millions of dollars in losses for themselves, and in some cases permanent loss of consumer confidence in beef products. This case raised some very intriguing questions about the constitutionality of the law itself (versus the First Amendment issue of free speech). Further, the economic issues involved estimating the amount and duration of price impact and related damages inflicted from this ten-minute segment on a television talk show. In what

follows, the key issues and testimony of selected key witnesses from this five-week trial are briefly summarized, with emphasis on the economic issues and analysis.

by Marvin L. Hayenga

Background

The food disparagement law

The food disparagement law in Texas requires that the person making the statement "knows the information is false," and "the information states or implies that the perishable food product is not safe for consumption by the public" (Texas Civil Practice and Remedies Code §96.002). Further, in determining whether the information is false, the judge or jury is to consider "whether the information was based on reasonable and reliable scientific inquiry, facts, or data" (Texas Civil Practice and Remedies Code §96.003). The Texas law defines a perishable food product to be "a food product of agriculture or aquaculture that is sold or distributed in a form that will perish or decay beyond marketability within a limited period of time" (Texas Civil Practice and Remedies Code §96.001). The tort of product disparagement generally requires harmful intent or malice, and that the defendant knew the statement was false but expressed it anyway (Harl). Besides claiming product disparagement under this law, business disparagement, libel, slander, and negligence also were charged by the cattle feeders.

The 16 April 1996 Oprah Winfrey Show

The show had three segments focusing on consumer safety and food: mad cow disease, *E. coli* bacteria, and unsafe food handling methods in the kitchen. Only the mad cow disease segment was challenged by the plaintiffs. The discussion focused on the mad cow disease in the United Kingdom and the possibility that it could be present in the United States. United Kingdom authorities had announced a month earlier (20 March 1996) that

deaths had been attributed to a new variant of the human disease Creutzfeldt-Jakob Disease (CJD), which scientists believed was probably linked to consuming beef from cattle infected with BSE. This stimulated worldwide media coverage in the press, television, and radio. The use of rendered sheep and cattle products in the meat and bone meal used for cattle feed was the likely source of spreading infection in the cattle population in the United Kingdom. On 3 April 1996, the World Health Organization issued a report saying that all countries should ban the use of ruminant tissues in ruminant feed. Consumers, because of concerns about BSE, quickly and sharply reduced beef consumption in Western Europe and Southeast Asia.

In the ten-minute segment about mad cow disease, the Oprah Winfrey show guests and audience focused on the question: Could it happen here? The guests included Howard Lyman, director of

- “14 percent of all cows are ground up, turned into feed and fed back to other animals”;
- “feeding cows to cows”;

and regarding slaughter plants,

- “any animal that is not staggering around goes in there.”

In addition, Oprah Winfrey spontaneously said, “It has just stopped me cold from eating another burger.”

Further, plaintiffs charged that the defendants “ambushed” the pro-beef industry panelists, and that too much of their discussion was edited out of the show. Cattlemen’s organizations engaged in a letter writing campaign complaining about the show. Oprah brought Dr. Gary Weber back a week later to augment the safe-beef points made on the previous show.

The charges undoubtedly were also prompted by the \$1.50 per hundred pounds (the limit allowed by the Chicago Mercantile Exchange) drop in the April live cattle futures contract on the day that the Oprah show was broadcast. This was called the “Oprah crash” by one trader. In addition, cash prices for fed cattle dropped during the two weeks after the show.

The trial

Plaintiffs’ case

Plaintiffs and defendants. The cattle feeders spent much of their time pointing out what they considered false statements by Howard Lyman on the show. They claimed significant losses because of lower cattle prices and hedging position losses that they attributed to the show. They testified that beef consumption and cattle prices dropped because of the statements made by Lyman and the very influential Oprah Winfrey. Plaintiffs also testified that live cattle were perishable, as their economic value and profitability deteriorated quickly if fed longer than their usual practice. Oprah Winfrey and Howard Lyman were called as witnesses by the plaintiffs. They were asked about (and defended) their interpretation of and rationale for statements at issue. Both the show transcript and the unedited tape were examined and reexamined line by line in excruciating detail by both plaintiff and defense attorneys.

