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Antitrust Status of Farmer Cooperatives:

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The Story of the Capper- Volstead Act

Abstract

The Capper-Volstead Act provides a limited exemption from antitrust liability for agricultural producers who market the products they produce on a cooperative basis. Without Capper-Volstead, farmers who agree among themselves on the prices they'll accept for their products and other terms of trade would risk being held in violation of antitrust law. Even with the exemption, agricultural producers are not free to unduly enhance the prices they charge, consolidate with or collaborate in anticompetitive conduct with nonproducers, or engage in conduct with no legitimate business purpose that is intended to reduce competition.

Keywords: cooperative, antitrust, Capper-Volstead Act, law

Antitrust Status of Farmer Cooperatives: The Story of the Capper-Volstead Act

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Preface

Antitrust law poses a special challenge to agricultural marketing associations. Certain conduct by independent business people--agreeing on prices, terms of sale, and whom to sell to--violates the Sherman Act and other antitrust statutes. And these are the very types of collaborative activities that agricultural producers conduct through their marketing cooperatives.

Since 1922, the Capper-Volstead Act has provided a limited antitrust exemption for agricultural marketing associations. Producers, through qualifying associations, can agree on prices and other terms of sale, select the extent of their joint marketing activity, agree on common marketing practices with other cooperatives, and achieve substantial market share and influence.

But Capper-Volstead is not a total antitrust exemption. So cooperative managers, directors, and advisers must understand courses of conduct that may expose their organization to antitrust risk. These include collaborating and/or combining with firms other than Capper-Volstead cooperatives and engaging in activity with little or no discernable purpose other than to limit or eliminate competition.

This report focuses on the development and evolution of antitrust law as it applies to agricultural marketing cooperatives. It places as much emphasis on how and why the rules evolved as it does on the rules themselves. It attempts to tell a story rather than provide clear and simple signposts for making business decisions.

While some readers may find this frustrating, it is done for a purpose. There are no easy answers to most questions involving possible antitrust liability. Antitrust disputes are fact intensive and their resolution can be very subjective. Litigation can involve numerous issues and take many years to resolve. Involvement of a legal counsel who understands both cooperatives and antitrust issues is crucial to limiting legal exposure in this area.

This report does not represent official policy of the U.S. Department of Agriculture, the U.S. Department of Justice, or any other Government agency. This publication is presented only to provide information to persons interested in the antitrust status of agricultural producers and their cooperative marketing associations.

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ANTITRUST STATUS OF FARMER COOPERATIVES:

The Story of the Capper-Volstead Act

This report is essentially the story of the Capper-Volstead Act.¹ Enacted in 1922, Capper-Volstead authorizes agricultural producers to act together in associations that process, prepare for market, handle, and market the agricultural products they produce. Without this protection, farmers, who agree on the price they will accept for their production and other terms of trade, would risk challenge and prosecution for restraining trade and attempted monopolization under our antitrust laws. Cooperative scholars consider Capper-Volstead so crucial to the development of effective producer owned and controlled marketing firms that it "is frequently referred to as the 'Magna Carta' of farmers' cooperatives."²

Capper-Volstead is somewhat unique for a major Federal law; it has remained as written for 80 years. In fact, there has been no serious attempt to amend it. While Capper-Volstead has been on the books for many years, it is a living statute subject to continuous application and interpretation by cooperative leaders and advisers, competitors and their counsel, antitrust enforcement officials, and judges asked to resolve conflicts about its meaning.

This paper begins with a detailed account of the historical background that led to enactment of landmark antitrust legislation, notably sections 1 and 2 of the Sherman Act.³ Next it focuses on judicial application the Sherman Act and other factors that led to enactment of Capper-Volstead. Then, it turns to various decisions interpreting the scope of the exemption and the extent of joint conduct by agricultural producers that it sanctions.

¹ 42 Stat. 388 (1922), 7 U.S.C. §§ 291-292.

² Ewell P. Roy, *Cooperatives: Today and Tomorrow* (Danville, IL: Interstate Printers & Publishers, 1964) 215-216.

³ 26 Stat. 209 (1890), 15 U.S.C. §§ 1-2.

CHAPTER 1

HISTORICAL PERSPECTIVE⁴

The Civil War is the defining event in our history for many reasons. It not only determined our political and geographic composition, but also marked, and in some ways facilitated, the transformation of the bases of our economy from land and the individual to industry and the corporation. The story of how people reacted to this change is, in part, the story of the development of laws that limit the ability of the few to accumulate and exercise economic power to the detriment of the many.

This report focuses on the role of farmers and farmer cooperatives in the evolution of this public policy initiative. It begins with a historical overview of the part 3 entities -- railroads, farmers, and corporate trusts -- played in the enactment of the landmark laws in this area, the Interstate Commerce Act of 1887 and the Sherman Act of 1890.

THE RAILROADS: THE EARLY YEARS

The Conestoga wagon, which carried settlers west from 1750 until 1850, was only a modest mechanical improvement over the carts used by Hannibal when he crossed the Alps to wage war against the Romans during the Second Punic War (218-201 B.C.). But then, Conestoga wagoning ended abruptly around 1850 when the railroads crossed the Appalachians.

Railroads were the first great American business. They served as both the model for and facilitator of other industrialization. And they

⁴ This summary is based considerably upon Sidney Ratner et al., *The Evolution of the American Economy* (New York: Basic Books, Inc., 1979); Simon N. Whitney, *Antitrust Policies*, (New York: The Twentieth Century Fund, 1958); S. Chesterfield Oppenheim, et al., *Federal Antitrust Laws*, 4th Ed. (St. Paul, MN: West Publishing, 1981); Wayne D. Rasmussen, *Farmers, Cooperatives, and USDA* (Washington, DC: U. S. Department of Agriculture, 1991).

became the subject of the first legislative initiatives to regulate anticompetitive conduct.

The concept of moving objects in wagons with wheels over rails is documented as far back as European mines of the 1500s. The wagons, pulled by men or horses, moved more easily over wooden rails than over the rutted and muddy mine entrances and floors.

The basic development of modern railroading, with steam engines and steel rails, is credited, like much of the foundation for the Industrial Revolution, to English inventor-engineers. In 1804, Englishman Richard Trevithick attached one of his new engines using high-pressure steam to a carriage and used it to haul several tons of cargo along 15 kilometers of track, the first successful operation of a railroad locomotive. Another Englishman, George Stevenson, opened the first public railroad in 1825 and in 1830 opened a second line, between Manchester and Liverpool. It provided the first scheduled passenger service.

Some Americans quickly recognized the potential of this new system. In 1815, John Stevens obtained a charter from the State of New Jersey to build a steam-powered railroad across the state. When he couldn't raise enough money for the project, he built a circular track near his estate in Hoboken, NJ, and a steam-powered vehicle to run on it. In 1825, his finished project became the first railroad in the United States.

In 1827, Baltimore merchants, hoping to increase trade with western states, received a charter for the Baltimore & Ohio Railroad. Ground was broken on July 4, 1828, and in 1830 Peter Cooper's experimental locomotive, *Tom Thumb*, made its first run over the 13 miles of completed track. On Christmas Day, 1830, the South Carolina Railroad provided the first scheduled steam rail service in the nation in and out of Charleston. Although only 23 miles of operating rail lines existed in 1830, the seeds of the Industrial Revolution were sown and germinating.

Railroads combined the steam power and low-friction technologies of the waterways with the flexibility of being able to operate without benefit of a navigable river or canal. The growth of railroading was astonishing. By 1835, more than 200 railroad charters had been granted in 11 states, and more than 1,000 miles of track had been opened for service.

Unlike the waterways, these early rail ventures were owned and controlled by private, not public, entities. Most were structured under State charters as corporations. The corporate form was selected because the cost and complexity of constructing and operating a railroad were greater than a single owner or partnership could handle.

Railroads were an early model of public-private partnership. While the railroads were owned by private corporations, they received substantial assistance from all levels of government. The State charters often granted them rights of eminent domain, special tax preferences, and credit advantages.

Local governments began a practice still common today--bidding against each other for new businesses--by offering financial incentives to be "on the line."

In 1850, in response to western political pressure, the federal government gave several million acres of land to the states of Illinois, Alabama, and Mississippi to aid in the construction of a north-south line from Illinois to the Gulf of Mexico. These lands were turned over to the Illinois Central Railroad Company, which then sold or mortgaged the land to pay for building the railroad. It was completed in 1856. This gift of Federal land became the precedent for a shift in Federal land policy during and after the Civil War.

During the 1850s, the rail mileage in the country increased from 9,000 to 30,000. What had been little more than a scattering of short lines became an integrated network serving all of the states east of the Mississippi River. The City of Chicago, which began the decade with 1 rail line and 29,000 residents, ended it with 11 railroads and 109,000 inhabitants.

Although Government involvement in railroad construction was significant, three-fourths of the more than \$1 billion invested in American railroads before 1860 was private capital.

The ability of railroads to move people and products was illustrated throughout the Civil War. For example, in the autumn of 1863, 25,000 Union troops moved from Washington to Tennessee, in 30 trains over 12 days, to lift the Confederate siege of Chattanooga. The Union drive to Atlanta was aided by the daily arrival of 16 trains from the North bringing 1,600 tons of supplies to General Sherman's army.

After the war, the railroads were a primary factor in the development of the United States. They permitted raw materials in

abundance west of the Appalachians to move east and finished products to move west at much greater speed and at much lower cost than was possible on roads or canals. Producer prices were able to increase at the same time consumer prices decreased. Specialized production in areas with a comparative advantage became prevalent as competition between producers in previously distant markets increased. The Constitution had created the possibility of a great "common market" throughout the United States. The railroads made it a reality.

THE FARMERS MOVE WEST

Agriculture was the dominant force in our economy before the Civil War. Two events in the 1790s began a period of remarkable growth in agricultural production.

One was Eli Whitney's invention of the cotton gin in 1793. This permitted rapid growth in the production of short-staple upland cotton as a high-profit, alternative crop to tobacco in the South.

The second was the migration of people from the coastal communities in the Middle Atlantic and New England regions to settlements in western and northern "frontiers" like Ohio, Kentucky, and Illinois. These people found satisfaction as independent family farmers working the cheap and fertile land that seemed inexhaustible.

In the early 1840s, settlers began moving west, following the Oregon Trail to the Pacific Northwest. They found favorable conditions for growing wheat in eastern Washington and fruit from the Willamette Valley to Puget Sound. But they remained isolated and devoid of economic or political support for many years as the country focused on the gold fever in their burgeoning neighbor to the south, California.

As part of the Treaty of Guadalupe Hidalgo ending the Mexican War, Mexico ceded California to the United States on February 2, 1848. Unknown to any of the treaty signers, gold had been discovered nine days earlier, on January 24, at a sawmill owned by John A. Sutter, a Swiss immigrant, on the South Fork of the American River.

The ensuing "gold rush" brought people from all over the world to California to seek instant riches. In the 4 years from 1848 to 1852, the population of California increased from 15,000 residents to

250,000.⁵ The rapid influx of people created a great demand for beef, bread, and other food staples. Many miners discovered that they had a better opportunity to improve their financial fortunes by becoming ranchers and grazing cattle on the open range or cultivating wheat, grapes, or other fruit than by searching for gold. They could sell all the food and wine they could produce to the miners for just about any price they chose.

Estimates suggest that between 1800 and 1860 the number of farms and total farm output in the United States increased sixfold. On the eve of the Civil War, agriculture accounted for 60 percent of our production of commodities.

But the economy was already entering a period of transformation. At the beginning of the 19th century, five out of six Americans worked in agriculture. By 1860, that ratio had fallen to just over one out of two. Agriculture's contribution to the gross national product was twice that of manufacturing in 1860, but it had been three times as great in 1840.

The Civil War facilitated dramatic change in agriculture. The war created a tremendous demand for farm products while taking the young men away from the fields. Those remaining, mostly older people, adapted to new horse-drawn machinery such as grain harvesters and hay rakes. This allowed them to meet the demand for increased production and to profit from markedly higher prices. By the end of the war, previously self-sufficient agriculture in the North and West had become market-oriented.

During the antebellum years, the Government had gradually liberalized its policies on making land available in more western areas. The Homestead Act of 1862 completed this trend. It made 160 acres of land available for free to anyone who would reside on and cultivate it for 5 years. In just a few decades, an enormous amount of land,

⁵ In 1850, California was granted virtually instant statehood. At this time, the only "states" west of the Mississippi River were Iowa, Missouri, Arkansas, and Texas. The magnitude of this "leap" over a large portion of our land mass is illustrated by the fact that it is 1,600 miles from Kansas City, on the western edge of Missouri, to Reno NV, on the eastern edge of California and just west of Sutter's Mill. But it is only 1,100 miles from Kansas City to Washington, DC.

roughly equal to all of western Europe, was made available to ranchers and farmers.

Opening the West to farming and ranching led to a new set of problems for producers. For one thing, it was difficult for settlers used to farming the fertile, rain-blessed land around and east of the Mississippi River to adapt to the semi-arid high plains lands of the West.

Also, many farmers had borrowed heavily during the war to purchase more land and equipment. Paying off these loans became difficult as general price deflation and reduced demand contributed to sharp declines in farm prices after the conflict ended. All of this land coming into production further depressed the prices farmers received.

Finally, while towns and markets were springing up every day as people came west to seek their fortune in mining or provide goods and services to others, farm markets were still primarily east of the Mississippi. This meant shipping east via railroads.

RAILROAD GROWTH, CONDUCT, AND REGULATION

During the 1860s, businessmen in San Francisco began shipping wheat to the East Coast and exporting wheat to Great Britain, Australia, and even China. Wheat farms in California became large-scale enterprises, supported by absentee owners, abundant credit, and mechanization. For example, by the early 1870s the combine was used throughout the Sacramento and San Joaquin Valleys. Combines didn't come into general use in the Great Plains until the 1920s.

After the end of the Civil War, the move to unite the states included a drive to build a transcontinental railroad linking the states along the Mississippi to California. Construction was funded by huge land grants and government loans. For a small investment, four Sacramento businessmen--Leland Stanford, Mark Hopkins, Collis Huntington, and Charles Crocker--gained control of the Central Pacific Railway. It was building east from Sacramento to meet with the Union Pacific, which was building west from Omaha, in the Nebraska Territory just beyond the Iowa border.

In 1869, the Golden Spike ceremony commemorating the joining of the Union Pacific and Central Pacific marked the advent of

transcontinental service. This new rail line made it possible to transport California agricultural products to eastern markets in days rather than the weeks it took using ships. This was certainly a boon to California agriculture.

It was also a boon for the four investor-owners of the Central Pacific (later renamed the Southern Pacific). They reaped enormous profits and used them to buy control of river and port facilities in the State. With a monopoly over transportation, the Southern Pacific had the power to manipulate rates and make or break any farmer, manufacturer, or mining company in the region. It used that power to suppress any attempt to establish effective government regulation of rates. For the next 50 years, the Southern Pacific was the dominant force in both the California economy and California politics.

Over the next several years, four additional lines reached the Pacific: the Great Northern and the Northern Pacific to the north and the Southern Pacific and the Atchison, Topeka & Santa Fe to the south. The western boundary of the American frontier, which barely 2 decades before had been the Mississippi River, was now pushed all the way to the Pacific Ocean. Rail freight traffic grew from 10 billion ton-miles in 1865 to 75 billion ton-miles in 1890.

Much of this growth was in the agrarian West. For example, large ice compartments and insulation were added to traditional box cars to create iced refrigerator cars. By 1890, carloads of oranges, apricots, cherries, and strawberries were being shipped from California to eastern markets in refrigerated cars owned by both the railroads and private carlines. This greatly facilitated the further growth of California fruit and vegetable production.

The rapid growth of the railroads presented both the carriers and their customers with a new challenge, competition. Competition had been limited before the war. Most railroads were small, providing service between a couple of population centers. Neither the State "charter" process nor the level of potential business favored the construction of competing lines.

After the war, growing competition and technological advances led to significant reductions in the cost of service to customers. They also spurred the development of a standard gauge for track, business agreements to share equipment and revenue of interline service equitably, and a standard time system so schedules could be easily understood.

Eastern rail owners learned that a high volume of through traffic was essential to the health of their capital-intensive companies. They moved swiftly to control midwestern lines and gain direct access to Chicago, St. Louis, and other emerging business centers. They also learned that business couldn't be taken for granted and that purchases and leases of other lines was the most effective way to guarantee the generation of sufficient revenue.

While the railroads were operating more efficiently and hauling more traffic at falling rates, large numbers of shippers and, for different but related reasons, the railroads themselves were unhappy with the existing situation. Most problems stemmed from variations in the degree of competition faced by the railroads. Frequently, several lines operated over long distances between major cities. And it was just as common for a single railroad to be the only service provider between cities and their surrounding countryside. This led the carriers to charge relatively low rates on long, competitive hauls and higher rates on noncompetitive short hauls.

The railroads wanted relief from the cutthroat competition between cities. Competing lines negotiated cartel arrangements with the objective of sharing traffic and revenue in an orderly manner. These efforts to reduce competition were only modestly successful. They lacked a legal foundation and represented little more than gentlemen's agreements. Both participants and outsiders frequently cut prices to increase profits by taking business away from carriers who honored the cartel agreement.

Shippers throughout the Nation began to complain about volatile and discriminatory freight rates. In the East, "rate wars" were so common that charges often changed every week. A period of low rates would be followed by one of excessively high rates. Smaller shippers protested discriminatory low rates in favor of big shippers, such as John D. Rockefeller and his Standard Oil Company.

Midwest and Great Plains farmers were particularly impacted by questionable rail practices. They had to rely on rail transportation and were often served by a single rail line. They were subjected to short-haul rates that exceeded those of longer hauls, downgrading of their grain by rail-owned local elevators, and the general practice of charging what the traffic will bear.

In 1867, Oliver Hudson Kelley led farmers to organize the National Grange of the Patrons of Husbandry. By 1875, it had grown

to 800,000 members. One of the Grange's accomplishments was the stimulation of cooperative development. As early as 1868, Kelley began urging members to develop a network of marketing cooperatives as a shield against business monopolies and a way for farmers to establish the price for their products.

Many local farm supply and general stores were started in rural areas, also following the cooperative principles of user ownership, democratic control, and returning earnings to members based on patronage. But many of these stores were under-capitalized and poorly managed. When the Grange began to decline in the late 1870s, so did most of the cooperatives it founded.

The Grange also recognized the importance of political involvement. Western farmers, now organized through the Grange, elected a number of their members to midwestern State governorships. Their supporters became forces in several State legislatures. Grange support helped enact state laws regulating the services and rates of businesses perceived as abusing farmers, primarily the railroads and grain elevators. The impacted businesses reacted with a series of legal challenges questioning the constitutionality of these "Granger" laws.

Several cases were argued before the U.S. Supreme Court in late 1875 and January 1876. After more than a year of deliberation, separate opinions were issued in each case, as a group, on March 1, 1877. All were written by Chief Justice Morrison Waite and all found the challenged laws constitutional.

The lead opinion concerned a provision in the Illinois constitution, adopted in 1870, and an implementing law enacted the next year. Among other things, the law (1) set maximum rates grain elevators in a city of more than 100,000 population (Chicago) could charge and (2) required elevator operators to be licensed.⁶ The other cases involved laws regulating rail rates in Iowa,⁷ Wisconsin,⁸ and Minnesota.⁹

⁶ *Munn v. Illinois*, 94 U.S. 113 (1877).

⁷ *Chicago, Burlington, and Quincy RR Co. v. Iowa*, 94 U.S. 155 (1877).

⁸ *Peik v. Chicago and North-western Railway Co.*, 94 U.S. 164 (1877); *Chicago, Milwaukee, and St. Paul RR Co. v. Ackley*, 94 U.S. 179 (1877).

⁹ *Winona and St. Peter Railroad Company v. Blake*, 94 U.S. 180 (1877).

The railroads claimed these laws violated three provisions of the Constitution:

1. That part of Art. I, Sec. 8 that says Congress shall "regulate commerce with foreign nations and among the several States."

2. That part of Art. I, Sec. 9 that says "no preference shall be given to any regulation of commerce or revenue to the ports of one State over those of another."

3. That part of the 14th amendment, Sec. 1 that reads no State shall "deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."¹⁰

Chief Justice Waite, a firm believer in judicial self-restraint, wrote only a single paragraph in *Munn v. Illinois* on each of the first two arguments. As to the commerce clause, he said storing grain may be incidently connected with interstate commerce, but is primarily a matter of intra-State concern.¹¹ Art. 1, Sec. 9 was disposed of as a provision only applying to Federal regulation.¹² While the Court's reasoning on the latter issue was not challenged, the applicability of the commerce clause would be raised in subsequent litigation.

Waite focused his opinion on the 14th Amendment. In upholding the Illinois law, he said that regulating the use or the price of the use of property does not deprive the owner of that property. This is especially true when the property is used to provide a public service.¹³ He concluded that if people felt they had been treated unfairly by the legislature, they "must resort to the polls, not to the courts."¹⁴

But even as the opinions were being drafted, winds of change were in the air. Big business was booming and individualism was in favor. The prevailing economic philosophy of the times was laissez

¹⁰ *Munn v. Illinois*, 94 U.S. at 123.

¹¹ 94 U.S. at 135. Waite's position is interesting in view of his extensive discussion of the movement of grain from the West, through the Chicago elevators, and into barges and railcars for shipment to the Atlantic coast. 94 U.S. at 130-131. The same opinion was expressed concerning railroads in *CB&Q RR Co. v. Iowa*, 94 U.S. at 163.

¹² 94 U.S. at 135.

¹³ 94 U.S. at 126, 130.

¹⁴ 94 U.S. at 134.

faire. Corporate interests wanted to grow without fear of government intervention. Their lawyers were more than willing to help. In 1878, they formed the American Bar Association. It became a sounding board for protecting property interests from government.

The influence of laissez faire in political and legal circles was soon evident in the U.S. Supreme Court. From 1877 to 1886, five justices resigned or died. And two of those remaining, Joseph Bradley and Stephen Field, had not been comfortable with the judicial restraint shown in *Munn*. The Court became more inclined to protect the property interests of the emerging business corporations.¹⁵

In 1886, the Supreme Court again considered the ability of the States to regulate rail rates on goods going outside the State. Four of the five new justices sided with the two remaining activist jurists to repudiate the Granger cases and strike down State regulation of rail rates on traffic moving among the states.¹⁶

The *Wabash* case involved an Illinois statute which imposed a penalty on a railroad that charged lower rates on long hauls that extended beyond its border than on a shorter, in-State haul on the same tracks. The Court, in holding the statute unconstitutional, relied exclusively on the commerce clause language that provides Congress shall have the power to "regulate commerce with foreign nations and among the several States."

The Court did little to distinguish the Granger cases, whose facts included elements of interstate movement. It simply concluded that this type "of regulation is one which must be, if established at all, of a general and national character..."¹⁷

The *Wabash* decision created a political void. The states were barred from regulating the railroads and Congress had not done so. As neither shippers nor the railroads were comfortable with the pro-

¹⁵ The discussion of the Granger cases and the subsequent change in attitude by the Supreme Court is based in part on Rocco J. Tresolini, *American Constitutional Law*, 2nd Ed. (New York: The MacMillan Co., 1959), pp. 264-266, 326-331.

¹⁶ *Wabash, St. Louis & Pacific Railway Co. v. Illinois*, 118 U.S. 557 (1886).

¹⁷ 118 U.S. at 577.

spect of no rules in the rail service game, it took Congress only a few months to react, passing the Interstate Commerce Act of 1887.

This landmark legislation marked the first time Congress affirmatively exerted its authority under the Constitution to regulate commerce among the States. It was also the first time Congress created an independent administrative body, the Interstate Commerce Commission (ICC), to regulate trade and commerce. The ICC was charged with keeping rail rates just and reasonable.

Railroad regulation in the early days of the ICC was not very effective, at least from the shipper perspective. The railroads used the ICC to raise rates on their competitive long-haul routes. And they used the courts to challenge, often successfully, ICC decisions they didn't like. For example, in the "Maximum Freight Rates" decision¹⁸ the Supreme Court ruled the ICC had the authority to declare rail rates reasonable or unreasonable, but not the power to prescribe future rates. *ICC v. Alabama Midland Railway Co.*¹⁹ held the ICC lacked the power to prevent short-haul rates from exceeding long-haul rates on the same railroad.

However, the rising influence of the progressive movement at the turn of the century, brought with it a feeling that the railroads needed more stringent public oversight. The Elkins Act of 1903²⁰ ended the railroads' practice of giving rebates to large corporations. The Hepburn Act of 1906²¹ gave the ICC the power to set maximum rates. The Mann-Elkins Act of 1910²² granted the ICC clear authority over long- and short-haul rate differences.²³

In spite of its new authority, the ICC never became a major factor in curtailing anticompetitive behavior. Changing economic conditions

¹⁸ *ICC v. Cincinnati, New Orleans & Texas Pacific Railway Co.*, 167 U.S. 479 (1897).

¹⁹ 168 U.S. 144 (1897).

²⁰ Chap. 708, 32 Stat. 847 (1903).

²¹ Chap. 3591, 34 Stat. 584 (1906).

²² Chap. 309, 36 Stat. 539 (1910).

²³ All of these laws and other general rail rate regulation were repealed by the Railroad Revitalization and Regulatory Reform Act of 1976 (P.L. 94-210, 90 Stat. 31 (1976)) and subsequent rail deregulation legislation.

reduced such conduct. Railroad consolidations mitigated long-haul competition. Later, the evolution of the truck provided tough new competition in the short-haul market. But in the late 19th century, the public had a positive impression that the ICC was there and looking out for the public good. This created a favorable political climate for the enactment and enforcement of more sweeping laws designed to limit restraints of trade in general.

Corporations and Trusts

For the first three quarters of the 19th century, most American businesses were small in size, organized as a sole proprietorship or a partnership of a few men, managed by their owners, required little capital, produced a single product, and served local markets.

By 1890, a new industrial structure was taking shape. A relative handful of large corporations were gaining dominance in many key industries. In these organizations, management was separate from ownership, large amounts of capital were used to acquire machinery and other fixed assets, and many products were produced and sold in a national or international market. Farmers and their cooperatives were caught up in this change and influenced by public and Government responses to it.

Development of the Corporate Structure

Joint business companies can be traced back to ancient civilizations in Asia Minor and early Greek and Roman societies. But the modern corporate form developed in England in the 1840s to support the movement of production from the home to the factory. Until then, most commercial operations involved an owner, his family, and perhaps a small number of employees providing a product or service to the local community. The corporation made it easy to combine the key components of production--capital and people--to produce a product and serve a region, an entire country, and even other parts of the world.

In the United States, the corporate structure was particularly attractive to the railroads. The huge amount of money needed to build, equip, and operate this expanding industry greatly exceeded the

available wealth of any one individual, or even the young country. Initial capital came from port cities along our Atlantic Coast who were anxious to become links between the vast natural resources of the West and the growing industries of Europe. Soon, Europeans were funding much of the rail expansion, sensing this was the window to participation in great business opportunities that would arise as the United States grew.

The railroads were also far too complex for a single or even a small group of people to manage. Railroads were leaders in developing modern management structures staffed with professional managers. Functions such as finance, operations, and traffic were recognized as separate specialties. Accounting, legal, purchasing, and marketing departments emerged.

Also, the railroads pioneered amalgamation and use of the securities markets to acquire market power and wealth. For example, in 1853 the properties of 10 individual rail companies operating between Albany and Buffalo were combined to form the New York Central. Securities amounting to \$34 million were distributed to 2,445 investors in exchange for the stock they held in the individual rail companies.

While railroading led the way in corporate development, manufacturing later overshadowed it in size and complexity. New and improved machines, the use of power, and factory organization made it possible to produce standardized goods in an almost never-ending stream. Where new technology yielded economies of scale--a decrease in cost per unit as more units are produced--special incentives for industrialists to expand their production were created.

Horizontal Coordination

The railroads reduced long distance transportation costs and increased the market area where each manufacturer could sell his increased production. This threw him into competition with other producers whose previous markets had been, like his own, local in nature. In industry after industry, growth in supply exceeded demand.

Since manufacturers had invested heavily in specialized equipment which could be used only for limited purposes, they couldn't withdraw from a market and transfer their capital to another use without incurring heavy losses. Each manufacturer continued producing as

long as the price received for each unit of production covered his direct costs (labor and materials). The best he could hope for, if selling at a loss, was that his competitors would be forced out of business before he was.

Even this wasn't a good solution from a businessman's viewpoint. The exit of one competitor through bankruptcy usually resulted in the entry of a new competitor who purchased the assets of the bankrupt firm at a bargain price. Entrepreneurs raised on the virtues of open competition and survival of the fittest were confronted with situations they now described as "ruinous" and "destructive" competition.

To meet the threat of falling prices and vanishing profits, industrialists formed regional and national trade associations, and through them entered into agreements to set minimum prices, limit total output, and/or divide markets. In Europe, such cartel agreements were legally enforceable and helped solve the overproduction problems. However, in the United States these pooling agreements had no standing in court. If a participant broke the agreement by selling at a price below that established by the cartel, he could not be sued, even if the agreement was part of a written contract. Thus, most pooling agreements lasted only a short time, followed by a quick return to price wars.

John D. Rockefeller, head of the Petroleum Refiners Association, is credited with devising a more permanent form of combination. In 1882, he and his associates at Standard Oil adapted the old legal device of a trust to meet the current needs of business.

In a business trust, the corporations in the industry signed irrevocable deeds of trust, transferring control of their properties to a separate legal entity, the trust. A board of trustees was empowered to manage the properties on behalf of the shareholders of the individual corporations, who remained legal owners of the assets. This arrangement had the advantage of being permanent. The irrevocable deeds of trust prevented unilateral withdrawal of a participant.

More importantly, it put centralized management of the industry in the hands of the trustees. They could make all of the business decisions for the industry, including the elimination of surplus capacity. For example, the number of plants in the Standard Oil trust was reduced from 55 in 1882 to only 22 by 1886.

Eight nationwide trusts were attempted in the 1880s. Six successfully controlled their industries--sugar, whiskey, lead, cottonseed oil,

linseed oil, and petroleum. These entities were pioneers in creating large industrial enterprises through horizontal combination--the process of joining together companies operating at one level or stage of production. They not only found a legal form for big business, but they also began to develop centralized managerial techniques.

In the early 1890s, about the time that the trust form came under legal attack, New Jersey changed its incorporation laws to authorize one corporation to own the stock of other corporations. In a short time, the holding company had supplanted the trust as the preferred vehicle for consolidating control of companies within the same industry. But the image of the trust as the symbol of the rapid rise of large enterprises in the 1880s was so strong that the term continued to be applied to big business long after the legal form had been abandoned.

Vertical Coordination

While some companies faced pressure on prices from overproduction, others found their ambitions blocked by inadequacies in the existing system of wholesalers. While these firms could produce a large output with continuous-process machinery, in some instances wholesalers couldn't move those goods quickly enough. In other instances, wholesalers lacked the ability to perform essential functions, such as demonstration, installation, and repair.

In the 1880s, makers of low-cost packaged consumer products--cigarettes, flour, breakfast cereals, canned goods--set up their own sales offices where they employed aggressive marketing techniques. Advertising became a particularly potent weapon. Most of the products were new to consumers. A low per-unit price made it difficult to stimulate demand by price reductions.

At the same time, producers of a variety of new durable goods--sewing machines, agricultural implements, office machines, elevators--created national networks of local representatives. They not only sold products but also provided spare parts, specialized repair service, and the credit to purchase these big-ticket items.

Innovators in mass marketing and distribution often had to overcome vested interests at the local and state levels. A good example is the Singer Sewing Machine Company. Formed in the 1850s, Singer first sold its products through local merchants.

However, after the Civil War it found independent distributors were unable to provide the credit, conduct the demonstrations, and furnish the repair service the company needed to mass market its product. Singer decided to create its own distributing organization and employed its own traveling salesmen.

Local interests, to protect their markets, invoked "peddler licensing" and tax laws that discriminated against out-of-state products and sales people. Singer had the resources and determination to challenge these tactics in court and, relying on the commerce clause of the Constitution, have them ruled invalid.²⁴

Similar parochialism confronted innovators in agriculture. For example, refrigerated rail cars allowed meat packers to achieve economies of scale in processing meat in central locations, such as Chicago, and then ship it hundreds of miles for sale to stores at prices below what local butchers were charging. Local butchers responded by inducing a number of states to pass meat inspection laws that had the affect of eliminating competition from the Chicago packers.

When one of its agents was convicted under such a law in Minnesota, Armour took the case to the U.S. Supreme Court and prevailed.²⁵ A Minnesota law made it a crime to sell beef, pork, veal, lamb or mutton for human consumption unless the animal it came from was certified healthy by a local inspector within 24 hours before slaughter. Minnesota argued this was a valid exercise of State policy power to protect human health. But the Court, noting the law kept out all meat from other states, both sound and adulterated, held it unconstitutionally abridged Congressional power to regulate interstate commerce.

Manufacturing firms integrated not only forward into marketing but also backward into purchasing to assure adequate supplies for large volume production. Durable goods firms bought or constructed factories to provide themselves with parts and materials. Producers of nondurable goods took similar steps. Meat packers, for example, bought into stockyards along the cattle frontier. Cigarette makers built

²⁴ *Welton v. State of Missouri*, 91 U.S. 275 (1876); *Webber v. Virginia*, 103 U.S. 344 (1880).

²⁵ *Minnesota v. Barber*, 136 U.S. 313 (1890).

their own storing and curing sheds for the tobacco they purchased from farmers.

Some firms grew both horizontally and vertically. For example, in 1882, Standard Oil represented a horizontal combination of kerosene refineries. But the trust expanded vertically--backward into crude oil production and forward into wholesale and retail marketing--to use its large-scale operations more effectively. On the other hand, the formation of the American Tobacco Company in 1890 combined five firms with their own marketing and purchasing activities into a single unit that could both reduce costs and exercise tight control of the industry.

COOPERATIVES EMERGE

During the years leading up to enactment of the Sherman Act, cooperation sputtered but grew.

The retrenchment of the Granger movement²⁶ coincided roughly with the emergence of a new agrarian society, the Farmers' Alliance. As farm prices continued to fall from 1887 to 1890, the Alliance membership grew. Its leader, Dr. C. W. Macune, promoted cooperatives as an answer to the farmer's worsening economic position.

The Alliance took a somewhat different approach to cooperative structure than the Grange. The Grange emphasized the role of the local associations, which could band together to work on problems too big for a small, local cooperative to handle. This could be characterized as the forerunner of the federated system.

The Alliance developed statewide associations to unite farmers into larger, stronger cooperatives. County associations were primarily governance vehicles, serving to elect delegates to policy positions in the statewide associations. This approach became the model for today's large, centralized cooperatives.

But like their Granger forebears, the Alliance cooperatives gave farmers a quick boost but then passed from the scene. The Alliance tried to develop financing policies that minimized the amount of money farmers were required to invest in their cooperatives. Up-front fees were not sufficient to adequately capitalize the new ventures.

²⁶ *Supra*, p. 10.

Then the Alliance rejected the Rochdale approach of charging market prices and returning earnings, if any, to patrons after the end of the fiscal year. It adopted instead a policy of attempting to operate at cost on a transaction-by-transaction basis. While this kept the cost of supplies low and provided the highest possible returns to producers for products marketed, it also meant that the slightest miscalculation left the associations without funds. When the cooperatives began to fail, the Alliance leadership lost interest and turned to political activity as a way to improve farmer income.

Other, independent cooperatives were also developing. The largest number were local dairy processing cooperatives. Several cooperative cheese plants were in operation even before the rise of the Granger movement. The introduction of the centrifugal cream separator in 1879 gave a great impetus to commercial production of creamery butter and the formation of many more dairy processing cooperatives.

Noted cooperative historian Joseph Knapp points out that many of these associations, like their Granger and Alliance counterparts, were destined to fail. They were not formed on the basis of economic feasibility, and rather "the unscrupulous efforts of promoters who were primarily interested in selling creamery equipment."²⁷

Many early cooperatives failed because they were long on cooperative spirit and enthusiasm, but short on business acumen. Another young cooperative movement in the expanding California fruit industry, added the need to operate on sound business principles to the general cooperative business plan.

California was a long way from eastern markets, putting individual producers at the mercy of dealers and commission agents. Growers soon learned that group action was needed to sell their products at a profit. In the 1880s, grower cooperatives became active

²⁷ Joseph G. Knapp, *The Rise of American Cooperative Enterprise: 1620-1920* (Danville, IL: Interstate Printers and Publishers, 1969) p. 71. Knapp credits Professor T. L. Haecker, who joined the staff of the University of Minnesota in 1891, with bringing some rationality to the dairy cooperative system. Haecker educated producers on the schemes of the promoters and started a program on butter making at the university that led to improved quality of Minnesota butter. By 1896, numerous efficient cooperative creameries were functioning in Minnesota.

players in the marketing of numerous specialty crops including oranges, lemons, raisins, prunes, apricots, and nuts.

Unlike some of their eastern and midwestern contemporaries, Californians never became enthralled with cooperation as an end in itself. Rather, they took the pragmatic view that a cooperative was a means to an end. The Californians needed to find a way to profitably sell crops grown in specialized producing areas far from their markets. The cooperative was merely an extension of the farming operation, an exclusive marketing agency.

Californians also recognized that operating effectively in distant markets necessitated attracting and retaining competent management. While other associations were often run by local producers caught up in the euphoria of the moment but with little business training or experience, California farmers paid top salaries to develop an efficient management core. This led to the development of tools such as marketing agreements, pools, and federations that still serve farmers well today.

Thus cooperatives were well established at the time Congress began considering the Sherman Act. By 1890, there were about 1,000 active farmer cooperatives in the United States. More than 700 were handling dairy products, about 100 grain, and about 100 fruits and vegetables.

CHAPTER 2. THE SHERMAN ACT

As the dominance of large firms grew, so did public resentment. The developing backlash against the "trusts" was not an attack on business or capitalism. Many of those calling for Government intervention were businessmen and their spokesmen, particularly small entrepreneurs who had been damaged, or who believed that they had been damaged, by the aggressive behavior of large corporations. They focused on traditional sentiment against monopoly and the widely held belief in America about the virtue of freedom of opportunity.

Some people defended business combinations because they appeared to be highly efficient, a value some believed to be as important as competition.

Critics gained a key ally in Senator John Sherman (R-OH),²⁸ widely recognized as the ablest financial expert in public service. Although the antitrust act that carries his name was actually drafted in the Senate Judiciary Committee, Sherman's interest and support were key to its enactment.

Sherman's position to influence the enactment of antitrust law was due to both good luck and good planning. Naturally drawn to politics, Sherman was first a member of the Whig party. However, he soon joined the new Republican party. He was elected to the House of Representatives in 1854 and in 1855 served as president of the first Republican convention in Ohio. After 6 years in the House, he was elected to the Senate in 1861 to fill the seat vacated by Solmon P. Chase.

Sherman spent 32 years in the Senate (1861-1877, 1881-1897). During his first tenure he rode the crest of the wave sweeping the Republican Party, and Ohio Republicans in particular, to political

²⁸ John Sherman, the younger brother of Union General William Tecumseh Sherman, was born at Lancaster, Ohio, in 1823. His father, a member of the state supreme court, died when John was 7 years old, leaving his widow with 11 children to support. John left school at the age of 14 to work but at age 17 he began to study law under the guidance of his uncle and oldest brother. He was admitted to the bar in 1844 and practiced law in Mansfield for 10 years.

dominance during and after the Civil War. Sherman quickly gained the allegiance of the party's two main constituent groups—midwestern farmers and eastern businessmen—when he rose to Chairman of the Agriculture Committee (38th and 39th Congresses) and the Finance Committee (38th and 40th-44th Congresses). However, he resigned his Senate seat in 1877 to serve as Secretary of the Treasury under President Rutherford B. Hayes, a fellow Republican from Ohio.

In 1881, President Hayes was succeeded by Senator-elect James Garfield, yet another Ohio Republican. Sherman left the cabinet and won reelection to the Senate seat vacated by Garfield. During his second period in the Senate, Sherman again served on the Finance Committee, but not Agriculture. While he wasn't chairman of the Finance Committee, his experience and reputation gave him considerable influence over legislation impacting the country's financial affairs.

LEGISLATIVE HISTORY

In the late 1880s, Sherman became convinced of the need to place some limits on the growing power of the trusts. He laid the groundwork for the enactment of an antitrust law near the end of the 50th Congress.

First, he led the Senate to approve a resolution, which he introduced, directing the Finance Committee to study the need to control or prohibit anticompetitive conduct.²⁹ Several weeks later, the first bills were introduced attacking trusts and combinations in restraint of trade. Sherman used the directive as leverage to have the bills referred to the Finance Committee rather than either the Judiciary or Commerce Committee.³⁰ Thus, he was positioned to move quickly to make sure a bill was reported out of the Finance Committee before Congress adjourned.³¹

While no action was taken before the end of the 50th Congress, Sherman gained the prestigious distinction of sponsoring antitrust

²⁹ 19 Cong. Rec. 6041 (July 10, 1888).

³⁰ 19 Cong. Rec. 7512-7513 (August 14, 1888).

³¹ 19 Cong. Rec. 8483-8484 (September 11, 1888).

legislation introduced as the first Senate bill (S. 1) of the 51st Congress.³² Little dispute existed among Federal legislators over the need for action. The first day of Senate debate on S. 1 consisted almost entirely of a lengthy speech by Senator James George, a Southern Democrat from Mississippi.

Senator George, a former chief justice of his State's supreme court and a member of the Judiciary Committee, would become Sherman's personal nemesis during Senate consideration of his bill. But Senator George included such a strong condemnation of trusts in this opening statement that Senator Sherman quoted it with approval during the subsequent debate:

These trusts and combinations are great wrongs to the people. They have invaded many of the most important branches of business. They operate with a double-edged sword. They increase beyond reason the cost of the necessaries of life and business, and they decrease the cost of the raw material, the farm products of the country. They regulate prices at their will, depress the price of what they buy and increase the price of what they sell. They aggregate to themselves great, enormous wealth by extortion which makes the people poor. Then, making this extorted wealth the means of further extortion from their unfortunate victims, the people of the United States, they pursue unmolested, unrestrained by law, their ceaseless round of speculation under the law, till they are fast producing that condition in our people in which the great mass of them are servitors of those who have aggregated wealth at their command.³³

During consideration of antitrust legislation, little opposition was expressed to its overall intent. There was, however, much discussion over whether the bill should have been referred to the Judiciary or Commerce Committee and, more important, whether Senator Sher-

³² 21 Cong. Rec. 96 (December 4, 1889).

³³ Senator George's statement, 21 Cong. Rec. 1768 (February 27, 1890); Senator Sherman's quote thereof, 21 Cong. Rec. 2461 (March 21, 1890).

man's language was constitutional. Numerous amendments were introduced to fine-tune the language, some passing and others not.³⁴

After several days of debate, which probably confused rather than clarified the issues in the minds of many Senators, Senator George was able to wrest control of the bill from Senator Sherman and have it referred to the Judiciary Committee for rewriting.³⁵

One of the amendments offered during Senate consideration of Senator Sherman's bill was designed to protect farmer cooperatives. A number of senators were concerned that Senator Sherman's bill would outlaw farmer cooperatives. For example, during floor debate, Senator William Stewart (R-NV)³⁶ said:

...(T)ake, for example, the beef trust in Chicago.... There is a plain remedy for that trust, not in legislation perhaps, but in the action of the parties interested. Farmers who are producing beef have to sell it at an enormous sacrifice, at starvation prices. Cattle are cheap all through the country. Still beef is high in Chicago. Suppose the farmers in the West should unite and say, "We will not sell our beef except at a certain price." Suppose they should unite to beat this combination; *they would all be criminals under this bill*; they could not combine to beat it at all.³⁷ (Emphasis added).

After stating a similar second example concerning wheat growers, Senator Stewart continued, "This measure strikes at...the very root of co-operation.... When capital is combined and strong, it will for a time

³⁴ 21 Cong. Rec. 2455-2474 (March 21, 1890); 21 Cong. Rec. 2556-2572 (March 24, 1890); 21 Cong. Rec. 2597-2616 (March 25, 1890); 21 Cong. Rec. 2639-2662 (March 26, 1890); 21 Cong. Rec. 2723-2731 (March 27, 1890).

³⁵ 21 Cong. Rec. 2731 (March 27, 1890).

³⁶ Senator Stewart possibly gained an appreciation for cooperatives while living in California throughout the 1850s and serving for a time as state attorney general.

³⁷ 21 Cong. Rec. 2606 (1890).

produce evils, but if you take away the right of co-operation you take away the power to redress those evils..."³⁸

To allay this concern, Senator Sherman proposed an amendment first suggested by Senator George, saying "I do not think it necessary, but, at the same time to avoid any confusion, I submit it..."³⁹ The amendment read:

*Provided, That this act shall not be construed to apply to any arrangements, agreements, or combinations between laborers made with the view of lessening the number of hours of their labor or of increasing their wages; nor to any arrangements, agreements, associations, or combinations among persons engaged in horticulture or agriculture made with the view of enhancing the price of their own agricultural or horticultural products.*⁴⁰ (Emphasis supplied.)

The amendment was agreed to by voice vote.⁴¹

Two days later, the Senate again took up Senator Sherman's amendment.⁴² The discussion turned out to be the last gasp for his entire bill. Sherman, thinking another amendment had been called up, took the floor and began a sarcastic attack. This mistake was smoothed over with a colloquy suggesting not all amendments needing reaffirmation were properly printed in italics on the version given the Senators, leading to more confusion. After a somewhat meandering discussion of various issue concerning the bill,⁴³ a motion was made and passed to refer the entire bill, including pending amendments, to the Judiciary Committee.⁴⁴ The Judiciary Committee rewrite, which

³⁸ *Id.*

³⁹ 21 Cong. Rec. 2611 (1890).

⁴⁰ 21 Cong. Rec. 2611-2612 (1890). This is not the precise language introduced by Senator Sherman. It includes several nonsubstantive changes made during the brief floor debate.

⁴¹ 21 Cong. Rec. 2612 (1890).

⁴² 21 Cong. Rec. 2726 (1890).

⁴³ 21 Cong. Rec. 2726-2731 (1890).

⁴⁴ 21 Cong. Rec. 2731 (1890).

became the law as enacted, omitted any reference to farmer cooperatives.

The main argument against referral concerned the Judiciary Committee's apparent reputation as a graveyard for any legislation perceived as anti-business.⁴⁵ The motion to refer contained a provision requiring the committee to report it back within 20 days. The committee beat the target, reporting out the new language in less than a week.⁴⁶ The bill was brought up on the Senate floor less than another week later and passed after a minimum of debate.⁴⁷

The Senate Judiciary Committee language was enacted into law, but not before some additional controversy. In the House, S. 1 was referred to the its Judiciary Committee and promptly reported favorably for House consideration.⁴⁸

During House floor debate, an amendment was adopted declaring two types of contracts illegal: (1) agreements to prevent competition in the sale of any commodity transported from one State to be sold in another State, and (2) agreements to prevent competition in the transportation of persons or property from one State to another. But after some haggling, the House instructed its conferees not to insist on the amendment.⁴⁹

The conference report recommending adoption of the bill as originally passed by the Senate was approved without debate in the Senate⁵⁰ and minimal discussion in the House.⁵¹ It was promptly

⁴⁵ See, e. g., the comments of Senator Vance which begin, "I never have a bill in which I feel any interest referred to this grand mausoleum of Senate literature, the Judiciary Committee, without feeling that I have attended a funeral." 21 Cong. Rec. 2610 (March 25, 1890).

⁴⁶ 21 Cong. Rec. 2901 (April 2, 1890).

⁴⁷ 21 Cong. Rec. 3145-3153 (April 8, 1890).

⁴⁸ 21 Cong. Rec. 3857 (April 25, 1890).

⁴⁹ 21 Cong. Rec. 5981-5983 (June 12, 1890). A detailed list of citations to the entire congressional consideration of S. 1 can be found in the "History of Bills and Joint Resolutions: Senate Bills" in the Index to Volume 21 of the Congressional Record, p. 1.

⁵⁰ 21 Cong. Rec. 6208 (June 18, 1890).

⁵¹ 21 Cong. Rec. 6312-6314 (June 20, 1890).

signed into law by President Benjamin Harrison on July 2, 1890.⁵²

PROVISIONS

The first two provisions of the Sherman Act remain the core of our antitrust law. Section 1 begins:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal...⁵³

Section 2 reads:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a felony...⁵⁴

These prohibitions on trade restraints have never been amended. They reflect, if not necessarily codify word for word, earlier common law rules. Their interpretation and application to cooperatives is at the heart of this report.

Other Sherman Act language added two additional essential ingredients for effective governmental action--meaningful penalties and a means of enforcement.

First, Sections 1 and 2 provide that a violation is a criminal felony punishable by substantial fines and prison time. Under either

⁵² 21 Cong. Rec. 6922 (July 2, 1890). Act of July 2, 1890, c. 647, 26 Stat. 209, 15 U.S.C. §§ 1-8. The law was originally titled "An act to protect trade and commerce against unlawful restraints and monopolies." The Hart-Scott-Rodino Antitrust Improvements Act of 1976, 90 Stat. 1383, 1387 (1976), added language to the earlier law providing it may be cited as the "Sherman Act."

⁵³ 15 U.S.C. § 1.

⁵⁴ 15 U.S.C. § 2.

provision, "conviction... shall be punished by fine not exceeding \$10,000,000 if a corporation, or, if any other person, \$350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."⁵⁵

Second, the U.S. Department of Justice was directed to bring legal action to prevent and restrain violations.⁵⁶

The Sherman Act has changed little since it was enacted. Some modest amendments have been made to Sections 1 and 2. In 1937, provisions were added to the first sentence of Section 1 shielding State fair trade laws from antitrust scrutiny.⁵⁷ They were repealed in 1975.⁵⁸

Other amendments through the years have strengthened the penalties. Originally, a violation was a misdemeanor punishable by a fine of not more than \$5,000 and imprisonment not exceeding 1 year.⁵⁹ In 1955, the maximum fine was increased to \$50,000.⁶⁰ In 1974, violation was changed from a misdemeanor to a felony; separate maximum fines were established of \$1 million for a corporation and \$100,000 for any other person; and the possible prison sentence was increased to 3 years.⁶¹ In 1990, maximum fines were increased to current levels, \$10 million for corporations and \$350,000 for other offenders.⁶²

Other Sherman Act provisions are procedural in nature and will be rarely mentioned herein:

- Sec. 3 makes the act applicable to territories of the United States and the District of Columbia.⁶³

⁵⁵ 15 U.S.C. §§ 1, 2.

⁵⁶ 15 U.S.C. § 4.

⁵⁷ Act of Aug. 17, 1937, ch. 690, title VIII, 50 Stat. 693 (1937).

⁵⁸ Pub. L. 94-145, § 2, 89 Stat. 801 (1975).

⁵⁹ 26 Stat. 209 (1890).

⁶⁰ Act of July 5, 1955, ch. 281, 69 Stat. 282 (1955).

⁶¹ Pub. L. 93-528, § 3, 88 Stat. 1708 (1974).

⁶² Pub. L. 101-588, § 4(a), 104 Stat. 2880 (1990).

⁶³ 26 Stat. 209, § 3, *at* 15 U.S.C. § 3.

- Sec. 4 establishes federal court jurisdiction, Department of Justice authority to enforce the act, and sets out procedural guidelines.⁶⁴
- Sec. 5 gives courts hearing an antitrust case nationwide power to summon and subpoena witnesses.⁶⁵
- Sec. 6 provides for the seizure, condemnation, and forfeiture of property being transported from one State to another and is involved in an activity that violates Section 1 of the law.⁶⁶
- Sec. 7 authorizes private parties injured by conduct illegal under the act to sue and to recover three times the amount of their losses and the costs of litigation, including a reasonable attorney's fee.⁶⁷
- Sec. 8 defines the term "person" to include corporations and associations formed under Federal, State, territorial, or foreign country laws.⁶⁸

Big business didn't appear to feel threatened by the Sherman Act. Apparently it believed the law was so vaguely worded and innocuous as to be unenforceable. Business also felt that its friends in Government would protect its interests. The statute passed the Senate with only one dissenting vote. It cleared the House of Representatives on an initial vote of 152 to 72 and 240 to 0 in final form.

JUDICIAL INTERPRETATION

At first, business indifference seemed justified. Few suits were filed. In the first case to reach the U.S. Supreme Court, business scored an impressive victory.

⁶⁴ 26 Stat. 209-210, § 4, *at* 15 U.S.C. § 4.

⁶⁵ 26 Stat. 209-210, § 5, *at* 15 U.S.C. § 5.

⁶⁶ 26 Stat. 210, § 6, *at* 15 U.S.C. § 6.

⁶⁷ 26 Stat. 210, § 7, *at* 15 U.S.C. § 15.

⁶⁸ 26 Stat. 210, § 8, *at* 15 U.S.C. § 7.

In 1892, the American Sugar Refining Company, a New Jersey corporation which controlled a majority of the sugar refining companies in the United States, obtained nearly complete control of the manufacture and distribution of refined sugar by purchasing the stock of the E. C. Knight Company and three other Philadelphia refineries. The United States brought an action alleging American Sugar Refining was a "combination...in restraint of trade and commerce among the several states" made illegal by Section 1 of the Sherman Act.

The Court, still dominated by the laissez-faire philosophy, held on an 8-1 vote that the Sherman Act could not be applied to a virtual monopoly of the sugar industry because the manufacture of sugar was not an act committed in interstate commerce.⁶⁹

In his lone dissent, Justice Harlan expressed astonishment that the majority could so easily distinguish manufacturing from commerce. He cited several State court decisions that, like *State v. Standard Oil Company*,⁷⁰ had held monopoly arrangements null and void as contrary to public policy. He remarked that "while the opinion of the Court does not declare the act of 1890 to be unconstitutional, it defeats the main object for which it was passed."⁷¹

Whether bowing to popular opinion as reflected in the emerging influence of the progressive movement, Justice Harlan's dissent, or for some other reason, the Court quickly abandoned the philosophy of the *E. C. Knight* opinion. Future cases acknowledged a broad application of the concept of commerce. They focused on finding the proper

⁶⁹ United States v. E. C. Knight Co., 156 U.S. 1 (1895).

⁷⁰ *State v. Standard Oil Company*, 30 N.E. 279 (Ohio 1892). In this case, the Ohio Supreme Court held Standard Oil of Ohio violated common law on two grounds, (1) the shareholders acted illegally in turning over control of the company to the trustees of the New York-based Standard Oil Trust, and (2) the trust's possession of 90 per cent of the country's refining capacity constituted a monopoly contrary to public policy.

The court issued an order to the company to terminate its connection to the trust, which was soon dissolved. The individual companies continued to collaborate under a looser community-of-interest arrangement. In 1899, the group created a more formal legal relationship by forming a holding company, the Standard Oil Company of New Jersey, to hold the shares of the various companies and to own outright several refineries.

⁷¹ 156 U.S. at 42.

approach for determining which restraints of trade violated the Sherman Act.

During the same term, the Court delivered two other conservative opinions, one striking down a tax on income derived from land or personal property⁷² and another upholding a sweeping anti-labor injunction issued in connection with the Pullman strike in Chicago during the summer of 1894.⁷³ These three opinions evoked strong protests from the American working class, which was now convinced that the judiciary had become the reactionary defender of entrenched economic interests.

However, the general public was not yet sufficiently mobilized to challenge business influence over economic or public policy. Fostered by these judicial victories, the pro-business Republican election victory of 1896, and recovery from the business depression of 1893-1897, a period of substantial business mergers began. One historian identified 84 important new combinations between 1890 and 1897 with authorized capital stock of \$1 billion. Between 1898 and 1902 he identified 189 combinations with capital stock of \$4 billion.⁷⁴

This trend was actually facilitated by a series of Government legal victories. The Supreme Court began reading Section 1 of the Sherman Act literally. It issued several decisions holding all agreements among competitors on prices and production are illegal restraints of trade.⁷⁵ This encouraged entrepreneurs to combine competing businesses into a single entity. Merger was considered a safer method of eliminating competition than keeping the businesses separate and engaging in anticompetitive conduct.

⁷² *Pollock v. Farmers' Loan and Trust Co.*, 158 U.S. 601 (1895).

⁷³ *In re Debs*, 158 U.S. 564 (1895).

⁷⁴ Thorelli, *The Federal Antitrust Policy*, pp. 294-303.

⁷⁵ *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897); *United States v. Joint Traffic Ass'n*, 171 U.S. 505 (1898); *Addyston Pipe and Steel Co. v. United States*, 175 U.S. 211 (1899).

Literal Meaning Decisions

Several early cases interpreting the Sherman Act involved anticompetitive conduct of the railroads. The second case to reach the Supreme Court grew out of a governmental initiative to break up the Trans-Missouri Freight Association, an agreement among 15 railroads operating west of the Mississippi River for the primary purpose of fixing freight rates.⁷⁶

The Court had several important issues to consider. First, the railroads had already dissolved the agreement before the Court heard the case and argued the litigation was moot. The Court found that the carriers couldn't avoid liability by simply ceasing their possibly illegal conduct, especially since the lack of a ruling would leave them free to reform the association once the case was dismissed.

Next, the railroads asserted that their agreement was authorized by the Interstate Commerce Act and therefore insulated from antitrust liability. Again, the Court rejected the carrier position. It found the two laws consistent, noting that the Sherman Act applied to "every" contract, including contracts among railroads. It also noted its opinion in *E. C. Knight* and said that "To exclude agreements as to rates by competing railroads for the transportation of articles of commerce between the States would leave little for the act to take effect upon."⁷⁷

Finally, the Court had to decide whether this was the type of restraint of trade outlawed by the Sherman Act. It was generally accepted that, at common law, only *unreasonable* restraints of trade were forbidden. In a 5-4 majority opinion, the Court determined to follow the literal reading of the Act as declaring illegal "every" contract or combination that restrained trade among the States. Thus,

⁷⁶ *United States v. Trans-Missouri Freight Assn*, 166 U.S. 290 (1897).

⁷⁷ 166 U.S. at 313. At the time this opinion was drafted, the Court was reviewing, and upholding, an earlier decision striking down the position of the I.C.C. that it had the authority to set rail rates. *Cincinnati, New Orleans and Texas Pacific Railway Co. v. I.C.C.*, 162 U.S. 184 (1896); *I.C.C. v. Cincinnati, New Orleans and Texas Pacific Railway Co.*, 167 U.S. 479 (1897). To hold that rail rates were also exempt from antitrust law would have created the same vacuum that led to enactment of the Interstate Commerce Act in the first place.

it didn't have to examine whether this agreement was reasonable. It restrained trade in interstate commerce and was therefore illegal.⁷⁸

Justice White, in a vigorous dissent, reviewed the history of the common law concept of restraint of trade and argued that the concept of "reasonableness" was an inherent component thereof.⁷⁹ While his view was not to hold sway this day, it would ultimately become the accepted interpretation of the Sherman Act.⁸⁰

The following year the Court, relying on *Trans-Missouri Freight Ass'n*, struck down a similar rate agreement between 31 lines operating between Chicago and the Atlantic Coast.⁸¹

In 1899, the Court, for the first time, applied the Sherman Act to invalidate a price-setting agreement among manufacturers.⁸² Addyston Pipe was one of six companies which, in 1894, reached an agreement that they would not compete with each other in the manufacture and sale of cast-iron pipe. The Court distinguished *E. C. Knight* on the basis that the sugar contract only covered manufacturing while, in this case, the agreement also included sales.⁸³ The majority possibly avoided a dissent on the issue of "reasonableness" by stating the price charged in one market was so obviously unreasonable that the issue need not be discussed further.⁸⁴

Business Reacts, Roosevelt Responds

The Supreme Court decisions of the 1890s convinced the business community that consolidation of competing firms was the only legal method to achieve stability. In addition, experience gained during the depression of the 1890s suggested the practical soundness of large combinations; most of them fared rather well during the hard times.

⁷⁸ 166 U.S. at 342.

⁷⁹ 166 U.S. at 346.

⁸⁰ *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

⁸¹ *United States v. Joint Traffic Ass'n*, 171 U.S. 505 (1898).

⁸² *Addyston Pipe and Steel Co. v. United States*, 175 U.S. 211 (1899).

⁸³ 175 U.S. at 238-242.

⁸⁴ 175 U.S. at 238.

As noted earlier, the turn of the century witnessed a major merger movement in the United States, highlighted by the decision of the petroleum industry to reorganize as a holding company. In the space of a half-dozen years, more than 2,800 business firms entered mergers, including more than 1,200 in 1899.

The turn of the century also marked a change in Government attitude, personified by the ascension in 1901 of Theodore Roosevelt to the presidency.⁸⁵ Roosevelt was not a dogmatic "trust-buster." But he felt big business needed to recognize a social responsibility.

When some large corporations didn't respond to his urging to be less ruthless and self-centered, Roosevelt decided he needed to do something to get their attention. He instructed the attorney general to institute antitrust proceedings against the Northern Securities Company, a holding company organized in New Jersey by stockholders of the Great Northern Railway Co. and the Northern Pacific Railway Co. These two companies operated competing and substantially parallel lines from the Great Lakes to Puget Sound. The venture was backed by the most powerful capitalists of the era--J.P. Morgan, John D. Rockefeller, Edward H. Herriman, and James J. Hill.

The business community was stunned by Roosevelt's bold move. Big business was even more alarmed when the Supreme Court found this holding company eliminated competition between the lines and was therefore an illegal restraint of trade.⁸⁶ The decision was close, 5-4, and four separate opinions covering more than 200 pages in the United States Reports were issued. But it accomplished Roosevelt's purpose of establishing precedent that the mere creation of a holding company didn't shield anticompetitive conduct from antitrust enforcement.

Business received another setback the following year when the Court held that a relatively informal, but successful, coalition of meat packers that controlled prices they paid for live cattle and charged for

⁸⁵ In 1900, Roosevelt was elected vice president on the Republican ticket headed by William McKinley. Six months into his term, McKinley was assassinated at Buffalo, NY. On September 14, 1901, Roosevelt became President. In 1904, he was elected to a second term in a landslide.

⁸⁶ Northern Securities Co. v. United States, 193 U. S. 197 (1904).

fresh meat also violated the Sherman Act.⁸⁷ This unanimous opinion was written by Justice Holmes, one of the dissenters in *Northern Securities Co.*

Roosevelt's antitrust policy sometimes rested on his intuitive distinction between "good" trusts that focused on increasing efficiency and acted with moderation and "bad" trusts that relied on abuse of power.⁸⁸ At his direction, the Justice Department instituted antitrust suits against two holding companies which had gained notoriety for their predatory tactics toward competitors, Standard Oil Co. of New Jersey and the American Tobacco Co. The result of this litigation was to shape antitrust analysis through today and the foreseeable future.

Rule of Reason

The first suit was filed against Standard Oil in November 1906. The litigation encompassed nine subsidiaries of the Standard Oil Co. in as many different states, 62 other corporations and partnerships, and seven individuals. The Government charged they engaged in a conspiracy to restrain trade and commerce in petroleum and to monopolize such commerce. The violations were alleged to have occurred over 36 years, covering the time the defendants operated as an informal pool, the Standard Oil Trust, and the Standard Oil of New Jersey holding company.

The suit against American Tobacco was filed in July 1907. While naming nearly as many defendants as the Standard Oil complaint, this case focused on the combination of the five major producers of

⁸⁷ *Swift and Co. v. United States*, 196 U. S. 375 (1905).

⁸⁸ Roosevelt's view that big business wasn't going away, but needed to serve the will of the people, not the other way around, was influenced by the so-called progressive movement. The progressive movement became particularly strong in California. Its leaders formed the Lincoln-Roosevelt League and, in 1910, succeeded in breaking the Southern Pacific stranglehold on both the governorship and the State legislature. Progressive leaders enacted State rail and utility regulation and worker compensation legislation. California progressives also believed political power should be taken out of the hands of party bosses and given directly to the people. They pushed through the initiative, referendum, and recall laws that are still an important part of the political process in California.

cigarettes and other tobacco products into a holding company in January 1890.

The American Tobacco litigation was the first to be decided at the district court level. A specially convened panel of four judges held, on a 3-1 vote, that American Tobacco was an illegal combination in restraint of interstate commerce under the Sherman Act and ordered its dissolution. The judges felt compelled to apply the literal language of the Sherman Act, but invited the Supreme Court to review the issue.⁸⁹

More than a year later, the court trying the Standard Oil case reached essentially the same result. It concluded Standard Oil was an agreement to combine competitors that reduced competition and was therefore illegal. This court also ordered the holding company dissolved.⁹⁰

Both decisions were appealed directly to the Supreme Court.⁹¹ They were decided on the same day. Fourteen years after his dissent in *Trans-Missouri Freight Ass'n*, Mr. White, as Chief Justice, repeated his views with respect to the rule of reason. He now spoke for an 8-1 majority on the Court.

The first opinion issued involved Standard Oil.⁹² The Court adopted the rationale that words used in a statute, which at the time of enactment had "a well-known meaning at common law or in the law

⁸⁹ United States v. American Tobacco Co. et al., 164 Fed. 700 (S.D. NY 1908).

⁹⁰ United States v. Standard Oil Co. of New Jersey et al., 173 Fed. 177 (E.D. Mo. 1909).

⁹¹ Some of the unusual appellate practices in antitrust cases result from the so-called Expediting Act (the Act of February 11, 1903, ch. 544, 32 Stat. 823), which provided that cases initiated by the U.S. government under the Sherman Act (and later the Clayton Act) were appealable directly, by either party, from the district court to the U.S. Supreme Court. This provision was repealed in 1984, Pub. L. 98-620, § 402(11), 98 Stat. 3358 (1984). Today, a district court may still certify an important antitrust case for direct appeal. The Supreme Court can accept or reject the district court request, 15 U.S.C. § 29.

⁹² Standard Oil Company or New Jersey et al. v. United States, 221 U.S. 1 (1911).

of this country...are presumed to have been used in that sense unless the context compels..." a different interpretation.⁹³

Then the Court found that, at the time the Sherman Act was passed, common law was well understood to only prohibit contracts and combinations that "...unduly restrain interstate or foreign commerce."⁹⁴ It concluded that a "standard of reason" was intended by Congress to be the test used to determine if contracts or conduct violate the statute.⁹⁵

The Court further explained its holding in *Standard Oil* in the American Tobacco case opinion.⁹⁶ It said that the words "restraint of trade" only include conduct, contracts, and combinations that harm the public interest by unduly restraining competition. The Sherman Act does not forbid normal contracts entered into in the normal course of business.⁹⁷

While business interests won the battle to the extent that the Court held that all contracts limiting competition were not *per se* illegal, Standard Oil and American Tobacco lost their wars. The Court held both entities engaged in unreasonable restraint of trade in violation of the Sherman Act. Both were ordered to dissolve.⁹⁸

The rule of reason remains today as the primary standard for interpreting the Sherman Act.⁹⁹ But while the concept has a nice sound, it also is a somewhat vague yardstick for measuring whether a particular course of conduct, in a specific fact situation, constitutes a legal or illegal restraint of trade.

⁹³ 221 U.S. at 59.

⁹⁴ 221 U.S. at 60.

⁹⁵ *Id.*

⁹⁶ *United States v. American Tobacco Company*, 221 U.S. 106 (1911).

⁹⁷ *Id.* at 179-180.

⁹⁸ The order to dissolve was supported by all nine justices. The majority opinions, adopting the rule of reason, were signed by eight justices. Justice Harlan dissented in both on the grounds that the Court shouldn't have abandoned the stricter standard of the earlier opinions.

⁹⁹ *All Care Nursing Service v. High Tech Staffing Services*, 135 F.3d 740, 746 (11th Cir. 1998), *cert. denied*, 526 U.S. 1016 (1999).

One early case of particular interest to agriculture provides a useful discussion of this issue. In 1906, the Chicago Board of Trade adopted a rule providing that when the exchange was closed its members could only trade certain grain futures contracts at the closing price of the last session. This rule was apparently adopted for two reasons. First, many smaller members perceived that a few large members had an unfair advantage as they were better able to hire large staffs who could trade on a continuous basis. Also, many traders were simply being worked into the ground trying to keep up with a constantly changing market. In essence, the rule brought order to the market and permitted member employees to lead a more normal life.

The Government argued that the rule was an illegal agreement among competitors to fix prices. Noted jurist Justice Louis Brandeis wrote an opinion for a unanimous Court, virtually devoid of references to precedent or other citations, upholding the rule.¹⁰⁰ Justice Brandeis reasoned that the Government's case rests:

...upon the bald assertion, that a rule or agreement by which men occupying positions of strength in any branch of trade, fixed prices at which they would buy or sell during an important part of the business day, is an illegal restraint of trade under the Anti-Trust Law. But the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all

¹⁰⁰ Chicago Board of Trade v. United States, 246 U. S. 231 (1918).

relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.¹⁰¹

The Court noted that the rule only restricted price competition during part of the day, applied to a small part of the grain shipped to Chicago each day, and had no appreciable effect on either the market price or volume of grain being traded in Chicago or elsewhere.¹⁰² It also commented favorably on the impact of the rule in leveling the field for country dealers, permitting trades to occur at smaller margins for grain merchants, and shortening the time of great stress each day for workers.¹⁰³

The general test of reasonableness enunciated in *Chicago Board of Trade*--whether the restraint under review promotes or suppresses competition--and the list of facts to be considered in making that determination are still used today. But the rule of reasonableness is not the only yardstick for measuring legality under the antitrust laws.

Rule of *Per Se* Illegality

The rule of *per se* illegality arose almost contemporaneously with the rule of reason. They complement each other as tests for interpreting the broad language of the Sherman Act. Today, they form the basis for analyzing the legality of virtually all actions and agreements that restrain trade.

The rule of *per se* illegality states that some conduct is so inherently anticompetitive that no investigation as to its "reasonableness" is necessary. Simply doing the deed is to restrain trade or attempt to monopolize in violation of the Sherman Act. This report discusses precedent under the *per se* standard in some detail because of the important implications of the rule for producer marketing associations.

¹⁰¹ *Id.* at 238.

¹⁰² *Id.* at 239-240.

¹⁰³ *Id.* at 240-241.

The rationale for the rule of *per se* illegality is well stated in another case involving railroad conduct. The Northern Pacific Railway received about 40 million acres of land when it built its line from Lake Superior to the Puget Sound during the 1860s and 1870s. In succeeding years, most of this land was sold or leased to others for business development. Many of these contracts included "preferential routing" clauses which required the land owner or lessee to ship goods produced or manufactured on the land on the Northern Pacific, provided that its rates were no higher than those of competing carriers.

In 1949, the Justice Department filed suit charging that the "preferential routing" clauses were illegal restraints of trade under Section 1 of the Sherman Act. A U.S. District Court Judge granted the Government's request for summary judgment and enjoined the railroad from enforcing its "preferential routing" clauses.¹⁰⁴

The railroad appealed directly to the Supreme Court. In affirming the lower court order, the Court found these clauses stifled competition by denying competitors access to these customers on the same terms offered by the Northern Pacific. The Court said:

...(T)here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as re-

¹⁰⁴ United States v. Northern Pacific Railway Co., 142 F. Supp. 679 (W.D. Wash., N.D. 1956). The judge, using "quid pro quo" analysis, held that making a sale or lease contingent on agreeing to ship over the Northern Pacific was a tying arrangement declared *per se* illegal in *International Salt Co. v. United States*, 332 U.S. 392 (1947), and other cases cited in the opinion.

lated industries, in an effort to determine at large whether a particular restraint has been unreasonable...¹⁰⁵

The first justification for the *per se* rule is that it is a useful deterrent to undesirable conduct. When counsel can tell clients that certain activity, such as agreeing on prices with your competitors, is just as illegal as robbing a liquor store, the clients are likely to discard the strategy. If a client is told certain questionable conduct is only illegal if done in an "unreasonable" manner, some clients are tempted to want to explore the outer limits of how much they can get away with.

The second justification recognizes that antitrust litigation frequently devours vast amounts of time and resources of the parties involved, be they private or Government entities. When conduct is so egregious that it will almost never be found reasonable, the Court has said the benefit to society of avoiding such trials exceeds the cost to that rare defendant who might have been able to show such conduct was justified.

