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I Can't Make You Love Me If You Won't: Capper-Volstead Jilted by Sherman One

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The intersection between the Sherman Act and the Capper-Volstead exemption for collective conduct by agricultural industry members has given rise to a number of recent cases. *In re Fresh and Process Potatoes Antitrust Litig.*, No. 4:10–MD–2186 (D. Idaho) ("*Potatoes*"), is particularly noteworthy. There, the District Court held that the Capper-Volstead exemption does not reach pre-production farming activity, such as planting and harvesting, adopted to reduce the supply of potatoes – and hence, to increase the price at which the product is sold. Lacking any refuge in Capper-Volstead, such collective farming activity is fully subject to *per se* condemnation under the antitrust laws.

The Case Background

Suing in Idaho, the heart of the nation's potato industry, potato purchasers challenged the supply "management" program adopted by the United Potato Growers of America ("UPGA"), an umbrella cooperative of potato growers, as a Sherman Act § 1 violation. Under the program, potato growers agreed: (1) to limit potato planting acreage; (2) to destroy existing stocks; and (3) to refrain from growing additional potatoes, thus constricting the supply of potatoes available for sale. The purchasers further alleged that this pre-production potato management program was designed to raise product prices, and as implemented had in fact achieved that goal. Thus, the purchasers argued, the UPGA and other named defendants engaged in unlawful price-fixing.

The UPGA moved to dismiss, arguing, in substance, that the Capper-Volstead Act permits an agricultural co-op to agree on product selling prices – that is, to fix prices – even though the Sherman Act would prohibit the agreement absent the statutory exemption. *See, e.g.*, *Maryland & Virginia Milk Producers Ass'n. v. United States*, 362 U. S. 458, 465 (1960); *Northern Cal. Supermarkets, Inc. v. Central Cal. Lettuce Producers Coop.*, 413 F. Supp. 984, 991-93 (N.D. Cal. 1976), *aff'd*, 580 F.2d 369 (9th Cir. 1978), *cert. denied*, 439 U.S. 1090 (1979). Restricting supply, the co-op asserted, was simply an alternative means to establish potato selling prices. Outside of the Capper-Volstead setting, many a company has, of course, been held liable under the Sherman Act for conspiring to price-fix by agreeing to limit supply. But according to the UPGA, because the

Capper-Volstead Act permits co-op price-fixing, the exemption also immunized the co-op's pre-production supply management program.

The District Court rejected the co-op's Capper-Volstead defense. *Potatoes*, No. 4:10–MD–2186, 2011 WL 6020859 [(CCH) 2011-2 Trade Cases ¶77,739] (D. Idaho Dec. 2, 2011). The Court held that the Capper–Volstead Act does not apply to pre-production supply restrictions, but reaches, instead, only "acts done to an agricultural product after it has been planted and harvested." *Id.* at *6. The Court is spot-right. Congress passed the Capper-Volstead Act to give members of the agricultural community the right to collectively market their products. But neither the express language of the statute, nor the underlying congressional intent, extends to collective action restricting pre-production crop supply. The Sherman Act immunity is, therefore, limited.

The Capper-Volstead Act

The Capper-Volstead Act arose from economic conditions in the late 19th and early 20th centuries. Historically, large buyers of agricultural products bullied farmers into lowering product prices. Product buyers not only touted the availability of supply from other farmers, they also exploited the bargaining power inherent in unpredictable weather and growing seasons and the farmer's increasing need (indeed, often-times desperation) to sell crops before they spoiled. Having low-balled the farmers for their products, the buyers and subsequent middlemen then price-gouged consumers for whom farm products were necessities of life. Although American farmer cooperatives were organized prior to the Civil War, it was not until shortly after 1900 that dairy farmer associations began to bargain collectively, with many commodity associations formed thereafter. *See generally* Christine A. Varney, *The Capper-Volstead Act, Agricultural Cooperatives, and Antitrust Immunity*, The Antitrust Source 1, 1-2 (Dec. 2010) ("*Varney Article*"); Report of the National Commission For the Review of Antitrust Laws and Procedures 254-55 (1979) ("1979 Commission Report").

Like organized labor, however, farmer co-ops were early targets of antitrust litigation. Buyers sued co-ops that combined their harvests and that engaged in joint selling to increase their own bargaining power for conspiring to violate the antitrust laws. In response, States adopted what were called "marketing acts" to allow farmers "to continue to produce singly, but . . . to emulate the efforts and practices of industrial corporations in processing, preparing for market and marketing farm products." Milton J. Keegan, *Power of Agricultural Cooperative Associations to Limit Production*, 26 Mich. L. Rev. 648, 649 (1927-28). Congress itself authorized the creation of non-profit, non-stock agricultural co-ops when it passed the Clayton Act in 1914, but the provision's limited scope quickly rendered it ineffective.

Congress therefore enacted the Capper-Volstead Act in 1922. Section 1 of the Act provides, in pertinent part, that:

> 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 . . . .