Cross examination focused on whether the statements in dispute were facts or opinions, whether others had made similar statements, and whether the defendants had the right to state that opinion. The National Cattlemen’s Beef Association consumer

the American Humane Society’s “Eating With Conscience” campaign, and an animal rights activist and vegetarian; Dr. Gary Weber, National Cattlemen’s Beef Association spokesperson; and Dr. William Hueston, a U.S. Department of Agriculture expert on BSE. Both Weber and Hueston argued that U.S. beef was safe, reported on the steps taken to ensure that BSE would not occur in the United States, and said that BSE had never been found in the United States.

The defendants were charged with making false statements during the show. Statements by Lyman that drew particular criticism from the cattle feeders include the following:

- “this disease could make AIDS look like the common cold”;



surveys done before and after the Oprah show were entered in evidence; the surveys showed that no significant changes in consumer confidence in beef occurred, though plaintiffs claimed otherwise.

Scientists. Plaintiffs called Dr. Gary Weber, Dr. William Hueston, and Dr. Lester Crawford, the former head of the USDA meat inspection and food safety operations, to testify. They essentially testified that U.S. beef was free of BSE, and asserted that the safeguards put in place by the government were adequate. After diagnosing mad cow disease in the United Kingdom in 1986, U.K. cattle and beef imports into the United States stopped in 1989. The rendering industry in the U.K. voluntarily banned the use of sheep, a possible disease source, in making meat and bone meal for ruminant feed in 1989. Further, the USDA BSE monitoring program in the 1990s examined the brains of several thousand cattle exhibiting rabies or BSE symptoms (they are similar), and found no BSE. A mandatory ban of the use of ruminant-derived meat and bone meal in ruminant feed was proposed by the U.S. Food and Drug Administration in the summer of 1996, and adopted one year after the Oprah show, effective 4 August 1997.

On cross examination, the defense brought out the parallels between the U.K. and U.S. situations, and the fact that the U.K. government officials had claimed that U.K. beef was safe for humans prior to 20 March 1996, when the new variant of human CJD first was linked to BSE. Plaintiffs' attorneys brought out the differences between the two situations on redirect examination. Weber's claim of being ambushed was subjected to questioning by the defense. He had previously debated Howard Lyman on the same subject on CNBC. The jury also was shown a tape of his practice session with a media consultant in a simulated "Oprah Sinfrey" [sic] show which dealt with statements similar to those that came up on the actual show.

Traders. Two traders in the live cattle pit at the Chicago Mercantile Exchange testified that the Oprah show caused or exacerbated the live cattle futures price drop on 16 April and the following two weeks. They testified that many traders were watching the show in Chicago that morning (the day that prices dropped the \$1.50 per cwt limit on nearby futures contracts). On cross examination, they also acknowledged they were "biased"; their views about the issues being litigated were consistent with the plaintiffs' views. Further, the jury was shown 16 April television interviews of one witness where he offered several other reasons for the price drop that day in one interview, and emphasized the Oprah show in another.

The Purcell Model Analyzing Texas Cattle Price Behavior

Purcell's estimated model was

$$CP = 11.37 + 0.90 CP_{t-1} - 0.01 BfProd + e$$

CP was the weekly weighted average USDA Texas-Oklahoma 35 percent to 65 percent Choice Steer price (\$/cwt), and *BfProd* (assumed predetermined) was weekly U.S. federally inspected beef production (million lbs). The lagged price was in the model to deal with the nonstationary price series, and correct for strong first-order autocorrelation. The model was estimated using OLS. Purcell reported that the R^2 was 0.88, the *BfProd* variable was significantly negative at the 0.06 confidence level, the lagged price was highly significant, and the standard error of the estimate was 1.5. The test for constant variance was rejected at the 0.04 level of significance, showing heteroskedasticity was present. Purcell then estimated the 95 percent confidence band around the predicted price from his equation and found that two of the three residuals below the lower 95 percent confidence limit were in the week of the Oprah show (-\$3.62), and the week after the Oprah show (-\$3.52) in 1996. Since heteroskedasticity results in biased and inconsistent variance estimates, and makes estimated confidence limits inaccurate, the outliers Purcell found in the two weeks in April 1996 may not have been outside the true confidence limits. Other residuals from the estimated model after that two-week period were within Purcell's 95 percent confidence bands. While not brought out at trial, those residuals were not biased downward.