It is important to remember that the rules of reasonableness and *per se* illegality are not separate and distinct. As the Court stated in *Northern Pacific Railway*, *per se* illegal conduct is activity "...conclusively presumed to be unreasonable."¹⁰⁶ It is activity that might be characterized as unreasonable under any circumstances.

Both rules measure compliance with the same basic standard. As the Court said in a subsequent decision, "Both *per se* rules and the Rule of Reason are employed 'to form a judgment about the competitive significance of the restraint.' (Citation omitted)... (W)hether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same--whether or not the challenged" conduct restricts competition.¹⁰⁷

As noted in *Northern Pacific Railway*, practices considered "...unlawful in and of themselves are price fixing, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 210; division of markets,

¹⁰⁵ *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5 (1958).

¹⁰⁶ *Id.* at 5.

¹⁰⁷ *NCAA v. Board of Regents of Univ. Of Okla.*, 468 U.S. 85, 103-104 (1984).

United States v. Addyston Pipe & Steel Co., 85 F. 271, aff'd, 175 U.S. 211; group boycotts, *Fashion Originators' Guild v. Federal Trade Comm'n*, 312 U.S. 457; and tying arrangements, *International Salt Co. v. United States*, 332 U.S. 392.¹⁰⁸

The first three of these situations will now be examined in light of their significance for cooperatives.¹⁰⁹

Price Fixing

In a sense, *per se* illegality was first espoused by the Supreme Court in the *Trans-Missouri Freight Ass'n* and *Joint Traffic Ass'n* decisions where it held any agreement, like price fixing, that has a "direct and immediate effect... upon inter state commerce" is invalid.¹¹⁰

Even in *Standard Oil Co.* the Court recognized that price fixing among competitors is in "nature, character and necessary effect" adverse to competition and, therefore, subject to a "conclusive presumption" of invalidity.¹¹¹

After the rule of reason was adopted in *Standard Oil Co.*, cartels routinely argued that even if they were fixing prices they weren't in violation of the Sherman Act because they were only agreeing on "reasonable" prices. Companies with more than 80 percent of the manufactured pottery market took this position when appealing criminal convictions for fixing prices and limiting sales to specific jobbers from 1919 to 1922.

The U.S. Court of Appeals for the Second Circuit reversed the conviction, holding *incorrect* an instruction to the jurors that if they

¹⁰⁸ *Northern Pacific Railway Co. v. United States*, 356 U.S. at 5.

¹⁰⁹ The fourth instance of conduct considered illegal *per se*, tying arrangements, has not been an issue in cases against cooperatives. A tying arrangement occurs when a seller, having one product a buyer wants, refuses to sell it alone and insists any buyer who wants it must also purchase another product. For example, *International Salt* refused to sell salt to customers unless they also purchased expensive salt dispersing equipment from it. To date, cooperatives have not been challenged on the grounds that they engaged in tying arrangements.

¹¹⁰ *United States v. Joint Traffic Ass'n*, 171 U.S. 505, 568 (1898).

¹¹¹ *Standard Oil Co. V. United States*, 221 U.S. 1, 65 (1911).

found price fixing, then they should not consider whether the prices fixed were reasonable.¹¹²

The U.S. Supreme Court reinstated the verdicts. In the process, it laid to rest the possible defense that price fixing was permissible if the agreed upon prices were "reasonable." The Court said:

The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement... Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed...¹¹³

Trenton Potteries involved defendants who had sufficient market power to adversely effect competition in a major way. The Court expanded the scope of the *per se* rule in a subsequent opinion involving, once again, the petroleum industry.

During the depression, oil refining was a depressed industry. Major refiners were fully integrated to the retail level. They could respond to changes in demand by either changing the amount of product they placed in the market or by changing prices. But there were also independent refiners without production and storage capacity. They were often forced to offer product to retailers as it came out of the refinery at prices, called spot market prices, that could lower the price throughout the market and limit the strategies available to the majors.

¹¹² *Trenton Potteries Co. v. United States*, 300 Fd. 550 (2nd Cir. 1924), *rev'd*, 273 U.S. 392 (1927).

¹¹³ *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1927), *rev'g*, 300 Fd. 550 (1924).

Several major midwest refiners began a concerted program of bidding for and buying gas on the spot market to hold spot market prices at a level they regarded as appropriate. They were charged with criminal conduct in violation of Section 1 of the Sherman Act. After a jury trial, some defendants were found not guilty and others were convicted.¹¹⁴ Those found guilty appealed to the Court of Appeals for the Seventh Circuit. That court reversed and remanded the case to have the remaining convictions overturned.¹¹⁵

The Government appealed to the U.S. Supreme Court, which reversed the 7th Circuit and upheld the convictions.¹¹⁶ The Court made several statements clarifying and expanding the scope of the Sherman Act.

1. First, it is significant that the Court held the conduct in this case--sporadically buying some product off the market--amounted to price fixing at all. Most previous cases had dealt with an agreement among competitors on the actual price(s) they would accept for goods they sold. The Court, however, made it clear "these programs were a species of price-fixing or manipulation...wholly consistent with the maintenance of a floor under the market.... (T)he machinery employed by a combination for price-fixing is immaterial."¹¹⁷

2. Second, the Court said that is was also not important "... that the prices paid by the combination were not fixed in the sense that they were uniform and inflexible."¹¹⁸ Just as an agreement to charge or pay the same prices is illegal under the Sherman Act, so is an agreement

¹¹⁴ See, *United States v. Standard Oil Co. (Indiana)*, 23 F. Supp. 937 (W.D. Wis. 1938), upholding some of the convictions and overturning others.

¹¹⁵ *United States v. Socony-Vacuum Oil Co.*, 105 F.2d 809 (7th Cir. 1939), *rev'd*, 310 U.S. 150 (1940).

¹¹⁶ *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), *rev'g*, 105 F.2d 809. The author isn't sure if this is significant, but it is interesting that this opinion was released the same day as *Tigner v. Texas*, 310 U.S. 141, upholding a State antitrust law against a challenge that a provision excluding agricultural producers when marketing their farm products violated the equal protection clause of the Fourteenth Amendment.

¹¹⁷ 310 U.S. at 223.

¹¹⁸ 310 U.S. at 222.

"...to raise or lower prices whatever machinery for price-fixing was used."¹¹⁹

3. Third, the Court said that the Government doesn't have to establish that the challenged conduct is the sole reason for a price rise to prove the conduct illegally restrains trade. That other factors "may have contributed to that rise and stability of the markets (are) immaterial... Proof that there was a conspiracy, that its purpose was to raise prices, and that it caused *or contributed* to a price rise is proof of the actual consummation or execution of a conspiracy under § 1 of the Sherman Act." (emphasis added)¹²⁰

4. Fourth, the Court found "the fact that sales on the spot market were still governed by some competition is of no consequence."¹²¹ The test the Court applied is that conduct does not have to eliminate competition from the market to be illegal, but only needs to clearly curtail it.

5. Fifth, the Court determined again that arrangements fixing prices can not be justified as designed to diminish some business-perceived evil of competition. Using the phrase "*per se*" for the first time, the Court said:

Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive. It has not permitted the age-old cry of ruinous competition and competitive evils to be a defense to price-fixing conspiracies. It has no more allowed genuine or fancied competitive abuses as a legal justification for such schemes than it has good intentions of the members of the combination... Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*.¹²²

¹¹⁹ *Id.*

¹²⁰ 310 U.S. at 219-220.

¹²¹ 310 U.S. at 220.

¹²² 310 U.S. at 221-223.

6. Sixth, the Court noted that offending parties don't need to have monopoly power to violate Section 1 of the Sherman Act:

Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of the market. The (Sherman) Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference.¹²³

7. Seventh, the *Socony-Vacuum* opinion includes extensive dictum that a price fixing agreement violates Section 1 regardless of whether the conspirators possess the power to affect prices or have any effect on the price prevailing in the market. The Court said:

[We do] not mean that both a purpose and a power to fix prices is necessary for establishment of a conspiracy under § 1 of the Sherman Act. That would be true if power or ability to commit an offense was necessary in order to convict a person of conspiring to commit it. But... conspiracies under the Sherman Act are not dependent on any overt act other than the act of conspiring... In view of these considerations a conspiracy to fix prices violates § 1 of the Act though... it is not established that the conspirators had the means available for accomplishment of their objective.¹²⁴

The rule that price-fixing is illegal *per se* raises significant problems for producer marketing associations. What do producers do when they decide to jointly market their products through a cooperative marketing association? They agree on the prices they will charge and other terms of trade. Absent some sort of special protection, these actions constitute conduct that is *per se* illegal under Section 1 of the Sherman Act.

¹²³ 310 U.S. at 221.

¹²⁴ 310 U.S. at 224-225, n.59.

Thus, the importance of the Capper-Volstead Act becomes apparent. Without it, producers who market their products on a cooperative basis would be in constant danger of prosecution and conviction for violating the Sherman Act.

While not as crucial to cooperatives as the rules concerning price agreements, the ability to engage in other conduct labeled illegal *per se* can also be important to their overall ability to compete in the marketplace.

Trade Territory Allocation

The U.S. Supreme Court has held that competitors who agree not to compete with each other in geographic territories, like those that agree not to compete on the basis of price, have committed a *per se* violation of Sec. 1 of the Sherman Act. The leading case in this area, *United States v. Topco Associates*,¹²⁵ is particularly important to cooperatives. The defendant was a purchasing cooperative that provides food products to its grocery store members, a type of cooperative association without the special antitrust protection accorded agricultural producer marketing associations.

Topco was founded in the 1940s by a group of small, local grocery chains to provide themselves with high quality merchandise under private labels so they could compete more effectively with larger regional and national chains. No grocery business was conducted under the Topco name and it didn't manufacture any products or own any warehouses. Its basic function was to serve as a purchasing agent for its members. By the mid-1960s, Topco purchased more than 1,000 different food and related nonfood items, most of which were identified with brand names owned by Topco, for its members. The products were usually shipped directly from the supplier to facilities of the members.

Topco acknowledged that part of its organizational structure was an agreement, included in its bylaws, that members would be assigned exclusive rights to market Topco products in separate geographic territories and would not enter the territory of another member without the consent of that member. The United States brought an action in

¹²⁵ *United States v. Topco Associates*, 405 U.S. 596 (1972).

Federal district court seeking an injunction prohibiting Topco members from agreeing not to compete in the same territory.

The trial court agreed with Topco that its members could not compete effectively with the large chain stores without private label products, that joint purchasing was necessary because the members were all too small to establish their own private label, and that the exclusive territorial arrangements were reasonably related to the joint purchasing arrangement as each individual member would be loath to use a so-called private label which other retailers in the same area could share. The court concluded that the territorial allocation scheme was not a *per se* violation of antitrust law. Further, it found that whatever anti-competitive effect the agreement had on competition in Topco brands was "far outweighed by the increased ability of Topco members to compete with both the national chains and other supermarkets operating in their respective territories."¹²⁶ The court entered a judgment for Topco.

The United States appealed directly to the Supreme Court. The Court did not challenge most of the findings by the trial court, but ruled that the case should have been decided under the rule of *per se* illegality, not a rule of reason analysis. The lower court opinion was reversed.¹²⁷

Topco is important for a couple of reasons. First, of course, it involves a cooperative. So it removes any ambiguity that might exist as to whether cooperatives as a whole are covered by antitrust law.

Second, the decision makes it clear that horizontal territorial limitations on competition are illegal *per se*. While the Court had made the point in several earlier decisions,¹²⁸ these cases usually also involved price fixing or conspiracies by major players in an industry. In *Topco*, all of the conspirators were relatively small firms trying to survive and compete with the industry giants. The case applies the *per se* rule to market division arrangements regardless of whether they are linked to price fixing or other restraints. It also holds that the

¹²⁶ United States v. Topco Associates, 319 F. Supp. 1031, 1043 (N.D. Ill. 1970), *rev'd* 405 U.S. 596 (1972).

¹²⁷ United States v. Topco Associates, 405 U.S. 596 (1972), *rev'g*, 319 F. Supp. 1031 (N.D. Ill. 1970).

¹²⁸ *Cited at* 405 U.S. 608.

Government need not show significant market power on the part of the conspirators and that it is irrelevant that the agreement facilitates competition in some market other than the one in which the restraint works.

A later private litigation by a dissident member attacked a cooperative of specialty food wholesalers that also allocated trade territories. The cooperative was unsuccessful in convincing the trial court judge to rule that *Topco* was outdated precedent and that horizontal agreements to divide territories should be judged by the rule of reason.¹²⁹

These decisions further illustrate the importance of Capper-Volstead to agricultural producers and their marketing cooperatives. The farmer-members are independent business people subject to the antitrust limits in Section 1 of the Sherman Act. The courts have held that the anti-competitive aspects of agreements to keep out of each other's trade territory, as a matter of law, outweigh any justifications. While this rule has been applied to purchasing associations without Capper-Volstead protection, it has not been a barrier to coordination among producers and their associations that are covered by Capper-Volstead.

Group Boycotts, Refusals to Deal

A third activity that the courts have identified as illegal *per se* is the group boycott. A boycott usually involves concerted action by a group of persons at the same level of activity to keep other competitors out of their market. The illegal conduct can involve either the purchase of products from suppliers or the sale of finished goods to customers.

For example, assume a group of tomato canners is facing potential competition from a new entrant into their line of business. One course of action they might take is to let the tomato growers know that if they sell product to the new canner they will never be able to sell to any member of the group again. A second possible tactic is to tell the grocery chains and other purchasers of canned tomato products that if

¹²⁹ *Bascom Food Products v. Reese Finer Foods*, 715 F. Supp. 616, 632 (D.N.J. 1989).

they buy from the new firm, then they will no longer be able to buy from any member of the group.

The boycotting group members, in effect, say to their suppliers or to their customers, "If you don't stop dealing with non-group members, we will stop dealing with you."

If the supplier or customer believes it is more important to continue trading with group members than with non-group members, the threat, whether overt or implied, will be effective. And if enough suppliers or customers refuse to deal with nongroup members, the boycott will be successful and the victims of the boycott will be foreclosed from competing with the perpetrators of the boycott.

Group boycotts have been contentious for many years. One early case involved an association of retail lumber dealers that published a list of lumber wholesalers who sold directly to consumers. This was found to be an illegal restraint of trade because it both tended to prevent association members from dealing with those wholesalers and to prevent wholesalers from selling to consumers. The Court held:

A retail dealer has the unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself,...

When the retailer goes beyond his personal right, and, conspiring and combining with others of like purpose, seeks to obstruct the free course of interstate trade and commerce and to unduly suppress competition by placing obnoxious wholesale dealers under the coercive influence of a condemnatory report circulated among others, actual or possible customers of the offenders, he exceeds his lawful rights, and such action brings him and those acting with him within the condemnation of the (Sherman) act...¹³⁰

¹³⁰ Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600, 614 (1914). Earlier, the Court had held illegal a boycott by labor union members against employers under its "literal language" approach to Sherman. *Loewe v. Lamlor*, 208 U.S. 274 (1908). See also, *United States v. King*, 229 Fed. 275, 279 (D. Mass. 1915).

Group boycotts were formally tabbed illegal *per se* in *Fashion Originators' Guild of America v. FTC*.¹³¹ The Fashion Guild was an association of manufacturers of textiles and women's clothing who tried to protect their original creations by refusing to sell to businesses that produced or sold copies of their garments. The Federal Trade Commission (FTC) brought an antitrust enforcement action against the Guild and ordered Guild members to stop refusing to deal with these businesses.

On appeal to the U.S. Supreme Court, the Guild argued that its practices were reasonable and necessary to protect against piracy of original designs. It challenged the FTC's refusal to hear much of the evidence the Guild wanted to present on this subject.

The Court upheld the FTC's handling of the evidence, stating: "Under these circumstances it was not error to refuse to hear the evidence offered, for the reasonableness of the methods pursued by the combination to accomplish its unlawful object is no more material than would be the reasonableness of the prices fixed by unlawful combination."¹³²

A third case involving a group boycott, *Klor's v. Broadway-Hale Stores*,¹³³ is of particular interest to small businesses. Klor's, a small retail store on Mission Street in San Francisco, sold consumer electronic and appliance products. Broadway-Hale, a chain of department stores, had a store next door to Klor's that also sold consumer electronic and appliance products. Klor's sued Broadway-Hale and several manufacturers and distributors of such products alleging Broadway-Hale pressured the suppliers not to sell products to Klor's or to sell to it only at discriminatory prices and highly unfavorable terms.

Broadway-Hale did not dispute the allegations. Rather, it sought summary judgment and dismissal of the complaint for failure to state a cause of action. It argued that the boycott did not harm competition because there were numerous other stores within a short distance of its Mission Street store that sold such products in competition with it. A

¹³¹ *Fashion Originators' Guild of America v. Federal Trade Commission*, 312 U.S. 457 (1941).

¹³² *Id.* at 468.

¹³³ *Klor's v. Broadway-Hale Stores*, 359 U.S. 207 (1959).

Federal district court judge granted the motion and the 9th Circuit Court of Appeals affirmed,¹³⁴ using logic that can best be described by the cliché "antitrust law protects competition, not competitors."

The Supreme Court disagreed and remanded the case for a trial, stating:

Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category. They have not been saved by allegations that they were reasonable in the specific circumstances, nor by a failure to show that they "fixed or regulated prices, parceled out or limited production, or brought about a deterioration in quality." (citations omitted)

...

... This combination takes from Klor's its freedom to buy appliances in an open competitive market and drives it out of business as a dealer in the defendants' products... It interferes with the natural flow of interstate commerce... As such it is not to be tolerated merely because the victim is one merchant whose business is so small that its destruction makes little difference to the economy. Monopoly can as surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups.¹³⁵

Two leading cases on the issue of group boycotts have involved nonagricultural cooperatives. The first concerned the Associate Press (AP), a cooperative news gathering and disseminating service owned by 1,550 United States daily newspaper members.¹³⁶ AP's bylaws prohibited members from selling news to nonmembers and granted each member powers to block nonmember competitors from joining

¹³⁴ Klor's v. Broadway-Hale Stores, 255 F.2d 214 (9th Cir. 1958).

¹³⁵ Klor's v. Broadway-Hale Stores, 359 U. S. at 212-213.

¹³⁶ AP was created in 1848 by six New York City newspapers to negotiate access and rates with telegraph companies. While still owned by U.S. newspapers, it now serves more than 15,000 news organizations, including broadcasters, in 112 countries.

AP. The United States sought an injunction blocking AP from enforcing these bylaws on the grounds that they constituted a conspiracy to restrain trade and an attempt to monopolize in violation of Sec. 1 of the Sherman Act. The District Court awarded summary judgment to the Government¹³⁷ and the case was appealed directly to the Supreme Court.

The Supreme Court affirmed the lower court ruling.¹³⁸ The Court reasoned that the effect of these bylaws was to empower each individual AP member to block any nonmember newspaper from the opportunity to purchase news from AP or any of its members. The Court noted that the owner of property can choose his business associates and decide for himself with whom he will or won't deal. However, the court stated:

The Sherman Act was specifically intended to prohibit independent businesses from becoming "associates" in a common plan which is bound to reduce their competitor's opportunity to buy and sell things in which the groups compete. Victory of a member of such a combination over its business rivals achieved by such collective means cannot consistently with the Sherman Act or with practical, everyday knowledge be attributed to *individual* "enterprise and sagacity"; such hampering of business rivals can only be attributed to that which really makes it possible--the collective power of an unlawful combination.¹³⁹

Although it appears to be dictum,¹⁴⁰ the Court mentioned that the fact that AP operated as a cooperative did not insulate it from antitrust liability. The Court said, "It is significant that when Congress has

¹³⁷ United States v. Associated Press, 52 F. Supp. 362 (S.D. NY 1943).

¹³⁸ Associated Press v. United States, 326 U.S. 1 (1945).

¹³⁹ *Id.* at 15.

¹⁴⁰ "Dictum" is an incidental comment in a judicial opinion that is not directly related to the issue(s) before the court. In this case, as AP is not an agricultural marketing cooperative, it has no special status under antitrust law. So the Court's statements about AP operating as a cooperative are not directly relevant to whether its conduct is legal or not.

desired to permit cooperatives to interfere with the competitive system of business, it has done so expressly by legislation."¹⁴¹

This case doesn't overturn the general rule that a business, including a cooperative without Capper-Volstead protection, is free to choose not to sell to any potential customer in the normal course of its business. However, allowing each member to block the association and other members of the association (including a Capper-Volstead cooperative) from doing business with one of its competitors may be vulnerable to challenge under antitrust laws.

The second case involved Northwest Wholesale Stationers, a wholesale purchasing cooperative of office supply retailers in the Pacific Northwest. Nonmember retailers were permitted to purchase supplies from the cooperative. But since patronage refunds were only paid to members, members effectively purchased supplies at a lower price than nonmembers. Northwest's membership voted to expel one of its members--without notice, a hearing, or any other opportunity to challenge the decision.¹⁴²

The expelled member, Pacific Stationary & Printing Co., sued in Federal district court alleging the expulsion without procedural protections constituted a group boycott that limited its ability to compete and should be considered a *per se* violation of Section 1 of the Sherman Act. The district court rejected application of the *per se* rule. It applied rule of reason analysis, found no anticompetitive effect on the basis of the record, and awarded a summary judgment for the cooperative.

The Court of Appeals for the 9th Circuit reversed that decision, holding that rule of reason analysis is only appropriate where a

¹⁴¹ *Id.* at 14. This sentence is marked by a footnote referring to the protection given farm cooperatives by the Capper-Volstead Act, 7 U.S.C. 291, 292.

¹⁴² Apparently a retail store member was purchased by another firm that operated as both a wholesaler and a retailer. The sparse record in the case suggests the purchaser failed to notify Northwest that it had acquired the "member" as required in Northwest's bylaws and Northwest alleged that was the basis for the action. The former member asserted the expulsion resulted from its decision to maintain a wholesale operation.

cooperative provides safeguards sufficient to prevent arbitrary expulsion. It found the expulsion *per se* illegal as a concerted refusal to deal, or group boycott.¹⁴³

The Supreme Court reversed the 9th Circuit.¹⁴⁴ The Court first rejected the theory that application of the *per se* rule should turn on whether procedural safeguards are employed.¹⁴⁵

The Court said that the expulsion, however carried out, was not the type of practice which warrants *per se* condemnation. It noted that cases finding *per se* illegality involved a boycott that "cut off access to a supply, facility, or market necessary to enable the boycotted firm to compete... In addition, the practices were generally not justified by plausible arguments that they were intended to enhance overall efficiency and make markets more competitive."¹⁴⁶

The Court recognized that the presence of a purchasing cooperative in a market often furthers economic efficiencies by enabling its members to realize "economies of scale" in the purchase and handling of goods.¹⁴⁷ Since a purchasing cooperative has a legitimate, pro-competitive function, it is not "a form of concerted activity characteristically likely to result in predominantly anticompetitive effects."¹⁴⁸ Reasoning that a cooperative, to function effectively, must have rules for admitting and expelling members, the Court noted that a member's expulsion "does not necessarily imply anticompetitive animus and thereby raise a probability of anticompetitive effect."¹⁴⁹

¹⁴³ Pacific Stationery & Printing Co. v. Northwest Wholesale Stationers, 715 F. 2d 1393 (9th Cir. 1983); *rev'd*, Northwest Wholesale Stationers v. Pacific Stationery & Printing, 472 U.S. 284 (1985).

¹⁴⁴ Northwest Wholesale Stationers v. Pacific Stationery & Printing, 472 U.S. 284 (1985); *rev'g*, Pacific Stationery & Printing Co. v. Northwest Wholesale Stationers, 715 F. 2d 1393 (9th Cir. 1983).

¹⁴⁵ 472 U.S. at 293.

¹⁴⁶ *Id.* at 294.

¹⁴⁷ *Id.* at 295.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 296.

In remanding the case for evaluation under the rule of reason, the Court made clear that a member expulsion violates antitrust laws only if it is likely to have a substantial anticompetitive effect. Furthermore, an anticompetitive effect results only if continued membership is essential to the member's ability to compete. The court concluded that when a member "challenges expulsion from a joint buying cooperative, some showing must be made that the cooperative possesses market power or unique access to a business element necessary for effective competition."¹⁵⁰

Northwest Wholesalers should not be read as creating an exemption for purchasing cooperatives to engage in group boycotts. This case can be distinguished from *Associated Press* because the cooperative here did not have a dominant position in the industry and the expelled member was not denied access to the cooperative's services, only to patronage refund allocations.

In a subsequent litigation, a dissident member of a purchasing cooperative of specialty food wholesalers alleged the association's decision to refuse to continue selling him products constituted a group boycott that was a *per se* violation of Section 1 of the Sherman Act. The trial court judge determined the cooperative's products were so well received in the trade that the plaintiff couldn't compete in the business without them.

The judge, relying on the "essential to compete" exception to the general rule in *Northwest Wholesale Stationers*, granted plaintiff's request for a preliminary injunction requiring the cooperative to sell him products. The judge held that plaintiff would likely prevail on the merits and suffer irreparable harm if denied access to the cooperative's products during the time before a trial could be held.¹⁵¹

In two additional decisions, Federal courts have sustained cooperative expulsions of members from antitrust attack. The U.S. Court of Appeals for the Ninth Circuit affirmed a trial court entry of a summary judgment against a member expelled from a farmer marketing cooperative for cause (delivering product outside his

¹⁵⁰ *Id.* at 298.

¹⁵¹ *Bascom Food Products v. Reese Finer Foods*, 715 F. Supp. 616, 634 and 641 (D.N.J. 1989).

marketing agreement). The expelled member was accorded a hearing and other procedural safeguards. The court essentially determined the expelled member had no legal basis to challenge his expulsion.¹⁵²

A Federal district court reached a similar conclusion in antitrust litigation initiated by dairy farmers expelled from their dairy herd improvement association (DHIA).¹⁵³ The expelled members asked for a ruling that their expulsion was a group boycott and refusal to deal that is illegal *per se*. The court determined that they would have to prove the unreasonableness of the DHIA's conduct. An issue in the case concerned whether plaintiffs intentionally violated DHIA rules to subvert its testing procedures. The court reasoned, "A contrary rule would render virtually any attempt by a DHIA to enforce its standards illegal under the Sherman Act."¹⁵⁴

Thus, cooperatives have flexibility to enforce their own rules as to who may be members and customers, so long as they are reasonable, without being liable for engaging in an illegal group boycott or concerted refusal to deal. But that protection probably does not extend to such tactics involving other participants in the industry in which they operate.

¹⁵² Whitney v. National Grape Cooperative Association, No. 87-3854 (9th Cir. March 14, 1988), noted as unpublished at 842 F.2d 336.

¹⁵³ Carleton v. Vermont Dairy Herd Improvement Ass'n, 1992-1 Trade Cases (CCH) ¶ 69,761 (D. Vt. 1991).

¹⁵⁴ 1992-1 Trade Cases (CCH) at 67,488-67,489.

CHAPTER 3. SHERMAN TO CAPPER-VOLSTEAD, 1890-1922

The time between enactment of the Sherman Act and the Capper-Volstead Act was one of great activity and change. The progressive movement grew in importance with the rise of public resentment toward large, abusive businesses. Farmer marketing cooperatives became important participants on several lines of business. States adopted their own antitrust laws and the first laws specifically authorizing the formation of producer cooperatives. And the Federal Government enacted additional legislation reining in the power of big business and recognizing the special needs of producer associations within the context of antitrust law.

COOPERATIVE GROWTH

Some persons who have attacked the special antitrust status of farmer cooperatives under the Capper-Volstead Act, particularly cooperatives with significant market power, have maintained that "when the act was passed in 1922, cooperatives were small and had limited market power, so Congress did not foresee the need to provide in the act explicit limitations on the size of cooperatives."¹⁵⁵

Reynolds points out that it was true that most cooperatives were small, local organizations when the Sherman Act was passed in 1890. However, beginning about 1895, larger centralized cooperatives and federated regional associations began to emerge. By the time Congress was considering legislation that became the Capper-Volstead Act, cooperatives were a major national presence in several segments of the food industry. For example:

- From 1913 through 1921, the share of California citrus shipped by the California Fruit Growers Exchange (Sunkist) grew fairly steadily from 61.5 percent to 72.5 percent.

¹⁵⁵ Bruce Reynolds, *Many Early Co-ops Had Clout*, 46 *Farmer Cooperatives*, Jan.-Feb. 1980, at 21.

- From 1913 through 1921, the share of raisins shipped by the California Associated Raisin Company (Sun-Maid) varied from 89.7 percent (1913) to 76.8 percent (1916) and held fairly constant at around 86 percent from 1919 through 1921.
- From 1917 through 1921, the share of cranberries handled by the American Cranberry Exchange increased from 56.0 percent to 66.0 percent.¹⁵⁶

Debate on the Capper-Volstead Act, which is reviewed in detail later in this report, is filled with references to the market power of these and other producer associations, some on the national level and others with considerable sway in local markets. A brief history of these entities will lay some foundation for the battles ahead.

Creameries and Cheese Plants

Noted cooperative historian Joseph Knapp reports that by 1896 cooperative creameries and cheese plants were well established in the United States. They were essentially local in nature, providing butter and cheese to people living near their plants. However, in the early 1900s non-cooperative firms began building centralized creameries that acquired large volumes of cream from a wide geographic area and could provide branded-name butter to retail stores, at lower cost than the local cooperatives. Most of the savings realized by the noncooperative firms were in wholesaling and jobbing, not in manufacturing.¹⁵⁷

Several federated butter marketing associations were functioning by 1921. In 1917, several California cooperatives serving the Los Angeles market formed the Challenge Cream and Butter Association. In 1918, the Dairy Extension Department of the University of Minnesota began a program to federate local organizations in the State to produce and market a uniform product. By 1921, more than one-half of the 645 cooperative creameries in Minnesota had joined the

¹⁵⁶ Reynolds at 21-22.

¹⁵⁷ Joseph G. Knapp, *The Rise of American Cooperative Enterprise: 1620-1920* (Danville, IL: The Interstate Printers & Publishers, 1969), at 216.

Minnesota Cooperative Creamery Association, later known by its Land O' Lakes brand.¹⁵⁸

Cooperative cheese factories also began marketing on a large-scale federated basis. As early as 1904, several cheese cooperatives in Tillamook County, Oregon, hired a common sales agent to market their products in West Coast cities. This success led nine such associations to hire an inspector to help develop more uniform, higher quality products. By 1921, 25 local cheese factories were members of the Tillamook County Creamery Association and, marketing under the "Tillamook" label, became the premier provider of cheese throughout the West.

By 1919, 120 members of the Wisconsin Cheese Producers' Federation were marketing 14 million pounds per year through their cooperative.¹⁵⁹

Fluid Milk

In 1907, dairy leaders began an attempt to organize all of the milk producers serving the New York City market. While membership grew through the years, little was accomplished by the Dairymen's League until 1916 when its executive committee took the bold step of setting a minimum price that members expected for their milk. Distributors refused to pay it, and the association called for members to withhold their milk from the market. This boycott enjoyed widespread support from nonmembers as well as association members, and after 11 days the handlers agreed to the association demands.

Milk prices were subject to war-induced government controls during 1917 and 1918. When controls were lifted in early 1919, a second holding action was called to obtain a higher price for producers. After 18 days, this boycott was also successful and the reputation and membership of the Dairymen's League climbed again. Similar associations formed and also organized boycotts, with generally good results for producers in Boston, Chicago, Cincinnati and Pittsburgh.

¹⁵⁸ *Id.* at 217.

¹⁵⁹ *Id.* at 218-219.

The rapid growth of fluid milk associations was viewed with alarm by handlers and some Government leaders who feared the producers would achieve monopoly status and begin to act like the industrial trusts. Several suits attacking dairy cooperatives as restraints of trade were filed. These suits discouraged farmers from joining and led the cooperatives in 1916 to form a political action arm, the National Milk Producers Federation. This new political association became a key player in enhancing Federal policy support for cooperative marketing.¹⁶⁰

California Fruit Growers Exchange¹⁶¹

Beginning in 1893, California citrus growers worked to develop an effective marketing arm, finally forming the California Fruit Growers Exchange in 1905. It consisted of local grower cooperative associations which organized on a federated basis into a single marketing exchange. While it began as simply a common sales agent, in time it developed programs to solve a number of grower problems-- control of citrus pests and diseases, the collection of freight claims, the high cost of packing materials, etc.

Association President F. Q. Story was one of the first cooperative executives to grasp the power of advertizing. While he had a difficult time convincing his farmer directors to spend any money, in 1905 they authorized \$250 to promote Exchange fruit in England and Continental Europe. Two years later, \$10,000 was approved to test advertising of oranges in Iowa.

This experiment proved that advertising oranges worked. Now Story saw the need for a trademark. This led to the adoption, in 1908, of the "Sunkist" brand, which has become synonymous with Exchange fruit. By this time the Exchange was already handling 56 percent of all citrus shipments from California.

Under the leadership of General Manager G. Harold Powell, the decade from 1912-1922 was one of increased centralization and efficiency for the Exchange. The local associations gradually, sometimes grudgingly, relinquished their autonomy as they realized a

¹⁶⁰ *Id.* at 219-223.

¹⁶¹ This subsection is based on Knapp, pp. 237-272.

single strong marketing entity offered the greatest returns to their members. As the industry boomed, production began to outpace new markets. In 1920, the Exchange launched a research department to develop alternative uses for fruit not fit for the fresh market.

Thus, as Congress considered the Capper-Volstead Act, it was well aware of "Sunkist" and the strong presence it commanded in the citrus industry.

California Associated Raisin Company¹⁶²

Like the citrus growers, the raisin grape growers tried, unsuccessfully, to develop a successful marketing association during the 1890s and early 1900s. By 1912, the raisin industry was totally demoralized. Prices didn't cover the cost of production. Packers and other businessmen in Fresno, whose prosperity was closely tied to that of the raisin growers, helped develop an association strong enough to control the marketing of a large fraction of the raisin crop.

A producer association named the California Associated Raisin Company devised a marketing plan under which growers would agree to pledge their crops to the association for 3 years, subject to renewal by the association for 2 more years. The growers were promised fixed minimum prices for their production. The plan would be abandoned if less than 60 percent of the state's raisin acreage joined the effort. By April 1, 1913, 76 percent of the raisin acreage was covered by such contracts.

The organizers also departed somewhat from traditional cooperative organization. Stock was sold to bankers and other non-producer businessmen in the area, as well as to growers. To make the stock attractive, it paid an 8 percent annual dividend. The widespread sale of dividend-paying stocks was deemed necessary to raise enough capital to be effective marketers and also unified the community behind the association.

The association also adopted a controversial governance structure. All stock was subject to a voting trust agreement that placed control in

¹⁶² This portion of the report is based on both Knapp, pp. 294-299, and a paper by Victoria A. Saker prepared for presentation at the Law and Society Annual Meetings, June 10, 1989, in Madison, Wisconsin.

the hands of 25 trustees who in turn elected 7 directors to oversee the organization. This arrangement was similar to the one used by Standard Oil and led detractors to refer to the association as "the raisin trust."

Starting with a dominant position in the market and skilled, aggressive management, the association quickly secured a substantial price increase for the growers. Faced with production capacity that exceeded demand, it replicated the advertising program of the Citrus Exchange, launching the "Sun Maid" trademark in 1916.

The association first tried to secure a set industrywide price. When the packers (firms who bought grapes, packed them, and shipped them to distant markets) couldn't agree on how to respond, the association signed up packers on an individual basis. The packers hoped the association would use their services and not threaten them as a direct competitor.

The association's status under the antitrust laws was called into question almost as soon as it began operation. Buyers immediately called the Department of Justice and demanded an investigation of this new association. When the association leased a large packing plant and began processing part of the 1913 crop, the packers joined in the protests.

In October 1913, the Attorney General asked the U.S. Attorney in San Francisco to investigate these complaints. Later, he made a similar request of the U.S. Attorney in Los Angeles. Both offices already had heavy case loads and seemed to believe that stabilizing the raisin industry was a beneficial development. Although the association continued to buy packing houses, increased its market share to 80 percent of the raisin crop, and developed its own brokerage and sales operation, the Attorney General's concerns were ignored for 3 years.

In 1916, the Los Angeles office reported that while the association might be a monopoly, it had made raisin growing profitable without increasing prices to consumers by removing excessive middlemen margins from the marketing function. It also noted that even nongrower investors were interested in a healthy raisin industry.

Also in 1916, the association had to decide whether to renew its established contracts. Market share was declining because packers were paying inflated prices to new growers and to growers who would violate their contract with the association. Some trustees suggested the company might do better by simply converting to private packer status.

Instead, the association declared that it would release all growers unless substantial new acreage was committed. By the deadline, 85 percent of the raisin acreage was under association control.¹⁶³

In 1918, when the grower contracts were again scheduled to expire, the association instituted a campaign to sign up nonmembers and boosted market share to 88 percent. The association moved to solidify its control of the industry by refusing to renew any contracts with outside packers and began doing all processing in company-owned plants.

Also in 1918, just as the country was coming out from under wartime price controls, untimely rain caused widespread damage to the raisin grape crop. In early 1919, independent packers sold their remaining stocks for twice the previous year's price. When demand remained strong, the association set its 1919 price at 3 times the 1918 price. Independent packers, who had no raisins to sell, and buyers who had committed some time ago to take raisins from the association without fixing a price, besieged the Department of Justice with complaints. Justice referred the matter to the Federal Trade Commission (FTC) for review.

Justice's charge to the FTC was to review (1) whether the association was obtaining and maintaining more than fair and reasonable prices for its products and (2) recommend how the association might be restructured to conduct its business in accordance with the law.

The independent packers testified that the association's 1919 price was so far above the combined grower and association costs that it was inherently unreasonable and evidence of an illegal monopoly that was abusing its power by attempting to drive them out of business.

The association countered the unreasonable price argument by pointing out that the growers suffered substantial losses because of the weather in 1918 and were entitled to recoup those losses in 1919. However, it had no good response to effectively rebut the monopoly

¹⁶³ Sager reports that much of the success of the association in signing up new growers in both 1916 and 1918 may have been as much the result of blatant intimidation and coercion as it was the enhanced returns earned for growers. Knapp doesn't mention the use of night-rider mobs and other violent tactics covered in detail by Sager.

assertions. Association counsel was forced to admit it did not qualify for protection under Section 6 of the Clayton Act and to rely on the argument that it came within the spirit of Congress' intent in the Clayton Act's exemption for agricultural organizations.

The FTC issued its report on June 8, 1920.¹⁶⁴ It found the association's 1919 price was so far above the cost of production that it "was in excess of a fair and reasonable price." FTC said the if the association wanted the protection of Section 6 of the Clayton Act, it had to eliminate its capital stock (and thus the voting trust arrangement) and restrict membership to actual growers of raisin grapes.

The Department of Justice threatened to prosecute the association if it didn't restructure itself. With the 1920 harvest approaching, the association feared litigation would jeopardize the confidence of the raisin trade in the association so it delayed responding. In late July 1920, the association leaders notified Justice they believed the Raisin Company had operated in the best interests of both growers and consumers and could not accept the Government's conditions. In early September 1920, Attorney General A. Mitchell Palmer ordered the U.S. Attorney in Los Angeles to file suit, disregarding warnings of the political and economic backlash that might follow.

On January 18, 1922, one month before the Capper-Volstead Act became law, the California Associated Raisin Company and the United States entered into a consent decree settling the litigation. The association mainly agreed to refrain from using coercion to obtain crop contracts; purchasing additional packing plants and packing businesses from competitors; discriminating among purchasers of raisins; making any purchases of raisins from nonmembers to fix prices; or restricting production in any way.

While the decree did not deal with structural issues, in 1923 the association reorganized as a nonstock membership corporation. This terminated the voting-trust agreement and gave direct control to the grower members. The association also changed its name to the Sun-Maid Raisin Growers.

¹⁶⁴ The Report is printed in the record of the Senate Judiciary Committee's hearings on the Capper-Volstead bill, 67th Cong., 1st Sess., H.R. 2373, June, 1921, pp. 8-16.

Without a doubt, the California Associated Raisin Company was on legislators' minds when they considered Section 6 of the Clayton Act and the Capper-Volstead Act. While the primary focus would be on its market power, subtle influences also appear likely. For example, the 8 percent annual return to attract capital may have influenced that figure becoming the permissible upper limit written into Capper-Volstead. And the fact that the Justice Department asked the FTC to review whether its 1919 price was unreasonably high may have been a factor in the establishment of the "undue price enhancement" test incorporated in Section 2 of Capper-Volstead. Regardless, the California Associated Raisin Company story shows Congress was aware that not all cooperatives were benign local associations when it gave farmer cooperatives favorable status under the antitrust laws.

EARLY STATE ANTITRUST LAWS

The Sherman Act only applies to commerce that crosses State boundaries. At the time of enactment, and for some years thereafter, much of the nation's commerce--including cooperative activity--was still local in nature. State legislatures and courts made important determinations concerning cooperative conduct during this period.

Around the time the Sherman Act was adopted, many states enacted provisions in their constitutions or statutes prohibiting monopolies, trusts, and restraint of trade. Efforts were made to exempt farmers and their associations from these prohibitions. At first, the courts interpreted these laws in a manner hostile to cooperatives.

In 1889, the State of Texas enacted an antitrust statute which said: "The provisions of this act shall not apply to agricultural products or live stock while in the hands of the producer or raiser." The legality of this provision was questioned in a Federal court, which struck down the entire law on the basis that this language violates that part of Section 1 of the 14th Amendment of the U.S. Constitution which reads "...nor shall any State...deny any person within its jurisdiction the equal protection of the laws."¹⁶⁵

¹⁶⁵ In re Grice, 79 F. 627, 647-650 (N.D. Tex. Cir. 1897); *rev'd on other grounds*, 169 U. S. 284 (1898). The district court judge noted that 80 percent

In 1891, Illinois enacted a statute making it illegal for any individual, partnership, or corporation to enter into a combination to fix prices or limit the amount of any article that would be produced or sold. The law also provided that a purchaser who signed a contract to buy goods from a participant in a combination that violated the law could refuse to pay for the goods.

By the time the law became effective, dairy farmers serving the Chicago market had already formed a cooperative marketing association to establish the price members would receive for their milk and delivery terms. A milk dealer signed a purchase agreement with the cooperative but then refused to pay. When the cooperative sued to enforce the contract, the dealer raised the 1891 law as a defense.

The Illinois Supreme Court, in an opinion that doesn't mention of the Sherman Act, held for the dealer.¹⁶⁶ Using what today would be called "per se" analysis, the court found the marketing agreement between the cooperative and its members was intended to "...fix the price and control and limit the amount (of milk) shipped. The purposes attempted to be accomplished through the corporation were illegal."¹⁶⁷

The cooperative argued that since it was a corporation the firm and the members constituted a single entity under law, incapable of conspiring with itself to restrain trade. The court in essence "pierced the corporate veil" and determined that acts of the cooperative:

...are the acts of the associated persons, as corporators or as individuals... The corporation as an entity may not be able to create a trust or combination with itself, but its individual shareholders may in controlling it, together with it, create such trust or combination that will constitute it, with them alike, guilty.¹⁶⁸

of the people of Texas were exempted because they were engaged in raising agricultural products and live stock, 79 F. at 647.

¹⁶⁶ Ford v. Chicago Milk Shippers Ass'n, 39 N.E. 651 (Ill. 1895).

¹⁶⁷ *Id.* at 655.

¹⁶⁸ *Id.*

In 1893, Illinois amended its antitrust act by adding an agricultural exemption identical to that in the Texas law. This time the constitutionality of the statute reached the U.S. Supreme Court.

Thomas Connolly purchased some pipe on credit from the Union Sewer Pipe Company. When Connolly failed to pay his bill, the company sued to collect. Connolly contended that Union Sewer Pipe was a trust and, as the Illinois antitrust act specified that any purchaser of any article from any corporation operating as a trust was not liable for the purchase price, he could not be held liable for the purchase price of the pipe.

The company claimed that the Anti-Trust Act of Illinois was void because it exempted farm products in the hands of the producer in violation of the equal-protection clause of the 14th Amendment of the U.S. Constitution. The Federal district court agreed and the Supreme Court affirmed the decision.¹⁶⁹

One practice of early marketing cooperatives that provoked a number of lawsuits was the assessment of penalties--called liquidated damages--against members who sold product to another buyer in violation of their marketing agreement with their cooperative. In one case, the bylaws of an Iowa hog marketing cooperative provided that a member had to pay it 5 cents for each hundredweight sold to a competitor. A buyer sued under Iowa's antitrust law forbidding combinations designed to prevent full and free competition among buyers and sellers.

In its opinion, the Iowa Supreme Court made several statements and cited several cases it said invoked the common law. However, without any attempt to determine if the liquidated damages were "reasonable," the court found they violated the Iowa law and permanently enjoined the cooperative and its leaders from collecting them.¹⁷⁰

¹⁶⁹ *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540 (1902); *followed* in Georgia in a similar case, *Brown v. Jacobs' Pharmacy Co.*, 41 S.E. 553 (Georgia 1902).

¹⁷⁰ *Reeves v. Decorah Farmers' Co-operative Society*, 140 N.W. 844 (Iowa 1913). It is, of course, doubtful either party had the resources of Standard Oil and the U.S. Government to make a case on the issue of reasonableness.

A month later, the Alabama Court of Appeals took a slightly different tack but reached the same conclusion. A fruit marketing cooperative sued to collect liquidated damages from a member who sold to another buyer in violation of their marketing agreement. The court found no need to look at whether the contract violated any State or Federal law. It noted the cooperative openly espoused the goal of enhancing prices paid to its members and said an agreement among producers to seek this goal is in and of itself an unreasonable restraint of trade that violates common law.¹⁷¹

Agricultural producers were between the proverbial rock and the hard place in their relationship to State antitrust law. Without an exemption, efforts to do business on a cooperative basis were subject to challenge as an illegal conspiracy to restrain trade. And State efforts to provide special antitrust protection for farmers to market their products on a cooperative basis were stymied by court cases striking down such provisions as invalid under the 14th Amendment to the U.S. Constitution.

¹⁷¹ *Georgia Fruit Exchange v. Turnipseed*, 62 So. 542 (Ala. 1913). In a subsequent decision, the Alabama Supreme Court held a bylaw setting a uniform fee on all sales of members, whether through the cooperative or not, was not a restraint of trade. *Ex parte Baldwin County Producers' Corporation*, 83 So. 69 (Ala. 1919).

Also, in other states it was held, apparently in pursuance of common law principles, that the associations involved were not operating in restraint of trade even though their contracts, or bylaws, provided for liquidated damages. *See, Burley Tobacco Society v. Gillaspay*, 100 N.E. 89 (1912), wherein the court noted a cooperative designed "to secure a fair and adequate price" for grower members confronted by a high degree of concentration among buyers (the tobacco trust) "could not be held...to contravene any established interest of society. Public policy does not ask those who till the soil to take less than a fair return for their labor." 100 N.E. at 94. *See also, Bullville Milk Producers' Ass'n v. Armstrong*, 178 N.Y.S. 612 (1919); *Castorland Milk & Cheese Co. v. Shantz*, 179 N.Y.S. 131 (1919).

EARLY COOPERATIVE INCORPORATION LAWS

The rise of cooperatives as a major factor in the rural economy and the enactment of laws permitting widespread use of the corporate form of doing business happened about the same time.

Only a few states passed laws specifically dealing with the formation of cooperatives before 1911. They were modifications to existing State laws authorizing general business corporations. Cooperatives organized during this time issued stock and established their cooperative characteristics (one-member one-vote and distributions of earnings on the basis of patronage) in their articles of incorporation and bylaws.

In the early 20th century, some leading cooperative scholars adopted the theory of cooperation espoused by the Farmers Alliance. They decided cooperatives that paid competitive prices and retained earnings to accumulate capital were just regular corporations with a unique way of allocating earnings. They felt a new structure that more closely adhered to the "operating at cost" principle was needed. Writers at the time characterized it as a movement away from the commercial "company" approach and toward a fraternal "association" of producers. The basic scheme they devised included:

1. Eliminating capital stock, with all invested capital being "debt."
2. Treating each individual transaction on an "at cost" basis.
3. Eliminating nonmember business.

This approach influenced several State legislatures that were enacting cooperative laws, including important agricultural states such as California, Alabama and Texas. None adopted all of the suggestions, but they did generally promote non-stock associations of producers that would operate on a not-for-profit basis.¹⁷²

¹⁷² Edwin G. Nourse, "The First Cooperative Statutes" and "The Emergence of the Nonstock Association," in *American Cooperation: Selected Readings*, 226-244 (Martin Abrahamsen & Claud Scroggs, eds., 1957). Many new cooperatives were formed under these statutes as non-stock associations. Most existing cooperatives simply ignored the new laws. A few marketing cooperatives, notably California Fruit Growers Exchange (Sunkist), converted

CONGRESS RESPONDS TO STANDARD OIL AND AMERICAN TOBACCO

Antitrust proponents were not pleased by the Supreme Court decisions in 1911 holding the Sherman Act only forbids "unreasonable" restraints of trade.¹⁷³ Although both trusts were ordered to dissolve, the decisions created considerable uncertainty as to conduct the courts might sustain or rebuke. In 1914, Congress responded with the passage of two acts designed to provide further protection against anticompetitive conduct.

Federal Trade Commission Act

The first to be enacted is the Federal Trade Commission Act.¹⁷⁴ Congress believed that antitrust policy could best be developed by an independent administrative body that could acquire economic expertise beyond that available to Congress itself or the courts. The Federal Trade Commission (FTC) was granted powers to investigate suspected violations of the law, hear evidence, and issue cease and desist orders. The FTC's mandate was contained in Section 5 of the Act, which gave it the power to order the cessation of a category of behavior identified only as "unfair methods of competition in commerce."¹⁷⁵

The Act was amended in 1938 to expand the FTC's responsibility to also include preventing "unfair or deceptive acts in commerce."¹⁷⁶ The Act was amended again in 1975 to expand its coverage to transactions "in *and affecting* commerce."¹⁷⁷ (Emphasis added)

from a stock to a nonstock association to take advantage of Section 6 of the Clayton Act.

¹⁷³ Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911); United States v. American Tobacco Co., 221 U.S. 106 (1911).

¹⁷⁴ The Federal Trade Commission Act is the Act of September 26, 1914, ch. 11, 38 Stat. 717, as amended, 15 U.S.C. §§ 41-58.

¹⁷⁵ 15 U.S.C. § 45.

¹⁷⁶ Act of March 21, 1938, ch. 49, 52 Stat. 111.

¹⁷⁷ Pub.L. 93-637, Sec. 201(a), 88 Stat. 2193 (1975). This change responded to Supreme Court rulings that the coverage of the Clayton Act,

Clayton Act

The second new law enacted in 1914 was the Clayton Act.¹⁷⁸ It prohibits specific business practices which were being employed at the time to suppress competition and give large businesses undue advantages over smaller ones. Three practices of particular importance to cooperatives are made illegal:

- "...to discriminate in price between different purchasers of commodities of like grade and quality...where the effect of such discrimination may be to substantially lessen competition...."¹⁷⁹
- "...to lease or make a sale (of one product)...on the condition...the lessee or purchaser thereof shall not use or deal in (another product) of a competitor or competitors of the lessor or seller, where the effect...may be to substantially lessen competition...."¹⁸⁰
- "...to acquire directly or indirectly, the whole or any part of the stock...or assets of another person engaged in commerce or in any activity affecting commerce...where...the effect may be to substantially lessen competition...."¹⁸¹

Section 6 of the Clayton Act

While the Clayton Act was designed to clarify and strengthen public policy against restraints of trade, it also included important

which (like the FTC Act) omitted transactions "affecting" commerce, was considerably less extensive than that of the Sherman Act. *See*, United States v. American Building Maintenance Industries, 422 U.S. 271 (1975).

¹⁷⁸ The Clayton Act is the Act of October 15, 1914, ch. 323, 38 Stat. 730, as amended, 15 U.S.C. §§ 12-27, 29 U.S.C. § 52.

¹⁷⁹ Sec. 2 of Clayton, 15 U.S.C. § 13.

¹⁸⁰ Sec. 3 of Clayton, 15 U.S.C. § 14. Such contract provisions are commonly called "tying agreements."

¹⁸¹ Sec. 7 of Clayton, 15 U.S.C. § 18.

language recognizing in Federal law, for the first time, the unique marketing challenges confronting agricultural producers.

Following the passage of the Sherman Act, as larger and larger marketing and bargaining associations of producers were formed, the question of the application of the Sherman Act to such associations claimed the attention of agricultural leaders. Their belief (hope?) that it didn't apply was shattered in a statement by the U.S. Supreme Court in the famous "Danbury Hatters" decision, *Loewe v. Lawlor*.¹⁸²

Members of the United Hatters of North America labor union called a strike against manufacturers of hats in Danbury, CT, to force the manufacturers to recognize and negotiate wages and working conditions with their union. The manufacturers sued for damages alleging the union was an illegal combination in restraint of trade under Section 1 of the Sherman Act.

The Court ruled in favor of the manufacturers. Cooperatives were impacted because of an argument made by counsel for the manufacturers. He asserted congressional intent to include labor unions under the Sherman Act was evidenced by several bills introduced in Congress after its enactment to make Sherman inapplicable to labor unions, none of which were passed.¹⁸³ When commenting on this argument, the Court stated:

The (Sherman) act made no distinction between classes. It provided that 'every' contract, combination or conspiracy in restraint of trade was illegal. The records of Congress show that several efforts were made to exempt, by legislation, organizations *of farmers* and laborers from the operation of the act and that all these efforts failed, so that the act remained as we have it before us.¹⁸⁴ (emphasis added)

The Court's reference to Senator Sherman's amendment to exclude farmer cooperatives from the Act doesn't appear germane to the case. But it sent a clear signal to cooperatives that should a case

¹⁸² *Loewe v. Lawlor*, 208 U.S. 274 (1908).

¹⁸³ 208 U.S. at 279-280.

¹⁸⁴ 208 U.S. at 301.

alleging one of them was a combination in restraint of trade reach the Court, it was likely to be decided against them.

After *Loewe v. Lawlor*, there was a widespread demand for an end to the threat of prosecution as unlawful combinations in restraint of trade that hung over labor and farm organizations. Section 6 of the Clayton Act is the result. It provides:

That the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade under the antitrust laws.¹⁸⁵

On its face, the scope of Section 6 is unclear. Competing farmers are unmistakably authorized to combine in organizations which, of themselves, do not violate antitrust law. Ambiguity arises because the statute exempts both the "existence and operation" of farm organizations, but limits that exemption to "lawfully carrying out" their "legitimate objects." The legislative history of Section 6 demonstrates that this ambiguity was the fruit of compromise between those who opposed any exemption and advocates of complete immunity.

Legislative History

The Clayton Act was introduced by Rep. Henry Clayton (D-AL) on April 14, 1914, and referred to the House Judiciary Committee.¹⁸⁶

¹⁸⁵ 15 U.S.C. § 17.

¹⁸⁶ H.R. 15657, 63rd Cong., 2nd Sess., at 51 Cong. Rec. 6714 (1914). At the time, Rep. Clayton was chairman of the House Judiciary Committee. While the bill is named for Rep. Clayton, he resigned his house seat in a little more than a month after its introduction to accept a U.S. District Court Judgeship in his native Alabama, a position he held until his death in 1929.

As introduced, the provision covering farmer cooperatives read:

That nothing contained in the antitrust laws shall be construed to forbid the existence and operation of fraternal, labor, consumer, agricultural, or horticultural organizations, orders, or associations, instituted for the purpose of mutual help and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organization, orders, or associations from carrying out the legitimate objectives thereof.¹⁸⁷

Uncertainty as to the scope of this provision arose even before the bill reached the House floor. The Judiciary Committee report said that the provision was designed to remove all doubt about the legality of farm and labor organizations and that "the law should not be construed in such a way as to authorize their dissolution by the courts under the antitrust laws."¹⁸⁸

A minority report filed by several Republicans on the Committee complained that the bill did not sufficiently aid farmers. Their view was that:

... the only sort of farmer organization which this section sanctions is one which does nothing more than discuss better agricultural methods. As soon as farmers combine to get better prices for their products, or to sell directly to consumers, this paragraph affords them no relief from the antitrust laws.¹⁸⁹

On June 1, during floor debate, Rep. Edwin Webb (D-NC), who was the of floor manager of the bill, offered a Judiciary Committee amendment which became the last part of Section 6:

Thus Clayton had little impact on the legislative history of the bill that bears his name.

¹⁸⁷ 51 Cong. Rec. 9086 (1914). The language was Sec. 7 of the original bill.

¹⁸⁸ H.R. Rep. No. 627, 63rd Cong., 2d Sess. 16 (1914).

¹⁸⁹ *Id.* at 10.

...nor shall such organizations, orders, or associations, or members thereof be held or construed to be illegal combinations or conspiracies in restraint of trade under the antitrust laws.¹⁹⁰

Rep. Robert Henry (D-TX), the Judiciary Committee member who had drafted this language, said:

In my judgment, when Congress was dealing with "combinations in restraint of trade" it never intended that the law should apply to labor organizations or farmers' organizations without capital and not for profit. The courts took a different view of it and construed the act as it was never intended that it should be interpreted. The time has come when we can correct that error and write the language in the law as those gentlemen insist that it should be and should have been.¹⁹¹

Another influential Congressman, Rep. Alben Barkley (D-KY), also expressed the view that the Webb amendment exempted labor organizations and farmer cooperatives from the antitrust laws.¹⁹²

But numerous other Congressmen took an opposite view. Rep. Andrew Volstead (R-MN) urged that the amendment be clarified "so that it will not be open to dispute as to its meaning."¹⁹³ He said:

It is very unfortunate that an amendment should be proposed to this bill which must of necessity go into the

¹⁹⁰ 51 Cong. Rec. 9538 (1914). Rep. Webb was elected chairman of the Judiciary Committee on July 18th. 51 Cong. Rec. 12,327 (1914).

¹⁹¹ 51 Cong. Rec. 9540 (1914). Rep. Henry was the great-great-great-grandson of revolutionary patriot Patrick Henry. Rep. Henry also commanded considerable respect in his own right as chairman of the House Committee on Rules.

¹⁹² 51 Cong. Rec. 9554 (1914). Rep. Barkley later served for many years as leader of the Democrats in the Senate and then as Vice-President under President Harry Truman.

¹⁹³ 51 Cong. Rec. 9564 (1914).

courts after it becomes a law before anybody will know definitely just what it means. It looks as though it has been drawn to deceive somebody.¹⁹⁴

His plea was echoed by others but the Webb amendment was adopted unanimously without change, 207 to 0.¹⁹⁵

Dissatisfied with the committee language, Rep. Robert Thomas (D-KY) offered a substitute:

The provisions of the antitrust laws shall not apply to agricultural, labor, consumers, fraternal, or horticultural organizations, orders or associations.¹⁹⁶

Thomas knew that an agreement between Rep. Webb and the labor union movement about the wording of the exemption provision doomed his amendment. The Thomas amendment wasn't taken up until the committee language had already passed by unanimous vote. But, he nonetheless sparked some interesting floor debate.

In his opening remarks, Thomas pointed out the committee language only applied to unions and cooperatives that do not have capital stock or are not operated at a profit. He questioned whether a cooperative that made it possible for farmers to obtain a better price for their products and thus generated a "profit" for its members was covered by the bill. He challenged those members who said they wanted to protect union members and farmers from antitrust exposure to "vote for this amendment of mine and you will get it; otherwise you will not."¹⁹⁷

¹⁹⁴ *Id.* Rep. Volstead was, at this time, already a senior member of the minority on the Judiciary Committee. As chairman of the Judiciary Committee in the Republican-controlled 67th Congress, he would play a major role in further strengthening public policy support for farmer marketing cooperatives.

¹⁹⁵ 51 Cong. Rec. 9566 (1914).

¹⁹⁶ 51 Cong. Rec. 9538 (1914).

¹⁹⁷ 51 Cong. Rec. 9566 (1914).

Rep. Webb's true feeling came out in a floor discussion with Rep. Victor Murdock (R-KS).¹⁹⁸

Mr. MURDOCK: From the debate I will say to the gentleman that there is a great difference of opinion as to just what (the committee language) does.... Did the Committee on the Judiciary intend the Webb amendment to exempt organized labor from the provisions of the Sherman antitrust law?

Mr. WEBB: It certainly does exempt their existence and operation if organized for mutual help and without profit.

Mr. MURDOCK: Does it say anything--

Mr. WEBB: We wanted to make it plain that no labor organization or farmers' organization organized for mutual help without profit should be construed to be a combination in restraint of trade or a conspiracy under the antitrust laws. Now, I will say frankly to my friend that *we never intended to make any organizations, regardless of what they might do, exempt in every respect from the law.* I would not vote for any amendment that does that.¹⁹⁹ (Emphasis added)

Rep. A. W. Gregg (D-TX) offered perhaps the most eloquent support of the Thomas amendment:

What is the object of farmers' organizations? One of the main objects is by cooperation to secure the best market and price for their products. Should they agree not to sell their cotton, wheat, corn, or other products at less than a given price, I fear the courts would hold that they were an organization for profit, and under this provision as now worded they would not be exempt from prosecution and punishment under the antitrust laws. Thus would be destroyed

¹⁹⁸ Rep. Murdock subsequently left the House to launch an unsuccessful bid for a Senate seat. He was appointed to the FTC and was chair at the time of the investigation and report on the California Associated Raisin Company.

¹⁹⁹ 51 Cong. Rec. 9567 (1914).

one of their main objects for organization. I am not willing to subject them to any such danger.

Again, suppose an agricultural or horticultural organization in my county or anywhere else should, in addition to their other purposes, wish to organize for the purpose of erecting a warehouse and issue stock for that purpose, a thing which they have done in some cases, in order to have some place in which to store their products, while they are holding them for more favorable conditions in the market. Most of them are people of small means and not able by voluntary contributions to build warehouses, and if they should issue capital stock to build one, they at once, under the provisions of this section as worded, would become subject to the operations of the antitrust laws. Thus you force them either to expose their products to the weather or rent warehouses possibly at exorbitant rent. For one I am not willing to do this, but want them to have the right by issuing stock or otherwise to build and own their own warehouses. If we are going to do anything for them, let us do it ungrudgingly.²⁰⁰

Faced with strong opposition from Rep. Webb, the Thomas amendment was rejected, 105 to 69.²⁰¹

Rep. John Nelson (R-WI) then offered an amendment as a compromise between the committee and the Thomas language. While it was pending, he engaged in a spirited discussion with Rep. Webb over the issue of a possible cooperative monopoly.

Mr. WEBB: Does the gentleman think that it would be right to allow the cotton farmers in the South or the corn raisers of the West to form corporations whereby they could hold, corner, or monopolize the entire cotton or corn crop of

²⁰⁰ 51 Cong. Rec. 9568 (1914).

²⁰¹ 51 Cong. Rec. 9569 (1914). The limited application of the committee language is highlighted by a later comment of Rep. Edward Browne (R-WI) that "At least 75 per cent of the farmer organizations in the United States are organized for profit and have capital stock." 51 Cong. Rec. 9571 (1914).

the season and compel the world to pay them 25 or 30 or 40 cents a pound for it, or \$2 a bushel for corn, and clean up two or three hundred million? Does the gentleman think that would be right? I want to get his opinion.

Mr. NELSON: Mr. Chairman, I want to say to the gentleman that I have had that query propounded to me by the gentleman before, and this is my candid judgment. The gentleman is conjuring up an imaginary evil.

Mr. WEBB: Oh, no... (w)hen the farmers or any other class of men form a corporation for profit, to pay dividends, and undertake to monopolize any product in this country they ought to come within the Sherman antitrust law...

...

Has the gentleman any metaphysical scissors that will tell us the difference between the man who forms corporations for monopolistic purposes and the man who spins in the factory or the man who raises sheep?

...

Mr. NELSON: ... what I am insisting upon (is) not special privilege, but equal rights. You permit (capitalists to)...put their money together, and the money is represented by capital stock, but you deny the farmers of this land the right to do the same.

...

...The farmer wants to keep his individual farm. He does not want to hold it under a corporation. He wants to be independent, but he wants to cooperate with other independent farmers in buying supplies and marketing his products without being under the ban of the law--without being a criminal. This you do not permit him to do.²⁰²

Shortly thereafter, Rep. Nelson's time expired, and so did his proposed amendment. The bill passed the House without further change to the labor and agricultural cooperative provision.²⁰³

²⁰² 51 Cong. Rec. 9571 (1914).

²⁰³ 51 Cong. Rec. 9911 (1914).

When the bill reached the Senate, it was also referred to the Judiciary Committee. Its report said, "The other important and general purposes of the bill are to exempt labor, agricultural, horticultural and other organizations from the operations of the antitrust acts."²⁰⁴

Confusion over the scope of the provision, which arose in the House, continued in the Senate. Senator Charles Culberson (D-TX), Chairman of the Judiciary Committee, declared on the floor:

Following the original purpose of the framers of the Sherman antitrust law, the bill proposes expressly to exempt labor, agricultural, horticultural, and other organizations from the operation of the antitrust laws.²⁰⁵

Some Senators who were sympathetic to farmers took a narrower view. They thought: "...this provision does not really exempt any of these organizations from prosecution for the commission of acts which would, in fact, be in restraint of trade, and therefore prohibited by the Sherman antitrust law, but it does recognize their right to exist as organizations."²⁰⁶

Senator Atlee Pomerene (D-OH), on the other hand, believed this provision was drafted too broadly because it would permit organizations to engage in unlawful activities.²⁰⁷

Senator Henry Hollis (D-NH), who favored the language because he thought it placed agricultural organizations outside the Sherman Act, suggested that the permission given by the bill for "lawfully carrying out the legitimate objects thereof" meant that "An act will be lawful in this connection unless it is prohibited by some special statute or by common law."²⁰⁸

²⁰⁴ S. Rep. No. 698, 63rd Cong., 2d Sess. 2 (1914).

²⁰⁵ 51 Cong. Rec. 13,848 (1914).

²⁰⁶ *Id.* Colloquy between Senator Wesley Jones (R-WA), whose remarks are quoted here, and Senator William Thompson (D-KS).

²⁰⁷ 51 Cong. Rec. 13,911 (1914).

²⁰⁸ 51 Cong. Rec. 13,967 (1914).

As in the House, there were fervent pleas to clarify the scope of the section since it was being supported by so many who held conflicting views as to its meaning.²⁰⁹

Near the end of the debate, Senator Albert Cummins (R-IA) offered an amendment to delete the words "agricultural and horticultural" because he felt they would repeal the antitrust laws in important respects. He did not want to permit such organizations to "forestall the market" or "to come together for the purpose of increasing the price or affecting the trade in the things in which the members of the association deal."²¹⁰ The Cummins amendment was rejected, 39 to 20.²¹¹

After some rewriting by a conference committee,²¹² the final version was passed by the House and Senate and signed by President Woodrow Wilson on October 15, 1914.²¹³

Judicial Interpretation

Unfortunately for cooperatives, the first judicial review of a case involving Section 6 of Clayton involved some very bad facts. Persons marketing 75 percent of the Aroostock (ME) county potatoes formed an association called the Aroostock Potato Shippers' Association. The members appointed a "committee" to determine whether any person who produced, received, or dealt in such potatoes was "undesirable." Persons found to be "undesirable" were placed on a black list. The list was circulated among the members who were forbidden by association bylaws from having any business dealings with blacklisted persons. Heavy fines were assessed against members who violated this bylaw.

The black list was also circulated among other persons dealing in potatoes who were not members of the association. They were notified

²⁰⁹ 51 Cong. Rec. 14,011 (1914).

²¹⁰ 51 Cong. Rec. 14,586 (1914).

²¹¹ 51 Cong. Rec. 14,590 (1914).

²¹² For example, references to "consumers and fraternal organizations" were removed to make the exemption section covering labor and cooperatives apply only to groups composed of people "who produce something." House floor remarks of newly-elected Judiciary Chairman Webb, 51 Cong. Rec. 16,342 (1914).

²¹³ 51 Cong. Rec. 16,756 (1914).

that, unless they ceased dealing with the blacklisted person, they would also be blacklisted and association members would no longer deal with them.

The U.S. Department of Justice brought criminal charges under Section 1 of the Sherman Act against Carl King and other association members alleging participation in a conspiracy in restraint of trade. In two opinions, Federal District Court Judge James Morton refused to grant the cooperative's requests to dismiss the complaints for failure to state a claim of action.²¹⁴

In his first opinion, Judge Morton noted the indictment was very vague, so he assumed association members had some business justification for refusing to deal with the blacklisted persons. He accepted the association's argument that its members could agree among themselves not to deal with certain persons and compel each other to honor that agreement. However, he held that when the association circulated its blacklist to nonmembers and coerced them to refuse to deal with persons listed thereon, the members were engaged in an illegal restraint of trade. And to support his finding, the judge called this activity a "secondary boycott...outlawed by the United States Supreme Court"²¹⁵ in the very opinion that played a major role in spurring cooperatives to seek enactment of Section 6 of Clayton in the first place, the Danbury Hatters' case, *Loewe v. Lawlor*.

After this ruling, the Government issued a second, more specific indictment. In seeking its dismissal, the defendants raised the affirmative defense that they were "...an agricultural organization within the Clayton Act, and that they are not therefore subject to prosecution, even assuming that otherwise they would be."²¹⁶

Judge Morton disagreed. First, he noted that the court record lacked any evidence that the association members were persons who raised potatoes. Rather, it suggested they were commercial shippers. The record also failed to establish that the association did not have capital stock and did not operate for profit. On this basis alone, he wrote, the association was not shown to meet the requirements of Section 6 of the Clayton Act.

²¹⁴ United States v. King, 229 Fed. 275 (D. Mass. 1915).

²¹⁵ 229 Fed. at 279.

²¹⁶ United States v. King, 250 Fed. 908, 909 (D. Mass. 1916).

Second, the court stated that:

Even if it were (covered by Sec. 6 of Clayton), I do not think that the coercion of outsiders by a secondary boycott, which was discussed in my opinion on the former indictment, can be held to be a lawful carrying out of the legitimate objects of such an association. That act means, as I understand it, that organizations such as it describes are not to be dissolved and broken up as illegal, nor held to be combinations or conspiracies in restraint of trade; but they are not privileged to adopt methods of carrying on their business which are not permitted to other lawful associations.²¹⁷

In the next case applying Section 6 of Clayton, the U.S. Supreme Court reached a similar conclusion. It held that this provision protects producers from prosecution simply for forming a cooperative and engaging in normal business operations. But it does not shield cooperatives from antitrust prosecution for engaging in anticompetitive conduct with non-cooperative firms.²¹⁸

Two subsequent Federal district court opinions came to the conclusion that associations of farmers meeting the organizational tests of Section 6 of Clayton, acting alone and not in concert with others, enjoy total immunity under Section 6 from charges of monopolization under Section 2 of the Sherman Act.²¹⁹ However, in its *Maryland &*

²¹⁷ 250 Fed. at 910. The U.S. Supreme Court reached a similar conclusion about the limited scope of Clayton § 6 in a case involving a secondary boycott by a labor union. *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 469 (1921).

²¹⁸ *United States v. Borden*, 308 U.S. 188, 195-196 (1939). The Borden case is described in detail at pp. 155-162.

²¹⁹ *United States v. Dairy Co-op Ass'n*, 49 F. Supp. 475 (D. Ore. 1943); *United States v. Maryland & Virginia Milk Producers Ass'n*, 167 F. Supp. 45 (D.C. D.C. 1958). Another district court refused to follow the Maryland & Virginia opinion even before it was overturned. *April v. National Cranberry Association*, 168 F. Supp. 919, 921 (D. Mass. 1958).