7 U.S.C. § 291 (emphasis added).

Capper-Volstead's Limited Antitrust Immunity

By protecting co-ops from antitrust liability for collective marketing, Congress sought to enhance the bargaining power of co-ops in their struggle against "unnecessary middlemen," who extracted "excessive profits" from both farmers and customers. *See, e.g.*, 59 Cong. Rec. 7852. This state of affairs was "unfair to the consumer, because he had to pay too much for what he needs, and it is unfair to the farmer, because he receives too little in return for his investment of time and labor expended." 59 Cong. Rec. 8022. Indeed, Senator Capper stated that, "for years evidence has been piling up to convince us that we have the most expensive marketing system in the world, also the most inefficient, if we except China . . . ." 62 Cong. Rec. 2060-61. Thus, the Congressional debates emphasized the need to protect the farmer's marketing activity as a means to deliver value down to end-user consumers. Senator Capper, along with others, believed that cooperatives would eliminate middlemen, streamline the marketing system, and provide farmers with access to a much broader market. *See generally Maryland & Virginia Milk Producers*, 362 U. S. at 464-68; *Varney Article*, The Antitrust Source at 5-6 (summarizing the legislative history).

The collective action that the Capper-Volstead Act permits is, accordingly, expressly limited to "***processing, preparing for market, handling, and marketing***." As the *Potatoes* court correctly recognized, this activity describes what happens ***after*** crops are "planted and harvested" – not before. 2011 WL 6020859, at *6. Congress was quite clear in limiting antitrust immunity to collective post-production activity by farmers. There was no intent to insulate co-ops from all antitrust liability. The House Committee report on Capper-Volstead itself states that, "[i]n 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." H. R. Rep. No. 24, 67th Cong., 1st Sess., at 3 (1921).

Pre-Production Supply Restraints

The Supreme Court has recognized that the Capper-Volstead Act allows farmers to organize together, to set co-op policy, and, indeed, to establish or "fix" the prices at which the co-op will sell product – all without violating the antitrust laws. *See Maryland & Virginia Milk Producers*, 362 U.S. at 465-66. But the courts have not recognized any Capper-Volstead authorization to immunize pre-production restraints on planting or harvesting. *See Potatoes*, 2011 WL 6020859, at *6 (distinguishing prior rulings that considered post-production restraints limiting the sale of product).

Federal enforcers have railed at the notion that Capper-Volstead protects supply restrictions from antitrust scrutiny. For example, in the early 1950s, the Antitrust Division filed two suits against co-ops that had adopted production restrictions, one of which resulted in a preliminary injunction and the other in a consent decree. *Varney Article*, The Antitrust Source at 6 n. 37. Stanley N. Barnes, then-Assistant Attorney General in charge of the Antitrust Division, stated unequivocally that co-op activity "to limit production" was among the activity that the Division regarded as illegal, regardless of Capper-Volstead. Address to the American Institute of Cooperation, Aug. 10, 1953, at 10, *quoted in* Note, *Agricultural Cooperatives and the Antitrust Laws: Clayton, Capper-Volstead, and Common Sense*, 44 Va. L. Rev. 63, 75 (1958); *see generally* Report of the Attorney General's National Committee To Study the Antitrust Laws 325 n.231 (1955) (citing criminal cases in the 1940s).

The FTC has expressed the same position. Summarizing the Capper-Volstead debates, the Commission has noted that "Congress did not intend to allow farmers to use cooperatives as a vehicle by which they could effectively agree to limit production." *In the Matter of Central California Lettuce Producers Cooperative*, 90 F.T.C. 18, 32 n. 20 (July 25, 1977). The FTC quoted Senator Capper:

> But a farmers' monopoly is impossible. If the cooperative marketing association makes its price too high, the result is inevitable self-destruction by overproduction in the following years. No other industry except agriculture has this ***automatic safeguard.*** With corporation activities the group producers, such as the United States Steel Corporation, can reduce the quantity of steel rails it will produce at any given time or completely close down its mills and reduce the supply.

Id. (emphasis added).

In other words, under Capper-Volstead, co-ops can fix the price at which their products are sold "because if the price rises, farmers will produce more and consumers will not be overcharged. Individual freedom to produce more in times of high prices is a quintessential safeguard against Capper-Volstead abuse, which Congress recognized in enacting the statute." *Potatoes*, 2011WL 6020859, at 8. The ability of individual farmers to control their own production thus operates as a natural check on the co-ops. *But see* Kenneth R. O'Rourke & Andrew Frackman, *The Capper-Volstead Act Exemption and Supply Restraints in Agricultural Antitrust Actions*, 19 J. of the Antitrust and Unfair Competition L. Section of the State Bar of Cal. 69, 83 (No. 2, Fall 2010) (critiquing Sen. Capper's remarks).