Economist. Wayne Purcell, a noted livestock economist from Virginia Tech, testified for the plaintiffs. He had analyzed the supply and demand factors in the market, and found nothing to explain the price declines except the Oprah show. He argued that all the other supply and demand factors were already reflected in the market price.

To support his testimony, Purcell had estimated a model of weekly Texas cattle price behavior during January 1994–August 1996.

During the trial, the details of the estimated model (see sidebar) were not presented to the jury, just the graph showing the confidence limits and the outliers. Purcell said that the price plunge during those two weeks was outside the ordinary variation expected from economic forces included in his model; the outliers were due to forces imposed on the cattle markets from outside the industry—in this instance, the Oprah show. He said that the impact lasted at least the eleven weeks for which damages were claimed. Further, he testified that

market volume in the five business days just prior to the Oprah show (when prices dropped about \$3 per hundred pounds) was too small to provide credible prices for use in damage calculations. He argued that the substantially higher weekly weighted average price (based primarily on a high-volume day one week earlier) was the appropriate base for damage calculations.

The cross examination of Purcell focused on calculation errors in his table

Damage experts. In their damage calculations, accountants simply relied on the cattle feeders' assertions that the lower live cattle prices which occurred from the week before the show until the time when prices returned to that level (\$61.90 or \$62 per cwt) eleven weeks later were all attributable to the Oprah show. Price changes occurring on the intervening days until the Oprah show on Tuesday were not considered, because the trading volume was small on those days and the resulting reported prices were not considered the appropriate

basis for damage calculations according to

Purcell (the Monday, 15 April USDA price report was approximately \$59 per cwt). The difference in sale prices and the should-have-been price for all sales in the damage period were considered damages by plaintiffs,

with reimbursement requested from Oprah Winfrey and her fellow defendants. In addition,

Engler/Cactus claimed added losses from increased hedging of cattle due to the Oprah show, which resulted in lower profits because prices went up after they hedged. Total