Virginia opinion, the Supreme Court rejected this analysis. The Court said:

The language shows no more than a purpose to allow farmers to act together in cooperative associations without the associations as such being "held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws," as they otherwise might have been. This interpretation is supported by the House and Senate Committee Reports on the bill. Thus, the full effect of § 6 is that a group of farmers acting together as a single entity in an association cannot be restrained "from lawfully carrying out *the legitimate objects* thereof" (emphasis supplied), but the section cannot support the contention that it gives such an entity full freedom to engage in predatory trade practices at will."²²⁰

Thus, Section 6 of the Clayton Act gives a limited protection to farmers to form marketing cooperatives without capital stock. They are authorized to combine and carry out legitimate business operations just as if they were shareholders in an investor-owned firm. However, it does not provide broad general immunity from the antitrust laws. Conduct intended to stifle or eliminate competition is subject to review, just as if it were conducted by any other business entity.

Criminal prosecutions such as *King* were oppressive to farmer organizations, even if association conduct was questionable. Even unsuccessful prosecutions disturbed producers. The fact that Section 6 did not remove the threat of indictment led to pleas that Congress act again.

One step taken was the addition of language to the appropriations acts for the Department of Justice beginning with the fiscal year ending

²²⁰ Maryland & Virginia Milk Producers Association v. United States, 362 U.S. 458, 465-466 (1960), *rev'g* 167 F. Supp. 45. This complex litigation involves three district court opinions discussed in more detail later in this report at pages 224-230.

June 30, 1914,²²¹ through the fiscal year ending June 30, 1928.²²² It stated that none of the funds provided the Department of Justice to enforce the antitrust laws could "be expended for the prosecution of producers of farm products and associations of farmers who co-operate and organize in an effort to and for the purpose to obtain and maintain a fair and reasonable price for their products."

While not an antitrust law, cooperatives were encouraged by the inclusion of language in Sec. 26 of the so-called Food Control Act of 1917 providing "... farmers and fruit growers, co-operative and other exchanges, or societies of a similar character shall not be included in the provisions of this section..."²²³

Of greater long-term significance was the drive to enact additional permanent legislation granting broader public policy support for cooperative marketing by agricultural producers.

²²¹ 38 Stat. 53.

²²² 44 Stat. 1194. This rider became an important precedent when cooperatives were confronted with what they viewed as over-zealous enforcement by the Federal Trade Commission in the 1970s.

²²³ 40 Stat. 276, 286. This wartime law made it a criminal felony to hoard or destroy food or other necessities of life for the purpose of limiting the supply or affecting the market price of such items.

CHAPTER 4. THE CAPPER-VOLSTEAD ACT

Enacted in 1922, the Capper-Volstead Act²²⁴ has served as the foundation supporting the development of many effective cooperative marketing ventures controlled by their producer-owners. It has given producers assurance that if they organize in compliance with a few easily-understood constraints and conduct their joint marketing activities in a responsible manner, they will not be considered as being engaged in an illegal restraint of trade.

This is not to say that implementation of the Capper-Volstead Act has been free of controversy. Several contentious issues of interpretation and application have arisen and others are likely to surface in the future. But these skirmishes have not diminished the value of this statute to farmers and ranchers.

GENERAL OVERVIEW

Capper-Volstead has two provisions. Section 1 provides a limited exemption from the antitrust laws for agricultural producers to market their products on a cooperative basis. Section 2 provides a mechanism to make sure producers do not abuse their collective power to the detriment of the general public.

Section 1 describes the "persons" and "associations" entitled to claim the limited antitrust exemption and the elements and scope of the exemption.²²⁵ This modified outline breaks out the key concepts in the statutory language:

- A. Membership must be limited to "persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers.."

²²⁴ 42 Stat. 388 (1922), 7 U.S.C. §§ 291-292. The statute is commonly referred to as the Capper-Volstead Act in honor of its principal sponsors, Senator Arthur Capper and Rep. Andrew Volstead. The actual title is "An Act To authorize association of producers of agricultural products."

²²⁵ 7 U.S.C. § 291.

B. Agricultural producers may:

- i) "act together in associations, corporate or otherwise, with or without capital stock"
- ii) "in collectively processing, preparing for market, handling, and marketing such products of persons so engaged."

C. Such associations may:

- i) "have marketing agencies in common," and
- ii) "make the necessary contracts and agreements to effect such purposes. "

D. Provided:

- i) "such associations are operated for the mutual benefit of the members. . . as. . . producers. "
- ii) "no member. . . is allowed more than one vote because of the amount of stock or membership capital he may own, *or* the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum. "
- iii) "the association shall not deal in the products of nonmembers to an amount greater in value than such as are handled by it for the members."

Section 2 confers on the Secretary of Agriculture the authority to prevent producers from abusing their collective marketing power.²²⁶ It provides, in part:

"If the Secretary of Agriculture (has) reason to believe that any such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the

²²⁶ 7 U.S.C. § 292.

price of any agricultural product is unduly enhanced thereby, he shall serve upon such association a complaint stating his charge...(with) a notice of hearing...requiring the association to show cause why an order should not be made directing it to cease and desist from monopolization or restraint of trade."

. . .

"The Department of Justice shall...(enforce any) such order."

The Capper-Volstead Act makes three significant changes in the nature of the cooperative exemption found in Section 6 of the Clayton Act. First, it liberalizes the eligibility requirement for cooperatives. While Clayton only refers to agricultural organizations without capital stock, Capper-Volstead covers all such "associations, corporate or otherwise, with or without capital stock."

Second, the Clayton Act language is exclusively negative, stating simply that the antitrust laws shall not apply to the lawful conduct of cooperatives. Section 1 of Capper-Volstead, however, makes an affirmative grant of authority. It says that farmers may act together for the purposes of processing, preparing for market, handling and marketing the agricultural products they produce. Farmers and their associations may have marketing agencies in common and may enter into other contracts necessary to carry out these purposes.

Third, Section 6 of Clayton offers no alternative procedure to standard antitrust enforcement. Section 2 of Capper-Volstead, however, prescribes an administrative enforcement function in the Department of Agriculture to assess whether otherwise permissible conduct by producers results in prices that are unduly higher than they would have been without the collective activity. Cooperatives were unsuccessful in their efforts to establish that Capper-Volstead grants exclusive jurisdiction in the Secretary of Agriculture over anti-competitive conduct by cooperatives. But Section 2 provides a shield from hostile action by the antitrust enforcement agencies over conduct authorized by Section 1.

RATIONALE FOR CAPPER-VOLSTEAD

Justice Blackmun, in his majority opinion in a leading case interpreting Capper-Volstead, *National Broiler Marketing Ass'n v. United States*, explained from the Supreme Court's perspective why Congress passed the Capper-Volstead Act.²²⁷

First, Justice Blackmun noted the exemption under Section 6 of the Clayton Act was proving inadequate because it was limited to nonstock organizations. Agricultural groups were finding that to serve the needs of their members, they had to sell stock to raise capital to finance handling and processing services essential to selling member production profitably. Thus, the first reason for the enactment of Capper-Volstead was to allow farmers to raise capital and engage in value-adding activities that prepared their products for market without violating antitrust law.²²⁸

Second, individual farmers were considered to be at a severe disadvantage in the marketplace. They lacked the economic strength to deal with the vagaries of agricultural markets. And they were subject to manipulation by processors and distributors who could force farmers to sell at prices and terms of sale dictated by the buyers. So the second reason for allowing farmers to join together in cooperatives was to bolster their economic strength, so they could weather adverse economic periods and deal on a more equal basis with processors and distributors.²²⁹

The National Broiler Marketing Association argued that Capper-Volstead was intended to protect all entities who bear the costs and risks of fluctuating agricultural markets. The Court disagreed, stating it was not the exposure to these costs and risks that concerned Congress, but rather the inability of individual farmers, "whose economic position rendered them comparatively helpless," to effectively respond.²³⁰

²²⁷ *National Broiler Marketing Ass'n v. United States*, 436 U. S. 816, 824-827 (1978).

²²⁸ 436 U. S. at 824-825.

²²⁹ 436 U. S. at 825-826.

²³⁰ 436 U. S. at 826.

The Court then concluded that processors and packers, who had no farming operations were not "farmers" as the term is used in Capper-Volstead and not eligible to be members of an association with Capper-Volstead protection.²³¹ The Court left unanswered key questions that remain unanswered today: Is there a point at which an entity with agricultural production becomes either so large or so involved in processing that it is no longer a "farmer" under Capper-Volstead and, if so, how is it determined when that point is reached or passed?

LEGISLATIVE HISTORY

Exemptions from the antitrust laws are not taken lightly on Capitol Hill. Enactment of the Capper-Volstead Act involved a substantial dedication of time and effort by cooperative leaders and their allies in Congress. This section relates how Capper-Volstead became law.

In the process, an extensive legislative history developed that still provides valuable guidance in applying the provisions of the law to real life situations. While legislative history doesn't alter the clear language of the statute, it gives insight into the intent of the framers when the language is ambiguous.

Building Momentum

In 1916, dairy marketing organizations, who felt they were being singled out for antitrust enforcement, formed the National Cooperative Milk Producers Association to solidify their strength and protect their general interests. Shortly thereafter, the Milk Producers joined with the National Grange, the National Farmers Union, and other farm organizations to form the National Board of Farm Organizations, headquartered in Washington, DC. For the first time, cooperative supporters had a unified voice in the Nation's capitol.

At a National Board meeting in the fall of 1917, the Milk Producers proposed taking steps to establish the farmers' right to organize and operate cooperative associations without fear of conflict

²³¹ 436 U.S. at 827-829.

with the antitrust laws. This resulted in a resolution passed by the 200 organization representatives that declared:

Producers and consumers are bound together by economic laws which they did not make and which they cannot repeal. Between these two are powerful agencies whose only interest it is to take such toll as they may, as products are passing from producer to consumer. These agencies, by reason of their financial strength, their perfect organization, and their far-flung financial connections, exercise an influence greater than is warranted by their numbers or the service they perform. We therefore urge upon Congress the necessity of such an amendment to the antitrust laws as will clearly permit farmers' organizations to make collective sales of the farm, ranch, and dairy products produced by their members. Such organizations, with liberty of action, can insist that the agencies engaged in processing and distribution sell such products at prices as low as may be consistent with the cost of production and distribution."

John D. Miller, chairman of the legislative committee of the Dairymen's League, had been instrumental in the State of New York adopting an amendment to its penal code in 1918 providing agreements by agricultural producers "engaged in making collective sales or marketing and prescribing the terms and conditions thereof are not conspiracies and they shall not be construed to be injurious to trade or commerce."²³² Based on this success, Miller was recruited to draft legislation to implement the resolution.

National Board officials thought it best to have the bill appear as nonpartisan as possible.²³³ Thus Miller's original draft was first introduced in the Senate on May 28, 1919, by a newly-elected

²³² Laws of New York, 1918, chap. 491.

²³³ Much of the information on the history of Capper-Volstead, not taken from the Congressional Record, is based on a memorandum written by Mr. Miller and provided to this agency by letter dated July 18, 1946.

Republican from Kansas, Senator Arthur Capper.²³⁴ An almost identical bill were introduced in the House on July 24, 1919, by a newly elected Democrat from California, Hugh S. Hersman.²³⁵

The Capper-Hersman bill, as it became known, was written as an express amendment to Section 6 of the Clayton Act. The bill deleted the words "not having capital stock" and provided that "Associations corporate or otherwise of farmers... engaged in making collective sales for their members or shareholders' of "products produced by their members or shareholders are not contracts, combinations, or conspiracies in restraint of trade or commerce."

Hearings were held by the House Judiciary Committee in October 1919.²³⁶ Miller and representatives of all the major members of the National Board appeared and urged adoption of the bill. In January 1919, hearings were also held on the Senate side.²³⁷ However, no action was taken on the Capper-Hersman bill.

Miller wrote that following the hearings in the House he was called to the office of Andrew Volstead, a Republican congressman from Minnesota, who had just risen to chair of the House Judiciary Committee. Volstead reportedly told him that the committee favored the concept of the bill,²³⁸ but he had three suggestions to improve its

²³⁴ S. 845, 66th Cong., 1st Sess., 58 Cong. Rec. 348 (1919).

²³⁵ H.R. 7783, 66th Cong, 1st Sess., 58 Cong. Rec. 3116 (1919). Another new California congressman, Republican Henry E. Barbour, introduced a companion bill at the same time as Hersman. H.R. 7784, 66th Cong, 1st Sess., 58 Cong. Rec. 3116 (1919). Congressman Barbour represented the area in and around Fresno, which included Sum-Maid's main office and many of its members' vineyards.

²³⁶ *Collective Bargaining for Farmers, Hearings on H.R. 7783 before the House Comm. on the Judiciary*, 66th Cong., 1st Sess. (1919).

²³⁷ *Labor, Agriculture, Dairy, and Horticultural Organizations, Hearings on S. 845 before the Senate Comm. on the Judiciary*, 66th Cong., 2d Sess. (1920).

²³⁸ The interest of Cong. Volstead, a lawyer, in the bill may have been sparked by the fact that he received his college degree from the Decorah Institute, Decorah, Iowa, home of the hog marketing cooperative whose use of liquidated damages was held to be an illegal restraint of trade. *Reeves v. Decorah Farmers' Co-operative Society*, 140 N.W. 844 (Iowa 1913).

chances of enactment.

First, Volstead recommended that the bill be sponsored by Republicans in both chambers, because the Republican party was likely to be the majority party in the upcoming Congress. Rep. Hersman consented. The farm groups asked Volstead to sponsor the House version, and he agreed.

Second, Volstead suggested rewriting the bill as an affirmative statement of rights and powers given to farmers without any mention of existing legislation.

Third, Volstead stated that the bill's chances in the House would be greatly improved if language was added providing for the regulation of farmer cooperatives by some public official to keep them from demanding excessive prices.

Several re-writes involving staff of the farm organizations, Senator Capper, and Mr. Volstead produced a mutually acceptable draft. On May 4, 1920, Chairman Volstead introduced the bill in the House.²³⁹ Three days later, Senator Capper introduced identical legislation in the Senate.²⁴⁰ Both bills were referred to the respective Judiciary Committees.

House Consideration, 66th Congress

The House Judiciary Committee apparently felt sufficient hearings had been held on the issue with regard to the Capper-Hersman bill. It reported H.R. 13931 without amendment on May 7, 1920, only three days after it was introduced.²⁴¹ In pertinent part, the report read:

The object of this bill is to authorize the producers of agricultural products to form associations for the purpose of collectively preparing for market and marketing their products.

²³⁹ H.R. 13,931, 66th Cong., 2d Sess., 59 Cong. Rec. 6553 (1920). Volstead had introduced an earlier version of the legislation, but it was disregarded. H.R. 13703, 66th Cong., 2nd Sess., 59 Cong. Rec. 5925 (1920).

²⁴⁰ S. 4344, 66th Cong., 2d Sess., 59 Cong. Rec. 6671 (1920).

²⁴¹ H.R. Rep. 939, 66th Cong., 2d Sess. (1920), *reprinted at* 59 Cong. Rec. 8033.

Section 1 defines and limits the kind of associations to which the legislation applies. These limitations are aimed to exclude from the benefits of this legislation all but actual farmers and all associations not operated for the mutual help of their members as such producers. Unless each member has but one vote in his association, irrespective of the amount he may have invested as capital therein, the association must not pay a dividend of to exceed 8 per cent per annum. This limitation of 8 per cent is designed to compel payment to the members of as large a part of the proceeds derived from the sale of their products as possible, instead of paying it as a dividend upon the money used as capital

...The aim has been to make the provisions of the bill sufficiently liberal so that all cooperative farm associations operated in good faith for the benefit of its members might avail themselves of the provision of this bill...

Section 2 makes applicable to these associations in a modified form the provisions of the Clayton Act. Briefly, it gives the Secretary of Agriculture power to prevent these associations from exploiting the public. In the event that any association should refuse to comply with the order of the Secretary, a suit may be brought in the appropriate district court to enforce his order. The farmers are not asking a chance to oppress the public, but insist that they should be given a fair opportunity to meet business conditions as they exist--a condition that is very unfair under the present law. Wherever a farmer seeks to sell his products he meets in the market place the representatives of vast aggregations of organized capital that largely determine the price of his products. Personally he has very little if anything to say about the price. If he seeks to associate himself with his neighbors for the purpose of collectively negotiating for a fair price, he is threatened with prosecution. Many of the corporations with which he is compelled to deal are each composed of from thirty to forty thousand members. These members collectively do business as one person. The officers of the corporation act as agents of these members. This bill, if it becomes a law, will allow farmers to form like

associations, the officers of which will act as agents for their members.

...It is no answer that farmers may acquire the status and secure the rights of a business corporation by deeding their farms to a corporation. That is neither practical nor desirable from any standpoint. Without doing that they can not associate themselves together for the mutual profit of the members without being threatened with prosecution.

...(Several) States have granted the right to form associations such as those contemplated in this bill. But these States can not confer any right upon their organizations to engage in interstate and foreign commerce. This bill is designed to grant that right...²⁴²

H.R. 13931 was first debated on the floor of the House on May 28, 1920. Rep. Dick Morgan (R-OK), a member of the Judiciary Committee, was the first spokesman favoring it. Six years earlier, Morgan had dissented from the Judiciary Committee Report on the Clayton Act because he believed the exemption language in that legislation was not broad enough. Morgan traced the development of cooperatives, stated the exemption provided in Section 6 of the Clayton Act was unfortunately ambiguous, and declared it to be the intention of the proposed bill to make:

...a broader and more comprehensive declaration as to the kind and character of cooperative farm organizations which shall not be prohibited by the provisions of any of the antitrust laws.²⁴³

Rep. Morgan summarized the economic goals of the bill:

Cooperative farmers, organizations will bring producers and consumers closer together. The excessive charges of unnecessary middlemen will be eliminated, and the cost of marketing, manufacturing, and distributing farm products

²⁴² *Id.*

²⁴³ 59 Cong. Rec. 7851-2 (1920).

will be greatly reduced. The producers and consumers will share equitably in the profits derived from cooperative business organizations among farmers. Prices will be stabilized, production will be more uniform and larger in the aggregate, the supply of food products will increase in proportion to the demand, speculations, gambling and profiteering in food products will be curtailed, controlled, and in a large measure prevented, as a result the farmers will be more prosperous, the cost of living will be reduced, and the general public welfare will be benefitted.²⁴⁴

Rep. Joseph Walsh (R-MA), also a member of the Judiciary Committee, made the opening statements for the opponents of special antitrust treatment of agricultural cooperatives. He focused on Section 2 of the bill, alleging that if the Secretary of Agriculture did not prosecute farmers, nobody could:

Under the provisions of this bill we turn over to the Secretary of Agriculture, the guardian angel of the farmers of this country, the say so as to whether men shall be prosecuted in case they have, through the enhancement of price, lessened competition or restrained trade. That authority now in other industries is vested elsewhere.

Furthermore, there is no provision in this bill for anybody to lodge a complaint or to require an investigation or prosecution.²⁴⁵

After opening statements, the House adjourned for the day. Consideration of H.R. 13931 resumed May 31, 1920.

²⁴⁴ 59 Cong. Rec. 7852 (1920). The purpose to eliminate the middleman through the formation of marketing cooperatives was echoed frequently in the course of debate on the Capper-Volstead Act. *See, e. g.*, Congressman Swope of Kentucky (59 Cong. Rec. 8022); Mann of Illinois (59 Cong. Rec. 8027); Browne of Wisconsin (59 Cong. Rec. 8035).

²⁴⁵ 59 Cong. Rec. 7857 (1920). Rep. Cannon similarly complained that if the Secretary of Agriculture sympathized with a cooperative, there would be no remedy for its restraints of trade. 59 Cong. Rec. 7858 (1920).

Rep. Volstead, the first to speak, emphasized the need for cooperatives to raise capital. He also explained how the 8 percent limit on dividends on equity capital was selected:

It is necessary for (cooperatives) at least to have some capital on which to do business, and to make some profit that they can save for the purpose of taking care of losses that are always incident to any business, and it seems to me that we ought to give them that right. The provision in the bill that the profit must not exceed 8 per cent is intended to protect the farmers. It is designed to compel the officers of these associations to pay the proceeds from the products of the members to the members, to the farmers. Some of them insist that the dividend should not exceed 5 or 6 per cent instead of 8 per cent. These associations should make money for the members and not for the association. In these days of high money rates it is thought necessary to make the rate 8 per cent, otherwise it might not be possible to get the necessary money to do business.²⁴⁶

A lengthy discussion followed between urban representatives, who claimed the legislation would raise prices to consumers, and rural representatives, who claimed it wouldn't. The most important contribution came from Rep. Hersman, who used examples from his home State of California to illustrate the positive influences of cooperative marketing:

I picked up in my office before I left a copy of the report of the California Almond Growers' Exchange. That triangle that you see here [indicating] represents what the farmer got before he was organized. It is one-quarter of the price that the consumer paid. The farmer got 25 cents out of the consumer's dollar. The first year after the organization he got what is represented by the second black figure, almost half of the consumer's dollar. To-day he is getting close to three-quarters of the consumer's dollar. They have cut down

²⁴⁶ 59 Cong. Rec. 8017 (1920).

the tax in transit, and the consumer was not paying any more for almonds last year than he was nine years ago.

. . . .
Now I would like to discuss what the prune and apricot growers and the raisin growers have done for themselves. Their organizations have raised the price to the farmers and taken away the profits of the middleman, and not until last year was the price increased to the consumer. Under the stimulating influence of increased price, planting has greatly increased. The acreage in some fruits has increased 200 per cent. What does this mean? It means that the product will be greatly increased and ultimately the farmers can afford to sell them for less when the market is stabilized and a price can be reasonably assured by his association.²⁴⁷

Rep. Barkley addressed the key issue of the individual producer's lack of market power compared with firms that sell him equipment and supplies and market his output:

..No farmer can compete alone with the conditions that surround him. We all know that it is economically impossible for any individual farmer to compete with the conditions under which he must live. When he buys from a merchant he buys at the merchant's price, and he has no power to compel the merchant to reduce the price. When he buys agricultural machinery from implement houses he has no power as an individual to exercise a voice in determining the price he pays for it.

When he sells his product..he must sell it at a price dictated not by himself but by others who have had no part in its production. For that reason I favor the passage of laws that will enable him and encourage him to cooperate with others similarly situated in order that greater efficiency may be secured and in order that the farmer may produce that

²⁴⁷ 59 Cong. Rec. 8024-8025 (1920).

which must feed and clothe us under conditions that will encourage the greatest production and conservation.²⁴⁸

Rep. Browne noted that while some States, including Wisconsin, had already passed similar laws, these State laws could not confer any right on producers to market cooperatively in interstate and foreign commerce. Federal legislation was needed to convey this privilege.²⁴⁹

Rep. William Igoe (D-MO), floor manager for the opposition, focused on potential anti-competitive conduct by producers which, the courts later held, was not authorized at all by the bill. Igoe suggested cooperatives would be empowered to dictate the prices distributors could charge when they resold products purchased from cooperative members and that they would be totally free of any control under any of the antitrust laws.²⁵⁰ As the debate neared conclusion, Igoe asserted cooperative members would be free to employ group boycotts to prevent nonmembers from selling their production to anyone.²⁵¹

Despite such criticism, on May 31, 1920, the House passed the legislation, 234 to 58.²⁵²

Senate Consideration, 66th Congress

The House referred its bill to the Senate the next day, June 1, 1920.²⁵³ It was reported to the Senate by the Judiciary Committee in only two days.²⁵⁴ The report recommended that the bill be approved, but with two important amendments to Sec. 2, the enforcement provision:²⁵⁵

²⁴⁸ 59 Cong. Rec. 8034 (1920).

²⁴⁹ 59 Cong. Rec. 8035 (1920).

²⁵⁰ 59 Cong. Rec. 8031 (1920).

²⁵¹ 59 Cong. Rec. 8039 (1920).

²⁵² 59 Cong. Rec. 8040-8041 (1920).

²⁵³ 59 Cong. Rec. 8051 (1920).

²⁵⁴ 59 Cong. Rec. 8345 (1920).

²⁵⁵ S. Rep. No. 655, 66th Cong., 2nd Sess. (1920). This report is barely more than one page in length. None of the four reports cited in this section is longer than three pages.

- The Federal Trade Commission would be substituted for the Secretary of Agriculture throughout the provision.
- The following language would be added:

Nothing herein contained shall be deemed to authorize the creation of, or attempt to create, a monopoly, or to exempt any association organized hereunder from any proceedings instituted under the (Clayton) (A)ct...on account of unfair methods of competition in commerce.²⁵⁶

The report's only comment on the bill read:

It was felt by the committee that it was safer to leave the supervision of associations provided for in the bill in the hands of the Federal Trade Commission than under the jurisdiction of the Secretary of Agriculture, especially as the commission is already equipped with the requisite machinery to obtain information to carry out the provisions of section 2 of the bill.²⁵⁷

The bill lay dormant for more than six months until it was called to the Senate floor December 14, 1920. Although debate consisted primarily of posturing,²⁵⁸ several important comments were made.

Senator William King (D-UT), a member of the Judiciary Committee who opposed the House bill, opened debate by saying that the purpose of the Act was to:

...legalize all forms of combination upon the part of agricultural producers... for the purpose of enabling them to deal with their products in a collective manner and through the instrumentality of combinations and organizations. Not only that; it provides, as I interpret the measure, that they

²⁵⁶ *Id.* at 1-2.

²⁵⁷ *Id.* at 2.

²⁵⁸ The outcome, passage of the bill with the Judiciary Committee amendments, was anticipated by all participants.

shall not only be permitted to combine for the purpose of marketing their products, but for the purpose of holding them for an indefinite period in order to secure higher prices, even though such action might constitute a monopoly or restrain trade or be destructive of competition.

Moreover, the bill provides that such associations may combine for the purpose of preparing their products for market, and also for the purpose of handling the same, and they may likewise "process" such products. The word "process," I presume, comprises all steps necessary to convert the raw materials into finished products.²⁵⁹

King said agricultural producers could build warehouses and store products to force higher prices; construct factories to process their products, and might thus "take the form of monopolies, not only in production but in 'processing,' in handling, and in placing the products, raw or finished, upon the market."²⁶⁰

King stressed to his fellow Senators that the bill would permit producer associations to engage in substantial value-added processing and marketing when he said:

I suggest that under the first section of the bill the right seems to be given to such combinations and associations to fix prices for all products, whether raw or finished. There is nothing in the bill, it would seem, to prevent the classes referred to from erecting mills for the purpose of making flour and from withholding flour from the market for indefinite periods in order to enhance prices. I think it can be reasonably contended that this bill would authorize the manufacture of all sorts of products, from cereals to dehydrated and prepared and preserved fruits, as well as the productions of planters, ranchmen, and dairymen. The ranchmen produce meat. They would be permitted, it would seem, the right to build packing houses to care for their

²⁵⁹ 60 Cong. Rec. 312 (1920). Senator King wielded considerable power in the Senate during the 66th Congress as its President pro tempore.

²⁶⁰ *Id.*

products, hold them in storage, fix prices, and form combinations that would be restrictive of trade and, possibly, destructive of competition.²⁶¹

Later in the debate, Senator Irvine Lenroot (R-WI) challenged Senator King's assessment. Part of their colloquy reads:

Mr. KING: Might not the ranchmen--that is the word that is used--erect packing establishments, buy refrigerating cars, and do all the things that the packers now do and take care of the by-products, and for that reason launch out into all sorts of business and combine for the purpose of maintaining prices and creating monopolies with respect to the commodities in the production of which they are engaged?

Mr. LENROOT: They could not, for this reason: As I said a moment ago, the members of the association are confined to dealing in the things produced by their own members--in agricultural products. They can not.. attempt to monopolize the food products of the country as the packers do; they can not go into the wholesale grocery business; they can do nothing of the kind. They are confined to dealing with the things that the members themselves produce; that is all.

Mr. KING: I think the interpretation of the Senator is the one, doubtless, which the members of the committee desire to have placed upon the bill, but I doubt whether that interpretation is the one which will be followed.²⁶²

At this point, Senator Thomas Walsh (D-MT)²⁶³ took the floor and sided with Senator King, saying the bill "...beyond a doubt, permit(s)

²⁶¹ *Id.*

²⁶² 60 Cong. Rec. 369 (1920).

²⁶³ Senator Thomas Walsh (D-MT) should not be confused with Rep. Joseph Walsh (R-MA) who also took part in the debate over the Capper-Volstead bill.

a number of hog raisers, if they see fit to do so, to erect a packing house in which their own product will be treated.."²⁶⁴

Senator King's statement also makes it clear that the Senate was aware the cooperatives had already achieved substantial market share. He asserted that raisin grape growers:

... formed an association by means of which they control all of the grapes of California. They control the raisin crop, and they have advanced the price more than 300 per cent. They have a monopoly of the raisin industry, and so powerful is this monopoly that it fixes prices and holds the country, so far as raisins are concerned, in its grasp.²⁶⁵

While Senator King obviously thought this was an undesirable outcome, Senator Porter McCumber (R-ND) wasn't so sure. He commented that while he didn't know all the facts about the raisin industry, "... I know that for a number of years (growers) did not even get living prices for their raisins, and if they should get good prices for a year or two I certainly should not object to it."²⁶⁶

The debate carried over to the next day, when Senator Frank Kellogg (R-MN) spoke on behalf of the House language. After commenting on the small percentage of the consumer's food dollar that reaches many farmers, he also discussed the rise of sophisticated cooperatives in California, but in kinder terms than Senator King:

I can remember only a few years ago when the fruit producers of California were bankrupt all the time. They had no facilities for marketing their products and no agents to furnish the products to the country as the country required

²⁶⁴ 60 Cong. Rec. 370 (1920). During this statement, Senator Walsh pointed out that the threat of producer associations to the great agribusiness firms of the day was limited because the bill did not authorize federated associations or the handling of nonmember production. Both of these activities were specifically sanctioned by language added to the bill later in the legislative process.

²⁶⁵ 60 Cong. Rec. 313 (1920).

²⁶⁶ *Id.*

them. There were no storage facilities and no coordination, but each man proceeded to dump his stuff upon the railroads. Consequently the markets were glutted; people could not buy all the products when they were glutted, and at other seasons of the year they had to pay enormous prices and many times could not get fruit. Now the producers have real scientific, businesslike organizations. They have built their own warehouses for the handling of their fruit; they have their own agents; they guarantee deliveries of good oranges and other fruit so that any man can buy from one of those farmers' organizations and know that the product will be good. The same thing to some extent applies to apples. The result has been that the public has paid less according to the standard prices of the country, and the producer has received more.²⁶⁷

Confusion on the Senate floor over the rationale for the 8 percent limit on dividends on stock and membership capital was resolved by Senator Walsh. He said that the general plan for cooperatives is to allocate earnings on the basis of patronage. However, it is sometimes difficult to get farmers to provide needed equity capital. To be fair to those who do contribute capital, the associations are authorized to pay them a return of up to 8 percent before allocating the remaining earnings to all members on a patronage basis.²⁶⁸

As the debate was winding down, Senators Walsh and King engaged in a colloquy to clarify any doubt about a key issue, whether the bill authorized an unregulated monopoly by agricultural producers.

Mr. KING: Does the Senator think the bill would exempt from prosecution under the Sherman law any individuals of any association organized under the bill which created a monopoly or developed a monopoly in any of the products referred to in the bill?

²⁶⁷ 60 Cong. Rec. 361 (1920).

²⁶⁸ 60 Cong. Rec. 365 (1920).

Mr. WALSH of Montana: That is very carefully taken care of by the amendment offered by the Senate committee, reading as follows:

Nothing herein contained shall be deemed to authorize the creation of or attempt to create a monopoly, or to exempt any association organized hereunder from any proceeding instituted under the act entitled "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes" approved October 15, 1914 on account of unfair methods of competition in commerce.

If any one of these organizations should resort to any monopolistic practices or attempt to drive any rival out of business or resort to corruption in the case of purchasing agents or anything of that kind, they would all be subject to the operation of the Federal Trade Commission act.

Mr. KING: Would they be subject to the operations of the Sherman law?

Mr. WALSH of Montana: Undoubtedly; it so provides.

Mr. KING: If they should create a monopoly?

Mr. WALSH of Montana: Yes.²⁶⁹

Just prior to passage of H.R. 13931 by the Senate, amendments were adopted (1) to substitute the words "Federal Trade Commission" in every place in which the term "Secretary of Agriculture" appeared, and (2) to add the "nothing herein" amendment of Senator Walsh as a separate paragraph. Thus, under the Senate version, the antitrust laws were to remain applicable in their entirety to cooperatives. The amendments and the bill as amended were all approved without recorded votes.²⁷⁰

²⁶⁹ 60 Cong. Rec. 373 (1920).

²⁷⁰ 60 Cong. Rec. 376-377 (1920).

The Senate immediately requested a conference with the House and appointed its conferees.²⁷¹ On December 20, 1920, the Senate version was briefly discussed on the House floor. Rep. Volstead indicated the House was not ready to accept the Senate amendments and the House appointed its conferees.²⁷²

The conferees were unable to agree on provisions of their conflicting bills. The measure died with the adjournment of the 66th Congress.

Regrouping for a Second Campaign

John Miller's memo recalling events leading to enactment of Capper-Volstead reports that new President Warren G. Harding, some time after his inauguration, called a conference of farm leaders. He spoke to the group and expressed support for a new law giving farmers greater rights to combine for the purpose of preparing and marketing their products. However, he did not explicitly endorse the Capper-Volstead bill.

After Harding left the conference, the farm leaders discussed the Capper-Volstead bill and unanimously approved a resolution urging its enactment as passed by the House in the previous Congress. The resolution was presented to President Harding who then endorsed the bill.

Miller also reported that Senator Capper was concerned that the upcoming fight in the Senate would be largely a lawyer's battle.²⁷³ Capper suggested the President ask Senator Frank Kellogg (R-MN) to serve as floor leader for the bill. Kellogg was a very able lawyer and speaker, who would later serve as Secretary of State and one of the judges of the World Court. Kellogg consented and the stage was set for the final push to enactment.

²⁷¹ 60 Cong. Rec. 377 (1920).

²⁷² 60 Cong. Rec. 571.

²⁷³ Senator Capper was a career journalist and publisher. He was virtually the only non-lawyer to play a significant role in the development of the Capper-Volstead Act.

House Consideration, 67th Congress

Rep. Volstead reintroduced his bill "to authorize association of producers of agricultural products" on April 11, 1921, the first business day of the 67th Congress.²⁷⁴ The bill, H.R. 2373, was referred to the Judiciary Committee, which he still chaired.

H.R. 2373 included two significant changes from the Volstead bill in the previous Congress. Both were designed to meet concerns raised in the Senate.

- A provision in Sec. 1 of the earlier bill stating farmer collective marketing could occur "any law to the contrary notwithstanding" was deleted. Several Senators had questioned whether this could be interpreted as a blanket exemption from the antitrust laws.
- Language was added to Sec. 1 providing "Such associations may have marketing agencies in common." Senator Walsh had commented that "...there ought to a provision for the federation of marketing associations."²⁷⁵

The bill was reported favorably by the Judiciary Committee on April 26th.²⁷⁶

The report repeats the analysis made in House Report 939 of the previous Congress and added two new justifications. First, it supports the addition of the "marketing agencies in common" provision with an illustration of local grain elevators who cannot lawfully market on a combined basis and thus serve only a gathering points for large terminal elevator companies.

Second, it argues against adoption of the two amendments added by the Senate in the last Congress, stating:

This bill directs the Secretary of Agriculture to supervise these associations. The reason for that is apparent when one

²⁷⁴ H.R. 2373, 67th Cong., 1st Sess., at 61 Cong. Rec. 98 (1921).

²⁷⁵ 60 Cong. Rec. 370 (1920).

²⁷⁶ H.R. Rep. No. 24, 67th Cong., 1st Sess. (1921).

considers the duties and the organization of the department. The Secretary has for many years aided farmers in forming such associations, and his department is thoroughly familiar with the needs and the difficulties under which they always have a struggle. There is in his department a Bureau of Markets that is constantly engaged in studying marketing conditions and prices of agricultural products both in this and foreign countries. As a consequence he is especially well equipped for the purpose of determining whether the prices charged by any of these associations are excessive. That is one of the duties that somebody must perform to safeguard the public.

If it is safe not to place a limit upon the size of an ordinary corporation, there certainly is no reason to fear monopoly from farm associations. But in the event that any such association should monopolize or restrain trade so as to unduly enhance the price of any agricultural product ample provision is made in the bill to protect the public. The Secretary of Agriculture in a sundry fashion can grant relief, and he, with his expert knowledge always at hand, can act more expeditiously than could any other agency. In the event an association fails to abide by his judgment it can not only be haled into court but a temporary injunction can at once be issued against it.

In the event that associations authorized by this bill shall do anything forbidden by the Sherman Antitrust Act, they will be subject to the penalties imposed by that law. It is not sought to place these associations above the law but to grant them the same immunity from prosecution that corporations now enjoy so that they may be able to do business successfully in competition with them.²⁷⁷

The report also noted that the 1920 national conventions of both political parties adopted platform language endorsing the right of farmers to form cooperatives to market their products.²⁷⁸

²⁷⁷ *Id.* At 3.

²⁷⁸ *Id.* Both platform planks are reprinted at 61 Cong. Rec. 1044 (1921).

The bill was taken up by the House on May 4th. While extended House debate occurred the previous year, discussion of H.R. 2373 was limited to two hours. Chairman Volstead, in discussing his bill, said:

(This bill) aims to authorize cooperative associations among farmers for the purpose of marketing their products...

The objection made to these organizations at present is that they violate the Sherman Antitrust Act, and that is upon the theory that each farmer is a separate business entity. When he combines with his neighbor for the purpose of securing better treatment in the disposal of his crops, he is charged with a conspiracy or combination contrary to the Sherman Antitrust Act. Businessmen can combine by putting their money into corporations, but it is impractical for farmers to combine their farms into similar corporate form. The object of this bill is to modify the laws under which business organizations are now formed, so that farmers may take advantage of the form of organization that is used by business concerns. It is objected in some quarters that this repeals the Sherman Antitrust Act as to farmers. That is not true any more than it is true that a combination of two or three corporations violates the act. Such combinations may or may not monopolize or restrain trade. Corporations today have all sorts of subsidiary companies that operate together, and no one claims they violate this act.²⁷⁹

After expanding on the local elevator example in the report, Volstead carefully pointed out:

If these organizations should combine with corporations not organized as provided in this bill to thus monopolize or restrain trade, they will become subject to the Sherman Antitrust Act just the same as any other combination or corporation. We are merely seeking to give them a status that will make it possible for them to organize and to

²⁷⁹ 61 Cong. Rec. 1033 (1921).

cooperate with other organizations similarly organized to the extent that may be necessary to meet industrial conditions.²⁸⁰

Rep. Ira Hersey (R-ME), also a Judiciary Committee member, made perhaps the strongest statement in support of cooperation:

The value of such farm organizations to the producers of agricultural products is beyond estimate. By such organizations the farmers of this country can work and think together. It creates a civic force in large farming communities which protects the farmers, both for the present and for the future. They can thereby operate together in buying seed, fertilizer, farm machinery, and everything needed for the conduct of the farm.

They can work and act together in marketing their products, both in the local and in all markets of the world. The small farmer is assisted in his efforts to hold or market his crops. It does away with the middleman, the speculator, and the importer; in brief, it enables the producers to act together for their mutual interests in the planting, care, and marketing of agricultural products.²⁸¹

Just prior to passage of the bill by the House, Volstead pointed out that while the effect of the bill was to remove the threat of criminal prosecution of farmers' organizations, Section 2 provided a remedy through the Secretary Agriculture, and that the farmers approved such control. Rep. Hatton Sumners (D-TX) asked if the bill had any chance of passing in the Senate without Section 2 and Volstead responded that he did not think so and did not think it ought to.²⁸² After some parliamentary wrangling the bill was passed, 295-49.²⁸³

²⁸⁰ *Id.*

²⁸¹ 61 Cong. Rec. 1043 (1921). Rep. Hersey lived in Maine's Aroostock County and represented the potato growers whose activities led to the unfavorable (for cooperatives) decisions in the *United States v. King* cases, *supra*, pp. 83-85.

²⁸² 61 Cong. Rec. 1044 (1921).

²⁸³ 61 Cong. Rec. 1046 (1921).

Senate Consideration, 67th Congress, and Enactment

Senator Capper reintroduced his bill early in the 67th Congress and succeeded in getting it referred to the Committee on Agriculture and Forestry.²⁸⁴ However, no action was taken on it as the House had moved quickly on the Volstead bill.

After House passage on May 4, the Volstead bill was transmitted to the Senate and referred to the Judiciary Committee.²⁸⁵ This became the vehicle for Senate action.

The Judiciary Committee rewrote the bill and on July 27 favorably reported its substitute for the House language.²⁸⁶ The Senate committee recommended two major changes in the House bill.

First, the committee renewed its attempt to prohibit producer associations from establishing a monopoly position in a market. But this time, rather than simply adding language to the end of the House version of Section 2, the committee proposed to replace the House language with a simple statement that:

Nothing herein contained shall be deemed to authorize the creation of, or attempt to create, a monopoly, or to exempt any association organized hereunder from any proceedings instituted under the (Federal Trade Commission Act of 1914) on account of unfair methods of competition in commerce.²⁸⁷

In support of this change, the report states:

The foregoing is a reproduction of the House bill, omitting therefrom section 2, and adding thereto the provision to guard against the establishment of a monopoly, in substance like the amendment proposed by this committee

²⁸⁴ 61 Cong. Rec. 424 (1921).

²⁸⁵ 61 Cong. Rec. 1058 (1921).

²⁸⁶ S. Rep. No. 236, 67th Cong., 1st Sess. (1921), at 61 Cong. Rec. 4332 (1921). This was the only action taken on the bill until January 1922.

²⁸⁷ S. Rep. No. 236, 67th Cong., 1st Sess. 1 (1921).

and adopted by the Senate to a like bill which passed the House at the last session...

The hearings conducted by the subcommittee have confirmed the members thereof in the conviction that the amendment insisted upon by the Senate at the last session is essential for the protection of the consuming public and can do no possible harm to the great body of farmers in whose interest the legislation is demanded.

Inasmuch as it is utterly impossible to establish a monopoly of any of the ordinary farm products, cereals, cotton, livestock, etc., and inhibition of monopoly must be unobjectionable to the producers of such. Moreover, your committee is entirely satisfied that they have no desire or purpose to establish a monopoly. Why anyone should insist, under these circumstances, on the enactment of a law which, in terms, would authorize them to do so, your committee finds it impossible to understand.

It is possible, however, to establish a monopoly with respect to farm products which can be produced profitably only in a very limited area, or in the case of highly perishable products, like milk, which will not stand shipment long distances. It would not be in the public interest, your committee believes, to permit all producers of milk within the area from which one of our great cities is supplied to effect a single organization having thus a monopoly which might or might not be utilized to exact extortionate prices of consumers. Your committee sees no good reason why two, three, a half dozen, or a dozen cooperative associations might not properly be organized for the purpose of supplying a city with its milk, nor why, in the case of raisins, for instance, produced only within a limited area in the State of California, a monopolistic organization should be permitted and encouraged, rather than two or three cooperative associations organized and operating on similar lines.²⁸⁸

²⁸⁸ *Id.*, at 1-2.

Second, the committee inserted language authorizing associations covered by the bill to market agricultural products of nonmembers, provided the value of products handled for members exceeds that handled for nonmembers.²⁸⁹ In explaining this change, the report said:

The bill before us during the last session authorized the organization of associations dealing in "products of their members." The bill now under consideration authorizes them to deal in the "products of persons so engaged." Obviously, under the former the associations would be restricted in their dealings to members; in the latter, though they are restricted as to the character of the products in which they may deal, it is clear that they may deal with any person in such products, whether he be a member or not.

The bill has for its purpose the removal of obstacles, if such there be in the Federal statutes, in the way of the organization of cooperative farm marketing associations, a purpose which the majority, at least, of your committee is in full sympathy. It may be, and probably is, true that such associations can not operate with the highest degree of success... unless they are permitted to deal to some extent in the products of nonmembers similar in character to those handled for the members. But the protection of the statute ought not be given to a small number of (producers) who contribute from their own farms an inconsiderable quantity of the products handled by the association.²⁹⁰

Senate debate commenced at the beginning of the Second Session of the 67th Congress.²⁹¹ It was conducted under the general assumption (an accurate one, it turned out) that the House version, with minor amendments, would pass the Senate.

²⁸⁹ *Id.*, at 1. Although not spelled out in the bill, it has always been assumed that the "majority member business" rule would be applied on an annual, accounting-year basis.

²⁹⁰ *Id.*, at 3.

²⁹¹ The bill was called to the floor on January 31, 1922 (62 Cong. Rec. 1978) and debate began February 2 (62 Cong. Rec. 2048).

Senator Kellogg, in his role as floor leader, opened Senate consideration of H.R. 2373 with a concise statement of the need for greater public policy support for farmer cooperatives:

On account of the individualistic nature of the farmer's occupation, and the inability to consolidate into great aggregations of capital, the farmer finds himself at a disadvantage, and also, I believe, the consuming public. There is no doubt whatever that the difference between what the farmer receives for his products and what the consuming public pays is unreasonably great in the case of many if not all of the products grown and marketed to-day, and I believe that one of the means for the alleviation of this condition is marketing associations among the farmers themselves. They have, I think, already had considerable experience, and I believe will develop the ability to handle their own products properly and place them in the markets of the country and the markets of the world.

...
The main object of the cooperative association is to get reasonable prices for the farmer, principally through lessening the cost of marketing and selling his products and cutting down the differences between what the farmer receives and what the public finally pays.²⁹²

Kellogg detailed the legislative history of the similar bills in the prior Congress which resulted in the disagreement between the two chambers. He summarized the House bill and urged the Senate to reject the substitute proposed by its Judiciary Committee and to adopt the version passed by the House.

Kellogg engaged in a colloquy with Senator Cummins on the issue of who might qualify for membership in an association covered by the bill.

Mr. CUMMINS: Are the words "as farmers, planters, ranchmen, dairymen, nut or fruit growers" used to exclude all others who may be engaged in the production of

²⁹² 62 Cong. Rec. 2048-2049 (1922).

agricultural products, or are those words merely descriptive of the general subject?

Mr. KELLOGG: I think they are descriptive of the general subject. I think "farmers" would have covered them all.

Mr. CUMMINS: I think the Senator does not exactly catch my point. Take the flouring mills of Minneapolis: they are engaged, in a broad sense, in the production of an agricultural product. The packers are engaged, in a broad sense, in the production of an agricultural product. The Senator does not intend by this bill to confer upon them the privileges which the bill grants, I assume?

Mr. KELLOGG: Certainly not: and I do not think a proper construction of the bill grants them any such privileges. The bill covers farmers, people who produce farm products of all kinds, and out of precaution the descriptive words were added.²⁹³

This discussion clarifies the intent of the bill's sponsors as to whom the legislation was to cover. First, the phrase "persons engaged in the production of agricultural products" is to be construed broadly to include all producers of agricultural products, not just those specifically listed. Second, the phrase only encompasses people who grow crops and raise animals. The sponsors did not intend for Capper-Volstead to protect processors who are not owned and controlled by farmers.

Senator Kellogg also explained and defended Section 2 of the House bill:

The first question which has arisen is why the Secretary of Agriculture should be named as the officer to find whether the association has unduly enhanced prices. I know of no officer more competent to deal with the question than the Secretary of Agriculture. He has in his department a Bureau of Markets. He keeps track of the cost of production, the cost of selling, and what the public is paying. He has the

²⁹³ 62 Cong. Rec. 2052 (1922).

statistics and he, through his Bureau of Markets, can determine better than any other agency of the Government whether such a cooperative marketing association is really being operated in restraint of trade as a monopoly and is unduly enhancing prices.

The Attorney General has the duty placed upon him to take charge of the suit in the court to prosecute it, but the Attorney General has not the machinery to study these cooperative associations, to find out the cost of production, the cost of selling, the reasonable prices to the consumers, and various other elements which it is easy for the Secretary of Agriculture to find out.

It may be said, therefore, that before such associations can be prosecuted under the Sherman Act for any restraint of trade or monopoly, whether it is a mere technical monopoly, or not, the Secretary of Agriculture must investigate and make a finding that the cooperative association is in restraint of trade or is a monopoly and is unduly enhancing prices.²⁹⁴

Senator Capper took the floor next and said:

Mr. President, the cooperative marketing bill as it was offered in both the Senate and House seeks simply to make definite the law relating to cooperative associations of farmers and to establish a basis on which these organizations may be legally formed. Its purpose is to give to the farmer the same right to bargain collectively that is already enjoyed by corporations. The bill is designed to make affirmative and unquestioned the right which already is generally admitted, but which, in view of the Sherman law, is subject to nullifying interpretation by those whose interests are not identical with those of the farmer, and who for one reason or another may be in a position to obtain an interpretation advantageous to themselves and embarrassing or detrimental to the members of cooperative organizations.²⁹⁵

²⁹⁴ 62 Cong. Rec. 2049 (1922).

²⁹⁵ 62 Cong. Rec. 2057 (1922).

. . .

While it seems evident that Congress intends that the farmer shall not be prosecuted for acting collectively in the marketing of his product, yet the Federal law is such that these prosecutions may be threatened or actually brought against him. The farmer does not relish the possibility of being prosecuted for an alleged violation of law, even though he feels fairly certain that he would not be convicted."²⁹⁶

Capper attacked the Judiciary Committee substitute for Section 2 of the House bill, stating:

...this proviso nullifies the act, as no association can efficiently operate that does not control and handle a substantial part of a given commodity in the locality where it operates. Middlemen allege that farmers in selling their products individually are competitors with each other, and that by combining into associations to market collectively such competition is eliminated and the farmers thereby undertake to form a monopoly. Though it is conceded that the inevitable effect of cooperative marketing is to lessen competition between farmers, it nevertheless remains that farmers must market collectively or, in the most correct sense, they can not market at all, but must usually turn over their products to a noncompetitive buyer who operates the only elevator or milk station accessible to the farmers in that locality.

. . .

The bill as it passed the House, and which I hope will have the approval of the Senate, gives to consumers a protection which they do not now have as against middlemen, in that if such farmers' marketing associations unduly enhance prices a complete and adequate remedy is provided in section 2. If such associations unduly enhance prices, the Secretary of Agriculture may order them to cease and desist from monopolizing and restraining trade and

²⁹⁶ 62 Cong. Rec. 2059 (1922).

commerce. This provision of section 2 is taken from the Federal Trade Commission Act, and the Secretary of Agriculture can, as the Federal Trade Commission has repeatedly done, issue orders to cease and desist from specific acts. But if the bill is enacted into law in the form reported by the committee it will be a trap for the farmers and in no sense a measure of relief.²⁹⁷

The remarks of Senators Kellogg and Capper took up the first afternoon of debate. When debate resumed the following afternoon, most of the time was spent on extraneous discussion.²⁹⁸

As the time for the day to conclude approached, Senator Walsh took the floor. While Senator Walsh may not have been a villain out to sabotage cooperatives as some commentators have suggested, he staunchly believed that it was bad public policy to empower cooperatives to monopolize any segment of agricultural marketing. He devoted considerable effort attempting to convince his colleagues to replace Section 2 of the House bill with the Judiciary Committee language forbidding "...the creation of, or attempt to create, a monopoly...."

Senator Walsh began his remarks with a conciliatory statement:

...I am profoundly convinced that the salvation of the industry of this country depends in no small degree upon the adoption and the extension of the principle of cooperative marketing. The enormous spread which exists between the price which the producer of the agricultural product gets when he puts it on the market and that which the consumer pays for it is little less than a national scandal, and anything which can be done to take up that expense will be at the same time a benefit to the producers of the agricultural products on the one hand and the ultimate consumer on the other. I am, as I said, a profound believer in the wisdom of

²⁹⁷ 62 Cong. Rec. 2058 (1922).

²⁹⁸ 62 Cong. Rec. 2107-2120 (1922).

giving every encouragement possible to the extension of the cooperative principle.²⁹⁹

But he also soon took up the issue of monopolization, saying:

...the only substantial difference now, the only real subject of contention between the bill as it passed the House and now before us, and the Senate substitute, (is) namely, whether we should authorize, under the protection of this act, the creation of or the attempt to create a monopoly in the products of which the bill refers.

. . .

The Senate Committee insists that we shall not authorize that to be done. I understand the position of Senators on the other side to be that we shall, and that is a plain statement of the issue between us.³⁰⁰

The hour was late and, after Senator Walsh's opening remarks, the Senate prepared to recess.

Senator Walsh continued when debate resumed on February 6th. Soon Senator Walsh engaged in a colloquy with Senator Wesley Jones (R-WA) on issues considered by Senator Kellogg--who is covered by Section 1 and the extent of their conduct shielded from prosecution.

Mr. JONES: ..I am very much interested in the proposition whether, in the Senator's judgment, the Senate bill or the House bill would permit a combination of the creameries which are producing condensed milk?

Mr. WALSH: I have no doubt that it would; I have no doubt that both bills would authorize the organization of associations among farmers to make butter of their product or to make cheese of their product or to make condensed milk of their product, and to put the product on the market.

Mr. JONES: This is what I had in mind. For instance, in the State of Washington we have condensed-milk

²⁹⁹ 62 Cong. Rec. 2121 (1922).

³⁰⁰ 62 Cong. Rec. 2122 (1922).

creameries... but they are not farmers' associations; they are independent organizations; one might say they are manufacturing establishments. Now, what I was wondering was whether or not this proposed legislation would permit a combination of that kind?

Mr. WALSH: I should say not. The Senator from Washington will observe that under the provisions of both bills the organization authorized must be an organization of the producers themselves of the product of the farm. They may engage in marketing that product or they may engage in processing it for the purpose of putting it upon the market, but the proposed legislation would exclude a combination of producers of condensed milk who do not themselves produce it.³⁰¹

Thus, it appears clear that the Senate believed the Capper-Volstead Act authorized producers to engage in value-added processing and forward marketing of goods manufactured from raw products they produced. It is equally clear they believed the protections of the Act were forfeited if nonproducer processors were involved in the collective activity.

Senator Walsh went on:

There is a further provision in both bills to the effect that the organization may deal not only in the products of their members but also in the product by whomsoever it may be produced. The Senator for Ohio [Mr. Pomerene] at the last session of the Senate inquired very pertinently whether that provision would not, for instance, permit Mr. Swift or Mr. Armour, or Mr. Wilson, each of whom, I (will assume), owns a farm and raises hogs, for instance, to organize under this proposed act and deal in the products of their own farms, and also to buy extensively from other producers. I think that that could be accomplished under the House bill. Recognizing that there is an evil there, and that the act might easily be abused, the Senate bill provides that such

³⁰¹ 62 Cong. Rec. 2156 (1922).

organizations can not deal in products other than those produced by their members to an amount greater than the amount of the products which they get from their members. So that if the three gentlemen to whom I refer should organize an association under this proposed law, they could throw the product of their own farms into the association and could put just so much more into the business, but no more.³⁰²

Thus, Senator Walsh acknowledges that Capper-Volstead protection is not limited to associations of small-scale farmers. He also suggests that wealthy persons with close ties to corporate agribusiness can jointly market on a cooperative basis, so long as the association does not buy more product from outsiders than it handles for members.

Senator Walsh quickly returned to the subject of a possible producer monopoly, noting at one point:

...the only people who came before the (Judiciary) committee in relation to this bill, other than the representatives of the farm organizations..., were representative of the California Raisin Growers' Association, a confessed monopoly, and the representatives of the milk producers' associations, who frankly stated their purpose to set up a monopoly of the supply of milk to the great cities of the country under the provisions of this bill, if they shall be permitted so to do.³⁰³

So when the Senate rejected the Judiciary Committee amendment to replace Section 2 in the House bill with a statement barring producer association monopolies, it was aware that producers might, and in the case of raisins had, established a dominant position in the marketplace. And it did not adopt proposed language forbidding the accumulation of such market power.

Senate debate touched on another issue of continuing relevance. Senator George Norris (R-NE) had pointed out that during Judiciary

³⁰² 62 Cong. Rec. 2157 (1922).

³⁰³ *Id.*

Committee hearings general agreement existed that most farmer organizations had not done anything, and did not plan to do anything, to violate the law. However, he stated:

(Producer association leaders) want the law, however, because...they are afraid. They say, "We will be threatened.... The people in the business circulate propaganda and write letters, and so forth, and the farmers are afraid to come in." ...as to the great bulk of the producers I am of the opinion that it is more a matter of psychology than anything else. I do not believe they violate law now when they organize.³⁰⁴

Senator Pomerene then asked if cooperatives are rarely prosecuted, what is the need for the legislation? Senator Walsh responded:

Just simply as the Senator from Nebraska said, that those who do not want the organization, the men who have the business now, the middlemen who are standing between the producer and the consumer and taking their toll, discourage the organization of these corporations or associations by the suggestion that they will be in violation of law.³⁰⁵

Senator Norris picked up on the point that opponents of cooperatives could discourage their formation by simply suggesting joint marketing was illegal, saying:

...as the Senator from Montana [Mr. Walsh] said the other day, those who are interested in preventing his organizing, in preventing a cooperative movement on his part to do away with the middlemen, industriously circulate

³⁰⁴ 62 Cong. Rec. 2165 (1922). Senator Norris had just assumed the chairmanship of the Committee on Agriculture and Forestry, where he became known as the father of the Tennessee Valley Authority. The first of that project's dams was named Norris Dam.

³⁰⁵ *Id.*

reports that this kind of organization would be in violation of the Sherman antitrust law. The farmer is scattered all over the country, timid, and does not have the fortune to back him in fighting through the courts any lawsuit, whether it is justly or unjustly begun, and naturally he is afraid to go into a cooperative organization for fear, not that he will be convicted and sent to jail, but that he will be harassed, that there will be litigation extending through all the courts and through all the years. He is naturally timid and stays out of it.³⁰⁶

The discussion turned to Section 2 of the House bill. Confusion developed over the action the Secretary of Agriculture was to take if he found prices to be "unduly" enhanced. Some Senators apparently thought the Secretary could, or should, set a fair price. Again Senator Walsh provided a cogent explanation:

Take the case of a monopoly; if (a cooperative) monopolizes to such an extent as that prices are unduly enhanced, the Secretary of Agriculture directs that it refrain "therefrom"; that is, of course, refrain from monopolizing; not from enhancing prices, but from monopolizing. Likewise, if he finds that it does not constitute a monopoly but that there is an undue restraint of trade, as a consequence of which prices are enhanced, he is commanded to order that it desist "therefrom"; that is to say, from restraining trade.³⁰⁷

³⁰⁶ 62 Cong. Rec. 2259 (1922). Lack of understanding among farmers as to their rights to organize continues to make them vulnerable to threats of antitrust litigation by buyers of their products who want to avoid dealing with a strong, unified grower association. Even informed growers can be intimidated by the threat from a large, wealthy agribusiness firm to bring an antitrust action. Although the growers may know they are on strong legal ground, they lack the resources to survive a lengthy, expensive antitrust litigation. So their attempt at cooperation is stifled before it really begins.

³⁰⁷ 62 Cong. Rec. 2166 (1922).

Debate continued the following day, February 7th. Much of the discussion concerned various court cases dealing with producer associations. However, Senator King did make one of the stronger arguments against passage of the bill. He expressed grave concern about the power of monopolies in general:

I believe that if we pass the pending bill, we are indicating to the public that there will be no further effort to destroy monopolies and combinations in restraint of trade; that we will confess our impotency to deal with the subject...

I sympathize, as the Senator from Wisconsin (Senator Lenroot) does, with the farmers... This bill, however, in my opinion, will be regarded by trusts and combinations, by conspirators in restraint of trade, with glee and with rejoicing; and I warn the Senators now that if this bill is passed and becomes a law all of the illegal combinations in the United States will take courage from its enactment, and will continue their depredations without fear of the heavy hand of the law being placed upon them.³⁰⁸

Senator Lenroot retorted that if the Senate substitute barring monopolization were adopted, it would abrogate the benefits conferred under Section 1. He argued:

Whenever there is an association formed, a part of the effect of the formation of that association is an undue restraint of trade.

If a part of the purpose of that association be to eliminate competition, can Senators say that a court may not hold that that is an attempt to create a monopoly? That is the very basis of any holding of an attempt to create a monopoly, which is still made unlawful under the Senate amendment.

. . .

If the Senate Committee substitute shall be enacted, here is an association of farmers, growers of agricultural products, and, of course, one of the objects of that

³⁰⁸ 62 Cong. Rec. 2223 (1922).

association or one of the necessary results will be the elimination of competition between themselves and to secure better prices for their products. So I say the courts might well hold that the purpose of such a combination or association was an attempt to monopolize and therefore within the condemnation of the Senate committee substitute.³⁰⁹

As the general debate wound to a close, the primary question before the Senate remained as first expressed by Senator Walsh, would Congress sanction associations with the potential to control an unlimited share of the market in the product their members produced?

Senator Lawrence Phipps (R-CO) spoke on behalf of an amendment he had filed the previous day. The Phipps amendment provided that when farmers agreed to sell their products to a processor, under a contract that made the price received by the farmers dependent on the price received by the processor for the final product, the processors could cooperate in selling their products just as farmers could under the bill.³¹⁰ No vote was taken at this time.

The remainder of the day's discussion centered on squabbling over the rules for wrapping up the debate and voting on amendments and the bill itself.

The final day of Senate debate, February 8th, began with several lengthy statements in support of cooperatives.³¹¹ This was followed by a rehash by opponents of the dangers of permitting any monopoly and the perceived weaknesses of administrative enforcement by the Secretary of Agriculture.³¹²

Senator Walsh introduced two amendments to the House bill, which was technically before the Senate as passed by the House. The first provided "That any person engaged in the same industry shall be

³⁰⁹ 62 Cong. Rec. 2225-2226 (1922).

³¹⁰ 62 Cong. Rec. 2227 (1922). Senator Phipps was one of the few legislators at the time with a background in big business, having risen from clerk to first vice president of the Carnegie Steel Co. before leaving Pittsburgh for Colorado and a second career as an investor and politician.

³¹¹ 62 Cong. Rec. 2256-2264 (1922).

³¹² 62 Cong. Rec. 2264-2267 (1922).

admitted to membership in the association on equal terms with all others."³¹³

This amendment was probably a ploy to embarrass those Senators who opposed Senator Walsh's amendment to forbid cooperative monopolies by tying their opposition to the California Raisin Growers' Association. Walsh declared the provision would not be necessary if the anti-monopoly amendment were adopted. Then he postulated:

It is disclosed in the record that 93 per cent of the raisin growers in California belong to that association. The other 7 per cent continue to sell their products to commission merchants as they have in the past, but those commission merchants must go out of business, because they can not get enough of the product to enable them to operate profitably. If they do go out of business, then the 7 per cent will be too small a body to organize a separate association of their own able to conduct the business successfully. Accordingly, they will have no way of marketing their products unless they are admitted to membership in the organization now effected.³¹⁴

Senator Kellogg responded that cooperatives should be allowed to determine who they will admit as members. Senator Lenroot suggested it was somewhat inconsistent for Senator Walsh to be promoting an amendment that would compel cooperatives to increase market share or even become a monopoly. The amendment was rejected without a recorded vote.³¹⁵

Senator Walsh's second amendment, discussed earlier, provided that an association could not "deal in the products of nonmembers to an amount greater in value than such as are handled by it for members." No one spoke against this provision and it was adopted without a recorded vote.³¹⁶

³¹³ 62 Cong. Rec. 2267 (1922).

³¹⁴ *Id.*

³¹⁵ 62 Cong. Rec. 2268 (1922).

³¹⁶ 62 Cong. Rec. 2267-2269 (1922).

Next, a series of technical amendments were proposed, some being adopted, others rejected, and one withdrawn.³¹⁷

Senator Phipps then proposed his amendment concerning antitrust protection for processors who paid farmers under a formula based on what the processors received for finished products. During the debate it was alleged that this amendment was aimed at improving the profitability of sugar processors. The amendment was rejected without a recorded vote.³¹⁸

Then the discussion returned to the key issue, the Judiciary Committee proposal barring a cooperative monopoly. Senator King argued for the amendment, Senator Hitchcock against. Senator King asked whether Senator Hitchcock took the position that, under the bill, organizations throughout a State, or among the various States, could have a common representative sell their products, engage in joint value-added processing, build warehouses, and withhold product from the market until they obtained a suitable price. Hitchcock answered that yes, they could. King then asked Hitchcock if he thought this was a wise thing and Hitchcock responded that he did.³¹⁹

As the debate concluded, the Senate first rejected without recorded vote a last-minute amendment offered by Senator King to have the Federal Trade Commission, not the Secretary of Agriculture, be the enforcement agency under Section 2 of the bill.³²⁰

Next, it considered the Judiciary Committee amendment to replace Section 2 with a ban on cooperative monopolies. Senator Walsh made one last plea:

I wish it to be thoroughly understood, as we proceed to vote, that to reject the Senate substitute and to adopt the House text will be to remove the inhibition from setting up any milk monopoly in any one of the great cities of the country, and with no check upon anything they may do in the way of exacting exorbitant prices from consumers,

³¹⁷ 62 Cong. Rec. 2269-2273 (1922).

³¹⁸ 62 Cong. Rec. 2273-2275 (1922).

³¹⁹ 62 Cong. Rec. 2277 (1922).

³²⁰ 62 Cong. Rec. 2279 (1922).

except as provided in section (2) of the bill, the validity of which is open to most serious question....³²¹

Nonetheless, the amendment was rejected by recorded vote of 5 yeas, 56 nays, and 35 abstentions.³²²

Finally, the House bill as amended by the Senate passed by a recorded vote of 58 yeas, 1 nay, and 37 abstentions.³²³

The remainder of the legislative history of the Capper-Volstead Act is uneventful. On February 11th, three days after Senate passage, the legislation was again taken up on the floor of the House. Rep. Volstead repeated some of his earlier points justifying the legislation. Then the House voted to approve the bill as amended by the Senate.³²⁴

The following week it was signed by the Speaker of the House,³²⁵ signed by the Vice President in his role as President of the Senate,³²⁶ forwarded to the President for his approval,³²⁷ and signed into law by President Harding on February 18, 1922.³²⁸

One thing that stands out in this review of legislative history is the widespread, bipartisan support enjoyed by cooperatives during this period. Section 6 of the Clayton Act was passed by a heavily Democratic Congress elected during Woodrow Wilson's landslide victory in 1912. Capper-Volstead was approved by an even more dominantly Republican Congress that swept to power on the coattails of Warren G. Harding in 1920. The generally positive image of cooperatives on Capitol Hill has been very valuable to their farmer members through the years.

³²¹ *Id.*

³²² 62 Cong. Rec. 2281 (1922). At this point Mr. Phipps reoffered his amendment to protect processors. The chair refused his request for a recorded vote and the amendment was quickly rejected.

³²³ 62 Cong. Rec. 2282 (1922).

³²⁴ 62 Cong. Rec. 2453-2455 (1922).

³²⁵ 62 Cong. Rec. 2523 (1922).

³²⁶ 62 Cong. Rec. 2582 (1922).

³²⁷ 62 Cong. Rec. 2715 (1922).

³²⁸ 62 Cong. Rec. 3172 (1922).

CHAPTER 5. OTHER ANTITRUST LAWS

Before exploring how the core antitrust laws have been interpreted and applied to cooperatives, it's useful to cover subsequent Federal and State statutes that support cooperative marketing by farmers. While none has the overall impact of Capper-Volstead, each provides public policy support for cooperatives in certain circumstances.

NAVAL STORES AMENDMENTS FAIL

As enacted in 1922, Section 1 of the Capper-Volstead Act provides that the law covers "... persons engaged in the production of agricultural products, as farmers, planters, ranchmen, dairymen, nut or fruit growers..."³²⁹

In early 1923, during the waning days of the 67th Congress, Senator "Pat" Harrison (D-MS) made two attempts to insert a specific reference to producers of naval stores after "nut or fruit growers" in Section 1 of Capper-Volstead. While neither was successful, they set the stage for a heated debate during consideration of the Cooperative Marketing Act of 1926.

"Naval stores" is a trade term covering products produced from the sap of yellow pine trees along a band of Southern states stretching from Georgia and Florida west to Texas. The finished products are turpentine and rosin.

On January 10, 1923, the Senate was debating an appropriations bill for USDA. Senator Harrison offered an amendment to insert "or producers of naval stores" after "nut or fruit growers" in Section 1 of Capper-Volstead.³³⁰ Harrison argued that the naval stores industry had been severely depressed for 15 years and his amendment would do nothing more than "place the producers of rosin and turpentine upon

³²⁹ 7 U.S.C. § 291.

³³⁰ 64 Cong. Rec. 1521 (1923). During the brief debate that followed, Senator Henry Cabot Lodge (R-MA) became confused and asked why Congress should permit combinations of companies that sell goods to the navy. Sen. Harrison was permitted to modify his amendment to read "or producers of rosin and turpentine." 64 Cong. Rec. 1522 (1923).

the same basis as to organization of marketing associations as the producers of fruits, nuts, and vegetables."³³¹

Harrison acknowledged that he was adding a legislative amendment to an appropriations bill and asked his colleagues not to raise a point of order. However, Senator Charles McNary (R-OR), while expressing support for the Harrison amendment, did object and the point of order was sustained, killing this amendment.³³²

The following day, Harrison introduced a new bill (S. 4324) to insert "or producers of turpentine and rosin" after "nut and fruit growers" in Section 1 of Capper-Volstead.³³³

The Senate took up Senator Harrison's new bill on February 5th. During another brief debate, Harrison asserted that the rosin and turpentine "...crops are owned by small farmers. In thousands and thousands of instances, where they have, say, 40 trees, they will box them, and this is to allow them to organize and sell their product."³³⁴

No Senator objected to the bill and it was passed.³³⁵

The legislation was sent to the House on February 6th and referred to the Judiciary Committee.³³⁶ The bill was reported out of committee on February 24th.³³⁷ A week later, on March 4, 1923, the 67th Congress adjourned without the House taking up Senator Harrison's bill.

While this ended the attempt to directly amend Capper-Volstead by adding a reference to producers of naval stores, it only served as an introductory skirmish over the issue of how producers of naval stores should be treated under the antitrust laws. The subsequent debates over including a reference to naval stores in the Cooperative Marketing Act of 1926 would focus attention for the first time on an

³³¹ 64 Cong. Rec. 1522 (1923).

³³² *Id.*

³³³ 64 Cong. Rec. 1563 (1923). On January 18, H. R. 4324 was reported out by the Committee on Agriculture and Forestry. 64 Cong. Rec. 1921 (1923).

³³⁴ 64 Cong. Rec. 3064 (1923).

³³⁵ *Id.*

³³⁶ 64 Cong. Rec. 3137 (1923).

³³⁷ 64 Cong. Rec. 4584 (1923).

issue still unresolved--the limits, if any, on the size and scope of an entity seeking to qualify as a "producer" for antitrust exemption purposes.

COOPERATIVE MARKETING ACT OF 1926

Now that farmers had been granted limited antitrust protection for their cooperative ventures, public policy focus shifted to assisting the establishment of effective associations. The result was a statute, the Cooperative Marketing Act of 1926,³³⁸ that lends support in two ways:

- It establishes a permanent unit within USDA to gather and disseminate information on, conduct studies about, and provide technical assistance to farmer cooperatives.³³⁹
- It reinforces congressional intent to facilitate the development of strong cooperative associations by specifically authorizing them to "acquire, exchange, interpret, and disseminate past, present, and prospective crop, market, statistical, economic, and other similar information by direct exchange between such persons, and/of such associations or federations thereof, and/or by and through a common agent created or selected by them."³⁴⁰

An important element of Section 5 is that it authorizes the exchange of information not only among producers, but also between producers and their cooperative associations, between various associations including members of the same federated system, and between cooperatives and a common marketing agent they have created or retained to assist them in their collective marketing activity.

On July 1, 1922, USDA established a Division of Agricultural Cooperation within its Bureau of Agricultural Economics.³⁴¹ The

³³⁸ Chap. 725, 44 Stat. 802 (1926), codified at 7 U.S.C. §§ 451-455.

³³⁹ Section 1-4 of the Act, 7 U.S.C. §§ 451-454.

³⁴⁰ Section 5 of the Act, 7 U.S.C. § 455.