Equally important, control over the supply of agricultural products is itself the subject of a comprehensive federal statutory scheme – the Agricultural Marketing Agreement Act of 1937 (the "AMAA"), 7 U.S.C. §§ 601 *et seq*. – which the Secretary of Agriculture administers. Thus, as the FTC said in *Central California Lettuce*, while Capper-Volstead exempts price-fixing:

> A different issue would be presented if it were alleged and proven that a cooperative had sought to limit production even among its own members, thus shutting off the safety valve against private abuse that ameliorates the adverse consumer impact of the Capper-Volstead exemption and circumventing the important procedural safeguards of the AMAA.

90 F.T.C. at 102 n.20.

Finally, although a co-op agreement on pre-production supply restraints is properly subject to the Sherman Act, a co-op's bonafide gathering and distribution of product information should not, standing alone, subject the association to antitrust liability. *See Potatoes*, 2011 WL 6020859, at *8 (discussing *Northern Cal. Supermarkets,* 413 F. Supp. 984). Antitrust law does not condemn information exchanges, often a mission of trade associations, as per se unlawful. Agricultural co-ops covered by Capper-Volstead should not be treated differently. If, however, the information exchange is a mechanism to impose, implement, monitor or enforce pre-production supply restrictions, there would be no immunity. And, of course, non-per se antitrust scrutiny would apply

in all events, as it does outside the Capper-Volstead context. *See generally United States v. Container Corp. of Am.*, 393 U.S. 333 (1969); *Todd v. Exxon Corp.*, 275 F. 3d 191 (2nd Cir. 2001).

Capper-Volstead in the 21st Century

Familiar principles counsel that exemptions from the antitrust laws are narrowly construed. Even putting to the side the statutory language and congressional intent, this canon of construction applies well to the Capper-Volstead Act today. The conditions that led to exempting co-op activity from the antitrust laws in 1922 – to allow small farmers to sell collectively as a counterweight to buyer power – are much-changed in the 21st century, and have been for years. More than 30 years ago, a national antitrust commission observed "an accelerating trend toward concentration in agricultural marketing," and noted that "the threat of monopoly by some cooperatives is now substantial." 1979 Commission Report at 259.

Today, total agricultural co-op business was over $191 billion in 2008. Nat'l Council of Farmer Cooperatives, *Cooperative Facts*, *available at* http://www.ncfc.org/information/cooperative-facts. Huge agricultural co-ops, operating as vertically integrated enterprises, are commonplace. "Agricultural producers not only plant, harvest and sell crops, but they or their cooperatives also pack and ship the crops." Kenneth R. O'Rourke & Andrew Frackman, *The Capper-Volstead Act Exemption and Supply Restraints in Agricultural Antitrust Actions*, 19 J. of the Antitrust and Unfair Competition L. Section of the State Bar of Cal. 69, 71 (No. 2, Fall 2010).

For example, Land O'Lakes, the nation's second largest co-op, had 2010 sales of more than $11 billion and earnings of over $178 million. Land O'Lakes, *Annual Report* at 2 (2010); National Consumer Cooperative Bank, *2011 NCB Co-Op 100 List*, *available at* http://www.coop100.coop. Land O'Lakes not only markets milk and other dairy products, but also distributes "feed, seed, agronomy products and business and production services," reaching all 50 states and 60 foreign countries. Land O'Lakes, Inc., *What Is a Co-op?*, *available at* http://www.landolakesinc.com/company/coop/default.aspx. The co-op consists of "approximately 9,000 employees, 3,200 direct producer-members and 1,000 member-cooperatives serving more than 300,000 agricultural producers." Land O'Lakes, Inc., *Welcome*, *available at* http://www.landolakesinc.com/company/default.aspx. Land O'Lakes' board consists of directors representing the co-op's various dairy and "ag" regions. Directors are nominated by region, with director representation weighed according to business by co-op members within the particular region. Land O'Lakes, *Goverance*, *available at* http://www.landolakesinc.com/company/governance/default.aspx.

Ocean Spray, Sun-Maid, and Welch's/National Grape are similarly large co-ops with integrated production, processing and marketing functions. These sorts of agri-businesses are a far cry from the co-ops that informed Capper-Volstead's enactment. As the *Potatoes* case itself reflects, the buyer-power that today's large co-ops can exercise is fairly a subject of concern. Stretching Capper-Volstead's language to reach restraints on pre-production supply activity – collective conduct that has nothing to do with the reasons that Congress passed the law to begin with – hardly seems justified.

In 2010, the Antitrust Division and the Department of Agriculture hosted workshops around the country focused on competition in agricultural industries. Whether this fact-finding activity will produce legislative change remains to be seen. This much is clear, however: whether the Capper-

Volstead Act is still the right law for the state of the agricultural industry today is a question worth asking – and answering. Meanwhile, the *Potatoes* court correctly recognized that there is no sound basis for expanding the Act's antitrust exemption to collective action restricting pre-production supplies under of guise of crop "management."

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