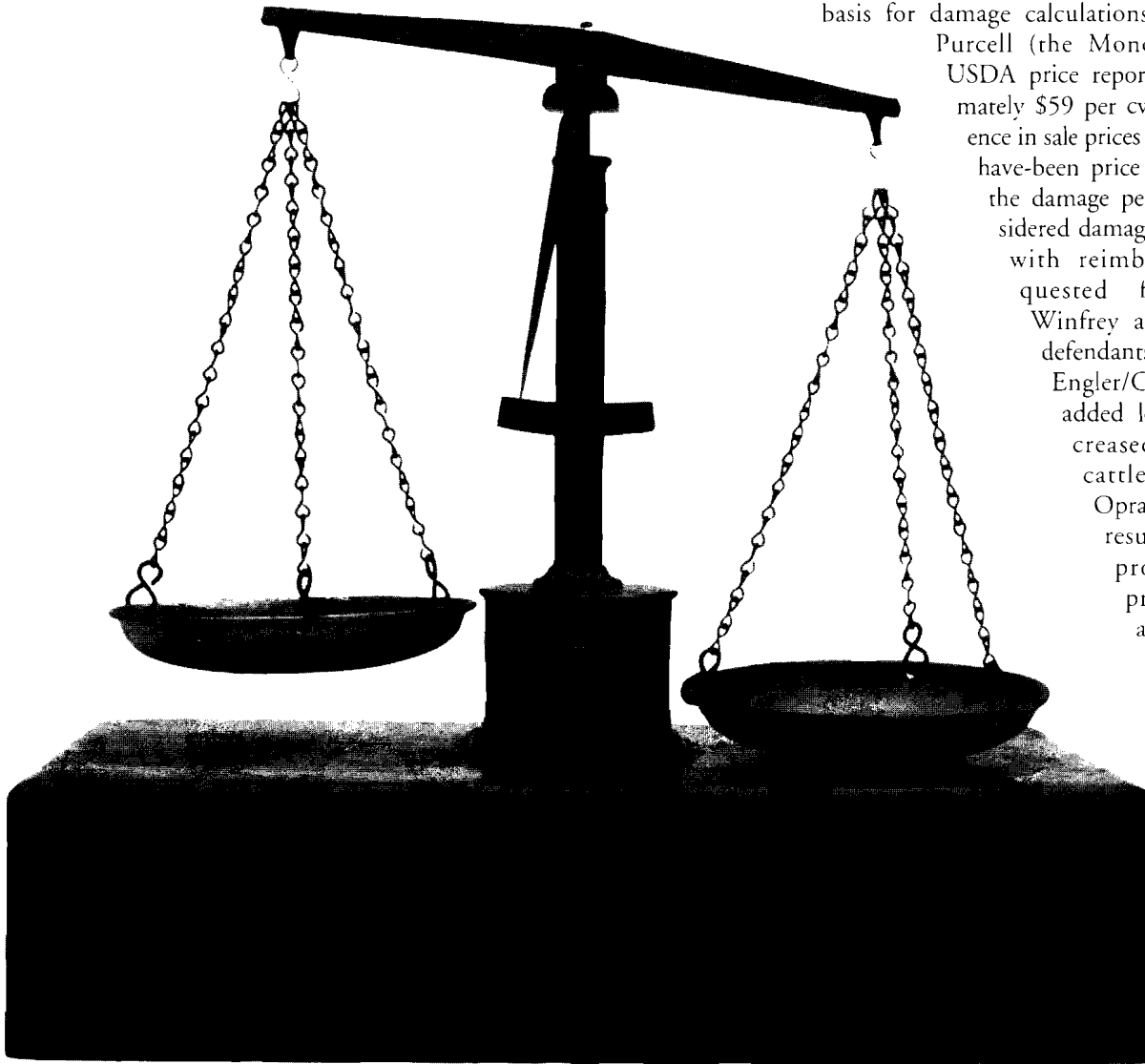
damage claims were in the \$10–\$12 million range, although the estimates kept changing as customers' cattle were identified and excluded,

of residuals, which he explained were typing errors; his commodity newsletters during April 1996 that mentioned several factors influencing cattle prices, and did not mention Oprah (he said that university policy prohibited mentioning names); and many other supply and demand factors potentially influencing price during that period (given the acronym DEMONS by defense counsel—D for drought, E for exports, ..., S for supplies of beef, etc.) which Purcell said were already reflected in market prices.

other partners' shares were identified and excluded, and inventory value changes were not permitted as damage claims by the judge. Initially, the Texas Beef group claimed that changes in the value of all cattle in inventory from 1 April 1996 to 1 May 1996 were damages attributable to Oprah, although the show did not air until 16 April.

Directed verdict

After four weeks, the plaintiffs concluded their case.



The defendants asked the judge to dismiss all charges against them. Judge Robinson ruled that sufficient evidence to prove the slander, libel, negligence, and statutory product defamation claims had not been presented, so those charges were dismissed.

The judge concluded that statements by the plaintiffs' witnesses Hueston and Weber during the show validated a substantial part of the statements made by Lyman during the show. Further, there was no testimony showing that the defendants had knowingly made disparaging, false statements. The show did not mention Texas or the plaintiffs. The judge found that referring to the cattle or beef industry involved too many people to allow an individual to recover damages, according to a Texas Court of Appeals precedent. Disparagement had to be "of and concerning the plaintiffs"; that burden of proof was not met.