³⁴¹ Over the years, the unit has been reorganized and renamed several times. Today it is the Cooperative Services group within the Rural Business-

unit's first publication was L. S. Hulbert's *Legal Phases of Cooperative Associations*.³⁴²

Legal Phases includes a concise summary of the background leading to enactment of Capper-Volstead and a common sense explanation of its provisions.³⁴³ In 1923 and 1924 the Division published several case studies of successful cooperatives, conducted its first survey of cooperative business activity, and launched a mimeographed newsletter entitled *American Cooperation*. The group also began providing technical assistance upon the request of cooperatives and working with income tax officials to clear up misunderstandings about the tax treatment of cooperatives.

These fledgling efforts on cooperation were doing little to alleviate the continuing and worsening depression in agriculture during a period of general post-war prosperity. Farm-state legislators were calling for more drastic steps. The most prominent was the so-called McNary-Haugen bill. The bill was named after its sponsors, Senator Charles McNary (R-OR)³⁴⁴ and Rep. Gilbert Haugen (R-IA).³⁴⁵ Their

Cooperative Service agency, part of USDA's Rural Development mission area. It facilitates the development of new agricultural and rural cooperatives, offers technical assistance to existing cooperatives, conducts research and gathers statistics on cooperative business activity, and prepares and disseminates educational materials that promote understanding of how business is conducted on a cooperative basis.

³⁴² L. S. Hulbert, *Legal Phases of Cooperative Associations*, USDA Department Bulletin No. 1106 (1922).

³⁴³ *Id.* at 35-46.

³⁴⁴ Senator McNary was just beginning a long Senate career that would be highlighted by his role as minority leader from 1933 until his death in 1944. Having been appointed to his seat before the Republican landslide in 1920, he was rising quickly in seniority on the Agriculture Committee. He became chairman during the 69th Congress when Senator George Norris resigned that slot to become chair of the Judiciary Committee.

³⁴⁵ Rep. Haugen was a veteran congressman, having served since 1899, and chair of the Committee on Agriculture. Like Rep. Volstead, he had attended college in Decorah, Iowa, home of the hog marketing cooperatives whose use of liquidated damages was held to be an illegal restraint of trade. *Reeves v. Decorah Farmers' Co-operative Society*, 140 N.W. 844 (Iowa 1913), n. 145.

plan was to mandate a two-price system for farm products, guaranteeing a "fair exchange price" for products for domestic consumption and selling surplus agricultural products at world prices.

McNary-Haugen was strongly opposed by President Calvin Coolidge, Secretary of Agriculture William Jardine, and Secretary of Commerce Herbert Hoover. All three were staunch supporters of cooperatives, at least in part because cooperatives were seen as a viable alternative to direct government intervention in the economic affairs of farmers proposed in McNary-Haugen. At the same time, many cooperative leaders supported McNary-Haugen. The emerging force in agricultural policy, the American Farm Bureau Federation, supported both cooperatives and McNary-Haugen.³⁴⁶

While USDA was developing a cooperative program, cooperatives themselves were recognizing the need for better channels of communication within the movement. In February 1924, at the bequest of the Milk Producers Federation, representatives of USDA and various farm and cooperative groups met in Washington, DC. They agreed to establish a national educational body to conduct programs on cooperation. In January 1925, the American Institute of Cooperation (AIC) was incorporated as an educational institution under the laws of the District of Columbia.

AIC's first conference was a four-week program that summer at the University of Pennsylvania in Philadelphia. The conference was both an educational and a public relations success. It also showcased the expertise at USDA on cooperatives and established good feelings between the Department and cooperative leaders.

Following the AIC meeting, cooperative leaders and Agriculture Secretary Jardine agreed to support an initiative to encourage the acquisition and dissemination of information pertaining to cooperatives, both within USDA and among the cooperatives themselves. Jardine's staff drafted legislation, and after 33 leaders of cooperative associations endorsed the bill, it was forwarded to Congress.³⁴⁷

³⁴⁶ Much of the background material on the Cooperative Marketing Act of 1926 is based on Wayne Rasmussen, *Farmers, Cooperative, and USDA*, USDA Agricultural Information Bulletin 621 (1991), pp. 79-92.

³⁴⁷ The skids were greased, so to speak, in the House. Even considering the unique chronology sometimes employed in the Congressional Record, this

The House Agriculture Committee Report³⁴⁸ briefly summarizes the bill's intent and includes statements of endorsement from cooperative leaders. The report notes first that the bill proposed a permanent division of cooperative marketing in USDA's Bureau of Agricultural Economics, "...which...through research, educational, and service work, would render assistance to cooperative associations."³⁴⁹

Second, it states the bill also provided for:

...the acquisition and dissemination, by associations of farmers, of crop and market information. It is highly important that associations should be allowed to keep their members fully informed in regard to all of the factors affecting the demand for their products. It is generally known that farmers, due to the large number of them and to their widely scattered geographical situation, proceed in many respects unintelligently in regard to the production and marketing of their products. The provision in question would tend to alleviate this condition.³⁵⁰

The full House took up the bill of January 26, 1926. During floor debate, Rep. Henry Barbour (R-CA), who represented the Fresno area, offered this cogent justification for the bill:

I live in a country where cooperative marketing has probably reached its highest state of development, and we have found there that one of the problems of the cooperative marketing association is the same as the problem of the farmers who are not organized, and that is overproduction.

is probably one of the few instances where the bill was mentioned as being reported favorably by the responsible committee (Committee on Agriculture, 67 Cong. Rec. 2338, first column) before it was reported as having been introduced (H.R. 7893, introduced by Rep. Haugen on January 18, 1926, 67 Cong. Rec. 2338, second column).

³⁴⁸ H.R. Rep. No. 116, 69th Cong., 1st Sess. (1926).

³⁴⁹ *Id.* at 1.

³⁵⁰ *Id.* at 2.

There has been no way in which information could be gathered successfully and disseminated among the members of an association in a way that would prevent the overproduction of the farm products which these association handle and market.

This legislation will give to the bureau of cooperative marketing and to the members of the various organizations the right to gather such information and to disseminate it among organizations and among themselves without being liable criminally for such acts. It will, in my opinion, tend to do away with this great problem that has confronted us and now confronts us, namely, the problem of overproduction...³⁵¹

Rep. Barbour may have been unduly optimistic in thinking that providing farmers information on potential overproduction would prompt them to reduce plantings. But his argument helped protect legislative reenforcement of the public policy support for cooperative marketing by farmers embodied in Section 6 of the Clayton Act and the Capper-Volstead Act.

No significant opposition materialized. Floor debate was limited to 2 hours. Even some of that time was spent on tangential issues such as the unfair impact of tariffs on farmers. A few congressmen suggested the bill was an insufficient response to the dire needs of farmers.³⁵²

³⁵¹ 67 Cong. Rec. 2775 (1926).

³⁵² Even the Congressional Record suggests the representatives were doubled over in laughter when Rep. Ole Juulson Kvale, an ordained Lutheran minister and a Farmer-Labor Party member from Minnesota, who could undoubtedly speak with a strong Scandinavian brogue, said, among other things:

If a bill were introduced here giving the farmer the right to use the multiplication table or granting him the privilege of making use of God's rain and sunshine, I suppose I would vote for such a bill. And it would do as much for the farmer as the bill under consideration. Oh, this innocent thing, this spineless, sapless, lifeless, jellyfish substance, this milk-and-water, insipid, tasteless, odorless, colorless, harmless concoction! [Laughter.] Another

Two important issues arose during the debate. First, some congressmen were concerned that the bill provided some special status to large, investor-owned packers and food processors. This view was answered by Representative James McLaughlin (R-MI), who responded:

This bill, in the assistance it would give, the encouragement it would give, and the protection it would give, is limited to the original producers who are farmers, planters, ranchmen, dairymen, or nut or fruit growers. Men engaged in those productions can organize a company. They could organize a packing plant. They could operate a series of tanneries or manufactories of clothing or anything of that kind; but the organizations which are to receive the benefit and protection of this act must be composed of these original producers who are described in section 5.³⁵³

Second, the Jardine bill, as it was called, contained a different description of covered activity than Section 1 of Capper-Volstead. Under section 1 of this bill, agricultural products were defined as "agricultural, horticultural, viticultural, and dairy products, livestock and the products thereof, the products of poultry and bee raising, the edible products of forestry, and any and all products raised or produced on farms and processed or manufactured products thereof.." ³⁵⁴

Representative John McDuffie (D-AL) offered an amendment to insert "and naval stores" after "edible."³⁵⁵ Several southern congressmen spoke in favor of the amendment as a way to help small

Coolidge pink pill for pale farmers! {Laughter and applause.} 67
Cong. Rec. 2781 (1926).

Rep. Kvale, like Rep. Volstead and Rep. Haugen, had close ties to Decorah, Iowa. Kvale was born and raised near Decorah and graduated from Luther College in Decorah.

³⁵³ 67 Cong. Rec. 2768-2769 (1926).

³⁵⁴ 67 Cong. Rec. 2767 (1926).

³⁵⁵ *Id.*

farmers. Representative Haugen, chairman of the Agriculture Committee, said that he had no objection to the "naval stores" amendment, which he saw as a modest broadening of the definition of agricultural product.³⁵⁶

The "naval stores" amendment was adopted³⁵⁷ and the bill was passed overwhelmingly by the House.³⁵⁸ The following day, it was referred to the Senate and assigned to the Committee on Agriculture and Forestry.³⁵⁹

Contention over the inclusion of a specific reference to naval stores in the bill arose during a series of hearings held on the legislation by the Senate Agriculture Committee.³⁶⁰ Paint and varnish manufacturers, paper manufacturers, and soap producers objected to the language. They argued that the reference wasn't intended to assist limited resource farmers, but rather a small number of large, integrated companies that owned vast forests and manufactured substantial quantities of turpentine and rosins. The turpentine and rosin producers association countered that most producers were small; that the products were developed naturally, not by a manufacturing process; and USDA's Forest Service routinely treated treed land that produced naval stores as turpentine orchards or forests.

While most farm group representatives limited their remarks to support of greater assistance to cooperatives, Chester Gray of the American Farm Bureau Federation spoke forcefully against the inclusion of the naval stores language. Gray asserted the bill would be subverted if it included products that are not strictly agricultural in nature and are produced primarily by lumber companies and corporations rather than individuals.³⁶¹

³⁵⁶ 67 Cong. Rec. 2769 (1926).

³⁵⁷ 67 Cong. Rec. 2770 (1926).

³⁵⁸ 67 Cong. Rec. 2783 (1926).

³⁵⁹ 67 Cong. Rec. 2825 (1926).

³⁶⁰ *To Promote Cooperative Marketing: Hearings on S. 1910 and H.R. 7893 Before the Senate Committee on Agriculture and Forestry*, 69th cong, 1st Sess. (1926).

³⁶¹ *Id.* at 154-155.

On the last day of Senate hearings, the first witness, Representative Thaddeus Sweet (R-NY), announced he had been dispatched to inform the Senate that House Agriculture Committee Chairman Haugen had changed his position and now opposed including the reference to naval stores in the bill.³⁶² The hearings ended with a statement in support of the naval stores language from Senator Harrison, who had introduced the amendments to add "naval stores" to Capper-Volstead.³⁶³

H.R. 7893, with the "naval stores" language in tact, was reported favorably by the Senate committee on April 24, 1926.³⁶⁴ The Senate report paraphrased the House report. While it made no mention of Section 5, it included a letter from Secretary Jardine, which stated:

With respect to the provisions of section 5 of the bill, relative to the acquisition and dissemination of crop and market information by cooperative associations, attention is called to the high importance of allowing such associations to keep their members fully informed in regard to all of the factors affecting the demand for their products. The more information producers have with respect to the demand for their products the more intelligent should be their action with respect to the production of them.³⁶⁵

Thus, Secretary Jardine seemed to share Rep. Barbour's view that if farmers had sufficient information, they would limit production in times of impending surpluses.

After several false starts, Senate debate on the bill started June 3, 1926. Senate floor debate attributed to the bill was exhaustive, but

³⁶² *Id.* at 177. Representative Sweet was probably chosen to deliver the message because he was the president of the Sweet Paper Manufacturing Co., a company in one of the industries supporting the naval stores provision.

³⁶³ *Id.* at 186-187.

³⁶⁴ S. Rep. No. 664, 69th Cong., 1st Sess. (1926).

³⁶⁵ Letter from W. M. Jardine, Secretary of Agriculture, to the Hon. George W. Norris, chairman of the Senate Committee on Agriculture and Forestry (Jan. 8, 1926), reprinted in S. Rep. No. 664, 69th Cong., 1st Sess., at 2-3 (1926).

primarily on an unrelated matter. An attempt was made to attach the McNary-Haugen plan to this otherwise innocuous bill and that led to voluminous debate over McNary-Haugen. This effort proved unsuccessful.

Several hours of Senate debate dealt with an amendment, offered by Senator Frank Willis (R-OH), to strike the reference to "naval stores."³⁶⁶ The arguments on the Senate floor were the same ones raised during the hearings. Those Senators opposed to including naval stores in the bill's coverage argued that turpentine and resin were manufactured products, made and marketed by large industrial firms who were members of a "trust" seeking an exemption from the antitrust laws.³⁶⁷

Senate supporters of keeping naval stores in the legislation asserted they were naturally occurring products from the sap of pine trees grown on small plots of land owned by thousands of small farmers. They questioned the logic of having the bill cover the products of maple tree sap (syrup and sugar), but not pine tree sap. They argued that the bill did not grant an exemption from antitrust law, but only authorized producers of naval stores to share market information and tap expertise within USDA. They also suggested the attack on naval stores was being engineered by "trusts" of the large firms in industries that use turpentine and resin (paper, paint, varnish, and soap).³⁶⁸

When the time for debate on the amendment expired, the motion to delete the mention of "naval stores" from the bill was approved.³⁶⁹ Language similar to the bill approved by the House Agriculture

³⁶⁶ 67 Cong. Rec. 11,449 (1926).

³⁶⁷ *See, e.g.*, statements by Senator Willis (67 Cong. Rec. 11,450) and Senator Simeon Fess (R-OH) (67 Cong. Rec. 11,618).

Senator Willis inserted a letter in the record from Secretary of Agriculture Jardine advising Congress to delete the reference to "naval stores" from the bill (67 Cong. Rec. 11,450). Secretary Jardine said cooperatives wanted the language deleted, but didn't provide any reasons for their position.

³⁶⁸ *See, e.g.*, statements by Senator James Heflin (D-AL) (67 Cong. Rec. 11532 and 11618) and Senator Pat Harrison (D-MS) (67 Cong. Rec. 11616).

³⁶⁹ Passed by a recorded vote of 46 yeas, 32 nays, and 18 abstentions, 67 Cong. Rec. 11,620 (1926).

Committee (without the reference to naval stores) passed the Senate on June 29th.³⁷⁰ The House promptly concurred in the Senate version.³⁷¹ The bill was signed into law by President Coolidge on July 2, 1926.³⁷²

Throughout the debate over the naval stores reference, the legislators avoided addressing the issue of whether they considered a large, integrated company that both owned extensive "turpentine orchards" and processed and sold naval stores to be a "producer" of agricultural products. Supporters of the language talked about the small producers in the industry, and opponents focused on the processing operations of the large firms also in the industry. Thus the exercise sheds little light on the question of how big and how diverse an entity can be and still be a producer for the purpose of applying the producer association exemptions from antitrust law.

As enacted, the Cooperative Marketing Act of 1926 reinforces the public policy support for cooperative marketing by agricultural producers in Section 6 of the Clayton Act and the Capper-Volstead Act. It establishes a positive role for USDA in assisting farmers to organize and operate cooperatives, without authorizing any undue intrusion or regulation by the Department. And it recognizes that information sharing is an important part of any initiative by farmers to work together to solve their production and marketing challenges.

FISHERMAN'S COLLECTIVE MARKETING ACT

As the general business depression spread in the early 1930s, market conditions for fishermen became as difficult as for farmers. In 1934, the Fisherman's Collective Marketing Act was enacted.³⁷³ It provides commercial producers of aquatic products with the same protections from antitrust prosecution given farmers under Capper-Volstead.

The Fisherman's Act has two differences from Capper-Volstead. First, rather than applying to agricultural producers, it covers "Persons

³⁷⁰ 67 Cong. Rec. 12,228 (1926).

³⁷¹ 67 Cong. Rec. 12,456 (1926).

³⁷² 67 Cong. Rec. 13,092 (1926).

³⁷³ Chap. 742, 48 Stat. 1213 (1934), codified at 15 U.S.C. §§ 521-522.

engaged in the fishery industry, as fishermen, catching, collecting, or cultivating aquatic products, or as planters of aquatic products in public or private beds...(acting together)...in collectively catching, producing, preparing for market, processing, handling, and marketing...such products..."³⁷⁴

Second, enforcement authority is vested in the Secretary of Commerce rather than the Secretary of Agriculture.³⁷⁵

This law is important to the antitrust status of farmer cooperatives for at least two reasons. First, it extends the same protection to another segment of the food production industry, commercial fishermen and aquaculturists. Second, because the two laws are virtually identical in their treatment of the individuals covered, court decisions and administrative rulings issued about this law are of some precedential value in interpreting and applying the Capper-Volstead Act.

Legislation in this area (H.R. 9233) was introduced in the House on April 19, 1934, by Rep. Schuyler Bland (D-VA), chair of the Committee on Merchant Marine and Fisheries.³⁷⁶ The bill was referred to the Merchant Marine and Fisheries Committee and reported favorably on May 7th.³⁷⁷

An almost identical bill (S. 3589) was introduced in the Senate on May 11th by Senator Hubert Stephens (D-MS), chair of the Committee on Commerce.³⁷⁸ This bill was referred to the Commerce Committee and reported favorably on May 17th.³⁷⁹

³⁷⁴ Sec. 1 of the Act, 15 U.S.C. § 521.

³⁷⁵ Sec. 2 of the Act, 15 U.S.C. § 522.

³⁷⁶ H.R. 9233, 73rd Cong., 2d Sess. (1934), at 78 Cong. Rec. 6974 (1934). Rep. Bland was a lifelong resident of the Chesapeake Bay region who represented that area in Congress for more than 30 years, many as chair of the Merchant Marine and Fisheries Committee.

³⁷⁷ H.R. Rep. No. 1504, 73rd Cong., 2d Sess. (1934), at 78 Cong. Rec. 8261 (1934).

³⁷⁸ S. 3589, 73rd Cong., 2d Sess. (1934), at 78 Cong. Rec. 8562 (1934).

³⁷⁹ S. Rep. No. 1045, 73rd Cong., 2d Sess. (1934), at 78 Cong. Rec. 8982 (1934).

The only Congressional debate on the bills took place in the House on May 21st. Chairman Bland called the bill up hoping to pass it under a unanimous consent agreement. Rep. Charles Truax (D-OH) quickly challenged the bill.³⁸⁰ Truax had no apparent problem with the bill, but rather wanted to vent his frustration that the Capper-Volstead Act had not been an effective cure for the continuing depression in agriculture. Reps. Bland and Truax engaged in an interesting discussion.

Mr. BLAND: ...this bill provides for the same relief for the fishermen that has already been given to the farmers. There is no change in the law except it is made applicable to fishermen. Their desperate condition throughout the country, as well as their desire to organize in order to better themselves, is the basis for the legislation.

Mr. TRUAX: Does this bill apply mainly to deep-sea fishermen or to fresh-water fishermen as well?

Mr. BLAND: It applies to all classes of fishermen.

Mr. TRUAX: And I presume the gentleman is referring to commercial fishing?

Mr. BLAND: Yes; all classes of commercial fishing.

Mr. TRUAX: And the bill provides they may organize cooperative marketing associations?

Mr. BLAND: Just as the farmers may do now.

Mr. TRUAX: If the cooperative associations that the gentleman proposes to form under this bill are no more successful in obtaining higher prices for the industry than the farmer cooperatives have been in securing higher prices for farm products, I shall not withdraw my reservation of objection.

Mr. BLAND: We just want an opportunity to try it, that is all.

³⁸⁰ The debate takes little more than a column in the Congressional Record at 78 Cong. Rec. 9175 (1934). Rep. Truax, a freshman congressman, had only a high school education. But, he had served for several years as editor of *Swine World* and for 16 years as director of agriculture for the State of Ohio before being elected to Congress.

Mr. TRUAX: yes; but we have tried this for 15 years and the prices are getting lower day by day.³⁸¹

When Rep. Truax wondered whether impetus for the bill was coming from fishermen or the Bureau of Fisheries in the Commerce Department, Rep. Francis Maloney (D-CT) responded that "...the request comes largely from the fishermen themselves. I have had letters from outstanding fishermen along the New England coast, including oyster growers and people engaged in all branches of deep-sea fishing, urging the passage of this bill."³⁸²

Rep. Mahoney's comment is noteworthy for its reference to oyster growers, indicating Congress intended the bill to cover all aquaculturists, not just "fishermen." Rep. Thomas Blanton (D-TX) also commented favorably on the bill.³⁸³

Final house consideration of H.R. 9233 was delayed until June 7th, when it passed by acclamation.³⁸⁴ On June 13th the Senate passed its version, also by acclamation.³⁸⁵ Five days later, the Senate acquiesced to the House bill.³⁸⁶ The Fisherman's Collective Marketing Act was signed into law by President Roosevelt on June 25, 1934.³⁸⁷

ROBINSON PATMAN ACT

In 1936, Congress passed the final antitrust law of importance to farmer cooperatives, the so-called Robinson Patman Act.³⁸⁸ This Act is a series of amendments to the Clayton Act aimed at preventing buyers with market power from obtaining goods on more favorable

³⁸¹ 78 Cong. Rec. 9175 (1934).

³⁸² *Id.*

³⁸³ *Id.*

³⁸⁴ 78 Cong. Rec. 10,745-10,746 (1934).

³⁸⁵ 78 Cong. Rec. 11,322 (1934).

³⁸⁶ 78 Cong. Rec. 12,421 (1934).

³⁸⁷ 78 Cong. Rec. 12,454 (1934).

³⁸⁸ Chap. 592, 49 Stat. 1526 (1936), codified primarily at 15 U.S.C. § 13.

terms than others in the same market. It attempts to achieve this result by making it unlawful for sellers to discriminate in price between different purchasers when the result may be to substantially reduce competition. Differentials are permitted that are based on the cost of manufacture, sale, or delivery, or to respond to competition.³⁸⁹

Robinson-Patman specifically provides that patronage refunds paid by cooperatives to members and other patrons are not discriminatory.³⁹⁰ Interpretation of Robinson-Patman is a complex subject beyond the scope of this report.

Cooperatives need to be aware of the Act, because transactions by cooperatives with third parties are covered. For example, a dairy cooperative was found to have violated the Robinson-Patman Act when it paid secret rebates to some customers but not others.³⁹¹

In another instance, a producer association negotiated contracts with processors providing the processors would withhold 5 percent of the funds due association members for product delivered and pay those funds to the association. Unhappy members sued the association to have their marketing agreements voided on several grounds, including the assertion that withholding these funds from their payments for product violated the Robinson-Patman Act. The court held these payments didn't violate the law or render the association's membership agreements illegal.³⁹²

Another case illustrates how Robinson-Patman can catch cooperatives off guard.³⁹³ A cooperative supplied specialized feeds to its members, breeders of fur-bearing animals. The cooperative delivered the feed free in areas with a high concentration of members. Other members were required to pick up their feed at the cooperative's facility.

³⁸⁹ Sec. 1 of the Robinson-Patman Act, amending § 2 of the Clayton Act, 15 U.S.C. § 13.

³⁹⁰ Sec. 4 of the Robinson-Patman Act, 15 U.S.C. § 13b.

³⁹¹ *Bergjans Farm Dairy v. Sanitary Milk Producers*, 241 F. Supp. 476, 486-488 (E.D. Mo. 1965), *aff'd*, 368 F.2d 679, 691-692 (8th Cir. 1966).

³⁹² *Waters v. National Farmers Organization*, 328 F. Supp. 1229, 1245 (S.D. Ind. 1971).

³⁹³ *Bell v. Fur Breeders Agricultural Cooperative*, 3 F. Supp. 2d 1941 (D. Utah 1998).

Two members, who lived approximately 80 miles from the nearest delivery route, sued the cooperative. They asked for an injunction requiring their cooperative to deliver feed free to them, claiming that the policy of delivering feed free of charge to other members constituted price discrimination in violation of Robinson-Patman. They also asked for triple damages based on lost profits, litigation costs, and attorney's fees under Section 4 of the Clayton Act.

The cooperative asked the court to dismiss the litigation on the grounds that the plaintiffs' claims, even if true, didn't allege anything illegal. A U.S. District Court judge in Utah denied the cooperative's motion to dismiss. He held the delivery policy could be shown to be an unlawful indirect price discrimination resulting in competitive injury to plaintiffs and a violation of antitrust law entitling plaintiffs to treble damages.

STATE BARRIERS ELIMINATED

The cooperative model of the Farmers Alliance--the one that eschewed equity capital, conducted each transaction on an "at-cost" basis, and refused nonmember business--sounded good. Around the time the Clayton Act was passed, several states enacted laws authorizing cooperatives that followed these tenets. Unfortunately, the model simply didn't work. Such associations were unable to accumulate sufficient capital to finance needed investments or even enough cash to carry themselves through an inevitable business downturn.

The need for a more pragmatic approach was most evident in California, where numerous new producer groups were being formed. Aaron Sapiro, a sharp and enthusiastic San Francisco attorney, who represented many of the California marketing associations, drafted a model state law. Then he traveled around the country to market his draft legislation. Between 1921 and 1928, 46 states and Puerto Rico enacted new state cooperative statutes based on the Sapiro model. Among its features, the Sapiro model:

1. Is strictly an agricultural cooperative law. Membership in an authorized cooperative is limited to agricultural producers and other associations of agricultural producers.

2. Authorizes both stock and nonstock cooperatives. It also facilitates the accumulation of capital by authorizing nonvoting stock which can be sold to nonmembers.
3. Permits limited business with and for nonmembers.
4. Includes a one-member one-vote provision. Some states, including California, were sensitive to the dissatisfaction of large producers with this rule and did not include it in their law. This opened the way for limited weighted voting based on patronage, at the discretion of the members of each cooperative.
5. Specifically provides for long-term marketing contracts with members and remedies for member breaches of these contracts.
6. States that any association organized thereunder is not a conspiracy or combination in restraint of trade or an illegal monopoly.³⁹⁴

Most of these State statutes provide that the formation of a cooperative incorporated under the statute is not a violation of the state's antitrust laws.³⁹⁵ When the states enacted these laws en masse,

³⁹⁴ The influence of the nonstock advocates reached its peak just as Congress was debating legislation that became the Clayton Antitrust Act of 1914, which may explain in part why Sec. 6 of that act only applies to nonstock cooperatives. The Sapiro model was sweeping the country just as Congress was debating whether to strengthen the protection from antitrust liability for farmers marketing on a cooperative basis. The Capper-Volstead Act is consistent with the Sapiro model in that it covers any marketing cooperative (stock and nonstock) which limits membership to agricultural producers, either limits each member to one vote or limits the return on stock to 8 percent per year, and permits business with nonmembers, provided it is less than business conducted each year with or for members.

³⁹⁵ James R. Baarda, *State Incorporation Statutes for Farmer Cooperatives*, ACS Cooperative Information Report 30 (USDA 1982), pp. 127-128.

it convinced the state courts to change their negative attitude toward the antitrust status of farmer cooperatives. The State courts also recognized that enactment of Section 6 of the Clayton Act in 1914 and the Capper-Volstead Act in 1922 reflected a strong national policy acceptance of agricultural cooperatives as outside the sphere of undesirable restraints of trade.

The basis for the conclusion of the court in each instance, that the association involved was not a restraint of trade, varies. But all the cases hold that the statutory public policy of the State had changed. Associations were rendered legal which, under old standards, might have been regarded as illegal.³⁹⁶

Many State courts held that when their State enacted a cooperative incorporation statute authorizing such associations to contract with their members to handle and market their produce, the cooperative law took precedence over a prior statute of the State outlawing trusts and restraints of trade.³⁹⁷ Some courts reasoned that the later statute (the cooperative law) is an expression of the legislature of the state of equal rank with the earlier antitrust law and the fact that it is of later date causes it to modify the earlier statute against restraint of trade.³⁹⁸

In other instances, the courts attached some significance to the fact that the association was formed under a cooperative statute that

³⁹⁶ See, e. g., *Kansas Wheat Growers' Ass'n v. Schulte*, 216 P. 311 (Kan. 1923); *Rifle Potato Growers' Co-op Ass'n v. Smith*, 240 P. 937 (Colo. 1925); *Northern Wisconsin Co-op Tobacco Pool v. Bekkedal*, 182 Wis. 571, 197 N.W. 936 (1925); *List v. Burley Tobacco Growers' Co-op Ass'n*, 151 N.E. 471 (Ohio 1926).

³⁹⁷ See, e. g., *Warren v. Alabama Farm Bureau Cotton Ass'n*, 104 So. 264 (Ala. 1925); *Colma Vegetable Ass'n v. Bonetti*, 267 P. 172 (Cal. 1928); *Dark Tobacco Growers' Co-op Ass'n v. Robertson*, 150 N.E. 106 (Ind. 1926); *Kansas Wheat Growers' Ass'n v. Schulte*, 216 P. 311 (Kan. 1923); *Potter v. Dark Tobacco Growers' Co-op Ass'n*, 257 S.W. 33 (Ky. 1923); *Nebraska Wheat Growers' Ass'n v. Orrquest*, 204 N.W. 798 (Neb. 1925); *List v. Burley Tobacco Growers' Co-op Ass'n*, 151 N.E. 471 (Ohio 1926); *Oregon Growers' Co-op Ass'n v. Lentz*, 212 P. 811 (Or. 1923).

³⁹⁸ *Rifle Potato Growers' Co-op Association v. Smith*, 240 P. 937 (Colo. 1925); *Northern Wisconsin Co-op Tobacco Pool v. Bekkedal*, 197 N.W. 936 (Wis. 1925); *Clear Lake Co-op Live Stock Shippers' Association v. Weir*, 206 N.W. 297 (Iowa 1925).

contained a provision in effect expressly exempting associations formed thereunder from the antitrust laws of the state.³⁹⁹

When the State antitrust prohibitions were contained in its constitution, it was necessary for the court to find that the association was not, in fact, within the scope of this provision of the constitution.⁴⁰⁰

Eventually the U. S. Supreme Court also adjusted to the change in public policy concerning cooperatives. In 1923, Liberty Warehouse bought tobacco from a producer it knew had signed an exclusive marketing agreement with a cooperative. This was a violation of the newly enacted Co-operative Marketing Act of Kentucky.

The cooperative sued to collect damages and secure an injunction against the warehouse. The warehouse raised numerous constitutional defenses, including an allegation that the law was class legislation invalid under the equal protection clause of the 14th Amendment.

The Court of Appeals of Kentucky, relying heavily on its decision in *Potter*,⁴⁰¹ rejected the warehouse's arguments and decided the case in favor of the cooperative.⁴⁰²

The U. S. Supreme Court affirmed the State court opinion and upheld the statute.⁴⁰³ First, the Court found that as the statute

³⁹⁹ Lee v. Clearwater Growers' Ass'n, 93 Fla. 214, 111 So. 722 (1927), followed in *Jellesma v. Tampa Better Milk Producers' Co-operative*, 147 So. 463 (Fla. 1933); *Tobacco Growers' Co-op Ass'n v. Jones*, 117 S.E. 174 (N.C. 1923); *Dark Tobacco Growers' Co-op Ass'n v. Dunn*, 266 S.W. 308 (Tenn. 1924).

⁴⁰⁰ *Brown v. Staple Cotton Co-op Ass'n*, 96 So. 849 (Miss. 1923). The Mississippi constitution forbid restraints of trade that were "inimical to the public welfare." The court found cooperative marketing by farmers was reasonable and thus not the type of restraint that fell within the constitution's language. See also, *Minnesota Wheat Growers' Co-op Marketing Ass'n v. Huggins*, 203 N.W. 420 (Minn. 1925).

⁴⁰¹ *Potter v. Dark Tobacco Growers' Co-op Ass'n*, 257 S.W. 33 (Ky. 1923) (Supra, note 397).

⁴⁰² *Liberty Warehouse Co. v. Burley Tobacco Growers' Co-op Ass'n*, 271 S.W. 695, 697 (Ky. 1925).

⁴⁰³ *Liberty Warehouse Co. v. Burley Tobacco Growers' Co-op Marketing Ass'n*, 276 U.S. 71 (1928), *aff'g*, 271 S.W. 695 (Ky. 1925).

penalizes anyone who induces an association member to break his marketing contract, no basis exists to invoke the equal protection clause. The Court distinguished *Connolly v. Union Sewer Pipe Co.*⁴⁰⁴ on the basis that under the facts in that case farmers were given preferred status over sellers of pipe.⁴⁰⁵

Second, the Court acknowledged that the law does prohibit buyers from simply signing up growers as they had done before its enactment. But it expressed little sympathy for the warehouse, noting:

...this is done to protect certain contracts which the legislature deemed of great importance to the public and peculiarly subject to invasion. We need not determine whether the liberty protected by the Constitution includes the right to induce a breach of contract between others for the aggrandizement of the intermeddler--to violate the nice sense of right which honorable traders ought to observe.⁴⁰⁶

Third, the Court noted that congressional passage of Section 6 of the Clayton Act, the Capper-Volstead Act, and the Cooperative Marketing Act of 1926 reflect strong legislative support for the concept of cooperative marketing by agricultural producers.⁴⁰⁷

And fourth, the Court discussed the near-unanimous string of State court cases upholding the new State cooperative laws against a variety of challenges.⁴⁰⁸

Finally, in 1940, the U. S. Supreme Court overruled *Connolly*. The vehicle was a case of similar facts. A Mr. Tigner had been indicted for conspiring to fix the retail price of beer in violation of the Texas antitrust law. The Texas statute contained an exemption for agricultural products and livestock in the hands of farmers or ranchers almost identical to the one in the Illinois law that caused the Court to

⁴⁰⁴ 184 U.S. 540 (1902).

⁴⁰⁵ *Liberty Warehouse Co. v. Burley Tobacco Growers' Co-op Marketing Ass'n*, 276 U.S. at 91.

⁴⁰⁶ *Id.* at 92.

⁴⁰⁷ *Id.* at 92-93.

⁴⁰⁸ *Id.* at 93-95.

strike down the entire law in *Connolly*. Tigner raised the defense, successful in *Connolly*, that the Texas law violated the equal protection clause of the 14th Amendment.

The Court of Criminal Appeals of Texas recognized that it should follow *Connolly* and rule for Tigner. But, instead, it noted that *Connolly* had been decided over 30 years ago and stated "...the question should receive fresh consideration."⁴⁰⁹

The court took judicial notice of the economic vulnerability of individual farmers and ranchers compared to that of the entities that buy their produce. It said states had an interest in protecting agricultural producers and noted that almost every State had passed a law authorizing the formation of cooperatives. It concluded that the State had a valid reason to exclude farmers and ranchers from an antitrust law aimed at merchants, traders, manufacturers, and others in the urban commercial environment. The court refused to invalidate the indictment.⁴¹⁰

On appeal, the U.S. Supreme Court essentially adopted the reasoning of the Texas court. It found that a State could legitimately believe that combinations of farmers and stockmen restraining trade in their agricultural products did not pose a threat to the community, or, at least, a much lesser threat than combinations of industrialists and middlemen. The Court specifically overruled the *Connolly* case and concluded, "We find no constitutional bar against excluding farmers and stockmen from the criminal statute against combination and monopoly."⁴¹¹

The *Tigner* decision removed any doubt as to the right of a State to exclude farmers and ranchers from their antitrust laws for the purpose of marketing their products on a cooperative basis. This removed a major potential legal barrier to the growth of farmer cooperative marketing.

⁴⁰⁹ Ex parte Tigner, 132 S.W.2d 885, 889 (Texas 1939).

⁴¹⁰ Id. at 896-897.

⁴¹¹ Tigner v. Texas, 310 U.S. 141, 149 (1940).

Chapter 6: Application of Antitrust Law to Farmer Cooperatives

The basic rules concerning exposure under the Sherman Act were covered earlier in this report.⁴¹² This chapter focuses on the limited protection provided by the Capper-Volstead Act.⁴¹³ Relevant cases and ruling involving other statutes, such as Sec. 6 of the Clayton Act and the Fisherman's Act, are included.

Decisions are grouped and discussed in a somewhat arbitrary mixture of subject matter and chronological order. It would be preferable to approach the issues strictly by subject matter, but many antitrust cases deal with several important issues. Also, earlier decisions can influence even unrelated later ones. Furthermore, some complex litigation took as long as 20 years to reach a conclusion, leaving ample time for important legal principles to change while the case was being argued and decided.

A general overview of the Capper-Volstead Act is provided at the beginning of chapter 4. In summary, Section 1 allows farmers to market products they produce on a cooperative basis, if they comply with a few relatively objective standards set out in the law. Section 2 directs the Secretary of Agriculture to make sure producers don't abuse this privilege by unduly enhancing the prices they charge. But as is often true in law, the devil is in the details.

Capper-Volstead is written in broad language and without any definitions of the terms used. As a result, the courts have been asked to make several key determinations about the extent of the shield against antitrust liability provided.

1. Who can participate in a Capper-Volstead association.
2. What types of producer conduct are protected.
3. What types of producer conduct are not protected.
4. May cooperatives approach, or achieve, monopoly status.
5. How extensive is the Secretary of Agriculture's authority.

⁴¹² *Supra*, pp. 28-30.

⁴¹³ 7 U.S.C. § 291.

This chapter begins with detailed coverage of two early cases that lay out general ground rules for interpreting Capper-Volstead. It then discusses each of the five issues listed above in detail.

A few points should be kept in mind while reviewing this material. First, in the 80 years since its enactment, the Capper-Volstead Act has never been amended. So all of the legislative and judicial history pertaining to the Act is still relevant.

Second, while the Capper-Volstead Act is often called the magna charta of cooperative marketing, the word "cooperative" does not appear in the statute. Congress recognized that cooperatives were a means to an end--enhanced and stabilized income levels for agricultural producers without harm to ultimate consumers--and not an end in themselves. Thus, the protection is available to producers using any form of association, a concept somewhat broader than most traditional academic or legal definitions of a cooperative.⁴¹⁴

Third, Capper-Volstead needs to be argued as an affirmative defense to charges of illegal anticompetitive conduct. The accusing party does not need to prove facts that destroy the immunity. The cooperative must establish that it meets both the organizational and operational parameters for protection.⁴¹⁵

EARLY COURT INTERPRETATION

In the 15 years following enactment of Capper-Volstead, no reported decisions were issued interpreting it. But two cases involving

⁴¹⁴ The Department of Justice has taken the position that some form of formal "association" is required to qualify for the limited antitrust protection. In the Competitive Impact Statement accompanying a consent decree in an action against crab fishermen, Justice stated that when the fishermen simply agreed among themselves on prices they would accept and to refrain from fishing while negotiating with buyers, they were engaged in a conspiracy to restrain trade in violation of Section 1 of the Sherman Act. However, it said that if the fishermen formed a fishermen's marketing association, such conduct would be protected under the Fisherman's Collective Marketing Act. *Oregon v. Mulkey*, 1997-1 Trade Cases (CCH) ¶ 71,859 at 80,042 (D. Ore. 1997).

⁴¹⁵ *United States v. National Board of Fur Farm Organizations*, 395 F. Supp. 56 (E. D. Wis. 1975).

Federal antitrust enforcement actions against dairy cooperatives, on in the late 1930s and the other in the late 1940s, established several broad parameters that are still followed in applying the act to specific situations and issues.

United States v. Borden

The first Supreme Court opinion to consider the Capper-Volstead Act is *United States v. Borden*.⁴¹⁶ The decision came nearly two decades after Capper-Volstead was enacted, and for another two decades it was the only Supreme Court opinion dealing with the Act. Chief Justice Charles Evan Hughes' opinion, for a unanimous Court, lays out clear and concise rules that still control major issues about anticompetitive conduct by agricultural producers.

In November 1938, the Department of Justice charged numerous participants in the Chicago fluid milk market with engaging in an unlawful combination and conspiracy in restraint of interstate commerce in violation of Sec. 1 of the Sherman Act. The Government divided the defendants into five groups:

- Bottlers and distributors, and various entities controlled by them
- Pure Milk Association (PMA), a producer cooperative
- The Milk Wagon Drivers Union
- Chicago municipal officials
- Arbitrators who settled disputes between the major distributors and PMA over the amount the distributors pay to PMA members for their milk⁴¹⁷

The indictment contained 4 counts of conspiracy:

- To fix prices paid to farmers
- To fix prices charged by distributors
- To prevent independent distributors from serving Chicago
- To control the supply of fluid milk brought into Chicago

⁴¹⁶ *United States v. Borden*, 308 U.S. 188 (1939), *rev'g* 28 F. Supp. 177 (N.D. Ill, E.D. 1939).

⁴¹⁷ 308 U.S. at 191.

All of the defendants based their defense on a general demurrer⁴¹⁸ to the complaint. This avoided a trial on the facts and permitted a timely and focused consideration of the law.

The trial court judge sustained the demurrers and dismissed all of the indictments.⁴¹⁹ He observed that in the nearly 50 years since the Sherman Act became law, sweeping changes in the Nation's social and economic problems had led to a new approach of the law toward restraints of trade. He asserted that while "...the Sherman Act embodies the philosophy of individualism and unrestrained competition...later legislation has embodied the philosophy of collectivism and control of harmful competition."⁴²⁰

The trial court judge offered this general explanation of the Capper-Volstead Act:

This Act legalizes price fixing for those within its purview. To that extent it modifies the Sherman Act. It removes from the Sherman Act those organizations, cooperative in their nature, which come within the purview of the Capper-Volstead Act. Prior to the Capper-Volstead Act farmers were treated no differently than others under the antitrust laws, so far as price fixing was concerned.

...

The Capper-Volstead Act does not condemn any kind of monopoly or restraint of trade, or any price fixing, unless such monopoly or price fixing unduly enhances the price of an agricultural product. The Act then, by section 2 thereof, commits to an officer of the executive department, the Secretary of Agriculture, the power of regulation and visitation.

⁴¹⁸ A "demurrer" is a motion to dismiss the indictment on the grounds that even if all of the facts alleged by the Government are true, it still hasn't established a basis for the court to find that any illegal activity has occurred.

⁴¹⁹ *United States v. Borden*, 28 F. Supp. 177 (N. D. Ill., D.D. 1939), *rev'd*, 308 U.S. 188 (1939). While parts of both opinions dealt with procedural issues such as jurisdiction, this review will be limited to the substantive issues in the case.

⁴²⁰ 28 F. Supp. at 183.

...

This is the first statute, to which the attention of the court has been called which, with reference to farmers' cooperatives, embodies the theory of executive regulation and control of price and profit. The theory and philosophy of unrestrained competition is departed from and in its stead is substituted the theory of governmental regulation of combinations and prices...The court deduces from the Capper-Volstead Act that the Secretary of Agriculture has exclusive jurisdiction to determine and order, in the first instance, whether or not farmer cooperatives, in their operation, monopolize and restrain interstate trade and commerce "to such an extent that the price of any agricultural product is unduly enhanced." Until the Secretary of Agriculture acts, the judicial power cannot be invoked.⁴²¹

Although not mentioned in this opinion, the U.S. Supreme Court opinion reports that the district Court judge held that PMA, as an agricultural cooperative, its officers and agents, were shielded from prosecution under Section 1 of the Sherman Act by the Capper-Volstead Act.⁴²²

In the published opinion, the judge placed his main focus on the Agricultural Marketing Agreement Act of 1937.⁴²³ He read the Act of 1937 to require the Secretary of Agriculture to issue a marketing "order" to stabilize transactions in covered agricultural commodities, including milk, unless the Secretary finds that an order would not tend to raise prices to farmers without unduly harming consumers.⁴²⁴ He then reasons that the Act of 1937, since it was enacted after the Sherman Act, is a Congressional commitment to vest in the Secretary of Agriculture "full, complete and plenary power over the production

⁴²¹ 28 F. Supp. at 183-184.

⁴²² *See*, 308 U.S. at 191.

⁴²³ Ch. 296, 50 Stat. 246, 7 U.S.C. § 601 *et seq.*

⁴²⁴ An "order" is a regulation covering processors, producers and producer associations, and others engaged in the handling of covered agricultural products.

and marketing, in interstate commerce, of agricultural products, including milk."⁴²⁵

The judge concluded that since the regulation and control of milk marketing is vested exclusively in the Secretary of Agriculture, "The marketing of the agricultural products, including milk, covered by the Agricultural Marketing Agreement Act (of 1937), is removed from the purview of the Sherman Act. In other words, so far as the marketing of agricultural commodities, including milk, is concerned, no indictment will lie under section 1 of the Sherman Act."⁴²⁶

The Justice Department appealed directly to the U.S. Supreme Court. The Supreme Court held the district court had erroneously interpreted both the Agricultural Marketing Agreement Act of 1937 and the Capper-Volstead Act.

First, the Supreme Court found the district court's ruling that the 1937 Act removed the marketing of all covered agricultural products from the operation of Section 1 of the Sherman Act to be simply wrong. The Court acknowledged that when the Secretary of Agriculture issues a marketing agreement or marketing order, the regulatory scheme is shielded from antitrust law. However, in the absence of a properly prepared regulation, the Court found nothing in the Act of 1937 suggesting "...commerce in agricultural commodities is stripped of the safeguards set up by the Anti-Trust Act and is left open to the restraints, however unreasonable, which conspiring producers, distributors and their allies may see fit to impose."⁴²⁷

After discussing legislative construction, the Court summarized:

Farmers and others are not permitted to resort to their own devices and to make any agreements or arrangements they desire, regardless of the restraints which may be inflicted upon commerce. The statutory program to be followed under the Agricultural Act requires the participation of the Secretary of Agriculture who is to hold hearings and make findings. The obvious intention is to provide for what

⁴²⁵ 28 F. Supp. at 187.

⁴²⁶ *Id.*

⁴²⁷ *United States v. Borden*, 308 U.S. 188, 198 (1939), *rev'g* 28 F. Supp. 177 (1939).

may be found to be reasonable arrangements in particular instances and in the light of the circumstances disclosed...To give validity to marketing agreements the Secretary must be an actual party to the agreements...As to agreements and arrangements not thus agreed upon or directed by the Secretary, the Agricultural Act in no way impinges upon the prohibitions and penalties of the Sherman Act, and its condemnation of private action in entering into combinations and conspiracies which impose the prohibited restraint upon interstate commerce remains untouched.⁴²⁸

...

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 a prosecution sought to penalize what was thus validly agreed upon or directed by the Secretary. Further than that the Agricultural Act does not go.⁴²⁹

Then the Court discussed whether the lower court had correctly held that "...the Capper-Volstead Act had modified the Sherman Act so as to exempt the Pure Milk Association, a cooperative agricultural organization, and its officers and agents, from prosecution under these counts."⁴³⁰

After citing the district court comments quoted above,⁴³¹ the Court offered the overall assessment that "We are unable to accept that view. We cannot find in the Capper-Volstead Act, any more than in the Agricultural Act, an intention to declare immunity for the combinations and conspiracies charged in the present indictment."⁴³²

⁴²⁸ 308 U.S. at 199-200.

⁴²⁹ 308 U.S. at 201-202.

⁴³⁰ 308 U.S. at 203.

⁴³¹ See footnote 421.

⁴³² 308 U.S. at 204.

First, the Court examined the scope of the exemption provided agricultural producers under Section 1 of Capper-Volstead. After listing the privileges given farmers to collectively market their products, the Court said:

The rights of these agricultural producers thus to unite in preparing for market and in marketing their products, and to make the contracts which are necessary for that collaboration, cannot be deemed to authorize any combination or conspiracy with other persons in restraint of trade that these producers may see fit to devise. In this instance, the conspiracy charged is not that of merely forming a collective association of producers to market their products but a conspiracy, or conspiracies, with major distributors and their allied groups, with labor officials, municipal officials, and others, in order to maintain artificial and non-competitive prices to be paid to all producers for all fluid milk produced in Illinois and neighboring States and marketed in the Chicago area. . . .Such a combined attempt of all the defendants, producers, distributors and their allies, to control the market finds no justification if § 1 of the Capper-Volstead Act.⁴³³

Turning to Section 2 of Capper-Volstead, the Supreme Court rejected the district court's conclusion that Section 2 vests exclusive jurisdiction over charges of illegal conduct involving producer associations in the Secretary of Agriculture.

The Court noted that Section 2 creates a special procedure to be followed when the Secretary believes an agricultural cooperative with the power to restrain trade has unduly enhanced prices. However, it found "...no ground for saying that this limited procedure is a substitute for the provisions of the Sherman Act, or has the result of permitting the sort of combinations and conspiracies here charged unless and until the Secretary of Agriculture takes action."⁴³⁴

⁴³³ 308 U.S. at 204-205.

⁴³⁴ 308 U.S. at 206.

In conclusion, the Court said:

...the procedure under § 2 of the Capper-Volstead Act is auxiliary and was intended merely as a qualification of the authorization given to cooperative agricultural producers by § 1, so that if the collective action of such producers, as there permitted, results in the opinion of the Secretary in monopolization or unduly enhanced prices, he may intervene and seek to control the action thus taken under § 1. But as § 1 cannot be regarded as authorizing the sort of conspiracies between producers and others that are charged in this indictment, the qualifying procedure for which § 2 provides is not to be deemed to be designed to take the place of, or to postpone or prevent, prosecution under § 1 of the Sherman Act for the purpose of punishing such conspiracies.⁴³⁵

The *Borden* opinion established several ground rules for applying the antitrust laws to farmer cooperatives, which remain valid today.

- Collective activity authorized by marketing orders and marketing agreements issued in compliance with the requirements of the Agricultural Marketing Agreement Act of 1937 is shielded from attack under the antitrust laws. However, the '37 Act offers no protection for anti-competitive conduct not covered by a valid marketing order or agreement. Nor does it require prior action by the Secretary of Agriculture before antitrust enforcement activity can begin against private combinations and conspiracies that restrain trade in the marketing of agricultural products.⁴³⁶
- Section 1 of Capper-Volstead permits agricultural producers to market their products on a cooperative basis and to enter into contracts necessary for that collaboration. However, it does not protect them from antitrust liability when they engage in anti-competitive conduct

⁴³⁵ *Id.*

⁴³⁶ Detailed coverage of the Agricultural Marketing Agreement Act of 1937 is beyond the scope of this report. Specific issues of particular importance to cooperatives will be covered as they arise.

with non-producers such as processors and distributors.

- Section 2 of Capper-Volstead authorizes the Secretary of Agriculture to act against an agricultural marketing cooperative that uses market power attained under the shield of Section 1 to unduly enhance the prices it charges. However, it does not give the Secretary exclusive jurisdiction over anti-competitive conduct involving agricultural producers. Section 2 is no barrier to antitrust enforcement agencies (and private parties) suing producers and their cooperatives for engaging in conduct not covered by Section 1.⁴³⁷

Maryland & Virginia Milk Producers Ass'n

In the years immediately following the *Borden* decision the need to produce adequate food and fiber to support our involvement in World War II muted concerns about possible anti-competitive conduct by farmers. However, after the war, the Government once again challenged a cooperative marketing scheme in the dairy industry.

Maryland & Virginia Milk Producers Ass'n was formed by dairy farmers in the Mid-Atlantic states in 1920. Around 1930, the association negotiated full supply contracts with most of the distributors who purchased member milk, processed it, and sold their products to grocery stores. For some unexplained reason, in 1938, the full supply contracts were cancelled with several distributors, including the two largest firms that jointly purchased about 70 percent of the milk marketed through the association. Throughout the period up to and including the litigation, these two buyers and several smaller customers purchased from the association on a day-to-day basis without any written contract. At least four smaller distributors continued to do business with the association under written full-supply contracts.⁴³⁸

⁴³⁷ Likewise, the mere fact that the Secretary of Commerce has not acted under the provisions of the Fisheries Cooperative Marketing Act does not mean that an illegal restraint of trade has not occurred. *Manaka v. Monterey Sardine Industries, Inc.*, 41 F. Supp. 531, 534 (N.D. Cal. 1941).

⁴³⁸ Under these contracts, the purchasers agreed to buy all of the milk they needed from the association and association agreed to attempt to provide that

In 1940, the association and the distributors entered into a milk marketing agreement under the Agricultural Marketing Act of 1937. As part of this regulated marketing system, a tiered pricing scheme for milk sales was implemented. Distributors paid more to the association for milk sold to consumers in fluid form than for milk converted into processed products. In late 1946, the association became dissatisfied with USDA's method to establish prices it received under the marketing order. It exercised its option to let the marketing agreement expire on March 31, 1947.

However, the association and the distributors continued to operate in roughly the same manner as they had under the marketing order. The continuing full supply contracts were modified to incorporate the tiered pricing scheme. Only now, instead of USDA setting the prices for the different classes of milk, the association did so. When it wanted to change the applicable prices, it called a meeting of all its customers and announced the new prices.

At this time the association had about 1,500 members and supplied roughly 80 percent of the milk consumed in the Washington, DC, area. It sold to seven distributors who accounted for about 85 percent of the milk and cream sold in the same market.

In March, 1948, the association and its seven distributor-customers were indicted for conspiring to restrain trade. The indictment alleged numerous misdeeds by the defendants during the past 18 years. However, the heart of the Government's case was that the full-supply arrangements (written and unwritten) between the parties, combined with the rigid pricing scheme accepted by all parties, violated the Sherman Act.

The defendants' first tactic was to move to dismiss the indictment on the grounds that the facts stated did not constitute an antitrust

milk as requested. If the association was unable to meet a distributor's needs, it was then free to purchase milk from other sources. One bit of historical evidence undoubtedly helped the association in the eyes of the courts. From 1942 through the end of the war, the massive needs for milk for people engaged in the war effort in and around Washington would sometimes exceed the production of association members. During these times the association not only waived its full supply contracts but also aggressively sought to find other suppliers for its customers. Even after the war, the association worked with its customers to find them milk elsewhere when they needed it.

violation. In an unreported opinion, a Federal district judge agreed and dismissed the indictment. On appeal, the U.S. Court of Appeals for the District of Columbia reversed the dismissal.⁴³⁹ The court reasoned that price fixing agreements are illegal *per se*. While Capper-Volstead protects collusive activity among producers, it does not protect anti-competitive conduct in collusion with distributors. And, while fixed prices are also sheltered when established under a marketing order, the cancellation of that order also removes the shield. Thus the government was entitled to attempt to prove the association and its distributors were engaged in illegal activity.

The defendants waived their right to a jury trial and, at the close of the Government's case, moved for a directed verdict of acquittal. The judge granted the motion for the three defendant distributors who were buying milk on a day-to-day basis, but not for the association and the four distributors still buying under a full supply contract.⁴⁴⁰

The judge acknowledged the *Borden* decision and noted that farmers may combine with impunity to fix prices and restrain trade and commerce. However, the immunity ends when they act in restraint of trade with others who are not farmers.⁴⁴¹

Next he addressed the Government's contention that the defendants should be held to have fixed prices because the buyers all paid the same price for milk. The Government argued that illegal collusion was shown by the fact that the price was announced at a meeting attended by all of the buyers. The judge rejected this line of reasoning. He found that the price was determined solely by the cooperative and imposed on all of the buyers. The fact that the price was announced at a meeting attended by all of the distributors, instead of to each distributor separately, did not constitute evidence of collusion.⁴⁴²

⁴³⁹ *United States v. Maryland & Virginia Milk Producers Ass'n*, 179 F.2d 426 (D.C. 1949), *cert. denied*, 338 U.S. 831 (1949).

⁴⁴⁰ *United States v. Maryland & Virginia Milk Producers Ass'n*, 90 F. Supp. 681 (D.C. D.C. 1950), *rev'd*, *Maryland & Virginia Milk Producers Ass'n v. United States*, 193 F.2d 907 (D.C. 1951).

⁴⁴¹ 90 F. Supp. at 685-686.

⁴⁴² 90 F. Supp. 686.

The judge also rejected the Government's contention that the defendants were fixing the price of milk sold to consumers. He found that the association had no role in setting prices for milk sold by the distributors. He noted that on one occasion the association had lowered the price for a distributor faced with a price-cutting move by a competitor. He said that cutting the price to that one buyer to enable it to remain competitive in its market fell well short of participation in a conspiracy to fix prices.⁴⁴³

He also found that while the distributors often charged the same prices for their various products, this did not support an inference that the prices were set in concert.⁴⁴⁴

Finally, the judge dealt with the interplay of the full-supply contracts and the tiered pricing scheme based on the marketing order program. He reasoned that by canceling the marketing agreement with USDA while retaining its pricing structure, the association wanted the benefits of the Government program without the burdens. He concluded that it could not legally do this. He found that while none of the defendants acted in bad faith or with a malevolent intent, the combination of the full-supply contracts and the tiered pricing scheme constituted a *per se* illegal agreement to fix prices. The motion to acquit was granted as to the distributors not under full-supply contracts for at least the last three years, but not as to the association and the other distributors who were parties to full supply contracts.⁴⁴⁵

The remaining defendants appealed this last finding by the district court. The U. S. Court of Appeals for the District of Columbia reversed the trial court on this point and granted the remaining motions for acquittal.⁴⁴⁶

After a lengthy review of the *Borden* decision and several statements of support for much of the trial court's opinion, the

⁴⁴³ *Id.*

⁴⁴⁴ *Id.* He did indicate, in dicta, that were this a case where the government sought merely a civil injunction, rather than a criminal conviction, he might have looked at this issue more closely.

⁴⁴⁵ 90 F. Supp. 688-689.

⁴⁴⁶ Maryland & Virginia Milk Producers Ass'n v. United States, 193 F.2d 907 (D.C. 1951), *rev'g*, United States v. Maryland & Virginia Milk Producers Ass'n, 90 F. Supp. 681 (D.C. D.C. 1950).

appellate court turned to the full-supply contracts. It said that full-supply contracts are illegal when made to eliminate or suppress competition. However, it found that the record contained no evidence of such an intent. Rather, it suggested that neither wholesale or resale prices were fixed by joint action of the alleged conspirators.⁴⁴⁷

The court also rejected the trial judge's logic that removing the Secretary of Agriculture's presence from a classified pricing scheme automatically made its use illegal *per se*. It concluded:

Full supply contracts embodying the classified use pricing scheme are not in themselves illegal unless they are made for the purpose of eliminating and suppressing competition or unless they tend to have that effect. A full supply contract containing the classification plan for arriving at the price of milk is, in a sense, an agreement to fix the price of milk; but only in the same sense that a sales contract for a flat price is an agreement to fix prices. For such a contract to be illegal *per se* it must be demonstrable that it gives to the contracting parties power which may be wielded to the disadvantage and detriment of the public and which may become oppressive as against competitors and tyrannical as against consumers.⁴⁴⁸

The court noted that if Congress wanted to forbid the use of a classified pricing scheme except under a marketing order, it could have done so. And while the Government's theory that full-supply tiered-pricing contracts constitute illegal price fixing is interesting economic analysis, absent some proof that they restrained trade in this instance, the theory falls far short of proving guilt beyond a reasonable doubt.⁴⁴⁹

Maryland & Virginia clarified producer association status under *Borden*, removing any doubt that:

⁴⁴⁷ 193 F.2d 915.

⁴⁴⁸ 193 F.2d 916.

⁴⁴⁹ 193 F.2d 916-917. Of passing interest is the fact that the distributors entered into a plea bargain before the final appeal was argued. Thus only the association was fully exonerated by this opinion.

- Farmers may agree among themselves on the price or prices they will receive for their products and to use their collective economic power to impose those prices on purchasers of their products.

- Producer associations may use tools such as full-supply contracts to establish and protect markets for member products, but not to eliminate or suppress competition.⁴⁵⁰

And *Maryland & Virginia* is consistent with *Borden* in holding that producers and their associations cannot collude with their customers in setting prices or participate in any agreement among purchasers as to the prices they will charge consumers or other customers.

WHO CAN PARTICIPATE IN A CAPPER-VOLSTEAD COOPERATIVE?

One of the major ambiguities in Section 1 of Capper-Volstead is the use of three terms to describe who can participate in a protected association--"person," "member," and "producer"--without defining any of them. This has opened avenues of assault for parties challenging the protected status of various associations and forced the courts to consider the parameters of each term as used in the statute.

Person

Section 1 begins with a statement as to who may form an association eligible for antitrust protection: "Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers."⁴⁵¹

⁴⁵⁰ *In accord*, *Lone Star Milk Producers v. Dairy Farmers of America*, 2001-2 Trade Cases (CCH) ¶ 73,509 (E. D. Tex. 2001).

⁴⁵¹ 7 U.S.C. § 291. The courts have tended to group the six descriptive terms in the first sentence of § 1 of Capper-Volstead--farmers, planters, ranchers, dairymen, nut or fruit growers--and refer to them by the generic

At the time Capper-Volstead was enacted, Congress was focusing on traditional family farms that operated as sole proprietorships and limited their activity to growing crops and raising animals. But, in the years since 1922, the structure of farming and of agribusiness in general have undergone significant changes. The courts have been asked to interpret the term "person" in light of this evolution.

The review has focused on two questions. First, is the term "person" broad enough to encompass all forms of legal entities, or does it mean only natural persons? Second, do the descriptive terms such as "farmers" and "dairyman" limit the Act's coverage to "persons" who actually till the soil or raise animals and derive most of their income from farming?

The Government raised both issues in a second major antitrust suit against Maryland & Virginia Milk Producers Association.⁴⁵² While most Maryland & Virginia members were natural persons, some were partnerships and some were corporations. In addition, while some of the members were full-time dairy farmers, others were engaged principally in other occupations and had employees operate their farms.

Maryland & Virginia raised Capper-Volstead as a defense to the substantive allegations of illegal anticompetitive conduct. The Government argued Capper-Volstead did not apply because the words "dairyman" and "farmers" should be read to mean natural persons who personally work on farms and derive the major portion of their income from farming. The court rejected the Government's position, stating it:

...sees no basis for such a restricted definition. The owner or operator of a dairy (farm) is a dairyman, whether he personally works on his dairy or has the work done by employees. So, too, the owner of a farm may be regarded as a farmer even though he devotes the major portion of his activities to other pursuits. When Congress desired to put a

term "producers."

⁴⁵² United States v. Maryland & Virginia Milk Producers Ass'n, 167 F. Supp. 45 (D.D.C. 1958); *aff'd in part and rev'd in part on other grounds*, United States v. Maryland & Virginia Milk Producers Ass'n, 362 U.S. 458 (1960).

more circumscribed definition on the term "farmer" it did so expressly, as is true in the Bankruptcy Act, 11 U.S.C.A. § 1 et seq. The Court, therefore, is of the opinion it is immaterial whether every member of the association personally works on his farm or whether every member of the association is a natural person or a corporation.⁴⁵³

The status of "incorporated" farms was also questioned in a case brought by investor-owned citrus juice processors against Sunkist Growers. At the time, Sunkist was a mixed-membership cooperative. Roughly 80 percent of the member were local associations of citrus growers, each of which operated a packing house that prepared fruit grown by their farmer-members for market. However, about 5 percent of the memberships were held by corporate growers with sufficient production of citrus fruit to justify installing their own packing house facilities.⁴⁵⁴ The Ninth Circuit Court of Appeals cited *Maryland & Virginia Milk Producers* and concurred that nothing in the context of the Capper-Volstead Act indicates that a corporation can not be considered a "person" within the meaning of Capper-Volstead.⁴⁵⁵

It appears settled that both individual producers and partnerships and corporations are encompassed within the term "person" under Capper-Volstead. It is reasonable to assume that, if asked, courts would reach the same conclusion concerning limited liability companies. Thus, the legal form of entities holding memberships in a producer association should not be a basis for challenging that association's access to Capper-Volstead protection.

⁴⁵³ 167 F. Supp. at 49.

⁴⁵⁴ The remaining 15 percent of the memberships were held by private packing houses operated for profit. The impact of these members on Sunkist's Capper-Volstead status is discussed in a detailed summary of this case in the next section of this report.

⁴⁵⁵ *Case-Swayne Co. v. Sunkist Growers, Inc.*, 369 F.2d 449, 461 (9th Cir. 1966), *rev'd on other grounds*, *Case-Swayne Co. v. Sunkist Growers*, 389 U.S. 384 (1967). The Supreme Court noted, without comment, the presence of corporate members in Sunkist and addressed itself, instead, to the antitrust consequences of membership in the association of non-grower packing houses. 389 U.S. at 387.

Likewise, an absentee owner of a farm is also a "producer" eligible to hold a membership in an association claiming protected status under Capper-Volstead.⁴⁵⁶

Member

The next two sections of this report discuss some older, major cases that establish the rule that all members of a cooperative must be producers and define the concept of "producer." However, it wasn't until the mid-1990s that a court directly confronted the issue of how you determine whether someone is a "member" of a cooperative.⁴⁵⁷

Defendants in the case were several state dairy herd improvement associations (DHIAs) and their national association. The DHIAs are owned and controlled by dairy farmers. The DHIAs gather and report information on the history and characteristics of the dairy animals owned by each member-dairyman as well as the milk produced by the animals. The records are referred to as "official" and are used by farmers in their herd management decisions and to value animals sold from one producer to another.

Plaintiffs were two private, for-profit firms that entered the dairy records business in competition with the DHIAs. The DHIAs refused to share information with them or to let them join the national DHIA association so they could issue "official" records. Plaintiffs sued alleging the DHIAs were violating Sections 1 and 2 of the Sherman Act. The DHIAs raised Capper-Volstead as an affirmative defense authorizing the challenged behavior and moved for summary judgment. The private firms challenged the DHIAs' right to Capper-Volstead protection on the grounds that one of the "members" of the Pennsylvania DHIA, a Penn State extension specialist, was an ineligible nonproducer.

⁴⁵⁶ See, e.g., *United States v. Maryland & Virginia Milk Producers Ass'n*, 167 F. Supp. 45, 48 (D.D.C. 1958), where the court said that "milk producers" are "persons *owning or operating* dairy farms at which milk is produced,..." (emphasis added).

⁴⁵⁷ *Agritronics Corp. v. National Dairy Herd Ass'n*, 1994-2 Trade Cases (CCH) ¶ 70,758 (N.D. N.Y. 1994); *also*, 914 F. Supp. 814 (N.D. N.Y. 1996).

The DHIA's admitted that the extension specialist was not a producer, that he was called an "associate member" in their bylaws, and that he attended association member and director meetings. However, they also presented uncontroverted evidence that the extension specialist had no vote and no other role or control of the policy making within the organization. Thus, they argued, the label placed on this person by the bylaws should not determine his status but rather the court should look at his actual authority to determine if he is indeed a "member."

The court said this was a difficult issue to handle because no substantive standard existed for determining what constitutes a membership for Capper-Volstead purposes. Next it reviewed the language in Capper-Volstead and in two Supreme Court decisions that referred to members setting organization policy as a characteristic of a cooperative.⁴⁵⁸ It then said, "...since the purpose of the Act is to give the individual members an opportunity to participate in the affairs of the association... (they) must have the means...to do so. Voting or some equivalent form of power would be such a mean."⁴⁵⁹

The court noted the unchallenged evidence that the extension agent attended association membership and board meetings only to provide educational services and act as a liaison between Penn State and the Pennsylvania DHIA. He had no vote or other control over the association, so the court disregarded his title of "associate member" and decided he was not a "member" as he didn't "...possess the substantive rights of a member, nor does he have the required amount of input into the affairs of the association as would be expected of a member."⁴⁶⁰

When the same judge subsequently ruled on a second round of motions for summary judgment, the private firms attempted to resurrect this issue. The court retorted, "Simply put, associate members with no control over an agricultural cooperative are not true

⁴⁵⁸ Maryland & Virginia Milk Producers v. United States, 362 U.S. 458, 466 (1960); Case-Swayne v. Sunkist Growers, 389 U.S. 384, 395-396 (1967).

⁴⁵⁹ 1994-2 Trade Cases (CCH) ¶ 70,758 at 73,197.

⁴⁶⁰ *Id.*

statutory "members" and do not strip the cooperative of its exempt status."⁴⁶¹

Thus, whatever a person affiliated with a producer association is called, whether that person is a "member" turns on whether he has the right to vote in or otherwise control the policy making undertaken by that association. Nonetheless, the case should serve notice to cooperatives to avoid calling anyone a "member" who is not a producer. As the next section explains, all members of a Capper-Volstead protected association must be agricultural producers. Using the term "member" to include nonproducers may confuse people and spur controversy where the use of another term would avoid these undesirable results.

Members Must be Producers

Differentiating a producer from a nonproducer wouldn't be so important in Capper-Volstead cases were it not for the requirement that all members of a protected cooperative must be agricultural producers.

The courts first addressed this issue in the early 1950s. Investor-owned citrus juice processors in California embarked on a lengthy campaign to dislodge Sunkist Growers from its dominant position in the California citrus industry. Their initial suit unsuccessfully tried to establish a conspiracy to restrain trade in violation of Section 1 of the Sherman Act between Sunkist Growers and its wholly owned processing subsidiaries.⁴⁶²

One processor, Case-Swayne Co., launched a new attack. This case alleged that the Sunkist organization was a conspiracy among grower associations and nonproducer members forbidden by Section 1 of the Sherman Act and outside the protection of Capper-Volstead. Case-Swayne also charged that Sunkist illegally obtained and misused monopoly power in violation of Section 2 of Sherman.

The Section 2 part of the case focused on the fact-intensive issues of relevant product, geographic markets, and possible abuse of market

⁴⁶¹ *Agritronics v. National Dairy Herd Ass'n*, 914 F. Supp. 814, 824 (N.D. N.Y. 1996).

⁴⁶² *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products*, 370 U.S. 19 (1962).

power. However, the Section 1 part concerned the legal issue of the proper role, if any, of nonproducer members in a Capper-Volstead protected association.

As mentioned above, the courts brushed aside the processor argument that partnerships and corporations could not hold memberships in a Capper-Volstead association. However, Case-Swayne successfully challenged the memberships held by private, for-profit packing houses.

At the time of the litigation, roughly 15 percent of Sunkist's members were so-called "agency associations." These were private corporations and partnerships that packed fruit produced by local growers under an agency contract with the growers and then marketed that fruit through Sunkist.

The agency associations were paid fixed fees by their growers to cover their costs. Agency associations also received patronage refunds from Sunkist on the same basis as other members. But the agency associations did not keep these patronage refunds. Each passed its allocated share of the gains and losses realized on Sunkist marketing operations through to the growers it served on the basis of the amount of fruit provided by each grower.

At the U.S. District Court trial, the judge granted Sunkist's motion for a directed verdict at the close of Case-Swayne's case. Case-Swayne appealed.

As to the allegations of conspiracy among Sunkist and the agency associations in violation of Section 1 of Sherman, the U.S. Court of Appeals for the 9th Circuit agreed with the trial court's conclusion that Sunkist was protected by the Capper-Volstead Act. The court relied on the language in Capper-Volstead providing producers and their associations may enter into contracts necessary to effectively market their production. It concluded that Sunkist could have entered into arms-length contracts with these packing houses to prepare grower fruit for market. The fact that these entities were considered a class of membership was not, in the court's opinion, such a serious offense to the intent of Capper-Volstead that the growers could not be considered one association qualified for its protection.⁴⁶³

⁴⁶³ Case-Swayne v. Sunkist Growers, 369 F.2d 449, 461-462, (9th Cir. 1966), *rev'd*, 389 U.S. 384 (1967).

Two others elements of this decision are worth noting. First, Judge Ely dissented from this part of the court's opinion. Ely argued that the clear language of Capper-Volstead required that a protected association "must be composed *solely* of agricultural producers."⁴⁶⁴ (court's emphasis)

Second, a unanimous court held the trial judge had incorrectly determined the relevant product and geographic markets. The judgment was reversed and the case remanded for a new trial on whether Sunkist had wrongfully exercised its monopoly power in the redefined markets.

Both parties petitioned the U.S. Supreme Court for writs of certiorari. The Court granted Case-Swayne's request for review on the issue of whether all members of an association had to be agricultural producers for it to qualify for Capper-Volstead protection.⁴⁶⁵ In a series of opinions, the Court held that all members did have to be producers.⁴⁶⁶

Justice Marshall, writing for a 5-judge majority, adopted a literal-language approach to the issue. He provided a detailed description of Sunkist's structure and quoted passages from the legislative history suggesting only producers could be members of a Capper-Volstead association. He concluded that Capper-Volstead, as an exception to a general law, must be narrowly construed. Since the act specifically authorizes agricultural producers to act together, any non-producer participation in the control and policy making of an association strips the entire association of Capper-Volstead protection.⁴⁶⁷ The 9th Circuit judgment was reversed and the case remanded for further proceedings consistent with the majority opinion to determine if Sunkist and the agency associations had engaged in any conspiracy, combination, or contract in violation of Section 1 of the Sherman Act.

⁴⁶⁴ 369 F.2d at 463.

⁴⁶⁵ Case-Swayne v. Sunkist Growers, 387 U.S. 903 (1967).

⁴⁶⁶ Case-Swayne v. Sunkist Growers, 389 U.S. 384 (1967), *rev'g*, 369 F.2d 449 (9th Cir. 1966).

⁴⁶⁷ 389 U.S. at 395-396.

Justices White and Stewart concurred in the result remanding the case for further consideration.⁴⁶⁸ However, they suggested that the penalty, exposing Sunkist to "...antitrust liability for a great many transactions which are wholly between growers or between their cooperative organizations, transactions which Congress intended to exempt from the antitrust laws,"⁴⁶⁹ was too harsh for the indiscretion involved. They asked that the case be remanded but potential damages limited to the consequences of "...the forbidden relationship between an exempt and a nonexempt entity."⁴⁷⁰

Justice Harlan argued that any exposure for Sunkist be prospective only. He noted that agency associations had been members of Sunkist for at least 40 years and the system had gone unchallenged until this case. Also, the record failed to show any predatory intent by anyone. The only motive for including the agency associations as members, according to the evidence, was to provide more packing facility options for growers wishing to market through the Sunkist system.

Justice Harlan wanted the decision to serve as notice to Sunkist and all other agricultural marketing cooperatives that from now on a strict prohibition on even benign nonproducer membership would not be tolerated. He asked that the case be remanded and damages limited to those caused by the agency associations acting in their own interest rather than that of the growers.⁴⁷¹

Justice Douglas opined that the positions espoused in the concurring opinions had not been argued and should be reserved for consideration in a subsequent case.⁴⁷²

Following this decision, Sunkist restructured to eliminate any membership role for the for-profit packing houses. Individual growers who used these houses were offered two options to affiliate with Sunkist. They could join a local association that packs fruit and holds a membership in the district exchanges that market the fruit under the Sunkist umbrella. Or, they could be direct members of the district

⁴⁶⁸ 389 U.S. at 400-403.

⁴⁶⁹ 389 U.S. at 402.

⁴⁷⁰ 389 U.S. at 403.

⁴⁷¹ 389 U.S. at 396-400.

⁴⁷² 389 U.S. at 403.

exchanges and either pack their own fruit or contract with a local association or for-profit packing house to do the packing for them.

In 1971, the court overseeing implementation of earlier remands in this long-continuing litigation found that under this reorganization "no one can be a member of Sunkist at any level who is not a grower of citrus fruit or a cooperative association of such growers."⁴⁷³ Therefore, Sunkist was now in compliance with the requirements to qualify for antitrust protection under the Capper-Volstead Act.

Producer

The Supreme Court decision in *Case-Swayne v. Sunkist Growers* makes it clear that only *bone fide* producers of agricultural products can be members of associations seeking the limited antitrust protection accorded by the Capper-Volstead Act. But it opened a Pandora's box of problems for cooperatives and for antitrust enforcement officials in determining just who is and is not an agricultural producer.

No one disputes that a person, whose primary occupation involves tilling the soil and/or raising animals, is a producer. But things are less clear when a person is engaged in other aspects of bringing food to market, particularly processing agricultural commodities into other products. While the courts have dealt with the issue, as of this writing the line between producer and non-producer remains vague and subject to interpretation.

National Broiler Marketing Association

Vertical integration in the poultry industry began in the late 1940s. Until that time, poultry was raised mainly by many small independent growers. Facilities producing various components of the production to market cycle--breeding, hatching, feed, processing, and marketing--were separately owned. The growers owned their birds and sold them to processors who marketed the product.

After World War II, feed manufacturers and food processors developed a system that allowed farmers to produce more poultry without new large investments. Single companies began acquiring all

⁴⁷³ *Case-Swayne v. Sunkist Growers*, 355 F. Supp. 408, 415 (C. D. Cal. 1971).

aspects of the production cycle--including hatcheries, birds, feed and medicine--except those needed to actually raise and tend the birds. These emerging integrators contracted with the formerly independent farmers to have them raise the chicks to slaughter weight (or, in the case of breeder or laying hens, to care for the birds and gather the eggs). Since the farmer no longer owned the birds, he or she was only required to provide the production facility and necessary labor.

Once vertical integration began, the poultry industry changed rapidly. The broiler industry was 90 percent integrated by 1955. While the egg industry was only 15 percent integrated in 1955, the degree of integration grew to 44 percent by 1965 and more than 90 percent by 1978.

The *Case Swayne* decision caused considerable uncertainty among integrated firms. In 1969, the National Egg Company, a cooperative of integrated egg producers, asked the Justice Department if it would object to Ralston Purina becoming a member. In response, Justice issued a business review letter advising National Egg that it interpreted the term "producer" as used in the Capper-Volstead Act to include integrated producers of eggs using contract growers, and it would not object to Ralston Purina becoming a member.⁴⁷⁴

In 1970, integrated broiler producers, who also used contract growers, formed their own cooperative, the National Broiler Marketing Association (NBMA). However, in November 1971, more than a year after NBMA was formed, the Justice Department reversed its stance and issued three contemporaneous review letters announcing its new position that integrated egg and broiler firms were not "producers" for Capper-Volstead purposes.

The first responded to a second inquiry from National Egg and Ralston Purina. It asked whether it was proper for National Egg to count eggs produced by growers under contract to Ralston as eggs produced by Ralston for purposes of the Capper-Volstead requirement that a majority of products marketed must have been produced by members.⁴⁷⁵ The second addressed a request from Central Soya (which produced only 10 percent of the eggs it marketed on its own farms) and National Egg to approve Central Soya's membership in

⁴⁷⁴ Department of Justice Business Review Letter 69-11 (Nov. 29, 1969).

⁴⁷⁵ Department of Justice Business Review Letter 71-13 (Nov. 17, 1971).

National Egg.⁴⁷⁶ The third addressed a request from Holly Farms (which produced only 3 percent of the broilers it marketed) for permission to join NBMA.⁴⁷⁷ In each instance, the Justice refused to say it would not challenge the proposed conduct under the antitrust laws.

NBMA seized the litigation initiative, filing a declaratory judgment action in the Western District of North Carolina, opposing Justice's interpretation of Capper-Volstead and seeking an authoritative decision on the issue.

Justice responded by filing a civil action against NBMA and its members in U.S. District Court in Atlanta, alleging they conspired to fix the prices of broiler chickens in violation of Section 1 of the Sherman Act. The complaint asked for an injunction barring such restraints of trade.⁴⁷⁸

Both parties agreed to a statement of the facts. NBMA members exchanged information about broiler prices, set a minimum price for member sales of broilers, withheld product from the market until buyers would pay the agreed to price, and sold surplus broilers to customers in foreign countries.

NBMA didn't contest that its members engaged in these activities, but rather countered that this conduct was protected by Section 6 of the Clayton Act, the Capper-Volstead Act, and Section 5 of the Agricultural Marketing Act of 1926. Justice responded that these laws were not applicable because NBMA's members were not "producers" entitled to the protection of these laws. It argued that the only

⁴⁷⁶ Department of Justice Business Review Letter 71-14 (Nov. 17, 1971).

⁴⁷⁷ Department of Justice Business Review Letter 71-15 (Nov. 17, 1971).

⁴⁷⁸ One can probably assume Justice felt it was more likely to prevail in urban Atlanta than rural North Carolina. Justice then convinced the court in North Carolina to dismiss the integrator's suit, arguing all the issues would be resolved in its case.

NBMA also took steps to better position itself for the ensuing battle. NBMA was originally organized as a stock cooperative under Georgia law. In December, 1973, it converted to a non-profit membership cooperative association not having stock. This not only permitted it to portray itself as less of an agribusiness entity but also brought it within the scope of § 6 of the Clayton Act.

producers in the broiler industry were the contract growers. Justice did not challenge the association on any other grounds, so the sole issue to be litigated was whether NBMA's members were "producers" covered by the cooperative exemptions from antitrust liability.

Much was written and argued during the course of the case about the amount of involvement and risk of the integrators in broiler production. However, in view of the basis for the U.S. Supreme Court's ultimate resolution of the central issue, these arguments will be touched on only in passing.

The facts weren't in dispute, so both sides filed motions for partial summary judgment. After almost 2 years of legal jockeying, the U.S. District Court judge granted NBMA's motion and denied the Government's motion.⁴⁷⁹

The district court judge based his decision primarily on two factors. The first was an opinion of the U.S. Court of Appeals for the 5th Circuit, which included Georgia at the time.⁴⁸⁰ That case held that an integrated poultry firm was engaged in "farming" and its truck drivers who picked up and hauled mature chickens raised by contract growers to the company processing facilities were "agricultural laborers" within an exemption from coverage under the National Labor Relations Act and the Fair Labor Standards Act.⁴⁸¹ The judge noted that while the NBMA case involved antitrust rather than labor law, the earlier labor law cases had looked at the overall operation of an integrator and found it to be a "farmer."

Second, the court relied on the risks of physical loss of the birds and market price fluctuations borne by the integrators to hold they were producers qualified to form a cooperative protected by Capper-Volstead.

⁴⁷⁹ United States v. National Broiler Marketing Association, 1975-2 Trade Cases (CCH) ¶ 60,509 (N.D. Ga., September 29, 1975).

⁴⁸⁰ Georgia is now part of the 11th Circuit.

⁴⁸¹ National Labor Relations Board v. Strain Poultry Farms, 405 F.2d 1025 (5th Cir. 1969). The district court cited a similar Eighth Circuit case holding an integrated egg producer was a farmer under the Fair Labor Standards Act, Wirtz v. Tyson's Poultry, 355 F.2d 255 (8th Cir. 1966). The Ninth Circuit had reached a similar conclusion in National Labor Relations Board v. Ryckebosch, 471 F.2d 20 (9th Cir. 1972).

The Government conceded all points not covered by the order of partial summary judgment and NBMA agreed to the court's issuing a final decree in its favor, clearing the way for a prompt appeal by the Government to the 5th Circuit.⁴⁸²

Unfortunately for NBMA, while its case was pending before the 5th Circuit, one of the linchpins of its defense came undone. Just weeks after the district court decision in its case, the U.S. Court of Appeals for the 1st Circuit sustained a National Labor Relations Board (NLRB) determination that under Federal labor law, a fully integrated poultry firm was engaged in farming in its chick hatchery and breeding farm operations, but not its feed mill and poultry processing operations. The court endorsed the NLRB position that truck drivers delivering feed from the firm's feed mill to contract growers weren't working for a farmer or supporting the firm's farming operations. Thus, the drivers were "employees" and not "agricultural laborers" exempt from protection under the National Labor Relations Act.⁴⁸³

The U.S. Supreme Court accepted this labor law case on a writ of certiorari to resolve any apparent conflict among the various circuits.⁴⁸⁴ Justice Stevens, writing for a unanimous Court, noted that while good arguments existed to support resolving the issue in favor of the integrated processor, the issue was close and the Court felt compelled to defer to the NLRB's judgment. The Court affirmed the 1st Circuit position that integrator poultry firms were not "farmers" for labor law purposes when engaged in feed mill and poultry processing operations.⁴⁸⁵ Thus, when the 5th Circuit was ready to decide NBMA's case, one of its most important precedents had been overturned.

The 5th Circuit summarized the arguments of both sides and noted both had a logical appeal. However, it found the Government's position to be more in line with the language and purpose of the Capper-Volstead Act. The court reasoned:

⁴⁸² 1976-1 Trade Cases (CCH) ¶ 60,801 (N.D. Ga., March 16, 1976).

⁴⁸³ National Labor Relations Board v. Bayside Enterprises, 527 F.2d 436 (1st Cir. 1975), *aff'd*, 429 U.S. 298 (1977).

⁴⁸⁴ 425 U.S. 970 (1976).

⁴⁸⁵ 429 U.S. 298 (1977).

We cannot conceive that the ordinary, popular sense of the word "farmers" would fit broiler integrator companies....

...
NBMA cautions us against a romantic view of agriculture and points out that agriculture has changed greatly from the Jeffersonian conception of the self-sufficient yeoman. We agree that agriculture has changed. But the ordinary, popular meaning of the word "farmer" has not. When the common run of people wish to speak of the broader spectrum of modern agriculture, the word generally used is "agribusiness." "Farmer" still means what it meant in 1922-one who owns or operates a farm.⁴⁸⁶

The 5th Circuit sort of glossed over the fact that until the Supreme Court's opinion in *Bayside Enterprises* only 3 months earlier, its position had been that the word "farmer" fit broiler integrator companies, but did note that its opinion in *Strain Poultry Farms* was no longer good law.⁴⁸⁷

The U.S. Supreme Court, impressed with the importance of the issue to the agricultural community and for the administration of the antitrust laws, granted NBMA's request to hear the case.⁴⁸⁸ Then the Court majority proceeded, as it often does, to decide the case in the least intrusive manner possible. Unfortunately, this resulted in a series of opinions that do not provide clearcut guidance on the issue of what constitutes a "producer" for Capper-Volstead purposes.

Justice Blackmun wrote a majority opinion signed by six justices that affirmed the 5th Circuit but on much narrower grounds than the Government had hoped.⁴⁸⁹ The majority made several statements that supported the Government's position that all integrators were outside

⁴⁸⁶ *Unites States v. National Broiler Marketing Association*, 550 F.2d 1380, 1386 (5th Cir. 1977), *rev'g*, 1975-2 Trade Cases (CCH) ¶ 60,509 (N.D. Ga., September 29, 1975).

⁴⁸⁷ 550 F.2d at 1389-1390.

⁴⁸⁸ 434 U.S. 888 (1977).

⁴⁸⁹ *National Broiler Marketing Assn. v. United States*, 436 U.S. 816 (1978), *aff'g*, 550 F.2d 1380.

the scope of agricultural "producers" entitled to protection from antitrust liability.⁴⁹⁰

However, in justifying its affirmation of the 5th Circuit, the majority latched onto a fact neither litigant had emphasized because it naturally led to a ruling that did not produce the outcome either desired. In its introductory summary of the facts of the case, the majority noted that a small number of NBMA members:

...do not own or control any breeder flock whose offspring are raised as broilers, and do not own or control any hatchery where the broiler chicks are hatched... and also do not maintain any grow-out facility. These members, who buy chicks already hatched and then place them with growers, enter the production line only at its later processing stages."⁴⁹¹

Rather than attempt to resolve the intricate issue of whether fully integrated poultry firms were producers, the majority simply said that members who did not maintain a breeder flock, a hatchery, or a grow-out facility "were not among those Congress intended to protect by the Capper-Volstead Act."⁴⁹²

The Court had previously cited *Case Swayne*⁴⁹³ to emphasize that

⁴⁹⁰ "...not all persons engaged in the production of agricultural products are entitled to join together and to obtain and enjoy the (Capper-Volstead) Act's benefits.... 436 U.S. at 823.

"The congressional debates demonstrate that the (Capper-Volstead) Act was meant to aid not the full spectrum of the agricultural sector but, instead, to aid only those whose economic position rendered them comparatively helpless." 436 U.S. at 826.

"Clearly, Congress did not intend to extend the benefits of the Act to the processors and packers to whom the farmers sold their goods, even when the relationship was such that the processor and packer bore a part of the risk." 436 U.S. at 826-827.

⁴⁹¹ 436 U.S. at 822.

⁴⁹² 436 U.S. at 827.

⁴⁹³ 436 U.S. at 822, *Case-Swayne v. Sunkist Growers*, 389 U.S. 384 (1967). The majority cited *Bayside Enterprises* even earlier, after the second

all members had to be producers for the association to qualify for Capper-Volstead protection. Now it concluded that these few NBMA members "... are not 'farmers' as that term is used in the Act, and that a cooperative organization that includes them--or even one of them--as members is not entitled to the limited protection of the Capper-Volstead Act."⁴⁹⁴

In a dissenting opinion, Justice White supported the holding of the district court that the integrated firms came within the term "producer" as used in Capper-Volstead.⁴⁹⁵ He reasoned that integrators are not mere processors who buy product only when it is ready for manufacturing. He said that broiler chickens are agricultural products, integrators own them and support their development with feed and medicine from when they are chicks until they become dressed for retail sale, and thus integrators produce them.⁴⁹⁶

Justice White also found public policy support for a limited antitrust exemption for the integrators. He agreed with the majority that Congress, in 1922, was focused primarily on the weak market power of small independent farmers forced to sell to a relatively few large and powerful buyers. However, he argued that the nature of agriculture had changed significantly over the years. Now, integrated poultry firms faced a similar buyers' market. Their product, fresh poultry, had to be sold within four days of slaughter into a market dominated by a few large supermarket chains. White accused the ma-

word of its opinion (436 U.S. at 817). The distinction between operating hatcheries and breeding flocks (farming) and running a feed mill and processing plant (not farming) made in that decision seemed to play a role in how the court decided *NBMA*. But the Court never referred to *Bayside Enterprises* in the analysis portion of its opinion.

⁴⁹⁴ 436 U.S. at 828-829. In a note, the Court acknowledges that it is leaving undecided such issues as whether the fully integrated processor that grows its own broilers or the integrator that grows out some birds while contracting with independent growers to raise most of the birds processed in its facility are producers under Capper-Volstead. 436 U.S. at 828, n. 21.

⁴⁹⁵ 436 U.S. at 840.

⁴⁹⁶ 436 U.S. at 843.

jority of failing to interpret Capper-Volstead in light of the changes in industry organization.⁴⁹⁷

Justice Brennan agreed with the majority that the case could be decided on the narrow basis that some NBMA members had no actual farming operations. However, he felt compelled to write a concurring opinion in response to the dissent.⁴⁹⁸

Justice Brennan endorsed the 5th Circuit decision holding that integrators were as a class outside the scope of Capper-Volstead. He agreed with Justice White that agriculture had evolved, but contested White's conclusion that Capper-Volstead was subject to interpretation in light of that change. Brennan cited the Senate's rejection of the Phipps amendment--to specifically include processors who paid growers on a formula based on the price the processor received for the finished product--within the concept of "producer" under the Act. He said that Congressional intent was "...to permit only individual economic units working at the farm level to form cooperatives..." covered by the Act.⁴⁹⁹

Brennan also asserted that it would be an anomaly to allow processors to use Capper-Volstead "...to disadvantage the contract grower 'producers' who today continue to fall within the conception of 'farmers' Congress envisioned in 1922."⁵⁰⁰

Thus, *National Broiler Marketing Association* clears the air at both ends of the spectrum. Persons who till the soil and raise animals are "producers" entitled to form marketing cooperatives protected by Capper-Volstead and other laws designed to limit their exposure to antitrust liability. And firms who only enter the farm-to-consumer cycle at the processing stage are not "producers" and are not entitled to be members of protected associations. But the status of entities in the large area in the middle of the spectrum--those who engage in some elements of both production and processing--remains unclear.

⁴⁹⁷ 436 U.S. at 843-844.

⁴⁹⁸ 436 U.S. at 829.

⁴⁹⁹ 436 U.S. at 832.

⁵⁰⁰ 436 U.S. at 839.

De Minimis Rule for Ancillary Members

When presented with a different set of facts, the 8th Circuit Court of Appeals carved a modest exception to the rule developed through *Case Swayne* and *NBMA* that even one nonproducer member deprives a producer association of Capper-Volstead protection.⁵⁰¹

The case involved private antitrust claims against a dairy marketing association that had a small number of nonfarmer members during the period in dispute. They were not processors or corporate middlemen, but rather local business people—car dealer, fertilizer salesman, television salesman, etc.—who were sympathetic to the problems facing farmers in their community and were signed up by overzealous association employees. Many considered the \$25 dues assessment to be a donation to help the association succeed.⁵⁰²

The court noted that these nonproducers had no direct interest in the association, marketed no milk, and did not assert access to any antitrust protection. It reasoned that while "no middlemen are to be permitted to 'infiltrate' otherwise exempt cooperatives... (t)he 'not even one' language in *National Broiler* cannot be divorced from that Court's emphasis on the economic role of such middlemen and on the intent of Congress not to permit such middlemen to participate in price-fixing."⁵⁰³

The court said that "the receipt of twenty-five dollars in 'dues' from a handful of individuals is hardly the same as shielding

⁵⁰¹ *Alexander v. National Farmers Organization*, 687 F.2d 1173, 1185-1187 (8th Cir. 1982), *cert. denied*, 461 U.S. 937 (1983).

⁵⁰² The trial court opinion is unclear as to the exact rights and privileges of these nonproducer "members." NFO asserted that its bylaws prevented these persons from exercising any vestiges of membership, but introduced no evidence it actually enforced the bylaw. On the other hand, no evidence was produced linking these nonproducer members to the establishment of NFO policy. First, the judge said he didn't have to decide the issue. Then he went on to say that if he had ruled, he would feel compelled by *National Broiler Marketing Association* to hold that NFO was not a producer association entitled to Capper-Volstead protection. *In Re Midwest Milk Monopolization Litigation*, 510 F. Supp. 381, 425-426 (W.D. Mo. 1981).

⁵⁰³ 687 F.2d at 1186.

middlemen from price-fixing liability."⁵⁰⁴ After attempting to justify its audacity in carving out an exception to a Supreme Court rule by saying the facts in the case predated the *National Broiler* decision, the court stated that "...NFO's entry into milk marketing exclusively on behalf of dairy farmers is precisely the kind of cooperative endeavor that Congress intended not to be subject to antitrust attack."⁵⁰⁵ The court refused to strip NFO of its antitrust protection because it had a few local supporters as non-producer members resulting from "ignorance or sloppiness on the part of NFO in policing its membership roles"⁵⁰⁶ rather than a deliberate attempt to shield middlemen and processors from antitrust liability.

Is Big Necessarily Bad?

The position is sometimes stated that the Capper-Volstead Act and the other cooperative exemptions were enacted to protect small, struggling producers who till the land and not large marketing corporations. This was clearly the viewpoint, for example, of an FTC administrative law judge. He held members of a cooperative marketing association who limited their anticompetitive activity to agreeing on prices were not protected from *per se* antitrust liability. Obviously frustrated with the judicial acceptance of corporate memberships in *Case Swayne v. Sunkist*, he wrote:

In sum, perhaps Congress should be told that the major assumptions underlying the (Capper-Volstead) exemption, itself, are now open to serious question because (1) the exemption is being claimed by giant agribusinesses, like United Brands in this case, which have the resources that are

⁵⁰⁴ *Id.*

⁵⁰⁵ 687 F.2d at 1187.

⁵⁰⁶ 687 F.2d at 1185. Considering how lax many cooperatives are in policing their membership roles to make sure all current members are producers, this interpretation has probably saved some from an embarrassing and possibly debilitating challenge to their Capper-Volstead status. However, outside of the 8th Circuit, the issue of harmless nonproducer members is still uncertain.

far different from those of the small family farmers who were Congress' concern in 1922;...⁵⁰⁷

But this comment was rebuffed by a Federal district court judge who ruled in a private litigation, based on the same facts, that producers who only engage in setting prices are protected by Capper-Volstead. In a note strongly criticizing the administrative law judge's opinion on several fronts, the Federal judge commented:

He also expressed the opinion that the statute was intended to protect small farmers, and it should not be allowed to shield the activities of giant agribusiness from the antitrust laws. However, neither section 6 nor Capper-Volstead contain restrictions on the size of growers who are exempted under the Acts.⁵⁰⁸

Integrated Entities

Two subsequent rulings have dealt with the issue of whether firms with both production and processing operations qualify as producers under Capper-Volstead. Both cast a limited amount of light onto the overall issue.

In 1988, the Department of Justice issued a favorable business review letter to an attorney representing fruit and vegetable growers interested in forming a new producer marketing association, to be known as the Texas Produce Marketing Cooperative.⁵⁰⁹ The facts, as reported in the letter, provide that membership in the cooperative would be limited to producers of fruits and vegetables. However, the letter continued:

⁵⁰⁷ Initial decision, administrative law judge, in the Matter of Central California Lettuce Producers Cooperative, Federal Trade Commission Docket No. 8970 (March 13, 1975), at 42; *order vacated and complaint dismissed*, Order of the Federal Trade Commission, (July 25, 1977).

⁵⁰⁸ *Northern California Supermarkets v. Central California Lettuce Producers Cooperative*, 413 F. Supp. 984, 993-994, n. 11 (N. D. Cal. 1976), *aff'd per curiam*, 580 F.2d 369 (1978), *cert. denied*, 439 U.S. 1090 (1979).

⁵⁰⁹ Department of Justice Business Review Letter 88-3 (March 17, 1988).

Some members also will maintain facilities for handling, packing and storing the products, and these members may assist other members in the handling and marketing of their products...At the same time, these members will not be precluded from acting as agents for the handling and marketing of products grown by nonmembers of the Cooperative.⁵¹⁰

The letter then cites the Capper-Volstead Act and states that Justice had no current intention to challenge the proposed activities of the association. Thus, at least in this instance, the Department of Justice was willing to accept an unspecified amount of vertical integration by producers who wished to qualify their association under Capper-Volstead.

Sometime in the early 1990s, the Department of Justice brought criminal antitrust charges against Samuel Hinote, the president of Delta Pride Catfish, a catfish processing and marketing association owned entirely by catfish producers. Hinote was charged with conspiring with other catfish processors and marketers to illegally fix wholesale prices for catfish. Hinote moved to dismiss the indictment on the grounds that all of the alleged conspirators were catfish producers and therefore any collusion that did occur was shielded by the Capper-Volstead Act and the Fisherman's Collective Marketing Act.

Hinote's motion to dismiss asserted that all of the unindicted coconspirators owned and operated their own catfish production ponds as well as processing plants and marketing functions. It also stated that most of the firms involved in any price setting activity were entirely owned by catfish producers. However, two of the alleged conspirators were subsidiaries of ConAgra and Hormel, which Hinote admitted were not owned exclusively by farmers but, he asserted, are themselves farmers and fishermen under the applicable statutes.

The trial court judge did not agree with Hinote that ConAgra and Hormel qualified as producers under Capper-Volstead or the Fisherman's Act.⁵¹¹ The judge noted that while these firms leased

⁵¹⁰ *Id.*, at page 2.

⁵¹¹ *United States v. Hinote*, 823 F. Supp. 1350 (S.D. Miss. 1993). The judge described ConAgra and Hormel as "large conglomerates with multi-

ponds and grow substantial quantities of catfish, they also obtained significant catfish for their processing operations from contract growers and by purchases from independent producers on the open market.

He quoted extensively from Justice Brennan's dissent in *National Broiler Marketing Association*⁵¹² to the effect that fully integrated firms should not be considered producers for antitrust exemption purposes. He said that since these two firms did not engage in any collective handling or processing, but rather acted as "traditional 'middlemen,' the very group which Congress viewed as exploiting the true farmers it sought to protect under the Capper-Volstead Act."⁵¹³

The judge concluded that since Hinote couldn't establish that "...all" of his alleged co-conspirators were privileged to act collectively under the Capper-Volstead Act, his challenge to the indictment must fail."⁵¹⁴ (court's emphasis)

The court conducted a jury trial. Hinote was acquitted, so no appeals were taken concerning the opinion denying the motion to dismiss. So, at least one Federal court opinion holds that whomever Capper-Volstead is intended to protect, it is not fully integrated firms with independent handling and marketing operations and multi-billion dollars sales each year.

Processing Subsidiaries

Another element of confusion concerning who is a producer protected by Capper-Volstead was introduced by dicta in a decision granting summary judgment to a cooperative charged with illegally conspiring with its wholly owned processing subsidiary.⁵¹⁵ Producer members of National Grape Cooperative provide concord grapes to the cooperative which sells them to its wholly owned subsidiary, Welch

billion dollar annual sales in the production of a wide variety of food products." Note 6 at 1353.

⁵¹² 436 U.S. 816, 829 (1978).

⁵¹³ 823 F. Supp. at 1358-1359.

⁵¹⁴ 823 F. Supp. at 1360.

⁵¹⁵ *Ripplemeyer v. National Grape Cooperative Ass'n*, 807 F. Supp. 1439 (W.D. Ark. 1992).

Foods, for processing into grape juice and other consumer products. Welch is organized as a cooperative with National Grape as its only member.

In 1990, National Grape terminated its members in Arkansas and Missouri because production in that area had decreased to a level that made it impractical for the cooperative to continue to serve them. The terminated growers sued National Grape on many grounds, including an allegation that National Grape and Welch conspired to restrain trade in violation of Section 1 of Sherman. Before addressing the issue, which the court decided for the cooperative on the basis of general business law, it discussed the applicability of Capper-Volstead to the Section 1 charge of conspiracy between National Grape and Welch.

The court began by citing *National Broiler Marketing Ass'n* and *Case-Swayne* for the proposition that "... 'middlemen', if infiltrated into an otherwise exempt cooperative, are not to receive benefit of the Capper-Volstead exemption in antitrust litigation."⁵¹⁶

The court then summarized:

In this case, there is no dispute that Welch, a wholly owned non-stock "cooperative" of National, is a non-farmer processor. The Court has made clear that when agricultural industries vertically integrate, including non-farmer middlemen such as processors, the economic role of these middlemen exceeds the conduct Congress intended to permit through the Capper-Volstead exemption. Thus, the court finds that while the exemption provides a limited immunity to farm cooperatives from antitrust litigation, the uncontested nature and relationship of National and Welch foreclose application of the Capper-Volstead exemption.⁵¹⁷

The court is saying that Welch, while a wholly-owned subsidiary of a Capper-Volstead cooperative, is a separate nonfarmer processor not eligible for protection as a Capper-Volstead cooperative. In the process, the court cited *Case-Swayne v. Sunkist*⁵¹⁸ for the proposition

⁵¹⁶ 807 F. Supp. at 1457.

⁵¹⁷ *Id.*

⁵¹⁸ 389 U.S. 384 (1967).

that a cooperative loses its Capper-Volstead protection if it admits non-producers as members. Yet it ignored *Sunkist v. Winkler & Smith*, which holds a cooperative and its subsidiaries are a single entity for Capper-Volstead purposes.⁵¹⁹ Also, the court never explained how National and Welch can be a single entity under general business and antitrust law, but not under Capper-Volstead.

Nonetheless, the decision casts a cloud over the ability of subsidiaries of Capper-Volstead cooperatives to enter into joint marketing agreements with unrelated Capper-Volstead associations. As further consolidation and integration takes place in the food industry, including forward integration by traditional farmers, more questions are likely about whether specific entities qualify as "producers" for purposes of the Capper-Volstead Act. How future courts resolve these cases will be a matter of great interest to many segments of agriculture.

PROTECTED PRODUCER CONDUCT

Determining who is eligible for membership in a Capper-Volstead protected cooperative is only the first step in interpreting its value to producers. The second step is defining what conduct is protected from antitrust liability. The next three sections look at this issue. This section looks at permitted conduct, the next at conduct outside the scope of the Act. The third examines the special issue of the extent to which producers can use their cooperative to gain monopoly power over a market.

Any Business Structure Permissible

Section 6 of the Clayton Act only applies to agricultural organizations that do not issue capital stock. Section 1 of Capper-Volstead provides producers may "act together in associations, corporate or otherwise, with or without capital stock."⁵²⁰

⁵¹⁹ 370 U.S. 19, 29 (1962).

⁵²⁰ 7 U.S.C. § 291.

Most producer associations claiming Capper-Volstead status are organized as corporations, either with or without capital stock, under a State cooperative corporation law. A few are organized under a State general business corporation law and establish their cooperative characteristics in their articles of incorporation and bylaws. Producers associated as members of the newest form of business entity, a limited liability company, should also be covered.

The Department of Justice takes the position that producers must be members of a formal "producer association" before they can agree on prices and to whom they will sell their production. In early 1997, Justice and the States of Oregon, California, and Washington entered into a consent decree agreement with 10 commercial crab fishermen on the West coast. The defendants were the leaders of fishermen who had simply reached a mutual understanding not to sell crabs until all purchasers on the West coast agreed to pay the minimum price set by the fishermen.

In its competitive impact statement, Justice asserted that this conduct amounted to price fixing and a horizontal boycott in violation of Section 1 of the Sherman Act. To be protected from liability, the fisherman had to be members of a fishermen's marketing association entitled to the exemption provided by the Fishermen's Collective Marketing Act of 1934. Under the consent decree, the fishermen were permitted to continue to set prices and withhold product from the market to get their price, provided they formed and joined a properly structured producer association.⁵²¹

Joint Marketing

Capper-Volstead authorizes producers to act together "in collectively processing, preparing for market, handling, and

⁵²¹ Oregon v. Mulkey, 1997-1 Trade Cases (CCH) ¶ 71,859 (D. Ore. 1997). As frequently happens in antitrust disputes involving the Government, the parties had negotiated a settlement before the lawsuit was filed. The published documents are useful, however, in ascertaining the attitude of the antitrust enforcement officials concerning the conduct under review.

marketing" their production.⁵²² While four steps in the value-added process are listed in the law, judicial review has focused on the scope of the term "market."

Some producers have integrated forward to the point of putting their processed consumer products right on the grocery store shelf--Land O'Lakes butter, Ocean Spray cranberries, Welch's grape products, Blue Diamond almonds, etc. Other producers have limited their group action to negotiating price and other terms of sale for their raw produce with buyers, or merely agreeing on the price they will accept for their product and then arranging their own sales, or only providing selected services to their members. The courts have responded with a series of decisions giving the term "marketing" as it is used in Capper-Volstead a sufficiently broad interpretation to include each of these associations.

Associations which take title to and process member product into value-added products for resale have always been treated by the courts as engaged in processing and marketing protected under Capper-Volstead. As the judge in *United States v. Hinote* noted:

The farmers formed Delta Pride to process and sell their fish, and thus enable them to receive a larger portion of the profit realized on the eventual sale of their catfish. If this case concerned nothing more than the collective actions of Delta Pride's shareholders/farmers in processing and marketing their own fish, the court would be compelled to find their activities exempt from antitrust liability under the Capper-Volstead Act.⁵²³

Other producer associations--that limit their joint activity to negotiating contracts covering the terms of sale of member product to buyers, or who merely agree on a sales price and let the members sell to whomever they please--hold a unique place in cooperative antitrust

⁵²² 7 U.S.C. § 291. The courts tend to focus on the term "marketing" as encompassing all of these activities.

⁵²³ *United States v. Hinote*, 823 F. Supp. 1350, 1354 n. 8 (S.D. Miss. 1993) (Motion to dismiss indictment denied because of possible conspiracy to restrain trade involving non-producers engaged in processing).

law, and perhaps antitrust law in general. They are probably among the few organizations to be attacked by both buyers and Government antitrust enforcers as not engaging in enough anti-competitive conduct to be protected from antitrust liability. Yet it is in this context that the court decisions interpret what it means to "market" under Capper-Volstead.

Bargaining and Price Setting

Bargaining associations are producer cooperatives that limit their activity to negotiating transfer prices and other terms of sale (quality standards, delivery terms, etc.) with buyers of their members' production. They may either take title to the members' products and resell them, or serve as an agent with title passing directly from the producer to the buyer.⁵²⁴

Treasure Valley. The landmark case concerning the Capper-Volstead status of cooperative bargaining associations involved western potato growers.⁵²⁵ It started as an ill-conceived reaction by the growers to a serious deterioration in their market. It ended as a major judicial endorsement of group action by producers.

For some time leading up to the mid-1960s, potato growers in Malheur County, in southeastern Oregon, initiated pre-season sales contracts through the Malheur Potato Bargaining Association. Southwestern Idaho growers negotiated similar contracts through the Treasure Valley Potato Bargaining Association. The two associations bargained with two major potato processors, Ore-Ida Foods and the J.R. Simplot Co., over the price and terms of sale for potatoes deli-

⁵²⁴ Two books are available about the history and operation of agricultural bargaining associations. The first is Ralph B. Bunje, *Cooperative Farm Bargaining and Price Negotiations*, USDA Cooperative Information Report 26 (1961). The second is Gerald D. Marcus, *Farm Bargaining Cooperatives: Group Action, Greater Gain*, USDA ACS Research Report 130 (1994).

⁵²⁵ *Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc.*, 1973-1 Trade Cases (CCH) ¶ 74,315 (D.C. Id. 1971), *aff'd*, 497 F.2d 203, 214 (9th Cir. 1974), *cert. denied*, 419 U.S. 999 (1974).

vered to their plants at, respectively, Ontario, Oregon and Caldwell, Idaho.

The plants were less than 30 miles apart along Interstate 84 where it crosses the Oregon-Idaho border. Malheur would bargain first with Ore-Ida at Ontario and when an agreement was reached, Treasure Valley would ask for and receive essentially the same terms from Simplot at Caldwell. Malheur would authorize its members to sell to Simplot according to the Treasure Valley contract and Treasure Valley would likewise endorse Malheur's contract with Ore-Ida. Growers were free to sell to whichever processor they preferred and some growers provided potatoes to both. Both processors were permitted to buy additional potatoes from nonmember growers.

Officers and members of Malheur and Treasure Valley met regularly to discuss prices and terms of sale each would seek. In fact, the entire negotiation process was unusually public. Growers and processor employees talked openly about the negotiations and proposals were regularly reported in the local press.

This process seemed to work fine for an undisclosed length of time. The district court noted that the processors benefitted by having an assured supply of product without being subjected to the risks of open market supply and price at harvest and delivery. Likewise, the growers had a home for their production and also escaped the vagaries of open market pricing at harvest. Also, no growers in the country received higher prices pursuant to pre-season contracts than members of these two associations.⁵²⁶

From 1963 through 1966, several factors combined to throw the supply-demand balance for potatoes grown in the area out of kilter. The facts are reported in some detail as an example of how changes in market conditions can disrupt established cooperative marketing patterns and lead to costly and time consuming litigation.

The most important change was the development of new technology that permitted water to be taken from the Snake River and used to irrigate thousands of acres of previously barren land. In 1963, about 5,500 acres under production in the area. That number jumped by 57 percent in 1964.

⁵²⁶ 1973-1 Trade Cases (CCH) at 93,465-93,466.

Any immediate impact on supply was mitigated, however, by frost and other severe weather conditions in 1964 resulted in a poor crop that year. Similar production problems developed throughout the country and in the Spring of 1965, open market prices jumped appreciably. The cost of seed potatoes for the 1965 crop was also high and the associations negotiated high pre-season contract prices.

These high prices and the new availability of water attracted further increases in production--fostered by large corporate growers entering the market--of 134 percent in 1965 and 169 percent in 1966. The product shortfall of 1964 became a surplus in 1965. With the prospect of huge production surpluses in 1966, previously harmonious negotiations turned acrimonious. The associations balked at signing contracts at the prices offered by the processors. By the time contracts were signed, the processors had met a large portion of their needs through individual contracts with nonmembers of the associations.

The associations, probably under intense pressure from members facing low prices and the prospect of product without a home, sued the processors for conspiring to restrain trade and attempting to monopolize trade under Sections 1 and 2 of the Sherman Act. The processors counter-sued the growers on the same grounds.

After 4 years of pretrial proceedings, the case was tried without a jury. First, the judge concluded that the processors had not violated antitrust law. He found the associations had failed to establish any concerted action by the two buyers to fix prices or refuse to deal with their members. He noted that any similarity in the contracts offered by the two processors was largely in response to demands by the associations that their members be treated alike.

Second, the judge--with little discussion and analysis--held that the joint bargaining activity of the associations was immunized from liability by Section 6 of the Clayton Act.⁵²⁷

Both sides appealed. The U.S. Court of Appeals for the 9th Circuit affirmed the district court ruling that no illegal conduct had occurred.

As for the grower claims against the processors, the Court of Appeals determined that the findings of the trial court were not clearly erroneous. The growers asserted that the fact that the contracts offered

⁵²⁷ 1973-1 Trade Cases (CCH) at 93,470.

by the processors were nearly identical established *per se* a conspiracy and attempt to monopolize. But the court declined to apply *per se* analysis.

The court noted that officials of both firms had rebutted grower circumstantial evidence of collusion with unequivocal denials. It also held that the admission of the associations that they "... actively strived to obtain similar contracts supports the finding that the activity of the bargaining associations, not of Simplot and Ore-Ida, was the controlling reason for the similarity of price and contract terms."⁵²⁸

Thus, bargaining associations that strive to establish uniform prices and terms of sale from buyers are on notice that this activity is a two-edged sword. The courts will likely expect clear and convincing evidence of buyer anticompetitive behavior aimed at the association before holding the buyers liable under the antitrust laws.

When assessing the processors' counterclaims against the growers, the Court of Appeals relied more on the Capper-Volstead Act than Section 6 of the Clayton Act. The processors' argued that since the associations did not actually sell the members' potatoes, they did not qualify as protected organizations because they did not engage in any of the functions enumerated in the law (processing, preparing for market, handling and marketing).

The Court acknowledged that "the associations did not collectively *process, prepare for market, handle* or actually sell potatoes (court's emphasis)."⁵²⁹ However, it went on to say:

The activities of the two associations came within the word *marketing*.

...

We think the term *marketing* is broader than the word *sell*.... The associations here were engaged in bargaining for the sales to be made by their individual members. This necessarily requires supplying market information and performing other acts that are part of the aggregate of functions involved in the transferring of title to the potatoes. The associations were thus performing "marketing" functions

⁵²⁸ 497 F.2d at 208.

⁵²⁹ 497 F.2d at 215.

within the plain meaning of the term. We see no reason to give that word a special meaning within the context of the Capper-Volstead Act.⁵³⁰

Thus, the court established that producers, who limit their joint activity to negotiating farm gate prices with potential buyers, are entitled to the same protection under the Capper-Volstead Act as those that take title to the product for resale in raw form or for manufacturing into various value-added items.

Central California Lettuce. On June 10, 1974, two months after the 9th Circuit opinion in *Treasure Valley*, the Federal Trade Commission (FTC) issued an administrative complaint alleging the Central California Lettuce Producers Cooperative (Central) and its grower-shipper members engaged in "unfair methods of competition" in violation of Section 5 of the Federal Trade Commission Act.⁵³¹ But a private suit by a small chain of retail grocery stores, alleging the same parties illegally conspired to fix prices for lettuce shipped from the Salinas Valley in violation of Section 1 of the Sherman Act, reached final judgment first. The decision established the principle that producers, who only agreed to a price range for the sale of their production, are also entitled to Capper-Volstead protection.⁵³²

The facts were not disputed in either the FTC proceeding or the private litigation. Central was formed in 1972 as a nonstock cooperative corporation. It became operational in May, 1973, when each of its 22 lettuce grower-shipper members had signed marketing agreements. Under these contracts, members agreed to share information regarding the actual and expected status of their crops, sell lettuce within the limits of ceiling and floor prices established through Central, and report delinquent accounts and chronic complainers to Central.

⁵³⁰ *Id.*

⁵³¹ 15 U.S.C. § 15.

⁵³² *Northern California Supermarkets v. Central California Lettuce Producers Cooperative*, 413 F. Supp. 984 (N. D. Cal. 1976), *aff'd per curiam*, 580 F.2d 369 (1978), *cert. denied*, 439 U.S. 1090 (1979).

An executive committee composed of a representative from each member met at least once a week and determined the pricing policy the members would follow for a specified period of time. Central never shipped, harvested, handled, nor sold any lettuce. Nor did Central negotiate directly with buyers on behalf of its members. Central had no employees and no payroll.

Each member of Central conducted its own individual sales program. Members negotiated and sold lettuce directly to buyers and payment for the lettuce was billed and collected by each member.

No one disputed that Central's primary function was to set prices or ranges of prices to which members agreed to adhere in the sale of their lettuce. In addition, Central members exchanged information on crop conditions and problems with buyers. They also sponsored some advertising of lettuce and other special programs to increase lettuce sales. Members of Central shipped close to 70 percent of the lettuce produced in the Salinas-Watsonville-King City growing area in southern California.

The legal arguments in the lettuce cases were similar to those raised in *Treasure Valley*. The complaints charged that the growers' price-fixing activity constituted a combination or conspiracy to restrained trade, a *per se* violation of antitrust law. The association raised Section 6 of the Clayton Act, the Capper-Volstead Act, and Section 5 of the Cooperative Marketing Act of 1926 as affirmative defenses. The FTC staff and the supermarket chain responded that price fixing, with a few minor embellishments, did not constitute "marketing" of agricultural products protected by these laws.

The first ruling issued was an initial decision by an administrative law judge at the FTC.⁵³³ The judge held that the members of Central, when they agreed on a pricing policy and then went their separate ways to sell their production, were not engaged in "collectively marketing" their lettuce as required to qualify for protection under Section 6 of the Clayton Act and Section 1 of Capper-Volstead. He dismissed the Cooperative Marketing Act defense on the basis that this language covers the sharing of market information but does not authorize any setting of prices.

⁵³³ In the matter of Central California Lettuce Producers Cooperative, et al., F.T.C. Docket No. 8970 (March 13, 1975).

The judge noted that the law appears to approve of more restrictive cooperative arrangements, such as a single person negotiating the sale of all the members' production, rather than having 22 separate entities selling separately. Nonetheless, he held that Central was not protected as presently constituted and its price-fixing activity violated Section 5 of the Federal Trade Commission Act. He ordered Central dissolved and the members to cease and desist from price setting.

While Central appealing this decision to the full FTC, a Federal judge for the Northern District of California issued his decision in the private litigation brought by the supermarket chain that had purchased lettuce from members of Central.⁵³⁴ After a detailed recitation of the facts and the history of the statutes raised as defenses by Central, this judge determined that this dispute was controlled by the 9th Circuit opinion in *Treasure Valley*.⁵³⁵ He dismissed the buyer's attempt to distinguish *Treasure Valley* on the basis that the potato growers engaged in collective bargaining while the lettuce growers only set prices and did their own contract negotiation as "a distinction without a difference."⁵³⁶ He went on to say,

...even if Central engaged in no other collective marketing activities, mere price-fixing is clearly within the ambit of the statutory protection. It would be ironic and anomalous to expose producers, who meet in a cooperative to set prices, to antitrust liability, knowing full well that if the same producers engage in even more anticompetitive practices, such as collective marketing or bargaining, they would clearly be entitled to an exemption.⁵³⁷

The judge granted Central's motion for summary judgment and denied the supermarket's motion for summary judgment.

⁵³⁴ Northern California Supermarkets v. Central California Lettuce Producers Cooperative, 413 F. Supp. 984 (N. D. Cal. 1976), *aff'd per curiam*, 580 F.2d 369 (1978), *cert. denied*, 439 U.S. 1090 (1979).

⁵³⁵ 413 F. Supp. at 991.

⁵³⁶ 413 F. Supp. at 992.

⁵³⁷ *Id.*

Although the briefs in the administrative appeals had been filed before the District Court opinion was issued, the FTC waited another 18 months before issuing its decision. The Commission eventually acquiesced to the logic and conclusions of the district court, vacated the order of its administrative law judge, and dismissed the complaint.⁵³⁸

The following year, the U.S. Court of Appeals for the 9th Circuit, in a one-paragraph per curiam opinion that cites the full FTC decision, affirmed the district court "...for the reasons stated by the trial judge..."⁵³⁹

Other courts quickly adopted these decisions. In the *Yankee Milk* case, plaintiff Fairdale Farms conceded that Yankee Milk could fix the price its members charged for their milk. However, Fairdale Farms argued the Regional Cooperative Marketing Association (RCMA), a federated cooperative association organized for the sole purpose of fixing prices charged its member cooperatives, is not entitled to Capper-Volstead protection. The district court held that RCMA was entitled to Capper-Volstead status as either an "association" or a "marketing agen[t] in common."⁵⁴⁰

Citing *Treasure Valley* and *Central California Lettuce*, the court granted Yankee's motion for summary judgment on the price fixing charge, stating, "The reasoning of these cases is highly persuasive; we hold that section 1 of the Capper-Volstead Act exempts from the constraints of section 1 of the Sherman Act a qualified agricultural organization that does nothing but fix prices."⁵⁴¹

On appeal, the U. S. Court of Appeals for the 2nd Circuit affirmed the district court on the price fixing issue regarding both Yankee Milk and RCMA, stating, "It would be strange indeed if participation in this portion of the marketing process, standing alone, would subject a

⁵³⁸ Order of the Federal Trade Commission, In the matter of Central California Lettuce Producers Cooperative, et al., F.T.C. Docket No. 8970 (July 25, 1977).

⁵³⁹ 580 F.2d 369 (1978).

⁵⁴⁰ Fairdale Farms v. Yankee Milk, 1980-1 Trade Cases (CCH) ¶ 63,029, at 77,112 (D. Vt. 1979).

⁵⁴¹ 1980-1 Trade Cases (CCH) ¶ 63,029 at 77,115.

cooperative to antitrust liability, when the exercise of the full range of activities covered by Capper-Volstead would not."⁵⁴²

The 6th Circuit accepted these rulings in a Government case against Dairymen, Inc. It said that Capper-Volstead "...permits an agricultural association to be formed solely to fix the price at which its members products are sold."⁵⁴³

Thus, it is established that producers who limit their collective marketing activity to negotiating on a group basis, or who even do as little as agreeing on the prices they will accept for their products, are protected from antitrust liability for price fixing.⁵⁴⁴

Marketing Service Associations

At least one court has held that producer associations that only provide services that facilitate member marketing of their products engage in "marketing" member product. The associations under attack, Dairy Herd Improvement Associations, (DHIAs) test the physical and production characteristics of member dairy cattle and prepare reports of the test results. These reports are used by members to manage the makeup of their herds and to help establish value when an animal is sold by one producer to another. After quoting the "marketing is broad" language of the Ninth Circuit in *Treasure Valley*, the court concluded that an association that tests milk and provides milk production records to dairy farmers "...has clearly demonstrated that it is performing a 'marketing' function within the meaning of the (Capper-Volstead Act)."⁵⁴⁵

In a later decision, the same judge dismissed evidence submitted by plaintiffs that the managers of the defendant DHIAs didn't think they were engaged in marketing. The court stated, "Plaintiffs rely on the opinions of lay witnesses for what essentially are legal conclusions.

⁵⁴² Fairdale Farms v. Yankee Milk, 635 F.2d 1037, 1040 (2nd Cir. 1980).

⁵⁴³ United States v. Dairymen, Inc., 660 F.2d 192, 194, (6th Cir. 1981).

⁵⁴⁴ Northern California Supermarkets v. Central California Lettuce Producers Cooperative, 413 F. Supp. 984, 993. (N.D. Cal. 1976).

⁵⁴⁵ Agritronics Corp. v. National Dairy Herd Ass'n, 1994-2 Trade Cases (CCH) ¶ 70,758 at 73,198 (N.D. N.Y. 1994).

While the general managers and CEOs of the cooperatives may not believe that they 'market' produce under their definitions of the word, most courts would beg to differ."⁵⁴⁶

The court then repeated its earlier reference to *Treasure Valley* and again concluded the associations were "marketing" as the term is used in Capper-Volstead.⁵⁴⁷

Association Collaboration

The Capper-Volstead Act not only permits producers to act together in cooperative marketing "associations" but also provides that "Such associations may have marketing agencies in common..."⁵⁴⁸

Like other key terms, neither "association" nor "marketing agency in common" is defined in the Act. This has led to litigation alleging both complex internal structures of a cooperative and agreements between separate cooperatives are outside the protection of Capper-Volstead.

Complex Cooperative Structures

The classic textbook description of a cooperative is a group of producers who form a corporation to operate on a cooperative basis. Each producer is a member-owner and the cooperative provides services to the membership. Many cooperatives are organized along this simple owner-entity model. They are referred to as centralized cooperatives. No matter how large or diverse a centralized cooperative may become, it still maintains the two-level structure of a group of members directly owning a single cooperative.

Other producers have developed more complex organizational structures. They formed smaller, locally owned and controlled centralized cooperatives. Then these cooperatives formed another cooperative venture, pooling their resources to enter lines of business beyond the ability of a single local cooperative. This "co-op of co-ops" is often referred to as a federated cooperative. Several layers of

⁵⁴⁶ *Agritronics Corp. v. National Dairy Herd Ass'n*, 914 F. Supp. 814, 824-825 (N.D. N.Y. 1996).

⁵⁴⁷ *Id.* at 825.

⁵⁴⁸ 7 U.S.C. § 291.

organization can develop when these "federateds" form other "co-ops of co-ops" such as CF Industries and CoBank.

Still more complexity can enter the picture when either a centralized or federated cooperative forms one or more subsidiaries or other affiliated entities. A single group of producers may own and control the entire organization under a legal structure far more intricate than the simple centralized model.

Complex structures are not necessarily a recent development. Sunkist, the well known marketer of oranges and other citrus fruit, had such a structure in the early 1900s before Capper-Volstead was even enacted. A major antitrust case that reached the U. S. Supreme Court considered the impact of Sunkist's structure on its member-producer's antitrust status under Capper-Volstead.⁵⁴⁹

Sunkist was born out of a severe depression from 1890-1893 in the California citrus industry. Overproduction and a marketing system incapable of moving fruit to markets on the east coast at a profit led growers to convene and organize a system of local packing facilities and a centralized marketing arm owned and controlled by the packing "sheds". Thus, from its inception more than 100 years ago, Sunkist operated as a federated cooperative.

In 1915, several Sunkist members that handled lemons decided to develop and market processed products from lemons that weren't suitable for the fresh market. This was a new and risky venture and not all Sunkist members were interested in participating. So, a separate cooperative, Exchange Lemon, was formed. The following year a second new cooperative, Exchange Orange, was formed by a different mix of Sunkist members to develop and market processed products from oranges also unfit for the fresh market.

In 1931, the Sunkist board of decided to make the processing facilities of Exchange Orange available to all its members by purchasing it and operating it as a wholly owned subsidiary. The products of Exchange Lemon (an affiliated cooperative) and Exchange Orange (a wholly owned subsidiary) were marketed by a products divi-

⁵⁴⁹ Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., 284 F.2d 1 (9th Cir. 1960), *rev'd*, 370 U.S.19 (1962). See pages 169, 172-176 for discussion of the Sunkist "producer" issue.

sion established within Sunkist (a federated cooperative) and overseen by directors of Exchange Lemon and Exchange Orange.⁵⁵⁰

Shortly after World War II, the Sunkist family and four independent companies--TreeSweet, Silzle, Winckler & Smith, and Case-Swayne--produced and marketed citrus byproducts, including canned orange juice. Sunkist members produced about 70 percent of the oranges grown in California during this period. The other firms were primarily dependent on Sunkist for their supply of by-product oranges.

Sunkist's legal problems began with the bankruptcy of one of these firms, Winckler & Smith. It began operating in 1946, when it had purchased much of its by-product orange needs from Sunkist. Purchases from Sunkist declined over the next few years.

The 1951 harvest produced a record tonnage of byproduct quality oranges. Sunkist sold a modest amount of this product to outside purchasers for use in orange concentrate and turned the rest over to Exchange Orange. The fruit delivered exceeded Exchange Orange's manufacturing capacity. It turned some of the excess over to Exchange Lemon at cost for processing into orange juice. The remainder was sold to two of the four independent processors, TreeSweet and Silzle, for processing into orange juice. The fruit sales were at distress prices which virtually guaranteed a profit would be realized by TreeSweet and Silzle.

Apparently Case-Swayne decided to meet its needs from sources outside of Sunkist. Winckler & Smith also attempted to meet its needs through an independent broker. However, the fruit supplied was not suitable for processing into the product Winckler & Smith wanted to produce, single strength Valencia orange juice. Sometime into the marketing year Winckler & Smith asked Sunkist to provide it with byproduct oranges. Sunkist, which by now had a "home" for all of its members' fruit, refused. Winckler & Smith was unable to produce single strength orange juice in 1951 and subsequently filed for bankruptcy.

The trustee in bankruptcy brought an antitrust complaint seeking treble damages from Sunkist and Exchange Orange as defendants and

⁵⁵⁰ 370 U.S. at 21-22.

Exchange Lemon, TreeSweet and Silzle as co-conspirators. The complaint raised three arguments:

1. Sunkist and Exchange Orange's refusal to sell to Winckler & Smith was designed to eliminate Winckler & Smith as a competitor and therefore constituted a conspiracy to restrain trade in violation of Section 1 of the Sherman Act

2. Sunkist and Exchange Orange's agreement to sell product to the coconspirators but not to Winckler & Smith was also a conspiracy to restrain trade designed to eliminate Winckler & Smith as a competitor and a violation of Section 1 of the Sherman Act.

3. Sunkist and Exchange Orange monopolized the relevant market, single strength Valencia orange juice, and used their monopoly power to eliminate Winckler and Smith as a competitor in violation of Section 2 of the Sherman Act.

Sunkist attempted to establish two justifications for its refusal to deal with Winckler & Smith. The trial judge permitted it to introduce evidence that it didn't need to do business with Winckler & Smith because TreeSweet and Silzle were willing and able to process all of the product Exchange Orange sent them. The judge refused, however, to allow evidence that Sunkist didn't want to deal with Winckler & Smith because it had good reason to believe the firm was selling adulterated and watered down product and therefore hurting the overall market for members' orange-based products. Sunkist and Exchange Orange also denied that they had a monopoly in the single-strength orange juice market.

The judge sent the case to the jury with a complex set of instructions that permitted the jury to deliver a general verdict for Winckler & Smith without specifying exactly how it determined Sunkist violated the Sherman Act. The jury awarded Winckler & Smith damages of \$500,000, which were trebled to \$1,5 million.

Sunkist challenged various rulings and jury instructions to the U.S. Court of Appeals for the Ninth Circuit. That court held the case until the U.S. Supreme Court had ruled in *Maryland & Virginia Milk Producers v. United States*.⁵⁵¹ In a lengthy opinion that primarily recites the facts and allegations of the case and discusses various ques-

⁵⁵¹ 362 U.S. 458 (1960).

tions of the admissibility of evidence, the appellate court affirmed the trial judge's decision to send the case to the jury.⁵⁵²

First, the court focused on Sunkist's defense that it was shielded from antitrust liability by Sec. 6 of the Clayton Act and Sec. 1 of the Capper-Volstead Act. The court noted that *Maryland & Virginia Milk Producers* made it clear that neither act provides a "blanket" exemption for a cooperative to either monopolize or restrain competition. Thus it was proper for the jury to consider whether an antitrust violation had occurred.⁵⁵³

On the issue of Sunkist's refusal to deal with Winckler & Smith, the court acknowledged that as a general rule a business has the right to choose whom it will buy from and sell to without interference from the courts, citing *United States v. Colgate*, 250 U. S. 300 (1919). But the court also said this "right... cannot be taken as an absolute."⁵⁵⁴ It must be exercised to achieve "lawful marketing objectives."⁵⁵⁵

The court said that the case involved allegations of a concerted refusal to deal by some members of an industry with other members of the industry. This can involve a "group boycott" long held to be illegal under the law.⁵⁵⁶ The court thus found that whether the refusal to deal violated the Sherman Act had also been properly left to the jury.

Sunkist challenged certain instructions that permitted the jury to find an illegal conspiracy between itself and only Exchange Orange or Exchange Lemon. The court upheld the instructions on the basis that different cooperatives could just as easily conspire illegally among themselves as could different individuals. For support, the court quoted language from *Maryland & Virginia* that the cooperative exemptions cover a "group of farmers acting together *as a single entity*...."⁵⁵⁷ (court's emphasis)

⁵⁵² *Sunkist Growers v. Winckler & Smith Citrus Products*, 284 F.2d 1 (9th Cir. 1960).

⁵⁵³ 284 F.2d at 7-9.

⁵⁵⁴ 284 F.2d at 15.

⁵⁵⁵ 284 F.2d at 17.

⁵⁵⁶ *Id.*, citing *Klor's v. Broadway-Hale Stores*, 359 U. S. 207 (1959).

⁵⁵⁷ 284 F.2d at 22.

Sunkist also challenged the trial judge's ruling on the admissibility of evidence that Winckler & Smith's juice was watered down and adulterated. The court found it should have been admitted on the issue of damages, but not on the issue of liability.⁵⁵⁸ In conclusion, the court affirmed the jury's verdict on the issue of liability, and reversed and remanded on the issue of the amount of damages.⁵⁵⁹

The U.S. Supreme Court granted certiorari on the issue of whether dealings among the three cooperatives were insulated from antitrust liability.⁵⁶⁰ After summarizing the facts and arguments, the Court reached a conclusion favorable to the producers and their cooperatives. The Court said:

We are squarely presented, then, with the question of whether Sunkist, Exchange Orange, and Exchange Lemon--the three legal entities formed by those 12,000 growers--can be considered independent parties for the purposes of the conspiracy provisions of §§ 1 and 2 of the Sherman Act. We conclude not.

...

There can be no doubt that under these statutes the 12,000 California-Arizona citrus growers ultimately involved could join together into *one* organization (court's emphasis) for the collective processing and marketing of their fruit and fruit products without the business decisions of their officers being held combinations and conspiracies. The language of the Capper-Volstead Act is specific in permitting concerted efforts by farmers in the processing, preparing for market, and marketing of their products. And the legislative history of the Act reveals several references to the Sunkist organization.... Although we cannot draw from these references a knowing approval of the tripartite legal organization of the 11,000 growers (in 1922), they do indi-

⁵⁵⁸ 284 F.2d at 27-30.

⁵⁵⁹ 284 F.2d at 34.

⁵⁶⁰ *Sunkist Growers v. Winckler & Smith Citrus Products*, 368 U.S. 813 (1961).

cate that a cooperative of such size and general activities was contemplated by the Act.

...

...the 12,000 growers here involved are in practical effect and in the contemplation of the statutes one "organization" or "association" even though they have formally organized themselves into three separate legal entities...That the packing is done by local associations, the advertising, sales, and traffic by divisions of the area association, and the processing by separate organizations does not in our opinion preclude these growers from being considered one organization or association for purposes of the Clayton and Capper-Volstead Acts.⁵⁶¹

The Court then said that a general verdict prevents a reviewing court from determining which theory was the basis for the jury's decision. The verdict in this case may have rested on a legally erroneous finding of unlawful conspiracy among the three cooperatives, so it must be reversed. The Court held that this ruling made it unnecessary to explore other issues in the case, such as whether the relationship among the cooperatives, TreeSweet, and Silzle amounted to an illegal conspiracy to restrain trade. It concluded, "...our decision in no way detracts from earlier cases holding agricultural cooperatives liable for conspiracies with outside groups" (citing *Borden* and *Maryland & Virginia Milk Producers*).⁵⁶²

The ability of individual cooperatives to form a federated cooperative was affirmed in a subsequent case involving the egg industry. United Egg Producers, a federation of five regional egg marketing cooperatives, sought a preliminary injunction against Bauer International Corporation, an import-export business. United Egg alleged Bauer issued knowingly false and misleading reports that it was to import a significant shipment of eggs with the intent of driving down the price of eggs in interstate commerce, a violation of the Commodity

⁵⁶¹ *Sunkist Growers v. Winckler & Smith Citrus Products*, 370 U.S. 19, 27-29 (1962).

⁵⁶² 370 U.S. at 30.

Exchange Act.⁵⁶³ Bauer counterclaimed that the members of United Egg were not entitled to equitable relief because they did not come to court with "clean hands." Bauer alleged the egg cooperatives were trying to manipulate the market upward through a variety of schemes that violated the antitrust laws.

In the first of two opinions, the U.S. District Court for the Southern District of New York granted United Egg's request for an injunction barring Bauer from issuing misleading reports. The judge found that possible antitrust violations by plaintiffs were no defense against the granting of a preliminary injunction that would clearly protect the public from unscrupulous conduct.⁵⁶⁴

In the second opinion, issued little more than a month later, the court granted United Egg's request for summary judgment on the antitrust allegations. The court found all evidence indicated the five members of United Egg were associations of producers entitled to protection under the Capper-Volstead Act. Although United Egg controlled nearly 55 percent of the eggs marketed in the United States, its members' agreements on prices and marketing strategies were immune from attack under the Sherman Act.⁵⁶⁵

Subsequent decisions have also held that a marketing cooperative and its wholly owned subsidiary are a single entity for purposes on analyzing whether a conspiracy exists in violation of Section 1 of the Sherman Act. As a single entity, the courts have found them incapable of conspiring in violation of the Sherman Act.⁵⁶⁶

Cooperation Among Cooperatives

Sometimes cooperatives choose to remain separate and independent associations but to work together, or to hire a common

⁵⁶³ 7 U.S.C. § 1 et seq.

⁵⁶⁴ United Egg Producers v. Bauer International Corporation, 311 F. Supp. 1375, 1385 (S.D. N.Y. 1970).

⁵⁶⁵ United Egg Producers v. Bauer International Corporation, 312 F. Supp. 319, 320 (S.D. N.Y. 1970).

⁵⁶⁶ Hudson's Bay Co. v. American Legend Cooperative, 651 F. Supp. 819, 839 (D. N.J. 1986) (mink marketing association); Ripplemeyer v. National Grape Cooperative Association, 807 F. Supp. 1439, 1459 (W.D. Ark. 1992) (grape marketing association).

outside agent, to further their business objectives. These strategies are also protected by the "marketing agencies in common" language in Section 1 of Capper-Volstead.⁵⁶⁷

This provision was noticed with approval in an early decision upholding the Secretary of Agriculture's power to enforce the Packers and Stockyard Act of 1921. The case involved an alleged refusal of certain livestock dealers to do business with the common agent formed by eight producers associations to secure orders for their members' livestock. The court said the use of the common agent:

...gives to its eight constituent owners, the Producers Companies, an approach of their own to the nonresident market without dependence upon the old line order buyers, and realizes for them and their members profits that would otherwise go to the old line order buyers. Such an agency, owned by co-operative associations in common, is authorized by the Capper-Volstead Act, § 1.⁵⁶⁸

Congress restated its support for joint marketing activity by cooperatives during consideration of the Agricultural Act of 1961.⁵⁶⁹ The Senate version included two provisions⁵⁷⁰ reaffirming the national policy of encouraging agricultural cooperatives and expressly permitting two or more cooperatives to perform acts that individual cooperatives could lawfully perform.⁵⁷¹ The conference committee did not include this Senate language in the final version of the legislation because the committee believed it was "a mere restatement of existing law."⁵⁷² However, the House managers agreed to include the language

⁵⁶⁷ 7 U.S.C. § 291.

⁵⁶⁸ *Farmers' Livestock Commission Co. v. United States*, 54 F.2d 375, 377 (E.D. Ill. 1931).

⁵⁶⁹ Agricultural Act of 1961, Pub. L. No. 87-128, 75 Stat. 294.

⁵⁷⁰ S. 1643, 87th Cong., 1st Sess. § 401(a)-(b) (1961). The specific language of these provisions is printed at 107 Cong. Rec. 13,225 (1961).

⁵⁷¹ 107 Cong. Rec. 13,261-62 (1961) (remarks of Senator Ellender); 107 Cong. Rec. 14,519 (1961) (remarks of Senator Aiken).

⁵⁷² 107 Cong. Rec. 14,565 (1961).

in the committee report, to provide guidance to courts as to Congressional intent in any future litigation.⁵⁷³

The issue sometimes arises as to whether otherwise competing cooperatives must organize a formal "agency in common" or whether they can simply share information and discuss prices and other terms of sale among themselves. The Government has occasionally taken the position that cooperatives may not agree among themselves on the prices they will charge for their member products. The courts have uniformly rejected this argument.

The first such case involved an antitrust suit brought against two dairy cooperatives for engaging in an unlawful conspiracy to fix the price of milk they sold to distributors supplying Fort Meade, a military base in Maryland.⁵⁷⁴ Apparently the Government's argument was that while producers can set prices as members of a single cooperative, a price setting agreement between two otherwise competing cooperatives is not protected from prosecution under the antitrust law.⁵⁷⁵ After the Government introduced a stipulation of facts previously agreed to by the parties, the cooperatives moved for a judgment of acquittal.

The judge, relying heavily on Sec. 6 of the Clayton Act, granted the cooperatives' motion.⁵⁷⁶ He found:

The obvious purpose of the Clayton Act was to liberate combinations of farmers and their cooperative organizations from the prohibitions of the antitrust laws as long as they do

⁵⁷³ 107 Cong. Rec. 14,521 (1961) (remarks of Senator Holland, describing the House managers' statement).

⁵⁷⁴ *United States v. Maryland Cooperative Milk Producers*, 145 F. Supp. 151 (D.C. D.C. 1956). The other defendant was a frequent target of the Justice Department at the time, the Maryland and Virginia Milk Producers Association.

⁵⁷⁵ The judge was not receptive to the Government's case and issued a terse opinion short on both facts and a description of the parties' positions.

⁵⁷⁶ Both defendants were farmer cooperatives organized without capital stock and otherwise covered by Clayton § 6. After the quoted language, the judge cited both Capper-Volstead and the Cooperative Marketing Act of 1926 for reinforcing Congressional intent to allow cooperatives to jointly set prices.

not combine with others who are outside of this category. It seems immaterial whether a large group of farmers organizes a single organization or divides itself into several organizations. Their joint activity, whether in the form of a single association or two or more associations, is not an illegal combination in restraint of trade in the light of the provisions of the Clayton Act. Surely, the legality of the actions of a group of farmers should not depend on such a nebulous consideration as the question whether they found it convenient to organize a single large cooperative or two smaller groups. The effect of the joint action is the same in either event and should be tested by the same yardstick. The exemption should be construed as applicable to a group of farmers irrespective of whether they are joined into a single cooperative or into several cooperative associations acting jointly. Any other construction would result in partially defeating the intent of the Congress and frustrating the meaning of the Act.⁵⁷⁷

In the *Treasure Valley* case, the U.S. Court of Appeals for the 9th Circuit found that a separate agency was simply not necessary for producer associations to act together in marketing member product. It reasoned:

If Section 1 of the Capper-Volstead Act, 7 U.S.C. § 291, permits a common marketing agency, separate from the cooperatives themselves, it would follow that *without* such a separate agency, the associations may act together in marketing and make the necessary contracts to accomplish their legitimate purpose. If an act of the agent is lawful, the same act performed by the principal is also lawful.⁵⁷⁸ (court's emphasis)

⁵⁷⁷ 145 F. Supp. at 153-154.

⁵⁷⁸ *Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc.*, 497 F.2d 203, 214 (9th Cir. 1974), *aff'g*, 1973-1 Trade Cases (CCH) ¶ 74,315 (D.C. Id. 1971), *cert. denied*, 419 U.S. 999 (1974).

The court found support for its decision in Section 5 of the Cooperative Marketing Act of 1926, which authorizes producers and their associations to gather and share market information.⁵⁷⁹

Federal courts in New England reached the same conclusion in a private litigation by a dairy processor attacking the legality of a federation of seven dairy cooperatives whose only purpose was to serve as a forum for its members to agree on a common pricing policy. The courts granted the federated's motion for summary judgment on the basis that Capper-Volstead protected producers against the processor's claim that multiple cooperatives can not engage in a price setting endeavor.⁵⁸⁰

A U.S. district court in California reached a similar result in an antitrust case filed by a privately-owned tomato canner and processor against the California Tomato Growers Association, a producer bargaining association, and two cooperative canners. The private canner alleged the three grower cooperative associations fixed the price of canning tomatoes in violation of Section 1 of the Sherman Act and attempted to monopolize the California canning tomato market in violation of Section 2 of Sherman. The court didn't discuss the arms-length negotiation that takes place when a bargaining association and a processing cooperative agree to a sales contract. Rather, it simply ruled that whatever price fixing and attempts to monopolize may have occurred were protected by Capper-Volstead:

In short, that which agricultural producers may combine to accomplish within a single association, they may lawfully combine to achieve by way of multiple organizations.