While the economic value of fed cattle may drop if not marketed at the optimum time, the judge found that live cattle in a feedlot were not sufficiently perishable for the Texas Food Disparagement law to apply to this case. They were not "beyond marketability" within a limited period of time.

Thus, the food disparagement charge was thrown out because cattle in feedlots were not perishable as defined in the law, and because it had not been established that defendants knowingly made false statements. Consequently, what was going to be the test case of the food disparagement law suddenly became much less interesting from a legal standpoint. Only the common law business disparagement claim remained for defense to refute and the jury to consider.

To prove business disparagement involves fairly high standards of proof. The judge's charge to the jury subsequently indicated that the law requires proof that a false, disparaging statement was made with (1) knowledge of or serious *doubts* as to its falsity; (2) harmful intent or malice against plaintiffs' businesses; and (3) subsequent damages to the plaintiffs. The business disparagement standard for the false statements became slightly lower than the food disparagement law; liability could be established if there was a reckless disregard for the truth (for example, not checking the facts before making the statement which you seriously doubted was true), rather than just stating something you knew was untrue, the standard under the food disparagement law. Rhetoric, hyperbole, and statements of opinion that don't imply a false statement of objective fact were permitted. But, the standard was higher by having to show an intent to harm the *plaintiffs*, specifically, rather than a generic product class.

Defense case

Defendants essentially countered the remaining

business disparagement charge by showing that the statements in question had a factual basis or were substantially true, or by arguing that they were opinions, rhetoric, or hyperbole which anyone should be free to express in a talk show format where different opinions and debate were desired.

Executive producer. The executive producer of the Oprah Winfrey Show, Diane Hudson, addressed the intent-to-harm issue. She testified that their intent was to deal with important and topical consumer safety issues. Further, she testified that the Harpo Productions staff thought the statements were true, that they had no intent to harm the cattle industry, and that they had brought beef industry representatives on the show to debate these issues with Howard Lyman. They did not know any of the cattlemen bringing the suit. A week after the original show, because of the concerns raised by the cattlemen, a follow-up Oprah Winfrey Show segment with Dr. Weber augmented his message that beef was safe in the United States; Oprah subsequently received a letter of appreciation from the National Cattlemen's Beef Association Board of Directors.

Economists. As a consultant and expert witness for the defense, I analyzed factors affecting cattle prices in the days and weeks immediately following the Oprah show. The plaintiffs had the burden of showing that there was a causal relationship between the show and cattle prices and the extent and duration of lower prices which were reasonably attributable to the Oprah show. The plaintiffs' damage estimates assumed that all of the lower prices were due to the Oprah show. The intent of the defense was to bring out the other factors influencing cattle prices during this time period, and in so doing raise doubt that the cause of lower prices was the Oprah show. The defense also aimed to establish that the estimated damages, which attributed all of the price decline over an eleven-week period to Oprah, were not reasonable.

A simple way of rebutting that claim was to point out those supply and demand factors which adversely impacted prices immediately after the show. During the two-week period when prices dropped sharply, it was shown that

- (a) the number of cattle marketed increased sharply;
- (b) there were increased "captive supplies" (cattle owned or previously forward contracted by packers) slaughtered;
- (c) export market demand in Southeast Asia was dropping and cancellations or renegotiations of previous sales began about the time of the Oprah show; and
- (d) packer profit margins increased.

Since each of these supply and demand changes was reasonably expected to negatively affect cattle prices, claiming the price drop was due solely to the Oprah show was not reasonable.

Further, the \$3 price drop during the prior week was reported by two professional price reporting agencies, the USDA and the Texas Cattle Feeders Association. Both agencies felt comfortable reporting the daily prices as a credible representation of market prices, so there was no good reason why those price changes prior to the show should be ignored in calculating damages.

In addition, testimony was presented that feeder cattle prices were influenced by both fed cattle prices and corn prices, citing studies done at Kansas State University and Oklahoma State University (Cole, Mintert, and Schroeder; Anderson and Trapp). Lower fed cattle prices typically are associated with lower purchase prices for feeder cattle (in the 1:1 to 1:1.5 range). That laid the foundation for calculating lower feeder cattle purchase costs as a gain offsetting the lower fed cattle selling prices claimed as damages.

There was a clear downtrend in futures and cash prices in the months and weeks before the show, which continued for two weeks after the show, before prices began a long, steady uptrend. The typical seasonal pattern of lower cash prices for fed cattle during the spring and early summer was offered as one factor to explain that price declines during April were not unusual.

Was the futures price drop (termed the "Oprah crash") on 16 April attributable to speculator overreaction to the message on the Oprah show? If so, was it due to the show or attributable to the speculators? The cash price for cattle was more than \$1/cwt lower than the soon-to-expire April futures prices the day before the show, during the period when deliveries were possible. In the previous week when a similar situation occurred, the futures market had a limit move (\$1.50 per cwt) down two days in a row (and some cattle deliveries were made to fulfill contracts to arbitrage these price differences). If futures prices did not drop on 16 April to be in line with lower cash prices, more deliveries might have been made—a motivation for traders with "long" positions to sell. Thus, the futures price drop observed on the day of the Oprah show might have occurred even if there had been no show.

Did the Oprah show influence futures prices that day or succeeding days? Possibly, but there is no way to sort out the effect of the Oprah show from other market influences with any reasonable degree of confidence. Further, cash prices were relevant for damages, not futures prices, except for hedging loss claims.

Hedging losses claimed by Engler/Cactus were

shown to be based on positions taken beginning sixteen days after the Oprah show, with positions being added until forty-five days after the show. Prices went up after the hedges were initiated, so the profits from the hedged cattle were lower than on unhedged cattle. Because of the significant time gap between the show and the hedging, I concluded that these futures positions were not the immediate and direct effect of the show, and the claimed hedging losses were unreasonable.

Dan Slottje, an econometrician from Southern Methodist University and KPMG Peat Marwick, critiqued the Purcell model and conclusions. Purcell had explained data errors pointed out in cross examination as typing errors which had no impact on his analysis or conclusions. Slottje indicated that the raw data errors were also on the disks provided to the defense, and that Purcell's conclusions were invalid because the causes of the observed residuals could not reasonably be inferred without very careful modeling of all other potentially significant contributors to price changes during that time period (some mentioned above were not considered by Purcell).

Damage expert. Bettina Whyte, a Price Waterhouse damage expert, pointed out that the claimed damages were sharply reduced if the prices the day before the Oprah show were used as the base (\$59 vs. \$61.90 or \$62 the week before). Price declines incurred before the Oprah show clearly should not be attributable to the Oprah show, but they were in the plaintiffs' damage calculations. Further, the hedging gains by Engler/Cactus while the prices dropped, combined with the lower prices paid for a large volume of feeder cattle purchased during this period of lower prices, more than offset any claimed damages from lower fed cattle prices. Feeder cattle prices conservatively were assumed to decline on a 1:1 basis with fed cattle prices. Texas Beef Group savings from lower feeder cattle purchase prices approximately offset their lower fed cattle prices.

Closing arguments

Plaintiffs' attorneys argued that false, disparaging statements were made in the Oprah show which hurt the beef industry and the plaintiffs. Cattle prices dropped due to the Oprah show, not other market factors, damaging the plaintiffs. Damages should be based on the much higher week-before cattle price, not the price on the day before the show when few cattle were marketed.

Howard Lyman's counsel emphasized that Lyman's statements were scientifically sound, while free speech was the primary focus of the Oprah Show attorney's closing arguments. Further, many supply and demand factors (DEMONS) which were contributing to lower cattle prices were summa-



rized, along with many other examples of mass media information about BSE conveyed to the American consumer. Defendants emphasized that U.S. consumer confidence in beef was not significantly changed after the Oprah show, so the show should not be held responsible for the losses claimed.