...

...since price fixing is a legitimate Capper-Volstead purpose, and since two or more agricultural associations may act together in the furtherance of such legitimate activities, the alleged conduct of Tri-Valley, Cal-Can and CTGA is protected from the dictates of Sherman Act § 1.

⁵⁷⁹ 7 U.S.C. § 455, *cited*, 497 F.2d at 214.

⁵⁸⁰ *Fairdale Farms v. Yankee Milk*, 1980-1 Trade Cases (CCH) ¶ 63,029, at 77,113-77,115 (D. Vt. 1979), *aff'd*, 635 F.2d 1037, 1039-1040 (2d Cir. 1980).

...

Just as Capper-Volstead protects certain conduct from § 1 of the Sherman Act, it also shields certain combinations or conspiracies to monopolize between or among agricultural associations from the limitations of Sherman Act § 2.⁵⁸¹

The court also noted that since a single cooperative may lawfully acquire 100 percent of a market, two or more associations working together may also gain such monopoly power, so long as they do not employ predatory practices.⁵⁸²

Finally, the courts have combined the holdings of *Treasure Valley* and *Central California Lettuce* to hold that two or more cooperatives "can voluntarily join together solely for the purpose of setting uniform prices for their members."⁵⁸³

One example of cooperation among cooperatives that has been repeatedly challenged as anticompetitive is the dairy cooperative standby pool. The standby pool isn't a pool of milk, but rather a pool of money, contributed by member cooperatives to a joint venture they own. Normally the contributing cooperatives serve markets (usually in the south) that have times during the year (usually in the fall) when consumer demand exceeds the amount of milk their members produce. Pooled funds are used to purchase options to buy milk from areas that normally have excess production, such as Minnesota and Wisconsin.

If pool members need milk and the option price is below the current market price, they exercise their options and milk is shipped to them for resale to their customers. If they don't need the milk or if milk can be purchased for less elsewhere, the options are allowed to expire and the owners of the milk process it into other dairy products such as butter and cheese. The standby pool operates like an insurance

⁵⁸¹ GVF Cannery v. California Tomato Growers Ass'n, 511 F. Supp. 711, 714 (N.D. Cal. 1981).

⁵⁸² 511 F. Supp. at 715.

⁵⁸³ United States v. Dairymen, Inc., 660 F.2d 192, 194, (6th Cir. 1981). See also, Fairdale Farms v. Yankee Milk, 1980-1 Trade Cases (CCH) ¶ 63,029, at 77,113 (D. Vt. 1979), *aff'd, in part*, 635 F.2d 1037, 1039 (2d Cir. 1980).

policy, making sure the cooperatives and their customers have an adequate supply of fresh milk at all times.

While earlier cases had mentioned standby pools as part of a much broader inquiry, one case dealt almost exclusively with the legality of the standby pool.⁵⁸⁴ Ewald Brothers, a fluid milk bottler, was unhappy at having to pay more than the Federal order minimum price for milk. It sued Mid-America Dairymen (Mid Am), the cooperative that supplied its milk, on the grounds that the Mid Am's participation in the standby pool amounted to a violation of the Sherman Act.

Mid-Am answered that the standby pool was protected by the Capper-Volstead Act. Ewald countered that the pool's claim of Capper-Volstead status was tainted by participation of noncooperative dairies in its activities. Ewald also alleged that the pool wasn't really operated to provide a smooth supply of milk to consumers but rather as a tool to maintain monopoly prices.

Mid-Am admitted that the pool entered into options contracts with two or three proprietary dairies. However, Mid-Am placed the majority of its options with producer-owned cooperatives. And it proved that the pool was owned and controlled entirely by its producer cooperative members.⁵⁸⁵

In an unpublished opinion, the trial court granted Mid-Am's request for summary judgment on all issues. The U.S. Court of Appeals for the 8th Circuit had little difficulty in affirming that decision. The appellate court found that the standby pool was totally owned and controlled by producer associations and that it was free, under Section 1 of Capper-Volstead, to sign contracts that facilitated its objective of collectively marketing its members' products, so long as the majority of the products handled came from members.⁵⁸⁶ The

⁵⁸⁴ Ewald Bros. v. Mid-America Dairymen, 877 F.2d 1384 (8th Cir. 1989).

⁵⁸⁵ During the early part of the period covered in the litigation, the pool was organized as a loose association of co-ops bound together by contract. Later, it was reorganized as an incorporated federated cooperative. So the court's findings apply to either organizational arrangement.

⁵⁸⁶ 877 F.2d at 1390. The court never specifically says the cooperatives providing surplus milk were members of the pool, so we are left to assume that either they were or the court didn't care because they were eligible to

fact that it bought a limited amount of milk from nonproducers fell far short of the level of nonproducer involvement that would threaten the pool's Capper-Volstead status.

The court also summarily dismissed Ewald's assertion that the pool unlawfully raised prices to purchasers from Mid-Am. The court cited earlier decisions involving this same standby pool by a district court in Georgia⁵⁸⁷ and this court itself⁵⁸⁸ holding the pool served the legitimate purpose of providing additional supplies of milk as needed in response to fluctuating consumer demand. While the pool may have enhanced its members' ability to set prices, Ewald had failed to introduce any evidence that the pool actually fixed prices or was operated with predatory or anticompetitive intent. Thus, there was no genuine issue of material fact to be tried and Mid-Am was entitled to summary judgment.⁵⁸⁹

These cases illustrate the substantial flexibility available to producers in structuring their cooperative marketing operations. They can use a single, centralized cooperative with a simple structure; join centralized cooperatives together into one or more federated cooperatives; form subsidiaries of either centralized or federated cooperatives; have their associations remain independent but hire a common agent to facilitate their marketing; or have their independent associations exchange information and agree on prices and other terms of sale they will accept without any further coordination.

Necessary Contracts and Agreements

Section 1 of Capper-Volstead also provides that producer associations may "make the necessary contracts and agreements" to achieve their marketing objectives.⁵⁹⁰ Associations and producers can enter into binding marketing agreements among themselves and have normal

become members if that was necessary.

⁵⁸⁷ *Kinnett Dairies v. Dairymen, Inc.*, 512 F. Supp. 608, 633, 643 (M.D. Ga. 1981).

⁵⁸⁸ *Alexander v. NFO*, 687 F.2d 1173, 1206-1207, (8th Cir. 1982).

⁵⁸⁹ 877 F.2d at 1394.

⁵⁹⁰ 7 U.S.C. § 291.

contractual arrangements with others without running afoul of the bar on "contracts" that restrain trade in Section 1 of Sherman.⁵⁹¹

Statutory Limitations

Section 1 of the Capper-Volstead Act contains a short list of limitations on association organization and operation. These are designed to insure that the association operates in the best interests of its members as agricultural producers, and not for the benefit of investors. Compliance with these rules is critical for producers wishing to use the marketing flexibility Capper-Volstead provides.

Mutual Benefit as Producers

The first limit on producer associations requires that they be "operated for the mutual benefit of the members... as... producers."⁵⁹²

Capper-Volstead does not protect persons engaging in conduct not directly related to tilling the soil or raising animals. For example, all of the road builders in an area can't each plant a tomato patch beside their parking lots and form a vegetable marketing association as a vehicle to rig bids on construction contracts. They can agree on the price they will accept for their tomatoes, but not the fees they will accept for construction work.⁵⁹³

Plaintiffs in private antitrust cases have asserted that an association that does not return earnings to member-patrons based on the amount of business each does with the cooperative during the year

⁵⁹¹ Maryland & Virginia Milk Producers Ass'n v. United States, 193 F.2d 907, 915-917 (D.C. Cir. 1951) (full supply contracts with customers approved). *See also*, Alexander v. National Farmers Organization, 687 F.2d 1173, 1188 (8th Cir. 1982) (Normal business contracts with haulers and processors to further direct marketing efforts do not support a claim that the cooperative conspired with these entities in violation of the antitrust laws.)

⁵⁹² 7 U.S.C. § 291.

⁵⁹³ *See*, United States v. Maryland & Virginia Milk Producers, 167 F. Supp. 45, 52 (D.C. D.C. 1958), where the court noted the Capper-Volstead "immunities relate solely to agricultural products. If an organization... should step outside of that field and carry on business in products of a different nature, then...Capper-Volstead...would not apply."

is not operating for the mutual benefit of its members. This argument has been rejected by the courts.⁵⁹⁴ Thus, while the payment of patronage refunds is a requirement to qualify for single taxation of income under the Internal Revenue Code, it is not a prerequisite to qualify for the limited antitrust protection of the Capper-Volstead Act.

One Member/One Vote or 8 Percent Limit on Dividends

For an association to qualify for Capper-Volstead protection, either "no member...is allowed more than one vote because of the amount of stock or membership capital he may own, or the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum."⁵⁹⁵

This provision compliments the one requiring the association to operate for the mutual benefit of the members as producers. It places objective limits on the ability of any segment of the membership to seize control of the association to distribute benefits on the basis of investment rather than use.

As this is an "either/or" standard, "the law does not require compliance with both but merely with either one."⁵⁹⁶

The first test permits members to have a variable number of votes, so long as the number of votes is not based on investment. Weighted voting based on patronage is permissible.⁵⁹⁷

⁵⁹⁴ *Waters v. National Farmers Organization*, 328 F. Supp. 1229, 1245 (S.D. Ind. 1971); *Alexander v. National Farmers Organization*, 687 F.2d 1173, 1184-1185 (8th Cir. 1982).

⁵⁹⁵ 7 U.S.C. § 291.

⁵⁹⁶ *United States v. Maryland & Virginia Milk Producers Ass'n*, 167 F. Supp. 45, 50 (D.C. D.C. 1958); *aff'd in part and rev'd in part on other grounds*, *United States v. Maryland & Virginia Milk Producers Ass'n*, 362 U.S. 458 (1960).

⁵⁹⁷ *Agritronics Corp. v. National Dairy Herd Ass'n*, 914 F. Supp. 814 (N.D. N.Y. 1996), wherein the court said, "Despite plaintiff's protestations to the contrary, it is not always necessary that a cooperative be strictly 'one member, one vote.' The voting structure is irrelevant if the organization does not pay dividends on stock or membership capital in excess of eight percent." 914 F. Supp. at 823-824.

The second clause offers the option of permitting voting based on investment, so long as the annual return on equity does not exceed 8 percent per year. This rule provides cooperatives substantial latitude in attracting capital, a concern of lawmakers at the time of enactment that continues to be a challenge today. While many cooperatives make governance decisions on the basis of one-member one-vote and pay little or no return on equity, they have the option to pursue capital more aggressively without jeopardizing their antitrust status.

Majority of Product Handled Must Be Member Product

Section 1 of Capper-Volstead also mandates that a protected association "shall not deal in the products of nonmembers to an amount greater in value than such as are handled by it for members."⁵⁹⁸ As indicated in the legislative history, this rule was added on the Senate floor to keep a few wealthy farmers from conspiring to restrain trade in a given commodity by forming a cooperative and then purchasing a large share of a crop in the marketplace to adversely impact the market.⁵⁹⁹

The majority-member business test is an annual test. A majority of the product handled by the cooperative each year must be produced by the members. Product purchased from others by the members and then resold through the cooperative is counted as nonmember product.

Some cooperatives, particularly ones without a sufficient membership base to have any meaningful impact on prices or terms of sale, complain that this rule hinders their ability to effectively serve their members. While this may be true, the burden is on the members of such an association to convince producers who want the benefits of the association's service to join them in their cooperative effort.

This concludes the review of conduct authorized under the Capper-Volstead Act. The next section examines activity courts have found outside the protection of the Act and the reasons those conclusions.

⁵⁹⁸ 7 U.S.C. § 291.

⁵⁹⁹ *Supra*, p. 115.

UNPROTECTED CONDUCT

The Capper-Volstead Act protects farmers from prosecution under the antitrust laws for forming a cooperative and pursuing normal business objectives and strategies. As the Supreme Court has phrased it, Capper-Volstead reflects a "general philosophy" of giving farmers, "...through agricultural cooperatives acting as entities, the same unified competitive advantage--and responsibility--available to businessmen acting through corporations as entities."⁶⁰⁰

The Court went on to say that the legislative history suggests a Congressional intent:

...to make it possible for farmer-producers to organize together, set association policy, fix prices at which their cooperative will sell their produce, and otherwise carry on like a business corporation without thereby violating the antitrust laws. It does not suggest a congressional desire to vest cooperatives with unrestricted power to restrain trade or to achieve monopoly by preying on independent producers, processors, or dealers intent on carrying on their own businesses in their own legitimate way.⁶⁰¹

Over the years, the courts have held that certain types of conduct by farmers and their cooperatives are outside of the protection provided by Capper-Volstead. Such conduct may not be *per se* unlawful under the antitrust laws. But, if challenged, it will be reviewed under the same standards that apply to similar conduct between two or more noncooperative firms.

Two types of conduct have been consistently found to be outside the scope of Capper-Volstead. The first is conspiring with or combining with nonproducer entities to engage in some activity that violates the antitrust law. The second is engaging in anticompetitive activity that cannot be justified for business reasons, often referred to

⁶⁰⁰ Maryland and Virginia Milk Producers Association v. United States, 362 U.S. 458, 466 (1960).

⁶⁰¹ 362 U.S. at 466-467. See also, Marketing Assistance Plan v. Associated Milk Producers, Inc., 338 F. Supp. 1019, 1023 (S.D. Tex. 1972).

as "predatory" conduct. This section will focus on the cases establishing the boundaries of these limitations.

Collaborating with Nonproducers

The cardinal rule of limiting cooperative antitrust risk is to avoid engaging in activity that violates the antitrust laws with entities that are not also Capper-Volstead protected associations. Yet it will receive limited treatment here because it is a corollary to axioms discussed earlier:

- The Capper-Volstead Act and other laws limiting antitrust exposure for agricultural producers do not cover conspiracies to restrain trade, attempt to monopolize, or other actions that violate the Sherman Act and other antitrust laws conducted in conjunction with entities that are not also Capper-Volstead protected producer associations.⁶⁰²
- The Capper-Volstead Act and other laws limiting antitrust exposure for agricultural producers only protect associations that limit their membership to bona fide producers.⁶⁰³

This does not mean that all contracts and other arrangements with nonproducer entities, including competitors, subject producer associations to antitrust liability. It only means that, if challenged, such agreements will be tested under the rules of reason and *per se* liability just as would similar agreements between noncooperative firms.

For example, in the mid-1950s, Keith Young, an experienced milk production and distribution manager, moved from Kansas City to

⁶⁰² United States v. Borden, 308 U.S. 188 (1939). *See, e.g.*, Bergjans Farm Dairy v. Sanitary Milk Producers, 241 F. Supp. 476, 482 (E.D. Mo. 1965), *aff'd*, 368 F.2d 679 (8th Cir. 1966) (cooperative violates Sherman § 1 when it conspires with noncooperative customers to fix the customers' resale price).

⁶⁰³ United States v. National Broiler Marketing Association, 436 U.S. 816 (1978).

Dallas. At the time, milk distributors in Dallas only offered milk in half gallon containers which sold for about \$.50 retail. The price for two half gallon containers was often as low as \$.96.

Young signed a contract with North Texas Producers Association, a milk marketing cooperative that furnished 85 percent of the fluid milk sold in the Dallas area, to provide him with milk in one gallon containers. Young wanted to sell the gallon containers for 69 cents each at retail, resulting in a savings to the consumer of 27 cents per gallon.

When word of Young's intentions spread through the milk industry in Dallas, the established distributors suddenly agreed to a price increase that North Texas Producers had been seeking for some time. North Texas Producers then informed Young it would not honor their contract, even though it had already spent a considerable amount of money on equipment to provide bottled milk in one-gallon containers.

Young sued North Texas Producers and its other distributor-customers on the basis that they had conspired to restrain competition and monopolize the Dallas milk market by refusing to sell him milk. The defendants argued the acceptance of a price increase by the distributors for milk furnished by the cooperative and the cooperative's unilateral cancellation of its contract with Young were two separate and unrelated events. The case went to the jury, which disagreed, and awarded substantial monetary damages to Young.

Defendants appealed to the U.S. Court of Appeals for the 5th Circuit, which easily affirmed the trial court verdict.⁶⁰⁴ It dismissed defendants' claim that Young was seeking a special advantage not available to his competitors. It appears the primary reason the cooperative appealed was to attack the size of the damage award, which was also upheld. This decision sends a clear message to cooperatives that engaging in anticompetitive conduct with noncooperative firms will expose the association and its members to considerable liability.

In a later case, a Federal district court judge refused to grant the cooperative defendant's motion for summary judgment on Sherman

⁶⁰⁴ North Texas Producers Association v. Young, 308 F.2d 235 (5th Cir. 1962), *cert. denied*, 372 U.S. 929 (1963).

Section 1 and 2 claims when the parties agreed on the record that one of the alleged coconspirators was not a producer and the plaintiff introduced some credible evidence of anti-competitive conduct between the two.⁶⁰⁵

Businesspeople, when they find that attempts to make certain arrangements with other firms--usually competitors or customers--aren't going to work out for legal or other reasons, sometimes react, "If we can't work with them, then we'll just buy them out." This leads to the second area of possible antitrust risk for cooperatives, combining with noncooperative firms.

Consolidating with Non-cooperative Firms

The provision of antitrust law governing mergers and acquisitions is Section 7 of the Clayton Act. This section forbids a business engaged in commerce from acquiring some or all of the stock or assets of another business where the effect of the acquisition "may be substantially to lessen competition, or to tend to create a monopoly."⁶⁰⁶

The application of this provision to cooperative acquisitions of noncooperatives was discussed in a series of opinions issued in a complex late-1950s antitrust action by the Government against Maryland & Virginia Milk Producers.⁶⁰⁷ Before the acquisition in question, about 86 percent of the fluid milk sold to dealers in the Washington, DC, metropolitan area was provided by Maryland & Virginia. Eight of the 12 dealers in the market, including the three largest, bought most of their milk from the cooperative.

While cooperative dealers dominated the local private market, they generated only 45 percent of the sales to Federal Government establishments (primarily hospitals and military bases). These sales were made under contracts awarded through competitive bidding. The

⁶⁰⁵ *Farmland Dairies v. New York Farm Bureau*, 1996-1 Trade Cases (CCH) ¶ 71,423 at 77, 148 (N.D. N.Y. 1996).

⁶⁰⁶ 15 U.S.C. § 18.

⁶⁰⁷ *United States v. Maryland & Virginia Milk Producers Ass'n*, 167 F. Supp. 45 (D.C. D.C. 1958), *rev'd*, 362 U.S. 458 (1960); 167 F. Supp. 799 (D.C. D.C. 1958), *aff'd*, 362 U.S. 458 (1960); 168 F. Supp. 880 (D.C. D.C. 1959), *aff'd*, 362 U.S. 458 (1960).

fourth largest dealer in the market, Embassy Dairy, had nearly 50 percent of this market. Embassy obtained this large market share by frequently underbidding dealers who bought from the cooperative.

Embassy purchased its milk directly from dairy farmers who chose not to market through Maryland & Virginia. In the spring of 1954, negotiations began on the sale of Embassy's assets to Maryland & Virginia. The deal was completed in July, 1954.

After the acquisition, Embassy Dairy immediately went out of business. Maryland & Virginia continued to operate the retail business of Embassy. Many of the farmers who had sold to Embassy were unable to find a home for their milk in the Washington area unless they joined Maryland & Virginia. Some did so, increasing the cooperative's share of milk controlled in the market. Others began selling milk in the Baltimore market. The cooperative's share of sales under contract to Federal institutions jumped from 45 percent to nearly 92 percent.

The United States challenged this acquisition on three grounds. First, that Maryland & Virginia had monopolized or attempted to monopolize the local milk market in violation of Section 2 of the Sherman Act.⁶⁰⁸ Second, Maryland & Virginia had conspired with Embassy to restrain trade in the local milk market in violation of Sections 1 and 3 of the Sherman Act.⁶⁰⁹ Third, Maryland & Virginia's purchase of all assets of Embassy substantially lessened competition or tended to create a monopoly in violation of Section 7 of the Clayton Act.⁶¹⁰

In the first of three decisions, the trial court considered whether the Capper-Volstead Act was an absolute defense to the allegations against the cooperative. It held that a properly organized cooperative "...is entirely exempt from the provisions of the antitrust laws, both as to its very existence as well as to all its activities, provided it does not enter into conspiracies or combinations with persons who are not

⁶⁰⁸ 15 U.S.C. § 2.

⁶⁰⁹ 15 U.S.C. § 3. Section 3 of the Sherman Act is virtually identical to § 1, except it applies to commerce involving U.S. territories and the District of Columbia while § 1 only refers specifically to trade among the States or with foreign countries.

⁶¹⁰ 15 U.S.C. § 18.

producers of agricultural commodities."⁶¹¹ On this basis, the court dismissed the charge that Maryland & Virginia attempted to monopolize the local market for milk in violation of Section 2 of Sherman, but not the charges that it conspired with Embassy in violation of Sections 1 and 3 of Sherman and combined with Embassy in violation of Section 7 of the Clayton Act.

Next the court held a trial (apparently without a jury) on the allegation that Maryland & Virginia's purchase of Embassy's assets substantially lessened competition or tended to create a monopoly in violation of Section 7 of the Clayton Act. At the conclusion, the court issued its second opinion.⁶¹² The court made several findings of law, all favorable to the Government.

- *The acquisition is not immune from challenge under either section 6 of the Clayton Act or the Capper-Volstead Act.* The court referred to its first opinion in this case where it said that neither statute extends to contracts or combinations involving a cooperative and one or more persons or concerns that are not Capper-Volstead cooperatives.⁶¹³

- *While the Government isn't required to establish an intent to lessen competition, it can introduce evidence of such an intent.* The cooperative's case wasn't helped by the introduction into evidence of internal memos and of papers given to the bank financing the acquisition indicating an intent to eliminate an unwanted competitor.⁶¹⁴ Also, the court found it worth noting that the evidence indicated the cooperative paid far more than its actual value for the property purchased.⁶¹⁵

⁶¹¹ United States v. Maryland & Virginia Milk Producers Association, 167 F. Supp. 45, 52 (D.C. D.C. 1958), *rev'd*, 362 U.S. 458 (1960).

⁶¹² United States v. Maryland & Virginia Milk Producers Association, 167 F. Supp. 799 (D.C. D.C. 1958), *aff'd*, 362 U.S. 458 (1960).

⁶¹³ 167 F. Supp. at 801, *citing* United States v. Maryland & Virginia Milk Producers, 167 F. Supp. 45 (D.C. D.C. 1958).

⁶¹⁴ 167 F. Supp. at 804-806 (the opinion contains various quotations from the documents).

⁶¹⁵ 167 F. Supp. at 806.

- *The acquisition tended to lessen competition in the Washington milk market.* First, it eliminated producer access to the largest independent purchaser of milk in the area. Second, it reduced competition for sales to Government installations by eliminating a firm noted for underbidding customers of the acquirer.⁶¹⁶

- *The acquisition tended to create a monopoly by concentrating a larger share of milk supply reaching the Washington market in the hands of the cooperative.* The court acknowledged that the purchase did not give Maryland & Virginia a total monopoly in the market. It found, however, that the law "is not aimed only at complete monopolies or directed solely at entire elimination of all competition. It is sufficient if the acquisition, merger, or absorption tends to lessen competition or tends to create a monopoly."⁶¹⁷

- *It does not matter that the number of dealers in the market was not reduced.* The court was not persuaded by the cooperative's argument that the acquisition did not reduce competition because it merely resulted in the substitution of a new dealer in the market, Maryland & Virginia, in place of Embassy. It found this was an assertion of form over substance because the dominant wholesaler now owned the largest independent dealer, augmenting its influence over the market and "getting rid of a troublesome rival."⁶¹⁸

- *It does not matter milk prices in the area did not increase after the transaction.* The court noted milk prices are influenced by numerous factors. They might have been even lower were it not for Maryland & Virginia's purchase of Embassy.⁶¹⁹

- *Neither participation by the Bank for Cooperatives in financing the purchase nor favorable comments by USDA employees brings the acquisition within the exemption for transactions duly*

⁶¹⁶ 167 F. Supp. at 807.

⁶¹⁷ *Id.*

⁶¹⁸ *Id.*

⁶¹⁹ *Id.*

authorized by the Secretary of Agriculture. Section 7 of the Clayton Act exempts transactions duly consummated pursuant to authority granted in other statutes to listed Government agencies and officials, including the Secretary of Agriculture. The court found no statutory provision existed empowering the Secretary of Agriculture to approve any transaction such as this one. It didn't even comment on the approval of a loan to finance the purchase by the Baltimore Bank for Cooperatives. It found that comments by employees of the Farmer Cooperative Service (predecessor to the Rural Business-Cooperative Service) favoring the acquisition in no way amounted to formal USDA approval.⁶²⁰

- *The "failing firm" defense is available to cooperatives.* The litigation also involved the acquisition of a second independent dealer by Maryland & Virginia. The court found the evidence established without contradiction that this firm was hopelessly insolvent and owed the cooperative a large amount of money for milk delivered but not paid for. As this firm was on the brink of going out of business, its acquisition by Maryland & Virginia would not result in a lessening of competition or additional monopoly power and the purchase did not violate Section 7 of the Clayton Act.⁶²¹

The court ordered Maryland & Virginia to divest itself of all assets acquired from Embassy Dairy and to cancel all contracts ancillary to the acquisition.

At this point the Government asked the court for a decision, based on the record of the previous trial, on the issue of whether the cooperative's purchase of Embassy restrained trade in violation of Sections 1 and 3 of the Sherman Act. In a brief third opinion, the court found the transaction illegally restrained trade by foreclosing competition with respect to sales of milk to the Government and purchases of milk from producers.⁶²²

⁶²⁰ 167 F. Supp. at 807-808.

⁶²¹ 167 F. Supp. at 808-809.

⁶²² *United States v. Maryland & Virginia Milk Producers Ass'n*, 168 F. Supp. 880 (D.C. D.C. 1959), *aff'd*, 362 U.S. 458 (1960).

Both sides asked the U.S. Supreme Court to review the decisions. The Court unanimously sided with the Government on all three issues.⁶²³

First, the Court overruled the district court's conclusion of law in its first opinion that Capper-Volstead shields producer associations from liability under Section 2 of the Sherman Act.⁶²⁴ The Court's discussion of whether the Embassy acquisition amounted to an attempt to monopolize referred to facts not mentioned in the trial court opinion.

While not using the term, the events mentioned (disrupting truck shipments, boycotting an unrelated business of the owner of a dairy to persuade him to buy association milk, using the leverage of a loan made to another dairy to compel it to buy association milk) were similar to what lower courts were beginning to call "predatory practices." The Court found that these anticompetitive activities were "...so far outside the 'legitimate objects' of a cooperative that, if proved, they would constitute clear violations of § 2 of the Sherman Act..."⁶²⁵ It found the district court erred in dismissing the Government's charge under Section 2 of the Sherman Act without ascertaining the facts.

The Court limited its discussion of Section 7 of the Clayton Act to consideration of the impact of the last sentence of that provision which states the provision shall not apply "...to transactions duly consummated pursuant to authority given by the...Secretary of Agriculture under any statutory provision vesting such power in... (the) Secretary."⁶²⁶ The Court found no statutory authority exists giving the Secretary the authority to approve acquisitions by a producer association and thereby exempt them from the antitrust law.⁶²⁷

Then the Court turned to whether the acquisition amounted to an illegal conspiracy to restrain trade. It noted the agreement of sale

⁶²³ Maryland & Virginia Milk Producers Ass'n v. United States, 362 U.S. 458 (1960).

⁶²⁴ 362 U.S. at 463.

⁶²⁵ 362 U.S. at 468.

⁶²⁶ 7 U.S.C. § 18.

⁶²⁷ 362 U.S. at 469-470.

between Embassy and Maryland & Virginia contained provisions in which the former owners of Embassy agreed (1) not to compete with the association in the purchase of milk in the Washington area for 10 years and (2) to encourage all former Embassy producers to either join the association or to ship their milk to Baltimore. It also mentioned the spirited competition between the two firms and the inflated purchase price paid by Maryland & Virginia.⁶²⁸

Apparently the cooperative had raised an argument before the Court either not raised or not commented on in the third trial court opinion. The Court rejected the assertion of Maryland & Virginia that the purchase was protected by the Capper-Volstead provision "that cooperatives can lawfully make 'the necessary contracts and agreements' to process, handle, and market milk for their producer-members."⁶²⁹

The Court said that a contract to purchase assets of a non-cooperative firm merely for a business use is protected. But when the purchase is designed to "restrain and suppress competitors and competition," Capper-Volstead is not applicable.⁶³⁰

In summary, the Supreme Court made it clear that a business combination between a Capper-Volstead cooperative and a firm without Capper-Volstead protection that substantially lessens competition and/or tends to create a monopoly will subject the cooperative to liability under both Section 2 of the Sherman Act and Section 7 of the Clayton Act.

Subsequent decisions have adopted and applied this rule. A Federal judge in Missouri held that the purchase by a cooperative of

⁶²⁸ 362 U.S. at 470-471.

⁶²⁹ 362 U.S. at 471.

⁶³⁰ 362 U.S. at 472. Some cooperatives reacted strongly to the decision and persuaded the Senate Committee on Agriculture to include a provision in its version of the 1961 farm bill that would have amended Capper-Volstead to give cooperatives the unencumbered right to merge with or acquire any firm, cooperative or otherwise, in the same line of business as the cooperative. Other cooperative leaders and advisers felt such an amendment "unneeded and perhaps unwise." Harold Jordan, "The Application of Section 7 of the Clayton Act to Integration of Farmer Cooperative Associations," *American Cooperation* 1961, pp. 388-389. Congress took no further action.

its leading independent competitor with intent to reduce competition constitutes an unprotected attempt to monopolize in violation of Section 2 of the Sherman Act.⁶³¹

In the 1980s, the Department of Justice challenged the purchase of a non-cooperative competitor by a California rice marketing cooperative. The trial court brushed aside the cooperative's attempt to use Capper-Volstead as a defense as "...simply irrelevant.... The Capper-Volstead Act cannot immunize a cooperative's acquisition of a competing non-cooperative business when the acquisition is violative of Section 7 of the Clayton Act."⁶³²

Thus, it is clearly established that combinations of cooperative and non-cooperative firms are not shielded by the Capper-Volstead Act from antitrust scrutiny. They are subject to review under the same standards as similar combinations among non-cooperative entities.

Predatory Conduct

The courts have always taken a dim view of conduct without a justifiable business purpose that is primarily, if not exclusively, intended to restrain trade or inhibit competition.⁶³³ The courts have come to refer to all such activity as "predatory conduct." And they have consistently held that predatory conduct is beyond the scope of legitimate business activity protected by the Capper-Volstead Act.

The decisions that find the existence of predatory conduct are fact specific. This section discusses various cases where the issue has arisen and the reasons why courts have found specific actions to be "predatory."

⁶³¹ *Bergjans Farm Dairy v. Sanitary Milk Producers*, 241 F. Supp. 476, 486 (E.D. Mo. 1965), *aff'd*, 368 F.2d 679 (8th Cir. 1966).

⁶³² *United States v. Rice Growers Association of California*, 1986-2 Trade Cases (CCH) ¶ 67,287 at 61,459, n.5 (E.D. Cal. 1986).

⁶³³ See, e.g., *Maryland & Virginia Milk Producers v. United States*, 362 U.S. 458, 468 (1960). In some instances, predatory conduct wasn't an issue directly before the court. Nonetheless, evidence suggesting such illicit activity was noted in the opinion and certainly didn't help the cooperative's cause. See, e.g., *Gulf Coast Shrimpers and Oystermans Association v. United States*, 236 F. 2d 658, 665 (5th Cir. 1956).

United States v. King.⁶³⁴ Case law regarding predatory conduct predates enactment of the Capper-Volstead Act. In the first case regarding cooperatives that followed enactment of Section 6 of the Clayton Act, the executive committee of the Aroostook Potato Shippers Association (APSA) had been authorized to determine that someone who produced, received, or otherwise dealt in Maine potatoes was "undesirable." Association members were forbidden by its bylaws from doing business with a person on the so-called "black list." The APSA circulated its list among other participants in the potato industry and suggested that unless they ceased doing business with the blacklisted persons, they would also be blacklisted by the APSA and its members.

The court held that the association members could agree among themselves not to do business with someone in their industry. However, they engaged in unprotected conduct when they attempted to coerce others in the industry to refrain from doing business with a so-called "undesirable." The court noted the Government's indictment did not allege any anticompetitive intent or purpose behind the blacklisting. However, the court held the Government need not do so where a so-called "secondary boycott" was undertaken, because no reasonable business justification existed for coercing outsiders to honor the association's black list.⁶³⁵

Cooperative members can decide not to do business with an outside entity; *i.e.*, engage in a direct boycott of it. However, they can not engage in a secondary boycott, *i.e.*, coerce nonmembers not to do business with another outside entity.

Gulf Coast Shrimpers & Oystermans Ass'n v. United States.⁶³⁶ In the years after World War II, most commercial shrimp and oyster fishermen operating out of ports in Mississippi were members of the Gulf Coast Shrimpers & Oystermans Association. The Government indicted the association and three of its officers for engaging in a

⁶³⁴ *United States v. King*, 229 F. 276 (D.C. Mass. 1915); 250 F. 908 (D.C. Mass. 1916).

⁶³⁵ *Id.*

⁶³⁶ *Gulf Coast Shrimpers & Oystermans Ass'n v. United States*, 236 F.2d 658 (5th Cir. 1956), *cert. denied*, 352 U.S. 927 (1956).

conspiracy to fix prices in violation of Section 1 of the Sherman Act. The case was tried before a jury and the Government obtained convictions against all defendants. The association and the convicted officers secured review by the U.S. Court of Appeals for the 5th Circuit.

The 5th Circuit opinion does not provide a very clear picture of the details in this case. During the trial, the Government apparently introduced substantial evidence that the association used coercive tactics designed to prevent nonmembers from gaining access to Mississippi fish processors. The court summarized the Government's evidence as showing that:

...to insure dealer compliance with its pricing policies, the appellant Association either authorized or ratified mass member picketing, designed to prevent nonmembers or out-of-state fishermen from fishing in Mississippi waters or selling to Mississippi coast packers; boycotting of nonconforming dealers by association members; and coercion of nonmember fishermen to join the association and comply with its price schedule.⁶³⁷

The court found that "...the Association exceeded any possible privilege or exemption granted by the Fishermen's Collective Marketing Act when it undertook not simply to fix prices demanded by its members, but to exclude from the market all persons not buying and selling in accordance with its fixed prices."⁶³⁸

Coercion of nonmembers to join the association and/or adhere to its pricing and marketing practices is a predatory practice that violates the antitrust laws and is not protected by the Capper-Volstead Act.⁶³⁹

⁶³⁷ 236 F.2d at 661.

⁶³⁸ 236 F.2d at 665.

⁶³⁹ See, *Fairdale Farms v. Yankee Milk*, 635 F.2d 1037, 1044 (2d Cir. 1980); *Alexander v. National Farmers Organization*, 687 F.2d 1173, 1182 (8th Cir. 1982).

Several private cases alleging predatory conduct by producer associations were filed after the U.S. Supreme Court issued its opinion in the second case involving Maryland & Virginia Milk Producers.⁶⁴⁰ As part of this complex opinion, the Court reversed a district court decision granting the cooperative's motion to dismiss charges that it violated Section 2 of the Sherman Act. The Court said:

Thus, the full effect of § 6 (of the Clayton Act) is that a group of farmers acting together as a single entity in an association cannot be restrained "from lawfully carrying out the legitimate objectives thereof," (emphasis supplied), but the section cannot support the contention that it gives such an entity full freedom to engage in predatory trade practices at will.

...

...We believe it is reasonably clear from the very language of the Capper-Volstead Act, as it was in § 6 of the Clayton Act, that the general philosophy of both was simply that individual farmers should be given, through agricultural cooperatives acting as entities, the same unified competitive advantage--and responsibility--available to businessmen acting through corporations as entities.⁶⁴¹

The Court listed several alleged wrongdoings by the cooperative--attempts to interfere with truck deliveries to dealers who didn't buy their milk from the cooperative; inducing a dairy to shift its nonmember milk to another market; boycotting a feed and farm supply store to compel its owner, who also owned a dairy, to buy milk from the cooperative; and threatening to call in a loan made to a dairy unless it limited its milk purchases to cooperative milk. It said these alleged acts "...are so far outside the 'legitimate objects' of a cooperative that, if proved, they would constitute clear violations of § 2 of the Sherman Act by this Association..."⁶⁴²

⁶⁴⁰ United States v. Maryland & Virginia Milk Producers Ass'n, 362 U.S. 458 (1960), *rev'g*, 167 F. Supp. 45 (D.C. D.C. 1958).

⁶⁴¹ 362 U.S. at 465-466.

⁶⁴² 362 U.S. at 468.

*North Texas Producers Ass'n v. Metzger Dairies.*⁶⁴³ North Texas Producers Association supplied almost 90 percent of the raw milk marketed in Dallas and Ft. Worth, Texas. The Dallas-Ft. Worth area was covered by a Federal milk marketing order that guaranteed producers a minimum price for their milk. This was the price received by North Texas Producers until late 1958, when the cooperative announced that it was now charging a price 30 cents per hundredweight over the Federally set minimum price.

Purchasers who did not want to buy milk from North Texas at the higher price were asked to notify the association at once. Four processors balked. But within two weeks, all four acknowledged that the cost per hundredweight of bringing in milk from other areas exceeded that of buying from the cooperative at the new price and asked to be reinstated as customers.

Under Capper-Volstead, cooperatives are free to set a price for member milk that includes an "over order premium."⁶⁴⁴ However, North Texas went further. It resumed normal business relations with three of the four dairies, but it apparently decided to stop certain practices of the fourth firm, Metzger Dairy, that it didn't like.

Metzger was the major purchaser of nonmember milk in the Dallas-Ft. Worth area and used two independent trucking firms to haul milk to its plant. North Texas informed Metzger it would only resume selling its milk if Metzger agreed that (1) no additional producers would be taken on by Metzger without prior approval of the association and (2) association member milk would be delivered to Metzger's plant in association owned or leased vehicles.

Metzger refused these conditions and continued to purchase milk, at a higher overall cost, from other suppliers. A letter from a cooperative director to the members urged them to talk to their friends and ask them not to buy Metzger milk because it was produced by nonmembers of the association. The court said that this stimulated a boycott of certain grocers that compelled them to stop offering Metzger milk for sale.⁶⁴⁵

⁶⁴³ *North Texas Producers Ass'n v. Metzger Dairies*, 348 F.2d 189 (5th Cir. 1965), *cert. denied*, 382 U.S. 977 (1966).

⁶⁴⁴ *Fairdale Farms v. Yankee Milk*, 715 F.2d 30, 31-34 (2nd Cir. 1983).

⁶⁴⁵ 348 F.2d at 195-196.

Further, the cooperative launched an unsuccessful attempt to buy out Metzger. Metzger filed a private antitrust suit seeking triple damages from North Texas for losses caused by its attempt to monopolize milk sales in the Dallas-Ft. Worth market in violation of Section 2 of the Sherman Act.

The trial resulted in a jury verdict for the cooperative. However, the trial judge determined that the verdict was contrary to the evidence and granted Metzger's motion for a new trial. A second trial produced a jury verdict for Metzger and an award of substantial damages.

The cooperative appealed the jury verdict and asked the U.S. Court of Appeals for the 5th Circuit to reverse the judgment on the grounds that its conduct was protected by Section 6 of the Clayton Act and the Capper-Volstead Act. The 5th Circuit refused, stating that the Supreme Court has made it clear that:

... farmers may act together in a cooperative association, and the *legitimate objects* of mutual help may be carried out by the association without contravening the antitrust laws, but that otherwise, the association acts as an entity with the same responsibility under section 2 of the Sherman Act as if it were a private business corporation. (court's emphasis).⁶⁴⁶

The appellate court sustained the trial court's ruling granting Metzger a new trial and the jury verdict against the producer association in the second trial. The court noted the covert attempt by the cooperative to purchase Metzger and efforts by association leaders to convince not only members but outsiders as well to boycott stores that sold milk supplied by Metzger. It concluded that the facts justified the jury's finding the cooperative's conduct amounted to monopolistic practices or attempts to monopolize in violation of Section 2 of Sherman.⁶⁴⁷

⁶⁴⁶ 348 F.2d at 194, *citing* Maryland & Virginia Milk Producers v. United States, 362 U.S. 458 (1960).

⁶⁴⁷ 348 F.2d at 196.

*Bergjans Farm Dairy v. Sanitary Milk Producers.*⁶⁴⁸ The case was brought by six small dairy processors against Sanitary Milk Producers, a cooperative which controlled about 60 percent of the raw milk in the St. Louis area. The court considered Sanitary's market position to have reached "monopoly, or near monopoly," status. However, the court was not concerned with the level of Sanitary's market power, which it found "was contemplated by the Capper-Volstead Act" and "lawfully obtained." But it was concerned about possible "unlawful (use)" of that market power.⁶⁴⁹

For many years, Sanitary operated as a bargaining association, selling member raw milk on a collective basis. In late 1961, Sanitary was frustrated that dairies in the St. Louis area wouldn't sign sole-source contracts with it and brought milk in from outside the market area. This reduced the amount of member milk marketed as fluid milk which, under the Federal milk market order program, was more profitable than milk used for manufactured products.

In early 1962, Sanitary purchased a bottling plant and began direct marketing of member milk. Dairymen who had supplied the former owner of the plant, including members of other cooperatives, were cut off and their supply replaced with milk of Sanitary members.

In an attempt to enhance its market presence, Sanitary lowered the price of wholesale milk. If it had reduced the price and made up the difference from higher fluid milk utilization of member production, the court suggested Sanitary's conduct would have been legal.

However, when the other local processors met its price, Sanitary tried a new strategy. It raised the price back to earlier levels and began providing secret cash rebates, literally in plain brown paper envelopes, to customers. To cover the deceit, the customers raised their retail prices to reflect the bogus wholesale price increase. But in a few weeks, the scheme became public and other processors lowered their price to reflect what Sanitary was actually charging.

Sanitary next purchased the noncooperative processor that had led the coordinated response to Sanitary's price moves. Again, producers who were not Sanitary members lost their home for their milk.

⁶⁴⁸ *Bergjans Farm Dairy v. Sanitary Milk Producers*, 241 F. Supp. 476 (E.D. Mo. 1965), *aff'd*, 368 F.2d 679 (8th Cir. 1966).

⁶⁴⁹ 241 F. Supp. at 483.

The case was tried before a jury, which awarded monetary damages to the plaintiffs. The judge wrote his opinion in response to plaintiffs' request for an injunction against further unlawful conduct by Sanitary.

While the case only involved an alleged attempt to monopolize under Section 2 of Sherman, the court pointed out that the secret rebate agreement between Sanitary and buyers in the St. Louis market could be interpreted as a conspiracy to fix prices in violation of Section 1 of Sherman and would be considered as evidence of intent to monopolize in violation of Section 2.⁶⁵⁰

The court viewed this conduct in combination with a general assessment of the way Sanitary built and conducted its processing business. The court concluded that this evidence showed a predatory intent to eliminate competition not protected by the limited antitrust immunity granted by Capper-Volstead. The court granted the processor's request for an injunction, placing Sanitary and its officers under orders to act lawfully in the future.

Sanitary appealed to the U.S. Court of Appeals for the 8th Circuit, primarily on the basis of numerous alleged errors made by the judge during the trial phase of the case. While the appellate court found some of Sanitary's points valid, it concluded that the errors did not justify overturning the decision. In a key ruling, the court said that the mere existence of the secret cash rebates paid by the cooperative to milk retailers was sufficient to support a finding that the cooperative engaged in a conspiracy to fix wholesale prices of milk.⁶⁵¹

Thus, covert manipulation of market pricing through secret rebates to purchasers is an unlawful predatory practice.

Isaly Dairy Company of Pittsburgh v. United Dairy Farmers.⁶⁵² Dairyman's Co-operative Sales Association (DCSA) was the dominant milk marketing cooperative serving Pittsburgh, PA. This case was initiated by disgruntled DCSA members who withdrew and formed a

⁶⁵⁰ 241 F. Supp. at 484.

⁶⁵¹ *Sanitary Milk Producers v. Bergjans Farm Dairy*, 368 F.2d 679, 690, (8th Cir. 1966), *aff'g*, 241 F. Supp. 476 (E.D. Mo. 1965).

⁶⁵² *Isaly Dairy Company of Pittsburgh v. United Dairy Farmers*, 250 F. Supp. 99 (W. D. Pa. 1966).

new cooperative, United Dairy Farmers (UDF). When UDF was unsuccessful in negotiating contracts with dairy processing firms, it filed suit against four dairy companies and DCSA for conspiring to fix the price of milk at levels below what farmers should be receiving.

One of the noncooperative dairies, Isaly Dairy Company, countered by filing a complaint against UDF and some of its members for conspiring to monopolize the Pittsburgh milk market and to fix the price of milk sold there. Isaly sought an injunction against farmer picketing of its plant and some of its customers' stores. One day, the picketing at the plant got out of hand, police restored order, and a local judge issued an order regulating future picketing. Farmer picketing continued subject to the order, without interrupting traffic in or out of the plant or the stores and without any further incidents.

The Federal district court judge handling the case suggested that all of the litigation was an abusive use of antitrust law. He said that Isaly could sign a contract buying all of the milk it needed from DCSA and the farmers were free to sell their milk through UDF. The judge also ruled that the farmer pickets, conducted in compliance with guidelines established by a local judge, did not amount to an attempt to monopolize the market. The request for an injunction was denied.

This judge found the cooperatives in this case did not engage in illegal predatory conduct by entering into full supply contracts with buyers, selling member products for less than competitors thought they ought to be charging, or peacefully picketing stores of a firm that had signed a full supply contract with a competing cooperative.

Otto Milk Company v. United Dairy Farmers.⁶⁵³ Apparently emboldened by its victory in *Islay*, within a few months UDF launched an aggressive picketing campaign against grocery stores that carried milk by another dairy, Otto Milk. Like Isaly, Otto had a contract to purchase its raw milk from DCSA.

UDF members told the store managers the pickets would leave if their store stopped selling Otto products. In some instances, managers were asked to substitute products of another dairy for those of Otto. If a store stopped buying Otto products, the pickets would leave and

⁶⁵³ *Otto Milk Company v. United Dairy Farmers Cooperative Association*, 261 F. Supp. 381 (W.D. Pa. 1966), *aff'd*, 388 F.2d 789 (3rd Cir. 1967).

move on to another store still doing business with Otto. Otto filed a complaint in Federal court alleging violations of Sections 1 and 2 of the Sherman Act. After oral argument, Otto dropped its claim for damages and the court was faced with only a request for an injunction against further illegal conduct by UDF.

This time, UDF found itself before a less friendly judge. While this judge never mentioned the *Islay* decision, he clearly distanced himself from it.

UDF's first defense was that the court lacked jurisdiction under the Sherman Act because the picketing was purely local, not interstate, in nature. The court disagreed, stating "The Sherman Act...is not to be construed so narrowly. It 'extends not only to transactions in the stream of interstate commerce, but also to intrastate transactions which substantially *affect* interstate commerce.'" (court's emphasis, citation omitted).⁶⁵⁴ The court found that because Otto purchases materials used in its business from and sells milk in states other than Pennsylvania, Otto's lost sales resulting from UDF's action had a substantial affect on interstate commerce.

Next, UDF urged that its conduct was protected by Section 6 of the Clayton Act and the Capper-Volstead Act. The court, citing *North Texas Producers v. Metzger*,⁶⁵⁵ held these laws only protected actions to further the legitimate objectives of farmers. It said the Congress never intended "...that agricultural cooperatives be given a blanket exemption from the antitrust laws that would allow them to engage in predatory practices or conspire with others to monopolize or otherwise restrain trade in violation of the antitrust laws."⁶⁵⁶

This judge found that UDF's picketers not only wanted to tell their story but also to stop customers from patronizing the stores and force the stores to stop purchasing milk from Otto. He held the picketing was "...designed ultimately to exclude DCSA from competition... and corner the market for... (UDF)."⁶⁵⁷ He ruled that the

⁶⁵⁴ 261 F. Supp. at 383, 384.

⁶⁵⁵ 362 F.2d 189 (5th Cir. 1965), *supra.* at 235-236.

⁶⁵⁶ 261 F. Supp. at 384-385.

⁶⁵⁷ 261 F. Supp. at 385.

boycott was an attempt to monopolize trade in violation of Section 2 of the Sherman Act.

He also found an illegal conspiracy between UDF and the stores that ceased doing business with Otto that restrained trade in violation of Section 1 of Sherman. He determined that it did not matter that the stores were coerced into dropping Otto, stating:

Simultaneous or express agreement between parties is not necessary to the formation of a conspiracy (cite omitted). It is sufficient if there is acquiescence in an illegal scheme (cite omitted). Indeed, even if one is coerced by economic threats or pressure to participate in an illegal scheme, that does not make him any less a co-conspirator (cite omitted)."⁶⁵⁸

Finally, this court rejected UDF's claim that its picketing, when peaceful, was free speech accorded constitutional protection. The judge said the UDF members were mixing speech with conduct intended to induce customers to stop shopping at retail stores handling Otto milk and thus coerce those stores to cease doing business with Otto. The court held, "...the objective of the picketing was to achieve a result contrary to the provisions of the Sherman Act.... The enjoining of picketing, the sole purpose of which is in conflict with a valid statute, is not inconsistent with Constitutional guarantees of freedom of speech (cites omitted)."⁶⁵⁹

The district court found UDF's actions amounted to "a boycott designed to restrain and monopolize interstate commerce in violation of the Sherman Antitrust law."⁶⁶⁰ The judge granted Otto's request for a permanent injunction barring UDF from picketing Otto's customers.

UDF appealed to the U.S. Court of Appeals for the 3rd Circuit. UDF raised the same defenses on appeal that it had used earlier in the district court and again they were rejected.⁶⁶¹ The appellate court

⁶⁵⁸ *Id.*

⁶⁵⁹ 261 F. Supp. at 386.

⁶⁶⁰ *Id.*

⁶⁶¹ *Otto Milk Company v. United Dairy Farmers Cooperative Ass'n*, 388 F.2d 789 (3rd Cir. 1967), *aff'g*, 261 F. Supp. 381 (W.D. Pa. 1966).

went into the facts of the case in more detail than the district court and condemned the actions of UDF and its leaders in even harsher words, finding it a "raw endeavor...to monopolize..(by) destroying their major competitor, Dairymen's Co-operative Sales Association and taking over the Western Pennsylvania milk products field."⁶⁶²

UDF raised the favorable decision it had received in *Isaly* but the court distinguished that case on the basis that in *Isaly* the picketing was aimed at plaintiff's plant and stores, not innocent third parties. Finally, the 3rd Circuit found "no merit" in UDF's argument that it was engaged in constitutionally protected free speech.⁶⁶³

Another form of boycotting was added to the list of predatory conduct, picketing and harassment of innocent third party customers of a buyer or competitor.

In summary, agricultural producers are privileged to act together in deciding on the prices and terms of sale they will accept for their production, just as shareholders in an investor-owned firm can do. But cooperative directors, managers, and members must constantly remember that the Capper-Volstead Act provides only a limited antitrust immunity for associations of agricultural producers.

The previous sections of this report discussed circumstances where producers worked too closely with, or illegally combined with, their competitors. This section covered instances where producers were too aggressive in their methods of competition. These cases illustrate conduct that can be held predatory, while by no means an exhaustive list of actions, a court might find to be predatory conduct:

- Using intimidation and coercion to force otherwise unwilling producers to join, or at least abide by the prices set and other rules of, an association.
- Advocating secondary boycotts against buyers; i. e., pressuring persons not affiliated with the association to refrain from doing business with buyers to force otherwise unwilling buyers to

⁶⁶² 388 F.2d at 797.

⁶⁶³ 388 F.2d at 799.

deal with the association, or at least abide by the prices and other terms of trade established by the association.

- Covert manipulation of prices paid by buyers, as through the payment of secret rebates to underbid competitors.
- Picketing retail establishments that bought from processors who did not secure their raw product from members of the association, to force the retailers to buy from processors who did obtain their raw product from association members.
- Disrupting deliveries of raw product to the facilities of processors unwilling to do business with the association.
- Loaning money to customers and then using the leverage created by the loan to force the customer to accept prices and other terms of trade set by the association.⁶⁶⁴

COOPERATIVE MONOPOLIZATION

Section 2 of the Sherman Act makes it a felony for any person to "... monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize..." any part of interstate commerce.⁶⁶⁵

Section 1 of the Capper-Volstead Act provides agricultural producers "...may act together in associations...in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce..." the products they produce.⁶⁶⁶

As early as the *Borden* case, it was established that the power to collectively market bestowed on producers by Capper-Volstead is not

⁶⁶⁴ Anyone interested in studying a more detailed list of actions the government might consider "predatory" might review the final judgment entered as part of the consent decree in *United States v. Associated Milk Producers, Inc.*, 394 F. Supp. 29, 49 (W.D. Mo. 1975).

⁶⁶⁵ 15 U.S.C. § 2.

⁶⁶⁶ 7 U.S.C. § 291.

absolute.⁶⁶⁷ The last major issues to be addressed in this report are whether the collective marketing authority granted producers under Capper-Volstead empowers them to "monopolize" the markets in which they participate and, if so, what are the restraints, if any, on a cooperative monopoly.

Early Decisions Accept Cooperative Monopolies

For several decades, the concept of a cooperative "monopoly" received little attention. Most producer marketing associations were local or regional and controlled a relatively modest share of the markets in which they operated. While there were some exceptions in specific fruits and vegetables such as oranges, raisins, and cranberries, numerous substitutes existed in the produce sections of virtually every grocery store for these items. Judges, when confronted with a dominant cooperative, didn't see any reason to be alarmed.

A Federal district court judge, in a decision involving the fishing industry issued shortly after *Borden*, just seemed to assume a cooperative could establish a monopoly. However, he also believed a cooperative could not abuse its monopoly power.⁶⁶⁸

All fish processors along the Monterey Bay had signed contracts agreeing to only accept fish from members of the Monterey Sardine Industries, Inc., a cooperative association of boats that fish the waters in the vicinity of the bay. Nonmember fisherman Frank Manaka leased a fishing boat and found a canner willing to accept his catch, but the association refused to waive its contract provision requiring the processor to take only fish provided by members. Manaka sued the association alleging it was an illegal conspiracy in restraint of trade.

The court did not question the authority of the fishermen to attain "... monopolistic control over the business and over all fish caught..." in the area.⁶⁶⁹ Nonetheless, the court did not condone their conduct. The court didn't provide much analysis but rather just held that as the association was a monopoly, its contract provision requiring processors

⁶⁶⁷ United States v. Borden, 308 U.S. 188, 204-205 (1939).

⁶⁶⁸ Manaka v. Monterey Sardine Industries, 41 F. Supp. 531 (N.D. Cal. 1941).

⁶⁶⁹ 41 F. Supp. at 534.

to buy only from its members closed the market to nonmembers and thus amounted to an illegal restraint of trade.

The first case to discuss an agricultural cooperative monopoly concerned the post-World War II cranberry industry.⁶⁷⁰ In 1946, production greatly exceeded demand, leading to a collapse in cranberry product prices. Cape Cod Food Products found itself with substantial debt and an inventory of cranberry products worth less than cost and, in 1949, the company was foreclosed. Someone, in the name of the company, brought a civil antitrust action to recover triple damages against National Cranberry Assn, a cooperative with about 50 percent of the production under contract, certain lenders, and some of its officers. The complaint charged that the lenders conspired with the producer association to drive Cape Cod Foods out of the cranberry business.

In his instruction to the jury, the judge offered an explanation of the term "monopolize" as used in the Sherman Act. He said that a layman might assume that anyone with 100 percent of the market has a "monopoly." But in antitrust law "the verb 'monopolize' means to acquire through means which are not specifically approved a dominant position in the market so as to exclude actual or potential competition, and to follow such a course of conduct with the intent of monopolizing."⁶⁷¹

He continued:

There is nothing unlawful under the Sherman Act or any other antitrust act in trying to get even 100 per cent of the market through skill, efficiency, superiority of product, or like entirely laudable steps. It is not unlawful under the antitrust acts for a Capper-Volstead cooperative, such as the National Cranberry Association admittedly is, to try to acquire even 100 per cent of the market if it does it exclusively through marketing agreements approved under the Capper-Volstead Act.

⁶⁷⁰ Cape Cod Food Products v. National Cranberry Ass'n, 119 F. Supp. 900 (D.C. Mass. 1954). The available facts in this case are sketchy as the published opinion is merely the instructions of the judge to the jury.

⁶⁷¹ 119 F. Supp. at 906.

...

Hence, it is not a violation of the Sherman Act or any other anti-trust act for a Capper-Volstead cooperative to acquire a large, even 100 per cent, position in a market if it does it solely through those steps which involve cooperative purchasing and cooperative selling.⁶⁷²

Thus, a trend had already begun that would be developed during a period of intense scrutiny of cooperative activity to see if it amounted to an illegal attempt to monopolize a market. Courts will not be overly concerned with the fact *per se* that a cooperative has significant market power. But, they will look into how that market power is attained and how it is exercised.

United States v. Grinnell

In 1966, the U.S. Supreme Court attempted to clarify the scope of Section 2 of the Sherman Act. It stated:

The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident... monopoly power (is) the power to control prices or exclude competition.⁶⁷³

⁶⁷² 119 F. Supp. at 907. *Cited with approval*, *Shoenberg Farms v. Denver Milk Producers*, 231 F. Supp. 266, 268-269 (D.C. Colo. 1964). In subsequent cases, courts would consistently hold that Capper-Volstead permits farmers to combine into cooperative monopolies, places no limits on combination, nor does it forbid farmers from combining once their cooperative reaches a certain size. *See, e.g.*, *Fairdale Farms v. Yankee Milk*, 635 F.2d, 1037, 1040 (2d Cir. 1980), *cert. denied*, 454 U.S. 818 (1981); *Kinnett Dairies v. Dairymen, Inc.*, 512 F. Supp. 608, 631 (M.D. Ga. 1981), *aff'd*, 715 F.2d 520 (11th Cir. 1983).

⁶⁷³ *United States v. Grinnell*, 384 U.S. 563, 570-571 (1966).

After *Grinnell*, a court must find two elements exist to hold a business entity guilty of monopolizing or attempting to monopolize trade or commerce in violation of Section 2 of the Sherman Act.

First, the firm must have the ability to control prices or exclude competition in the relevant commercial market.

Second, the firm must have deliberately set out to acquire monopoly power, or taken steps to maintain its monopoly status, rather than to have unintentionally become and/or remained a monopoly as a result of having developed a superior product, made superior management decisions, or historical accident.⁶⁷⁴

The primary focus of the following discussion involves rationalizing the inherent conflict between the *Grinnell* language making it illegal to deliberately attempt to create monopoly power and the Capper-Volstead Act's language authorizing agricultural producers to collectively market their products with no stated limitation on that power. To date, the issue has not been satisfactorily resolved, partly because the U.S. Supreme Court has declined several opportunities to consider the matter. But it may also be an issue which defies an answer that is both equitable and easy to apply.

The first case to apply *Grinnell* to cooperative marketing was the 9th Circuit Court of Appeals decision in *Case-Swayne v. Sunkist Growers*.⁶⁷⁵ This ruling came out only a few months after *Grinnell*.

The district court had granted Sunkist's motion for a directed verdict on various issues, including a charge that Sunkist had monopolized certain citrus fruit markets. In reviewing that portion of the directed verdict, the 9th Circuit took a general view of the second element of *Grinnell*. It said "...size alone does not constitute an offense under the Sherman Act; nor does the mere possession of

⁶⁷⁴ A major issue in many antitrust cases, including those against farmer cooperatives, is defining the proper product and geographic markets to be used in measuring whether the defendant has the power to control prices and exclude competition as required by the first element of *Grinnell*. While the court rulings on these issues were significant to the parties, this analysis is fact intensive and commodity or product specific and beyond the scope of this report.

⁶⁷⁵ *Case-Swayne v. Sunkist Growers*, 369 F.2d 449 (9th Cir. 1966).

monopoly power. It is the wrongful use and exercise of that power which is proscribed by section 2 of the Act."⁶⁷⁶

Case-Swayne alleged that Sunkist manipulated prices and refused to sell product to it to exclude Case-Swayne from the market. The appellate court did not find Sunkist had done anything illegal, but said Case-Swayne had introduced sufficient evidence that Sunkist might have had a monopoly and might have used any monopoly status it did have to control prices and exclude Case-Swayne from the market to avoid a directed verdict. The case was remanded to the district court to continue the trial.

Thus *Case-Swayne* established that Capper-Volstead did not immunize farmer cooperatives from liability under Section 2 of the Sherman Act (as interpreted by *Grinnell*) for the "wrongful use and exercise" of monopoly power. But it didn't provide any guidelines to use in deciding when a cooperative is abusing its market power.⁶⁷⁷

After *Case-Swayne*, the focus on cooperative antitrust status moved to the Midwest and Southeast, where the unprecedented consolidation among dairy cooperatives was occurring. *Grinnell* become the vehicle for measuring cooperative conduct in a series of complex cases arising, with one exception, out of dairy cooperative consolidation.

Reporting on these cases is made difficult by the length of time some of them took to litigate. One case lasted 20 years. While the cases were in progress, decisions would come down in other cases that impacted how the courts viewed the current cases. The following treatment is more chronological than case-specific to reflect how opinions in contemporaneous cases influenced each other.

⁶⁷⁶ 369 F.2d at 458.

⁶⁷⁷ A majority on the appellate court panel affirmed the district court holding on the issue for which this case is more widely known, that Sunkist's organizational structure came within the scope of the Capper-Volstead Act. Both sides petitioned the U.S. Supreme Court for writs of certiorari. The Court granted Case-Swayne's request, but not that of Sunkist (387 U.S. 903 (1967)), and held Sunkist had certain non-producer members which voided its claim to Capper-Volstead protection, 389 U.S. 384 (1967). In 1968, Sunkist reorganized and revoked the membership status of its non-producer affiliates. The district court held Sunkist now qualified for Capper-Volstead protection. 355 F. Supp. 408 (C.D. Cal. 1971). The ultimate resolution of the Sherman § 2 claims was not reported.

Milk Industry Transformation

Milk is a unique commodity. Numerous substitutes exist in most consumers' minds for oranges, raisins, cranberries, etc. For many people, especially mothers, there is no substitute for milk. And while many food products can stay on the farm, in the warehouse, or on the store shelf for extended periods of time, fresh milk is highly perishable. Producers literally sell it or smell it.

Since the Depression of the 1930s, the Government has recognized the desires of consumers for a ready supply of fresh, wholesome milk and the difficulties producers face in satisfying that demand. USDA, under laws enacted by Congress, has regulated milk marketing and, through regulation, guaranteed minimum prices for dairy farmers.

During the late 1950s and early 1960s, milk-producer incomes were extremely low, in relation to both the amount of work required and to what people could earn in other agricultural pursuits and in off-farm jobs.⁶⁷⁸ From 1955 to 1965, the number of farms having milk cows declined about 61 percent.

The wave of technological change that had altered the market for other agricultural commodities earlier now reached the milk industry. Improved production, processing, transportation and distribution methods changed previously isolated markets into broad, competing, and yet interdependent ones.

Weak milk prices, declining cooperative membership, and expanding competition among previously isolated production areas caused dairy industry and cooperative leaders to rethink how they were organized and operating. The result was an upheaval in the Midwest and Southeast that led to the formation of three large regional marketing cooperatives and the aggressive entry of a general farm organization into milk marketing.

Existing cooperatives first attempted to solve their problems by forming federated organizations to coordinate their separate activities.

⁶⁷⁸ Background information in this section is based primarily on Ronald D. Knutson, *Cooperative Bargaining Developments in the Dairy Industry, 1960-70*, USDA Farmer Cooperative Service Research Report 19 (1971), and the factual information in the court opinions discussed herein.

In 1960, producer associations in Detroit, Toledo, Cleveland, and Pittsburgh formed the Great Lakes Milk Marketing Federation. By 1969, the now renamed Great Lakes-Southern Milk Inc. encompassed 20 cooperatives and stretched from the Canadian border to the Gulf of Mexico and from the Mississippi River to the East Coast. Member associations represented 34,000 members producing 11.3 percent of total U.S. milk production and 70 percent of the Grade A milk in their marketing areas.

In 1964, cooperatives West of the Great Lakes-Southern Milk group formed their own federation, Associated Dairymen, Inc. Its 15 members stretched from Minnesota and Wisconsin to Texas and from Indiana to Kansas and Nebraska. By 1970, it represented 50,000 producers with 17.2 percent of total U.S. milk production.

Other, smaller federations were formed in the New York-New England market, Mid-Atlantic states, Florida, the mountain west, and in the Chicago market.

However, the federateds couldn't make significant headway in raising the incomes of dairy farmers. Producer problems were still perceived as local in nature. Each local association, while part of a federated system, was still governed by independent directors and managers. These local cooperatives were unwilling to sacrifice local autonomy and money to address problems from a broader perspective. Now that milk could be safely hauled longer distances, buyers were able to take advantage of the industry fragmentation and play one cooperative against another when negotiating purchase prices and terms of sale.⁶⁷⁹

AMPI. The movement away from federation to consolidation was swift and substantial. In August of 1967, six large members of Associated Dairymen, Inc., merged into Milk Producers, Inc. (MPI). Several other dairies joined by the end of the year and MPI had substantial market shares in Kansas (40 percent), Texas (70 percent), Oklahoma (80 percent) and Arkansas (95 percent).

MPI picked up additional members in succeeding months. In November, 1969, it became a major force in the industry when Pure

⁶⁷⁹ The impact of the developing interstate highway system and large dairy tank trucks is mentioned, for example, in *United States v. Dairymen, Inc.*, 1978-1 Trade Cases (CCH) ¶ 62,053, at 74,539 (W.D. Ky. 1978).

Milk Association and four smaller cooperatives serving the Chicago market joined the renamed Associated Milk Producers Inc. (AMPI). By 1971, AMPI supplied over 75 percent of the milk to such fluid milk markets as Chicago, Dallas, Houston, Indianapolis, Madison, Memphis, Oklahoma City, and San Antonio. In a little more than 3 years, 111 formerly independent producer associations and 31,000 dairy farmers had consolidated into a single marketing cooperative.

Mid-Am. Mid-America Dairymen (Mid-Am) was formed in 1968 with the merger of cooperatives serving markets in Iowa, Kansas, Missouri, and Illinois. Associations serving the Omaha and Minneapolis markets soon joined. By 1971, Mid-Am included 31 former associations and 23,000 producers.

DI. Dairymen, Inc. (DI) was also formed in 1968, by eight cooperatives mainly serving the central and southeastern states. Sixteen other cooperatives soon joined DI, and by 1971 it had 9,800 producer members.

In summary, from 1967 to 1971, nearly 170 predominantly local cooperatives had combined into three large multi-market regional cooperatives with nearly 64,000 producer members. It is easy to understand the interest this development aroused among antitrust enforcement officials and others in the milk industry.

NFO. In the mid-1950s, after the Korean War, farm prices collapsed and a drought occurred. Disgruntled midwestern farmers formed the National Farmers Organization (NFO) as a not-for-profit corporation under Iowa law. The original mission was to educate the world, and Washington, DC, in particular, about the difficult times for farmers. However, when prices rebounded and the drought ended, NFO realized it could no longer survive simply as a protest organization.

Under the direction of its evangelistic president, Oren Lee Staley, NFO launched a new initiative to facilitate collective bargaining in agriculture.⁶⁸⁰

NFO members signed contracts naming NFO as their exclusive representative to sell all commodities produced on their farms. Until a resale agreement for a given commodity was signed, the members

⁶⁸⁰ For a detailed history of the development of NFO, *see* Don Muhm, *The NFO: A Farm Belt Rebel* (Lone Oak Press, 2000).

were free to sell to whomever they chose. The contracts were for 3 years and renewed automatically unless the member canceled during a 10-day window before the renewal date.

Despite great effort over several years, including its infamous "holding actions" designed to force processors to sign agreements to buy product from NFO members at NFO-established prices,⁶⁸¹ NFO was unable to sign enough processors to so-called "master contracts" to activate its role as a cooperative bargaining association.⁶⁸²

While NFO never became a major presence in milk marketing as did the three cooperatives, it did become a major headache for them. First, it attracted some producers away from the cooperatives, undercutting their efforts to present a united producer front when bargaining with processors. Second, it was an active participant in a series of costly and decisive legal battles.⁶⁸³

⁶⁸¹ NFO organized several "farmer strikes," called holding actions, during the 1960s. Members would withhold production from the market in an attempt to force buyers to agree to pay higher prices for member products. Many withholding actions turned violent when participants confronted nonparticipants. A milk holding action began on March 15, 1967. It collapsed two weeks later when the Department of Justice filed an antitrust suit against NFO for using threats, intimidation, harassment and acts of violence in an attempt to monopolize the milk trade in violation of Section 2 of the Sherman Act. While NFO blamed the failure of the holding action on the antitrust suit, other observers said that once the initial flurry of publicity subsided, farmers simply didn't support it and milk continued to flow freely to stores and consumers. (Muhm at 103-105).

⁶⁸² NFO negotiated some local agreements to supply product to processors, but participation by members under these contracts was voluntary.

⁶⁸³ NFO also had to battle over antitrust issues with its own members. Some members became disenchanted and sued NFO on several grounds, including broad allegations of antitrust violations, in an attempt to void their marketing contracts.

NFO countered that it met all of the requirements to qualify for the limited antitrust protection under Capper-Volstead. The dissident members argued that NFO was not operated for the "mutual benefit of its members" because, as a nonprofit corporation, it could not distribute earnings and surpluses to its member-owners unless the organization dissolved and liquidated its assets. The court agreed with NFO. It held NFO met the standards for coverage under Capper-Volstead and that payment of patronage

Mid-Am Fires the First Shot

Muhm⁶⁸⁴ reports that in the late 1960s, NFO determined that it could not work with the new regional dairy cooperatives and decided to compete with them. Although it had neither experience in milk marketing nor access to processing facilities, NFO told farmers that existing cooperatives weren't doing enough for them and promised farmers higher prices if they agreed to sell their milk through NFO. Some farmers terminated their marketing arrangements with their old cooperatives and signed contracts with NFO.

Mid-Am was especially upset with NFO activity in Mid-Am's home state of Missouri. Mid-Am believed NFO was backing up unfounded claims that it could do a better job of marketing milk by undercutting Mid-Am prices to dealers, particularly in St. Louis, and paying premium prices to farmer members with money provided by producers of other crops and loans by members to keep NFO afloat.

Mid-Am fired the first shot in a 20-year battle. In March, 1971, Mid-Am brought suit in Federal district court in Missouri charging NFO with various violations of Federal antitrust law, including illegal price fixing, restraining trade by inducing Mid-Am members to breach their marketing agreements, and illegally encouraging farmers to boycott Mid-Am.

Apparently, Mid-Am hoped the suit would discourage NFO from trying to compete with it as the representative of dairy farmers in the area. But instead of backing off, NFO counterclaimed against Mid-Am and also sued AMPI and two reserve pools set up by the cooperatives to manage surplus milk in times when production

refunds or other distributions to members was not a requisite for a producer association to be "operating for the mutual benefit of its members."

The members also asserted that NFO violated antitrust law by signing contracts with processors. NFO responded that normal, arms-length contracts to sell member product, without a showing of restraint of trade or attempt to monopolize, were not forbidden by the antitrust laws. Again the court agreed with NFO and entered a judgment in its favor. *Waters v. National Farmers Organization*, 328 F. Supp. 1229 (S.D. Ind. 1971). *See also*, *Alexander v. National Farmers Organization*, 687 F. 2d 1173, 1184-1187 (8th Cir. 1982).

⁶⁸⁴ Don Muhm, *The NFO: A Farm Belt Rebel* (Lone Oak Press, 2000).

exceeded demand. NFO made essentially the same allegations against the other cooperatives as Mid-Am had made against it. AMPI then counterclaimed against NFO, on the same grounds as Mid-Am in the original complaint.