The verdict

Judge Mary Lou Robinson asked the jury a series of questions to determine whether the defendants were guilty of business disparagement based on a preponderance of the evidence, and, if so, what damages should be paid. The first question was, "Did a below-named Defendant publish a false, disparaging statement that was of and concerning the cattle of a below-named Plaintiff as those terms have been defined for you?" The twelve-person Amarillo jury unanimously responded no. With that response, no other questions posed to the jury (dealing with defendant's knowledge of falsity or reckless disregard, harmful intent or malice, or damages) needed to be considered. That response was a victory for the defense.

The jury was not formally polled, but from press and television interviews, one jury member indicated that the free speech issue influenced their verdict. Another juror said he felt that Howard Lyman came off a little strong, but that Lyman believed what he said was true. A third juror said that plaintiffs had not proved that the show caused cattle prices to drop. The plaintiffs' attorneys felt

that the tough hurdle to overcome was the phrase "of and concerning the cattle of plaintiffs" in the question posed to the jury by the judge, and that this led to the not guilty verdict.

The implications

Since the food disparagement ("veggie libel") law in Texas requires that products be perishable within a limited period of time, the situation in this case didn't meet that requirement in Judge Robinson's opinion. Is that provision one that makes sense? The legislative rationale might have been that temporary dips in a market for something not immediately perishable may not be enough of a problem to warrant protective legislation and more litigation in the courts.

In addition, even if false and disparaging statements had been found, was the causal link between the show and the amount and duration of lower actual prices received by plaintiffs established with reasonable certainty? The judge's instructions said that damages had to be a direct, monetary loss realized in their cattle business naturally and solely attributable to the false communications.

Consistent with the "solely attributable" language, the damage claims were based on the assumption that all the lower prices received in the eleven weeks after the Oprah Winfrey show (and including price drops several days before the show) were due to the show, even though many other

influential supply or demand factors were changing. Purcell included supply changes as a significant factor in his model, and market volume did surge during those two weeks after the show. However, prices were outside Purcell's 95 percent lower confidence limits only two weeks, not eleven weeks. These statistical results were inconsistent with the damage calculations attributing all of the price drop to the Oprah show.

Finally, could hedging positions taken sixteen to forty-five days after the show be reasonably attributed to the Oprah show, when new market information becomes available on a daily basis? The added hedging positions certainly were not immediate effects, though plaintiffs claimed they were the direct result of the show. Even if the futures positions were taken immediately after the show, would the opportunity costs which they were claiming be legitimate damage claims? If the profit margins established by hedging were similar to typical hedging practices, would margin calls (a measure of lost opportunities) be considered a direct monetary loss?

What did the highly publicized trial accomplish? Certainly it made food disparagement, free speech, Oprah, cattlemen, mad cow disease, and Amarillo national headline news for five weeks. A few cattle feeders lost an expensive lawsuit, and many people questioned whether cattlemen ever should have pursued this lawsuit. Even Amarillo residents, in a local informal poll, heavily favored Oprah Winfrey. Despite their loss and the high costs incurred pursuing the case, the cattlemen claimed that the trial clearly established that U.S. beef is safe.

The judge's decisions are being appealed by Engler and Cactus Growers. Plaintiffs' attorneys indicate the appeal is likely to focus on the "perishability" issue and the exclusion of some witnesses who may have testified regarding defendants' knowledge of the falsity of some statements made. In addition, 130 cattle feeders who fed cattle in Cactus feedlots are initiating a new case based on the Texas food disparagement law. If the appeal is successful, or the new case goes forward through the judicial system, the Oprah "mad cow" show could still become a more complete test of the food disparagement law.

Perhaps the trial raised television, radio, and print media consciousness and concern about the possi-

bility of being sued. That might make people in the media more careful about the messages they or their guests offer about agricultural products or businesses. If so, perhaps the plaintiffs' goal was at least partially achieved. However, the ability to speak freely about concerns or issues regarding the safety of our food supply is very important, and many would be reluctant to see that freedom abridged because of such concerns. Recently, Ralph Nader and other consumer activists have taken public positions against these laws. The constitutionality of the food disparagement laws remains untested. ■

■ For more information

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