The case was referred to Judge John W. Oliver who, according to Muhm,⁶⁸⁵ made two assumptions when handling the case, one valid and one questionable. First, Judge Oliver decided the case was too complex to try before a jury. Since few people understand and even fewer can explain the Federal milk market order system, this was probably sound reasoning.

Second, Judge Oliver believed he could leave no stone unturned because he was handling the case that would determine the future course of agricultural marketing. This assumption turned out to be wrong, but it played a major part in the length and cost of the litigation. Under Judge Oliver's control, the parties embarked on a 10-year period of discovery that cost farmers millions of dollars and created hard feelings that set neighbor against neighbor and even split families along the lines of "co-op" v. NFO.

While this case dragged on, other developments occurred that ultimately had an equal or greater influence on agricultural marketing.

Justice Department Action

The phenomenal change in dairy cooperative structure in the late 1960s ushered in a period of intense scrutiny of all cooperatives, but particularly dairy cooperatives, by antitrust enforcement officials. Printed reports of economic analyses of cooperatives by the Antitrust Division of the Department of Justice and the Federal Trade Commission's Bureau of Competition totaled more than 1,000 pages. Commissions were formed, testimony gathered, reports written and published, and responses prepared.

However well intended and developed, these academic exercises had little impact on farmers or their cooperatives. Producers were focused on the rising tide of litigation. During 1972 and 1973, the Department of Justice (Justice) brought a separate civil antitrust suit against each of the three new milk cooperatives.

⁶⁸⁵ *Id.* at 125.

AMPI. The first complaint, filed February 1, 1972, against AMPI, provided a succinct description of the economic picture troubling Federal antitrust officials. Of particular concern was the interplay between the new regional cooperatives and USDA's milk market order program.

At the time, more than 60 Federal milk marketing orders regulated the sale of milk in local geographic (usually metropolitan) markets. Prior to 1967, one or more local cooperatives and private dairies typically served these markets.

The sudden emergence of AMPI, Mid-Am, and DI created producer associations that operated in several market order territories. They treated their entire service area as a market and shipped milk between various metropolitan markets to enhance the earnings of their membership as a whole.

Marketing orders are usually adopted and amended by a favorable vote of producers who produce at least two-thirds of the milk for the market. Justice was particularly unhappy with a provision in the law permitting cooperatives to bloc vote on behalf of their members in marketing order elections.⁶⁸⁶ Justice noted that since AMPI controlled 90 percent or more of the production in various marketing order areas, AMPI had the only vote that counted in governance decisions affecting those orders.

Justice accused AMPI of manipulating the milk market order system by moving milk from areas where it had little competition to areas where it had meaningful competition. This enabled AMPI to drive down the price of milk in areas where it had competition while charging over-order premiums where it had little competition. Nonmember producers were squeezed by low prices in competitive areas, while AMPI members were protected by receiving payments based on AMPI's overall performance. Justice charged this activity was an illegal attempt to restrain trade, eliminate competition, and monopolize in violations of Sections 1 and 2 of the Sherman Act.

⁶⁸⁶ Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 608(c)(12). Under legislation enacted in 1983 authorizing marketing orders for promotional purposes only, cooperatives are also allowed to bloc vote for all of their members, but members are permitted to vote individually if they so choose. The Dairy Production Stabilization Act of 1983, 7 U.S.C. § 4508. No such opt-out provision applies to other marketing orders.

Justice also asserted AMPI engaged in other illegal anticompetitive conduct. One charge concerned alleged agreements with unnamed processors that they would not purchase milk from competitors of AMPI. Another attacked alleged agreements with truckers, who hauled milk for AMPI members, that they would not haul nonmember milk.

This case never produced a written opinion on the issues. The complaint was originally filed in the Western District of Texas in San Antonio, the city where AMPI had its headquarters. In 1974, the case was transferred to Judge Oliver in an attempt to coordinate it with the private litigation involving the same issues and cooperatives.

In April, 1975, Justice and AMPI agreed on a consent decree ending the litigation. The settlement barred AMPI from engaging in a number of activities identified as anti-competitive by Justice, but did not otherwise attempt to break up or restructure the cooperative.⁶⁸⁷

When it realized that Justice wasn't going to attempt to break up AMPI, NFO aggressively sought to intervene in the case. NFO's argument was that AMPI, through political contributions documented in the Senate Watergate Committee's final report, had undermined the objectivity of Antitrust Division of the Department of Justice.

As Judge Oliver saw it, NFO wanted to supplant the Justice Department as the prosecutor in this case. The judge found that no evidence clouding the integrity of the Justice people handling this case. He rejected NFO's position and its motion to intervene.⁶⁸⁸

NFO appealed the denial of its request to intervene to the U. S. Court of Appeals for the 8th Circuit. This court took judicial notice of NFO's interest in blocking any consent decree in this case and forcing the Government to go to trial. Section 5 of the Clayton Act has provided, since enactment in 1914, that a final judgment against the defendant in a Government antitrust case is *prima facie* evidence against that defendant in private litigation involving the same situation. But a consent decree is excluded from this rule and is inadmissible in

⁶⁸⁷ United States v. Associated Milk Producers, Inc., 394 F. Supp. 29 (W.D. Mo. 1975).

⁶⁸⁸ 394 F. Supp. at 38-40.

private litigation.⁶⁸⁹ After a review of the proceedings, the 8th Circuit affirmed Judge Oliver's denial of NFO's intervention request.⁶⁹⁰

Mid-Am. In December, 1973, the United States filed suit against Mid-America Dairywomen (Mid-Am) alleging antitrust violations and seeking relief similar to what it asked for in its suit against AMPI. This case was filed in the Western District of Missouri and was assigned to Judge Oliver. This case was also settled via a consent decree barring Mid-Am from using numerous alleged anticompetitive tactics.⁶⁹¹

Just as the AMPI case was nearing conclusion, a major amendment to Section 5 of the Clayton Act was enacted.⁶⁹² The amendment consisted of new provisions requiring greater disclosure to the public of proposed consent decrees and an opportunity for public comment. As a result of the Antitrust Procedures and Penalties Act (APPA), anyone wishing to study this case in detail has access to the Federal Register publication of the proposed consent decree, a summary of the case called a competitive impact statement,⁶⁹³ and to the written comments provided by the public and Justice's response to those comments.⁶⁹⁴

As in the AMPI case, NFO asked to intervene, this time on the grounds that the Government's proposed settlement wasn't in the public interest. NFO also asserted that Justice had not been vigilant enough in forcing Mid-Am to disclose information under the APPA.

NFO asked the court to order the breakup of Mid-Am or, in the alternative, to give members an unlimited right to leave Mid-Am on 30

⁶⁸⁹ 7 U.S.C. § 16(a).

⁶⁹⁰ *United States v. Associated Milk Producers, Inc.*, 534 F.2d 113 (1976), *aff'g*, 394 F. Supp. 29 (1975). The Supreme Court denied NFO's request that it hear the case on a writ of certiorari, 437 U.S. 905 (1978).

⁶⁹¹ *United States v. Mid-America Dairywomen, Inc.*, 1977-1 Trade Cases (CCH) ¶ 61,508 (W.D. Mo. 1977).

⁶⁹² The Antitrust Procedures and Penalties Act, § 2, Pub. L. No. 93-528, 88 Stat. 1706 (1974), codified at 15 U.S.C. 16(b)-(h).

⁶⁹³ 41 Fed. Reg. 21,799-21,811 (1976).

⁶⁹⁴ 41 Fed. Reg. 37,353-37,367 (1976).

days notice. The court noted that members of Mid-Am were permitted to leave on 30 days notice anytime during the year following final approval of the consent decree, and on the anniversary date of his or her membership agreement each year thereafter. Judge Oliver again denied NFO's motion to intervene and approved the consent decree as proposed by the parties.⁶⁹⁵

DI. On March 29, 1973, Justice brought suit against Dairymen, Inc. (DI). Justice made the same allegations of illegal conduct it had against AMPI and Mid-Am--oving milk to depress prices received by competing producers; restricting truckers from hauling for nonmembers; coercing producers to become members; and suppressing efforts of members to resign and compete with DI. The main difference between this litigation and the other two cases is that DI did not settle, but rather conducted a lengthy defense of both the Government's charges and related private actions.

The case was filed in the Western District of Kentucky in Louisville, where DI had its headquarters. DI was not a direct participant in the private litigation before Judge Oliver, so the case was not transferred to his court. After more than 5 years, the District Court Judge in Kentucky issued an opinion generally favorable to DI.⁶⁹⁶

This judge, citing *Maryland & Virginia Milk Producers Association v. United States*, 362 U.S. 458 (1960), tacitly rejected the Government's request that he look at the evidence in its entirety for a pattern of attempted monopolization. Rather, he examined each allegation separately and found the Government failed to prove, in most instances, that DI's actions reached the level of predatory conduct.

Full supply and committed supply contracts. DI attempted to compel all purchasers of its milk to sign contracts obligating them to purchase all of their milk from DI (full-supply contracts). When this

⁶⁹⁵ United States v. Mid-America Dairymen, Inc., 1977-1 Trade Cases (CCH) ¶ 61,508 at 71,980 (W.D. Mo. 1977).

⁶⁹⁶ United States v. Dairymen, Inc., 1978-1 Trade Cases (CCH) ¶ 62,053 (W.D. Ky. 1978), *aff'd in part, rev'd in part, and remanded*, 660 F.2d 192 (1981).

failed in some instances, it offered to supply milk under contracts requiring the purchasers to buy a certain amount of milk from DI (committed supply contracts). The court noted that buyers could continue preexisting purchase arrangements with independent producers and other cooperatives, and that firms who had signed full-supply contracts were offered the option to switch to committed supply contracts. The court also observed that some handlers were parts of agribusiness firms with assets greatly exceeding those of DI, who could, and sometimes did, turn to sources other than DI for all their raw milk needs. The court concluded DI's efforts to obtain full and committed supply contracts did not amount to predatory conduct.⁶⁹⁷

Acquisitions. Over a 5-year period, DI had acquired 18 processing plants. The government admitted it could not prove the purchases were predatory (the prices paid were reasonable and the purchases occurred at a leisurely pace). The court refused to treat them as part of an overall scheme to monopolize. Thus, the court held these acquisitions were not made to illegally restrain or suppress competition.⁶⁹⁸

Hauling contracts. Truckers hauling DI milk signed contracts requiring them to haul only for DI. The court said that the threat of contamination from commingling outside milk with member milk justified DI requiring truckers to haul only DI milk in trucks that hauled any DI milk. However, DI could not foreclose its contract haulers from transporting nonmember milk in other trucks they owned and/or operated.⁶⁹⁹

Membership contracts. Membership agreements bound producers to market through DI for 2 years. The court found the Government failed to show the 2-year length of the marketing contracts was unreasonable.⁷⁰⁰

Pooling. The court held DI had moved milk into Mississippi with a predatory intent of coercing nonmembers serving that market to join

⁶⁹⁷ 1978-1 Trade Cases (CCH) ¶ 62,053, at 74,544.

⁶⁹⁸ 1978-1 Trade Cases (CCH) ¶ 62,053, at 74,545.

⁶⁹⁹ *Id.*

⁷⁰⁰ 1978-1 Trade Cases (CCH) ¶ 62,053, at 74,546.

DI.⁷⁰¹ The practice was suspended after 4 months when USDA took steps to stop it. In a subsequent opinion, the court held that since the practice was unlikely to resume, no injunctive relief was appropriate.⁷⁰²

Thus, at the district court level, DI scored an almost total victory. The court, interpreting each Justice Department allegation independently to see if it was predatory conduct, found the Government hadn't met its burden of proof.

Related Private Litigation

Beginning in 1979, a number of court decisions issued in private cases would impact both the Government's action against DI and the NFO litigation with AMPI and Mid-Am. One concerned a dispute between producer associations and a private dairy in New England. A second was a suit by a Georgia dairy against DI based essentially on the Government's action against that cooperative. A third concerned the relationship among cooperative bargaining and processing associations marketing the same crop.

Fairdale Farms v. Yankee Milk

In June, 1973, dairy farmers in the northeastern states believed the minimum prices set under the milk market orders in their area were too low to provide them an adequate return on their farming operations. Seven producer associations serving those markets created the Regional Cooperative Marketing Agency (RCMA). RCMA was a federated organization patterned on the early attempts by midwestern producers to affiliate for the purpose of increasing their market power. From its inception through August, 1975, members of RCMA set prices they would accept for member milk above the market order minimums.

Fairdale Farms was a milk producer and a dealer-processor located near Bennington, VT. Historically, it had purchased a large portion of the milk it processed from members of Yankee Milk, a cooperative member of RCMA. In 1974, Fairdale refused to continue

⁷⁰¹ 1978-1 Trade Cases (CCH) ¶ 62,053, at 74,546-74,547.

⁷⁰² United States v. Dairy men, Inc., 1978-2 Trade Cases (CCH) ¶ 62,186 (W.D. Ky. 1978).

paying over-order premiums and discontinued purchasing milk from Yankee members.

In 1976, Fairdale brought an antitrust action against Yankee Milk and RCMA. Fairdale raised two issues. First, it alleged that price fixing by Yankee members and among the RCMA members was illegal *per se* as a conspiracy to restrain trade prohibited by Section 1 of the Sherman Act. Second, Fairdale charged Yankee and the other RCMA members attempted to monopolize the raw milk market from which Fairdale obtained its supply in violation of Section 2 of Sherman. Yankee and RCMA admitted agreeing on prices and, citing the Capper-Volstead Act, moved for summary judgment on both counts.⁷⁰³

As a defense against the attempt to monopolize charge, Yankee and RCMA argued that Capper-Volstead permits cooperatives to acquire monopoly power unless they do so through predatory means. To prevail, Fairdale had to prove both that Yankee and/or RCMA had monopoly power and had committed at least one predatory act. As Fairdale had not alleged any predatory conduct, the cooperatives argued that they were entitled to summary judgment. The cooperatives pointed out that all of the various cases finding cooperatives had violated Section 2 of Sherman involved associations engaged in predatory conduct.

The trial court judge refused to accept the premise that Congress intended to authorize agricultural producers to attain monopoly power.⁷⁰⁴ He pointed out that the cooperatives had not produced a decision wherein a plaintiff's case was dismissed because it failed to introduce evidence of predatory conduct. In denying the cooperatives' motion for summary judgment, he wrote that while he did "...not doubt that proof of predatory practices adds substantial weight to a plaintiff's monopoly claim, ... (I) refuse to hold that it is a necessary element."⁷⁰⁵

⁷⁰³ The courts' dismissal of the Sherman § 1 charges on the basis that Capper-Volstead authorizes producers and associations of producers to engage in mere price fixing is discussed earlier in this report.

⁷⁰⁴ Fairdale Farms v. Yankee Milk, 1980-1 Trade Cases (CCH) ¶ 63,029, at 77,116 (D.C. Vt. 1979), *aff'd in part, vacated in part, and remanded*, 635 F.2d 1037 (2d Cir. 1980), *cert. denied*, 454 U.S. 818 (1981).

⁷⁰⁵ *Id.*

The cooperatives appealed to the U.S. Court of Appeals for the Second Circuit, which took a tack more favorable to cooperatives. First, the appellate court agreed with Yankee Milk that producers could attain monopoly status, saying:

By exempting farmers from Sherman Act limitations on the ability to combine into cooperatives, Capper-Volstead gives farmers the right to combine into cooperative monopolies. The Act places no limits on combination; it does not forbid farmers from combining after their cooperative reaches a certain size. For a court to impose such limits and hold cooperatives liable for treble damages if they run afoul of a judicial standard would discourage the growth of these cooperatives. The Capper-Volstead Act recognizes that farmer cooperatives may grow into monopolies and includes precautions to prevent abuse of monopoly power.⁷⁰⁶

After citing numerous laws favorable to cooperatives, the court observed, "In short, when Congress enacted the Capper-Volstead Act, it did not intend to prohibit the voluntary and natural growth that agricultural cooperatives needed to accomplish their assigned purpose of effective farmer representation."⁷⁰⁷

The 2nd Circuit then attempted to reconcile the Capper-Volstead Act with *Grinnell*,⁷⁰⁸ reasoning that:

...the effect of Capper-Volstead is to prevent the full application of the second element of this test to agricultural cooperatives. Capper-Volstead permits the formation of

⁷⁰⁶ Fairdale Farms v. Yankee Milk, 635 F.2d 1037, 1040 (2d Cir. 1980)

⁷⁰⁷ 635 F.2d at 1043.

⁷⁰⁸ "The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." United States v. Grinnell, 384 U.S. 563, 570-571 (1966).

such cooperatives and places no limitation on their size. As the cooperative grows, so, normally, does its power over the market. Thus, while the formation, growth, and operation of a powerful cooperative is obviously a "willful acquisition or maintenance of such power," and will rarely result from "a superior product, business acumen, or historic accident," it is exactly what Capper-Volstead permits.

We conclude that *Grinnell* does not apply to monopoly power that results from such acts as the formation, growth, and combination of agricultural cooperatives, but applies only to the acquisition of such power by other, predatory means.⁷⁰⁹

The 2nd Circuit vacated the district court's denial of the cooperative's motion for summary judgment and remanded the case for the trial court to clarify whether predatory acts had been shown that would justify denying the cooperative's motion again and conducting further proceedings.

In summary, the Second Circuit in *Fairdale Farms* added a fourth exception to the second element of *Grinnell*. To show a cooperative violated Section 2 of the Sherman Act, a plaintiff must first show that the cooperative has monopoly power (the power to control prices or to exclude competitors from the relevant market). Then it must also show that the cooperative willfully acquired or maintained that power and did not achieve it from growth or development as a consequence of (1) a superior product, (2) business acumen, (3) historical accident, or, (4) conduct compatible with what Congress authorized in Section 1 of the Capper-Volstead Act.

On remand, the district court dismissed the monopolization claim and Fairdale Farms appealed. The Second Circuit affirmed the dismissal on the basis that Fairdale had not shown the cooperatives engaged in any conduct not protected by Capper-Volstead.⁷¹⁰ The court found that Yankee and RCMA did not engage in predatory practices when they established over-order premiums, charged

⁷⁰⁹ 635 F.2d at 1045.

⁷¹⁰ *Fairdale Farms v. Yankee Milk*, 715 F.2d 30 (2nd Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984).

different premiums in different market order areas, or refused to sell milk to Fairdale unless it paid the price set by producers and paid by other purchasers in the marketing area.⁷¹¹

Kinnett Dairies v. Dairymen, Inc.

In August 1973, just weeks after the Department of Justice sued DI, Kinnett Dairies, a privately owned and operated dairy, filed a similar private complaint in the U.S. district court in Columbus, GA. Kinnett made two basic allegations against DI. First, it said that DI participated in several arrangements with other cooperatives that restrained trade in violation of Section 1 of the Sherman Act by keeping surplus milk out of Georgia and thereby keeping prices it could charge Kinnett artificially high. Second, that DI violated Section 2 of Sherman via various business practices designed to monopolize the milk market in Georgia.

After nearly 8 years, the district court issued an opinion following trial that was a total victory for DI.⁷¹² The court relied heavily on *Fairdale Farms* and the district court opinion in *United State v. DI*. The case is getting more coverage in this report than is justified by its legal significance because the jurist, Senior District Judge Bootle, not only took the time to explain why certain issues that keep recurring in these cases were important to the parties but did a better job than many of his judicial colleagues in explaining his rulings in plain English.

Problems between Kinnett and its cooperative supplier began before DI entered the picture. Until 1970, Kinnett hauled the milk from the farms of its producer-suppliers, both cooperative members and independent producers, to its plants. In 1969, GMPCA, a local cooperative association which provided milk to Kinnett and later became part of DI, began hauling its members' milk to market.

Both entities found hauling operations desirable because they were profitable and provided a regular opportunity to place an employee or contractor on the farms to establish personal contacts and build producer loyalty. In early 1970, the manager of GMPCA informed

⁷¹¹ 715 F.2d at 31-34.

⁷¹² *Kinnett Dairies v. Dairymen, Inc.*, 512 F. Supp. 608 (M.D. Ga. 1981), *aff'd*, 715 F.2d 520 (8th Cir. 1983), *cert. denied*, 465 U.S. 1051 (1984).

Kinnett that it would no longer be allowed to haul milk for GMPCA members because GMPCA feared its members' milk might be contaminated by nonmember milk mixed in the same tanker and that Kinnett employees were talking producers into leaving GMPCA.

GMPCA treated Kinnett just like it did other processors. It took over hauling member milk to all its customers' plants. In September, 1970, GMPCA joined DI. DI continued the exclusive hauling requirement, retained the manager of GMPCA, and terminated any hauler who attempted to influence members to leave the cooperative.⁷¹³

Kinnett's lawsuit was triggered by the convergence of several events in late 1972 and early 1973 that drove up the cost of milk production while actual output was decreasing. A severe drought in the eastern United States was causing a decline in local grain production and stressing the animals. Grain sales to Russia were depleting midwestern grain reserves and further driving up the cost of animal feed in the southeast.

DI asked its customers to accept an increase in the transfer price in their sales agreements to protect dairy farmer income. All of DI's customers agreed to the price increase except Kinnett. On the day before the price increase was to go into effect, Kinnett notified DI that it would accept the increase if DI would guarantee that all of the extra money collected would be passed through to producers. DI considered this to be an attempt to gain a role in its internal decision-making process and rejected the suggestion.

A provision in DI sales agreements said that all customers were entitled to the most favorable terms of trade received by any other customer. Thus, if DI gave in to Kinnett it would have to rescind the price increase accepted by its other customers. On August 2, 1973, DI ceased providing milk to Kinnett and Kinnett sued.

Kinnett obtained a temporary restraining order requiring DI to continue selling milk to Kinnett under the terms of their contract until that contract expired. USDA softened the impact of this decision. It recognized the predicament facing Georgia dairymen and increased the minimum price required under the applicable milk marketing order to

⁷¹³ 512 F. Supp. at 622-623.

cover more than half of DI's requested price increase. DI's other customers voluntarily agreed to continue paying the difference.⁷¹⁴

The court considered Kinnett's claim that DI illegally conspired to restrain trade through agreements with other cooperatives to manage the supply of milk available for sale in Georgia. Citing *Fairdale Farms* at length, this court agreed that farmers were free to combine as they saw fit and obtain monopoly status.⁷¹⁵

Then Judge Bootle outlined the steps a cooperative could take on its own to restrict competition.

1. A cooperative may recruit an unlimited number of farmer members, even if the production of those members amounts to a dominant position in the market for the product they produce. Judge Bootle found that "(t)he acquisition and growth of market power by farmers through voluntary association in agricultural cooperatives is not only tolerated by the terms of the Capper-Volstead exemption, but is encouraged."⁷¹⁶

2. A cooperative, as agent for its farmer members, may "lawfully perform all of the tasks necessary to the processing, preparing for market, handling and marketing of their (products)."⁷¹⁷ The judge noted this included gathering, testing, hauling, and processing, as well as selling.

3. A cooperative may fix the price of member product it sells and, in seeking the best price it can, "may exercise such market leverage as is afforded by managing in the market the combined production of its members."⁷¹⁸

4. A cooperative without monopoly power may refuse to sell product to anyone. A cooperative that is a monopoly may not refuse to sell to someone offering reasonable terms of purchase, if the refusal is intended to perpetuate its monopoly. In other words, a cooperative may refuse to sell to anyone who declines to accept a fair and reasonable offer.

⁷¹⁴ 512 F. Supp. at 621-622.

⁷¹⁵ 512 F. Supp. at 630-631.

⁷¹⁶ 512 F. Supp. at 632.

⁷¹⁷ *Id.*

⁷¹⁸ *Id.*

5. A cooperative may allocate territory among its members.
6. A cooperative may agree with other cooperatives on the prices each will charge for member product and allocate sales territories and customers among themselves "...if this furthers the legitimate marketing purposes of the farmers, even though the antitrust laws may forbid other types of organizations from combining together in similar conduct."⁷¹⁹

Judge Bootle then determined that none of the conduct questioned by Kinnett was "...predatory in any sense of the word" because:

The entire spirit of Section 6 of the Clayton Act and of the Capper-Volstead Act was its purpose to free farmers from the role of pricetakers and to enable them through joint action to agree upon, announce, and with some measure of assurance and confidence insist upon the agreed upon price for their product.⁷²⁰

The conduct allowed cooperatives with Capper-Volstead antitrust protection includes (1) working with other cooperatives to set prices and manage supplies, (2) charging prices above the Federal minimum, (3) taking over transportation functions previously performed by Kinnett, (4) threatening to stop providing product to customers who began buying from a competitor, and (5) insisting on full or committed supply sales contracts.⁷²¹

He also noted that all of Kinnett's allegations, other than DI cutting off its milk supply, had been reviewed and found to be nonpredatory by the district court in the Government's case against DI. This court said that, under the circumstances (the unprecedented low levels of dairy farmer income and DI's obligation to sell to all customers at the lowest price offered any customer), DI did not act with predation when it attempted to convince Kinnett to revise its contract like all other buyers from DI had done. Whether DI acted

⁷¹⁹ 512 F. Supp. at 633.

⁷²⁰ *Id.*

⁷²¹ 512 F. Supp. at 633-635.

properly was a matter of contract law, not predatory conduct amounting to a violation of antitrust law.⁷²²

The court's treatment of the hauling issue is a good example of its common sense approach and language. In finding the cooperative did not act with predation in taking over Kinnett's role as milk hauler for its members, the court found the cooperative's motive:

...was to terminate Kinnett's practically unlimited access to D.I.'s dairy farmer members which access Kinnett was obviously ready, willing and able to use, legitimately albeit, to persuade such members to desert D.I. at the expiration of their membership contracts and become independent producers for Kinnett. D.I. does not have, and does not claim any right to prevent such attempts at persuasion on the part of Kinnett, but at the same time, D.I. is under no obligation to provide or continue to provide ready access for such attempts...How long would plaintiff itself have continued to employ a hauler who was attempting to convince independent producers marketing their milk directly to plaintiff to join (the co-op)?⁷²³

The judge made another interesting finding. He noted that Kinnett had been so successful in persuading producers to leave DI that it no longer needed to purchase any milk from DI. He said, "This underscores the fact that a cooperative's market power is somewhat tenuous and transitory. What power defendant had had largely vanished."⁷²⁴ The fact that members could, and did, leave DI led him to find that DI never really possessed sufficient market power to incur liability for monopolization under Section 2 of the Sherman Act.

Judge Bootle held that DI had not engaged in anticompetitive conduct with outsiders nor in any predatory conduct. Relying primarily on *Fairdale Farms*, he issued a judgment for DI.

⁷²² 512 F. Supp. at 635-638.

⁷²³ 512 F. Supp. at 638.

⁷²⁴ 512 F. Supp. at 641.

However, he also seemed to anticipate where the appellate court was heading with the Government's case against DI. He acknowledged that judges in cases not involving cooperatives had ruled that otherwise lawful conduct, with an exclusionary intent, is evidence of an illegal attempt to monopolize commerce. He noted that he found it very difficult "...to discern whether conduct is legally exclusionary or illegally exclusionary...(because) all businessmen, even those honestly competing, have an exclusionary intent."⁷²⁵

The judge concluded that the evidence indicated that DI had "...no conscious intent to stifle or smother competition or to exclude others from the market place."⁷²⁶

GVC Cannery v. California Tomato Growers

Decisions in antitrust cases involving cooperatives seemed to flow with regularity in the Spring of 1981. A month after the *Kinnett* decision, a California judge decided a suit by a private canner alleging a producer bargaining association and two processing cooperatives were engaged in an unlawful attempt to monopolize the canning tomato market. In rejecting the private canner's assertion, the judge said:

It is not unlawful under the antitrust acts for a Capper-Volstead cooperative...to try to acquire even 100% of the market if it does it exclusively through marketing agreements approved under the Capper-Volstead Act." *Cape Cod Food Products v. National Cranberry Association*, 119 F. Supp. 900 (D. Mass. 1954).

Because an agricultural cooperative may lawfully achieve 100% of a market, it necessarily follows that two or more such organizations may together hold such monopoly power. A contrary holding would impose grave legal consequences upon organizational distinctions that are of de minimis meaning and effect [citation omitted]. Given that price fixing is a legitimate Capper-Volstead purpose--even where such activity fosters a monopoly of one or more agricultural associations--the § 2 combination and conspiracy allegation

⁷²⁵ 512 F. Supp. at 641.

⁷²⁶ 512 F. Supp. at 643.

must fall under the weight of Congress' s intent to immunize such conduct from the antitrust laws.⁷²⁷

The private canner also charged that the bargaining association had illegally monopolized the market for canning tomatoes. Since this case fell within the jurisdiction of the 9th Circuit, the court cited *Case-Swayne* to show that the second element of *Grinnell* rendered unlawful "...the wrongful use and exercise of [monopoly] power."⁷²⁸ Taking guidance from *Fairdale Farms*, this court held "wrongful" as used in *Case-Swayne* meant "predatory." Thus, this court agreed with the 2nd Circuit that a plaintiff had to establish that a cooperative with Capper-Volstead status either acquired or exercised monopoly power in a predatory fashion to prove the cooperative monopolized or attempted to monopolize commerce in violation of Section 2 of Sherman.⁷²⁹

United States v. DI Revisited

Three months after Judge Bootle's decision in *Kinnett*, the U. S. Court of Appeals for the 6th Circuit issued its opinion in the Government's case against DI. The trial court said that DI's requirement that buyers sign full or committed supply contracts before DI would sell them milk was not a predatory practice and therefore did not indicate any violation of antitrust law.⁷³⁰ The Justice Department made a partial comeback on appeal. The U. S. Court of Appeals for the 6th Circuit found that the district court:

⁷²⁷ *GVF Cannery v. California Tomato Growers Ass'n*, 511 F. Supp. 711, 714-715 (N. D. Cal. 1981).

⁷²⁸ 511 F. Supp. at 716.

⁷²⁹ *Id.* The judge determined that GVF Canning had not properly pleaded predatory conduct on the part of California Tomato Growers Ass'n and gave it 60 days to file an amended complaint. In accord with the basic holding that a plaintiff has to prove predatory conduct before producers can be held to have engaged in an illegal restraint of trade, *Amarel v. Connel*, 1994-1 Trade Cases (CCH) ¶ 70,632 (D. D. Cal 1993).

⁷³⁰ *United States v. Dairy men, Inc.*, 1978-1 Trade Cases (CCH) ¶ 62,053 (W. D. Ky. 1978).

...set too high a burden on the Government when it required the Government to show that D.I.'s practices rose to the level of predatory practices, *i.e.*, anticompetitive practices without any business justification. The offense of attempt to monopolize requires only that the defendant has engaged in anticompetitive conduct with a specific intent to monopolize and that there was a dangerous probability that the attempt would be successful. (cites omitted) The district court did not determine whether D.I. used its full supply and committed supply contracts and exclusive hauling contracts with the specific intent to monopolize...

Although there is evidence of economic justification for the use of full supply and committed supply contracts, the question of intent is paramount. An anticompetitive practice may have economic justification, but its use may be undertaken with unlawful intent and in the desire to achieve an unlawful goal. On remand... the most important inquiry is whether these contracts were intended to stifle competition or were intended to meet legitimate business purposes.⁷³¹

This Sixth Circuit opinion is somewhat at odds with the Second Circuit opinion in *Fairdale Farms v. Yankee Milk*.⁷³² The Second Circuit held that Section 1 of Capper-Volstead protected cooperative conduct that did not rise to the level of a predatory practice, an anticompetitive practice without any business justification. The Sixth Circuit did not question the ability of producers to accumulate monopoly power through voluntary combination. But it said that a cooperative could be found in violation of antitrust law for acquiring that power through the use of anticompetitive practices with a business justification if the conduct was undertaken with a specific intent to stifle or eliminate competition.

On remand, in an unreported opinion, the district court held that DI's actions, taken as a whole, demonstrated a specific intent to

⁷³¹ *United States v. Dairymen, Inc.*, 660 F.2d 192, 194-195. (6th Cir. 1981), *aff'g in part, rev'g in part, and remanding*, 1978-1 Trade Cases (CCH) ¶ 62,053 (W.D. Ky. 1978).

⁷³² *Fairdale Farms v. Yankee Milk*, 635 F.2d 1037 (2nd Cir. 1980).

monopolize the fluid milk market in the Southeast.⁷³³ However, it rejected the Government's claim that DI violated Section 2 of the Sherman Act because it found that the Government didn't meet its burden of proof under the first element of *Grinnell*, to establish that DI could control prices or exclude competitors from the relevant markets.

The district court did find DI's full and committed supply contracts violated Section 3 of the Clayton Act.⁷³⁴ The court said that DI had "sound and legitimate" reasons for entering into the agreements. Nonetheless, at the time the contracts were obtained, DI had sufficient market share (59.5 percent) to exclude competitors from markets they had previously served, and the contracts achieved that end.⁷³⁵

On appeal, the Sixth Circuit affirmed the district court opinion.⁷³⁶ The court never mentioned the language in Section 1 of Capper-Volstead authorizing producer associations to "make the necessary contracts and agreements" to carry out their legitimate business objectives.⁷³⁷ The appellate court just seemed to accept the district court finding that a full or committed supply contract, negotiated by a cooperative with an undefined but substantial market share, was inherently intended to lessen competition and therefore a violation of Section 3 of Clayton.

Midwest Milk Revisited

In January, 1981, after 10 years of argument that produced a record of more than 15,000 pages, Judge Oliver issued a 140-page

⁷³³ The district court opinion is summarized in the subsequent opinion of the 6th Circuit, *United States v. Dairymen, Inc*, 1985-1 Trade Cases (CCH) ¶ 66,638 (6th Cir. 1985).

⁷³⁴ Section 3 of the Clayton Act (15 U.S.C. § 14) forbids agreements not to buy the goods of a competitor if the effect of the agreement may be to substantially lessen competition or tend to create a monopoly.

⁷³⁵ 1985-1 Trade Cases (CCH) ¶ 66,638, at 66,156-7.

⁷³⁶ *United States v. Dairymen, Inc*, 1985-1 Trade Cases. (CCH) ¶ 66,638 (6th Cir. 1985).

⁷³⁷ 7 U.S.C. § 291.

exhaustive summary of the facts and allegations in the case. He directed judgments be entered on behalf of the defendants in all three phases of the litigation on the grounds that none of the parties had presented sufficient evidence to prove their allegations.⁷³⁸

AMPI, Mid-Am, and NFO all appealed to the U.S. Court of Appeals for the 8th Circuit. The appellate court issued a lengthy opinion covering a broad range of issues.⁷³⁹

The court summarizing the facts of the case and the general antitrust principles as modified by the Capper-Volstead Act. Citing *Fairdale Farms*, the court noted that agricultural "cooperatives may, singly or in combination with other exempt cooperatives, obtain monopoly power in a given market so long as it is achieved through natural growth, voluntary confederation and without resort to predatory or anti-competitive practices."⁷⁴⁰

On the complex issue of the standard to be used in determining whether cooperative conduct is outside the protection of Capper-Volstead, the Eighth Circuit sided with the Sixth Circuit opinion in *United States v. Dairymen, Inc.*, saying:

Whether a co-op's given business practice is unlawful thus is not merely a question of whether it is "predatory" in a strict sense, e.g., lacking a legitimate business justification. As the Sixth Circuit recently noted, "[a]n anti-competitive practice may have economic justification, but its use may be undertaken with unlawful intent and in the desire to achieve an unlawful goal." *United States v. Dairymen, Inc.*, 660 F.2d 192, 195 (6th Cir. 1981). That court squarely rejected the argument that Section 2 prohibits co-ops only from engaging in narrowly defined "predatory practices." *Id.* at 194. We agree. A cooperative may not use its position, no

⁷³⁸In re Midwest Milk Monopolization Litigation, 510 F. Supp. 381 (W.D. Mo. 1981), *aff'd in part, rev'd in part, and remanded*, Alexander v. National Farmers Organization, 687 F.2d 1173 (8th Cir. 1982), *cert. denied*, 461 U.S. 937 (1983).

⁷³⁹Alexander v. National Farmers Organization, 687 F.2d 1173 (8th Cir. 1982).

⁷⁴⁰687 F.2d at 1182.

matter how lawfully acquired, "to stifle or smother competition." *Maryland & Virginia Milk Producers Assoc.*, *supra*, 362 U.S. 463. Where such an unlawful intent is clear, overt acts in furtherance of this purpose are not immunized simply because they also have other justifications or because they are merely "anticompetitive" rather than "predatory."⁷⁴¹

After concluding that NFO met the structural tests for Capper-Volstead protection, the court sustained Judge Oliver's dismissal of the established cooperatives' claims against NFO. The court rejected claims that NFO illegally coerced or induced members of other cooperatives to join NFO. It held that asking members of other cooperatives to join NFO actually fostered legitimate competition where none existed.⁷⁴² The court also found that NFO withholding actions, not directed at eliminating competition, were protected by Capper-Volstead.⁷⁴³

The appellate court, however, reversed Judge Oliver's findings that Mid-Am and AMPI had not engaged in illegal conduct. The Eighth Circuit held the district court had reached a clearly erroneous factual conclusion that the cooperatives had not engaged in predatory conduct. It also stated the judge erred in looking at each action by the Mid-Am and AMPI separately rather than analyzing them collectively and finding an intent to eliminate competition.

The court noted the cooperatives were free to act in concert to eliminate competition among themselves and to gain market share and raise milk prices through lawful means. But, they could not engage in conduct designed to eliminate competition from other parties. It noted that conflicting evidence would justify the finding of the trial court that

⁷⁴¹ 687 F.2d at 1183. But in a subsequent decision the 10th Circuit seemed to accept the standard set by the 2nd Circuit in *Fairdale Farms*. It stated that Capper-Volstead protected cooperative conduct that did not involve anti-competitive agreements with non-producers or "predatory tactics..." *Holly Sugar v. Goshen County Cooperative Beet Growers, Ass'n*, 725 F.2d 564, 569 (10th Cir. 1984).

⁷⁴² 687 F.2d at 1187-1188.

⁷⁴³ 687 F.2d at 1188.

many actions of the cooperatives, viewed in isolation, were not unlawful. But some conduct was clearly predatory in nature and, when their conduct is viewed as a whole, the only conclusion that can be drawn is that Mid-Am and AMPI conspired to monopolize the market for Grade A milk and to eliminate competition in that market.⁷⁴⁴

The court referred to several actions as evidence of a general intent to monopolize and eliminate competition.

1. The cooperatives vigorously opposed attempts by NFO to become "qualified" as a cooperative under Federal milk market orders. Their actions included numerous letters and personal contacts with key State and Federal government officials questioning NFO's qualifications. They also proposed an amendment to the definition of "cooperative association" under the applicable orders which, if adopted, would have seriously hindered NFO's efforts to become qualified. The court held that while this activity was not illegal in and of itself under the *Noerr-Pennington* doctrine,⁷⁴⁵ it could be considered to indicate the purpose of other, unprotected activity.⁷⁴⁶

2. The court discussed examples of the Mid-Am and AMPI short-shipping and making late deliveries to dairies that bought milk from NFO rather than from them, charging discriminatory "fees" only to dairies who bought from nonmember producers, and threatening to stop shipping milk to a dairy that bought from NFO. The court found such conduct "plainly predatory" as well as further evidence of an overall intent to eliminate NFO as a competitor.⁷⁴⁷

⁷⁴⁴ 687 F.2d at 1193.

⁷⁴⁵ In the 1960's the Supreme Court was asked to balance the conflicting goals of policies (1) protecting private rights to petition the government for a redress of grievances and (2) prohibiting conspiracies to monopolize and eliminate competition. In two separate cases, the Supreme Court held concerted effort aimed solely at influencing public officials did not violate the Sherman Act. *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

⁷⁴⁶ 687 F.2d at 1195-1196.

⁷⁴⁷ *Id.* at 1198.

3. Mid-Am and AMPI threatened to sue dairies that bought milk from NFO on the grounds that they were aiding and abetting NFO's allegedly illegal attempts to induce cooperative members to market through NFO. The courts found this was further evidence of an unlawful attempt to prevent NFO from being a competitor in milk marketing.⁷⁴⁸

When it viewed the record as a whole, the court concluded, "The foregoing pattern of conduct establishes that (the cooperatives) conspired to gain control over milk marketing and to eliminate competition through unlawful practices."⁷⁴⁹

The 8th Circuit remanded the case to the district court to determine the level of damages due NFO. Normally, at this stage of the proceedings, a case winds down and disappears below the radar screen. But this was not a normal case.

After 3 years Judge Oliver, who was probably not too pleased to have his original opinion overturned or to see this set of litigants again, ruled that NFO had not proven it was entitled to any damages.⁷⁵⁰ NFO appealed. The Eighth Circuit sustained his denial of NFO request for injunctive relief. But it held NFO was entitled to substantial monetary damages.⁷⁵¹

The wrangling continued until finally, in 1991, the litigation was settled when NFO agreed to drop all claims against Mid-Am and AMPI in exchange for a cash payment of \$21.4 million.

While NFO "won" the ultimate battle, it suffered some unexpected casualties. Farmers throughout the Midwest were sick and tired of their organizations in constant turmoil with each other. At the time of the settlement, NFO President DeVon Woodland, who had succeeded Oren Lee Staley and continued his policies of attacking large cooperatives and agri-business in general, declared NFO was headed for a new era.

⁷⁴⁸ *Id.* at 1203.

⁷⁴⁹ *Id.* at 1207.

⁷⁵⁰ *Alexander v. National Farmers Organization*, 614 F. Supp. 745 (W.D. Mo. 1985).

⁷⁵¹ *National Farmers Organization v. AMPI*, 850 F.2d 1286 (8th Cir. 1988), *aff'g in part, rev'g in part, and remanding*, 614 F. Supp. 745.

A half-year later, in December 1991, Woodland was voted out of office at the NFO annual meeting and succeeded by Steven Holloran, a young farmer from Nebraska, who had never met Oren Lee Staley.

NFO, now flush with cash for the first time in its history, was ready to move from constant confrontation to more cordial conciliation with other agricultural groups. It was time for cooperatives to focus on making money for their farmer-members instead of their lawyers.

Kinnett Dairies v. DI Revisited

Kinnett Dairies appealed Judge Bootle's adverse ruling in its case against Dairymen, Inc. Kinnett's main contention, based on the 6th Circuit's decision in the Government's case against DI,⁷⁵² was that the district court had used an overly stringent test of requiring it to show predatory conduct to prevail.

The Eleventh Circuit Court of Appeals, which had jurisdiction over Kinnett's case, issued a brief opinion rejecting Kinnett's claim. It referred to the Judge Bootle's specific finding that DI had "no conscious intent to stifle or smother competition.... (512 F. Supp. at 643)" and found Kinnett's reliance on the 6th Circuit opinion did not sustain its request for reversal.⁷⁵³

SECTION 2 OF CAPPER-VOLSTEAD

Congress deemed it necessary to provide a mechanism to prevent producers from abusing their combined market power to the detriment of consumers. Section 2 of the Capper-Volstead Act⁷⁵⁴ doesn't directly limit the ability of producers to accumulate market power through their cooperative. However, it does bar producer associations from monopolizing or restraining trade and using their market power to unduly enhance the prices they charge for the products they sell.

⁷⁵² United States v. Dairymen, Inc., 660 F.2d 192 (6th cir. 1981).

⁷⁵³ Kinnett Dairies v. Dairymen, Inc., 715 F. 2d 520, 521 (11th Cir. 1983), *aff'g*, 512 F. Supp. 608 (M.D. Ga. 1981).

⁷⁵⁴ 7 U.S.C. § 292.

USDA Enforcement

In Section 2, Congress directed that if the Secretary of Agriculture determines a producer association "monopolizes or restrains trade...to such an extent that the price of any agricultural product is unduly enhanced thereby, he shall..." serve a complaint stating the reasons for his action and a notice of hearing for the cooperative to show cause why the Secretary should not issue an order directing it to cease the challenged conduct."⁷⁵⁵

After the hearing, if the Secretary believes that an association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced thereby, he or she shall issue an order reciting the facts found and directing the association to cease and desist from its monopolization or restraint of trade.

If the association fails to comply with the order within 30 days, the Secretary is required to file a certified copy of the order and certified copies of all records in the matter, in U.S. district court in the judicial district in which the association has its principal place of business.

The Department of Justice is responsible for enforcing the order. The district court may affirm, modify, or set aside the Secretary's order; issue a temporary injunction against the cooperative while the case is pending; and "a permanent injunction or other appropriate remedy" after it hears argument.⁷⁵⁶

A particularly vexing aspect of Section 2 is ascertaining an objective standard for determining when the price of an agricultural product is "unduly enhanced." This issue has been the subject of some academic inquiry, but never an administrative or judicial decision.

In a simple sense, "unduly" and "unreasonably" are synonyms. So a price is unduly enhanced when it is unreasonable or excessive under the circumstances. But also in a simple sense, to say a price is illegal when it becomes "unreasonable" is like having no standard at all. How, or if, this issue will be addressed in uncertain at this time.

⁷⁵⁵ *Id.*

⁷⁵⁶ *Id.*

Apparently, until 1953, responsibility for enforcing Section 2 of Capper-Volstead rested in the Office of the Secretary of Agriculture. In 1953, that responsibility was assigned to the Office of the Solicitor.⁷⁵⁷

In 1959, the Secretary revoked the previous delegation of authority and created a three-person committee to "...carry out the responsibilities assigned to the Secretary of Agriculture by the Capper-Volstead Act...."⁷⁵⁸ The members of the original so-called Capper-Volstead Committee were the general counsel (chair), the administrator of the Agricultural Marketing Service, and the administrator of the Farmer Cooperative Service.

In 1972, Secretary Earl Butz, who might have seen the committee as a waste of time and money, terminated it.⁷⁵⁹ By 1975, Secretary Butz was under mounting pressure from cooperative critics and antitrust enforcement officials who questioned USDA's commitment and ability to enforce Section 2 of Capper-Volstead. He responded by appointing a new Capper-Volstead committee. This time the committee consisted of the general counsel (chair), the Assistant Secretary for Marketing and Consumer Services, and the director of Agricultural Economics.⁷⁶⁰

Two reports, issued in 1979, increased the institutional pressure on USDA to be more aggressive in monitoring cooperatives. The first, by the Presidentially-appointed National Commission for the Review of Antitrust Laws and Procedures, recommended that enforcement authority under Section 2 of Capper-Volstead be clearly

⁷⁵⁷ Office of the Secretary, Memorandum No. 1332, 18 Fed. Reg. 4408 (1953).

⁷⁵⁸ Office of the Secretary, Administration of Capper-Volstead Act, 24 Fed. Reg. 8335 (1959).

⁷⁵⁹ Office of the Secretary, Administration of Capper-Volstead Act, 37 Fed. Reg. 3196 (1972).

⁷⁶⁰ Office of the Secretary, Capper-Volstead Act, Assignment of Responsibility, 40 Fed. Reg. 6696 (1975). In 1981, the Secretary reauthorized the Capper-Volstead Act Committee as it is currently composed. It is chaired by USDA's chief economist (7 C.F.R. § 2.29(a)(9)). The other two members are the general counsel (7 C.F.R. § 2.31(n)) and the Under Secretary for Marketing and Regulatory Programs (7 C.F.R. § 2.22(a)(9)).

separated from USDA's activities to promote cooperatives, either within the Department or by moving Section 2 authority outside of USDA.⁷⁶¹

The second, by the General Accounting Office, recommended that USDA establish a more active oversight program including (1) the active monitoring of cooperative pricing activities and (2) the placement of the Capper-Volstead enforcement responsibilities in an agency separate from USDA's cooperative promotion functions.⁷⁶²

Critics seemed most concerned that USDA didn't have a procedure in place to continuously review prices charged by cooperatives for undue price enhancement. They felt USDA's position of waiting for and responding to outside complaints was ineffective.

In June, 1979, the USDA Capper-Volstead Committee issued a paper outlining a possible approach to establishing a new office within USDA to identify and investigate potential incidents of undue price enhancement.⁷⁶³

The following month, USDA published Proposed Rules of Practice for proceedings to enforce Section 2 of the Capper-Volstead Act.⁷⁶⁴ In early 1980, USDA published a Final Rule formalizing procedures to implement Section 2 of Capper-Volstead.⁷⁶⁵

The regulations begin with an open invitation for anyone to submit information on activity by a cooperative that could trigger an enforcement action.⁷⁶⁶ However, USDA chose not to establish a

⁷⁶¹ National Commission for the Review of Antitrust Laws and Procedures, Report to the President and the Attorney General, January 22, 1979, p. 263.

⁷⁶² General Accounting Office, Family Farmers Need Cooperatives --But Some Issues Need to Be Resolved (CED-79-106, July 26, 1979).

⁷⁶³ USDA Capper-Volstead Study Committee, Undue Price Enhancement by Agricultural Cooperatives: Criteria, Monitoring, Enforcement (June 1979).

⁷⁶⁴ Proposed Rules of Practice Governing Cease and Desist Proceedings Under Section 2 of the Capper-Volstead Act, 44 Fed. Reg. 39409 (1979)

⁷⁶⁵ Rules of Practice Governing Cease and Desist Proceedings Under Section 2 of the Capper-Volstead Act. 7 CFR § 1.160-1.175. The Final Rule is published at 45 Fed. Reg. 6587 (1980). Technical amendments to the regulation are published at 60 Fed. Reg. 8457-8459 (February 14, 1995).

⁷⁶⁶ 7 CFR § 1.162(a).

separate monitoring and investigation office.

In 1990, the General Accounting Office (GAO) once again called for USDA to actively monitor cooperative pricing practices. This time GAO suggested that Congress keep an eye on USDA. If the Department didn't become more active in enforcing Section 2 of Capper-Volstead, GAO recommended legislation transferring enforcement authority to the Federal Trade Commission.⁷⁶⁷

In early 1991, the Capper-Volstead Act Committee published a Notice in the Federal Register reminding the public of USDA's Section 2 enforcement mechanisms.⁷⁶⁸ No other changes in USDA policy on Capper-Volstead Section 2 enforcement procedures have been implemented.

At one time, the Department of Commerce had similar regulations concerning enforcement of the Fishermens Collective Cooperative Marketing Act. In 1996, they were removed from the Code of Federal Regulations as no longer needed because "...no... complaints have been filed and (the Department) is unaware of any complaints that may be filed."⁷⁶⁹

The Secretary of Agriculture has never been called upon to determine whether an association has restrained trade to such an extent that it has unduly enhanced prices. Thus there are no administrative rulings or court decisions interpreting Section 2.

This is not an indication of any lack of diligence on the part of the Secretary of Agriculture or of competitors and customers of cooperatives to look for instances of abusive trade restraint by cooperatives. Nor does it mean farmers are such good citizens that they would never even consider testing the limits of permissible conduct. Rather, it reflects (1) the nature of agriculture and the mind set of many farmers and (2) the lack of meaningful penalties in Section 2 of Capper-Volstead.

⁷⁶⁷ General Accounting Office, Dairy Cooperatives: Role and Effects of the Capper-Volstead Antitrust Exemption (RCED-90-186, September 1990), p. 32.

⁷⁶⁸ Notice, Providing Information Regarding Undue Price Enhancement Under the Capper-Volstead Act, 56 Fed. Reg. 4594 (February 5, 1991).

⁷⁶⁹ 61 Fed. Reg. 8224 (March 4, 1996).

Barriers to entry into the production of most agricultural products are quite low. Since farmers can't control production, as soon as a cooperative earns higher prices for its members, more people begin producing that product, supply soon outstrips demand, and prices fall.

Also, many farmers are independent by nature. Some simply don't want anyone else involved in their business operations. While they may buy supplies and services from a cooperative, they aren't inclined to participate in a group marketing scheme--especially if a marketing contract is involved. This usually requires surrendering some control over their crops and/or animals to a manager and board of directors.

Some suggest that a real failing of the farmer cooperative movement has been the inability of producer associations to ever acquire enough market power to even approach the threshold of unduly enhancing their prices. Whether the continuous evolution of agricultural markets and cooperative structure will result in producers acquiring that power is a matter of pure conjecture at this time.

Also, it should be noted that the only penalty available to the Department in a Section 2 enforcement action is the issuance of a cease and desist order. If a party is successful in a private antitrust suit, it can collect three times its actual damages. This is a strong incentive to forego administrative channels in favor of litigation.

Limits on USDA Jurisdiction

Producer associations generally assume they will receive more favorable treatment from USDA than from the Department of Justice or the Federal Trade Commission. Thus, they have attempted to establish that Section 2 of Capper-Volstead gives the Secretary of Agriculture exclusive jurisdiction over allegations that they engaged in anti-competitive behavior. Failing to establish exclusive jurisdiction in USDA, they have then tried to show USDA has primary jurisdiction.

The U.S. Supreme Court addressed the jurisdiction issue in its first interpretation of the Capper-Volstead Act, holding Section 2 establishes an additional tool to limit anticompetitive conduct and in no

way shields producers from liability for conduct that violates the Sherman Act.⁷⁷⁰

Sunkist Growers raised the issue of USDA jurisdiction in relation to that of the Federal Trade Commission (FTC). In May 1977, the FTC issued a formal complaint charging Sunkist with engaging in unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act.⁷⁷¹ Most of the allegations centered on Sunkist's exclusive dealing arrangements with various packing houses serving its orange and lemon growers. In August 1980, the dispute was settled. Sunkist would sell its Arizona processing plant and refrain from purchasing other processors or signing contracts with additional packing houses for a limited number of years without prior FTC approval.⁷⁷²

During the administrative process, Sunkist filed a complaint in Federal district court seeking injunctive relief on the basis that the FTC was operating outside its statutory jurisdiction. Sunkist asserted the Capper-Volstead Act vested exclusive jurisdiction over any anticompetitive activity by an agricultural marketing association in the Secretary of Agriculture. In the alternative, it argued the doctrine of primary jurisdiction requires USDA to act or fail to act before the FTC can interfere with such a cooperative.

Sunkist admitted that the *Borden* decision holds that if the charges were brought under Section 2 of the Sherman Act, the Department of Justice has jurisdiction. However, it asserted that different rules apply to the FTC. To support its case, Sunkist referred to congressional consideration, and rejection, of an attempt to designate the FTC as the agency charged with enforcing the provisions of Section 2 of Capper-Volstead.

⁷⁷⁰ United States v. Borden, 308 U.S. 188, 205-206 (1939), *rev'g*, 28 F. Supp. 177 (N.D. Ill. 1939).

⁷⁷¹ 15 U.S.C. § 45.

⁷⁷² This case is covered in great detail in a book: Fritz F. Mueller, Peter G. Helmberger & Thomas W. Paterson, *The Sunkist Case, A Study in Legal-Economic Analysis* (Lexington MA: Lexington Books, 1987).

A Federal district court judge rejected Sunkist's position and issued a judgment for the FTC.⁷⁷³ The judge noted that USDA might have jurisdiction over allegations of undue price enhancement. However, the FTC charged Sunkist with engaging in monopolistic practices intended to deter entry and reduce the number of competitors in the industry. As USDA does not have any express jurisdiction in these areas, the FTC properly asserted jurisdiction over Sunkist.

Section 2 of Capper-Volstead also does not stand as a barrier to private litigation. During one of its holding actions to raise the price of milk, some NFO members used threats and some actual violent acts to attempt to prevent members of a competing cooperative from delivering their milk to market. The competing cooperative sued NFO and the members on several grounds, including conspiring to restrain trade in violation of Section 1 of Sherman.

NFO raised Section 2 of Capper-Volstead as a defense, arguing that the Secretary of Agriculture, not the court, had jurisdiction over the events as they were intended to enhance prices. The court disagreed, holding that when violence is alleged in a non-frivolous manner, the court has jurisdiction to hear the case.⁷⁷⁴

⁷⁷³ *Sunkist Growers v. Federal Trade Commission*, 464 F. Supp. 302 (C.D. Cal. 1979).

⁷⁷⁴ *Cincinnati Milk Sales Ass'n v. NFO*, 1967 Trade Cases (CCH) ¶ 72,092 (S.D. Ohio 1967).

CHAPTER 7: ODDS AND ENDS

Over the years, antitrust issues concerning cooperatives have come before the courts that may not necessarily go to the heart of producers' protections under Capper-Volstead and other laws, but are significant to the parties when they arise. This section summarizes how these issues have come up and how they have been resolved.

COOPERATIVES, EMPLOYEES AND MEMBERS

The relationship of a cooperative with its employees and members under antitrust law was reviewed in a case brought by a terminated milk hauler against a dairy cooperative.

Rollin Green was an independent milk hauler who picked up milk from AMPI members and delivered it to a local dairy under a contract with AMPI. Several members complained about the quality of Green's hauling service and threatened to resign from AMPI because of it. AMPI employees consulted with a hauling committee of its members, terminated Green's contract, and allocated his customers to two other contract haulers.

In an antitrust action, Green alleged various conspiracies in violation of Section 1 of the Sherman Act. Both sides moved for summary judgment. The district court judge decided all issues in favor of AMPI and the U.S. Court of Appeals for the Eighth Circuit affirmed.⁷⁷⁵

The first allegation charged AMPI and three of its employees conspired to restrain trade in the milk hauling business. The court noted that two entities are required to establish a conspiracy and a corporation and its employees, agents, and officers are generally considered a single entity incapable of conspiring with each other.

An exception to this general rule exists if the employees, agents, or officers are, at the time of the conspiracy, acting for their own behalf. While Green alleged the employees were doing so, no

⁷⁷⁵ Green v. Associated Milk Producers, Inc., 1981-2 Trade Cases (CCH) ¶ 64,346 (D. Minn. 1981), *aff'd*, 692 F.2d 1153 (8th Cir. 1982).

evidence in the record supported that charge. The court held the general rule that a corporation and its employees, agents, and officers were a single entity not capable of engaging in a conspiracy applied to the cooperative and dismissed this allegation.⁷⁷⁶

The second allegation charged AMPI, its employees, and its members conspired to boycott and refused to do business with Green. The court cited Section 6 of the Clayton Act and Section 1 of the Capper-Volstead Act to support its finding that the cooperative and its members were also a single entity for antitrust purposes. It also dismissed this charge.⁷⁷⁷

A district court in Arkansas reached a similar conclusion in a case brought by growers terminated by their cooperative when it withdrew from serving the area where they farmed. Among the growers' numerous allegations were charges that the cooperative, its board president, and chief executive officer conspired to restrain trade in violation of Section 1 of Sherman. Although the court found Capper-Volstead did not apply to the facts, it nonetheless granted summary judgment for the cooperative and the other defendants because plaintiffs had failed to introduce any evidence that the board president and chief executive officer acted outside of their scope of authority or did anything contrary to the interests of the cooperative.⁷⁷⁸

Thus, the courts have established that a cooperative, its employees, and its members are, as a general rule, a single entity and by law not capable of conspiring among themselves in violation of the antitrust law.

COOPERATIVES AND CONTRACTORS

Green alleged a third conspiracy, that AMPI and the milk haulers given his former customers conspired to stifle competition in the milk hauling business. The court noted that Capper-Volstead does not shield a conspiracy between a cooperative and non-cooperatives. Nonetheless, AMPI's motion for summary judgment was granted on

⁷⁷⁶ 692 F.2d at 1156-1157.

⁷⁷⁷ 692 F.2d at 1157.

⁷⁷⁸ *Ripplemeyer v. National Grape Cooperative Association*, 807 F. Supp. 1439, 1460 (W.D. Ark. 1992).

this issue because Green failed to provide any evidence that the other haulers conspired with AMPI to terminate Green. AMPI's action was unilateral, with the contract haulers only input being a subsequent decision to take over Green's route.⁷⁷⁹

Green makes it is clear that a cooperative and its contractors can't be engaged in a conspiracy when the underlying decision for a change in their relationship was made unilaterally by the cooperative.

A second case involving a cooperative's relationship with an unhappy contract milk hauler was decided shortly after *Green*. In this instance two cooperatives had jointly negotiated a hauling contract with L & L Howell to truck their commingled milk to the same dairy.⁷⁸⁰ When Howell decided the contract wasn't as favorable as he had hoped, he asked to cooperatives to renegotiate. When they refused, Howell sued alleging the cooperatives violated the Sherman Act by conspiring and using their monopoly power to coerce him to accept an unreasonably low and therefore "predatory" fee for his trucking services.

The trial court judge allowed the case to go to the jury, which found for Howell and awarded him \$136,000 for lost profits. The cooperatives appealed the judge's failure to direct a verdict for them on all issues to the Sixth Circuit Court of Appeals.

The cooperatives raised Capper-Volstead as a defense to Howell's claims. Relying on *Green v. AMPI* and another case, the court held that milk hauling is among the cooperative activities protected by Capper-Volstead. The court noted that the only evidence of coercion was the fact that the two cooperatives controlled about 85 percent of milk produced in the local area and said:

This near monopoly status is precisely what the Capper-Volstead Act makes lawful, and it would not be unlawful even if defendants controlled 100% of the farmers. The evidence does not suggest that the cooperatives sought to expand their monopoly power by setting the price of milk

⁷⁷⁹ *Green v. AMPI*, 692 F.2d 1153, 1157 (8th Cir. 1982).

⁷⁸⁰ *L & L Howell v. Cincinnati Cooperative Milk Sales*, 1983-2 Trade Cases (CCH) ¶ 65,595 (6th Cir. 1983).

hauling or eliminating competition among haulers; the cooperatives themselves did not engage in milk hauling and evidenced no intention of doing so. They simply obtained an advantageous price of hauling for the benefit of their members. . . .⁷⁸¹

The court concluded that offering a price to a contractor, even an unreasonable low one, "is simply not the type of predatory or anticompetitive behavior the courts have forbidden to dairy cooperatives. Plaintiff Howell was not coerced into accepting the low price to eliminate or restrain competition, and the Capper-Volstead Act protects cooperatives that lawfully acquire and use their monopoly power."⁷⁸²

Thus, two Capper-Volstead cooperatives with a high combined market share are not exposed to antitrust liability simply for signing an advantageous agreement with the same contractor.

DIRECTOR, EMPLOYEE, AND ADVISER LIABILITY

Officers, directors, or agents of a cooperative, like those of any other business corporation that violates the penal provisions of the antitrust laws, may be prosecuted if they are responsible for the violation.

In its jury instruction in a private antitrust case,⁷⁸³ the court said that ordinarily an officer of a cooperative and the cooperative cannot conspire together. When the officer acts, he or she normally acts on behalf of the cooperative, and under the law, this is the conduct of a single person, so no conspiracy is possible. However, the court said, when an officer of one entity also has an interest in a second entity and acts on behalf of both entities, or on behalf of one entity and his own account, a dual role is created and a jury may find a conspiracy occurred.

⁷⁸¹ 1983-2 Trade Cases (CCH) at 68,969.

⁷⁸² *Id.* at 69,970. The Court of Appeals reversed the district court judgment and ordered the case dismissed.

⁷⁸³ *Cape Cod Food Products v. National Cranberry Ass'n*, 119 F. Supp. 900, 909 (D. C. Mass. 1954).

The court also noted later in the instructions that if an officer or director of a cooperative or other corporation had no connection with a violation of the antitrust laws, except that he or she happened to be an officer at the time the violation occurred, then the officer is not personally liable. The court said, "To be liable an individual must either himself participate or must authorize another to act or must with knowledge of the responsibility acquiesce in the act of another with which he is affiliated as an officer or in a like relationship."⁷⁸⁴

Subsequent private cases have held that a cooperative manager, other officers, the board president, and other directors, "(t)he individuals through whom a corporation acts and who shape its intentions," can be held liable for engaging in an illegal conspiracy with non-cooperative purchasers of the cooperative's product and for attempted monopolization in the conduct of their regular duties.⁷⁸⁵

A somewhat different standard was applied to counsel for a cooperative. The court in the *Tillamook(s)* case held counsel could not be held liable if his or her role was limited to the regular duty of providing legal advice, even if he or she mistakenly advised that a particular course of conduct would not violate antitrust law. However, if counsel goes beyond that role and acting alone or jointly with others makes policy decisions, then counsel can be held liable for antitrust violations just as any other officer of the company performing a similar function.⁷⁸⁶

SUPPLY CONTROL

One way to raise prices in the marketplace is to reduce available supply. Certainly a cooperative entity, whether selling raw product it controls or processed products made from raw commodities provided by its members, has the right to resell its inventory whenever it chooses. But it is less clear whether producer members can, through

⁷⁸⁴ *Id.* at 919.

⁷⁸⁵ *Tillamook Cheese & Dairy Ass'n v. Tillamook County Creamery Ass'n*, 358 F.2d 115, 118 (9th Cir. 1966). *See, also*, *Bergjans Farm Dairy Co. v. Sanitary Milk Producers*, 241 F. Supp. 476, 486 (E.D. Mo. 1965), *aff'd*, 368 F.2d 679 (8th Cir. 1966).

⁷⁸⁶ 358 F.2d at 118.

the mechanism of a producer association, agree among themselves to withhold product from the market to force buyers to pay a higher price for their products.

One administrative opinion interpreting the Fisherman's Collective Marketing Act suggests cooperative members may limit production.⁷⁸⁷ The Washington Crab Association was organized to negotiate higher prices and fairer terms of trade for its members from the processors who purchased their catches. When a stalemate developed, the fishermen "sat on the beach" for nearly a month, refusing to fish.

FTC Chairman Paul Rand Dixon found nothing wrong with the cooperative members limiting production, either by refusing to fish at all or by sending only a few boats out each day on a rotating basis to supply those processors willing to pay the association's requested price. He wrote:

To be sure, this is a "limitation on production" and, except for the exemption afforded... by the (FCMA)... would be a *per se* violation of the Sherman Act and the Federal Trade Commission Act... Thus, so long as the members of a cooperative are acting pursuant to an agreement *voluntarily* entered into among themselves, they are to be considered a single entity for antitrust purposes, the same as an ordinary business corporation with a number of "divisions." There is no obligation on the single corporation to produce at capacity; it may produce any volume that it likes and allocate production among its several "divisions" in such proportions as it sees fit... We see nothing unlawful in their limiting production by agreement among themselves, or in their "boat rotation."⁷⁸⁸

Another case involved a dairy producers association that sponsored a two-week milk withholding action to attempt to raise the price of milk for its members. The 8th Circuit Court of Appeals determined that since no member was coerced into participating and

⁷⁸⁷ In re Washington Crab Association, 66 F.T.C. 45 (1964).

⁷⁸⁸ 66 F.T.C. at 126-127.

the action was not intended to eliminate competition, it fell within the scope of conduct protected by the Capper-Volstead Act.⁷⁸⁹

In another action against crab fishermen, the Department of Justice said that commercial crab harvesters who simply agree among themselves to refrain from fishing while negotiating prices with buyers were engaged in a conspiracy to restrain trade in violation of Section 1 of Sherman. However, such conduct was protected by the Fisherman's Collective Marketing Act if the commercial crab fishermen formed a fishermen's marketing association before agreeing to limit production.⁷⁹⁰

It is uncontested, using the rationale of Chairman Dixon, that a value-added cooperative can, just like its non-cooperative competitors, limit the amount of product it offers for sale. These precedents suggest that members of a cooperative may voluntarily agree among themselves to limit their production as well.

Producers contemplating a withholding action should realize that if the action backfires, the courts may not be sympathetic to their plight. In 1975, lemon packing houses in Arizona, some of whom were members of the Sunkist system, withheld lemons from the market hoping to boost the prices received. But the final crop was larger than expected and the lemons were ultimately sold for less than they would have sold for at harvest.

Grower-members of Sunkist sued the for-profit packing house that packed and shipped their lemons under contract with Sunkist, alleging the withholding action violated Arizona antitrust law. The trial court jury found for the growers and awarded them damages for their losses.

The U.S. Court of Appeals for the Ninth Circuit reversed the order on the verdict.⁷⁹¹ The appellate court said, "The growers sought damages for the profits they would have realized had competition been

⁷⁸⁹ Alexander v. National Farmers Organization, 687 F.2d 1173, 1188 (8th Cir. 1982).

⁷⁹⁰ Competitive Impact Statement accompanying proposed consent judgment, Antitrust Division, Department of Justice, Oregon v. Mulkey, 1997-1 Trade Cases (CCH) ¶ 71,859 at 80,042 (D. Ore. 1997).

⁷⁹¹ Johnson v. Pacific Lighting Land Co., 817 F.2d 601 (9th Cir. 1987).

reduced. This is not the type of injury that (antitrust laws are) intended to forestall."⁷⁹²

COOPERATIVE OR UNION?

People who wish to deride cooperatives, particularly to others with a hostile attitude toward the labor movement, will sometimes call them little more than farmer unions. A case that began about the same time as *Borden*, but took significantly longer to make its way through the judicial system, addresses the important distinction between the cooperatives and labor unions under antitrust law.⁷⁹³

As noted earlier, during the Depression the economic conditions confronting fishermen were as challenging as those facing farmers. In 1934, Congress responded by passing the Fisherman's Collective Marketing Act. This extended the same antitrust protection to fishermen that farmers gained under Capper-Volstead.⁷⁹⁴

By the late 1930s, fishermen in the Pacific Northwest had formed a powerful association, the Pacific Coast Fishermen's Union. Membership included 90 percent of the commercial fishermen fishing off shore in Oregon and Washington and a substantial portion of the fishermen working the adjacent rivers and bays.

The Union played hardball. Members were forbidden by its constitution and bylaws from selling fish to processors not under contract with it. A packer or canner who signed up to take product from members was barred from buying fish from anyone not a member. Both the district and appellate court opinions relate that the Union engaged in boycotts, coercion, and other forms of what would today be called predatory conduct to keep both its members and its customers in line.

Apparently both the fishermen and the processors assumed they were engaged in an employee-employer relationship. The Union had applied for and been accepted as a member of the Congress of Industrial Organizations (CIO). The processors had formed an

⁷⁹² 817 F.2d at 605.

⁷⁹³ *Columbia River Packers Ass'n v. Hinton*, 34 F. Supp. 970 (D.C. Ore. 1939), *rev'd*, 117 F.2d 310 (9th Cir. 1941), *rev'd*, 315 U.S. 143 (1942).

⁷⁹⁴ *Supra*, pp. 142-145.

association, the Commercial Fisheries Association, to bargain with the Union.

When most of the other processors signed with the Union, Columbia River attempted to hold out. But in 1938, faced with a lack of product, it too signed. When independent fishermen who had been its suppliers offered to sell it fish, Columbia River told them it could not buy from them because of the exclusive dealings clause in its contract with the association. At this point the independent fisherman threatened to bring an antitrust suit against Columbia River.

As the 1939 fishing season approached Columbia River was, as the trial court put it, "Caught between two fires--the demand of the union that it renew the exclusive buying clause of the union contract, and the threat of the independent fishermen to claim damages.. if it does renew the exclusive buying clause...."⁷⁹⁵

Columbia River offered to buy fish from Union members at the price negotiated with the Commercial Fisheries Association, but not on an exclusive basis. When this offer was refused, Columbia River sued the Union and several of its leaders for engaging in an illegal conspiracy to restrain trade.

Columbia River asked the court to issue an injunction restraining the Union from interfering with its efforts to buy fish from nonmembers, a judgment invalidating the exclusive dealing clause of the contract, and damages. The judge issued a temporary restraining order preventing the Union from enforcing its rules barring (1) members from selling fish to packers or canners not under contract with the Union and (2) a packer or canner who signed up to take product from Union members from buying fish from anyone not a member.

As the case proceeded, the Union's primary defense was that the parties were engaged in a "labor dispute" between employees and an employer and the Norris-LaGuardia Act⁷⁹⁶ prohibits injunctions in labor disputes. In its brief, the Union also asserted it was a "trade association" protected by the Fisherman's Collective Marketing Act.⁷⁹⁷

⁷⁹⁵ 34 F. Supp. at 973.

⁷⁹⁶ 29 U.S.C. § 101 *et seq.*

⁷⁹⁷ 34 F. Supp. at 974.

Columbia River, challenging the conventional wisdom in the industry, argued the Norris-LaGuardia Act was not applicable. It showed the judge that the fishermen fished when and how they wanted without any control by it. He held that the Norris La-Guardia Act did not apply and then said "...the defendant union has more aptly described itself in claiming the benefits of the Fishermen's (Collective) Marketing Act. It is truly a cooperative marketing association, and we look to the law of cooperative marketing rather than to labor law in the determination of the legality of (its) acts."⁷⁹⁸

The judge cited and apparently had studied the *Borden* opinion more carefully than he had the Fisherman's Act. First, he mistakenly referred to the Secretary of Agriculture as having enforcement authority under the Fisherman's Act. Second, rather than analyzing the Union's conduct in light of the statutory law, he found for Columbia River on the basis that research had not uncovered any examples of agricultural marketing cooperatives requiring customers to buy exclusively from them or enforcing against their own members a requirement that they sell exclusively to buyers who had signed agreements with the cooperative.⁷⁹⁹ He held both strategies to be illegal restraints of trade and enjoined the Union from enforcing these rules without ever looking at whether the law allowed such restraints.⁸⁰⁰

The Union appealed to the 9th Circuit Court of Appeals. The only issue discussed in that court's opinion is the applicability of Norris-LaGuardia. The appellate court read Norris-LaGuardia to apply beyond traditional employee-employer relationships. It found the rules used by the Union were part of labor contracts protected from antitrust attack and reversed the trial court.⁸⁰¹

The U. S. Supreme Court accepted an appeal by Columbia River⁸⁰²

⁷⁹⁸ *Id.*

⁷⁹⁹ 34 F. Supp. at 974-975.

⁸⁰⁰ 34 F. Supp. at 977.

⁸⁰¹ *Hinton v. Columbia River Packers Ass'n*, 117 F.2d 310 (9th Cir. 1941).

⁸⁰² *Cert. granted*, 314 U.S. 600.

and reversed the 9th Circuit.⁸⁰³ In a brief opinion, the Court said that "Although affiliated with the C.I.O., the Union is primarily a fishermen's association, composed of fishermen who...carry on their business as independent entrepreneurs, uncontrolled by (Columbia River) or other processors."⁸⁰⁴

The Court described the Union as "a collective bargaining agency in the sale of fish caught by its members."⁸⁰⁵ It found the Norris-LaGuardia Act inapplicable because this dispute concerned the sale of fish between fish sellers and fish buyers and "...does not place in controversy the wages or hours, or other terms and conditions of employment."⁸⁰⁶

The case was remanded to the 9th Circuit which, perhaps not pleased to be reversed, issued a brief opinion now affirming the district court's conclusion that the Union was an illegal conspiracy to restrain trade.⁸⁰⁷ The 9th Circuit, without ever referring to the Fisherman's Collective Marketing Act, issued three terse findings that (1) Union did not qualify as an organization exempt from the antitrust laws, (2) the antitrust laws applied to Union, and (3) the fishermen had acquired the power to fix prices and control production which, the court said, "...we understand, is a violation of the Sherman Act."⁸⁰⁸

A subsequent criminal prosecution by the Government involving similar facts reached a similar conclusion.⁸⁰⁹ In this instance, commercial shrimp and oyster fishermen operating from Mississippi ports formed an association. The association secured contracts with all of the packers and canners in these ports requiring the processors to purchase all shrimp and oysters brought in by association members and

⁸⁰³ *Columbia River Packers Ass'n v. Hinton*, 315 U.S. 143 (1942), *rev'g*, *Hinton v. Columbia River Packers Ass'n*, 117 F.2d 310 (9th Cir. 1941).

⁸⁰⁴ 315 U.S. at 144-145.

⁸⁰⁵ 315 U.S. at 145.

⁸⁰⁶ 315 U.S. at 147.

⁸⁰⁷ *Hinton v. Columbia River Packers Ass'n*, 131 F.2d 88 (9th Cir. 1942).

⁸⁰⁸ 131 F.2d at 89.

⁸⁰⁹ *Gulf Coast Shrimpers and Oystermans Association v. United States*, 236 F.2d 658 (5th Cir. 1956).

to refrain from purchasing such product from boats outside the association. Although some of the boats were owned by the processors, all captains and crew working on association boats were paid a percentage of the value of each catch delivered to a processor (after the boat owner was reimbursed for fuel, food, and certain other operating expenses). Each boat fished when and where the captain chose and if the boat had a bad day neither the captain nor the crew got paid.

The transfer price for the catch was established according to schedules agreed to by the association and the packers and canners. At the trial, conflicting evidence was presented as to whether prices were established solely by the association or through discussion and negotiation with the processors.

The association probably attracted the Government's attention in 1951, when several hundred members picketed the docks in Pascagoula and forcefully prevented out-of-State fishermen from selling their shrimp catches to local packers. At trial, the Government also introduced evidence of the association coercing nonmember fishermen to join the association and boycotting buyers who didn't conform to association wishes.

The Government asserted that the fishermen were independent contractors engaged in price fixing with the packers and canners who purchased their catch. The defendants asserted they were a labor union of employees selling their services and the use of their vessels and equipment at wages determined at so many cents per pound of shrimp and oysters delivered. The jury was instructed that if it found the association was a union, then any talks with the packers and canners were protected negotiations over wages and other terms of employment. A jury found the defendants guilty of violating the Sherman Act.

The fishermen appealed the convictions but were unsuccessful for two reasons. First, the court, citing *Columbia River Packers Association v. Hinton*, held the fishermen had not proven that they were engaged in a "labor dispute" with the processors under the Norris-LaGuardia Act. Second, the court rejected a modest attempt by the fishermen to claim protection under the Fisherman's Collective Marketing Act. It did not dwell on the intent and scope of the law. It simply concluded that the fishermen's repeated use of coercive meth-

ods "exceeded any possible privilege or exemption granted by the...Act."⁸¹⁰

Thus, it was established that in a traditional agribusiness environment a union represents people negotiating wages and hours and other term of employment while a cooperative represents people negotiating terms of sale for something they produced. However, in the so-called "industrialized" agriculture, that distinction is becoming more difficult to discern. For example, when a poultry processor issues detailed instructions to a contract poultry grower on how the grower must raise the processor's chicks, the line between employee and independent contractor become more difficult to see.

As contract production spreads, the issue of whether grower associations will be considered unions or cooperatives by the courts will be one of potential interest to all parties involved.

CAPPER-VOLSTEAD AND EXPORTING

When cooperatives export products as part of their marketing function, the same antitrust rules apply as in their domestic operations.

Prior to 1966, Sunkist's export department relied on numerous exporting companies to generate and maintain sales to Hong Kong importers. That March, Sunkist terminated these arrangements and began direct sales to Hong Kong through a single broker of citrus fruits in the Far East, Reliance Commercial Enterprises. Reliance arranged for bids and letters of credit from Hong Kong importers. Sunkist performed the actual export functions, including handling, shipping, and insurance.

In six months Sunkist, which had been only an occasional shipper into the export market, captured nearly 70 percent of the Hong Kong market for American oranges. Several of the former brokers for Sunkist assigned their rights to sue to a Webb-Pomerene association in which they participated, Pacific Coast Agricultural Export Association.⁸¹¹ The association brought an antitrust action alleging

⁸¹⁰ 236 F.2d at 665.

⁸¹¹ The Webb-Pomerene Act (15 U.S.C. §§ 61-65) allows exporters to form associations for the sole purpose of marketing goods abroad. Such associations enjoy a limited antitrust exemption for that export trade.

Sunkist and Reliance violated sections 1 and 2 of the Sherman Act by conspiring to restrain trade and attempting to monopolize exports of oranges from California and Arizona to Hong Kong.

After a trial, the jury returned a general verdict against Sunkist and awarded monetary damages and attorneys' fees. The court also issued a limited injunction ordering Sunkist to terminate its exclusive sales agreement with Reliance and to stop refusing to sell oranges to other qualified exporters at competitive prices. The court denied association requests that it enjoin Sunkist from exporting oranges to Hong Kong, either directly or indirectly, and that it order the dissolution of Sunkist. Sunkist appealed the awarding of any equitable relief and the association appealed the denial of its request for additional penalties against Sunkist.

The U.S. Court of Appeals for the Ninth Circuit affirmed the trial court outcome.⁸¹² It held that an exclusive agency agreement is not illegal *per se* and that a good faith, economically motivated decision to switch exporters would also not subject Sunkist to antitrust liability. However, it found sufficient evidence existed to support the jury's finding that Sunkist's refusal to deal with its former brokers "was motivated by a desire to exclude the plaintiffs from the market or to accomplish some other anti-competitive objective."⁸¹³

Sunkist tried to avoid being penalized by arguing the plaintiffs hadn't shown they suffered any injury by its agreement with Reliance because Sunkist could have legally entered and dominated the Hong Kong market on its own under the shield of the Capper-Volstead Act. However, the court rejected this argument, finding Sunkist's course of action was not justified merely because it "might have achieved the same result by legal means."⁸¹⁴

The court then discussed each issue of equitable relief and determined the trial court had fashioned an appropriate remedy.

⁸¹² Pacific Coast Agricultural Export Association v. Sunkist Growers, 526 F.2d 1196 (9th Cir. 1975), *cert. denied*, 425 U.S. 959 (1976).

⁸¹³ 526 F.2d at 1203. *See also*, 526 F.2d 1204-1205.

⁸¹⁴ 526 F.2d 1206.

UNPROTECTED COOPERATIVES

By its wording, the Capper-Volstead Act is only available to associations of agricultural producers engaged in preparing for market and marketing member production. This raises a number of interesting issues. The first is whether the phrase "preparing for market" as used in Section 1 of Capper-Volstead is broad enough to encompass providing farm supplies and services to agricultural producers. The courts have never addressed this issue. But, this has not hampered farm supply cooperatives because the courts have found properly conducted cooperative supply activities do not violate the antitrust laws.

Other issues concern the status of farmer cooperatives compared to non-farm cooperatives. First, is there a legitimate basis for Congress to differentiate between types of cooperatives? And second, without Capper-Volstead protection, what is the status of nonagricultural cooperatives under the antitrust laws? Two cases decided in the early 1940s shed light on both of these matters.

The power of Congress to grant privileges to farmer cooperatives but not other types of cooperatives was approved in a case⁸¹⁵ concerning the Bituminous Coal Act of 1937.⁸¹⁶ The Coal Act was passed to stabilize the bituminous coal industry, which was facing "destructive competition" among producers. The heart of the act was a regulatory program requiring all coal to be sold above a minimum price and below a maximum price set by the Secretary of the Interior. One of the two exemptions from price regulation covered coal sold to a farmers cooperative or an intervening agency brokering a sale for a farmers cooperative.⁸¹⁷

Midland Cooperative Wholesale was a federated purchasing cooperative serving about 200 locals in the upper Midwest. Some Midland locals were owned and controlled by farmers and others had a more general membership consistent with treatment as a consumer

⁸¹⁵ *Midland Cooperative Wholesale v. Ickes*, 125 F.2d 618 (8th Cir. 1942).

⁸¹⁶ The Bituminous Coal Act of 1937, 50 Stat. 72 (1937), was repealed in 1966, 80 Stat. 649, 651 (1966).

⁸¹⁷ 125 F.2d at 622-623.

cooperative. The Department of the Interior issued an administrative order permitting Midland to purchase coal at a discount below the minimum regulated price for resale to its farmer cooperative members but not for resale to its other cooperative members.

Midland appealed to the U.S. Court of Appeals for the 8th Circuit, which upheld the Interior Department decision. The court reasoned that the purpose of the act was to stabilize the bituminous coal industry and that an exception to its coverage should be read narrowly. The court reviewed the law's legislative history and concluded:

The legislative history indicates clearly that Congress was well aware of a distinction between consumers' and farmers' cooperatives, that it was well aware that the Act extended certain treatment to farmers' cooperatives which it did not extend to consumers' cooperatives, and that it fully intended to do so....Congress had the right to discriminate between the types of cooperatives and it manifestly did so, and the failure to treat them alike it neither novel nor unreasonable.⁸¹⁸

The second case involved a complex scheme used to allocate movies to theaters in Detroit and a cast of very aggressive players who all seemed eager to do whatever they could to gain an upper hand in the business.⁸¹⁹ Independent second-run theaters in Detroit formed a cooperative to negotiate exhibition privileges with production studios and major film distributors. Plaintiff, a chain of second-run theaters, admitted to the judge that it could outbid independent theaters for films but wanted the court to rule it was unfair competition for the independents to associate in a cooperative to combat the power of chain operators.⁸²⁰

⁸¹⁸ 125 F.2d at 631.

⁸¹⁹ *Mid-West Theatres Co. v. Co-operative Theatres of Michigan*, 43 F. Supp. 216 (E. D. Mich. 1941).

⁸²⁰ The court found this admission to be a "fact of great importance." 43 F. Supp. at 219.

As a general principle, the court determined that independent businesses "may organize for the reasonable promotion of their economic activity without violation of the Sherman Act."⁸²¹ It held that the cooperative, organized pursuant to a state law, had a right to function so long as it did not violate any Federal or state law.

After reviewing the facts, the court concluded "...there are two sides to this question--first, that Co-Operative can and does protect the independents who would otherwise be helpless; and second, that Co-Operative does, at times, go too far in extending this "protection."⁸²²

Conduct which the court felt exceeded legitimate cooperative activity included (1) coercing a distributor to break a contract with a nonmember, (2) threatening not to do business with a producer who released pictures to nonmembers, and (3) leasing more pictures than its members could show to keep them out of the hands of nonmember competitors.⁸²³ The court denied plaintiff's request for damages and issued an injunction requiring both parties to refrain from the conduct listed above.

Mid-West Theatres holds that independent businesses without Capper-Volstead protection can form a purchasing cooperative. However, like any other venture including agricultural marketing cooperatives, such an association may not engage in conduct that lacks any observable business objective other than eliminating competition.

A series of opinions in litigation against a cooperative formed by Coca-Cola bottlers discuss several issues important to agricultural and nonagricultural supply cooperatives.⁸²⁴ One reason these cases may be insightful for farmer cooperatives is that soft drink bottlers, like agri-

⁸²¹ 43 F. Supp. at 221. *Citing* *Appalachian Coals v. United States*, 288 U.S. 344 (1933).

⁸²² 43 F. Supp. at 222. The court did not find it objectionable that the cooperative had "buying power of some magnitude," only that it abused that power at times.

⁸²³ 43 F. Supp. at 222-223.

⁸²⁴ *Sewell Plastics v. Coca-Cola*, 720 F. Supp. 1186 (W. D. N.C. 1988), 720 F. Supp. 1196 (W. D. N.C. 1989), *both aff'd*, 1990-2 Trade Cases (CCH) ¶ 69,165 (4th Cir. 1990).

cultural producers, have the benefit of a limited exemption from antitrust liability for their marketing activity.

Under the Soft Drink Interbrand Competition Act,⁸²⁵ contracts granting bottlers the exclusive right to bottle and sell a manufacturer's products within a specific territory are shielded from antitrust liability. Thus bottlers have an absolute monopoly to market a line of products within their trade territory, but must compete with bottlers of other manufacturer's products.

Prior to 1977, carbonated soft drinks were sold in containers made of glass, aluminum, or steel. About 1977, Sewell Plastics, Inc. (Sewell), among others, began to manufacture plastic soft drink bottles. The plastic bottles were well received by bottlers and consumers.

By 1981, Sewell was the dominant force in the plastic bottle market in the Southeast. It produced more than 50 percent of all plastic bottles sold in this area and more than 90 percent of the plastic bottles purchased by area Coca-Cola bottlers. Sewell increased its list prices every year from 1977 to 1981 and its earnings grew over 800 percent.

Cooperation was an established practice among soft drink bottlers. In 1975, several Coca-Cola bottlers in the Southeast had formed a cooperative to own and operate a modern can filling facility. About 1980, manufacturers of plastic-bottle equipment began encouraging the bottlers to consider self-manufacture of plastic bottles. The Coca-Cola Co., which had a vested interest in helping its franchisees hold down costs so they could compete more effectively against bottlers for Pepsi and other soft drink companies, also encouraged its bottlers to manufacture their own containers on a cooperative basis.

In 1981, various bottlers told Sewell that unless it agreed to a substantial reduction in its price, the bottlers would jointly manufacture their own plastic bottles. When Sewell refused, 33 Coca-Cola bottlers in the Southeast formed Southeastern Container, Inc., as a cooperative; built a manufacturing plant; and began manufacturing plastic bottles for its members.

⁸²⁵ 15 U.S.C. §§ 3501-3503.

All of Southeastern's members signed supply contracts with their cooperative that included these provisions:

- **Long-term commitment.** Members agreed to purchase 80 percent of their two-liter bottles from the cooperative for the next 5 years.
- **Freight equalization.** Members all pay the same price for the bottles, including delivery.
- **Price competition clause.** Members are permitted to purchase all their bottles elsewhere if they can show that two other suppliers offered lower prices over a six-month period and Southeastern was unable to meet the average of the two lower prices within 60 days.

In 1986, Sewell brought suit in Federal district court against the Coca-Cola Company, Southeastern Container, and the 33 members of Southeastern. Sewell alleged a number of claims under Federal antitrust law:

- The long-term commitment and freight equalization agreements constitute a conspiracy to restrain trade in violation of Section 1 of the Sherman Act.
- The long-term commitment agreement (to purchase 80 percent of their requirements from Southeastern) constituted an attempt to monopolize and monopolization of a line of commerce in a distinct geographic market in violation of Section 2 of Sherman
- The long-term commitment agreement constitutes an exclusive dealing arrangement in violation of Section 3 of the Clayton Act.
- The bottlers' ownership of Southeastern stock has the effect of substantially lessening competition in violation of Section 7 of Clayton.

Sewell claimed damages in excess of \$17 million as lost profits it would have made if the cooperative had not been formed, and sought monetary and permanent injunctive relief. Both sides moved for summary judgment. In May of 1988, the district court granted partial summary judgment in favor of the bottlers, holding their conduct wasn't *per se* illegal, but leaving open the question of whether the alleged conduct violated antitrust law under rule of reason analysis.⁸²⁶

The court convened a jury and began a trial. After opening arguments, the court granted defendants' motion for summary judgment and dismissed Sewell's claims.⁸²⁷ The U.S. Court of Appeals, Fourth Circuit, affirmed both decisions in an unpublished, *per curium* opinion.⁸²⁸

Sewell I. In its first opinion the district court reduced Sewell's claims to two basic arguments, namely group boycott and price fixing, and examined each under the rule of *per se* illegality. In finding Southeastern wasn't illegal *per se* as a group boycott, the court focused on three points. First, the fact that Sewell could compete for up to 20 percent of defendant bottlers' business and that of other bottlers meant the cooperative wasn't precluding Sewell from competing in the relevant market. Second, Southeastern wasn't really a combination between competitors because the exclusive territorial licenses limited competition between the members of Southeastern. Third, the arrangement had legitimate business benefits to the members of Southeastern that enabled them to compete with other soft drink bottlers.

The court relied extensively on *Northwest Wholesale Stationers v. Pacific Stationary and Printing*, 472 U.S. 284 (1985). In this case the U.S. Supreme Court held that exclusion by a wholesale purchasing cooperative of one of its member-retailers for violation of a cooperative rule was not an unlawful boycott under either *per se* or rule of reason analysis.

⁸²⁶ Sewell Plastics v. Coca-Cola, 720 F. Supp. 1186 (W.D.N.C. 1988).

⁸²⁷ Sewell Plastics v. Coca-Cola, 720 F. Supp. 1196 (W.D.N.C. 1989).

⁸²⁸ Sewell Plastics v. Coca-Cola, 1990-2 Trade Cases (CCH) ¶ 69,165 (4th Cir., Sept. 4, 1990), *cert. denied*, 498 U.S. 1110 (1991).

The court didn't grant total summary judgment because while not unlawful *per se*, it felt the conduct of the members of Southeastern might be unlawful under a rule of reason analysis if Sewell could prove their anticompetitive effects outweighed their pro-competitive justifications.

In assessing the *per se* illegality of the price-fixing agreement, the court focused on the cooperative nature of the venture, stating:

Several features of the defendants' enterprise make the anticompetitive effect of these restraints less than obvious. First, the defendants are setting a *price* for inputs to their production *charged by a joint venture which they own*. In this situation, defendants have *no* obvious incentive to raise prices or restrict output, because they would be raising the cost of their own products. That price is subject to competitive pressure from the prices charged by the distributors of other brands of soft drinks.

This feature of defendants' conduct distinguishes the *per se* price-fixing cases on which plaintiff relies. In no case cited by plaintiff did a court hold a price-fixing agreement *per se* illegal where the price-fixing companies were setting a price charged *to them* by a source of supply owned *by them*. (court's emphasis)⁸²⁹

The court also discussed legitimate business justifications for the price-setting agreement: equalizing cost would help attract investors who might not be as close to the plant as other potential members, "... increasing the volume, and lowering Southeastern's marginal cost of production. This, in turn, could enable Southeastern to lower its prices, enabling the bottlers to compete more effectively with bottlers of other soft drink brands."⁸³⁰

At this point, the court again felt compelled to give Sewell the chance to produce evidence sufficient to raise issues of material fact appropriate for a rule of reason analysis at trial.

⁸²⁹ 720 F. Supp. at 1194.

⁸³⁰ 720 F. Supp. at 1194-1195.

Sewell II. When the court decided to grant defendant's motion for summary judgment after opening arguments, it did so after concluding Sewell had failed to develop any economic justification for finding this supply cooperative constituted a violation of Federal or State antitrust law. The court listed several telling facts symptomatic of the entry of a supply cooperative into a concentrated market:

- Economic consequences in the relevant market of the bottle-making actions of defendants were dramatic.
- Prices for plastic bottles dropped to about half what they had been when Sewell had the regional bottle manufacturing market mostly to itself.
- Prices have remained low.
- The number of competitors in the market has remained the same, but market concentration has decreased.
- Some competitors have left the bottling business, and others have entered it.
- Consumers benefit from lower bottle prices.
- Production of plastic bottles has increased.
- Production processes have continued to become more efficient.
- Although some competitors may be making less profit, there has been no adverse effect on competition.⁸³¹

After a lengthy review of the procedural history of the case, the court restated the general facts and expanded on the economic findings

⁸³¹ At this point, the court noted, "The antitrust laws ... were enacted for 'the protection of *competition*, not *competitors*.'" (citations omitted)(emphasis in original) 720 F. Supp. at 1199.

of fact. The court then expressed further understanding of the pro-competitive impact of a supply cooperative on the marketplace:

Sewell contends that defendants' "purpose and intent in forming Southeastern was to lock Sewell and other plastic beverage bottle suppliers out of the Coke-bottler business in the areas where the bottlers were located." Complaint, para. 20. This claim makes no economic sense in the factual context of this case, because Sewell cannot explain how the bottlers would benefit in a way prohibited by the antitrust laws (*i.e.*, earning monopoly profits), by forming a corporation to manufacture plastic bottles for sale to themselves. Because the Bottlers' profits ultimately derive from the sale of soft drinks packaged in plastic bottles, the Bottlers have no economic incentive to invest in a cooperative manufacturing enterprise and "lock out" existing suppliers if that will raise the cost of an input such as the plastic bottles to themselves. Once the decision to invest is made, the Bottlers do have an economic incentive to cause their cooperative manufacturing enterprise to produce plastic bottles of the highest quality at the lowest possible price.

...Thus assuming that Southeastern would experience economies of scale similar to its competitors, one would expect Southeastern to be as efficient as its competitors and produce a bottle of the same or similar quality. Because Southeastern only sells bottles to its owner-members, there is no economic incentive for Southeastern to sell bottles at any price other than a price at or slightly above its total cost of production (including, for example, research and development expenditures). Selling at a price below cost would simply require the Bottlers to make capital contributions to Southeastern in the amount of any loss, offsetting any aggregate benefit from the lower prices charged to the Bottlers. Selling at a price very much above the actual cost of production would increase the effective price of the bottles by causing Southeastern to earn high profits, which could not simply be distributed back to the Bottlers as dividends because they would first be subject to the corporate income tax. Thus, as an efficient producer

pricing its product at or just above its costs, one would expect the entry of Southeastern in the market to have a *procompetitive* impact. The facts of this case confirm that expectation. (court's emphasis)⁸³²

Then the court discussed the specifics of the contractual relationship between Southeastern and its members and found:

Southeastern's supply contracts are reasonably justified means of achieving legitimate, *procompetitive* purposes. ... Even if we assume that purchasers of plastic bottles were not willing to sign supply contracts with *established* suppliers in 1982, that assumption does not make it unreasonable for buyers to sign such contracts with a potential entrant to the market. This is particularly true where, as in this case, the buyers have a financial interest in the newcomer. (court's emphasis).⁸³³

The court explained why the use of a delivered price is justified, saying "...use of a delivered price eliminated any advantage from being located relatively near the plant. This removed a potential obstacle to the formation of Southeastern and had plausible utility in attracting investors to the enterprise, thereby increasing volume and reducing Southeastern's marginal cost of production."⁸³⁴

The court also found the price competition clause in Southeastern's contracts justifiable as the most reasonable means to prevent Sewell from selective pricing to key members of Southeastern in order to disrupt the operation of the cooperative.

Relying on this analysis, the court found its application of the *per se* rules in *Sewell I* still valid and required no further discussion. It then looked for evidence of an antitrust violation under the rule of reason. It determined Sewell would be unable to show the cooperative would harm the competitive process, that the cooperative had engaged in predatory pricing, that the cooperative could raise prices above

⁸³² 720 F. Supp. at 1216-1217.

⁸³³ 720 F. Supp. at 1219.

⁸³⁴ *Id.*

those charged in a competitive market, or that the cooperative led to any actual or threatened antitrust injury. The court dismissed all of Sewell's claims, concluding, "Even if Sewell had advanced 'some' proof of anticompetitive effect, any restraints on trade arising out of defendants' formation and operation of Southeastern were reasonably necessary to achieve *pro*competitive benefits which clearly outweigh any anticompetitive effect." (court's emphasis)⁸³⁵

Capper-Volstead was raised as a defense in one case by a farm supply cooperative but not relied on by the court in making its decision.⁸³⁶ In 1991, Indiana Farm Bureau Cooperative Association (IFBCA) merged with Countrymark Cooperative to form a multi-state entity. Agmax, a local member of IFBCA, successfully sued to establish dissenters' rights and withdrew its equity investment in Countrymark, the successor organization.

Countrymark then refused to sell certain products to Agmax and ordered its member locals not to resell such products to Agmax. In response, Agmax sued Countrymark for violating Sections 1 (conspiring with its members to eliminate Agmax as a competitor) and 2 (monopolization) of Sherman and asked the court for an injunction requiring Countrymark to resume selling supplies to it.

Countrymark argued the request for an injunction should be denied because Agmax had no chance to win on the merits. Countrymark based this request on its alleged status as a Capper-Volstead cooperative which it asserted made it immune from liability under the Sherman Act for conspiring with its members or monopolization.

⁸³⁵ 720 F. Supp. at 1223. This case will be remembered, in the courthouse at Charlotte, NC, at least, for the huge amount of paper it generated. At one point early in the litigation the District Court, in a brief opinion worthy of reading as an example of the judicial system letting off steam, refused to decide the motions for summary judgment until the parties filed 10-page summaries of the over three feet of documents submitted to establish "undisputed" facts. West Publishing Company, hardly known for embellishing its legal reporters with abundant illustrations, found it appropriate to include two pictures of the court record in conjunction with the opinion. 119 F.R.D. 24-26 (W. D.N.C. 1988).

⁸³⁶ Agmax v. Countrymark Cooperative, 795 F. Supp. 888 (S.D. Ind. 1992).

According to the decision, Agmax countered that Countrymark's conduct, especially pressuring its member locals not to sell to Agmax, amounted to predatory conduct outside the protection of Capper-Volstead. Apparently neither Agmax nor the court questioned whether the selling of supplies was conduct protected by Capper-Volstead.

At one point, the court seemed to say that Countrymark was protected if it had not engaged in predatory conduct.⁸³⁷ But in the next paragraph, the court said it didn't need to resolve the issue in light of the facts in the case.⁸³⁸ Ultimately, the court ruled in Countrymark's favor on the grounds that Agmax had failed to justify injunctive relief under general antitrust standards, without examining the Capper-Volstead issue.

STATE ANTITRUST ENFORCEMENT

While most of this paper focuses on Federal antitrust policy, cooperatives must remember that they are also subject to State antitrust laws and enforcement. Two older cases, coincidentally decided only a week apart, illustrate this.

In one case, a cooperative and several non-cooperative corporations and business units, who together distributed 94 percent of the fluid milk sold in Milwaukee County, were successfully sued by the State of Wisconsin for conspiring to control and fix the price of milk in violation of the State's antitrust laws.⁸³⁹ In the second, an Ohio court held that a cooperative did not violate the State antitrust law when it refused to provide milk to a purchaser who offered a discounted price to its customers who bought large amounts of milk during each month.⁸⁴⁰

Sometimes a State's antitrust law will contain a blanket exemption for cooperatives. For example, Section 340(3) of New York's

⁸³⁷ 795 F. Supp. at 896.

⁸³⁸ *Id.*

⁸³⁹ *State v. Golden Guernsey Dairy Cooperative*, 43 N.W.2d 31 (Wis. 1950).

⁸⁴⁰ *Superior Dairy v. Stark County Milk Producers' Ass'n*, 100 N.E.2d 695 (Ohio 1950).

Donnelly Antitrust Act reads:

The provisions of this article shall not apply to cooperative associations, corporate or otherwise, of farmers, gardeners, or dairymen, including live stock farmers and fruit growers, nor to contracts, agreements or arrangements made by such associations,...

The New York State courts have recognized that this is a broader exemption than contained in Federal law. It bars them from entertaining actions under the State's Donnelly Antitrust Act against agricultural cooperatives and also against third parties, such as a grocery store that purchases from a cooperative, based on its contracts with a protected cooperative.

When State law doesn't contain such a broad cooperative exemption, State attorneys general can be just as aggressive as the U.S. Department of Justice in pursuing cooperatives. They can negotiate consent decrees that include both restraints on future conduct and substantial fines. This is true whether the defendant cooperative is large dairy association or a small, niche market association.

These cases illustrates that producer associations need to include compliance with the antitrust law of the State or states within which they operate in their overall risk management planning.

DISRUPTIVE STATE REGULATION

One case reviewed during the preparation of this report is worth noting, even though it doesn't involve any great economic or legal

⁸⁴¹ N.Y. Gen. Bus. Law, Art. 22, Monopolies § 340(3).

⁸⁴² *Margrove, Inc. v. Upstate Milk Cooperative*, 1974-2 Trade Cases (CCH) ¶ 75,268 (N.Y. Sup. Ct. 1974).

⁸⁴³ *Texas v. Associated Milk Producers, Inc.*, 1974-2 Trade Cases (CCH) ¶ 75,269 (Tex. D.C. Travis County 1974).

⁸⁴⁴ *Wisconsin v. United Wild Rice*, 1981-1 Trade Cases (CCH) ¶ 63,940 (Minn. 9th D.C. 1981).

issues such as "what is a producer?" In fact, Capper-Volstead isn't an issue at all. Rather it involves a cooperative caught in a vicious crossfire among some of its members, well intended but misguided state regulators, hard business realities, and the antitrust law.⁸⁴⁵

Sometime prior to 1957, the State of Pennsylvania created the State Milk Control Commission (commission) to set the price of milk produced in Pennsylvania sold (1) by producers and cooperatives to processors and (2) by retail establishments to consumers. However, the jurisdiction of the commission did not apply to sales of Pennsylvania milk out-of-state or to out-of-state milk sold into Pennsylvania. Beginning around 1957, the price set by the commission for milk sold by Ohio producers and their cooperatives to handlers in Ohio was well above the market price in the neighboring states of Ohio and New York.

Erie-Crawford Dairy Cooperative Assn consisted of about 1,200 dairy farmers serving the Pittsburgh and Erie markets. In the mid-1950s it lost two major customers when they could import milk from neighboring states for less total cost than buying Pennsylvania milk under the State-mandated price structure. To meet this competition, which threatened to drive it out of business, Erie-Crawford began making price adjustments when asked by its customers. Erie-Crawford charged them the State mandated price and then returned an agreed upon amount to meet prices being offered to Pennsylvania dairies by cooperatives in Ohio and New York.

Erie-Crawford also purchased some milk from out-of-State producers and resold it in Pennsylvania for less than it was compelled to charge for in-State milk. All proceeds received by Erie-Crawford were placed in a company-wide milk price pool and all farmer-producers were paid an equal amount per hundredweight for milk supplied regardless of the amount actually received from buyers for that producer's milk.

Two key facts were not contested throughout the litigation. Erie-Crawford did pay "rebates" to selected buyers and the price received by Pennsylvania farmers for their milk was less than it would have

⁸⁴⁵ Knuth v. Erie-Crawford Dairy Cooperative Association, 395 F.2d 420 (3rd Cir. 1967), *on remand*, 326 F. Supp. 48 (W.D. Pa. 1971), *aff'd in part, rev'd in part, and remanded*, 463 F.2d 470 (3rd Cir. 1972).

been had Erie-Crawford been able to sell all milk received at the commission prices.

Apparently, the arrangements between Erie-Crawford and its customers remained relatively secret until the mid-1960s. Then Robert Knuth, a producer-member of Erie-Crawford, initiated litigation on behalf of perhaps 300 members against their cooperative, various officers and directors, and its customers, to recover losses resulting from alleged underpayments for their milk. Among the various charges were three counts alleging conspiracies to restrain trade and monopolize:

1. To fix the price of milk shipped within Pennsylvania through the payment of rebates.

2. To suppress and eliminate competition by causing Pennsylvania milk to be shipped to Ohio and then shipped back to Pennsylvania for sale to processors at prices below those set by the Milk Commission.

3. To suppress and eliminate competition through agreements that processors would only purchase milk through Erie-Crawford.

When the case was first heard in Federal district court, the judge dismissed the complaint with prejudice for failure to state a claim. Plaintiff appealed and the U.S. Court of Appeals for the Third Circuit reversed the district court and remanded the case for trial. The appellate court reasoned plaintiffs should be given the opportunity to prove the alleged violations.⁸⁴⁶

At the time of trial, plaintiffs abandoned their second and third arguments, so only the legality of the "rebates" was at issue. After plaintiffs presented their evidence, the trial court judge (a different judge than the one who first dismissed the suit) granted defendants' motion to dismiss the antitrust allegations and the Third Circuit affirmed that portion of the opinion.⁸⁴⁷

⁸⁴⁶ Knuth v. Erie-Crawford Dairy Cooperative Ass'n, 395 F.2d 420 (3rd Cir. 1968). One interesting point made by the court here and picked up again in its second opinion is that even assuming the rebate payments violated a state law, that did not mean they were a violation of Federal antitrust law. 395 F.2d at 424. *See, also*, 463 F.2d 470, 476.

⁸⁴⁷ Knuth v. Erie-Crawford Dairy Cooperative Ass'n, 326 F. Supp. 48 (W.D. Pa. 1971); *aff'd in part, rev'd in part, and remanded*, 463 F.2d 470 (3rd Cir. 1972). Plaintiffs were allowed to go to the jury and prevailed on

The opinions supporting the dismissal might be recommended reading for any legislator or regulator who attempts to set prices by Government fiat for only a selected segment of an otherwise competitive market. While the temptation to quote at length has been resisted, a few key points are worthy of emphasis.

First, the appellate court had the boldness to say what the trial court only felt comfortable insinuating, that the dispute arose out of "persistent and largely futile efforts of the Pennsylvania Milk Control Commission...acting under a statutory mandate to insulate the Pennsylvania dairy industry from price competition."⁸⁴⁸

Second, the trial judge noted that the commission scheme left Erie-Crawford in an untenable position. If it followed the letter of the State law, it would quickly go out of business. As the judge phrased it:

In a fact situation like this, to hold that a seller is helpless and must stand by watching its business being destroyed would be a perversion of the result sought to be obtained by the Sherman Act. The antitrust laws were designed to encourage competition and to prevent predatory action. To outlaw the action of the Co-op in defending its markets by the time-honored and legally sanctioned method of meeting competition would be to turn the shelter of the antitrust legislation into a weapon which would kill free enterprise instead of protecting and promoting it.⁸⁴⁹

Third, the judge noted and the appellate court agreed that plaintiffs had utterly failed to establish that any illegal price fixing had occurred. Rather, the evidence showed that Erie-Crawford granted selective concessions only when asked, on a case-by-case basis, at the

charges of illegal conversion of their property under Pennsylvania state law. The district court judge granted a motion notwithstanding the verdict that relieved directors of liability who knew of and approved, but did not participate in, the rebate negotiations. The appellate court reversed this ruling, among others concerning the conversion allegations, and remanded the case for retrial on this state law issue.

⁸⁴⁸ 463 F.2d at 473.

⁸⁴⁹ 326 F. Supp. at 52-53.

lowest amount necessary to keep an individual customer. Further, no evidence was introduced that the concessions ever went beyond meeting competition to undercut a competitor's prices.⁸⁵⁰

Next, the courts held that merely paying rebates is not a *per se* violation of antitrust law.⁸⁵¹

The courts further found that an agreement between an individual seller and an individual buyer is not illegal price fixing under the antitrust laws. The law only limits collusion among multiple firms in horizontal or vertical competition.⁸⁵²

Finally, both courts expressed some wonderment at why the plaintiffs sued at all. The judges strongly suggested that the cooperative's actions seemed to clearly be in the best interest of their members, as it was unlikely that all member milk would have been sold at all at the unrealistically high prices set by the commission.⁸⁵³

The Pennsylvania legislature undoubtedly thought it was doing a good thing when it enacted a minimum price law. However, since the rest of the market was unregulated, about all the law really produced was a need for cooperatives to develop tools to circumvent it or perish and unfounded expectations among producers that they would receive a certain level of guaranteed income for their production.

MARKETING ORDERS AND CAPPER-VOLSTEAD

In a decision virtually devoid of facts, the plaintiff milk marketing cooperative alleged predatory and manipulative commercial activity by the defendant, a competing milk marketing cooperative. The defendant cooperative raised several affirmative defenses, including an argument that it was shielded from liability because, at the time of the alleged misdeeds, it was participating in the Federal milk program. A Federal district court judge denied a request of the defendant milk cooperative to dismiss the complaint of a competing milk cooperative

⁸⁵⁰ 326 F. Supp. at 52-53, 463 F.2d at 475-476.

⁸⁵¹ 326 F. Supp. at 52, 463 F.2d at 476.

⁸⁵² 326 F. Supp. at 53, 463 F.2d at 475.

⁸⁵³ 326 F. Supp. at 54, 463 F.2d at 475.

for failure to state a claim under the antitrust laws.⁸⁵⁴ The court ruled that coercive and manipulative conduct of the type alleged, undertaken to achieve a monopoly position, is not shielded from potential antitrust liability by the milk marketing order program.

This decision is consistent with *United States v. Borden*, in which the U.S. Supreme Court held conduct approved by the Secretary of Agriculture in a valid marketing order is shielded from antitrust attack by the Agricultural Marketing Act of 1937, but not any other conduct.⁸⁵⁵

LIMITS ON FTC JURISDICTION

Historically, the Federal Trade Commission (FTC) had deferred to the Department of Justice on issues involving cooperatives and the Capper-Volstead Act. However, in the 1970s, FTC economists conducted exhaustive investigations of potential anticompetitive impacts from cooperative marketing and from USDA-administered agricultural marketing order. Cooperatives felt the FTC's requests for information were unreasonably broad and compliance needlessly costly and time consuming. They also complained that the reports issued by FTC staff didn't indicate the authors had even read the material provided by the cooperatives.

Cooperatives then successfully lobbied Congress to secure the inclusion of an amendment in the Federal Trade Commission Improvements Act of 1980 that barred FTC from using any appropriated funds for fiscal 1980, 1981, or 1982 to (1) conduct any study, investigation, or prosecution of any agricultural cooperative for any conduct which, because of the Capper-Volstead Act, is not a violation of any Federal antitrust law or the Federal Trade Commission Act; or, (2) conduct any study or investigation of any agricultural marketing order.⁸⁵⁶ When the original 3-year ban expired, cooperatives succeeded in attaching language to a succession of annual

⁸⁵⁴ *Marketing Assistance Plan v. Associated Milk Producers, Inc.*, 338 F. Supp. 1019 (S.D. Tex. 1972).

⁸⁵⁵ *United States v. Borden*, 308 U.S. 188, 201-202 (1939).

⁸⁵⁶ Sec. 20 of the Federal Trade Commission Improvements Act of 1980, Pub. L. 96-252, 94 Stat. 374, 393 (1980).

appropriations bills covering the FTC barring the use of any of its funds for these purposes.

Finally, in 1994, Congress approved a permanent amendment to the Federal Trade Commission Act that provided the commission "shall not have any authority" to study, investigate, or prosecute any agricultural cooperative for conduct protected by Capper-Volstead or to study or investigate marketing orders.⁸⁵⁷

MARKETING AGREEMENTS

Some marketing cooperatives accept and attempt to resell at a profit whatever the members produce and deliver. Others require their members to sign contracts, usually referred to as marketing agreements, binding the members to deliver some or all of their production to the cooperative. Cooperatives with marketing agreements consider them essential to gathering both sufficient product and market power to achieve their objective of enhancing member income.

The seeds of litigation testing the validity of such contracts were sown in 1982. An early frost damaged the sugar beet crop in Goshen County, Wyoming. Holly Sugar Corporation, apparently the only processor of sugar beets in the area, refused to renegotiate its contract with the Goshen County Cooperative Beet Growers Assn., a bargaining association representing the local growers who were the only practical source of sugar beets for Holly's plant. The association believed Holly Sugar's position led to substantial losses for its members.

In 1983, the association sought to recoup the losses suffered by its members in 1982. The members voted to reject each of Holly's contract offers and not to release grower-members from their marketing agreements which precluded them from contracting individually with Holly.

Holly and two grower-members of the association brought suit in Federal district court seeking to enjoin the association from enforcing

⁸⁵⁷ Sec. 2 of the Federal Trade Commission Act Amendments of 1994, Pub. L. 103-312, 108 Stat. 1691 (1994), codified at 15 U.C.S. § 57b-5.

its marketing agreements. Plaintiffs alleged the contracts violated antitrust law.⁸⁵⁸

The trial court found that the association was acting unreasonably in refusing to sign a contract accepted by several other associations dealing with Holly. It also found that if the impasse was not broken, both Holly and the local economy would suffer irreparable harm. The judge issued a permanent injunction barring the association from interfering with members who wanted to negotiate on their own with Holly.

Goshen County Beet Growers appealed the injunction to the U.S. Court of Appeals for the 10th Circuit. The appellate court found, "...as a matter of law, neither the complaint nor the record establish any violation by the association of the antitrust laws of the United States."⁸⁵⁹

The sanctity of the marketing agreement was reinforced by a subsequent state court decision arising out of the same facts. Several members of the association, relying on the district court decision, did sign contracts with Holly outside of the bargaining association process. After the 10th Circuit reversed the district court's granting of the injunction, Goshen County Beet Growers brought a breach of contract action in State court to recover damages from those growers.⁸⁶⁰

A county judge entered summary judgment for the dissident growers, holding they were legally protected by the injunction in place at the time they signed contracts with Holly. But the Supreme Court of Wyoming reversed that decision. It found that the appellate court reversal of the original county court decision "...abrogated the decree as though it had never been entered."⁸⁶¹

⁸⁵⁸ The exact nature of the charges isn't clear. The district court opinion is not reported and the appellate opinion only describes them in a general manner.

⁸⁵⁹ Holly Sugar v. Goshen County Cooperative Beet Growers Association, 725 F.2d 564, 569 (10th Cir. 1984).

⁸⁶⁰ The marketing agreement provided for liquidated damages of \$2.00 per ton of beets wrongfully sold.

⁸⁶¹ Goshen County Cooperative Beet Association v. Pearson, 706 P.2d 1121, 1125 (Wyoming 1985).

These cases suggest that marketing agreements freely entered into between cooperative marketing associations and their members are not a violation of the antitrust law. And even if a court should enjoin a cooperative from enforcing such a contract, a member who agrees to deliver product to a buyer outside of the association machinery may be liable for damages for breach of contract if that injunction is later held invalid.

CHAPTER 8: IN CONCLUSION, A LOOK TO THE FUTURE

One difficulty with any research report is that it has to end at a specific point in time. As the drafting of this report concludes, it is mid-2002. Two developments have already occurred in the early 21st century that may portend how antitrust enforcement will impact cooperatives in the year ahead.

GUIDELINES FOR COLLABORATION AMONG COMPETITORS

On April 7, 2000, the Federal Trade Commission and the Department of Justice Antitrust Division (the agencies) jointly released the final version of their "Antitrust Guidelines for Collaborations Among Competitors."⁸⁶²

The phrase "competitor collaboration" is defined broadly to include any agreement between or among competitors to engage in economic activity, and the economic activity itself, that falls short of a merger.⁸⁶³ In the preamble, the agencies recognize that horizontal collaborations are often not only benign but pro-competitive. They say that the purpose of the Guidelines is provide an analytical framework

⁸⁶² The Guidelines are published at Trade Regulation Reporter (CCH) ¶ 13,161.

⁸⁶³ The Department of Justice first issued Merger Guidelines in 1968. They were revised in 1984 and in 1992. In 1982, the Federal Trade Commission (FTC) issued a Statement Concerning Horizontal Merger Guidelines. On April 8, 1997, the two Agencies released new joint Horizontal Merger Guidelines. These Merger Guidelines are published at Trade Regulation Reports (CCH) ¶ 13,104.

The Agencies state collaborations are likely to be less anti-competitive than mergers because (1) participants in a collaboration may remain competitors on other fronts while a merger eliminates all inter-firm competition and (2) mergers tend to be permanent while a collaboration is typically of limited duration. However, the Collaboration Guidelines incorporate tests from the Merger Guidelines in key assessment areas such as market concentration and the ease of entry of new competitors.

businesses can use to access the antitrust implications of collaborations with competitors and, more specifically, whether the agencies will challenge a specific proposed collaboration.

The guidelines are important to cooperatives because of the frequency with which cooperatives are entering into collaborations with other cooperatives and non-cooperative firms. When assessing the antitrust risk of joint ventures and other collaborations in the future, it may be prudent analyze whether the agreement is likely to stimulate an enforcement action from the agencies. If the answer is yes, then the parties need to examine whether the Capper-Volstead Act or other exemptions provide an effective shield against liability.

The guidelines focus on the potential anticompetitive harm of collaborations being examined under a rule of reason analysis. The agencies state that if a collaboration appears to be illegal *per se*, it will be challenged under the applicable *per se* rule(s). They also indicate the pro-competitive benefits of a collaboration will only be examined if the initial review reveals potential anticompetitive harm.

In close cases, the agencies will weigh whether the magnitude and likelihood of anticompetitive harm is greater than that of pro-competitive benefits. Anticompetitive harm is accessed using standard antitrust analysis that focuses on reducing competition and enabling price and output controls to the detriment of consumers. Pro-competitive benefit will be measured in terms of "cognizable efficiencies," which the agencies describe as efficiencies that are verifiable, not the result of anticompetitive reductions in output or services, and that cannot be achieved through practical, significantly less restrictive means.⁸⁶⁴

The guidelines also establish two "safety zones" wherein collaborations are presumed legal under antitrust law. The first is a limited market share situation where the participants and the collaborative effort have a combined market share of not more than 20 percent in each relevant market in which competition will be impacted by the collaboration. This shelter is not available to shield action illegal *per se*.

The second safety zone covers research and development ventures where three or more other entities are capable of successfully

⁸⁶⁴ Trade Regulation Reporter (CCH) ¶ 13,161, p. 20,863-20,864.

commercializing innovations on at least the same scale as the collaboration under review.⁸⁶⁵

The guidelines are by no means a series of bright line tests eliminating all uncertainty as to the possibility a collaboration among competitors will be challenged by Federal antitrust enforcers. But they do provide a framework cooperative advisers and leaders can use to weigh that risk as they consider whether to enter into collaborative agreements in the future.

BUTTER SETTLEMENT: THE FUTURE OF ANTITRUST ENFORCEMENT?

The rash of consolidations taking place throughout the food industry is placing pressure on all participants, including cooperatives, to become both more efficient and more effective in protecting and enhancing their market position. Public documents concerning a negotiated settlement between a major dairy marketing cooperative and the U.S. Department of Justice provide insight into how some cooperatives are dealing with changes in food marketing and how antitrust enforcement officials may react when cooperatives become the dominant players in a particular line of business.

In December, 1999, Dairy Farmers of America (DFA) entered into a letter agreement to purchase SODIAAL North American Corporation (SODIAAL). DFA and SODIAAL were two of the three firms who accounted for over 90 percent of branded butter sales in the Philadelphia and New York metropolitan areas. The third firm in the market is Land O' Lakes Inc (LOL). DFA and LOL are the two largest U.S. dairy marketing cooperatives (as measured by sales). SODIAAL is a privately held subsidiary of a French cooperative.

In March 2000, the U.S. Department of Justice filed a civil antitrust action to block the proposed acquisition. The Justice Department alleged that DFA's purchase of SODIAAL would substantially lessen competition in branded-butter markets in Philadelphia and New York and therefore violate Section 7 of the Clayton Act.⁸⁶⁶

⁸⁶⁵ *Id.* at 20, 864-20,865.

⁸⁶⁶ 15 U.S.C. § 18.

As part of the settlement process, Justice published a Competitive Impact Statement summarizing its case.⁸⁶⁷ When reviewing the proposed acquisition, Justice gave special emphasis to two legal standards for interpreting Capper-Volstead. First, it noted that if the purchase went through as proposed, DFA and LOL would control more than 90 percent of the branded butter market in Philadelphia and New York. Since both DFA and LOL are agricultural cooperatives, they could agree on the price and other terms of sale for their butter in these areas free from antitrust scrutiny.

Second, Justice noted that SODIAAL, as a private subsidiary of a French cooperative, is not covered by Capper-Volstead. Thus the Government was free to challenge its purchase by DFA under Section 7 of Clayton.

The United States (with the acquiescence of DFA) asked the court to approve a final judgment in the case that permits DFA to complete its acquisition of SODIAAL but prohibits DFA from joining with LOL in any joint effort to market branded butter. Procedural rules that apply to settling antitrust cases require a 60-day period for public comment after the Proposed Final Judgment and Competitive Impact Statement are published in the Federal Register. No comments were filed. In November 2000, the judge signed an order implementing the proposed final judgment.

Under the settlement, DFA agrees to transfer all of its assets necessary to manufacture and market its branded butter on the East coast, including DFA's interest in the "Breakstone's" brand, and all of the assets acquired from SODIAAL, including the "Keller's" and "Hotel Bar" brands, into a new limited liability company to be called Keller's Creamery, LLC. The key provision requires DFA to transfer partial ownership in Keller's to persons who are not agricultural producers. The purchasers are members of the pre-merger SODIAAL management team. This non-producer ownership interest deprives Keller's of cooperative status and the right to engage in common marketing activity with cooperatives (including LOL) under the protection of the Capper-Volstead Act.

⁸⁶⁷ United States v. Dairy Farmers of America, 2001-1 Trade Cases (CCH) ¶ 73,136 at 89,450 (E.D. Pa. 2000).

The agreement enjoins DFA and Keller's from entering into any collaborative marketing effort of branded butter with LOL and from disclosing any competitively sensitive information regarding branded butter to LOL. The agreement also contains several provisions to prevent DFA or Keller's from circumventing the judgment by restructuring themselves or selling any assets to another firm, particularly LOL, without the court's permission.

In essence, DFA agreed to forfeit its Capper-Volstead status with regard to marketing branded butter in the relevant markets in exchange for permission to purchase a major non-cooperative competitor in those markets. The acquisition gives DFA members an additional market for their milk that will be used to produce the butter manufactured at the former SODIAAL's plant and increases the amount of value-added processing by their cooperative. But in return, DFA loses the ability to collaborate with LOL to improve the economic return to all of their farmer-members.

Marketing cooperatives are reassured by Justice's acknowledgment that "explicit collusion" between large agricultural cooperatives with a dominant position in the marketplace "would be legal and could not be challenged under the antitrust laws."⁸⁶⁸

As the trend toward fewer but larger firms continues in many product lines in the food (and other) industries, cooperatives also feel pressure to grow. When this growth is accomplished by simply signing up new members or through working agreements or combinations with other cooperatives, antitrust concerns may be minimal. However, when deals involve joint ventures with, or acquisitions of, non-cooperative firms, the Capper-Volstead shield will not be available. The proposal will be subject to challenge under the same standards as an agreement between two non-cooperative firms.

The agreement accepted by DFA in this case consummates the acquisition but restructures it to negate future access to Capper-Volstead protection in the relevant market (branded butter). Whether this will become a model for Department of Justice response to future actions that reduce competitors in a market with a strong cooperative presence is unclear. And like any approach to resolving complex conflicts, what operates in the best interests of producers in one

⁸⁶⁸ 2001-1 Trade Cases ¶ 73,136 at 89,453.

instance may not in another. But as cooperatives adjust to the changing competitive environment of agri-business, antitrust issues and the attitude of Federal and state enforcement officials will remain important parts of the planning and implementation process.

Appendix A. Cooperative Antitrust Cases

This table lists only cases cited in the report that involved or directly impacted the legal status of cooperatives. This is consistent with the purpose of the paper, to provide a thorough but easy-to-use resource on the antitrust status of producer marketing associations. To keep the list manageable, the table also excludes numerous State court decisions, most issued during the 1920s, upholding State laws authorizing cooperatives. These cases are found in footnotes 396-399.

	<u>Pages</u>
<i>Agmax v. Countrymark Cooperative</i> 795 F. Supp. 888 (S.D. Ind. 1992)	309-310
<i>Agritronics Corp. v. National Dairy Herd Ass'n</i> , 1994-2 Trade Cases (CCH) ¶ 70,758 (N.D. N.Y. 1994); 914 F. Supp. 814 (N.D. N.Y. 1996)	170-172, 202-203, 219
<i>Alexander v. National Farmers Organization</i> 687 F.2d 1173 (8th Cir. 1982), <i>aff'g in part, rev'g in part</i> , <i>In re Midwest Milk Monopolization Litigation</i> , 510 F. Supp. 381 (W.D. Mo. 1981), <i>cert. denied</i> , 461 U.S. 937 (1983)	185-186, 217, 218, 219, 233, 253, 272-276, 290-291
<i>Alexander v. National Farmers Organization</i> 614 F. Supp. 745 (W.D. Mo. 1985), <i>aff'd in part</i> , <i>rev'd in part, and remanded</i> , <i>NFO v. AMPI</i> , 850 F.2d 1286 (8th Cir. 1988)	276
<i>April v. National Cranberry Ass'n</i> 168 F. Supp. 919 (D.C. Mass. 1958)	85
<i>Associated Milk Producers Inc.; United States v.</i> 394 F. Supp. 29 (W.D. MO. 1975), <i>aff'd</i> , 534 F.2d 113 (8th Cir. 1976), <i>cert. denied</i> , 437 U.S. 905 (1978)	243, 255-257

Associated Press; United States v.
52 F. Supp. 362 (S.D. NY 1943), *aff'd*,
326 U.S. 1 (1945) 53-55

Ex parte Baldwin County Producers' Corporation
83 So. 69 (Ala. 1919) 70

Bascom Food Products v. Reese Finer Foods
715 F. Supp. 612 (D.N.J. 1989) 50, 57

Bell v. Fur Breeders Agricultural Cooperative
3 F. Supp. 2d 1941 (D. Utah 1998) 146-147

Bergjans Farm Dairy Co. v. Sanitary Milk Producers
241 F. Supp. 476 (E.D. Mo. 1965), *aff'd*,
Sanitary Milk Producers v. Bergjans Farm Dairy,
368 F.2d 679 (8th Cir. 1966) 146, 222, 230-231,
237-238, 289

Borden; United States v.
28 F. Supp. 177 (N.D. Ill. 1939), *rev'd*,
308 U.S. 188 (1939) 85, 155-162, 209, 222,
243-244, 283-284, 316

Bullville Milk Producers Ass'n v. Armstrong
178 N.Y.S. 612 (1919) 70

Burley Tobacco Society v. Gillaspy, 100 N.E. 89 (Ind. 1912) 70

Cape Cod Food Products v. National Cranberry Ass'n
119 F. Supp. 900 (D. Mass. 1954) 245-246, 288-289

Carleton v. Vermont Dairy Herd Improvement Ass'n
1992-1 Trade Cases (CCH) ¶ 69,761 (D. Vt. 1991) 58

Case-Swayne v. Sunkist Growers
369 F.2d 449 (9th Cir. 1966), *rev'd*,
389 U.S. 384 (1967); *also*,
355 F. Supp. 408 (C.D. Cal. 1971) 169, 171, 172-176,
190-191, 247-248

Castorland Milk & Cheese Co. v. Shantz
179 N.Y.S. 131 (1919) 70

In re Central California Lettuce Producers Cooperative
F.T.C. Docket No. 8970 (Mar. 13, 1975),
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Appendix C. Federal Antitrust Statutes

The key portions of the Federal antitrust laws applicable to producer marketing associations are reproduced below, in order of enactment.

SHERMAN ACT

26 Stat. 209 (1890), as amended

§ 1. Trusts, etc., in restraint of trade illegal; penalty (15 U.S.C. § 1)

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony and, on conviction thereof, shall be punished by fine not exceeding ten million dollars if a corporation, or, if any other person, three hundred fifty thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

§ 2. Monopolizing trade a felony; penalty (15 U.S.C. § 2)

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding ten million dollars if a corporation, or, if any other person, three hundred fifty thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

FEDERAL TRADE COMMISSION ACT

38 Stat. 717 (1914), as amended, cooperative provision at
108 Stat. 1691 (1994)

§ 5. Unfair methods of competition unlawful; prevention by Commission (15 U.S.C. § 45)

(a)(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.

(2) The Commission is empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in section 57a(f)(3) of this title, Federal credit unions described in section 57a(f)(4) of this title, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Federal Aviation Act of 1958 [49 App. U.S.C. 1301 et seq.], and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended [7 U.S.C. 181 et seq.], except as provided in section 406(b) of said Act [7 U.S.C. 227(b)], from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

. . .

(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order

should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. . . .

§ 6. Additional powers of Commission (15 U.S.C. § 46)

The Commission shall also have power --

(a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices and management of any person, partnership, or corporation engaged in or whose business affects commerce, excepting banks, savings and loan institutions described in section 57a(f)(3) of this title, Federal credit unions described in section 57a(f)(4) of this title, and common carriers subject to the Act to regulate commerce, and its relation to other persons, partnerships, and corporations.

(b) To require, by general or special orders, persons, partnerships, and corporations engaged in or whose business affects commerce, excepting banks, savings and loan institutions described in section 57a(f)(3) of this title, Federal credit unions described in section 57a(f)(4) of this title, and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the Commission in such form as the Commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the Commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective persons, partnerships, and corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the Commission may prescribe, and shall be filed with the Commission within such reasonable period as the Commission may prescribe, unless additional time be granted in any case by the Commission...

§ 12. False advertising; injunctions and restraining orders

(15 U.S.C. § 52)

(a) It shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement --

(1) By United States mails, or in or having an effect upon commerce, by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of food, drugs, devices, or cosmetics; or

(2) By any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in or having an effect upon commerce of food, drugs, devices, or cosmetics.

(b) The dissemination or the causing to be disseminated of any false advertisement within the provisions of subsection (a) of this section shall be an unfair or deceptive act or practice in or affecting commerce within the meaning of section 45 of this title.

§ 24. Agricultural cooperatives (15 U.S.C. § 57b-5)

(a) The Commission shall not have any authority to conduct any study, investigation, or prosecution of any agricultural cooperative for any conduct which, because of the provisions of the Act entitled 'An Act to authorize association of producers of agricultural products', approved February 18, 1922 (7 U.S.C. 291, et seq., commonly known as the Capper-Volstead Act), is not a violation of any of the antitrust Acts or this Act.

(b) The Commission shall not have any authority to conduct any study or investigation of any agricultural marketing orders.

CLAYTON ACT

38 Stat. 730 (1914), as amended

§ 3. Sale, etc. on agreement not to use goods of competitor (15 U.S.C. § 14)

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

§ 4. Suits by persons injured (15 U.S.C. § 15)

(a) Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. . . .

§ 4A. Suits by United States; amount of recovery; prejudgment interest (15 U.S.C. § 15a)

Whenever the United States is hereafter injured in its business or property by reason of anything forbidden in the antitrust laws it may sue therefor in the United States district court for the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold damages by it sustained and the cost of suit. The court may award under this section, pursuant to a motion by the United States promptly made, simple interest on threefold damages for the period beginning on the date of service of the pleading of the United States setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances...

§ 4B. Limitation of actions (15 U.S.C. § 15b)

Any action to enforce any cause of action under sections 15, 15a, or 15c of this title shall be forever barred unless commenced within four years after the cause of action accrued...

§ 4C. Actions by State attorneys general (15 U.S.C. § 15c)

(a)(1) Any attorney general of a State may bring a civil action in the name of such State, as *parens patriae* on behalf of natural persons residing in such State, in any district court of the United States having jurisdiction of the defendant, to secure monetary relief as provided in this section for injury sustained by such natural persons to their property by reason of any violation of sections 1 to 7 of this title. The court shall exclude from the amount of monetary relief awarded in such action any amount of monetary relief (A) which duplicates amounts which have been awarded for the same injury, or (B) which is properly allocable to (i) natural persons who have excluded their claims pursuant to subsection (b)(2) of this section, and (ii) any business entity.

(2) The court shall award the State as monetary relief threefold the total damage sustained as described in paragraph (1) of this subsection, and the cost of suit, including a reasonable attorney's fee. The court may award under this paragraph, pursuant to a motion by such State promptly made, simple interest on the total damage for the period beginning on the date of service of such State's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. ...

§ 6. Antitrust laws not applicable to labor organizations

(15 U.S.C. § 17)

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

§ 7. Acquisition by one corporation of stock of another

(15 U.S.C. § 18)

No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No person shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more persons engaged in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or tend to create a monopoly.

. . .

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Secretary of Transportation, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission in the exercise of its jurisdiction under section 79j of this title, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission or Secretary.

§ 14. Liability of directors and agents of corporation
(15 U.S.C. § 24)

Whenever a corporation shall violate any of the penal provisions of the antitrust laws, such violation shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have authorized, ordered, or done any of the acts constituting in whole or in part such violation, and such violation shall be deemed a misdemeanor, and upon conviction therefor of any such director, officer, or agent he shall be punished by a fine of not exceeding \$5,000 or by imprisonment for not exceeding one year, or by both, in the discretion of the court.

CAPPER-VOLSTEAD ACT

42 Stat. 388 (1922)

§ 1. Authorization of associations; powers (7 U.S.C. § 291)

Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: Provided, however, that such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:

First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or,

Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

And in any case to the following:

Third. That the association shall not deal in the products of nonmembers to an amount greater in value than such as are handled by it for members.

§ 2. Monopolizing or restraining trade and unduly enhancing prices prohibited; remedy and procedure (7 U.S.C. 292)

If the Secretary of Agriculture shall have reason to believe that any such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product

is unduly enhanced by reason thereof, he shall serve upon such association a complaint stating his charge in that respect, to which complaint shall be attached, or contained therein, a notice of hearing, specifying a day and place not less than thirty days after the service thereof, requiring the association to show cause why an order should not be made directing it to cease and desist from monopolization or restraint of trade. An association so complained of may at the time and place so fixed show cause why such order should not be entered. The evidence given on such a hearing shall be taken under such rules and regulations as the Secretary of Agriculture may prescribe, reduced to writing, and made a part of the record therein. If upon such hearing the Secretary of Agriculture shall be of the opinion that such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced thereby, he shall issue and cause to be served upon the association an order reciting the facts found by him, directing such association to cease and desist from monopolization or restraint of trade. On the request of such association or if such association fails or neglects for thirty days to obey such order, the Secretary of Agriculture shall file in the district court in the judicial district in which such association has its principal place of business a certified copy of the order and of all the records in the proceeding, together with a petition asking that the order be enforced, and shall give notice to the Attorney General and to said association of such filing. Such district court shall thereupon have jurisdiction to enter a decree affirming, modifying, or setting aside said order, or enter such other decree as the court may deem equitable, and may make rules as to pleadings and proceedings to be had in considering such order. The place of trial may, for cause or by consent of parties, be changed as in other causes.

The facts found by the Secretary of Agriculture and recited or set forth in said order shall be prima facie evidence of such facts, but either party may adduce additional evidence. The Department of Justice shall have charge of the enforcement of such order. After the order is so filed in such district court and while pending for review therein the court may issue a temporary writ of injunction forbidding such association from violating such order or any part thereof. The court may, upon conclusion of its hearing, enforce its decree by a permanent

injunction or other appropriate remedy. Service of such complaint and of all notices may be made upon such association by service upon any officer or agent thereof engaged in carrying on its business, or on any attorney authorized to appear in such proceeding for such association, and such service shall be binding upon such association, the officers, and members thereof.

COOPERATIVE MARKETING ACT OF 1926

44 Stat. 802 (1926)

§ 1. Agricultural products defined (7 U.S.C. § 451)

When used in this chapter the term "agricultural products" means agricultural, horticultural, viticultural, and dairy products, livestock and the products thereof, the products of poultry and bee raising, the edible products of forestry, and any and all products raised or produced on farms and processed or manufactured products thereof, transported or intended to be transported interstate and/or foreign commerce.

§ 2. Supervision of division of cooperative marketing (7 U.S.C. § 452)

The division of cooperative marketing shall be under the direction and supervision of the Secretary of Agriculture.

§ 3. Authority and duties of division (7 U.S.C. § 453)

(a) The division shall render service to associations of producers of agricultural products, and federations and subsidiaries thereof, engaged in the cooperative marketing of agricultural products, including processing, warehousing, manufacturing, storage, the cooperative purchasing of farm supplies, credit, financing, insurance, and other cooperative activities.

(b) The division is authorized --

(1) To acquire, analyze, and disseminate economic, statistical, and historical information regarding the progress, organization, and business methods of cooperative associations in the United States and foreign countries.

(2) To conduct studies of the economic, legal, financial, social, and other phases of cooperation, and publish the results thereof. Such studies shall include the analyses of the organization, operation, financial and merchandising problems of cooperative associations.

(3) To make surveys and analyses if deemed advisable of the accounts and business practices of representative cooperative associations upon their request; to report to the association so surveyed the results thereof; and with the consent of the association so surveyed to publish summaries of the results of such surveys, together with similar facts, for the guidance of cooperative associations and for the purpose of assisting cooperative associations in developing methods of business and market analysis.

(4) To confer and advise with committees or groups of producers, if deemed advisable, that may be desirous of forming a cooperative association and to make an economic survey and analysis of the facts surrounding the production and marketing of the agricultural product or products which the association, if formed, would handle or market.

(5) To acquire from all available sources information concerning crop prospects, supply, demand, current receipts, exports, imports, and prices of the agricultural products handled or marketed by cooperative associations, and to employ qualified commodity marketing specialists to summarize and analyze this information and disseminate the same among cooperative associations and others.

(6) To promote the knowledge of cooperative principles and practices and to cooperate, in promoting such knowledge, with educational and marketing agencies, cooperative associations, and others.

(7) To make such special studies, in the United States and foreign countries, and to acquire and disseminate such information and findings as may be useful in the development and practice of cooperation.

§ 4. Advisers to counsel with Secretary of Agriculture; expenses and subsistence (7 U.S.C. § 454)

The Secretary of Agriculture is authorized, in his discretion, to call advisers to counsel with him and/or his representatives relative to specific problems of cooperative marketing of farm products or any other cooperative activity. Any person, other than an officer, agent, or employee of the United States, called into conference, as provided for in this section, may be paid actual transportation expenses and not to exceed \$10 per diem to cover subsistence and other expenses while in conference and en route from and to his home.

§ 5. Dissemination of crop, market, etc., information by cooperative marketing associations (7 U.S.C. § 455)

Persons engaged, as original producers of agricultural products, such as farmers, planters, ranchmen, dairymen, nut or fruit growers, acting together in associations, corporate or otherwise, in collectively processing, preparing for market, handling, and marketing in interstate and/or foreign commerce such products of persons so engaged, may acquire, exchange, interpret, and disseminate past, present, and prospective crop, market, statistical, economic, and other similar information by direct exchange between such persons, and/or such associations or federations thereof, and/or by and through a common agent created or selected by them.

FISHERMEN'S COLLECTIVE MARKETING ACT

48 Stat. 1213 (1934)

§ 1. Fishing industry; associations authorized; "aquatic products" defined; marketing agents; requirements (15 U.S.C. 521)

Persons engaged in the fishery industry, as fishermen, catching, collecting, or cultivating aquatic products, or as planters of aquatic products on public or private beds, may act together in associations, corporate or otherwise, with or without capital stock, in collectively catching, producing, preparing for market, processing, handling, and marketing in interstate and foreign commerce, such products of said persons so engaged.

The term "aquatic products" includes all commercial products of aquatic life in both fresh and salt water, as carried on in the several States, the District of Columbia, the several Territories of the United States, the insular possessions, or other places under the jurisdiction of the United States.

Such associations may have marketing agencies in common, and such associations and their members may make the necessary contracts and agreements to effect such purposes: Provided, however, that such associations are operated for the mutual benefit of the members thereof, and conform to one or both of the following requirements:

First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein; or

Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

and in any case to the following:

Third. That the association shall not deal in the products of nonmembers to an amount greater in value than such as are handled by it for members.

§ 2. Monopolies or restraints of trade; service of complaint by Secretary of Commerce; hearing; order to cease and desist; jurisdiction of district court (15 U.S.C § 522)

If the Secretary of Commerce shall have reason to believe that any such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any aquatic product is unduly enhanced by reason thereof, he shall serve upon such association a complaint stating his charge in that respect, to which complaint shall be attached, or contained therein, a notice of hearing, specifying a day and place not less than thirty days after the service thereof, requiring the association to show cause why an order should not be made directing it to cease and desist from monopolization or restraint of trade. An association so complained of may at the time and place so fixed show cause why such order should not be entered, The evidence given on such a hearing shall be taken under such rules and regulations as the Secretary of Commerce may prescribe, reduced to writing, and made a part of the record therein. If upon such hearing the Secretary of Commerce shall be of the opinion that such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any aquatic product is unduly enhanced thereby, he shall issue and cause to be served upon the association an order reciting the facts found by him, directing such association to cease and desist from monopolization or restraint of trade. In the request of such association or if such association fails or neglects for thirty days to obey such order, the Secretary of Commerce shall file in the district court in the judicial district in which such association has its principal place of business a certified copy of the order and of all the records in the proceedings, together with a petition asking that the order be enforced, and shall give notice to the Attorney General and to said association of such filing. Such district court shall thereupon have jurisdiction to enter a decree affirming, modifying, or setting aside said order, or enter such other decree as the court may deem equitable, and may make rules as to pleadings and proceedings

to be had in considering such order. the place of trial may, for cause or by consent of parties, be changed as in other causes.

The facts found by the Secretary of Commerce and recited or set forth in said order shall be prima facie evidence of such facts, but either party may adduce additional evidence. The Department of Justice shall have charge of the enforcement of such order. After the order is so filed in such district court and while pending for review therein, the court may issue a temporary writ of injunction forbidding such association from violating such order or any part thereof. The court shall, upon conclusion of its hearing, enforce its decree by a permanent injunction or other appropriate remedy. Service of such complaint and of all notices may be made upon such association by service upon any officer, or agent thereof, engaged in carrying on its business, or on any attorney authorized to appear in such proceeding for such association and such service shall be binding upon such association, the officers and members thereof.

PRICE DISCRIMINATION ACT (Robinson-Patman)

49 Stat. 1526 (1936)

§ 2. Discrimination in price, services, or facilities

(15 U.S.C. § 13)

(a) **Price; selection of customers.** It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered...

§ 4. Cooperative association; return of net earnings or surplus

(15 U.S.C. § 13b)

Nothing in this Act shall prevent a cooperative association from returning to its members, producers, or consumers the whole, or any part of, the net earnings or surplus resulting from its trading operations, in proportion to their purchases or sales from, to, or through the association.